A Tale of Three Constitutional Courts in Democratic Transitions

Darinka Piqani*

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

Introduction: a diachronic comparison of constitutional courts in Europe

This book brings together the concept of democratic transition and the phenomenon of centralised constitutional review. It is based on the premise that constitutional courts are one of the many actors and factors of transitions. They have a mandate for the interpretation and enforcement of the new democratic constitution to make possible the desired transition from an illiberal regime to democracy. Such courts may facilitate this transition by providing 'a system of peaceful dispute resolution',[1] 'a mechanism for purging the laws of authoritarian elements'[2] and 'a focal point for a new rhetoric of state legitimacy, one based on respect for democratic values and rights, and on a rejection of former rhetoric [. . .]'.[3] Biagi's book explores whether and how constitutional courts in Italy, Spain and the Czech Republic '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'.[4]

*Assistant Professor of European Union Law, Leiden University; email: d.piqani@law.leidenuniv.nl.

[1]A. Stone Sweet, 'Constitutional Courts' in M. Rosenfeld and A. Sajo, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 826.

[2]Ibid.

[3]Ibid.

[4]Biagi, p. 3.

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According to Biagi, transitions to democracy should be understood as going beyond the 'formal' transition that is the first stage in the process in which a new, democratic constitution is adopted. His analysis goes beyond this and the author embraces the concept of 'substantive transition', i.e. the process in which the fundamental principles of the new democratic system are *enforced*. For instance, as Biagi argues, the adoption of the 1948 Italian Constitution could not immediately translate into a democratic shift in political, economic and social life. This was so because several constitutional provisions on fundamental rights were not effectively enforced and many laws dating back to the Fascist regime were still in force. It was only in 1956, when the Italian Constitutional Court started its activity, that the Constitution was enforced, and thus one could speak of 'transition in action'.[5]

The author is aware that the 'marriage' of centralised constitutional review and democratic transitions is not a novelty in academic debate. Centralised constitutional review has featured prominently in academic writings from a comparative perspective. In addition, the role of constitutional courts in democratic transitions, such as for instance in Central and Eastern Europe, has been scrutinised in comparative constitutional law.[6] However, as the author points out, the originality of this research is the 'diachronic comparison', which offers an analysis of the role of constitutional courts in three different historical periods in Europe: the period after the Second World War, the democratic transitions at the end of the 1970s and the beginning of the 1980s, as well as the fall of the Iron Curtain and the emergence of new democratic states in Central and Eastern Europe. These three periods are reflected in the concept of 'three generations of European Constitutional Courts'.[7] Thus, ultimately, the purpose of the book is to compare the role played by constitutional courts in the completion of democratic transition across three different periods.

The focus of the study is Europe, and the timeline is limited: it examines Europe after World War II, yet events preceding the Second World War – such

[5]Biagi, p. 15.

[6]*See* for instance H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000); S. Bartole, *Riforme Costituzionali nell'Europa Centro-Orientale, Da satelliti comunisti a democrazie sovrane* (Il Mulino 1993); R. Prochazka, *Mission Accomplished on Founding Constitutional Adjudication in Central Europe* (Central European University Press 2002); W. Sadurski, *Rights Before Courts, A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer 2005); G. de Vergottini (ed.), *Giustizia Costituzionale e Sviluppo Democratico nei Paesi dell'Europa Centro Orientale* (G. Gappichelli 2000); W. Sadurski (ed.), *Constitutional Justice, East and West – Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2002); M. Verdussen (ed.), *La Justice Constitutionnelle en Europe Centrale* (Centres d'Etudes Constitutionnelles et Administratives, Bruylant/LGDJ 1997).

