Introduction

Monika Florczak-Wątor

Do constitutional courts (CCs) create the law or do they just apply it? Does the interpretation of the Constitution in the process of analysing the constitutionality of the law have a creative or purely reconstructive nature? Can the CC develop, correct, and supplement the law or should it limit itself only to the assessment of compliance with the patterns of control specified in the application? These are questions that have been raised in the literature for years and have not been answered exhaustively. Although CCs currently exist in most European States, the question regarding the extent of their judicial activities and their optimal position in the structure of States organized on the basis of the separation of powers still remains open.¹ A significant number of active CCs raises an additional important question: Is it possible to analyse previously mentioned problems in terms of comparative law in order to discuss specific (and if so, which) typical assumptions (phenomena or tendencies), or are there such significant divergences that CCs should be analysed separately?

The aim of this book is to analyse and describe the specificity of law-making for selected European CCs. Our understanding of the notion of law-making, which is the key to our research, is very broad. It includes the repeal, modification, and supplementation of the law by CCs within the scope – and as a consequence – of the examination of the compliance of the law with the Constitution. The above-mentioned concept of law-making is applied through the creative interpretation of law, including the interpretation of law in accordance with the Constitution and in a manner that is friendly to European Union (EU) law and international law, as well as through adjudication on constitutionality of law combined with the determination of the extent of the declared unconstitutionality and the legal consequences of the CC judgements. Moreover, CCs have normative competence

- 1 See e.g. Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008); Andrew Harding & Peter Leyland (eds.), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill Publishing 2009); Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press 2009); Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 816, 817–825.

2 Introduction

sensu stricto as they are entitled to issue internal rules concerning the organization of CCs, in particular with regard to procedural issues. The initial research hypothesis is the assumption that the CCs determine the shape of the law, not only by repealing unconstitutional norms from it, but also by modifying and supplementing those norms that remain in the legal order after the announcement of the ruling on their conformity with the Constitution or their partial unconstitutionality. Therefore, the judicial review would seem to position itself between law-making and law-application, while the CC is not only a negative but also a positive law-maker,² which requires a redefinition of its position within the system.³ This is because, in our opinion, Hans Kelsen's description of CCs being linked to the term 'negative law-maker'⁴ does not reflect the essence of the changes which a ruling on the unconstitutionality of the law involves. This is due to the finding that, at present, the effect of such a judgement increasingly relates not to the repeal of a law, but to an amendment of normative content of the reviewed provision. The constitutionality of a law is examined at the level of legal norms and these are not always *expressis verbis* articulated in the wording of the legal provision. Often the provisions are not contested in their entirety, but only to a certain extent or in terms of a specific meaning, and therefore, if they are found to be unconstitutional, they lose their binding force only to a certain extent. Such a derogation is usually not expressed in the wording of a statute which, as such, does not change. Reconstruction of the normative content of a statute after issuing CC ruling declaring the partial unconstitutionality of the statute often leads to the conclusion that this content has not been reduced, but, on the contrary, extended to cover issues that have been previously excluded from the scope of the relevant regulation.

In our research, the results of which we present in this book, we analyse twelve CCs, ten of which are national CCs operating in European States that have adopted the model of the centralized control of the constitutionality of law, and the other two are international courts protecting the legal orders created at the

2 See Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (Cambridge University Press 2011); Anna Gamper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4 *Cambridge Journal of International and Comparative Law* 423, 424–434; Stone Sweet (n 1) 827–828.

3 As Alec Stone Sweet indicated: 'constitutional courts ought to be conceptualised as specialised legislative organs, and constitutional review ought to be understood as one stage in the elaboration of statutes'. Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000) 61. Referring to this opinion, Wojciech Sadurski added: 'This seems quite obvious – although not to many legal scholars who often prefer to perceive constitutional courts as judicial organs; following the legal fiction propounded by the courts themselves, they tend to situate them within the judicial branch within the general tri-partite scheme of separation of powers'. Sadurski (n 1) 87.

4 See Hans Kelsen, *Allgemeine Staatslehre* (J Springer 1925) 229–231; Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' in *Vereinigung der Deutschen Staatsrechtslehrer* (ed.), *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol 5 (De Gruyter 1929) 30–32; Friedrich Koja, *Hans Kelsen oder Die Reinheit der Rechtslehre* (Böhlau Verlag Wien 1988) 131–133.

European level. Within the first group, the analysis takes into account both the CCs established in Western European countries just after the Second World War (Germany, Italy, Spain, and France), as well as CCs established in Central and Eastern European countries after the fall of communism, including the Visegrad countries (Poland, Hungary, the Czech Republic, and the Slovak Republic), the Baltic States (Latvia), and the Balkan States (Bulgaria). Therefore, we have considered those countries that have a tradition of CCs having functioned in a stable democracy dating back several decades, as well as those in which CCs are relatively young institutions that are still building their authority and real constitutional position. We have also included in our research those countries in which the CC system is currently in a constitutional crisis and in which the law-making of the CCs is beginning to threaten democracy and the rule of law.⁵

