Constitutional adjudication is a phenomenon that has developed through case-based reasoning. Courts and tribunals, when ruling on constitutional matters, not only take into account the applicable domestic and foreign legal regulations, but also judicial decisions that develop and supplement them. An argument based on the court’s own authority or on the authority of other courts, regardless of their national, foreign, or international character, is one of the most significant and persuasive modes of argumentation in current constitutional jurisprudence. Moreover, case-based reasoning enables courts to correct, supplement, and develop the law through its creative interpretation, frequently inspired by previous judicial decisions. These latter judgments are sometimes regarded as binding precedents that determine the content of subsequent decisions in similar cases.

This applies not only to common law countries, but also to civil law jurisdictions that do not have a system of formally binding precedents. In constitutional adjudication, the proper use of the jurisprudential heritage of various courts and tribunals is one of the most challenging issues that has long been the subject of comparative research.

The aim of the authors of this collection of studies was to examine—with regard to courts deciding on constitutional cases—the practice of using references to their own case law and the case law of other courts, as well as to determine the


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significance of this type of argumentation in constitutional adjudication. The volume not only presents the results of this research with respect to selected national and international courts, but also includes a comparative chapter pointing out the similarities and differences in the application of jurisprudential argumentations in all the analysed jurisdictions.

Developing the research methodology for this study required an appropriate selection of courts and tribunals for a comparative analysis. The starting point of our research was the assumption that case-based reasoning is used by all courts and tribunals adjudicating constitutional cases, regardless of whether they are national or international jurisdictions, and regardless of whether these bodies operate in the common law or civil law system. We have adopted a broad understanding of the concept of a constitutional case adjudicated by such courts and tribunals, assuming that it is any case requiring adjudication on the basis of fundamental principles, standards, and values applicable in a given legal order, concerning issues of importance for the functioning of various entities within that legal order, such as individuals, public authorities, states, and international organisations. For this reason, the research not only covered courts functioning within national legal orders, but also international courts functioning within the European legal space. The power of the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) undoubtedly extends beyond the territorial boundaries of the Member States of the Council of Europe and the European Union. Thus, although these courts cannot be regarded as having a global character, they are good examples of international bodies that independently resolve disputes of a constitutional nature and that strongly influence the constitutional orders of States that are members of these international organisations. The choice of the two European courts for comparative studies was further justified by the fact that our research largely focuses on the jurisprudence of constitutional courts operating in the European legal space. For the latter, the ECtHR and the CJEU are the most suitable partners in judicial dialogue on human rights, democracy, and the rule of law.4

Undoubtedly, the main component of this research was the European constitutional courts, for which a comparative perspective was created by their counterparts—on the one hand, supreme courts functioning in common law countries, and on the other hand, the afore-mentioned European international courts. In creating the palette of constitutional courts included in the research, we were guided by the need to show their diversity and dissimilarity.5 Therefore, we have chosen courts established in different historical periods; that is, both those created just after the Second World War and influenced by its events, as well as those established half a

5 For a typology of European constitutional courts’ jurisdiction see, e.g., Victor Ferreres Comella, Constitutional Courts and Democratic Values: A European Perspective (Yale University Press 2009) 7–8.
Introduction

A century later after the fall of communism and the rise of regimes based on democracy and the rule of law. In our research, we have included not only countries wherein the constitutional judiciary has a strong position in the system of State organs and real influence over the shape of the legal order, the situation of the individual, and the functioning of government, but also countries wherein the constitutional judiciary is currently experiencing a serious crisis associated with its subordination to illiberal governments, the loss of the attributes of independence and impartiality, the decline in its institutional authority, and widespread questioning of its legitimacy in the control of the constitutionality of the law. The research shows that the state of democracy and the rule of law in a country have a direct impact on the adjudicating activity of the constitutional courts upholding the supremacy of the constitution and the protection of individual rights, as well as on their case-based reasoning on constitutional issues. The last criterion for selecting countries for comparative legal research was a geographical one. The volume therefore includes constitutional courts representing Western European countries (Germany and Italy), Central European countries belonging to the Visegrad Group (Poland and Hungary), Northern European countries that are part of the Baltic group (Latvia), and Southern European countries from the Balkans (Romania).

