The Constitutional Court and minority rights: two recent cases

Since its establishment 15 years ago, Indonesia's Constitutional Court has become a forum in which various minorities have been able to pursue their interests, often in the face of subjugation from larger groups and even the state itself. These groups include customary law communities, whose dependence on natural resources such as forests and coastal areas has brought them into conflict with the interests of the state and businesses, who often claim a legal entitlement to those resources. These groups also include adherents to so-called ‘deviant’ sects – that is, those who call themselves believers of a religion officially recognised in Indonesia, but believe in a ‘version’ of that religion that diverges from the orthodox tenets of that religion. The cases involving these two minority groups have drawn significant controversy and academic writing (Crouch 2012; Butt 2014; Lindsey & Pausacker 2016; Fenwick 2017; Lindsey 2012, p.20; Crouch 2011; Budiwanti 2009).

This paper focuses on two Constitutional Court cases handed down in late 2017 involving two other broad minority groups, upon whose interests the Constitutional Court had not previously adjudicated. These cases also drew significant public attention and controversy, but very little has yet been written about them. The first of these cases touched upon the interests of Indonesia’s LGBTQI community, which has suffered increasing intolerance in recent years (Firdaus 2018). In December 2017 the Court handed down its decision in a case brought by members of a conservative Muslim group: the ‘Family Love Alliance’ (AILA). Amongst other things, they challenged Article 292 of the Criminal Code, which prohibits ‘indecent activities’ (perbuatan cabul) with a minor of the same gender as the perpetrator. Although Article 292 does not refer to homosexual or other types of non-heterosexual sexual activity, most Indonesian legal commentators accept that it covers it, amongst other activities.

The applicants asked the Court to change Article 292 so that it applied to indecent acts between people of the same gender, regardless of their age. By the narrowest of margins, a five-judge-majority decided that the Court lacked the power to amend the Criminal Code, but nevertheless appeared to support the conservative sentiment behind the application. The four-judge minority agreed with the applicants, and would have outlawed consensual gay sex, if their opinion had carried the day.

The second case this paper discusses relates concerned the constitutional recognition of indigenous beliefs, which are referred to variously in Indonesia as aliran kepercayaan, kepercayaan, keyakinan and kebatinan. In this paper, I refer to them simply as ‘beliefs’ (kepercayaan) to distinguish them from recognised ‘religions’ (agama). These religions are neither state-recognised, nor necessarily blasphemous ‘deviations’ of them. Some of them pre-date the reception into Indonesia of the officially recognised religions: Islam, Catholicism, Protestantism, Hinduism, Buddhism and Confucianism. Others might more readily fall into the category of ‘new age’ spiritual movements. The number of those adhering beliefs in not certain. However, the Culture and Education Ministry estimates that there are 12 million believers spread across 187 groups in 13 provinces (Nadlir 2017; Voonews 2018).\(^1\)

For many years, some belief groups, and their supporters, have asked the state to treat their beliefs as equal to the official religions. While the government has in fact recognised them during some periods (Hosen 2014, p.338–40; Lindsey 2012, p.59–62), they have not received the same level of

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\(^1\) By contrast, Hefner (2017, p.211) puts the number of adherents of indigenous religions at 200-300,000 and a similar number of people involved in new religious movements; another author puts the number of native faith groups at 12,000 (Heriyanto 2017).
financial or institutional support as official religions, and, on the whole, have been marginalised, ignored or even discriminated against.

In November 2017, the Constitutional Court issued a decision that may clear a new path towards greater state recognition and support of indigenous religions. In the decision, the Court unanimously decided to change provisions of a statute that had required those following an indigenous religion to leave the religious column or entry in their state-issued Family Card and Identity Card blank. The Court decided that this was discriminatory and that ‘penghayat kepercayaan’ (believer of an indigenous religion) could appear instead.

The Constitutional Court and human rights
Before turning to discuss these cases in detail, I make some observations about the Court’s function in cases involving minority rights. On the one hand, the Constitutional Court portrays itself as protector of human rights, primarily through exercise of its constitutional review function. Using this power, the Court can invalidate national legislation that it thinks violates the charter of human rights contained in the Constitution, which include a bundle of rights that appear directed towards ‘minorities’. There is, for example, a provision that guarantees the rights of customary law communities. This has been used to justify the Court’s decision that required the state to recognise community forests, and to allow community access to forest resources, for example.

