

A Proposal to Adopt Concrete Judicial Review in Indonesian Constitutional Court: A Study on the German Federal Constitutional Court Experiences

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DOI: <https://doi.org/10.22304/piih.v10n2.a1>

Submitted: November 11, 2022 | Accepted: April 12, 2023

Abstract

The study aims to propose an adoption to concrete judicial review in Indonesian Constitutional Court based on the experiences of the German Federal Constitutional Court. It was motivated by the weak protection of citizen's constitutional rights in ordinary court; and the absence of concrete judicial review authority at the Indonesian Constitutional Court. This study used doctrinal legal research method with legal documents or regulations, cases, and comparative analyses. This concrete review confirms the role of judges of ordinary courts in proceeding with the constitutional system, especially in protecting fundamental rights from the legislatures' law violations based on Articles 93, 94, and 100 of the German Basic Law and the GFCC Act. The Indonesian Constitutional Court needs a concrete review authority in the future and the GFCC is the best judicial reference. There are several constitutional and legal arguments. Constitutional arguments and legal facts explain the necessity of the authority for the Indonesian Constitutional Court. Firstly, there are many cases faced by Indonesian Constitutional Court. Secondly, it can provide solutions for the dualism judicial review problem on conflicted decisions between the Constitutional Court and the Supreme Court. Thirdly, it can strengthen the role of judges in the Supreme Court (general, religious, military, and administrative courts) to generate the obligation to uphold the 1945 Constitution. The proposal through the amendment of the 1945 Constitution is an ideal way to create legal certainty and to strengthen institutions for the protection of fundamental rights in Indonesia.

Keywords: concrete review, constitutional court, judicial review.

A. Introduction

Judicial review is the fundamental authority of the constitutional courts. It is the power of the judicial branches to set aside ordinary legislative or administrative laws if judges conclude that a law conflicts with the constitution.¹ Judicial review is

PADJADJARAN Journal of Law Volume 10 Number 2 Year 2023 [ISSN 2460-1543] [e-ISSN 2442-9325]

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¹ Georg Vanberg, *The Politics of Constitutional Review in Germany* (New York: Cambridge University Press, 2005), 1.

an examination of the constitutionality of laws and legislations, consisting of abstract judicial review and concrete judicial review or constitutional question (hereinafter concrete review). It is an insurance model of judicial review² to protect interests from the policy of a future majority and political forces from the dominant of political parties and to protect from laws that violate constitutional rights guaranteed in the constitution.³

The development of judicial review was influenced by the United States Supreme Court's practice of judicial review and Kelsen's idea of the Austrian Constitutional Court (*Verfassungsgerichtshof*). The practice of the US Supreme Court has become the foundation for concrete judicial review worldwide. At the same time, Kelsen's idea has provided an institutional Constitutional Court that is separated from the Supreme Court with the same function of abstract judicial review. An abstract and concrete or specific review determines the party to apply the mechanism to enforce constitutional values, democracy, the rule of law, humanity, equality, justice, etc. When a legislature deviates from these modern constitutional values, there are methods for enforcing them.⁴

Most European constitutional courts mixed abstract and concrete review jurisdiction in the constitution. They are Germany, Spain (Article 163 of the Spanish Constitution), Italy (Article 134 of the Constitution of the Italian Republic), Austrian (Article 139 of the 1920 Austria Federal Constitution), Portugal (Article 280 of the Portugal Constitution), Hungary (Article 32A (1) of the 1949 Hungary Constitution, Bosnia and Herzegovina (Article VI (3) (c) of the Bosnia and Herzegovina Constitution), Turkiye (Article 148 of the Turkiye Constitution), etc. In Germany, the jurisdiction of the German Federal Constitutional Court or *Bundesverfassungsgericht* (hereinafter the GFCC) is regulated in Articles 93, 94, and 100 of the Basic Law, with more detail in the Federal Constitutional Court Act August 11, 1993 (Federal Law Gazette I p. 1473, which has been amended by Article 2 of the Act of October 8, 2017 (Federal Law Gazette I p. 3546) (hereinafter the GFCC Act).

It provides various possibilities of recourse to the Court. The GFCC is responsible for a judicial assessment of legislation. It decides cases of legislative

² Tom Ginsburg, *Judicial Review in New Democracies Constitution Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 25.

³ Tanto Lailam, *Pertentangan Norma Hukum Dalam Praktik Pengujian Undang-Undang di Indonesia* (Yogyakarta: LP3M UMY, 2015), 162.

⁴ Wen Chen Chang, "Asian Exceptionalism? Reflections on 'Judicial Review in the Contemporary World': Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler," *International Journal of Constitutional Law* 17, no. 1 (2019): 32, <https://doi.org/10.1093/icon/moz023>.

acts in abstract and concrete reviews,⁵ court verdicts in individual cases, and other constitutional complaints.⁶ It is truly extraordinary power,⁷ the “guardian of the constitution” (*Hüter der Verfassung*).⁸ The GFCC consists of sixteen judges divided into two senates. Each Senate has its authority but they always decide as the GFCC. It distributes authority to the First and Second Senates. The President of the GFCC is the Presiding Justice of the First Senate and the Vice President is for the Second Senate. The First Senate shall be competent based on the Basic Law and the GFCC Act and Articles 93, 94, and 100 of the Basic Law. Articles 13 and 14 (1) of the GFCC Act cover an abstract and concrete judicial review and the constitutional complaints cases (except for municipalities or associations of municipalities and electoral law complaints).

