I owe an explanation regarding the cover of the book. The painting on the cover is the «Ideal City,» an information that may illustrate our approach to comparative constitutional law. Originally the idea was to put on the cover an additional painting; after all there were many different representations of the Ideal City in the Renaissance. Some of them have people on the painting, for others the Ideal City is an arrangement of buildings only. Alternatively, we proposed to have a cover with a number of distortions of the Ideal City. After all, comparative constitutional law is about the practical and pragmatic distortions of an idea. Of course, these distortions are called adaptations. The idea was to conceive the constitutions and constitutional systems as being references to a shared belief, which exists only in these conflicting references.

It is out of both pure intellectual curiosity and practical necessity in my position at the European Court of Human Rights that I consider the normative role of comparative constitutional law. As of now, the theory of comparative constitutional law is to some extent missing a vision for its own normative use, and this presents real practical problems.

Take, for instance, the law on adoption by homosexual couples. Of the forty-seven member states of the Council of Europe, some countries have allowed adoption by same-sex couples, almost a dozen countries ban it, others have in-between positions and five have no law on the matter at all. Now, is this brief summary a genuine and serious work of comparative constitutional law? Certainly not, because it lacks mention of the scope, the purpose, the tradition behind each law, presenting a rule without its context. It is the role of scholarship, I think, to situate this kind of research within a normative framework.

A question arises as to whether the Strasbourg Court and other courts interrogate the normative context of law on a regular basis, and if so, whether they do it properly or improperly. The Strasbourg Court does have a specific convention-related reason to do this exercise, but I believe there is also a deeper element at work. This deeper element goes back to a nineteenth century German theory which is
translated as «the normative power of the factual»: if there is a fact that of course gives regularity, and therefore we tend to attribute some normative power to it, although this ‘naturalistic fallacy’ contradicts the traditional – again rather German – division between Sein and Sollen. Nevertheless, the human mind functions thusly; the more examples we see, the more likely we are to follow the fashion. What is the source of this «normative power of the factual» that emerges in comparative constitutional law? I think it is purely related to embarrassment: people tend to be embarrassed when they have to find that the practice they would otherwise embrace contradicts prevailing social practices.

Now, having said that, every day an increasing number of counter-theories and counter-practices emerge, and this tension is one of comparative constitutional law’s fundamental elements. For instance, the Strasbourg Court notably ruled that the U.K. could not impose a blanket denial of all prisoners’ voting rights without proper procedure, and the U.K. is still in the process of fully complying with the ruling. No other country in Europe denies prisoners voting rights in such a categorical way, but British politicians protested that the rule was part of their national tradition. Lithuania’s Parliament likewise protested the emerging European consensus on certain civil law measures in regards to transsexuals, refusing to change their law in light of national tradition.

So in spite of a seemingly elegant theory, a constitution is nonetheless a product of a national culture, a challenge to the emerging multilevel interrelationship embedded in a multilevel constitution. If Europe – and I limit my discussion to Europe – would like to overcome its problems, the extension will become fundamental.

Take another recent case before the Strasbourg Court as an example, concerning adoption of children in France who were brought to the country from abroad. Under Islamic law, there is no adoption, as a child’s place in a bloodline must be maintained, with the child bearing the name of the father. There is instead a system called «kafala», an Islamic concept of guardianship. This is the concept that prevails in such nations as Morocco and Nigeria, which are often involved in adoption cases that arise in France. If a woman from the Maghreb who holds French citizenship took into guardianship a baby prior to coming to France, and then wanted to officially adopt
the child once in France, the woman would be prohibited by French law from doing so. Since its law was amended a few years ago, France is one of the very few countries in Europe that prohibits adoption in cases where a child was taken into the kafala system.

Why is French law of that opinion? Because in the 1990s a well-intentioned parliamentarian wanted to require full adoptions as in all other countries, and the Ministry of Foreign Affairs opposed the plan as against the French public interest. Because of friendly relations with these Maghreb countries, the position of the Ministry of Foreign Affairs prevailed, and the draft amendment transformed into a much more rigid regime that gives full protection to the expectations of the country of origin. A number of rights-protecting institutions in France determined that this policy was highly unfavorable to the child. One element which was not mentioned in the judgement of the Strasbourg Court was that under Sharia law, only a Muslim can adopt a Muslim. That aspect was completely left out of the discussion.

Why do I mention this? Because this is the practical dimension of comparative constitutional law. It involves very serious issues of unspelled principles. Comparative constitutional law is not simply an academic pursuit of mechanical enumeration of similarities and differences. Nor is it a matter of proving that certain European nations are superior, as it seemed to be a few decades ago, when the prevailing thought was, «we have a constitutional system and those ‘other countries over there’ do not». That was at the level of self-assurance. Comparative constitutional law today is a subject for intense debate that goes beyond self-assurance, and while I am not entitled to speak on behalf of the profession, I think that books like this help both the debate and the thinkers who engage in it to thrive.