

(Research/Review) Article

# The Constitutional Court as a Positive Legislative through the Living Constitution Approach

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**Abstract:** This study examines the role of the Constitutional Court of Indonesia (Mahkamah Konstitusi/MK) as a *positive legislator* through the lens of the *living constitution* approach, which conceptualizes the constitution as a dynamic and evolving document responding to social and political change. The main problem addressed is the extent to which the MK's judicial activism in interpreting and even creating new legal norms aligns with constitutional principles, democratic legitimacy, and the balance of powers between the judiciary and the legislature. The objective of the research is to analyze how the MK's progressive interpretations have transformed it from a *negative legislator*—which merely annuls unconstitutional laws—into a *positive legislator* that effectively fills legal gaps and constructs new constitutional meanings. Using a normative juridical method combined with case study analysis, this research explores key constitutional decisions, focusing on cases where the MK extended its interpretive authority beyond mere judicial review. The findings reveal that the MK, through the living constitution approach, justifies its role as a *positive legislator* by invoking principles of constitutional morality, justice, and responsiveness to societal evolution. However, this judicial creativity also generates tension with legislative supremacy and may risk overstepping the boundaries of judicial function. The synthesis of findings suggests that the MK's transformation embodies the dynamic interplay between constitutional text and social context, reinforcing the adaptability of Indonesian constitutionalism. The study concludes that while the MK's position as a *positive legislator* under the living constitution paradigm strengthens constitutional justice and protects citizens' rights, it must remain anchored in checks and balances to prevent judicial overreach and preserve democratic legitimacy.

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## 1. Introduction

Indonesia's dynamic social, political, and legal changes have positioned the Constitutional Court (MK) as a key institution in maintaining the balance between constitutional supremacy, popular sovereignty, and democratic legitimacy. In this context, the Constitutional Court not only functions as a negative legislator, invalidating laws that contradict the constitution, but also increasingly plays the role of a positive legislature, creating new norms and filling legal gaps to uphold constitutional justice (Efendi et al., 2023). This phenomenon indicates a shift in the constitutional paradigm in Indonesia, where the Constitutional Court uses the Living Constitution approach to interpret the 1945 Constitution as a living document that can adapt to societal social developments (Buana, 2020). The Living Constitution approach views the constitution as needing to be interpreted

evolutionarily to address the challenges of the times and changes in social values, so the meaning of constitutional norms is not static (Rudy et al., 2021). In the Indonesian context, this approach serves as the basis for the Constitutional Court to broaden the meaning of constitutional articles and align them with contemporary demands for justice, as evidenced by significant rulings such as Decision Number 90/PUU-XXI/2023 (Faisyah et al., 2025). Nevertheless, the practice of positive legislation by the Constitutional Court raises academic debate regarding the limits of judicial authority and the principle of separation of powers, particularly concerning the extent to which constitutional judges are entitled to create new norms without violating the legislative domain (Fikriya et al., 2024). Previous research on the role of the Constitutional Court as a positive legislature generally uses a juridical-normative approach with doctrinal analysis of Constitutional Court decisions and constitutional doctrines (Al-Dulaimi, 2018; Dominic J. Nardi, 2018; Faisyah et al., 2025; Kurniawan et al., 2024). This approach has the advantage of explaining legal structures, constitutional principles, and the legal arguments underlying norm formation, thus providing a comprehensive theoretical understanding of the rationality of the Constitutional Court's decisions (Faisyah et al., 2025). However, this method has weaknesses because it is less capable of explaining the empirical and social impact of the Constitutional Court's decisions on constitutional practice and public perception of the judiciary's legitimacy (Dominic J. Nardi, 2018). Empirical studies using quantitative or mixed methods are still rare, even though they could enrich our understanding of the extent to which the Constitutional Court's positive legislative actions affect legal certainty and democratic governance (Hariri & Arifin, 2025).

Based on the literature review results, there is a clear research gap. Previous studies have focused more on the legal description and formal classification of the Constitutional Court's decisions without deeply exploring the patterns of normative argumentation used by judges in forming new norms based on the Living Constitution principle (Fikriya et al., 2024). Therefore, further research is still needed to systematically describe how the Constitutional Court constructs constitutional interpretations into new norms that fill legal voids while also assessing whether these actions align with the principles of constitutional justice and democracy.

To fill this gap, this research employs a qualitative approach with a juridical-normative method combined with content analysis of the main decisions of the Constitutional Court that illustrate positive legislative practices. Through this approach, the research aims to identify patterns of normative argumentation in norm formation and evaluate the extent to which the Constitutional Court's actions as a positive legislature remain within the framework of democratic constitutionalism principles. This approach is also intended to combine the strengths of normative interpretation with empirical analysis based on secondary data in order to deeply evaluate the relationship between judicial creativity, legal certainty, and democratic legitimacy.

This research contributes both theoretically and practically. Theoretically, this research expands understanding of the limits of the Constitutional Court's authority as a positive legislature and provides a clear conceptual basis for applying the Living Constitution approach in Indonesia. Practically, this research provides recommendations for maintaining a balance between judicial interpretative freedom and constitutional supremacy in order to avoid potential abuse of judicial power that could disrupt the constitutional democratic system. Additionally, this research is expected to enrich the academic discourse on the dynamics of adaptive constitutionalism and the role of the judiciary in the law-making process.

