# Contents

_Acknowledgements_  v  
_Table of Cases_  xiii  
_Table of European Treaties and European Legal Instruments_  xxxvii  
_Table of Statutes_  xxxix  

**Introduction**  1  
Introductory Definitions: Constitutional Interpretation and Constitutional Review  2  
Background: The Need for a Perspective Combining National and European Constitutional Law  3  
Objectives  5  
Method  6  
Terminology  9  
Structure  9  

**Chapter 1**  
The Role of Non-Judicial Actors in Upholding the Constitution  11  
I. Introduction  11  
II. Councils of State and Chancellors of Justice  12  
A. Councils of State  13  
   i. Dutch Council of State (Raad van State)  14  
   ii. Belgian Council of State (Conseil d'État / Raad van State)  16  
   iii. The Dual Mandate of Councils of State in the light of the European Convention on Human Rights  18  
B. Chancellors of Justice  20  
III. Parliament and its Committees  23  
A. Opportunities for Parliament to Uphold the Constitution  23  
B. Parliament, its Chambers and its Committees  25  
   i. Finland: Perustuslainvaliokunta  26  
   ii. United Kingdom: House of Lords Constitution Committee  29  
C. Influence of the Presence of Other Actors in the Constitutional System  32  
IV. Heads of State  35  
V. The People  43  
VI. Concluding Remarks  50  

**Chapter 2**  
The Rise of Constitutional Adjudication  53  
I. Introduction  53  
II. The Notion of 'Constitutional Jurisdiction'  54  
III. Exploring the Reasons behind the Rise of Constitutional Adjudication  55
A. Avoiding Competence Collisions between State Bodies 55
   i. Belgium: From Cour d'arbitrage to Cour constitutionnelle 56
   ii. France: Conseil constitutionnel 57
B. Guaranteeing Observance of the Rule of Law and Affording Protection to Fundamental Rights 61
   i. Germany: Bundesverfassungsgericht 63
   ii. Italy: Corte costituzionale 65
   iii. Spain: Tribunal Constitucional 67
   iv. Czech Republic: Ústavní Soud 69
   v. Poland: Trybunał Konstytucyjny 71
   vi. Hungary: Alkotmánybíróság 73
C. The Impact of the ECHR and of EU Membership 75
   i. Finland 76
IV. Bucking the Trend? A Closer Look at the Approaches of the Netherlands and the United Kingdom 79
   A. The Netherlands 79
   B. United Kingdom 83
V. Concluding Remarks and Some Brief Reflections on the Two European Courts 86

Chapter 3
Purpose of Constitutional Adjudication and Access to Constitutional Courts 93
I. Introduction 93
II. The Institutional Design of Constitutional Adjudication 94
III. Four Purposes that May be Served by Constitutional Adjudication 97
   A. Ensuring that the Legislature Does Not Overstep Constitutional Boundaries 99
      i. Abstract Constitutionality Challenges 99
      ii. Preliminary References 132
      iii. Abstract Interpretation of the Constitution 140
   B. Protecting the Fundamental Rights of Individuals in Specific Cases 142
      i. Germany 143
      ii. Czech Republic 145
      iii. Spain 146
      iv. Hungary 148
      v. Poland 150
      vi. Comparative Remarks 151
   C. Resolving Institutional Disputes 155
      i. Enforcing the Vertical Balance of Powers 156
      ii. Enforcing the Horizontal Balance of Powers 163
   D. Ensuring the Integrity of Political Office and Related Processes 168
      i. Hearing Electoral Disputes 169
      ii. Adjudicating Presidential Impeachment 172
      iii. Proscribing Political Parties 176
      iv. Examining the Regularity and Constitutionality of Referendums 181
IV. Final Comparative Remarks and Reflections on the Court of Justice 185
   A. National Comparative Analysis: Some General Comments 185
   B. The Court of Justice in Comparative Perspective 189
      i. Ensuring that the Legislature Does Not Overstep its Boundaries 190
      ii. Protecting the Fundamental Rights of Individuals in Specific Cases 193
      iii. Resolving Vertical and Horizontal Institutional Disputes 196
      iv. Ensuring the Integrity of Political Office and Related Processes 201
      v. Other ‘Non-constitutional’ Functions Performed by the Court of Justice 201

