Good Governance and Ethnic Minorities in Indonesia

An administrative law study of the Chinese and Turkish communities with a comparison to the Netherlands

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Goed bestuur en etnische minderheden in Indonesië

Een bestuursrechtelijke studie van de Chinese en Turkse gemeenschap in Indonesië met een vergelijkende analyse van de Nederlandse situatie

(met een samenvatting in het Nederlands)

Proefschrift

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door

Awaludin Marwan
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Preface

This book is dedicated to Munir Said Thalib. On September 7th 2004, Thalib was poisoned with arsenic while on a flight from Jakarta to Amsterdam. Thalib was traveling to the Netherlands to study at Utrecht University School of Law and was well-known in Indonesia as a brave human rights activist. Thalib has always been a great inspiration to me and many others studying about Indonesian law, and those who hope to foster justice for the Indonesian poor.

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Since arriving in Utrecht, I feel very lucky to have found a close-knit Indonesian community in the Netherlands. Although coming to the Netherlands felt challenging and lonely at first, I was soon welcomed with open arms into the Indonesian community. After many months, I now consider this supportive group of people to be my 'new family' in the Netherlands.

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Our senior, Adnan Buyung Nasution, defended his PhD thesis in 1992 on '*The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*,' and as such, was a very influential person throughout legal reform and the legal aid movement in Indonesia. He may become one of the important examples of how Utrecht Law alumni have contributed significantly to the country.

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Table of Contents

Preface vii
Table of Contents x
Abbreviations xiv

Chapter 1
Good Governance and Ethnic Minorities from an Administrative Law Perspective: Quo Vadis?
1. Introduction: the problems 1
2. Research questions 11
3. Comparative study between Indonesia and the Netherlands 13
4. Research method 18
5. Structure of the thesis 22

Chapter 2 Normative Framework
Good Governance: Concept and Principles
1. Introduction 24
2. Concept of good governance 25
3. Definition of good governance and ethnic minorities 35
4. Selected principles of good governance 41
   4.1 The principle of transparency 42
   4.2 The principle of participation 45
   4.3 The principle of human rights 50
5. Provisional conclusions 55

Chapter 3
Good Governance and Ethnic Minorities in Indonesia
1. Introduction 60
2. General legal norms of good governance and ethnic minorities 62
   2.1 Introduction 62
   2.2 Article 28 of the Indonesian Constitution 63
   2.3 Legislation on equal treatment, non-discrimination and human rights 69

2.4 Legislation concerning legal protection 77
2.5 Institutions that deal with the norms for the government and legal protection of ethnic minorities 84
2.5.1 The administrative authorities 84
2.5.2 The National Ombudsman 88
2.5.3 The Indonesian National Commission of Human Rights 94
2.5.4 The courts 100
2.6 Provisional findings 105
3. Specific legal norms for the government and legal protection of ethnic minorities: a case study of Chinese and Turkish communities 110
3.1 The principle of transparency 110
3.1.1 Introduction 110
3.1.2 Legal framework of the Public Disclosure Act 111
3.1.3 Transparency facilitates comprehensive information about ethnic minorities 114
3.1.4 Transparent procedures and the function of the online mechanism 124
3.1.5 Transparency requirements of the National Action Plan on Human Rights 125
3.1.6 Transparency in anti-discrimination law 129
3.1.7 Provisional Findings 135
3.2 The principle of participation 136
3.2.1 Introduction 136
3.2.2 Chinese and Turkish citizen's panels 137
3.2.3 Chinese and Turkish community-level participation 144
3.2.4 Demonstration: citizens' initiative or anarchy? 156
3.2.5 The CLEAR method: a case study of Yogyakarta 160
3.2.6 Provisional findings 166
3.3 The principle of human rights 168
3.3.1 Introduction 168
3.3.2 The right to good governance of Chinese people 170
3.3.3 The right to good governance of Turkish people 178
3.3.4 Changing name: an ironic discrimination 192
3.3.5 Land confiscation and maladministration 197
3.3.6 The events of 1965 and 1998 203
3.3.7 Provisional findings 215
4. Provisional conclusions of chapter 3 217

Chapter 4
Good Governance and Ethnic Minorities in The Netherlands

1. Introduction 221
2. General legal norms of good governance and ethnic minorities 223
   - 2.1 Introduction 223
   - 2.2 Article 1 of the Dutch Constitution 224
   - 2.3 Legislation on equal treatment, non-discrimination and human rights 227
   - 2.4 Legislation concerning legal protection, preventive and repressive approaches 234
   - 2.5 Institutions that deal with the norms for the government and legal protection for ethnic minorities 240
     - 2.5.1 The administrative authorities 241
     - 2.5.2 The National Ombudsman 243
     - 2.5.3 The Netherlands Institute for Human Rights 246
     - 2.5.4 The courts 249
   - 2.6 Provisional findings 251
3. Specific legal norms for the government and legal protection of ethnic minorities: a case study of Chinese and Turkish communities 253
   - 3.1 The principle of transparency 253
     - 3.1.1 Introduction 253
     - 3.1.2 Transparency and the Dutch Government Information Act 254
     - 3.1.3 The role of transparency in promoting cooperation and peace between ethnic groups 257
     - 3.1.4 Access to information 262
     - 3.1.5 Transparency in practice: integration policy 266
     - 3.1.6 Provisional findings 272
   - 3.2 The principle of participation 273
     - 3.2.1 Introduction 273
     - 3.2.2 Constitutional motive 274
     - 3.2.3 Citizens' panels and community-level participation 281
     - 3.2.4 The implementation of ethnic minority participation 284
       - 3.2.4.1 Position of the stranger in the courtroom 285
       - 3.2.4.2 Participation and the Turkish Government's crackdown on freedom 289
       - 3.2.4.3 Complaining about discrimination through the Netherlands Institute for Human Rights 296

3.2.5 The CLEAR method 299
3.2.6 Provisional findings 306
3.3 The principle of human rights 308
3.3.1 Introduction 308
3.3.2 The right to good governance 309
3.3.3 The right to freedom from discrimination 315
3.3.4 Legal protection of ethnic minorities in court decisions 322
3.3.5 Ethnic profiling 328
3.3.6 Provisional findings 332
3.4 Provisional conclusions of chapter 4 334

Chapter 5
Good Ethnic Minority Governance: A Comparison of Good Governance and Ethnic Minority Protection in the Netherlands and Indonesia
1. Introduction 339
2. Good ethnic minority governance 340
3. Good ethnic minority regulations 347
4. Good ethnic minority institutions 355
5. The principle of transparency 365
5.1 Public Disclosure Acts and public engagement 368
5.2 Transparency and preventing social conflict 376
6. The principle of participation 383
6.1 A constitutional motive 387
6.2 The CLEAR method 392
6.3 Citizen's panels and community-level participation 397
7. The principle of human rights 401
8. Provisional conclusions 408

Chapter 6
Theoretical Reflections, Conclusions and Recommendations
1. Theoretical reflections 416
2. Conclusions 419
3. Recommendations 433
4. Final concluding remarks 438

Summary 448

Bibliography 472

Abbreviations

ATTAC	:	Association for the Taxation of Financial Transactions for the Aid of Citizens
ABONG	:	Associação Brasileira de Organizações Não Governamentais (Brazilian Association of Non-Governmental Organisations)
ADB	:	the Asian Development Bank
ADV	:	Anti-Discrimination Services
APEC	:	Asia-Pacific Economic Cooperation
BANSER	:	Barisan Ansor Serbaguna (the paramilitary wing of Nahdatul Ulama)
Baperki	:	Badan Permusjawaratan Kewarganegaraan Indonesia (People's Body for Indonesia Citizenship)
BPUPK	:	Badan Penyelidik Usaha Persiapan Kemerdekaan (Investigation Body for Indonesia Independence Preparation)
CDA	:	Christian Democratic Appeal
Cedaw	:	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	:	International Convention on the Elimination of All Forms of Racial Discrimination
CGMI	:	Consentrasi Gerakan Mahasiswa Indonesia (Indonesian Concentration of Students Movement)
CIDA	:	the Canadian International Development Agency
CJG	:	Centre for Global Justice
CJIB	:	the Central Judicial Collection Agency
CRTV	:	Chinese Radio and Television
D66	:	the Democrats 66 (D66),

DFID	:	the Department for International Development
DIV	:	the Expertise Centre on Diversity and Employment
DIY	:	Daerah Istimewa Yogyakarta (Yogyakarta Special Region)
E/T	:	Ex-Political Prisoner (For the accused communist after the tragedy of 1965 in Indonesia)
ECHR	:	European Convention of Human Rights
ELSAM	:	Lembaga Advokasi Masyarakat
EU	:	European Union
FETO	:	Fethullah Terrorist Organization
F-KB	:	Fraksi Kebangkitan Bangsa (Fraction of National Awakening, Indonesian Parliament)
F-PBB	:	Fraksi Partai Bulan Bintang (Fraction of Crescent and Star Party, Indonesian Parliament)
F-PG	:	Fraksi Partai Golkar (Fraction of Golkar, Indonesian Parliament)
FPI	:	Front Pembela Islam (Moslem Front Defender)
GALA	:	General Administrative Law Act
Gandi	:	Gerakan Anti Diskriminasi (Anti Discrimination Movement)
GMNI	:	Gerakan Mahasiswa Nasional Indonesia (the Indonesian National Students Movement)
Golkar	:	Golongan Karya (The Party of Functional Groups, Indonesian Political Party)
HMI	:	Himpunan Mahasiswa Islam (Muslim Students Association)
HRE	:	Human Rights Education
HTI	:	Hizbut Tahrir Indonesia
ICC	:	International Criminal Court
ICCPR	:	International Covenant on Civil and Political Rights

ICT	:	Information and Communications Technology
IDR	:	Indonesian Rupiah, Indonesian currency
IKI	:	Ikatan Kewarganegaraan Indonesia (Indonesian Citizenship Institution)
LBH	:	Legal Aid Institution
IMF	:	International Monetary Fund
IND	:	Immigration and Naturalization Service (IND)
Interpol	:	International Criminal Police Organization
IPT 1965	:	International People's Tribunal 1965
KAMI	:	Kesatuan Aksi Mahasiswa Indonesia (Indonesian Students Action Front)
KNIP	:	Komite Nasional Indonesia Pusat (Central Indonesia National Committee, a preliminary of Indonesian Parliament)
KPP HAM	:	Komisi Penyelidik Pelanggaran HAM di Timor-Timur (Investigation Commission on Human Rights Violations in Timor Leste)
KTP	:	Kartu Tanda Penduduk (Id card, Indonesia)
KWI	:	Konferensi Wali Gereja Indonesia (Church Guardian Conference)
LGBT	:	lesbian, gay, bisexual, transgender, and intersex people
LOM	:	Landelijk Overlag Minderheden, National Ethnic Minorities Consultative Committee, the Netherlands
MATAKIN	:	Majelis Tinggi Agama Konghucu Indonesia (Higher Assembly of Indonesian Konghucu Religion)
MPR	:	Majelis Permusyawaratan Rakyat, People's Consultative Assembly, Indonesia.
MUI	:	Majelis Ulama Indonesia, Indonesian Moslem Council
NATO	:	North Atlantic Treaty Organization
NGO	:	Non-Government Organisation

NIDA	:	Rotterdam (a social foundation and local political party)
NKRI	:	Negara Kesatuan Republik Indonesia (The United of Republic of Indonesia)
NU	:	*Nahdlatul Ulama*, Indonesia biggest moslem organisation
OECD	:	Organisation for Economic Cooperation
OIC	:	Organization of Islamic Conference
Partindo	:	Partai Great Indonesia Party (Partindo
Pasiad	:	Pacific Ulkeleri Sosyal ile ve Ikhtisadi. Dayanisma Dernegi, (Pacific Countries Social and conomic Solidarity Association, Turkish educational foundation)
PDI	:	Partai Demokrasi Indonesian Democratic Party
PDI-P	:	Partai Demokrasi indonesia Perjuangan, Indonesian Democratic Party of Struggle
PGI	:	Persatuan Gereja-Gereja di Indonesia (Indonesia Church Union)
Pkb	:	Partai Kebangkitan Bangsa (Nation awakening party, Indonesian political party)
PKI	:	Partai Komunis Indonesia, Indonesia Communist Party
PKK	:	Partiya Karkerên Kurdistanê (Kurdish Workers Party)
PNI	:	Partai Nasional Indonesia (Indonesia Nationalist Party)
PTPN	:	PT Perkebunan Nusantara (State owned entreprise on agriculture, forestry and fishery, Indonesia)
PvdA	:	Partij van de Arbeid, Labour Party in Netherland
SBAC	:	Amsterdam Sara Burgerhart Activiteitencentrum

SBKRI	:	Surat Bukti Kewarganegaraan Republik Indonesia (Letter of Evidence of Indonesian Citizenship)
SNB	:	Solidaritas Nusa Bangsa (National Solidarity, Indonesian NGO on democratic values),
SOMAL	:	Sekretariat Bersama Organisasi Mahasiswa Lokal (Joint Secretariat of Local Student Organisations)
SP	:	Socialist Party (SP),
STAD	:	Steunpunt Anti-Discriminatie
F-UG	:	Fraksi Utusan Golongan (Fraction from group representative, Indonesian parliament)
TNI	:	Tentara Nasional Indonesia (Indonesia National Army)
UDHR	:	Universal Declaration of Human Rights
UIN	:	Islamic State University
HRC	:	United Nations Human Rights Committee (HRC)
ECHR	:	European Court of Human Rights,
ECJ	:	European Court of Justice,
IACtHR	:	Inter-American Court of Human Rights
CERD	:	Committee on the Elimination of Racial Discrimination
AfrCommHPR	:	African Commission on Human and People Rights
UN	:	United Nations
UNHCR	:	United Nations High Commissioner for Refugees
UWV	:	Employee Insurance Agency
VVD	:	People's Party for Freedom and Democracy
WEF	:	World Economic Forum
WOB	:	Wet openbaarheid van bestuur
WTO	:	World Trade Organization

CHAPTER 1
Good Governance and Ethnic Minorities from an Administrative Law Perspective: Quo Vadis?

1. Introduction: the problems
2. Research questions
3. Comparative study between Indonesia and the Netherlands
4. Research method
5. Structure of the thesis

1. Introduction: the problems

In Indonesian public discourse, ethnic minorities are sometimes presented negatively. Discrimination, stereotyping, prejudice, xenophobia and violence may have been caused by maladministration. These problems may originate from the Guided Democracy 1959-1965 era and worsened under the New Order administration 1966-1998 which were characterised as maladministration, mismanagement, corruption, and misuse of power.[1] Unfortunately, these problems continue to be a problem within the Indonesian government and still remain at the present time in Indonesia. From the perspective of good governance, arbitrary conduct and maladministration signifies that a government has neglected the proper use of their power. Good governance is needed to reinforce the norms for the government and to protect the people from potential harm caused by the action (or inaction) of the governments.[2] Good go-

[1] Awaludin Marwan, *Radical Subject of Zizekian Study: Racist Fantasy Termination! Protection Chinese Ethnic Minorities in the Era of Gus Dur*, Berlin, Lambert Academic Publishing, 2013, p. 23-29.

[2] Good governance can be elaborated as a concept of proper use of the government's power and strengthening the duty of having a good and faithful exercise of elementary task of government. Good government emphasizes to managing responsible work to serve public sector, and promoting social aims of the wishes of population and guaranteeing the security of persons and society. G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 13

vernance may provide crucial leverage in the promotion of equality and the prevention of discrimination.

Good governance is a legal-administrative law concept which strengthens the norms for the governments and the legal protection of people. Implementing norms such as the prohibition of the misuse power, prohibition of arbitrariness, legal certainty, equality, proportionality and carefulness, can help to safeguard fundamental rights.[3] In other words, good governance, which was developed from the doctrine of administrative law, may promote 'optimal conditions for the real protection of fundamental rights' through the proper exercise of government power, good administrative practice, and fairness.[4] In addition, the concept of good governance obliges governments to realise their duties and protect the legal position of citizens. A more detailed explanation and definition of the concept of good governance can be found in Chapter 2, where I specify that the focus of this research is the norms for the governments and the legal protection of persons, more specifically ethnic minorities. In this chapter, I begin with a discussion of incidents and cases that portray the problems of maladministration and discrimination in relation to ethnic minorities in Indonesia, and thus demonstrate the necessity of good governance. Following these examples, I present the main research questions that I aim to address, and explain the nature of the comparison between administrative law of Indonesia and the Netherlands. In addition, I will justify why Turkish and Chinese communities have been selected specifically, outline my research methodology, and describe the structure of the thesis.

In an Indonesian context, the commitment to so-called 'universal principles of good governance' first emerged in Indonesian political debate in the Konstituante (Constitutional Assembly) between

[3] G.H. Addink. *Good governance: a norm for the administration or a citizen's right?* in G.H. Addink et al. (eds) Grensverleggend Bestuursrecht, Alphen aan den Rijn, Kluwer, 2008, p. 3-35.

[4] G.H. Addink. *Principles of Good Governance: Lessons from Administrative Law,* In. D. M. Curtin and Ramses A. Wessel (eds): *Good Governance and the European Union* (Intersentia, Antwerp-Oxford-New York: 2005), p. 38.

1956 and 1959.[5] Unfortunately, the implementation of the norms for the government (the norms for the governments are legal norms which can be found in legislation and case law)—and consequently the fulfilment of the fundamental rights of people— have been violated repeatedly. In other words, despite the support for the concept of good governance in the Constitutional Assembly, in practice, the norms for the government and the legal protection were inadequately guaranteed. One example, under the New Order regime, was the requirement of a Proof of Citizenship of the Republic of Indonesia (SBKRI, *Surat Bukti Kewarganegaraan Republik Indonesia*). People without a SBKRI often encountered difficulties when attempting to access public services.[6] The requirement for this letter only applied to Chinese-Indonesians, and although the Indonesian Government abolished the SBKRI through Presidential Instruction No. 26 of 1998, some public servants continue to request this letter. The problem is also an example of the (sometimes wilful) ignorance of public servants with regards to the norms for the government.

Many other examples of the violation of the faithful exercise of governmental norms can be found in Indonesia, which have resulted in a lack of legal protection for vulnerable people. When the government neglects to attempt to minimise legal errors, and provide sufficient techniques to compel civil servants to implement regulations, the legal protection of people cannot be fully achieved.[7] For instance, the SBKRI example demonstrates a failure to respect the principle of equality, despite adequate the existence of regulation to prevent unequal treatment. Other examples of such neglect are illustrated in the difficulties with ba-

[5] Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*, Jakarta, Pustaka Sinar Harapan, 1992, p. 21. During the process of creating the new constitution, the Indonesian Konstituante 1956-1959 tried to scrutinise ideas which were applicable to the Indonesian legal context, such as political participation, avoiding of authoritarianism, strengthening liberty, direct democracy in a multi-party system, separation of power, etc. The universal principles of good governance were part of such a concept which was debated in the Indonesian Konstituante. At that time, the term good governance was referred to as 'good government.'

[6] See., Indonesian CERD Report of 2000.

[7] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 35.

sic registration experienced during the crisis of citizenship for Chinese-Indonesians in 1958, and the lack of provision of birth certificates for Benteng-Chinese people.

The situation of Benteng-Chinese people demonstrates that realising the norm of equality should be a priority for the government. At least, the government must be devoted to the principle of due care and respect the norm of timeliness.[8] Indeed, the government should be concerned with ensuring that it performs its duties in a timely manner. However, the case of Benteng-Chinese concerns Chinese-Indonesians who have not been provided with a birth certificate. Without a birth certificate, these people are not able to apply for identity cards, passports, marriage certificates, driver's licences, and so on. Thus, without these documents, these people have had difficulties accessing education, healthcare, and other public or private services. Luckily, after an intervention by some NGOs, the Indonesian Government granted some Benteng-Chinese people birth certificates. At the present time, some of the Benteng-Chinese have been able to obtain a birth certificate but this has sometimes taken years. However, others have been able to do so easily, and thus this lack of registration constitutes a violation of the norm of timeliness. For instance, one Benteng-Chinese woman, Oey Endah (born on May 12, 1951) only obtained her birth certificate at the age of 64 years old, despite the fact that the Indonesian Civic Administration Law obligates the Indonesian Government to grant a birth certificate to a newborn baby once they are delivered. Oey Endah lived for many years without such a certificate. This case shows a lack of commitment of the government to the principle of due care, especially with regards to timeliness. From an administrative law perspective, this case caused complex difficulties for people, especially Benteng-Chinese, in public life. The situation of Benteng-Chinese people will be elaborated upon in Chapter 3.

The case of Benteng-Chinese individuals above demonstrates that it is vital that the government obeys the norm of timeliness if it is to protect the interests of people. In addition, good governance encourages the government to re-evaluate the implementation of their obligations

[8] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 22.

with regards to timeliness. Beside timeliness, good governance also promotes the requirement of good regulations to support the implementation of the norms for the government and legal protection. Sadly, during Guided Democracy and the New Order, racist treatment was widespread and supported by some (either inadequate or bad) regulations. For instance, the Indonesian government promulgated the Act of Citizenship No. 2 of 1958 with the intention of resolving a problem with the People's Republic of China regarding the citizenship of Chinese people living in Indonesia. However, the government's actions resulted in hundreds of thousands of Indonesian citizens of Chinese descent losing their citizenship and becoming stateless, a clear example of mass maladministration.[9] Moreover, the improper actions of the government fuelled anti-foreigner sentiment especially following the issuing of Government Regulation No. 10 of 1959, which prohibited foreigners from trading in Indonesia. This legislation was used to aggressively defend the position and rights of ethnic Indonesians (*pribumi*), at the expense of non-pribumi citizens of Indonesia.[10] This regulation caused many Chinese-Indonesians to suffer economic harm, lose their jobs, and was followed by ethnic violence during the early Guided Democracy regime.

After the Guided Democracy regime fell apart, the New Order continued to breach the norms for the governments, especially the principles of equality, proportionality and reasonable policies, despite Indonesia defining itself as a 'state based on rule of law' (Article 1:3 of the Indonesian Constitution). During Soeharto's New Order, some statutes were issued that were explicitly discriminatory, for example Presidential Decree No.

[9] The implementation of Law No. 2 of 1958 regulated dual nationality for Chinese-Indonesians. Such individuals were required to choose between either Indonesian nationality or Chinese nationality. Further explanation of Law No. 2 of 1958 can be seen in the section on the Act of Citizenship in Chapter 3. See also, Awaludin Marwan, Radical Subject of Zizekian Study: Racist Fantasy Termination! Protection Chinese Ethnic Minorities in the Era of Gus Dur, Berlin, Lambert Academic Publishing, 2013, p. 23-29.

[10] Government Regulation No. 10 of 1958 was inspired by Rachmat Muljomiseno's regulation under Prime Minister Djuanda. Rachmat was a Minister of Trade and an active member of Nahdlatul Ulama, who restricted foreign merchants from trading outside of big cities only. This racist regulation affected approximately 25,000 people. Many Chinese people were forced to leave Indonesia by the military – one woman was even killed by the expelling forces. Siauw Tiong Djin. Siaw Giok Tjhan. Perjuangan seorang Patriot membangun Nasion Indonesia dan Masyarakat Bhineka Tunggal Ika, Penerbit Hasta Mitra, 1999, p. 317-319.

240 of 1967 (a policy on citizenship for people of non-Indonesian descent) and Presidential Instruction No. 14 of 1967 (which restricted Chinese culture, religion and faith). There were also many secret documents shared between Ministers which were used to manipulate racial barriers against 'foreigners.' In this period, Dutch colonial regulations such as the *Koninklijk Besluit* No. 64 (*Staatsblad* 1870; describing the legal basis of association), and the *Ordonnantie* No. 250 (*Staatsblad* 1909; restricting the formation of Chinese secret organisations) were reactivated to oppress the Chinese.[11] In addition, during Soeharto's era, corruption and maladministration caused significant harm to ethnic minorities.

As shown in the above cases, the norms for the governments need to be properly implemented and clearly defined by proper regulation. 'Good governance requires good legislation that takes into account the interests of citizens and the administration.'[12] In addition, good governance can provide 'the best way of creating [...] a coherent system' of good regulations to toughen the norms for the government and in that context the protection of the people.[13] Hence, we can investigate whether regulations such as the Act of Citizenship No. 2 of 1958, the Government Regulation 10 of 1959, the Presidential Decree No. 240 of 1967 (a policy on citizenship for people of non-Indonesian descent) and the Presidential Instruction No. 14 of 1967 (which restricted Chinese culture, religion and faith) were issued after carefully considering the balance of interests between citizens and government, and whether these regulations ensured a coherent, reasonable, and proportional system.

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[11] *Koninklijk Besluit* of 28 March 1870 (Staatsblad 1870 No. 64) describes the legal basis of association of organisations formed without permission of the Governor General of the Dutch East Indies. The Governor General would monitor the basic principles of an organisation, working environment, and other regulations with a limited time licence. The Governor General had the authority to disband the association if he found the existence of the organisation infringed the common order of society. Meanwhile, *Ordonnantie* of 23 April 1909 (Staatsblad 1909 No. 250) stipulated that secret Chinese organisations were prohibited from operating in the Dutch East Indies. If a person was found to be involved with a secret Chinese organisation by the Colonial police, that person would be imprisoned for three months.

[12] G.H. Addink. *Good governance: a norm for the administration or a citizen's right*? in G.H. Addink et al. (eds) Grensverleggend Bestuursrecht, Alphen aan den Rijn, Kluwer, 2008,

[13] G.H. Addink. *Principles of Good Governance: Lessons from Administrative Law*, In. D. M. Curtin and Ramses A. Wessel (eds): *Good Governance and the European Union* (Intersentia, Antwerp-Oxford-New York: 2005), p. 38.

Whilst one use of good governance is to investigate whether regulation is sufficient to reinforce the norms for the government and the protection of people's rights, it is also useful for analysing whether or not the administration is misusing their power, acting arbitrarily, or conducting maladministration. Here, legal protection from the viewpoint of administrative law may be beneficial for ethnic minorities. Legal protection is one way that a citizen can submit an appeal to the courts and a complaint to the Ombudsman. These institutions have the authority to review the fulfilment of norms and to evaluate the decisions and conduct of government. Thus, good governance, in terms of legal protection from an administrative law viewpoint, is useful for evaluating examples of maladministration that have harmed ethnic minorities. For instance, good governance can provide valuable insights into the ethnic profiling of Chinese people who wish to register land in Yogyakarta, or inspections by the Immigration Affairs who detained six Turkish teachers in Depok. In Yogyakarta, Chinese people are forbidden from owning land, so the Land Agency engages in 'ethnic surveillance;' registrants with a Chinese physical appearance have their applications rejected (this case is explored in detail in Chapter 3).[14] Another case is the inspection and detention of six Turkish teachers by Immigration Affairs. Whilst the Turkish teachers were eating lunch with their students, the Immigration Affairs began an investigation without a letter of assignment or providing reasons for their arrest, or detention (this case is elaborated upon in Chapter 3). The activities of both the Land Agency and Immigration Affairs can be analysed using good governance to discern to what extent these cases constitute misuse of power or arbitrariness and resulted in discriminatory action against ethnic minorities. This research concerns an administrative law study of the treatment of Chinese and Turkish communities from a good governance perspective. The reasons why I have selected these ethnic minority groups will be detailed in the following section.

