5-2014

Book Review/Response: Maartje de Visser and Laurent Pech on Comparative Constitutional Review in Europe

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[Editor's Note: In this installment of I•CONnect's Book Review/Response Series, Laurent Pech reviews Maartje de Visser's recent book on Constitutional Review in Europe: A Comparative Analysis. Maartje de Visser then responds to the review.]

Review by Laurent Pech

–Laurent Pech, Professor of European Law and Head of the Law Department, Middlesex University London[1]

Let's not beat around the bush. Professor de Visser's comparative law monograph is a genuine *tour de force*.

Aiming to present and explain the institution of constitutional review in a European context, three key questions are explored: *Who* is responsible for protecting the supremacy and integrity of constitutional norms, and *why* and *how* the task of upholding the constitution is carried out.

These questions are answered through the study of seven topics in as many chapters: (i) the role of non-judicial actors in upholding the constitution; (ii) the rise of constitutional adjudication; (iii) the purposes of constitutional adjudication and access to constitutional courts; (iv) the constitutional bench; (v) the sources of standards for constitutional review; (vi) testing and remedying unconstitutionality and (vii), the interplay between constitutional courts and other actors, including the European Court of Justice and the European Court of Human Rights.

No less than eleven countries, all in the EU, are studied. This does not however prevent the author from making references, where relevant, to countries that do not belong to her default study group.

Having distinguished between a broad and a narrow understanding of constitutional review, and generally favoring the former sense (i.e., constitutional review as 'the process of assessing whether one's behavior or that of other actors is in line with the constitution or other texts or principles with a constitutional rank or role', p. 2), one of the author's main theses is that 'upholding the constitution is a shared responsibility of various institutions, not just of courts, and that not all countries prefer to designate judges as chiefly responsible for guarding constitutional rules and principles against infringements' (p. 5).

The book however moves quickly beyond a demonstration of what is arguably a relatively uncontroversial point, to offer an unrivaled wealth of information and so many fascinating insights and findings that this reviewer's task to offer a concise book review is a rather difficult one.

Before highlighting and commenting on the book's strengths, it would seem appropriate to first explain how the author seeks to pre-empt potential criticism on the two issues which she was no doubt regularly confronted with during her research: Why should one focus on the selected countries and not others? Why would one abundantly refer to the EU Court of Justice and the European Court of Human Rights in the context of a research dedicated to constitutional review?

Professor de Visser masterfully assuages these two potential sources of criticism in the book's introduction.

With respect to her choice of legal systems, one of the traditional pitfalls of comparative law analysis, the author offers a number of compelling reasons. In a nutshell, she submits that her selection is sufficiently large to make meaningful comparisons and give a suitably representative view of the various issues, that it appropriately includes countries with either a strong or a weak form of constitutional adjudication, and is geographically adequate as the sample includes countries from western Europe, southern Europe, central and eastern Europe and Scandinavia. These justifications are compelling. While it is inevitable that some readers whose national legal system is not being reviewed may object to the omission, the selected sample offers the reader ample food for thought and the review of eleven legal systems in itself represents an incredible feat for a single researcher.

That said, and just to play the necessary role of the devil's advocate, I would submit for instance that the omission of Ireland might be regretted for conceptual and practical reasons. Ireland would have indeed offered an ideal point of comparison to appreciate the unique features of the British approach, and a revealing example of how a legal system, previously shaped by the English common law and the principle of parliamentary sovereignty, having so forcefully moved in the direction of a strong form of constitutional adjudication. Ireland would have also offered the example of a legal system departing from the dominant Kelsen model of constitutional adjudication, which furthermore offers an unprecedented ease of access to its Supreme Court as a result of an extremely and perhaps unprecedented generous interpretation of legal standing in the situation where an applicant seeks to challenge an actual or potential breach of the Irish Constitution.

