# Unlegislated Powers of the Constitutional Judges

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# الاختصاصات غير المشرعة للقاضي الدستوري

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**Abstract**

This study examines the extension in the power of constitutional courts by creating powers to themselves without any constitutional or legislative basis. Under this extension, the constitutional court find themselves enforced to innovate new jurisdictions to solve constitutional problems that cannot be addressed by the traditional jurisdiction. However, when the constitutional courts assigning themselves with such jurisdictions, it may raise some concerns about its infringing the powers of other branches and violating some constitutional principles. The main aim of this paper is to clarify the concept and nature of these powers, and then assess and evaluate the risks of these powers by highlighting the most important positive and negative thoughts about the unlegislated powers of the constitutional judge. Keywords; unlegislated judications, constitutional reconciliation, judicial lawmakers

**الملخص**

تبحث هذه الدراسة في مجال التوسع الحاصل في الصلاحيات التي ينشئها القاضي الدستوري لنفسه دون ان يكون لها أي أساس تشريعي او دستوري، بموجب هذا اتوسع يجد القاضي الدستوري نفسه ملزما لابتكار اختصاصات جديدة من اجل إيجاد معالجة للمشاكل الدستورية التي لا يمكن معالجتها بواسطة الاختصاصات التقليدية، الا ان ممارسة هذه الاختصاصات غير المشرعة دستوريا قد تثير العديد من المخاوف حول مدى انتهاكها للصلاحيات الممنوحة للسلطات الأخرى وبالتالي تنتهك بعض المبادئ الأساسية، الهدف الأساسي من هذه الدراسة لبيان مفهوم وطبيعة تلك الاختصاصات ومن ثم تقييم المخاطر المترتبة منها من خلال توضيح كافة الأفكار الإيجابية والسلبية التي تدور حول فكرة الاختصاصات المبتكرة للقاضي الدستوري.

الكلمات المفتاحية: الاختصاصات غير المشرعة، التوفيق الدستوري، المشرع القضائي.

## Introduction

A significant extension appears in the powers of constitutional judges, change from exercising the traditional jurisdictions to significant functions by innovating new jurisdictions for themselves

without basing on any constitutional or legislative provisions. This extension in the power of constitutional courts promotes us to ask a vital question about the reasons behind creating new judicial jurisdictions by the constitutional courts without any constitutional or legislative basis? In response to this argument, this study delivers a clear idea of the development in the powers of the constitutional judges in exercising the unlegislated jurisdictions.

The main of this paper is to examine whether such jurisdictions help resolve some constitutional problems in more legal systems such as (legislative omission and the conflict of the constitutional provisions). It argues that some applications of these unlegislated powers make an important contribution to address the unsolved constitutional dilemma. In order to achieve this result a general agreement need to be reached about the argument that the traditional powers that already given to constitutional court is no longer sufficient to solve the new problems, and then this 'unlegislated powers need to be regulated in a way which respect or protects the constitutional supremacy.

**Research questions**

Are constitutional courts shifting towards a developed role by innovate to themselves new powers that have not been constitutionally conformed to them under certain constitutional circumstances.

**Significance of Research**

The study provides a significant contribution to examine the applications of the unlegislated powers as it adopted by many constitutional courts in different countries. This paper attempts to find out the concerns and benefits of the powers innovated by constitutional courts in addressing the unsolved constitutional problems. By contrast, many jurisprudential trends have not recognised these jurisdictions as unlegislated powers. This paper can be considering as the first study that discuss the existence of the powers innovated by constitutional judges as unregulated powers. Furthermore, this study also intends to determining this extension to be legislatively and judicially recognised as unlegislated powers.

**Research methodology**

To achieve the purposes of this study, this paper is based on the analytical and comparative methods. These methods assisted to gain a

rich analysis of the judicial applications of the unlegislated powers of the constitutional court in response to the unaddressed constitutional problems. This methodology also assisted us to achieve a clear picture of the most positive and negative thoughts of the appearance of the unlegislated powers.

## 2. Understanding the unlegislated Powers of the Constitutional Judge

having a well-defined explanation of the unlegislated jurisdictions, assists the researcher to gain a clear point of view of why constitutional judges have judicially innovated by themselves new powers to keep abreast of developments in the constitutional systems. This part will be divided into two subsections: the first determine the historical basis of the of the unlegislated powers. The second examines the definition and legal basis for the idea of such powers. The final part will determine the nature of these powers.

### 2.1 The historical basis of the of the unlegislated powers

The emergence of the notion the unlegislated powers cannot be understood without first stating the historical basis of such powers. Historically and practically, the unlegislated power of the constitutional courts originated from the USA legal systems especially in the case of *Marbury v Madison*.[1] Under this occasion, the Supreme Court made to itself a new jurisdiction which has not been constitutionally or legislatively assigned with it. John Marshall (Chief Justices) declared the Judiciary Act 1789 is unconstitutional.[2] Three significant questions have by Marshall; the first one was "Can the writ issue from this court?" in response to this argument, Chief Justices Mareshall stated that constitutionally of the jurisdictions of the Supreme Court are divided into two types of jurisdictions, which are original and appellate, that should not be altered by legislative power. Marshall emphasised that if the legislative power could amend the constitutional jurisdiction,

[1] Edward S Corwin, "Marbury V. Madison and the Doctrine of Judicial Review," *Michigan Law Review* (1914): 539.