[14] Awaludin Marwan. *How Yogyakarta preserves discrimination*. The Jakarta Post, May 11, 2018, see., http://www.thejakartapost.com/academia/2018/05/11/how-yogyakarta-preserves-discrimination.html, last visited on July 27, 2018.

Generally speaking, ethnic minorities are a vulnerable group;[15] they are commonly treated unequally and routinely and systematically discriminated against.[16] From a good governance perspective, the norms for the government should be improved to recognise the position of ethnic minorities as equal to non-ethnic minorities and to guarantee that they are legally protected. Hence, legal protection needs to be provided by the government—when this research uses the term 'government,' it refers to administrative authorities, judiciary, legislative institutions, and the fourth power e.g. the Ombudsman and National Human Rights Institution. When this research uses 'the administration' it refers solely to the administrative authorities. Administrative law includes the norms for the governments and the legal protection of the people in that context which includes the respect of fundamental rights.[17] In this research the term 'government' is used in a narrow sense, meaning 'the administration', and more specifically 'the administrative authorities', unless it is made explicit (or it is the contextually clear) that a broader meaning (i.e. the powers in the State) is intended.[18] Furthermore, legal protection can be obtained through a variety of procedures: by filing an objection with the administrative authorities, litigation through the courts, and non-litigation approaches provided by the Ombudsman or the National Human Rights Institution. Non-litigation approaches also include those provided by the National

[15] Loïc Wacquant, *Marginality, Ethnicity and Penalty in the Neo-Liberal City: An Analytic Cartography*. Ethnic and Racial Studies, Vol. 37, No. 10, 2014, p. 1687-1711.

[16] Seyla Benhabib, *The Rights of Others, Aliens, Residents and Citizens*, Cambridge, Cambridge University Press, 2004, p. 21.

[17] One of principles of good governance is the human right principle. This principle confers a subjective right upon citizens and an obligation upon the government. Minority rights also include the obligation for the government to do required activities and policies related to the duties to respect, to protect, and to fulfil minority rights. Through the implementation of the principle of human rights, the idea of good governance is not only expected to pay attention to the interests of the majority. Rather, it also serves to help attain the maximum achievement of administrative activities for the fulfilment of the right to protect the inherent dignity of each and every individual, including minority ethnic groups. G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 60.

[18] G.H. Addink, Good governance in the EU member states, Utrecht, 2015, p.27, https://www.ris.uu.nl/ws/files/18826324/final_version_september_2015.pdf.

Human Rights Institution and other similar institutions. For instance, the intimidation of the Turkish community and the confiscation of Chinese land are examples where the submission of complaints has arguably played a crucial role. Following the failed coup d'état in Turkey in July 2016, members of the anti-Erdogan *Hizmet* group were subjected to death threats and intimidation and other security problems around the world, including in Indonesia. In response to these threats and intimidation, the *Hizmet* group filed a report and requested assistance through the Indonesian National Commission of Human Rights. This particular request is one example that concerns legal protection, and will be elaborated upon further in Chapter 3.

Similarly, the importance of legal protection is evident in Chinese communities' appeals through the courts regarding land confiscation by the government. A massive land confiscation operation took place following the events of 1965, which also included mass killings, extermination, enslavement, forced eviction and displacement of civilians, and arbitrary suspension of independence and other physical freedoms. One of the groups that was most severely affected was the Chinese community; the International People's Tribunal of 1965 stated that the Indonesian government committed genocide, and had targeted Chinese communities in Aceh, Medan, and Lombok.[19] Afterwards, thousands of Chinese were expelled and their property and land was seized by the Indonesian government without proper assessment by the courts. During the New Order, Chinese people whose land was confiscated had no opportunity to submit an appeal. Thus, the courts did not provide sufficient legal protection during the New Order regime. After the collapse of Soeharto's New Order in 1998, Chinese communities began to lodge appeals to the courts in order to request the return of their land. It is important to understand whether or not this legal protection (case law submitted by Chinese-Indonesians) is sufficient to restore their position. Further discussion of this case can be read in Chapter 3.

[19] See, *Genosida ala Indonesia 1965,* available at http://www.tribunal1965.org/id/1965-genosida-ala-indonesia/, (accessed 8 November 2016).

As shown by the above cases, the Indonesian legal system is in dire need of the concept of good governance,[20] which provides (one of the) potential sources of support to solving the problems of racial discrimination. With this in mind, I have selected three principles of good governance that this research will focus on: transparency, participation, and human rights. Here I will provide some arguments for this selection, but a deeper and broader explanation for the reasoning of the selection of these particular principles of good governance is elaborated upon in Chapter 2.

First, transparency is an important principle for addressing the problem; if ethnic minorities do not have access to information and knowledge about fighting discrimination, they will not be able to participate in the public processes that enable them to defend their rights. The Indonesian Public Information Act No. 14 of 2008 stipulates the obligation of the government to make their information, meetings, and decision-making processes available to the public.[21] Ethnic minorities can use this Act to access to public information, and protect their interests. Transparency enables ethnic minorities to equip themselves with information which they can wield to combat discrimination. Sadly, the Indonesian Government seems to provide inadequate information on anti-discrimination and does not publish their CERD (International Convention on the Elimination of All Forms of Racial Discrimination) report frequently enough. The norms for the government oblige the administration to publish a CERD report every two years, but the last report was published in 2000. The principle of participation is equally important; after obtaining adequate information, ethnic minorities must be able to exercise their right to participate in order to struggle against

[20] A critical study investigates the concept of good governance in Indonesia from the role of post-colonialism of World Bank and IMF. Herlambang argued that dominant discourse of good governance is still on the hand of International donor which controls the friendly legal reform for foreign investment and economic development. R. Herlambang Perdana Wiratraman. Good governance and legal reform in Indonesia. 2006. Master thesis of Mahidol University.

[21] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 46.

discrimination.[22] One Chinese-Indonesian person was even criminalised after having been accused of blasphemy in the 2017 Gubernatorial Election of Jakarta (a case which is explored in detail in Chapter 3). This case demonstrated that Chinese-Indonesians are still at risk of discrimination. During the Gubernatorial Election, anti-Chinese hate speech escalated, yet Chinese-Indonesians did not challenge this through the courts. Indeed, the participation of ethnic minorities is vital for them to defend their position and combat discrimination at the micro or macro level. In addition, I analyse the participation of ethnic minorities and the response of administrative authority through the CLEAR Method which I describe in Chapter 2. Finally, the principle of human rights is a crucial legal principle in the frame of legal protection of ethnic minorities. Many mass organisations were disbanded without a proper procedure in Indonesia, including several Chinese and Turkish organisations which were banned without authorisation by the courts, violating the right to good governance. The right to good governance is part of the principle of human rights, a further explanation of this right can be found in section 4.3 of chapter 2. Hence the implementation of the principle of human rights is an important aspect of ethnic minority protection. [23]

2. Research questions

This research attempts to investigate the problems that affect ethnic minorities from an administrative law viewpoint, and more specifically, a good governance perspective. As shown above, ethnic minorities are often discriminated against, they are a vulnerable group who I argue are likely victims of maladministration, often experience difficulties when accessing public services and whose human rights are frequently violated. From an administrative law perspective, the concept of good governance is concerned with the norms for the government and the legal protection of people, including ethnic minorities. Good governance

[22] Ernesto Laclau and Chantal Mouffe. *Hegemony and Socialist Strategy*, London & New York, Verso, 1985, p. 24-28.

[23] Costas Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitan,* Oxford & New York, Routledge, 2007, p. 111-112.

is not only concerned with rights, but also the obligations of government and people. The faithfulness of governments to act based on the principles of avoiding misuse of power and arbitrariness, legal certainty, equality, proportionality and carefulness, is sometimes challenged. If governments engage in maladministration, mismanagement, corruption, and misuse of power, the implementation of the norms of government may be suspended. When a government engages in maladministration, mismanagement and so on, vulnerable groups —such as ethnic minorities are likely to be amongst the worst affected. Thus, it is important to evaluate the implementation of these norms to discern whether or not the position of ethnic minorities is sufficiently protected— the concept of good governance can be used to make such an evaluation. Sometimes, ethnic minorities face problems during the non-contention phase (i.e. before a decision has been made) of the policy making process. At this stage, they can engage with the law-making process, and raise any issues that relate to their position. On the other hand, they may also encounter problems during the contention phase (after a decision has been made) if they want to make an appeal or complaint through the courts, the Ombudsman or the National Human Rights Institutions. After considering the issues raised in the discussion I have formulated the following questions:

- How has the concept of good governance contributed to the strengthening of norms for the government and the legal protection of ethnic minorities, especially with regards to Chinese and Turkish people living in Indonesia and the Netherlands?
- How have the principles of good governance, and especially the principles of transparency, participation and human rights, fostered the norms for the government and legal protection for Chinese and Turkish people in Indonesia and the Netherlands?
- How have the governmental authorities, the courts, the ombudsman and national human rights institutions used these principles of good governance to solve problems that Chinese and Turkish people have experienced with the Indonesian and Dutch government?

3. Comparative study between Indonesia and the Netherlands

This study uses a good governance perspective in which the norms for the governments and the protection of ethnic minorities' rights are the main objects of this research; I explore this by assessing both the extent to which ethnic minorities can be involved with the activities of the government and how the government respects, protects, recognises, and fulfils their rights in Indonesia and the Netherlands.

First of all, there are many differences between Indonesia and the Netherlands as demonstrated by their relative scores on the democracy index,[24] corruption perception index,[25] human rights indicator grade,[26]

[24] The Netherlands, according to records by the Economist, is rated as a high-quality democracy. Referring to the Democracy Index 2017, the Netherlands is already ranked 3th with a score of 9.66. As a country with a fairly good quality of democracy, ethnic minorities in the Netherlands have the opportunity to effectively fight for their rights. Their ability to participate helps to create civil society and to oversee the government's performance related to the fulfilment of rights protection of ethnic minorities. This can also prevent cases of maladministration, mismanagement and corruption. Difference with Indonesia, is ranked 65th with a score of 6.41. (See, Laza Kekic, The Economist Intelligence Unit's index of democracy. The Economist, 2017, available at https://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf accessed 1 March 2018).

[25] The relevance of this approach within this study is based on the comparative legal systems of minority protection from the perspective of developed countries; the Netherlands is categorised as one of the most corruption-free states in the world. According to the Corruption Perceptions Index of 2017, the Netherlands was ranked 8th, with a score of 82. Referring to the corruption perception index in 2017, Indonesia is categorised as one of the most corrupt countries. Ranked 96th, Indonesia has a score of 37. See, Transparency International Corruption Perceptions Index 2017, available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 (accessed 1 March 2018). My research on the protection of ethnic minorities is important because improving the quality of government services for ethnic minorities is in the spirit of equal treatment, justice and fairness. This study will encourage the Indonesian government to improve its policies through the National Strategy on Access to Justice. See., President Decree No. 3 of 2010 on The Program for Justice. See also, Ineke van De Meene & Benjamin van Rooij, *Access to Justice and Legal Empowerment Making the Poor Central in Legal Development Co-operation,* Leiden, Leiden University Press, 2008, p. 14. And see the National Action Plan on Human Rights: Presidential Regulation No. 75 of 2015 on the National Action Plan on Human Rights.

[26] Based on the International Human Risk Indicator, the Netherlands is ranked 6th for its human right empowerment and has a score of 75.57%. On the other hand, Indonesia is in a much lower position, ranked 195th with a score of 29.29%. See., International Human Risk Indicator 2017 available at *https://reliefweb.int/sites/reliefweb.int/files/resources/2014_Human_Rights_Risk_Index_Map.pdf* (accessed 1 March 2018. This situation makes a comparative study between the Netherlands and Indonesia not only viable, but vital to inspire a legal transplantation of ethnic minority rights. The Netherlands is a nation with a good level of human rights development, as seen by the 2014 Human Development Index; the Netherlands is ranked 7th with a score of 0.924, while Indonesia has not moved from 103th with

etc. Nevertheless, there are also some significant similarities, thus enabling a meaningful comparison.

For example, there are many similarities in the legislation, for instance in the legislation regarding protection of ethnic minorities in the Dutch Equal Treatment Act and the Indonesian Human Rights Act.[27]

Firstly, from a good governance perspective, it is vital to understand the legal norms and public institutions that function to improve the norms for the governments and the protection of ethnic minorities. This research compares the similarities in legal norms and public institutions that work to protect ethnic minorities in both Indonesia and the Netherlands. The legal norms of ethnic minority protection in Indonesia and the Netherlands are regulated in their respective constitutions and a number of regulations.[28] The position of ethnic minorities seems to be guaranteed by Article 28 of the Indonesian Constitution and Article 1 of the Dutch Constitution. Meanwhile in Indonesia, regulations about the legal protection of ethnic minorities are enforced via the Human Rights Act; similarly, the Netherlands regulates the protection of ethnic minorities through its Equal Treatment Act. A study of the legal situation and analysis of legal norms in the legislation regarding

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a score of 0.689. See, Human Development Report 2014, available at *http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf* (accessed 1 March 2018) United Nations Development Programme 2014.

[27] The Dutch Equal Treatment Act and Indonesian Law No. 39 of 1999 share many similarities. Some similarities of legal norms between the two countries are: first, the prohibition on discrimination on the grounds of ethnicity regulated by Article 4 of the Dutch Equal Treatment Act and regulated in Article 1 of Indonesian Law No. 39 of 1999. Second, it is unlawful to discriminate with regards to: public advertising of employment and procedures leading to the filling of vacancies; job placement; the commencement or termination of an employment relationship; the appointment and dismissal of civil servants, etc. according to Article 5 of the Dutch Equal Treatment Act and Article 64, Article 72, et al. of Indonesian Law No. 39 of 1999.

[28] According to Dworkin, a particular issue that becomes a legal norm of a constitution is a guarantee of the rule of law. In a constitutional text, there is a command that guarantees the process of law. What Dworkin refers to as 'what the constitution says' should be followed by state institutions which consistently obey the words of the constitution. For example, if the constitution mentions equality of treatment and anti-discrimination, the state should ensure that these concepts are implemented. Ronald Dworkin, *Freedom's Law the Moral Reading of the American Constitution*. Oxford, Oxford University Press, 1996, p. 72-79.

the norms for the governments and the ethnic minorities' protection is an essential part of this research.

Secondly, in Indonesia and the Netherlands, government institutions that exist for the protection of ethnic minorities serve similar functions. For instance, the Netherlands Institute for Human Rights and the Indonesian National Commission of Human Rights have, in essence, the same objectives, namely protecting ethnic minority rights, conducting investigations, promoting ethnic minority rights, providing legal empowerment to ethnic minorities, undertaking research, providing human rights education, and so on. When carrying out their functions, public institutions such as the Netherlands Institute for Human Rights and the Indonesian National Commission of Human Rights can refer to the principles of good governance, so that governments can be more transparent and empower citizens to actively participate.[29]

Thirdly, Indonesia and the Netherlands have a long shared legal history (from 1602 until 1945).[30] From a good governance perspective, Indonesia and the Netherlands have similar ideas about the development of the rule of law, of democracy, and of modern states. This shared history has, unsurprisingly, also influenced the development of protection for ethnic minorities.[31] When Indonesia became independent a large part of its legislation consisted of laws that were copied from the Netherlands. These two countries began with almost the same legal sources, which is particularly interesting when analysed from a good governance perspective. The history of human rights law, the problems and the protection of ethnic minorities also originate from the legal systems of Dutch colonial law. For example, Article 163 of the '*Indische Staatsregeling*' which made explicit legal distinctions between 'the European', 'foreign oriental', and 'indigenous' people. Furthermore, conducting a compara-

[29] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 90.

[30] John Ball. *Indonesian Legal History, 1602-1848*, Sydney, Oughtershaw Press, 1982.

[31] Daniel S Lev, *Legal Evolution and Political Authority in Indonesia. Selected Essays.* The Hague, London, and Boston, Kluwer Law International, 2000, p. 287. This long history determines the character of Indonesia and the Netherlands in possessing the same legal system, which adheres to the civil law tradition, both in the area of criminal law – Indonesia is still using the Dutch *Wetboek van Strafrecht* of 1915 – and in the area of civil law where Indonesia still widely refers to the Dutch *Burgelijk Wetboek* in the practice of law.

tive study is possible when the comparison is based on a study of 'legal norms, legal institutions and perspectives.'[32] In my research, a comparative study of 'legal norms' of ethnic minority protection is applied to the Constitution, Dutch Equal Treatment Act and Indonesian Law No. 39 of 1999 (Human Rights Act). This study will examine the legal norms of general principles, values, and legal procedures of administrative law and also the practices of government institutions, such as the Netherlands Human Rights Institution, the Indonesian National Commission of Human Rights, the Ombudsman, and the courts. In the frame of this research, these are the main institutions that conduct the programmes, policies, and activities that deal with the protection of ethnic minorities. *Finally*, a comparative study between the legal systems of both countries is possible because of the similarities in 'perspective', which in this case is the concept of good governance. As a theoretical foundation, good governance is a suitable lens for the analysis of the legal systems of Indonesia and the Netherlands and the protection they offer ethnic minorities. How ethnic minorities participate actively in protecting their own rights in the legal system (e.g. by courts or reporting to the Ombudsman and the National Human Rights Institution) is a particular theoretical dimension of a good governance perspective that is very important in reviewing the legal protection of ethnic minorities.[33]

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[32] Luc J Wintgens, *Legisprudence and Comparative Law*. in Mark van Hoeke. *Epistemology and Methodology of Comparative Law*, Oxford, Hart Publishing, 2004, p. 299-305.

[33] Although there are similarities in the legal systems of both countries, it is also important to investigate their differences. From a good governance perspective, we can see that the principles of transparency, participation, and human rights are implemented at different stages in their respective histories. For instance, the Netherlands has advanced levels of participation in public services. Referring to the Democracy Index 2012, the Netherlands is ranked 10th with a score of 8.99 – far higher than Indonesia in terms of participation. Ethnic minorities who have a high level of participation are able to better protect their rights. Similarly, the level of fulfilment of ethnic minority rights (as part of the principle of human rights for all citizens) is also higher in the Netherlands than in Indonesia. Based on the International Human Risk Indicator, the Netherlands is ranked 6th for its human rights empowerment with a score of 75.57%. Indonesia, on the other hand, is much lower, ranked 195th with a score of 29.29%. Finally, the situation that makes a practical difference to ethnic minority protection in Indonesia and the Netherlands, is the effectiveness of the Ombudsman's work. The Dutch Ombudsman's recommendations are more effective than those of the Indonesian Ombudsman, which means that the Dutch Ombudsman provides a practical,

For this research, my focus is on Turkish and Chinese ethnic minority groups. These are the only two ethnic minorities that are observed in the context of good governance in this research. This research tries to investigate and evaluate the legal norms in relation to the Chinese and Turkish communities that live in Indonesia and the Netherlands. One reason for choosing these ethnicities is that they are established minority groups in both countries, and have been living in Indonesia and the Netherlands for many years. Researching the Turkish and Chinese communities in the Netherlands and Indonesia is possible because their presence is relatively significant. In the Netherlands, there is a Chinese community of 28,220 people[34] and a Turkish community of 396,414 people.[35] In Indonesia, there is a Chinese community of 2,832,510 people[36] and a Turkish community of approximately 600 people.[37] After the failed Coup in Turkey, both the Indonesian government and Dutch government have begun to pay more attention and concern to legal protection of the Turkish community living in either country. This is what makes the study of the Turkish community interesting. Other ethnic minorities (such as Moroccan or Surinamese communities) in the Netherlands are also subjected to racial discrimination, but have different stories that will not be included in this study; finding equivalent Moroccan communities in Indonesia is difficult as only a few Moroccan people live in Jakarta, and Surinamese communities in Indonesia tend to assimilate into Javanese society more easily because they are usually of Javanese descent and speak Javanese. Both the

institutional means by which ethnic minorities can protect their rights.

[34] Statistics Netherlands, CBS Den Haag accessed 14 December 2015.

[35] Statistics Netherlands, CBS Den Haag accessed 14 December 2015.

[36] Badan Pusat Statistik 2010 accessed 14 December 2015.

[37] Interviewed with Sulistiyono Directory of Intelligence at Immigration Affair of Indonesia on 5 December 2016.The quantity, indeed, is different between Turkish and Chinese in Indonesia and the Netherlands. However, my interviews with Immigration Affairs indicated that there is a more significant presence of Turkish immigrants in Indonesia compared to immigrants from other countries like Morocco, Nigeria, Afghanistan, and so on. Furthermore, after the failed coup in Turkey, many Turkish people living Indonesia felt at a risk of human rights violations. Some have requested my help in accessing legal protection under Indonesian law. I have given them legal aid and formed a warm friendship with Hizmet community. After providing legal aid to Turkish people in Indonesia, I also made contact with the Hizmet community in the Netherlands.

Turkish and Chinese ethnic minority groups have built a social presence and have become involved in the administrative systems of both countries. Furthermore, the focus is on the discrimination faced by Chinese and Turkish communities as ethnic minorities. Ethnic minorities, for my purposes includes immigrants, refugees, or marginalised national minority groups.[38] Relevant case studies related to these two communities are included. There is relevant case law on, amongst other things, immigration, citizenship, conflict of land, blasphemy, social benefit, arbitrary policing, public service, and the labour market.

4. Research method

In November 2014, I started my review of the literature and the primary sources of the Indonesian and Dutch Constitutions, statutes, administrative regulations, policy papers, explanatory memoranda, and cases were collected. I made a compilation of legislation, administrative policy, and other legal documents[39] for analysis from a good governance perspective with reference to ethnic minority protection. Case law on Turkish and Chinese people in Indonesia and the Netherlands was also considered. Other relevant sources in describing the position of ethnic minorities in Indonesia and the Netherlands include the CERD reports: (1) the document of 'the Netherlands Institute for Human Rights Submission to the Eighty-seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Reports of the Netherlands' and (2) 'Report Submitted

[38] This group of refugees and immigrants eventually formed a group of national minorities vulnerable to unfair treatment and discrimination. They have their own distinct culture, including having a foreign language, and so on. Alan Patten, *Equal Recognition the Moral Foundations of Minority Rights*, Princeton, Princeton University Press, 2014, p. 270.

[39] Carol M. Bast and Margie A. Hawkins make a distinction between primary and secondary sources of law. Primary sources are the constitutions, statutes, court rules, administrative regulations, cases, and loose-leaf services. Meanwhile, secondary sources include treatises, law review Articles, law dictionaries, legal thesauruses, hornbooks, legal encyclopedias, legal education publications, restatements, etc. Lastly, Bast and Hawkins mention digests, citators, and indexes to legal periodicals as sources worth consulting. See, Carol M. Bast, Margie A Hawkins and Sharon Hanson, *Legal Method*, London, Cavendish Publishing Limited, 1999, p. 39.

by States Parties Under Article 9 of the Convention Third Periodic Report of States Parties Due in 2000, Addendum, Indonesia'. These two documents were utilised to begin analysing the network of legal norms and case law on good governance and ethnic minorities.

Field research in Indonesia was conducted between February 2015 and May 2015 and September 2016 and January 2017; this largely took place in Jakarta and other cities such as Semarang, Jepara, Yogyakarta, Padang, Bangka Belitung, and Padang. For the rest of the time I stayed in the Netherlands whilst conducting field research in Utrecht, Amsterdam, The Hague, Rotterdam, Leeuwarden, Leiden, and Zwolle.[40] In other words, this research applies empirically-grounded legal research.[41] In-depth interviews and observations were conducted. Interviews were held with more than 100 people including Turkish and Chinese people, police officers, lawyers, human rights activists, journalists, legal scholars, members/experts of the Indonesian and Dutch Ombudsman's office, members/experts of Indonesian and the Netherlands Institute for Human Rights, senior advisors to the Indonesian Ministry of Justice, advisors of municipalities, and members of anti-discrimination bureaus. The interviews were undertaken using a basic list of questions which was later adapted in response to insights gained during field research. Several people were interviewed more than three or four times in order

[40] In the stage of field research, I adopted a socio-legal studies approach, which was inspired by the charismatic Indonesian PhD Researcher at Utrecht University School of Law, Prof. Dr. (Iur) H. Adnan Buyung Nasution, SH and in particular his thesis 'The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959', published in 1992. See, Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*, Jakarta, Pustaka Sinar Harapan, 1992, p., 4-5. Buyung tried to develop a picture of the connection between norm and fact; Articles and the political battle behind the Constitution making process; the formulation of language within the norm and the formation of influential and important actors in the debate in the Konstituante 1956-1959. In writing of the thesis my focus was more on the legal and more specifically on the administrative law aspects.

[41] A socio-legal approach can be defined as a research method that interrogates the attitudes, ideas, perceptions, expectations, and values of people who take part in a particular legal system and then analyses these variables and how they relate to institutions and communities. See., Pompeu Casanovas, Nuria Casellas and Joan-Josep Vallbe, *Empirically Grounded Development of Legal Ontologies: A Socio-Legal Perspective*. In Giovanni Sartor (ed.), *Approaches to Legal Ontologies. Theories, Domains, Methodologies*, Dordrecht, Springer Science, 2011, p. 49.

to obtain updates and a clearer understanding of their interpretation of legislation and its enforcement.

This research employed field research methodology to develop the understanding of legal norms and their implementation in practice. An empirical approach can enrich the understanding of how the Indonesian and Dutch governments implement the concept of good governance and its principles of transparency, participation and human rights. T, this research provided interviews and observations. The purpose of the interviews and observations was not only to collect factual information and the personal opinions of actors, but to explore the difference between legal norms and legal practice, and to investigate the social and political reality of law enforcement of the norms for government and legal protection of ethnic minorities in the Dutch or Indonesian Constitutions, the Dutch Equal Treatment Act, the Indonesian Human Rights Act and so on. Through the interviews, I was able to examine various interpretations of the law, alongside the socio-political background of ethnic minorities, and how the principles of transparency, participation and human rights are implemented. Similarly, my observational research provided facilitated a comprehensive analysis of the role of institutions (the administrative authorities, Indonesian and Dutch Ombudsman, Netherlands Institute for Human Rights, Indonesian National Commission of Human Right and courts), the participation of ethnic communities, and what social milieu encompassing the actors' exercise their power. From academic standard, conducting observational research can be used to collect data relating to work and activities, spontaneous behaviour and expressed opinions of respondents.[42]' Observational research also tries to assess both the formal and informal networks involved in people's daily lives and recording local organisation's structure of social relations and of power.[43] Using observation in allows for the collection of data relating to people's perceptions, work and activities either formal or informal aspect. Furthermore,

[42] Saul B. Sells and Robert M. W. Travers. *Observational Research*. American Educational Research, Vol. 15, No. 5, (Dec, 1945), pp. 394-407

[43] Sam Wong. *Ethnography Alternative Research Methodology*. Amsterdam, Amsterdam University Press, 2007, p. 47-52

such an approach could be valuable to understanding the legal culture of the organisational settings of the Chinese and Turkish community, the Ombudsman, and the National Human Rights Institutions that deal with the concept of good governance.

