

Who should uphold the constitution? An answer from comparative law

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Maartje DE VISSER, *Constitutional Review in Europe – A Comparative Analysis*, Oxford: Hart Publishing, 2014, xliii + 484 p., ISBN 9781849463850

Maartje de Visser's book on constitutional review in Europe is the result of a very ambitious endeavour, and it has to be immediately said that the book lives up to its author's ambitions. Not only because the comparative analysis of eleven EU member states' legal systems is performed with all the care and precision needed, not only because those legal orders are analysed as they interact with the EU legal order and that of the European Convention on Human Rights, but also, and maybe most importantly, because the study is not limited to the role of constitutional courts and supreme courts in legal systems that provide for judicial review of constitutionality of statutory and other normative instruments. Rather, this analysis also includes systems where there is no such judicial review in the strict sense, i.e. in the first place the Netherlands and the United Kingdom. The book is presented by the publishers as '*intended for practitioners, academics and students with an interest in (European) constitutional law*': indeed there is much to learn about the countries that are examined; beyond learning, there is much food for thought, especially for constitutional lawyers and also for EU lawyers.

The eleven jurisdictions examined are Belgium, the Czech Republic, Finland, France, Germany, Italy, Hungary, the Netherlands, Spain, Poland and the United Kingdom: a broad variety of constitutional systems, thus reflecting most of the typical constitutional settings that one may find throughout Europe in the perspective of the topic examined by the author. The only thing missing, in my view, is a representative of a European system of diffuse constitutional review, such as Ireland or Greece; but this lacuna is well compensated for by the first chapter, which addresses a very important issue that is usually not dealt with by most constitutional lawyers, namely the role of 'non-judicial actors' such as Councils of

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State, Parliaments and their committees, the head of state and last, but not least, the people.

The book has a structure which is by no means that of a handbook, but succeeds in being clear and orderly, in the way a book of comparative law has to be structured in order to allow the reader to learn, understand and compare: the chapters are conceived and ordered in a conceptual way; country studies are not systematically developed for all jurisdictions for each of the topics: a selection is operated that permits the author to bring out the most interesting cases.

A short introduction clarifies the objectives, method and terminology of the book, founded upon a definition of constitutional interpretation and constitutional review as two concepts that are indispensable in order to answer the two major question addressed by De Visser: who should uphold the constitution, and how is constitutional review organised?

The first chapter deals, as already indicated, with the ‘role of non-judicial actors in upholding the constitution’. The author concludes that it is important to reiterate that all those actors ‘devote at least part of their time and energy to constitutional questions [...] before moving to consider the role of the courts in protecting and enforcing the provisions and principles of the constitution, given the frequent and growing tendency to see “court” and “constitutional interpretation and review” as natural companions’. Without a doubt, the fact that the author is Dutch has put her in a position where the point of view is necessarily different from this ‘frequent and growing tendency’, as the constituent power in her country deliberately chose in 1981 not to create a system of judicial review of constitutionality of primary legislation.

Chapter 2 deals with ‘the rise of constitutional adjudication’, in examining the reasons behind such a rise, i.e. mainly avoiding competence collision and guaranteeing the observance of the rule of law and affording protection to fundamental rights. Here again the analysis is not limited to those countries where constitutional adjudication has been established over the last seventy years, but includes also the Netherlands and the UK.

Chapter 3 examines the ‘purposes for constitutional adjudication and access to constitutional court’, which are mainly four in number: ensuring that the legislator does not overstep constitutional boundaries; protecting fundamental rights and Individuals in specific cases, resolving institutional disputes and ensuring the integrity of political office and related processes. The chapter concludes with an examination of how the European Court of Justice serves those purposes in the EU legal order.

Chapter 4, by far the shortest, deals with the ‘constitutional bench’, analysing how judges are selected, appointed, and keep tenure.

Chapter 5 is dedicated to ‘identifying the sources of standards for constitutional review’, giving due consideration to the use of non-written principles as grounds for review and to the fact that written standards are not static.

Chapter 6 analyses ‘testing and remedying unconstitutionality’, with amongst others two in-depth comparative analyses based upon case studies: ‘constitution-conform interpretation’ and ‘types of judgments and their effects’, which distinguishes between decisions to uphold the statute and findings of unconstitutionality.

Chapter 7, one of the longest and to my view most interesting, deals with the ‘interplay between constitutional courts and other actors’, which includes ‘(constitutional) legislatures’ and ordinary courts in the domestic settings, as well as the interactions between European constitutional courts, between the latter and the European Court of Justice, and between national highest and constitutional courts and the European Court of Human Rights.

An overwhelming amount of food for thought is here. Furthermore, there is a considerable amount of materials, explained and commented upon in a very accurate way: the acknowledgements reveal how many excellent scholars the author knows and has been able to consult. Clearly, one may always find a detail where one does not agree with the author – in my case a small point of the explanation regarding the French *question prioritaire de constitutionnalité*; but such disagreements are of the same kind as those one has with colleagues from one’s own country.

Maartje de Visser’s book is definitely to be recommended to constitutional and EU law specialists as a major contribution to some of the most timely issues they have to deal with. Her analysis clearly demonstrates how many shadings there are in dealing with issues such as the so-called dialogue between courts, the primacy of EU law, the limits to procedural autonomy of EU member states and the margin of manoeuvre in enforcing the European Convention on Human Rights. The analysis is that of a lawyer who works with all materials that must be considered, not only with the text of constitutions, treaties and court rulings, though the latter materials are dealt with with all due care.