The comparative perspective for these European constitutional courts is, as already pointed out, constituted by supreme courts functioning in the common law system, in which the basic form of jurisprudence is argumentation based on precedents and case-based reasoning. We have chosen supreme courts from countries located on two different continents with different historical traditions functioning in differently shaped power structures. What they have in common is their judicial authority and the power to interpret the constitution and develop it creatively. Based on these criteria, we have selected three common law courts for comparative research: the Supreme Court of the United States of America, the Supreme Court of Canada, and the High Court of Australia.

The research of the case law of the aforementioned courts conducted by the contributors to this volume was mainly qualitative in nature. The quantitative research of self-references made by courts and their references to the case law of other national, foreign, and international courts was conducted to a limited extent and only by some authors. Carrying out comprehensive quantitative research would require a detailed analysis of very extensive case law material, which, in the case of the courts analysed, would be the result of their judicial activity spanning several decades, or even—as the example of the US Supreme Court shows—over two centuries. In the case of some of the courts analysed, such partial quantitative research of their case law has already been conducted by other scholars and

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7 See, e.g., Jan Winczorek, ‘Wzorce wykładni konstytucji w świetle analizy treści uzasadnień orzeczeń Trybunału Konstytucyjnego’ in Tomasz Stawecki and Jan Winczorek (eds.), *Wykładnia konstytucji. Inspiracje, teorie, argumenty* (Wolters Kluwer 2014) 387n. This is an
the authors of the chapters concerning those courts included the results of such studies in their analyses.

The contributions presented in this volume determine not only the frequency with which individual courts refer to their own jurisprudence and to the jurisprudence of other national, foreign, and international courts, but also the manner in which citations are made, the motives for using references, and their importance in the overall court argumentation.

The research covers four types of judicial references applied by the courts and tribunals examined; namely, references to their own case law, references to the case law of other national courts, references to the case law of foreign courts ruling on constitutional issues, and references to the case law of international courts.

In order to ensure an equal scope of research and comparable criteria for the analysis of the case law of the aforementioned courts and tribunals, the editor of the book prepared questionnaires with detailed research questions for each category of court included in the study. The questionnaires consisted of four parts, the first of which concerned the position of the court within the judicial system of the state, the next two of which covered the role of self-references of the court and its references to the case law of national, foreign, and international courts, and the final part examined the methodological problems related to the application of case-based reasoning in constitutional adjudication. The questions from the first part concerned the position of the examined court in the structure of state bodies, its relations with other judicial authorities, and the binding effects of its decisions in the vertical and horizontal dimensions.8 This part of the questionnaire ended with questions concerning the possibility of a court being able to deviate from the view expressed in its earlier decisions and the reasons given by that court for having to follow or overrule its own judgments. The next part of the questionnaire contained questions concerning the practice of the court referring by the court to its own case law, including the ways of quoting its own decisions, the reasons given by the court for the necessity of following its own settlements, and the significance of self-references for adjudications in constitutional cases. Further questions concerned the practice of courts referring to the case law of other courts, considering national, foreign, and international courts separately. For each category of courts, in addition to the aforementioned questions concerning the ways in which judgments are cited, the reasons for referring to them, and their significance for constitutional adjudications, questions were also asked about which courts are cited and how often, and if there are any particular reasons for references to those particular courts. The final section of the questionnaire was devoted to the methodology and included such questions.

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8 The vertical binding effects of a court ruling means, among other things, the obligation of other courts to apply the ruling to the matters decided, while the horizontal binding effect means the obligation of the court panels of judges to follow the opinion expressed in previous decisions of that court.
as whether the court has developed a consistent methodology for applying case-based reasoning and whether the court’s awareness of the methodological problems associated with the use of this type of argument was evident from its case law.

The answers to these questions were included in the individual chapters; hence, the chapters, in some parts, have a similar structure and address comparable issues. However, it should be emphasised that the authors were asked to present the results of their research in a manner that they considered to be the most optimal from the point of view of the discussed issue and the specificity of the court in relation to which it was analysed. Therefore, the chapters do not have a uniform structure and the issues taken up by the authors are analysed to a different extent. The final chapter provides a comparative analysis and conclusions drawn from the research.

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I would like to take this opportunity to thank the authors of all the chapters for accepting the invitation to participate in the preparation of this book. They enthusiastically engaged in the research, which was a huge challenge due to the volume of the analysed case law material and the complexity of the legal problems that had to be considered. I hope that the research we have undertaken will be continued in the future and that the preliminary results of this research, which we present in this volume, will be an important reference point for further research addressing the issue of precedents and case-based reasoning in constitutional adjudications.

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