I used a comparative administrative law approach in order to investigate similarities and differences between the Indonesian and Dutch legal systems on good governance and ethnic minority protection. By using a comparative approach, I have tried to analyse whether the two legal systems use similar concepts. A comparative inquiry also helps to describe differences in legal doctrine, institutional character, interpretative style of statutes and the resulting implications.[44] Hence, the comparison includes a legal analysis of the Dutch Equal Treatment Act, National Ombudsman Act, Government Information Act, General Administrative Law Act, etc. Similarly, in Indonesia, written law is also useful in the implementation of the protection of ethnic minority rights. The focus here is primarily on the Human Rights Act, the Indonesian Government Administration, the Citizenship Act, the Public Services Act, the Public Disclosure Act, and the Ombudsman Act. Close reading of the text of regulations can generate a picture of the logical or linguistic network and its common tradition of legal hermeneutics[45] for how legal protection of ethnic minorities is established.

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[44] John Bell, *Legal Research and the Distinctiveness of Comparative Law*. In Mark van Hoeke (ed.), *Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline*, Oxford, Hart Publishing, 2011, p. 155-170.

[45] Hermeneutics are useful for legal approaches which can inspire the art of prophesying, translating, interpreting, explaining, describing, portraying, depicting, etc. In Ancient Greek texts, 'hermeneutics' referred to the message of the Gods, namely Hermes who was said to have created language and writing. In Aristotle's *Organon,* it was stated that hermeneutics provide an explanation of a logical grammar. Jerzy Stelmach & Bartosz Brozek. Methods of Legal Reasoning. 2006. Springer., p. 167. A prominent scholar who frequently used the concept of hermeneutics is Hans Georg Gadamer. He states that hermeneutics recognises that the text is always ready to be interpreted and identifies the meaning of every single word. Moreover, hermeneutics can also be used to look for truth behind the sentence. See., Hans Georg Gadamer, *The Gadamer Reader: A Bouquet of the Later Writings.* Richard E Palmer (ed.), Illinois, Northwestern University Press, 2007, p. 156., See also, Hans Georg Gadamer, *Truth and Method,* New York, Continuum Publishing Group, 2006, p. 15., Hermeneutics are also suitable for the field of legal interpretation., See. Gregory Leyh, *Legal Hermeneutics: History, Theory, and Practice*, California, University of California Press, 1992, p. 174.

5. Structure of the thesis

Chapter 2 describes the normative framework of this research. The concept of good governance and the topic of ethnic minority protection are outlined as the main theoretical lens used to analyse the legislation, case law and legal processes. Reference is made to the study of administrative law to investigate the problems of ethnic minorities in the legal system and practice. This chapter also provides definitions of good governance and some key terms including the principles of transparency, participation and human rights. Here, good governance and its principles of transparency, participation, and human rights are presented as a legal solution to the problems of discrimination against ethnic minorities from an administrative law perspective.

Chapter 3 explains the position of legislation and the institutional character of good governance and ethnic minority protection in Indonesia. In this way, the general and the specific aspects of good governance are focused on the norms for the government and legal protection of ethnic minorities. It starts with an analysis of the Indonesian Constitution, the Act of Citizenship, and the Human Rights Act and then continues by discussing the authority of the government, the Indonesian Ombudsman, Indonesian National Commission of Human Rights, and the Indonesian courts. Lastly, I summarise my research findings about the implementation of transparency, participation and human rights.

Chapter 4 addresses the Dutch legal system with reference to good governance and ethnic minorities. Starting with the general norms from Article 1 of the Dutch Constitution, and Equal Treatment Act, there is a description of the functions of the anti-discrimination bureaus, the Netherlands Institute for Human Rights, the Ombudsman and the courts in combating maladministration as well as the implementation of the good governance principles of transparency, participation and human rights in the Netherlands.

Chapter 5 compares the Dutch and Indonesian legal systems with regards to good governance and ethnic minorities. The idea of 'good ethnic minority governance' is established through the comparison of

legal strategy and legal protection of ethnic minorities in Indonesia and the Netherlands.

Finally, Chapter 6 contains the conclusions and recommendations.

CHAPTER 2
NORMATIVE FRAMEWORK
Good Governance: Concept and Principles

1. Introduction
2. The concept of good governance
3. The definition of good governance and ethnic minorities
4. The selected principles of good governance
   4.1 The principle of transparency
   4.2 The principle of participation
   4.3 The principle of human rights
5. Provisional conclusions

1. Introduction

Chapter 2 describes the normative framework for good governance in the context of ethnic minorities. The concept of good governance and its principles are here presented as elements of administrative law that I will use to analyse ethnic minorities in their relation to the governmental authorities. In other words, this chapter will form the normative framework for the investigation of ethnic minorities' problems with a focus on Chinese and Turks in Indonesia (chapter 3) and the Netherlands (chapter 4), with the aim of comparing my findings later in chapter 5. In section 2 of this chapter there is an explanation of the concept of good governance from a variety of perspectives. In essence in this research, good governance has two concerns; strengthening the norms for the governmental authorities, and in that context, norms related to the legal protection of people. The explanation ends with a definition of good governance as it will be used in this research (section 3). The definition is also needed to operationalise the concept of good governance and to outline the focus and limitations of this concept. Good governance in the context of administrative law is the main concept that will be used to

explore the legal problems of ethnic minorities in Indonesia and the Netherlands on national level.

In addition, I have selected, developed and defined three principles of good governance (transparency, participation and human rights) to investigate the situation of the Turkish and Chinese communities in Indonesia and the Netherlands. *First*, the principle of transparency (section 4.1) has been developed from the more specific principles that encourage the governmental authorities to publish their documents, to open their meetings and to allow people, including ethnic minorities, to access public information. The exploration of the principle of transparency, with its specifications, focuses on the Dutch Government Information Act (*Wet openbaarheid van bestuur, WOB*) and the Indonesian Public Disclosure Act (*Undang-Undang tentang Keterbukaan Informasi Publik*). *Second*, the principle of participation (section 4.2) is used to analyse the legal activities of governmental authorities and in which context ethnic minorities engage with public life in general, and more specifically in the relation to the governmental authorities. In section 2 and section 4.2 reference is made to the Dutch General Administrative Law Act (GALA), the Indonesian Government Administration Act, and other relevant pieces of laws and regulations. *Third,* the principle of human rights in the context of good governance, is used to investigate the right to good governance, its specifications and implementation. Here, the Dutch Equal Treatment Act (*Algemene wet gelijke behandeling*), the Indonesian Human Rights Act (*Undang-Undang tentang Hak Asasi Manusia*), and other laws and regulations are valuable indicators of the legal problems experienced by ethnic minorities in Indonesia and the Netherlands, and thus are valuable for my analysis (section 4.3).

2. Concept of good governance

In this section, I present an overview of many of the theories that are related to the concept of good governance. In essence, as mentioned in chapter 1, good governance is a legal concept that is concerned with the norms for the governmental authorities (legal norms specifically for these authorities) and the legal protection of citizens (legal norms in dif-

ferent forms of review). In other words, good governance encompasses not only rights, but also obligations. Simply put, good governance is concerned with 'duties and rights.' In this research, I aim to present good governance as a concept which has the potential to help solve many of the problems that ethnic minorities face, by analysing their rights, and investigating to what extent the government realises its obligations with regards to ethnic minorities.

First, good governance, in the administrative law tradition, stipulates the commitment of governmental authorities to realise their duties related to the prohibition of the misuse of power, prohibition of arbitrariness, legal certainty, reasonableness, equality, proportionality and carefulness. In implementing their duties, governmental authorities, at least, must dedicate themselves to proper administrative activities.[46]

'Properness' or 'proper administration' was the first evolutionary step towards the concept of good governance, which developed originally as unwritten norms in the context of the (administrative) courts to ensure the correct or appropriate implementation of governmental duties. Later, iterations of these principles were codified in laws at the national level in many different countries.[47] Proper administration in

[46] Good governance is concerned with improving the resource management of all government institutions with the aim of enhancing the ability of these institutions to provide public services. Equally important, is that good governance may establish stability, firmness, balance, and steadiness among public institutions whilst exercising their duties. See., Matt Andrews, Good governance means different things in different countries. An International Journal of Policy, Administration, and Institutions, Vol. 23, No. 1, January 2010, p. 7-35. When resources (for example the budget, the capacity of public servants and infrastructure) are used wisely, governments are able to deliver high quality public services to the people. Furthermore, the values of, stability and balance may encourage government to abide their own standards and procedures, and prevent arbitrariness. In addition, good governance, in enhancing government's legitimacy, can essentially be thought of as an approach to governance reform with a focus on the efficiency of the public administration, reducing poverty, and combating corruption, nepotism and mismanagement. Ved P. Nanda. Good governance Concept Revisited. The Annals of the American Academy of Political and Social Science, Vol. 603, Law, Society, and Democracy: Comparative Perspectives (Jan., 2006), pp. 269-283. In other words, government behaviour that is inefficient, corrupt, nepotistic or mismanaged, can be classified as 'bad governance.' These problems— particularly corruption and nepotism—, are a 'chronic illness' that thwarts fair distribution. Robert I. Rotberg. Overcoming Difficult Challenges: Bolstering Good Governance. The Annals of The American Academy of Political and Social Science, Vol. 652, (Marc, 2014), pp. 8-19.

[47] G.H. Addink, *Good governance in the EU-member-states*; https://www.ris.uu.nl/ws/files/18826324/final_version_september_2015.pdf.

the context of respecting legal standards refers to the norms of prohibition of the misuse of power, prohibition of arbitrariness, legal certainty, reasonableness, equality, proportionality and carefulness.[48] From this point, these maxims will be described as (1) the prohibition of misuse of power, which means that an administrative authority should not use its power for other purposes than are regulated in statutory. This maxim is essentially stipulated by Article 10e of Indonesian Government Administration Act (IGAA) No. 30 of 2014. Likewise, a similar maxim can be found in Article 3.3 of Dutch General Administrative Law Act (GALA). Furthermore, (2) the prohibition of arbitrariness states that governments must abide by procedures and promote administrative discipline, balance rights and duties, and ensure social order (Article 4a, 4d, 4l of Indonesian Public Service Act (IPSA) No. 25 of 2009). In addition, (3) Legal certainty, obliges all activities and exercises to be based on existing regulations in accordance with Article 10a of IGAA; (4) 'reasonableness' means providing sufficient explanations for any administrative decision (See: Article 10f of IGAA); (5) the maxim of equality avows non-discrimination and equal treatment for all people (See Article 10c of IGAA, Article 4g of IPSA; (6) the norm of proportionality states that administrative authorities' activities must be proportional in magnitude and quality to their objectives (10b of IGAA); (7) 'carefulness' obliges the administration to avoid causing harm and to reduce risk when performing their duties (10b of IGAA). These maxims have been developed in administrative law discourses, and can be used as objective standards to evaluate whether a government observes or neglects the principle of properness.[49] Furthermore, these maxims can also be utilised to analyse problems with the implementation of these obligations by governmental authorities, and in this context, the fulfilment of fundamental rights related to the legal protection of people.

Second, good governance stimulates improvements to the function of public governmental authorities, strengthening structures for de-

[48] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 77-80.

[49] Muhammad Yasin, et al. Anotasi Undang-Undang No. 30 Tahun 2014 tentang Administrasi Pemerintahan, University of Indonesia-Centre for Study of Governance and Administrative Reform (UI-CSGAR), 2017, p. 81-85.

termining institutional objectives,[50] and establishing integrity and professionalism amongst public servants.[51] Governmental authorities that neglect their duties are best described as dysfunctional. Thus, good governance is concerned with fairer rules, administrative institutions, and making sure that these institutions are able to support the implementation of the government's obligations.[52] Good governance aims not only to establish a structure for determining institutional objectives, but also to monitor performance and guarantee that objectives are achieved.[53] Indeed, good governance is primarily focused on the performance of governmental authorities —and how essential services should be delivered. Furthermore, good governance also urges the reduction of inappropriate behaviour and encourages professionalism and integrity.[54] Bad governance is associated with maladministration and the discharge

[50] Good governance asserts that governments must observe their duties. In order to ensure that it fulfils its duties, a government needs to equip its actions with strategies and effective policies. Indeed, good governance requires a strategy consisting of clear statements of direction, policies that have clear jurisdiction, procedures and guidelines, and information that describes who, what, and how. See, John Weckert and Richard Lucas. What is good governance? See, Professionalism in the Information and Communication Technology Industry. ANU Press, 2013, pp. 157-158. This strategy also includes how to implement politics of recognition regarding identities and cultural diversity. With a commitment to good governance, cultural diversity can be protected and integrated into a comprehensive regulatory stance which can be beneficial for legal protection. See, Ilir Haxhi and Hans van Ees. Explaining diversity in the Worldwide diffusion of codes of good governance. Journal of International Business Studies, Vol. 41, No. 4 (May 2010), pp. 710-726.

[51] Another important aspect of the concept of good governance, in strengthening legitimacy for the government, is that it urges governments to realise their duties and obligations. Whilst reducing poverty is one of the major goals of good governance, it also intends to establish a faithful, clean, proper, responsive, and legitimate public institution that can produce better change and justice. When a government faithfully observes good governance, then its duties (such as providing public service, pursuing social aims of the wishes of population, and protecting fundamental rights) can be firmly secured. See, G.H. Addink (Forthcoming*), Good Governance: Concept and Context*, Oxford, p. 13. Corrupt governments, who lost its legitimacy, such as the authoritarian regimes of Southeast Asia, Africa or Latin America in the 1970s-1990s failed to observe their duties and abused their power. Ian Gough and Geof Wood. *Insecurity and Welfare Regimes in Asia, Africa, and Latin America: Social Policy Development Context,* Cambridge, Cambridge University Press, 2004.

[52] SN. Sangita. *Administrative Reforms for Good Governance*. The Indian Journal of Political Science, Vol. 63, No. 4 (December 2002), p. 325-350.

[53] John Weckert and Richard Lucas. *What is good governance*? See, Professionalism in the Information and Communication Technology Industry. ANU Press, 2013, pp. 157-158.

[54] John Weckert and Richard Lucas. *What is good governance*? See, Professionalism in the Information and Communication Technology Industry. ANU Press, 2013, pp. 157-158.

of responsibility.[55] Maladministration, corruption, and other 'viruses' that afflict administrative authorities[56] can spread from public servants who do not abide by norms related to codes of conduct and integrity. This is why the role of the Ombudsman is pivotal towards investigating improper conduct by public servants, as stated in Article 3 of the Indonesian Ombudsman Act No. 37 of 2008. Submitting a complaint to the Ombudsman can be an effective mean of ensuring proper conduct by public servants acting on behalf of administrative or governmental authorities. As the reasons above have shown, good governance can encourage governments to realise their duties and provide good administrative services.

Third, good governance is a legal concept which was developed from concepts of proper governance, rule of law and democracy. In other words, good governance can be said to be a marriage of rule of law and democracy, which some administrative law scholars call 'democratic rule of law.' In essence, the concept of good governance is closely related the concept of democratic rule of law.[57] Simply put, rule of law is

[55] Kempe Ronald Hope. *Toward Good Governance and Sustainable Development*: The African Peer Review Mechanism. Governance: An International Journal of Policy, Administration, and Institutions, Vol. 18, No. 2.

[56] The Indonesian administrative law has a broad scope. It acknowledges the connection between other disciplines of science and legal studies. Administrative law may be interconnected to various types of science and these connections not only influence one another, but sometimes overlap and provide mutual support. Simply put, administrative law connects with criminal law, civil law, human rights law, and social science. In the field of criminal law, some maxims of administrative law can be seen in the standards and procedures of Indonesian Criminal Law. The connection between administrative law and criminal law for example, can be seen in cases of corruption, bribery or administrative extortion, in which some scholars call 'administrative penal.' W. F. Prins. *Inleiding in het administratief recht van Indonesie,* Groningen, J.B. Wolters, 1950, p. 13. The connection between administrative law and criminal law also can be observed in legal practice in the implementation of general criminal law (especially the code of criminal procedure) and crimes concerning government activities. W.F Prins and R. Kosim Hadisapoetra. *Pengantar Ilmu Hukum Administrasi Negara*, Jakarta, Pradnya Paramita, 1976, p. 12-15. The relation administrative law and civil law can be sighted in government contract, such as insurance for public servant's official car or land acquisition from individuals, etc. Diana Halim Koentjoro. *Hukum Administrasi Negara*, Bogor, Ghalia Indonesia, 2004, p. 20

[57] Democratic rule of law (*democratische rechstaat*) establishes the concept of managing power which based on law in order to maintain and pursue the social aims of population. This democratic rule of law becomes a normative legal ground for the structure and practice of administrative law, R.J.N. Schlossels and S.E. Zijlstra. *Bestuursrecht in de Sociale*

a legal concept that restricts the exercise of power by separating it into well-established laws and institutions. This concept highlights the principle of legality, states that there should be specific procedures for every public institution, and that each institution should be able to be investigated by the court (judicial control). Rule of law is separated into legislative, executive, and judiciary power. Each power is obliged to respect the spirit of checks and balances.[58] Furthermore, current debates about rule of law (*rechtsstaat*) concern not only restrictions of power exercise, but also judicial control, the development of legal principles, and the protection of fundamental rights.[59] Democracy can be defined as a political system whereby members of a society contribute to the governing of a state through representation and participation. This system entrusts supreme power to the majority of people who are governed by representatives in parliament. In this system people can enjoy different types of freedom: freedom of expression, freedom of the press, academic freedom, and so on. Furthermore, democracy can be understood as a po-

Rechststaat. Deventer, Wolters Kluwer, 2007, 14. Another important consideration, democratic rule of law respects more the expression of people which cannot be oppressed by the legacy of system of feudalism. Every person can develop his or herself in accordance with personal quality which is able to join with any competition in labour market and any economic life, M.C Burkens, et al. *Beginselen van de democratische rechsstaat. Inleidding tot de grondslagen van het Nederlandse staats-en bestuursrecht*. Deventer, Wolters Kluwer, 2012, p. 23-25.

[58] The rule of law creates a separation of powers in which legislation has been made properly, and executive power can implement this legislation and decisions of the court. Hayek argues that the First Agreement of the People of 1647 and the Instrument of Government of 1653 present the separation of power as 'the grand secret of liberty and good government' in the past; See., Friedrich von Hayek, Law, Legislation and Liberty. *A New Statement of the Liberal Principles of Justice and Political Economy*, Oxford & New York, Routledge, 1973, p. 128-129. nowadays ideas of a balance between the classical powers and new specified forms of each these powers have developed. At the present time, in the rule of law discourses there is more attention for an independent judiciary applying legal principles and the protection of the different types of fundamental rights. Brian Z Tamanaha, *On the Rule of Law*. History, Politics, Theory. 2004. Cambridge University Press. p. 109. By the same token, good governance has the same objectives of strengthening governmental authorities in their activities and the effectiveness of the legal protection by courts, ombudsman institutions and human rights institutions.

[59] Stephen Humphreys, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice*. 2010. Cambridge University Press., p. 29. See also, Joseph Raz, *The Concept of a Legal System an Introduction to the Theory of Legal System,* Oxford, Clarendon Press, 1970, p. 131-134.

litical form of government in which decisions are made by the people (direct democracy) or indirectly by means of elected representatives (representative democracy).[60] For a long time there has been a focus on the indirect representative democracy, but nowadays new, different forms of direct democracy have been developed in administrative and constitutional law. Sometimes this has been labelled as a form of deliberative democracy.[61]

Another interesting feature of good governance is the connection that it makes with democracy.[62] Good governance and rule of law are both concerned with the creation of laws, serving public affairs, adjudication in criminal or civil cases, and protecting liberty. When rule of law becomes a formalist, strictly bureaucratic, and conservative legal approach, good governance provides a complementary solution. Good governance can foster rule of law by encouraging a government to act carefully, proportionally, and reasonably. On the other hand, with good governance and democracy, people are able to control the government either directly through elections, the submission of objections, appeals, and complaints— or indirectly through the freedom of the press, critical social movements, and so on. Good governance can be utilised to protect democracy from anarchy and tyranny of the majority. However, a

[60] John Stuart Mill, *On Representative Government*. Princeton, Princeton University Press, 1976, p. 24, See also, John Stuart Mill, *Essays on Politics and Society,* Toronto, University of Toronto Press, 1977, p. 120, See also, Jurgen Habermas, *On the Pragmatics of Communication.* Massachusetts, Massachusetts Institute of Technology, 1998, p. 117.

[61] Furthermore, democracy, on the other hand, is connected to good governance as it encourages sovereignty, autonomy and self-determination. The concept democracy may open possibility to have adequate communication between government and its people. In the past, political discourse is dominated by representative democracy, but at the present time, democracy seems to be more deliberative democracy. Henceforth, democracy creates direct involvement of people of the activities of government.

[62] Indeed, good governance can also inspire the further development of democracy. If we look at the principles of good governance, transparency, properness, transparency, participation, effectiveness, accountability, and human rights; some of them are close to rule of law as well as to democracy. For instance, the principles of properness and human (civil) rights are closely related to the rule of law. Meanwhile, the principles of participation and transparency are aligned with the concept of democracy. Thus, all of these concepts of rule of law and democracy and good governance share common goals of strengthening proper government in their activities and in that context protecting people's rights. In essence, we see here also aspects of pursuing justice.

poor government is better than no government; a government is necessary to eliminate chaos and produce order.[63] Finally, it can be stated that the latest development to the concepts of rule of law and democracy, is that they have combined to form democratic rule of law, which in turn has also influenced the concept of good governance. Both democratic rule of law and good governance aim to reinforce norms for the activities of governmental authorities, and in that context, improve the legal protection of people. There is a dimension of legality which states the need for a legal basis for the binding decisions that are made by administrative authorities, and for these decisions to be made according to both the written and unwritten principles of law. However, these laws limit the scope of jurisdiction and encourage the use of discretionary power in accordance with written and unwritten legal norms. This use of discretionary power is still based on the best interests of people and reinforcing the norms for the governments and the legal protection of people's rights. Strengthening duties and rights through good governance is in the same spirit as transitioning from a pre-bureaucratic government and a repressive approach, to a post bureaucratic government and a responsive approach,[64] as well as the transition from formalist law to progressive law.[65]

Another interesting aspect of good governance is that it may inspire governments to observe international legal trends.[66] In other words,

[63] John Stuart Mill, *Essays on Equality, Law, and Education,* Toronto, University of Toronto Press, 1873, p. 24.

[64] Philippe Nonet and Philip Selznick. Law and Society in Transition: Toward Responsive Law. New York: Harper and Row, 1978. This book explains the most important transition of pre-bureaucratic government, bureaucratic government to post-bureaucratic government as well as transformation from repressive approach of power holders, becoming autonomy and the last transition of responsive approach. Post-bureaucratic and repressive approach is type of tyrannical government. After this type government turned to democratic system, it becomes bureaucratic and autonomy, where everything too formalist and black-letter law and dehumanise people. The latest part is post-bureaucratic government and responsive approach which concerns with social aims of the wishes of population.

[65] Satjipto Rahardjo. Membedah Hukum Progresif. Jakarta, Kompas, 2006. This book introduces a progressive law which opposed to a formalist law. This progressive law tries to pursue justice and happiness for society.

[66] G.H. Addink. Good governance: A Principle of International Law. In, Cedric Ryngaert, Erik J. Molenaar, Sarah M. H. Nouwen. What's wrong with International Law? Leiden&Boston,

good governance, as a legal concept, encourages a critical examination of the implementation of government policies and whether or not these policies have legitimacy in international affairs discourse.[67] Governments gain legitimacy by participating on the global stage and observing international law and global governance.[68] The dominant definitions of good governance are provided by the IMF and the World Bank. The World Bank states that 'good governance is epitomised by predictable, open and enlightened policymaking (that is transparency processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs and all behaving under the rule of law.'[69] Similarly, the IMF has argued that good governance is a key to economic success. Furthermore, the IMF emphasises that economic policies and regulatory frameworks must obey the rule of law, and that the eradication of corruption is essential to protecting the integrity of the market, ensuring fair competition, and securing healthy economic development.[70] However, I argue that these definitions are overly focused on economics.

The concept of good governance that developed from the tradition of administrative law discourse provides an important alternative to the dominant conceptions provided by the World Bank and the IMF. The Indonesian Government Administration Act No. 30 of 2014, explicitly references the concept of good governance. The concept of good governance also appears in the Dutch General Administrative Law Act (GALA). Furthermore, the concept of good governance aims to reinforce the norms for the governments and legal protection of people through: *first*, a faithful realisation of the maxim of properness e.g. the prohibition of the misuse of power, prohibition of arbitrariness, legal

Brill Nijhoff, 2005, p. 288-303.

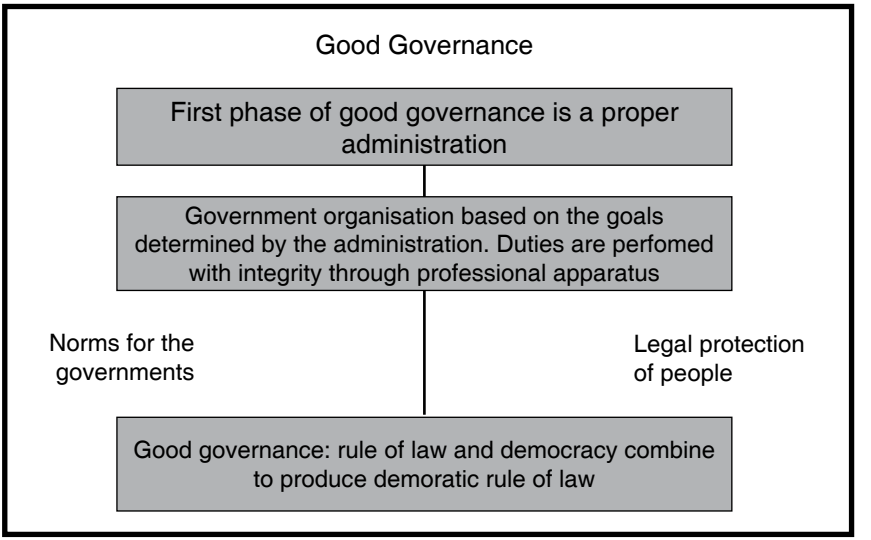
[67] Angela R. Riley. Good (Native) Governance. Columbia Law Review, Vol. 107, No. 5 (Jun., 2007), pp. 1049-1125.