## **2. Literature Review**

### **2.1. Living Constitution and the Concept of a Positive Legislator**

The Living Constitution approach views the constitution not merely as a text whose meaning has remained fixed since its formulation, but as a normative document that must be interpreted contextually and evolutionarily to remain relevant to societal changes in social, technological, and moral spheres. Instead of asserting a single historical meaning (originalism), this approach emphasizes interpretive flexibility, allowing the constitution to respond to contemporary issues without waiting for formal amendments. Modern thought on living constitutionalism has been developed by a number of scholars and practitioners who promote the importance of normative experimentation and a reading of the constitution that is sensitive to the plurality of values in contemporary society (Sunstein, 2023). This becomes relevant because in many countries, rapid changes such as information technology,

new equality issues, or public health crises give rise to demands for constitutional courts to act adaptively. The Living Constitution offers a normative framework that justifies a more proactive judicial role when traditional legislative processes are slow or obstructed (Sunstein, 2023).

The debate between proponents of living constitutionalism and originalism continues to evolve; both are not merely technical differences in interpretation but also concern normative legitimacy (Izzo, 2023; Reva B. Siegel, 2023). Recent writings confirm that the debate is not only academic but also has implications for the legitimacy of courts when introducing new norms or expanding constitutional rights (e.g., the debate surrounding the interpretive practices of the US Supreme Court and constitutional courts in Europe). On the other hand, some modern scholars emphasize balance, asserting that historical and contextual readings are not always contradictory but can interact to produce coherent interpretations in contemporary situations.

Conceptually, when a judge accepts the premise of a Living Constitution, the possibility of doing what is referred to in the literature as "positive legislation" increases. Positive legislation here is understood as a phenomenon where judicial decisions not only invalidate unconstitutional norms (the negative function of the legislator) but also create, expand, or require new norms to fill legal gaps or align the legal framework with the demands of contemporary justice. In practice, this can manifest as:

- a. Extensive reading of rights, expanding the definition of rights regulated by the constitution to include new situations.
- b. Establishing new conditions or requirements, adding implementation requirements to laws that remain in effect but are "corrected" judicially.
- c. Normative conditional declaration, stating constitutional laws under certain conditions (conditional constitutionalization) so that the decision serves as a catalyst for legislative change.

Recent international empirical literature provides numerous examples of courts playing this role, as well as critical analyses of its implications for the balance of power.

## 2.2. A Jurisprudential Study of the Indonesian Constitutional Court

Jurisprudential studies on the Indonesian Constitutional Court (MK) in recent literature generally focus on (a) the shift in the MK's function from a negative legislator to a more positive legislator in practice; (b) methods of interpretation (judicial argumentation techniques, reference to legal sources); (c) remedial mechanisms used (e.g., conditional unconstitutionality); (d) institutional implications for the legislature and executive; and (e) democratic legitimacy and judicial accountability. These studies combine a doctrinal approach, analysis of court decision texts, and increasingly, empirical or comparative analysis.

Some studies also focus on the role of the Constitutional Court in sectoral issues such as labor rights, freedom of expression, and environmental law. Since its establishment, the Constitutional Court has been recognized for its strong role in upholding the constitution through judicial review. However, literature from the past decade notes a shift in practice: the Constitutional Court not only invalidates unconstitutional norms but also often issues rulings that lead to new normative consequences, whether through extensive readings of rights, interpretations of principles, or conditional rulings that compel legislators to revise laws within a specific timeframe. The phenomenon of conditional unconstitutionality, prominent in the omnibus law decision (Decision No. 91/PUU-XVIII/2020), is often cited as evidence of "judicial legislation" in a remedial form: the Constitutional Court declared the Job Creation Law formally flawed and gave a deadline for improvement, so the decision was not a pure cancellation but a form of conditional normative intervention. Practical literature and commentaries on international law extensively discuss the implications of this decision.

The implications of the study on jurisprudential studies focus the analysis on the legitimacy of the action—whether it is part of the adaptive function of the guardian of the constitution or a form of usurpation of legislative functions. Normative and doctrinal analysis is still dominant; empirical studies on implementation consequences (how legislators/executives respond) are only just beginning to emerge.

Several systematic jurisprudential studies (analysis of court decision texts) have attempted to map the argumentation strategies of judges at the Constitutional Court. International literature on constitutional courts mentions similar patterns that are also evident in the Constitutional Court's decisions:

- a. Purposive reasoning, where judges interpret the constitution based on purposive values (e.g., protection of human rights, social justice).
- b. Use of international normative standards, where the Constitutional Court sometimes refers to international instruments or foreign judicial practices as a source of comparison (see the study on the Constitutional Court's use of international law).
- c. Remedial/conditional formulation, where decisions are temporary or conditional to allow space for the legislature to improve regulations (e.g., the Omnibus Law decision).
- d. Dialogic framing, where judges design decisions to invite legislative response (e.g., setting deadlines, making recommendations for technical improvements).

Empirical studies examining the Constitutional Court's decisions (2003–2023) confirm the existence of these patterns, although their frequency and effect differ across issues (e.g., civil rights vs. economic regulation). Methodological studies recommend using content analysis with a coding frame to capture this variation in argumentation.

In modern jurisprudential studies, several Constitutional Court decisions have become the focus of intensive analysis due to their normative impact, namely:

- a. Decision No. 91/PUU-XVIII/2020 (Omnibus/Job Creation Law). The Constitutional Court stated that the formation of the Job Creation Law was formally flawed and gave a deadline for improvement (conditional unconstitutionality). Literature reviews and analyses of legal practice assess this decision as an example of how the Constitutional Court uses its authority to improve the legislative process while also forcing changes in administrative/legislative policy. Many practical articles and international law commentaries discuss the political and legal implications of the decision.
- b. Human Rights & Freedom of Expression Decisions. Several Constitutional Court decisions related to the ITE (Electronic Information and Transactions) Law and restrictions on public reporting have garnered attention because these decisions demonstrate a narrow interpretation of rights that limits the criminalization of public criticism (examples of recent rulings that have been highlighted in the media). Recent news coverage and legal analysis highlight how the Constitutional Court intervened to protect civil liberties.
- c. Decisions related to elections and political parties/individual candidates—several decisions that open up space for individual candidates or revise eligibility criteria are seen as the Constitutional Court's effort to align political norms with the needs of the times; jurisprudential studies examine their rationality and institutional impact. (See analysis of the 2024 election verdict).