On the other, it is easy to overstate the utility of bringing a claim before the Court for various reasons associated related to the Court’s institutional design. For example, despite their importance, the Court’s review powers are narrow: it cannot review government regulations and decisions that violate constitutional rights, but rather only whether national statutes violate them. This is unfortunate, because many of these regulatory instruments are thought to violate constitutional rights, including those of minority groups. Also, the Constitutional Court has no formal powers of enforcement, relying almost entirely on its reputation and public support to push the government to comply with its decisions. Nevertheless, despite some examples of government defiance, the Court’s decisions are usually followed. However, it bears noting that, beyond media reportage and potential political fallout, there would be few consequences for the government if it ignored the Court’s decisions.

The utility of Constitutional Court proceedings is brought further into question by some of the practices the Court has chosen to employ, which seem to preclude applicants from getting any benefit from winning a case. Two of these practices are relevant to note here. The first is that the Court has continually refused to review the constitutionality of the way statutes are implemented, or the practical effect they have. According to the Court, its reviews are limited to assessing the words or norms in statutes, rather than how they are interpreted or applied in practice. It is for other courts in Indonesia’s judicial hierarchy to determine whether the implementation of a law corresponds with its norms. Nevertheless, the Court sometimes makes exceptions to these practices, and such an exception appears to have been made in the Beliefs case, discussed below.

The Court also limits its decisions by giving most of them prospective effect. In other words, if the Court decides that a statute breaches the Constitution and declares that statute to be invalid, that statute will only be invalid from the moment the Court finishes reading its decision. Any action taken under the statute between its enactment and its invalidation is not affected by the declaration of invalidity and therefore remains legal.\(^2\) As the Court commonly explains, it has taken this approach

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\(^2\) For statements to this effect see, Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands, para [3.15.13]; and Constitutional Court Decision 36/PUU-X/2012, reviewing Law 22 of 2001 on Oil and Natural Gas,
because it is concerned with the constitutionality of statutory norms that apply generally to all, not concrete cases. Of course, this approach significantly undermines the utility of bringing an application before the Constitutional Court. Even if the applicant wins, he or she can obtain no redress for damage to constitutional rights already suffered. For most applicants, then, the most they can hope for is a moral victory: applicants can only expect to prevent future constitutional damage to themselves or others by having the Court remove the offending statute from the books.

**Homosexual sex case**

As mentioned, in this case, brought in April 2016, members of the Family Love Alliance, represented by a team of 36 lawyers calling themselves the ‘Advocacy Team for a Civilised Indonesia’, challenged various provisions of the Criminal Code. These included Article 292 which prohibited ‘indecent acts’ between people of the same gender, but only if one of them was a minor, which, under Indonesian law is defined as someone under 21 years of age. The applicants also complained about Article 284, which defined adultery as unfaithfulness to one’s marriage partner and did not extend to other combinations of sex outside of marriage, such as between unmarried couples.

The applicants argued that the provisions violated the Constitution, including its religion-related rights and protections, and Indonesia’s national philosophy, Pancasila, the first principle of which is ‘belief in Almighty God’. They also claimed that the provisions threatened the ‘integrity of the family’ and religious values, both of which were ‘very important in developing the people and the nation’. They claimed, for example, that the adultery provision’s limited application – that is, only to unfaithfulness to one’s marriage partner, rather than to include any sex outside of marriage – was ‘dangerous to family culture in Indonesia and ... the structure of the community’. Accordingly, the impugned provisions did not merely touch upon domestic issues, but rather were of great national importance. This was, the applicants argued, also made clear by the constitutional inclusion of the rights to form and have a family (Articles 28B(1) and 28G(1)) and of the various religion-related rights mentioned above. As the applicants claimed:

> Indonesia was not established by its founders as ‘religion neutral’ or a ‘secular state’. Pancasila and the Preamble to the Constitution are laden with religious values as the basis of the establishment of the State of Indonesia. With this philosophical basis, the need to base all laws on moral foundations based on Almighty God is a non-negotiable certainty. Religions in Indonesia fundamentally prohibit adultery, rape by anyone, and same-sex relations.

The applicants also criticised the Criminal Code as being a product of Dutch colonialism. Enacted by the Dutch for the colony in 1886, the Code has applied largely unamended ever since, despite efforts to update or replace it since 1963. For the applicants, not only was the Code old; it also did not suit Indonesian cultural or religious beliefs. The applicants cited serious ‘flareups’ in the community, which, they claimed, were caused by a ‘lack of legal clarity about morality, particularly in respect of adultery...and same sex immorality’.

