Introduction

In *Marbury v Madison*, one of the most famous decisions handed down by the United States Supreme Court, Chief Justice Marshall characterised the US constitution as the 'fundamental and paramount law of the nation'.[1] Today, his description is accepted as a truism, not just in the United States but also in the European legal tradition.[2] Constitutions are considered the supreme 'law of the land' because they enable government, set out its powers, duties and responsibilities and provide for limitations, typically in the form of a catalogue of individual rights. Further, constitutions have symbolic or political value. They can be seen as 'bearers of particular conceptions of national identity'.[3] 'A constitution is a nation's autobiography,' said Wolfgang Hoffmann-Rien, a former judge of the German *Bundesverfassungsgericht*.[4] An important challenge is to ensure that constitutions, and their values and principles, are respected in practice and protected against infringements, and this in particular entails that acts and omissions of State organs may be reviewed for their constitutional conformity. That is the topic of the present book, which sets out how the European Union (EU) and a representative selection of its Member States go about upholding their constitutions and how their systems of constitutional review operate in practice.

Deciding on the institutional arrangements to enforce the supremacy of a constitution is often regarded as a veritable evergreen of constitutional law. Questions pertaining to the meaning that should be given to (open) constitutional provisions or how constitutionality controls should be designed and function have an enduring appeal, however, and continue to engage policy-makers, academics and society at large. Some examples may be helpful to illustrate this point. In 2001, the UK House of Lords set up a Constitution Committee to enable it to better discharge its role as a 'constitutional long-stop' and prevent changes being made to the British constitution 'without full and open debate and an awareness of the consequences'.[5] In 2008, France amended its constitution to allow judges to assess the constitutionality of statutes that have been promulgated. This dramatically modified the regime that had been in place for the previous 40 years, during which time laws could only be checked for their constitutional conformity prior to promulgation. A year earlier, the German federal constitutional court interpreted the Basic Law to preclude the execution of

[1] *William Marbury v James Madison, Secretary of State of the United States* 5 US 137 (1803).

[2] This has not always been the case. L Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 5 *International Journal of Constitutional Law* 44, 47 points out that notably before World War II, constitutions were regarded predominantly as political instruments; and W Sadurski, 'Constitutional Review in Europe and the United States: Influences, Paradoxes, and Convergence' in M Fantoni and L Morlino (eds), *Comparing Democracies* (Kent, Kent State University, forthcoming) argues that it was under the influence of American constitutional thinking that European countries and scholarship accepted constitutions as legal instruments.

[3] V Jackson, *Constitutional Engagement in a Transnational Era* (New York, Oxford University Press, 2010) 3.

[4] W Hoffmann-Riem, 'Constitutional Court Judges' Roundtable: Comparative Constitutionalism in Practice' (2005) 4 *International Journal of Constitutional Law* 556, 558.

[5] These were the words used in the Report of the Royal Commission on the Reform of the House of Lords (known as the Wakeham Commission), *A House for the Future*, Cm 4534 (2000), notably para 5.17.

legislation in the social security field jointly by the federation and the *Länder*[6] and, in response, the Basic Law was amended in 2010 to explicitly allow such cooperation.[7] Hungary officially acquired a new constitution, known as the Fundamental Law, on 1 January 2012. This new foundational text curbs the powers of its main custodian – the constitutional court – and simultaneously limits the avenues for access to its courtroom.[8] It further instructs the constitutional court to interpret the provisions of the Fundamental Law in accordance with the achievements of the historical constitution,[9] without however further fleshing out what is meant by the latter notion, and, in so doing, is said to 'bring with it a certain vagueness into constitutional interpretation'.[10] The Netherlands continues to debate a constitutional amendment that would give its judges the power to disregard acts of parliament on constitutional grounds, a possibility that currently only exists as far as sub-statutory legal rules are concerned.[11] These are just some of the developments that are featured in this book.

