

CONSTITUTION-BASED POSITIVE LEGISLATURE: A COMPARATIVE STUDY OF INDONESIA, BULGARIA, AND MEXICO

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Abstract

This paper examines the increasing tendency of constitutional judges to function as a “positive legislature,” namely by establishing alternative normative standards rather than merely annulling illegal legislation. The paper used a comparative doctrinal methodology to analyze three jurisdictions: Indonesia's Constitutional Court, Bulgaria's Constitutional Court, and Mexico's Supreme Court. The comparison reveals that Indonesia frequently uses conditional rulings with *erga omnes* effects to effectively establish replacement norms; Bulgaria often mitigates normative vacuums by reviving previous rules and expansive, teleological constitutional interpretation; and Mexico enhances rights protection through the *juicio de amparo* and the gradual establishment of progressive, binding precedent. Based on these patterns, the article suggests a Constitutionally Guided Positive Legislature (CGPL) model that directs the creation of judicial norms through (i) structured and open normative intervention, (ii) temporary constitutional norms with clear boundaries, (iii) substantial democratic justification, and (iv) a test for the separation of powers. CGPL is meant to keep judicial lawmaking in check, ensuring it remains fair and responsible while also protecting rights, delivering real justice, and keeping democracy alive.

Keywords: *Constitutional Court; Constitutional Democracy; Judicial Lawmaking; Positive legislator; Separation of Powers.*

Abstrak

Artikel ini mengkaji kecenderungan yang semakin meningkat dari hakim konstitusi untuk berfungsi sebagai legislator positif, yaitu dengan menetapkan standar normatif alternatif, bukan semata mata membatalkan undang undang yang bertentangan dengan hukum. Artikel ini menggunakan metodologi doktrinal komparatif untuk menganalisis tiga yurisdiksi, yaitu Mahkamah Konstitusi Indonesia, Mahkamah Konstitusi Bulgaria, dan Mahkamah Agung Meksiko. Perbandingan tersebut menunjukkan bahwa Indonesia kerap menggunakan putusan bersyarat yang memiliki akibat hukum *erga omnes* untuk secara efektif membentuk norma pengganti. Bulgaria sering mengurangi kekosongan norma dengan menghidupkan kembali aturan sebelumnya serta menggunakan penafsiran konstitusional yang luas dan teleologis. Sementara itu, Meksiko memperkuat perlindungan hak melalui *juicio de amparo* dan pembentukan preseden mengikat yang progresif secara bertahap. Berdasarkan pola tersebut, artikel ini menawarkan model Legislator Positif yang Dipandu Konstitusi, atau Constitutionally Guided Positive Legislature, yang mengarahkan pembentukan norma yudisial melalui empat prinsip, yaitu intervensi normatif yang terstruktur dan terbuka, norma konstitusional sementara dengan batasan yang jelas, justifikasi demokratis yang substansial, serta pengujian terhadap prinsip pemisahan kekuasaan. Model ini dimaksudkan untuk menjaga agar pembentukan hukum oleh hakim tetap terkendali, adil, dan

bertanggung jawab, sekaligus tetap mampu melindungi hak, menghadirkan keadilan nyata, dan menjaga keberlangsungan demokrasi.

Kata Kunci: Mahkamah Konstitusi, Demokrasi Konstitusional, Pembentukan Hukum oleh Hakim, Legislator Positif, Pemisahan Kekuasaan.

I. Introduction

Hans Kelsen initially described constitutional adjudication as the activity of a "negative legislator." Since then, it has been widely accepted that constitutional courts can only strike down laws that go against the constitution, not create new ones. However, modern court practice in numerous jurisdictions indicates a departure from this traditional position. More and more, constitutional courts are acting as "positive legislators." They don't just strike down laws; they also alter the meaning of regulations, impose conditions that must be met, or create new rules to fill legal gaps.¹ People often call these kinds of decisions an "authority leap" because they appear to be rulemaking without going through the usual steps of drafting laws.

This is especially true in Indonesia. The Indonesian Constitutional Court has not only struck down laws since it was established following changes to the 1945 Constitution (UUD 1945), but has also often added new rules. Decision No. 21/PUU-XII/2014 on pretrial review (*praperadilan*) is one of the clearest examples. In this case, the Court added a new object of review called the "designation of a suspect."² This judgment is seen as a kind of "authority leap" because it created a new rule without following the normal legislative process. In Decision No. 90/PUU-XXI/2023, the Court also revised the age criteria for presidential and vice-presidential candidates in a similar manner. In that decision, the Indonesian Constitutional Court changed the meaning of the forty-year age limit by adding an exception for regional chiefs. Titon Slamet Kurnia and Kuswanto say this decision is an abuse of the Court's jurisdiction as a positive legislator, thereby weakening the separation of powers.³

¹Labib Muttaqin et al., 'Is the Legislator in the Constitutional Court? Examining the Tension Between Judiciary and Democracy in Indonesia', *Journal of Indonesian Legal Studies* 10, no. 1 (2025): 91–134, <https://doi.org/10.15294/jils.v10i1.13494>.

²Agus Prabowo and Agus Manfaluthfi, 'Kajian Yuridis Terhadap Peran Mahkamah Konstitusi Sebagai Positif Legislator Atas Putusan Nomor 21/PUU-XII/2014 Tentang Penambahan Objek Penetapan Status Tersangka Dalam Praperadilan', *DIVERSI: Jurnal Hukum* 3, no. 1 (2018): 93, <https://doi.org/10.32503/diversi.v3i1.158>.

³Titon Slamet Kurnia and Kuswanto Kuswanto, 'Abolishing The Constitutional Court's Role as Positive Legislature: A Preliminary Study', *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* 10, no. 1 (2025): 164–78, <https://doi.org/10.22373/petita.v10i1.775>.

This phenomenon is substantiated by empirical data. Muhammad Alief Farezi Efendi and colleagues report that, in the last eleven years, 107 of the 198 petitions that were granted were decided in a way that was good for the legislator. But only 26 of those choices were implemented by the state entities that were supposed to.⁴ This shows that the Indonesian Constitutional Court has the power to create new legal norms, yet people still rarely follow its decisions. This shows that there is a big problem with putting it into action. This phenomenon is not exclusive to Indonesia. The Constitutional Court of Bulgaria has undergone a similar change. The Court has used evolutionary interpretation (changing the meaning of constitutional provisions to reflect changes in society) and conforming interpretation (reading laws in a way that keeps them in line with the Constitution). In practice, this often takes the place of the legislature's role.

Aleksandar Tsekov contends that the Bulgarian Constitutional Court has operated as a legitimate "lawmaker," but this has led to tensions between the Court and legislative bodies. A comparable trend is evident in comparative European scholarship.⁵ Florczak-Wątor stresses that constitutional courts in a number of nations have evolved from serving solely as negative legislators to actively establishing new normative standards to maintain alignment between the legal order and constitutional norms and human rights principles.⁶

Mexico demonstrates a type of positive-legislator behavior that has been more prominently employed by the Supreme Court than by Indonesia and Bulgaria. The Court plays a key role in making Mexico's political system more democratic, especially between 1995 and 2011. The Supreme Court not only strengthened democratic values by creating a new way of thinking about the law grounded in natural-law principles, but also turned intellectual ideas into a practical, adaptable approach to interpreting the law.⁷ This indicates that judicial rulings have benefited the democratic process. Consequently, the positive-legislator phenomena ought not to be perceived as an outlier, but rather as a universal trend in current constitutional adjudication.

⁴Muhammad Alief Farezi Efendi et al., 'Positive Legislature Decisions by the Constitutional Court: Putusan Positive Legislature Oleh Mahkamah Konstitusi', *Jurnal Konstitusi* 20, no. 4 (2023): 622–39, <https://doi.org/10.31078/jk2044>.

