13 European constitutional courts as law-makers: research synthesis

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1 The evolution of European constitutional courts

The first constitutional courts (CCs) appeared in Europe precisely 100 years ago. These CCs were established in 1920 in Austria¹ and Czechoslovakia.² However, at the beginning of the 1930s, these two CCs actually stopped operating.³ Therefore, the beginnings of the CC system in Europe could not be considered successful, especially as, after the Second World War, of the above two CCs, only one (the Austrian CC) resumed operations. However, from a theoretical point of view, the interwar period was particularly important for the development of the centralized judicial review model. This is because it was then that Hans Kelsen – a prominent representative of the Vienna School of Jurisprudence and one of the co-creators of the Austrian CC – formulated the basic assumptions for this model. Most CCs, which started to form in Europe after the Second World War, were established mainly on the basis of this Kelsenian model with the role of interpreting and applying the Constitution to preserve its supremacy by controlling the constitutionality of laws to ensure the prevalence of the democratic principle and of fundamental rights, and to adapt the Constitution when social changes and the times demanded such a task.⁴ Although currently the basic assumption of the Kelsenian model – namely, that the CC is only a ‘negative law-maker’ – seems to be disputable, the thesis that the CC is not entitled to create *ex novo* any pieces of legislation still has many supporters.

In this collection of studies, two CC categories that were established and developed after the Second World War are analysed. The first includes those CCs functioning in European countries as constitutional bodies. Among them are those

1 The Austrian CC was established under the Act of 25 January 1919 and the Constitution of the Federal Republic of Austria of 1 October 1920.

2 The CC of the First Czechoslovak Republic was established by the Czechoslovakian Constitution of 1920.

3 See Leszek Garlicki, ‘Ewolucja podstaw kontroli konstytucyjności w Austrii’, in Janusz Łętowski, Wojciech Sokolewicz (eds.), *Państwo, prawo, obywatel. Zbiór studiów dla uczczenia 60-lecia urodzin i 40-lecia pracy naukowej profesora Adama Łopatki* (Zakład Narodowy im. Osolińskich 1989) 289, 289–298.

4 Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (Cambridge University Press 2011) 889.

CCs that were created in Western Europe in response to the negative experiences of the period of Nazism and fascism, as well as CCs that originated in Central and Eastern Europe after the fall of communism. The second category of CCs includes European courts of an international nature; namely, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). These bodies not only ensure that the Member States of the Council of Europe and the EU, respectively, comply with the obligations arising from the European Convention on Human Rights (ECHR) and EU Treaties, but also, in the case of countries that are moving away from democratic standards, that they are taking over the tasks of national CCs regarding the protection of democratic standards.⁵ This is because the standards of the ECHR and EU Treaties are comparable to the constitutional standards of the Member States of the Council of Europe and the EU as they originate from the common constitutional traditions of those countries.

Within the first category, the authors of this book analysed ten European CCs created at different times and under different circumstances. The German and Italian CCs were established in the 1950s as the guardians of the new democratic constitutions adopted in those countries immediately after the end of the Second World War. The Spanish CC was established almost 30 years later as a factor stabilizing the democratic system after the fall of General Francisco Franco's regime. Different reasons constituted the basis for the establishment of the French Constitutional Council in 1958. Its original task was to protect the legislative powers of the parliament arising from the Constitution of the Fifth French Republic. In contrast with the first CCs mentioned above, the Council did not have the power to repeal unconstitutional laws, but purely the competence to issue decisions on them before they became a part of the legal system. It was only at the beginning of the 1970s that the Council started to transform into a 'regular' CC, protecting democracy and human rights.⁶ The process of this transformation was finalized following the Constitutional Council being awarded the power to examine the constitutionality of laws in response to the priority preliminary rulings on the issue of constitutionality (QPC).⁷

5 See Francis Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in Deirdre Curtin, Daniel O'Keeffe (ed.), *Constitutional Adjudication in European Community and National Law* (Butterworth Dublin 1992), 25, 25; Anthony Arnall, 'A Constitutional Court for Europe?' (2003–2004) CYELS (Cambridge Yearbook of European Legal Studies) 2; Bo Vesterdorf, *A constitutional court for the EU?*, IJCL (International Journal of Constitutional Law) (2006) 4, 607, 607; Lukas Bauer, *Der Europäische Gerichtshof als Verfassungsgericht?* (Nomos 2008) 160–161.

6 See Decision 71–44 DC, of 16 July 1971. See also Alec Stone Sweet, 'The Juridical Coup d'État and the Problem of Authority' (2007) 10 *German Law Journal* 915, 915–928.

7 The mechanism of the 'priority' question on constitutionality was introduced on 1 March 2010 by organic act No. 2009–1523 of 10 December 2009. See Xavier Philippe, 'Constitutional Review in France: The Extended Role of the Conseil Constitutionnel through the New Priority Preliminary Rulings Procedure (QPC)' (2012) 53 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio iuridica* 65, 66.

In Central and Eastern Europe, the first CCs were established shortly after the fall of communism to become the guardians of the new democratic constitutions adopted at the beginning of the 1990s. In this study collection, this group is represented by the CCs of Hungary, Bulgaria, the Czech Republic, and the Slovak Republic. In Latvia, which was also included in the research, the CC was established as late as 1996, and in addition, in that country, unlike many other countries from that region, a new constitution had not been adopted, whereas the one passed in 1922 was upheld. In all these post-communist countries, CCs were one of the main achievements of the political transitions. Only the Polish CC was created under completely different circumstances. It was established in the mid-1980s by way of an amendment to the 1952 Communist Constitution that was in force at that time.⁸ Therefore, the CC appeared in the Polish legal order before the start of the political transition and, therefore, for obvious reasons, it could not initially be seen as a guarantor of democracy and the rule of law. It had limited powers and was formally subordinated to the parliament, which at that time held the overriding position in the system of State authorities. Every CC ruling on the unconstitutionality of laws could have been rejected by the parliament. However, the position of the CC and the scope of its competences evolved together with the change in the political system. The introduction in 1989 of the principle of a democratic law-governed state into the 1952 Constitution was of key importance to its further functioning. From that moment onwards, the CC actively engaged in the process of the democratization of the State by inferring from the principle of a democratic law-governed state further important constitutional principles, as well as the rights and freedoms of individuals, which were omitted from the Communist Constitution. Ultimately, the Polish CC received its current status as an independent authority, while its rulings became final as late as 1999, which was ten years after the political transformation started and two years after the new democratic Constitution entered into force.