[68] Thomas G. Weiss. Governance, Good Governance and Global Governance: Conceptual and Actual Challenges. Third World Quarterly, Vol. 21, No. 5 (Oct., 2000), pp. 795-814.

[69] Development in Practice. Governance the World Bank's Experience. Washington DC, World Bank, 1994. p, 11

[70] The IMF and Good governance. International Monetary Fund, 2016.

certainty, reasonableness, equality, proportionality and carefulness; *second*, establishing government institutions based on goals determined by administration and monitoring performance with integrity and professional apparatus; *third*, the latest development of the concepts of rule of law and the concept of democracy, which combine to form democratic rule of law. This concept of democratic rule of law is partly another name for the concept of good governance; *finally*, good governance emphasises that governments should improve their legitimacy at both national and international levels.



In the first phase, good governance is introduced through properness which developed as unwritten norms and review norms by the administrative court. Later, properness was specified and codified in GALA and IGAA.

Furthermore, good governance is a concept comprised of duties and rights, and is closely related to the concepts of rule of law and democracy. Whilst rule of law focuses on the separation of power, and democracy is related to representing the majority, good governance emphasises a willingness to pursue objectives/ purposes to improve the actors within the system, as well as the system itself. Good governance is the latest form of rule of law and democracy. Components of rule of law and

democracy are included within good governance.

Below I provide some short specifications of the definition of rule of law, democracy, and good governance as used in this research. The rule of law consists of four components: the principle of legality, the division of power, the protection of fundamental rights, and judicial control. Meanwhile, democracy can be divided into direct democracy and representative democracy. Finally, good governance provides the norms for the governmental authorities and legal protection for people in the context of administrative law.

In the final part of this section are some explanations of additional terminology that appears in this research, for example. 'government,' 'administrative authorities.' 'municipality,' and so on. 'Government' refers to all powers including executive, legislative, judicative, and the Ombudsman/ National Human Rights Institution. My primary focus is on administrative authorities who can issue administrative decisions by public law.[71]

3. Definition of good governance and ethnic minorities

Good governance

As mentioned earlier in this chapter, definitions are needed to operationalise the main concept that I use in this research: good governance. There are many definitions of good governance; good governance can be defined from multidisciplinary, political, economic, social, and anthropological approaches. But this study focuses on good governance from a legal perspective. Before describing the definition of good governance that I use, it is useful to see an example of good governance from an interdisciplinary perspective. It is important to see such a definition because this research can oversee the various definitions of good governance and later focus on the legal definition of good governance

Good governance can be defined or associated with 'political (pluralism, participation, decentralisation, human rights and consensus), economic (economic liberalisation, private ownership, investment,

[71] In many times, I use the term of governmental authorities which means the administrative authorities or administration.

growth, poverty alleviation), social (civil society and non-governmental organisations, or communitarianism, social capital or social cohesion), legal (rule of law and independent judiciary), and administrative (accountability, transparency, less corruption, efficiency, and effectiveness and responsiveness).'[72] Non-legal approaches have defined good governance as an economic instrument, a tool of social engineering, a developmental approach, and so on. Meanwhile, the legal approach is only concerned with good governance with regards to the function of legal norms and institutions. However, good governance can be seen from many other angles. Hence, I provide my own definition which is based on the explanation of the concept of good governance based on the discussion above. The definition of good governance that is used in this research is as follows:

Good governance is a concept that provides legal guidance with regards to strengthening the norms for governments and legal protection of people. The concept was developed from the doctrine of administrative law, and aims to establish government structures for determining institutional objectives and monitoring the performance of apparatus based on integrity and professionalism.

In addition, good governance can be described as norms for the governmental authorities and providing safeguards for these activities through the Ombudsman, the National Human Rights Institution and especially the courts, all of which ensure the implementation of the principles of good governance: properness, transparency, effectiveness, accountability, participation and human rights. The best way to easily understand good governance is through its principles— these principles are practical and factual implementations of the concept of good governance.

Ethnic Minorities

Ethnic minorities, as the object of this research, can be defined from many angles. Ethnic minorities are a group which has an ethnic identity

[72] SN. Sangita. Administrative Reforms for Good Governance. The Indian Journal of Political Science, Vol. 63, No. 4 (December 2002), p. 325-350.

within democratic rule where they exist in a 'jungle' like society; they can be easily hunted by the predators of the majority.[73] Meanwhile, ethnic minorities are treated as half citizens. In order to obtain full citizenship, ethnic minorities must naturalise. However, formal citizenship alone is not enough; they need integration of culture, including language and customs.[74] Unfortunately, because ethnic minorities may stand out because of their skin colour, physical appearance, and behaviour, they nonetheless remain socially half citizens, even when they are legally considered to be 'full' citizens. Ethnic minorities, from their very existence, are groups that have simply been neglected, despite the world promoting pluralist-fantasy values. Irrespective of campaigns for anti-discrimination, protection of human rights, and equality, ethnic minorities are trapped in a fantasy of a multicultural society.[75] Furthermore, the Oxford Dictionary of Law states the following in relation to ethnic minorities:

> A group numerically inferior to the rest of the population of a government whose members are nationals of that government and possess cultural, religious or linguistic characteristics distinct from those of the total population and show, if only implicitly, a sense of solidarity, directed towards preserving their own social customs, religion, or language. The attempted extirpation of an ethnic minority by the forces of the majority within a government (known as ethnic cleansing) can be regarded as a crime against humanity justifying humanitarian intervention.[76]

Discrimination on the basis of religion, belief, political opinion, nationality, sex, sexual orientation or civil status must be prohibited.[77] For the most part, ethnic minorities become victims of discrimination and violence in relation to their ethnic background.[78] Other definitions

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[73] Seyla Benhabib, The Rights of Others. Aliens, Residents and Citizens, Cambridge, Cambridge University Press, 2004, p. 45.

[74] Yael Tamir, Liberal Nationalism, Princeton, Princeton University Press, 1993, pp. 26-27.

[75] Isaiah Berlin, A Value Pluralist and Humanist View of Human Nature and the Meaning of Life, Amsterdam & New York, Rodopi, 2006, p. 119.

[76] Elizabeth A. Martin, Oxford Dictionary of Law, Oxford, Oxford University Press, 2004, p. 182.

[77] Melissa F. Weiner, Whitening a Diverse Dutch Classroom: White Cultural Discourses in An Amsterdam Primary School, Ethnic and Racial Studies. Vol. 38. No. 2, 2014, pp. 359-376.

[78] Jacqueline K. Nelson, Speaking Racism and Anti-Racism: Perspectives of Local Anti-Racism Actors. Ethnic and Racial Studies, Vol. 38, No. 2, 2015, pp. 342-358.

of ethnic minorities can be found in online dictionaries. The Oxford English Dictionary Online adds that an 'ethnic minority is a group within a community which has different national or cultural traditions from the main population'.[79] The Cambridge English Dictionary Online states that an 'ethnic minority is a group of people of a particular race or nationality living in a country or area where most people are from a different race or nationality.[80] The Macmillan Dictionary Online states that ethnic minorities are 'a group of people with the same culture and traditions who live in a place where most people have a different culture and different traditions'.[81] Minority ethnic groups are often presented as dirty, chaotic, tribal, irrational, emotional, hypersexual, exotic, lazy, criminal, and physical rather than cerebral.[82] Although they are officially citizens with legally authorised residency, their fundamental rights are often neglected.[83] Therefore, ethnic minorities can often occupy a dangerous and precarious position in society. Ideally, as citizens, they should receive fair and equal treatment by the government.[84]

Some distinguish between ethnic and racial groups, mostly on the grounds of skin colour. For example, the history of the fight between white and black people, leading to racial discrimination, has been well-documented. In the Oxford Dictionary of Law, racial discrimination is described as follows:

> Racial discrimination, on the grounds of colour, race, nationality, or ethnic origins. It is dealt with by the [UK] Race Relations Acts of 1965, 1968, and

[79] https://en.oxforddictionaries.com/definition/ethnic_minority, accessed on 5 March 2018. See also, Elizabeth a. Martin. A Dictionary of Law. Oxford, Oxford University Press, 2003, p. 182.

[80] http://dictionary.cambridge.org/dictionary/english/ethnic-minority, accessed on 5 March 2018.

[81] http://www.macmillandictionary.com/dictionary/british/ethnic-minority, accessed on 5 March 2018.

[82] Melissa F. Weiner, Whitening a Diverse Dutch Classroom: White Cultural Discourses in An Amsterdam Primary School, Ethnic and Racial Studies, Vol. 38. No. 2, 2014, pp. 359-376.

[83] Andrew Smith, Rethinking the 'Everyday' in 'Ethnicity and Everyday Life'. Ethnic and Racial Studies, Vol. 38, No. 7, 2015, pp. 1137-1151.

[84] Nicholas Mark Smith, Basic Equality and Discrimination. Reconciling Theory and Law, Burlington, Ashgate, 2011, p. 76.

> 1976. The 1965 Act created an offence of incitement to racial hatred and made racial discrimination illegal in public places. The 1968 Act prohibits discrimination in respect of goods, services, facilities, employment, accommodation, and advertisements. The 1976 Act prohibits indirect racial discrimination, as well as discrimination in clubs with more than 25 members. It also prohibits the types of discrimination dealt with by the 1975 Sex Discrimination Act. The Race Relations (Amendment) Act 2000 extends coverage of the 1976 Act by prohibiting racial discrimination in the functions of the police and other public authorities not previously covered by that Act. It also places a general duty on public authorities to eliminate discrimination and promote racial equality. The Commission for Racial Equality has the power to conduct formal investigations into complaints. Individual complaints in the field of employment are dealt with by employment tribunals; other complaints are dealt with in specified county courts.[85]

In the history of human civilisation, the anti-racist struggle for civil rights is full of tales of sacrifice. Many figures are famous for their part in the struggle for equal treatment, for example: Malcolm X, Martin Luther King Jr., Nelson Mandela, Harriet Tubman, Sojouner Truth, Nina Simone, Mary McLeod Bethune, Lena Horne, Marva Collins, Rosa Parks, and W.E.B. Du Bois. Today, the struggle is understood as being more complex, and includes issues other than race; the struggle for racial equality cannot be reduced to a struggle solely between people of colour and white people. Although this problem rightly receives attention, discrimination on the basis of religion, belief, political opinion, nationality, sex, cultural identity, educational class, sexual orientation or civil status, etc. should not be ignored.[86]

Besides definitions of ethnic minorities that appear in dictionaries, I have also reviewed various definitions in academic literature. For instance, Kymlicka defines ethnic minorities as a group who one hand 'wish to integrate into the larger society and to be accepted as full members of it,' but also wish to have their ethnic identity recognised. Therefore, ethnic minorities have often attempted to improve and encourage institutions and the law to respect cultural differences or pro-

[85] Elizabeth A. Martin, Oxford Dictionary of Law, Oxford, Oxford University Press, 2004, p. 182.

[86] Will Kymlicka et al, Do Multiculturalism policies erode the welfare state? An empirical policies analysis. In, Keith Banting & Will Kymlicka, Multiculturalism and the Welfare State. Recognition and Redistribution in Contemporary Democracies, Oxford, Oxford University Press, 2006, pp. 49-53.

posed separate or self-governing institutions.[87] Meanwhile, Wacquant defines ethnic minorities as a group of people whose ethnicity becomes an object of a punitive management of marginality and disciplinary social policy. In other words, ethnic minorities are exposed to the risk of multiple groups who suffered types of insecurity (economic, social, criminal, sanitary, housing, etc).[88] In addition, Stephen May, Tariq Modood and Judith Squires note that the definition of ethnic varies depending on the country. Some governments simply define ethnic minorities as a group of migrants, whilst others impose assimilation policies and encourage naturalization. Others are more tolerant and defines ethnic minorities as a group with different ethnic and religious identities.[89]

There is almost no difference between the definitions of ethnic minorities found in literature and those found in dictionaries. For instance, both literature and dictionaries mention ethnic identity as the primary feature distinction of defining ethnic minority, which may be manifested in skin colour, physical appearance, culture, language, religion, etc. However, the literature explicitly refers to the subordinate position of ethnic minorities in the social hierarchy that ethnic minorities, and identifies this as a risk for oppression and discrimination.

The definition of ethnic minorities is complex, but in general the weakness of the various groups of ethnic backgrounds means that, although members of ethnic minorities may have gained legal status as citizens, their fundamental rights are only partially fulfilled. Herewith, the definition of ethnic minorities is used in this research, namely: ethnic minorities are groups or individuals that are marginalised on the basis of their ethnic, racial, and economic background. On many occasions, they do not have adequate access to justice, do not have sufficient legal empowerment, and as such are susceptible to discrimination and oppression.

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[87] Will Kymlicka, *Multicultural Citizenship. a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 11

[88] Loïc Wacquant, Marginality, Ethnicity and Penality in the Neo-Liberal City: An Analytical Cartography. Ethnic and Racial Studies 2014. Vol. 37, No., p. 1687-1711.

[89] Stephen May, et al, *Ethnicity, Nationalism, and Minority Rights.* Cambridge, Cambridge University Press, 2004, p. 8

4. Selected principles of good governance

The six principles of good governance e.g. properness, transparency, effectiveness, accountability, participation, human rights[90] are useful to be utilised to oversee the implementation of the norms for the government and legal protection of people. However, this research makes a selection of three of these principles to form an analytical framework from which to investigate ethnic minorities' problems. The basic argumentations for the selections are: (1) this research selects principles based on direct benefit for the oversight of norms for governments and the legal protection of ethnic minorities; (2) choosing principles which are relevant to empowering the position of ethnic minorities; (3) selecting innovative methods to investigate the interests of ethnic minorities. Thus, the principles of transparency, participation and human rights have been chosen to apply administrative law norms to the legal situations and practices of ethnic minorities. The principle of transparency facilitates a better understanding of the use of public information; without sufficient information, it is difficult for ethnic minorities to participate in politics and their governmental programme. The government authorities are also obligated to reinforce the principle of transparency such as opening their meetings, publications and the decision-making process to people including ethnic minorities. At the same time, the principle of participation may also be beneficial for describing the legal movements of ethnic minorities and how they obtain an improved capacity in legal matters. The last principle is human rights, which is a vital component of ethnic minority protection; it positions ethnic minorities as human beings whose fundamental rights must be respected. Other principles of effectiveness and accountability do not have any direct benefit for ethnic minorities. The principle of properness is not suf-

[90] The introduction of principles of good governance can simply be described hereby: properness means denoting something that is truly what rule says; transparency can be associated that the condition of being transparent, the implementation of sharing public information, meeting and involving people for decision-making process; effectiveness means successful in producing a desired or intended result; accountability is the fact of being responsible; participation is the action of people to intervene the public policy or regulation or submission of complaints; human rights can be defined the protection of people from action of government authorities' decisions.

ficiently innovative to analyse ethnic minorities' problems. Sometimes, ethnic minorities encounter problems during the non-contention phase (the period during the decision-making process) meaning they can engage with the law-making process. On the other hand, they may also face a problem during the contention phase, in which case they can submit an appeal or complaint through the courts and the Ombudsman or the National Human Rights Institutions. After describing the six principles of good governance, these three indicators were used to select which principles will be included in the framework of analysis. The chosen principles classified these three indicators. The principles of transparency, participation and human rights can be used to investigate the problems experienced by ethnic minorities in both the non-contention phase or the contention phase. These three principles were selected because they are included three basic argumentations for selection above e.g. the principles of transparency, participation and human rights have direct benefits for ethnic minorities, are relevant to empowering the position of ethnic minorities, and innovative or progressive instrument to investigate the interest of ethnic minorities.

4.1 The principle of transparency

The principle of transparency has been chosen in this research to focus on several issues: (1) the idea of transparency in Public Disclosure Act and its implementation; (2) the function of transparency as a tool of social harmony for ethnic groups; and (3) the implementation of transparency in legal practice for the protection of ethnic minorities. These issues can be said to be the operationalised elements of the principle of transparency. The principle of transparency can be defined as an essential condition which ensures that the rules to which people are subject to are made clear, and that the reasons behind measures and applicable regulations are clear and accessible to all.[91] In other words, the principle of transparency states the need for openness and clarity from the governmental authorities in their relation to the people, and requires trans-

[91] Elizabeth A. Martin, *Oxford Dictionary of Law*, Oxford, Oxford University Press, 2004, p. 505.

parency of meetings, acts and information of the governmental authorities. *Firstly,* transparency is always supported by a Public Disclosure Act. Governments have an obligation to provide sufficient public information, and ensure the right to know within the framework of the idea of transparency.[92] Ethnic minorities can test the role of transparency that is implemented by the administration, the Parliament, the courts, and the Ombudsman, which consists of transparency of meetings, the administration's actions, and public information.[93] The requirements for the accessibility of information for ethnic minorities are described in sections 2 and 3 of the Dutch Government Information Act, and in Article 2 of the Indonesian Public Disclosure Act. In sum, information should be made available by the government to everyone, including ethnic minority groups.

Second, transparency plays a significant role in the establishment of ethnic harmony and in preventing social conflict. A transparent system enables campaigns for inclusive government policy to combat discrimination. Another important function of transparency is improving the ethnographic understanding of ethnic minorities, including their cultural background, religion, political views, social trends, etc. It is the duty of government to present accurate information according to security, human rights, and environmental factors.[94] Furthermore, the understandability of information is a pivotal element of transparency.[95] Good transparency can generate public information about many ethnic minority communities and can help contact with them that develops social harmony.[96]

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[92] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*. Leiden, Martinus Nijhoff Publishers, 2009, p. 123.

[93] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 74.

[94] Ronald B. Mitchell, *Sources of transparency: Information Systems in International Regimes.* International Studies Quarterly, Vol. 42, No. 1, 1998, pp. 109-130.

[95] Beverly R. Walther, *Discussion of Information Transparency and Coordination Failure: Theory and Experiment.* Journal of Accounting Research, Vol. 42, No. 2 Studies on Financial Reporting, Disclosure and Corporate Governance (May, 2004), pp. 197-205.

[96] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace*, New York, State University of New York Press, 2006, p. 50.

Incorrect public information may lead to the misunderstanding of public policies such as integration and immigration which are related to ethnic minorities. At the very least, public information which makes it clear that ethnic minorities are protected by human rights regulations, encourages people to refrain from discrimination. Transparency can also stimulate the accumulation of experience and knowledge with the official language of the government.[97] Transparency plays a significant role in countering distorted facts, bias, hate, feelings, stereotyping, and prejudice that can lead to racial discrimination.[98] In addition, transparency stimulates public knowledge of human rights, which in turn could reduce the likelihood of rights being violated.[99] In sum, it is important that the government provides public information with validity, accuracy, and reliability in campaigning for good governance and ethnic minority protection.[100]

My *third* point is that the implementation of transparency in legal practice is related to ethnic minority protection. The procedure for the implementation of transparency principles regarding ethnic minorities is often through general legislation. That is, ethnic minorities use the same legal instruments as the majority when exercising their rights to obtain transparent information. In the Netherlands, ethnic minorities (in accordance with the Netherlands Government Information Act) can access documents issued by the administrative authorities, working papers related to policy planning, public services, and environmental information (Article 1, the Netherlands Government Information Act).

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[97] Amy Kind, *What's so transparent about transparency? Philosophical Studies,* An International Journal for Philosophy in the Analytic Tradition, Vol. 115, No. 3 (Sep., 2003), pp. 225-244.

[98] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace*, New York, State University of New York Press, 2006, p. 53.

[99] Amy Kind, *What's so transparent about transparency? Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 115, No. 3 (Sep., 2003), pp. 225-244.

[100] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace*, New York, State University of New York Press, 2006, p. 48.

Non-discriminatory access to public documents should be implemented by governments in order to serve the needs of ethnic minorities. The minority rights revolution can only be realised by giving positive recognition to minority groups through executive policy, parliamentary regulation, and transparent court proceedings.[101] The creation of laws that guarantee the rights of ethnic minorities in social, economic, political, civil and cultural affairs, will improve the quality of the nation's degree as a legal government.[102]

Transparency allows everyone, including ethnic minorities, to have better access to public information. This research argues that transparency serves several functions in the legal practice of combating discrimination. First, the establishment of transparency is undertaken by the Public Disclosure Act. Indonesia has the Indonesia Public Disclosure Act and the Netherlands has the Government Information Act, both of which play pivotal roles in building a public information system that is accessible and beneficial to ethnic minorities. Second, the principle of transparency may lead to the reduction of social conflict among ethnic groups. With better information about ethnic minorities, society can improve its understanding of their culture, behaviour, perceptions, lifestyle, etc. Public information accessed by ethnic minorities can also help them to deal with conflict and combat discrimination. Finally, the implementation of the principle of transparency in legal practice delineates the particular dynamic of political law enforcement. These operationalised elements can be used to analyse (1) transparent meetings of the government, (2) governmental acts such as orders, regulations, decisions, policy rules, and plans, and (3) governmental information.

4.2 The principle of participation

In simple terms, the principle of participation serves as a conceptual indicator in this normative framework and comprises of four compo-

[101] John D. Skrentny, *The Minority Rights Revolution,* Cambridge, The Belknap Press of Harvard University Press, 2004, p. 4.

[102] Jonathan Friedman, *Cultural Identity and Global Process*, London, Sage Publications, 1994, pp. 79-82.

nents which can be seen as specifications of this principle. (1) the measurement of the constitutional motive of ethnic minorities; (2) the application of the CLEAR Method in the legal field; (3) legal movements of ethnic minorities on citizens panels and community-level participation; (4) the implementation of ethnic minority participation in legal practice. This research is mainly focused on the issue of the constitutional motive, as one incentive for ethnic minorities to participate is to be active in defending their rights. Simply put, participation is the action of taking part in something, particularly the decision-making process and challenging decisions through the Ombudsman, the National Human Rights Institution, or the courts. In addition, the principle of participation is a norm that urges the governmental authorities to facilitate active involvement of individuals or groups of individuals in a collective or individual process, and is specified by norms on popular initiatives, citizen's panels, referenda and community level involvement.

In the public discourse on minorities, participation is a key element to strengthening their position in public life. Indeed, governments require a particular instrument for enhancing minority participation in accordance with the Lund Recommendations on the Effective Participation of National Minorities in Public life. This document also emphasises that 'the notion of good governance includes the premise that simple majoritarian decision-making is not always sufficient.'[103] Another document which equally important for analysing minority participation is the Framework Convention for the Protection of National Minorities, which states governments must 'guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.'[104] Hence, effective participation

[103] The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, OSCE High Commissioner on National Minorities, 1999, p. 22.

[104] Article 4.1 of Framework Convention for the Protection of National Minorities. In the broader picture, minority participation can function in many fields such as economic, social, legal, cultural, political life. One of examples, in political life, participation in election represents how minorities can involve with electoral process and political sphere through exercising the rights to vote and stand for office without discrimination. This political par-

is a pivotal component to access to social services.[105] In other words, participation is a form of activity which is very important for minority to be able to pursue non-discrimination and social inclusion policies.

To combat discriminatory decisions, ethnic minorities can make objections to administrative authorities (Article 7:1 of the Dutch General Administrative Law Act/ GALA) and submit an appeal through the courts (Article 8:1). In addition, if they have faced discriminatory or improper conduct of administration, ethnic minorities can also send a request to the Ombudsman (Article 9:18 of GALA).

Equally important to empowering legal participation of minorities is to pay attention to linguistic obstacles present throughout the justice system. In the legal field, ethnic minorities often face difficulties dealing with the official language of the justice system. The framework convention requires translation or 'the right to be informed promptly in a language which minority understands' in accordance with Article 10.3. Indeed, any social dimension of language rights may encourage the principle of non-discrimination and effective equality.[106] Hence, the facilitation of translation is necessary to yield minority participation. In the Netherlands, the

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ticipation is needed to defend the position of minority through their own representation in government bodies. Without losing the respect of various minority participation, this research is more focused on legal participation of ethnic minority. The Lund recommendations also mentions a functioning independent judiciary is needed for making minority participation effective. By the same token, the Lund recommendation is written that one of minority participation can be exercised through litigation or non-litigation approach. Litigation approach can be held by courts and non-litigation approach such national commissions and ombudsman can play a significant role. This approach just like inquiry which I develop on constitutional motive of ethnic minority participation. Another important consideration, legal participation can foster socio-economic participation. Socio-economic participation of minorities is needed to encourage minority to access to their own socio-economic rights as well as the right to equal treatment. See also, The Lund Recommendations on the Effective Participation of National Minorities, p. 9. See also, Kristin Henrard. Minorities, Identity, Socio-Economic Participation and Integration: About Interrelations and Synergies. See., Kristin Henrard (eds), the Interrelation between the Right to Identity of Minorities and Their Socio-Economic Participation. Leiden & Boston, Martinus Nijhoff Publishers, 2013, p. 21., See also, Kristin Henrard. Minorities, Identity, Socio-Economic Participation and Integration., p. 72.

[105] Compilation of thematic commentaries of the advisory committee. Framework Convention for the Protection of National Minorities, Council of Europe, 2013, pp. 53-55.

[106] Compilation of thematic commentaries of the advisory committee. Framework Convention for the Protection of National Minorities, Council of Europe, 2013, p. 19. In addition, socio-economic rights can be obtained through legal participation on decision-making process and submission of complaints.

need for translation is regulated in Article 4:5, Article 6:5, Article 9:28 of GALA and in Indonesia this problem is stipulated in Article 51 (2) and Article 177 (1) Criminal Procedure Code, Article 5 (1) Law No 13 of 2006 concerning Protection of Victim and Witness and Article 74 of Law No 30 of 2014 concerning Government Administration.

Another essential element of legal participation by minority is to be evaluated by a particular concept of assessment. The CLEAR method is presented by Addink as an analytical tool to measure public participation.[107] It is an assessment framework for the success of ethnic minority participation. The concept of participation aims to provide better space for dialogue between people and the government.[108] In many circumstances, ethnic minorities are not able to participate in the administrative process or complaint mechanisms.[109] Participation serves as a control to direct the government away from the pathology of authoritarian patterns of rule.[110] My research requires a theoretical instrument to analyse the participation of ethnic minorities and the CLEAR method provide it. In this way, I can elucidate the map of Chinese and Turkish participation in the Netherlands and Indonesia.

C = Can citizens participate?	Suitable (skills)
L = Do they Like to participate?	Involved (commitment)
E = Are they Enabled to participate?	Organised (collaboration)
A = Are they Asked to participate?	Asked (by public authorities)
R = Do they Respond if they do participate?	Appreciated (by public authorities)[111]

The CLEAR method consists of (1) capacity, (2) commitment, (3) organisation, (4) proper conduct of administration and (5) the response of

[107] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance,* SIM Special No. 34, Utrecht 2010, p. 14.

