

CHAPTER FOUR
FINDING AND ANALYSIS

To construct a good external supervision on the Constitutional Court in Indonesia, there is a need to find and analyse the reasons why the Constitutional Justices need to have external supervision. There are some highlight, that will be discussed and analysed in this Chapter, as follows:

1. Discussion on the issue of supervision of Constitutional Justices;
2. Lesson learned from other countries about the supervision of judiciary;
3. Comparative analysis of Indonesia and other countries; and
4. Reason behind the need of external supervision of Constitutional Justices.

A. Discussion on Issue of Supervision of Constitutional Justices

Table 1.
Internal Supervision on Constitutional Court of Justices

Laws and The Regulation	Law No. 8 of 2011 on Constitutional Court	Constitutional Court Regulation (PMK) No. 1 of 2013	Constitutional Court Regulation (PMK) No. 2 of 2013
Name	Honorary Council of the Constitutional Court (MKMK)	Honorary Council of the Constitutional Court (MKMK)	Ethics Board of Constitutional Justice

The Members	<ul style="list-style-type: none"> • One person of Justices. • One person of the member of Judicial Commission. • One person of the House of Representative elemen. • One person of the Government. • One person of the Supreme Justice. 	<ul style="list-style-type: none"> • One person of Constitutional Justices. • One person of the Chair of Judicial Commision • One person of former of Constitutional Justices or Supreme Justices. • One person of former state institution. • One person of Senior law science 	<ul style="list-style-type: none"> • One person of the former of Justices. • One person of the academic. • One person of the public figure.
The Auhtority	Not explained in the Law No. 8 of 2011 on Constitutional Court	<ul style="list-style-type: none"> • Invite the Constitutional Court that it is assumed violation of code of ehtics to giving explanation and defence. • Invite the applicant, witness, and/or other party that has related to asked description, including the docoment or other evidence; and • Give sanction to the Constitutional Justices that proved to violate the code of ethics. 	<ul style="list-style-type: none"> • Provide a written opinion on the question of Justices about a behavior that contain doubt as violation. • Invite and check the Justices that do violation or Justices who suspected violations and related party. • Give oral admonition. • Suggested establishing the Honorary Council to check and take decisions for the Justices that violations or Justices who suspected violation.

Continuation of the status	Rejected by the Constitutional Court on Decision of the Constitutional Court Number 49/PUU-IX/2011	Prevailing	Prevailing
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Based on the table above, it can be discussion on the supervision of Justices is inseparable from the relationship between the two institutions, namely the Constitutional Court and the Judicial Commission. The Constitutional Court in Indonesia is a new high of state institution and has equal position to the Supreme Court. The Constitutional Court and the Supreme Court are independent judiciary and are separated from other ascendancy, namely the executive and the legislature.⁴³ Whereas the Judicial Commission is an institution that is independent and has the authority to uphold the honor, dignity and behavior of the judges.

The House of Representatives has brought two times judicial reviews on Law of the Judicial Commission but it always failed in the hands of the Constitutional Court. As a result, the Constitutional Court is like God that it is immune to supervision.

Revising the rules is important to the performance and power of the Constitutional Court in order to be able to be supervised and criticized. Supervision is conducted on the performance of Constitutional Justices. Referring to the 1945 Constitution, there are no state institutions that have power or that cannot be corrected.

⁴³ Jimly Asshiddiqie, 2015, "*kedudukan Mahkamah Konstitusi dalam Struktur Ketatanegaraan Indonesia*", available at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11779#.WafWslckzfY>, accessed on 30th August 2017, at 10.09 am.

The Corruption Eradication Commission (KPK) has caught two Constitutional Justices, they are Akil Mochtar, the Chairman of the Constitutional Court period 2013-2018 and Patrialis Akbar, the Constitutional Justices period 2013-2018. System of supervision against of the Constitutional Court is questionable.⁴⁴ There is a general presumption that the Constitutional Court Justices looks unwilling to be supervised.⁴⁵ Some scholars appear to reject the idea of external supervision of the Constitutional Court. Thus, many argue that the Constitutional Court today is an institution without supervision.

Although a Board of Ethics by the Constitutional Court was established, this institution has not been able to ensure the supervision of Justice's performance. This internal supervision has a lot of problems that cause it could not work effectively. From an institutional perspective and the dynamics of the work, the Board of Ethics will face obstacles regarding the relationship between the Chairman of the Constitutional Court and the Board of Ethics. For example, in case of memo given by the Chairman of the Constitutional Court, Prof Arief Hidayat, shows the weakness of the Board of Ethic. Technically, administrative and budgetary are part of Constitutional Court and also are not independent. But human resources is a half and not part of Constitutional Court, meaning that it is limited. It can be concluded that the Board of ethics is still under the control of the Constitutional Court and also the institutions that are supposed to be supervised.

