

## Introduction

What is the relationship between transitions to democracy and constitutionalism? What role have constitutional courts played in the past in democratization processes? What “lessons” can be drawn from these experiences by countries – such as those involved in the “Arab Spring” – that are currently undergoing a transition from an authoritarian rule? These are some of the key questions this book addresses. Transitions to democracy, on the one hand, and constitutional justice, on the other, are topics that, each in its specific domain, have been the subject of numerous in-depth studies. Transition processes, especially in the early phases, have been analyzed mainly by historians, political scientists, sociologists, philosophers, and economists, and only at a later stage did legal scholars (particularly constitutional law scholars) start to examine these processes. In fact, jurists

have not been inspired by the topic of “transition,” that by its very nature is ambiguous, risky and objectively hard to grasp... [They] have focused on the “established” order or, at most, on the sensitive phase of the “constituent” power, but it is beyond doubt that – at least in general – they have neglected an analysis of the ... “intermediate” phases, i.e. of the phases of “transition.”<sup>1</sup>

In turn, constitutional justice – particularly following the setting up and consolidation of constitutional courts – has become one of the main areas of research for constitutional scholars, especially in light of its central role in liberal-democratic countries. Indeed, it is received opinion that one of the essential requirements of a truly democratic state is the existence of an effective system of constitutional review.

On the contrary, the studies that have sought to bring together these two fields of research are much less common. It is true, however, that in recent years scholars have taken steps to fill this gap: consider, for example, the work of Wojciech

<sup>1</sup> 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), 47.

Sadurski,<sup>2</sup> Herman Schwartz,<sup>3</sup> and Radoslav Procházka<sup>4</sup> on the role of constitutional courts in Central and Eastern Europe following the collapse of Communism, or the studies by Tom Ginsburg on constitutional courts in Asia and their role in the democratization processes,<sup>5</sup> or the research on constitutional courts in individual countries.<sup>6</sup> Moreover, international conferences have recently been held on this topic.<sup>7</sup>

This book is intended to contribute to this strand of research by examining the role of constitutional justice – and more specifically of constitutional courts – in the processes of democratic transition that took place in Europe in the twentieth century. In particular, the volume focuses on three countries: Italy, Spain, and the Czech Republic. These countries provide extremely interesting case studies because their constitutional courts – to use an expression of László Sólyom – belong to the “three generations of European Constitutional Courts,”<sup>8</sup> whose creation is inextricably linked to the three waves of democratic transition that took place in Europe in the twentieth century. The first generation consists of the German and Italian constitutional courts, set up in the 1950s following the defeat of the Nazi and Fascist regimes; the second generation, consisting of the Spanish and Portuguese courts, came into existence after the fall of the authoritarian regimes of Franco and Salazar in the 1970s; finally, the third generation consists of the constitutional courts of the Central and Eastern European countries, that were established after the collapse of the Communist regime. Therefore, unlike other comparative studies that have

<sup>2</sup> Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014); Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002).

<sup>3</sup> Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000).

<sup>4</sup> Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002).

<sup>5</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003).

<sup>6</sup> E.g., László Sólyom, “The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary” (2003) 18 *International Sociology*, 133 ff.; 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.; Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press 2008).

<sup>7</sup> See, by way of example, the Conference *Advocates or Notaries of Democracy? A Comparative Socio-legal Analysis of the Role of Constitutional Courts in Political Transformation Processes*, Berlin, September 22–24, 2011.

<sup>8</sup> Sólyom 2003, note 6, at 135. Due to the fact that it is strictly linked to democratic transition processes, the “numbering” of the generations of constitutional courts begins from the end of World War II even though, as is well known, the first instances of constitutional courts date back to the period between the two world wars. It is for this reason that some legal scholars, when speaking of the first generation, refer to the Czechoslovak and Austrian courts set up in 1920 and the Spanish Court of Constitutional Guarantees established in 1931. See, e.g., Michel Fromont, *La justice constitutionnelle dans le monde* (Daloz 1996), 17 ff.

focused on just one generation of constitutional courts (such as the one (mentioned above) consisting of the courts of Central and Eastern Europe), this study carries out a *diachronic* comparison, providing an analysis of the role of these courts in three distinct historical phases: the period after World War II, the late 1970s–early 1980s, and the period after the fall of the Berlin Wall.

The main aim of this study is to examine whether and how the constitutional courts of these three generations managed to ensure through their judgments an initial full implementation of the constitutional provisions, thus contributing – together with other actors and factors – to the positive outcome of the democratization processes. In other words, the intention is to better understand, from the perspective of the constitutional courts, the relationship between transitions to democracy and constitutionalism.

The decision to analyze the transitions that took place in Italy, Spain, and the Czech Republic is due to the fact that these countries present certain similar characteristics that make them particularly suitable for a comparative study. In the first place, they all experienced a successful transition to democracy; second, in each case the break with the previous autocratic regime occurred mainly through the adoption of a new democratic constitution, thus giving rise to *constitutional* transitions; third, each of these three countries adopted a parliamentary form of government and granted the power to exercise constitutional review of legislation to an ad hoc body, the constitutional court.