⁵Aleksandar Tsekov, 'The Bulgarian Constitutional Court as a Positive Legislator', in *Rule of Law in Crisis*, 1st edn, by Martin Belov (Routledge, 2022), <https://doi.org/10.4324/9781003349501-17>.

⁶Monika Florczak-Wątor, *Judicial Law-Making in European Constitutional Courts*, 1st edn (Routledge, 2020), <https://doi.org/10.4324/9781003022442>.

⁷Carlos Patiño Gutiérrez, 'The Mexican Supreme Court and Its Contributions to Democratic Transition. An Approach from Legal Philosophy', *Problema. Anuario de Filosofía y Teoría Del Derecho*, 22 June 2022, 193–227, <https://doi.org/10.22201/ijj.24487937e.2022.16.17043>.

Judicial involvement in lawmaking varies from country to country. The Bulgarian Constitutional Court serves as a positive legislator, largely through its interpretation functions, exemplifying a proactive judicial approach; in contrast, other states may confer a more restricted role to courts. But this change also brings up some big problems. First, it weakens the separation of powers by blurring the line between legislative and judicial functions. Second, new standards that arise from court decisions don't come from open, fair processes like laws do. Third, this approach is susceptible to politicization, particularly in political contexts, as demonstrated by Indonesia's case regarding the presidential age requirement. Labib Muttaqin emphasizes that these activities create conflict between the supremacy of the constitution and the sovereignty of the people.⁸

Nonetheless, it is important to stress that the legitimacy of judges to fulfill a norm-creating function akin to that of the legislature is theoretically grounded in constitutional democracy. This authority comes from the Constitution, which is based on the idea of popular sovereignty. In this sense, it is similar to the political legitimacy that legislative bodies have. This type of judicial legitimacy is based on the idea that courts constitute an institutional way for people to express and channel their shared goals through legal reasoning, even while judges are not directly involved in politics.⁹ In other words, even though judges are not chosen through elections, their decisions can nonetheless show what the public wants within the limits of the Constitution's protection of rights and supremacy.

The court's role as a positive legislator exemplifies judicial activism when judges not only interpret statutes but also create new legal standards. Activism like this can have a significant impact on the law, especially when legislative bodies don't respond quickly or at all to society's legal needs. In this way, courts often operate as "gap-fillers," giving legal norms when the legislature doesn't. This function is still controversial, though, because it gives judges significant power, which some people think is akin to that of official parliamentarians.

From the standpoint of international comparative research conducted by Mochammad Arief Agus and Andi Muhammad Irvan Alamsyah, the Indonesian Constitutional Court's intervention in legislative functions, in contrast to practices in more developed jurisdictions, indicates a significant

⁸Muttaqin et al., 'Is the Legislator in the Constitutional Court?'

⁹Juan Javier Del Granado and Jesse Bull, 'The Province of the Rule of Law (Finally) Determined', *Journal of Advanced Research in Law and Economics* 10, no. 1 (2019): 173, [https://doi.org/10.14505/jarle.v10.1\(39\).18](https://doi.org/10.14505/jarle.v10.1(39).18).

disparity in institutionalization. They contend that Indonesia's positive-legislator practice is still in its nascent phase and lacks a solid normative basis. This differs from what many other countries have done, which is to clearly define the constitutional court's function in filling legal gaps, including its limits, how it operates, and its legitimacy. Thus, they stress the importance of Indonesia learning from other countries, especially in strengthening oversight systems and holding the Constitutional Court accountable for its rulings.¹⁰

Additionally, the extent of judicial participation in the formulation of norms and regulations differs throughout countries. The Bulgarian Constitutional Court's function as a positive legislator, executed through its interpretative activities, exemplifies a proactive judicial stance, in contrast to other jurisdictions that may confer a more restricted role to courts.¹¹ This emphasizes that a positive legislator is not a consistent or universal phenomenon; instead, it is significantly influenced by each country's institutional framework, legal heritage, and political environment.

In Indonesia, Bulgaria, and Mexico, the phenomenon of positive legislator exhibits a dual nature: it serves as a progressive tool for addressing legislative deficiencies while simultaneously posing a potential risk to representative democracy. This discussion necessitates meticulous comparative investigation to ascertain a suitable equilibrium between the efficacy of constitutional protection and democratic legitimacy.

II. Method Research

This study employs normative legal research (doctrinal legal research)¹² to analyze and compare the practice of positive legislation by constitutional adjudicative bodies in Indonesia, Bulgaria, and Mexico. The selection of a normative legal research design is predicated on the study's focus on legal norms, doctrine, judicial decisions, and theoretical frameworks regarding the role of courts in establishing legal norms, rather than on the empirical conduct of actors or the sociological ramifications of such practices.

¹⁰Mochammad Arief Agus and A. Alamsyah, 'An Analytical Study on The Intervention of The Legislature to The Constitutional Court In Indonesia Compared to Developed Countries', *Indonesia Law Review* 12, no. 3 (n.d.), <https://doi.org/10.15742/ilrev.v12n3.2>.

¹¹Tsekov, 'The Bulgarian Constitutional Court as a Positive Legislator'.

¹²Doctrinal legal research is a traditional methodology in legal scholarship that focuses on identifying, interpreting, and applying legal rules through the analysis of legal sources such as statutes, case law (jurisprudence), and general legal principles. Stefan Theil, 'Carefully Tailored: Doctrinal Methods and Empirical Contributions', *Oxford Journal of Legal Studies* 45, no. 4 (2025): 1047–75, <https://doi.org/10.1093/ojls/gqaf029>.

The study predominantly employs a comparative law methodology to identify parallels and variations in the positive-legislating techniques employed by the Indonesian Constitutional Court, the Bulgarian Constitutional Court, and Mexico's Supreme Court. The research also uses a conceptual approach to examine the concepts of positive and negative legislator, judicial activism, judicial restraint, and the separation of powers. This method is essential for developing a theoretical framework that elucidates the legitimacy, constraints, and constitutional ramifications of judicial lawmaking. Lastly, a case study examines important decisions that demonstrate good practices by lawmakers in each country.

Data analysis is conducted using a prescriptive-analytical method. That is, the study does not merely describe positive-legislating practices in each country, but also assesses their implications for the rule of law, legal certainty, and the separation of powers. Through comparative analysis, this research seeks to formulate general patterns, identify key similarities, and highlight fundamental differences in judicial lawmaking practices, while also offering a normative reflection on the ideal limits of constitutional adjudication within modern democratic systems.

III. Result & Discussion

A. The practice of “positive legislature” in the Indonesian Constitutional Court, the Bulgarian Constitutional Court, and Mexico's Supreme Court

1. The practice of “positive legislature” in the Indonesian Constitutional Court

The Constitutional Court's role as a positive legislator is seen in several rulings that not only annul statutory standards but also establish new norms to address legal deficiencies. Geofani Milthree Saragih, Mirza Nasution, and Eka NAM Sihombing all agree that the Constitutional Court has no choice but to get involved in the legislative process in some cases. This is because the Constitution says that citizens' constitutional rights must be protected even if there are no laws in place to do so. Geofani and colleagues assert that this practice creates a concurrent conceptual conflict between the principles of judicial activism and judicial restraint, as constitutional judges are compelled to assume a more progressive stance, risking transgressing the formal boundaries of their authority as protectors of the Constitution.¹³

¹³Geofani Milthree Saragih et al., ‘Judicial Review Oleh Mahkamah Konstitusi: Judicial Activism vs. Judicial Restraint Dalam Perspektif Kebebasan Kehakiman: Judicial Review by the Constitutional Court: Judicial Activism vs. Judicial Restraint in the Perspective of Judicial Freedom’, *Jurnal Konstitusi* 22, no. 1 (2025): 039–065, <https://doi.org/10.31078/jk2213>.

