THE ROLE OF THE CONSTITUTIONAL COURT IN THE PROTECTION OF RELIGIOUS MINORITIES IN INDONESIA

A POST-REFORM ERA REFLECTION

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1 INTRODUCTION

1.1 Background

Twenty years ago marked the end of the dictatorship of Soeharto and his New Order regime and the state of Indonesia’s transition into democracy. Ever since then, it has been often-cited as the success story of democratization; it has been given by Freedom House a score of 3.0 in freedom rating (1 being most free and 7 least), higher than other countries in South East Asia region (the most affluent, Singapore, for example had a score of 4). Yet as Meitzner cautioned since 2011, there are signs that Indonesia’s democracy is stagnating. He cites as one of the areas where Indonesia is experiencing rollbacks, endangering its forward trajectory in democratization, as the protection of minority rights.

Minority rights protection is important in a democracy in order to prevent it from transforming into tyranny of majority. Yet two decades after the Reform era started, one disheartening trend in Indonesia democracy is the prevalent human rights violations of religious minorities. At first, the development seemed to be promising. Faced with the challenge to redesign the country after 32 years under an authoritarian regime, rebuilding the institutions of democracy, namely the state, rule of law, and democratic accountability, the political elites throughout the period of 1999-2002 laid the foundations for the necessary legal and institutional reforms within a constitution, transforming the country into a constitutional democracy. While the constitution making process and the resulting product may be viewed as imperfect and even “messy”, after four amendments the 1945 Constitution enshrined more participatory political processes, a stronger system of check and balances and the incorporation of constitutional human rights. The human rights provisions, largely enshrined in Chapter XA, mirror the provisions in the Universal Declaration of Human Rights (UDHR) and the International Covenant for Civil and Political Rights (ICCPR). Clarke, as cited by Indrayana, argued that the

incorporation of human rights marks a “radical shift in Indonesia’s constitutional philosophy from essentially authoritarian to a more liberal-democratic model”. In particular for religious minority rights, the Constitution provides protection both the freedom of religion and belief as well as freedom of expression as well as assurances for non-discrimination and equality before the law.

Another positive yield from the constitution making process is the establishment of a Constitutional Court (CC), which became operational by the enactment of Law No. 24 year 2003. The CC, separate from the court system under the Supreme Court, has jurisdiction over, among others, the constitutional review of national level laws. Constitutional review is important as many laws promulgated before the constitutional reform were still in force and many of them have been used to or serve as foundation for other legal instruments that repress human rights.

Human rights defending civil society organizations (CSOs) in Indonesia have been utilizing the CC to pursue their agenda. After all, they are no stranger to using strategic litigation to pursue their agenda. Even before the dawn of the New Order era, whereby there was no independent judiciary and very restricted democratic space, they use strategic litigations in pursuance of legal reform and rights protection - if not to win at least to bring forth the issue to national discourse. Yet if success is defined by having their judicial review (JR) petitions granted, the result has been mixed. Moreover, even in cases where the CC grant the review

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6 Ibid., 287.
7 Indonesia, The 1945 Constitution, art. 28E and 29. “Belief” here is used to translate the word “kepercayaan”, which may also be translated as “conviction”.
8 Ibid., art. 28, 28E (3).
9 Ibid., art. 27, 28D, 28H, 28 (I).
10 Indonesia, Law No. 8 Year 2011 on the Amendment of Law No. 24 Year 2003 on the Constitutional Court, art 27.
11 It should be noted that Law No. 24 Year 2003 on Constitutional Court originally tried to restrict this power to only for laws promulgated after the Constitutional Amendments, a restriction that is annulled by the Constitutional Court itself. (see section 5.2. of this study)
13 For example, in 2016-2017 out of 121 petitions, only 26 were granted by the Constitutional Court. See Innggit Afani and Ismail Hasani, Membangun Putusan Mahkamah Konstitusi yang Berkarakter, Laporan Kinerja Mahkamah Konstitusi 2016-2017 (Jakarta: Setara Institue, 2017), 2.
petition, the compliance by the relevant branches of the government is seldom tracked or studied, especially with relation to civil and political rights.

JR petitions in CC have also been used in defending religious minorities rights. While violations of religious minorities’ human rights in Indonesia often occur in the form of inter-religious and sectarian communal conflicts, Indonesia’s legal system in particular perpetuates discrimination against them. While there are occasions when religious minorities are prosecuted by laws related to defamation and public order, arguably the most problematic legal instrument for religious minorities is the Law on the Prevention of Misuse and/or Defamation of Religion Law No. 1/1965- hereinafter shall be referred to as Blasphemy Law. It is a brief law with only four substantive articles: the first three regulate protection measures for six religions categorized as “religions adhered to by the population in Indonesia”, while the fourth constitutes an amendment to the prevailing criminal code to assign punishment of maximum five year imprisonment for blasphemous acts. There are two primary reasons why this law is problematic: firstly because it has become the legal basis of, or at least the precedent for the systematic marginalization of other religions outside of the six, including local religions. Secondly, the criminalization of blasphemy, a provision that has often criminalized those of religious minorities.

There have been at least three constitutional reviews in the past ten years in an attempt to address these problems. In 2010, a JR petition was filed to challenge the constitutionality of the entire Blasphemy Law, citing numerous constitutional rights from the right to legal recogni-

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14 Exacerbated by the omission by the State against the victimized minorities. These have been reported by many CSOs, for example until 2015 Wahid Institute issues annual reports, tracking violations of FORB by state and non-state actors. See for example The Wahid Institute, “Laporan Sementara Dinamika Kebebasan Beragama dan Berkeyakinan (KBB) di Indonesia tahun 2015,” 10 April, 2018, http://www.wahidinstitute.org/wi-id/images/upload/dokumen/laporan_sementara_kbb2015.pdf


16 The six are Islam, Christianity, Catholicism, Hindu, Buddhism and Confucianism, with justification for their official acknowledgement as “This can be proven in the history of the development of religions in Indonesia.” See Law No. 1/PNPS/1965 on Prevention Abuse and/or Religious Defamation, Art 1, Elucidation.

17 Melissa A. Crouch, “Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law,” Asian Journal of Comparative Law 7 (2011): 4. It should be noted that the common translation in the literature is “Blasphemy Law” but the law in fact uses the word “Penodaan” which bears the meaning of “besmirching” or “defaming”,

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tion and certainty,\textsuperscript{18} freedom from discrimination,\textsuperscript{19} freedom of religion and belief (FORB),\textsuperscript{20} to freedom of association and expression.\textsuperscript{21} Two years later, a petition was filed challenging the constitutionality of Article 156a in the Criminal Code, which was included in the statute pursuant to the dictate in the Blasphemy Law. The primary ground for the petition is that the elements of the crime were too ambiguous to assure legal certainty. Finally, in late 2016 (the case was decided in 2017) a judicial review petition was filed against provisions in the Civic Administration Law that differentiated the registration practice for adherents of other forms of faith categorized as aliran kepercayaan (mystical beliefs, which include traditional and/or local religions) compared to the six state-acknowledged religions. The primary grounds for the petition do not include freedom of religion and freedom of expression, but leaned heavily on violations of rule of law, equality before the law, legal certainty and equal treatment, as well as right to freedom from discrimination.

1.2 Research Question

Against this background, this study is primarily aimed at analyzing the CC in Indonesia as a space to defend particularly religious minorities’ rights and within the broader context of a transition to a constitutional democracy. With the three legal cases as the focus, this study seeks to answer the following question: overall, what is the effectiveness of judicial review in the legal protection of religious minorities in Indonesia? In answering this question, the following sub-questions will be addressed:

1. What role can judicial review and CC play in Indonesia as a constitutional democracy? This in part requires addressing the effect of the unresolved debate on the place of religion in the state’s construct influences the CC’s decision-making.
2. What are the legal and institutional issues that need to be considered when utilizing the CC as a space to defend religious minorities rights in Indonesia?

\textsuperscript{18} Indonesia, The 1945 Constitution, art. 28D (1).
\textsuperscript{19} Ibid., art 28J (1).
\textsuperscript{20} Ibid., art 28I (1) and 29 (2).
\textsuperscript{21} Ibid., art. 28E (3).
1.3 Previous Studies

There have been numerous studies written on the issue of minority rights in a pluralistic democracy, the appropriateness of judicial review with relation to separation of powers, and the use of strategic litigation in defending human rights. In the context of Indonesia, the issue of constitution making, rule of law, judicial powers, as well as the ever-lasting debate on whether Indonesia will be a confessional or secular state also have been covered in many literatures. Many academics and NGOs have also studied the issue of FORB and freedom of expression in the country, including specifically the Blasphemy Law and its implications to the rights of minorities. Lastly, an overview of CSO strategies for managing diversity and FORB has also been conducted most notably by Bagir, Wefner, and Fauzi. This study is written in the hope that it can add to the existing literature by the combined focus on religious minorities, the CC, and its judicial review jurisdiction, and the case studies in order to specifically address Indonesia’s CC effectiveness as a space to claim religious minority rights.

1.4 Methodology

While this study heavily leans to the legal and institutional analysis of the CC and the human rights framework relevant to religious minorities’ rights, it will also take into account the historical, political, and civil society variables. Thus, it will cover both the substantive and practical dimension of the law regulating human rights, specifically the principle of non-discrimination and equality and FORB both at international and national level. It will then


24 Many CSO reports as well as academic work such as Melissa Crouch (cited above), Aksel Tomte, “Constitutional review of the Indonesian Blasphemy Law,” Nordic Journal of Human Rights 30, no. 2 (2012): 174-204


26 As will be shown in section 3 of this study these variables are used by Langford, Rodriguez-Garavi, and Rossin in assessing court judgments related to social and political rights in Malcolm Langford, César Rodríguez-Garavi, and Julieta Rossi, Social Rights Judgments and the Politics of Compliance: Making It Stick (Cambridge: Cambridge University Press, 2017), 4, 83.
assess how the CC has interpreted these standards with relation to the petitions related to the Blasphemy Law. The procedural dimension will cover the surrounding context, which is the institutional and socio-political condition relevant to the rights of religious minorities in Indonesia. It will also include the development of the CC, its mandate and its performance of the mandate, especially with relation to human rights issues.

This research will rely on literatures, including primary sources (especially, but not limited to relevant CC’s decisions and civil society’s as well as government bodies’ press releases and statements) and secondary resources in the form of relevant prior studies on the issues covered by this study. The study will be structured as follows: first, it will discuss religious minority rights, highlighting the importance of minority protection in a democracy as well as the applicable international human rights standards of minority rights as both group and individual rights. It will then continue to discuss the role of judicial review in defending democracy and human rights. The section will explain the debate on democratic legitimacy of judicial review and its utility in defending human rights. This will include a discussion on the limitations of strategic litigation for defending human rights in different stages of democratization. The next parts of the thesis then will contain a discussion on the specific situation in Indonesia concerning religious minorities, especially FORB violations stemming from the Law on Blasphemy. Legal reform that brings about stronger human rights regime in the country and the establishment of the CC will then be addressed. The use of judicial review by civil society actors in human rights advocacy will be highlighted, as well as a preliminary assessment on the impact of its judicial decisions. The last part of the thesis will focus on the three CC’s decisions related to Blasphemy Law as mentioned above. It will outline the court’s perspective on the principle of equality and non-discrimination, legal certainty, and FORB.

2 Right of Minorities in a Democracy

Beetham in his book *Democracy and Human Rights* encourages understanding democracy as beyond its institutional-centred definitions, such as that is being forwarded by Joseph Schumpeter: “an institutional arrangement for arriving at political decisions which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”\(^{27}\) He rather promotes viewing democracy starting from the principles it seeks to embody or realize

\(^{27}\) Beetham, *Democracy*, 2.
and then the institutions required to materialize them. The core principles of democracy, he asserts, are popular control and political equality. Having said that, democracy inherently endorses the rule of majority, and maintaining genuine equality in such setting can be a challenge especially in a pluralistic society. As Swain asserted, the fact that “…democracy is a conflict-driven process which may exacerbate inequalities and encourage affected groups to pursue insurgency” should always guide every process of democratization. Despite the danger that a democracy can turn into “structured dominance of adversarial majority groups” democratic systems are ones that offer most promise for minority groups as its basic principles demand that all members should have a voice.