A majority of the Court turned down the applicants, because they had asked the Court for a decision it lacked jurisdiction to provide. The applicants had not asked the Court to broadly interpret these provisions – a request to which the Court could have acceded. Rather, they had asked it to create new criminal norms and apply them to new classes of people. But, according to the Court, only the

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3 The description and analysis of this decision draws on Butt (2018).
8 Constitutional Court Decision 46/PUU-XIV/2016, p. 431. The Court explained in some detail how
The legislature could 'criminalise or decriminalise'; the Court was a negative legislator, not a positive one, and so it could not act as a 'mini parliament'. The Court also expressed scepticism that amendments to the Code provisions along the lines the applicants suggested would result in any changes to behaviour.

Nevertheless, the majority neither rejected the fundamental religious premise upon which the application was based, nor the specific arguments of the applicants, accepting, in the case of adultery, that:

"It is very possible that one reason for the destruction of social and family systems and structures is that the broader concept of adultery has not been criminalised under Indonesian law..."

As mentioned, four dissenting judges would have granted the applicants’ requests. They emphasised that Pancasila was ‘the source of all sources of law’ and that, therefore, all laws must not contradict its values. Indeed, the minority declared ‘Belief in Almighty God’ to be the ‘highest’ principle of Pancasila because it was first on the list of five. The first principle was therefore ‘absolute’, the source of ‘all values of goodness’, and even underlay Pancasila’s four remaining principles. The minority also pointed to the constitutional provisions that provided freedom of religion and to worship in accordance with that religion, and that required respect for customary law (or ‘living law’ as the minority called it).

For the minority, the first Pancasila principle, and these constitutional rights, meant that no law would be valid if it violated religious law or ‘living law’. Pancasila and these rights also affected the interpretation of other constitutional rights. For example, Article 28D(1) grants the constitutional right to ‘just legal certainty’. For the minority,

"this is not mere legal certainty. If there is legal certainty in the form of a norm of a Statute that reduces, narrows, invades or violates the [first principle] or religious values or living law...then that legal certainty is not just legal certainty...[Such a statute] must be declared to violate the Constitution and to no longer have any binding force and certainty cannot be left to the open legal policy of lawmakers [emphasis in original]."

the amendments proposed by the applicants would change the nature of the offences, at pp. 433-41.

10 Constitutional Court Decision 46/PUU-XIV/2016, p. 444.
13 The judges were Chief Justice Arief Hidayat, Deputy Chief Justice Anwar Usman, and Justices Konstitusi Wahiduddin Adams and Aswanto.
14 Pancasila has long been the ‘source of all sources of law’ and this is not controversial in Indonesia, despite being a particularly vague philosophy that is difficult to apply and having been almost never judicially interpreted (Butt 2007).
15 As the minority put it, ‘An act is said to be good if it does not violate the values, norms and law of God’: Constitutional Court Decision 46/PUU-XIV/2016, p. 454.
16 Ibid. As the minority put it at 455, Indonesia’s founding fathers had established Pancasila as a principle of life for a nation with a variety of religions, which would help the nation to remain together. To my knowledge this is the first time the norms of Pancasila have been formally ranked by a judicial institution.
17 This reference to ‘open legal policy’ refers to the scope the legislature has to enact laws within the confines imposed by the Constitution. Within those confines, the legislature may have numerous choices, all of which might be constitutional. For discussion of this concept, see Butt (2015).
The minority, therefore, appeared to consider that a ‘just law’ in Article 28D(1) was a law that does not violate religious values. This is an important conclusion, not least because the Court uses ‘legal certainty’ perhaps more often as a constitutional ground to invalidate legislation than any other.

The minority also pointed to Article 28J(2) which reads:

in exercising his or her rights and freedom, every person must be subject to the restrictions stipulated in laws and regulations with the intention of guaranteeing the recognition of and respect for the rights and freedoms of other people and to fulfil fair demands in accordance with the considerations of moral and religious values, security, and public order in a democratic society.

The minority emphasised that Article 28J(2) mentions religious norms as a ground upon which the legislature can justify overriding the constitutional rights of some to protect the constitutional rights of others. This meant that the Constitution was a ‘godly constitution’; accordingly, statutes that reduced or limited religious values needed to be amended so that they did not violate those values and religious teachings.18

The minority continued:

If the status quo is maintained, then constitutional supremacy and the authority of the law in Indonesia will be severely threatened, because a statute that contains the phrase ‘by the grace of Almighty God’ will in fact contain legal norms that contradict or at least narrow and reduce the scope of culpability of an act that has been clearly established by the law of God. The same goes for judicial decisions which include in the headnote the words ‘In the name of Justice based on Almighty God’. These decisions must acquit perpetrators who have clearly been validly and convincingly proven to have performed an act which is strictly prohibited according to the law of God, just because the elements of the crime were not fulfilled, even though the act was clearly prohibited and was extremely culpable according to religious values and divine enlightenment.19