Leaving the issue of the sample's representativeness, one may also regret the absence of any development or explanation regarding the usefulness of what is arguably a traditional distinction between a European model and an American model of constitutional review (see e.g. Favoreu (L.), 'Modèle européen et modèle américain de justice constitutionnelle', *AIJC*, 1988, p. 51). The author's selection of countries and framework of analysis do not seem informed by this divide and the reader is left wondering whether the lack of analysis on what some scholars may still see as a customary academic divide reflects a rejection of its scientific usefulness.

Early in the introduction, the author further makes clear that her monograph reflects an approach that combines national and European constitutional law. However, a comprehensive analysis of the two European supranational courts, in a study dedicated to constitutional review, may still raise some eyebrows in some quarters. Suffice it to say here that while there may be no scholarly consensus as to whether the EU Treaties or the European Convention of Human Rights, despite their formal Treaty format, can be rightly considered respectively as the "constitution" of the EU and of the Council of Europe, the case law of both the EU Court of Justice and the European Court of Human Rights clearly betray a constitutional perspective. It would seem also rather uncontroversial to at least argue today that both the EU Treaties and the ECHR can be suitably compared to national constitutions at least in a functional sense. It would seem similarly passé to deny that both European courts have been entrusted with functions that are reminiscent of the functions exercised by national courts entrusted with the task of upholding the national constitution. Perhaps more decisively and originally, the author also submits that membership of the EU and of the Council of Europe has exerted an undeniable impact on the institution of constitutional review, and that one should be knowledgeable about the constitutional state of play at the national and European levels to make sense of new developments and dynamics in Europe's legal space. The point whereby national courts entrusted with constitutional review do not operate in a vacuum but interact with and are influenced by other actors, both within and *outside* the confines of the national legal system, is both a stimulating and convincing one.

Another traditional pitfall for the comparative lawyer to avoid is the temptation to present one system at a time before drawing some transversal findings in a concluding chapter. The author shows an unusual

aptitude in avoiding this danger by structuring her different chapters around system-neutral themes and 'real life' concrete problems and questions. Comparative findings are also regularly offered during the course of the analysis before being neatly summarized in concluding remarks, which are to be found at the end of each chapter. The author should also be commended for offering compelling and accessible summaries of complex and topical issues, in an elegant style that is particularly engaging. This is not to say that the analysis offered is superficial or moves from one issue to the next without subtlety or the depth required to assist policy-makers or scholars in their respective tasks. On the contrary, this book should be considered the new compulsory starting point for anyone interested in any key aspect of the constitutional adjudicatory process, and wishing to be quickly able to rely on authoritative points of comparison.

With a sample of eleven countries, the author faced the additional danger of committing errors or misunderstandings, if only because of resources limitations and linguistic difficulties. Having paid particular attention to the developments devoted to France, the United Kingdom and the European Courts, legal systems with which this reviewer is particularly familiar, it is difficult not to be struck by the quality of the research undertaken and the subtle nature of the analysis developed by the author on the basis of an impressive bibliography. Constitutional law experts from the different systems under investigation should in any event be trusted to eventually bring to the author's attention any omission or error which might have been made, a process which, ideally, may convince the author to publish a second edition of this magnificent monograph, and add perhaps a few more countries to her selection.

The only major regret one may perhaps express, concerns the absence of a concluding chapter bringing all of the book's key findings into a grandiose finale. Instead, the reader is left with a final paragraph that does not do justice to the breath and depth of this magnificent monograph. One may also be forgiven for expecting to discover a comprehensive overview of the ideal European model of constitutional review or at the very least, the author's list of 'best practices' as regards constitutional interpretation and constitutional review. The author cannot however be faulted for not making clear, early in her analysis, that readers should not expect a list of 'best practices as regards the design and functioning of constitutional review either at a national level or within the Union legal order. Rather … the book provides the reader with a set of materials and arguments that can be relied upon in thinking about the institution of constitutional review' (p. 6). Be that as it may, this reviewer is still of the opinion that endeavoring to identify Europe's common and diverse constitutional traditions or similarities and variations in these two domains is perhaps insufficiently ambitious when all the relevant material has been so exhaustively and skilfully explored and dissected. For instance, it may have been a good idea to consider whether there is such a thing as a 'European model' of constitutional review, whether one can be derived from the book's findings, or investigate the EU or the Council of Europe's actions and policies in the area of constitutional assistance to identify the features of constitutional review which may be promoted within and beyond Europe. In this context, an analysis of constitutional review in post-conflict countries such as Bosnia or Kosovo, or in EU candidate countries such as Serbia or Turkey, would have perhaps revealed some interesting findings regarding the extent of Europe's 'soft power' in the area of constitutional review.