The Second Senate authorities are based on the GFCC Act and Articles 93, 94, and 100 of the Basic Law. Articles 13 and 14 (2) of the GFCC Act cover (1) judicial review, (2) the dissolution of political parties and decision not to give the state budget to political parties, (3) electoral complaints; (4) the Federal President, federal and state judges impeachments; (5) to decide disputes between constitutional organs: (a) highest federal organs; (b) federal against states organs; (c) between different states; (6) to decide on formal judicial review; (7) constitutional complaints not assigned to the First Senate based on Articles 91, 93 (2) Number 4a, 4b and Article 13 Number 8a and 14 (1), and the last to decide of the constitutionality interpretation of the Basic Law by State Constitutional Courts. In the First and Second Senate, there are chambers with three justices that are appointed at the beginning of the judicial year and remain for more than three years. Based on these important jurisdictions, the constitutional powers related to constitutionality review include constitutional complaint (*verfassungsbeschwerde*), abstract norm review (*abstrakte normenkontrolle*), and a concrete review (*konkrete normenkontrolle*).

Abstract review is a review of legislation act by a constitutional organ (*BvF file reference*) and a concrete review of statutes upon judicial referral (*BvL file*

⁵ Erin F. Delaney and Rosalind Dixon, *Comparative Judicial Review* (United Kingdom: Edward Elgar Publishing, 2018), 8, <https://doi.org/10.4337/9781788110600>.

⁶ Jürgen Bröhmer, *70 Years German Basic Law the German Constitution and its Court: Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights* (Malaysia: The Malaysian Current Law Journal Sdn Bhd and Konrad-Adenauer-Stiftung e.V., 2019), 8.

⁷ Martin Borowski, “The Beginnings of Germany’s Federal Constitutional Court,” *Ratio Juris* 16, no. 2 (2003): 155, <https://doi.org/10.1111/1467-9337.00230>.

⁸ Andreas Voßkuhle, “Protection of Human Rights in the European Union: Multilevel Cooperation on Human Rights Between the European Constitutional Courts, Session 6, Keynote Lecture: “Human Rights – Global Culture – International Institutions,” accessed on November 4, 2010, http://www.ourcommonfuture.de/fileadmin/user_upload/dateien/Reden/Vosskuhle.pdf.

reference). It is the most powerful independent and impartial court with an extensive set of competencies and political impact.⁹

The practices of the GFCC have become a reference role model for other countries, especially on the impact of decisions on protecting and fulfilling fundamental rights.¹⁰ According to Nußberger, the GFCC is the “chambers of the heart of the republic”.¹¹ Hailbronner opinion has defined a positive countermodel to the US Supreme Court.¹² Andreas Voßkuhle, the President of the GFCC 2010-2020 states that “over the last few decades, interest in the study of GFCC decisions has increased rapidly among political actors, political, and judicial experts, legal academics from many countries.” The interest of this study is the characteristics of decisions that have implications for the wider community in Europe.

The best practices of the GFCC give excellent learning to the many constitutional courts in the world, including Indonesia. In the Indonesian perspective, the GFCC is referred to as an ad hoc Committee of the People's Consultative Assembly when the idea of establishing a model for the Constitutional Court in the amendment of the 1945 Constitution. There are several reasons it had chosen as a reference for Indonesian Constitutional Court to create a concrete review proposal.

First, a concrete review is a component of a constitutional review, which Indonesia and Germany follow in the same model of court. However, the regulation of constitutional review in Indonesia is still limited to the authority of abstract review without concrete review. Second, in terms of legal tradition, Indonesia, and Germany is the same civil law tradition. Third, the GFCC authorities were mentioned and discussed during the meetings when the idea of establishing the Indonesian Constitutional Court.¹³

In practice, several decisions also use the comparative law perspective from the GFCC and German Legal System in establishing academic debates on legal reasoning when the Indonesian Constitutional Court was deciding a case, especially cases of concrete review and constitutional complaint characteristics such as the

⁹ Jens Brandenburg, “*Lady Justice’s Delay: Judicial Policy Bargaining and the Duration of Senate Proceedings at the German Federal Constitutional Court*” (Dissertation University of Mannheim, Germany, 2014), 4.

¹⁰ Tanto Lailam, “Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional,” *JURNAL HAM* 13, no. 1 (2022): 66.

¹¹ Angelika Nußberger, “The European Court of Human Rights and the German Federal Constitutional Court,” accessed on October 10, 2022, https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/the-echr-and-the-german-constitutional-court_angelika-nussberger.pdf.

¹² Michaela Hailbronner, “Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism,” *International Journal of Constitutional Law* 12, no. 3 (2014): 626, <https://doi.org/10.1093/icon/mou047>.

¹³ I Dewa Gede Palguna, “Constitutional Complaint and the Protection of Citizens the Constitutional Rights,” *Constitutional Review* 3, no. 1 (2017): 1, <https://doi.org/10.31078/consrev311>.

Constitutional Court Decision Number 001/PUU-IV/2006 and Number 28/PUU-XVII/2019 on constitutional complaint application, and the Constitutional Court Decision Number 013-022/PUU-IV/2006 on Concrete Review Case.

There is a general similarity in judicial review authority between the Indonesian Constitutional Court and the GFCC, especially on abstract judicial review. However, the Indonesian Constitutional Court has limited authority. It only covers abstract norms reviewing and has not accommodated reviewing of concrete norms¹⁴ and constitutional complaint authorities.¹⁵ The weakness of the 1945 Constitution and the Law Number 24 of 2003 on the Constitutional Court or the Law Number 8 of 2011 on the first revision of the Indonesian Law Number 24 of 2003 on the Constitutional Court, the Law Number 4 of 2014 on the second revision of the Indonesian Law is the absence of a concrete review mechanism.

It has impacted the absence of an authorized institution in resolving concrete review cases from 2006 until now. Many cases have not been resolved and many judicial review decisions made by the Constitutional Court and the Supreme Court are conflicting.¹⁶ Hence, in the future, the Indonesian Constitutional Court needs to be given the authority to increase the constitutional rights protection of citizens in Indonesia. This study employed a doctrinal legal research method. It used several approaches: (1) legal documents or regulations analysis; (2) case analysis method. It is to study the law carried out in the legal practice of the constitutional court's decisions in concrete cases, and (3) the comparative analysis method focuses on examining two different legal systems and the performance of the GFCC and the Indonesian Constitutional Court. The data collection used a library-based study. It was conducted primarily at the Academy for European Human Rights Protection Library and the Library of the University of Cologne.