Jurisprudential literature examines each of these decisions in terms of the judges' arguments, the legal basis referenced, and the implementation implications (whether the decision was followed by the legislature/executive or triggered institutional conflict).

### **2.3. The Use of International Law in the decisions of the Indonesian Constitutional Court**

In the last two decades, one of the significant developments in Indonesia's constitutional court practice has been the increasing use of international law by the Constitutional Court (MK) in its legal considerations. International law, as a system and set of rules governing relations between states, plays a crucial role in shaping a peaceful and orderly world order (Nurhasanah, 2025). This phenomenon marks a shift in orientation from textual and national-centric interpretations toward a more open approach to the principles of global law. Since the establishment of the Constitutional Court in 2003, references to international instruments have indeed appeared, but it was only in the period from 2020 onward that this trend became more consistent and explicit in various decisions touching on human rights, environmental issues, gender equality, and freedom of expression. This indicates that the Constitutional Court is beginning to play a role as a constitutional actor that not only interprets the 1945 Constitution within the national legal framework but also within the broader context of the international legal system, in line with the spirit of a living constitution that is adaptable to global value developments (Buana, 2020; Rudy et al., 2021).

The use of international law by the Constitutional Court is rooted in two main foundations. First, normatively, the 1945 Constitution after amendments affirms that Indonesia respects international law and recognizes human rights as part of the national legal system. Second, doctrinally, the Constitutional Court views that internationally recognized universal values can serve as additional constitutional parameters in interpreting general articles, especially those related to citizens' constitutional rights. In this case, the

Constitutional Court uses international law as an "interpretive aid" to affirm the meaning of a living constitution, not merely as a source of positive law that is directly binding.

Jurisprudential studies show that the Constitutional Court's references to international law can be classified into three main forms. First, referential use, which is when international instruments are cited only as a moral reference or to strengthen arguments without a direct normative impact on the outcome of the decision. For example, this can be found in rulings related to religious freedom and minority protection, where the Constitutional Court cites the Universal Declaration of Human Rights (UDHR) or the International Covenant on Civil and Political Rights (ICCPR) to affirm Indonesia's position as a democratic country that respects human rights (Faisyah et al., 2025). Second, interpretive use, which is the use of international norms to interpret ambiguous constitutional meaning. For example, in cases concerning freedom of expression and the right to digital privacy, the Constitutional Court refers to the principles in the ICCPR to assess the proportionality of restrictions on individual freedoms (Rudy et al., 2021). Third, normative or transformative use, which is when the Constitutional Court explicitly adopts international principles or norms as part of binding national law. This final form is still relatively rare, but it shows a strong tendency toward pragmatic monism, where the boundary between national and international law is becoming increasingly fluid (Efendi et al., 2023).

One important example of the Constitutional Court's normative use of international law can be found in its decisions related to environmental protection and the rights of future generations. In recent years, the Constitutional Court has interpreted the right to a good and healthy environment (Article 28H of the 1945 Constitution) by referring to the Paris Agreement and the principles of sustainable development outlined in the Rio Declaration on Environment and Development. By citing Indonesia's commitment to these international agreements, the Constitutional Court expanded the constitutional meaning of a "good and healthy environment" to include the state's obligation to ensure intergenerational ecological sustainability. This approach reflects the evolutionary interpretation characteristic of a living constitution, where the Constitutional Court brings constitutional values to life through integration with global norms (Hariri & Arifin, 2025).

Additionally, some decisions related to gender equality and child protection also demonstrate the use of international law as a normative reference. For example, in the case of a judicial review of the Marriage Law, the Constitutional Court cited the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) to justify the annulment of provisions that restrict the minimum age for marriage for women to under 18 years old. In its arguments, the Constitutional Court stated that although the constitution does not explicitly regulate the age of marriage, the universally recognized principles of equality and child protection can serve as an interpretive guide to achieve constitutional justice. This case is often considered a concrete example of how international law is used transformatively to expand the space for constitutional protection (Kurniawan et al., 2024).

From a theoretical perspective, the use of international law by the Constitutional Court demonstrates a constitutional dialog between national and international legal systems. This concept asserts that the constitution cannot be understood in isolation, but must be read within the context of the globalization of law and increasing interdependence between countries (S & A.L.W., 2022). In many countries, including Indonesia, constitutional courts serve as the primary medium for this dialog. MK plays a dual role: as the guardian of domestic constitutional supremacy and as a link between national values and international commitments. Thus, the Constitutional Court contributes to the formation of constitutional pluralism where international and national norms mutually enrich each other, rather than negate each other.

#### **2.4. Democracy, Accountability, and the Balance of Power**

In the context of modern constitutional law, the relationship between democracy, accountability, and the balance of power is the cornerstone of the sustainability of the constitutional legal system. These three elements are not standalone concepts, but are interconnected in forming a responsive, open, and just governance system. In a presidential system like Indonesia, where executive power has direct legitimacy from the people, the existence of judicial institutions—especially the Constitutional Court (MK)—is key to ensuring that democratic practices remain within the constitutional framework and do not shift toward electoral authoritarianism. In other words, the Constitutional Court plays a role

in maintaining the balance between the will of the majority and the protection of minority rights, which is the essence of constitutional democracy.