Decision No. 46/PUU-VIII/2010 about the legal status of children born outside of marriage is one of the most often cited examples of how the Constitutional Court acts as a positive legislator. The Court's decision not only invalidated Article 43(1) of the Marriage Law, which said that a child born outside of marriage only has a civil relationship with the mother, but it also established a new rule that such a child has a civil relationship with the biological father, as long as paternity can be proven through science and technology or other forms of evidence recognized by law.¹⁴ This decision is certainly a conditionally constitutional one. In other words, the Court didn't just throw out a discriminatory norm; it also formulated a new one to protect children's rights. Its practical impact is significant: thousands of children who previously lacked legal recognition of their rights to their biological dads have since gained enhanced legal standing.

Decision No. 102/PUU-VII/2009, which states that citizens who are not on the Permanent Voters List (Daftar Pemilih Tetap/DPT) can use a national identity card (KTP), is another example of the Constitutional Court serving as a good legislator. The original election law said that only registered voters with the DPT may vote. The Court found that this restriction violated the constitutional norm protecting the freedom to vote. Not only did it make the norm invalid, but it also established a new rule allowing those with a valid KTP to vote at the polling place closest to where they live.¹⁵ This decision was a conditional ruling that found the law unconstitutional and created a new rule that went into effect right away. It had a significant effect on later elections, as millions of people who may have lost their right to vote were able to participate in the democratic process.

In addition, Decision No. 5/PUU-V/2007 on independent candidates in regional head elections (*Pilkada*) is significant proof that the Court is a good legislator. The old law said that only political parties could propose people for regional office. The Court said that citizens can also run as independents; therefore, that restriction is no longer legal.¹⁶ This ruling not only upheld the principle of political equality but also changed Indonesia's voting system immediately. After the decision, independent candidates were allowed to run in regional elections, and in certain cases,

¹⁴Anwar Hafidzi et al., 'The Biological Fathers Have Civil Rights With Evidence And Conviction Of Their Children', *Jurnal Ilmiah Al-Syir'ah* 18, no. 2 (2020): 127, <https://doi.org/10.30984/jis.v18i2.1127>.

¹⁵Bagus Surya Prabowo, 'Menggas Judicial Activism Dalam Putusan Presidential Threshold Di Mahkamah Konstitusi', *Jurnal Konstitusi* 19, no. 1 (2022): 073, <https://doi.org/10.31078/jk1914>.

¹⁶Bayu Mahendra, 'A Commentary: The Inadmissibility of Non-Indonesian Citizens in Judicial Review before the Indonesian Constitutional Court', *Constitutional Review* 3, no. 2 (2018): 208, <https://doi.org/10.31078/consrev324>.

they even won. So, by making this ruling, the Court filled a legal void and created a new normative rule, something the legislature would usually do.

The examples provided illustrate that Constitutional Court decisions characterized as conditionally constitutional or conditionally unconstitutional are not only procedural judicial instruments; they possess significant social and political ramifications. Such decisions do not pertain solely to the individual petitioners; they are applicable *erga omnes*, so binding all citizens. This lends Constitutional Court decisions a statutory meaning regarding their general applicability, bolstering the assertion that Indonesia's Constitutional Court has, in reality, fulfilled a legitimate positive-legislator role.

From a legal and constitutional perspective, the Indonesian Constitutional Court's move toward positive legislative practices should not be seen as a simple departure from its original purpose as a negative legislator. Instead, it should be seen as a natural result of the 1945 Constitution's open nature as a constitutional text.¹⁷ The Constitution of Indonesia contains many rules grounded in principles and ideas, such as protecting democracy, guaranteeing constitutional rights, and treating everyone equally under the law. These rules need to be clarified by judicial interpretation. When the legislature is slow or fails to turn these ideas into operational rules, the Court has to step in and make changes to keep the Constitution from getting stuck. In this regard, the Court's positive-legislator role may be perceived as a rectifying constitutional mechanism, rather than a unilateral appropriation of legislative authority.

Additionally, the assertion that the Constitutional Court's positive-legislator tactics erode the separation of powers ought to be contextualized within the contemporary paradigm of checks and balances, rather than a stringent separation-of-powers framework. In modern constitutional thought, the separation of powers is not perceived as complete isolation among the branches of government, but rather as a system of reciprocal oversight intended to avert the supremacy of one branch over the others. Constitutional Court decisions that create new normative content often serve as corrective measures in response to the legislature's failure to meet its constitutional responsibilities.¹⁸ In this sense, positive legislating does not signify judicial supremacy; instead, it

¹⁷Martha C. Beck and Polish Academy of Sciences, 'Creating Global Civilization: Integrating Greek Philosophy and Culture with Indonesian Political Philosophy and Culture', *Dialogue and Universalism* 35, no. 1 (2025): 149–75, <https://doi.org/10.5840/du202535110>.

¹⁸Oly Viana Agustine et al., 'Constitutional Review of Criminal Norms: Does Indonesia Need Judicial Activism?', *The International Journal of Human Rights* 27, no. 4 (2023): 772–88, <https://doi.org/10.1080/13642987.2023.2185608>.

is a method of constitutional enforcement aimed at a legislature that is neglectful or inadequately responsive to the Constitution's directives.¹⁹

From the perspective of constitutional law doctrine, the primary issue regarding the Constitutional Court's positive-legislator practice is not whether the Court has the authority to establish norms, but rather the lack of definitive guidelines delineating the scope and limitations of such normative intervention. When the standards established by Constitutional Court rulings are excessively intricate, technocratic, and enduring, the Court jeopardizes its role as a constitutional adjudicator and may inadvertently become a policymaker. This is the point at which the risk of judicial overreach arises. This is when the court stops merely enforcing the Constitution and starts deciding public policy, which should always be up for debate in a democracy. Without a strong set of rules, positive-legislator activities could lead people to rely more on the Constitutional Court and weaken the DPR's legislative function structurally.²⁰ Without a strong set of rules, positive-legislator activities could lead people to rely more on the Constitutional Court and weaken the DPR's legislative function structurally.

Therefore, from a normative standpoint, the Constitutional Court's legitimacy to act as a positive legislator can be justified only insofar as three principal conditions are met. First, there must be a legal vacuum or a norm that demonstrably violates citizens' constitutional rights. Second, there must be an absence of effective legislative response within a reasonable time frame. Third, the norm articulated by the Court must be temporary (an interim norm) and minimalist, limited to ensuring the effective enjoyment of constitutional rights until the legislature enacts further regulation. Without these three conditions, positive-legislator practices risk losing their constitutional foundation and devolving into unaccountable judicial legislation.

Based on the foregoing analysis, it can be concluded that the Indonesian Constitutional Court's positive-legislator practice constitutes a historical and functional inevitability. In performing its mandate, the Court cannot reasonably confine itself to merely annulling unconstitutional norms without offering a normative solution, because doing so would generate

¹⁹Ivana Eka Kusuma Wardani, 'Peran Mahkamah Konstitusi Dalam Mengawal Prinsip Checks and Balances Terhadap Dewan Perwakilan Daerah Di Indonesia', *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 2, no. 2 (2019): 239–52, <https://doi.org/10.24090/volksgeist.v2i2.2883>.

²⁰Ernst-Ulrich Petersmann, 'From Integration Through Law to Global Community Law?: Between Arbitration, Adjudication, and Judicial Overreach', in *The Global Community Yearbook of International Law and Jurisprudence 2020*, by Ernst-Ulrich Petersmann (Oxford University Press, 2021), <https://doi.org/10.1093/oso/9780197618721.003.0003>.

legal vacuums and jeopardize the protection of citizens' constitutional rights. The Court's positive-legislator function should therefore be positioned as a constitutional emergency valve, rather than as a permanent mode of lawmaking. A rigorous legal analysis requires that the debate move beyond the dichotomy of judicial activism versus judicial restraint and instead focus on designing institutional arrangements capable of balancing constitutional rights protection, legal certainty, and democratic legitimacy.