[108] Samuel Hickey & Giles Mohan, *Participation: from tyranny to transformation? Exploring new approaches to participation in development,* London, Zed Books, 2004, p. 63.

[109] Costas Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism*, New York & Oxford, Routledge, 2007, p. 35.

[110] Gerard Clarke, *The Politics of NGOs in South-East Asia,* New York & Oxford, Routledge, 1998, p. 25.

[111] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance,* SIM Special No. 34, Utrecht 2010, p. 14.

the administration. The lower the capacity of ethnic minorities that participate in the complaint mechanism process, the lower the quality of the legal approach. All people should be able to analyse the functioning of the administration and its legal dispute resolution mechanism.[112] The CLEAR method provides a theoretical lens through which the availability of legal infrastructure relevant to the prevention of discrimination and the capacity of ethnic minorities to be involved with its institutions can be analysed.

Other theoretical concepts of participation that are used in this research are citizen's panels and community-level participation. A citizen's panel is a form of participation that involves a large number of people who make recommendations to a public entity.[113] Community-level participation is the systematic movement of individuals or organisations in response to public policy or policy proposals, and their engagement with public debate and freedom of expression. Examples of this form of participation are public hearings and meetings, surveys, and other activities which contribute to the drafting of a particular policy.[114]

The focus of the investigation on the principle of participation will mostly be based on what is called constitutional motive[115]; how ethnic minorities use legal instruments, either the Ombudsman,[116] the Netherlands Institute for Human Rights,[117] or the courts,[118] etc. to protect their individual interests. An ethnic minority can be motivated by various reasons, involving public participation factors, namely: democratic, constitutional, corporatist and administrative motivations.

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[112] Daniel Lathrop & Laurel Ruma, *Open Government Collaboration, Transparency, and Participation in Practice*. 2010. O'reilly Media., p. 48.

[113] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 109.

[114] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 111.

[115] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018.

[116] Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Dordrecht, Springer Science Media, 2004, p. 5.

[117] Linda C. Reif, The Ombudsman, *Good Governance and the International Human Rights System*, Dordrecht, Springer Science Media, 2004, p. 3.

[118] Hector Fix-Fierro. *Courts, Justice and Efficiency. A Socio-legal study of economic rationality in adjudication*, Oxford, Hart Publishing, 2003, p. 14.

Democratic motivation gives opportunities for ethnic minorities to influence regulation and policy. Constitutional motivation provides protection for ethnic minorities' interests as individuals in the context of power balance. Corporatist motivation serves as a social space or a legal instrument for ethnic minorities organisations to review their own responsibility. Finally, administrative motivation is related to the public service of the institutions.[119]

To summarise, I will investigate ethnic minority participation through their (1) constitutional motives (submission of objection, appeal, and complaint), (2) the CLEAR Method, to evaluate whether the capacity of participants is sufficient and the response of governments is adequate, and (3) citizen's panel and community-level participation, to oversee the magnitude of legal movements of minorities and their efficacy in intervening with government policy. At this stage, I bring into play some legislation such as the Dutch General Administrative Act, the Indonesian Government Administration Act and the other relevant regulations. These pieces of legislation have become 'the rules of the game of participation.' Of course, effective ethnic minority participation is necessary to empower their own position in public life.

4.3 The principle of human rights

This study will investigate some aspects of human rights in the framework of the principles of good governance and how they can be used by ethnic minorities such as: the right to good governance,[120] the right to freedom from discrimination,[121] and so on. The principle of human rights is associated with the right to good governance through the underlying norms that form principles of good governance: properness, transparency, participation, effectiveness and accountability.

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[119] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*. Oxford, p. 105.

[120] Margarita Cheshmedzhieva, *The Right to Good Administration.* Vol. 4. No. 8 August 2014, American International Journal of Contemporary Research. See also. Bucura C. Mihaescu Evans*. The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system*, Luxembourg Legal Studies, 2015.

[121] Stephen May, et al, *Ethnicity, Nationalism, and Minority Rights.* Cambridge, Cambridge University Press, 2004, pp. 3-5.

Furthermore, the right to good governance can be defined as the implementation of a moral maxim by which administrative authorities act in accordance with principles of non-discrimination, impartiality, objectivity, fairness and responsive bureaucracy.[122] The concept of the right to good governance is actually not mentioned explicitly in any international convention, but its fundamental substance can be seen in Article 41 of the Charter of Fundamental Right of the European Union.[123] Ethnic minorities have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions; the right to be heard, the right to have access to his or her file, the right to get replacement for any damage, and language rights. This right can also be seen in several articles of the Indonesian Government Administration Act. This right allows ethnic minorities to be treated fairly, to have the opportunity to obtain the right to be heard and to ensure the right to obtain the reasons for a decision by a public body.[124] Good governance in making distribution of procedural rights does not only belong to majority groups, but it also belongs to minority groups which require potential legal empowerment. The role of legislative activities is to maximise the number of people that participate in influencing the views and actions of parliament.[125] This means that the work of legislation which produces legislative regulations should prioritise the interests of human rights, particularly the protection of the rights of ethnic minorities. Discrimination can be understood as violence supported by law because the government is conceptualised as the political unit of a whole community.[126]

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[122] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 123.

[123] Margarita Cheshmedzhieva, *The Right to Good Administration.* Vol. 4. No. 8 August 2014, American International Journal of Contemporary Research. See also, . *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system*, Luxembourg Legal Studies, 2015.

[124] Vala Kristjansdottir, *Good Administration as a Fundamental Rights.* Stjornmal & Stjornsyla. Icelandic Review of Politics and Administration, Vol. 0, Issue 1, pp. 237-255.

[125] Sarah A Binder, *Minority Rights, Majority Rule, Partisanship and the Development of Congress*. Cambridge, Cambridge University Press, 1997, pp. 69-70.

[126] Nesrin Uçarlar, *Between Majority Power and Minority Resistance: Kurdish Linguistic Rights in Turkey*, Lund University Press, 2009, p. 46.

Generally speaking, a sufficient system of minority protection must be formed of two strata: the fulfilment of general rights and specific rights for minorities.[127] Indeed, minorities are often excluded from the political unity, therefore minority-group rights are a necessity. Even these rights, for the most part, are not proposed by minorities themselves but these are encouraged by the members of larger sovereign society.[128] Hence, governments should protect the opportunity to develop and enjoy minority cultural rights.[129] Either general rights or minority rights are beneficial for ethnic minorities. Minority rights, by the way, appear from political decisions to empower the position of ethnic minorities. However, without a doubt, minorities often struggle to obtain proper fulfilment of general rights. Minority specific rights are part of a human rights framework.[130] Minority specific rights may support minority groups to be able to enjoy human rights. In many instances, minority rights may appear as the recognition of holidays, language, and self-government.[131] Meanwhile, for the most part, general rights must be expanded to greater minority protection against discrimination and improving the recognition of cultural diversity which provide special needs for minority groups.[132] Sometimes, minority rights are needed to enable minorities to be able to get close to their race, language, religion, and culture.[133] The prohibition of discrimination and minority specific rights is beneficial for ethnic minorities.

At the international level ethnic minorities, are entitled to the general rights mentioned in the Universal Declaration of Human and in the

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[127] Kristin Henrard. *The EU, Double Standards and Minority Protection: A Double Redefinition and Future Prospects.* See., Kristin Henrard (eds). *Double Standards Pertaining to Minority Protection,* Leiden & Boston, 2010, p. 25

[128] Seyla Benhabib, *The Rights of Others, Aliens, Residents and Citizens*, Cambridge, Cambridge University Press, 2004,

[129] Alan Patten, *Equal Recognition the Moral Foundations of Minority Rights*, Princeton, Princeton University Press, 2014, p. 85

[130] Kristin Henrard. *The EU, Double Standards and Minority Protection,* p. 34

[131] Alan Patten, *Equal Recognition the Moral Foundations of Minority Rights*, Princeton, Princeton University Press, 2014, pp. 159-160.

[132] Kristin Henrard. *The EU, Double Standards and Minority Protection*, p. 37.

[133] Alan Patten, *Equal Recognition the Moral Foundations of Minority Rights*, Princeton, Princeton University Press, 2014, p. 54.

International Covenant on Civil and Political Rights, and also minority specific rights that appear in Article 27 of this ICCPR Article 27 states that 'In those States in which ethnic, religious or linguistic minorities ex-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.' At the regional level, ethnic minorities also have an umbrella of legal protection through the Charter of Fundamental Rights of the European Union. Ethnic minorities receive the protection of social, economic, political, civil and cultural rights through the existence of specialized institutions. In the Netherlands, for example, there is the Netherlands Institute for Human Rights (*College voor de rechten van de mens*). On the 19th of April 2011, this special agency was made responsible for investigating human rights protection, tracing discrimination, making reports and recommendations to convey advice, providing information, conducting human rights education, cooperating with civil society, examining the ratification of international covenants, implementing the resolution of organisations on international human rights, and observing European or international recommendations on human rights (Article 3, the Netherlands Institute for Human Rights Act). Through the Institute, ethnic minorities are able to report the discrimination that they experience and receive advice and special protection.

In Indonesia, the equivalent institution is divided into two parts: first, the Human Rights Commission (set up under the Human Rights Act), and second, the Court of Human Rights (set up under the Human Rights Court Act). The Human Rights Commission's function is to study, research, educate, monitor and mediate issues of human rights. Sometimes the Commission can also investigate cases of serious human rights violations. On the other hand, the Human Rights Court is in charge of examining and deciding whether rights have been violated. Ethnic minorities are groups which are vulnerable to violence. Behind the use of the term 'politics of Universalism,' there is diversity in viewing physical and cultural differences.[134] This is the controversy

[134] Shannon Speed, *At the Crossroads of Human Right and Anthropology: Toward a Criti-*

that surrounds cultural relativism.[135] In the southern hemisphere human rights exist for the collective interest, rather than for individuals; people fight for social and economic interests, rather than civil and political interests.[136] In the northern hemisphere, the understanding of human rights is focused more on political freedom than communal solidarity. Protecting the rights of all citizens including minorities is an ideological responsibility of the government.[137]

The fulfilment of rights for ethnic minorities today is an ethical imperative. In fact, in 1965 an international covenant relating to the Elimination of Racial Discrimination was made even before the creation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in 1966. The battle against racism and violence based on ethnicity began with the establishment of the Committee on the Elimination of Racial Discrimination and ad hoc Conciliation Commissions in 1965.[138] Today's world has provided the place for a global society which is multicultural, tolerant, democratic and without any discrimination. This Act, of course, promotes the right to freedom from discrimination.

Last but not least, I focus on exploring the right to good governance and the right to freedom from discrimination and so on, for ethnic minorities. Here, the Dutch Equal Treatment Act, the Indonesian Human Rights Act, and other relevant regulations can become the main analytical legal frameworks to examine ethnic minorities' problems in Indonesia and the Netherlands.

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cally Engaged Activist Research. The American Anthropological Association, Vol. 108, issue 1, pp. 66-67.

[135] Alison Dundes Renteln, *Relativism and the Search for Human Rights.* American Anthropologist, New Series, Vol. 90. No. 1 (Mar., 1988), pp. 56-72.

[136] Costas Douzinas, *The End of Human Rights. Critical Legal Theory at the Turn of the Century*, Oxford, Hart Publishing, 2000, p. 297.

[137] Sally Engle Marry, *Transnational Human Right and Local Activism Mapping the Middle*. The American Anthropological Association, Vol. 108, issue 1, pp. 38-55.

[138] Roger Stenson Clark, *A United Nations High Commissioner for Human Rights*, Leiden, Martinus Nijhoff, 1972, p. 17.

5. Provisional conclusions

Learning from the discussion above, these conclusions begin to describe the concept of good governance as the legal concept about strengthening norms for the governments and the legal protection of people. In the first phase, good governance, developed from the doctrine of administrative law, emphasises reinforcing the norms for the government with respect to the prohibition of the misuse of power, prohibition of arbitrariness, legal certainty, equality, proportionality and carefulness, and so on. Later on, good governance fortifies the structure of governmental authorities for determining institutional objectives and control performance of its apparatus with respect to integrity and professionalism. The norms of good governance exist on a more abstract level than the more concrete principles of good governance. Furthermore, this concept of good governance inspires the six principles of good governance, namely: properness, transparency, effectiveness, accountability, participation, and human rights. Meanwhile, good governance may bring the politics of recognition of ethnic minorities to the forefront of discourses on the concepts of democracy and the rule of law. The abstract level of the concept of good governance has links that should be considered independently from the concepts of rule of law and the democracy. For a clear substantial guiding, it is important to have definitions of the three concepts. The concept of good governance – in this administrative law study – is defined as the idea of the norms for the governmental authorities and the legal protection of ethnic minorities. The concept of the rule of law states that there should be a legal basis for the activities of governmental authorities which must act according to the law, and that the powers of government are separated and well-balanced by an independent judiciary that deals with legal principles and the protection of fundamental rights. The concept of democracy is the idea the people have a legal influence on the government, and that there should be interconnection with the governmental authorities directly or indirectly.

Here, this chapter provides the definition of good governance which is used in this research. Good governance is a concept that provides le-

gal guidance with regards to strengthening norms for the governmental authorities and legal protection of people. In addition, this concept was developed from the doctrine of administrative law, and aims to establish government structures for determining institutional objectives and monitoring the performance of apparatus based on integrity and professionalism.

By interpreting and implementing good governance, the administrative authorities should provide the procedure for a complaint mechanism for vulnerable groups and ethnic minorities to enable them to effectively fight against discrimination through proper legal channels.[139] Herewith, good governance is a two step-approach: first, guaranteeing proper administration from unwritten principles which are developed by the administrative court. Later, these principles were codified in GALA and IGAA to become direct norms for administrative authorities. Second, these principles of properness are worked out in law (GALA, the Government Information Act, the Equal Treatment Act, and so on) and function as direct norms for the administrative authorities. This dual approach can also be seen in the implementation of the norms of properness for the administrative authorities and as review norms used by the controlling institutions.

After explaining the concept of good governance, this section also describes the selected principles to analyse the norms for the governments and the legal protection of ethnic minorities, namely: the principles of transparency, participation, and fundamental rights. The principle of transparency can be defined as an essential condition which ensures the rules to which people are subject to are made clear and that the reasons behind measures and applicable regulations are clear to all. In other words, this principle can also be defined as the need for openness and clarity from the governmental authorities in their relations to the people and has been specified by the transparency of the meetings, of the acts and information from governmental authorities. Furthermore, the principle of participation is the act of taking part in something, espe-

[139] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge, Cambridge University Press, 2004, p. 18.

cially in the decision-making process and challenging decisions through the Ombudsman, the National Human Rights Institution or the courts. In addition, the principle of participation can be defined as a norm for the governmental authorities to develop the active involvement of individuals or groups of individuals in a collective or individual process and has been specified by norms for popular initiatives, citizen's panels, referenda and community level involvement. Finally, the principle of human rights, from an administrative law perspective, can be defined as another term for access to justice. The principle of human rights can also be associated with the right to good governance and its underlying norms: the need of properness, transparency, participation, effectiveness and accountability.

In terms of the principles of transparency, members of ethnic minority groups as *homo dignus* (human dignity) want a better life through accessing the resource of information.[140] Their rights include the availability, clarity, and accessibility of information that they really need. At the very least, information about legal knowledge is needed to protect their individual interests.[141] In fighting against discrimination, ethnic minorities need basic information to understand their rights and the relevant legal procedures to file complaints. Even the complaint itself is another practical instrument in this research, and I use it to observe dispute settlement resolution when combating discrimination.[142] Therefore, the principle of participation will be used to investigate how ethnic minorities file complaints to either the Netherlands Institute for Human Rights or the Ombudsman. It is interesting to investigate the use of chapter 9:2 of the General Administrative Law Act as the legal basis for ethnic minorities who approach the Ombudsman, and Article 1 of the Equal Treatment Act for ethnic minorities who ask for help from

[140] Anoeska Buijze*, The Six Faces of Transparency*. Utrecht Law Review. Volume 9, Issue 3 (July) 2013.

[141] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*. Leiden, Martinus Nijhoff Publishers, 2009, p. 123.

[142] Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy. Toward a Radical Democratic Politics*, London & New York, Verso, 1985, pp. 21-30.

the Netherlands Institute for Human Rights. Again, as a form of participation, ethnic minorities can complain to the Indonesian National Commission of Human Rights and the Ombudsman, both of which are obliged to interpret the Indonesian Human Rights Act and the Indonesian Ombudsman Act. These legal bodies help ethnic minorities to utilise a critical approach to law, and thus improve their lives. Members of ethnic minorities are often well aware of the injustice meted out to them and they fight to complain via the proper legal channels such as through the Ombudsman, the National Human Rights Institutions and the courts. Finally, this research uses practical indicators in the principle of human rights to measure, in respect of ethnic minorities, their rights to good governance, their rights to freedom of discrimination, and so on. In other words, the three principles of good governance that I elaborated on form an analytical framework for my research. These principles as discussed above are: first, the principle of transparency that provides an evaluative analysis for the extent to which government facilitates (1) information, (2) open meetings and (3) publications. Legal instruments that are used for analysis of this principle include the Indonesian Public Disclosure Act and the Dutch Government Information Act. Second, the principle of participation, from which I can investigate ethnic minority participation through their (1) constitutional motives (submission of objection, appeal, and complaint), (2) the CLEAR Method, (3) citizen's panel and community-level participation. Third, the principle of human rights. For a practical evaluation of this principle, I refer to several pieces of legislation, such as the Dutch General Administrative Law Act and the Indonesian Government Administration Act. Other rights are dependent on the situation of each country. I describe the rights to good governance as norms for everyone, including ethnic minorities. These rights require ethnic minorities to be treated fairly, to have the opportunity to be heard, to obtain the reasons for decisions made by a public body. To investigate other rights, such as the right to freedom from discrimination, I utilise the Indonesian Human Rights Act and the Dutch Equal Treatment Act.

CHAPTER 3

Good Governance and Ethnic Minorities in Indonesia

1. Introduction
2. General legal norms of good governance and ethnic minorities
   - 2.1 Introduction
   - 2.2 Article 28 of the Indonesian Constitution
   - 2.3 Legislation on equal treatment, non-discrimination and human rights
   - 2.4 Legislation concerning legal protection
   - 2.5 Institutions that deal with the norms for the government and legal protection of ethnic minorities
     - 2.5.1 The administrative authorities
     - 2.5.2 The National Ombudsman
     - 2.5.3 The Indonesian Commission of Human Rights
     - 2.5.4 The courts
   - 2.6 Provisional findings
3. Specific legal norms for the government and legal protection of ethnic minorities: a case study of Chinese and Turkish communities
   - 3.1 The principle of transparency
     - 3.1.1 Introduction
     - 3.1.2 Legal framework of the Public Disclosure Act
     - 3.1.3 Transparency facilitates comprehensive information about ethnic minorities
     - 3.1.4 Transparent procedures and the function of online mechanism
     - 3.1.5 Transparency requirements on the National Action Plan on Human Rights
     - 3.1.6 Transparency in anti-discrimination law
     - 3.1.7 Provisional findings
   - 3.2 The principle of participation
     - 3.2.1 Introduction
     - 3.2.2 Chinese and Turkish citizen's panel
     - 3.2.3 Chinese and Turkish community-level participation
     - 3.2.4 Demonstration: citizen's initiative or anarchy?
     - 3.2.5 The CLEAR method: a case study of Yogyakarta
     - 3.2.6 Provisional findings
   - 3.3 The principle of human rights
     - 3.3.1 Introduction
     - 3.3.2 The right to good governance of Chinese people
     - 3.3.3 The right to good governance of Turkish people
     - 3.3.4 Changing name: an ironic discrimination
     - 3.3.5 Land confiscation and maladministration
     - 3.3.6 The events of 1965 and 1998
     - 3.3.7 Provisional findings
4. Provisional findings

1. Introduction

The idea of good governance is a new concept in Indonesian legal discourse.[143] In the Indonesian context, good governance can be introduced to create legal reforms and enhance the legal protection of the people. Interestingly, Indonesian interpretations of the concept of good governance cannot be separated their cosmology of Eastern values. Satjipto Rahardjo argues that, as an Eastern society, Indonesian people prioritise harmony, peace, balance, and togetherness.[144] These values can be instilled in Indonesia by interpreting good governance, which deploys 'obligations and protections.' As discussed in chapter 2, good governance is especially important for ethnic minorities. When compared to more established legal concepts such as rule of law and democracy, the concept of good governance is still in its youth, and as a concept is still immature. Thus, good governance has not yet been evaluated in detail in Indonesian legal discourses.

The concept of the rule of law has a longer history, and is addressed in Article 1 of the 1945 Indonesian Constitution. The ideas of democracy and liberty rose to prominence during the 1998 reform and the collapse of Soeharto's regime. By contrast, the idea of good governance has not yet received serious attention in political debate and mass media.

This chapter will elaborate on the idea of good governance with regards to ethnic minority policy, identify relevant legal norms regarding the fulfilment of fundamental rights, and evaluate examples of their implementation. Good governance, in the context of Indonesian administrative law, is concerned with strengthening the norms for the Indonesian Government and the legal protection of ethnic minorities. This research focuses specifically on the legal protection for Chinese and Turkish people in Indonesia.

Section 2 describes legislation in the context of good governance on norms for the government and the legal protection. Article 28 of the Indonesian Constitution contains elements of good governance and

[143] Interview with Paul Moedikdo, A senior Indonesian legal scholar in September 2015

[144] Satjipto Rahardjo. *Hukum dan Perilaku. Hidup Baik adalah Dasar Hukum yang Baik*, Jakarta, Kompas, 2009, p. 19

legal protection, particularly the rights to equality before the law, and legal certainty (Article 28 D). This Article inspired many other pieces of national legislation such as the Act of Citizenship and the Human Rights Act. In section 3, I clarify the role of governmental institutions in implementing good governance with regards to ethnic minority rights, and will compare it to the ideal conduct of an administration that respects the principles of good governance when formulating policy. Furthermore, the Indonesian government created the National Human Rights Action Plan to provide formal guidance for the protection of ethnic minority rights. Other institutions, including the National Commission of Human Rights and the Ombudsman, also play significant roles in fighting discrimination. The final institution is the judiciary, which is represented by different types of courts. The court is the only institution endowed with legally binding power, and is the final channel that ethnic minorities may access after Ombudsman and the Commission of Human rights which, in contrast only have the ability to make recommendations. The courts (the District Court, Administrative Court, and Supreme Court) also make important contributions to interpreting good governance. Section 3.1 begins with an analysis of the application of the principle of transparency, starting with the function of Law No. 14 of 2008 concerning Public Disclosure. The distribution of relevant information by the administrative authorities can result in beneficial outcomes, especially for ethnic minorities. More transparent governmental administration will ensure a higher degree of security for ethnic minorities. Section 3.2 delineates a model of the participation of ethnic minorities. Grassroots participation can take the form of a citizen's panel which allows minorities to participate in the policy-making process. Similarly, modern organisations participating at the community-level also make contributions to public policy. Finally, section 3.3 describes human rights violations. An administrative authority or a governmental body that has abused its power is likely to cheat the legal instruments by suspending human rights prosecution. Therefore, the crimes against humanity of 1965 and 1998 in Indonesia continue to go unresolved. The tragedies of 1965 and the 1998 crimes against human-

ity resulted in many Chinese victims. Good governance is important to encourage the investigation and resolution of these crimes against humanity.

2. General legal norms of good governance and ethnic minorities

This chapter will discuss general and specific norms relating to the government. General norms are those which can be found in the Indonesian Constitution and pieces of legislation regarding norms for the government and legal protection of ethnic minorities. These general norms are relevant to the position of all ethnic minorities. On the other hand, 'specific' norms are those that I use to investigate the particular legal position of the Turkish and Chinese communities in Indonesia. In other words, general norms are norms related to all ethnic minorities, and specific norms are norms related to Turkish and Chinese people in Indonesia. General norms and specific norms are different with general rights and minority-specific rights. General norms and specific norms discuss the norms for the government and legal protection of ethnic minorities. Whilst, general rights and minority specific rights is a human rights approach. General norms and specific norms, hereby, is an issue of good governance which discuss the legal norms for the government. General norms discuss a legal norm of Article 28 of Indonesian Constitution, legislation on equal treatment, non-discrimination and human rights and the role of institutions such as the administrative authorities, National Ombudsman, Indonesian Commission of Human Rights and court which related to all ethnic minorities. Furthermore, specific legal norms contain a discussion about the implementation of the principle of transparency, participation and human rights related to the Turkish and Chinese communities.'

2.1 Introduction

The following section will discuss the Indonesian Constitution and pieces of legislation that are most relevant to the discourses of good governance and ethnic minorities. The discussion begins with an exploration of Article 28 of the Indonesian Constitution. After the 1998 reforma-

tion, Article 28 was developed to provide better human rights provisions than those created at the time of the 1945 revolution. Indeed, Article 28 is pivotal norm for the Indonesian government from a good governance perspective. This Article can be seen as a norm for government and legal protection for citizens. Article 28 of the Indonesian Constitution is particularly meaningful with regards to the development of good governance, and provides an umbrella of legal protection to ethnic minorities. Generally speaking, the Act of Citizenship and the Human Rights Act can be analysed from the perspective of good governance and ethnic minorities. In the past, the Act of Citizenship has been interpreted arbitrarily, resulting in the victimisation of the Chinese community in Indonesia. The most recent regime of regulation is the Human Rights Act, which consists of various human rights provisions in great detail. The Human Rights Act can be seen as the engine of legal reform that has encouraged ethnic minorities to participate in legal arenas.

2.2 Article 28 of the Indonesian Constitution

The original version of the 1945 Indonesian Constitution was inadequate in regulating legal protection issues.[145] Article 28 merely stated that 'the freedom to associate and to assemble, to express written and oral opinions, and so on shall be regulated by law.' This Article is a norm for the government which obligates the administrative authorities to respect and recognise various norms mentioned here. From a good governance perspective, this article provides legal protection to citizens. However, in the time of revolution and afterwards, the discussion of norms for the government and legal protection for citizen did not flourish, because the government was uncommitted to the implementation of this article. Soekarno, the first President of Indonesia, argued that the issue of human rights evokes concepts of individualism which are incompatible with the spirit of Indonesian communitarianism.[146] Similarly,

[145] A.B. Kusuma & R.E. Elson, *A Note on the sources for the 1945 constitutional debates in Indonesia*. Brijdragen tot de Taal-, Land- en Volkenkunde. Vol. 167, No. 2-3, 2011, pp. 196-209., See also., Denny Indrayana. *Indonesian Constitutional Reform 1999-2002 An Evaluation of Constitution-Making in Transition*. Jakarta, Kompas Book Publishing, 2008, p. 287.