[7]Biagi, p. 2.

as the establishment of constitutional courts in Austria and Czechoslovakia – are not ignored. Despite this geographic and temporal limitation, one of the ambitions of the study is to 'provide useful insights for constitutional courts in countries that are currently experiencing (or likely to experience in the future) a transition from authoritarian rule [. . .]'[8] This is indeed a valid and common objective of comparative studies such as this one, but it should be coupled with the acknowledgement – as the author notes – that each transition is characterised 'by numerous variables, consisting of actors and factors'.[9] These variables that mark and shape transitions may be institutional and non-institutional actors as well as endogenous and exogenous factors.[10] It can be argued that especially endogenous factors such as 'unexpected events, the nature of the previous non-democratic 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'[11] give a local character to each (democratic) transition and as such represent limits on the ability to extrapolate findings from one case study to another.

The book starts off with an introductory account on democratic transitions and constitutional courts. Afterwards, in Chapters 2, 3 and 4, the author examines, respectively, the most pertinent judgments of the Italian, Spanish and Czech Constitutional Courts. All three chapters replicate a similar structure, which facilitates comparison: the author explores the political context of transition, the establishment of the constitutional court in each jurisdiction and the main areas of intervention by these courts. Although mainly descriptive, these chapters offer an impressive wealth of information. All the findings are then brought together and distilled in the fifth and final chapter in which the role of these courts in completing the transition to democracy is assessed. This is the most analytical part of the book. Here, the analysis shifts from a country-based analysis to an issue-based one and Biagi identifies common trends as well as more specific issues present in the case law of these courts. In addition, he provides a very interesting and engaging picture of the factors that have influenced the action of constitutional courts and that have marked their success or failure.

This review essay will engage with three main themes that capture the myriad of issues dealt with in the book. It will start by discussing the emergence of centralised constitutional review in Europe and, more specifically, in Italy, Spain and the Czech Republic. The second theme, which corresponds to Biagi's core narrative and arguments, is the jurisprudence of democratic transition in Italy, Spain

[8]Biagi, p. 7.
[9]Biagi, p. 10.
[10]Ibid.
[11]Ibid.

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and the Czech Republic. In the third and last theme, this essay will interact with Biagi's findings on the successes and challenges faced by these constitutional courts. The jurisprudence of democratic transition in the book is assessed through a lens of effectiveness and the conclusion is that the significant impact of these courts was coupled with distrust especially in Italy and the Czech Republic.

Centralised constitutional review in Europe: between acceptance and reluctance

One recurring theme in the book, explored against a rich historical, political and social background, is the consensus on the establishment of constitutional courts in Italy, Spain and the Czech Republic. Before diving into the three particular case studies, Biagi sheds light on the reasons behind the establishment of constitutional courts in Europe after the Second World War.

As discussed in the book, first and foremost these courts have been seen as a reaction to past autocratic regimes, although as the author himself notes, other countries emerging from similar autocratic regimes, such as Greece, Portugal[12] and Estonia, opted for different solutions, such as the diffused model of constitutional review and the mixed model. In addition to this, Teitel and Ferreres Comella have seen a certain symbolism in the choice of a centralised court. Teitel argues, among other things, that '[First], the courts emerge out of systems of centralised state power; as new forums specially created in the transformation, their very establishment defines a break from past political arrangements'.[13] Similarly, Ferreres Comella is of the opinion that 'some European countries that suffered dictatorships have expressed their commitment to the new, democratic constitutions through the establishment of constitutional courts'.[14]

Another reason given by Biagi for the setting up of these courts after World War Two is distrust of the legislative and judicial branch of power. Especially regarding the latter, constitutional courts were conceived as an alternative to a 'government of judges' or, even worse, to judicial review performed by judges that were seen as part of the previous autocratic regimes. Other authors, such as Ferejohn and Pasquino, confirm this view: 'the very fact that there was a transition under way from an old and distrusted regime to a new one, meant that judges

[12]For a general account on the constitutional transformations in these countries of Southern Europe, *see* for instance K.G. Mavrias, *Transition Democratique et Changement Constitutionnel en Europe du Sud, Espagne, Grece, Portugal* (Sakkoulas 1997).

[13]R. Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', 106 *Yale Law Journal* (1997) p. 2032.