Chapter 4
The Constitutional Bench 205
I. Introduction 205
II. Selection and Appointment Procedures 206
III. Number of Judges and Eligibility Criteria 210
   A. Number of Judges 210
   B. Qualifications that New Judges Must Possess 211
IV. Tenure of Judicial Appointments and Termination Thereof 218
   A. Duration of Appointment 218
   B. Removal from the Bench 221
V. Final Comparative Remarks and Reflections on the Court of Justice 223

Chapter 5
Identifying the Sources of Standards for Constitutional Review 229
I. Introduction 229
II. Belgium: Cour constitutionnelle 230
III. Czech Republic: Ústavní Soud 235
IV. Germany: Bundesverfassungsgericht 239
V. France: Conseil constitutionnel 243
VI. Hungary: Alkotmánybíróság 249
VII. Italy: Corte costituzionale 255
VIII. Poland: Trybunał Konstytucyjny 260
IX. Spain: Tribunal Constitucional 262
X. The Netherlands: Raad van State 264
XI. United Kingdom: House of Lords Constitution Committee 266
XII. Finland: Perustuslakivaliokunta 268
XIII. European Union: Court of Justice 269
XIV. Comparative Remarks 276

Chapter 6
Testing and Remediying Unconstitutionality 281
I. Introduction 281
II. Deference Rhetoric 282
III. Theory of the Living Law 286
IV. Constitution-Conform Interpretation 291
A. General Introduction
B. Four Examples of Decisions Involving Courts Engaging in Constitution-Conform Interpretation
   i. Belgium: Restricting Party Financing on Fundamental Rights Grounds
   ii. The Czech Republic: Burden of Proof in Discrimination Cases
   iii. France: Security and Liberty
   iv. Spain: Right to Assistance from Interpreters in Criminal Cases
C. Evaluating the Technique of Constitution-Conform Interpretation
D. The European Level: The Court of Justice

V. Types of Judgment and their Effects
   A. Decision to Uphold the Statute
   B. Findings of Unconstitutionality
      i. General Features: Legal Effects, Partial Annulment and the Inclusion of Legislative Guidelines
      ii. Timing and the Possibility of Deferring Annulment to a Later Date
      iii. Findings of Unconstitutionality Not Accompanied by Annulment
   C. The European Level: The Court of Justice

VI. Concluding Remarks

Chapter 7
Interplay between Constitutional Courts and Other Actors
   I. Introduction
   II. Interactions between Constitutional Courts and (Constitutional) Legislatures
      A. Processes of Give-and-Take
         i. Case Study: Germany and the Regulation of Abortion
         ii. Case Study: Hungary and Limitation Periods for Crimes Committed during Communism
      B. Legislative Overrides
         i. United Kingdom: Section 4 of the Human Rights Act 1998
         ii. Poland: Non-Finality of Judgments Handed Down by the Trybunał Konstytucyjny before 1997
      C. Constitutional Overrides
         i. France
         ii. Italy
         iii. Germany
         iv. Hungary
         v. European Union
         vi. General Observations
      D. Legislative Inertia following a Constitutional Decision
   III. Interactions between Constitutional Courts and the Ordinary Courts
      A. Constitution-Conform Interpretation and the Demarcation of Constitutional and Ordinary Jurisdiction
      B. The Appellate Dimension of the Constitutional Complaint Mechanism
IV. Interactions among European Constitutional Courts
   A. Conference of European Constitutional Courts 393
   B. Venice Commission and World Conference on Constitutional Justice 396
   C. Appraising the Move to Cross-Border Judicial Gatherings 399

V. Interactions between Constitutional Courts and the Court of Justice 403
   A. Avenues for Interaction between Constitutional Courts and the Court of Justice 403
   B. Topics on which Constitutional Courts and the Court of Justice Interact 408
   C. The Impact of the Court of Justice’s Case Law on the Position of Constitutional Courts within the Domestic Legal Order 418

VI. Interactions between National Highest and Constitutional Courts and the European Court of Human Rights 427
   A. Communication through Case Law 428
   B. Personal Encounters 436

VII. Concluding Remarks 438

Bibliography 441

Index 477