[2] Susan Low Bloch and Maeva Marcus, "John Marshall's Selective Use of History in Marbury V. Madison," *Wis. L. Rev.* (1986); Robert Lowry Clinton, *Marbury V. Madison and Judicial Review* (University Press of Kansas, 1989); G Edward White, "The Constitutional Journey of" Marbury V. Madison"," *Virginia Law Review* (2003): 1467; Robert F Nagel, "Marbury V. Madison and Modern Judicial Review," *Wake Forest L. Rev.* 38 (2003); Mark Tushnet, "Marbury V. Madison around the World," *Tenn. L. Rev.* 71 (2003); Maxwell Stearns, "Spokeo V. Robins and the Constitutional Foundations of Statutory Standing," (2015).

then the provisions of Constitution which indicate these jurisdictions was unreasonable. Furthermore, Justices Marshall claimed, "When there is a conflict between constitution and law, the more fundamental must prevail".[1] Subsequently, the Supreme Court refused Marbury's request and stated the invalidity of the Article 13 of the Act. In this decision, the Supreme Court based on the principle of hierarchy of legal rules. The court justified its decision by saying that the Section 13 that empowered the Court to issue a writ, was invalid then consequently unconstitutional.[2]

As we can see, the case of *Marbury v Madison* is deemed as legal and historical basis for the unlegislated powers of the constitutional courts. This case is considered a starting point for the constitutional judges to create jurisdictions when they find themselves unable to solve a judicial problem by the jurisdiction already assigned to them. Under this case, the jurisdiction of judicial review has become legislatively recognised. After this significant case, the power of the judicial review are adapted by many countries through including it within their constitutions in different forms.

### 2.2 Nature of the unlegislated powers

Since the unlegislated jurisdiction of the constitutional judge is not clearly defined, it is necessary to clarify its nature and its most important features in order to be able to distinguish it from other jurisdictions.

#### 2.2.1 Judicial basis

One of the most important features that characterise the unlegislated jurisdictions is that they are made by the constitutional judiciary itself without having any constitutional or legislative basis. In many cases, the constitutional judges find themselves enforced to extend their powers by creating new jurisdictions. Such extension in the unlegislated jurisdictions is based on the doctrine of judicial necessity. In fact, the need for the unenacted or unregulated rules stimulate constitutional courts to extend their powers by exercising the constitutional obligations appointed to the constitutional or

[1] C. Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (Rowman & Littlefield, 1994), 83.
[2] Laura Langer, *Judicial Review in State Supreme Courts: A Comparative Study* (SUNY Press, 2002), 4.

Parliamentary legislature. In some occasions, the constitutional courts explicitly justified their extension in jurisdiction based on the principle of the judicial necessity. For example, the Supreme Court of India indicated this principle in the case Kesavananda Bharati v State of Kerala , by stating that "Parliament cannot amend the basic feature or basic structure of the Constitution. Furthermore, there is no complete or exhaustive list of the basic feature – the court decides these features as and when necessary".[1]

### 2.2.2 Relativism

One of the most important characteristics that characterizes this authority is the relativity of its effects, in that it is not binding on the court itself in future judicial rulings, but the Constitutional Court can reverse its previous decisions in the event of similar cases. The reason for describing it as relativism is due to the interest that is intended to be preferred over the other. The Constitutional Court may give priority to a constitutional text or principle that protects a specific interest at the expense of another constitutional text or principle to resolve the issue presented to it by giving it a higher rank than the other. However, the constitutional judge may refrain from giving preference or supremacy to that interest in an issue that will be presented to him in the future if there are circumstances or occasions that require giving this status.

## 3. Types of the unlegislated powers of constitutional judges

From time to time, the constitutional judges create new jurisdictions to themselves in order to solve the disputes. These unlegislated jurisdictions adopted by a number of constitutional courts. Nevertheless, practicing such jurisdictions is all dissimilar, ranking from reconciling the conflict constitutional provisions to functioning statutory powers. In some judicial systems, the constitutional court innovate the powers of constitutional reconciliation between the conflict constitutional provisions inside the Constitution itself. Meanwhile, other constitutional courts extended its powers as a lawmaker to enacting legislative rules to solve the legislative gap ceased by the legislature.

### 3.1 Constitutional Conciliation as an unlegislated power of constitutional judge

[1] *Kesavananda Bharati V. State of Kerala*, (1973).

Constitutional Conciliation is one of the judicial jurisdictions exercised by constitutional courts without any constitutional or legislative basis. The emergence of such power cannot be understood sufficiently without first defining and determining its types.

### 3.1.1 The definition of the Constitutional Conciliation

The The significance of this power arises when constitutional provisions or principles come into conflict between themselves. In this situation, constitutional judges will be incapable to overcome such conflict. This is due the fact that such conflict is not among principles or provisions in dissimilar sources in the legal systems, rather it occurred between rules and principles occupy the same position within the constitutional bloc. At the result, such conflict cannot be removed through the traditional jurisdictions given to the constitutional judges. In order to overcome such problem, the constitutional judges find themselves enforced extend their jurisdictions by creating a hierarchy between the conflicted provisions and principles. Under this hierarchy, new powers are innovated by the constitutional courts to reconcile between these rules wwithout entailing depriving them of constitutional values.