2. Positive-Legislator Practices in the Bulgarian Constitutional Court

The Bulgarian Constitutional Court (BCC) plays a significant role in the country's legal and political landscape. It represents one of the most complex and progressive manifestations of positive-legislator authority in Eastern Europe. In practice, the BCC does not function solely as a negative legislator that annuls unconstitutional statutes; it also actively shapes, modifies, and revitalizes legal norms through creative, teleological constitutional interpretation. This functional shift signals the Bulgarian Constitutional Court's transformation in enforcing principles of substantive justice and legal certainty, both of which are essential to sustaining the rule of law and constitutional supremacy.²¹ This functional shift marks the BCC's broader transformation in enforcing principles of substantive justice and legal certainty, both of which are essential to sustaining the supremacy of law.²²

Historically, the Bulgarian Constitutional Court was designed on a Kelsenian model that presupposes a clear separation between judicial and legislative functions. However, since the 1990s, Bulgarian constitutional practice has evolved in a more dynamic direction, with the Court increasingly engaged in filling legal gaps arising from deficiencies in statutory drafting and from rapid social and political change.²³ In Decision No. 22 of 1995, for example, the Court held that when a statute is declared unconstitutional, the legal provisions previously repealed by that statute must automatically be revived in order to prevent a normative vacuum.²⁴ The act of reactivating norms that have previously lost their legal force is not explicitly provided for in the constitution and may therefore be understood as a form of judicial norm-creation..

²¹Tsekov, 'The Bulgarian Constitutional Court as a Positive Legislator'.

²²Stilyan Yotov, 'Material Justice and Formal-Procedural Rule of Law', in *Rule of Law in Crisis*, 1st edn, by Martin Belov (Routledge, 2022), <https://doi.org/10.4324/9781003349501-15>.

²³Martin Belov, 'Mastering Emergency Situations', in *Courts and Judicial Activism under Crisis Conditions*, 1st edn, by Martin Belov (Routledge, 2021), <https://doi.org/10.4324/9781003200666-13>.

²⁴Chris Hanretty, 'The Bulgarian Constitutional Court as an Additional Legislative Chamber', *East European Politics and Societies: And Cultures* 28, no. 3 (2014): 540–58, <https://doi.org/10.1177/0888325414530149>.

This practice has been further reinforced through the use of interpretation in conformity, an interpretive technique that enables the Court to preserve a statute's validity by construing it in a manner consistent with the Constitution, rather than annulling it in its entirety.²⁵ Through this approach, the Court has frequently introduced limitations or exceptions that were not expressly formulated by the legislature. For instance, in Case No. 3 of 1995, the Court reviewed the constitutionality of a parliamentary regulation requiring state officials to appear before a legislative committee. Rather than striking down the provision, the Court crafted an exception for the President, the Vice President, and the constitutional judges. By doing so, the Court substantively reconstructed the norm under review, produced a new binding construction, and effectively positioned itself as a co-legislative actor.

Furthermore, the Bulgarian Constitutional Court has consistently relied on teleological and evolutionary interpretation to expand the meaning of the constitution in line with social dynamics and contemporary development. In Case No. 7 of 2015, the Court affirmed that the Constitution should be understood as a living and adaptive normative instrument rather than a static text that merely constrains state action. Through this approach, the Court articulated new normative constructions by interpreting fundamental constitutional values, including democracy, justice, and the rule of law, as principles that are dynamic and context-sensitive.²⁶ Accordingly, the Court does not merely read the constitutional text; it reconstructs its meaning to generate new legal implications, a practice that conceptually reflects the character of positive legislation.

In Case No. 22 of 2002 and Case No. 6 of 2006, the Bulgarian Constitutional Court went even further by endorsing the doctrine of the “unconstitutional constitutional amendment.” Under this view, the Court possesses authority to review, and even annul, constitutional amendments when such amendments are deemed incompatible with the state's fundamental constitutional principles.²⁷ Through this doctrine, the Court does not merely safeguard the constitution; it also constructs the boundaries of constituent power, thereby positioning itself within the process of the highest form of lawmaking. This illustrates that the Court has entrenched its role as a positive

²⁵Matthias Klatt, ed., *Constitutionally Conforming Interpretation – Comparative Perspectives: Volume 2: Connections and Analysis*, 1st edn (Hart Publishing, 2025), <https://doi.org/10.5040/9781509953837>.

²⁶Peter Petkoff, ‘Freedom of Religion or Belief in the Jurisprudence of the Bulgarian Constitutional Court I’, *Religion, State and Society* 36, no. 3 (2008): 225–50, <https://doi.org/10.1080/09637490802260179>.

²⁷Krassen Stoichev, ‘The Issue of Legal Gaps in the Law in the Jurisprudence of the Constitutional Court of the Republic of Bulgaria’, *Plovdiv University »Paisiy Hilendarski«* 7 (n.d.): 94–100.

legislator in the most substantive sense, namely as an institution capable of rewriting and reconfiguring the state's supreme legal order.

Nevertheless, the Bulgarian Constitutional Court's practice as a positive legislator has not been free of controversy. First, a fundamental debate persists over the limits of the Court's authority to create norms without infringing on the principle of the separation of powers. Some observers argue that the Court's judicial activism in formulating new legal norms risks diminishing Parliament's legislative role and disrupting the constitutional balance among branches of state power. Second, the Court has often been drawn into political conflict, particularly when its decisions concern strategic and sensitive issues such as national defense policy, freedom of the press, and the allocation of authority between executive and legislative institutions.²⁸ Third, low public trust in Bulgaria's judiciary, driven by concerns over corruption and institutional opacity, further undermines the Court's legitimacy in exercising a positive-legislator role.²⁹

Despite these criticisms, it is difficult to deny that the Bulgarian Constitutional Court has become a pivotal institution in the development of modern constitutional law. Through its innovative decisions, the Court has restored lapsed norms, filled legal gaps, and aligned constitutional meaning with contemporary democratic values. In theoretical terms, this practice reflects an evolution from the Court's function as a guardian of the constitution toward a role as an architect of the constitutional order, in which the Court not only safeguards constitutional supremacy but also actively shapes the trajectory of national legal development.

Accordingly, the Bulgarian Constitutional Court's practice as a positive legislator can be understood as a construct resting on three principal foundations. First, the Court employs a mechanism of legal restoration (law resurrection), namely the revival of repealed norms, to prevent legal vacuums following the invalidation of statutes found unconstitutional. Second, the Court employs conformity-based and teleological interpretive techniques by construing statutes to preserve their compatibility with the Constitution. This may include adding to, limiting, or substantially reconstructing the norm under review. Third, the Court has developed a constitutional-amendment control function by creating a new legal doctrine that authorizes it to

²⁸Jan Malíř and Jana Ondřejková, 'Law-Making Activity of the Czech Constitutional Court', in *Judicial Law-Making in European Constitutional Courts*, 1st edn, by Monika Florczak-Wątor (Routledge, 2020), <https://doi.org/10.4324/9781003022442-6>.

²⁹Stoichev, 'The Issue of Legal Gaps in the Law in the Jurisprudence of the Constitutional Court of the Republic of Bulgaria'.

assess, and in certain circumstances invalidate, constitutional amendments found to be inconsistent with the state's fundamental principles. Taken together, these three pillars demonstrate that the Court functions not only as an arbiter of constitutionality but also as a normative actor that actively shapes the trajectory of Bulgaria's constitutional development.

These practices further confirm that the Bulgarian Constitutional Court is not merely an institution that supervises the constitutionality of legal norms, but also performs a creative role in shaping constitutional law. Through normative interventions that are restorative, interpretive, and corrective with respect to constitutional change, the Court emerges as an active participant in the process of constitutional lawmaking. This role positions the Bulgarian Constitutional Court as a salient example of the evolution of modern constitutionalism, while also illustrating how judicial power can transform into a norm-producing force within a dynamic, adaptive constitutional system.

