

## The Guardian of Constitution: A Comparative Perspective of Indonesia and Cambodia

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**Abstract:** A democratic state may be indicated by the existence of a constitutional institution that has the competence to uphold constitutionalism and defend the constitution. As the guardian of the constitution, the Constitutional Council of the Kingdom of Cambodia (Constitutional Council) and the Constitutional Court of the Republic of Indonesia (Constitutional Court) have the same purpose, namely to uphold constitutionalism and protect the constitution. However, in terms of structure, procedures, and competencies, the Constitutional Council and the Constitutional Court have individual mechanisms. Institutionally, the two judicial bodies occupy different characteristics, but they share the common goal of safeguarding the constitution's core values. This paper aims to analyze and scrutinize different features of the Constitutional Council and the Constitutional Court by showing the same purpose as the guardian of the constitution. Within this paper, the legal outcomes which is decisions are discussed, particularly the effect of the decisions. In addition, this paper looks into who can be the applicant or can file a complaint and clarifies the qualifications and resignations of judges. This paper concludes on whether the Constitutional Court and the Constitutional Council have different paths in upholding constitutionalism and protecting the constitution.

**Keywords:** Constitution; Constitutional Council; Constitutional Court

### 1. Introduction

The institution may exist as a court, holding judicial power and conducting the court's procedures, or may exist as a constitutional council or court that was responsive to ideas that had already taken root in democratic countries.<sup>1</sup> A constitutional court (sometimes called a 'constitutional tribunal' or constitutional council') is a constitutionally established, independent organ of the state whose central purpose is to defend the normative superiority of constitutional law within the juridical order.<sup>2</sup>

In Cambodia, the Royal Government, National Assembly, Senate, Judiciary, and Constitutional Council have the main role in upholding the effectiveness and respect of the constitution. Among them, the Constitutional Council, *the highest constitutional*

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<sup>1</sup> Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (January 1, 2007): 45–47, <https://doi.org/10.1093/icon/mol044>.

<sup>2</sup> Alec Stone Sweet. "Constitutional Courts", in *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó (United Kingdom: Oxford University Press, 2015), 816.

*authority*,<sup>3</sup> has a solid connection to the constitution. Referring to the position of the Constitutional Council, it is neither in the judicial branch nor the legislative branch. The legal hierarchy of the Constitutional Council is not in a vertical hierarchy like the supreme court which is above the appeal court and trial court. Since it is ambiguous as there are none of the provisions stating the position of the Constitutional Council, one can assume that the Constitutional Council is in the judicial branch and higher than the supreme court. From another perspective, one can assume that it is under the judicial branch. It can be in a particular branch that is separate from the executive, legislative, and judicial power. However, it must be independent of these three branches.<sup>4</sup> Thus, the Constitutional Council exercises an exclusively judicial function that is not part of the judicial power.<sup>5</sup> Looking to the Constitutional Court of Indonesia, it is one of the institutions holding judicial power beside the supreme court.

Notably, the Constitutional Council plays an imperative role in a judicial review regarding constitutional matters governing those three powers. The Constitutional Council has the competence to decide on the constitutionality of the law, interpretation, and electoral problems. These competencies are closely reflected in the competencies of the Constitutional Court of Indonesia which includes the authority to try a case at the first and final level, and it holds the final power of decision in reviewing the constitutionality of laws, determining disputes over the authorities of state institutions whose powers are given by this constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.<sup>6</sup> These competencies are an integral part of the strong commitment to upholding the constitution.

This paper argues that the constitutional courts in any type of form are driven to maintain the value of the constitution on fundamental level, and not become influenced by any other government branch. However, political status in countries such as Cambodia, and Indonesia in some cases, often are perceived to be negatively discouraging the constitutional value. Therefore, this paper is structured into three parts. First, it briefly outlines the history of the Constitutional Court and Constitutional Council. Second, it discusses the competency of the Constitutional Court and Council although these two institutions have different structures or mechanisms. It consists of the historical aspects, the competence of the Constitutional Council and the Constitutional Court, and who can file a complaint, and make decisions. Third, it provides the composition, qualification, and dismissal of the Constitutional Court and Constitutional Council. Lastly, this paper provides conclusions identifying the similarities and differences in the common goal as guardian of the constitution.

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<sup>3</sup> Aurel Croissant and Philip Lorenz, *Comparative Politics of Southeast Asia— An Introduction to Governments and Political Regimes* (Switzerland: Springer International Publishing AG, 2018), 48, <https://doi.org/10.1007/978-3-319-68182-5>.

<sup>4</sup> Chun Nareth, *Introduction to Constitutional Law* (Cambodia: Royal University of Law and Economics, 2016), 50.

<sup>5</sup> Constitutional Court of Korea, *Constitutional justice and Social Integration*, Paper presented at 3<sup>rd</sup> Congress of the World Conference on Constitutional Justice, Seoul, Republic of Korea, 2014, [https://www.venice.coe.int/WCCJ/Seoul/docs/Cambodia\\_CC\\_reply\\_questionnaire\\_3WCCJ-E.pdf](https://www.venice.coe.int/WCCJ/Seoul/docs/Cambodia_CC_reply_questionnaire_3WCCJ-E.pdf)

<sup>6</sup> The 1945 Indonesian Constitution, Art. 24 (c).

## 2. Analysis and Discussion

### 2.1. Brief History

The idea of the rule of law, including law and courts, has been present in human history for millennia. However, written constitutions of states have been around only for approximately two centuries, and the first constitutional courts were founded less than a century ago. A constitutional court is, therefore, a relatively new institution in the history of law. Nonetheless, the existence and operation of constitutional courts are widespread in the early 21st century. It is a global phenomenon that merits scholarly analysis from a legal theoretical and doctrinal perspective.<sup>7</sup> Recently, international law has been considered to have an inherent power of judicial review, a concept which has even crept into the concept of expanded judicial power.<sup>8</sup>

#### 2.1.1. Urgent need in Indonesia

Although it was naturally established in a relatively short pace of time, the 1945 Indonesian Constitution continues to be influential to this day. It is essential to consider two key parts of the Constitution to gain a deeper understanding of its effects. In the first place there is *Pancasila*. It is a national ideology which translates to the five values of belief, namely in one God, humanism, Indonesian unity, democracy, and social justice. In the 1945 Constitution, Pancasila is mentioned in the preamble of the Indonesian Constitution, a term coined by Soekarno (The First President). For the second attribute, Soepomo proposed his thoughts. His holistic view of the state is based on the premise that it is conceived as a family whose needs are paramount, better known as the integralist state.<sup>9</sup> The values of *Pancasila* (5 Indonesian fundamental principles) and the concept of the integral state would then be put together as a constitutional foundation.