The further evolution of the CC system currently being observed in specific Central and Eastern European countries is a consequence of power being taken over in those countries by populist governments that are moving away from the idea of democracy and the rule of law. This trend has been especially visible in Hungary since 2010 and in Poland since 2015. The CCs in these two countries have become politicized in recent years, whereby the ruling parliamentary majorities have filled them with ‘their own’ judges. The main task of these ‘new’ CCs has become the legalization of constitutionally doubtful pieces of legislation that have been adopted by the parliamentary majority. Instead of controlling the activities of the parliament, the CCs in Poland and Hungary have started to execute its

8 This was the Constitution of the People’s Republic of Poland adopted on 22 July 1952, which only lost its full force when the Constitution of the Republic of Poland entered into force in 1997. On the narrative of discontinuity versus the continuity of the ‘constitutional environment’ see Aleksandra Kuśtra-Rogatka, ‘The Polish Constitutional Court and Political “Revolution” after 1989: Between the Continuity and Discontinuity of the Constitutional Narrative’ (2016) 6 *Wrocław Review of Law, Administration & Economics* 62, 66 et seq.

political decisions. This type of CC ‘activism’ poses a serious threat to the democratic constitutional order and its underlying axiology.⁹

In this situation, the role of the CCs in the countries affected by constitutional crises started to be taken over by the international courts; namely, the ECtHR and the CJEU. The citizens of these countries and their judges have begun to address the complaints to the ECtHR and preliminary references to the CJEU in matters, that would otherwise have been resolved by the Hungarian and Polish CCs. As an example, there was the case on Polish legislation concerning the lowering of the retirement age of Supreme Court judges, where the CJEU held that the application of this legislation to the judges in post within that court is not justified by a legitimate objective and undermines the principle of the irremovability of judges, that principle being essential to their independence.¹⁰ This group of cases includes also the case before the ECtHR concerning the premature termination of the President of the Hungarian Supreme Court’s mandate on account of his criticisms of legislative reforms, which was contrary to the Convention.¹¹

2 The law-making activity of constitutional courts

Law-making (understood as the process of abrogating, modifying, and supplementing laws) in cases where the CCs act as positive legislators can be analysed in many different ways and from different perspectives. The authors who have studied this problem to date have been mostly trying to distinguish between the different types of judicial law-making undertaken by CCs. Allan R. Brewer-Carías, in his report on CCs as positive legislators in comparative law, identified four main trends regarding such types of activity.¹² The first trend he described concerned CCs interfering with the Constituent Power by enacting constitutional rules and even mutating the Constitution. The second trend is related to CCs interfering with existing legislation by complementing statutes, adding new provisions to

9 See Leszek Garlicki, ‘Disabling the Constitutional Court in Poland?’ in Andrzej Szmyt & Bogusław Banaszak, (eds.), *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015*. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold (Gdańsk University Press 2016) 63, 63–69; Tomasz Tadeusz Konciewicz, ‘Polish Judiciary in Times of Constitutional Reckoning, of Fidelities, Doubts, Boats and ... a Journey’ (2017) 38 *Gdańskie Studia Prawnicze* 292, 292–306; Wojciech Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’ (2019) 11 *Hague Journal on the Rule of Law* 63, 63–84.

10 C-619/18, of 24 June 2019 (*Commission v. Poland*). See also Jakub Jaraczewski, Age is the limit? Background of the CJEU case C-619/18 *Commission v Poland*, VerfBlog (26.11.2019), <https://verfassungsblog.de/age-is-the-limit-background-of-the-cjeu-case-c-619-18-commission-v-poland>.

11 Case 20261/12, of 23 June 2016 (*Baka v. Hungary*). See also: Attila Vincze, ‘Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgement *Baka v Hungary*’ (2015) 21 *European Public Law* 445, 445–456; David Kosař & Katarina Šipulová, ‘The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary* and the Rule of Law’ (2018) 10 *Hague Journal on the Rule of Law* 83, 83–110.

12 Brewer-Carías (n 4) 893.

them and determining the temporal effects of legislation. The third trend is defined as CCs interfering with an absence of legislation due to absolute or relative legislative omissions. Finally, he identified the fourth trend as the role of CCs as legislators on matters of judicial review. In turn, Anna Gamper, in her paper, distinguished between six different types of CC law-making; namely, negative legislation, positive legislation as entailed by negative legislation, legislative proposals, substitute and mandated legislation, and legislation through interpretation.¹³ These are only two examples of the different approaches that can be adopted by those examining the issue of the law-making activity of CCs.

In this book, the law-making activity of CCs was simultaneously analysed at the constitutional level as well as at the sub-constitutional (mainly statutory) level. In both cases the authors of specific chapters were trying to identify the different types of positive (even creative) influence that CCs have on the legal order. They distinguished law-making through the creative interpretation of laws as well as through shaping the content of the law due to various legal effects arising from CC judgements. The authors also tackled the issue of legislative omissions and the question of whether CCs can, in some cases, supplement legislation, or even substitute for the legislator. Finally, they analysed the power of CCs to create procedural rules on judicial review and to formulate legislative recommendations for the law-making authorities.

One of the purposes of the book, as mentioned in the Introduction, was the establishment of the relationship between the law-making activity of national CCs on the one hand and the ECtHR and CJEU on the other hand. Therefore, this issue was also analysed in some chapters. As Krzysztof Wojtyczek explained in his chapter, the law-making activity of the CCs can be an object of review for the ECtHR when it examines the compatibility of national authorities' acts and omissions with the ECHR. Moreover, the established case law may be a source of legitimate expectations protected under the Convention.

3 Law-making at the level of constitutional regulations

3.1 Determining the scope of admissible constitutional changes

The main task of the CC is to preserve the supremacy of the Constitution. However, the CC is not merely a guardian of the wording of the Constitution, but is first and foremost a guarantor of its spirit and axiology. Therefore, although only some European countries such as Germany, France, Italy, and the Czech Republic have constitutions containing unchangeable provisions, CCs from other countries also consider themselves as having the competence to protect the inviolability of those constitutional principles that determine the 'identity of the Constitution' and that constitute the 'constitutional core.' However, in cases where explicit

¹³ Anna Gamper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4 *Cambridge Journal of International and Comparative Law* 423, 424–434.

constitutional decisions on the ‘eternity clauses’ are lacking, the CC adjudicates which constitutional provisions cannot be amended. Therefore, the Italian CC defines the constitutional core as the set of fundamental principles of the legal order and human rights,¹⁴ while the Slovak CC, as Ján Štiavnický and Max Steuer explained in their chapter, perceives the material core of the Constitution as containing all the principles of the rule of law including the principle of independence of the judiciary. In turn, the Hungarian CC uses the concept of constitutional identity,¹⁵ which is currently even the legal term, as in 2018 it was introduced into the text of the Hungarian Constitution. This term of ‘constitutional identity’ also appears in the judgements of the Polish CC, although it has not yet been positivized.