The concept of democracy adopted within the framework of the Indonesian constitution is not merely electoral democracy, but substantive democracy that emphasizes respect for human rights, the rule of law, and social justice. Democracy can only be called true when there are mechanisms that guaranty broad participation, free political competition, and accountability to public decisions. In this context, the Constitutional Court becomes an institutional instrument to ensure the accountability of power, meaning that every branch of power is subject to constitutional principles. Decisions by the Constitutional Court that annul unconstitutional laws, correct procedural violations in the legislative process, or reconfigure relations between state institutions are a tangible manifestation of the checks and balances mechanism that ensures democracy does not lose its substance (Asshiddiqie, 2006).

Accountability within the constitutional framework has two main dimensions: political accountability and judicial accountability. Political accountability demands that institutions elected thru elections are responsible to the public thru democratic mechanisms, while judicial accountability ensures that every government action can be tested against higher legal norms, namely the constitution. In this regard, the Constitutional Court plays a strategic role as the guardian of constitutional accountability. Thru its authority to conduct judicial review, the Constitutional Court upholds the principle that no state organ is above the constitution. This principle simultaneously affirms the substantive meaning of the rule of law, where power is limited by legal norms and not the other way around.

The balance of power (checks and balances) is a vital mechanism for maintaining democratic stability. Montesquieu's classical theory of the separation of powers has evolved in modern constitutional practice into a system of functional interdependence, where the branches of power are not completely separate, but rather oversee and balance each other. In the Indonesian context, the relationship between the executive, legislative, and judicial branches is often dynamic and even tense, especially when political interests clash with constitutional principles. In situations like this, the Constitutional Court serves as the guardian of the constitution, as well as the referee in conflicts between branches of power. For example, in decisions related to disputes over the authority of state institutions, the Constitutional Court affirms the constitutional limits that must be respected by every branch of power. Thus, the Constitutional Court not only formally maintains the balance of power but also substantively ensures the integrity of the government system.

In practice, a healthy balance of power also demands transparency and public participation in the constitutional process. In recent years, Indonesia's Constitutional Court has begun to adopt a participatory approach in its decision-making process, such as opening up space for *amicus curiae*, public hearings, and public consultations in cases that have a broad impact on society. This innovation strengthens the social legitimacy of the Constitutional Court while deepening the quality of deliberative democracy (Hariri & Arifin, 2025).

However, the relationship between democracy, accountability, and the balance of power is not always harmonious. The biggest challenge actually arises when the Constitutional Court plays too active a role in determining the direction of public policy, leading to accusations of excessive judicial activism. Some circles believe that this attitude could shift the balance of power and create tension between the judiciary and the legislature. This phenomenon is evident, for example, in the Constitutional Court's decisions to annul key articles of strategic laws such as the Omnibus Law or the revision of the KPK Law, which sparked debate between constitutional supremacy and the government's political mandate. In global literature, a similar phenomenon is referred to as the judicialization of politics, which is when constitutional courts take on roles that should be performed by political institutions (Hirschl, 2020). Nevertheless, proponents of the proactive judiciary view argue that judicial activism is precisely what is needed to balance executive and legislative dominance in an immature democracy.

### **3. Materials and Method**

#### **3.1. Research Design**

This research employs a qualitative approach with a juridical-normative method combined with content analysis of relevant Constitutional Court (MK) decisions related to the concept of positive legislature and the application of a living constitution. This approach

was chosen because it is able to explain the dynamics of constitutional interpretation, which is not only normative but also reflects the social and political values that exist in society.

The juridical-normative method focuses on the study of written legal norms, legal principles, and doctrines that have developed in legal science (Marzuki, 2013). In this context, primary legal materials, in the form of constitutional court decisions, are analyzed to identify patterns of normative argumentation and the creation of new norms by constitutional judges. Meanwhile, secondary legal materials are used to strengthen the conceptual analysis related to the theory of the living constitution, the role of a positive legislature, and the principles of constitutional democracy.

Content analysis is used to examine the content and structure of arguments in Constitutional Court decisions, considering the surrounding social, political, and legal context. Through this method, the research aims to identify themes, patterns, and trends in the positive legislative practices carried out by the Constitutional Court.

### 3.2. Data Sources and Types

This research utilizes two categories of legal data: primary legal materials and secondary legal materials, which include the following:

- a. Primary Legal Materials
  - 1) Decisions of the Constitutional Court of the Republic of Indonesia related to the living constitution and positive legislature, such as Decision Numbers 90/PUU-XXI/2023, 46/PUU-XIV/2016, 100/PUU-XI/2013, and other relevant decisions.
  - 2) The 1945 Constitution of the Republic of Indonesia.
  - 3) Legislation related to the functions, powers, and procedures of the Constitutional Court Putusan Mahkamah Konstitusi Republik Indonesia yang berkaitan dengan living constitution dan positive legislature, seperti Putusan Nomor 90/PUU-XXI/2023, 46/PUU-XIV/2016, 100/PUU-XI/2013, dan putusan lain yang relevan.
- b. Secondary Legal Materials
  - 1) Books, scientific journal articles, and previous research results regarding the role of the Constitutional Court, the living constitution, positive legislature, and constitutionalism theory.
  - 2) Academic documents, legal research reports, and publications from constitutional law research institutions or think tanks.
- c. Tertiary Legal Materials
  - 1) Legal dictionaries
  - 2) Encyclopedias
  - 3) Other supporting documents that help clarify constitutional law terms and concepts.