While the minority accepted that the Constitutional Court should generally exercise judicial restraint and not function as a positive legislator, an exception was justifiable here for three reasons. First, the impugned provisions so clearly reduced or even violated religious values.20 Second, a draft of Indonesia’s proposed new Criminal Code, which included a broader definition of the offence, in line with what the applicants sought, was before parliament.21 And third, its decision did not in fact expand the concept of adultery. Instead, it simply reverted to the concept of adultery originally understood in Indonesia, before it was narrowed by Criminal Code, which had been enacted by the Dutch during their colonisation of Indonesia.22 Specifically regarding Article 292, the minority labelled it as a ‘victory’ for members of the Dutch Parliament when the Code was enacted who, according to the minority, were

indeed affirmative with respect to homosexual practices, even though homosexual practices clearly were sexual behaviours which were intrinsically…and universally reprehensible according to religious law and divine enlightenment, and living law.23

The minority concluded with the following statement:

The incidence of people ‘taking the law into their own hands’ which the community is doing against perpetrators of prohibited sexual relations (whether in the form of adultery, rape or homosexuality) happens because the religious values and living law of the community in Indonesia does not have a place that is proportional in Indonesia’s criminal law system. If there is a modification of legal norms concerning this issue, then it is hoped that the legal structure and legal culture of the Indonesian community in facing these acts can also change for the better.24

Discussion
This decision was described as a ‘win’ by moderates against conservatives (Hawley 2017). This appears to be true in respect LGBTI groups. The draft Code before parliament resembles the current Code in that it only prohibits consensual same sex intercourse with a minor. Of course, the Code might be amended before enactment to prohibit these activities, but if it is not, or if the Code is not enacted at all,25 then the decision represents a significant setback for conservatives.26

However, that this decision was so close does not bode well for the future of Indonesian pluralism. It appears to have teetered on a knife’s edge for almost a year, with early rumours suggesting that initial drafts of the decision had decided in favour of the Family Love Alliance in a six-to-three majority. As it turns out, the result might have been the opposite had former Constitutional Court judge Patrialis Akbar not been removed from office when he was. In early 2017 Akbar was arrested for taking bribes to fix the outcome of an unrelated constitutional review case. He was removed from office soon thereafter and prosecuted and convicted in September 2017. He had not been arrested while Homosexual Sex was being argued, and is said to have displayed a preference for the minority position during the proceedings (Hutton 2017). If he had remained on the bench, the minority view may well have carried the day. In the event, his replacement, Professor Saldi Isra, voted with the majority. This almost-equal division within the Court suggests that the minority’s thinking could one day be adopted by a majority, particularly if one or two judges with more conservative views are appointed to replace retirees in coming years.

This is certainly possible. The appointment system for Constitutional Court judges – under which the national parliament, executive and Supreme Court are each responsible for filling three positions on the nine-judge bench – appears to have been initially designed to encourage ‘moderate’ appointments. This ‘cooperative’ appointment model is adopted in other countries and is intended to discourage arms of government from making appointments clearly sympathetic to their own interests, through fear that one of the other arms might do the same (Ginsburg 2003, p.45). Cooperating institutions can, therefore, be effective checks on each other’s choices under this model. However, if more than one arm supports a conservative appointment then these checks will no longer operate. This could happen in Indonesia, for example, if the executive and legislature, both make such an appointment, perhaps in response to perceived public conservative sentiment. Worse, nominating institutions appear to have absolute discretion to appoint who they please, provided that appointees meet the technical requirements to occupy judicial office, and how they choose and vet their candidates is notoriously opaque.

Perhaps most significant is that the decision indicates further judicial acceptance of the use of religious norms – particularly Islamic norms – in constitutional interpretation. Of course, this

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25 It is by no means clear whether the draft will be enacted, amidst significant controversy about many aspects of the draft not related to these morality offences. To pick just one example, over a decade ago, debate focused on whether witchcraft should be criminalised (Butt 2003).
26 This sits in stark contrast with the adultery offence. This draft broadly defines adultery to include all extra-marital intercourse. If this is enacted, then the adultery-related legal changes the applicants want will materialise in any event, so any victory will only be temporary.
observation applies most particularly to the minority decision. However, it also bears emphasising that the majority expressly indicated that its rejection of the application was not a rejection of legal change along the lines the applicants suggested. Indeed, the Court responded to claims that its decision was ‘pro LGBT’ by holding a press conference at which its spokespersons declared that the Court was indeed worried by the ‘social phenomena’ about which the applicants complained (Sahbani 2017). Importantly, the majority did not criticise the way the minority had used religious norms as a new yardstick for constitutional review; rather, it was simply unwilling to reformulate criminal norms on any basis.