In addition to the national CCs, as already mentioned, we have analysed two international courts operating within the structures of European integration; namely, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The inclusion of these courts in the category of CCs may seem controversial, since until now the concept of the CC has referred to the national courts that protect the supremacy of the Constitution and that have the competence to review the constitutionality of the law. Although neither the Council of Europe nor the EU are federal States, the constituent documents (the European Convention on Human Rights (ECHR) and the EU Treaties) perform a similar function in these organizations to those of national constitutions within State organizations.⁶ These two international courts protect the standards arising from these documents and, likewise, perform functions similar to those performed by national CCs. Furthermore, in countries where traditional CCs have found themselves in crisis (Poland and Hungary), the role of the guardian of constitutional standards has been taken over precisely by the above-mentioned international courts. This is perfectly illustrated by the situation in Poland, where the number of legal questions and constitutional complaints filed with the CC has declined dramatically during the last three years,⁷ while the number of complaints

5 On the constitutional crisis in Poland see: Piotr Radziejewicz & Piotr Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016* (Wolters Kluwer Polska 2017); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019). On the constitutional crisis in Hungary see Peter Wilkin, *Hungary's Crisis of Democracy: The Road to Serfdom* (Lexington Books 2016).

6 See Francis Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in Deirdre Curtin, Daniel O'Keefe (eds.), *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.

7 See the Report of the Stefan Batory Foundation Legal Experts Group 'Functioning of the Constitutional Court 2014–2017' available in Polish at <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idci/Funkcjonowanie%20Try>

4 Introduction

on constitutional matters submitted by citizens to the ECtHR and the corresponding preliminary questions referred by the courts to the CJEU have increased. Since the allegation of a breach of constitutional standards cannot be formally raised before such international bodies, it is transformed into an allegation of a violation of the ECHR or EU standards. However, the same standards are still at stake as regards, for instance, non-discrimination, the protection of fundamental rights and freedoms, the independence of the judiciary and the separation of powers. Therefore, there is no doubt that in those States where the CC is being marginalized or is even actually disappearing, the CCs' role is being taken over by international courts, which are the guardians of European standards developed on the basis of constitutional standards common to the Member States associated with the given organization.

Each chapter of this collection of studies is devoted to one specific CC. These chapters have a similar structure and take into account similar research problems. The concluding comments concerning the law-making activities of all CCs covered by the research are included in the last chapter. The authors of particular chapters are all researchers from the countries of the CCs whose law-making activity they have analysed. First, they present the legal basis for the functioning of a respective CC, the evolution of its constitutional position, its competencies, as well as the social trust it enjoys and the social acceptability of its rulings. Subsequently, the individual chapters present the issue of law-making of the particular CC, referring to specific examples from rulings in which both constitutional law-making and statutory law-making were considered for the national CCs functioning in the individual countries. In both cases, the aim was to demonstrate how CCs modify or supplement constitutional and statutory provisions by applying various methods of interpretation, and how, when a ruling declares unconstitutionality, it can result in large and quality-diversified changes in the content of the examined provision. The authors of the individual chapters also mention specific examples of CC decisions containing a law-making component, as well as the consequences of these decisions for the applicable legal order. The specific chapters also present the reactions of various State authorities, particularly the courts, to the law-making activity of the CCs, as well as the position of the legal science in this respect. It is worth noting that the judicial activism of the CCs in many countries has been, and continues to be, the main cause of conflicts with other courts, especially the Supreme Courts.⁸ The studies contained in this collection

bunalu%20Konstytucyjnego.pdf (30 November 2019). The synthesis of this report is available in English at <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Functioning%20of%20the%20Constitutional%20Tribunal%202014.pdf> (30 November 2019).

- 8 See e.g. Leszek Garlicki, 'Constitutional Courts Versus Supreme Courts' (2007) 5 *International Journal of Constitutional Law* 44, 44–68; Law 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, Antonia Geisler, Siri Hummel (eds.) *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory* (Peter Lang, 2014) 79, 79–94.

also demonstrate the mutual inspirations of the CCs regarding the development and supplementation of the law. This is also an important element of their law-making activity. The sources of inspiration for CCs are not only the rulings of the CCs operating in other countries, but also the judgements of the above-mentioned international European courts, which undoubtedly contributed to the harmonization of European standards with regard to the protection of human rights and systemic matters. Yet, both the ECtHR and the CJEU benefit from European constitutional traditions, which the conventional CCs largely create and develop in their rulings. The problem of these interactions between the constitutional and national courts, which is frequently described in the literature before referring to the concept of judicial dialogue, is discussed in greater detail in some of the chapters.

In order to address the issue of the CCs' law-making in relation to more European countries, it was necessary to significantly limit the size of particular chapters. Therefore, many specific problems have only been signalled or briefly elaborated (without going into detail). Moreover, we do not consider further some theoretical problems that are directly connected with the topic of our research, such as the issue of legitimacy of CCs,⁹ since our aim was mainly the analysis, description and systematic categorization of different law-making techniques applied in the case-law of European CCs. We hope the results of our research will enrich the discussion on these theoretical issues with new relevant findings.

This book has been prepared as part of the research project entitled 'Specificity of Constitutional Courts law-making and its limits,' which was financed by the Polish National Science Centre (Decision No. 2015/18/E/HS5/00353).

9 On the issue of legitimacy of CCs see e.g. Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2003); Kim Lane Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)' in Wojciech Sadurski, Martin Krygier & Adam Czarnota (eds.), *Rethinking the Rule of Law in Post Communist Europe: Part Legacies, Institutional, and Constitutional Discourses* (Central European University Press 2005) 25, 25–60; Sadurski (n 1) 27–63; Gamper (n 2) 436–440; Rosenfeld & Sajó (n 1) 828–829.