The participation of minorities in a democracy hinges on the possibility that the minority in a particular issue can be part of the majority in others, yet for more ‘permanent’ minorities such as ethnic or religious, this may be hard to achieve. Thus as a general rule, diversity poses significant challenges for democratic politics. There are a number of ways to avoid this according to Beetham, including by identifying ways to incorporate minority views systematically in decisions without blocking political change or to take some issues out of the scope of majority decisions altogether- for example enshrining human rights in a bill of rights and/or a constitution. In this way, political equality can be maintained and majoritarianism as a procedural device retains its justification and legitimacy as long as it does not seriously harm democracy’s basic principles. This is one of the argument often used to champion constitutional democracy, where by per Rawlsian public reason, political decisions shall be made using publicly available values and standards within the framework established in the highest law of the land.

While human rights are expected to temper the adverse effect of democracy’s tyranny of majority inclinations in protection of minorities, in fact there is an absence of a commonly agreed definition of the term. A working definition may be derived from the one offered by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission of Prevention of Discrimination and Protection of Minorities in 1977:


29 Ibid., 222.

30 Beetham, Democracy, 29.

31 Swain Ashok, “Democracy”, 220.

32 Beetham, Democracy, 25-30.

“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”

A debatable element from this definition is the requirement of citizenship for a group or an individual to claim minority rights. However, other definitional components to define minority may be derived from Capotorti’s proposal, namely that a minority is a group in (a) “non-dominant position”, (b) of different “ethnic, religious or linguistic characteristics” and (c) show the “sense of solidarity… towards preservation of culture, traditions, religion or language”. Additionally, aside from these objective criteria, the UN Office of High Commissioner on Human Rights (UN OHCHR) also suggests the inclusion of a subjective criterion, i.e. “the will on the part of the members of the groups in question to preserve their own characteristics and the wish of the individuals concerned to be considered part of that group”.  

The importance of protecting the individual rights of those belonging to a national, ethnic or linguistic minorities is underlined in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities then further elucidated this article. The preamble of this non-binding document underlines that the promotion and protection of minority rights “as an integral part of the development of society as a whole and within a democratic framework based on the rule of law” is necessary for international relations as well as the State’s internal political and social stability. Further, in 1994 the Human Rights Committee issued General Comment 23 - a non-binding but authoritative ICCPR’s stipulation interpretation- on Article


35 In General Comment 23, the UN Human Rights Committee stated that all of the rights in the International Covenant for Civil and Political Rights (ICCPR) should be guaranteed for all persons belonging to a minority except for rights expressly reserved for citizens such as ones stated in Article 25 UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, available at: http://www.refworld.org/docid/453883fc0.html, para 5.1.


27. It further underlines that while Article 27 is concerning individual rights, they are to be enjoyed “in community with the other members of the group”, underlining that this may require States to take measures in protecting the identity of minority groups.\(^{38}\)

As with most rights, these can be limited but legitimate limitation should only be in place under specific conditions. Specifically, relevant to this study as mentioned above is FORB, freedom of expression, and associated to them, freedom of association, and in the ICCPR, all of them may be limited under the condition that the limitations are:

- a. prescribed by law
- b. necessary
- c. to protect the legitimate purposes of:
  - i. public safety
  - ii. (public) order
  - iii. (public) health
  - iv. (public) morals
  - v. the fundamental rights and freedoms of others.
  - vi. reputation of others\(^{39}\)

On FORB, the Human Rights Committee holds in General Comment 22 that while the \textit{forum internum} of this freedom cannot be limited\(^{40}\) the external manifestation can be. However, the Committee cautions that although the limitations should be only for the prescribed legitimate purposes, the scope of which should be defined by taking into account “the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26”\(^{41}\). The Committee also advocates for caution in implementing legitimate limitation on freedom of opinion and expression in General Comment 34, underlining the importance for state parties to the ICCPR to “confirm to the strict test of necessity and proportionality.”\(^{42}\)

\(^{38}\) UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 23: Article 27 (Rights of Minorities)}, 8 April 1994, CCPR/C/21/Rev.1/Add.5, para 6.2.


\(^{40}\) UN Human Rights Committee (HRC), \textit{CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)}, 30 July 1993, CCPR/C/21/Rev.1/Add.4., para. 2.

\(^{41}\) Ibid., para 18.

\(^{42}\) UN Human Rights Committee (HRC), \textit{General comment no. 34, Article 19, Freedoms of opinion and expression}, 12 September 2011, CCPR/C/GC/34, para 22.
While freedom of expression and FORB sometimes are considered to be at odds with one another, in fact they are equally important and enforcing each other, especially for religious minorities. This is underlined in the UN OHCHR Rabat Plan of Action, that

“the freedom to exercise or not exercise one's religion or belief cannot exist if the freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters could be held”43

3 Judicial Review in Constitutional Democracy as a Rights Protection Mechanism

As already explained above, the threat of majoritarianism is one of those that may undermine the quality or even sustainability of democratic rule. Democracy may allow a majority to emerge that could use its numerical advantage to restrain, limit or even suppress civil rights.44 Aside from the division of power, one of the ways to avoid this is by establishing a constitutional democracy, establishing a body of rules that will enshrine the agreed rules and procedures of the polity, including the rights of the citizenry. There has been a definite trend in recent years toward the adoption of constitutions by newly democratizing governments. The newer constitutions developed over the past fifty years have demonstrated “the global influence of democratization, human rights ideology, and economic neoliberalism”45 Arjomand divides the development of constitutionalism in five stages, from the pre 18th-century legal development traditions of law-making constitutes royal decrees on administrative law and the rest of body of law was developed through law finding and jurisprudence, to authoritarian constitutions for state building purposes (rechtstaat) to the present era of constitutionalism.46 Citing Stone Sweet, he points to the characteristic of the new constitutionalism as “a mixture of increasingly judicialized legislation by parliaments and administrative organs and legislative jurisprudence by the constitutional courts and supranational judiciary organs”47

47 Ibid.
Legislative jurisprudence through a CC’s judicial power is an extension of the characteristic of a constitutional democracy, which exercises permanent control over the activity of the government to compel public authorities to respect human rights and liberties. After all, law as expression of majority will is not itself the ultimate legal means of guaranteeing the rights of the governed; without certain safeguard, it may only be the manifestation of just another form of absolutism. Thus, a CC with judicial review power will, among others, make charter of rights and liberties jurisprudential and separate them from the will of representatives. The ability for individuals to petition for judicial review avails an avenue whereby the governed can be recognized as autonomous and can inspect or check the government’s activities or at least its legal products. As Rousseau impressed, “The control over the constitutionality of laws is what allows for the imposition upon the agents of the state respect for the rights of the governed between one election and the next.” Similarly, Shappiro in his democratic justice theory posits that the court is a manifestation of the institutional response when the two principles in a constitutional democracy, majority rule and equal self-determination, conflict.

In post authoritarian contexts, “the emergence of constitutional courts as guardians of the new constitutional orders is largely due to their being instruments of unconditional enforcement of individual rights.”

The judiciary’s judicial review power entails its increased power in lawmaking, and the source of the debate on this issue is to what extent the judiciary should exercise this. After all, the idea of separation of power in a democracy between the executive, legislative, and judicative classically demands, to ensure legitimacy of law, that lawmaking lies in the hands of the legislative as the representatives of the people. As Montesquieu stated, in order for liberty to be respected, the same man or the same body of principals or nobles or of the people must not wield the power to make, implement laws and adjudication. However, democracy is not only about ensuring collective self-government, but also about opposing arbitrary exercise of power which may violate the very principles democracy seeks to attain: popular control and political equality. Further, as Rousseau observed, while division of power is hoped to ensure that the legislatives will always produce laws that abide to the Constitution, the unity of state power tends to be re-established in the executive who will need to confer the authority over normative power to the winning party when running the government. Thus, when the

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49 Ibid, 277.
52 Rousseau, “the Constitutional”, 274.
53 Shappiro, “Element”, 583.
constitution is enshrining both the relationships between public authorities and the human rights that need to be protected for all, including the minority, a new democratic configuration will be needed. In this sense, one that accommodates the judicial review power of the Court to assure that the exercise of power in governance does not exceed the limits set in the Constitution.

There are typically two types of judicial reviews, namely the strong one, where courts have the authority to annul the law based on lack of constitutionality, and the weak, whereby courts may scrutinize legislation, the constitutionality of legislation, or, whether they violate rights, but they cannot decline applying laws or moderate their applications only to avoid right violation. This study shall focus on strong type of judicial review, but even in this case, there remains the important question of the degree of strength. Burt, for example, sees the role of judicial review as preventing domination through democratic means and should do so without usurping the role of the legislative. As Shappiro impressed, a minimalist role of CC can serve as a remedy to compensate for the imperfection of democracy, but “remedies should be no more intrusive on the democratic process than is necessary to repair them.” Yet some may justify more expansive judicial activism, especially in places where the democracy is imperfect or in constitutional autocracy. Chowdhury, for example, speaking in the context of India, asserts that the judiciary has the responsibility to check the acts of the other branches of the government, and takes the role of the “supreme interpreter, protector and guardian of the supremacy of the constitution”. Thus, in the event of other branches’ failures to exercise their constitutional duty the judiciary may assume the role of a policy maker, legislator, and even the role of a monitor to oversee the implementation of its directions. As Lever warned however, the support for judicial review is often based on the assumption that judges are likelier to defend fundamental rights, a debatable conjecture especially in relation to economic and social rights, which may not be part of the constitution and entails complex arrangements. The presumption of judicial independence and neutrality is also difficult to be verified. In many jurisdictions judges with judicial review powers are appointed by a selection process that involves political elites. Also, as Langford noted “indirect political pressures or personal ideology may compromise judicial independence.”

55 Ibid.
58 Ibid., “Element”, 610.
According to Rousseau, there are three ways for CC to interpret the constitution in a judicial review of a legislation:

a. Limiting interpretation: where it removes juridical effect from disputable legislative provisions or excluding from among possible interpretations those that would make it contradict the constitution (declaring provisions as having devoid of any legal effect).

b. Constructive interpretations: it no longer curtails but adds provisions to the law that are designed to make it consistent with the constitution or make a legal clause convey more meaning than expressly provided in the text.

c. Guideline interpretation, wherein council define and specify for those authorities responsible for the implementation of the law the modes of application necessary for conformity with the constitution.62

The perception of CCs as bastions of human freedom and democratic freedoms makes it a space where civil society and individuals come to defend their rights. The constitutional frames serving as political and moral frames, they provide spaces for movements to articulate, disseminate, and gain attention for their broader demands.63 In other words they become forums for mobilization, contestation as well as conflict, namely where constitutional meanings are contested, which relate to broader political and moral commitments.64 Writing about CCs in former Soviet Union states, Scheppele asserted that they can force politicians to honor commitments made to implement human rights and freedoms, thus serving as an important check and balance to post-communist governments that might adopt different policies. Scholarly research has found mounting evidence that under certain conditions CCs can and have become the primary vehicles of democratic values.65 Yet it should also be borne in mind that judicial decisions are only points in a long process of social change. Whether or not the courts aid or hinder social progress, also depend on their position in the broader political environment.66

Beyond perception however, how does one analyse whether a court in a jurisdiction is an effective space to defend human rights? Langford, Rodriguez-Garavito, and Rossi noted that compliance for judicial rulings, specifically on economic and social rights, is impacted by

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63 Ibid., 893.
64 Ibid.
many factors, including “…responsiveness of defendants, courts and public opinion, influence of the civil society groups and their allies”\textsuperscript{67}. In their research, focusing on social rights judgments, they use four broad analytical frameworks in examining the question of the politics of compliance, namely:

a) Legal variables, which include the nature of the right, litigants, remedies and court monitoring, legal system and judicial culture

b) Political variables, namely the characteristics of the state and political system, such as the capacity of the state apparatus to implement rulings, type of political system, institutional arrangements between the branches of government, the type of defendant

c) Socio-economic variables that cover broader country characteristics such as levels of wealth, social inequality and ethnic fractionalisation as well as degree of public and majoritarian support for particular cases or litigants.

d) Civil society variables including structure and cohesion of the partnership between litigants and lawyers and broader civil society coalitions.

In the same volume, Sigal, Rossi and Morales examine a slightly wider range of variables that might explain enforcement, such as the size of the case, complexity of the remedy, court’s stance, institutional strength, and political will to comply.\textsuperscript{68}

Though all of these variables are significant, the thesis mainly addresses the legal variables but also in relation to how these are read through broader political and social factors in Indonesia.