It is the Indonesian Constitution that stated that the Supreme Court has the absolute power of judiciary in accordance with the law. Moreover, in the first time of its implementation, the constitution did not recognize judicial review. Since Indonesia gained independence from the Netherlands, it adopted Dutch civil law traditions, in which acts of parliament are considered the supreme expression of democratic will and are not subject to questioning by courts. Furthermore, judicial review was not feasible under New Order regimes, either ideologically or practically.

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<sup>7</sup> Albert HY Chen, "Constitutional Courts in Asia: Western Origins and Asian Practice," *University of Hong Kong Faculty of Law Research Paper*, no. 2019/088 (2018): 1–2.

<sup>8</sup> Dapo Akande, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?," *International & Comparative Law Quarterly* 46, no. 2 (1997): 309–43.

<sup>9</sup> David Bourchier, *Illiberal Democracy in Indonesia: The Ideology of the Family State* (London: Routledge, 2014), Chapter 2.

Subsequently, there had been a gradual weakening of the Indonesian Supreme Court by the Indonesian government. Having been interfered with by the executive branch in the Supreme Court, the judiciary lacked the ability to challenge the government and complied consistently with its demands. A fresh hope for judicial/constitutional review in Indonesia emerged only after the New Order administration ended.

The discussion begins with the fact that there have been many theories put forward about the main driving forces behind the creation of constitutional courts across the globe by scholars of comparative law and politics for many decades. This raises the question of whether self-interested politicians would give power to unelected judges in order to restrict the future political choices they make. The Indonesian Constitutional Court was established in 2001 for two primary reasons, the ultimate causes and the proximate causes. "By proximate cause, I mean an event that is closest to, or immediately responsible for causing, some observed result. This exists in contrast to a higher-level ultimate cause, which is usually thought of as the real reason something occurred."<sup>10</sup>

As in the basic principle, the creation of the Court is the division of power among the elites. Under Indonesia's fragmented political configuration, a strong presidency is virtually impossible without the support of a large majority or coalition within the DPR (People's Representative Council). It is therefore necessary for the elected presidency to have additional "safety measures," such as the constitutional court's supervision of an impeachment process. Those circumstances led the winning party to propose the creation of the Constitutional Court at the time.

When Wahid defeated the favourite candidate Megawati Soekarnoputri in the 1999 election and became the fourth president of Indonesia, there was a dramatic public outburst from millions of Megawati's supporters. Wahid thus appointed Megawati as vice president in order to appease her supporters. Later, the erratic and sometimes provocative behaviour which Wahid displayed early in his presidency prompted his opponents and even his political allies to grow increasingly hostile toward him. A special emergency session of the MPR (People's Assembly) was called in July 2001, with the purpose of impeaching Wahid and appointing Megawati as his replacement.

As the next president in line, Megawati was not confident that the various political parties in the Parliament would be able to work together. She offered a proposal for elevating the grounds for removing the president through a constitutional court. A strong argument can be made, based on these facts, that the Court was established primarily to resolve a pressing political issue. The purpose of this was not to establish an independent judiciary with the ability to carry out judicial reviews. Jimly Asshiddiqie,

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<sup>10</sup> Hendrianto Stefanus, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge, 2018), 41.

initially appointed as Chief Justice of the court, maintained that the court would not have existed without these political events leading to the removal of President Abdurrahman Wahid.<sup>11</sup>

However, basing all the reasoning solely on the repercussions of one isolated political event is truly an understatement. The drive to create a constitutional court in Indonesia was neither new nor foreign from a historical or political perspective. Due to the fact that judicial review had not been available in Indonesia for many years, establishing Constitutional Court was an idea brought to the public discourse more than often. Lawyers, scholars, and non-governmental organizations (NGOs) had repeatedly urged the adoption of judicial review.<sup>12</sup> Conflict of interest occurred between the governing body and the Judges' Association over a constitutional review and the power of the judiciary during Soeharto's (Indonesian Second President) New Order regime.<sup>13</sup> Even so, the Judges' Association couldn't bring about a significant reform on its own because of a lack of support.<sup>14</sup> The inertia lasted until one of the accumulated and calculated NGOs coalitions, which pushed for a new constitution after the collapse of the New Order rule, suggested the formation of a specific body that oversee the constitution with the hope that judicial review being implemented afterwards.<sup>15</sup>

The Constitutional Court was not created with important contributions from judges, lawyers, or non-governmental organisations, despite their long push for judicial independence. A constitutional commission suggested by the NGO was rejected by the People's Assembly, and instead a team of experts was formed to assist with constitutional reform. NGO coalitions, nevertheless, did not acknowledge the work of the expert group, asserting that the team was formed merely for non-essential reasons, as the assembly did not take most of their recommendations into consideration. As a result, the People's Assembly Annual Session voted to reject the Constitutional Commission's proposal and to again give the Assembly Working Body the duty of preparing further constitutional amendments. It can be concluded that the Constitutional Court was established with very little input from civil society as represented by NGOs. Firstly, they dealt exclusively with the establishment of a constitutional commission and not with the specific issue of judicial review.

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<sup>11</sup> Jimly Asshiddiqie, "Setahun Mahkamah Konstitusi: Refleksi, Gagasan Dan Penyelenggaraan, Serta Setangkep Harapan". In *Menjaga Denyut Konstitusi: Refleksi Satu Tahun Mahkamah Konstitusi*, ed. Refly Harun, Zainal A. M. Husein, and Bisariyadi (Jakarta: Konstitusi Press, 2004), 11.