The notion of the reconciliation between the fundamental principles and rules arose after the extension in the scope of the constitutional recourses located outside of the constitutional document itself. The extension in the scope of constitutional provisions, in their aggregate, form a "constitutional bloc".[1] Regarding the definition for the concept of powers of constitutional conciliation, although it has not been judicially, jurisprudentially, nor legislatively defined, the current study seeks to provide definition as: It is an unlegislated jurisdiction created by the constitutional judges to find the optimal balance between a conflicted constitutional rules or principles. Under this jurisdiction, the constitutional judges applying a substantive hierarchy between These rules and principles have the same value and level inside the constitutional bloc.[2] Such hierarchy enables constitutional judges to reconcile between these provisions or principles, without excluding some of them on the account of others, not depriving some of them

[1] DR. Ahmed Oudah AL-Dulaimi, *The Hierarchy of the Constitutional Rules (Comparative Study)* (Egypt: Dar Aljamaa ALjadedah, 2021). P 72.

[2] Ahmed Oudah Al-Dulaimi et al., "Are All Constitutional Rules Created Equal? Substantive Hierarchy in Constitutions in Theory and Practice," 45, no. 1 (2018). P 64.

from their constitutional values and nor giving another superior level than the constitutional value.

### 3.1.2 Types of the power of constitutional reconciliation

The judicial power of the constitutional reconciliation is not limited to overcome the constitutional conflict the rules which are stipulated inside the constitutions; it similarly can be occurred with the principles and rights that have constitutional value even are located outside of the constitution. For the purpose of the study, the power of constitutional reconciliation will be categorised into two types as follows;

#### 3.1.2.1 The constitutional reconciliation Between the Constitutional Rules

In this type of jurisdiction, the constitutional courts exercise their unlegislated power of reconciliation to overcome the conflict between the rules inside the constitutional documents only. In doing so, the constitutional judges rely on the nation of substantive hierarchy to create a kind of weighting between those constitutional rules. It has been argued that constitutional provisions are graded according to the nation of the hierarchy. To achieve this end, some scholars suggested a number of criteria to rely on when applying the power of constitutional reconciliation. The first criterion based on "the rules of amending the constitutional provisions" as the key principles to distinguish the primary provisions from the secondary provisions. Under this principle, the constitutional provisions are classified into two types. Basic Structure (the constitutional amendment rules) is considered as the first type is performed, according to its the functions, to determine the alteration measures and the period in which the constitutional assembly or the authorised branches is empowered to interfere to annul, alter, and add to the provisions of the constitution.[1] The second type of is those provisions and principles that, under Basic Structure, are altered. Based on this criterion, the rules that embrace a set of provisions regulating distribution of the powers and the rights and liberties of people (second type) it can be given a higher level as primary rules. Meanwhile, the rules regulating the amendment of the constitution it can be deemed as secondary constitutional provisions as they derive their legitimacy from the primary provisions. So, if any conflict occurred between the

[1] Favoreu, L., [Constitutional Bloc]. *Dictionnaire constitutionnel*, 1992, pp.87-89. (In French)

constitutional amendment rules (the first type) and the amended rules (the second type) the constitutional courts would give the constitutional priority for the second type on the expense of the fist type of rules. [1]

This type of the jurisdiction has been expressly applied by the Court of Appeal of Malaysia. In the case of Indira Gandhi, Mutho v Pengarah Jabatan Agama Islam Perak & 2 Ors, the court made a clear hierarchy between the Westminster principles with principles of Shariah law regulated by article 121(1A) of the Constitution in order to remove. Based on this hierarchy, the courts reconciled between these principles and article 121(1A) and overcame the conflict between them. The court, in its decision, described the Westminster principles as the constitutional amendment rules (Basic Structure) within the constitutional decument. It declared that the Westminster principles are deemed important part of the Constitutional which cannot be arrogated or removed. Consequently، the court held that the basic Westminster principles hold higher significance than the provisions of article 121 (1A). This end can be seen clearly by its statement that this jurisdiction cannot be taken away from the civil courts and granted to the *Shariah* courts on the basis of Article 121 (1A) and that is due to the position that this jurisdiction occupies as a basic structure of the constitution. [2] Thus, the principles included in the basic structure of the constitution were granted a superior constitutional value within the constitutional document.

### 3.1.2.2The Reconciliation Between the Constitutional Provisions and Constitutional Rights

As previously mentioned, the constitutional conflict is not restricted to be occurring between the rules and provisions inside the constitutional text only. It can be appearing between these rules and the fundamental rights and liberties inherent inside the constitutional documents. The key obligation of the constitutional judges is to apply the principle of the constitutional reconciliation when the conflict happens between these rights with the provisions. It has been argued that these liberties and rights, formally and procedurally, occupy the

[1] ALBERTON, G, [From the indispensable integration of the bloc of the conventionality to the constitutional bloc]. *op. cit***,** pp263.(In French), EMILIOU, N. 1996. *The principle of proportionality in European law: a comparative study*, Kluwer Law Intl.

[2] Indira Gandhi Mutho V. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145.

same level of the constitutional value. However, these constitutional values are in ranking order from the substantive perspective.

In doing such reconciliation, a number of criteria should be applied to gain a clear point of view of how these rights and liberties can be constitutionally graded. It has been argued that different criteria can be adopted by the constitutional courts to set up a hierarchy and reconcile between the conflicted rights and liberties.