B. Concrete Judicial Review as a Fundamental Rights Protection

Judicial reviews are extensive, diffused, or centralized reviews, a *posteriori* or a *priori*, concrete, and abstract, with the effect of judicial declarations of unconstitutionality. Apart from abstract and concrete review, there are applications with a combination and hybrid of concrete abstract review. It focuses

¹⁴ Pan Muhammad Faiz, "The Role of the Constitutional Court in Securing Constitutional Government in Indonesia," (Dissertation University of Queensland, Australia, 2016), 35.

¹⁵ Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Netherlands: Brill Nijhoff, 2015), 77.

¹⁶ The dualism of judicial review institutions causes the decision disparity of judicial review. Article 24A of the 1945 Constitution states that the Indonesian Supreme Court examines the legislation under the law against the law and Article 24C of 1945 Constitution regulates the MKRI reviews the law against the 1945 Constitution.

on a mixed elements approach: abstract, then concrete review.¹⁷ Abstract judicial review is a court's evaluation of potential future implications of the law. The benefits of evaluating abstract norms include the court's ability to evaluate legislation even when they do not cause debate in society. The abstract examination is the area of constitutional court perspective that is relevant in constitutional discussions in parliament. On the other hand, this concrete judicial review is closely related to the constitutional complaint, like two sides of a coin. Judges from ordinary courts submit concrete review before making decisions, while constitutional complaints are submitted by individuals or legal entities after the judge's made decision.¹⁸

In European constitutional law jargon, abstract review refers to the control of the constitutionality of legislation by constitutional courts or equivalent courts. In American literature, an abstract review is without a concrete 'case or controversy', the original form of a pre-enforcement review. It aims to request an interlocutory injunction against the suspension of the application of the law. On the other hand, the concrete review is activated when a judge of the ordinary courts sends the question to the constitutional court. The Judges considered one or more legal norms or other public acts unconstitutional.¹⁹

Richard S. Kay's opinion that the concrete review is an "injury in fact" legal mechanism.²⁰ It is "the constitutionality of law upon the court's request". Judges of the ordinary courts can only ask a constitutional question when the judges examine and settle the case.²¹ The differences can be seen in the table below:

Authority	Object of Disputes	Applicants
Abstract Review	Law and Regulations	Members of Parliaments, State Government (Germany), an Individual, Legal Entity, Indigenous People, etc.
Concrete Review	Implementation of Law and	Ordinary Court Justice

¹⁷ Janneke Gerards, "Abstract and Concrete Reasonableness Review by the European Court of Human Rights," *European Convention on Human Rights Law Review* 1, no. 2 (2020): 233-237, <https://doi.org/10.1163/26663236-bja10005>.

¹⁸ Sylvain Brouard and Christoph Hönnige, "Constitutional Courts as Veto Players: Lessons From the United States, France and Germany," *European Journal of Political Research* 56, no. 3 (2017): 3, <https://doi.org/10.1111/1475-6765.12192>.

¹⁹ Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002), 345-348.

²⁰ Richard S. Kay, *Standing to Raise Constitutional Issues: A Comparative Analysis* (Bruylant: SSRN, 2006), 5.

²¹ Xavier Nugraha (et.al.), "Constitutional Question: Alternatif Baru Pelindungan Hak Konstitusional Warga Negara Melalui Concrete Review di Indonesia," *Jurnal Negara Hukum* 10, no. 1 (2019): 136, <https://doi.org/10.22212/jnh.v10i1.1209>.

	Regulation in the Court Case	
Constitutional Complaint	Law and Regulations (Problem Interpretations), Court Decisions, and Others After Legal Remedies are Exhausted	Individual and Legal Entity

The concrete judicial review proves the role of judges in ordinary courts in advancing the constitutional system, especially in protecting the citizen fundamental rights from the threat of laws made by the legislature. Kommer said "its jurisdiction, if ordinary court judges find the validity and constitutional problems of law in a real case,"²² or actual case²³ or application of law in the litigation process.²⁴ Its characteristics are:

- a. Concrete judicial review application by ordinary judges or the parties or both, but ideally, the application by the ordinary judges if there is constitutional complaint authority. Hence, the parties can use by constitutional complaint mechanism after the judges decide on the case.
- b. The object of constitutionality is the law that the judge will apply in the litigation process (actual cases) at the civil, criminal, administrative, and other courts. It does not declare an unconstitutional of the act.
- c. The judge doubted the constitutionality of the law used as the basis for resolving cases. Omara's opinion is that ordinary judges are prohibited from doubting the constitutionality of the law, only applying the law.²⁵
- d. The petition for concrete review was submitted to the constitutional courts with a judicial referral mechanism. Judicial referrals are made when a court is convinced that a law under which a case has arisen violates the constitution.²⁶
- e. The constitutional courts only decide on the constitutionality of laws and do

²² Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *German Law Journal* 20, no. 4 (2019): 536, <https://doi.org/10.1017/glj.2019.46>. See also Armin von Bogdandy and Davide Paris, "Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court" (MPIL Research Paper Series Number 2019-01-2020), 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313641.

²³ Denis Preshova, "On the Rise While Falling: The New Roles of Constitutional Courts in the Era of European Integration," (Ph.D. Thesis in Universität zu Köln Germany, 2019), 23.

²⁴ Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (United Kingdom: Oxford University Press, 2013), 104. See also Nicola Christine Corbin, "Developments in Abstract Judicial Review in Austria, Italy and Germany," (Ph.D. Dissertation Department of Political Science The University of Birmingham, United Kingdom, 2010), 5-6.

²⁵ Andy Omara, "Protecting Economic and Social Rights in a Constitutionally Strong Form of Judicial Review: The Case of Constitutional Review by the Indonesian Constitutional Court" (Ph.D. Dissertation in Law University of Washington, United States, 2017).