4 Protection of Religious Minorities in Indonesia’s Human Rights Legal Framework: An Inconsistent Story

4.1 The History of Managing Diversity in Indonesia

Due to its geographical and demographic makeup, Indonesia has always had to grapple with the issue of its diversity. This was evident from the first historical pronouncement of Indonesia as a nation by the educated native youth of the then Dutch East Indies. During the Youth Conference of 1928, the Youth proclaimed Indonesia as “One Land, One Nation, One Language". The one unifying language however was not Javanese, the language spoken by the

\textsuperscript{67} Langford, Rodríguez-Garavito, Rossi, \textit{Social Rights}, 4.

\textsuperscript{68} Ibid., 83.
ethnic majority, but one derived from Malay. This move was geared to encourage the non-Javanese ethnic groups to buy into the national construction project. A similar issue, but this time with religion, had to be dealt with during the national independence preparation during the Japanese occupation, where debates occurred in the occupier’s sponsored Investigating Committee for Preparatory Works for Independence (Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI)). As noted by Elson, the Committee immediately had to tackle the question of positioning Islam in the structure of the new State during the discussion on the nation’s ideological foundation. Soepomo, one of the Committee’s members and a Dutch-trained legal scholar, underlined the need that the new state “… will not unite itself with the largest group, but which can stand above all groups, but which can pay regard to and respect the peculiar features of all groups, both large and small.”

Despite the call from Committee members of Islamic background, such as Muhammadiyah’s Ki Bagus Hadikusumo, to build an Islam-based state, the nationalist view prevailed. The agreed upon founding principles of Indonesia, the Five Principles (Pancasila), which were later on incorporated into the preamble of the Constitution eventually did not include any mention of the religion. Yet concessions were made, manifested in the first principle, “The belief in One and Only God”, and Article 29 of the Constitution adopted in 1945 states that “the State is based on the divinity of the One and Only God”.

The following period after 1945 saw Indonesia’s brief foray into federal democracy and attempts to remake the Constitution as a Unitarian State, a project soon became deadlocked on the question whether the State should be a sharia or secular state. This time the debate was ended in 1959 by President Soekarno who declared that Indonesia should return to the skeletal 1945 Constitution and become a “Guided Democracy”. The Guided Democracy era, 1959-1966, saw the transformation of Indonesia’s legal culture into one that put politics above legal

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70 Muhammadiyah is a major Islamic non-governmental organization founded in 1912 by Ahmad Dahlan and views itself as a reformist socio-religious movement. The other one is Nahdatul Ulama (NU) which is a traditionalist Sunni Islam movement that was established in 1926  
71 Elson, “Another Look”, 111. Muhammadiyah and Nahdlatul Ulama are the two largest Muslim Organizations in Indonesia.  
72 Indonesia, The 1945 Constitution, art. 29 (1).  
73 Tim Lindsey, “The Trajectory of Law Reform in Indonesia, A Short Overview of Legal System and Change,” in Lindsey, Indonesia and Law, 9.
certainty and rule of law, where Soekarno became the supreme leader. The same era also saw the increased influence of the Communist Party, and their power tussles with other political forces at the time, which includes Islamic and nationalist parties as well as the military. Some historians also point to the fear of mainstream Moslem organizations of the gaining prominence of aliran kepercayaan (mysticism), a term that describes either the blending of elements of traditional religions such as Kejawen with Islam, a standalone local faith, or newly emerging cults. In a move arguably made to alleviate the tension and fear of both communism (which was often equated with atheism) and mysticism, Presidential Declaration No. 1/ 1965 on The Prevention of Misuse and/or Defamation of Religion was issued. The Declaration, which was made into Law after the fall of Soekarno in 1966, is the legal instrument that became the root of the differentiation between state-acknowledged and non-state acknowledged religion, as well as the separation between religion and belief.

The Blasphemy Law is a brief law, with four substantive articles and an elucidation section. However, its impact in the years after the enactment has been enormous. The law itself is

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74 Ibid.
75 Sudarto, Adherents, 9-13.
76 Ibid., 25.
77 The content of the law is as follows:

Article 1
Every person is prohibited from intentionally expressing, advocating or mobilizing public support for interpreting a religion adhered to in Indonesia or performing religious activities that resemble the religious activities of the religion, the interpretation and activities of which deviate from the principal teachings of the religion.

Article 2
(1) Whoever violates the content of Article 1 shall receive an order and hard notice to cease the act in a Joint Ministerial Decree of the Minister of Religious Affairs, the Minister of Home Affairs, and the Attorney General.

(2) If the violation stipulated in paragraph 1 is committed by an organization or a belief (aliran kepercayaan), the President of the Republic of Indonesia may disband the organization or the belief and proclaim the organization as forbidden organization or belief, among others after the President has received advice from the Minister of Religious Affairs, the Minister/Attorney General and the Minister of Home Affairs.

Article 3
If after the actions taken by the Minister of Religious Affairs together with the Minister/Attorney General and the Ministry of Interior Affairs or by the President of the Republic of Indonesia pursuant to the stipulations in Article 2 against person, organization or belief, and they continue to violate the stipulations in Article 1, thus the person, believer, member and/or member of management of the Organization related to the belief shall be punished with imprisonment of at the maximum five years.

Article 4
In the Criminal Code a new Article shall be added with the following substance:

Article 156a
problematic as it criminalizes public statements or interpretation or activities that deviate from or defame religious teachings, which in itself is problematic from the perspective of freedom of expression and freedom of religion. This criminal provision is inserted in the Criminal Code Article 156 (a). However, the most problematic part of this law is the Elucidation, both in what it fails to define and what it explains. The General Explanation of the Elucidation states that firstly, the inclusion of the belief in One and Only God in Pancasila signifies that “the national unity is based on religiosity”.\textsuperscript{78} It continues to describe that the Presidential Declaration is a response to the emergence of “…beliefs or mystical/belief organizations which violates the teachings and laws of religions” and that “Many of the teachings/acts of the adherents of the beliefs have caused acts that violate the law, disrupt the unity of the Nation and defame Religion”.\textsuperscript{79} The section further defines that the religions protected by the legal instrument are “Islam, Christian, Catholic, Hindu, Buddha, Khong Cu (Confucius)”. The selection of these six religions was explained by the assertion that “…these six religions are religions that are adhered to by almost all of the population of Indonesia … thus they shall be afforded assistance and protection as what is provided by (Article 1)”. It should be noted here that later on, due to anti-Communist sentiments, in 1967 President Instruction No. 14 on Chinese Religion Belief and Culture also placed restriction on the exercise of Confucianism, and as can be found in Circular Letter of Ministry of Internal Affairs No. 477/74054 on Filling in “Religion” Column dated 18 November 1978, the state-acknowledged religions were reduced to five.\textsuperscript{80}

The Elucidation assures that the legal instrument does not entail prohibition of other religions, providing as examples other world religions such as Judaism, Zoroaster, Shinto and Taoism, but firmly states that “Upon mystic organizations.beliefs, the Government endeavors to reorient them to healthy views and towards divinity of The One and Only God”. As to the party who will have the authority to determine the acceptable principal teachings of the protected

\textsuperscript{78} Indonesia, Law No. 1/PNPS/1965, Elucidation of art. 1.1.
\textsuperscript{79} Ibid., 1.2.
\textsuperscript{80} Indonesia, Presidential Instruction No. 14 Year 1967 on Chinese Religion, Belief and Traditions.
religions, the Elucidation determines that these “…can be identified by the Ministry of Religious Affairs which to that end has the tools/methods to examine them”. 81

Thus, in short, aside from criminalizing non-orthodoxy, the Law and its Elucidation allows the State to gain control over determining orthodoxy of the state-acknowledged religions and set the tone for the policies related to the treatment of these categories of beliefs:

(1) State-acknowledged or official religious minorities, to receive support and protection from the State
(2) Non state-acknowledged or official religious minorities, seemingly to encompass world religions outside the six State acknowledged ones, to be left undisturbed by the State
(3) Other beliefs not categorized as religion, which includes traditional religions, insinuated to be misguided and therefore needed to be encouraged to convert to “healthy views and towards divinity of The One and Only God” which some have interpreted as being converted to the acknowledged religions.

After its enactment, the Blasphemy Law and Article 165a of the Criminal Code has been used to appease majoritarianism tendencies by the State. It was firstly used three years after its enactment during the New Order regime against a magazine publisher who published a short story deemed to insult Islam82 and it was used nine more times until 1998.83

Aside from the danger of being criminalized, those whose belief fall outside the state-acknowledged religion additionally have been subjected to systematic marginalization and discrimination. This is especially the case for traditional religions that are categorized as mystical beliefs rather than religion.84 Despite the fact that they have existed before the world religions coming into the country, the denial of classifying them as religions have deprived

81 Article 1 – It should be noted that the fear of communism also propelled the issuance of Presidential Instruction No. 14 of 1967 on Chinese Religion, Beliefs, and Traditions seeking their limitation and/or dissolution. Although Confucianism was not explicitly dissolved through this Presidential Instruction, public activities related to the implementation of religious activities of Confucianism had been eliminated. Sudarto, Adherent, 25.

82 Pultoni, Siti Aminah, Uli Parulian Sihombing, Panduan Pemantauan Tindak Pidana Penodaan Agama dan Ujaran Kebencian atas Nama Agama (Jakarta: The Indonesian Legal Resource Center, 2012), 51.

83 Crouch, "Law and Religion", 16.

84 Sudarto citing the work of Rachmat Subagya, explaining that this classification started in 1971, when the Monitoring Body of Religion and Belief (Pengawas Aliran Kepercayaan Masyarakat/ PAKEM) under the Attorney General suspended 167 mystical beliefs, while deeming that local religions in God Almighty should be regarded as mysticism beliefs.
them of public services and economic and social rights. This is especially the case because there are civic laws and regulations as well as other economic and social policies built around this categorization. These include laws and regulation governing civic (including birth) registration, marriage, education, and even government employment. Some of the forms of systematic discrimination local religions face as mapped by Setara Institute, many of which are perpetuated after the Reform era, are shown in Table One.\textsuperscript{85}

**Table One**

<table>
<thead>
<tr>
<th>No</th>
<th>Forms of Discrimination</th>
<th>Regulations Used</th>
<th>Impact</th>
</tr>
</thead>
</table>
| 1. | Denial of identity recognition as adherents of Local Religions | 1. Circular Letter of the Minister of Home Affairs No: 477/74054 on November 18, 1978  
2. Instruction of Minister of Religious Affairs of the Republic of Indonesia No. 14/1978 on the follow up to the Instruction of Minister of Religious Affairs No. 4/1987 on Policies to Local Religions.  
The two instruments follow the paradigm of Law No.1/PNPS/1965 which underlie all policies taken by the State towards adherents of local religions | Since the release of these instruments, which are formulated utilizing the logics of the PNPS Law, local religions believers’ identities have always been questioned and subjected to systemic discrimination since their births until their deaths. |
| 2. | The inability to serve in the Indonesian Armed Forces (Tentara Nasional Indonesia /TNI) or the Indonesian National Police (Kepolisian Negara Republik Indonesia/Polri) | Law No.28/1997 on the Indonesian National Police. This law is no longer valid as there is a new law on the Indonesian National Police. One of the problematic article in the law was Article 15 paragraph (1) point h, which insinuate suspicion that adherents of local religions may cause divisions and threaten the unity of the nation. | While this Law has been amended, local religion believer’s right and obligation to serve in the Indonesian National Army or the Indonesian National Police are hindered, as underlined in the Blasphemy Law and Law on Civic Administration CC petitions.\textsuperscript{86} |
| 3. | The inability to register | 1. Law No. 1 of 1974 on Mar- | Due to the provisions of such |

\textsuperscript{85} Ibid., 34-36. Table edited and some additional analysis is included in the event of which additional reference is indicated.