Badinter & Genevois suggested two factors on which the constitutional judge can rely in adopting the principle of constitutional reconciliation between conflicting fundamental rights and liberties, which could be clarified as follows; The first factor depends on the degree of preciseness of the constitutional text that protects the right or freedom, and on the possibility of regulating some exceptions to that right or liberty. Meanwhile, the second factor depends of the restrictions on the judicial review on the legislative duties such as the laws and decisions that regulate these rights and liberties. According to these factors, the constitutional judge will give the superior level to the rights and liberties that meet the two factors.[1] Another criterion can be adopted in applying a hierarchy between the fundamental rights can be seen when overcome the conflict, is to give the constitutional priority to the constitution been amended some rules and principles are contrary with the fundamental rights. In this case, the constitutional judges find themselves enforced to reconciling between them with preference given to these rights. [2]

Brami supported what Badinter & Genevois goes for in their suggestion by arguing that the foundation of the notion of the reconciliation between the constitutional provisions derived from the evaluation stated by Badinter & Genevois when they argued that the constitutional courts can make that hierarchy between the principles with the constitutional value. Another criterion to apply the principle of the reconciliation been jurisprudentially assumed to resolve the problem of the conflict between some rights and liberties by giving the superiority to others.[3]

[1] Di Manno, T., 1994. *[The Constitutional Council and the means and conclusions raised ex officio]*. Economica-PUAM. (In French)

[2] Genevois, B, [A category of principles of constitutional value: the fundamental principles recognized by the laws of the Republic], RFD adm, 1998, p.294.(In French)

[3] Cyril Brami, "La Hiérarchie Des Normes En Droit Constitutionnel Français: Essai D'analyse Systémique" (Université de Cergy-Pontoise, 2008).

These criteria distinguish between two types of rights and liberties; the first one these are determined by the legislator with goal with constitutional value and public interest. Meanwhile, the second types these rights and liberties have not been legislatively specified with any constitutional values.[1] By applying these criteria, the rights and liberties with goal with constitutional value are considered a more superior than the others, and thus they will be given the preference once the conflict occurred with the others. [2]

A clear example of this type of conflict can be clearly found in the 1956 French Constitution. Especially with the individual rights and liberties that are inherence in article 34 of the Constitution. The Council, in its decision issued on 21 February 2008, identified These rights and liberties with goal as a constitutional value by protecting the public order. In the decision of this case, the constitutional judge examined the discretionary jurisdictions of the legislative power to select from the legislative available alternatives to reach the pursued purpose. By applying the criteria above, these kind of rights and liberties can be classified with higher position because they have met the above criteria. Conversely, the constitutional judge, in another occasion, identified the principle of equality as a second-grade constitutional value. This is due the fact that the principle of equality contains provisions, under which the principle of equality is restricted for reasons related to the achievement of the public interest only.[3] As this principle granted the legislator a discretion in regulating the principle of equality, the constitutional judge considered it as second-level constitutional principle. [4]Therefore, if any conflict occurs between the rights and liberties includes in article 34 with the principle of equality, the constitutional judges innovate its reconciliation power to overcome such conflict by giving the preference the former one.

The innovated power of the constitutional reconciliation is also adopted the Federal Constitutional Court of Germany. In the Southwest

[1] Al-Dulaimi et al., "Are All Constitutional Rules Created Equal? Substantive Hierarchy in Constitutions in Theory and Practice."

[2] Di Manno, T, *[The Constitutional Council and the means and conclusions raised ex officio]*. Economica-PUAM, 1994 . (In French)

[3] RIALS, S, [Uncertainties of the notion of Constitution under the Fifth Republic], *Revue du droit public et de la science politique***,** 1984 , pp.604. (In French)

[4] Al-Dulaimi et al., "Are All Constitutional Rules Created Equal? Substantive Hierarchy in Constitutions in Theory and Practice."

Case (1951), the constitutional judges built a hierarchy between the constitutional rights within the provisions of the German Basic Law.[1] Under This case, Court acknowledged that the constitutional rights and principles stipulated in in both Article 1 and Article 20 occupy constitutional rank superior than others.[2] The constitutional courts is based, in its decision on, the Article 79(3) the German Basic Law, which grant these constitutional rights and principles the sovereignty and protection from any amendment or annulment by any legislators. Thus, the constitutional court, by this case, innovated to itself a power of the reconciliation between the conflicted rights and principles.

**3.1.2.3The constitutional reconciliation between the Constitutional provisions and Fundamental Values**

Jurisprudentially, the power of constitutional reconciliation is extended to be applied to resolve the conflict between the constitutional rules and principles. This consequence indicates the notion of a hierarchy between the constitutional provisions and principles and reconciling them. The problem arises when the constitution includes some provisions conflicts with the fundamental principles such as the separation of powers and the rule of laws. These principles even are not explicitly stipulated withing the constitution, but they hold superior value in the constitutional system. To solve such problems, the constitutional judges find themselves enforced to reconcile between an explicit constitutional provisions and implicit fundamental principles by building a hierarchy between these principles and provisions. A clear example of the powers of the constitutional reconciliation between explicit provision and implicit fundamental principle found in the case (*Wheat case*[3]) in Australia. By this case, the constitutional judges stated that the Section 101[4] of the constitution conflict with the principle of the separation of powers. Having such conflict makes the job of the constitutional courts more complicated, as the conflict not between provisions are belonging to the same legal document. The

[1] GÖZLER, K, *Judicial Review of Constitutional Amendments: A Comparative Study*, Ekin, 2008, pp.299.