[14]V.F. Comella, 'The Consequences of Centralizing Review in a Special Court: Some Thoughts on Judicial Activism', 82(7) *Texas Law Review* (2003-2004) p. 1705 at p. 1711.

were viewed with particular suspicion as potential holders of constitutional review authority. As a result, there were powerful political reasons to place constitutional adjudication outside the judiciary'.[15] Distrust in the old, authoritarian judiciary is a valid argument; yet similar concerns could be extended to constitutional judges who may not have been completely detached from the past and therefore 'purified' from concepts of an authoritarian judicial culture.

Biagi also looks at the role of the Council of Europe and the European Union – especially in the context of the setting up of constitutional courts in Central and Eastern European countries. Biagi refers to a general approach by the Council of Europe in recommending the establishment of these centralised (constitutional) courts.[16] Indeed, the Council of Europe became a central point of reference for countries coming out of communist regimes by exercising its influence, mainly through its conditionality requirements and constitutional assistance. In a report of 1993, the Venice Commission recommended:

> Especially if a state wishes to introduce constitutional jurisdiction to its legal system, for the first time, possibly in connection with a new constitution, it appears preferable to entrust the decision of constitutional issues to a special institution, raised (to that extent) above the ordinary courts. For in this situation the judges of the ordinary courts may be neither trained nor used to dealing with constitutional matters.[17]

Less clear perhaps, as Biagi also notes, is the role played by the prospect of EU membership. There is an assumption according to which this prospect played an important role in the adoption of the centralised model of constitutional review by Central Eastern European countries.[18] Prochazka argues that the return to Europe for these countries meant the adjustment of their own institutions according to the constitutional model of some EU member states. However, it should be noted that the setting up of constitutional courts in Central and Eastern Europe took place well before any step of rapprochement with the EU or any realistic attempt towards EU membership. This perhaps less direct link between the prospect of EU membership and the setting up of constitutional courts is also acknowledged by Biagi when noting that legal opinion on this issue is divided (p. 31). He echoes the view by Sadurksi according to whom 'Most of the

[15]J. Ferejohn and P. Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice', in Sadurski (2002), *supra* n. 5, p. 31.

[16]*See* discussion on p. 31 of the book.

[17]H. Steinberger, 'The European Commission for Democracy Through Law (Venice Commission), Models of Constitutional Jurisdiction', CDL-STD (1993)002, available at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)002-e>.

[18]*See* for instance Prochazka, *supra* n. 6, p. 17.

constitutional courts were set up at the beginning of the 1990s, that is, well before serious talks about possible membership had begun'.[19]

In Chapters 2, 3 and 4 of the book, the author dives specifically into the case studies. Stark differences emerge. For instance, in Italy, the approach towards the establishment and the features of centralised constitutional review was very fragmented. After the fall of Fascism, generally there was support for a centralised Court except from the Communist party. The Forti Committee discussed several proposals ranging from a diffused system, a centralised constitutional court and the option of having the joint sessions of the Court of Cassation in charge of the review of constitutionality of laws. In addition, there did not seem to be an appetite for a diffused system in the Constituent Assembly due to fears of a government of judges. When the final proposal reached the Constituent Assembly, division persisted as the left (Socialists and Communists) and representatives of 'the old liberal school of thought'[20] opposed the setting up of a centralised court, although for different reasons: the first feared a potential conservative stance on desired reforms, whereas the second feared that it would undermine a State based on the rule of law.[21] Others felt that such an institution would undermine the supremacy of Parliament. On the other hand, the Christian Democrats were in favour of an organ which would uphold the supremacy of the Constitution. Ultimately, the approach of the Christian Democrats prevailed, and the 1948 Italian Constitution provided for the establishment of the Constitutional Court. Yet this did not mean that the Court could start its deliberations, because the governing majority slowed down the adoption of implementing legislation that was needed for it to become operational. Together with disagreement on the election of its members, this had as a result that the Italian Constitutional Court would start to function only in 1956 despite its establishment in the 1948 Constitution.

