EUROPEAN CONSTITUTIONAL COURTS AND TRANSITIONS TO DEMOCRACY

This book brings together research on democratization processes and constitutional justice by examining the role of three generations of European constitutional courts in the transitions to democracy that took place in Europe in the twentieth century. Using a comparative perspective, the author examines how the constitutional courts during that period managed to ensure an initial full implementation of the constitutional provisions, thus contributing – together with other actors and factors – to the positive outcome of the democratization processes. *European Constitutional Courts and Transitions to Democracy* provides a better understanding of the relationship between transitions to democracy and constitutionalism from the perspective of constitutional courts.

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Ai miei genitori, Marina e Marco, e a mio fratello Lorenzo

A mia moglie Elena e a mia figlia Arianna

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Foreword

Giuseppe de Vergottini
Professor Emeritus, University of Bologna

The introduction of constitutional review mechanisms represents one of the key stages characterizing a political regime change in the transition from an authoritarian to a democratic form of government. Taking this as his starting point, Francesco Biagi addresses this topic by examining three different experiences of constitutional transformation. The first historical phase consists of the adoption of new constitutions in the aftermath of the political and institutional reconstruction that took place in Europe after World War II. The second phase is represented by the overcoming of the remaining authoritarian regimes present in Europe, namely the regimes of Salazar and Franco. The third phase consists of the abandonment of socialist constitutionalism in its Leninist version with the collapse of the authoritarian regimes that formed part of the Soviet bloc. Each of these historical phases requires an analysis of the specific constitutional developments. In the first phase the focus is on the Constitution of Italy, in the second phase, on the Constitution of Spain, and in the third phase, on the Constitution of Czechoslovakia.

Biagi rightly places his analysis in the framework of the transitions from authoritarian regimes to democratic systems, a topic that has been examined by political scientists and legal scholars for more than two decades. His research seeks to ascertain the impact of constitutional courts on the new constitutions, especially with regard to the effectiveness of the review of the legislation enacted by the political forces in Parliament. Because the study aims to examine the effectiveness of constitutional review, quite understandably it is not limited to the analysis of the formal constitutional provisions, but also examines the concrete constitutional developments. Therefore, the focus is on the dynamics of the legal systems, and this is why it is useful to rely on transitional studies.

The notion of transition has emerged only in recent years in the domain of constitutional law. In this respect, it should be noted that constitutional law studies tend to focus on the role of the constituent power (the radical change of a constitution and hence of the related political regime) and on constitutional amendments

of various kinds ("partial" reforms and at times "total" reforms of the constitution as in the case of Switzerland, Spain, and Austria, and in various postsocialist constitutions). It was mainly political scientists who first examined the topic of regime change, including the notion of *transition*, after which constitutional scholars elaborated the concept of *constitutional transition*.

The term "transition" does not have an unequivocal legal meaning, although it is evident that it refers to a change from something that exists to something emerging in its place. This concept does not cover all the developments and adaptations resulting from the implementation of a constitution, deriving from political or administrative practices and courts decisions (implicit changes), or from formal amendments (explicit changes), provided that the political regime and the form of government have remained the same. Moreover, the constitutional transition does not coincide with the concept of *provisional constitution*, which refers to a constitutional instrument adopted in historical phases characterized by precarious or provisional arrangements prior to the adoption of definitive measures. Except in particular cases, constitutional transitions do not give rise to provisional constitutions. In this respect, an example is given by the case of South Africa, where during the transitional phase a provisional constitution was adopted in 1993, prior to the final Constitution of 1996.

The term "transition" is used particularly to describe the evolution from authoritarian regimes characterized by one-party systems to pluralistic and democratic systems. Political scientists have argued that the transition is a situation on the move and depicted it as a "process." In fact, the transition is a concept that conveys the idea of a dynamic process entailing various phases culminating in that of "consolidation." It is only at this point that, starting as a protest movement against a regime and continuing with the progressive adoption of new principles and rules in the place of the previous ones, the change can be said to be consolidated because the previous regime has been replaced by a new one. From a legal perspective, the transitions culminating in the adoption of new constitutions or in major constitutional reforms accompanying the change of political regime and the form of government are particularly important. The evolution (transition) from authoritarian to democratic institutions has traditionally meant a regime change. This was the case after the collapse of the Fascist and Nazi regimes in the mid-1940s, and then of the Salazar and Franco regimes in the 1970s, or with the generalized rejection of the socialist model in favor of liberal democracy, at least in formal terms, after the fall of the Soviet Union at the end of the 1980s.

In this sense, transition means that one normative scheme consisting of certain principles and rules is replaced by another one. The transition may take place over a period, whereas the adoption of a new constitution is *instantaneous*. The formal constitution, once adopted, is fixed at a certain point in time. The constitution immobilizes the change that has taken place, regardless of whether the process leading to its adoption has come about gradually or suddenly, and until such time as

it does not undergo further change, it will remain in force. This does not rule out the possibility that the implementation of its principles will be laborious and complex and that it will take time because the process of consolidation may turn out to be complicated. The implementation of the constitution is always characterized by the adaptation of the principles to the reality. It is in this phase that the gap between the intentions of the constitutional framers and that which is permitted by current circumstances becomes evident.