<sup>12</sup> Tim Lindsey, "Indonesian Constitutional Reform: Muddling towards Democracy," *Sing. J. Int'l & Comp. L.* 6 (2002): 261–66.

<sup>13</sup> David K. Linnan, "Indonesian Law Reform, or Once More unto the Breach: A Brief Institutional History.," *Australian Journal of Asian Law* 1, no. 1 (1999): 5–15.

<sup>14</sup> Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (SEAP Publications, 2005), 213.

<sup>15</sup> Andrew Ellis, "The Indonesian Constitutional Transition: Conservatism or Fundamental Change," *Sing. J. Int'l & Comp. L.* 6 (2002): 143.

Furthermore, by rejecting the expert team's report, the NGOs' coalition distanced itself from the People's assembly charged with constitution-making, and therefore had almost no impact on the political process. Ultimately, most of the political elite that controlled the assembly's seats controlled the constitutional reform process.

In November 2001, for the Third Amendment of the Constitution, the Committee concluded Article 24(2), Article 24C, and Article 7B of the Indonesian Constitution. Thus, the Third Amendment changed the judicial branches in Indonesia from a single model of judiciary into the dualist model of judicial branches where there are two institutions holding the judicial powers. Finally, the Constitutional Court was created in 2003 and the administrative and budgetary autonomy was fully guaranteed to the court. After gaining its legal ground in Indonesia's Constitution, Article 24C (1) states that the Constitutional Court is charged with reviewing parliamentary laws, resolving constitutional disputes between constitutionally mandated political institutions, resolving election disputes and bans on parties, and deciding whether a process of impeachment against the president is admissible.

Election complaints make up the majority of cases heard by the court today, followed by cases for judicial review and institutional disputes. In the event that an act of parliament violates a person's constitutional rights, an individual, traditional community, legal person, or government institution can request a judicial review.<sup>16</sup> Despite the fact there is no abstract judicial review, and claimants must show their personal and immediate impact, the court has developed a broad definition of affectedness that involves a wide range of factors. Working along with the supreme court is the designated aim of the constitutional court, and together the balance is expected to enable the creation of judicial impartiality.<sup>17</sup>

It is no secret that the Constitutional Court established a strong reputation in the first years of its existence as a guardian of constitutional law. A clause that restricted the court's jurisdiction to review laws passed after 1999 was struck down in its very first judicial review decision, and several criminal law provisions that were exploited as measures of political repression during the previous era have since been taken down. On the top of that, courts have repeatedly invalidated, in part, laws deregulating the nation's energy, water supply, and oil and natural gas sectors when they ruled against the government and a portion of the national budget was also decided as unconstitutional by the Court.

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<sup>16</sup> Petra Stockmann, *The New Indonesian Constitutional Court: A Study into Its Beginnings and First Years of Work* (Hanns Seidel Foundation, 2007), 26–27.

<sup>17</sup> Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (2010): 397–424.

It is important to note that despite its outstanding record, the Constitutional Court is also subject to some limitations that may affect its role as guardian of the constitutional order. One of them is that court decisions do not affect ongoing judicial proceedings or past verdicts and do not provide legal grounds for appeal based on the relevant legislation.

### 2.1.2. Distinguished existence in Cambodia

The constitution in Cambodia has a close connection with the political regime. Once the political regime of one's country collapses, the constitution also collapses. From obtaining independence in 1953 until the present day, Cambodia has had six political regimes<sup>18</sup> and just as many constitutions. During the absence of the Constitutional Council, the national assembly was the one that controlled and interpreted the constitution. Before the two occurrences of the Constitutional Council in the Khmer Republic and the Kingdom of Cambodia's Constitution, it started to introduce the concept of judicial review and constitutionality.

The Khmer Republic's constitution of 30 April 1972 in Chapter 8, established a system of constitutional control known as the constitutional court.<sup>19</sup> Despite its name, this organization operated independently of the courts. This was influenced by the western interference. The Constitutional Council pursuant to the 1972 constitution has the power to interpret the constitution, review constitutionality, and solve disputes related to presidential and parliamentary elections. Although the 1972 constitution stipulated the functions and establishment of the Constitutional Council, the Constitutional Council itself was never implemented or established due to the civil war.

The arrival of the Khmer Rouge dictatorship in 1975 resulted in massacres and the total destruction of infrastructure and the rule of law until the end of 1978. A light of hope in Cambodia shined in 1993 after facing chronic political trauma. The United Nations-sponsored election in 1993 created the Constituent Assembly. Consequently, the product of the Constituent Assembly was the 1993 constitution which stipulates the Constitutional Council in Chapter XII of the constitution; this has many similarities with the French constitutional council.<sup>20</sup> The Constitutional Council was established as a result of the new constitution while the Constitutional Court of Indonesia occurred as a result of a constitutional amendment. Even though the Constitutional Council was created in the 1993 constitution, it started effectively functioning only from 1998

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<sup>18</sup> These are six regimes: (1). French protectorate of Cambodia (1863-1953), (2). People's Socialist Community (1955-1970), (3). Khmer Republic (1970-1975), (4). Democratic Kampuchea (1975-1979), (5). People Republic of Kampuchea (1989-1993) and (6). The Kingdom of Cambodia (1993-Present).

<sup>19</sup> "Khmer Republic's Constitution Project 30 April 1972", in *The Compilation of the Kingdom of Cambodia's Constitution from 1947 to 2016* (Phnom Penh: Norton University), 42.

<sup>20</sup> "Background," Cambodian Constitutional Court, accessed on October 2, 2021. [www.ConstitutionalCouncil.gov.kh/historyConstitutionalCouncil\\_en.php](http://www.ConstitutionalCouncil.gov.kh/historyConstitutionalCouncil_en.php).



onward. It was considered the first Constitution Council that had been established. The Constitutional Council has committed to moving forward to international recognition, particularly gaining popular trust and confidence,<sup>21</sup> aims which were introduced for the first time by H.E. IM Chhun Lim, current President of the Constitutional Council.