⁴⁴ Pressreader, 2017, "*Pengawasan Hakim MK*", available at <https://www.pressreader.com/indonesia/kompas/20170309/281638190001290>, accessed on 30th August 2017, at 9.15 am.

⁴⁵ Ibid.

Applying a model of supervision such as the above, it can be ascertained that it will not be effective and will bring about some problems with internal supervision. Whether there is nothing wrong with external supervision and independent? Whether the intended supervision is an intervention for them? Actually, the intended purpose of supervision is to ensure that powers are not abused. The position of the Justice has a great power and sometimes is called the super body. This glorious position can be easily changed to become corrupt, such as Akil Mochtar and Patrialis Akbar. It is clear that the effective supervision is needed to prevent such corrupt behaviour. In order to be a more effective supervision, then it should be made an independent institution outside of the structure of the institutions supervised.

Which institution is appropriate for the supervision against Justices? Whether to create a new institution or use existing institutions? It is very appropriate if utilizing existing institution, means using the Judicial Commission. Definition Council for the Judiciary⁴⁶:

1. a self-governing;
2. judicial organisation;
3. functions independently from the government, and parliament;
4. acts as an intermediate institution ('buffer') between the legislative-executive branch of government and the judiciary;
5. does not administer justice as such, but typically performs 'meta-judicial' task (disciplinary action, career-decisions of judges, recruitment

⁴⁶ Wim Voermans. "*Indonesia Council for Judiciary*". Presentative Indonesia on April 2010.

and professional training of judges, coordination between courts, general policies, courts service-related activities, budget, housing, automation, finances and accounting, etc.)”

The Judicial Commission has different position compared to the Board of Ethics. Judicial Commission is independent and was formed on the basis of the Constitution. The Judicial Commission also is an institution that has a long experience doing the task of supervision. It is clear and rational if this supervision function is moved to the Judicial Commission.

The position of the Judicial Commission that is emphasized in Article 24B paragraph (1) of the 1945 Constitution of the Republic of Indonesia state that⁴⁷ “There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as Justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges,”

The word "judges" on Article 24B paragraph (1) of the 1945 Constitution, is not only limited to the Supreme Justices and the Judges at lower Court, because the 1945 Constitution does not provide limits to judge which is meant.

There are some highlights, namely:

1. According to Article 27A paragraph (1) Law Number 24 of 2003 on Constitution Court, this Law requires the Constitutional Court to arrange a Code of ethics and Code of Conduct Justices. The Law

⁴⁷ See the 1945 Constitution article 24B paragraph (1)

also contain norms that must be kept by every Justice in performing their duty to maintain the integrity and personality, justice and statesman.⁴⁸ The arrangement of the Code of Ethics and Code of Conduct of the Justices refer to "The Bangalore Principles of Judicial Conduct 2002" which was well received by the countries that embraced the system "Civil Law" or "Common Law". The Bangalore Principles means independence, impartiality, integrity, propriety, equality, competence and diligence.

2. Based on Law Number 48 Year 2009 on Judicial Authority. This Law affirms the position of the Supreme Court and the Constitutional Court as a state institution that exercises judicial authority. It is regulated in Chapter V about "Other Agencies whose functions related with the judicial authority". This Law also regulates about supervision system of Supreme Justices and Judges at the lower Court and Constitutional Justices that the Judicial Commission as an external supervisor.⁴⁹ This Law in detail regulated in Chapter VI about "supervision on Judge and Justices."
3. Law Number 8 of 2011 about Constitutional Court. This Law did not regulate clearly about supervision of Justices. This Law just set on Honorary Council of Constitutional Court (MKHK). Article 27A paragraph (7) stated that the establishment of the structure and

⁴⁸ See *Law Number 8 Year 2011 about changes of Act No. 24/2003 about The Constitutional Court*. Article 27A paragraph (1). Statute Book of Republic of Indonesia. Year 2011 number 70.

⁴⁹ See *Law Number 48 Year 2009 on Judicial Power*, Article 39 paragraph (4) and Article 40 paragraph (1). Statute Book of Republic of Indonesia. Year 2009 Number 157.

administration of Honorary Council of Constitutional Court be further regulated by the Constitutional Court Regulation.

The conclusion is there are the rule for the Justices but the Justices still be against the rule. It means that the Constitutional Court show their weakness. In the Law No. 8 of 2011 on Constitutional Court did not explain about supervision. The existence of Law No. 48 of 2009 on Judicial Authority is expressly confirmed the position of the Supreme Court and the Constitutional Court as an State institution that exercising the judicial authority. This Law also regulates about system supervision of Supreme Justices and Judges lower Court and Constitution Justices that the Judicial Commission as an external supervisor.