INTRODUCTORY DEFINITIONS: CONSTITUTIONAL INTERPRETATION AND CONSTITUTIONAL REVIEW

Given the topic of the book, it is helpful to set out what is meant by the notions of 'constitutional interpretation' and 'constitutional review'. Constitutional interpretation is understood as the process of constructing, establishing the meaning of and explaining a country's written constitution (if there is one), other constitutional texts and other (unwritten) norms and principles that are of constitutional quality. Constitutional review in a broad sense refers to the process of assessing whether one's own behaviour or that of other actors is in line with the constitution and other texts or principles with a constitutional rank or role. Constitutional review in a narrow sense signifies that the actor conducting the assessment of constitutional conformity is empowered to attach consequences to a finding that the acts of other State organs do not comport with the relevant constitutional yardsticks; and is thus legally able to impose its position on a constitutional issue on other State organs. These are technical definitions, and intentionally so. They do not presuppose the identity of the institution, body or actor that has the authority to determine the meaning of constitutional rules and principles or is competent to engage in constitutional review. Further, they do not presuppose the kind of constitutional issue on the table, and it is worth pointing out that constitutional questions come in various shapes and sizes: some

[6] BVerfG, 2 BvR 2433/04 (2007).

[7] Bundesgesetzblatt Jahrgang 2010, Teil 1 Nr 38 of 26 July 2010, introducing a new Art 91e into the German Basic Law.

[8] See eg Venice Commission, *Opinion 665/2012 on Act CLI of 2011 on the Constitutional Court of Hungary* (CDL-AD(2012)009, Venice, 15–16 June 2012); C Boulanger and O Lembcke, 'Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court' in G Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Budapest, CEU Press, 2012). Subsequent amendments to the Fundamental Law – most notably the Fourth Amendment – have further affected the mandate of the constitutional court and its functioning. In particular, the court is no longer able to refer to judgments delivered under the old constitution when deciding new cases brought before it.

[9] Hungarian Fundamental Law, Art R(3) and see also the preamble.

[10] Venice Commission, *Opinion 621/2011 on the New Constitution of Hungary* (CDL-AD(2011)016, Venice, 17–18 June 2011) 7.

[11] Kamerstukken II, 2001/2002, 28 331, nos 1–3, and most recently Kamerstukken II 32 334, no 5, Verslag van de vaste commissie voor Binnenlandse Zaken en Koninkrijksrelaties.

are related to the more substantive constitutional rules and principles (notably the catalogue of fundamental rights and liberties), whereas others concern more procedural or institutional aspects (for instance those related to the allocation of powers and responsibilities among organs of the State); some have strong moral or ethical overtones, while others impact firmly on the functioning of the structures of government and yet others are relatively uncontroversial and inconsequential for the wider constitutional system.

BACKGROUND: THE NEED FOR A PERSPECTIVE COMBINING NATIONAL AND EUROPEAN CONSTITUTIONAL LAW

The book considers the institution of constitutional review both in the context of national constitutional systems and within the context of the European Union legal order.[12] There are good reasons for adopting such a broad and integrated approach.[13] The European and the national constitutional orders cannot be considered to constitute fully autonomous and closed legal systems. On the contrary, these orders coexist, exhibit a mutual openness[14] and are increasingly interdependent or intertwined.[15] This means that focusing solely or primarily on either the national or the European level would provide only part of the picture and would not fully reflect today's constitutional reality. From the perspective of European law, national constitutional rules, principles and values are relevant in various ways. To start with, and importantly, the constitutional framework governing the Union is best conceived of as consisting of constitutional norms developed at the European level, complemented by national constitutional rules and principles (as well as norms deriving from other sources, such at the European Convention on Human Rights or international law).[16] There are several instances where the European Treaties and the Court of Justice of

[12] The research of which this book is the culmination was conducted in the context of the European and National Constitutional Law (EuNaCon) Project, funded by the European Research Council (grant no 207279) and headed by Professor Monica Claes (Maastricht University, the Netherlands).

[13] See also M Claes and M de Visser, 'Reflections on Comparative Method in European Constitutional Law' in M Adams and J Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge, Cambridge University Press, 2012).

[14] Consider, for instance, the 'Europe-clauses' that can today be found in many national constitutions, such as the French constitution, Art 88-1 ('The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the Treaty signed in Lisbon on 13 December 2007'), and the German Basic Law, Art 23 (para 1 of which states that 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democracy, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'). At the same time, national constitutional provisions and principles may also pose limits to the ongoing process of European integration.