3. Positive-Legislator Practices in Mexico's Supreme Court

In Mexico, the evolution of constitutional adjudication has positioned the Supreme Court and the federal judiciary in a strategically important role as instruments of legal engineering, thereby contributing significantly both to the country's democratic transition and to the consolidation of the rule of law. The Supreme Court gained renewed political and juridical legitimacy through a series of constitutional reforms in the 1990s, which substantially expanded judicial authority to conduct constitutional review of legislation, and, according to some interpretations, even of constitutional amendments. Nevertheless, the scope and implications of this expanded authority remain the subject of sustained and intense debate among scholars and political actors.³⁰

A central instrument in Mexico's constitutional legal system is the *juicio de amparo*.³¹ Through this mechanism, the Supreme Court developed the doctrine of control de constitucionalidad ex officio, which expands the duty of federal judges to actively review the constitutionality of substantive law, rather than limiting review to procedural aspects alone. The decision in Contradicción de tesis No. 351/2014 is a key marker of this shift, affirming that judges

³⁰Fransisca Pou Giménez, et al., 'Amicus Curiae: Considerations on the Judicial Review of Constitutional Amendments', *Isonomia* 2025-Spring, no. 62 (2025): 208–34, <https://doi.org/10.5347/62/2025/837>.

³¹The *juicio de amparo* is a distinctive legal remedy in Latin America, particularly in Mexico, designed to protect individuals' constitutional rights against violations arising from governmental acts or omissions. Lydia Brashear Tiede and Susan Achury, 'Challenging Authorities' (in) Action via Amparos', in *Research Handbook on Law and Courts*, ed. Susan M. Sterett and Lee D. Walker (Edward Elgar Publishing, 2019), <https://doi.org/10.4337/9781788113205.00016>.

must not remain passive; instead, they bear a proactive obligation to safeguard constitutional supremacy in every case they adjudicate.³² This development has pushed Mexico's judiciary closer to a positive-legislator role and marks a fundamental departure from the classical civil-law tradition that once treated judges primarily as mere mouthpieces of statutory law. Over the past decade, this shift has become increasingly evident through the recognition of judicial precedent as a binding source of law, thereby strengthening judges' position as norm-makers within Mexico's constitutional practice.³³

One concrete illustration of this development can be found in Amparo en Revisión No. 1046/2012, in which Mexico's Supreme Court opened space for the expansion of the control de constitucionalidad doctrine by recognizing that judges have a duty to assess the conformity of substantive legal norms with the constitution, even though at that early stage the ruling was still classified as a tesis aislada. This trajectory was later consolidated through Contradicción de tesis No. 351/2014, which expressly established a proactive constitutional-review obligation for all judges.³⁴

Another example that underscores the Court's role as a positive legislator is its line of decisions recognizing same-sex marriage. Beginning in 2015, through various amparo proceedings, the Supreme Court held that limiting marriage exclusively to heterosexual couples violates the principles of equality and non-discrimination.³⁵ In practice, these rulings established a new normative framework that bound state authorities, even though the rules were not explicitly articulated in the constitutional text. This development, therefore, illustrates, with particular clarity, the norm-creating function exercised by Mexico's constitutional adjudicative system.

Over time, discourse on the role of Mexico's Supreme Court has been shaped by a conceptual tension between a legalistic approach, which emphasizes strict adherence to the constitution's textual meaning, and an interpretivist approach, which affords broader space for judicial creativity

³²Juan Manuel Acuña, 'Constitutional Control in the "Juicio de Amparo". Critical Study of the Contradiction of Thesis 351/2014', *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, 27 June 2024, e17505, <https://doi.org/10.22201/ijj.24484881e.2024.51.17505>.

³³Rubén Sánchez Gil, 'Judicial Precedent in Mexico. Constitutional Basis and Basic Problems', *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional* 1, no. 43 (2020): 377, <https://doi.org/10.22201/ijj.24484881e.2020.43.15189>.

³⁴Acuña, 'Constitutional Control in the "Juicio de Amparo". Critical Study of the Contradiction of Thesis 351/2014'.

³⁵Mauro Arturo Rivera León, 'Otero's Grave? Nature, Functioning and Problematics of the General Declaration of Unconstitutionality in Mexico', *Anuario Iberoamericano de Justicia Constitucional* 26, no. 1 (2022): 57–88, <https://doi.org/10.18042/cepc/aijc.26.03>.

in interpreting and operationalizing democratic and human rights principles in response to social dynamics and contemporary needs.³⁶ In practice, Mexico's Supreme Court has increasingly gravitated toward an interpretivist orientation that enables it to exercise a positive-legislator function, particularly in the context of democratic transition and consolidation. Nevertheless, this orientation is not free from normative difficulty, because it carries the risk of excessive expansion of judicial authority.³⁷

Several judicial decisions, particularly in the electoral context, exhibit modes of reasoning that may erode democratic legitimacy. This raises a critical question regarding the proper limits of a positive-legislator role, so that the court does not drift into the position of a political actor that ultimately weakens constitutionalism. Although the literature does not always explicitly label it "positive legislating," the Mexican Supreme Court's practice of expanding normative standards, shaping social policy, and strengthening human rights protections demonstrates the substantive characteristics of positive legislation.³⁸ This role situates the Court not merely as an interpreter of law, but also as a moral and social architect that helps construct the direction of legal development and democracy in Mexico.

Empirically, available data also suggest a correlation between the Supreme Court's rising judicial activism and declining levels of public trust in the legislative branch. Reports by democracy research institutions in Latin America indicate that legislative stagnation, political fragmentation, and low parliamentary effectiveness have encouraged the public and social actors to increasingly rely on courts as the primary arena for resolving normative conflicts.³⁹ In this context, the Mexican Supreme Court's positive-legislator function may be understood as an institutional response to failures of political representation, even as it simultaneously increases the burden of legitimacy the judiciary must bear.

When the Court goes too far in formulating social policy, for example, in areas such as education, health, or budgetary redistribution, judicial decisions often encounter resistance from

³⁶Arianna Sanchez et al., 'Legalist vs. Interpretativist: The Supreme Court and the Democratic Transition in Mexico', *SSRN Electronic Journal*, ahead of print, 2009, <https://doi.org/10.2139/ssrn.1499490>.

³⁷José Oliveros Ruiz, 'Report on Abusive Judicial Review of Electoral Matters', *Mexican Law Review*, 9 August 2023, 43–76, <https://doi.org/10.22201/ijj.24485306e.2023.1.18457>.

³⁸Juan F. Gonzalez-Bertomeu and Roberto Gargarella, eds, *The Latin American Casebook*, 0 edn (Routledge, 2016), <https://doi.org/10.4324/9781315556291>.

³⁹José Fernández-Albertos and Víctor Lapuente, 'Doomed to Disagree? Party-Voter Discipline and Policy Gridlock under Divided Government', *Party Politics* 17, no. 6 (2011): 801–22, <https://doi.org/10.1177/1354068810376780>.

the executive and legislative branches at both the federal and state levels. Implementation data indicate that not all norms issued through judicial rulings can be effectively implemented, especially when they require budgetary support or extensive administrative change. This underscores that judicial positive legislating has implementational capacity limits that political legislatures do not share.

Accordingly, Mexico's experience shows that positive-legislator practices by the Supreme Court constitute an ambivalent phenomenon. On the one hand, they have contributed tangibly to human rights protection, the strengthening of equality, and democratic consolidation in the post-authoritarian period. On the other hand, such practices generate risks of democratic delegitimation, inter-institutional conflict, and excessive dependence on courts as the primary source of norm creation. Therefore, the principal lesson from Mexico is not to accept or reject positive legislation in a rigid dichotomy, but rather to formulate an institutional design capable of balancing judicial creativity with democratic accountability, so that courts remain guardians of the constitution without becoming dominant political actors within the constitutional order.