By contrast, the establishment of the Spanish Constitutional Court was based on consensus, which in fact characterised transition in Spain and the adoption of the 1978 democratic Constitution as a whole. Cases of hostile reception of the Court's judgments were sporadic.[22] The Czech Constitutional Court experienced the 'paradox of the acceptance and rejection'.[23] On the one hand, the Court was quickly established and 'benefited from widespread support among the population, but, on the other hand, strong hostility toward the Court was shown by the ordinary judges, Parliament, President Klaus, and certain legal scholars'.[24]

[19]Biagi, p. 32.
[20]Biagi, p. 38.
[21]Ibid.
[22]Biagi, p. 199.
[23]Biagi refers to this definition by the Pavel Hollande, former vice-president of the Czech Constitutional Court, p. 149.
[24]Ibid.

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Biagi identifies as reasons for the consensus in Spain the desire to mark a break with the past, the existence of Francoist judges in ordinary courts and the regional structure of the country.[25] The author dismisses quite convincingly the weight of the 'indigenous tradition',[26] based on the experience of the 1931 Spanish Court of Constitutional Guarantees, given that in the constituent drafting this was mentioned as a negative example. On the other hand, Biagi accords special attention to this 'indigenous tradition' in the case of the Czech Republic, since the 1993 Czech Constitutional Court was preceded by three generations of constitutional courts. Yet, one should not forget that, for instance, the 1920 Constitutional Court of Czechoslovakia developed quite a scarce jurisprudence.[27] However, the Constitutional Court of the Czech and Slovak Republic that was established in 1991, and which preceded the 1993 Czech Constitutional Court, did indeed leave its mark by reviewing legislation on lustration and hate speech.

Overall, the Italian Constitutional Court faced the biggest resistance compared to its Spanish and Czech counterparts. Biagi has convincingly showcased this by providing a variety of reasons for it, ranging from previous experiences or absence of constitutional review mechanisms; historical, political and social context; the type and degree of the rupture with the past and elements of judicial culture.

Jurisprudence of democratic transition: upholding the supremacy of the Constitution and dealing with the past

The bulk of the analysis in the book is dedicated to the case law of constitutional courts during transition. The diachronic comparison of the three courts yields interesting results. Biagi identifies the upholding of the normative value of the Constitution and the protection of fundamental rights as common trends in the case law of the three courts. These two trends overlap. In fact, most cases illustrating the enforcement of the normative value of the Constitution concern the protection of fundamental rights.

The normative value of the Constitution as discussed in the book encapsulates the binding nature of constitutional provisions and their supremacy over legislation, including (authoritarian) laws predating the adoption of new democratic constitutions. The Italian Constitutional Court seems to have carried the heaviest burden. In its first ever judgment,[28] which Biagi defines as one that 'marked a turning point in the substantive transition',[29] it assessed the compatibility of

[25]Biagi, p. 98.
[26]Prochazka, *supra* n. 6, p. 59.
[27]Sadurski (2005), *supra* n. 6, p.1-2.
[28]Judgment 1/1956 of the Italian Constitutional Court.
[29]Biagi, p. 62.

Article 113 of the Unified Code on Public Security, which required prior authorisation by the police for the distribution of posters and newspapers, with Article 21 of the Italian Constitution on freedom of expression. The law was declared unconstitutional by the Court, thereby confirming the supremacy of the Constitution in relation to laws that predated it. As the author convincingly explains, this judgment was issued in a context in which the Court of Cassation had refused to annul fascist legislation based on programmatic or non-immediately applicable constitutional provisions, whereas ordinary courts had been keen to uphold the supremacy of the Constitution by immediately applying constitutional provisions. The Court took the position that notwithstanding the nature of constitutional provisions, programmatic or preceptive, these would serve as the standard of review and laws violating them would be declared unconstitutional.