B. Lesson Learned From Other Countries

Jimly Asshiddiqie and Ni'matul Huda argue that the establishment of the Constitutional Court on every country has various background.⁵⁰ But in general, the establishment of the Constitutional Court start from a process of political change of power from authoritarian toward democratic.⁵¹ Whereas the existence of the Constitutional Court is to resolve conflicts over state because in the process of change toward a democratic state cannot be avoided the emergence of conflicts over state.⁵²

⁵⁰ Ni'matul Huda, *Politik Ketatanegaraan Indonesia: Kajian terhadap Dinamika Perubahan UUD 1945* Yogyakarta, FH IUU Press, 2003, page 223.

⁵¹ *Ibid.*

⁵² *Ibid.*

After the Second World War, the concept of Constitutional Court with Judicial review disseminate in Europe by establishing the Constitutional Court separately from the Supreme Court.⁵³ But France adopts differently by forming the Constitutional Council (Conseil Constitutionnel).⁵⁴ Countries of the former French colonies following the French pattern.⁵⁵

Until now there has been 78 countries that adopted the Constitutional Court system that established separate from Supreme Court and Indonesia has 78 number of country explained that by the Law Number 24 of 2003 about The Constitutional Court on 13th Augustus 2003, which has been in operation since the inauguration of the nine Justice on 16th August 2003. But this Law was amendment to Law Number 8 of 2011 on Constitutional Court.

In doing research, the proper pattern to looking for solutions to a problem is to do comparisons. Through this research, the author tried to illustrate how the comparisons in other countries are related to the supervision of Justice by the existence of Judicial Commission. Therefore, the writer want to expose the model of the Judicial Commission or similar institutions in other countries with the hope that can be the material in accordance with the needs of Indonesia and then be adapted.

This comparison aims to compare the constitution of other country, and looking for the values that are universal. The other aims of this comparison is to find an equation and the difference that is expected to contribute to the

⁵³ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Konstitusi Press, Jakarta, 2005.

⁵⁴ *Ibid.*

⁵⁵ Jimly Asshiddiqie, Mustafa Fakhri, *Mahkamah Konstitusi*, Kompilasi Ketentuan Konstitusi, Undang-Undang dan Peraturan di 78 Negara, page. 3

existence of the Judicial Commission in the system of supervision of judges in Indonesia.

The countries that will be made to compare is as follows:

1. Indonesia;
2. Italy; and
3. France.

1. Indonesia Judicial Commission's

a) Legal basis of the formation of the Judicial Commission⁵⁶

(1) The 1945 Constitution

Article 24A paragraph (3):

“Candidate Justices of the Supreme Court shall be proposed by the Judicial Commission to the House of Representatives for approval and shall subsequently be formally appointed to office by the President. “

Article 24B:

(1) There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as Justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges.

(2) The members of the Judicial Commission shall possess legal knowledge and experience and shall be persons of integrity with a honourable personality.

(3) The members of the Judicial Commission shall be appointed and removed by the President with the approval of the House of Representatives.

(4) The structure, composition and membership of the Judicial Commission shall be further regulation by law.

(2) Law Number 22 of 2004 on Judicial Commission.

⁵⁶ Komisi Yudisial, 2012, “*Dasar Hukum Komisi Yudisial*”, available at <http://www.komisiyudisial.go.id/statis-24-dasar-hukum.html>, accessed on Sunday, December 10th 2017, at 9.50 pm.

- (3) Law of the Republic of Indonesia Number 48 of 2009 on the Judges Authority, Article 34 paragraph (1) and (3).

b) The Authority⁵⁷

According to the Article 13 of Law No. 18 of 2011 on the Judicial Commission, the authority of Judicial Commission follows as:

- (1) Proposed appointment of the Supreme Justices and ad hoc justices in the Supreme Court for the House of Representative to get approval;
- (2) Maintain and uphold the honour, dignity, and behaviour of the judges;
- (3) Define the Code of Ethics and/or Code of Conduct of Judges (KEPPH) with the Supreme Court; and
- (4) Maintain and enforce the implementation of the Code of Ethics and/or Code of Conduct of Judges (KEPPH).

c) The Task⁵⁸

Based on Article 14 of Law No. 18 of 2011 , in carrying out the authority referred to in Article 13 letter a, namely to propose the adoption of the Supreme Justices and ad hoc judges of the Supreme Court for the House of Representative (DPR) to get approval, then the Judicial Commission has the task:

- (1) To do registration for the Supreme Court Justices;

⁵⁷ Komisi Yudisial, 2012, "*Wewenang dan Tugas Komisi Yudisial*", available at <http://www.komisiyudisial.go.id/statis-38-wewenang-dan-tugas.html> , accessed on Sunday, December 10th 2017, at 9.55 pm.