²⁶ Donald P. Kommers and Russell A. Miller, "Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court," *Journal of Comparative Law* 3, no. 2 (2008): 202.

not resolve concrete cases that ordinary judges are trying.

- f. Since the judge submits the application, the case being tried by the judge must be postponed until there is a decision by the constitutional courts.
- g. If a constitutional judge decides that the law being tested does not conflict with the constitution, then the judge can continue his case based on the law. If the constitutional judge decides that the law being reviewed is contrary to the constitution, then the law is annulled and declared invalid. It cannot be used as a basis for judges to resolve the case. So, the ordinary courts will then decide its case based on the GFCC decision.

The advantages of a concrete judicial review mechanism for strengthening fundamental rights and constitutional adjudication system, first, a legal mechanism to strengthen the protection of the fundamental rights of citizens. Judges in ordinary courts play a role in strengthening constitutional rights in concrete cases. Second, ordinary judges are no longer seen as mouthpieces of the law but as mouthpieces of constitutional justice. This constitutional guarantee ensures that judges have independence in interpreting the law, not being forced to apply the law, especially if the judge doubts the constitutionality of the law. Third, judges in ordinary courts participate in supervising laws made by the legislature. Suppose the judge resolves the case, considering that the law used as the basis for resolving the case is contrary to the constitution. Fourth, to create legal communication between constitutional and supreme court judges to build a judicial dialogue to carry out their constitutional obligations in strengthening the protection of fundamental rights.

C. Best Practices of the Concrete Judicial Review in the GFCC

The GFCC was inaugurated in a solemn ceremony in Karlsruhe, held on 28 September 1951. In inaugural remarks, Chancellor Konrad Adenauer said “The court should stand as a pillar of the Federal Republic of Germany and the supreme guardian of the Basic Law”. It presented both a challenge and an opportunity. The challenge was implementing liberal and democratic values in a political and legal culture skeptical of liberalism and democracy. The opportunity was to establish judicial review without defending its democratic legitimacy.²⁷

It must protect the fundamental rights against infringements from the legislator, which is the concrete review. The GFCC has become an important institution in protecting the Basic Law, realizing Germany's rule of law and modern democracy. Also, fulfill one of the fundamental requirements of rights protected

²⁷ Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001* (Oxford University Press: United Kingdom, 2015), 1.

under the principles of Europe's new constitutionalism. A concrete or specific judicial review is a specific authority of the court.²⁸ Based on Article 100 of the Basic Law on Concrete Judicial Review, Article 13 Number 11, 11a, 12, 13, 14 of the GFCC Act, and the procedural law of concrete review on Article 80 – 89 of the GFCC Act. Its application can be submitted directly by the judge from an ordinary court or other parties to the GFCC or State Constitutional Courts.

Hence, in Germany, there are 1 GFCC at the federal level and 16 constitutional courts at the state level. The GFCC authority of it is divided into three concrete cases related implementation of laws, namely: the Federal Law (Article 100 (1) of the Basic Law), the International Law (Article 100 (2) of the Basic Law), and the interpretation of the Basic Law by State Constitutional Courts (Article 100 (3) of the Basic Law). Relating to it submitted to the court has implications for delaying the judicial process since the referral proceeding. The applicant judge may continue his trial after obtaining a decision on a concrete review or after GFCC decides on a judicial referral proceeding to enforce or interpret.²⁹ These proceeding has determined and changed the face of German Legal System.³⁰ It has concrete review played a critical role in enforcing these constitutional principles in Germany's Legal Order.

Several steps of admission procedure for concrete judicial review: first, the subject of the cases is the German Federal Law, the international law has impacted German Citizens and interpretation of the Basic Law by State Constitutional Courts. Second, an applicant for German Federal Law cases and implemented international public law are judges at the ordinary court, for example, civil courts, criminal courts, administrative courts, and other courts. The judge shall be independent and impartial from the other parties. Also, an applicant for the Basic Law interpretation case is a state constitutional court.³¹ The German Federal Parliament (*Bundestag*),

²⁸ Angelika Nussberger, "The European Court of Human Rights at Sixty – Challenges and Perspectives," *The European Convention on Human Rights Law Review* 1, no. 1 (2020): 11–13, <https://doi.org/10.1163/26663236-00101006>.

²⁹ Donald P. Kommers, "The Federal Constitutional Court: Guardian of German Democracy," *Annals of the American Academy of Political and Social Science* 603 (2006): 115, <https://doi.org/10.1177/0002716205283080>.

³⁰ Stefan Martini, "Lifting the Constitutional Curtain? The Use of Foreign Precedent by the German Federal Constitutional Court," Tania Groppi and Marie – Claire Ponthoreau (ed.), *The Use of Foreign Precedents by Constitutional Judges, Volume 1 in the Series of Hart Studies in Comparative Law* (United Kingdom: Hart Publishing, 2013), 233.

³¹ Constitutional Court of the States: (1) Constitutional Court of Baden-Württemberg (*Verfassungsgerichtshof Baden-Württemberg*), (2) Constitutional Court of Bavaria (*Bayerischer Verfassungsgerichtshof*), (3) Constitutional Court of Berlin (*Verfassungsgerichtshof des Landes Berlin*), (4) Constitutional Court of Brandenburg (*Verfassungsgericht des Landes Brandenburg*), (5) Constitutional Court of Bremen (*Staatsgerichtshof der Freien Hansestadt Bremen*), (6) Constitutional Court of Hamburg (*Hamburgisches Verfassungsgericht*), (7) Constitutional Court of Hessen (*Staatsgerichtshof des Landes Hessen*), (8)

The Senate (*Bundesrat*) and the Federal Government (*Bundeskanzler der Bundesrepublik Deutschland*), state governments are parties involved in the application. Third, the legal reason for an application, including why the judges from ordinary courts doubted the constitutionality of the law used as the basis for resolving cases. Hence, the judges create a legal argument why incompatible with the Basic Law, and the judge must be signed the application.