### 3.3. Data Collection Techniques

Data collection was carried out through library research by tracing relevant primary, secondary, and tertiary legal sources. The data collection process was carried out using the following steps:

- a. Identification and selection of relevant Constitutional Court decisions related to the concept of positive legislature.
- b. Collection of academic doctrines and literature discussing the theory of the living constitution and the role of the Constitutional Court in a democratic system.
- c. Organization of data based on themes and legal issues arising in the decisions.
- d. Classification of data based on relevance to the theoretical framework and research problem formulation.

### 3.4. Data Analysis Techniques

The collected data was analyzed using qualitative content analysis techniques with a deductive-inductive approach. The analysis was conducted in three stages:

- a. Data reduction, which involved filtering legal materials to ensure that only data relevant to the problem formulation was used.
- b. Categorization and coding, which involved grouping the arguments and rationales of the decisions based on the principles of a living constitution, positive legislature, and the influence of international law.
- c. Contextual interpretation, which involved interpreting the analysis results by relating them to the principles of constitutionalism and substantive democracy.

### 3.5. Analysis Procedure in the Research Algorithm

This study employs a qualitative approach with a juridical-normative method, aiming to deeply examine how the Constitutional Court (MK) forms new norms through positive legislative practices based on the living constitution approach. In a methodological context, the analysis is conducted systematically with the aid of algorithmic representations to illustrate the research logic flow, from legal data identification to conceptual synthesis. This algorithmic approach is not a form of data quantification but rather a visual and logical way to sequentially and transparently demonstrate the stages of analytical thinking.

This approach also enhances the research audit trail, providing a traceable record of analysis that other researchers can revisit. In the context of legal research, a research algorithm is understood as a conceptual instrument that explains how researchers move from legal texts to normative meaning, as well as how each decision of the Constitutional Court is interpreted within the framework of a dynamic living constitution (Efendi et al., 2023; Hariri & Arifin, 2025).

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#### **Algorithm 1. Qualitative-Normative Analysis Procedure for the Role of the Constitutional Court as a Positive Legislator**

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INPUT: Constitutional Court Decisions, Legal Doctrine, and Academic Literature

OUTPUT: Conceptual Findings on the Practice of Positive Legislation of the Constitutional Court within the Framework of a Living

- 1: Selection of Legal Data
  - 2: Thematic Classification
  - 3: Analysis of Ratio Decidendi
  - 4: Normative-Evolutionary Interpretation
  - 5: Doctrinal Comparison
  - 6: Evaluation of Constitutional Principles
  - 7: Synthesis and Conclusion
- 

This algorithmic approach clarifies the relationship between legal reasoning and constitutional interpretation, as suggested by Luban (2021) and Schauer (2023), who propose that the tracing of legal logic should be visualized in a sequential structure to avoid getting bogged down in vague textual descriptions. In this context, the algorithm helps map the researcher's legal thinking process from the empirical level (Constitutional Court decisions) to the normative level (the concept of constitutional justice).

Additionally, the use of algorithms in qualitative legal research facilitates the development of replicable logic, which is an analytical framework that can be utilized by other researchers (Amin et al., 2023). Thus, the analytical steps outlined in the algorithm not only serve to clarify the research stages but also ensure that the interpretation process of the Constitutional Court's decisions is carried out transparently, systematically, and consistently with the methodological principles of legal research.

## 4. Results and Discussion

### 4.1. Characteristics of the Constitutional Court's Jurisprudence in the Perspective of a Living Constitution

In the last decade, Indonesia's Constitutional Court (MK) has shown a significant shift in its jurisprudential style: from a tendency toward textual-formal interpretation to a more contextual and evolutionary interpretation. This is a hallmark of the living constitution approach. This shift is not mere academic rhetoric: several key decisions show that the Constitutional Court frequently places constitutional values in a broader socio-historical perspective, refers to international standards, and in some cases produces normative consequences that resemble legislation (positive legislating). Contemporary empirical findings and jurisprudential analysis identify at least six key characteristics of the Constitutional Court's judicial practice from a living constitution perspective, namely:

- a. Value-oriented evolutionary interpretation
- b. Use of cross-regime legal references, including international law
- c. Remedial techniques and conditional unconstitutionality
- d. Argumentation based on principle balancing
- e. Dialogical argumentative patterns (institutional dialog)

f. Selective issue selection, focusing on urgent public rights and governance

In the context of implementing a Living Constitution, the characteristics of the Constitutional Court's (MK) jurisprudence are not only reflected in the direction of interpretation but also in the argumentative methods and value orientations underlying each decision. Analysis of several post-2016 decisions indicates that the Constitutional Court is increasingly adopting a reflective interpretation model, open to international law, and prioritizing substantive justice over formalistic justice (Buana, 2020; Faisyah et al., 2025)

These characteristics can be summarized into six main dimensions that describe the patterns of reasoning and constitutional adjudication practices of the Constitutional Court, as presented in the following table:

**Table 1.** Summary of the Characteristics of the Constitutional Court's Jurisprudence from the Perspective of a Living Constitution

Key Characteristics	Brief Description	Examples/Indicators in the Decision
Evolutionary interpretation	Contextual and value-oriented interpretation	A decision that expands the meaning of environmental/children's rights
International legal references	Utilizing international instruments as an interpretive tool	References to the ICCPR, CEDAW, and the Paris Agreement are considered.
Remedial techniques	Conditional unconstitutionality / deadline for legislators	Decision on omnibus/job creation; conditional decision
Principled balancing	Using proportionality analysis and principle balancing	A decision that weighs freedom against public safety.
Institutional dialogue	Drafting a decision to encourage legislative/executive response	Instructions for law revision; implementation recommendations
Issue selectivity	Focus on human rights, the environment, children's rights, and freedom of expression	The highest frequency of references is on socio-humanitarian issues.

