

## CHAPTER ONE

### INTRODUCTION

#### A. Background

On Wednesday night, October 2<sup>nd</sup> in Jakarta, the Corruption Eradication Commission (KPK) set the Chairman of the Constitutional Court, Akil Mochtar, as a suspect in the receiving of bribery for two cases of election dispute. Akil was accused as a suspect regarding the local election dispute in Gunung Mas regency, Central Kalimantan, and Lebak.<sup>1</sup>

The arrest of the Chairman Justice of Constitutional Court by the Corruption Eradication Commission (KPK) seems to justify the distribution and divergence of crime in every organ of state power at all levels.<sup>2</sup> This case confirm the need to consider the involvement of external institution in supervising the behavior of justices.<sup>3</sup>

The next case is the case of Arief Hidayat. Jimly Asshiddiqie responds about ethics sanction imposed to the Chairman of the Constitutional Court is the first ethics sanction on Constitutional Justices. The sanction of ethics is a form of oral admonition by the Ethics Board of the Constitutional Court.

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<sup>1</sup> News Republika, 2013, "Kronologis Penangkapan Akil Mochtar", available at <http://www.republika.co.id/berita/nasional/hukum/13/10/03/mu3hdy-kronologis-penangkapan-akil-mochtar>, accessed on Tuesday, May 30<sup>th</sup> 2017, at 9.25 pm.

<sup>2</sup> Malik, *Perppu Pengawasan Hakim MK versus Putusan Final MK*, the Journal of the Constitution, Volume 10, Number 4. December, (Jakarta: Registrar and the Secretariat General of the Constitutional Court 2013), page 580.

<sup>3</sup> Constitutional Court of the Republic of Indonesia, *the blueprint the Constitutional Court of the Republic of Indonesia*, Jakarta: Secretary General of the Constitutional Court of the Republic of Indonesia, 2004, page 15.

The sanctions were applied because Arief Hidayat allegedly gave the memo to the Deputy Attorney General specifically Widyo Pramono case.<sup>4</sup>

The bribery case which involved the Chairman of Justice of the Constitutional Court has become a reason to revise the Law on the Judicial Commission. The House of Representatives (DPR) shall immediately prepare about the need of the existence of an institution as the external supervision.

The Constitutional Court argue that the supervision of the Judicial Commission is not constitutional based on two legal reasoning, namely the problem of the interpretation of the framer constitution (original intent) and its systematic.<sup>5</sup> Both of the legal reasoning, according to the Court, contain inconsistencies between Article 24B paragraph (1), the 1945 Constitution with the Law Number 22 of 2004 on Judicial Commission<sup>6</sup> and the Law Number 4 of 2004 on Judicial authority.<sup>7</sup> The supervision of the Judicial Commission to Constitutional Justices is arguably not in line with the 1945 Constitution. But on the contrary, Supreme Court Justices and judges at the lower courts become the object of supervision of the Judicial Commission.<sup>8</sup>

In avoiding the legal vacuum and strengthening supervision of behaviour of the Constitutional Justices, it has been accordingly established a permanent supervision namely Honorary Council of Constitutional Court

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<sup>4</sup> Tempo.co, 2016, “Ketua MK Terbukti Melanggar Etik, Jimly: Tak Perlu Mundur”, available at <https://m.tempo.co/read/news/2016/04/30/078767290/ketua-mk-terbukti-melanggar-etik-jimly-tak-perlu-mundur>, accessed on Tuesday, May 30<sup>th</sup> 2017, at 9.43.pm.

<sup>5</sup> See the Decision of Constitutional Court Number 005 Number/PUU-IV/2006, page 173-176.

<sup>6</sup> State Gazette of the Republic Indonesia (LNRI) 2004 Number 89, Supplement State Gazette of the Republic of Indonesia (TLNRI) Number 4415.

<sup>7</sup> State Gazette of the Republic Indonesia (LNRI) 2004 Number 8, Supplement State Gazette of the Republic of Indonesia (TLNRI) Number 4397.

<sup>8</sup> *Ibid.*, page 173-176.

(MKMK) or in Indonesia called as *Majelis Kehormatan Hakim Konstitusi* . The MKMK as a form of permanent supervision based on Article 27A Law Number 8 of 2011 about the changes of the Law Number 23 Year 2004 about The Constitutional Court.<sup>9</sup> The MKMK consists of five members.<sup>10</sup> Then the MKMK declared illegal by the Decision of the Constitutional Court Number 49/PUU-IX/2011<sup>11</sup> because the existence of the elements of the House of Representative (DPR), elements of the government and the supreme justices which have potential to cause a conflict of interest. There will be conflict of interest because of the House of Representative (DPR), the Government, Supreme Court and the Judicial Commission may be the parties involved in the Constitutional Court cases.<sup>12</sup> The Constitutional Court also argued that the membership of the Honorary Council of Constitutional Justices (MKMK) does not give any guarantees of independence and impartiality.