The immediate application and superiority of constitutional provisions, as the author shows, was similarly a matter of debate among scholars in Spain and an issue on which the Spanish Supreme Court had taken a non-coherent approach.[30] This debate was based on the old conception of the Constitution as a 'political document of a programmatic nature',[31] whereas the new democratic Constitution in its Article 9 enshrined the rule of law and positioned the Constitution at the top of the hierarchy of legal norms. The Spanish Constitutional Court confirmed the superior status of constitutional provisions which meant, among other things, that 'both the citizens and the public authorities ... are subject to it'.[32]

It is remarkable and visible – thanks to the diachronic comparison applied by the author – that in the Czech Republic this discussion on the normative value of the Constitution was not particularly present, except for the position of the Charter of Fundamental Rights and Basic Freedoms. Due to disagreements on the content of social rights, fundamental rights were not included in the text of the 1992 Czech Constitution. The Constitution rather incorporated the 1991 Czechoslovak Charter of Fundamental Rights as part of the constitutional order.[33] So legal uncertainty related mostly to the position of the Charter in Czech

[30] *See* discussion in Biagi, p. 105-110.

[31] J. Solanes Mullor and A. Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance', in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer, 2019) p. 553, available at <https://doi.org/10.1007/978-94-6265-273-6_12>.

[32] Biagi, p. 109.

[33] *See* Z. Kuhn, 'The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment Ultra Vires', in Albi and Bardutzky, *supra* n. 31, p 807, available at <https://doi.org/10.1007/978-94-6265-273-6_17>.

constitutional law. However, the enforceability of the provisions of the Charter and its constitutional status were upheld by the Federal and Czech Constitutional Court. According to Kuhn, 'This self-executing nature of fundamental rights seems to be an inviolable part of the Constitution, beyond the reach of the constitution-maker'.[34]

The importance of the confirmation of the normative value of constitutional provisions goes beyond the specific context of democratic transition. Whereas during democratic transition, the affirmation of the normative value of the Constitution is an immediate tool to facilitate the passage from an authoritarian regime to a democratic one, in the period of consolidation and later, it ensures respect for the rule of law. In addition, it is also a tool of empowerment for these courts which are the institutions in charge of upholding the supremacy of the Constitution.

Protection of fundamental rights, as the second common trend identified by Biagi, was not foreseen by Kelsen in his model of constitutional review as it did not fit his conception of constitutional courts as 'negative legislators'. However, protection of fundamental rights took a prominent role in democratic transitions after the Second World War and was also one of the factors for the setting up of Kelsenian courts in Europe. As Stone Sweet observes,[35] undoubtedly this feature of constitutional review contradicted Kelsen's original idea of centralised courts as 'negative legislators'. In the process of discovering the content of rights, these courts would become involved in a process of law making akin to that of the 'positive legislator'. There is truth in this observation. Take for instance the case law of the Italian Constitutional Court, as discussed by Biagi, on the right to strike. Article 40 of the Italian Constitution provided that 'the right to strike shall be exercised in compliance with the law', a very vague wording. In the absence of legislation adopted by Parliament, the Italian Constitutional Court declared the immediate application of the right to strike and interpreted it in an expansive manner by including within its scope not only the protection of economic ends but also the protection of strikes of a political nature.[36] The intervention of the Italian Constitutional Court was crucial as past fascist legislation had not been repealed due to parliamentary inaction. Likewise, in a sensitive context, the Czech Constitutional Court was called on to assess the compatibility of the 5% electoral threshold laid down in a law of Parliament. Although the Court in this case upheld the choice of the legislature, it took the opportunity to remind

[34]Ibid.
[35]Stone Sweet, *supra* n. 1, p. 819.
[36]Biagi, p. 71-76.

policy makers that there would be limits to electoral thresholds and that a 10% requirement would probably be considered unreasonable due to difficulties it would create for the representation of small parties.[37]

These two examples illustrate the inevitable involvement of constitutional courts in the political process when enforcing fundamental rights, and even more so during periods of political transition. In the Italian example, the empty legal space on the right to strike left by the legislature accentuated the role of the Court in shaping fundamental rights and democratic transition. The Czech Constitutional Court and the Spanish Constitutional Court, on the other hand, acted in a context characterised by legislative action. Biagi sees the adoption of these laws as forming a context 'that was undoubtedly much more favorable than that of the Italian Constitutional judges'[38] and that showed a more complementary role of these courts vis-à-vis the legislature.