CCs applying these concepts consider themselves as having the competence to assess whether EU law is in breach of this constitutional core or the constitutional identity of the given State.¹⁶ The Czech CC has increased its ability to assess the constitutionally acceptable degree of State interference in the process of European integration by increasing the scope of the ‘constitutional order’ from the point of view of which such an assessment is made. Using the so-called Euro-amendment to the Constitution adopted in 2001, the Czech CC arrived at the conclusion that the notion of the constitutional order includes also various types of international treaties protecting human rights, e.g. the ECHR and the International Covenant on Civil and Political Rights (ICCPR).¹⁷ The effect of this ruling involved, on the one hand, the addition of new constitutional patterns of control in the process of examining the constitutionality of laws and, on the other, the obligation of the ordinary judges to refer the control of the compliance of laws with human rights treaties to the Czech CC. The Court simultaneously emphasized that the impassable limits of State intervention in the processes of European integration are set by the principle of a democratic law-governed state. This is because it acknowledged that the transfer of EU competencies would only be consistent with the constitutional order understood in this way if it respected the basic attributes of the rule of law principle that must not be breached.¹⁸

By determining the scope of admissible constitutional changes, CCs thus place themselves *de facto* above the Constituent bodies. Moreover, by specifying the impassable limits – from the constitutional point of view – of European integration, the CCs may even affect the activity of the State in the international arena.

14 See cases: 183/1974; 1146/1988; 105/14; 24/17.

15 Decision 22/2016, of 5 December 2016.

16 However, this is not the case in the Slovak Republic as the Slovak CC acknowledged the dominance of EU law over domestic law and showed no preference for constitutional pluralism. See Max Steuer, ‘Constitutional pluralism and the Slovak Constitutional Court: the Challenge of European Union Law’ (2018) 8 *The Lawyer Quarterly* 108, 127.

17 Pl. ÚS 36/01, of 25 June 2002.

18 Pl. ÚS 50/04, of 8 March 2006.

3.2 *Determining the constitutionality of constitutional amendments*

In practice, the provisions of the Constitution are rarely subject to CC examination, as they are most frequently a pattern for examining provisions positioned lower in the hierarchy of the sources of law. It is also disputable as to whether the CCs can examine the constitutionality of an amendment to the Constitution. Their competence in examining the constitutionality of the procedure for amending the Constitution is questioned less frequently. However, some of the CCs analysed in this book not only considered themselves as competent at conducting a substantive examination of amendments to the Constitution, but they even found amendments to the Constitution to be unconstitutional as a result of such an examination. This applies, as asserted by Martin Belov and Aleksandar Tsekov in their chapter, to the Bulgarian CC, which declared an amendment to the Constitution awarding the President of Bulgaria the power to dismiss the Chairman of the Supreme Court of Cassation, the Chairman of the Supreme Administrative Court, and the State Prosecutor General, as unconstitutional.¹⁹ This was also the case with the Czech CC, which annulled Constitutional Act No. 195/2009 Coll. (on the Prorogation of the Fifth Term of Office of the Chamber of Deputies), as affirmed by Jan Malíř and Jana Ondřejková.²⁰ However, the most illuminating example of this type of law-making activity is the Slovak case, mentioned by Ján Štiavnický and Max Steuer in their chapter. In January 2019, the Slovak CC derogated a part of the Constitution concerning one-time screening of active judges as this regulation was found to violate the material core of the Constitution.²¹

These types of CC rulings essentially restrict the freedom of the Constitution-makers and therefore they should only be issued in the form of preventive controls, as the *ex post* elimination of an unconstitutional amendment to the Constitution can seriously destabilize the functioning of the State. Therefore, in such cases, control of the constitutionality of the constitutional amendments should be exercised before the amendment has been enacted through a popular vote, when required.²²

3.3 *Law-making through constitutional interpretation*

The interpretation of the Constitution is essentially creative, mainly because its provisions are formulated in a highly general way and leave room for various understanding.²³ Undoubtedly, in many countries, such a mode of constitutional regulation is also the effect of a constitutional compromise and of attempts to

19 Case 6/2006, of 13 September 2006.

20 Pl. ÚS 27/09, of 10 September 2010.

21 See Marek Domin, 'A Part of the Constitution Is Unconstitutional, the Slovak Constitutional Court has Ruled' *Verfassungsblog* (8 February 2019), <https://verfassungsblog.de/a-part-of-the-constitution-is-unconstitutional-the-slovak-constitutional-court-has-ruled/>.

22 Brewer-Carías (n 4) 895.

23 See e.g. Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 689, 689–690; Lino A. Graglia, 'Creative Constitutional

address the most contentious and controversial issues in the Constitution without prejudging them clearly and unequivocally. However, the task of the CC is not only to concretize the constitutional provisions, but also to develop them and to adapt them to changing social conditions, and even to supplement them with new rules whenever such supplementation has occurred and has been seen to be necessary. Although the intensity of these kinds of law-making activity through constitutional interpretation differs among the CCs that have been examined, one can point out that in some countries the informal amendments to the Constitution through its creative interpretation take place quite often. The Hungarian CC, as affirmed by Zoltán Pozsár-Szentmiklósy in his chapter, has made twelve such constitutional changes to date. Some of them were accepted by the Constitution-maker implicitly *post factum* (by not taking any legislative action), while others were ‘legalized’ (by amending the Constitution and introducing into its content a norm formulated via CC interpretation),²⁴ or successfully rejected (by introducing a norm into the Constitution, which differs from and supersedes the one formulated by the CC).

The creative interpretation of the Constitution by the CC is sometimes necessary as the Constitution is a living instrument functioning in a perpetually changing social reality. A good example of this is the ruling of the Spanish CC on same-sex marriages, as mentioned by Covadonga Ferrer Martín de Vidales in her chapter. There is no doubt that when preparing the text of the Spanish Constitution in the 1970s, the authors did not have in mind same-sex marriage, so it cannot be assumed that they either allowed them or that they ruled them out. It was only in this ruling that the Spanish CC decided that when regulating the institution of same-sex marriages, the law-makers exercised legislative freedom within the limits set by the Constitution.

The creative interpretation of the Constitution by the CC can also touch on more concrete, or even technical, constitutional provisions. As Jan Malíř and Jana Ondřejková explained in their chapter, the Czech CC applied such an interpretation for determining the method of calculating the deadline for the President of the Republic to veto a bill, as prescribed by the Constitution. A creative interpretation of this kind is also applied by the CJEU, for instance, in matters on the safeguarding the powers of EU institutions.²⁵

The constitutional review of the law requires the CC to reconstruct the normative content of the constitutional provisions using various methods of

Interpretation as Justification for Rule by the Supreme Court’ (2019) 51 *Arizona State Law Journal* 109, 109–111.