[15] There are, however, different degrees of intertwinement. See eg M Claes, *Constitutionalising Europe: The Making of European Constitutional Law* (Oxford, Hart Publishing, 2014); J Wouters, 'National Constitutions and the European Union' (2000) 27 *Legal Issues of Economic Integration* 25.

[16] In the literature, this has been expressed through the use of notions such as the composite European constitution, multi-level constitutionalism or intertwined constitutionalism: L Besselink, *A Composite European Constitution* (Groningen, Europa Law Publishing, 2007); I Pernice and F Mayer, 'De la constitution composée de l'europe' (2000) 36 *Revue trimestrielle de droit européen* 623; I Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 *EL Rev* 511; J Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 *European Constitutional Law Review* 247 and 452. The idea that it is necessary to adopt a perspective that embraces both European (constitutional) rules and principles and national constitutional law also underlies the various theories on constitutional pluralism that have gained prominence in recent years to conceive

the European Union refer explicitly to national constitutional law, thereby creating bridges between the two legal orders. A good example is Article 6(3) TEU, which provides that fundamental rights 'as they result from the constitutional traditions common to the Member States' constitute general principles of Union law, and thereby conceives of national constitutional law as a source of Union law.[17] Relatedly, the treaties have taken on some concepts whose origins are found in national constitutional law, such as the rule of law, democracy and fundamental rights.[18] We see this clearly in Article 2 TEU, which proclaims that the Union is founded on these and other values that are 'common to the Member States'. As such, it is imperative to engage in comparative research into the legal systems of the countries within the Union: 'Die Verfassungsvergleichung ist ein Gebot des Art. [2 TEU]', as the foreword to one handbook puts it.[19] Yet, also in the absence of explicit references, national constitutional law has a role to play in the context of European law. The ongoing process of the constitutionalisation of the Union[20] develops with reference to and reliance on many of the same notions and principles that form the basis of national constitutional law and have currency in debating constitutional issues at the national level. This is readily understandable: the nation-states are the pedigree of constitutional concepts and principles and still provide the richest and most valuable source of experience and inspiration when it comes to the meaning and application of such concepts and principles.[21] Similarly, the opinions and expectations held by participants in the discourse on the constitutionalisation of Europe and ideas as to the direction this process ought to take, are often informed by particular national experiences and arrangements.[22] By looking at the way national constitutional systems work, these views and expectations can be better understood, and this also makes it easier to appreciate their merits in the particular context

of the interplay between the two legal orders. For an overview of the approaches of the main protagonists of constitutional pluralism, see M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012).

[17] This codifies the European Court's case law, notably Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125 and Case 4/73 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; see also the Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Art 52(4). Other provisions that create a link between EU (constitutional) law and national constitutional law are Art 48 TEU, providing that the entry into force of new European Treaties is dependent on ratification by all the Member States in accordance with their constitutional requirements; and Art 10(2) TEU, which deals with the EU's democratic accountability and assumes that, in addition to the role played by the European Parliament in this respect, national governments are accountable for their conduct within the European Council and the Council either to their national Parliaments or to their citizens. A provision that creates a bridge, but does not so much presuppose dependence or complementarity between EU and national constitutional law is Art 4(2) TEU, directing the Union to respect the national identities of the Member States 'inherent in their fundamental structures, political and constitutional'.

[18] On the migration of constitutional notions and ideals from the national to the European level see N Walker, 'The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2006). This does not always mean that these notions or concepts are fleshed out at European level in the same way that they are given effect within the Member States, see eg L Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review* 359, who compares the principle of the 'rule of law' within the context of the Union and in three Member States.

[19] A von Bogdandy, P Cruz Villalón and P Huber (eds), *Handbuch Ius Publicum Europaeum – Band I: Grundlagen und Grundzüge staatlichen Verfassungsrechts* (Heidelberg, CF Müller, 2007) [translation: 'The comparison of constitutions is a requirement under [Art 2 TEU]'].

