

CONTENTS

	Page
AUTHOR’S NOTE	1
PART ONE	
CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS IN COMPARATIVE LAW	5
INTRODUCTION: HANS KELSEN, JUDICIAL REVIEW, AND THE NEGATIVE LEGISLATOR	5
CHAPTER 1	
JUDICIAL REVIEW OF LEGISLATION AND THE LEGISLATOR	13
I. THE SYSTEMS OF JUDICIAL REVIEW AND THE ROLE OF CONSTITUTIONAL COURTS	13
II. CONTROL OF CONSTITUTIONALITY AND CONTROL OF CONVENTIONALITY	20
III. THE INTERPRETATION OF THE CONSTITUTION AND THE INFLUENCE OF THE CONSTITUTIONAL COURTS ON CONSTITUTIONAL AND LEGAL REFORMS	29
IV. THE QUESTION OF CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS	31
CHAPTER 2	
CONSTITUTIONAL COURTS’ INTERFERENCE WITH THE CONSTITUENT POWER	41
I. CONSTITUTIONAL COURTS’ RESOLUTION OF DISPUTES OF CONSTITUTIONAL RANK AND ENACTMENT OF CONSTITUTIONAL RULES	41
II. CONSTITUTIONAL COURTS AND JUDICIAL REVIEW OF PROVISIONS OF THE CONSTITUTION AND OF CONSTITUTIONAL REFORMS AND AMENDMENTS	45

CONTENTS

III. THE ROLE OF CONSTITUTIONAL COURTS' ADAPTATION OF THE CONSTITUTION AND THE QUESTION OF LEGITIMATE CHANGES TO THE CONSTITUTION	50
1. <i>Adapting the Constitution on Matters of Fundamental Rights Guarantees</i>	51
2. <i>The Mutation of the Constitution on Institutional Matters</i>	65
IV. THE PROBLEM OF ILLEGITIMATE MUTATIONS OF THE CONSTITUTION	68

CHAPTER 3

CONSTITUTIONAL COURTS' INTERFERENCE WITH THE LEGISLATOR ON EXISTING LEGISLATION	73
I. CONSTITUTIONAL COURTS' INTERPRETATION OF STATUTES IN HARMONY WITH THE CONSTITUTION	73
II. CONSTITUTIONAL COURTS COMPLEMENTING THE LEGISLATOR BY ADDING NEW RULES (AND NEW MEANING) TO AN EXISTING LEGISLATIVE PROVISION	79
III. CONSTITUTIONAL COURTS COMPLEMENTING LEGISLATIVE FUNCTIONS BY INTERFERING WITH THE TEMPORAL EFFECTS OF LEGISLATION	94
1. <i>The Power of the Constitutional Court to Determine When Annulled Legislation Will Cease to Have Effects: Postponing the Effect of the Court's Ruling</i>	95
2. <i>The Power of the Constitutional Court to Determine When Annulled Legislation Will Cease to Have Effects: Retroactive or Nonretroactive Effects of Its Own Decisions</i>	103
A. <i>The Possibility of Limiting the Retroactive Ex Tunc Effects Regarding Declarative Decisions</i>	103
B. <i>The Possibility of Retroactive Effects for Ex Nunc Constitutive Decisions</i>	108
3. <i>The Power of Constitutional Courts to Revive Repealed Legislation</i>	114
IV. THE DEFORMATION OF THE INTERPRETATIVE PRINCIPLE: CONSTITUTIONAL COURTS' REFORMING OF STATUTES AND INTERPRETING THEM WITHOUT INTERPRETING THE CONSTITUTION	115

CHAPTER 4**CONSTITUTIONAL COURTS' INTERFERENCE WITH THE
LEGISLATOR REGARDING LEGISLATIVE OMISSIONS 125**

- I. CONSTITUTIONAL COURTS' FILLING THE GAP OF
ABSOLUTE LEGISLATIVE OMISSIONS 126
 - 1. *Direct Action against Absolute Legislative Omissions* 126
 - 2. *The Protection of Fundamental Rights against Absolute
Legislative Omissions by Means of Actions or Complaints for
Their Protection* 135
- II. CONSTITUTIONAL COURTS' FILLING THE GAP OF
RELATIVE LEGISLATIVE OMISSIONS 148
 - 1. *Constitutional Courts and Equality Rights: Deciding on the
Unconstitutionality of Statutes without Declaring Their Nullity* 149
 - 2. *Constitutional Courts' Issuing Nonbinding Directives to the
Legislator* 153
 - 3. *Constitutional Courts' Issuing Binding Orders and Directives
to the Legislator* 160
- III. CONSTITUTIONAL COURTS AS PROVISIONAL
LEGISLATORS 165

CHAPTER 5**CONSTITUTIONAL COURTS AS LEGISLATORS ON
MATTERS OF JUDICIAL REVIEW 173**

- I. CONSTITUTIONAL COURTS CREATING THEIR OWN
JUDICIAL REVIEW POWERS 173
 - 1. *The Judge-Made Law Regarding the Diffuse System of Judicial
Review* 173
 - 2. *The Extension of Judicial Review Powers to Ensure the
Protection of Fundamental Rights* 174
 - 3. *The Need for the Express Provision in the Constitution of
Judicial Review Powers of the Constitutional Jurisdiction and
Its Deviation* 178
- II. CONSTITUTIONAL COURTS CREATING PROCEDURAL
RULES ON JUDICIAL REVIEW PROCESSES 186
- FINAL REMARKS 189**

CONTENTS

PART TWO

NATIONAL REPORTS 193

ARGENTINA: Alejandra Rodríguez Galán and Alfredo Mauricio Vítolo, *Constitutional Courts as Positive Legislators* 195