\textsuperscript{86} See for example testimony of Hj. RA Tumbu Saraswati in the Law on Civic Administration Constitutional Court Petition No. 97/PUU-XIV/2016, 52-53, or the testimony of Sardy in the Blasphemy Law Petition No. 140/PUU-VII/2009, 88.
<table>
<thead>
<tr>
<th>No</th>
<th>Forms of Discrimination</th>
<th>Regulations Used</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Marriages to the Civil Registration Office. This is because registration of a marriage has to be preceded by religious wedding documented by the religion's institution and the Civil Registration Office only accepts documentation from the religious institution of state-acknowledged religions.</td>
<td>It was strengthened by the Circular Letter of Minister of Home Affairs No. 477/74054/1975 on Practical Guideline in Inputting Data about Religious Affiliation as stated in Decree of Minister of Home Affairs No. 221a/1975 on the Registration of Marriage and Divorce at the Civil Registration Office.</td>
<td>Letters, marriages of couples of adherents of Local Religions could not be registered. Although Government Regulation No. 37 year 2007 finally allowed for registration of marriages based on local religions’ wedding, the requirements are notably more difficult than for believers of state-recognized religions, including that the presiding local religion leader has to be registered in a local religion organization that in turn has to be registered in the ministry in charge of “guiding Adherent of Belief to The One and Only God”.</td>
</tr>
<tr>
<td>2</td>
<td>2. Letter of the Minister of Religious Affairs to the Governor of East Java No: B/5943/78 on July 3, 1978 on Local Religions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Inputting data in the religion column in the Identification Cards (Kartu Tanda Penduduk/ KTP) according to the religions and beliefs of the adherents of Local Religions.</td>
<td>1. Letter of the Coordinating Minister for Public Welfare (Menteri Koordinator Bidang Kesejahteraan Rakyat/Menko Kesra) No: B.310/MENKO/KESRA/VI/1980 of June 30, 1980 2. Letter of the Minister of Religious Affairs to the Minister of Home Affairs No: B.VI/5996/1980 on July 7, 1980 on Marriage, Identification Card and Funeral Ceremony for the adherents of Local Religions in God Almighty.</td>
<td>Adherents of Local Religions were not able to fill in the column of religion in their national identity cards in accordance to their own religions and beliefs and were thus coerced to register themselves as believers of one of the state-acknowledged religions to secure the identity cards. In Law No. 23 year 2016 they finally can attain national identity cards but the religion column has to be left blank.</td>
</tr>
<tr>
<td>5</td>
<td>Adherents of Local Religions’ freedom to express and to self-develop.</td>
<td>1. Law No. 15/1961 on Main Regulations on the Attorney General of the Republic of Indonesia Article 2(3), renewed in Law No. 16/2004 on the Attorney General</td>
<td>The state supervision of mystical beliefs preceded Blasphemy Law, although the law enhanced the discrimination by criminalizing blas-</td>
</tr>
</tbody>
</table>
2. Decree of the Attorney General of the Republic of Indonesia No: KEP, 108/J.A./5/1984. It was then renewed with the Decree of the Attorney General of the Republic of Indonesia No: KEP.004/J.A./01/1994 on the Establishment of the Coordinating Team of Monitoring Body of Religion and Belief (Pengawas Aliran Kepercayaan Masyarakat/PAKEM). PAKEM was assigned “to conduct research and to carefully assess the development of a Local Religion in order to discover its impact on the public order and peace” and “to be able to take active and preventive measures in accordance with the provisions of applicable legislations” (Article 3, point b and d of Decree of the Attorney General of the Republic of Indonesia No: KEP, 108/J.A./5/1984). PAKEM has the authority to disband beliefs considered to be dangerous to public security.

4.2 Post Reform Constitutional Religious Minorities Protection

As mentioned previously, the change of regime in Indonesia in 1998 has affirmed its commitment to human rights and constitutional democracy. The commitment to human rights was endorsed by national consensus, in particular through the Decree of People’s Consultative Assembly No XVII Year 1998 on Human Rights. Finally, in 2000, the Constitution of Indonesia was amended to include a new chapter that recognized human rights as constitutional rights (Article 28A-28J), adopted from the main international human rights treaties. 

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88 For more on this institution, see Uli Parulian Sihombing et.al., Menggugat Bakor Pakem: Kajian Hukum Terhadap Pengawasan Agama dan Kepercayaan di Indonesia (Jakarta: The Indonesian Legal Resource Center, 2008).

89 Indonesia, Decree of Indonesian’s Consultative Assembly No XVII of 1998 on Human Rights.

90 Indonesia, the 1945 Constitution, art. 28A-J.

91 Simon Butt, The constitutional court and democracy in Indonesia (Brill Nijhoff,, 2015), 18.
nesia’s legal framework dealing with human rights during the post-Soeharto administrations has improved significantly. There have been copious statutory enactments, government regulations and even the ratification of international treaties,\(^92\) including the ICCPR\(^93\) and IESCR.\(^94\) Also as stated above, the commitment brought about judicial reforms, and, along with the democratic climate, there has been more freedom for strategic litigation to claim rights and address human rights violations, especially with the establishment of the Constitutional Court.\(^95\)

In terms of the rights of religious minorities, the post-amendment Constitution has the following guarantees for their freedom of religion and belief and expression:

### Table 2: Provisions on FORB, Freedom from Discrimination, and Freedom of Expression in Indonesia’s Constitution

<table>
<thead>
<tr>
<th>Freedom of Religion and Belief</th>
<th>Right to freedom from discrimination and enjoyment of culture</th>
<th>Freedom of Expression</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 28E (1):</strong> Every person has the right to adhere to and worship in accordance to his/her religion, choose education and learning, choose employment, choose citizenship, choose place of residence within the state territory and leave it as well as has the right to return.</td>
<td><strong>Article 28I(2):</strong> “Every person is free from discriminative treatment based upon any ground whatsoever and entitled to protection against the discriminative treatment.**</td>
<td><strong>Article 28: “The freedom to associate and to assemble, to express thoughts verbally and in writing and so forth shall be regulated by law”.</strong></td>
</tr>
<tr>
<td><strong>Article 28 E (2):</strong> Every person shall have the right to the freedom to believe a belief (<em>kepercayaan</em>), express his/her thought and position, in accordance to his/her conscience.</td>
<td><strong>Article 28I(3):</strong> “The cultural identity and rights of traditional community shall be respected in harmony with the development of the age and civilization.”</td>
<td><strong>Article 28E (3): “Every person has the right to the freedom of association, of assembly, and to express opinions”</strong></td>
</tr>
<tr>
<td><strong>Article 28I(1):</strong> The rights to life, the right to not be tortured, the right to freedom of thought and conscience, freedom to have a religion, the right not to be enslaved, the right to be</td>
<td></td>
<td><strong>Article 28F: “Every person has the right to communicate and to obtain information for the development of his/herself and social surrounding, and shall have the right to seek, obtain, possess, store, process and convey information by utilizing all available types of channels</strong></td>
</tr>
</tbody>
</table>

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93 Indonesia, Law No. 12 Year 2005 on the Ratification of International Covenant on Civil and Political Rights

94 Indonesia, Law No. 11 Year 2005 on the Ratification of International Covenant on Economic, Social and Cultural Rights.

95 Indonesia, The 1945 Constitution, art 24 C.
recognized as an individual before the law, the right not to be prosecuted based on a retroactive law are human rights that cannot be limited under any circumstances.

**Article 29 (2):** the State guarantees the freedom of all persons to adhere to his/her own religion and to worship in accordance to the religion and belief.

As it can be seen from above, the distinction between religion and belief is retained in the stipulations related to freedom of religion. And while Article 28I(1) states that the freedom of religion and belief should not be limited, the limitation clause in Article 28J(2) states: “In exercising his or her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values and public order in a democratic society”

There are two problems with the limitation clause in the constitution. Firstly, there is no specific derogation clause, as can be found in the ICCPR Article 4, allowing states in situation of public emergency to suspend temporarily their obligation to assure the enjoyment of civil and political rights in the Covenant.96 Another problem is the inclusion of limitation based on “religious values”, which is made problematic by the discriminatory laws and regulations pertaining religion as expounded above and unclear constitutional definition as to what constitutes religious values. The Elucidation for Article 28 as a whole (together with Article 29 and 34) is

“The article, may they be pertaining citizens or the whole population constitute the desire of Indonesia nation to develop a State that is democratic and that has the intent to avail social justice and (respect for) humanity”.

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96 In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
Thus, despite the absence of elucidation on the rights and limitation, it impresses the interconnection between the constitutional rights and upholding democracy.

However, flawed, it is hard not to conclude that the national legal framework for human rights definitely improved if compared with the New Order era. Yet the legal developments belies the government’s full implementation of its duties based on both national and international human rights laws. Juwana analyses that from 1998–2003, the protection and promotion of human rights in Indonesia did not meet expectations; the efforts of successive administrations to improve the legal framework and to establish institutions have had minimal effect in contributing to the protection and promotion of human rights. 97 The improvement to Indonesia’s legal framework only provides ideal benchmark standards, which has as yet been translated into concrete reality.98 In terms of the use of Blasphemy Law to criminalize minorities, for example, despite the increased protection of constitutional rights of freedom of religion and belief and freedom of expression, since 1998 there has been an increased in the use of the article. Some theorize that while the New Order regime preferred repression to respond to communal dissent thus used criminalization sparingly in nipping inter-religious conflicts in the bud, the democratic regimes in the Reform era used the law to appease the masses rather than upholding human rights to achieve the same end. Thus, as noted by Amnesty International for example, since 2005-2013 there were more than 12 people indicted and punished based on the blasphemy provision.99 Due to the varying majority-minority compositions of Indonesia100 the act of blaspheming can be against any of the six state-acknowledged religion, although as the vast majority of the population is Moslem, most commonly the prosecution is related to acts allegedly insulting Islam.101 Recently the Indonesian Institute for Independent Judiciary (Lembaga Kajian dan Advokasi Independensi Peradilan- LeIP) on the application of

98 Ibid., 663.
100 If one reads the Central Statistics Bureau of Indonesia’s report for its latest population census in 2010, the composition of the country’s 237, 641, 326 population according to religion is 87,18 percent Islam, 6,96 Christian, 2,91 Catholic, 1,69 Hindu, 0,72 Buddha, 0,05 Kong Hu Cu, 0,13 others, while the rest are either not answering or not asked about their beliefs. It should be noted that they describe Kong Hu Cu or Confucianism as “the most recent acknowledged religion by the government of Indonesia”,100 reaffirming the divide between state-acknowledged and other religions and beliefs. Indonesia has differing majority-minority compositions of the six state acknowledged religions differ in the archipelagic country, for example in Bali 83,46 percent of the population are Hindus and in Nusa Tengara Timur more than 90 percent of the population are either Catholics or Moslems (Citizenship, Ethnicity, Religion, and Daily Language of Indonesia’s population: The Result of Population Census of 2010, The Central Statistic Bureau)
101 In the 2017 Amnesty International Report, out of the five case studies, four pertained to blaspheming against Islam while one is for defaming Catholicism. See, Amnesty International, Prosecuting.
Article 156a of the Criminal Code by tracking first instance and appeal court decisions and mapped the various ways acts have been interpreted as blasphemous. As can be seen from table below two, “blasphemy” has been interpreted to cover a wide variety of acts:

**Table Four: Classification of Acts Charged as Blasphemy Based on Article 156a of The Criminal Code**

<table>
<thead>
<tr>
<th>No</th>
<th>Classification</th>
<th>Case Example (Names of Defendants)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Act, verbal or written statement explicitly aimed at offending or attacking religious symbols considered sacred by a religion</td>
<td>Alexander An, Agung Handoko, Muhammad Rokhisin, and Miftakhur Rosidin</td>
</tr>
<tr>
<td>2</td>
<td>Disseminating religious interpretation differing from the mainstream (orthodox) interpretation</td>
<td>Andreas Guntur, Khairuddin, T. Abdul Fattah, Bantil Al Syekh Muhammad Ganti, Tajul Muluk, Heidi Eugene, Lia Eden,</td>
</tr>
<tr>
<td>3</td>
<td>Disseminating a religious publication containing an interpretation of another religion’s teaching.</td>
<td>Antonius Richmon Bawenangan, Charles Sitorus, and Makmur Bin Amir</td>
</tr>
<tr>
<td>4</td>
<td>Erroneous exercise of a religious ritual</td>
<td>Ronal Tambunan and Herison Yohannes Riwu</td>
</tr>
<tr>
<td>5</td>
<td>Other acts interpreted as blasphemy, including disbelief in religion</td>
<td>Alfred Wang, Agus Santoso, Basuki Tjahaja Purnama</td>
</tr>
</tbody>
</table>

The fate of those who adhere to mystical beliefs also did not much improve. The systemic discrimination has been preserved and even perpetuated. Some improvements were made initially, most notably by President Abdurrahman Wahid, who in 2000 issued a Presidential Decree annulling the 1978 Presidential Instruction. The Decree recovered the freedom to exercise Chinese culture publicly and reinstated the acknowledgment for Confucianism. However, as enumerated in Table One, the policies that discriminate on beliefs categorized as mysticism (*aliran kepercayaan*) has been perpetuated in the years following the Reform era. One example of this is the 2006 Law No. 23 on Civic Administration Law, amended in 2013 by Law No. 24. This Law that regulates how the population is registered by the State. Article 61 in Law No. 23 year 2006 regulates the definition and substance of Household Registry Card (*Kartu Keluarga* - which serves as record for household members) while Article 64 of Law No. 23 regulates the same matter related to electronic Population Identity Card (*Kartu*

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102 The organization tracked 27 decisions published by the Court for criminalization that uses either Article 156a of the Criminal Code or Article 28 (2) on the Electronic Information and Transaction which stipulates “Ever person who intentionally or without right disseminates information aimed at inciting hate or enmity (against) individual and/or certain communal group based on ethnicity, religion, race and intergroup”

103 LeIP, *Penafiran Terhadap Pasal 156a Huruf a KUHP Tentang Penodaan Agama (Analisis Hukum dan Hak Asasi Manusia)*, (Draft) 2017, (not yet published).