## 2.2. Different Features but Same Purposes

As judicial review operates in new democracies, the characteristics may be determined. In this context, there is an extremely crucial factor of whether the court has an institutional design and whether it is accessible. Constitutions generally design judicial review mechanisms based on their institutional design, but not always. In this sense, the constitution mainly the choices of its regulator.<sup>22</sup> Constitutions often include some provisions for judicial review as part of the political bargain at the start of a democratic regime. Detailed information about the judicial review body, such as its jurisdiction, composition, and membership selection method, may be provided in the constitutional text. Those topics will be the main focus of the discussion in this section.

### 2.2.1. Competence of posteriori review

The Constitutional Council has 3 (three) competencies. First, the Constitutional Council is a supreme institution that has the competence to guarantee the respect of the Constitution.<sup>23</sup> By this means, the Constitutional Council is the sole institution to interpret the constitutional provisions and the laws, and review the constitutionality.<sup>24</sup> On top of that, the Constitutional Council may also conduct an a *posteriori* review of laws upon the request of the relevant authority according to the law. Regarding interpretation, the Constitutional Council has the sole authority to interpret the law and the constitution; even the supreme court of Cambodia has no authority to do so. However, any constitutionality issues raised in ongoing litigation can be referred by the courts to the Constitutional Council for interpretation and judgement.<sup>25</sup> The Constitutional Council has discretion to interpret, based on the meaning of the law or constitution, the intention of lawmakers [by the drafted document similar to *travaux preparatoires*], the historical development, and the general principle of national law,

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<sup>21</sup> Taing Ratana, *The Constitutional Council of the Kingdom Of Cambodia in Promoting Its Core Values: Respect Rule of Law, Protect Independence, Fulfill Neutrality* (Japan: Nagoya University, 2022), 5.

<sup>22</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003), 2.

<sup>23</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, No. NS/ RKM/ 0107/ 005 of 31 January 2007, Art.15.

<sup>24</sup> The 1993 Constitution of Cambodia, Article 136.

<sup>25</sup> Teilee Kuong, "Constitutional Council of Cambodia at the Age of Majority A History of Weathering the Rule of Law Storms in Peacetime", in *Constitutional Courts In Asia*, edited by Albert H.Y Chen and Andrew Harding (United Kingdom: Cambridge University Press, 2018), 242.



along with the jurisprudence of the particular countries within.<sup>26</sup> In addition to the interpretation, the Constitutional Council can only examine and review when there is a request, and it cannot function on any matter of its own will.

Second, the Constitutional Council has the sole right to examine and rule on electoral disputes, including the election of the Members of the National Assembly and the election of the Senators.<sup>27</sup> Adding to the electoral disputes, the Constitutional Council is primarily an appeal body that ruled on complaints previously heard by the National Election Committee according to the electoral law of Cambodia. The Constitutional Council has the sole authority to nullify any vote by the National Assembly that is contrary to “the principle of safeguarding the independence, sovereignty, territorial integrity, and that undermines the political unity of the nation or the administrative management of the nation.”<sup>28</sup> Besides, in the case of refusal of the political parties’ registration made by the Ministry of Interior, the political parties can bring that matter to the Constitutional Council to examine. (iii) the Constitutional Court has a role to notify His Majesty the King. The King is able to consult directly with the Constitutional Council on all proposals to amend the Constitution. “[The Constitutional Council] is a neutral and independent institution while exercising its functions.”<sup>29</sup> With all of these functions, it is a real showcase of constitutional court power to protect the value of the Cambodian constitution.

### 2.2.2. Progressive judicial review

On the other hand, in Indonesia, article 24 (1) of the Indonesian Constitution regulates the judiciary power, which some constitutional law expert’s decider to call judicial power. The article explicitly mentions that “Judicial Power is an independent power to administer justice to enforce law and justice.”<sup>30</sup> A judicial power that is independent stands within the framework of the legal state, which entails adjustments that are harmonious, balanced, and supportive of efforts to protect human rights, namely equal rights for judicial and legislative powers. There are not only these two branches, in the concept of the division of power in Indonesia; besides judiciary power, there is also an executive branch of governance.

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<sup>26</sup> Hor Peng, *The constitution of the Kingdom of Cambodia: The evolution of constitutional Theories and interpretation* (Cambodia: Konrad Adenauer Stiftung, 2016), 46.

<sup>27</sup> The 1993 Constitution of Cambodia, Article 136.

<sup>28</sup> Constitutional Council of Cambodia, *Constitutional council of the Kingdom of Cambodia*, (Cambodia: Constitutional Council of Cambodia), 6. [https://www.ccc.gov.kh/detail\\_info\\_en.php?\\_txtID=794](https://www.ccc.gov.kh/detail_info_en.php?_txtID=794)

<sup>29</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, No. NS/ RKM/ 0107/ 005 of 31 January 2007, Art.2.

<sup>30</sup> The Indonesian Constitution, Art. 24 (1).

The purpose of the judiciary as an independent power is to administer justice to enforce law and justice.<sup>31</sup> The judicial power act stipulates in its explanation of article 3 (1) that judicial independence refers to being “free from any outside influences and without any bias whatsoever. For a clean and prestigious justice system to exist, this effort must be made to realise the sense of justice”.<sup>32</sup> The sense which eradicates judicial corruption, though the implementation remains a challenge, given the number of laws that are still not in line with this constitutional guarantee.

In Indonesia, the Constitutional Court has produced a significant development to the constitutional system. The Constitutional Court functions not only as the guardian of the Constitution but also as an institution which brought about the checks and balances *with* regard to the Legislative and the Executive. The Constitution guarantees the judicial independence of the Constitutional Court. Article 24 section 1 of the Indonesian Constitution stipulates that the judicial power shall be independent and shall possess the power to ensure that the judicature enforces law and justice. The article provides a fundamental basis for the Constitutional Court in conducting its competencies. Institutionally, the Constitutional Court is separated from the other judicial branches, namely the Supreme Court. While the supreme court holds power at the highest level of trial as well as the judicial review of the legality of executive laws and regulations. These competencies are different from the competencies of the Constitutional Court.