- I. REDUCTION OF THE SCOPE OF THE POLITICAL QUESTIONS DOCTRINE 199
- II. RECOGNITION OF PROCEDURAL GUARANTEES IN THE ABSENCE OF LEGISLATION 200
- III. STANDING 202
- IV. *ACCIÓN DECLARATIVA DE CERTEZA* (DECLARATORY JUDGMENTS) AS A DIRECT FORM OF EXERCISE OF CONSTITUTIONAL REVIEW 203
- V. *SUA SPONTE* CONSTITUTIONAL REVIEW 204
- VI. *ERGA OMNES* EFFECT OF JUDICIAL DECISIONS 205
- VII. ACTIVIST JURISPRUDENCE 205
 1. “*Educating*” Congress 206
 2. *Reconciling Internal Legislation with Human Rights Treaties by Means of Interpretation* 207
 3. *Amending Political Will and Rewriting Statutes* 208
- VIII. CONCLUSION 211

AUSTRALIA: Cheryl Saunders, *Interpretation and Review* 213

- I. FRAMEWORK 213
 1. *Authority for Review* 213
 2. *Jurisdiction* 215
 3. *Concrete Review* 217
 - A. Advisory Opinions 217
 - B. Declarations of Incompatibility 219
 4. *Standing* 220
- II. APPROACH 223
 1. *Phases* 224
 - A. 1903–1920 224
 - B. 1920–1944 225
 - C. 1944–1981 226
 - D. 1981–1998 228
 - E. 1998 to the Present 230

2.	<i>Legalism and Realism</i>	231
A.	Legalism	231
B.	Realism	232
C.	Realistic Legalism	234
3.	<i>Interpretation and Change</i>	236
A.	An Instrument of Government	236
B.	Relevance of the Framers	238
III.	SOURCES	240
1.	<i>Precedent</i>	240
2.	<i>Extrinsic Materials</i>	241
3.	<i>Foreign Law</i>	244
4.	<i>International Law</i>	246
	BIBLIOGRAPHY	249
	AUSTRIA: Konrad Lachmayer, <i>Constitutional Courts as Positive Legislators</i>	251
I.	INTRODUCTION: CONSTITUTIONAL JUSTICE IN AUSTRIA	251
II.	BRIEF DESCRIPTION OF THE JUDICIAL REVIEW METHOD APPLIED IN AUSTRIA	252
1.	<i>Introduction</i>	252
2.	<i>Access to Constitutional Justice</i>	254
III.	JUDICIAL QUESTIONS ON MATTERS OF JUDICIAL REVIEW	256
1.	<i>Judicial Decisions on Judicial Review</i>	256
2.	<i>Effects of Judicial Decisions on Constitutional Matters</i>	257
IV.	IMPORTANT DEVELOPMENTS AND DECISIONS OF THE CONSTITUTIONAL COURT	258
1.	<i>Developing the Contents of the Fundamental Principles of the Austrian Constitution</i>	258
2.	<i>Concrete Guidelines for the Legislator</i>	259
3.	<i>Creating Constitutional Systems</i>	261
4.	<i>Principle of Equality</i>	262
V.	CONCLUSION – OPENING UP CONSTITUTIONAL POTENTIALS AND VALUE-BASED JUDGMENTS	263

CONTENTS

BELGIUM: Patricia Popelier, <i>The Belgian Constitutional Court as Positive Legislator: In Search of a Balance Between Rights Protection and Respect for Acts of Parliament</i>	265
INTRODUCTION	265
I. THE IMPACT OF THE CONSTITUTIONAL COURT ON CONSTITUTIONAL RELATIONS	266
II. LEGISLATIVE OMISSIONS IN THE CASE LAW OF THE CONSTITUTIONAL COURT	269
1. <i>Some Examples</i>	271
2. <i>Two Examples</i>	272
III. LEGAL FRAMEWORK	273
IV. CONSEQUENCES OF THE FINDING THAT A LEGISLATIVE LACUNA IS CONTRARY TO THE CONSTITUTION	275
CONCLUSIONS	279
BRAZIL: Thomas Bustamante and Evanilda de Godoi Bustamante, <i>Constitutional Courts as Negative Legislators: The Brazilian Case</i>	283
INTRODUCTORY CONSIDERATIONS	283
I. THE DIFFUSE AND INCIDENTAL SYSTEM OF JUDICIAL REVIEW	285
II. THE CONCENTRATED SYSTEM OF JUDICIAL REVIEW	289
1. <i>Concentrated Constitutional Jurisdiction by Direct Actions</i>	289
A. The Direct Action of Unconstitutionality	290
B. The Declaratory Action of Constitutionality	292
C. The Direct Action against Unconstitutional Omissions	293
D. The Claim against the Disrespect to a Fundamental Precept	296
2. <i>Concentrated Constitutional Review by Concrete Claims</i>	298
A. <i>Mandado de Segurança</i> (When Used to Contest an Act within the Legislative Procedure)	299
B. The Writ of Injunction (<i>Mandado de Injunção</i>)	300
C. Additive Decisions and the Writ of Injunction	302
III. EFFECTS OF THE JUDICIAL DECISIONS ON CONSTITUTIONAL MATTERS	303
1. <i>Inter Partes and Erga Omnes Decisions</i>	303
2. <i>Binding and Nonbinding Decisions</i>	305
3. <i>The Scope of the Binding Effects of the Decisions of the Court</i>	306