The table above shows that the Indonesian Constitutional Court has developed a jurisprudence style that is increasingly value-driven and dialogical. Characteristics such as principled balancing and institutional dialog indicate that the Constitutional Court is trying to strike a balance between upholding constitutional norms and respecting the functions of other institutions. Meanwhile, the use of international law strengthens the moral legitimacy and universality of constitutional interpretation within the framework of human rights.

Thus, this pattern marks a significant transition from constitutional formalism toward constitutional pragmatism, where the Constitutional Court not only acts as an interpreter of the law but also as an actor contributing to the formation of a legal system that is responsive, inclusive, and socially just.

#### 4.2. Implementation of the Constitutional Court's Role as a Positive Legislator

The role of the Constitutional Court (MK) as a positive legislator represents a paradigm shift in Indonesia's constitutional legal system from a model of judicial restraint toward judicial activism. This shift emerged as a consequence of the need to fill legal gaps, strengthen the protection of citizens' constitutional rights, and align the meaning of constitutional norms with dynamic social changes. According to Efendi et al. (2023), the Constitutional Court's

practice of positive legislation not only serves as a corrective effort against constitutionally flawed legislation but also as a constructive instrument to ensure that the basic values of the constitution remain relevant and operational in national life (Efendi et al., 2023).

In a theoretical context, the concept of a positive legislator is adopted from the thinking of Hans Kelsen, who initially distinguished the function of constitutional courts as negative legislators, meaning they annul norms that contradict the constitution without creating new ones (Asshidiqie, 2021). However, in contemporary practice, especially in countries that adhere to the living constitution system, constitutional courts no longer act solely as guardians of the constitutional text, but also as shapers of new normative meaning thru constructive and progressive rulings (Faisyah et al., 2025; Syofyan, 2022)

Indonesia's Constitutional Court shows a similar evolution. Some of its rulings show a tendency to broaden interpretation, improve norms, and even order lawmakers to revise or create new rules within a specific timeframe. This pattern is referred to by Hariri & Arifin (2025) as a form of "collaborative constitutionalism," where the Constitutional Court positions itself as part of an institutional dialog between the legislative, executive, and judicial branches of power to achieve substantive justice.

The constructive role of the Constitutional Court is evident in a number of important rulings recognized as milestones in the application of the living constitution in Indonesia. For example, Decision No. 46/PUU-VIII/2010 regarding the status of extramarital children, which affirms the recognition of civil relationships between extramarital children and their biological fathers. This decision broadens the interpretation of Article 28B paragraph (2) of the 1945 Constitution and demonstrates the Constitutional Court's courage in shifting from a formalistic approach to a sociological and humanistic one (Hidayat, 2021). Similarly, Decision No. 97/PUU-XIV/2016 regarding the inclusion of belief systems in ID cards and family cards demonstrates the Constitutional Court's role in broadening the meaning of "religion" in the constitution to include adherents of belief systems, as a form of protection for freedom of belief (Fikriya et al., 2024).

Meanwhile, Decision No. 91/PUU-XVIII/2020 regarding the Judicial Review of the Job Creation Law demonstrates the complexity of the Constitutional Court's role. On the one hand, the Constitutional Court partially annulled the norm due to procedural violations (negative function), but on the other hand, it gave the legislature a deadline to revise the law (positive function). According to Nardi (2022), this kind of decision signifies that the Constitutional Court has moved toward conditional constitutionality, namely, postponing the legal effects of the cancelation to maintain the stability of the national legal system (Dominic J. Nardi, 2018).

Furthermore, Decision No. 85/PUU-XX/2022, which affirms the Constitutional Court's authority to handle election result disputes until the establishment of special courts, demonstrates a form of textual adaptivism, namely an interpretation that maintains the text of the constitution but adjusts its context to institutional needs. Meanwhile, in Decision No. 24/PUU-XXI/2023, the Constitutional Court reinterpreted legal responsibility toward people with mental disorders using a human rights approach and the principle of non-discrimination. These last two decisions show that the Constitutional Court plays an active role in maintaining legal continuity and strengthening the principle of universal humanity in its judicial practice (Rudy et al., 2021).

To provide a comparative overview of the application of the positive legislator function in the Constitutional Court's jurisprudence, a summary of the characteristics of several key decisions can be seen in the following table:

**Table 2.** Summary of the Characteristics of the Constitutional Court's Jurisprudence from the Perspective of a Living Constitution

Constitutional Court Decision Number	Constitutional Issue	Categories of the Constitutional Court's Role	Interpretation Patterns
46/PUU-VIII/2010	Status of illegitimate children	Positive legislator.	Evolutionary and sociological
97/PUU-XIV/2016	Inclusion of religious beliefs in the religion column of ID cards and family cards	Positive legislator	Progressive and inclusive

91/PUU-XVIII/2020	Formal Review of the Job Creation Law	Mixed (negative & positive)	Mixed (negative & positive)
85/PUU-XX/2022	The Constitutional Court's authority to handle election result disputes until the establishment of special courts.	Positive legislator	Positive legislator
24/PUU-XXI/2023	Testing Article 491 paragraph 1 of the Criminal Code (responsibility for persons with mental disorders)	Positive legislator	Positive legislator

From the table, it can be concluded that the positive legislative practices of the Constitutional Court exhibit diverse patterns of interpretation, ranging from evolutionary, sociological, to teleological, with the primary orientation being the strengthening of constitutional rights and the principle of humanity. This pattern shows that the Constitutional Court has interpreted its role not merely as an interpreter of the constitutional text, but also as a shaper of the normative direction that balances the needs of national law with the constitutional values that are alive in society (Buana, 2020; Tongat et al., 2020). These five decisions show that the Constitutional Court is no longer merely the "guardian of the constitution" in the sense of a guardian of the constitution, but also plays a role as an agent of constitutional transformation, actively adapting positive law to the values of substantive justice and social change.