In this context, the competencies of the Constitutional Court are more about “constitutional matters”, whereas, the competencies of the Supreme Court are more about “legal matters”. In conducting “constitutional matters”, the Constitutional Court would not only be concerned with interpreting the Constitution but also with interpreting the Law, as it mainly aims to find the constitutionality of the Law. In practice, from 2006 up to the present day, the Constitutional Court has reviewed many thousands of decisions and norms, many hundreds of legal decisions have been the subject of judicial reviews which resulted in the revocation of Laws.

With regard to constitutional interpretation, the Constitutional Court does not always show any inclination to interpret the constitution using either original or non-original thinking. In general, the interpretation of the constitution merely depends on how a constitutional judge views the issue. According to a study conducted by researchers at the Constitutional Court, the Constitutional Justices did not always use constitutional interpretation but based its legal interpretation on interpretation of the Law that was being reviewed. The study also revealed that the Constitutional Court indicated in the decisions that the judges mostly quoted the constitutional provision as the basis of

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<sup>31</sup> Ibnu Subarkah et al., “The Obscurity of Judicial Independence towards Regulations with Legal Certainty in Indonesia,” *International Journal of Multicultural and Multireligious Understanding* 8, no. 11 (November 26, 2021): 473, <https://doi.org/10.18415/ijmmu.v8i11.3254>.

<sup>32</sup> Jimly Asshiddiqie, 2014, *Loc.Cit*.

review without elaborating on the essence of the meaning of phrases or norms in the provisions, or only mentioning the principles or values in the provisions without referring to the specific provisions relevant to the case, or did not mention the basis of the reviews upon which in this context, the judges directly concluded that the norms were (un)constitutional.

On the one hand, the judges in the Constitutional Court who delivered the decisions are free to do as they think fit. It is about judicial independence where the decisions have to be made. On the other hand, as the Constitutional Court has the main competency to interpret the constitution with the purpose of guarding values within the constitution, thus delivering a decision without a valid constitutional interpretation by the court is a breach of its legal competence. Judicial independence remains a major relevant topic for all federal court worldwide. More discussion on judicial independence will be found in the next sections.

### 2.2.3. Eligibility to legal reform

Not everyone is entitled to file a complaint to the Constitutional Council. The specific procedure must be applied; otherwise, the complaint is not accepted. The King, the president of the national assembly, one-tenth of members of the national assembly, the president of the Senate, one-quarter of the senators, the prime minister, or the supreme courts—using the interlocutory question—can file a complaint about the constitutionality of the law.<sup>33</sup> In a democratic country, there would be a question concerning citizens and whether they hold the right to apply to the Constitution Council. Theoretically speaking, they are able to submit a complaint but they must use the above mechanism to indirectly submit their inquiries.<sup>34</sup> It is quite predictable that citizens hardly ever submit their inquiries on the practical aspects.

Turning to the proposal of a constitutional amendment or revision, only the King has the prerogative right to do this.<sup>35</sup> The King can directly and officially consult with the Constitutional Council, while the prime minister or president of the national assembly with the support of one-quarter of all its members can only do so by requesting His Majesty the King. The King can consult with the Constitutional Council on all proposals to amend the constitution without needing third parties to proceed with the consultation procedure. Besides, political parties are also entitled to complain to the Council about matters concerning the refusal of their registration by the Ministry of Interior. On the last matter, individuals or political parties can lodge complaints through the Constitutional Council against decisions of the National Election Committee.

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<sup>33</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, N° NS/ RKM/ 0107/ 005 of 31 January 2007, Art.18.

<sup>34</sup> Teilee Kuong, "Constitutional Council of Cambodia at the Age of Majority A History of Weathering the Rule of Law Storms in Peacetime," 242.

<sup>35</sup> The 1993 Constitution of Cambodia, Art.143.

Looking at it from another side, article 51 of the Indonesian Constitutional Court Act provides confirmation that, in the judicial review, those who can act as an applicant are parties who consider their constitutional rights and/or authority to be harmed by the enactment of the law. In this context, those who have a legal standing in this process include a citizen of Indonesia or a group of people who have the same interests; “*masyarakat adat*” (Indigenous People of the Archipelago) as long as they are alive and following the development of society and the principles of the Unitary State of the Republic of Indonesia stipulated in the law; public or private legal entities; or governmental institutions.

*Adat* communities as legal subjects play a unique role in the Indonesian constitution which distinguishes, respects, and guards their rights to exercise cultural diversity related to land and natural resources management.<sup>36</sup> The applicants must demonstrate that such a law has caused a measurable detrimental violation of their constitutional rights. Otherwise, as it is rooted in the principle of “*point d’etre, point d’action*”, which means that no legal process should be taken without valid legal reasoning. If the evidence does not present convincing enough evidence in the opinion of the judges, then the legality of the application could not stand as well.<sup>37</sup> In addition, the constitutional loss in itself should be laid out in a specific matter and have a measurable impact or at least the potential of causing one that could occur if the law remains.<sup>38</sup>

#### 2.2.4. Decision: Differences between Council and Court

The decision of the Constitutional Council must be taken by an absolute majority (meaning that it requires five votes), and it is final without recourse to question. In the event of a tie, the president’s vote determines the outcome.<sup>39</sup> In the case of adoption of the rules and procedure and dismissal of a member of Constitutional Council will require a two-thirds majority. As the role of members of the Constitutional Council to decide, interpret and review, they are protected from being liable for any penal or civil sanction for their decisions.<sup>40</sup> They have the freedom to decide based on their own

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<sup>36</sup> Adriaan Bedner and Yance Arizona, “Adat in Indonesian Land Law: A Promise for the Future or a Dead End?,” *The Asia Pacific Journal of Anthropology* 20, no. 5 (October 20, 2019): 423, <https://doi.org/10.1080/14442213.2019.1670246>.