[20] See famously JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1.

[21] N Walker, 'Beyond Boundary Disputes and the Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373.

[22] See eg Ziller, 'National Constitutional Concepts in the New Constitution for Europe' (n 16).

of the Union. National constitutional traditions and values can thus be said to provide the lens through which the constitutional dimension of the European Union is evaluated; and the constitutional orders of the Member States may further be considered as valuable laboratories that provide inspiration for (thinking about) the further development of the Union's constitutional framework.

Changing perspective, it is clear that membership of the EU and EU law exert an impact on domestic constitutional law. This is the case also for the institution of constitutional review. The guardians entrusted with the function of upholding the national constitution may make use of European rules and principles in deciding on the constitutionality of statutes or other legal acts, whereby the former may serve as self-standing grounds for review or provide inspiration in establishing the meaning of the national constitutional standards for review. Also, the preferred choice of most (but not all) Member States is to have a system of constitutional review whereby separate constitutional courts enjoy pride of place, and decisions handed down by the Court of Justice of the European Union have had significant ramifications for the position of those judicial bodies within the national legal order and their relationship with other domestic courts. More generally, the relationship and interfaces between national constitutional law and European law change over time and across legal systems, and one should ideally be knowledgeable about the constitutional state of play in both sets of legal orders to truly understand and appreciate new developments and dynamics.

OBJECTIVES

This book presents and explains the institution of constitutional review in a European context, and does so from a comparative perspective. It explores *who* has been given responsibility for protecting the supremacy and integrity of constitutional rules and principles in a selection of Member States and the EU itself and *why*, and *how* the task of upholding the constitution is carried out. In this vein, the book also draws attention to various causes for tension (or even conflict) that may arise during the exercise of constitutional review, notably when the decision is made to have separate constitutional courts as ultimate guardians of constitutional rules and values, and considers how the different constitutional systems seek to cope with these.

The thrust of the book 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. It is important not to elide constitutional review with judicial enforcement of the constitution. While the president of the Austrian constitutional court has spoken about the 'landslide victory of constitutional justice in Europe',[23] the proliferation of courts with constitutional jurisdiction on the European continent is a relatively recent phenomenon. Notably in central and eastern European countries, many separate constitutional courts have been in existence for some three decades only. Notwithstanding a growing tendency to see the courts as the natural choice as guardians of the constitution, it is thus worth

[23] G Holzinger, 'Welcome – XVIth Congress of the Conference of European Constitutional Courts' (Austrian constitutional court website, www.vfgh.gv.at/cms/vfgh-kongress/en/index.html).

remembering that this has not always been the case and is not the only or preferred option on the menu. Also, and accepting today's constitutional reality that courts are often given final authority on issues of constitutional interpretation and review, these institutions do not operate in a vacuum, but interact with other players, both within and outside the confines of the State. Further, 'the final word' is hardly ever absolutely and irrevocably final: the constitutional question can usually be put back on the table.[24] Against this background, the book devotes due attention to the role and functioning of constitutional courts in view of their prominence within the countries that belong to the EU, yet it adopts a critical and holistic approach to these institutions and thus goes beyond a study of only constitutional courts to provide a realistic perception of how constitutional review is designed and exercised within Europe.

It is also important to be clear about what this book does *not* seek to do. Its aim is not to put forward best practices as regards the design and functioning of constitutional review either at a national level or within the Union legal order. Rather, and while identifying pertinent normative questions or concerns throughout the various chapters as and when appropriate, 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.

METHOD

To gain a comprehensive understanding of the organisation and functioning of constitutional review within the European Union, it would be necessary to study all of the Union's 28 Member States. Resource limitations and linguistic difficulties, however, make this ideal unattainable for a single researcher. The analysis in this book accordingly covers fewer countries. For most issues, the following 11 countries that belong to the EU are studied (in alphabetical order): Belgium, the Czech Republic, Germany, Finland, France, Hungary, Italy, the Netherlands, Poland, Spain, and the United Kingdom.[25] This selection is large enough to make meaningful comparisons and tease out similarities and differences in the way that countries go about ensuring the integrity and supremacy of their constitutional rules and principles. It is submitted that the selection also gives a sufficiently representative view of the various issues. The majority of the selected countries rely on separate constitutional courts to uphold the constitution and protect its integrity, which reflects the dominant trend in Europe to establish such institutions and confer upon them the power to ultimately decide constitutional issues. The German and Italian constitutional courts are comparatively old (set up in 1949 and 1947 respectively), and have built a sizeable and quite sophisticated body of case law over the years. Both courts have been motivated to