4.	<i>Interpretative and Reductive Decisions by the Federal Supreme Court</i>	308
5.	<i>The Temporal Effects of the Decisions on Constitutional Matters (on Direct Actions of Unconstitutionality)</i>	310
6.	<i>The Temporal Effects of the Decisions on Constitutional Matters (on Diffuse Decisions on Constitutional Matters)</i>	311
7.	<i>Constitutional Mutations</i>	312
IV.	CONCLUSION: THE IDEA OF THE NEGATIVE LEGISLATOR	312
	CANADA: Kent Roach, <i>The Canadian Constitutional Courts as Positive Legislators</i>	315
	INTRODUCTION	315
I.	CANADA'S SYSTEM OF JUDICIAL REVIEW	317
1.	<i>Federalism and the Court as Negative Legislator</i>	317
2.	<i>The Canadian Charter of Rights and Freedoms</i>	318
3.	<i>Negative and Positive Rights</i>	318
4.	<i>Charter Litigation</i>	319
5.	<i>Reference Cases</i>	319
6.	<i>Constitutional Remedies</i>	321
7.	<i>Positive Alternatives to Judicial Invalidation: Reading In or Judicial Amendments to Legislation</i>	322
8.	<i>Alternatives to Immediate Invalidation: Delayed Declarations of Invalidity and Reply Legislation</i>	324
	Summary	326
II.	CANADA'S EXPERIENCE WITH COURTS AS POSITIVE LEGISLATORS	328
1.	<i>Criminal Justice</i>	328
2.	<i>National Security</i>	329
3.	<i>Gay Rights</i>	331
4.	<i>Aboriginal and Treaty Rights</i>	333
5.	<i>Political Policy</i>	334
6.	<i>Minority-Language Policy</i>	335
7.	<i>Social and Economic Policy</i>	337
8.	<i>Labor Policy</i>	338
9.	<i>Health-Care Policy</i>	340
	CONCLUSION	342

CONTENTS

COLOMBIA: Germán Alfonso López Daza, <i>Le juge constitutionnel colombien, législateur-cadre positif: un gouvernement des juges</i>	345
INTRODUCTION	345
I. DYNAMISME DE LA COUR CONSTITUTIONNELLE COLOMBIENNE DANS SON RÔLE DE PROTECTRICE DE LA CONSTITUTION DE 1991	346
II. JUSTICE CONSTITUTIONNELLE VERSUS POUVOIR EXECUTIF-POUVOIR LEGISLATIF	348
III. LA COUR CONSTITUTIONNELLE COLOMBIENNE-LÉGISLATEUR CADRE POSITIF	350
1. <i>Sentences manipulatrices</i>	353
2. <i>Sentence substitutive</i>	353
3. <i>Sentences interprétatives ou conditionnées</i>	353
4. <i>Sentence additive ou d'intégration</i>	354
5. <i>Sentence de recommandation du législateur</i>	355
6. <i>Les sentences-lois</i>	355
7. <i>Les sentences à effet différé</i>	355
IV. CONSTRUCTION THÉORIQUE DU CONCEPT "GOUVERNEMENT DES JUGES"	356
BIBLIOGRAPHIE	359
COLOMBIA: Sandra Morelli, <i>The Colombian Constitutional Court: From Institutional Leadership to Conceptual Audacity</i>	363
I. PRELIMINARY CONSIDERATIONS	363
II. DISPLACEMENT IN COLOMBIA	366
1. <i>What Is the Unconstitutional State of Affairs?</i>	367
III. THE CONSTITUTIONAL CONTROL OF LAWS	378
1. <i>Warning</i>	378
2. <i>The Control of the Constitutionality of the Acts Amending the Constitution</i>	383
A. The Constitutional Control Limited to the Vices of Procedure	384
B. The Procedural Vices of the Law through Which a Constitutional Referendum Is Summoned	385
a. <i>The Power of the Congress of the Republic to Amend the Law Presented at the Request of a Popular Initiative</i>	386
b. <i>The Violation of the Law of Benches (Bancadas)</i>	386

COSTA RICA: Rubén Hernández Valle, <i>The Normative Resolutions of the Constitutional Court</i>	389
I. TYPOLOGY OF FAVORABLE LEGAL REVIEW RESOLUTIONS	389
1. <i>Favorable Exhortative Resolutions</i>	389
2. <i>Simple Unconstitutionality Resolutions</i>	391
A. Simple Unconstitutionality Declaration of Partial Nature	391
B. Simple Unconstitutionality Declaration of Full Nature	391
3. <i>Interpretative Resolutions</i>	392
A. Unconstitutionality Due to Erroneous Interpretation or Misapplication of a Provision in a Specific Case	392
B. Unconstitutionality as a Result of the Effects of the Challenged Text or Provision	394
4. <i>Favorable Resolutions of Inapplicability</i>	395
5. <i>Normative Resolutions</i>	395
A. Favorable Additive Resolutions	396
B. Favorable Substitutive Resolutions	397
II. CRITICAL ANALYSIS OF NORMATIVE RESOLUTIONS	401
1. <i>The Justification of Normative Resolutions</i>	401
2. <i>Criticism of Regulatory Resolutions</i>	402
III. REGULATORY RESOLUTIONS AND THE LIMITS TO CONSTITUTIONAL JURISDICTION	403
BIBLIOGRAPHY	406
CROATIA: Sanja Barić and Petar Bačić, <i>Constitutional Courts as Positive Legislators</i>	407
I. THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA: COMPOSITION, COMPETENCES, AND PROCEEDINGS	407
1. <i>Introduction</i>	407
2. <i>Composition and Terms of Duty</i>	409
3. <i>Competences of the Constitutional Court</i>	410
4. <i>Proceedings of the Constitutional Court</i>	411
5. <i>Abstract Review</i>	413
6. <i>Concrete Review</i>	415
7. <i>Effects of the Constitutional Court's Decision</i>	415