24 See e.g., Article 9 paras. 6–7 of the Hungarian Fundamental Law, which ‘legalized’ the earlier CC decisions granting to the President of the State the power to refuse to appoint some state officials and to refuse to award prizes in the name of the state (CC decisions: 8/1992, of 30 January 1992; 36/1992, of 10 June 1992 and 47/2007, of 3 July 2007).

25 See e.g., cases regarding the competence of the European Parliament: 294/83, of 23 April 1986 (*Les Verts*); C-70/88, of 22 May 1990 (*Chernobyl*); Case 25/62, of 15 July 1963 (*Plaumann*); Case 5/71, of 2 December 1971 (*Schöppenstedt*).

interpretation. Some of those methods support the law-making activity of the CC (in particular, the functional, teleological, and systemic interpretations), while, in contrast, others limit this type of CC activity (e.g. historical or linguistic interpretations). CCs also take into account the wording of the norms of the ECHR and EU legislation in the process of interpreting the Constitution (a pro-convention and pro-EU law interpretation, known also as an ECHR and EU law-friendly approach). However, some CCs set clear boundaries for the application of this type of interpretation. This is the case of the Polish CC stating that an interpretation that is friendly to European law must not lead to results that are in conflict with the explicit wording of the provisions of the Constitution and must not destroy the Constitution's implementation of its basic guarantee function. As the Polish CC emphasized in the judgement regarding the constitutionality of the Accession Treaty,²⁶ the provisions of the Constitution regarding the rights and freedoms of an individual set a minimum and unsurpassable threshold that cannot be lowered or challenged as a result of the introduction of Community regulations.²⁷

3.4 *Developing constitutional rights and principles*

The most creative interpretations of the Constitution take place regarding constitutional principles, and the rights and freedoms of an individual.

Various examples of constitutional principles can be given, the actual content of which were determined not by the way in which they were expressed in the Constitution, but by the way in which they were understood and applied in the CCs' rulings. The best example of this is the principle of a democratic law-governed state. Its basic elements were formulated by the German FCC and they were later derived and developed by other CCs, especially those from Central and Eastern Europe. The Polish CC, as Piotr Czarny and Bogumił Naleziński mentioned in their chapter, inferred from the principle of a democratic law-governed state such principles as the principle of the protection of trust in the State and the law, the principle of the protection of acquired rights and legitimate expectation, the principle of the protection of pending interests, the principle of contractual freedom, and the principle of proper legislation. None of these principles has been formulated *expressis verbis* in the text of the Constitution of the Republic of Poland to this day, although all of them are treated by the legal doctrine as constitutional principles. However, the creative interpretation of the Constitution by CCs also covers principles that are explicitly expressed in the Constitution. This applies to the Spanish CC, which formulated in its jurisprudence, as Covadonga Ferrer Martín de Vidales mentioned in her chapter, the basic elements of the

26 K 18/04, of 11 May 2015.

27 See Justyna Holocher & Bogumił Naleziński, 'Konstytucyjne determinanty stosowania prawa Unii Europejskiej przez organy władzy sądniczej w Rzeczypospolitej Polskiej' (2018) 4 *Rocznik Administracji Publicznej* 47, 52; Aleksandra Kustra, 'The Polish Constitutional Tribunal and the Judicial Europeanization of the Constitution' 35 (2015) *Polish Yearbook of International Law* 193, 215.

principle of the regional State.²⁸ This is also true of the Latvian CC, which specified the content of the principle of the continuation of the Latvian State, the principle of the separation of powers, as well as the principles of good legislation, justice, and proportionality, as expressed by Anita Rodina and Alla Spale in their chapter.

The creative interpretation of the principles is especially essential in the case law of the European international courts. The rules arising from the judgement of the CJEU are even recognized as general principles of the Union's law being part of primary EU law. Although some of these principles still exist outside the wording of the treaties, the EU Member States do not question their legality. The latter remark should be emphasized because all the countries covered by our research have adopted the civil law system, in which court rulings do not, in principle, constitute a separate category of sources of law. Among the examples of general principles arising from the CJEU case law that were provided by Monika Kawczyńska in her chapter, the principle of the supremacy of EU law and the principle of the exclusive implied competence of the Union to conclude international agreements were examined. The first of these principles was formulated in the ruling in the *Costa* case²⁹ and was later developed in the ruling *Internationale Handelsgesellschaft*.³⁰ This principle has been operating outside the treaties for over half a century, although there was an attempt to codify it. In turn, the second principle was formulated in the ruling in the *ERTA* case,³¹ developed in Opinion 1/76,³² and codified as late as in the Lisbon Treaty.³³

The second domain of constitutional regulation that is particularly susceptible to creative interpretation by the CCs is that of the provisions on the rights and freedoms of an individual. Interpretations in this area are creative *sensu stricto* since CCs supplement the Constitution with new individual rights and freedoms that are not explicitly stated in its provisions. Before 1997, the Polish CC inferred from the principle of a democratic law-governed state such rights as the right to privacy, the right to life, and the right to a fair trial, although in the Communist Constitution in force at that time these rights were not guaranteed *expressis verbis*. Similarly, the German FCC, as Ruth Weber mentioned in her chapter, has added new types of rights to the catalogue of constitutional rights; namely, the right to informational self-determination, and the right to the confidentiality and integrity of information technology systems.

The law-making approach that has the purpose of strengthening the rights of the individuals is also noticeable, as asserted by Monika Kawczyńska in her chapter, in the case law of the Luxembourg courts. The CJEU in the *Van Gend en Loos* case has established the principle of the direct effect of EU law, that could be invoked by individuals for the protection of their rights. Moreover, the CJEU

28 STC 114/2017, of 2 February 1981, para. 3.

29 Case 6/64, of 15 July 1964 (*Costa*).

30 Case 11/70, of 17 December 1970 (*Internationale Handelsgesellschaft*).

31 Case 22/70, of 31 March 1971 (*AETR/ERTA*).

32 Opinion 1/76, of 26 April 1977 (Inland waterway vessels).

33 Case 26/62, of 5 February 1963 (*van Gend & Loos*).

derived the fundamental rights, as part of general principles of the Union's law, from constitutional traditions common to the Member States and international human rights treaties, in particular the ECHR. Currently the principle of protection of fundamental rights within the EU legal order is expressed in Article 6 TFEU. In a similar manner, the CJEU formulated the principle of effective judicial protection of the individual, referring to the principle of effectiveness derived from the principle of sincere cooperation (Article 4 (3) TEU) and common constitutional traditions. The obligation of the state authority to provide remedies sufficient to ensure effective legal protection of the individuals in the fields covered by Union law is now foreseen in Article 19 (2) TEU.