[146] Saafroedin Bahar, *Risalah Sidang BPUPKI dan PPKI*, Jakarta, Sekretariat Negara,

Soepomo was a leading Indonesian legal scholar who emphasised the primacy of the spirit of family (*kekeluargaan*) to Indonesians, over the individual.[147] However, during the political debate in the Badan Penyelidik Usaha Persiapan Kemerdekaan (BPUPK, the Investigating Committee for Preparatory Work for Indonesia Independence), Muhammad Hatta, another a prominent member, stated a differing position— he insisted that human rights were necessary to protect citizens from abuse of power.[148] Likewise, Yamin strongly supported the draft of human rights provisions, and argued that Indonesia could not have a democratic rule of law without respecting legal rights and protecting its citizens.[149] The final outcome was a compromise that worked for both sides.

The 1945 Constitution of Indonesia was created at a time of emergency and was drafted hastily by the Constitution Committee of the BPUPK.[150] At the time, Indonesian leaders had to deal with the Japanese occupying forces, as well as internal political instability.[151] There was insufficient time to discuss human rights in the BPUPK and the parliament (KNIP), therefore the plan was to prepare the Indonesian Konstituante (Constitutional Assembly) as an *ad hoc* board, whose duty was to craft a new Indonesian Constitution. The Indonesian Konstituante (1956-1959) was elected by the people, and the members were given ample time to debate the inclusion of a human rights provision in the Constitution. During the time of transition, before the formation of the Konstituante, the Indonesian Government issued a temporary Constitution; firstly, the Federal Constitution on 27th December 1949, and later, the Provisional Constitution on 17 August 1950.

1995.

[147] Awaludin Marwan, et al, *Pergulatan Tafsir, Biografi Intelektual, Pemikiran Hukum Adat dan Konstitutionalisme,* Jakarta, Pustokum, 2015, p. 10-25.

[148] Saafroedin Bahar, *Risalah Sidang BPUPKI dan PPKI*, Jakarta, Sekretariat Negara, 1995.

[149] Muhammad Yamin, *Proklamasi dan Konstitusi Republik Indonesia.* Penerbit Djambatan, 1951, p. 111.

[150] M.C. Ricklefs, *A History of Modern Indonesia Since c. 1200,* London, Palgrave Macmillan, 2001, p. 258.

[151] George McTurnan Kahin, *Nationalism and Revolution in Indonesia.* Ithaca, Cornell University Press, 1952, p. 147-150.

In 1956, the debate about human rights began to evolve into a wider debate about the Universal Declaration of Human Rights (UDHR) in the Indonesian Constitution and how it would relate to religion, the cultural values of Indonesia, and the temporary human rights provisions of the 1949-1950 Constitution.[152] The 1950 Provisional Constitution stated a more progressive approach to human rights provision, for example by protecting a citizen's right to strike and hold demonstrations.[153] Moreover, this Constitution also espoused the importance of equal treatment as laid out in Article 7 (3), which stated that 'all are entitled to equal protection against any discrimination and against any incitement to such discrimination.' The introduction of human rights provision resulted in another complication in the Indonesia Konstituante, namely the legal protection of minorities as proposed by Siaw Giok Tjhan, Oei Tjoe Tat, and Yap Thiam Hien.[154] Anti-Chinese sentiment which was absent in the BPUPK of 1945, which included Chinese representatives such as Liem Koen Hian, Oey Tiang Tjoei, and Oey Tjong Hauw, but it began to develop in the Indonesia Konsituante. Nevertheless, guided democracy led human rights provisions into a dark age of authoritarianism.[155] After Soekarno disbanded the Indonesian Konstituante, the discussion on human rights was left unfinished, and the political situation resulted in the decimation of constitutional democracy.[156]

In the period between 1959 and 1998, human rights provisions in the Constitution was authoritarian regimes of Soekarno's Guided Democracy and Soeharto's New Order. Until the end of Soeharto's New Order in 1998, the discourse of human rights was started up again.

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[152] Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*. Jakarta, Pustaka Sinar Harapan, 1992, p, 133-138.

[153] Soepomo, *The Provisional Constitution of the Republic of Indonesia With Annotations and Explanations on Each Article*, Ithaca, Cornell University, 1964.

[154] Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*. Jakarta, Pustaka Sinar Harapan, 1992, p. 224-225.

[155] Daniel S. Lev, *Judicial Institutions and Legal Culture in Indonesia*. In Claire Holt. *Culture and Politics in Indonesia, Ithaca*, Equinox Publishing Ltd, 1972, p. 274-76.

[156] Herbert Feith, *The Decline of Constitutional Democracy in Indonesia.* Ithaca, Equinox Publishing, 1968, p. 578.

The role of the Constitution is pivotal to understanding Indonesian values,[157] as it reflects the need to harmonise the character of 'family spirit' with the ideas of modernity.[158] Human rights are contemporary a legal concept which must be addressed in the Constitution.[159] The amendment process following the 1998 reformation had a major influence on equal treatment discourses, as minority rights and prohibition of discrimination were not discussed in the original Constitution.[160] In some regards, much of the difficulties came from perceived tensions between 'Asian' and 'Western' values.[161] However, Syarief Muhammad Alaydarus from the Islamic Party (F-KB) argued that many concepts of 'Western' human rights have equivalent Islamic counterparts. For example, the freedom of religion (*hifzhuddin*), the right of security (*hifzhun nasl*), the right to property (*hifzhul mal*), and the right to employment (*hizhul kasb*).[162] Moreover, the huge changes made by the amendment have had a significant influence on Indonesian political life, most notably, the recognition of the political rights of citizens has improved.[163]

Post-Soeharto democratic regimes have endeavoured to enact many legal reforms, especially in the field of human rights legislation. A catalyst to amending the 1945 Indonesian Constitution was an aware-

[157] Satjipto Rahardjo, Mendudukan Undang-Undang Dasar: Suatu Pembahasan dari Optik Ilmu Hukum Umum, Jakarta, Genta Press, 2007.

[158] Soepomo, Indonesia Facing Problems of New Life and Reintegration, Jakarta, Penerbit Universitas, 1958, p. 58.

[159] Muhammad Yamin, Konstituante Indonesia dalam Gelanggang Demokrasi, Jakarta, Penerbit Djambatan Jakarta, 1956, p. 183.

[160] Gary F Bell, Minority Rights and Regionalism in Indonesia. Will Constitutional Recognition lead to disintegration and discrimination? Singapore Journal of International & Comparative Law (2001) 5 pp. 784-806

[161] Philip Eldbridge. Human Rights in Post-Suharto Indonesia. The Brown Journal of World Affairs. Spring 2002. Vol. IX, Issue 1.

[162] Nur Rosihin Ana, Nanang Subekti, et al, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Latar Belakang, Proses dan Hasil Pembahasan 1999-2002. Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama, Jakarta, Sekretariat Jenderal Mahkamah Konstitusi, 2010, p. 286.

[163] Susi Dwi Harijanti and Tim Lindsey, Indonesia: General election test the amended Constitution and the new Constitutional Court. International Journal of Comparative Law, Vol. 4. No. 1 (Jan 2006).

ness that human rights provisions must be regulated.[164] In the People's Consultative Assembly (MPR), politicians participated in debate about the inclusion of human rights in the Constitution. Most of the members of the sixth meeting of 'Commission A' agreed to include human rights provisions in the Constitution. However, this decision was challenged by both the Golkar and the military faction who insisted that human rights should continue to be regulated by organic statutory (MPR's Decree NO. XVII of 1998 and Law No. 39 of 1999 concerning human rights).[165] Proposals for human rights regulation were discussed at the Sixth meeting of Commission A; Patrialis Akbar (Fraction of Reformation) argued that the 1945 Indonesian Constitution already recognised the freedom to associate and to assemble, and respected freedom of expression for both written and oral opinions. He proposed that Article 28 of the Constitution should include provisions regarding labour rights such as prohibition of slavery, forced labour, torture, etc.[166] However, the issue of forced labour did not really attract any further attention.

In 1998, an important aspect of the Amendment was a statement made by a native Indonesian, Muhammad Ali, of the Indonesian Democratic Party of Struggle (PDI-P), who argued for the removal of the term *'pribumi'* (native Indonesian) from the Constitution, as its presence excluded Chinese-Indonesians, Arab-Indonesians, and European-Indonesians. Everybody agreed with Ali's remark at that time. Prior to its Amendment, the 1945 Constitution contained only minimal recognition of minorities, instead focusing strongly on integration and national unity.[167] In the Indonesian Konstituante of

[164] Ismail Suny, *Democratization Process in Indonesia*. International Journal of International Law. Vol. 2. No 4 Juli 2005.

[165] Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: AN Evaluation of Constitution-Making in Transition,* Jakarta, Kompas Book Publishing, 2008, p. 164.

[166] Nur Rosihin Ana, Nanang Subekti, et al, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Latar Belakang, Proses dan Hasil Pembahasan 1999-2002. Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama*, Jakarta, Sekretariat Jenderal Mahkamah Konstitusi, 2010, p. 279.

[167] Gary F Bell, *Minority Rights and Regionalism in Indonesia. Will Constitutional Recognition lead to disintegration and discrimination?* Singapore Journal of International & Comparative Law (2001) 5 pp. 784-806

1956-1959, political debate around this point arose after Anwar Sutan Amiruddin (PPTI) stated his position against the inclusion of minority rights in the Constitution. In reply, Siaw Giok Tjhan (Baperki) demanded that the constitution guarantee equal treatment of all citizens.[168] Most of members of the Konstituante accepted Siauw's proposal, including Mohamad Yamin.

After the issue of human rights and prohibition of discrimination arose in the Konstituante, this issue appeared again in the 1998 Constitutional Amendment. The material substance of human rights provision in the Constitution is sufficient to combat discrimination. Several pieces of human rights legislation were proposed by members of Parliament after a list of human rights provisions became regulated in the Constitution. For instance, Hamdan Zoelva (F-PBB) argued that the formulation of a Human Rights Act was critical given the country's poor record of protecting human rights through organic statutory; presidential decrees have proven insufficient in regulating human rights, thus an Act of Parliament is required now that the Constitution stipulated human rights provision. Furthermore, Zoelva argued that legal aid and access to justice should also be addressed in the Constitution.[169] Introducing human rights will strengthen the rule of law, which itself establishes basic principles such as the supremacy of law, equality before the law, and due process of law.[170] Additionally, Nusyahbani Katja Sungkana (F-UG) argued for the particular urgency of protecting the rights of children in the Constitution, including the specific rights to freedom from discrimination for children.[171]

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[168] Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*. Jakarta, Pustaka Sinar Harapan, 1992, p. 225.

[169] Nur Rosihin Ana, Nanang Subekti, et al, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Latar Belakang, Proses dan Hasil Pembahasan 1999-2002. Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama*, Jakarta, Sekretariat Jenderal Mahkamah Konstitusi, 2010, p. 287.

[170] Ismail Suny, *Democratization Process in Indonesia.* Vol. 2. No 4 Juli 2005.

[171] Nur Rosihin Ana, Nanang Subekti, et al, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Latar Belakang, Proses dan Hasil Pembahasan 1999-2002. Buku VIII Warga Negara dan Penduduk, Hak Asasi Manusia dan Agama,* Jakarta, Sekretariat Jenderal Mahkamah Konstitusi, 2010, p. 312.

Article 28 of the 1945 Indonesian Constitution finally introduced regulations regarding the right to life (Article 28A); the rights to social security (Article 28 A (1)); the children's rights (Article 28B (2)); the rights of access to education and science (Article 28 C (1)); the right to improvement through collective struggle (Article 28C (2)); the right to equal treatment before the law, the right to work, and the right to citizenship (Article 28D); the freedom of religion (Article 28E); the right to information (Article 28F); the right to be free from torture and obtain political asylum (Article 28 G); the right to property, health care, and public service (Article 28 H); the right to freedom from enslavement, the freedom from discrimination, and cultural identities (Article 28I); and the duty to respect the human rights of others (Article 28J). After the second amendment to the Constitution, several pieces of human rights provision have become particularly significant to the protection of minorities.[172] The most important of these is, Article 28I (2) which states that 'every person shall have the rights to be free from discriminatory treatment based upon any grounds whatsoever and shall have the right to protection from such discriminatory treatment.'

2.3 Legislation on equal treatment, non-discrimination and human rights

Equal treatment and non-discrimination a norm for the government and the legal protection of citizens. Thus, the Indonesian Government is required to reinforce the norms for the government and legal protection of people with regards to equal treatment and non-discrimination in its own legislation. In 1955, Indonesia was one of the main actors at the Asia-Africa Conference which encouraged the protection of human rights.[173] However, under Soekarno's repressive Guided Democracy, Indonesia suspended its human rights programme.[174] Similarly, be-

[172] Gary F Bell, *Minority Rights and Regionalism in Indonesia. Will Constitutional Recognition lead to disintegration and discrimination?* Singapore Journal of International & Comparative Law (2001) 5 pp. 784-806.

[173] The modern, global Constitution of 1955 stated that human rights were a vital component. Constitutions such as that of the Federal Republic of Germany and the Constitution of the People's Republic of China recognise the element of equality before the law,

[174] Herbert Feith, *The Decline of Constitutional Democracy in Indonesia.* Ithaca, Equinox

tween 1965-1998, Soeharto's oppressive regime continued to disregard human rights.[175] After the 1998 reform, the ideas of democracy and human rights became a primary concern. The creation of human rights legislation was discussed in Parliament which later issued Law No. 39 of 1999 concerning Human Rights. Before this law was established, existing pieces of human rights legislation included: (1) Law No. 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, (2) Presidential Decree No. 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child, (3) Presidential Decree No. 50 of 1993 concerning Establishing the National Commission of Human Rights, (4) Law No. 5 of 1998 concerning the Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment.

Law No. 7 of 1984 on the Ratification of the Convention concerning the Elimination of All Forms of Discrimination Against Women (CEDAW) was the first piece of human rights legislation related to the protection of women's rights in Indonesia. However, simply issuing legislation was unlikely to resolve the complex and serious history of women's rights violations in Indonesia, particularly women who are also ethnic minorities. The ratification of CEDAW did little to actually protect women and their human rights. For example, the crimes committed in the 1998 riot included much gendered-violence such as the mass rape of 152 Chinese women, 20 of whom were killed during the incident.[176] Furthermore, CEDAW is not enforced effectively, and as such offers little protection to women. In 1990, Indonesia ratified another international convention through Presidential Decree No. 36 of 1990, the Convention on the Rights of the Child. In Indonesia, the protection of children is also supported by the National Human Rights

Publishing, 1968, p. 578.

[175] Ken Ward, *Soeharto's Javanese Pancasila*, see also: Sidney Jones. *New Order Repression and the Birth of Jemaah Islamiyah*. In Edward Aspinall & Greg Fealy. Soeharto's New Order and its Legacy. *Essays in honour of Harold Crouch*, Canberra, The Australian National University, 2010, p., 27-45.

[176] Komnas Perempuan, *Seri Dokumen Kunci. Temuan Tim Gabungan Pencari Fakta Peristiwa Kerusuhan Mei 1998. Laporan Tim Relawan untuk Kemanusiaan*. Jakarta, Komnas Perempuan & New Zealand Official Development Assistance, 2002, p, 78-86.

Commission for the Rights of Children. Government programs and efforts to monitor children's rights during the New Order era were poor until the National Commission for the Protection of Children was established on October 26, 1998.

Presidential Decree No. 50 of 1993 concerning the Human Rights Commission as issued by Soeharto's government was not an adequate piece of legislation. This decree created a Commission comprised of 25 members without the power to propose legislation and which was only able to perform a small amount of human rights work. The legal authorities of the 1993 National Commission were limited to campaigning, studying, monitoring, and networking about human rights.[177] Soeharto selected his loyal ally, Ali Said (former Chairman of the Supreme Court), to be the chairman of the Human Rights Commission.

In the view of the New Order, 'the most dangerous legislation' accepted by the Indonesian government after the 1998 Reform was Law No. 5 of 1998 concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This legislation challenged the government to evaluate their previous actions as crimes against humanity. The killings in 1965 resulted in approximately 3 million people being massacred by the army and religious groups; the *petrus* (mysterious shootings) 1981-1984 left five thousand people dead; the 1989-1998 military operations in Aceh caused 1000 deaths; 100,000 were killed in the 1963-2003 military operation in Papua— these events are only the tip of the iceberg.[178] Unfortunately, of the many cases of human rights violations, only several cases were addressed in courts such as the 1984 Tanjung Priok Case (Ad hoc Human Rights Courts of 2003-2004), the 1998 kidnapping, or the disappeared persons cases (the military court), on July 27, 1996 tragedy (connectivity court), the 1998 student massacre (the military court), the Timor-Leste cases (Ad hoc Human Rights Courts of 2003-2004), and the Abepura cases (Ad hoc

[177] At least 25 members of The National Human Rights Commission were elected by Soeharto through Presidential Decree No. 455/ M of 1993,

[178] *Jalan Lain Mengadili Soeharto,* SUAR Vol. 07. No. 02 Tahun 2006., p. 14.

Human rights Courts in Makasar).[179] Unfortunately, the extraordinary human rights cases of the incidents of 1965 and the 1998 riots has never been solved in the Human Rights Court.

Other important pieces of human rights legislation were issued in 1998. The first was piece of legislation introduced in the 1998 reform was Law No. 5 of 1998 concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This legislation can be used to criticise violence by the state apparatus, such as the prevention on the use of torture by the police during criminal investigations. The most important piece of human rights legislation was also issued in 1998, Law No. 39 of 1999 concerning Human Rights which became a cornerstone of legal change. This law regulates the basic legal requirements of universal rights and formulated national human rights institutions. Article 3 of Law No. 39 of 1999 reflects a similar spirit to Article 7 of the Universal Declaration of Human Rights, which states that everyone should be treated equally without any discrimination.[180]

In 1998, the international spirit of the matter of equal rights was mentioned by Muladi in his role as the Minister of Justice. Based on the Vienna Declaration and the Programme of Action of the World Conference on Human Rights, the Indonesian government will respect, protect and enforce human rights through strengthening the rule of law and human rights regulation. According to Muladi, equal rights are a manifestation of human dignity as given by almighty God. Consequently, MPR's decree XVII/MPR/1998 on human rights was informed by Muladi's interpretation.[181] Equal rights are extremely important to a human rights legal system that states that everyone should be treated equally regardless of race, ethnicity, nationality, religion, etc. The

[179] *Menanti Gebrakan Komisioner Baru,* SUAR Vol. 08. No. 2 Tahun 2007.

[180] Article 3 (1) Everyone is born equal in dignity and human rights, and is bestowed with the intellect and reason to live with others in a spirit of brotherhood. (2) Everyone has the right to be recognized, guaranteed, protected, and treated fairly before the law and is entitled to equal legal certitude and treatment before the law. (3) Everyone has the right without any discrimination, to protection of human rights and obligations.

[181] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia, Proses Pembahasan Rancangan Undang-Undang tentang Hak Asasi Manusia. 2001.

use of 'everyone' is significant since it includes not only Indonesian citizens, but also includes foreigners as legal subjects. Furthermore, non-derogable rights are also regulated by Law No. 39 of 1999. Besides, if equality before the law is guaranteed, these non-derogable rights (especially Article 4) begin to occupy an important position within human rights discourses.[182]

This article states that every person has the right to protect their body and freedom; no one can allow the killing of another human being. During the 1999 hearing of the Human Rights Act, even the military faction of the Indonesian Parliament (represented by Sri Hardjendro), said that every person should be respected and have their human dignity protected.[183] In addition to the rights to life, Article 4 is also regulated several other non-derogable rights including the right to not to be tortured, the rights to not be enslaved, the rights to freedom of an individual, etc. Some rights protected by Article 4 share similar content with Article 5 with regards to the topics of equal treatment, legal protection and the rights of legal certainty. Equal rights are treated as natural rights of human beings.[184] Meanwhile, Article 7 is supported by Article 4 and Article 5 and opens the possibility of bringing disputes at the national and international levels.[185] Resolving human rights issues requires a plu-

[182] Article 4 The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever.

[183] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia. Proses Pembahasan. 2001

[184] Costas Douzinas, *The End of Human Rights. Critical Legal Theory at the Turn of the Century*, Oxford, Hart Publishing, 2000, p. 47.

[185] Article 5 (1) Everyone is recognised as an individual who has the right to demand and obtain equal treatment and protection before the law as befits his or her human dignity. (2) Everyone has the right to truly just support and protection from an objective, impartial judiciary. (3) All members of disadvantaged groups in society, such as children, the poor, and the disabled, are entitled to the greater protection of human rights.

Article 7 (1) Everyone has the right to use all effective national legal means and international forums against all violations of human rights guaranteed under Indonesian law, and under international law concerning human rights which has been ratified by Indonesia. (2) Provisions set forth in international law concerning human rights ratified by the Republic of Indonesia, are recognized under this Act as legally binding in Indonesia.

ralistic, eclectic and multidisciplinary approach that involves both legal and non-legal institutions.[186]

Law No 39 of 1999 stipulates many general rights that are beneficial to the people of Indonesia. Equal treatment and protection before the law are necessary to support non-derogable rights and other fundamental rights in daily life. Nevertheless, equal treatment and protection before the law must be supported by impartial and fair trials. Modern, independent, and fair courts are prerequisites to ensuring equal treatment, protection before the law, and the implementation of human rights. Meanwhile, Sajid Soetjoro from the Indonesian Democratic Party (PDI) stated that many human rights cases require urgent attention, such as Marsinah's case (concerning the murder of a labour activist), Udin's case (a journalist for Bernas's Newspaper), agrarian conflicts, kidnappings, mysterious mass killings, etc.[187] Somehow, the discourse of human rights as a formal language was developed without due attention.[188] These cases show the importance of the fair trials to resolving human rights enforcement problems and ensuring that justice prevails. Fair trials are also mentioned in Articles 17, 18 and 19 on the rights to justice (see below).

Law No. 39 of 1999 manages the segmentation of legal subjects, and guarantees that children, the poor, and disabled people can enjoy human rights protections in Indonesia. Everyone, regardless of their race, ethnicity, nationality, gender, age, and so on is entitled to access their fundamental rights based on this Human Rights Act. Hj. Gunarijah Kartasasmita (Golkar Fraction) explained that MPR's Regulation No. XVII/ MPR/ 1998 and Presidential Decree No. 50 of 1993 were both examples of existing legislation that were concerned with human rights. She emphasised that the Indonesian human rights legal system required an Ad Hoc Human Rights Court that is closely integrated with the Supreme Court. I consider her idea to be progressive, as it has encourag-

[186] Allen Buchanan, *The Heart of Human Rights*, Oxford, Oxford University Press, 2013, p. 50.

[187] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia. Proses Pembahasan, 2001.

[188] Hikmahanto Juwana, *Human Rights in Indonesia*, Volume 4 No. 1 October 2006.

ed the provision of special rooms in the ordinary Court.[189] A Special Human Rights Court is required for hearing the voices of victims.[190] Later, Indonesia created Law No. 6 of 2000 about Special Human Rights Court, even though this Court does not adjudicate ordinary violations of human rights. This human rights court addresses the vast majority of legal problems involving ethnic minorities.[191]

Rights to justice is a concept that stipulates that Indonesia is a state based on rule of law. No one shall be prosecuted without any court's decision following a fair hearing, conducted within and rigorous procedures. Procedures such as the criminal code procedure Law No. 8 of 1981 are guidelines that all prosecutors should follow when conducting detentions, and investigations, etc. For instance, the police cannot arrest someone without sufficient preliminary evidence (Article 17), detention requires a letter of assignment and reasons why the charged person is arrested (Article 18). However, these rights are sometimes infringed. For example, in 2014, the Director General of Immigration released a 'foreigner monitoring team,' the formation of which was, in fact, an infringement of the Immigration Law; it consisted of not only police, but also military officers who have no authority in law enforcement. On

[189] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia, Proses Pembahasan, 2001.

[190] Costas Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitan*, Oxford & New York, Routledge, 2007, p. 27.

[191] Right to Justice Article 17 Everyone without discrimination, has the right to justice by submitting applications, grievances, and charges, of a criminal, civil, and administrative nature, and to a hearing by an independent and impartial tribunal, according to legal procedure that guarantees a hearing by a just and fair judge allowing an objective and impartial verdict to be reached. Article 18 (1) Everyone arrested, detained, or charged for a penal offence has the right to be presumed innocent until proven guilty according to law in a trial at which he has had all the guarantees necessary for his defence, according to prevailing law. (2) No one shall be charged or held guilty of a penal offence for any act or omission which did not constitute a penal offence under prevailing law, at the time when it was committed. (3) Should any changes be made to law, the provisions most advantageous to the person held guilty shall apply. (4) Everyone brought before a tribunal has the right to legal aid from the start of the hearing until a legally binding decision is made by the tribunal. (5) No one shall be charged more than once for an action or omission concerning which a tribunal has previously made a legally binding decision. Article 19 (1) No offender or criminal shall be threatened with punishment in the form of seizure of part or whole of assets he legally owns. (2) No person found guilty by a tribunal shall be imprisoned or incarcerated for being unable to fulfil the obligations of a loan agreement.

November 24, 2016, this team conducted 'sweeps' of foreigners and arrested suspect persons, even if these foreigners had complete travel documents. However, in these 'sweeps' immigration officers often do not obey the Criminal Procedure Act, despite being legally obliged to do so (Article 104). One example of this situation was the sweeping of approximately six Turkish teachers in Depok who were arrested for nine hours in the Depok immigration office without adherence to the Criminal Procedure Act.[192] This case was an example of a government institution (The Immigration Affairs) that did not obey the right to justice in accordance to Article 17 and Article 18.

After elaborating the existence of right to justice in Law No. 39 of 1999, this law can also be used to investigate incidents of conflict and violence. For instance, conflict and violence are a tragic part of Indonesian history; human rights were violated in Aceh and Papua, the incidents of 1965, and the mysterious shootings of the 1980s in which the government is suspected as the main offender. Sometimes, mass conflicts have also arisen between groups of citizens such as in the Sambas (Dayak vs Madura), Poso (conflict between religious groups), and Dongos (political party chaos) cases. The government and its regulatory mechanism exist to secure the body of the individual, families, and property, and Law No. 39 of 1999 guarantees respect of these rights.

Last but not least, Law No. 39 of 1999 also regulates the National Commission of Human Rights. This institution was not a new body, but an existing institution which was established in 1993. Law No. 39 of 1999 endowed the institution with broader authorities and duties. The legal authority of this institution is described in Article 76 which reads 'The National Commission of Human rights has the function to study, research, disseminate, monitor and mediate human rights issues.' Law No. 39 of 1999 stipulates both human rights norms and the human rights institutions.[193]

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[192] *4 WNA Turki Ditahan Di Imigrasi*. Republika, 25 October 2016.