At the international level, this role aligns with the trend of judicial constitutionalism in various countries such as Germany, South Africa, and South Korea, where constitutional courts function not only as guardians of the constitution but also as co-legislators in shaping a legal order responsive to human rights (Aryawan et al., 2022). In the Indonesian context, this position is further strengthened by the practice of a living constitution, which views the constitution as a dynamic legal instrument oriented toward substantive justice.

Thus, the implementation of the Constitutional Court's role as a positive legislator demonstrates that this institution not only performs a normative oversight function but also contributes to a more democratic and just law-making process. Thru this approach, the Constitutional Court does not deny the principle of separation of powers, but rather actualizes it in the form of adaptive, participatory checks and balances that are oriented toward the constitutional values that are alive in modern Indonesian society.

Based on these series of decisions, it can be concluded that the positive legislative role of the Constitutional Court has brought three main implications for the national legal system, namely:

- a. Normatively, the Constitutional Court affirms the function of the constitution as a living document that must be adaptable to social dynamics, not merely a static text.
- b. Institutionally, the Constitutional Court encourages constructive dialog between the judiciary and the legislature to correct regulatory weaknesses without disregarding the principle of checks and balances.
- c. Socio-constitutionally, the Constitutional Court's decisions contribute to strengthening constitutional citizenship, where citizens understand their constitutional rights more substantively.

Thus, the implementation of the Constitutional Court's role as a positive legislator demonstrates that Indonesian constitutional jurisprudence has evolved toward a living constitution model, where the constitution is not only preserved but also revitalized thru a progressive and just interpretation process.

#### **4.3. Implications of the Constitutional Court's Role as a Positive Legislator on the Balance of Power and Constitutional Democracy**

The role of the Constitutional Court (MK) as a positive legislator not only affects changes in certain legal norms but also has a broad impact on the configuration of relations between state power branches (separation of powers) and the quality of constitutional democracy in Indonesia. When the Constitutional Court interprets the constitution progressively and creates new norms thru its decisions, this institution contributes to the formation of laws that are more responsive to the values of substantive justice, while also challenging the traditional boundaries between legislative and judicial functions.

According to Bagir Manan (2008), this dynamic describes the evolution from a rule-based constitution to a value-oriented constitution – where law is no longer merely a formal

product of parliament, but the result of a process of interpreting the constitution that lives within the nation's legal and moral consciousness (Manan, 2008). In other words, the Constitutional Court plays a role in filling legal gaps that lawmakers were unable to address, in order to ensure that constitutional principles remain relevant in the face of social, economic, and political changes.

#### ***4.3.1. Strengthening the Principle of Checks and Balances***

Normatively, Indonesia's constitutional system places the division of power based on the principle of checks and balances, where each branch of power has the function of overseeing each other without dominating. In this context, the role of the Constitutional Court as a positive legislator functions as a corrective mechanism against legislators who fail to interpret the constitution correctly in drafting laws.

The Constitutional Court's decision Number 91/PUU-XVIII/2020 regarding the Job Creation Law serves as a concrete example. In that decision, the Constitutional Court not only declared the law-making process conditionally unconstitutional but also gave lawmakers a two-year deadline to improve the procedure. This step demonstrates the dialogic model of judicial review, where the courts and parliament engage in dialog within a framework of mutual correction.

From existing studies, such practices are common in modern constitutional democracies like Germany and South Africa, where constitutional courts serve not merely as norm erasers, but also as critical partners to the legislature in upholding the fundamental values of the constitution. Thus, the role of the Constitutional Court in Indonesia strengthens the principle of the balance of power without eliminating the sovereignty of the people represented by the House of Representatives.

#### ***4.3.2. Transformation of Constitutional Democracy Toward Substantive***

The role of the Constitutional Court as a positive legislator also impacts the deepening of constitutional democracy from merely procedural to substantive. Procedural democracy emphasizes the electoral process and formal representation, while substantive democracy emphasizes the fulfillment of human rights, social justice, and the protection of vulnerable groups.

Thru several decisions such as 46/PUU-VIII/2010 (status of illegitimate children) and 97/PUU-XIV/2016 (recognition of religious beliefs), the Constitutional Court affirmed that democracy is not sufficient to guaranty only political participation, but must also ensure constitutional justice. According to Yuliana and Prawitasari (2022), the Constitutional Court's decision is a form of "substantive democracy enforcement" that expands the scope of constitutionalism from the political sphere to the socio-cultural realm.

Within the framework of a living constitution, the Constitutional Court positions the constitution as a living document that evolves with the needs of society. This aligns with the thinking of Roscoe Pound, as quoted by Asshiddiqie (2021), that law should be a tool for social engineering. When the Constitutional Court interprets the law by considering human values and social context, it is essentially actualizing the constitution in the real lives of citizens.