⁵⁸ *Ibid.*

- (2) To do the selection of candidates for the Supreme Court Justices;
- (3) Define the candidates for the Supreme Court Justices; and
- (4) Ask the candidates for the Supreme Court Justices to the House of Representative (DPR).

d) **Membership**⁵⁹

Based on Law No. 18 of 2011 about the amendment of Law No. 22 of 2004 on the Judicial Commission, the structure of membership of the Judicial Commission as follows:

- (1) The Judicial Commission consists of the chairman and members.
- (2) The Chair of the Judicial Commission consists of the Chairman and the Vice Chairman which Vice Chairman also as the member.
- (3) The Judicial Commission has 7 (seven) members.
- (4) Members of the Judicial Commission are the state officials.
- (5) The Judicial Commission membership consists of:
 - (a) 2 (two) the former judges;
 - (b) 2 (two) the practitioners of the law;
 - (c) 2 (two) the academics of the law; and
 - (d) 1 (one) members of the community.

⁵⁹ Komisi Yudisial, 2012, “Keanggotaan Komisi Yudisial”, available at <http://www.komisiyudisial.go.id/statis-27-keanggotaan.html> , accessed on Sunday, December 10th 2017, at 10.14 pm.

- (6) The Chair of the Judicial Commission selected from and by the members of the Judicial Commission.
- (7) Provisions regarding the procedures for the election of the chair of the Judicial Commission is governed by the Judicial Commission.

2. Italy

Italy has the parliamentary system based on proportional vote.⁶⁰ Judicial authority in Italy is recognized as branches of power that are autonomous and independent from another power.⁶¹ Article 104 Constitution of the Italian Republic mention that "judicial authority is a branch of the autonomous and independent organ that exists in the country."⁶²

a) Judicial Authority in Italy

The judicial authority in Italy regulates the Constitution of the Italian Republic Chapter IV of the judicial authority. This chapter consists of two parts. First part is the judicial organization that consists of ten article, start from Article 101 until Article 110. The second part is jurisdiction control, which consists of 3 (three) Article, namely Article 111 until Article 113.

⁶⁰Wikipedia, 2017, "Italia-Pemerintahan", available at <https://id.wikipedia.org/wiki/Italia#Pemerintahan>, accessed on Tuesday, August 29th 2017, at 7.40 am.

⁶¹Atang Iriawan, *et al.*, 2014 "Studi Perbandingan Komisi Yudisial di Berbagai Negara, Analysis Center and Information Services, Jakarta, page 39.

⁶²*Ibid.*

The court organization in Italy is also regulated in the decision regarding the Organization of the Judiciary. In the decision mentioned that the judicial authority in general in Italy consists of 5 (five), namely:

- (1) The lowest in hierarchy is Justice of The Peace (*giudici in pace*), it is the court to handle disputes over the small dispute or remove permissions in a city in which the first level execute judgments (or mediation) in the criminal or civil that is not important. The implementation of the task is often done by non-judges;
- (2) The Praetor Court (*pretori*) is the judicial institutions of the second level in Italy. They consist of Judges professional to handle appeal cases from the Justice of The Peace and in the first level, the implementing of judicial regarding civil and criminal cases are not taken seriously. The general court (tribunal) handles cases of civil and criminal cases more seriously on the first level and check the appeal against the decisions of the *praetori*. The court of Appeal (Corti d'Appello) checks appeal decisions of the first level of the general court;
- (3) Special Cassation court (*Corte in Cassazione*). Cassation against the decision of the court is made possible through a Cassation Court in Rome. The institution of general

judiciary also have other special courts such as the court and room (chamber) on Appeal Court to the problems related to children under the age, Regional Court for public water channels, and Assize Court (*Corti di Assise*) and Assize Court Appeal (*Corti di Assise di Appello*), which checks the serious crimes through collaboration between the professional judges and young judges.

- (4) In addition to the general judiciary institutions, there is also the special hierarchy of administration jurisdiction on the judicial system in Italy. Appeal against the decision of the government and associated with the result of the election in the first level is examined by Tribunal Administrative Regional with the possibility of appeal to the Boards of State;
- (5) In addition to the courts there is other special Judiciary of Judge such as the General Screeners Office, Military Court, the Committee on Taxation, Supreme Court for general water channel, but the Court of Constitutional also has the authority to declare the constitutionality of a legislation and also the government regulation and local government.

The Constitution of the Italian Republic stated that the Supreme Court Cassation is the main court and deals in the

judicial authority in Italy. The authority of the Supreme Court Cassation is to ensure the observation and the correct interpretation of the law by ensuring the implementation of the same law in first court and appeal.⁶³ In addition, it decides the dispute as a lower court namely criminal, civil, administrative, military have jurisdiction to certain cases.

b) Italy Constitutional Court' s

Before World War I, Italy never have a democratic government system. In the reign of Mussolini, Italy was little chaotic, but now Italy have already started to become a democratic nation with a good parliamentary system.

The Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by the ordinary and administrative Supreme Court.⁶⁴ The judges of the Constitutional Courts shall be chosen from among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice.