104 Sudarto, *Adherent*, 72. See also Indonesia, Presidential Decree No. 6 Year 2006 on the Retraction of Presidential Instruction No. 14 Year 1967 on Chinese Religion, Belief, and Traditions.
Tanda Penduduk - individual identity card that serves as the basis for all public service provision in the country. The provisions in both specify that the religion column in both documents should be left blank for adherents of both religions not yet acknowledged by the State or mystical belief believers. The repercussion of these provisions is various: having a blank religion column often left the adherents of local beliefs stigmatized even to the point of not being able to apply for work, and it made it difficult for them to access some public services such as marriage certification.

5 The Constitutional Court (CC) as Right Claim Institutions

5.1 The establishment of constitutional court and the mandates

As recounted by Indrayana, the period of 1999-2002 was Indonesia’s constitution making period, whereby two essential sets of institutions were crafted: those of human rights and separation of power. In terms of separation of power, by 1998 the judiciary was arguably most problematic. The third branch of the government had never had genuine independence and been plagued with corruption since the birth of the Republic. Pompe in his book “A History of Institutional Collapse” asks whether the subjugation of the judiciary to the executive power throughout the Old and New Order era could have been prevented had it been granted judicial review powers during the pre-independence constitutional debates. This power may have helped in the judiciary retaining its autonomy, but in the end, this power was not granted due to the belief in strict separation of power and presumption that the judges at the time did not

105 Indonesia, Law No 23 Year 2006 on Civic Administration, Art 1, states in Paragraph 1: “Household Registry Card contains data in the columns on the Household Registry Card number, full name of head of household and members of household, individual identification number, sex, address, place of birth, date of birth, religion, education, occupation, marital status, relationship within household, citizenship, immigration document, name of parents” (emphasis added). Paragraph 2: “Input on religion as stipulated in paragraph (1) for population whose religion is not yet acknowledged by laws and regulation or for adherents to mystical belief shall be left blank but still served and registered in population database”. Article 64 Law No. 24 year 2013 stipulated in paragraph 1 “Electronic Population Identity Card bears the picture of Pancasila Garuda symbol and the map of the territory of the United State of the Republic of Indonesia, containing population data elements namely individual identification number, name, male or female, religion, marital status, blood type, address, occupation, citizenship, photograph, period of validity, place and date of Electronic Population Identity Card issuance, and signature of Electronic Population Identity Card bearer” (emphasis added). Paragraph 5 of the law states: “The population data element on religion as stipulated in paragraph 1 for population whose religion is not yet acknowledged by laws and regulation or for adherents to mystical belief shall be left blank but still served and registered in population database”

106 Sudarto, Adherents, 73-75. See also the Judicial Review petition against the Civic Administration Law.

107 Indrayana, Constitutional Reform, 68.

have enough capacity in testing the constitutionality of laws. Thus for the next 53 years after the proclamation of independence, Indonesia’s judiciary was subjugated to the dictates of the executive and the judicial review power was in the hand of the upper house of the parliament, the People’s Consultative Assembly (Majelis Permusyawaratan Rakyat - MPR).

The restoration of judicial independence was among the chief concern in the constitution-making project. The parliament noted this since the early days of the Reform era, with Decree No. X/MPR/1998 highlighting that the subjugation of the judiciary by the executive presents opportunity for those who have power to intervene in judicial process and the development of collusions and negative practices in the court process. It further called for separation of judicative and executive functions, the upholding of rule of law, and assurance of respect towards human rights. This triggered the agenda of judicial reform, starting from separating the Supreme Court’s administration from the Ministry of Justice, but with regards to the judicial review power a different arrangement was struck.

Many academics attribute the inclusion of the CC in the Constitution to the controversy over the dismissal of Indonesia’s third president, K.H. Abdurrahman Wahid, which highlighted the need for a constitutional mechanism to settle constitutional disputes, such as the issue of impeachment. However, even before the controversy, the question of judicial review had occupied the parliamentarians during the constitutional reform process. There were three options entertained: the MPR, the Supreme Court, or the establishment of a new institution altogether - i.e. a CC. butt recounted how during the debates in 2000 there was a preference for the Supreme Court. Yet many parliamentarians saw this option as problematic as at that time, the judicial reform had not effectively started, and the institution was notoriously corrupt and reluctant to engage in reviewing legal instruments. Since 1970 the court actually already had the power to review bylaws’ consistency to superior laws (but not the constitution), a power later strengthened by subsequent laws regulating the judiciary. Yet as noted by Widjajanto

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110 Indonesia, People’s Consultative Assembly Decree No. X/MPR/1998 on Subjects of Development Reforms for Rescuing and Normalizing the National Life as State Orientation), Addendum II. C.
111 Ibid., Addendum III. C. 1.d., III. C.2.a.c.
112 Harold Crouch, Political Reform in Indonesia After Soeharto (Institute of Southeast Asian Studies, 2010), 194.
113 Lindsey, Indonesia Law and Society, 20.
114 Butt, The Constitutional Court, 29-30.
and cited by Butt, out of the 26 such cases filed before the Supreme Court in 1992-1999, 1 was struck down, five were decided, and the remaining were never decided. Additionally, there was doubt raised by experts advising the parliamentary at the time on the Supreme Court’s ability as a constitutionally established institution to avoid conflict of interest when deciding cases related to itself. All these reasons shifted the interest towards the establishment of a new judicial institution.

The CC’s establishment was mandated by Article 24C of the Constitution, stating that it will be the first and final instance court for deciding:

a) The constitutionality of laws
b) disputes on authorities between state institutions whose powers are given by the constitution
c) disputes on general election results
d) dissolution of political parties
e) issue decision on alleged violations by the President and/or vice president

The Court was finally established in 2003 by Law no. 24 on Constitutional Court, which was later amended by Law no. 8 year 2011. Since its establishment, the court has only exercised the first three authorities enlisted.

5.2 Statutory and Internal Constraints

The CC operates within statutory constraints against its authority. Constitutionally, it is restricted to reviewing national-level law. The authority to review legal instruments under national-level law is assigned to the Supreme Court, and this review is against the superior law, not the Constitution. In terms of human rights, this gap is unfortunate, since many human rights violations have been identified to be caused by local bylaws that arguably violate the constitution, including those that discriminate against women. Another restriction in place by the Constitution is the limitations of rights provision in article 29 (J)2 as has been discussed above. How the court interprets these restrictions in deciding constitutionality of laws, especially those relevant to the rights of minorities, will be discussed further below.

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118 Ibid., 80-112
119 Indonesia, Law No. 24 Year 2003 on Constitutional Court, art. 24 A.
There are other statutory constraints in place by laws governing the CC, but thus far it has managed to revoke provisions that it deems as restricting its constitutional authority. Some examples of the statutory restrictions that currently have been deemed unconstitutional are Article 50 of Law no. 24 that prohibits the Court from reviewing laws enacted before the first Amendment of the Constitution in 1999. The CC also declared unconstitutional the stipulations placing it under the supervision of the Judicial Commission, and the Emergency Law No.1 year 2013 which attempted to restrict the CC justices’ selection criteria and process and narrowly define its judicial review approach to prevent ultra petita decisions\textsuperscript{121} - a legal instrument that was promulgated in response to the corruption scandal of Chief Justice Akhil Mokhtar.\textsuperscript{122}

Internally, the Court, through its jurisprudence, has restricted its functions, albeit with some inconsistencies. For example, the Court in some of its decisions seem to place itself in “negative legislator” function, namely not to add but rather only invalidate unconstitutional norms, provisions or statutes.\textsuperscript{123} Moreover, it views itself as only having jurisdiction over adjudicating the constitutionality of legal norms, and not its implementation.\textsuperscript{124} However, in some of its decisions the Court has issued conditional constitutionality, defining how a stipulation shall be interpreted with effect to the implementation of the statutes, which includes in the case of Law on Civil Administration as will be discussed further in the case study section below.

5.3 Accessibility and Compliance

The Law on CC granted standing for individual citizens of Indonesia, customary law communities (with the caveat that it still exists and in accordance to the social development and principles of the Unitary State of the Republic of Indonesia as regulated by law), private or public legal entity and state institutions. They can file the petition when they consider their constitutional right and/or authority is or potentially will be damaged by the enactment of a certain law.\textsuperscript{125} Since its establishment, the Court grants standing to organizations, including CSOs

\textsuperscript{121} Ultra petita decisions refer to the Supreme Court deciding to declare unconstitutional other provisions within a law aside from the ones that are subject to the petition. An example of this was the decision on the Law on Truth and Reconciliation Commission, in which the Court annul the whole law rather than only the articles related to amnesty which were the subject of the petition. See The Constitutional Court of Republic of Indonesia, Decision No. 006/PUU-IV/2006.

\textsuperscript{122} Butt, The Constitutional Court, 80.

\textsuperscript{123} Ibid.

\textsuperscript{124} Ibid., 97

\textsuperscript{125} Indonesia, Law No. 24 Year 2003 on Constitutional Court, art 51 (1).
and NGOs as long as their charter of establishment has some connection to the substance of the application.\textsuperscript{126}

Access to participation in admissible cases is also availed for Concerned Parties. While judicial review petitions before the CC in nature are voluntary rather than contentious, Law No. 24 year 2003 on the CC, Article 54, allows the Court to summon the parliament and/or the president to give verbal or written testimony on an issue. In practice however, when the court deems a case to be admissible, at the very least the government will always be there to respond to judicial review admissions.\textsuperscript{127} Aside from that, the Constitutional Court is allowed to summon its own witnesses and experts.\textsuperscript{128} Participation of Concerned Parties beyond the government and the parliament is further elucidated in The Constitutional Court’s Regulation No. 06/PMK/2005 on Guidelines of Procedures in Judicial Review Cases. In Article 14 Concerned Parties are regulated as “parties with direct or indirect interest on the substance of the petition” with indirect interest defined widely to include “parties whose right and/or authority is indirectly impacted by the substance of the petition but are highly concerned with the petition at hand”. Once the application approved, then the Concerned Party “may be granted with the same rights as the Plaintiff during the proceedings in terms of providing testimony and evidence (when the said testimony and evidence) have not been adequately represented by the evidence presented by the President/government, the People’s Representative Assembly, and/or Regional Representative Assembly”.\textsuperscript{129}

Since its inception, the CC has been increasingly utilized by individuals and civil societies to annul laws they consider as harming their constitutional rights. As can be seen in the diagram below, the number of petitions registered for judicial review has an increasing trend, peaking in 2015.