B. Similarities and Differences in Positive-Legislator Practices in the Indonesian Constitutional Court, the Bulgarian Constitutional Court, and Mexico's Supreme Court

1. Similarities in Positive-Legislator Practices in the Indonesian Constitutional Court, the Bulgarian Constitutional Court, and Mexico's Supreme Court

When viewed through the lens of practice in the Indonesian Constitutional Court, the Bulgarian Constitutional Court, and Mexico's Supreme Court, it becomes clear that positive legislation is not a localized anomaly, but rather a structural feature of modern constitutionalism. The most fundamental similarity lies in a shared point of departure: all three institutions were normatively designed within traditions of judicial review that initially cast constitutional adjudicators as negative legislators. Indonesia and Bulgaria explicitly adopted a Kelsenian model, whereas Mexico emerged from a civil-law tradition that historically positioned judges as "the mouthpiece of the statute." Yet in constitutional practice, all three institutions have moved beyond their original design under comparable pressures, most notably the legislature's inability or slow pace in translating constitutional principles into effective operational norms.

A further similarity concerns the constitutional texts being interpreted. The constitutions of Indonesia, Bulgaria, and Mexico each contain open-ended, abstract, and principle-based provisions, especially regarding human rights, democracy, and the rule of law. This constitutional structure creates broad interpretive space for the Indonesian, Bulgarian, and Mexican

constitutional courts. When statutory norms prove discriminatory, exclusionary, or insufficiently responsive to social realities, these courts have relied on interpretive authority to address the resulting legal gaps. In Indonesia, this dynamic is visible in conditionally constitutional or conditionally unconstitutional decisions; in Bulgaria, in the restoration of earlier norms and conformity-based interpretation; and in Mexico, in the doctrine of control de constitucionalidad ex officio and the strengthening of binding judicial precedent. Although the techniques differ, the substantive outcome is similar: the courts do not stop at invalidation, but instead articulate substitute norms that take immediate effect and apply generally.

Another prominent commonality lies in the normative justifications invoked. Across jurisdictions, positive legislating is consistently framed as a constitutional response aimed at protecting fundamental rights and preventing legal vacuums. The Indonesian Constitutional Court has justified intervention to secure voting rights, political equality, and child protection; the Bulgarian Constitutional Court has defended its approach as necessary to preserve legal certainty and the constitution's fundamental values; and Mexico's Supreme Court has grounded its activism in equality, non-discrimination, and the incorporation of international human rights standards. In this sense, positive legislating is not presented as an arbitrary expansion of judicial power, but as a form of constitutional enforcement when the legislature fails to discharge its constitutional mandate.

The three experiences also share a recurrent pattern of institutional friction. Each reveals broadly similar conflict dynamics between the judiciary and the legislature. In Indonesia, the Constitutional Court is often criticized for blurring separation-of-powers boundaries and weakening the DPR's democratic legitimacy; in Bulgaria, judicial activism is viewed as reducing Parliament's legislative role and provoking open political contestation; and in Mexico, the Supreme Court's activism has generated concerns about abusive judicial review and the erosion of electoral democratic legitimacy. Put differently, in all three countries, positive legislating triggers a recurring tension between substantive justice and democratic legitimacy, and between the effective protection of rights and the principle of political representation.

Moreover, there is convergence in the nature of the norms produced. Judicially generated norms in Indonesia, Bulgaria, and Mexico tend to be self-executing, erga omnes in effect, and functionally equivalent to legislation in terms of general applicability. Indonesia's decisions on children born outside marriage, independent candidacies, or voting rights; Bulgaria's resurrection

of prior norms and its doctrinal control over constitutional amendments; and Mexico's jurisprudence on same-sex marriage and proactive constitutional review obligations all demonstrate that courts are not merely interpreting law, but are effectively "writing" law. This similarity underscores that positive legislating is not simply a matter of interpretive intensity, but of concrete normative consequences for the national legal order.

At the same time, all three jurisdictions exhibit a shared "boundary problem." None of the three systems provides clear constitutional parameters defining how far courts may go in crafting new norms. As a result, positive-legislator practices develop in a case-by-case manner, shaped by judicial composition and political context. Indonesia's lack of explicit statutory guardrails, Bulgaria's challenges of public trust in the judiciary, and Mexico's implementation constraints collectively indicate that the judicial role has expanded faster than accountability frameworks. This structural similarity is significant: the expansion of judicial norm-creation has not been adequately matched by institutional design that specifies limits and oversight mechanisms.

Accordingly, the similarities in positive-legislator practices across Indonesia, Bulgaria, and Mexico can be summarized in four interrelated features: structural drivers rooted in legislative failure, the exploitation of interpretive space created by open constitutional texts, a strong rights-protective orientation, and persistent tension over democratic legitimacy. Together, these experiences suggest that positive legislating is a global symptom of contemporary constitutional transformation rather than an idiosyncratic deviation. At the same time, they also demonstrate that, absent clear normative constraints, such practices may systematically recalibrate the balance of powers. The shared lesson, therefore, is not to reject or embrace positive legislating as a simple binary choice, but to develop a constitutional framework capable of channeling judicial creativity toward substantive justice without sacrificing democratic legitimacy.

2. Differences in Positive-Legislator Practices in the Indonesian Constitutional Court, the Bulgarian Constitutional Court, and Mexico's Supreme Court

Building on the discussion of positive-legislator practices in Indonesia, Bulgaria, and Mexico outlined above, the differences among these three jurisdictions can be identified sharply across four interrelated dimensions: (1) the constitutional basis of legitimacy, (2) the judicial techniques employed, (3) the degree and scale of intervention into legislative functions, and (4) the relationship between courts and each country's political-democratic context. These differences

demonstrate that, although all three institutions have moved beyond the classic negative-legislator model, the character and implications of their positive-legislator practices are far from uniform.

First, with respect to legitimacy and constitutional background, Indonesia exhibits a pragmatic, responsive form of positive legislation. The Indonesian Constitutional Court was originally designed as a negative legislator; consequently, any move toward articulating new norms tends to appear as a “doctrinal anomaly.” Its legitimacy does not derive from an explicit constitutional clause authorizing judicial norm creation, but rather from practical necessity: preventing legal vacuums and safeguarding constitutional rights. For this reason, positive-legislator practices in Indonesia remain normatively contested and are often criticized within separation-of-powers discourse.

By contrast, Bulgaria displays a more doctrinal and systemic foundation. Although it likewise operates within a Kelsenian framework, the Bulgarian Constitutional Court has progressively constructed normative legitimacy through early landmark decisions that later crystallized into more settled constitutional doctrines, such as law resurrection and the doctrine of the unconstitutional constitutional amendment. Mexico, in turn, derives the legitimacy of its positive-legislator function primarily from constitutional reforms and the transformation of the judiciary in the post-authoritarian period. In Mexico, the Supreme Court’s creative role is frequently framed as part of democratic consolidation and human-rights protection, rather than as an institutional deviation.

Second, differences are evident in judicial technique. Indonesia most frequently relies on conditionally constitutional or conditionally unconstitutional decisions. This method enables the Court to generate new normative content implicitly, through conditions or authoritative constructions, without openly asserting legislative authority. As a result, Indonesian judicial creativity tends to be indirect and, at times, normatively ambiguous. Bulgaria, by contrast, employs techniques that are more explicit and structurally oriented, such as reviving repealed norms or introducing normative exceptions that the legislature never enacted. Combined with teleological and evolutionary interpretation, this approach more self-consciously positions the Court as a co-legislative actor. Mexico’s techniques are anchored in amparo litigation and the doctrine of precedent, through which decisions that initially operate within an individual remedial framework can develop into generally binding standards for state authorities. Mexico’s judicial creativity is

thus gradual and case-based, but systemically significant because precedent functions in practice much like legislation.