Now the authority of the Constitutional Court of Italy is settling the constitution or law that is issued by the central

⁶³Atang Iriawan, *et al.*, 2014, *Op. Cit.* page 40-42

⁶⁴ Article 135 on the Constitution of the Italian Republic.

government or regional government. It aims to settle the dispute in the state institutions, implement charges of impeachment against the President regarding the breach of the constitution. In addition Constitutional Court can reject for filing general judiciary. The rejection is not only the statement, but also does not have a constitutional basis.

c) Italy Judicial Commission' s

The Judicial Commission in Italy is called the *Consiglio Superiore della Magistratura*, or in English the Superior Council of the Judiciary then called (CSM), which in article 104 of Constitution of the Italian Republic is referred to as the High Council of the Judiciary.

Article 104 of Constitution of the Italian Republic:

“The Judiciary is a branch that is autonomous and independent of all other powers. The High Council of the Judiciary is presided over by the President of the Republic. The first president and the general prosecutor of the Court of Cassation are members by rights. Two thirds of the members are elected by all the ordinary judges belonging to the various categories, and one third are elected by Parliament in joint session from among university professors of law and lawyers with fifteen years of practice.

The Council elects a vice-president from among a members designated by Parliament. Elected members of the Council remain in office for four years and cannot be immediately re-elected. They may not, while in office, be registered in professional rolls, or serve in Parliament or on a Regional Council.”

The authority of the CSM imposes sanctions related to the various forms of violation of Justice, different even though the

violation were not mentioned definitely. The Minister of Justice can take the initiative to implement the action, in accordance to Article 107 second paragraph on the Constitutional of the Italian Republic mention that “The Minister of Justice has the power to originate disciplinary action. Judges are distinguished only by their different functions. The state prosecutor enjoys the guarantees established in the prosecutor’s favour by the provisions concerning the organisation of the Judiciary.”

Referring to the functions assigned by the constitution, the CSM has been clearly defined as an important organ of the constitution. Its function as an administration executive in judicial activities, especially on the administration of the members of the judiciary, the agreement of the CSM with workers, promotion and disciplinary action regarding the judges and the prosecutors, also including the organization in the office of the Constitutional Court. It aims to ensure that each member of the judicial authority is complies to the law.

To keep the independency of judicial authority, the High Council of Judicial or the CSM was formed to guarantee the independence of the judiciary.⁶⁵ The membership of the CSM⁶⁶ consists of 33 members, namely The High Council of the Judiciary is presided over by the President of the Republic. The first

⁶⁵Atang Iriawan, *et al.*, 2014,*Op. Cit.* page 45

⁶⁶See article 104 Constitution of Italy.

president and the general prosecutor of the Court of Cassation are members by right. Two thirds of the members are elected by all the ordinary judges belonging to the various categories, and one third are elected by Parliament in joint session from among university professors of law and lawyers with fifteen years of practice. The Council elects a vice-president from among those members designated by Parliament. Elected members of the Council remain in office for four years and cannot be immediately re-elected. They may not, while in office, be registered in professional rolls, nor serve in Parliament or on a Regional Council.

Observing the configuration of the CSM in Chapter IV on the Constitution of the Italian Republic it can be said that the CSM is a part of the Judicial Authority. The existence of judicial authority in the Chapter shows the importance of the existence of the CSM in order to maintain the independency of judicial authority.

3. French

a) Judicial Authority in French

The judicial authority is regulated in Chapter VIII On the France's Constitution of 1958. The judicial system in France have

level with the judgment on the first level of the court, appeal court level, and the court of cassation level.⁶⁷

The Judge of Judiciary in French is appointed by the High Council of the Judiciary. Controlling the judges and the performance of the court in general is done with various ways and involves a different party is as follows:

- (1) The supervision of the court is done directly by the Chairman Justice of the appeal of local people;
- (2) The supervision in long distance is done by the Parliament on the aspects of the budget in general;
- (3) Supervision by public done more to the performance of the ministry, so limited on his responsibility alone. Supervision by the public is done by using the forum in parliament;
- (4) Supervision is done by the Inspection Office (*Inspection Generale de Services Jurisdque*) who reigned under the Department of Justice. The inspection done related to the routine activities of the judiciary, starting from the judicial management until aspects of the discipline of judges. An inspection done regularly but not rarely spontaneously as a response to the complaints from the community.⁶⁸

⁶⁷ Win Voermans, *Seminar on Comparative Models of Judicial Commission: Peran Komisi Yudisial di Era Transisi Menuju Demokrasi*, Jakarta, 5 Juli 2010, page 65.

⁶⁸ Win Voermans, *op.cit.*, page 70-72.

b) French Constitutional Court

Constitutional Council is regulated in Chapter VII on France's Constitution of 1958. The Constitutional Council in France acted as the council to examine the laws, regulations, discipline, and international agreement.

The Constitutional Council in France also has the authority as follows:⁶⁹

- (1) The Constitutional Court is authorized to guarantee the implementation of the presidential election;
- (2) Check the dispute about the result of the election;
- (3) To settle the dispute about the results of the election of the Chairman and Vice Chairman of the Senate; and
- (4) Ensure the implementation of the referendum and settle the dispute about the result of the referendum.