4 Law-making at the level of statutory regulations

CC rulings can apply not only to statutes, but also to other legal acts. However, within the group of acts examined, statutes hold a special place. They are adopted by parliament with its strong democratic legitimacy to act on behalf of the sovereign. None of the CCs have the normative power to create new pieces of legislation.³⁴ Therefore, when examining the statutes passed by parliament, CCs should act with restraint, treating a ruling on the lack of constitutionality as an *ultima ratio*. CCs should also respect the freedom of the parliamentary majority to implement its own vision of the policy as long as it falls within the constitutional framework set by the constituent body.³⁵ The examination of the constitutionality of a statute by the CC gives rise to specific dilemmas regarding the division of powers and the limits of the judicial review of legislation. Therefore, the law-making activity of the CC at the statute level has far more significant effects from both the theoretical and the practical point of view than at the level of sub-statutory legal regulations. Consequently, the chapters of this book have been more closely analysed at CC law-making level than at the statutory level.

4.1 Preventing the emergence of a dysfunctional legal gap as a result of constitutional court rulings

The CC rulings on the lack of constitutionality of a statute result in negative effects; namely, an unconstitutional statute (its provision) is repealed and ceases to be a part of the legal system. Such a situation may create a legal gap (*lacuna*) that involves a lack of regulation of a matter that should be encompassed by legislation. A legal gap of this kind may be more unconstitutional than the regulation that was removed from the legal system by the CC. Therefore, CCs have developed

34 As the French Constitutional Council emphasizes, 'the Constitution does not confer on the Constitutional Court a general power of discretion and decision identical to that of Parliament.' See decisions: 74–54, of 15 January 1975; 80–127, of 20 January 1981; 86–218, of 18 November 1986.

35 In Italy, Art. 28 of Law No. 87/1953 on the Rules on the Establishment and Functioning of the Constitutional Court explicitly forbade the CC from examining how parliament exercises its discretionary authority.

different instruments for preventing the emergence of a dysfunctional legal gap as a result of their rulings. Two situations should be distinguished in this respect.

The first is when the matter regulated by the legal norm that was removed by the CC due to its unconstitutionality can be covered by the scope of the regulation of another legal norm. This situation happens quite frequently as the law is a system of connected vessels and the change in one of these vessels frequently affects all other vessels. Therefore, the removal of one norm from the legal system usually results in 'filling' its scope of regulation with another norm that still remains in the system. In this way, a negative CC ruling simultaneously gives rise to positive effects, modifying the scope of the regulation of the provisions that were not even examined in proceedings before the CC. A statutory norm that has been removed from the legal system can be replaced by another statutory norm or by a constitutional norm that is concrete and suitable for direct application. A constitutional norm may, in such a situation, be applied either independently or jointly with a statutory norm, and then the former may supplement the shortcomings of the latter. The co-application of the Constitution and a statute is also a type of direct application of the Constitution.³⁶

The second situation, which should be distinguished in this regard, is one where the matter at hand cannot be encompassed by a statutory regulation and thus the direct application of the Constitution is impossible. Thus, to avoid the emergence of a dysfunctional legal gap, the CC may use various methods of postponing the derogation effect of its ruling. The most frequently encountered situations include the deferred entry into force of the CC ruling or a delay in issuing the CC ruling on the unconstitutionality of the law.

If the CC defers the entry into force of the ruling on the unconstitutionality of a provision, until the moment stipulated in the operative part arrives, the provision found to be unconstitutional temporarily remains in force and, as a consequence, *prima facie* should be applied by all public authorities during that time. In some countries, such as Poland, the maximum deferral period is set by the Constitution,³⁷ while in others (such as, Latvia) the CC has broad discretion to specify the length of the deferral period.³⁸ Deferral is always a result of a certain axiological compromise, as it is used when the CC concludes that the need to protect certain

36 As Leszek Garlicki noted, 'the direct application of the Constitution (of its provisions on fundamental rights) is present in the decisions of all the courts and judges. The Constitutional Court, while preserving the last word if a controversy arises, no longer claims a monopoly over application of the Constitution but, rather, acts as a coordinator of that process'. See Leszek Garlicki, 'Constitutional courts versus supreme courts' (2007) 5 *International Journal of Constitutional Law* 44, 52.

37 In accordance with Article 190, para. 3 of the Polish Constitution, the Polish CC may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act.

38 In Latvia, the period of the deferral is not specified in the Constitution, so the CC has broad discretion to determine the length of this period (most frequently deferral is for 6 months).

values or interests requires that the unconstitutional law remains in force for a limited period of time.

The CC may also defer issuing a ruling on the unconstitutionality of a provision, leaving the law-makers with time to amend it. Various types of decisions on 'expected unconstitutionality' are intended to prevent a gap from arising in the law by appealing to the parliament to immediately amend the unconstitutional provision under the pain of issuing a ruling on its unconstitutionality. These decisions involving non-compulsory judicial recommendations may take various forms. The Italian CC, as mentioned by Nausica Palazzo in her chapter, uses so-called exhortative judgements to force a legislative reaction on the parliament within the deadline set for it.³⁹ This type of threat involves striking down an unconstitutional provision if the legislator fails to execute the CC's recommendations. Similarly, as asserted by Julien Mouchette in his chapter, the French Constitutional Council issues so-called decisions of appeal to the legislator, in which it requests the law-makers to amend the provision, sometimes even within a deadline it has set on its own. The Council also formulates specific guidelines about the content of the future legal regulation and so it is pointed out that this is a form of 'close dialogue' between the Council and parliament.

The group of rulings that prevent the emergence of a dysfunctional legal gap also includes a declaration of unconstitutionality, which is used by the German FCC, as Ruth Weber mentioned in her chapter, to temporarily leave an unconstitutional regulation in force, the immediate removal of which from the legal order would be detrimental to the public interest. Likewise, as Covadonga Ferrer Martín de Vidales noted in her chapter, the Spanish CC also applies 'unconstitutionality without nullity' in its rulings, limiting itself to declaring the unconstitutionality of the legal regulation that it examined and leaving the law-makers to consider the matter of correcting it.