[2] DE VISSER, M. 2013. *Constitutional Review in Europe: A Comparative Analysis*, Bloomsbury Publishing

[3] *New South* Wales *v Commonwealth* [1915] HCA 17, 20 CLR 54

[4] Section 101 provides that with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder"

challenge is that the constitutional courts have two solve a conflict between provision inside the constitution and principles are inherent outside the constitution. Overcoming such conflict requires the constitutional courts to innovate a new jurisdiction to reconcile between the Section 101 and the "principle of the separation of powers". In this case, we found the High Court has given the "principle of separation of powers" a higher constitutional position than the Article 101 of the Constitution itself, even the principle being an implicit principle.[1]

### 3.2 Power of constitutional law as a Positive Legislator

Exercising the power as positive legislator is one the jurisdictions that created and developed by the constitutional courts. The appearance of the power as positive legislator, hard to be defined appropriately without examining the power of negative legislator its alternative. Having a clear idea of the both concepts assist us to get a clear perception of why the constitutional judges innovate a new power to exercise legislative functions. The following parts present brief understanding of these defections.

#### 3.2.1 Constitutional Judge as a Negative legislator

The concept of "negative legislator", theoretically, has been discovered by Hans Kelsen in his classic article 'La garantie juridictionnelle de la constitution'.[2] As previously mentioned, however, the actual appearance of the powers as negative legislator found its basis from the *Marbury v Madison* case.[3] Hans Kelesn based his debate on the analogy of the role exercised by the constitutional judge with that exercised by the legislative power. According to Kelsen, the legislature exercising a positive legislator when any action taken to enact a law to a particular system of law by an elected organ.[4] In contrast, the powers of negative legislator are identified to that by which the constitutional courts to annul the unconstitutional laws.[5] in terms of binding effect, Kelsen assumed that "there was no essential

[1] *New South* Wales *v Commonwealth* [1915] HCA 17, 20 CLR 54.

[2] Hans Kelsen, *La Garantie Juridictionnelle De La Constitution:(La Justice Constitutionnelle)* (1928), 197.

[3] Corwin, "Marbury V. Madison and the Doctrine of Judicial Review," 539.

[4] Laurence P. Claus and Richard S. Kay, "Constitutional Courts as "Positive Legislators" in the United States," *The American Journal of Comparative Law* 58 (2010); Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5, no. 1 (2007): 82.

[5] Hans Kelsen, "Judicial Review of Legislation," *Journal of Politics* 4, no. 1 (1942).

difference between the powers of the elected legislature as a positive legislator and the powers of the constitutional court as a negative legislator". Kelsen provided an explanation for what has been argued above by stating that the constitutional courts acting as legislator when they declare a law invalid. This is because the decision that essentially invalidates a law modifies the content of the set of legal rules which is convincing reason to consider it equal with the legislation. It can be clearly seen from his statement "[t]he annulment of a law is a legislative function, an act — so to speak— of negative legislation. A court which is competent to abolish laws — individually or generally – functions as a negative legislator".[1]

According to Kelsen's understanding, a similarity can be seen between the powers of the legislative organ when it abrogated a law by another law and the decisions by which the constitutional courts annul another law, both of them exercise negative legislator powers. Kelsen held that the idea of a law enacted by the legislative organs being annulled by alternative organ, which are the constitutional judges, established a significant limitation of the legislative branch. Such argument assumes that there are, alongside the positive, "a negative legislator", a power (constitutional court) that can be constituted based on completely different values from that of legislature chosen by the people.[2] Kelesn clearly stated the constitutional judges exercised a statutory jurisdiction through assigning with the function of invalidating the unconstitutional rules. Kelsen acknowledged,

"To annul a law is to assert a general norm, because the annulment of law has the same character as its elaboration—only with negative sign attached. … A tribunal which has the power to annul a law is, as a result, an organ of legislative power".[3]

The notion of the power of constitutional judges as "a negative legislator" is represented in the traditional jurisdictions which is limited to declare the invalidity of the laws and repeal these laws if against the

[1] *General Theory of Law and State*, vol. 1 (The Lawbook Exchange, Ltd., 1945), 268-69.
[2] Ibid.
[3] Kelsen, *La Garantie Juridictionnelle De La Constitution:(La Justice Constitutionnelle)*, 45.Cited by A.S. Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP Oxford, 2000), 35.

constitution.[1] Identifying the traditional jurisdiction of constitutional judges as "a negative legislator" was not limited to the Kelesn's theory, but it described by a number of scholars[2] and judges. Bustamante expresses the concept of the power of negative legislator as "the idea of a 'negative legislator' had been previously understood by the court as a regulative idea which ruled that the court should interfere in the least possible measure in the competences of the legislator".[3] Alec Stone considers the traditional powers of constitutional judges "[c]onstitutional judges, on the other hand, are negative legislator, whose legislative authority is restricted to annulling statutes when the parliament's law conflict with the law of the constitution".[4]

Judicially, such powers have been identified by the same attitude toward the traditional jurisdictions of constitutional courts. The Spanish Constitutional Court is one of the courts that seconded this definition. By its Decision 5/1981 dated on 13 February 1981, in the case of "Legal Grounds 6", the court declares that, "The Constitutional Court is the supreme interpreter of the Constitution, not legislator and it can only be asked to pronounce on whether or not provisions accord with

[1] Ahmed Oudah Mohammed AL-Dulaimi, "From Negative to Positive Legislator? Response to Unconstitutional Legislative Omission as a Case Study in the Changing Roles of Constitutional Courts" (Griffith University, 2018).