[193] Many regulations have been discussed in the field of good governance and ethnic minority protection including Article 28 of Indonesian Constitution; the Act of Citizenship; Human Rights Act; Law No 40 of 2008 concerning the Eradication of Racial and Ethnic Discrimination; Criminal Code (Article 310, 311, 315, and 156); Law No. 11 of 2005 concern-

2.4 Legislation concerning legal protection

An interesting feature of the norms for the government and legal protection can be seen in the Citizenship Act in Indonesia. Generally speaking, the Indonesian Government has an obligation to protect their own citizens and guarantees this protection through legislation. One example of legislation concerning legal protection in Indonesia is the Citizenship Act. In the Indonesian Constitution, an Indonesian citizen is an indigenous Indonesian or someone who has become naturalised in accordance with the law (Article 26 (1). One major feature of the discrimination against Chinese-Indonesians has been encountering the legal problems they face when trying to access their fundamental rights. For example, whilst Chinese Indonesians were required to prove their citizenship with (a certificate of Indonesian Citizenship) SBKRI, other ethnic groups were not.[194] The essential concept of citizenship is equality before the law and equal treatment.[195] However, the SBKRI has been used as a pretence for the specific extortion of Chinese people, and to restrict them from acquiring passports, driver's licenses, marriage certificates, etc.[196] In the past, the Citizenship Act did not explicitly mentioned Chinese exclusion since the issuing of Law No. 3 of 1946 concerning Indonesian Citizenship. While not as aggressive or explicit as the USA's Chinese Exclusion Act of 1882, the consequences were still significant and far-reaching. Meanwhile, Law No. 3 of 1945 excluded married women from the naturalisation process and from possessing Indonesian citizenship. However, a majority of dis-

ing the ratification of the international Covenant on Economic, Social, and Cultural Rights; Law No. 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights; Law No. 7 of 1984 concerning the Elimination of all Forms of Discrimination against Women; Law No. 29 of 1999 concerning the Ratification of the International Convention on the Elimination of all Forms of Racial Discrimination; Article 28:2 of Law No. 11 of 2008 concerning information technology; Law No. 26 of 2000 concerning the human rights court; Law No. 6 of 2011 concerning Immigration, etc.

[194] Wahyu Effendi, *Tionghoa dalam Cengkeraman SBKRI*. Jakarta, Redaksi, 2008, p. 14.

[195] Engin F. Isin, Theorizing Acts of Citizenship. In Engin F Isin &G reg M Nielsen. Acts of Citizenship. 2008. Zed Books Ltd., p. 16.

[196] Awaludin Marwan, *A Radical Subject of Zizekian Study: Racist Fantasy Termination! Protection Chinese Ethnic Minorities in the Era of Gus Dur, Indonesia*. Berlin, Lambert Academic Publishing, 2012, p. 16.

crimination occurred in legal practice rather than in regulation itself.[197] Issues of citizenship are a locus for discrimination and necessarily more likely to affect those who are not recognised as natives.

After Indonesian independence, the position of Chinese-Indonesians was being defined by economic strength and legal weakness. Some Chinese businesses such as Oei Tong HAM Concern (a conglomerate consisting of sugar factories, banks, steamboat companies, and so on) experienced significant economic prosperity.[198] Despite their success, it remained difficult for some Chinese-Indonesians to advocate for their citizenship status because existing regulations classified them as foreigners.[199]

Further problems for Chinese-Indonesians arose after Mao Zedong's government declaration that —in accordance with the principle of *jus sanguinis* (blood descendants)— all Chinese people were citizens of China, thus causing, many Chinese-Indonesians to have dual nationalities. This was problematic in Indonesia because the government follows the 'single nationality principle.' thus only allowing for a single nationality in its system of citizenship. Law No. 2 of 1958 was issued to attempt to resolve issues of dual citizenship for Chinese-Indonesians. The Indonesian Minister of Foreign Affairs, Prof. Mr. Soenario and the Chinese Minister of Foreign Affairs Chou En Lai, agreed on some matters of citizenship. The transformation process exposed the troubled relationship between the two countries, and resulted in many Chinese-Indonesians losing their citizenship entirely becoming stateless.[200] Law

[197] Aimee Dawis, *Orang Tionghoa Mencari Identitas*. Jakarta, Gramedia Pustaka, 2010.

[198] Peter Post, *The Oei Tiong Ham Concern and the Change of Regimes in Indonesia, 1931-1950*. In Marleen Dieleman, Juliette Koning and Peter Post. *Chinese Indonesians and Regime Change,* Leiden, Brill NV, 2011, p. 70.

[199] Beni Setiono, *Tionghoa Dalam Pusaran Politik,* Jakarta, TransMedia, 2008.

[200] Rizal Sukma, *Indonesia and China. The Politics of a Troubled Relationship*. Oxford & New York, Routledge, 1999, p. 18-21. Chinese people who did not have any access to the government encountered many problems when register attempting to register under the new system of Indonesian citizenship that was based on Law No. 2 of 1958. Many later became stateless, with some of leaving for to China whilst others remained in Indonesia, anxious about their citizenship status. This law was applied immediately without informing the public or providing accessible administrative support to those with to those with citizenship concerns. This Act caused a problem both the native Chinese and peranakan (Indonesian citizen of Chinese descent).

No. 2 of 1958 stated that Chinese-Indonesian dual nationals must choose which nationality to keep (Article 1).[201] That Article 28 (which is in the spirit of inclusion) and Law No. 2 (which is in the spirit of exclusion) existed simultaneously is paradoxical; they appear to contradict each other. 'Every person' should include citizens and non-citizens.[202]

Law No. 2 of 1958 triggered many discriminatory actions by the administrative authorities in legal practice because the implementation of this law caused hundreds of thousands of Chinese-Indonesians to become stateless. Furthermore, Chinese-Indonesian people regularly encountered difficulties when attempting to access public services, and their position became increasingly weak. Their already weakened position of being treated as a foreigner continued to worsen during Soeharto's New Order era, during which the use of the Chinese symbols was prohibited by the military. Soeharto's New Order government effectively abandoned Chinese people and accused them of being communist sympathizers.[203] The New Order regime created Law No. 3 of 1976 and Law No. 62 of 1958 concerning citizenship. A curious aspect of this Citizenship Act is the position of women, who still lacked legal standing. Married women could not apply for citizenship without permission from their husband (Article 10 (1)). Meanwhile, Law No. 3 of 1976, which served only as an additional provision, required applicants to swear loyalty to the State of Indonesia for their application to be successful. When Law No. 62 of 1958 entered into force, the rights to citizenship of Chinese-Indonesians were infringed upon many times.[204] This law did not make an improvement on the equal treatment for Chinese Indonesians, they were still targeted by discrimination and

[201] Suhandinata Justinian, *WNI Keturunan Tionghoa dalam Stabilitas Ekonomi dan Politik Indonesia*, Jakarta, Gramedia Pustaka, 2009.

[202] Christian Joppke, *Transformation of Citizenship: Status, Rights, Identity.* Citizenship Studies. Vol. 11, No. 1, 37-48 February 2007.

[203] John Rossa, *The September 30th Movement and Soeharto's Coup d'Etat in Indonesia*, Madison, The University of Wisconsin Press, 2006.

[204] After the reform of 1998, any social movement support amendment of Citizenship Act. One, called The Anti-Discrimination Movement (Gerakan Anti Diskriminasi/ GANDI), was established by the Chinese community and the Islamic organization, Nahdlatul Ulama. Objectives of this organization included eradicating and combating potential discrimination through legal reform. Interview with Wahyu Effendy on August, 11, 2015.

continued to be a vulnerable group. For instance, some incidents resulted in racial violence; riots took place in 1963, 1974, and 1998 in which incidents of discrimination against people of Chinese descent increased.[205] Despite being constitutionally obliged to protect its citizens, the administrative authorities showed no commitment to investigating criminal procedures related to the riots and continued to oppress Chinese communities. Further, the impact of the absence of equal treatment among citizens resulted in the New Order's forced assimilation policy and often stimulated the disbandment of Chinese cultural identities.[206] Therefore, political debates about citizenship cannot be separated from the position of Chinese people in Indonesia. Law No. 62 of 1958 did not strictly stipulate the prohibition discrimination or the obligation of the government to treat their citizens equally.

Citizenship is a concept that is fundamental to how the government recognises the rights of nationals under its jurisdiction. Therefore, citizenship is closely related to the concept of sovereignty, which evokes nationhood and personhood.[207] As Anti-Chinese discourse became more mainstream, Chinese-Indonesian citizenship became increasingly threatened. Generally speaking, the majority are those who hold and benefit from the majority of the power of the state - thus the government reflects their political will. Groups outside the majority are often stereotyped as aliens, immigrants, strangers, refugees, etc. and so are called 'the others.'

During Soeharto's era, administrative authorities played an active role in the systematic discrimination against people of Chinese descent, this maladministration manifested itself in several ways. Firstly, at the administrative level, there was discrimination and maladministration as exemplified by arbitrary requests for an SBKRI.[208] Secondly, sym-

[205] I. Wibowo & Thung Ju Lan, *Setelah Air Mata Kering: Masyarakat Tionghoa Pasca-Mei 1998.* Jakarta, Kompas, 2010.

[206] Charlotte Setijadi, *Ethnic Chinese in Contemporary Indonesia: Changing Identity Politics and the Paradox of Signification*, Iseas Yusorf Ishak Institute, Issue 2016 No. 12.

[207] Engin F. Isin, *Citizens without Frontiers*, London, Bloomsbury Academic, 2012, p. 31.

[208] F. Hendra Winata, *Menggugat SBKRI*, Jakarta, Yayasan Pengkajian Hukum Indonesia, 2010, p. 25-36.

bolic violence in the public sphere —such as the prohibition of Chinese cultural events and holy festivals in public spaces. Many Chinese people consider '*Cina*' to be a pejorative, racist slur and instead prefer '*Tionghoa*' which is more egalitarian and respectful. Despite this, the New Order's government continued to call the Chinese '*Cina*' rather than '*Tionghoa*' in both public discourse and legal rulings. After The 1998 Reform, some newspapers followed suit and began to use 'Tionghoa' to refer to Chinese people and 'Republik Rakyat Tiongkok' for People's Republic of China. On the other hand, the New Order Government issued Acts which using 'Cina' rather than 'Tionghoa' such as Presidium of Cabinet Decision No. 127/U/Kep/ 12/ 1966 concerning changing-name for Indonesian who uses Chinese name (*nama Cina*), and Presidential Decree No. 14 of 1967 concerning religion, faith and Chinese culture (*Adat Istiadat Cina*). Thirdly, at the State level, violence through military force, such as the violation of indigenous Chinese-Indonesians' civil rights through illegal land acquisitions, forced closure of Chinese schools, prohibition of Chinese languages, the expulsion of Chinese activists, etc. Fourthly, the Government failed to protect Chinese people from mass riots, rapes, robberies, burned houses, mass killings, etc.[209] These are the dilemmas experienced by Chinese people who have Indonesian citizenship.

In the post-Soeharto era, the topic of the position of Chinese-Indonesians has appeared again in public discourses, especially during the parliamentary debates concerning the revision of the Citizen Act No. 12 of 2006. Hamid Awaluddin, the Minister of Justice and Human Rights, argued that Law No. 62 of 1958 was no longer compatible with the spirit of equal treatment. Thus, the Act of Citizenship needed to be revised.[210] Various conceptualisations of citizenship are being debated— intimate citizenship, multicultural citizenship, sexual citizenship, transgender citizenship, cosmopolitan citizenship, and ecological

[209] Sarah Turner & Pamela Allen, *Chinese Indonesians in a rapidly changing nation: Pressures of ethnicity and identity.* Asia Pacific Viewpoint, Vol. 48, No. 1, April 2007.

[210] Raker I tanggal 17 November 2006 Menkum dan HAM Pansus RUU Tentang Kewarganegaraan RI.

citizenship,[211] —all of which were discussed during the revision of Law No. 12 of 2006, which dealt with the Indonesian Act of Citizenship. Bomer Pararibu (F-PG) argued the ratification of the International Convention on Civil and Political Rights and International Convention on Economic, Social, and Cultural Rights (both of which are anti-discrimination in spirit) have influenced the legal reform of the Indonesian Citizenship Act.[212] Human rights provisions help impart legal sensitivity and humanism to the concept of citizenship; raising it above the level of simple tribalism or traditionalism; when informed by the idea of human rights, citizenship thus no longer simply refers to traditional, archaic concepts of society that centre on clans, tribes, and communities, but becomes more individual and rational.[213] In other words, the Act of Citizenship is now more respectful to 'others'.

On November 25, 2006, the Minister of Justice and Human Rights and the ad hoc committee for the draft of Citizenship Act met to discuss a sensitive issue, namely, the topic of the term '*pribumi*' (native Indonesian). Starting with Sudianto Tjen (F-PDI P), who argued that using the term had always been a misuse of power by the administration to justify extortion and discrimination. He stated that the term should be strictly regulated, so that that it cannot be abused again.[214] In the 1956-1959 Konstituante, use of '*pribumi'* was accused of being tantamount to racist sentiment, specifically towards Indonesian citizens of Chinese descent. Siaw Giok Tjan, Kho Kwat Oen, Oei Tjoe Tat, and Yap Thiam Hien, strongly protested against the usage of this term.[215] Yap insisted that the use of the term could be a source of discrimination

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[211] Engin F. Isin, *Theorizing Acts of Citizenship*. In Engin F Isin & Greg M Nielsen. *Acts of Citizenship*, London & New York. Zed Books Ltd, 2008, p. 17.

[212] Raker I tanggal 17 November 2005 Menkum dan HAM Pansus RUU Tentang Kewarganegaraan RI.

[213] Engin Isin, *Citizenship after Orientalism*. In., Engin F. Isin & Bryan S Turner. *Handbook of Citizenship Studies*, London, Sage Publications, 2002. p. 119.

[214] Raker II tanggal 25 Januari 2006 Menkum dan HAM Pansus RUU Tentang Kewarganegaraan RI

[215] Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia. A Socio-legal study of the Indonesian Konstituante 1956-1959*. Jakarta, Pustaka Sinar Harapan, 1992, p. 224-229.

in the future.[216] Moreover, abuse of this term can also infringe upon the human rights of other ethnicities[217] such as Arabian, European, Indian, and Papuan people.

Another important case in the context of Indonesian Citizenship Act discourse are the assimilation policies. The forced assimilation policies of Soeharto's era resulted in the worst period for Indonesian citizens of Chinese descent. The most dilemmatic problem was the forced name changing of Chinese people. This was particularly bizarre, considering the heterogeneity of the origins of 'Indonesian' names. If Javanese, Ambonese, Batak, Arabic, and Sundanese names are all acceptable—why should only Chinese names have to change? Willingness to change name was considered a sign of devotion to Soeharto's New Order government and military forces (Republic of Indonesia Armed Forces/ ABRI).[218] I label this —to borrow Seyla Benhabib's term—the collapse of citizenship.[219] A name is something private, a gift of from parents to reflect their hopes, prayers, and dreams for their child. Moreover, names are closely related to cultural identities which cannot be simply abandoned and erased. Indonesia declares itself as multicultural state (*bhineka tunggal ika* -diversity in unity is the national slogan) yet forced changing-name is a violation of the diversity of the nation. Indonesia has a multinational and poly-ethnic history[220] and the government must respect this multiplicity of identity. Law No. 12 of 2006 concerning citizenship seems to include the notion of multiculturalism that was debated during the law-making process, and marks the emergence of equal treatment, human rights and legal protection.

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[216] Josef P. Widyatmadja, *Yap Thiam Hien: Pejuang Lintas Batas*. Jakarta, Penerbit Libri, 2013, p. 225.

[217] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers*, Washington, The University of Washington Press, 2011, p. 308-309.

[218] M.C. Ricklefs, *A History of Modern of Indonesia Since c. 1200*, London, Palgrave Macmillan, 2001, p. 410-415

[219] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*. Cambridge, Cambridge University Press, 2004, p. 73.

[220] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 10-15.

2.5 Institutions that deal with the norms for the government and legal protection of ethnic minorities

Now these legal norms of good governance and ethnic minorities have been discussed, we can begin to analyse how these norms have been implemented. Government institutions such as the administrative authorities, the parliament, the courts, the Indonesian Ombudsman and the Indonesian National Commission of Human Rights also implemented these legal norms. This section will describe the executive power of administration, the judiciary power and the fourth power —the Indonesian National Commission of Human Rights and the Indonesian Ombudsman— all of which are involved in work relating to good governance and ethnic minorities. In particular, I will expand on how the administration's interpretation of ethnic minority regulation has changed over time. I will show how the Commission and Ombudsman provide balance to the administration's power by representing the interests of ethnic minorities. These institutions can only provide non-legally binding recommendations unlike the courts, yet participation of ethnic minorities in filing case law which is not so enlivened.

2.5.1 The administrative authorities

In 1875, the occupying Dutch administration appointed a Chinese *officer* (a *kapitein*).[221] This allowed the Chinese community to enjoy a degree of self-governance. Meanwhile, Article 163 of the Indies' regulation (*Indische Staatsregeling*) implemented a caste system that placed Europeans at the top, native Indonesians at the bottom, and oriental foreigners (including Chinese people) in between.[222] The relative privilege of Chinese-Indonesians in this hierarchy enabled Chinese-Indonesians to

[221] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Washington, The University of Washington Press, 2011, p. 29.

[222] When Soepomo drafted the Indonesia Constitution of 1950, he also mentioned this distinction. *'this Article is similar to Article 7 of the RIS Constitution. The principle of treating and protecting all persons equally will result in no separate regulations being issued for the Indonesian, European, or Chinese groups. The reference to this matter in the UUD does not imperatively demand, for example the unification of law.'* See., Soepomo. *The Provisional Constitution of the Republic of Indonesia With Annotations and Explanations on Each Article*. Ithaca, Cornell University, 1964.

successfully build a conglomerate in Semarang, namely Oei Tiong HAM Concern, (which consisted of multiple banks sugar companies, manufacturing industries, trading firms, shops, and so on).[223] The revolution of Indonesian independence threatened this prosperity, and as a result, some Chinese-Indonesians supported the Dutch administration over the New Republic. [224]

The late colonial government treated Chinese-Indonesians fairly well, some of them were well educated and obtained governmental positions. However, during the early Republic, the first President, Soekarno— despite being a highly intellectual and not outwardly racist person— introduced policies that damaged the Chinese community.[225] For example, Presidium of the Cabinet Decision No. 127/ V/ Kep/ 12/ 1966 was used as the legal basis for coercing Chinese people to change their names, as discussed earlier in this chapter.[226] The Dutch administration and the early Republic Government had similar styles of exercising power when disciplining people, including ethnic minorities. The difference was that even the small degree of self-governance offered by the colonial administration disappeared after the establishment of the early Republic. In the early Republic, the government wanted to create a holy principle of the rule of law— namely equality before the law. No longer would a distinction be made between the European, oriental foreigner, and the native Indonesian— everyone would become equal before the law. Moreover, the character of the revolution during the early Republic reflected the ideological statement of Indonesia becoming a

[223] Peter Post, *The Oei Tiong HAM Concern and the Change of Regimes in Indonesia, 1931-1950*. See., Marleen Dieleman, Juliette Koning and Peter Post, *Chinese Indonesians and Regime Change*. Leiden, Brill BV, 2011, p. 170.

[224] Oei Tjoe Tat, *Memoar Oei Tjoe Tat. Pembantu Presiden Soekarno.* Jakarta, Hasta Mitra, 1995.

[225] Beni Setiono, *Tionghoa Dalam Pusaran Politik.* 2008. TransMedia. Jakarta., See also, Suhandinata Justinian. *WNI Keturunan Tionghoa dalam Stabilitas Ekonomi dan Politik Indonesia,* Jakarta, Gramedia Pustaka, 2009.

[226] (1) Sidoarjo Court Decision with the Number of Case: 781/Pdt.P/2012/PN. Sda, (2) Mojokerto Court Decision with the Number of Case: 31/ Pdt.P/2012/PN. Mkt, (3) Ambon Court Decision with the Number of Case: Perkara 54/Pdt.P/2012/PN.AB, (4) Kudus Court Decision with the Number of Case : 113/Pdr.P/2011/PN.Kds, (5) Surabaya Court Decision with the Number of Case : 387/Pdt.P/ 2009/PN. Sby

political entity.[227] Soekarno always stated that no matter our religion or ethnicity, the nations of Java, Sumatera, Borneo, Sulawesi, Bali, and so on, are no more, only the nation of Indonesia. Everybody should be able to obtain happiness in their motherland, Indonesia.[228]

Next came the New Order administration, led by Soeharto, which I consider this to be the most racist regime in the history of Indonesia. Not only did this government issue Presidential Decree No. 14 of 1967 which prohibited Chinese religious and cultural affairs in the public sphere and restricted Chinese religions, beliefs, and culture. Not only did they discriminate against the Chinese community by obligating them to show written evidence of Indonesian citizenship to access public services,[229] but they also organised anti-Chinese operations through secret telegrams. The Minister of Finance wrote the Letter No. S-92/A/51/0397 which stated that the confiscation of Chinese properties did not require a court decision by the courts, enabling the government to seize property belonging to the Chinese organisation.[230] The public prosecutor also took part in discriminatory action by releasing Letter No. R-067/0/op/01/1997 which sanctioned surveillance of Chinese members-only organisations that had been established by Chinese foreigners.[231] Another government institution, the Land Affairs Agency, also targeted these organisations, and stated their agenda in a similar letter: first, the forced confiscation of land belonging to Chinese organizations, and second, not providing services to members of the Chinese community.[232]

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[227] Herbert Feith, *The Decline of Constitutional Democracy in Indonesia.* Ithaca, Equinox Publishing, 1968, p. 26

[228] Soekarno's speech on July, 1, 1945 in the front of Preparatory Committee for Indonesian Independence.

[229] Awaludin Marwan, *A Radical Subject of Zizekian Study: Racist Fantasy Termination! Protection Chinese Ethnic Minorities in the Era of Gus Dur, Indonesia.* Berlin, Lambert Academic Publishing, 2012, p. 14-16.

[230] A Court's decision is required to seize property, *afwezigheid verklaring* (court permission required to confiscate land and property) a term was borrowed from Dutch. However, due the Minister of Finance's letter No. S-92/A/51/0397, allowed the government to confiscate property without a court order. This is a clear betrayal of the principles of the rule of law.

[231] The Indonesia Public Prosecutor's Letter No. R-067/0/op/01/1997.

[232] The Indonesia Land Affairs Agencies' Letter No. X.500-87.

The 1998 reform was a pivotal moment for Indonesia, Soeharto's regime collapsed and the student movement demanded for politics to become more transparent, democratic, and accountable— these calls grew even louder after the administration failed to bring justice to the victims of the 1998 riots in which thousands of people died, houses were burned, activists were kidnapped and disappeared, and hundreds of women were raped. An ad hoc investigation team was established by the administration, yet their findings never reached the Human Rights Court. Their investigation proceedings were thwarted by the Public Prosecutor, who impeded any progress in bringing this case to a court hearing. To date the administration has shown no will to resolve this problem.

Despite the aforementioned failures, after 1998 the government tried to improve the condition of human rights, in particular by improving ethnic minority protections. President Decree No. 6 of 2000, which was issued by Abdurrahman Wahid, tried to eliminate racial discrimination against Chinese-Indonesians. After that, many policies endeavoured to provide improvements to equal treatment and the fulfilment of human rights. Another attempt took shape in the National Human Rights Action Plan. The implementation of this plan demanded significant preparation and planning.[233] Of course, the plan was composed of rational arguments. Shortly after coming to power, Jokowi's administration issued the Presidential Regulation No. 75 of 2015, which refers to the Article 28H of the Indonesian Constitution which regulates the equal treatment to everybody who lives in Indonesia.

> Article 28H item (2) the 1945 Constitution of Indonesia states that everyone has the rights to access and special service to obtain equal opportunity and benefit in getting emancipation and justice. Likewise, Article 5 item (3) Law No. 39 of 1999 about human rights formulates everyone including vulnerable people have the rights to access equal treatment and protection which related to special service. These Articles mean that respecting, protecting, fulfilling, enforcing, and developing human rights by the government must be accessible by every community of Indonesia. Including the special treatment and protection towards the vulnerable communities such as disability, the elders, the poor people, women, children, refugee, indigenous people, and migrant workers. The responsibility of the government

[233] Leslie Paul Thiele, *Foucault's Triple Murder and the Modern Development of Power*. Canadian Journal of Political Science, Vol. No. 2 (Jun., 1986)., pp. 243-260.

> in the area of human rights should be implemented regardless distinction human being from their religion, tribes, ethnicity, race, social status, economic status, gender, language, political faith, and so on for implementing justice and prosperity of society. [234]

Presidential Regulation No. 75 of 2015 guarantees that every ethnicity has a right to access to the special services of government systems. Equality becomes the basic moral policy of human rights programs, ensuring that vulnerable communities receive attention from the government.[235] This regulation may seek to create institutional structures of decision making and executive power that are responsible for the establishment and maintenance of human rights.[236] However, human rights activists have doubts about the enforcement of the National Action Plan. They believe it is 'paper tiger' rather than true guidance of legal practice.

2.5.2 The National Ombudsman

In March 2000, President Abdurrahman Wahid (Gus Dur) released a Presidential Decree No. 44 of 2000 regarding the Ombudsman. The motivation behind establishing the Ombudsman was a desire to empower society, including ethnic minorities, to participate more with politics and the administration, and to encourage administrative authorities to be more transparent, clean, and free from corruption.[237] Gus Dur formed this institution in the image of other Ombudsman of countries where the institution is a corrective institution that works properly; an independent and non-partisan institution which helps people complaints of improper administrative authorities.[238]

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[234] The Presidential Regulation No. 75 of 2015 concerning the National Action Plan of Human Rights

[235] Jacqueline Stevens. *On Moral of Genealogy*. Political Theory, Vol. 31, No. 4 (Aug., 2003), pp. 558-588.

[236] Edward Said. *Michel Foucault As Intellectual Imagination*. Boundary 2, Vol 1 (autumn, 1972), pp. 1-36.

[237] Private discussion with Prof Sunaryati Hartono. The First member of The Ombudsman on September 2016.

[238] David Roberts, *The Ombudsman Cometh*. The Advocate. 1972 (360).