Rulings through which the CC restores the previous (pre-amendment) wording of the provision, when it finds that the provision amending the regulations being examined is unconstitutional, also constitute a way of avoiding a legal gap and, simultaneously, they are an obvious manifestation of judicial law-making. The power to restore the previous wording of the provision is used by the Polish and Latvian CCs. The Polish legal doctrine refers to such CC decisions as resuscitation decisions because they cause 'the revival' of a provision that has lost its binding force and has ceased to be part of the applicable legal order.⁴⁰ The Latvian CC, as Anita Rodina and Alla Spale noted in their chapter, emphasizes the temporary and provisional nature of this institution, indicating that the restoration of the provision is a remedy for a legal gap arising from a ruling on unconstitutionality that

39 See ruling 207/2018 regarding criminal liability for assistance in euthanasia by DJ Fabo.

40 Andrzej Grabowski, Bogumił Naleziński, 'Kłopoty z obowiązywaniem. Uwagi na tle orzecznictwa Trybunału Konstytucyjnego' in Jerzy Stelmach (ed.), *Studia z filozofii prawa* (Wydawnictwo Uniwersytetu Jagiellońskiego 2001), 219, 251–257; Monika Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne* (Ars boni et aequi 2006) 142–145.

will disappear when the law-makers pass a new legal regulation. Also, the Bulgarian CC and the Slovak CC apply the institution of the revival of a repealed provision.

4.2 *Partial unconstitutionality and its effect*

Contemporary CCs increasingly rarely state that the provisions being examined are entirely unconstitutional and increasingly frequently hold that they are partially unconstitutional. The reason for adopting such an adjudication strategy is the conviction that moderation is required with respect to interference with the parliament's legislative powers. Contrary to appearances, however, a ruling that a provision is partially unconstitutional can have more far-reaching effects than a ruling that the same provision is unconstitutional in its entirety. This is because a provision that is declared partially unconstitutional continues to operate in the legal system to the extent to which it is amended by the CC. The wording of this provision can therefore significantly distort the intentions that guided the law-makers at the time of its establishment. It can also be completely differently understood and applied in practice due to the amended normative content. The amended provision can also affect the way in which other provisions are understood and applied in its normative environment. However, primarily, the main problem with partial rulings is that they modify the normative content of a provision while keeping its wording unchanged. This, in turn, gives rise to difficulties related to establishing the actual scope of the normative change arising from this type of ruling. Consequently, until the legislator adjusts the wording of the provision to designate its new normative content, there will be a discrepancy between the wording of the provision and its normative content. This is a major problem for all authorities applying this regulation, including the courts.

To avoid discrepancies in applying the regulations after the ruling regarding their partial unconstitutionality, the indication given by the CC on the correct interpretation of the regulation is taken into account. This interpretation has different levels of significance depending on which parts of the CC's ruling are given guidelines. If the guidelines are found in the justification of the ruling, they are often treated by the courts as being the recommended – and not simply the 'correct' – method of interpretation. In contrast with the operative part, the justification does not generally have binding force. However, CCs sometimes include this desirable way of interpreting an examined provision in the operative part of their judgement, which is referred to as an interpretative judgement.⁴¹ An interpretation of this kind is binding on all addressees of the CC's judgement. The inclusion of the recommended interpretation of a provision in the operative part of a positive ruling means that the provision is in compliance with the Constitution, provided that it is applied in the manner specified by the CC. Therefore, this is a form of conditional constitutionality, as it assumes that the provision will be left in the legal system under the condition that it will be understood and applied in a

41 See e.g. Piotr Tuleja, *Wyroki interpretacyjne Trybunału Konstytucyjnego* (Ars boni et aequi 2016); Brewer-Carías (n 4) 74–78; Florczak-Wątor (n40) 93–102.

specific way. In practice, if this type of adjudicative activity by the CC is respected by the courts, it can lead to the harmonization of the interpretation applied in the courts of various levels. However, the problem is that the supreme courts exercise supervision over ordinary courts regarding judgements. Therefore, the imposition by the CCs of a particular type of interpretation of a law is frequently treated by the supreme courts as interfering in their powers.⁴² CCs also use the negative variant of interpretative rulings, indicating in the operative part of the ruling the unconstitutional understanding of the provision under review. The aim of such decisions is to eliminate unconstitutional interpretations, although, in order to avoid a dispute with the highest courts, as a rule, the CCs emphasize that the interpretation itself is not subject to review, while the CCs only examine the result of this interpretation in the form of a specific meaning of the provision. However, it should be noted that these interpretative rulings are also a source of conflict in relations between CCs and the highest courts, which is demonstrated, if only, by the example of Poland.

The concept of interpretive judgements has been especially developed in the case law of the Italian CC, both as so-called interpretative judgements of acceptance and so-called interpretative judgements of dismissal. However, the most extreme form of law-making constitutes ‘manipulative judgements,’ because, as their name implies, they manipulate the text of the statute and give it a meaning that can give rise to serious doubts. The Latvian CC and the Czech CC most frequently use the positive variant of interpretative rulings, which is less invasive because it enables the provision being examined to be kept in the legal order when its constitutional understanding exists. Additionally, the Bulgarian CC uses the so-called conformity interpretation as an intermediate solution between a ruling on the constitutionality of a provision that is being examined and a ruling on its unconstitutionality, as confirmed by Martin Belov and Aleksandar Tsekov in their chapter. In turn, positive and negative interpretative rulings can be found in the case law of the Spanish CC.⁴³ The Hungarian CC uses the concept of ‘constitutional requirements’ in a similar sense, which was reflected, for instance, in the ruling on punishing the homeless for occupying public space, as analysed by Zoltán Pozsár-Szentmiklósy in his chapter. Finally, the technique of interpretative reservations used by the French Constitutional Council is also worth mentioning. It involves declaring a provision to be compatible with the Constitution, with the reservation that it will be understood and applied in a strictly defined manner. Three types of reservations have developed in the jurisprudence

42 This is the situation, e.g. in Poland, where interpretative rulings are not respected by the courts because the Supreme Court questions the competence of the CC to issue them. On this matter see Rafał Mańko, “War of Courts” as a Clash of Legal Cultures: Rethinking the Conflict between the Polish Constitutional Tribunal and the Supreme Court Over “Interpretive Judgments” in Michael Hein et al. (eds.), *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory* (Peter Lang 2014) 79, 79–94; Florczak-Wątor (n 40) 204–206.

43 See Leo Brust, ‘The interpretation according to the constitution and the manipulative sentences’ (2009) 2 *Rev. direito GV* [online] 134, 135–136.

of the Constitutional Council, as explained by Julien Mouchette in his chapter; namely, neutralizing reservations (eliminating an unconstitutional interpretation), directive reservations (attributing liability to the law-makers for applying the law), and constructive reservations (adding a specific norm to the wording of a provision in order to make it compliant with the Constitution). This latter type of reservation gives rise to the greatest doubts because it can lead to the situation in which the law, in its new shape given by a decision of the Constitutional Council, will be in conflict with the original intention of the law-makers.

