

Francesco Biagi, *European Constitutional Courts and Transitions to Democracy*, Cambridge University Press, Cambridge, 2020, pp. 1-254*

Indice disponibile

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Data della pubblicazione sul sito: 26 giugno 2020

Suggerimento di citazione

Recensione a Francesco Biagi, *European Constitutional Courts and Transitions to Democracy*, Cambridge University Press, Cambridge, 2020, pp. 1-254, in *Forum di Quaderni Costituzionali*, 2, 2020. Disponibile in: www.forumcostituzionale.it.

* Ricercatore t.d. in Diritto Pubblico Comparato nell'Alma Mater Studiorum – Università di Bologna. Indirizzo mail: francesco.biagi4@unibo.it.

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. This book brings together these two fields 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 since their constitutional courts belong to the *three generations of European constitutional courts*, 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 focused on just one generation of constitutional courts (such as the one 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 main aim of this book 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 constitutional courts, the relationship between transitions to democracy and constitutionalism.

Chapter One 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 favour 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 actually 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 this 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 the Second World War – to set up constitutional courts, highlighting the fact that the establishment of these bodies is closely linked to the processes of transition to democracy.

Chapter Two analyses the role played by the Italian Constitutional Court. This Court 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 (for example in the field of public order).

Chapter Three deals with the Spanish Constitutional Court. In this second generation of constitutional 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 1978 Constitution, and played an important role in determining whether the pre-constitutional 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, and 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*.

Chapter Four 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 favour of a return to Communism, from occupying higher positions in the State apparatus for a certain period of time. Compared to the previous generations, a distinguishing feature of this third generation of courts is the interplay between the democratic transition, constitutional justice, and accession to the Council of Europe and the European Union.

Chapter Five 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 shows 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 which characterizes the outcome of every transition process, and heading off the risk of ending up in a situation of constitutions without constitutionalism.