Third, the degree and scale of legislative intervention differ. In Indonesia, the Constitutional Court's interventions tend to be fragmented and sectoral, for example, in voting rights, child status, or independent candidacies. These rulings may have wide effects, but they have not produced a comprehensive architecture of constitutional legislation. Bulgaria, on the other hand, reflects intervention that is structural and fundamental, extending even to the level of constitutional amendment. By asserting authority to review constitutional amendments, the Bulgarian Court positions itself above ordinary legislation and, in some respects, above constituent processes. Mexico occupies an intermediate position: its intervention is expansive in the human rights and social policy domains, but it generally does not extend to reconfiguring the constitutional structure as a whole. Its primary emphasis lies in correcting discriminatory legislation and strengthening equality-based principles.

Fourth, the court-politics relationship also distinguishes the three. In Indonesia, positive-legislator practices often trigger open tension between the Constitutional Court and the DPR, reinforcing the narrative of a "rival legislature." This is exacerbated by the limited institutionalization of mechanisms for constitutional dialogue. Bulgaria faces a different difficulty: although the Court is doctrinally strong, its public legitimacy is frequently strained by broader crises of trust in judicial institutions. Thus, normative authority is not always matched by societal confidence. In Mexico, the Supreme Court tends to enjoy comparatively stronger political and social legitimacy because it is widely perceived as correcting authoritarian legacies and protecting vulnerable groups. At the same time, the risk of abusive judicial review becomes salient when the Court is perceived to intrude too deeply into electoral politics.

Fifth, at the level of theoretical implications, Indonesia represents a positive-legislator model still "seeking its form," Bulgaria reflects a mature but controversial model approaching judicial supremacy, and Mexico exemplifies a model of transformative constitutionalism driven by judicial practice. Taken together, these cases suggest that positive legislating is not a single concept, but a spectrum of practices shaped by history, constitutional design, and national political dynamics.

TABLE 1. Differences in Positive-Legislator Practices Across Indonesia, Bulgaria, and Mexico

Dimension	Indonesia (Constitutional Court)	Bulgaria (Constitutional Court)	Mexico (Supreme Court)
Legitimacy & constitutional basis	• Rights-responsive; pragmatic • Justified primarily by preventing legal vacuums and protecting constitutional rights	• Systemic and doctrinal • Built within a Kelsenian framework through judge-made constitutional doctrines	• Civil-law tradition plus <i>juicio de amparo</i> • 1990s constitutional reforms strengthened judicial authority and legitimacy
Interpretive methods	• Conditionally constitutional/conditionally unconstitutional rulings • Implicit creation of new norms through authoritative constructions	• “Law resurrection” (revival of prior norms) • Teleological and evolutionary interpretation • Conformity-based interpretation with added limits/exceptions	• Amparo-based constitutional adjudication • Binding judicial precedent (case-law generalization) • Interpretivist reasoning emphasizing human rights and equality
Legislative intervention	• Fills legal vacuums • Crafts substitute norms with immediate effect	• Fills legal vacuums • Reconstructs statutory meaning and, at times, revives repealed norms	• Expands norms to advance human rights protections and social policy outcomes • Systemic effect through precedent and nationwide standards
Intervention objectives	• Protect constitutional rights • Prevent legal vacuums • Promote substantive justice	• Preserve legal certainty • Safeguard fundamental constitutional values • Adapt constitutional meaning to social change	• Promote equality and non-discrimination • Strengthen democracy and rights protection (often integrating international human rights standards)
Form of norms produced	• Self-executing • <i>Erga omnes</i> effect • Functionally statute-equivalent	• Self-executing • Generally binding • Functionally statute-equivalent	• Self-executing • Binding on state authorities • Expands and operationalizes precedent as a practical source of generally applicable norms
Key risks	• Separation-of-powers concerns • Institutional friction with the DPR (House of Representatives)	• Reduction of Parliament’s legislative role • Legitimacy concerns (including public trust issues)	• Risk of democratic delegitimation (especially in electoral contexts) • Inter-branch conflict • Resistance from executive/legislative actors, particularly where budgetary or administrative capacity is required

Illustrative cases	• Children born outside marriage • Independent candidacies in regional elections • Voting rights (e.g., ID-based voting)	• Revival of repealed norms (“law resurrection”) • Exemptions for high officials from parliamentary compulsion • Review/control of constitutional amendments	• Amparo and rights-based precedent • Same-sex marriage jurisprudence • Proactive constitutional review duties for judges (ex officio)
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Source: Author (2026)

Based on the table above, the key differences among Indonesia, Bulgaria, and Mexico do not lie in whether positive-legislator practices exist, but in how those practices are legitimized, exercised, and constrained. Indonesia faces challenges related to the limits of its frameworks and legal certainty; Bulgaria struggles with democratic legitimacy; and Mexico confronts the risk of judicial politicization. This comparison underscores that positive legislating is an increasingly unavoidable feature of contemporary constitutionalism, yet its sustainability depends critically on maintaining an appropriate balance between judicial creativity and the requirements of constitutional democracy.

C. The Constitutionally Guided Positive-Legislator (CGPL) Model for the Indonesian Constitutional Court in the Future

Theoretically, the concept of a Constitutionally Guided Positive Legislature (CGPL) did not emerge in a conceptual vacuum. It is rooted in the classic debate over the proper limits of courts in constitutional democracy, while also seeking to correct the shortcomings of existing approaches. Accordingly, the conceptual position of CGPL should be analyzed through its relationship to four major intellectual traditions associated with Hans Kelsen, John Hart Ely, Ronald Dworkin, and Jeremy Waldron. This approach is important to demonstrate that CGPL is not merely an expression of judicial activism, but rather a normative model with a clear and defensible theoretical foundation.

CGPL may be understood as a corrective to the negative-legislator doctrine associated with Hans Kelsen. In order to preserve the purity of the normative hierarchy and to prevent courts from usurping the legislature’s lawmaking function, Kelsen confined the role of a constitutional court

to annulling norms that conflict with the constitution.⁴⁰ CGPL does not negate that foundation. Rather, it begins with problems arising from the character of modern constitutions as open-ended, principle-oriented texts that contain strong mandates for the protection of rights. In such a context, invalidating a norm without a corresponding normative follow-up can generate legal vacuums and constitutional deadlock, ultimately weakening the effective protection of citizens' rights. CGPL therefore proposes a conceptual modification by allowing space for a positive judicial role, so long as it is exercised constitutionally, remains minimalist, and is limited in duration. Within this framework, CGPL is not positioned as the antithesis of the negative-legislator concept, but as its extension in situations where annulment alone is insufficient to ensure that the constitution operates effectively.

From this point, the relationship between CGPL and John Hart Ely's work can be understood as reinforcing the representation-reinforcement thesis. Ely justifies judicial intervention when democratic processes become distorted, particularly where minorities or otherwise disadvantaged groups are excluded from the political channels of representation that ought to be available to them.⁴¹ CGPL adopts that premise by positioning courts as democratic correctives while expanding the set of corrective tools available. Whereas Ely's framework primarily envisions judicial correction through invalidation of norms or the tightening of procedural requirements to restore the proper functioning of democratic processes, CGPL adds the possibility that, in certain circumstances where effective constitutional rights protection demands an immediate response, courts may articulate a transitional normative framework. On this account, CGPL can be understood as an expanded form of representation reinforcement: the court not only reopens democratic channels, but also provides a temporary normative bridge until the legislative process resumes normal operation.

From Ronald Dworkin's perspective, CGPL can be seen as consistent with the ideas of rights as trumps and law as integrity, because both reject the view that constitutional interpretation can be neutral or detached from moral reasoning and the demands of principled coherence.⁴²

⁴⁰Dianelis Zaldivar Valdes and José Walter Mondelo García, 'Notas Sobre El Legado de Hans Kelsen al Derecho Internacional', *DOXA. Cuadernos de Filosofía Del Derecho*, no. 49 (June 2025): 705–30, <https://doi.org/10.14198/doxa.28062>.