Fourth, based on procedural law, the GFCC may decide with or without an oral hearing. In the oral hearing, the GFCC shall allow the Federal Parliament, Senate, and Federal Government to submit a legal argument about why the law is compatible with the constitution. In this process, if the GFCC finds the applicant is not fully confident in the legal arguments or there is a solution without a concrete review mechanism, the GFCC stops this application. Fifth, the decision of the Concrete Judicial Review makes by the chamber (three judges) or senate (eight judges) to declare a request successful or unsuccessful. The decision by the chamber is the application from the ordinary court at state levels and by the senate if the application is by state constitutional courts and one of the supreme federal courts. The GFCC shall decide on whether the relevant point of law is compatible or incompatible with the Basic Law, if the referral is well founded, the court declares it incompatible with the Basic Law, and *vice versa*. In public international law cases, decides whether the public international law is part of federal law.

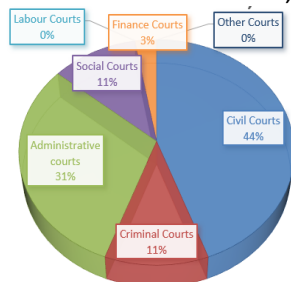
Concrete Judicial Review arises from the litigation process in ordinary court when ordinary judges feel uncertain about applying an allegedly unconstitutional law. Requests for it's to the GFCC with the referral system. Abstract and concrete review proceedings brought from 1951 to December 31, 2021 are 3.843 (1.53%) from 250.580 total cases.³² These new proceedings in 2020 are 36 cases, and 19 cases in 2021. The amounts of referring jurisdictions in concrete judicial review proceedings from the judges of ordinary courts include civil, criminal, administrative, and other courts. Percentages in 2020 and 2021, namely:³³

Constitutional Court of Mecklenburg-Western Pomerania (*Landesverfassungsgerichts Mecklenburg-Vorpommer*), (9) Constitutional Court of Niedersachsen (*Niedersächsischen Staatsgerichtshofs*), (10) Constitutional Court of North Rhine-Westphalia (*Verfassungsgerichtshoffür das Land Nordrhein- Westfalen*), (11) Constitutional Court of Rhineland-Palatinate (*Verfassungsgerichtshof Rheinland-Pfalz*), (12) Constitutional Court of Saarland (*Verfassungsgerichtshofs des Saarlandes*) (13) Constitutional Court of Saxony (*Verfassungsgerichtshof des Freistaates Sachsen*), (14) Constitutional Court of Saxony-Anhalt (*Verfassungsgericht des Landes Sachsen-Anhalt*), (15) Constitutional Court of Schleswig-Holstein (*Schleswig-Holsteinisches Landesverfassungsgericht*), (16) Constitutional Court of Thuringian (*Thüringer Verfassungsgerichtshof*).

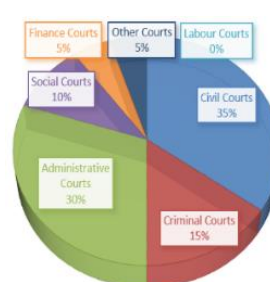
³² Concrete review: 3754 cases and abstract review: 89 cases. See *Bundesverfassungsgericht* Report (2020), 51-52. See also *Bundesverfassungsgericht* Report (2021), 37-39.

³³ *Bundesverfassungsgericht* Report (2020), 51-52, see also *Bundesverfassungsgericht* Report (2021), 46-47.

Specific Judicial Review Cases, 2020



Specific Judicial Review Cases, 2021



The number of cases resolved by a concrete reviewing mechanism was not too much if compared to constitutional complaint cases, in which an average of around 6.000 cases were resolved annually. However, with the completion of the cases, the GFCC began it developing the principle of democracy or the “watchdog” of good legislation (the epicenter of Germany’s Democracy³⁴ and government system,³⁵ and protection of fundamental rights). Several landmark decisions of the concrete review established new precedents, an important new legal principle or concept, or changes in the interpretation of existing law. It created an effect on the legal system.

Former Constitutional Justice Dieter Grimm's argues that GFCC has provided a jurisprudence foundation in concrete cases regarding the European Union integration process, for example, the Solange I case, Banana Market case, and Investment Allowance Act case.³⁶ Solange I case is an order of the Second Senate decision of 29 May 1974 on file reference Number 2 BvL 52 of 71, this application from the Administrative Court (*Verwaltungsgericht*) of Frankfurt or Main. The judge questioned the constitutionality of Articles 8 (2), 9, and 12 (1) of the European Economic Community (ECC) Council Regulation 120 of 67 on import provisions related to force majeure circumstances. In other cases, the Banana Market case Number 2 BvL 1 of 97 is an order of 7 June 2000.

The judicial referral from the Administrative Court of *Frankfurt* or Main focuses on whether compatible with the Basic Law of Articles 17 - 19 and Article 21 (2) of

³⁴ Ulrich Karpen, “Efficacy, Effectiveness, Efficiency: From Judicial to Managerial Rationality,” in Klaus Meßerschmidt A. Daniel Oliver-Lalana (ed.), *Rational Lawmaking Under Review: Legisprudence According to the German Federal Constitutional Court* (Switzerland: Springer International Publishing, 2016), 309.

³⁵ Donald P. Kommers, “The Basic Law: A Fifty Year Assessment,” *German Law Journal* 20, no. 4 (2019): 580, <https://doi.org/10.1017/glj.2019.48>.

³⁶ D Dieter Grimm, Mattias Wendel and Tobias Reinbacher, “European Constitutionalism, and the German Basic Law,” in Anneli Albi and Samo Bardutzky (ed.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Netherland: T.M.C. Asser Press, 2019), 414-415.