Membership of the Council of the Constitution in France consists of 9 (nine) members with employment period 9 (nine) years that could not be extended again. The composition of the Constitutional Council was 3 (three) men were appointed by the President, three men were appointed by the Chairman of the National Assembly, and three men were appointed by the Chairman of the

⁶⁹ See Chapter VII The Constitutional Council on France's Constitution of 1958.

Senate.⁷⁰ Members of the Constitutional Court could not hold unconstitutional positions as a minister or Member of Parliament

c) French Judicial Commission' s

Special institutions in France that have characteristics of the same function with the Judicial Commission in Indonesia is the *Conseil Superieur De La Magistrature*. This institution is regulated in the France's Constitution of 1958, namely in Articles 64 and 65. The Position *Conseil Superieur De La Magistrature* under President, independent on the judiciary. The background of this institution is that there are fears of the accountability of the judiciary and to protect the judiciary from the intervention of executive power.⁷¹

In the rule *Conseil Superieur De La Magistrature* only set at a glance at the two articles, where both are included in the chapter judicial authority. Article 64 generally set about the guarantee of the president to create the independency of judicial institutions. While the Article 65 set about the authority, which relates to the giving of consideration in the appointment of judges and disciplinary judges.

Membership of the *Conseil Superieur De La Magistrature* consists of 2 (two) ex-officio from the government, and 5 (five) members appointed from the group representative. Now the seven

⁷⁰ Saplaw.top, 2013, "Perbandingan MK di sepuluh Negara" available at <http://www.saplaw.top/tag/perbandingan-mk-di-sepuluh-negara>, accessed on Monday, November 13th 2017, at 6.39 pm.

⁷¹ Autheman, Violaine and Elena Sandra. 2004. *Global Best Practices: Judicial Council. Lessons Learned From Europe and Latin America*. IFES Rule of Law White Paper Series, page 1.

members of the *Conseil Supérieur De La Magistrature* details are as follows:

- (1) Ex-officio President as head;
- (2) Ex-officio Minister of Justice as Vice Chairman of;
- (3) One person appointed by the Senate;
- (4) One person appointed by the Assemblée Nationale;
- (5) One of the environment Conseil d'etat;
- (6) One of the environment Cour de Comptes;
- (7) Six people were taken by the magistrate sitting with system representatives;
- (8) Six people were taken by members of the office of the attorney general through the system of representation.⁷²

The internal structure of the *Conseil Supérieur De La Magistrature* consists of chairman who headed by French President in ex-officio, vice chairman headed by the Minister of Justice French and members. In addition *Conseil Supérieur De La Magistrature* have two divisions for help performance leadership, namely formation de siege and formation du parquet.⁷³

⁷² Wim Voemans, *op. cit*, page 73.

⁷³ *Ibid.*.

C. Comparative Analysis of Judicial Commission in Italy and France with the Judicial Commission in Indonesia

The position of the Judicial Commission in Indonesia emphasized in Article 24B paragraph (1) of the 1945 Constitution of the Republic of Indonesia is:⁷⁴ “There shall be an independent Judicial Commission which shall possess the authority to propose candidates for appointment as Justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges.”

There is phrase "in order to maintain and upholding the honour, dignity, and behaviour of judges. When looking at the Article 24B paragraph (1), there are 2 (two) very significant:

1. The position of the Judicial Commission.

The position is a consequence of the authority given by the constitution.

2. The authority of the Judicial Commission.

The position of the Judicial Commission as the institution explain s the authority of the free from the intervention of (intervention) institutions or other power.

There are 3 (three) aspects that are compared in this section, namely the existence of the setting of the formation of the Judicial Commission, layout of the setting of the Judicial Commission in the constitution, and independent nature of the Judicial Commission.

⁷⁴ See the 1945 Constitution article 24B paragraph (1)

The Judicial Commission in Indonesia is a state institution formed based on the constitution, which is exactly on the chapter IX Constitution.

The Chapter consists of 4 (four) article, among others:

1. Article 24 paragraph (1) and (2);
2. Article 24A paragraph (1), (2), (3), (4) and (5);
3. Article 24B paragraph (1), (2), (3), and (4); and
4. Article 2 paragraph (1), (2), (3), (4), (5), and (6).

Layout on settings in the constitution is similar in some countries which are the object of the comparison in this research, namely Italy and France.