<sup>37</sup> Laica Marzuki, “Judicial Review Di Mahkamah Konstitusi,” (Judicial Review in Constitutional Court) *Jurnal Legislasi Indonesia* 1, no. 3 (November 29, 2018): 4, <https://doi.org/10.54629/jli.v1i3.275>.

<sup>38</sup> Ahmad Fadlil Sumadi, “Hukum Acara Mahkamah Konstitusi dalam Teori dan Praktik,” (Prosedural Law in The Constitutional Court in Theory and Practice) *Jurnal Konstitusi* 8, no. 6 (May 20, 2016): 862, <https://doi.org/10.31078/jk%x>.

<sup>39</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, N° NS/ RKM/ 0107/ 005 of 31 January 2007, Art.22.

<sup>40</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, N° NS/ RKM/ 0107/ 005 of 31 January 2007, Art.11.

discretion, and the constitutional decision has the authority over all instituted power.<sup>41</sup> There is no public hearing for constitutional review. However, in some electoral disputes, the Constitutional Council may decide to convene a public hearing.<sup>42</sup> The legal system of Cambodia is a *de facto* civil law system as a consequence of French influence (with no declaration about the legal system of Cambodia in the constitution) in which the codified law prevails over the precedent. Nonetheless, the constitutional precedent in Cambodia is important for deciding the latter case, which has a similar legal issue as the former.<sup>43</sup> The Constitutional Council issued the decision No. 092/003/2007 which stated that international law is one of the sources of Cambodian law. Then the judicial branch should consider international law to apply in the Cambodian case as the judges see fit. In particular, this is the international law related to human rights, children's and women's rights as they are explicitly stipulated in the Cambodian constitution.

The Constitutional Council decision illuminates the way for the court to use international law to decide on the case. Moving to the final decision of the Constitutional Council, those decisions have authority over instituted power and prevail over any contradictory decision from other branches after the Constitutional Council has reached its judgment. When any provision of law is declared unconstitutional and it can be separated from the remaining text, it cannot be implemented or promulgated unless there is an amendment according to article 123 of the Cambodian constitution. In some cases, if that provision cannot be separated from the remaining text, the whole law cannot be applied or promulgated. At the end of the day, discussion and vote from the Constitutional Council shall be kept secret and they must not openly express their opinion outside the meeting.

In cases of judicial review, the Constitutional Court of the Republic of Indonesia can declare words, sentences, paragraphs, articles, or the law to be unconstitutional. The Constitutional Court must, therefore, consider legal arguments. A constitutional interpretation is a key element of these legal arguments. It determines whether a law is constitutional. The Constitutional Court must nonetheless use the constitution as the basis for deciding cases in its exercise of authority. For laws to be constitutional, the text of the constitution must be the standard, and not what the judges would prefer the constitution to mean. Yet, a written constitution, according to Jeffrey Goldsworthy, does not provide self-actualization.<sup>44</sup> Maintaining them over time requires interpretation and adaptation to changing circumstances. By developing reliable approaches

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<sup>41</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, No. NS/ RKM/ 0107/ 005 of 31 January 2007, Art.23.

<sup>42</sup> Internal Rules on the Proceedings in Front of the Constitutional Council, adopted on 8 July 1998 and amended on 21 May 1999, Art. 12.

<sup>43</sup> Taing Ratana, *Constitutional council: Election, structure, procedure, and competencies* (Cambodia: Konrad Adenauer Stiftung, 2016), 195.

<sup>44</sup> Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study* (OUP Oxford, 2006), 322.

to interpretation, the Constitutional Court ensures the constitutional text remains true to its underlying values.

The argument against the legality of constitutional review has always come from a premise that questions the constitutionality of the judicial review, or more specifically of how the justices review such a fundamental provision. The process of constitutional interpretation involves finding a balance between competing considerations that is extraordinarily difficult.<sup>45</sup> It can be difficult to distinguish legitimate changes from illegitimate ones. It could rely on several factors, such as the determinacy of the change and the indeterminacy of the purpose, the inner meaning of the change and the outer one, the evidence of intent or understanding that illuminates the original meaning and the evidence that does not, the changes in the application of a provision and the changes in its meaning, and so on. A former justice of the Constitutional Court once described the options to interpret the constitution as textual, grammatical, historical, sociological, sociological, philosophical, teleological, holistic, thematic, and doctrinal. The present day, legal scholars recognize six main methods of constitutional interpretation: textual, historical, functional, doctrinal, prudential, equitable, and natural.

### 2.3. Imparsial judges

Judges and courts have been portrayed in a wealth of images in contemporary democracies.<sup>46</sup> Compared to how we refer to other public officials, this accumulation of metaphors is unparalleled. There is rarely anything mundane about the representation of judges. There is no wonder why this is the case. Our justice system is burdened with a more mysterious political ideal, namely, the "rule of law, not of men", which differentiates it from legislators who represent interests and negotiate mutual agreements for the sake of collective self-government.

A constitutional court has a heavier burden and more hyperbolic images and ideals attached to it. Traditionally, it has been regarded as the bastion of rights and the protection against the danger of majority oppression. This is because it ensures constitutional supremacy and ultimately checks the constitutionality of ordinary political choices. In certain liberation movements and in emancipation struggles, they became the vedettes, largely due to mistrust of electoral politics. In fact, courts have not always done what they were expected to do.

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<sup>45</sup> Fritz Edwadr Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)," *Constitutional Review* 1, no. 1 (March 28, 2016): 1–27.

<sup>46</sup> Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013), 1–5.

### 2.3.1. Selection by three chambers

The Constitutional Council is composed of nine members,<sup>47</sup> one of whom is the President. The president or chairperson is elected by the members of the Constitutional Council with an absolute majority vote and shall have the right to decide the vote when it is tied. The president is elected every three years and can be eligible for reappointment. The rank of the president of Constitutional Council is equal to the president of the National Assembly.