EEC Regulation Number 404 of 93 on the community organization of the market in bananas. In 2011, there was Investment Allowance Act Case Number 1 BvL 3 of 08, its referral case from the Finance Court of the Saxony Anhalt State. In 2020 – 2021 there are compelling cases, namely: the GFCC decision Number 1 BvL 5 of 18 on the Impact of Divorce on Workplace Pensions and the GFCC Decision Number 2 BvL 8 of 19 on Forfeiture of Criminal Proceeds. First, the impact of divorce on workplace pensions is the judgment of the First Senate of May 26, 2020 (file reference 1 BvL 5 of 18), its referral case from the Hamm Higher Regional Court (*Oberlandesgericht*). The judges have a constitutionality question on Article 17 of the Pension Sharing Act April 3rd, 2009 (*Federal Law Gazette, Bundesgesetzblatt – BGBl I* p. 700) of the German Federal Law case based on Article 100 (1) of the Basic Law. The GFCC states that one of the defining features of marriage is that both partners enjoy equal rights (Art. 6 (1) and Art. 3 (2) of the Basic Law “Marriage and the family shall enjoy the special protection of the state, and Article 3 (2) of the Basic Law, “Men and women shall have equal rights”. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate the current disadvantage.

In this context, both spouses’ contributions regarding housekeeping, childcare, and employment are equally valued. For that reason, both spouses have an equal share of the assets generated jointly throughout their marriage. The GFCC decided that this legal framework is compatible with both spouses’ fundamental right to property if used in a way consistent with the Basic Law. However, if there are transfer losses, the spouse forced to give up a portion of their pension is making a sacrifice that is not worth it because the other spouse is not getting a proportional amount of their pension. The point of legal arguments, the GFCC does not stop the courts from finding a good balance between these different interests. It also does not stop them from dividing pensions in internal or external ways consistent with the Basic Law.

Second, the forfeiture of criminal proceeds file reference 2 BvL 8 of 19 is the Second Senate decision on February 10, 2021. Judges at the Federal Court (*Bundesgerichtshof*) submitted a concrete review to the GFCC regarding Article 316h sentence 1 of the Criminal Code (*Einführungsgesetz zum Strafgesetzbuch or EGStGB*) in the version of the criminal asset confiscation reform law on April 13, 2017 it regulates the criminal provisions for confiscation of assets resulting from crimes. The Federal Court of Justice suspended the appeal proceedings as far as the confiscation of the value of the proceeds of a crime is concerned because, under the old and new legal situation.

According to the legal situation before the reform law came into force, the confiscation of proceeds of a crime when the statute of limitations for prosecuting the underlying crime was statute barred - except for the extended forfeiture under Section 73 StGB a. F - excluded. With the entry into force of the law to reform the confiscation of assets under criminal law, Section 76a (2) Sentence 1, in conjunction with Section 78 (1) Sentence 2 of the Criminal Code, expressly stipulated the admissibility of independent confiscation of proceeds of a crime even if the statute of limitations on prosecution for the underlying offense had expired. In its decision, Article 316h sentence 1 EGStGB followed the Basic Law, and the Reform Act's retroactive effects (*Echte Rückwirkung*) were justified and compatible with the Basic Law. It is compatible with the principles of legal certainty and protection of legitimate expectations enshrined in the rule of law and fundamental rights. It also aims to ensure that – even in cases where prosecution is not possible – offenders cannot retain the proceeds of their crimes for good. Confiscation of criminal proceeds refers to the recovery of assets obtained through or in return for criminal acts (e.g., loot and pay for a crime) or the recovery of the value of these assets.

D. The Proposal of Concrete Judicial Review to the Indonesian Constitutional Court

The judicial power has regulated under Article 24 of the 1945 Constitution, which stipulates the judiciary power by the Indonesian Constitutional Court and Indonesian Supreme Court. The positions of both courts are equivalent with different functions. Article 24A regulates the Supreme Court and 24C about the Indonesian Constitutional Court. The Supreme Court was established in 1945. The Indonesian Constitutional Court was established in 2001 after 57 years of the Indonesian Constitution on 17 August 1945, it was a response to the constitutional crisis.³⁷ After the 1998 reformation era, the Indonesian Constitutional Court is one of the modern judicial systems as a guardian of the 1945 Constitution.³⁸ Consequently, the constitution has an important role not only to guarantee and protect fundamental rights in articles but also to provide various values used by the judiciary (the Indonesian Constitutional Court) in the interpretation and elaboration of these rights.³⁹

³⁷ Susi Dwi Harijanti and Tim Lindsey, "Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court," *International Journal of Constitutional Law* 4, no. 1 (2006): 146, <https://doi.org/10.1093/icon/moi055>.

³⁸ Tanto Lailam and Nita Andrianti, "The Constitutional Interpretation of Women's Political Rights," *Diponegoro Law Review* 7, no. 2 (2022): 173, <https://doi.org/10.14710/dilrev.7.2.2022.173-191>.

³⁹ Bagir Manan and Susi Dwi Harijanti, "Konstitusi Dan Hak Asasi Manusia," *Padjajaran Jurnal Ilmu Hukum* 3, no. 3 (2016): 448.