(See the table on the next page)

Table 2.
Analysis of Judicial Commission in Italy and France with the Judicial Commission in Indonesia

N	THE HIGHLIGHT	STATE		
		INDONESIA	ITALY	FRENCH
1	Name	<i>Komisi Yudisial</i>	<i>Consiglio Superiore della Magistratura</i>	<i>Conseil Supérieur De La Magistrature</i>
2	Constitutional Basis	Article 24B of the 1945 Constitution	Article 104 of the Constitution of the Italian Republic	Article 64 and 65 of the France's Constitution of 1958
3	Authority	<ol style="list-style-type: none"> 1. Propose appointment of the Supreme Justices and ad hoc justices in the Supreme Court for the House of Representative to get approval; 2. Maintain and uphold the honor, dignity, and behavior of the judges; 3. Define the Code of Ethics and/or Code of Conduct of Judges (KEPPH) with the Supreme Court; and 4. Maintain and enforce the implementation of the Code of Ethics and/or Code of Conduct of Judges (KEPPH). 	Impose sanction related to the various forms of violation of Justice, different even though the violation were not mentioned definitely.	Related to the giving of consideration in the appointment of judges and disciplinary judges and supervision.
4	The Member	7 Members	33 Members	15 Members

5	<p>The Elements of membership</p>	<ul style="list-style-type: none"> • Two former judges • Two from Academician (University) • Two legal Practitioners • One from the element of Society. 	<p>The High Council of the Judiciary is presided over by the President of the Republic. The first president and the general prosecutor of the Court of Cassation are members by right. Two thirds of the members are elected by all the ordinary judges belonging to the various categories, and one third are elected by Parliament in joint session from among university professors of law and lawyers with fifteen years of practice. The Council elects a vice-president from among those members designated by Parliament.</p>	<ul style="list-style-type: none"> • Ex-officio President as head; • Ex-officio Minister of Justice as Vice Chairman of; • One person appointed by the Senate; • One person appointed by the Assemblée Nationale; • One of the environment Council d'état; • One of the environment Cour de Comptes; • Six people were taken by the magistrate sitting with system representatives; • Six people were taken by members of the office of the attorney general through the system of representation
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Source: Analysis of the author

Based on the table above, it can be highlighted some similarity and differences between Indonesia Judicial Commission and Italy and France, namely:

1. The first similarity is form of the Judicial Commission in the Constitution of each country. The form of the Judicial Commission in the constitution actually ensure more warranty independence of the judiciary in the enforcement of laws. Thus the existence of the form of the Judicial Commission in the 1945 Constitution, has a strong position as an institution. This also shows that the Judicial Commission in Indonesia is the state institutions that have equal position to other state institutions in Indonesia, even ceremonially Judicial Commission expressed in the 1945 Constitution for a nomenclature, which means it also provides a clarity of tasks and authority as a state institutions.
2. Based on the table above, it can be formed categories as follows:
 - a. 7 members (small category);
 - b. 15 members (average category); and
 - c. 33 members (big categories).

Number of Commissioners will influence the performance of the Judicial Commission. More members will affect maximum performance. On contrary, less members will reduce the function. Article 24B of the 1945 Constitution does not to mention the number of commissioners of the Judicial Commission definitive. But it is regulated Law Number 18 of 2011 on Judicial Commission. Article 6 paragraph (1) of Law Number 18

of 2011 states that “Judicial Commission has 7 (seven) members”. There are considered as state officials as regulated in Article 6 paragraph (2) with states that “the members of the Judicial Commission is the state officials.”

3. There is also other difference between the independence of Judicial Commission of each country. The Judicial Commission in Indonesia is an independent state institution. It is different from Italy and France that the Judicial Commission is under the President. Although under the President, the Judicial Commission have aims to ensure more warranty the independency and independence of the judiciary in the enforcement of laws.

D. Reasons behind the Need of External Supervision of Constitutional Justices

Clearly on the background of this research is a problem faced by our state related to the Constitutional Court in Indonesia. In some cases justices happen to create a lack of trust from the community to the performance of the Constitutional Court. There is a need for a solution to deal with the problem. One of which become the solution is fully optimized supervision.

Regardless of the nature of the decision of Constitutional Court is that final and binding supervision is still needed to prevent abuse of power. Supervision is of course not done against the decision and the authority of the justices that hold trials, but against the behaviour of Justices, and upholding the dignity and honour and citizenship are always maintained.

The most appropriate constitutional institution to supervision is of course the Judicial Commission. Indeed there is decision of the Constitutional Court Decision Number 005/PUU-IV/2006 which stated that the Constitutional Justices does not include the sense of “judges” which becomes the object of the monitoring of the Judicial Commission. But the decision was based on the 3 (three) main opinions, namely:⁷⁵

1. The interpretation of the systematic with the original intent for the formulation of the Amendment of the 1945 Constitution did not enter the Constitutional Justices as one that should be monitored by the Judicial Commission.
2. Constitutional Justice is not the judges, but judges because of the position that is selected by the House of Representative (DPR), President, and Supreme Court, and did not involve the Judicial Commission.
3. If the justices entered in the monitoring of the Judicial Commission, it will interfere with the authority of the Constitutional Court to settling dispute over state institutions.