At the same time, it is important to bear in mind the differences between the three cases, including, in particular, the different nature of the previous illiberal regime. Indeed, whereas Fascist Italy and Francoist Spain are usually considered by scholars as *authoritarian* countries, Czechoslovakia was one of the satellite states of the Soviet Union, which were characterized by a *Socialist* regime. This difference is particularly significant because the nature of the previous regime influenced the trajectory of the transition, and, as a result, also the action of the constitutional courts. Suffice it to consider the fact that, unlike what happened in Western Europe, the transitions in Central and Eastern Europe were not just political and constitutional but also economic, aimed at setting up a market economy.

The book consists of five chapters. Chapter 1 sets the stage for the subsequent chapters by defining and discussing some key terms and situating the thesis of the book within the existing academic literature. It begins by putting forward a critique of one of the most established notions (especially among constitutional law scholars) of democratic transition, a notion mainly based on formal elements (the approval of the constitution), while arguing in favor of the concept of *substantive* transition, which encompasses elements of “law in action.” Indeed, the analysis of transitions in Europe has highlighted the fact 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 order, is not in itself sufficient to determine the effective transformation from an authoritarian to a democratic system.

Thus, rather than a *formal* transition, 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. According to 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 outcome of the transition largely depends on this second phase, also in light of the role played by the constitutional courts.

The second part of the first chapter provides a brief overview of the origins of constitutional justice in Europe, from the *Staatsgerichtsbarkeit* to the setting up of the first constitutional courts in Czechoslovakia, Austria, and Spain. The analysis then turns to the reasons leading the European constitutional framers – in the period after World War II – to set up constitutional courts, highlighting the fact that the establishment of these bodies is closely linked to the processes of transition to democracy.

The second, third, and fourth chapters focus, respectively, on the role of the Italian, Spanish, and Czech constitutional courts. Each case study examines the constitution-making process, casting light not only on the specific reasons why the constitutional framers decided to set up a constitutional court but also on the forms of resistance in each country to the establishment of these bodies. Previous experiences of constitutional justice are also analyzed. These chapters then examine the role of the courts within the institutional framework of each country, the issues on which they focused their activity, as well as the factors that either favored or hindered their action, identifying similarities and differences from one country to another.

The Italian Constitutional Court, the focus of the second chapter, belongs to the first generation of constitutional courts, and as a result its configuration and role at the time when it was established were largely experimental, if not a leap in the dark. The constitutional judges, especially during the initial phase (from 1956 until the end of the 1960s) focused on the elimination of the Fascist legislation that continued to severely constrain civil, political, religious, and social liberties. In this way the Court made a break with the past, as it contributed to putting an end to the continuity between Fascism and post-Fascism, at least from a legislative point of view. Indeed, with the striking down of Fascist legislation and the upholding of constitutional rights and freedoms the country experienced a transition from an “uncertain” democracy (that was the case in Italy in 1956) to a “mature” democracy. The role of the *Corte costituzionale* also needs to be assessed in light of the fact that in most cases it was required to take decisions in conflict with the prevailing conservative stance of the government, the parliamentary majority, and the superior courts. The difficult context in which it was operating helps to explain its excessively cautious orientation in certain rulings (e.g., in the field of public order).

Chapter 3 deals with the Spanish Constitutional Court. In this second generation of courts there are fewer unknown factors and more instances of courts in other countries to draw inspiration from, including the Italian Constitutional Court. All this contributed to the establishment and consolidation of constitutional justice. In the period from 1980 to the early 1990s, the Spanish Court dealt with four main issues, concerning the normative value of the constitutional provisions, the pre-constitutional legislation, fundamental rights, and the territorial organization of the state. From the very beginning, the *Tribunal constitucional* upheld the normative value of all the provisions of the Constitution, and played an important role in determining whether the preconstitutional laws were in conflict with the provisions of the Constitution laying down fundamental rights and freedoms. Moreover, it succeeded in setting up an effective system of protection of fundamental rights, as well as ensuring a rational functioning of the State of Autonomies. The territorial question represented one of the most complex issues to be addressed, as the outcome of the transition to democracy was largely dependent on this matter. The Spanish case thus highlights how the transition from an authoritarian regime to a democratic form of government may also require a new territorial distribution of powers: in fact, from a highly centralized state under Francisco Franco, Spain became a strongly decentralized country, a *State of Autonomies*.