Based on Article 24C (1) of the 1945 Constitution, the Indonesian Constitutional Court has the authority to first and final review laws against the 1945 Constitution (abstract judicial review). It had designed as the first judicial institution for reviewing laws,⁴⁰ this judicial review function aims to correct legislation problems (conflicts of laws against the constitution) in a democratic government⁴¹ and control the dynamics of post-reform democratization.⁴² It was formed to uphold constitutional values, protect citizen's fundamental rights, and strengthen the mechanism of checks and balances.⁴³ Simon Butt said the judicial review power is limited to ensuring the constitutionality of statutes or only considering the constitutionality of norms in the abstract.⁴⁴ It has no power to review concrete cases and interpreted or apply law in practice⁴⁵ and constitutional complaints.⁴⁶ The same argument from Hamdan Zoelva and Stefanus Hendrianto "concrete review explicitly is not included in one of the powers of the Indonesian Constitutional Court which are determined limited by the 1945 Constitution".⁴⁷

The Constitutional Court Decision Number 013-022/PUU-IV/2006 confirmed that it does not have concrete review authority. The absence of an institution that has the authority to resolve the issue of constitutional inquiry mechanisms in the legal system in Indonesia causes a void of constitutional protection for citizens, especially for those who are involved in the litigation process in court. But, in the

⁴⁰ Simon Butt, Melissa Crouch, and Rosalind Dixon, "Special Issue: The First Decade of Indonesia's Constitutional Court," *Australian Journal of Asian Law* 16, no. 2 (2016): 113, see also Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?" *Asian Journal of Comparative Law* 14, no. 1 (2019): 147–174, <https://doi.org/10.1017/asjcl.2018.19>.

⁴¹ Iwan Satriawan and Khairil Azmin Mokhtar, "The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election," *Constitutional Review* 1, no. 1 (2016): 103, <https://doi.org/10.31078/consrev115>. See also Khairil Azmin Mokhtar, Iwan Satriawan, and Nur Islami Muhammad, "A Comparison of Constitutional Adjudication Institutions in Malaysia and Indonesia," *Pertanika Journal of Social Sciences and Humanities* 25 (2017): 85.

⁴² Muchamad Ali Safa'at, "The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations," *Constitutional Review* 8, no. 1 (2022): 113, <https://doi.org/10.31078/consrev815>.

⁴³ Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," *Constitutional Review* 2, no. 1 (2016): 103, <https://doi.org/10.31078/consrev215>.

⁴⁴ Simon Butt, *The Indonesian Constitutional Court Implying Rights from the 'Rule of Law'*, Rosalind Dixon (ed.), *The Invisible Constitution in Comparative Perspective* (United Kingdom: Cambridge University Press), 42.

⁴⁵ Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Netherland: Brill Nijhoff, 2015), 96.

⁴⁶ Tanto Lailam, Putri Anggia, and Irwansyah, "The Proposal of Constitutional Complaint for the Indonesian Constitutional Court," *Jurnal Konstitusi* 19, no. 3 (2022): 693, <https://doi.org/10.31078/jk1939>.

⁴⁷ Stefanus Hendrianto, "Convergence or Borrowing: Standing in The Indonesian Constitutional Court," *Constitutional Review* 1, no. 1 (2016): 28, <https://doi.org/10.31078/consrev112>; Stefanus Hendrianto, *Law and Politics of Constitutional Courts Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 52. See also Hamdan Zoelva, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-hak Konstitusional Warga Negara," *Jurnal Media Hukum* 19, no. 1 (2012): 153-154, <https://doi.org/10.18196/jmh.v19i1.1984>.

future, this mechanism will be a necessity for the progressive and sustainable legal development in the Indonesian legal system.⁴⁸ Nowadays, court decisions have peacefully resolved political conflicts and advanced fundamental rights. It has become Indonesia's main driver of democratization⁴⁹ local democracy, and fundamental rights.⁵⁰ There are several legal facts and constitutional arguments why the Indonesian Constitutional Court needs concrete review authority, namely:

1. Many Concrete Judicial Review Cases Applied to the Indonesian Constitutional Court

In the Indonesian Constitutional Court practices from 2003 until now, there have been many cases such as the cases of Eggi Sudjana, Panji Utomo, Akil Mochtar, etc. Sudjana is a defendant in a criminal case of insult to the president and was tried at the Central Jakarta District Court. The proceeding related constitutionality of Article 134, Article 136 *bis*, and Article 137 of the Criminal Code Number 1 of 1946 is based on the Indonesian Constitutional Court Decision Number 013-022/PUU-IV/2006. Utomo was sentenced to three months prisoner for a crime against public order case based on Banda Aceh District Court Decision Number 232/Pid.B/2006/PN-BNA. Akil Mochtar is a former Chief Justice of the Indonesian Constitutional Court and examined several articles of Law Number 8 of 2010 on Money Laundering when he was a defendant in the Corruption and Money Laundering case in Jakarta Corruption Court.

The cases of Sudjana and Utomo are interesting. In Sudjana's case, when he was a defendant, he submitted a request for judicial review to the Constitutional Court. On December 4, 2006, the Constitutional Court decided that Articles 134, 136 *bis*, and 137 of the Criminal Code Number 1 of 1946 are contrary to the 1945 Constitution and have no binding legal force. However, the Central Jakarta District Court deviated from its decision by still sentenced three months in prison with six months of probation on February 22, 2007. Hence, on August 3, 2011, Indonesian Supreme Court released the decision Number 153 PK/PID/2010 to strengthen the

⁴⁸ Josua Satria Collins, "Penambahan Kewenangan Constitutional Question di Mahkamah Konstitusi Sebagai Upaya Untuk Melindungi Hak-hak Konstitusional Warga Negara," *Jurnal Konstitusi* 15, no. 4 (2019): 688, <https://doi.org/10.31078/jk1541>.

⁴⁹ 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): 417-418, <https://doi.org/10.1017/S1598240800003672>.

⁵⁰ Iwan Satriawan and Khairil Azmin Mokhtar, "The Constitutional Court's Role in Consolidating Democracy and Reforming Local Election," *Constitutional Review* 1, no. 1 (2015): 127, <https://doi.org/10.31078/consrev115>. See also, Iwan Satriawan and Khairil Azmin Mokhtar, "The Role of Indonesian Constitutional Court in Resolving Disputes among the State Organs," *Hasanuddin Law Review* 5, no. 2 (2019): 160, 10.20956/halrev.v5i2.1669.