A serious shortcoming of both the majority and minority decisions was that they accepted assumptions and propositions about the norms of religions practiced in Indonesia, but supported them with no evidence – or even specific references to religious texts or expert opinions adduced during proceedings. Instead, the Court presumed that all religions and beliefs in Indonesia, and the ‘living law’, prohibited these acts. But there is certainly no consensus on this, at least beyond groups of more conservative Muslims, much less that the state should intervene in such cases (Fachrudin 2017; Pisani 2014, p.2). It bears noting, too, that while the Court mentioned Indonesia’s various religions and beliefs, it specifically referred only to the Koran, ignoring the sources of the precepts of other widely-practiced religions in Indonesia, such as Christianity, Hinduism and Buddhism.

Likewise, both the majority and minority seemed to accept that homosexual sex and adultery posed threats to families and the nation, apparently because they destroyed the social fabric of Indonesian society. Yet evidence was neither provided to support this conclusion, nor to explain precisely how damage was defined, caused or quantified. Also concerning was that, while the majority questioned the appropriateness and utility of using law to affect the behaviour to which the applicants objected, the minority appeared to explain ‘vigilante justice’ as a failure of national law to incorporate religious norms. Though the minority certainly did not endorse violence against those accused of adultery or homosexual practices, it also did not condemn it. The minority appeared to portray it as an understandable response to perceived immoral behaviour.

Beliefs case

This case was brought in late September 2016 by four citizens – a farmer, student, and two small business operators – who followed indigenous beliefs, rather than the state-recognised religions, or even their deviant offshoots. These beliefs were named Marapu (East Sumba), Parmalin (North Sumatra), Ugamo Bangsa Batak (North Sumatra); and Sapto Dharmo. They complained about two provisions of the Population Administration Law. The first was Article 61, which covers the information a Family Card (Kartu Keluarga) must contain, including a citizen’s religion. Article 61(1) states that family cards must mention the religion of the family. Article 61(2) stated that those who do not adhere to a recognised religion, or who are adherents to an indigenous religion (penghayat kepercayaan), should not have any religion listed, but that they nevertheless are to be ‘given service’ and ‘recorded in the population database’. Article 64 deals with e-Identity Cards (Katu Tanda Penduduk) and, like Article 61, requires that a citizen’s religion be noted on the Card (Article 64(1)), but states that those who adhere to an unofficial religion or belief are to have the 'religion' section on the card left blank, but should receive services and be recorded in the database (Article 64(2)).

The applicants had encountered difficulties in obtaining an ID card, even though Article 64(2) required that they 'receive service' if they left the religion column blank. Some of them even admitted to lying on their forms – by listing a recognised religion, even though they did not follow it – just so that they could obtain a card. Without having a religion listed on their cards, others had

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28 Law 23 of 2006 on Population Administration.
29 Constitutional Court Decision 97/PUU-XIV/2016, p. 132.
trouble getting marriage certificates and birth certificates for their children; obtaining employment, particularly in the public service, and social security rights; enrolling their children in school; accessing financial services; and even organising burial in a public cemetery.

The applicants were represented by a group of 18 lawyers who argued that Articles 61 and 64 violated the applicants’ constitutional rights, even though those Articles required that the applicants be ‘given service’ if they left the religion column blank on their identify cards. Their main argument was that the provisions were discriminatory because they only referred to citizens’ ‘religion’ and did not accommodate a ‘belief’, even though a ‘belief’ had the same constitutional status as a ‘religion’. They argued, too, that this violated the ‘rule of law’, and asked the Court to declare these provisions invalid, unless ‘religion’ was interpreted to encompass ‘belief’.

The national executive and the national legislature submitted separate responses to the application to the Court. Neither put forward particularly strong arguments to defend the impugned provisions. The executive’s representatives in particular appeared almost sympathetic to the applicants’ arguments, accepting that the current system sometimes forced citizens to put down a religion they did not follow or to simply do without a KTP. It did not even ask the court to reject the application, but rather to provide a constitutional interpretation and decision that was ‘as just as possible’.