CONTENTS

8.	<i>Constitutional Complaint</i>	417
9.	<i>Other Competences</i>	420
A.	Jurisdictional Disputes	420
B.	Impeachment of the President of the Republic	420
C.	Supervision of the Constitutionality of Programs and Activities of Political Parties	420
D.	Control of the Constitutionality and Legality of the Elections and the National Referendum and the Electoral Disputes	421
E.	Constitutional Court Procedures of Appeal	421
F.	Monitoring the Execution of Constitutionality and Legality, and Supervisory Control over Passing Regulations for Executing the Constitution, Laws, and Other Regulations	422
II.	JUDICIAL ACTIVISM IN CONSTITUTIONAL REVIEW DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA	423
1.	<i>Judicial Activism versus the Legislative Branch</i>	424
2.	<i>Methodological Activism of the Constitutional Court – The Interpretation and Power of the Legal Argument</i>	428
3.	<i>Procedural Activism – Precedence of Form over Content</i>	431
4.	<i>Substantial Activism – Support for Democracy and Constitutional Rights</i>	433
III.	CONCLUSIONS ON THE ACTIVISM OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA	440
	CZECH REPUBLIC: Zdenek Kühn, <i>Czech Constitutional Court as Positive Legislator?</i>	445
I.	THE HISTORY AND THE POWERS OF THE CZECH CONSTITUTIONAL COURT	446
II.	CONSTITUTIONAL COMPLAINTS AGAINST DECISIONS OF GENERAL COURTS	448
III.	INTERPRETATIVE DECISIONS IN ABSTRACT CONSTITUTIONAL REVIEW: “SOFT CONSTITUTIONAL REVIEW”	454
IV.	POSITIVE ASPECT OF NEGATIVE DECISIONS OF THE COURT	458

V. UNCONSTITUTIONAL GAPS IN THE LEGAL SYSTEM: PROVIDING CONSTITUTIONAL REMEDIES OR JUDICIAL SUBSTITUTION FOR THE LEGISLATOR?	461
VI. THE CZECH CONSTITUTIONAL COURT ACTING OPENLY AS POSITIVE LEGISLATOR – CASES OF CONSTITUTIONALITY OF AMENDMENTS TO THE LAW	466
VII. COURT’S SELF-PERCEPTIONS AND CONCLUSIONS	468
FRANCE: Bertrand Mathieu, <i>Le Conseil constitutionnel “législateur positif.” Ou la question des interventions du juge constitutionnel français dans l’exercice de la fonction législative</i>	471
I. TITRE LIMINAIRE: ÉLÉMENTS D’ANALYSES SUR LE CONTRÔLE DE CONSTITUTIONNALITÉ EN FRANCE	472
II. LES INTERACTIONS ENTRE LA FONCTION JURIDICTIONNELLE DU CONSEIL CONSTITUTIONNEL ET LA FONCTION LÉGISLATIVE	478
1. <i>Les principes cadres</i>	478
2. <i>De quelques modalités d’intervention médiate du Conseil constitutionnel</i>	479
- Les incidences sur la fabrication de la loi	479
- Les incidences sur les révisions constitutionnelles	479
- La question de la séparabilité des dispositions inconstitutionnelles	480
- Les conséquences tirées de l’inconstitutionnalité relevée	481
- L’outil de la proportionnalité	483
III. ANALYSE D’UNE MODALITÉ SPÉCIFIQUE D’INTERVENTION DU CONSEIL CONSTITUTIONNEL: LES RÉSERVES D’INTERPRÉTATION	484
1. <i>Éléments de définition et champ d’application</i>	484
2. <i>Les destinataires des réserves d’interprétation</i>	488
3. <i>La portée des réserves d’interprétation: essai de typologie</i>	489
-L’exclusion d’une interprétation inconstitutionnelle: le postulat du respect de la Constitution par le législateur	489
-L’argument de la maladresse du législateur	490
-La tentation de la réécriture	490
-La modification du champ d’application de la loi	492
-La paralysie de l’application de la loi	493
4. <i>Éléments statistiques sommaires</i>	494
EN GUISE DE CONCLUSION	495

GERMANY: Ines Härtel, <i>Constitutional Courts as Positive Legislators</i>	497
I. JUDICIAL MEANS FOR JUDICIAL REVIEW	498
1. <i>Civil Rights Injunctions</i>	498
2. <i>Direct Actions to Control the Constitutionality of Statutes</i>	499
3. <i>Direct Actions to Control the Constitutionality of Legislative Omissions</i>	500
4. <i>Ex Officio Powers of Constitutional Judges and of the Constitutional Court or Tribunals</i>	501
5. <i>Authority of the Supreme Court of Constitutional Courts to Remove and Take Over Cases from Lower Courts (Avocamiento)</i>	501
II. JUDICIAL DECISIONS ON JUDICIAL REVIEW	502
1. <i>Constitutional Interpretation</i>	502
2. <i>Declaration of the Unconstitutional Character of Statutes (Declaration of Incompatibility)</i>	503
3. <i>Annulment (Complete or Partial) of Unconstitutional Statutes</i>	506
4. <i>Influencing the Constitution</i>	509
5. <i>Decisions Including Legislative Structures</i>	510
6. <i>Additive Decisions Reforming Legislation</i>	513
7. <i>Admonitory Decisions</i>	514
8. <i>Judicial Replacement of the Legislator</i>	516
9. <i>Judicial Replacement of the Government in Policy-Making Processes</i>	517
III. EFFECTS OF JUDICIAL DECISIONS ON CONSTITUTIONAL MATTERS	518
BELGIUM, FRANCE, GERMANY: Christian Behrendt, <i>L'activité du juge constitutionnel comme législateur-cadre positif</i>	521
INTRODUCTION	521
I. LA NOTION D'“INTERFÉRENCE”	525
II. LA CLASSIFICATION DES INTERFÉRENCES	527
III. L'IMPORTANCE QUANTITATIVE DES INTERFÉRENCES	529
1. <i>L'importance des lignes directrices</i>	530
2. <i>L'importance des injonctions</i>	531
IV. LE RECOURS À LA TECHNIQUE DES INTERFÉRENCES: UNE TENTATIVE D'ÉVALUATION	533
CONCLUSIONS	537