Central Jakarta District Court's Decision. In the case of Utomo, the Indonesian Constitutional Court reviewed Articles 154 and 155 of the Criminal Code, and it decided that the articles were contrary to the 1945 constitution and had no binding legal force. These cases are concrete cases for excellent learning to give concrete review authority in the Indonesian Constitutional Court. In these cases, the ordinary judges at the district court have implemented legal provisions that are substantively contradictory to the 1945 Constitution.

2. Solutions for Dualism Judicial Review Problem

One of the institutional problems of judicial review in the 1945 Constitution is the dualism of the authority on the Constitutional Court and the Supreme Court. Article 24A of the 1945 Constitution states that the Supreme Court examines the legislation under the law against the law. On the other hand, based on Article 24C of the 1945 Constitution, the Constitutional Court examines the law against the 1945 Constitution. The authority creates various problems in the judicial review system, especially the disparity in the decisions. For example, Oesman Sapta Odang is the Chairman of the Regional Representative Council 2017-2019.

Based on Articles 181 and 182 of the Law Number 7 of 2017 on the General Election, the requirement to become a candidate for the Regional Representative Council member is an individual who does not have multiple public positions (including the leaders of a political party the Constitutional Court Decision Number 30/PUU-XVI/ 2018) that may cause a conflict of interest with his duties, authorities, and rights as a member of the Regional Representative Council. In this case, Oesman is the chairperson of the People's Conscience Party (*Partai Hati Nurani Rakyat* –Partai Hanura) and will be re-nominated in the 2019 election.

The Constitutional Court interpreted the phrase "multiple public positions" by referring to the leaders of the political parties. The decision was then followed up with Article 60A of the General Election Commissions Regulation Number 26 of 2018, which stipulates that the requirements for candidates for regional representative Council members are individuals and not leaders of political parties. Osman then submitted a judicial review to the Supreme Court. The Supreme Court's decision granted Osman's request and canceled Article 60 A. The conflicted verdicts in the case are related to the Supreme Court Decision Number 65P/HUM/2018 against the verdict of Constitutional Court Number 30/PUU-XVI/2018. The Constitutional Court interpreted "other jobs" with the inclusion of leaders of the political parties. Thus, the General Election Commission (*Komisi Pemilihan Umum*- KPU) crossed out or disapproved of Osman as a candidate for the Regional Representative Council. The Supreme Court annulled the interpretation of

the Constitutional Court and granted Osman's request as a candidate for the Regional Representative Council. The dissenting conclusion is very significant. If the Constitutional Court has concrete review authority, such a problem will not occur because the Supreme Court judge can submit a referral proceeding to the Constitutional Court.

3. Strengthen the Role of Judges in the Supreme Court in Building the Responsibility to Uphold the 1945 Constitution.

Law enforcement with judges full of prudence, of course, aims not to let the laws conflicting with the constitutional rights of citizens. As a reference, judges in Germany are meticulous and ultracareful in making decisions. When judges hesitate in applying the norm, they submit a referral proceeding to the GFCC. The judge will ask whether the norm contradicts the human rights based on the constitution. the GFCC will answer the constitutionality of the legal norm. In addition, constructive collaboration between the Constitutional Court and the Supreme Court in supervising laws is necessary since there are erroneous laws and political compromises. The supervision of judges in the Supreme Court is active through the submission of cases to the Constitutional Court. On the other hand, the Constitutional Court is passive or waiting for the case.

Hence, the Constitutional Court's incapability to settle cases through concrete review can be detrimental to the mission to protect constitutional rights. Therefore, there must be possible ways or alternatives to adopt concrete review. Several academics, researchers, and even justices of the Constitutional Court have expressed the importance of constitutional complaints and concrete review mechanisms. For example, Faiz reviewed several alternatives to adopt the constitutional complaint, including constitutional amendments, legislative interpretation, and constitutional interpretation.⁵¹ Palguna, former justice of the Indonesian Constitutional Court also wrote a doctoral dissertation and eventually published on this subject. It analyzed constitutional complaints and proposed several alternative ways to adopt it as an authority of the Constitutional Court.⁵²

The first option is to make the fifth amendment to the 1945 constitution, which is a complicated long process. The second is to revise or make new law on the Constitutional Court through legislative action. However, people could rechallenge this interpretation of the law. This may not be the best way to settle things quickly.

⁵¹ Pan Mohamad Faiz, "A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court," 115.

⁵² I Dewa Gede Palguna, *Pengaduan Constitutional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-hak Warga Negara* (Jakarta: Sinar Grafika, 2013), 593.

Third, it may be possible for the Constitutional Court to bring up a concrete review by interpreting the constitution. However, it can only be done if there is a specific case that has something to do with the rule of law.⁵³ Ideally, a proposal for the concrete judicial review is the amendment of the 1945 Constitution to create legal certainty, and to strengthen institutions that protect human rights in Indonesia.

E. Conclusion

The role of judges in ordinary courts in advancing the constitutional system is proven substantial based on the concrete review process, especially to protect the state's fundamental rights from the laws made by the legislature. Based on Article 100 of the Basic Law and the GFCC Act, The GFCC authority in concrete review is related to the implementation of the federal law, the public international law, and the interpretation of State Constitutional Courts. The practices of concrete judicial review in the GFCC have become a role model in other countries, especially on the impact of decisions to the protection and fulfillment of fundamental rights. The judicial review of the Indonesian Constitutional Court provides no reviews to the concrete norms.

However, the Indonesian Constitutional Court needs a concrete review authority in the future; and the GFCC is the best judicial reference. Constitutional arguments and legal facts explain the necessity of the authority for the Indonesian Constitutional Court. Firstly, there are many cases faced by the Indonesian Constitutional Court. Secondly, it can provide solutions for the dualism judicial review problem, in particular on conflicted decisions between the Constitutional Court and the Supreme Court. Thirdly, it can strengthen the role of judges in the Supreme Court to generate the obligation to uphold the 1945 Constitution. The proposal through the amendment of the 1945 Constitution is an ideal way to create legal certainty and to strengthen institutions for the protection of fundamental rights in Indonesia.

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