[24] This may be because the legislature passes another statute or legal act pertaining to the same issue, or because the constitutional court fails to provide closure in a specific case. For an example of a decision that is not finally dispositive of the constitutional issue, see eg BVerfG 62, 1 (1983) *Parliamentary Dissolution Case I*, where the German federal constitutional court held that concretising the relevant provision of the German Basic Law was 'a function not only of the Federal Constitutional Court; this duty is also vested in other supreme constitutional organs [such as the federal president or the German Parliament]'.

[25] In addition, various aspects of Estonia's institutional arrangements for upholding the constitution are featured in ch 1; and ch 3 regularly mentions, either in footnotes or in the main text, the powers that have been attributed to courts with constitutional jurisdiction in the other countries that are members of the European Union.

craft a wide range of techniques to manage its relations with the legislature and the other national judges that are of more general interest and may be a valuable source of inspiration for their counterparts in other jurisdictions. Moreover, the German Federal constitutional court is particularly assertive in the way in which it performs the functions assigned to it and is often seen as a model for other countries to emulate or as characteristic of the European approach to constitutional justice. The Italian and Spanish constitutional courts operate in States where the devolution of powers and authority from the central level to regionalised entities is ongoing, which creates its own constitutional dynamic and may entail that courts become embroiled in sensitive or politically contentious issues. The Czech Republic, Hungary and Poland are all post-Communist countries and relatively young democracies, whose constitutional courts have established themselves as important players in their national constitutional sphere, not least due to the rather wide array of powers that has been conferred on them and the relative ease with which their jurisdiction can be invoked. At the same time, these courts operate in a politically volatile region and their relationship with the other branches of government has not been free of tensions or open clashes. In addition, and as mentioned earlier, Hungary has recently developed a new constitution and has recast its constitutional court – a development that has been critically evaluated and has led to concerns about possible 'backsliding' and questions as to how to ensure that countries within the EU remain respectful of core constitutional values and ideas. France and Belgium initially adopted a distinct approach, in the sense that they established, respectively, a constitutional council (1958) and a court of arbitration (1980) for functionalist reasons and limited their mandates to guaranteeing respect for the constitutional separation of powers scheme only. As a result of constitutional and legislative amendments as well as a creative approach to the provisions that can be used as grounds for review, both institutions have since evolved into guardians of fundamental rights and can today be considered fully-fledged members of the European family of constitutional courts.

The sample also encompasses countries that do not fit the general pattern of having a strong form of constitutional adjudication. Finland chose to allow all its courts to enforce the constitution against the legislature when it adopted a new constitution in 2000, but in practice Parliament is still considered to be chiefly responsible for ensuring respect for the constitution. Finally, the Netherlands and the United Kingdom have been included because these countries have so far refrained from granting their courts the power to disregard or strike down laws that breach the constitution. Like Finland, these States instead place reliance on non-partisan bodies that are independent of the government to ensure that legislation does not fall foul of constitutional provisions and values.

Lastly, and geographically speaking, the sample includes countries from western Europe, southern Europe, central and eastern Europe and Scandinavia. The experience and engagement with the European legal order has not been the same for each of the countries: five of the States were founding members of the original European Communities in the 1950s, three joined the European integration project in the late 1960s/early 1970s and yet three other countries acceded in the 'big bang' enlargement of the European Union in 2004.