#### ***4.3.3. Increased Political Accountability and Legislation***

One logical consequence of the positive legislator role is the increased accountability of legislative and executive institutions in designing regulations that are consistent with the constitution. The Constitutional Court serves as an ex post review mechanism that encourages the quality of legislation to improve.

Fadli's (2023) research found that after several positive decisions by the Constitutional Court, the DPR and the government became more cautious in drafting laws, particularly regarding citizens' constitutional rights. Decisions like 24/PUU-XXI/2023, which interprets criminal responsibility for individuals with mental disabilities, require legislators to consider the principle of non-discrimination when drafting the new Criminal Code.

Practically speaking, this mechanism of judicial review fosters a new form of political accountability based on constitutional values, not just electoral calculations. Thus, the Constitutional Court's judicial activism actually strengthens constitutional accountability — ensuring that political power does not act outside the boundaries of the basic principles of the rule of law.

#### ***4.3.4. Challenges and Limitations in the Risk of Judicial Overreach***

However, the role of the Constitutional Court as a positive legislator also raises debates about the limits of judicial intervention in the legislative domain. The main criticism comes from the view that the overly broad role of the Constitutional Court has the potential to lead to judicial overreach – a situation where the judiciary exceeds its functional limits and disrupts the balance between the branches of power.

Some academics argue that to maintain legitimacy, the Constitutional Court must limit itself to the principle of constitutional necessity, meaning it should only play an active role when the legislature fails to fulfill its constitutional obligations in a real way. Therefore, the positive function of the ideal legislator should not be interpreted as absolute authority to create new norms, but rather as a transitional mechanism to uphold the principle of constitutional justice.

#### ***4.3.5. State Administration Repositioning the Constitutional Court in the Constitutional Architecture***

Another significant implication is the emergence of the Constitutional Court's institutional repositioning within the constitutional architecture. The Constitutional Court now functions not only as the guardian of the constitution but also as the interpreter of constitutional values. This function places the Constitutional Court on par with other constitutional institutions within the framework of deliberative constitutionalism, where each institution plays a role in upholding the principles of justice and legal rationality. In Indonesian practice, this is evident in the pattern of the Constitutional Court's decisions, which do not close the door for legislators to follow up on or revise laws in accordance with the established constitutional direction.

Thus, the Constitutional Court did not usurp legislative functions, but rather forced the constitutionalization of legislation – a process where lawmaking must adhere to the principles, procedures, and values of the constitution.

### **5. Comparison**

A comparison with current practices and literature shows that the evolution of Indonesia's Constitutional Court (MK) toward a positive legislator role thru the Living Constitution approach is in line with global trends in modern constitutional justice systems. In the context of current technology and research methodologies, the use of digital data-driven content analysis on court decisions has become a new trend in constitutional law studies in various countries. This approach allows researchers to identify patterns of judicial argumentation more objectively and measurably, as is also applied in this study.

In terms of legal substance, the research findings are similar to those of comparative constitutionalism in Germany, South Africa, and South Korea, where constitutional courts practice dialogic judicial review and conditional constitutionality to maintain a balance between constitutional adaptability and democratic legitimacy. In the case of Indonesia, this practice is reflected in decisions such as No. 91/PUU-XVIII/2020 and No. 46/PUU-VIII/2010, which demonstrate direct interaction between the courts and the legislative body.

From a methodological innovation perspective, this research also aligns with the algorithmic reasoning visualization approach, which is now widely used in contemporary legal analysis. Algorithmic visualization of the qualitative-normative analysis stages strengthens the transparency and replicability of the research process. Thus, the contribution of this research is not only substantive in the development of the Living Constitution theory but also methodological in the application of algorithmic-based legal analysis, which systematically and scientifically represents the researcher's thinking logic.

Comparatively, the results of this study indicate that the transformation of the Indonesian Constitutional Court toward a positive legislator is in the mainstream of global constitutional court development, but with its own unique characteristics: balancing the idealism of substantive justice with the Indonesian socio-political context. Compared to the German model, which tends to be normative, and the South African model, which is transformative, the Indonesian model represents a pragmatic constitutionalism approach that positions the constitution as an adaptive instrument for the needs of a pluralistic democratic society.

## 6. Conclusion

This research found that Indonesia's Constitutional Court (MK) has undergone a functional shift from a negative legislator to a positive legislator thru the application of the Living Constitution approach. This approach allows the Constitutional Court to interpret the 1945 Constitution dynamically and contextually, ensuring the constitution remains relevant to the social, political, and moral developments of society. Analysis of several key decisions shows that the Constitutional Court not only nullifies unconstitutional norms but also shapes new norms that expand the protection of constitutional rights and strengthen the principle of substantive justice.

The synthesis of findings indicates that the Constitutional Court's practice of positive legislation aligns with the research objective, which is to explain how the Living Constitution approach strengthens the court's role in upholding constitutional justice without disregarding democratic principles and the separation of powers. The Constitutional Court acts as a mediator between the constitutional text and social reality, and as a key player in maintaining the balance between popular sovereignty and constitutional supremacy.

The main contribution of this research lies in the theoretical understanding of the relationship between judicial creativity, constitutional adaptability, and democratic legitimacy. Practically, this finding strengthens the argument that measured judicial activism can enhance political accountability and the quality of national legislation, as long as it remains within the framework of checks and balances.

However, this study has limitations in its legal-normative approach, which has not fully revealed the empirical impact of positive legislative practices on public perception and legal effectiveness. Therefore, further research is suggested using empirical or mixed methods to assess the extent to which the Constitutional Court's decisions influence lawmaking, legislative responses, and democratic legitimacy in Indonesian constitutional practice.

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