This not to say, however, that this book does not fully achieve the aims and objectives set out in its introduction. Written in an engaging style, which constantly holds the reader's attention, de Visser's monograph makes a decisive contribution to our understanding of the institution of constitutional review in Europe. There is little doubt that it will become a classic reference for the practitioners, academics and students of comparative constitutional law.

[1] Author's disclosure: Professor Pech was a member of the taskforce which supervised the research undertaken in the context of the ERC-funded European and National Constitutional Law project, which

was set up to investigate and advance understanding of Europe's composition constitution. In this capacity, he had the opportunity to work with Professor de Visser while she was undertaking her research which led to the monograph which is the subject of this book review.

A Reply to Laurent Pech

–Maartje de Visser, Assistant Professor of Law, Singapore Management University

I should like to begin by expressing my appreciation to Laurent Pech for reviewing my book: at a time when the academic profession seems to have lost some of the tranquility and leisure traditionally associated with it, Professor Pech found more than a moment to peruse a 400-something page tome. This is generous, to say the least. More than that, I am very grateful for his perceptive, gracious, comments regarding *Constitutional Review in Europe*. In my response, I engage with three points raised in the review: first, the methodological challenge of country selection; second, the enduring relevance of the divide between the American and the European model of constitutional adjudication; and finally, the possibility of a more ambitious finale for the book.

Beginning with the choice of countries covered in the book, Professor Pech advances the argument that Ireland ought usefully to have been included as well. I agree with his analysis that as one of the few common law jurisdictions in Europe, juxtaposing Ireland's arrangements for constitutional review both to the United Kingdom's approach and the proliferation of Kelsenian courts on the continent is certainly an attractive prospect. In a similar vein, a systematic exploration of the "hybrid" arrangements for constitutional review in place in for instance Portugal or Estonia or those in operation in post-conflict countries such as Bosnia would undoubtedly have provided further stimulating insights.

To be sure, methodological issues pertaining to country selection are a perennial challenge for scholars engaged in comparative work. The choice of my sample has been greatly influenced by the core theme of the book, namely that the task of upholding the constitution does not only fall to courts and that several European countries continue to profess that it is ultimately for parliament to ensure that laws do not fall foul of the constitutional framework. In this vein, and while the majority of the legal systems canvassed have a strong form of constitutional adjudication to reflect the dominant trend in Europe, it has been a matter of necessity to include a number of "outlier" jurisdictions that do not fit this general pattern. By carefully explaining how the United Kingdom, the Netherlands and Finland have organised constitutional review the book therefore already offers ample illustration of jurisdictions that, like Ireland, have resisted the pull of the Kelsenian mold. What is more, the Netherlands and Finland arguably provide an even more suitable vantage point to appreciate the UK's approach than Ireland would have, demonstrating that the United Kingdom is not unique in holding firm to the doctrine of parliamentary sovereignty. Like their UK counterparts, Dutch judges too lack the power to strike down or disregard allegedly unconstitutional laws and while Finland has recently accepted the decentralized model of constitutional adjudication that is also practiced (albeit in a slightly modified form) in Ireland, the Finnish parliament remains the principal site for debating the constitutionality of legislation – with reliance being placed in this regard on a dedicated parliamentary committee that resembles the UK's House of Lords Constitution Committee in several respects (p. 26-32 and p. 76-87)).