In the absence of the supervision of the behaviour of Constitutional Justices, the Constitutional Court internally formed Honorary Council of Constitutional Court (MKMK). Through the Constitutional Court Regulation (PMK) Number 1 Year 2013 formed the Honorary Council of Constitutional Court which consist of five members. The members of MKMK consists of elements of the Constitutional Justices, the commissioner of the Judicial

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<sup>9</sup> State Gazette of the Republic Indonesia (LNRI) 2011 Number 70, Supplement State Gazette of the Republic of Indonesia (TLNRI) Number 5226.

<sup>10</sup> Article 27A paragraph (2) of Law Number 8 of 2011, Honor Assembly Constitutional of Justices consist of 5 (five), each one of the justices, commissioner Judicial Commission, elements of Parliament, elements of the government of the law and the Supreme Judge.

<sup>11</sup> Decision Number 49/PUU-IX/2011 about the testing of Law Number 8 of 2011 about the changes to the Law Number 23 of 2004 about The Constitutional Court against the 1945 Constitution 14 October 2012.

<sup>12</sup> *Ibid.*, page 72.

Commission, the former of chairman of the state institutions, the former member of the Constitutional Justices / Supreme Court Justices and the professor of law science.<sup>13</sup> This means that the members of MKMK are free from the House of Representative (DPR), government and also Supreme Court Justices that was mentioned in Article 27A paragraph (2) of Law Number 8 Year 2011 on the Constitutional Court: *“To uphold the Ethics Board and Code of Conduct Justices as mentioned in paragraph (1), formed Honorary Council of the Constitutional Court that its membership consists of:*

1. *one the justices;*
2. *one member of the Judicial Commission;*
3. *one of the element of the DPR;*
4. *one of the elements of the government; and*
5. *one the Supreme Judges”*

Internal supervision of the Constitutional Court is not effective in the judiciary and it also shows the weakness of the internal control system. The arrest of Patrialis Akbar<sup>14</sup> by the Corruption Eradication Commission (KPK) is an indication of the ineffectiveness of the internal control system of the Constitutional Court.

The arrest of two justices of the Constitutional Court proved the crisis of condition that was mentioned in Article 22 paragraph (1) the 1945 Constitution. Through the Government Regulation in Lieu of Law (Perppu)

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<sup>13</sup> See in article 3 Chapter II Regulation of Constitutional Court No. 1 Year 2013.

<sup>14</sup> Nasional Kompas, 2017, *“Kronologi Penangkapan Patrialis Akbar oleh KPK di Grand Indonesia”*, available at <http://nasional.kompas.com/read/2017/01/26/20012881/kronologi.penangkapan.patrialis.akbar.oleh.kpk.di.grand.indonesia>, accessed on Sunday, December 18<sup>th</sup> 2017, at 12.21 am.

Number 1 of 2013 on the Second Amendment of Law Number 24 of 2003 about the Constitutional Court,<sup>15</sup> The President has taken action to save the Constitutional Court.

The Constitutional Court expressly rejected the involvement of the Judicial Commission in the establishment of Honorary Council of Constitutional Court (MKHK). Then the Constitutional Court established the Ethics Board of Constitutional Court through the Constitutional Court Regulation (PMK) Number 2 of 2013 about the Ethics Board of Constitutional Court which consist of three members. The members of Ethics Board consist of the former of the Constitutional Justices, academicians and public figures with the duration of reign for 3 (three) years.<sup>16</sup> The Ethics Board has the right to recommend the formation of Honorary Council of Constitutional Justices to trial the Constitutional Justices which violate code of ethics of Justices.<sup>17</sup>

According to the former Chairman of the House of Representatives (DPR) Marzuki Alie<sup>18</sup>, the House of Representatives (DPR) was preparing a revision of the rules for the performance of the Constitutional Court. The rule is Law No. 22 of 2004 on Judicial Commission. Refer to the case of Akil Mochtar, the revision of the Act was so required and urgent.

Marzuki Alie also said that the House of Representatives (DPR) has submitted two times judicial review of the Judicial Commission although both

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<sup>15</sup> State Gazette of the Republic Indonesia (LNRI) 2013 Number 167, Supplement State Gazette of the Republic of Indonesia (TLNRI) Number 5456.