GREECE: Julia Iliopoulos-Strangas and Stylianos-Ioannis G. Koutnatzis, <i>Constitutional Courts as Positive Legislators</i>	539
I. THE SYSTEM OF JUDICIAL REVIEW	540
1. <i>Judicial Organization</i>	540
2. <i>Control of Legislative and Executive Acts</i>	541
A. Origins and Development of Judicial Review throughout Greece's Constitutional History	541
B. Judicial Review under the Greek Constitution of 1975	542
a. <i>Constitutional Basis of Judicial Review</i>	542
b. <i>Substantive and Procedural Constitutional Claims</i>	543
c. <i>Primary Features of Judicial Review</i>	544
d. <i>Means of Concentration of Review</i>	546
e. <i>The Proposal to Establish a Constitutional Court</i>	549
f. <i>Control of Conventionality</i>	552
g. <i>Control of Executive Acts</i>	553
h. <i>Control of Constitutional Amendments</i>	555
II. THE APPLICATION OF JUDICIAL REVIEW	555
1. <i>The Development of Constitutional Jurisprudence</i>	556
A. The Greek Courts' Deferential Tradition	556
B. Phases in the Judicial Implementation of the 1975 Constitution	558
2. <i>Positive Legislation through Constitutional Adjudication</i>	563
A. Extension of Preferential Treatment in Equality Principle Cases	563
B. The Council of State's Environmental Jurisprudence	567
a. <i>Constitutional Entrenchment of the Current Status of Environmental Protection</i>	568
b. <i>The Principle of Sustainable Development</i>	570
III. FINAL REMARKS	571
HUNGARY, Lóránt Csink, József Petrétai, and Péter Tilk, <i>Constitutional Court as Positive Legislator</i>	575
I. ANTECEDENTS OF CONSTITUTIONAL ADJUDICATION	575
II. THE ESTABLISHMENT OF THE CONSTITUTIONAL COURT	576

III. THE LEGAL CHARACTER OF THE DECISIONS OF THE COURT	578
IV. THE MANIFESTATION OF POSITIVE LEGISLATION	579
1. <i>Constitutional Requirement</i>	579
2. <i>Mosaic Annulment</i>	581
3. <i>Role of the Court in the Examination of Omissions</i>	582
4. <i>Interpretation of the Constitution</i>	583
INDIA: Surya Deva, <i>Constitutional Courts as Positive Legislators: The Indian Experience</i>	587
INTRODUCTION	587
I. JUDICIAL REVIEW: CONSTITUTIONAL PROVISIONS AND JUDICIAL INTERPRETATION	588
1. <i>Judicial Review: The Provisions</i>	588
2. <i>Judicial Review: The Interpretation</i>	591
II. JUDICIARY BECOMING THE LEGISLATOR: SOME EXAMPLES	594
1. <i>Guidelines for Police Arrest and Detention: D K Basu v. State of West Bengal</i>	594
2. <i>Sexual Harassment of Women at Workplace: Vishaka v. State of Rajasthan</i>	596
3. <i>Ragging Menace at Universities</i>	598
CONCLUSION	600
ITALY: Giampaolo Parodi, <i>The Italian Constitutional Court as Positive Legislator</i>	603
BIBLIOGRAPHY	620
MEXICO: Eduardo Ferrer Mac-Gregor, <i>The Mexican Supreme Court as Positive Legislator</i>	623
INTRODUCTION	623
I. THE SUPREME COURT AS A CONSTITUTIONAL COURT	624
1. <i>Brief Background</i>	624
2. <i>Constitutional Evolution</i>	625
3. <i>Powers</i>	625
A. <i>Constitutional Control</i>	625
B. <i>Other Jurisdiction and Powers</i>	627

II.	THE SUPREME COURT AS A POSITIVE LEGISLATOR	627
1.	<i>Amparo Proceedings (Specific Effects)</i>	628
2.	<i>Abstract Unconstitutionality Cause of Action against General Norms (Laws and International Treaties) and Constitutional Controversies (Erga Omnes Effect)</i>	632
3.	<i>Legislative Omissions</i>	639
	CONCLUSIONS	642
	NETHERLANDS: Jerfi Uzman, Tom Barkhuysen, and Michiel L. van Emmerik, <i>The Dutch Supreme Court: A Reluctant Positive Legislator?</i>	645
	INTRODUCTION	645
I.	THE BAN ON JUDICIAL CONSTITUTIONALITY REVIEW AND ITS SCOPE	648
1.	<i>Article 120 of the Dutch Constitution</i>	648
2.	<i>Summary</i>	651
II.	ENFORCING INTERNATIONAL HUMAN RIGHTS LAW	652
1.	<i>Introduction: Monism and Article 94 of the Constitution</i>	652
2.	<i>"Eligible to Bind All Persons" and Judicial Lawmaking</i>	653
3.	<i>The Increasing Role of the European Convention in National Case Law</i>	656
4.	<i>Concluding Remarks</i>	660
III.	THE LAWMAKING ROLE OF THE COURTS	661
1.	<i>Introduction</i>	661
2.	<i>Defining the Process of Lawmaking</i>	662
3.	<i>The Case Law of the Supreme Court Concerning Its Lawmaking Role</i>	663
A.	<i>The Dual Custody Case: Distinguishing Positive from Negative Lawmaking</i>	664
B.	<i>The Dutch Citizenship Case: Avoiding Policy Decisions</i>	665
C.	<i>The Spring Decisions: Judicial Activism or Prudent Lawmaking?</i>	667
D.	<i>After the High-Water Mark: A Slow Retreat to Judicial Restraint</i>	667
E.	<i>Toward a New Model: The 1999 Labour Expenses Deduction Judgment</i>	669
F.	<i>The Exception to the Rule: European Union Law</i>	673
4.	<i>Reactions of "La Doctrine" after 1999</i>	675

