

A constitutional court is one of the most important institutions in today's democratic States, as it is a guard of the constitution, as well as a guarantor of the constitutional rights and freedoms of individuals. Traditionally, it has been described as a "negative legislator", and thus, as an organ that is only competent to derogate unconstitutional legal provisions. This concept of the passive constitutional court does not adequately describe the role that is currently performed by this organ in democratic States. A constitutional court actively makes law, modifies it and determines the direction of its development. This shift in the character of the constitutional court has been noticed in many states in which this organ functions. However, it sometimes happens, as is the case in Poland, that the constitutional court – counter to its intensive law-making activity – tries to indicate that it is still only a negative legislator. This project, which will be realized by an international research team, will lead to the final demolition of the myth of the constitutional court as a negative legislator. The most important purpose of the project is to depict the specificity of the law-making activity of the constitutional court and the specificity of the law that is the effect of that activity. The law created by the constitutional court is a new source of law, situated outside of the constitutional catalogue of the sources of universally binding law, that is neither civil law nor common law. This is the law that exists practically, but is not always "written", which is legitimized by the decisions of the constitutional court. It turns out that, for a citizen, knowledge of the binding legal acts that are promulgated according to the methods required by the law is insufficient. Currently, their content can be modified and completed by a judgment of a constitutional court. Therefore, in order to reconstruct the legal norms to which he is an addressee, a citizen must be aware of not only the relevant legal provision, but also the judgments of the constitutional court that relate to it. The project explains how the mechanism of the constitutional court's law emerges and functions in Poland, as well as in two countries with far-reaching traditions of judicial review, namely Austria and Germany. The specificity of that law will be presented through its comparison with common law made by courts in the USA and Canada. A constitutional court, though it is regarded as an organ of judicial power, does not create precedents like courts in the common law system, but it does create general and abstract legal norms analogous to the statutory norms enacted by the parliament. Constitutional court law is also applied differently in practice than the common law. The project will not only aim to describe the specificity of the law-making activity of a constitutional court, but also to determine the borders of such activity, as well as the possibility of controlling it. Those borders will be determined by taking into account basic constitutional principles, such as the principle of the division of power, the principle of judicial independence and the principle of the protection of the dignity of the individual and his constitutional rights. In Poland, the current meaning of those principles was determined during a period of political transformation, when the Polish Constitutional Tribunal was regarded as a negative legislator. At present, it is necessary to go outside of those frozen definitions and to settle European trends in defining those principles by reference to opinions in the jurisprudence of countries such as France, Italy and Spain. A proper definition of the content of the aforementioned principles allows us to determine the optimal borders of the law-making activity of a constitutional court.