[2] G. Nolte and E.C.D. Law, *European and Us Constitutionalism* (Council of Europe Pub., 2005), 167; *Journal of Constitutional Law in Eastern and Central Europe*, (TFLR-Institute, 1996); European Commission for Democracy through Law. Secretariat, *Bulletin on Constitutional Case-Law: Special Edition* (Secretariat of the Venice Commission, Council of Europe, 1994), 18; A.S. Sweet and M. Thatcher, *The Politics of Delegation* (Taylor & Francis, 2004); H. Avila, *Theory of Legal Principles* (Springer Netherlands, 2007), 8; Mark Tushnet, "Popular Constitutionalism as Political Law," *Chi.-Kent L. Rev.* 81 (2006); GA Gadgiev and AL Kononov, "The Constitutional Court Is Negative Legislator," *Legal World*, no. 3 (1998); Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5, no. 1 (2007); ibid.; Michel Rosenfeld, "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts," *Int'l J. Const. L.* 2 (2004); Tom Ginsburg and Zachary Elkins, "Ancillary Powers of Constitutional Courts," *Tex. L. Rev.* 87 (2008); László Sólyom, "The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary," *International Sociology* 18, no. 1 (2003).

[3] Thomas Bustamante, "L'interprétation Juridique Et La Cour Suprême Fédérale Du Brésil : Considérations Sur Le Récent Dépassement Du Positivisme Juridique Et Sur La Révision De La Théorie Du « législateur Négatif »," *Les Cahiers de droit* 54, no. 1 (2013): 15.

[4] M. Shapiro and A.S. Sweet, *On Law, Politics, and Judicialization* (OUP Oxford, 2002), 147.

the Constitution".[1] The Brazilian Federal Supreme Tribunal also upheld the theory of negative by ruling that:

"[t]he declaration of unconstitutionality in the way it was requested, would modify the system of the law, altering its sense, which is a legal impossibility, because the judicial power, when controlling the constitutionality of normative act, only acts as negative legislator".[2]

From all of the above, we can presume that the concept of the power of negative legislators is referred to as the judicial traditional jurisdictions. Due to the emergence of unsolved constitutional problems that cannot be resolved by the negative legislator role, the constitutional judges found themselves are obliged to invent new powers to adopt a new role as positive legislator.

3.2.2 Constitutional Judge as a Lawmaker (Positive Legislator)

After defining the concept of the negative legislators, it is time to understand the nature of one of the most significant powers created by the constitutional courts which is the role of positive legislator. By these powers, the constitutional court developed their jurisdiction to function a lawmaking role to bridge the gap made by the legislature. The role of the constitutional judges as "positive legislator" scholarly and judicially is defined. It has been argued that the first appearance of the jurisdiction of constitutional judges as positive legislators started during the twenty-first century.[3] Especially when the constitutional judges found themselves incapable, by their traditional role, to solve the new legislative problems. Brewer-Carias explained this understanding when stated:

> "The fact is, at the beginning of the twenty-first century, that there is no doubt that constitutional courts are no longer to be negative legislators in the traditional way, because their role is no longer reduced when controlling the constitutionality of statues, to declare their unconstitutionality, or to annul them when contrary to the constitution. Constitutional courts have progressively

[1] Surya Deva, "Constitutional Courts as 'Positive Legislators': The Indian Experience," (2010).

[2] Thomas Bustamante and Evanilda de Godoi Bustamante, "Constitutional Courts as "Negative Legislators": The Brazilian Case," (2010).

[3] AL-Dulaimi, "From Negative to Positive Legislator? Response to Unconstitutional Legislative Omission as a Case Study in the Changing Roles of Constitutional Courts." P 28.

assumed a more active role when reviewing legislative acts vis-à-vis the constitution".[1]

Brewer expresses the powers of "positive legislator" by arguing that the constitutional courts have progressively assigned themselves with role as a more significant supporting legislator in its jurisdictions especially when enacting a new norms which can be derived from the constitution.[2] Paata J Javakhishvili adopted the same point of view when he argued that in many cases, the functions of constitutional judges are no longer restricted to annule the unconstitutional laws only, rather taking a more significant role a far from the function of negative legislator to adopt a new powers as positive legislator through legislating new norms.[3]

Likewise, Stone Sweet characterises the European constitutional courts and especially the France constitutional council as positive legislators by arguing that it is time to say that the constitutional judges now function as positive legislators as a result of the transformation in the parliamentary governance. [4] Based on Kelsen's theory, the development in the powers of the constitutional judges has been identified as assistant of the legislature in solving the constitutional problems. Such role is named by many terms such as named "co-legislator"[5] "third legislators" and "positive lawmakers" [6] these terms is given to express the idea of that the constitutional judges became a third legislative power, which is different from the powers of Kelesn's "negative legislator", established into a most important "positive legislator".[7]

## 4. Assessing the unlegislated jurisdictions of constitutional courts

[1] A.R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press, 2013), 36.
[2] Ibid.
[3] Paata J Javakhishvili, "Constitutional Court of Georgia and De Facto Real Control," *Journal of Law*, no. 1 (2017).; Marieta Safta, "Developments in the Constitutional Review-Constitutional Court between the Status of Negative Legislator and the Status of Positive Co-Legislator," *Persp. Bus. LJ* 1 (2012).
[4] Stone Sweet, "The Politics of Constitutional Review in France and Europe," 69.
[5] Safta, "Developments in the Constitutional Review-Constitutional Court between the Status of Negative Legislator and the Status of Positive Co-Legislator."17.
[6] Claus and Kay, "Constitutional Courts as "Positive Legislators" in the United States."
[7] Kaarlo Tuori, "Combining Abstract Ex Ante and Concrete Ex Post Review: The Finnish Model," in *Judicial Activism and Restraint Theory and Practice of Constitutional Rights* (2010).