IV. MEANS AND EFFECTS OF JUDICIAL REVIEW	678
1. <i>Introduction</i>	678
2. <i>Procedures Available to Enforce Fundamental Rights Law</i>	678
3. <i>Remedies for Fundamental Rights Violations</i>	679
4. <i>Effects of Judgments</i>	681
5. <i>Mitigating the Temporal Effects of Judgments</i>	683
6. <i>Judicial Reforms</i>	685
SUMMARY	686
BIBLIOGRAPHY	688
 NORWAY: Eivind Smith, <i>Constitutional Courts as Positive Legislators</i>	 693
I. ON THE ORIGINS OF THE NORWEGIAN SYSTEM OF JUDICIAL REVIEW	693
II. ON THE CHARACTER OF THE NORWEGIAN SYSTEM OF JUDICIAL REVIEW	695
III. THE SUPREME COURT OF NORWAY AS A POSITIVE LEGISLATOR?	697
 POLAND: Marek Safjan, <i>The Constitutional Courts as a Positive Legislator</i>	 701
I. PRELIMINARY REMARKS	701
II. WHAT IS THE FUNCTION OF THE COURT AS A POSITIVE LEGISLATOR?	703
III. INDIRECT, POSITIVE IMPACT – EFFECTS OF NEGATIVE LEGISLATION	703
IV. DIRECT FORMS OF IMPACT EXERTED BY THE CONSTITUTIONAL COURTS VERSUS NORMATIVE ACTS	708
1. <i>Interpretation of the Constitution</i>	708
2. <i>Interpretation of Laws: Interpretative Rulings</i>	714
3. <i>Signalization</i>	717
CONCLUSIONS	718
 PORTUGAL: Joaquim de Sousa Ribeiro and Esperança Mealha, <i>Constitutional Courts as Positive Legislators</i>	 721
I. BRIEF DESCRIPTION OF THE JUDICIAL REVIEW METHOD APPLIED IN PORTUGAL	721

1. <i>The Preemptive Control</i>	722
2. <i>The Abstract Review and the Concrete Review of Legislation</i>	723
3. <i>The Enforceability and Implementation of Decisions of the Constitutional Court</i>	723
II. POWERS OF THE CONSTITUTIONAL COURT	724
1. <i>Portuguese Constitutional Court as a Negative Legislator</i>	724
2. <i>Powers of the Court and Effects of Constitutional Review Decisions</i>	725
3. <i>Interpretation of Statute in Harmony with the Constitution</i>	728
4. <i>Manipulative and Additive Decisions</i>	729
5. <i>The Impact of Constitutional Case Law</i>	730
SERBIA: Boško Tripković, <i>A Constitutional Court in Transition: Making Sense of Constitutional Adjudication in Postauthoritarian Serbia</i>	735
INTRODUCTION	735
I. NORMATIVE GOALS OF JUDICIAL REVIEW	736
II. PERFORMANCE OF THE SERBIAN CONSTITUTIONAL COURT	741
1. <i>General Features of the System of Judicial Review</i>	741
2. <i>Constitutional Adjudication and Democratic Process</i>	747
A. Representation	747
B. Deliberation	753
3. <i>Constitutional Court and Liberal Values</i>	757
A. Direct Protection of Liberal Values	758
B. Indirect Protection of Liberal Values	762
CONCLUSION	764
SLOVAK REPUBLIC: Ján Svák and Lucia Berdisová, <i>Constitutional Court of the Slovak Republic as Positive Legislator via Application and Interpretation of the Constitution</i>	767
I. INTERPRETATION OF THE CONSTITUTION	769
II. ABSTRACT CONTROL OF CONSTITUTIONALITY	771
1. <i>Effect of the Ruling of the Constitutional Court regarding the Unconformity Between Legal Regulations</i>	773
III. CONCRETE CONTROL OF CONSTITUTIONALITY	775

CONTENTS

SWITZERLAND: Tobias Jaag, <i>Constitutional Courts as Positive Legislators</i>	783
I. INTRODUCTION	783
1. <i>Courts as Legislators in General</i>	783
2. <i>The Federal Supreme Court as a Constitutional Court</i>	784
A. Judicial Review in General	784
B. Limitations on Judicial Review	785
3. <i>The Federal Supreme Court as Legislator</i>	786
A. Negative Legislation	786
B. Positive Legislation	788
4. <i>Federal and Cantonal Law</i>	788
II. REFUSAL OF THE FEDERAL SUPREME COURT TO ACT AS POSITIVE LEGISLATOR	789
1. <i>Principle</i>	789
2. <i>Examples</i>	789
III. THE FEDERAL SUPREME COURT AS POSITIVE LEGISLATOR	791
1. <i>In General</i>	791
2. <i>Fundamental Rights</i>	791
A. New Fundamental Rights	791
B. Interpretation and Substantiation of Fundamental Rights	793
3. <i>Political Rights</i>	793
4. <i>Procedural Guarantees</i>	795
5. <i>Federal Conflicts</i>	796
6. <i>Compensation for Infringement of Property Rights</i>	797
7. <i>Further Examples</i>	798
CONCLUSIONS	798
BIBLIOGRAPHY	800
ABBREVIATIONS	802
 UNITED KINGDOM: John Bell, <i>Constitutional Courts as Positive Legislators</i>	 803
INTRODUCTION AND TERMINOLOGY	803
I. CONSTITUTIONAL (JUDICIAL) REVIEW, CONCENTRATED OR DISTRIBUTED	806
II. SPECIFIC ISSUES	807