As mentioned, the applicants won this case. The Court’s decision was unanimous and declared that these provisions of the Public Administration Law were invalid for three main constitutional reasons. First, they were discriminatory. The Court dedicated significant space to discussing whether the Constitution distinguished between religion and belief, or whether they formed part of the same concept. This discussion was confusing, and the Court appeared to reach different conclusions about in different parts of its judgment. Nevertheless, it seems clear that the Court’s decision was predicated on the assumption that religions and beliefs are both constitutionally protected, and have the same status, if they are not part of the same concept. Accordingly, because the provisions of the Public Administration Law treated those with a recognised ‘religion’ (who could list their religion) differently from those with a ‘belief’ (who were to leave the religion column blank), they were discriminatory.

This discrimination was prohibited by the Population Administration Law itself, the Constitution, and various international conventions Indonesia had signed and ratified. It was also at odds with the Court’s own jurisprudence in which it had held that discrimination occurred when one ‘thing’ (hal), which presumably includes a group, was treated differently to another, without there being a reasonable ground to make the distinction; or where different ‘things’ were treated the same, leading to injustice. Applied to this case, discrimination would not have occurred if, in Articles

30 This, it is said, is created by Government Regulation 37 of 2007, which requires that marriages must be endorsed by an elder of a registered organisation (Hukumonline 2016).

31 Constitutional Court Decision 97/PUU-XIV/2016, p. 133. These groups have long encountered these administrative impediments (Bagir 2017, p.286; Hosen 2014, p.339).


34 Constitutional Court Decision 97/PUU-XIV/2016, p. 109

35 The Court concluded that these provisions violated the negara hukum, or the rule of law, though it did not really why.

36 Article 4 prohibits discrimination based on religion, ethnicity, socio-economic status and the like in the compilation of the database.

61(1) and 64(2), the word ‘religion’ encompassed indigenous beliefs. However, Articles 61(2) and 64(2) made it clear that ‘religion’ was intended only to refer to a recognised religion, because they set out rules and procedures that applied to belief holders, which excluded those beliefs from the operation of Articles 61(1) and 64(2). The rules and procedures contained in Article 61(2) and 64(2) would not have been necessary if ‘religion’ was intended to encompass those beliefs.

Second, because the Law had confined its definition of ‘religion’ to recognised religions, the state had also failed to meet its obligation to guarantee or respect the rights of adherents to beliefs. The Court said:

This is not in line with the spirit of the 1945 Constitution, which clear guarantees that every citizen is free to embrace a religion and belief and to worship in accordance with that belief.\(^{38}\)

Even though the Law entitled that citizens who did not list their religion to receive service, this was not in furtherance of the religion-related rights of those citizens, but rather the state’s obligation to provide public services and administer the database.\(^{39}\) The Court also criticised the provisions for ‘implicitly constructing the formulation of the right to adhere to a religion or belief as something given by the state’, when in fact the right attaches to every person as a natural right.\(^{40}\)

Third, the Court concluded that the provisions violated the constitutional principle of legal certainty, primarily because followers of beliefs found it difficult to obtain a Family Card and an Identity Card and, if they obtained one with a blank religion column, to the public services to which they were entitled. For the Court, this was ‘constitutional damage’ that ‘should not be permitted to happen’.\(^{41}\) This was quite a strange conclusion. After all, there was nothing unclear about the provision itself or its operation. And, this decision sits uncomfortably alongside the Court’s refusal in other cases, mentioned above, to consider how statutes are implemented or their consequences. The Court unconvincingly attempted to distinguish this case from these earlier decisions, holding that the problems the applicants had in obtaining employment and the like were not related to the implementation of a norm, but was rather the logical consequence of the understanding of ‘religion’ in the law.\(^{42}\)

The Court’s final holding was that the word ‘religion’ in Articles 61(1) and 64(1) was unconstitutional unless taken to include ‘belief’. However, it also declared that ‘to create order in population administration’, and considering that the types of indigenous beliefs are numerous and various, it

\(^{38}\) Constitutional Court Decision 97/PUU-XIV/2016, p. 149.

\(^{39}\) Constitutional Court Decision 97/PUU-XIV/2016, p. 149. On this point, the Court said that Law 25 of 2009 on Public Service required the state to provide public administration services – including to obtain data it needed to effectively run various government programs. Citizens also relied upon these services to provide ‘authentic evidence’ of their personal information that was necessary for them to enjoy various rights, including rights associated with their beliefs and religions. The very purpose of compiling the database would be undermined if important data about citizens was left out (as Articles 61(2) and 64(2) seemed to require), or if citizens were ‘forced’ to provide incorrect data (such as by choosing a religion they did not follow to access public services): Constitutional Court Decision 97/PUU-XIV/2016, p. 147.