The existence of the extension in the power of constitutional judges to innovate new jurisdictions lead to the belief that the constitutional judges has given themselves a position equal to the constitution itself. To assess the powers created by the constitutional courts, it is required to judge whether these jurisdictions are judicially created in way that consistent with the fundamental principles. This section will use the constitutional principles (e.g., "separation of powers", "parliamentary sovereignty", and "rule of law") as criteria to assess if the unlegislated jurisdictions uphold with these principles or not. The main of this section is to be examine the positive and negative thought about these jurisdictions as follows;

**The negative thoughts of the unlegislated powers**

Controversy surrounds assigning constitutional courts to themselves with unregulated jurisdictions with a number of criticisms leveled at these powers. Some scholars consider such extension of the powers of constitutional as a main threat to the constitutional principle. The separation of powers is deemed as one of these principles that might be threatened by such extensions. Daniela indicates this point of view by debating that the any extension in the powers of the constitutional courts toward exercising statutory authority might be an express danger to the principle of separation of powers. She states that when the constitutional judges give to themselves a jurisdiction to amend legislation or rules, without exercising the judicial review of the constitutionality of laws or explaining vacuum or ambiguity that requires judicial interpretation, they are infringing the "principle of separation of powers", and thus lead to the usurpation of functions.

It also claimed that assigning the constitutional courts themselves with new extended jurisdictions might lead to the belief that a new organ (fourth power) created outside the basis of constitutional supremacy. Such creation poses a danger to the separation of powers and then it may threat the constitution.[1] Meanwhile, another jurisprudential trend considers that constitutional judges, by exercising the innovated jurisdictions, become another form of legislative power by creating to themselves a role as lawmaker. In this situation, constitutional courts solve unconstitutional problems by means of

[1] Requejo Pagés Juan Luis "The Problems of Legislative Omission in Constitutional Jurisprudence," in *XIV Conference of Constitutional Courts of Europe* (Vilnius: Constitutional Courts of Europe, 2008).

undemocratic measures through substituting themselves for the legislature via regulating the rules needed.[1] Consequently, applying the duties of other branches cause a problem of unconstitutionality which is constitutionally not accepted.

One of the criticisms leveled at the unlegislated powers of the constitutional judges is that it may lead to the rebirth of the idea of the 'gouvernement des juges'.[2] The term 'gouvernement des juges' originally referred to the period during which judges exercised legislative functions that belong to the powers granted to the legislative branches. The return of the "government of judges" encroaches the separation of powers, by extending whose purpose the judicial functions to become a political and legislative functions.[3] Lambert gave a clear description for a "government of judges", with the belief that granting an ultimate accountability to the judicial branch leads to make a situation of the judicially governed society.[4]

Another criticism levelled at the unlegislated powers is exercising such jurisdiction might threaten the principle of Rule of Law. It argues that the constitutional judges, by exercising role as lawmaker, usurp the main obligation of the legislative branches and thus leads to the situation of the infringement of the democracy. This is due the fact that these extended jurisdictions are considered as anti-democratic powers given that unelected branches (judges) through intervening within the functions of elected legislatures. It cannot rely of the argument of filling the gap as reason for such extension in the power of constructional courts as it is inappropriate solution for problems and leads to the lack of democracy and illegitimacy. This point of view has supported by Justice Anthony M. Kennedyas follows;

> "Any society that relies on nine unelected judges to resolve the most serious issues of the day is not a functioning democracy. I just don't think that a democracy is responsible if it doesn't have a

[1] AL-Dulaimi, "From Negative to Positive Legislator? Response to Unconstitutional Legislative Omission as a Case Study in the Changing Roles of Constitutional Courts." P 163.

[2] Heuschling Luc, "Edouard Lambert. Le Gouvernement Des Juges Et La Lutte Contre La Législation Sociale Aux États-Unis. L'expérience Américaine Du Contrôle Judiciaire De La Constitutionnalité Des Lois," *Revue internationale de droit comparé* (2007).

[3] Stone Sweet, "The Politics of Constitutional Review in France and Europe," 84.

[4] Michael H. Davis, "A Government of Judges: An Historical Re-View," *The American Journal of Comparative Law* 35, no. 3 (1987): 561-62.

political, rational, respectful, decent discourse so it can solve these problems before they come to the Court".[1]

The unlegislated powers of the constitutional courts have been also described as encroachment of Parliamentary sovereignty. It has been based on the argument that assigning expensed jurisdictions to constitutional judges drives to usurping the will of the power by taking the powers of the representatives. This is because of the inability of the constitutional judges to understand and represent the real meaning of the constitution when they are issuing legislative rules as they represent their personal opinions.[2] For example Felix Frank stated:

"people have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases it is *they* who speak and not the Constitution. And I verily believe that this is what the country needs most to understand". [3]

### 4.1 The positive thoughts of the unlegislated powers

After stating the most important concerns of innovating some new jurisdiction by the constitutional judges, it is necessary to clarify the most important positives that can be achieved from granting the constitutional judge such jurisdictions. Firstly, some scholars have gone to argue that innovating the constitutional courts to themselves new powers have a number of positives by which constitutional judges can respect and defend the vital principles. This result can be clearly deduced from the reason that prompts the constitutional judges to innovate these jurisdictions which is aimed to make the provisions of constitution enforceable. As is well known, the Constitution, by its nature, is not enforceable by itself, rather requests to be measured by the passing the necessary laws and rules. Consequently, the omission of the legislature to enact any constitutionally obligated law infringe the legitimacy of the constitution. To overcome these consequences, another organ, which is the constitutional court, must take a positive role to reassert the implementation of the constitution.