As for Ireland's appeal in tracing the evolution of a legal system from parliamentary sovereignty to constitutional justice, this is not specific to that jurisdiction but rather a transition that every country will experience to some degree when deciding to introduce constitutional adjudication. Thus, in Germany, Italy, Spain, the Czech Republic, Hungary and Poland – all of which are analysed in the book – the decision to vest courts with the power of constitutional review was partly motivated by the realization that parliament could not be relied upon as the ultimate guardian of the constitution. What is more, legislatures

had in fact been responsible for many constitutional infringements committed under the previous regime of authoritarian rule. Moreover, in charting the movement to a strong form of constitutional adjudication, I would submit that looking at France and Belgium is at least, if not more, instructive than examining the Irish experience: both countries decided to establish bodies with very limited powers of constitutional review for separation-of-powers reasons, but through the combined effect of case law and formal constitutional changes, these jurisdictions have slowly but surely come to embrace a strong form of constitutional adjudication in the past decade or so.

Returning to the issue of country selection more generally, the book is premised on the belief that it is preferable to analyse a smaller sample in depth so as to offer meaningful insights rather than opt for quantity at the expense of quality. As such, one must draw the line somewhere; and all things considered, I do think that when it comes to the choice of which jurisdictions to study, the line has been appropriately drawn. This is also acknowledged by Professor Pech, who remarks that the justifications for the selection of legal systems that did make the cut are "compelling". At the same time, I would be delighted if other scholars would find *Constitutional Review in Europe* useful as a starting-point or source of inspiration to discuss the design and functioning of the set-up for constitutional review in those countries not featured in the book with a view to identifying commonalities and differences in this domain across Europe.

Turning to the second point, Professor Pech asks whether the limited discussion of the contrast between the so-called European vs. American model of constitutional justice should be taken as an implied rejection of its conceptual usefulness. While there is a body of literature that profitably employs this distinction,[1] I admit to harboring reservations about the contemporary descriptive accuracy of this particular terminology. To be fair, references to the "European" or the "US" model of constitutional adjudication are unproblematic insofar as the intention is to pinpoint the intellectual birthplace of these respective approaches. Yet, using this terminology to discuss present-day constitutional practice carries with it the prospect of those not intimately familiar with the arrangements actually in place in the different European countries coming away with the mistaken impression that the latter all have their own version of the *Bundesverfassungsgericht* – which has become the iconic hallmark of a Kelsenian-style court, including among American and Asian audiences. To be fair, this risk can be assuaged by replacing the European v US terminology with that of centralized v decentralized models of constitutional justice (which, as an aside, is also preferable when writing about judicial enforcement of the constitution on other continents). Indeed, I have favored the latter expressions in the book, including when explaining what this means in terms of institutional design (p. 94-95).

Furthermore, and moving beyond the question of the appropriate vocabulary in this regard, it seems preferable to use the courts v. non-judicial institutions distinction as a core organizing principle in a book concerning the practice of constitutional review of Europe rather than the centralized v. decentralized divide. Doing so properly acknowledges that there is at present no uniform approach as regards the identity of the main constitutional guardian(s) among the EU's Member States. In addition, while many European countries have opted to create constitutional courts, their model of judicial control of parliamentary enactments can today no longer be characterized as purely centralized in nature. On the one hand, several constitutional courts have devolved part of the responsibility for ensuring that laws are in harmony with the constitution to the regular courts, notably by requiring the latter to endeavor to construe the relevant legislation in a constitution-conform manner. On the other hand, the case law of the Court of Justice of the European Union has caused constitutional courts to lose their exclusive prerogative to inquire into the compatibility of statutes with higher rules. While these courts retain the competence to strike down laws for breach of the constitution, regular courts are able to check the same laws for compatibility with EU law and if the national rule is found wanting, refrain from applying it to the case at hand.[2] In short, it is increasingly accepted that the regular judiciary too has an important part to play in upholding the constitution and more broadly, keeping the legislature in check. In that vein, one of my

objectives has been to analyse the causes and consequences of changing patterns of interaction among courts of various stature (constitutional, ordinary, European) in practice rather than having the discussion revolve around a traditional contrast in terms of different conceptual approaches to the institutional design of arrangements for constitutional adjudication.