1.	<i>Constitutional Review Procedures</i>	807
2.	<i>Judicial Decisions</i>	808
	A. Human Rights and Judicial Activism	809
	B. Judicial Substitution	811
3.	<i>Effect of Decisions</i>	813
	UNITED STATES OF AMERICA: Laurence Claus and Richard S. Kay, <i>Constitutional Courts as Positive Legislators in the United States</i>	815
I.	LEGISLATORS AND POSITIVE LEGISLATORS	815
II.	HOW AMERICAN COURTS LEGISLATE THROUGH CONSTITUTIONAL ADJUDICATION	820
III.	ENFORCING JUDICIAL LEGISLATION	829
	VENEZUELA: Daniela Urosa Maggi, <i>Constitutional Courts as Positive Legislators: The Venezuelan Experience</i>	843
I.	THE NORMATIVE JURISDICTION ACCORDING TO THE JURISPRUDENCE OF THE CONSTITUTIONAL CHAMBER	846
II.	CASES WHERE THE CONSTITUTIONAL CHAMBER HAS EXTENDED ITS OWN COMPETENCIES THROUGH THE PRACTICING OF THE NORMATIVE JURISDICTION	847
1.	<i>Competencies in Constitutional Amparo Matters</i>	848
	A. Modification of the Competencies to Hear the Amparo Claims	849
	B. Modification of the Procedure of the Constitutional Amparo Claim	849
2.	<i>Competencies in the Special Recourse to Review Decisions</i>	850
3.	<i>Competencies to Hear the Interpretation of the Constitution Recourse</i>	852
4.	<i>Competencies in Matters of Concentrated Control of the Constitutionality of Statutes and Other Acts Having Rank of Law</i>	855
	A. Jurisprudential Inclusion of the Competency of Incidental Control over Statutes	855
	B. Modification of the Procedure of the Nullity Cases	857
5.	<i>Competencies in Matters of Control over Unconstitutionality for Omission</i>	858

6.	<i>Competency in Matters of Claims for Protection of Diffuse and Collective Interests</i>	859
A.	Creation of a Claim for Protection of Diffuse and Collective Interests	859
B.	Procedure to Be Followed and Legitimacy in Claims for Protection of Diffuse and Collective Interests	860
7.	<i>Competencies in Matters of Habeas Data</i>	860
III.	CASES OF JUDICIAL ACTIVISM ON MATTERS OF CONSTITUTIONAL INTERPRETATION: THE CONSTITUTIONAL CHAMBER AS POSITIVE CONSTITUENT	862
1.	<i>Decisions No. 6 of January 27, 2000 (case Milagros Gómez et al.) and No. 180 of March 28, 2000 (case Allan Brewer-Carías et al.): Legitimization of the Constitutional Transition Regime Approved by the National Constituent Assembly on December 1999 and Legitimization of the Acts Performed by Such Assembly in the Execution of Such Transition Regime.</i>	863
2.	<i>Decision No. 34 of January 26, 2004 (case Vestalia Araujo): Interpretation of Article 203 of the Constitution</i>	864
3.	<i>Decision No. 565 of April 15, 2008 (case Attorney General of the Republic): Interpretation of Article 164.10, of the 1999 Constitution</i>	865
IV.	PRECEDENTS OF THE CONSTITUTIONAL CHAMBER IN WHICH IT ACTED AS POSITIVE LEGISLATOR FOR ADDING TO THE LEGAL SYSTEM REGULATORY PRINCIPLES THAT DID NOT EXIST BEFORE	867
1.	<i>Decision No. 1013 of June 12, 2001 (case Elias Santana): Interpretation and Limitation of Rights Related to Freedom of Expression and Right to Rebuttal</i>	867
2.	<i>Decision No. 978 of April 30, 2003 (case Bolívar Banco): Resolution of the Method and Opportunity for Exercising the State Tax Authority on Tax Stamp Matters Pending the Issuing of the Relevant National Legislation</i>	868
3.	<i>Decision No. 511 of April 5, 2004 (case Maira Rincón Lugo): Decision on the Taking over Proceeding of Cases from Lower Courts (Avocamiento), Having Binding Nature for All Other Courts of the Supreme Tribunal of Justice</i>	869

4.	<i>Decision No. 1682 of July 15, 2005 (case Carmela Manpieri): Interpretation of Article 77 of the Constitution – Comparison between Men and Women De Facto and Men and Women Marriage – and the Praetorian Development of Its Legal Regime</i>	870
5.	<i>Decision No. 1456 of July 27, 2006 (case Yamilex Núñez de Godoy) and the Praetorian Development of the Legal Regime of Assisted Reproduction</i>	871
V.	PRECEDENTS OF THE CONSTITUTIONAL COURT THAT ACTS AS POSITIVE LEGISLATOR TO MODIFY PREEXISTING LAWS	872
1.	<i>Decisions That Modify Legal Rules through Substitutive Decisions on No Prior Declaration of Annulment of the Rule</i>	872
A.	Decision No. 2855 of November 20, 2002 (case <i>FEDENAGA</i>): Constitutionality of Articles 40 and 43 of the Decree with Force of Law on Rural Lands and Agrarian Development	873
B.	Decision No. 2560 of August 5, 2005 (case <i>Rómulo Pacheco</i>): Modification of Article 172 of the Organic Code of Criminal Procedure	874
C.	Decision No. 301 of February 27, 2007 (case <i>Adriana Vigilancia</i>): Modification of the Sense and Scope of Article 31 of the Income Tax Law	875
2.	<i>Decisions of the Constitutional Chamber That Annulled and Established the New Wording of Legal Provisions</i>	877
A.	Decision no. 80 of February 1, 2001 (Case of Procedural Terms): Modification of Article 197 of the Civil Procedure Code Regarding the Calculation of Procedural Terms	877
B.	Decision No. 1264 of June 11, 2002 (case <i>Jesús Rendón</i>): Partial Annulment of Article 201 of the Civil Procedure Code That Governs Judicial Holidays	878
C.	Decision No. 2241 of September 24, 2002 (case <i>Andrés Velázquez</i>): Partial Annulment of Article 80 of the Organic Law on the Financial Administration of the Public Sector	879
D.	Decision No. 3241 of December 12, 2002 (case <i>COVEIN</i>): Partial Annulment of Article 1 of the Ordinance on the Industry and Commerce License Tax of the Bolívar Municipality of the Anzoátegui State	880