\(^{40}\) Constitutional Court Decision 97/PUU-XIV/2016, p. 150

\(^{41}\) Constitutional Court Decision 97/PUU-XIV/2016, p. 151

\(^{42}\) Constitutional Court Decision 97/PUU-XIV/2016, p. 152.
would be sufficient to simply note *penghayat kepercayaan* (adherent to belief) on these cards, without detailing the particular belief adhered to.  

**Discussion**

This case is clearly an advance for religious freedom in Indonesia – particularly for those who hold indigenous beliefs. Some appear to have taken the decision as wholesale state recognition of indigenous beliefs for all purposes, and as a basis to undo decades of discrimination and even repression. However, the extent of the advance this case really represents is far from clear. Indeed, the precise scope and implications of the decision were unclear to the Minister of Religious Affairs, who, soon after the decision was handed down, said that religion and belief were not of the same status and that he would be meeting with the Court for further clarification (Marsyaf 2017).

The decision, and its potential ramifications, need to be viewed with caution, for a variety of reasons. First, the decision does not extend constitutional acknowledgment to all ‘beliefs’ practiced in Indonesia today. The Court was very careful to confine the application of its decision to beliefs in *Ketuhanan Yang Maha Esa* (Almighty God). This is not particularly controversial in constitutional terms, given that both the preamble and Article 29(1) of the Constitution declare that Indonesia is a state based on this principle. Although it is beyond the scope of this paper to discuss the variety of contested translations of *Ketuhanan Yang Maha Esa*, it is currently taken to imply monotheism. This means that polytheistic or other religions are unlikely to be taken to fall within its scope, and followers of those religions may continue to face the same problems as had the applicants, unless they can somehow reconstruct their beliefs to fit within accepted parameters, as Buddhists and Hindus have long been forced to do (Bagir 2017, p.287).

The decision also does not appear to lend any legitimacy to the so-called ‘deviant sects’ (*aliran sesat*) – that is, groups of people claiming to follow one of Indonesia’s recognised religions, but which, according to religious orthodoxy, deviate from the main tenets of those religions. It does not, for, example, assist Indonesia’s Ahmadi’s, some of whom have had similar problems obtaining a KTP to the applicants in this case (Suroyo 2017), quite apart from other discrimination and violence.

Second, the Court’s suggested solution of allowing adherents to list ‘penghayat kepercayaan’, instead of the specific name of their belief, is questionable. Of course, given the large numbers of ‘beliefs’ in Indonesia, listing them individually might cause complications and confusion, particularly for the development of a population database. Nevertheless, full constitutional recognition appears to require citizens to be able to list their specific beliefs – and not just that they have a belief that falls outside of the recognised religions. The Court’s solution is equivalent to allowing adherents to recognised religions only to list *agama* in their religion column, rather than their specific religion, whether that be Islam or Christianity, for example. No doubt the established religions would reject this.

Third, it is by no means clear that the decision will be implemented uniformly across the archipelago. Soon after the decision was handed down, MUI condemned it and, at its National Meeting in November 2017, criticised it for treating religions and beliefs as having the same status. MUI called

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43 Constitutional Court Decision 97/PUU-XIV/2016, para [3.13.5].
44 The Minister pointed to MPR Decision IV/MPR/1978 on Broad Outlines of State Policy in which it is said that *aliran kepercayaan terhadap Tuhan Yang Maha Esa* (streams of belief in Almighty God) are not *agama* (Marsyaf 2017).
45 The Court did not highlight this point in its decision. It does, however, bring into question the Court’s claim that Indonesian law and international human law concerning religious freedoms were broadly similar, given that the main human rights conventions contain no such limitation for recognition.
for special identity cards to be issued without a religion column for those with indigenous beliefs. The government appears to have followed this suggestion. In June 2018, the Ministry of Home Affairs issued a regulation and a circular containing information about new types of KKS that are needed to implement the MK’s decision.\(^{46}\) On these cards, instead of a ‘religion’ column, there Kepercayaan column in which ‘Kepercayaan Terhadap Tuhan yang Maha Esa’ will appear, not ‘penghayat kepercayaan’ as the Court suggested. However, progress on issuing KTPs with kepercayaan columns has been slow (Cochrane 2018). At time of writing, reports were emerging that they are available in some parts of Indonesia, but not others (‘Kolom Penghayat Kepercayaan Terganjal Aplikasi’ 2018; ‘Layanan E-KTP bagi Penghayat Kepercayaan Mulai Tersedia di Yogyakarta’ 2018).