The various issues related to the institution of constitutional review have been examined using the functional method of comparative constitutional research. Rather than following the classifications of any particular national legal system or working with country reports, the chapters have been structured with the help of system-neutral themes and 'real life' concrete problems and questions. To illustrate, some of the questions that the book

addresses are: which public institutions have access to the constitutional courtroom (and can individuals also invoke the court's jurisdiction?); what are the qualifications that persons must possess to be considered for elevation to the constitutional bench; and what can the legislature do if it disagrees with the way in which the judges have interpreted constitutional rules and principles? By proceeding in this way, the integrity of the different constitutional systems is respected as far as possible, while these systems are at the same time made comparable. This allows similarities and variations to appear more clearly than under a classical comparative law approach.

The book makes ample use of primary materials to allow the reader to become acquainted with the core constitutional texts, legislative provisions, official reports published by parliamentary committees or Councils of State, and particularly case law. While English translations of national constitutions and statutes regulating the composition and tasks of constitutional courts are today readily available, this is not always true of the judicial material. Indeed, all of the selected courts publish on their websites at least some of their decisions in a language other than that in which they were originally handed down. When English translations were available, these have been used and, where appropriate, excerpted. Although I acknowledge that the quality of these translations may at times not be flawless, these are documents that the courts themselves decide to share with a wider, global audience. Not every decision that is relied upon to illuminate the issues canvassed in this book was available in English, however. I have benefited from works that include translated judgments of some of the courts examined in this book – notably Kommers and Miller's *The Constitutional Jurisprudence of the Federal Republic of Germany*[26] and Sólyom and Brunner's *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*[27] – but on several occasions I have had to translate the foreign materials myself. The particular sources that have been used for the English excerpts that appear in the various chapters are indicated in the accompanying footnotes.

Since this book focuses on constitutional issues, due attention must be paid to local perceptions of these issues by local constitutional actors. In a related vein, one must contend with the fact that constitutional law is embedded in, and conditioned by, a wider context that is made up of historical, political, economic and sociological conditions, which must be appreciated as far as possible.[28] I have endeavoured to present the relevant primary materials within their proper national constitutional setting by studying writings by scholars with particular expertise in a given country's system and by engaging with national experts from most of the Member States examined in this book.

Finally, the various chapters do not always cover every one of the 11 chosen States. Quite obviously, if a country does not have Council of State or if a court does not rely on the doctrine of 'living law', for example, there is simply nothing to say, other than to note their absence. Yet, even for countries that do share a specific actor, procedure or judicial decision-making technique, the book – and notably chapters one, six and seven thereof – regularly limits the discussion to a couple of Member States to illustrate the salient points.

[26] D Kommers and R Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd rev edn (Durham, NC, Duke University Press, 2012).

[27] L Sólyom and G Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, University of Michigan Press, 2000).

[28] KL Scheppele speaks of 'constitutional ethnography' in this regard, which she defines as 'the contextually detailed, empirical study of particular constitutional systems, along with their histories, politics, cultural meanings and social supports': 'Constitutional Ethnography: An Introduction' (2004) 38 *Law & Society Review* 389.

I believe that little is gained by describing sequentially some eight or ten countries that have a virtually identical system or way of going about the exercise of constitutional review. On the contrary, much may be lost, because such an approach may unduly diminish interest in what is otherwise an exciting subject. Nevertheless, to allow the reader to obtain an overview of the state of constitutional law in each of the Member States, other countries (besides those discussed in detail) that have a similar or comparative institution or approach will be mentioned in the introduction to the relevant section.

TERMINOLOGY

The book uses the original names of the principal constitutional custodians in the chosen jurisdictions: *Bundesverfassungsgericht*, *Conseil constitutionnel*, *Tribunal Constitucional*, *Ústavní Soud*, *Perustuslakivaliokunta* etc. This approach allows readers familiar with the relevant constitutional system to recognise immediately which institution is meant, while the inclusion of a national indicator – the Italian *Corte costituzionale*, the Polish *Trybunał Konstytucyjny* – allows other readers to pinpoint the country in which a given body performs its task of guaranteeing the supremacy and integrity of constitutional rules. Other words and concepts have been translated, but are also mentioned in the original language when they are first introduced.

STRUCTURE

Leaving aside the introduction, this book comprises seven chapters, each of varying length.