\textsuperscript{126} Butt, \textit{The Constitutional Court}. 49.
\textsuperscript{128} Indonesia, Law No. 24 Year 2003 on Constitutional Court, art. 41 (2) and 42. http://www.mahkamahkonstitusi.go.id/public/content/pmk/PMK_PMK6.pdf
\textsuperscript{129} Indonesia, Constitutional Court’s Regulation No. 06/PMK/2005 on Guidelines of Procedures in Judicial Review Cases, art 5-6. 14(2).
Based on the CC’s data, since 2003 to mid-2018 there have been 1129 judicial review petitions received, 250 of which have been granted. The rest have been either rejected (395), declared inadmissible, including due to lack of jurisdiction (384), or withdrawn by the parties and/or deemed to have lapsed (130).

While there seems to be a significant number of petitions over the years, it should be noted that the procedures to file judicial review is highly formal. Both physical and electronic written petition must be filed to the court registry, containing legal analysis justifying legal standing, clear and detailed explanation on the grounds for judicial review and accompanied by a series of documents pertaining the identity of the petitioner and evidence to substantiate the claim.\(^\text{130}\) This will be followed by a public hearing, whereby petition and witnesses are presented from the plaintiffs and other “Concerned Parties”, including the government.\(^\text{131}\) This complex procedure has two consequences, firstly that a citizen will need legal expertise, either his or her own, or a legal representative. Secondly, the attendance in public hearing for plaintiffs who are not based in Jakarta, Indonesia’s capital and the seat of the CC, would have to bear the travel cost or at the very least have access to remote communication.\(^\text{132}\) Thus, as can be seen later in the case study, commonly plaintiffs are represented by lawyers, either private or from CSOs such as legal aid organizations, a feature that one may arguably restrict the access to the court. On the reverse side, others may posit that the procedures are necessary to

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\(^{130}\) Indonesia, Constitutional Court’s Regulation No. 06/PMK/2005 on Guidelines of Procedures in Judicial Review Cases, art 5-6

\(^{131}\) Ibid.

\(^{132}\) Ibid. Art 13(3) allows long distance proceedings
allow transparent process and to ensure the Court hear all important arguments and evidence, and some jurisdictional and procedural restriction may assist in preventing too much workload that will make decisions untimely and ineffective.¹³³

Another question concerns the performance of the CC itself as it adjudicated the constitutionality of various provisions against civil, political, social, and cultural rights enshrined in the highest law of the land. In observance of the CC’s ten-year anniversary, Setara Institute conducted a study on its performance in promoting and protecting human rights in 2013. Combining surveys on state administration experts and analysis of CC’s judicial review decisions, the extensive study generally found that the CC had moderately managed to follow international human rights principles, and protected and promoted political rights well throughout 2003-2013 especially related to elections. It also commended the progressive stance taken by the CC on cases related to economic and social rights. Yet it lamented the CC’s decisions on various laws adversely impacting civil rights, including freedom of religion and the right to life (especially related to death penalty).¹³⁴

Even when the Court is considered to be well-performing or progressive, there is also the question concerning the basis of their decisions and whether they in fact effect genuine change. Take as an example the court’s stance on management of public goods, privatization of which is a contentious economic and social right issue. Article 33 of the Constitution rules that the branches of production are important to the state and affect public life necessities are controlled by the state, and earth, water and natural resources are to be controlled by the State for the greatest benefit for the people.¹³⁵ Petitions grounded on this Article include the two filed against Law on Water Management that allowed the privatization of water. The first, brought by five groups of CSOs and individuals from various backgrounds in 2004, held among others that the commercialization of water management went against the aforementioned constitutional article.¹³⁶ The CC issued a partial constitutionality decision: the law (and

¹³³ Gentili, Gianluca (2011) "A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court," Penn State International Law Review: Vol. 29: No. 4, Article 2. 747 It should be noted however that with regards to timeliness, Setara Institute when mapping the 38 decisions decided by the CC in the period of 2016-2017 found that 31% of the cases took more than one year from submission of petition to decision. Setara Institute, Laporan Kinerja MK 2016-2017

¹³⁴ Ismail Hasani (ed), Dinamika Perlindungan Hak Konstitusional Warga: Mahkamah Konstitusi sebagai Mekanisme Nasional Baru Pemajuan dan Perlindungan Hak Asasi Manusia (Jakarta: Pustaka Masyarakat Setara), 420-427.

¹³⁵ Indonesia, The 1945 Constitution, art. 33 (2) and (3).

¹³⁶ The Constitutional Court of the Republic of Indonesia, Decision No Decision No. 85/PUU-XI/2013, 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, 8, 37, 44. It should be noted that the plaintiff also argued that right to water is human rights through the interpretation of Article 28H of the 1945 Constitution, i.e. the right of everyone to decent life and good as well as healthy environment.
thus the privatization of water) is constitutional as long as the state ensures everyone can fulfill their need of water and the state is actively involved in water resource planning. This conditional constitutionality seems to be at odds with the constitutional court’s stance that it is a negative legislator, by offering an added interpretation to the constitution. The second petition, filed by mass organizations such as Muhammadiyah in 2013, primarily argued that the implementation of the law has been inconsistent with the Court’s conditions. They brought forth as evidence the Governmental Decree No 16 Year 2005 on the Development of Access to Water System, which was the implementation instrument for the Law. The Decree, the petitioners argued, has opened the opportunity for concealed privatization schemes in water management that would be exempt from the state control.

The CC subsequently ruled to nullify the law, a decision grounded in part on its stance that that the water resource law and its operational regulations should ensure that the State actually has the power to control water resources for the benefit of the people, which the law and its operational regulation fails to fulfill.

Further, the CC dictated for the previous law, Law no. 11 year 1974 on Irrigation, to be in force to avoid legal vacuum. This decision is indeed progressive, but it also signified one of the instances the CC going beyond its assigned role as normative adjudicator. It considered how the law was implemented (rather than the norms within the law) in deciding to declare it unconstitutional, and further deciding a law already deemed to not be in force by the parliament and the executive to again be effective. Instances of inconsistency such as this cause concern, compounded with the lack of explanation on under what conditions it will expand its role.

As discussed above, effectiveness is also marked by the compliance of other branches of government to the decisions of the CC. As a general trend, the government and the legislative tend to not (at least openly) defy the CC’s decisions. Some factors can be attributed to it, including public support and trust that the CC is impartial and just, the elites realizing that their compliance today insures that the opposition will also be compliant in the future (insurance theory), and the CC’s own cognizance to avoid causing legal vacuum (although as can be seen

137 Ibid., 486-490.
138 It should be noted that, as Butt pointed out, the court’s conditional constitutionality at times even blatantly change the norms in a law altogether as what happened in the Marriage Law petition, where the reading of the article was changed from a child born out of wedlock having no parental claim to the father to that a child born out of wedlock but who can show evidence of paternity can have parental claim.
139 The Constitutional Court of the Republic of Indonesia, Decision No 85/PUU-XI/2013, 16.
139 Ibid., 20-3.
140 Ibid., 20-3.
141 Ibid, 146.
142 Butt, The constitutional, 70.
below, these measures at times mean going beyond their own defined limits in jurisdiction). However, at times the government does opt to circumvent the CC’s decisions by incorporating the rules of an annulled law into a lower level regulation, making it out of the scope of the Court’s jurisdiction. An example Butt brought forward was on the Electricity Law case in 2003, a law annulled also in part due to it violating Article 33(2), to which the government responded by issuing a Government Regulation that is not much different than the revoked law. Similarly, after the 2015 decision on Law no. 7 on Water, the Government, citing that Law No. 11/1974 is lacking any stipulation regulating drinking and unprocessed water, issued Government Regulation No. 121/2015 on the Management of Water Resource and Government Regulation No 122/2015 on drinking water system. The Civil Society for Water Justice has since pointed out that the government regulation on drinking water system made it difficult for regional government-owned companies to increase unprocessed water input, while the water management government regulation has been used to justify cooptation of public water sources by private companies without any repercussion. Further, until presently, a new law on this subject has not been enacted, and the drafting process has largely been not transparent. It should be noted that the unresponsiveness of the legislative to the demands of the CC has been interpreted by some as the underlying reason for the Court to issue conditional unconstitutionality decisions.

More research should be done on the issue of compliance, although it can be posited that the other branches’ response (and compliance) depends highly on the types of rights impacted by the CC’s decisions and the kind of state obligation they invoke. Decisions on civil and political rights that annul provisions are usually obeyed, and when they are of criminal law they are no longer used for prosecution. An example of this is one of the early cases of the CC, the lese majeste case in which the CC revoked the criminal code stipulation on the crime of insulting the president based on arguments related to freedom of expression, which is protected by the Constitution. Decisions that require active response and exercise of positive obligation, especially when it involves the parliament, have seen more mixed results. As shown above, 

143 Ibid., 72-73.
144 Ibid., 69.
145 Ibid., 70.
148 Ibid.
149 Butt, The Constitutional, 214.
150 Ibid., 214.
when a decision affects economic policies, it may even yield negative responses from the government. Using the above example still, when a decision requires promulgation of a new law, the legislative may be slow to respond: After all, it has been five years since the second decision on Law on Water Management, and there remains to be no new law. Yet there are exceptions: responses tend to be faster depending on the public sentiment and pressure on the issue at hand. Anti-corruption, for example, is an agenda that is strongly supported by the public. In 2002 a law on an independent Anti-Corruption Commission (Law No. 30 year 2002) was enacted, granting the commission with extraordinary investigative and prosecution powers including wiretapping without leave from the court. Moreover, Article 53 of the law dictates the establishment of a special Anti-Corruption Court in Jakarta. This law was brought for judicial review in 2006, *inter alia* petitioning for the annulment of its Article 53 because it violates the Constitutional Provision on the right to legal certainty.\(^{151}\) The primary argument is that the law is on eradicating corruption, an executive function, and a provision on the establishment of a special court makes it an instrument of the executive’s duty rather than the judicative.\(^{152}\) The Court then declared Article 53 as unconstitutional, but also stipulated for the necessary amendment on the matter be completed within three years during which time the provision shall still be in force.\(^{153}\) The legislative actually fulfilled this deadline by enacting Law No. 46 year 2009. It should be noted that this decision has at times been criticized, again because rather than retaining its negative legislator function it dictates what the legislative should do, although the decision is well-intended, namely to avoid legal vacuum that will put a halt on the Anti-Corruption Commission’s work to eradicate corruption.\(^{154}\)

### 6 Case Study: The Three Constitutional Decisions Related to Blasphemy Law

#### 6.1 The Civil Society Utilizing the Space

In the discussion of the three CC decisions that are the focus of the study, the largest and arguably the most analyzed case is the Blasphemy Law petition filed in 2009, whereby the petitioners were seeking the annulment of the whole Law. The plaintiff comprised of seven well-known human rights CSOs as well as four prominent individuals, one of whom was former President K.H. Abdurrahman Wahid. The legal representation for the plaintiffs comprised 54 lawyers under the umbrella of “Advocacy Team for Religious Freedom”. Numerous Con-


\(^{152}\) Ibid., 17.

\(^{153}\) Ibid., 291.

\(^{154}\) Ibid., 289.
cerned Parties, including the government and the parliament, offered submissions and some presented their own witnesses. The Court itself summoned many legal and religious experts. Compared to this case, the petition against Article 156a of the Criminal Code was smaller in scale. The petition was filed by five individual plaintiffs, four of whom are adherents of Syiah Islam (one of whom at the time of the filling was on trial for blasphemy) while the fifth was indicted for blasphemy for his Facebook status that allegedly insinuated disbelief in God. They were represented by ten lawyers from Universalia Legal Aid Foundation, whose mission statement is to promote harmony in pluralistic in Indonesia and protect the constitutional rights of minorities. Aside from the government there was no other Concerned Parties presenting submission or offering testimony. The third examined is the petition against Law on Civil Administration which was filed by four plaintiffs who were adherents of local religions. They were represented by 18 lawyers, many of whom are known human rights activists and whose secretariat for the case is at the office of ELSAM, a human rights organization which was also a plaintiff in the Blasphemy Law case.