Since Cambodia is a constitutional monarchy regime (“the monarch reigns but does not govern”),<sup>48</sup> it reflects on the monarchy, particularly the role and prerogatives of the King in the Constitutional Council. His Majesty the King has the privilege to appoint three members among nine members to work in the Constitutional Council at His Majesty’s discretion. The National Assembly and the Supreme Council of Magistracy elect three each. Members elected or appointed by the Supreme Council of Magistracy or the National Assembly are mostly from the ruling party—the Cambodian People’s Party.<sup>49</sup> The mandate of the members is limited to a maximum of nine years.<sup>50</sup> The candidates obtaining the first, second, and third highest votes shall be appointed for nine, six, and three years respectively. In case the vote is equal, the eldest candidate shall prevail. Every three years, the National Assembly and the Supreme Council of Magistracy are announced to the public, so it does not mean that these two institutions only choose candidates from their institutions. Any qualified candidate may apply for this position as a member of the Constitutional Council. Members of the Constitutional Council are not considered judges, but rather public officials with high rank and experience.

Similarly, the Indonesian Constitutional Court consists of nine judges. Three judges are nominated by the DPR (the Parliament), three are nominated by the President, and three are nominated by the Supreme Court. The philosophy of the appointment is addressed as a reflection of the three branches of government as well as checks and balances. The Constitutional Court as an institution is expected to be an institution. The appointment of the constitutional judges is guaranteed by the Law on Constitutional Court Article 19 to be transparent and participative. In this context, the appointment process is intended not to be a personal domain, but has to consider the public or the people as it is one of the principles of people sovereignty.

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<sup>47</sup> The 1993 Constitution of Cambodia, Art.137.

<sup>48</sup> The 1993 Constitution of Cambodia, Art.7.

<sup>49</sup> Teilee Kuong, “Constitutional Council of Cambodia at the Age of Majority A History of Weathering the Rule of Law Storms in Peacetime,” 246.

<sup>50</sup> Law on the amendment of the law on the Organization and the functioning of the Constitutional council, N° NS/ RKM/ 0107/ 005 of 31 January 2007, Art.2.



With regard to transparency and participation, the Law sets the minimal requirement that the nominee of the constitutional judges has to be published in the mass media. The publicity has to be easily accessible by the public to create the opportunity for the people to give feedback to the nominee. Furthermore, according to Article 20 Section (1) of the Law on Constitutional Court, the process of the appointment starting from the selection, the nomination and the appointment are regulated by each of the three institutions (the parliament, the president, and the supreme court).

However, the three branches have to ensure the objectivity and the accountability of the process. From the beginning of the establishment, the appointment process of constitutional justice was conducted according to the Law in terms of publicity, transparency and accountability. As to the process of the selection of the nominee, usually, the public does not become involved at any stage. The last word of who will be selected as the judge would be in the hands of each branch. Each of the Parliament, the President, and the Supreme Court have their last word to decide their nominations for the judges. The constitutional judges have their 5 years term of office and can be reappointed for a second term.

### 2.3.2. Qualification

Regarding the qualifications of members of the Constitutional Council based on LOFCC in Article 3, the members are “high-ranking personalities” or known as dignitaries.<sup>51</sup> They are of Khmer nationality by birth and hold only one Khmer nationality.<sup>52</sup> They are at least 45 years old. For educational background, the Constitutional Council members do not require a legal background as long as they hold high diplomas (at least a bachelor’s degree) in law, administration, diplomacy, or economics, along with at least fifteen years of professional experience.

The position of the Constitutional Council members is incompatible with the functions as “member of the government, senator, member of the National Assembly, president or vice president of a political party, president or vice president of a trade union and incumbent magistrate”. This indicates that the members of the Constitutional Council must hold no position as mentioned above after being appointed as a member of the Constitutional Council. Supposing they are holding any such positions, they must resign before working as a member of the Constitutional Council. It would cause a conflict of interest and shatter the image of independence and neutrality if the Constitutional Council members function in both the government and the Constitutional Council.

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<sup>51</sup> The 1993 Constitution of Cambodia, Art.138.

<sup>52</sup> Recently, there is a constitutional amendment which entered into force in November 2, 2021. It added the eligibility of members that they must hold only one Khmer nationality based on the Constitutional Law on the Amendment to Article 19 New, Article 82 New, Article 106 New (One), Article 119 New and Article 137 New of the Constitution of the Kingdom of Cambodia and to Article 3 and Article 4 of additional constitutional law tending to ensure the regular functioning of the national institutions.

Thereby, the LOFCC prohibits the said positions. After the selection is successfully finished and details of the members of the Constitutional Council are issued by the Royal Decree,<sup>53</sup> the first meeting of the Constitutional Council must take place within seven days at the latest.

The appointment of the constitutional judges in Indonesia until now has not been merely a political matter. Several judges have come from academia with a strong background and high competence in the field of constitutional law. However, Indonesia has also had experience of judges coming from prominent political backgrounds. Consequently, the selection of the candidate has always raised for and against arguments in the public discussion due to the fear of conflict of interest and intervention of impartiality from the political parties. Having the two former constitutional judges involved in gratification cases, the perspective of having candidates for constitutional judges having no political affiliation is now being pushed.

These flaws are fundamentally contrary to the rationale for the establishment of constitutional courts which is to address a variety of problems not necessarily related to the conditions of legal systems, but transitioning from authoritarian or totalitarian rule.<sup>54</sup> An independent constitutional court presents the opportunity to reform the court by selecting qualified judges who are not restricted by association with the previous administration. In accordance with judicial independence standards, this will leave the existing court system more or less intact.

### 2.3.3. Dismissal

Members of the Constitutional Council may resign, but they must submit the written resignation to the Constitutional Council, particularly the Constitutional Council president. In some cases, the Constitutional Council may dismiss its members from their positions by a two-thirds vote of the whole members of Constitutional Council. The following reasons can be a basis for dismissal such as (1) incompatibility with the Constitutional Council member's position; (2) failure to take the oath; (3) absence without permission or prior notification for three consecutive meetings; (4) unable to perform work due to mental or physical incapability; or (5) being prosecuted and imprisoned for a misdemeanor or felony (a two-thirds vote is not needed since that member is automatically dismissed). The members of the Constitutional Council have immunities from liability to civil or penal sanctions for decisions taken while fulfilling their functions.