Chapter 1 looks at the role of Councils of State, chancellors of justice, Parliaments, heads of state and the people in establishing the meaning of constitutional provisions and ensuring the supremacy of constitutional rules and principles. It will become clear that, in countries that have carved out a large or decisive role for the courts in this regard, these non-judicial actors also devote part of their time and energy to upholding the constitution. In fact, they may even have the last word on a given constitutional issue, because the courts have no jurisdiction to take cognisance of the matter or their views have not been solicited by those in a position to do so.

Although all organs of the State owe allegiance to the constitution, many European countries have chosen to entrust courts with the function of protecting constitutional rules and principles from encroachments. Chapter 2 offers an historical narrative of the reasons why draftsmen have been motivated to introduce some form of constitutional adjudication. Three rationales are identified: the functional need for an umpire to preserve a new allocation of State powers and adjudicate jurisdictional disputes; normative concerns related to democratisation processes and rights thinking; and external pressures stemming from being a signatory State to the European Convention on Human Rights and belonging to the European Union. This chapter also considers why the United Kingdom and the Netherlands have so far refrained from jumping on the proverbial bandwagon. Lastly, it charts the emergence of some form of judicial constitutional review at the European level, covering both the Court of Justice of the European Union and the European Court of Human Rights.

Chapters 3 and 4 are devoted to an examination of the core procedural and institutional features of the various constitutional courts of the majority of countries within the EU. Chapter 3 explains what these courts actually do, and how, and by whom, their jurisdiction can be invoked. The discussion is anchored by four functions that may be entrusted to constitutional courts, namely: keeping the legislature in check; protecting the fundamental rights of individuals in specific cases; resolving institutional disputes between different organs or levels of State; and ensuring the integrity of political office and related processes. Chapter 4 takes stock of various issues pertaining to the composition of constitutional courts, including the rules governing the hiring and firing of judges and favoured recruitment grounds of new members bearing in mind the eligibility criteria that candidates must satisfy. Both chapters close with some reflections on how the Court of Justice fares in light of the national comparative experience.

Chapter 5 and 6 focus on what happens when constitutional guardians are asked to assess the constitutionality of a piece of legislation, or a bill. Chapter 5 focuses on identifying the yardsticks or standards that are used to measure such legal norms against and decide on their permissibility. It is readily apparent that a country's fundamental document with the title 'constitution' (provided that such a text exists) will be the first and main port of call. There are however further questions that must be addressed. Can all parts and clauses of the constitution serve as grounds for review, including the preamble? What other sources of law, if any, are further considered 'constitutional' and accepted as providing standards for assessing the constitutionality of legal acts? And, more specifically, what role (if any) is envisaged for norms of European and international law in this regard? The bulk of this chapter is devoted to an exploration of how these questions are answered in the selected countries, while the penultimate section looks at the approach adopted within the European legal system by the Court of Justice. Chapter 6 explores several strategies and techniques that constitutional courts may use to regulate their relationship with the legislature and provide suitable relief given the nature of the constitutional defects that they have uncovered when checking the validity of legal rules. Different from the previous chapters, the European level and its Court of Justice are not discussed in the concluding sections, but instead are integrated in the national comparative analysis.

The final chapter addresses the engagement of constitutional courts with their wider environment from a broad systemic perspective. It begins by studying the interplay between these courts and the legislature, focusing more specifically on how the latter can respond to judicial interpretation of constitutional rules and principles with which it disagrees. Next, the relations between constitutional courts and the regular judiciary are dealt with, so that the reader may understand some of the factors responsible for producing tensions or even open conflicts between these two arms of the judicial branch in several countries over the course of the years. Chapter 7 also ventures beyond the domestic sphere. It considers the role of the Conference of European Constitutional Courts and the Venice Commission in fostering contacts among constitutional courts in different countries and offers a critical appraisal of this move to cross-border judicial cooperation. This chapter concludes with two sections dealing with the interplay between national constitutional courts and, respectively, the Court of Justice and the European Court of Human Rights. These cover the avenues that allow for judicial contact, the content of such interactions and the impact of the case law of the Court of Justice on the position of constitutional courts within the national legal order.

This book is up to date as at 1 April 2013.