The third issue that Professor Pech addresses is a more ambitious ending for the book. His comments here appear largely inspired by his generous observations concerning the materials canvassed in the book and the comprehensive analysis presented; and I am thankful for his ideas which I will address in future research. Returning to Pech's point, I am somewhat uneasy about entertaining notions of a "European model". This is in part because only the very general contours of such a model would in fact be shared among the different legal systems, leaving unaffected diversity in more specific questions of constitutional design, calling into question the usefulness of such an exercise. More generally, identifying "models" may lead to talk about "templates" that should be followed, and the related normative expectation that the proactive pursuit of more commonality in the organisation and functioning of constitutional review is desirable. This is risky, not to say inappropriate in the constitutional domain, where there is a need to make sure that the choices made fit a country's history, constitutional culture and political and social conditions. As such, my aim has been to disclose a range of constitutional materials and carefully discuss related conceptual issues that can enrich the migration of constitutional ideas if and when the competent national constitutional actors would like for such migration to take place.

That said, I am certainly not agnostic as to preferred vs. undesirable arrangements for constitutional review. Although this is not the place for an elaborate discussion, let me just say that my own thinking is informed by the recognition that courts cannot, and ought not to, be the exclusive guardians of constitutional rules and values, but that responsibility for upholding the constitution is a shared responsibility among a range of public – and private – actors. In his review, Professor Pech considers this to be a "relatively uncontroversial point". This is correct as a matter of constitutional theory, though not always practiced in daily constitutional life – and this can be observed both at the national and at the EU level. In my view, this is a defect that warrants serious attention and appropriate remedial action. Conceiving of constitutional guardianship as a common endeavour may yield several advantages. For one, synergizing varied perspectives and different legitimacy claims in constitutional interpretation processes should improve the quality of discussions on the meaning of constitutional values and principles. For another, it may reduce the pressure on courts to decide novel constitutional issues "single-handedly". In turn, this can reduce the likelihood of accusations of judicial activism and instead facilitate the exercise, and enhance the legitimacy of, having some form of judicial enforcement of the constitution. To cultivate a greater degree of shared constitutional guardianship, parliaments for instance could usefully look into the creation and role of committees tasked with scrutinizing bills for their constitutional compatibility – and in this regard, both the Finnish *Perustuslakivaliokunta* and the UK's House of Lords Constitution Committee (although operating in countries without a Kelsenian court) are a rich source of inspiration. Where they exist, such institutions as councils of state, chancellors of justice and presidents too should be better incentivized, and where necessary better enabled, to verify that proposed legal rules are in line with the constitution.

To conclude, the identification of topics for further exploration in Professor Pech's review serves to illustrate that there remains much useful scholarly work to be done as regards the arrangements for constitutional guardianship. One such issue Professor Pech rightly mentions concerns the degree and direction of Europe's "soft power" in the constitutional domain, including as regards the task of upholding the constitution. My hope is that *Constitutional Review in Europe*, by explaining and analyzing the choices that have been made and how these have played out in practice, will offer a compelling starting place for such future research.

[1] For instance Victor Ferreres Comella, *Constitutional Courts & Democratic Values – A European Perspective* (New Haven: Yale University Press, 2009).

[2] The landmark ruling in this regard is Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629. Note also the more recent decisions in Case C-189/10 *Proceedings against Aziz Melki and Sélim Abdeli* [2010] ECR I-5667; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-8015; Case C-314/08 *Krysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I-110149 and Case C-416/10 *Jozef Križan v Slovenská inšpekcia životného prostredia*[2013] ECR I-0000 that further weaken the position of constitutional courts and the authority of their rulings within the domestic legal order in cases falling within the scope of EU law.

Suggested Citation: Laurent Pech and Maartje de Visser, Book Review/Response, *Comparative Constitutional Review in Europe*, ICONnect. Blog, May 23, 2014, *available at*: http://www.iconnectblog.com/2014/05/book-reviewresponse-maartje-de-visser-and-laurent-pech-on-comparative-constitutional-review-in-europe