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<sup>53</sup> Royal Decree is the second highest hierarchy of law and Royal Decree is issued by the King.

<sup>54</sup> Jan Komarek, "National Constitutional Courts in the European Constitutional Democracy," *International Journal of Constitutional Law* 12, no. 3 (2014): 525–35.

On the other hand, in Indonesia, a Constitutional justice may be dismissed in one of three ways: honourably, dishonourably, and temporarily. In the event of death, resignation, or suffering from a permanent physical or mental illness for three months, the constitutional justice is honourably discharged. Yet, dishonourable dismissal may result when the justice has been convicted of a criminal sanction, violates the rules of law or their ethical code, skips 5 hearing sessions unreasonably, or attempts to postpone the passing of a decision without a valid reason. Under the same circumstances, constitutional justices who are being investigated tend to be temporarily dismissed from their duty until the legal process has been conducted. As mentioned above, the criteria for dismissal of justices are quite straightforward, but judicial corruption has damaged the image of the judicial system and undermined the honour of justices.<sup>55</sup>

Although this dismissal mechanism may be viewed as legal certainty, in truth it is not or rather has not proved to be so. Article 23 of the Constitutional Court Act leaves limitless authority to the Constitutional Court to regulate its internal mechanism, dismissal procedure included. Among the many difficulties with this original formulation is that constitutional court judges could only be dismissed on the recommendation of the Chief Justice with no clear basis for dismissing the Chief Justice himself.<sup>56</sup> Furthermore, although the article sets out various grounds for dishonorable dismissal, no regulations are inserted for judicial misconduct that did not constitute a dismissible offence. It was left to the Court in 2003 to formulate its own Code of Ethics and Behaviour Guidelines. Later, this problematic status quo manifested itself in the form of a forced resignation from Mochtar, a former chief judge, at the expense of dismissal after being found guilty of accepting a bribe.

However, it can be challenging to determine just how judges should achieve judicial independence and how much independence they need to perform their adjudicative function adequately. In this context, scholars begin to question whether accountability measures such as performance reviews and competence reviews should exempt judges from them, as there is a risk that these measures may influence their decisions, thereby providing them with improper influence.<sup>57</sup>

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<sup>55</sup> M. Lutfi Chakim, "Organizational Improvement of the Indonesian Constitutional Court: Reflections on Appointment, Supervision, and Dismissal of Justices," *International Journal for Court Administration* 12, no. 1 (March 11, 2021): 8–9, <https://doi.org/10.36745/ijca.308>.

<sup>56</sup> Theunis Robert Roux and Fritz Edward Siregar, "Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 8, 2016), 133–34, <https://papers.ssrn.com/abstract=2745096>.

<sup>57</sup> Simon Butt and Tim Lindsey, "Judicial Mafia: The Courts and State Illegality in Indonesia," in *The State and Illegality in Indonesia* (Brill, 2010), 196–99.

Constitutional Justices' protocol appointments and financial rights are governed by laws and regulations applicable to state officials to prevent judicial corruption caused by the non-fulfilment of their needs.<sup>58</sup> Justices are also entitled to immunity, which means they can only be subjected to political action in the direction of the Attorney General and after receiving approval from the President unless caught in the act of committing a crime. Therefore, such a given immunity is very strict and limited, under which a judge should exercise their duty with good faith. In other words, a judge will not be immune to civil or criminal prosecution if it is not regarding his/her judicial authority or if such a power is misused with a guilty intent.

However, in the Mochtar's case, the former justice was accused of committing corruption. As it turned out, there was an unlawful involvement in a court dispute over the election of the district governor for Gunung Mas district in Central Kalimantan. As reported by the KPK (Indonesian Corruption Eradication Commission), there was US\$ 260,000 found in Mochtar's private residence. Mochtar was said to have received that amount for agreeing to influence the case's outcome. Nonetheless, it should be noted, however, that the Constitutional Court Law only provides for the removal of ordinary constitutional judges. As a result, Mochtar simply resigned under pressure. In light of the extraordinary nature of the crisis, the President issued a government regulation in lieu of law No 1 of 2013 that carried out the second amendment to Law No 24 of 2003 to significantly reform the Constitutional Court Law.

### 3. Conclusion

Comparison between two different institutions of the Constitutional Council and the Constitutional Court may be plausible, but very important. It is to look at how two different institutions in two countries evolved and developed with a similar main objective as the guardian of the constitution. The Constitutional Council of the Kingdom of Cambodia is structured as an independent body and it is regarded as a supreme institution that is neither in the judicial branch nor other branches though it stands out as a constitutional body made up of members from three separate branches. As it is not under any certain branches, it means that the Constitutional Court is not under any branch's influence. Notwithstanding its independence and impartiality, the Constitutional Council cannot examine any matter on its own initiative. Its decision is final and binding. Its binding force prevails over any decision and law; its effect repeals any law contradicting the constitutional decision.

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<sup>58</sup> Mohammad Mahfud, "Separation of Powers and Independence of the Constitutional Court in Indonesia," *Observatório Da Jurisdição Constitucional* 1, no. 1 (2010): 11.

Moving to the Constitutional Court of the Republic of Indonesia, as one of the branches holding the judicial power, is established with the purpose to maintain the democratic state and rule of law in Indonesia. The Constitutional Court's competencies are mainly to uphold constitutionalism and the constitution. The Constitutional Court has started to build the sophisticated constitutional jurisprudence that Indonesia has always lacked. In conclusion, the Constitutional Council of the Kingdom of Cambodia and the Constitutional Court of the Republic of Indonesia serve as the guardian of the constitution despite its different features based on its history, origin and core value of each society. The Constitutional Court and Constitutional Council represent an efficient part of constitutional authority that has reflected the value of each country.

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