⁴¹Claudia Geiringer, 'Ely in New Zealand', *International Journal of Constitutional Law* 19, no. 2 (2021): 439–54, <https://doi.org/10.1093/icon/moab042>.

⁴²Dennis Patterson, 'Dworkin's Critique of Hart's Positivism', in *The Cambridge Companion to Legal Positivism*, 1st edn, ed. Torben Spaak and Patricia Mindus (Cambridge University Press, 2021), <https://doi.org/10.1017/9781108636377.029>.

Nevertheless, CGPL deliberately distances itself from approaches that might legitimize judicial creativity without clear institutional constraints. In this respect, CGPL introduces safeguards that are not always made explicit in Dworkin's theory. Any instance of judicial norm creation must be transparently justified through legal reasoning, calibrated in scope, limited in duration, and structured in a way that preserves space for legislative correction or replacement. Through this design, CGPL seeks to discipline the risks of judicial moralism by anchoring judicial intervention in a more concrete and structured framework of democratic accountability.

The distinctiveness of CGPL becomes clearer when it is understood as a normative response to Jeremy Waldron's critique of strong judicial review. Waldron questions the democratic legitimacy of judges in making normative choices because they lack an electoral mandate, and he argues that moral disagreement should be resolved through legislative deliberation rather than judicial determination.⁴³ Rather than dismissing Waldron's critique, CGPL internalizes it as a conceptual constraint. By requiring that judicially crafted norms be minimalist, time-limited, and grounded in constitutional mandate, CGPL preserves the legislature as the primary corrective mechanism once constitutional duties are again fulfilled. In this way, CGPL can be understood as a normative compromise: it avoids a drift toward judicial supremacy while also refusing to leave rights protection entirely to a democratic process that may be stalled or dysfunctional.

Building on these four theoretical relationships, CGPL can be positioned as an integrative framework. It not only addresses the limits of the Kelsen model, but also expands the procedural-democracy perspective developed by Ely, internalizes Dworkin's normative dimension and demand for principled coherence, and takes Waldron's democratic critique. CGPL's principal strength lies in its ability to reorient the debate away from the traditional dichotomy between judicial activism and judicial restraint toward a more functional approach: specifying the conditions, limits, and mechanisms that enable courts to engage in norm creation in a constrained manner, remain within constitutional bounds, and align with the requirements of constitutional democracy.

Building on the foregoing theoretical foundation, the comparative analysis of positive-legislator practices in Indonesia, Bulgaria, and Mexico points to the need for a more systematic

⁴³COURTOIS, Stéphane, 'Should the State Ban Hate Propaganda?: Some Thoughts on Jeremy Waldron's Recent Contribution', *Revue Philosophique de Louvain*, no. 1 (2021): 111–38, <https://doi.org/10.2143/RPL.118.1.3288901>.

and internally consistent model. CGPL is not intended to treat the positive-legislator role as a deviation from separation-of-powers principles. Rather, it conceptualizes the role as a limited constitutional function that must operate within a clear, transparent, and accountable normative framework. Under this approach, constitutional courts may be recognized as normative actors only to the extent that their interventions are strictly constrained, so that judicial norm creation does not evolve into a permanent legislative function.

CGPL's novelty is articulated through four interrelated elements, presented in sequential order. First, CGPL marks a shift from creative interpretation to structured normative intervention. In conventional constitutional practice, courts often respond to legal gaps or uncertainty through creative interpretive techniques, including conditionally constitutional decisions that preserve a norm's validity under specific conditions, and precedent-making that expands the scope of rights beyond the textual formulation of statutes. Although such approaches can be practically effective, they also invite criticism for blurring the boundary between interpretation and norm creation. CGPL therefore insists that when a court must move beyond ordinary constitutional interpretation, the intervention should be openly acknowledged and embedded in a structured, transparent normative procedure that is subject to public scrutiny. In this way, judicial flexibility is channeled without undermining legal certainty or democratic legitimacy.

Second, to prevent judicial intervention from becoming permanent, CGPL introduces Temporary Constitutional Norms as transitional rules. These temporary norms allow courts to respond to urgent legal vacuums while simultaneously reactivating the legislature's role by specifying a clear constitutional deadline. Within this design, the court-legislature relationship is constructed as an institutional dialogue: the court supplies a minimum regulatory framework to keep constitutional rights operative, while the legislature retains the primary mandate to enact final and comprehensive regulation.

Third, CGPL requires substantive democratic justification for legitimizing intervention. Accordingly, the validity of judicial norm creation is not determined solely by the court's formal authority, but also by its contribution to strengthening substantive democracy. This includes protecting vulnerable groups, expanding political participation, preventing majoritarian domination, and ensuring that constitutional rights are genuinely accessible and exercisable. Within these limits, courts are positioned as democratic correctives, and intervention is justified to the extent that it remedies democratic distortions and promotes inclusiveness.

Fourth, to mitigate tension with separation-of-powers principles, CGPL reconceptualizes institutional relations through functional separation of powers. Separation of powers is not understood rigidly as an absolute prohibition on judicial intervention, but as a functional allocation that permits judicial correction where legislative failure is systemic. Under this framework, courts operate as a constitutional safety valve rather than as substitutes for the legislature. Legitimate intervention must be proportional, relevant, time-bound, and consistently preserve space for correction through political processes.

In the Indonesian context, CGPL offers a framework for disciplining the Constitutional Court's judicial creativity in a more calibrated and accountable manner. These four elements, structured normative intervention, temporary constitutional norms, substantive democratic justification, and functional separation of powers, form an integrated design that enables the Court to address legal vacuums without sacrificing democratic legitimacy. In practice, the model keeps the Court responsive to the demands of constitutional rights protection while preventing a shift toward permanent judicial norm-making that would foreclose legislative deliberation.

Conclusion

This study concludes that the practice of constitutional courts acting as positive legislators reflects an important transformation in contemporary constitutional democracy, as shown by the experiences of Indonesia, Bulgaria, and Mexico. In Indonesia, the Constitutional Court develops this role through conditional decisions that create substitute norms with *erga omnes* effect. In Bulgaria, the Constitutional Court performs a more structural role through the revival of previous norms, teleological interpretation, and control over constitutional amendments. In Mexico, the Supreme Court strengthens positive legislator practices through the *juicio de amparo*, binding precedent, and progressive rights-based interpretation. Although these practices differ in form and intensity, they are generally driven by similar factors, namely legislative failure, legal vacuums, open constitutional texts, and the need to ensure effective protection of constitutional rights. Therefore, the central issue is not whether constitutional courts may act as positive legislators, but how such judicial lawmaking can be constitutionally guided, democratically justified, and institutionally limited. For that reason, the Constitutionally Guided Positive Legislature model is proposed as a framework to ensure that judicial norm creation remains structured, transparent, temporary, minimalist, and consistent with the separation of powers while still protecting rights and maintaining constitutional democracy.

Suggestions

Constitutional courts, especially the Indonesian Constitutional Court, should formulate clearer parameters before issuing decisions that contain positive legislator elements, including the existence of a serious legal vacuum, the urgency of constitutional rights protection, legislative inaction, and the proportionality of the norm created. Any judicially created norm should be framed as a temporary constitutional norm that applies only until the legislature enacts a more comprehensive and democratically deliberated regulation. At the same time, the legislature must actively follow up constitutional court decisions so that judicial intervention does not become a permanent substitute for legislative authority. Future studies should also examine the implementation of positive legislator decisions after they are issued, particularly whether such decisions are obeyed by state institutions, translated into legislation, and accepted by society, because the legitimacy of judicial law making depends not only on constitutional reasoning but also on its practical effectiveness within the democratic legal order.

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