When the decisions made by the *pouvoir constituant* impose a radical change with respect to the past, as in the three case studies examined in this book, where the previous authoritarian constitutions were abandoned, the developments taking place after the adoption of the new constitution are of the utmost importance. Therefore, the transition displays its effects over time. The formal constitutional provisions provide for a market economy, the regulation and protection of rights, political democracy, and the establishment of a new political culture. In particular, they also provide for constitutional justice. However, all this initially exists only on paper. The principles are nearly always merely aspirations, proposals, and policy statements, and as a result everything is projected forward into the implementation phase and the practices that are later put into place. It is evident that these developments are achieved to various extents and across different time frames, depending on the country.

The study shows the different level of difficulty encountered in effectively establishing constitutional courts. In each country examined in this book the positive factors enabling constitutional justice to take root are discussed, along with the factors causing delay or obstacles, that were to be overcome over time. One of the most problematic factors – affecting all the countries that set up (or tried to set up) a constitutional court – consists of the constraints to the political representation in Parliament due to constitutional review of legislation. Hence the inevitable obstacles that have stood in the way of the concrete development of the courts in certain historical periods.

Among the positive factors, Biagi rightly highlights the leading role played by international human rights courts. A strong influence was exerted by the principles laid down in the treaties regulating the European organizations, with particular reference to the Council of Europe and the European Convention on Human Rights, as well as the European Union. Articles 6 and 49 of the Treaty Establishing the European Community, as amended in 1997, laid down as requirements for accession to the European Union respect for the principles of freedom, democracy, human rights and fundamental freedoms, and the rule of law. In its case law the European Court of Human Rights has effectively contributed to strengthening the role of constitutional courts as the guardians of fundamental rights. Because the international jurisdiction on human rights has gradually taken on a pivotal role in the evolution of contemporary constitutional orders, the supporting role of the Strasbourg Court has made a major contribution to reinforcing the overall role of

European constitutional courts. As pointed out by the author, there can be no doubt that the centrality of the role of the person and human rights has significantly shaped in a democratic sense the completion of the transition in the countries examined in this study, and more in general in all the European experiences.

For the countries that have adopted a liberal democratic regime, numerous factors and elements have contributed to facilitating an effective convergence between the formal constitution and the substantive constitution. However, it is also important not to underestimate the factors that may hinder the role and functions granted by the constitutions to the constitutional courts. Biagi rightly points out that it would be mistaken to assume that the mere establishment of a constitutional court would necessarily lead to an effective recognition of constitutionalism. This observation refers, among others, to the countries involved in the "Arab Spring," but it also concerns the post-Communist European countries. The local culture and constitutional traditions of a country may hinder and delay the implementation of the constitutional safeguards. A constitutional court imposed by external forces without the approval of the local population has a limited chance of success, as shown in the case of Bosnia, where an international treaty (the Dayton Agreement of 1995) concluded by the powers intervening in the region at the end of a bloody conflict determined the framework for the Constitution of the Federation of Bosnia and Herzegovina (consisting of the Croat and the Muslim communities) and of the Serbian Republic of Bosnia Herzegovina. The Constitution, inspired by the principles of liberal constitutionalism, envisaged a Constitutional Court composed not only of national judges but also of foreign judges selected at the international level. However, this plan failed to take account of the popular will, in a framework that was substantially one of international protection. It is evident, then, that such an innovation was characterized by a congenital weakness.

On the whole, the countries emerging from the collapse of the Communist regime adopted constitutions containing a number of significant safeguards: in all cases, reference was made to the principles of liberal democracy, human dignity, pluralism, the rule of law, jurisdictional safeguards, the protection of minorities, and the recognition of constitutional justice, with a wealth of declamatory statements. This vast apparatus of constitutional safeguards could not be accompanied in the short term by the dissemination of a culture of rights, the formation of a democratic political tradition, and a pluralistic information system. In practice, in most of these countries the preexisting cultural climate survived for a long time, favored by the persistence of the nomenclature of the old regime, at times with a devastating resurgence of conflicts between ethnic groups in a climate of bitter and exasperated chauvinism.

In conclusion, the study confirms the pivotal role played by the constitutional courts in affirming the classic values of constitutionalism, with special reference to the protection of individual rights, taking for granted the consolidation of the principle of the separation and balance of powers. The *leitmotiv* is that of the

substantive elements of the constitutional safeguards that need to be provided to ensure the effectiveness of the action of the constitutional judges. The analysis of the case law of the constitutional courts in the period following the entry into force of the recent constitutions demonstrates the effective role of the constitutional judges in operating in such a way as to enhance the credibility of the principles contained in these constitutions. In fact, the constitutionalism outlined in the written provisions of the new constitutions was shown to be applied in practice. This enables the author to conclude that thanks to this tenacious and constructive case law, aimed above all at ensuring the effective implementation of fundamental rights, constitutional courts have achieved full legitimation.

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This book is geared toward an international audience. Therefore, several changes have been made to the original Italian version. These include the addition of English-language sources, new materials of interest to an international readership, and explanation of foreign terms.