The fourth chapter examines the role of the Constitutional Court of the Czech Republic, which in the first decade of its operation (from 1993 to the beginning of the new millennium) dealt mainly with the protection of fundamental rights, as well as with cases concerning transitional justice. With reference to this matter, the Court was called on to rule on particularly divisive issues concerning the country's past, such as the law on the illegitimacy of the Communist regime, the laws on the restitution of property, as well as the "lustration laws," which were aimed at preventing individuals involved with the Communist regime, or considered to be in favor of a return to Communism, from occupying higher positions in the state apparatus for a certain period. Compared to the previous generations, a distinguishing feature of this third generation of constitutional courts is the interplay between the democratic transition, constitutional justice, and accession to the Council of Europe and the European Union.

Finally, the concluding chapter brings things together with an analysis of the key lessons drawn from the discussion in the preceding chapters. In particular, it makes a comparison among the three generations of courts *by topic*, rather than country by country. The decision to make a comparison of this kind only in the last part of the book is due to the fact that it appeared necessary (in each of the preceding chapters) to show how the historical, political, institutional, and social context differed profoundly from country to country, above all considering that the transitions under examination are embedded in three markedly different historical periods. This last chapter carries out an analysis of the various types of intervention of the constitutional judges, the reasons for the success of the centralized system of constitutional

review, as well as the various factors influencing the activity of the courts. The analysis of the three generations has shown that thanks to the actions carried out during the transition processes, the constitutional courts have managed to achieve full legitimation in their respective constitutional systems and within the dynamics of their respective forms of government. Although their action was not immune to criticism, the constitutional courts emerged as key players of the substantive transitions, reducing the high degree of uncertainty that characterizes the outcome of every transition process.

Although the study focuses on Italy, Spain, and the Czech Republic, numerous references are also made to other European constitutional courts that were set up following the collapse of autocratic regimes (such as the German Constitutional Court, and the other post-Communist constitutional courts), highlighting analogies and differences between individual courts and generations of courts. Moreover, the book makes frequent references to the contributions of historians, political scientists, sociologists, and philosophers, in an attempt to emphasize the complexity and the multiplicity of perspectives associated with this topic. Indeed, in examining the role of constitutional courts in transition processes, an exclusively legal analysis would have been too limited, thus confirming the observation made by Giovanni Boggetti, who argued that

The comparative constitutional scholar, more than other comparative scholars, . . . can and should take account of the historical data provided by other disciplines such as political thought, political science, sociology of law, political history, and so on. All these data, provided by various disciplines, are necessary for the comparative constitutional scholar, who will find them extremely useful and indispensable.<sup>9</sup>

For the purposes of this study, no specific time limit was laid down with regard to the judgments to be examined. On the contrary, the book focuses on all the rulings of the constitutional courts that have had a decisive impact on the democratic transition process, regardless of when they were handed down. Although predictably most of the decisions concern the early years of activity of the courts, reference is also made to rulings delivered even many years after these bodies started to operate. Judgment 290/1974 of the Italian Constitutional Court concerning political strikes is emblematic from this point of view: although handed down 18 years after the Court started its activity (and 26 years after the entry into force of the Constitution), this ruling turned out to be extremely important in the process of democratic transition and consolidation.

It should also be noted that although the book focuses on transitions taking place in the past, it is not intended to be merely an historical inquiry. In fact, the European experience can provide useful insights for constitutional courts in

<sup>9</sup> Giovanni Boggetti, *Introduzione al diritto costituzionale comparato* (Giappichelli 1994), 178–179. See also Ran Hirschl, “From Comparative Constitutional Law to Comparative Constitutional Studies” (2013) 11 *International Journal of Constitutional Law* 1, 1–12.

countries that are currently experiencing (or likely to experience in the future) a transition from authoritarian rule, especially in light of the fact that transitional countries increasingly tend to set up constitutional courts or take measures aimed at strengthening the existing ones. The study is therefore aimed at contributing to a better understanding of the dynamics of what Samuel Issacharoff has called “the era of Constitutional Courts.”<sup>10</sup>

<sup>10</sup> Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015).

## 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<sup>1</sup>

## 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*.<sup>2</sup> This is clearly a wide-ranging notion, encompassing all changes in political regimes. Indeed, although with the “third wave of democratization”<sup>3</sup> 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*),<sup>4</sup> or from

<sup>1</sup> 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”).

<sup>2</sup> 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.

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

<sup>4</sup> 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,



an illiberal regime to another illiberal regime (of the same or different kind).<sup>5</sup> The transition may also lead to a “political gray zone”<sup>6</sup> where *hybrid* regimes are to be found.<sup>7</sup> 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*.<sup>8</sup>

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]).<sup>9</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> Carothers 2002, note 5, at 9.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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*.<sup>10</sup>

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.”<sup>11</sup> The second group, by contrast, consists of *exogenous* factors, such as the international context and influences, as well as the *Zeitgeist*.<sup>12</sup>

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

<sup>10</sup> 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).

<sup>11</sup> “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 *demosi* (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.

<sup>12</sup> 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 transitioning to and consolidating democracy are substantially less than if the spirit of the time is one where democratic ideologies have no powerful contenders.”