<sup>16</sup> Muhtadi, "*Politik Pemngawasan Hakim Konstitusi*", Fiat Justicia Law Journal, Volume 9 Number 3, 2015.

<sup>17</sup> *Ibid.*

<sup>18</sup> Merdeka, 2013, "*Ketua DPR Nilai Revisi UU KY Mendesak Buat Awasi Hakim MK*", available at <https://www.merdeka.com/peristiwa/ketua-dpr-nilai-revisi-uu-ky-mendesak-buat-awasi-hakim-mk.html>, accessed on Friday, December 29<sup>th</sup> 2017, at 8.33 pm.

were rejected by the Constitutional Court. As a result, the Constitutional Court is like A God that it is immune to supervision.<sup>19</sup>

Amendment of the 1945 Constitution and the Law on Judicial Commission are important to supervise the performance and power of the Constitutional Court. The supervision of Judicial Commission is needed to ensure the honor, dignity and behavior of the Justices.

The judges, as the main actors or central figure in the judiciary process, are always required to hone the sensitivity of conscience, maintain integrity, apply moral intelligence and improve professionalism in upholding the law and justice for many people.<sup>20</sup> Referring to some cases, the Constitutional Court seems to need to have maximum external supervision to maintain the integrity, and improve the professionalism in upholding the law and justice for a lot of people.

Basically, the external supervision of the Constitutional Justices has been regulated in Article 24B of the 1945 Constitution which states that:<sup>21</sup> “The Judicial Commission shall be independent in nature and have the competence to make proposals for the appointment of supreme justices as well as other competences within the framework of safeguarding and upholding the honor, the high status and the behaviour of judges”

According to Professor Ni'matul Huda, the terminology of the “judges” in the article 24B of the 1945 Constitution refers to the Supreme Court

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<sup>19</sup> *Ibid.*

<sup>20</sup> Jimly Asshidiqie, 2016, *Peradilan Etik dan Etika Konstitusi: Perspektif Baru Tentang Rule of Law of Ethics & Constitutional Law and Constitutional Ethics*, Jakarta, Sinar Grafika, page 159

<sup>21</sup> Article 24B UUD 1945 Pasca-Amendemen

Justices and judges at the lower court of the Supreme Court and Constitutional Court Justices. This supervision authority is an external control on the conduct of the judges which is carried out independently and objectively.

Decision of Constitutional Court Number 005/PUU/2006 about judicial review of Judicial Commission and Judicial Authority makes the inhibition of supervision to uphold the respect and dignity and keep the behaviour of Justices under the authority of the Judicial Commission. Supervision of judges becomes hampered because of the decision stating that all the words of the Constitutional Court does not have a binding legal force.

Some previous cases had been invalid as prove that there is a problem that must be solved. So, based on these cases of the Constitutional Court, it is interesting to investigate the issues of research writing method under the title: **"Urgency of External Supervision on Constitutional Court's Justices in Indonesia."**

The importance of the research is that there are cases where some of the constitutional justices have notwithstanding the rule. The importance of external supervision on the Constitutional Court's Justice in Indonesia is to strengthen oversight of the judiciary. External supervision also assesses that it is far from the interests and corruption. In reality, internal supervision does not influence maximally and do not create satisfaction to the community.

Through this research, the author will try to make comparisons of the judiciary system in some other countries. The function is to contribute knowledge and contribute to Indonesia information related to the external

supervision of constitutional justice in some countries. There are several countries that were selected as a comparison, namely Italy and France. The judicial system in the Italian state is different from the French, both geographically and forms of state. The thesis hopes that the results of this research can find a solution from the comparison of the judicial system in the other country to Indonesia.

#### **B. Research Problem**

Based on the description above, a research problem can be formulated: How is the Urgency of External Supervision on the Constitutional Court's Justices in Indonesia?

#### **C. Objectives of Research**

There are some objectives of the research as follow:

1. To emphasize the urgency of external supervision on the Constitutional Court's justice in Indonesia;
2. To analyze the urgency of external supervision on the Constitutional Court's justice in Indonesia;
3. To propose suggestions regarding the mechanism of external supervision on the Constitutional Court's justice in Indonesia.

#### **D. Benefit of Research**

The benefits of this research are:

1. Practical Benefit

This research will provide scholars, the government, and other supporting instruments an understanding on external supervision of the constitutional judges. Besides, this research will also open the view of the proper urgency of external supervision on Constitutional Court's Justices in Indonesia.

2. The theoretical Benefits

That is to be a conceptual contribution to science, especially in the field of supervision the urgency of external supervision on Constitutional Court's Justices in Indonesia.