4.3 Referring to the application of a provision that is found to be unconstitutional

The inclusion in the operative part of the CC ruling of a decision referring not to the content of a provision but to its application is also a form of judicial law-making. In fact, such a decision contains a kind of intertemporal norm prejudging either how to apply a provision that is held to be unconstitutional after a CC ruling or how to apply a CC ruling, which held that this provision is unconstitutional. In the first case, the CC specifies the moment from which the provision is considered unconstitutional, and similarly introduces a state of ‘unconstitutionality divided in time,’ because it assumes that, up to that moment, the provision will be considered constitutional.⁴⁴ Examples of such rulings include the Polish case regarding the inheritance of agricultural farms, in which the CC held that the contested provisions are compliant with the Constitution to the extent to which they apply to inheritances that were opened before the date of the publication of the CC judgement and are unconstitutional to the extent to which they apply to inheritances opened since the date on which the CC’s ruling became effective.⁴⁵ Examples of judgements from the second category are those in which the intertemporal norm contained in the operative part of the CC ruling specifies the method of applying this judgement in practice, especially on matters regarding citizens. In the Polish legal doctrine, such decisions are called applicative rulings,⁴⁶ examples of which are the rulings of the Polish CC in which it was stated that various types of fees paid on the basis of a provision subsequently recognized as unconstitutional are not refundable, although, in accordance with Article 190, para. 4 of the Constitution, a citizen is

44 On the concept of ‘unconstitutionality divided in time’ see Jan Podkowik, *Niekonstytucyjność prawa i jej skutki cywilnoprawne* (Wydawnictwo Naukowe Scholar 2019) 197–207.

45 P 4/99, of 31 January 2001. For more on this ruling and the effects of its entry into force, see Monika Florczak-Wątor, ‘Zasady dziedziczenia gospodarstw rolnych. Komentarz’ in Leszek Garlicki et al. (eds.), *Na straży państwa prawa. Trzydzieści lat orzecznictwa Trybunału Konstytucyjnego* (Wolters Kluwer 2016) 354, 367.

46 See Justyna Holocher, Urszula Kosielińska-Grabowska, ‘Dolce Vita? O wpływie wyroków aplikacyjnych Trybunału Konstytucyjnego na orzecznictwo sądowe’ in Aleksandra Samonek (ed.), *Teoria prawa: między nowoczesnością a ponowoczesnością* (Wydawnictwo Uniwersytetu Jagiellońskiego 2012) 233, 233–242; Florczak-Wątor (n 40) 114–116.

entitled to a refund of these fees.⁴⁷ Another example of such a ruling is the decision of the Slovak CC on the unconstitutionality of the provisions constituting the 'Special Court,' as analysed by Ján Štiavnický and Max Steuer in their chapter. In this case, the CC held that its ruling has no influence on the validity of the judgements issued by this Court and does not give them the right to reopen proceedings in cases that have ended in a final and binding manner.

The most obvious manifestation of judicial law-making involves the CC filling existing legal gaps via various methods of interpretation, especially with functional and teleological interpretations. Examples of these types of law-making activities appeared in the rulings of all CCs analysed in this study collection. Some of them, such as the Polish and Latvian CCs, clearly emphasize the difference between absolute legislative omissions and relative legislative omissions, recognizing that they only have the competence to examine the latter. An absolute legislative omission, and therefore those situations in which the law-makers decided not to resolve a given issue, is not subject to control by the CC, as it cannot declare the unconstitutionality of something that has not yet been regulated by parliament. However, a relative legislative omission applies to a legal regulation, which is considered defectively formed due to the defects appearing in it. The Czech CC approached the problem of examining legislative omissions more comprehensively, as affirmed by Jan Malíř and Jana Ondřejková in their chapter. The Czech CC enables the examination of absolute legislative omissions, including those involving the failure to publish a statute that the citizens were counting on.⁴⁸

The problematic nature of the legal consequences of rulings in which the CC declares the unconstitutionality of a relative legislative omission should be highlighted. The Polish CC is of the opinion that judgements of this kind do not cause changes in the legal system (in particular, they do not add an accidentally omitted element to an existing legal regulation), but only obligate the law-makers to take legislative action to improve the existing legal regulation. However, in other cases the Polish CC took a different stance, stating that such a type of ruling has a self-executing effect and corrects the improper piece of legislation by adding the missing legal norm. Similarly, in Italy, it is accepted that rulings in which the CC declares the unconstitutionality of a relative legislative omission are of a legislative nature. Furthermore, they are referred to as 'additive judgements,' distinguishing – as explained by Nausica Palazzo in her chapter – their two categories; namely, those adding guarantees or services and those adding legal principles.

A separate category of CC judgements concerns those which are issued in the form of a preventive control and therefore apply to the problem of the constitutionality of statutes before their introduction into the legal system. Preventive control is used not only in France but also in other European countries. A

47 See e.g. P 7/00, of 6 March 2002; P 6/02, of 10 December 2002; K 24/03, of 27 April 2004.

48 See ruling Pl.ÚS 9/07, of 1 July 2010, in which the Czech CC held that the parliament's failure to pass the act on the settlement of the historical property of churches and religious communities is unconstitutional, including, as a result, breaching the principle of the protection of a legitimate expectation.

provision that is considered unconstitutional does not become part of the applicable legal order, while the result of a CC ruling may either be the end of the legislative process without the introduction of the statute (or its unconstitutional provision) into the legal system or the referral by the president of the statute for further parliamentary work intended to correct it. The French Constitutional Council – as explained by Julien Mouchette in his chapter – can additionally correct the title of a statute if the content of the statute is amended as a result of its ruling.⁴⁹ However, such interference by the Constitutional Council cannot mean a substantive amendment to the statute. It is only a form of editorial revision of the particular piece of legislation.⁵⁰

5 Guidelines for the law-makers

Very often, CC rulings contain various directives, guidelines, and recommendations for the law-making authorities indicating the necessity of adopting specific legislative regulations. If formulated in the justification of the CC's ruling, these directives, guidelines, and recommendations are not of a binding nature and the law-making authority is not liable for not taking them into account. However, they doubtlessly constitute a certain form of interference in the legislative autonomy of the law-making authorities. This is because, as a rule, the CC does not usually restrict itself to stating that it is reasonable to regulate a specific issue, but also frequently indicates the optimal method of regulating it or even the content of the optimal regulation. The more detailed the directives, guidelines, and recommendations are, the greater the probability that they will determine the content of the future legal regulations. Such detailed guidelines may appear, for instance, in cases where the CC finds an absolute legislative omission and therefore a lack of jurisdiction for adjudicating the case. It then frequently makes various appeals to the law-makers and requests them to issue the legal regulation that they had omitted. This also applies to provisions that were not examined by the CC, when their defectiveness (not necessarily their unconstitutionality) was discovered while examining another (contested) regulation, or in a factual context in the light of which a constitutional complaint or legal question was issued. These types of guidelines have a signalling nature and their main purpose is to improve the quality of the law and remove existing legal gaps or conflicts.⁵¹ These statements frequently assume the form of a request addressed to the law-makers to pass specific regulations or to correct an existing regulation.⁵² They are not formally

49 Which is referred to as the 'rectification of the law by consequence'. See Pl ÚS 63/06, of 29 January 2008.

50 See e.g., the replacement of a comma with a hyphen. See Decision No. 2012–250 QPC, of 8 June 2012.

51 On the signalization in the Polish CC case law see Marek Safjan, *Poland. The Constitutional Court as a Positive Legislator* in Brewer-Carías (n 4) 717–718.