In addition to these common threads of case law identified by Biagi, in my view there is a third common line of cases: those dealing with the past. The business of correcting the wrongs of the past could have been identified as yet another common trend. Providing a rupture with the past in the form of invalidation of pre-constitutional laws that contradicted the Constitution was a priority for the Italian Constitutional Court due to the continuation of application of fascist legislation. Given the lack of a repeal clause in the new democratic Constitution, this was quite a bold move for this newly established constitutional court. By contrast, the Spanish Constitutional Court benefited from the 'Repeals' section of the 1978 Spanish Constitution, which abrogated past fascist laws and more generally repealed 'any provisions contrary to those contained in the Constitution [. . .]'. However, it did get involved in the review of pre-constitutional legislation, which was not fully in line with the level of protection of fundamental rights in the Constitution. Dealing with the past took a deeper meaning for the Czech Constitutional Court. There, it meant going beyond conflicts between the democratic constitution and any contrary pre-constitutional legislation. This Court, just like other counterparts in Central Eastern Europe, embraced transitional justice and reviewed the constitutionality of lustration laws, laws restituting property and the law on the illegitimacy of the communist regime. The Czech Constitutional Court turned into an important factor in the catharsis of the legal and political system by showing deference to the ambitious reforms of the legislature that aimed at dismantling the communist regime.

[37]Biagi, p. 173.
[38]Biagi, p. 183.

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Mission accomplished? An assessment of achievements and hardships

In the last chapter of the book, Biagi reflects on the success of centralised courts and on factors that determined their action. He sees the role played by these courts as complementary to the role played by political actors. Whereas the latter secured the adoption of democratic constitutions, constitutional courts contributed to the implementation of these constitutions and ultimately to substantive transition. It was due to the important judgments issued by these courts that the Constitution gained its place at the apex of the national legal order and principles such as rule of law, separation of powers and protection of fundamental rights were enforced. Yet, Biagi is careful to paint not only the lines of success but also of challenges faced by these courts and admits that 'their action was not immune to criticism'.[39]

The systematic review of the most important judgments during transition provides a good basis to reflect on the effectiveness of these courts. Stone Sweet argues that constitutional courts may manage 'the evolution of the polity through their decisions'[40] when they are effective. Effectiveness implies three conditions: (1) these courts decide on important cases that are brought before them on a regular basis; (2) constitutional judges give reasons for their rulings so that a jurisprudence is created; and (3) those affected by these courts' actions accept their judgments as having the force of precedent.[41] Seen from this perspective, I concur with Biagi's conclusion on the significant impact of these courts on democratic transition. For instance, regarding the first and second condition, one can think of the breakthrough of the Italian Constitutional Court with its judgments on the constitutionality of fascist laws and the normative value of the constitution as well as its rulings establishing a jurisprudence enforcing fundamental rights. Similarly, the case law of the Spanish Constitutional Court on the distribution of power between the central government and the Autonomous Communities, and the series of judgments issued by the Czech Constitutional Court on transitional justice certainly qualify as important cases. These landmark cases and others reflect a robust case law of constitutional interpretation on the position of the Constitution, the nucleus of fundamental rights as an absolute concept, or the 'jurisprudential construction'[42] of the state of Autonomies in Spain, and the 'state based on the rule on law'[43] as interpreted by the Czech Constitutional Court.

[39]Biagi, p. 205.
[40]Stone Sweet, *supra* n. 1, p. 825.
[41]Ibid.
[42]Biagi, p. 124.
[43]Biagi, p. 176.

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As regards the third element of effectiveness, it should be recalled that challenges arose for all three. Biagi describes the Italian Constitutional Court in the first phase of its existence as a 'ship sailing into the wind',[44] the wind being the three branches of power which were keen on keeping their authority and less willing to welcome this new institution in the Italian constitutional landscape. Similar hostility is evident in the case of the Czech Constitutional Court, which despite its quick establishment and wide initial support, stumbled in the 'war of courts' with the Supreme Court, which did not consider the judgments of the constitutional court as binding.[45] The Czech Constitutional Court faced similar hostility from the President of the Republic. The Spanish Constitutional Court seems to be the exception here given that, as Biagi reports in his book, it faced hostility only in isolated cases. It is difficult to pinpoint an explanation for this difference in reception. One could certainly think of the widespread consensus that characterised the establishment of the Spanish Constitutional Court. However, this was a shared feature with the Czech Constitutional Court, which experienced more reluctance from other political institutions.