Finally, being able to indicate ‘belief’ on these documents, rather than leaving them blank, may do little to end the discrimination, in practice, that not listing one of the recognised religions may continue to have. There are many aspects of life in Indonesia where not following a recognised religion – particularly Islam – is a disadvantage, regardless of what religion is listed on one’s identify card. Discrimination will likely continue in the workplace – particularly in the public sector – and perhaps in politics. Children might still find progressing in school difficult if religious education is mandatory, but their particular religion is not taught. It may still prove difficult to obtain a marriage certificate if the marriage ceremony is not officiated by a religious figure who has been registered with the Ministry of Education and Culture.\(^{47}\) In this context it is important that the Council of Islamic Scholars (Majelis Ulama Indonesia) has rejected this decision, arguing that religion and belief are separate, and suggesting that believers of indigenous religions should be given a different type of identity card. MUI’s view may be influential, at least in more conservative circles, including within government.

**Concluding observations**

The Constitutional Court often portrays itself as ‘the guardian’ of democracy and human rights. In a formal sense this is undoubtedly true: one of its main functions is to defend Indonesia’s constitutional bill of rights from legislative interference. Of course, many of these constitutional rights are designed to protect minorities. However, constitutional rights cases are rarely straightforward, and the Indonesian Constitutional Court, like courts the world over, is often asked to make decisions when the rights of different citizens seem to conflict with each other. Many of the world’s courts have developed quite sophisticated legal tests to work out which of these rights should trump any others. These tests are differently formulated from place to place, but will generally require a court: to identify a legitimate goal that interfering with the right must seek to attain; to determine whether the interference with that right is a suitable means of achieving the goal; to examine any less intrusive alternatives; and to decide whether the burden placed on right holders is proportionate to the goal (Möller 2012).

The Indonesian Constitution appears to have a basic test for this: Article 28J(2) of the Constitution, set out above. However, while the Constitutional Court has used Article 28J(2) countless times to justify refusing to protect the rights of applicants, it has not explained in its decisions how it applies Article 28J(2). (Of course, the application of Article 28J(2) may be quite clear behind closed doors, but these discussions are confidential.) In particular, it does not explain how it balances rights, and whether interfering with those rights is necessary to meet the purpose of the legislation. This leads to a lot of legal head scratching about how the Court reaches its decisions.

\(^{46}\) Minister of Home Affairs Regulation 118 of 2017 on Family Card Forms and Circular Letter 471.14/10666/DUKCAPIL.

\(^{47}\) See Article 81 of Government Regulation 37 of 2007.
Homosexual sex and Beliefs are different to many human rights cases the Constitutional Court has heard because the Court was not directly called upon to consider competing rights claims. Unlike in the 2009 Blasphemy Law case, for example, in Beliefs the government and DPR did not put forward strong arguments against the application, and no religious organisations, such as MUI, appeared as a ‘related party’. Accordingly, they were not able to argue before the Court that recognising indigenous faiths might affect the religion-related constitutional rights of adherents to Islam or other recognised religions, for example. There was, therefore, no pressure on the Court to consider whether the decision compromised or jeopardised the rights of others; it sufficed for the Court to simply mention that the rights of others would not be affected by recognising indigenous faiths, without being more specific. In Homosexual sex too, the majority was able to throw out the application on jurisdictional grounds without having to consider competing rights. The minority did not attempt to balance any rights against Article 28J(2), although it did mention Article 28J(2) to support its conclusion that the Constitution was a ‘godly constitution’, meaning that the validity of legislation could be determined by reference to religious norms.

While the outcomes in these cases may be positive for minority groups, one is not left with an impression of consistency in decision-making, or confidence that the legitimate rights and interests of minorities will be upheld in future cases, when balancing might be necessary. In previous cases in which the Court has refused to uphold the rights of minority groups, it appears that the Court has used Article 29J(2) to simply justify what it considers to be the interest of majority groups – presumably, on the grounds that the rights of large numbers of people will always outweigh the rights of smaller numbers. This type of thinking appears to be behind the Court’s decision in the 2009 Blasphemy Law case, for example, where the Court held that the feelings of believers of the orthodox religion, apparently adhered to by a majority, trumped the rights of a religious minority to express their religious beliefs.48 Clearly, this crude method of balancing rights will rarely, if ever, permit acceptable levels of constitutional protection for minorities.

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48 Quite apart from this, the court also did not explain how the religious practices of one very small group could affect the ‘right to have a religion and to worship in accordance with that religion’ of the Muslim majority.


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