52 See e.g., the Polish CC request addressed to the parliament to comprehensively regulate the protection of consumers against the bankruptcy of property developers (S 3/10, of 2 August 2010).

binding, but, as already mentioned, such guidelines can constitute a form of warning sent to the law-makers by the CC that the provision will be removed from the legal system if it is not corrected.

However, the directives, guidelines, and recommendations that are closely related to the decision itself, which are contained in the operative part of the CC judgement, are much more important. This applies to cases in which the CC finds the partial unconstitutionality of a provision, as a consequence of which the provision remains in the legal system but needs to be corrected by the law-makers because its wording does not reflect its new (corrected by the CC) normative content. Rulings of this type, as previously mentioned, are called partial rulings. Very detailed directives on what, to what extent, as well as how (in which direction) to correct a regulation are frequently formulated in the CC's justification. These directives may be considered binding on the law-makers because they supplement the operative part of the CC's judgement in a situation where the decision contained in it must be executed. The directives contained in the justification of a ruling on the unconstitutionality of a provision, which is left in force by the CC so that the law-makers have time to amend it, are similarly binding. The obligation to amend the provision arising from the operative part of such a ruling is valid, while a lack of amendment to the prescribed extent is treated as a failure to perform the CC's ruling.

In practice, the extent of the CC's control over the freedom of the law-makers is constantly increasing. A good example in this respect is the so-called review of the manifest error of assessment used in the jurisprudence of the French Constitutional Council. Although, as it emphasizes in its rulings, the Constitutional Council does not examine the aims set by the law-makers, it still assigns itself with powers of limited control over the means used to achieve them.⁵³ If the Constitutional Council find these means to be manifestly irrelevant to achieving the aim of a legal act, it considers itself as entitled to declare them unconstitutional. In some cases, as Julien Mouchette mentioned, a review of a manifest error of assessment of this type can lead to the assessment made by the parliament being replaced by a different assessment made by the Constitutional Council. In recent rulings, this control assumed the nature of proportionality control or, in other words, control of what is 'manifestly disproportionate.'

6 Regulatory powers of the constitutional courts

CCs covered by the research have among their competences those of a legislative nature *sensu stricto* because they are entitled to issue their internal rules. They are issued on the basis of the authorizations contained in the law, within the regulatory autonomy awarded to the CC as a guarantee of its independence and

53 This method of control was applied in Decision 2004–508, of 16 December 2004. On the same method see also Andrzej Grabowski & Tomasz Gizber-Studnicki, 'Normy programowe w Konstytucji' in Janusz Trzcíński (ed.), *Charakter i struktura norm konstytucji* (Wydawnictwo Sejmowe 1997) 95, 109–111.

impartiality. As a rule, such internal regulations adopted by the CC either repeat the constitutional and statutory regulations or specify them in greater detail. However, they sometimes enter the sphere of the rights and freedoms of the individual, specifying, for instance, the principles of their participation in hearings, access to case files or the effects of exceeding the instructional deadlines. Even then, it can generally be said that from the point of view of the impact on the applicable legal order, legal acts arising from the CCs' use of the statutory powers conferred on them are of marginal significance. For this reason, they were not of any great interest to the authors of the specific chapters.

However, the above-mentioned internal rules adopted by international courts are of greater importance. Neither the ECHR nor the EU Treaties regulate in detail the organization and principles of operation of the ECtHR and the CJEU, respectively. These acts make reference to internal rules, which are not only established by the ECtHR and the CJEU, but are also developed by those bodies involved in the practice of applying them. As Krzysztof Wojtyczek mentioned in his chapter, the ECtHR has broad discretion in defining the density of its internal rules and thus dividing the norm-making powers between the situation when it acts in the form of the plenary assembly of judges and the situation when it acts as a judicial body establishing internal rules through its practice that complements the written rules.

7 Conclusions

The examination of the rulings of the European CCs covered by this book leads to the conclusion that their influence on the applicable legal order at the level of both the Constitution and the statutes is significant and undoubted. The rulings of these courts no longer fall within the framework of the concept of the negative law-maker described by Hans Kelsen. This is because contemporary CCs do not restrict themselves to reviewing the constitutionality of statutes and possibly repealing those considered unconstitutional, but they also correct, supplement, and develop the wording of statutes as a result of the creative interpretation applied and the appropriate formulation of the operative part of issued rulings and their legal effects. Additionally, they indicate to parliaments the need to change the law, thereby initiating further processes for its correction, supplementation, and development.

The law-making activity of CCs is manifested at the level of both the provisions of the Constitution as well as statutory norms. In the first case, the CCs do not so much protect the wording of the Constitution (although this also happens, especially in cases where the Constitution contains above-mentioned unchangeable clauses), as its spirit and axiology. The CCs limit the freedom of the Constitution-makers to the extent to which it is possible to amend the Constitution, guaranteeing the immutability of its provisions, which constitute the so-called core of the Constitution or the constitutional identity. In this way, some CCs also specify constitutionally acceptable limits of State involvement in the processes of European integration. On the other hand, CCs creatively develop and supplement the Constitution, especially in the parts

in which it stipulates the constitutional principles and the rights and freedoms of an individual. In short, the CCs are real creators of the rigid Constitutions. At the statutory level, however, the law-making abilities of the CCs are especially manifested in the partial and interpretative rulings that it issues, as well as in its rulings confirming the unconstitutionality of legislative omissions. CCs also create inter-temporal norms to defer either the effectiveness of their ruling or the deprivation of the effectiveness of a provision acknowledged in that ruling as being unconstitutional. Additionally, CCs frequently include very detailed signalling guidelines in the justifications of their rulings that can determine the content of future statutory regulations adopted by parliament.