Table Six
Comparison of Plaintiffs

<table>
<thead>
<tr>
<th>Parties and Witnesses</th>
<th>Blasphemy Law</th>
<th>Article 156a Criminal Code</th>
<th>Civil Administration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>7 CSOs 4 Individuals</td>
<td>5 Individuals</td>
<td>4 Individuals</td>
</tr>
<tr>
<td>Plaintiff Witnesses and Experts</td>
<td>7</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Government</td>
<td>1 Submission</td>
<td>1 submission</td>
<td>1 submission</td>
</tr>
<tr>
<td>Government Witnesses and Experts</td>
<td>17</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>Parliament</td>
<td>1 Submission</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Parliament Witnesses and Experts</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Other Concerned parties</td>
<td>21</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Other Concerned Parties Witnesses and Experts</td>
<td>6</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Court-Summoned Witnesses and Experts</td>
<td>17</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

These include Muslim organizations, the associations of the five other state acknowledged religions, two associations of mystical beliefs, and two NHRIs, The National Commission of Human Rights and The National Commission Anti Violence Against Women.
The legal grounds for the petitions have been discussed at some length above, but the following table shows the comparison of the constitutional provisions utilized by the petitioners and their lawyers to justify their claims:

**Table Seven**

**Comparison of Constitutional Grounds**

<table>
<thead>
<tr>
<th>Constitutional Rights</th>
<th>Blasphemy Law</th>
<th>Article 156a</th>
<th>Civil Administration Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>The principle of <em>Negara Hukum</em> (commonly translated as Rule of Law) <em>Article 1(3)</em></td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>The right to equality before the law and the government (<em>Article 27(1)</em></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>The right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law <em>Article 28D(1)</em></td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Right to be free from discriminative treatment based upon any grounds whatsoever and right to protection from such discriminative treatment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legitimate rights limitation <em>Article 28J</em></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom of religion <em>Article 28 E(1) and (2), 28I (1), 29(2)</em></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom of association and expression (<em>Article 28E(3)</em></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Obligation to protect, promote, enforce and fulfill human rights (<em>Article 28I(4)</em></td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Seeing the comparison between the plaintiffs and their legal representation and the design of the petition, there are two aspects that can be discussed in terms of the choice of strategy. The first case seemed to rely on the stature of the plaintiffs rather than personal experiences of being harmed by the application of the law petitioned, while the subsequent two had victims or potential victims of the provisions. Moreover, while the first legal representation team named themselves clearly in accordance to the value they are promoting, and the second identified themselves with a particular CSO, in the third case, the counsels just provided their names without any organizational identification. In terms of the constitutional provisions utilized for the petitions, it is noticeable that the plaintiffs did not in their submission utilize articles related to legitimate rights limitations, freedom of religion, or freedom of expression, despite the fact that the Civic Administration Law have arguably impacted the three. This may have to do with the CC’s highly cautious approach to issues related to freedom of religion. This is understandable, since the issue of religion and its place in the construction of the State is very contentious since its inception. Thus, the approaches enlisted in section above that some celebrate as groundbreaking for defending rights and others criticized as overreaching from its function as negative legislator is never used for claims related to freedom of religion and its limitation. At times, the CC does not discuss the right even in petitions grounded on FORB. As noted by Setara Institute within the period of 2003-2013, aside from the Blasphemy Law case there were two other petitions using the Constitutional provisions on
freedom of religion, namely against the lack of criminal jurisdiction of the Religious Court\textsuperscript{156} and the polygamy provision in Law No. 1 year 1974 on Family Law.\textsuperscript{157} The first claimed that the Religious Court as regulated by Law No.7 year 1989 as amended by Law No. 3 year 2006, which jurisdiction is over family law matters for Muslims, should also have jurisdiction for criminal matters. The petitioner held that as a Moslem his freedom of religion is denied by the lack of possibility for him to live under Islamic criminal law (\textit{jinayah}). The second case relates to Article 3 of the Law, that deemed that a man can only marry more than one woman (the same courtesy is unavailable to women) with the leave of the court, a permit that can only be issued with the consent of all parties involved (i.e. including the previous wife(s)). Both petitions were rejected by the Court. In both cases the issue of limitation to freedom of religion is not discussed: the Religious Court petition was overturned because the Court viewed itself as having no jurisdiction in expanding the mandate of a law, the second because the conditionality of polygamy was not considered a violation to Islamic Law.

The Blasphemy petition was a high-profile hearing, receiving much coverage in national news throughout and drawing many parties applying as Concerned Parties as can be seen in the table above. The Court’s caution is exhibited by its summoning expert witnesses, something that it does not always do in dealing with petitions let alone in such high number. In reverse, the other two cases studied here did not receive as much public attention; the human rights defending CSOs seemed to opt for increased caution in public exposure and even in stating their organizational involvement when dealing with cases related to religion. This restraint was acutely evident in the Law on Civic Administration: only those who are familiar with human rights activism would realise that a number of the plaintiff’s legal representations are known human rights activists, and the postal address for the lawyers is in fact a human rights CSO’s secretariat. The strategic choice also extended to what constitutional articles to use, the avoidance of using freedom of religion and freedom expression seemed to reflect awareness that with regards to certain rights the Court would be less likely to rule for the interest of the plaintiffs.

The section below will discuss how the CC has interpreted the principles involved in these cases, namely the principle of legal certainty and rule of law, principle of non-discrimination, legitimate rights limitation, and FORB.

\textsuperscript{156} The Constitutional Court of the Republic of Indonesia, Decision No. 12/PUU-VI/2007.

\textsuperscript{157} The Constitutional Court of the Republic of Indonesia, No. 16/PUU-VI/2008.
6.2 Legal Interpretation of the Court

6.2.1 The principle of Negara Hukum (Rechtstaat) and Legal Certainty

The concept of “Negara Hukum”, has often been translated as rule of law but was derived from the European continental law style of rechtstaat inherited from the Dutch rule. This principle is essential to any democratic order, enshrined in the first article of the Constitution along with the provision that Indonesia’s sovereignty is in the hands of the people. This principle is not a standalone right, but the CC has been known to use it in at least one case to assist in defining and deriving a right not explicitly stated in the constitution. In one decision, the CC defines the Negara Hukum as:

“a state which adheres to principles including supremacy, equality, and due process of law which are guaranteed by the constitution. The Negara Hukum principle is a general principle adhered to in the administration of the State of Indonesia and its implementation must be connected with other provisions in the Constitution”

In Blasphemy Case however, the Court further impressed that the definition of Negara Hukum in Indonesia has to be intertwined with the role of religion in the State to form a non-secular definition:

“a Negara Hukum that places the principle of the Divinity of the One and Only God as the main principle, and religious values form the basis for the nation and state life dynamics, not a state that separate state and religion, and not only referring to either individualism or communalism principle.”

The implication of this definition of Negara Hukum, according to the CC is that the Constitution

“does not allow the possibility for campaigning freedom not to have religion, freedom for … besmirching the name of God. This element presents one of the elements that signify the main difference between the Negara Hukum of Indonesia and the Western rule of law, thus in implementing state governance, law formation, the implementation

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158 Art (2) and (3) 1945 Constitution
159 The case is related to Bibit and Chandra’s judicial review petition against the provision in the Law on Anti-Corruption Commission that dictated the Commission’s leaders to leave their position when they become a defendant in a criminal case. The Court used this principle in conjunction with the rights to legal certainty to derive the right to due process of law and presumption of innocence. This case was actually very political-Bibit and Chandra was considered by many as having been criminalized by the Police, and this CC decision which granted their petition was often hailed as defending the anti-corruption cause although some also have criticized it due to the retroactive effectiveness of the decision. See Butt, Simon, and Tim Lindsey. The constitution of Indonesia: a contextual analysis (Bloomsbury Publishing, 2012), 215.
160 The Constitutional Court of the Republic of Indonesia, Decision No. 16/PUU-VIII/2010 on Article 268 of the Criminal Code on the limitation of Judicial Review by the Supreme Court, 66.
of the government as well as the Court, divinity of God and teachings as well as religious values serves as the measuring tool to determine good law or bad law, even to determine constitutional and unconstitutional law.\footnote{162}

The discussion on *Negara Hukum* reflects the middle ground stance that Indonesia has always adopted concerning religion and state. In a way it emphasizes the belief that religious values are among the benchmarks to gauge the quality of a legal product. As discussed briefly above, the Court has also used the values from a particular religion in determining the merit of other cases argued by using religious freedom, namely the one on religious court and the polygamy clause in the family law. The principle of *Negara Hukum* is also discussed in the Civic Law petition, whereby the Court held that “In the idea of democratic state based on law or democratic *Negara Hukum*, also adopted by the 1945 Constitution the state is present or formed to protect (which within it include the meaning of respecting and guaranteeing the fulfilment) of (human) rights”.\footnote{163} Here the CC defined *Negara Hukum* pertaining to the role of the State as duty bearer, which later had implication for the stance it adopted with regards to local religion adherents and the blanking of the religious column on their civic registration documents.

Concerning legal certainty principle, it is certainly referred to although the adopted definition is not discussed in the Court’s consideration. As known, the legal certainty principle is part of the legality principle.\footnote{164} This principle can be broken down into: criminal provisions must be written down and no penalty can be imposed based on any customary, criminal provision must be well-defined, and criminal provision must be strictly interpreted without any application of analogy. The reference of the principle of legal certainty in the petitions against Article 156a and the Civic Administration Law refers to whether or not the criminal provision is well-defined or can be strictly interpreted. While the CC in Article 156a case held that the elements in question are already clearly defined\footnote{165}, in the Civic Administration Law case it defines the concept as legal certainty in terms of the legality of a person as legal subject and object.\footnote{166} The CC further underlined that Article 28D(1) of the Constitution guarantees legal certainty and equal treatment before the law, which is not implemented by the provisions the plaintiffs petitioned against.

162 Ibid.
163 Ibid., 138.
166 Ibid., 108.
6.2.2 Principle of Non-Discrimination and Limitation of Rights

In the Blasphemy Case, the CC had to decide both whether the criminalization of blasphemy and the determination of the six official religions is discriminatory. On the last mentioned, the Court held that the Elucidation of the Blasphemy Law dictated that for religions outside the six, pursuant to the wording of the Elucidation, signifies that “to be left alone does not mean to be abandoned, they can grow, develop, treated equally”. It further held that the government’s mandate as found in the Law’s Elucidation to guide organization and streams of mystical belief to the healthy view and towards the Divinity of The One and Only God does not mean to prohibit mystical belief. Rather, it requires the State to guide them so that they will be exercised in accordance to the Divinity of the One and Only God. This provision, the CC holds, was necessary because during the promulgation of the law, there were uncivilized mystical beliefs that demanded human sacrifice. It thus concluded that there was no discrimination in the provisions.

With regard to discrimination as the result of the ambiguous wording in Article 4 of the Blasphemy Law and Article 156a, in both cases the CC held that the various ways acts prosecutors and criminal courts have been interpreting what acts constitute blasphemy are not tantamount to legal certainty nor discrimination. The variety merely reflects the discretion of the court in adjudicating criminal cases; in other words this relates to the issue of application of law and not constitutional problems, and was therefore not within the CC’s jurisdiction.

Further, in the Blasphemy Law decision, the CC discusses at some length the concept of limitation of rights. It holds that:

“Limitation should not always be interpreted as discrimination. As long as the limitation is a form of protection for other people’s rights and within the order of societal, national, and state life (in conjunction with Article 28J(1) of the Constitution) this is a form of protection towards others’ human rights as well as constitutes basic obligation for others” (constitutional Article added).

It further points to Article 28J (2) that includes “religious values” as a ground for limiting human rights, although the definition of such values is not provided by the Court. It does however acknowledge that limitations of rights should be done through law, and thus it concludes that the limitation in the Blasphemy Law is legitimate because it was made through law. It further states that public order and moral grounds are also legitimate grounds for limi-

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167 Ibid., 280.
168 Ibid., 284.
169 Indonesia, Law No. 1/PNPS/1965, art. 4.
170 Ibid., 279.
tation both in Article 28(J)2 and international human rights instruments, and thus holds that “no person or institution has the right to harass religion and treats disrespectfully other religions’ elements which at the end causes public unrest and anger”.  