The argument is less powerful and convincing. **First** argument, the interpretation used is the interpretation of the systematic. But if that is used then a wider interpretation within the framework to enforce the judgments which is trusted of course is needed supervision of the conduct of the

⁷⁵ ub.ac.id, 2014, *Mahkamah Konstitusi dalam Sistem Checks and Balances*, taken from <http://safaat.lecture.ub.ac.id/files/2014/03/MAHKAMAH-KONSTITUSI-DALAM-SISTEM-CHECKS-AND-BALANCES.pdf>, downloaded on Friday, November 10th 2017, at 1.53 pm.

Constitutional Justices, especially is the nature of citizenship Constitutional Justices are still maintained. While the interpretation of the original intent, supervision of the Judicial Commission is also intended to apply for the Constitutional Justices.

Second, the status of the Constitutional Justices as judges because of the position is selected for a period of 5 (five) years of course should not become the base s powerful enough to remove it from the sense of “judges” which will be monitored by the Constitutional Court. Against the Supreme Justice non career any of the Judicial Commission can perform supervision. Filling the judge of course should be less significant for the basis of the differentiation supervision.

Third, at the time of the Judicial Commission has the authority for supervision for the conduct of the Constitutional Justices, not placing the Judicial Commission is at the high of the Court. Matter supervision is also outside of the case and the judicial authority is run by the Constitutional Court. Therefore when the Judicial Commission supervise of the behaviour of Constitutional Justices, Constitutional Court does not need to the independence and impartiality of the judge and settling dispute which involves the Constitutional Court as one of the parties.

On April 2004 a Working Group sponsored by the United States aid fund - (IFES) issued a release report on the results of them comparative

research against the institution of the Judicial Commission in several countries at the beginning of the IFES report says:⁷⁶

“In order to build an independent and accountable judiciary, many countries have chosen to create new institutions, such as judicial council. While judicial Councils can play an important role in strengthening judicial independence and in creating accountability mechanisms for the judiciary, they are only one of the components of a broad judicial reform strategy, which should cover a wide range of issues, including access to justice, the enforcement of judgements and anticorruption.”

In the IFES report also mentions the background of the establishment of similar institutions as follows,⁷⁷

“The underlying rationale for Judicial Commission creation in countries like France, Italy, Portugal, and Spain was the need to insulate the judiciary from the executive. Judicial Councils were granted extensive powers in judicial career, including the selection, promotion, and discipline of judges, in an attempt to limit executive interference.”

There are some of views of experts on the supervision of Constitutional justices, namely:

1. The observers of constitutional law, Refly Harun assess the role of the Ethics Board of Constitutional Court is not a maximum in guarding the Constitutional Justices. The reason for this is because the establishment and operational funding the Ethics Board still facilitated by the Constitutional Court.⁷⁸

⁷⁶Autheman, Violaine and Elena Sandra. 2004. *Global Best Practices: Judicial Council. Lessons Learned From Europe and Latin America*. IFES Rule of Law White Paper Series.

⁷⁷*Ibid.*

⁷⁸nasional.kompas, 2017, “Kinerja Dewan Etik Dinilai Belum Maksima, MK perlu Lembaga Penjaga”, available at <http://nasional.kompas.com/read/2017/02/01/19502361/kinerja.dewan.etik.dinilai.belum.maksimal.mk.perlu.lembaga.penjaga>, accessed on Sunday, January 28th 2018, at 8.15 am.

2. The Constitutional Court researcher, Abdul Ghoffar Husnan assess the form of Ethics Board still not a maximum in the organization and support in running the task.⁷⁹
3. The Chairman of the Judicial Commission talk about supervision of Constitutional Justices, Aidul Fitriaciada said that the requested supervised by the Judicial Commission is the Constitutional Justices, not the Constitutional Court as institution.⁸⁰

In line with the comments of the experts, it may emphasize the reason behind the need of external supervision of Constitutional Justices is because the current internal control system has not been able to guarantee the trust of supervision since there are still cases that emerged. There is a needs for having an external supervision as institutions that can maximally supervise the Constitutional Court Justices.

Judicial Commission is an independent body and was formed by the command of the 1945 Constitution. The Judicial Commission is also an institution that has a long experience to perform as supervision. Thus, it is rational that the function of external supervision is handed by the Judicial Commission.

⁷⁹ Pressreader, 2018, “*Ketua Tanpa Marwah*”, available at <https://www.pressreader.com/indonesia/kompas/20180125/281663960433951>, accessed on Sunday, January 28th 2018, at 8.30 am.

⁸⁰ news.okezone, 2017, “*Ketua KY Angkat Bicara soal Pengawasan Hakim Konstitusi*”, available at <https://news.okezone.com/read/2017/02/03/337/1608791/ketua-ky-angkat-bicara-soal-pengawasan-hakim-konstitusi>, accessed on Sunday, January 28th 2018, at 9.10 am.