CONTENTS

E.	Decision No. 865 of April 22, 2003 (case <i>Ernesto José Rodríguez Casares</i>): Annulment of Article 48 of the Ordinance on Urban and Rural Common and Personal Lands for the Bolivar District of the Zulia State	881
F.	Decision No. 1104 of May 23, 2006 (case <i>Carlos Brender</i>): Partial Annulment of Article 90 of the Organic Law of the Attorney General of the Republic	882
G.	Decision No. 163 of February 28, 2008 (case <i>Ciro Ramón Araujo</i>): Partial Annulment of the Organic Law of Public Defense	883
a.	<i>Partial Annulment and Modification of the Text of Article 3 of the Organic Law of Public Defense</i>	883
b.	<i>Partial Annulment and Modification of Articles 11, 12, and 13 of the Organic Law of Public Defense</i>	883
c.	<i>Partial Annulment and Modification of Article 15 of the Organic Law of Public Defense</i>	884
VI.	BRIEF CONCLUSIONS REGARDING THE UNCONSTITUTIONALITY OF THE EXERCISE OF THE NORMATIVE POWERS BY THE CONSTITUTIONAL CHAMBER OF THE SUPREME CHAMBER OF JUSTICE	885
 PART THREE		
SYNTHESIS REPORT: CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS IN COMPARATIVE LAW		889
PRELIMINARY REMARKS		889
1.	<i>The Subordination of Constitutional Courts to the Constitution</i>	889
2.	<i>New Role of Constitutional Courts and the Question of Acting as Positive Legislators</i>	891
FIRST TREND: CONSTITUTIONAL COURTS INTERFERING WITH THE CONSTITUENT POWER		893
1.	<i>Constitutional Courts Resolving Constitutional Federal Disputes and Enacting Constitutional Rules</i>	893
2.	<i>Constitutional Courts Exercising Judicial Review on Constitutional Provisions</i>	894
3.	<i>Constitutional Courts Exercising Judicial Review on Constitutional Reforms and Amendments</i>	894
4.	<i>The Role of Constitutional Courts Adapting the Constitution on Matters of Fundamental Rights</i>	896
5.	<i>The Mutation of the Constitution on Institutional Matters</i>	897

SECOND TREND: CONSTITUTIONAL COURTS INTERFERING
WITH EXISTING LEGISLATION 899

1. *Constitutional Courts Complementing Legislative Functions by Interpreting Statutes in Harmony with the Constitution* 899
2. *Constitutional Courts Complementing the Legislator by Adding New Rules (and a New Meaning) to the Existing Legislative Provision* 900
3. *Constitutional Courts Complementing Legislative Functions by Interfering with the Temporal Effects of Legislation* 902
 - A. The Power of the Constitutional Courts to Determine When Annulled Legislation Will Cease to Have Effect: Postponing the Effect of the Courts' Ruling 903
 - B. The Power of the Constitutional Courts to Determine When Annulled Legislation Will Cease to Have Effects: The Retroactive or Nonretroactive Effects of Their Own Decisions 904
 - a. *The Possibility of Limiting the Retroactive Ex Tunc Effects of Declarative Decisions* 905
 - b. *The Possibility of Retroactive Effects for Ex Nunc Constitutive Decisions* 906
4. *The Power of Constitutional Courts to Revive Repealed Legislation* 907

THIRD TREND: CONSTITUTIONAL COURTS INTERFERING
WITH THE ABSENCE OF LEGISLATION OR
WITH LEGISLATIVE OMISSIONS 907

1. *Constitutional Courts Filling In Absolute Legislative Omissions* 907
 - A. The Direct Action against Absolute Legislative Omissions 908
 - B. The Protection of Fundamental Rights from Absolute Legislative Omissions by Means of Actions or Complaints for Their Protection 909
2. *Constitutional Courts Filling In the Gap of Relative Legislative Omissions* 912
 - A. Constitutional Courts' Issuing of Nonbinding Directives to the Legislator 913
 - B. Constitutional Courts' Issuing of Binding Orders and Directives to the Legislator 914
3. *Constitutional Courts as Provisional Legislators* 915

CONTENTS

FOURTH TREND: CONSTITUTIONAL COURTS AS LEGISLATORS ON MATTERS OF JUDICIAL REVIEW	917
1. <i>Constitutional Courts’ Creating of Their Own Judicial Review Powers</i>	917
A. The Judge-Made Law on the Diffuse System of Judicial Review	917
B. The Extension of Judicial Review Powers to Ensure the Protection of Fundamental Rights	918
2. <i>The Need for the Express Provision in the Constitution of Judicial Review Powers of the Constitutional Jurisdiction and Its Deviation</i>	919
3. <i>Constitutional Courts’ Creation of Procedural Rules on Judicial Review</i>	920
FINAL REMARKS	921
APPENDIX	925
INDEX	929