[1] A. Lamparello and C. Swann, *The United States Supreme Court's Assault on the Constitution, Democracy, and the Rule of Law* (Taylor & Francis, 2016), 96.

[2] Stephen C Halpern and Charles M Lamb, *Supreme Court Activism and Restraint* (Free Press, 1982), 138.; Daniela Urosa Maggi, "Constitutional Courts as Positive Legislators: The Venezuelan Experience," in *XVIII International Congress of Comparative Law* (Washington: Cambridge University Press, 2010).

[3] Max Freedman, *Roosevelt and Frankfurter: Their Correspondence 1928-1945* (1967), 383.

Many arguments have been arisen to refute the criticisms levelled at the unlegislated jurisdictions of the constitutional judges. It states that when the constitutional court reconciling between the two conflicted constitutional rules or principles, or exercising the legislative role, it is not infringing the functions of other organs or violating upon the principle of separation of powers. Through innovating these jurisdictions, the constitutional court relies on the separation of powers to achieve the constitutional balance. Consequently, the legislature, in the first stage, infringes these principles when it does not enact the needed legislations, and accordingly the constitutional courts interfere to solve the outcomes of such infringement.[1]It also has been indicated that the main aim of innovating jurisdictions by the constitutional courts is not to prevent, block, or censor the functions of the legislature, rather they aim to correct, guide, and assist the legislature to protect the supremacy of the constitution. .[2] This argument supported by Alec Stone stated that:

> "It is enough to note that constitutional judges can produce these beneficial effects on the polity only insofar as they, in fact, behave as (very powerful) positive legislators. If, for example, constitutional judges did not annul legislation as unconstitutional and, at the same time, tell (or at least signal to) legislators how they should have legislated in the first place, then constitutional review could function neither to correctstatutes nor to put lawmakers "on the right track".[3]

By the case of *Vriend v Alberta* (1998), Justice Iacobucci declared that engagement of the constitutional court in the legislative functions has become an urgent need when the legislative powers have failed to accomplish their constitutional obligations.

The main obligations of the legislative power are to submit to the law (under the principle of the rule of law) through regulating the will of people in the form of laws. So, the infringement of the rule of law occurs when the legislative branches omit to implement their constitutional duties. As the constitutional courts are incapable to defend the principle of the rule of law by their traditional jurisdictions,

[1] Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne Univ Pr, 1988), 253.
[2] Louis Favoreu, "La Légitimité Du Juge Constitutionnel," *Revue internationale de droit comparé* 46, no. 2 (1994).
[3] Stone Sweet, "The Politics of Constitutional Review in France and Europe," 86.

they found themselves to create new jurisdictions to solve the new constitutional problems (legislative omission, constitutional conflict between rules).[1] Therefore, the main aim innovating such jurisdictions is to protect the fundamental principles, on to infringing them as claimed. However, justifying the extensions in the jurisdictions of the constitutional courts do not mean that these powers are free from any limitations, rather it must be restricted to applied within the intended purpose.

Iacobucci indicated that democratic principles require both the legislative and executive branches to function under these principles, if they omit to implement these obligations, the constitutional courts find themselves obliged to protect these principles. When the constitutional judges find that the actions issued by the legislative and executive powers are not in accordance with the principles stipulated in the constitution, their intervention to protect those principles cannot be considered an undemocratic function, but rather to protect those democratic principles that have been violated by the legislative powers.[2]

The main obligations of the legislative power are to submit to the law (under the principle of the rule of law) through regulating the will of people in the form of laws. So, the infringement of the rule of law occurs when the legislative branches omit to implement their constitutional duties. As the constitutional courts are incapable to protect the principle of the rule of law by their traditional jurisdictions, they found themselves to create new jurisdictions to solve the new constitutional problems (legislative omission, constitutional conflict between rules). Therefore, the main aim innovating such jurisdictions is to protect the fundamental principles, on to infringing them as claimed. However, justifying the extensions in the jurisdictions of the constitutional courts do not mean that these powers are free from any limitations, rather it must be restricted to applied within the intended purpose.

From all of above, we can conclude that all the risks and concerns regarding the extension in the jurisdictions of the constitutional judges it can be refuted by arguing that the innovate

[1] AL-Dulaimi, "From Negative to Positive Legislator? Response to Unconstitutional Legislative Omission as a Case Study in the Changing Roles of Constitutional Courts." P 172.
[2] Ibid.

powers can be regulated to be exercised within the legal restriction. One of these restrictions is that the exercise of these powers is limited to achieve the purpose for which these powers are innovated which are (addressing the problems of legislative omission and the constitutional conflicts). On other words, the main aim of such powers is not to exceed or surpass the constitutional boundaries, rather than to solve the constitutional problems than could not be solves by the traditional powers.

## 5. Conclusion

As we have seen through the mentioned arguments, the main reason for the constitutional courts to innovate new jurisdictions to themselves is to solve the problems that cannot be addressed by the traditional jurisdiction. Under this purpose, the constructional courts found themselves enforced to extend their jurisdictions at the time that the constitutional legislator nor legislative power have failed to implement their obligations. Such failure causes a number of consequences (the conflicts between constitutional rules and principles, or the problem of legislative omission) which requires the intervene by another organ to overcome them. The constitutional courts, as a protector of the supremacy of the constitution, have to intervene to protect the constitutional values. However, such intervention must be governed by the purpose of protection the constitutional supremacy and overcoming the consequences of the legislature's failures.

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