Biagi reflects on the factors that have influenced the action of constitutional courts during transition. As the reader will explore further in the book, such factors include the time needed for setting up these courts, the appointment procedure and status of constitutional judges, constitutional procedures, the (historical, political and institutional) context in which these courts operate and the 'Europe factor'. Specifically, regarding the 'Europe factor', Biagi argues that accession of countries to the Council of Europe and the European Union and the jurisprudence of their supranational courts, had a 'favorable impact on the second and third generation of courts'.[46] This is due to the fact that membership to both these European organisations was conditioned with respect for democratic principles. Thus, conditionality had a dual purpose: it served as a tool for bringing these countries closer to the Council of Europe and the EU, at the same time as advancing democratic transition.

There is an additional effect of EU membership that has been witnessed in the action of these courts, although it goes beyond transition to democracy, and as such it is beyond the scope of the book. Yet, it is of interest because it highlights the other side of the coin, namely the adjustment of national constitutional case law in light of EU obligations. For instance, it is well-known how the Czech Constitutional Court in its Sugar Quotas case saga departed from its previous more 'protectionist' case law on fundamental rights in the agricultural market and replaced its activism on human rights protection with 'constitutional

[44]Biagi, p. 85.
[45]Biagi, p. 150.
[46]Biagi, p. 200.

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self-restraint'.[47] The Court accepted that the standard of fundamental rights protection within the EU could not be considered lower than the one offered in the Czech Republic and it deemed previous case law on production quotas as such, and their allocation to individual producers, as 'excessive'. Anneli Albi took quite a critical stance in the academic debate at the time by arguing that this judgment raised questions of 'a certain degree of downwards adjustment in the national administrative cultures and in the level of protection of fundamental rights in the process of implementing EU law'.[48] This is an interesting example which illustrates the mixed impact of the 'Europe factor'. Initially, it acted as a catalyst for democratic transformation, and later on, in the consolidation period, it played a role in the adjustment of the national level of fundamental rights protection to the EU standard.

Conclusion

Any reader who is looking for a meticulous account of the role of three generations of constitutional courts in transitions to democracy should read the book by Biagi. There are at least two reasons to do so: firstly, the analysis of constitutional jurisprudence is embedded in a rich historical, political and social background. Biagi carefully dissects the political context in which these courts emerged and acted and offers this as a tool to the reader to better understand the actions of these courts and their impact on transition. Secondly, the story told in the book is very balanced and nuanced. The three courts are described with their achievements but also with their fragilities and challenges. Some degree of hostility towards centralised constitutional review and the action of these courts is the common element to all democratic transitions described in the book. To a

[47]Czech Constitutional Court, Judgment on Sugar Quotas, Pl. ÚS 50/04, 08 March 2006. This case concerned the constitutionality of a governmental regulation on the allocation of sugar quotas for sugar producers. Petitioners claimed that the regime adopted by the government violated the principle of equality, the freedom of producers to conduct business and the right to property. The Court annulled certain provisions of the Government Regulation on the ground that the Czech Government had acted ultra vires 'by exercising an authority which had been already transferred to Community organs and which the Government, as a result, no longer held'. According to the Court, the Government was not authorised to adopt the implementing decree, as the competence to regulate the sugar market had been transferred, through Art. 10a of the Constitution, to EU institutions, which had regulated the issue through a directly applicable act, the EC regulation on sugar quotas.

[48]A. Albi, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums', 15(1) *European Law Journal* p. 46 at p. 58.

certain extent this is inherent in the countermajoritarian nature of constitutional courts but, as Biagi shows, it can be amplified by legal tradition, the consensus, or the lack thereof during democratic transitions, and by the actions of political elites. Ultimately, the book is a welcome addition to the comparative study of European constitutional courts.

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