The non-discrimination principle is interpreted more thoroughly by the Court in the Civic Administration Case, by referring to its jurisprudence, namely that discrimination signifies different treatment on the same matter, differential treatment to different matters is not discrimination.\(^1\)\(^7\)\(^2\) It also cites its definition in previous jurisprudence that discrimination cannot be asserted if there is an absence of reasonable ground for the different treatment.\(^1\)\(^7\)\(^3\) It then deduced that it could not find any reasonable and constitutional ground to allow the differential treatment towards mystical beliefs adherents in the way their religion column is inputted in their civic registration documents.\(^1\)\(^7\)\(^4\) This is because “such limitation does not bear any relation with respecting others right and freedom and is not (put in place) to fulfill the just demand in a democratic society. On the contrary, the limitation of the rights in question has in fact caused unjust treatment for citizens who adhere to mystical beliefs…”\(^1\)\(^7\)\(^5\)

### 6.2.3 Freedom of Religion and Belief

When making its decision for Blasphemy Law petition the CC first puts forth its conclusion that “the intent of the petitioners is towards finding the form and interpretation on freedom of religion and belief in Indonesia.” This prompts the CC to analyse the law “not only based on freedom of religion but also from the perspective of *Negara Hukum*, democracy, human rights, public order, and the religious values adhered to Indonesia.” Thus, it launches to a consideration that seems to be an attempt to formulate what it considers as a constitutional, Indonesian view of pluralism, liberalism or fundamentalism.\(^1\)\(^7\)\(^6\) It is not immediately clear what is meant by this, but as can be seen in the previous sections, the Court seemed to hold among others that FORB in Indonesia does not include the right to not believe in God.

The CC sees freedom of religion as both individual and communal right, asserting “the right to religion is also a communal collective right to be able to peacefully and securely implementing religious teachings without disturbance by other parties.”\(^1\)\(^7\)\(^7\) Departing from that,

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\(^1\)\(^7\)\(^1\) Ibid., 300.
\(^1\)\(^7\)\(^2\) The Constitutional Court of the Republic of Indonesia, Decision No. 97/PUU-XIV/2016, 146.
\(^1\)\(^7\)\(^3\) Ibid.
\(^1\)\(^7\)\(^4\) Ibid., 152.
\(^1\)\(^7\)\(^5\) Ibid.
\(^1\)\(^7\)\(^6\) The Constitutional Court of the Republic of Indonesia, Decision No. 140/PUU-VII/2009, 279.
\(^1\)\(^7\)\(^7\) Ibid., 295.
while concurring that the forum internum of the right cannot be limited, the forum externum can be, essentially stating that “deviant interpretation” may be considered to be in line with freedom of religion but can be limited once it is expressed in the form of “…, stating one’s thought and stance according to one’s conscience (pursuant to Article 28E(2))”.  

In the Civic Administration Law case, although the plaintiffs did not use freedom of religion as part of its petition, the Court surprisingly again begins its consideration by stating that it will firstly clarify its stance on freedom of religion. It then reiterates the definition of freedom of religion in Indonesia “That the right to adhere to a religion or belief in the One and Only God is a constitutional right of citizens”. However, the CC emphasizes that it is a natural right, inherent in being human and not granted by the State. It emphasizes that the preamble of the Constitution dictates that the existence of the State is to protect the rights of citizens pursuant to Article 28I paragraph 4. Thus while it does not elucidate on what exactly a religion is, it holds that the differentiation between religion and belief cannot mean differentiating the treatment between the adherents of the two. The CC then argues that the contended Articles in the Civic Administration Laws are unconstitutional if they interpret “religion” as not including belief.

6.2.4 Question Regarding Decisions and The Jurisdiction of the Court

As mentioned above the Court has retained its strict interpretation of its jurisdiction in Article 156a and Blasphemy Law petitions. It firmly holds in both cases that the application of the law is beyond its jurisdictional reach. This includes, in the Blasphemy Law Case, the CC’s opinion on the Ministerial Interior Affairs Circular Letter No. 477/74054 published in 1978 on the input of religious column in the national identity card. As mentioned above, the Circular Letter eliminates Confucianism as a state-acknowledged religion and regulates only five religions could be inputted in the religion column of civic registration documents. The Court holds that “… the State should fulfill the constitutional rights without discriminative treatment. Even if the Circular Letter considered discriminative is correct… this cannot be used as ground or evidence that the Law on Prevention of Defamation of Religion is discriminative because the Circular Letter had no relation with the Law on Blasphemy”. The CC adopted
the same position in Article 156a case, on the practice whereby suspects have been charged with blasphemy without being preceded by a Joint Ministerial Decree defining a belief to be deviant pursuant to the Blasphemy Law. The Court again holds the opinion that “This is not a form of legal uncertainty or discrimination, but rather a form of judicial consideration in meting out justice in accordance to each characteristic of case and an issue of application of law and not constitutional problem”. 183 Thus, even when acknowledging in the consideration that the Blasphemy law in terms of formulation, legal principles need to be “perfected” 184 it rejected the petition because the law materially did not violate the Constitution.

Yet, it is precisely the resulting examples of discrimination and violations of rights from the blank religion column in the local religions’ adherents’ identity card that becomes the ground for the CC to issue the conditional constitutionality decision for the Law on Civic Administration, as already explained in the discrimination section above. The CC specifies in its decision that for administrative order, the adherents of mystical beliefs should have “belief” in their religion column. While from the perspective of human rights this is to some extent a good decision, it remains to be seen whether the CC actually had the jurisdiction to specify how the policy should be implemented by the State, given that in other cases it has restrained itself from doing so. It also raises into question why the Court did not use the conditional constitutionality powers on the Blasphemy Law or Article 156a despite the fact that it had noticed that the Law’s formulation is imperfect and its application has resulted in various human rights violations.

6.2.5 A Note on Enforcement

In terms of the call to amend the Blasphemy Law, the parliament has responded by including this in the deliberation for the drafting of a new Criminal Code. The current draft however is a source of concern: rather than narrowing the criminal provision, Article 156a has been expanded into six proposed articles aimed at protecting religion. Setting aside the problematic concept of having criminal provisions aimed at protecting religion (rather than the believers), most worrying is the inclusion of the proposed Article 345 that explicitly prohibits proselytizing, an expression of religious beliefs important for many beliefs, including the Abrahamic religions that form the vast majority of Indonesian citizens. 185 Although some components seem to be designed to protect religious minorities, such as the proposed Article 351 that criminalized illegal dispersion of worship activities and Article 353 criminalizing desecration

183 The Constitutional Court of the Republic of Indonesia, Decision No. 84/PUU-X/2012, 122.
and damaging houses of worship, the framing that these are for the protection of religion and the absence of clear definition of what construes as religion may create further violations.\textsuperscript{186} This is further amplified by the fact that until now, the enforcement of blasphemy law has always been to appease majoritarian tendencies, raising into question whether even if they are passed into law, the law enforcement would enforce the proposed provisions in defense of religious minorities. The question becomes even more complicated as there is still no definition about what religion is and whether these provisions will equally protect the adherents of local religions or mystical beliefs.

With regards to the civic administration registration, even during the hearing of the petition on the law governing this matter, the government plead for the most just and constitutional interpretation for the law.\textsuperscript{187} This counter petition is very different from the two other cases studied, whereby the government requested the dismissal of the plaintiffs’ petitions.\textsuperscript{188} After the decision, the Government has expressed its commitment to follow the instruction and disseminated the decision to other ministries. While there is not yet an assessment on the effectiveness of the implementation, some news coverage indicates possible issues. For example, the comment made by the Director General of Population and Civic Registration of the Ministry of Interior Affairs, Zudan Arif Fakrulloh stating that there are several models being considered, “Whether Religion: Islam and then beneath Mystical Beliefs: Sunda Wiwitan (a name of local religion). Or (one can) write Religion: Mystical Belief. We are still discussing this”\textsuperscript{189} This side-stepping of the Court’s decision, by availing the option that the local religion is going to still be classified as one of the six religions, clearly falls outside the spirit of the decision to respect the freedom of religion of the mystical beliefs. It also testifies to the inclination to interpret “equating religions with beliefs” as including them in one of the state acknowledged religions. More concerning is both the parliament and government’s reaction that the CC decision entails the need to amend the Articles the Court decided to be conditionally constitutional.\textsuperscript{190} During the CC hearing, the parliament has been insistent in their counter petition that it is the intent of the law to differentiate religion and belief adherents, a distinction


\textsuperscript{187} The Constitutional Court of the Republic of Indonesia, Decision No. 97/PUU-XIV/2016, 156.

\textsuperscript{188} Citation of the government’s plea in Art 156a. See The Constitutional Court of the Republic of Indonesia, Decision No. 140/PUU-V/2009, 177.


the Court has declared as unconstitutional. It is not a wonder then comments indicating that redrafting of the law is necessary (rather than accepting the interpretation provided by the Court) coming from the parliament, underlining the need to avoid public unrest “...because our state’s concept is based on theistic state”. Thus, it is a source of concern that the amendment may result in the setback rather than progress on the matter of civic acknowledgment of the local religion adherents.

7 Conclusion

This study has shown how theoretically judicial review has an important role in ensuring that minority rights will not be trampled by the majoritarian tendency of a democratic rule. While separation of power ensures checks and balances within the government, enshrining human rights in the highest law of the land as is the case in many constitutional democracies afford further protection. Judicial review acts as a further assurance that the legal products resulting from the negotiation of the elites and the majority with the values enshrined in the constitution. The debate on a court’s judicial review power usually lies on how much it can upset the balance of the trias politica, specifically to what extent it can engage in lawmaking- being an institution whose membership is not usually determined by popular vote. On the other hand, in many contexts courts attain their legitimacy from their presumed independence and neutrality, despite the fact that they may be compromised by factors such as popular or political pressures or even personal beliefs. Further, the question on the effectiveness of judicial review in protecting human rights, including those of minorities, depends on how the other branches of government respond to their decisions. In short, how effective a CC is in ensuring laws to be in line with human rights values in the constitution depends on its internal institutional characteristics and constraints, but also external factors such as the compliance of other relevant actors and various other political and social variables.

Religious minorities in Indonesia have been the most repressed during the authoritarian regimes that reigned prior to 1998. Ideally, with the constitutional amendments brought by the dawn of the Reform Era, they could be finally safe from the majoritarian violence, systemic discrimination, and arbitrary prosecution. The inclusion of international human rights standards and the establishment of the CC seems to be an avenue to claim the rights that had been

191 The Constitutional Court of the Republic of Indonesia, Decision No. 97/PUU-XIV/2016, 80-90, 278.
192 Hukumonline, “Penghayat Kepercayaan.”
previously denied, at least by annulling laws that have been used to repress them. Yet as shown by this study, including from the analysis of the case studies, the CC had its own internal and external impediments to grapple with. The internal restrictions include its inconsistency in exercising its lawmaking power while among the external is the how the other branches of the government respond to obligations arising from its decisions.

Its utility for religious minorities is further complicated by the fact that religion has always been a very sensitive issue in the country. Salomon-style baby splitting has historically been the method to address the issue of the role of religion in the construct of the State. Thus Indonesia is neither a confessional nor a secular state, and its laws (or as the Court argues in the Blasphemy Law case, their implementation) privileges certain groups in the effort to maintain harmony. The CC perpetuates this approach to religion and the state. In the Blasphemy Law case, the Court concedes that the law may have to be reformulated, and its implementation may have to be improved, but leaves the task to the legislative. Similarly in Article 156a case, it declines to issue a conditional constitutionality decision even when by granting it the law enforcement will have to implement the provision cautiously as envisioned in the Blasphemy Law. In other cases mentioned in the study, the CC have opted to not focus on the issue of freedom of religion and its legitimate limitation and rather draw its decision from its negative legislator function (which as mentioned, it has bypassed in a significant number of cases) or from Islamic law. The casualties to this approach are the very principles the CC ideally upholds. Negara Hukum defined by including religious values makes rule of law ambiguous as what they are and from which religion should they be derived remain to be unclear. A Pancasila-grounded FORB definition denies the very essence of the freedom as the Court holds it to mean that Indonesian citizens only have the right to have a religion and belief, and only of a certain kind, i.e. ones that believe there is only the One and Only God.

It is not the conclusion of this study that the CC and Judicial Review is not an effective space for religious minorities to revoke laws that harm them. The Civil Administration Law petition shows that while it insists on the very restrictive definition of FORB that is faulty by international standards, it also decides that the systemic discrimination bred from the artificial distinction between religion and belief is unconstitutional. There are some circumstantial indications that this may also be enabled by the low-key petition proceedings and further studies need to be done to map how much influence the personal beliefs of the presiding justices influence the decision. However, the study has shown it is yet to be a dependable one, and similarly to politicians in the other branches of the government, especially vulnerable to popular
pressure. In utilizing it to pursue religious minorities' rights caution has to be exercised, and even if the CC sides to the plaintiff's interests, the implementation is not something that can be taken for granted.
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