

# TABLE OF CONTENTS

<i>Acknowledgements</i> . . . . .	IX
<i>About the contributors</i> . . . . .	XI

## **Introduction: Unity of law achieved through judicial reasoning** . . . . . 1

*Pavel Ondřejek*

1 The changing role of courts in Central Europe . . . . .	1
2 Structure of the book and overview of individual chapters . . . . .	4
2.1 Theoretical and doctrinal foundations of judicial law-making in Central European countries . . . . .	5
2.2 Pro-systemic and anti-systemic effects of judge made-law and judicial interpretation . . . . .	7

## **Part I THEORETICAL AND DOCTRINAL FOUNDATIONS OF JUDICIAL LAW-MAKING IN CENTRAL EUROPEAN COUNTRIES** . . . . . 13

### ***Ekklesia and Dikasterion*—which body is considered to be *kyrion panton*? (Is it the right question to be asked?) Recent dimensions of an old problem** . . . . . 15

*Alexander Brörtl*

1 Introduction / Εισαγωγή . . . . .	16
2 On the Relationship Between εκκλησια and δικαστηριον in the Athenian Democracy . . . . .	17
3 Strengthening the Judicial Power: The Birth of the Constitutional Review in the United States of America (Marbury v. Madison) . . . . .	25
4 Who Should Be the Guard of the Constitution? . . . . .	27
5 The Sword of Damocles Hanging Over Constitutional Amendments . . . . .	29

### **Legal decision-making in the view of cognitive sciences: Between systematic and casuistic approaches to law** . . . . . 36

*Tomáš Gábriš*

1 Introduction . . . . .	37
2 Systematic versus Casuistic Approach to Law: On the Benefits of Legal Casuistry . . . . .	38
2.1 Problems with the Systematic Approach to Law . . . . .	38
2.2 Casuistic Jurisprudence . . . . .	41
2.3 On the Use of Casuistry in Post-Positivist Legal Thought . . . . .	42
3 Cognitive Science and Legal Problem-Solving . . . . .	43

3.1 Judgment and Decision-Making from a Traditional View of Philosophy and Psychology . . . . .	44
3.2 Judgment and Decision-Making in View of Cognitive Sciences . . . . .	45
3.3 Implications for Legal Thinking (Judgment and Decision-Making of Lawyers) . . . . .	47
4 Conclusions . . . . .	50
<b>Beyond the coherence of legal rules . . . . .</b>	<b>52</b>
<i>Martin Abel</i>	
1 The context of interpretation . . . . .	53
2 Beyond discovering . . . . .	56
3 The pretence of deduction . . . . .	58
4 The place of induction . . . . .	63
<b>Sources of law and settled administrative practice . . . . .</b>	<b>67</b>
<i>Zdeněk Kühn</i>	
1 Position of established (settled) administrative practices within the dogmatics of sources of law . . . . .	68
2 Case law of the Constitutional Court . . . . .	70
3 Case law of the Supreme Administrative Court . . . . .	72
<b>Part II PRO-SYSTEMIC AND ANTI-SYSTEMIC EFFECTS OF JUDGE MADE-LAW AND JUDICIAL INTERPRETATION . . . . .</b>	<b>77</b>
<b>Judicial interpretation as a competence . . . . .</b>	<b>79</b>
<i>Karel Beran</i>	
1 Introduction . . . . .	80
2 What is interpretation of the law and in what ways it differs from interpretation in general? . . . . .	81
3 Interpretation as part of the process of application of the law . . . . .	83
4 What competences are required for interpreting the law? . . . . .	87
5 Conclusion . . . . .	92
<b>How the legislator and jurisprudence can increase the pro-systemic nature of judicial interpretation and application of the law? . . . . .</b>	<b>95</b>
<i>Katarzyna Żák Krzyżanková</i>	
1 Introduction . . . . .	96
2 On the legislator's options to influence the pro-systemic nature of judicial decision-making . . . . .	99
3 On the ability of jurisprudence to influence the pro-systemic nature of judicial decision-making . . . . .	110
4 Conclusion . . . . .	117

## **Maximalism and minimalism in judicial decision-making: How can courts strengthen or weaken the unity of a legal system? . . . 119**

*Pavel Ondřejek*

1	Introduction . . . . .	120
2	Minimalism and maximalism in judicial decision-making . . . . .	123
3	Integrity in law and Janus model of the effects of case law . . . . .	126
4	Pro- and anti-systemic characteristics of a judicial decision in terms of width and depth of arguments . . . . .	128
4.1	Pro-systemic minimalism . . . . .	129
4.2	Pro-systemic maximalism . . . . .	130
4.3	Anti-systemic minimalism . . . . .	132
4.4	Anti-systemic maximalism . . . . .	132
5	Summary . . . . .	134

## **(Trans)Forming the applicable norm by the German type constitutional complaint—The case of Hungary . . . . . 136**

*Fruzsina Gárdos-Orosz*

1	Introduction—the problem of judicial law making . . . . .	137
2	The norm, the court and the German type constitutional complaint in Hungary . . . . .	140
3	Finding and revising the norm created by the ordinary judiciary—the spotlight of the constitutional complaint procedure. . . . .	145
4	The Fundamental Law and the Constitutional Court case law in ordinary jurisprudence . . . . .	150
4.1	Further thoughts on the constitutional change . . . . .	150
4.2	References to CC decisions . . . . .	152
5	The result: examples where the norm created by the ordinary court was changed by the Constitutional Court by constitutional complaint review procedure . . . . .	154
6	Conclusions . . . . .	157

## **Legitimacy of retrospective effects in judicial decision-making process . . . . . 159**

*Jan Tryzna*

1	Introduction . . . . .	160
2	Significance of judicial decision-making for legal order. . . . .	160
3	Retroactive/retrospective judicial decision making. . . . .	168
4	Reasons for retrospective judicial decision making. . . . .	169
5	Prospective effect of judicial decisions . . . . .	170
6	Conclusion . . . . .	171

**Evolutionary vs. static interpretation: Unity or fragmentation  
in the intertemporal interpretation of the European Convention  
on Human Rights?** ..... 173

*Lisa Sonnleitner*

1 Introduction ..... 174

2 The European Convention on Human Rights as a “Living Instrument” ... 175

2.1 A History of Evolutionary Interpretation of the ECHR. .... 175

2.2 The Brighton Process as an Obstacle to Evolutionary Interpretation? ... 177

2.3 Unity versus Fragmentation in the Intertemporal Interpretation of  
the ECHR ..... 178

3 Static and Evolutionary Interpretation and the ECHR Constitution ..... 179

3.1 The Constitutional Triangle of the ECHR ..... 179

3.2 The Roots of Static and Evolutionary Interpretation in the  
Constitutional Triangle. .... 182

4 Evolutionary and Static Interpretation in Balance ..... 184

4.1 The Constitutional Values of the ECHR as Principles ..... 184

4.2 Resolving the Conflict Between Static and Evolutionary Interpretation:  
Cornerstones of a Balancing Model. .... 185

5 Conclusions ..... 187

*Summary* . . . . . 189

*Bibliography* . . . . . 191

*List of case law* . . . . . 205

*Index* . . . . . 209