Gus Dur was a figure in favour of pluralism, he promoted multiculturalism and inter-religious dialogue, and had close friends from diverse backgrounds. His background was in the Islamic organisation *Nahdlatul Ulama* (NU) that has produced many young Indonesian intellectuals. Between 2016-2021, Ahmad Su'adi, one such Muslim from NU, who was also inspired by Gus Dur, served as the Ombudsman's commissioner.[239] He believes that 'discrimination' enacted by the administrative authorities is best understood as maladministration itself. In addition, he worked to build a legal framework based upon this belief, stating 'discrimination by the government institution is maladministration.' The other commissioner of the Ombudsman is Alvie Lie, a Chinese-Indonesian and former of member of parliament, who has been particularly critical of damaging public policy.[240] These persons support the work of Ombudsman.

According to Article 3 Law No. 37 of 2008 the basic values of the Ombudsman are justice and non-discrimination. Further, the Indonesian Ombudsman has several explicit objectives as mentioned in Article 4, including fighting against corruption, collusion, and nepotism, and supporting clean, open, fair, effective, and efficient government.[241] The Ombudsman performs their function to investigate complaints and identify whether maladministration exists or not in the administrative system in accordance with Article 7.[242] Furthermore, the Ombudsman

[239] Interview with Ahmad Su'adi. Members of Ombudsman in September 2016.

[240] Personal communication with Alvin Lie in September 2016.

[241] Article 4 The Ombudsman has the objectives as follows: a. To realize a state based on the rule of law that is democratic, just and wealthy in characters; b. To encourage government and public administration which is free from corruption, collusion, nepotism; clean, open, fair, effective and efficient; c. To improve the quality of state government service in all sectors so as every citizen and resident gets justice, security, and welfare which are getting better; d. To help realizing and improving the efforts for the eradication and prevention of practices of maladministration, discrimination, collusion, corruption, and nepotism; e. To improve the legal culture of the nation, the law awareness of the public, and the supremacy of law, the essence of which are truthfulness and justice.

[242] Article 7 the Ombudsman has the following functions: a. to receive grievance on presumption of maladministration in administering public services; b. to conduct substantial investigation of the grievance; c. to follow up the grievance which is under the jurisdiction of Ombudsman; d. to conduct own motion investigation to the presumption of maladministration in administering public services; e. to conduct coordination and cooperation with other

also serves as the primary institution where ethnic minorities can request administrative justice and send complaints requesting an investigation into maladministration of administrative authorities.[243] For instance, the Turkish community has only ever complained through the Ombudsman on a single occasion after being arbitrarily detained by the Immigration Affairs authorities.[244] In another instance, some Chinese-Indonesians submitted a complaint to the Ombudsman regarding the prohibition of land ownership in Yogyakarta (this case will be elaborated in the section of the principle of participation).

Generally speaking, the Ombudsman encourages the administrative authorities and its citizens to develop democracy.[245] This institution supervises administrative authorities including the police, ministers, and local governments with the aim of accomplishing better public service (Law No. 25 of 2009 concerning public service).[246] This supervising task is evident in several cases. One case was a that of a Canadian-Turkish teacher in Depok, Jakarta who wanted a residence permit from Depok Immigration Affairs. However, the staff refused to provide service for the required photo session and fingerprint collection. This Canadian-Turkish teacher went back home feeling disappointed with the quality of service that he experienced, and engaged the services of a lawyer, who lodged an official complaint on this teacher's behalf. Following a complaint filed by a lawyer from the teacher's school, the Ombudsman visited Depok Immigration Affairs to conduct an investigation. The Ombudsman indicated there was maladministration regarding the refusal to provide public service by the Immigration Affair. The outcome of this investigation was that Immigration Affairs invited the teacher back to allow him to continue with his residence permit application.

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state organs or public agencies as well as non-governmental organizations and individuals; f. to develop networks; g. to conduct the prevention of maladministration in administering public services; and h. to conduct other assignments as mandated by the law.

[243] A. N. Patterson, *The Ombudsman*. U.B.C. Law Review. Vol. 1. (777) 1959-1963.

[244] Interview with Prof. Drs. Adrianus Eliasta Meliala, MSi. MSC, PhD in October 2016.

[245] Anita Stuhmcke & Anne Tran, *The Commonwealth Ombudsman. An Integrity Branch of Government?* Alternative Law Journal (233) 2007.

[246] Innis G. Macleod, *The Ombudsman.* Administrative Law Review. (93). 1966-1967.

This case demonstrates the power and efficiency of the Ombudsman and how can generate practical outcomes. Endorsements from Adrianus Meilala, the Commissioner, have contributed to the public's positive image of the Ombudsman. He personally visited Depok Immigration Affairs to investigate suspected maladministration, prompting the office to rectify their conduct even before the Ombudsman presented its formal recommendations.[247]

The Ombudsman has also declared war on corruption, collusion, and nepotism. One member, Ahmad Alamsyah Saragih, was a pioneer in radical anti-corruption activism. Before he was a member of the Ombudsman, he was the chairman of the Public Information Commission which promotes transparency and openness. He argued that corruption has no place in the administrative system anymore. And thus, campaigns for the creation of a system to prevent corruption.[248] Some cases brought to the Ombudsman involve potential cases of corruption. For instance, the conflict about land ownership of the Chinese community in Yogyakarta. The administrative authority of Yogyakarta does not allow non-native people to own land in its jurisdiction; Chinese people are instead required to rent land (the rights to use) from the government (Sultan) of Yogyakarta. Consequently, every decade, they have to renew their rental agreements.[249] Due to the price of land increasing over time, the rent for the year 2016 (200 million IDR) is now equal the price of the land itself.[250] These cases were brought to the Ombudsman who then issued a letter stating that the Land Affairs Agency should provide the Chinese community with equal treatment.[251]

Since the establishment of this institution, many complaints have been submitted to the Ombudsman. Beside receiving complaints, the Ombudsman also has a mandate to supervise public service according

[247] Personal conversation with Adrianus Meilala and BK, the Canadian-Turkish teacher in October 2016, see, Ombudsman's Letter No. 285/ ORI-SRT/III/2017

[248] Personal conversation with Ahmad Alamsyah Saragih in October 2016

[249] Interview with Zealous Siput Lokasari on December, 8, 2016.

[250] Interview with Willie Sebastian on December, 8, 2016.

[251] Case No 005/LM/III/2016/Yogyakarta, Case No. 0079/LM/IV/2016/Yogyakarta, Case No. 008/ LM/IV/2016/Yogyakarta.

to Law No. 25 of 2009. The Ombudsman releases an annual survey of public service that ranks or grades ministers and other public institutions. The rankings consist of red (bad), yellow (standard) and green (good). Ministers and government bodies who are graded 'red' are often disappointed. This survey is also conducted at the local level. Sometimes the publication of negative grades causes the Ombudsman to distance itself from the administration. This Law stipulates the obligation of government to serve its citizens equally and non-discrimination in accordance with Article 4.

Equally important, is that the Ombudsman is used to receiving the complaints of the people; thus, it is a channel of democracy and rule of law within the country.[252] Perhaps testament to the quality of its work, the Ombudsman has become a way to submit complaints about public service. Since the Ombudsman began producing annual reports, increasing numbers of reports have been filed; starting in 2002, the Ombudsman received 396 reports,[253] in 2003 the report consisted of 273 complaints,[254] the 2004 report composed of 787 complaints,[255] and the 2005 report constituted 1010 complaints.[256] By the same token, ethnic minorities can access the complaint channels without few barriers, so they can easily complain when they feel discriminated against by a public servant through the Ombudsman. However, not all the cases that are submitted result in further proceedings by the Ombudsman because the Ombudsman has its own screening process for the selection of cases. One such case concerned a Chinese person in Aceh who complained about being forced to fast during Ramadan month. It is widely known that in Aceh, the administrative authority informs conducts itself in line with customary Islamic law. Nonetheless, in accordance with this complaint, the Ombudsman did not consider this instance to be a misuse of

[252] Laurence W. Maher, *Complaining to The Ombudsman*. Legal Service Bull., 11 (1976-1977).

[253] The Ombudsman Annual Report 2002.

[254] The Ombudsman Annual Report 2003.

[255] The Ombudsman Annual Report 2004.

[256] The Ombudsman Annual Report 2005.

administrative authority, and consequently, the case was dismissed.[257]

According to the Indonesian Ombudsman law, the Ombudsman has a broad authority and competency to supervise the administration, investigate suspected maladministration, superintend public services, provide recommendation, mediate, request expert witnesses, and conduct inspections.

The distinguished competency, character and authority of the Indonesian Ombudsman can be favourably compared with the Dutch Ombudsman and the Ombudsman of Scandinavian countries—especially because Indonesian Ombudsman Law is equipped with criminal provision. The Indonesian Ombudsman has equipped their position with criminal provisions as a means to defend and to protect their investigatory duties. Anyone who obstructs the Ombudsman during an investigation can be punished with two years' imprisonment or a fine of 1 million IDR (Article 44).[258]

Unfortunately, since being issued this Act has never been used to prosecute one who obstructs the work of the Ombudsman. More worryingly, the outcomes of the, Ombudsman's recommendations are not measured; thus, it is difficult to evaluate whether their work is effectual or not. Of course, many people still respect the Ombudsman. For example, it is rare for parties to decline an invitation from the Ombudsman. Meanwhile, public awareness of using the Ombudsman is low— Alam Saragih wants to encourage the Ombudsman to come down from the sky to the earth.[259] In addition, he will create the *amicus curiae* of the Ombudsman and make this institution much more popular. The Ombudsman can also be used by ethnic minorities to defend their interest and to protect them from maladministration. If ethnic minorities are suffered from discrimination and maladministration, they can send a complaint to the Ombudsman.

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[257] The Indonesia Ombudsman's Report. Case No. 0104/LM/VII/2014/BNA .

[258] Article 44 Whoever obstructs the Ombudsman in conducting the investigation as specified under Article 28 is punishable of imprisonment the maximum of which is 2 (two) years or of fine the maximum of which is 1,000,000,000.00 IDR (One Billion Rupiah).

[259] Interview with Ahmad Alam Saragih in September 2016.

2.5.3 The Indonesian National Commission of Human Rights

The Indonesian National Commission of Human Rights was established on 7 June 1993 by Presidential Decree No. 50 of 1993 which appointed Ali Said (ex-chairman of Supreme Court) as the chairman of the Commission. Later, Soeharto also issued Presidential Decree No. 455/ M of 1993[260], which appointed a further 25 members to these institutions.[261] The first generation of the Commission consisted of famous actors such as activists, legal or political scholars, and religious figures. However, many people claim that these institutions merely served a cosmetic purpose under the shadow of tyranny. Nevertheless, the first and second generations of the Indonesian National Commission of Human Rights were held in high regard, and most members are 'giants' in their fields. Yet the Commission had no power to investigate, mediate, or prosecute violations of human rights. The only powers that the Commission had was to study human rights legislation, conduct research, and attend international human rights events. This is particularly unfortunate given the grave issue of racism against the Chinese community, which clearly requires practical action.

After the 1998 reform, Law No. 39 of 1999 stipulated the tasks of the Commission in greater detail. The primary functions of the Commission are to study, research, disseminate, monitor and mediate human rights issues. The Commission also receives a complaint of human rights violations and takes appropriate action to settle them. In Pematangsiantar, a city in North Sumatera, NGOs requested the Commission to investigate

[260] According to Presidential decree 455/M of 1993 appointed 25 members, ranging from: Miriam Budiarjo (Vice chairman I), Marzuki Darusman (Vice Chairman II), Bararuddin Lopa (General secretary) Charlen Himawan, Nurcholis Madjid, Roekmini Koesoemo Astoeti, Hasan Basri, Soegiri, Soetandyo W, Sri Soemantri M, Munawir Sjadzali, Djoko Sugianto, Satjipto Rahardjo, Aisyah Aminy, Albert Hasibuan, Djoko Moeljono, A. H. S Attamimi, Arnold Achmad Baramuli, Bambang W. Soeharto, Muljadi, Gani Djemat, Clementino Dos Reis Amaral, BN Marbun, Asmara Nababan. They established an office at Senopati No. 40 A. Jakarta. Even though the Commission had limited power, they conducted an investigation of the Marsinah case in which a female labourer who demonstrated against her factory and was assassinated. Although their investigation was under threat, the Commission persevered. Ken Marijtje Prahari Setiawan. Promoting Human Rights. National Human Rights Commissions in Indonesia and Malaysia. Leiden, Leiden University Press, 2013., p. 41

[261] Awaludin Marwan, Satjipto Rahardjo: sebuah biografi intelektual & pertarungan tafsir terhadap filsafat hukum progresif, Yogyakarta, Thafa Media, 2013.

the termination of a Chinese-Indonesian's employment. The individual had been working as a commissioner for PTPN IV, and the NGO was concerned that his dismissal had been motivated by racism.[262] Another case that was received by the Commission concerned a documentary film that implied that the Jakartan culture and identity was responsible for racial discrimination.[263] The Commissions received these complaints not only because universal human rights state racial discrimination is unacceptable, but also because Pancasila has become the philosophical basis and inspiration for the Human Rights Act. Pancasila is the baseline norm of the Indonesian legal system and plays a role in maintaining diversity in unity; it means recognising that Indonesia is a single nation that government respects cultural diversity. Hence, the position of the Commission is somewhere in between the Pancasilan and universal human rights values. In other words, one purpose of the Commission is to integrate or to harmonise Pancasila with the values of the Universal Declaration of Human Rights.[264]

The Commission has a function to improve the protection and upholding of human rights (Article 75). To achieve these aims, The Commission encourages the production of research and publications in improving human rights discourses in Indonesia.[265] The Commission

[262] Indonesian National Commission of Human Rights 2014 reports on discrimination against ethnicity

[263] Indonesian National Commission of Human Rights 2014 reports on discrimination against ethnicity

[264] Article 75 The National Commission on Human Rights aims to: a. develops conditions conducive to the execution of human rights in accordance with Pancasila, the 1945 Constitution, the United Nations Charter, and the Universal Declaration of Human Rights; and, b. improve the protection and upholding of human rights in the interests of the personal development of Indonesian people as a whole and their ability to participate in several aspects of life. Article 76 (1) To achieve these aims, the National Commission on Human Rights functions to study, research, disseminate, monitor and mediate human rights issues. (2) Members of the National Commission on Human Rights are drawn from public figures who are professional, dedicated, have a high level of integrity, who fully who fully comprehend the aspirations of a democratic and welfare state based on justice, and who respect human rights and obligations. (3) The National Commission on Human Rights is domiciled in the capital city of the Republic of Indonesia. (4) Representative offices of the National Commission on Human Rights may be established in the regions. Article 77 The National Commission of Human Rights is based on the principles of Pancasila.

[265] Interview with Sandra Moniaga, Commissioner at Indonesian National Commission of

issues programs and policies in accordance with the National Human Rights Action Plan which also consists of study, research, dissemination, monitoring and mediation of human rights issues (Article 76 (1)). These results of those activities support and shape the Commission's response when they receive complaints from society. One complaint concerning the rights to security in Makassar, was submitted by a group of refugees who were concerned about their safety in South Sulawesi,[266] the Commission undertake research, monitor, and mediate the rights of refugees in Indonesia. In order to fulfil these functions, the Commission is divided into respective sub-commissions dedicated to monitoring, research, mediation, and human rights education. The Monitoring Sub-Commission sometimes engages in 'front-line' activities after a human rights violation has been reported. This Sub-Commission can invite and interview parties, witnesses, and experts to discern whether the report constitutes an infringement of human rights or not.[267] The mediation sub-commission, has a function of resolving conflict between involved parties. In a case of 'deadlock' between the parties, the Commission can issue its own decision upon matters.[268] Furthermore, the Commission has established local branches in some provinces, thus increasing their proximity to the citizens and communities who submit complaints to the Commission. Furthermore, the Commission is composed of people with high integrity, dedication, and a strong background in human rights.[269]

As I mentioned earlier in chapter 1, one of the main issues the commission has addressed is the 1965 killings, the International People's

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Human Rights on October 2016.

[266] Indonesian National Commission of Human Rights 2014 reports on discrimination against ethnicity

[267] Personal conversations with Siti Noor Laila, Commissioner at Commission on September 2016

[268] Interview with Roichatul Aswidah Commissioner at Commission on September 2016

[269] Article 84 Those eligible for appointment as members of the National Commission on Human Rights are Indonesian citizens who: a. Have experience in the promotion and protection of individuals or groups whose human rights have been violated; b. Are experienced lawyers, judges, police, attorneys, or other members of the legal profession; c. Are experienced in legislative and executive affairs and in the affairs of high level state institutions; or d. Are religious figures, public figures, members of NGOs, or from higher education establishments.

Tribunal 1965 (IPT 65) issued their verdict on the events of 1965 and afterwards. The victims of the 1965 crimes against humanity still live with stigma and trauma. However, the Indonesian Human Rights Commission has faced difficulties whilst conducting their investigations in the form of obstruction by the military, who have a vested interest in maintaining the 'social amnesia' surrounding these tragedies.

Even prior to the tragedies of 1965, the Chinese community were suffering, for example in 1963 many racial riots took place in East Java, West Java, and Jakarta. These also resulted in thousands of Chinese victims including cases of arson attacks, robbery, and mass violence. Even during the revolution (1945-1949), clandestine Indonesian military forces attacked and seized the housing of Chinese-Indonesians to use for their guerrilla army (I discuss this case in section of human rights). Despite this extensive history of discrimination, the Commission focuses on the incidents of 1965 particularly violence against Chinese people. Investigations into these tragedies have taken place in East Flores, Denpasar, Moncongloe, and the Buru Islands.[270] The Chinese community was not the main victim, they suffered greatly in the riots and political exclusion of 1965.

The most racist tragedy in Indonesia was the 1998 riots. Anti-Chinese sentiment rapidly escalated, ultimately resulting in thousands of people being killed, and the rape of the rape 168 Chinese women, 20 of whom later died. The Commission has also investigated these cases. Unfortunately, this process now has been stalled by the Public Prosecutors, their inaction reflects the government's apathy towards resolving these cases.[271]The Commission appointed a special team to investigate these cases who concluded that there was a suspicion criminal offence and human rights violation in 1998.

The Commission, in accordance with Law No. 26 of 2000 concerning human rights, has a function to investigate criminal offences related to human rights violation. But the main function of the Commission is

[270] Komnas HAM Republik Indonesia. Hasil Penyelidikan Pelanggaran HAM yang Berat Peristiwa 1965-1966. 2012, Komnas HAM RI

[271] Laporan Tim Relawan untuk Kemanusiaan, Temuan Tim Gabungan Pencari Fakta Peristiwa Kerusuhan Mei 1998, Publikasi Komnas Perempuan.

mentioned in Law No. 39 of 1999 concerning human rights.[272]

The function of study by the Commission is to encourage governments to engage with contemporary human rights issues in practice and theory. Using the results of prior studies that are relevant to cases at hand, commissioners are able to deliver better advocacy for victims. The function of study is particularly important in obliging commissioners to have an in-depth knowledge of human rights issues. For instance, a collaborative study between the Commission and the Anti-Discrimination

[272] Article 89 (1) To carry out the functions of the National Commission of Human Rights with realize aims as referred to in Article 76, the National Commission of Human Rights has the authority to: a. Study and examine international human rights instruments with the aim of providing recommendations concerning their possible accession and ratification; b. Study and examine legislation in order to provide recommendations concerning drawing up, amending and revoking of legislation concerning human rights; c. Publish studies and examination reports; d. Carry out literature studies, field studies, and comparative studies with other countries; e. Discuss issues related to protecting, upholding and promoting human rights; and, f. Conduct cooperative research and examination into human rights with organizations, institutions or other parties, at regional, national and international levels.

(2) To carry out its function as disseminator as referred to in Article 76, the National Commission of Human Rights is charged with and authorized to: a. Disseminate information concerning human rights to the Indonesian public; b. Take steps to raise public awareness about human rights through formal and non-formal education institutes and other bodies; c. Cooperate with organizations, institutions or other parties at national, regional and international level with regard human rights;

(3) To carry out its supervisory function as referred to in Article 76, the National Commission of Human Rights is charged with and authorized to: a. Monitor the execution of human rights and compile reports of the output of this monitoring; b. Investigate and examine incidents occurring in society which either by their nature or scope likely constitute violations of human rights; c. Call on complainants, victims and accused to request and hear their statements; d. Call on witnesses to request and hear their witness statements, and in the case of prosecution witness to request submission of necessary evidence; e. Survey incident locations and other locations as deemed necessary; f. Call on related parties to give written statements or to submit necessary authenticated documents as required upon approval of the Head of Court; g. Examine houses, yards, buildings, and other places that certain parties reside in or own, upon approval of the Head of Court; h. On approval of the Head of Court, provide input into particular cases currently undergoing judicial process if the case involves violation of human rights of public issue and court investigation, and the input of the National Commission of Human Rights shall be made known to the parties by the judge;

(4) To carry out its function as mediator as referred to in Article 76, the National Commission of Human Rights is charged with and authorized to: a. Arbitrate between the two parties; b. Resolve cases through consultation, negotiation, mediation, conciliation and expert evaluation; c. Give recommendations to the parties for resolving conflict through the courts; d. submit recommendations concerning cases of human rights violations to the Government in order that their resolution may be followed up on; e. submit recommendations concerning cases of human rights violations to the House of Representatives of the Republic of Indonesia for their follow up.

Movement (GANDI) on the use of Proof of Indonesian Citizenship Documents (SBKRI) found that in practice, law enforcement officials and public servants regularly used the documents to extort and discriminate against the Chinese community.[273] This study was very helpful in understanding several complaints submitted to the Commission. One complainant even described being refused service when applying for a passport. An investigation into this incident was found that the Immigration Affairs office of Pondok Pinang had continued to request an SBKRI as a main requirement, despite this being prohibited by law (see: Gus Dur Presidential Decree of 2000).[274] This study of the SBKRI helped to discover a pattern whereby contrary to normative requirements, the SBKRI is still routinely requested by public servants. Having the results of this study to hand, commissioners are thus able to advocate better for the victims of discrimination, as they can point with authority to this pattern of illegal, discriminatory behaviour when making arguments before the court.

Second, the Commission has a function of mediators and investigators of human rights violation. One example of the function of investigation can be seen in the Turkish people's case in Indonesia. After the failed July 2016 Coup in Turkey, many human rights violations escalated in Turkey and spread across many other countries. Turkish people in Indonesia who were blackmailed, received murder threats, and experienced their travel document face many problems since the Turkish Embassy did not want to provide service to the *Hizmet* community (a Turkish community who follow charismatic leader Fethullah Gulen).[275] Following an investigation, the Commission issued several letters of human rights protection to the Turkish community in Indonesia. This institution also mediated a discussion with several other institutions (including representatives from the Directorate of Immigration, Ministry

[273] Wahyu Effendi, et al. *SBKRI: Analisis dan Hasil Pemantauan*, Jakarta, Komnas RI and Gandi, 2012.

[274] Indonesian National Commission of Human Rights 2015 reports on discrimination against ethnicity

[275] Indonesian National Commission of Human Rights 2016 reports on discrimination against ethnicity and rights of security.

of Foreign Affairs, and Ministry of Education, and so on) about Turkish problems in Indonesia.

2.5.4 The courts

The court (including the District Court, Administrative Court, and Supreme Court, etc.) is a public institution in Indonesia which was[276] supported by the first Indonesian judges that came from the colonial-era prestigious schools of law (*Rechtschool*) established in 1909.[277] Tremendous and skilled judges, such as Kusuma Atmadja, Wirjono Prodjodikoro, Soepomo, Gondokoesoemo, Subekti endeavoured to endow the court-room with their interpretation of justice, law, and *adat* (customary law).[278] Until the present time, the courts have a significant role in legal disputes ranging from criminal, civil and administrative cases. Another type of court is the Administrative Court, which is the primary institution that is concerned with challenges to administrative decisions.[279] The courts

[276] Peter Burns, *The Leiden Legacy. Concept of law in Indonesia*. Leiden, KITLV, 2004, p. 43-45.

[277] Ab Massier, *The Voice of the Law in Transition. Indonesian Jurists and their languages, 1915-2000,* Leiden KITLV Press, 2008, p. 82-85.

[278] Sebastian Pompe, *The Indonesian Supreme Court. A Study of Institutional Collapse*, Southeast Asia Program Publications Cornell University, 2005, p. 11.

[279] Adriaan Bedner. Administrative Courts in Indonesia: A Socio-Legal Study. Indonesian translation by Indra Krishnamurti. Peradilan Tata Usaha Negara Indonesia: Sebuah Studi Sosio-legal, Jakarta, HuMa, Van Vollenhoven Institute, KITLV, 2010, p. 309-342. A comprehensive study of administrative courts in Indonesia was conducted by Adriaan Bedner entitled Administrative Courts in Indonesia: A Socio-Legal Study. Several reasons were presented to justify this research. Firstly, there were many legal reforms between 1999-2011, such as UU No. 9 of 2004 and UU No. 51 of 2009. These changes resulted in both increasing and reducing various aspects of the administrative court's authority. On one hand, new institutions were established that shared functions with the administrative court— for instance the Ethics Board of Elections (Dewan Kehormatan Penyelenggara Pemilu) which adjudicate on the electoral administration. On the other hand, the other new institutions gave additional authority to the administrative court. For example, complainants that are unsatisfied with the Information Commission can sue through the administrative court. Further, new court institutions have emerged that have authority that is closely related to the administrative court such as the Constitutional Court (Mahkamah Konstitusi) which also carries out judicial reviews of acts that violate the constitution. The last institutions that were established are the Judicial Commission, which monitors court activity and judge's behaviour, and The KPK (Commission for the Eradication of Corruption) which investigates the scandals related to the court. The KPK has the authority to prosecute judges or the official staff members of the court who are involved in nepotism and corruption, as what happened in the case of Muhtadi Asnun in Tangerang dan Syarifudin in North Jakarta. Thirdly, NGOs (such as Lembaga Inde-

are pivotal institutions with regards to receiving cases relating to the legal protection of ethnic minorities.

During the New Order, Chinese communities lodged lawsuits requesting the return of their land through the courts. Of course, here, the power of judges is crucial to securing a legally binding verdict. The following case law concerned seizure of land belonging to Chinese High School Batavia. This Chinese community told their story from their position.

> After 1965 political resistance escalated, peaking during the 30th September Coup conducted by the Indonesian Communist Party (to date this accusation is inconclusive). The reaction of the government was 'to clean' all members of the Indonesian Communist Party, including the Hua Chung School of North Bandengan Street No. 80 Jakarta, which already lodged an appeal against the second defendants (the Military Forces) around 1966 who arbitrarily : (1) disbanded the Hua Chung School and destroyed all documentation related to land ownership and all letters of permit that belonged to the school; (2) ordered demolition of the school building and educational facilities (please see photos in the attachment) (3) to expel the teachers, pupils, and the staff of Hua Chung School using torture.[280]

In this case, the Court decided that Hua Chung School did not have any rights to the land anymore because only few of them submitted complaints regarding land confiscation to the courts. Of course, this is despite the fact that hundreds of Chinese organisation's land was foreclosed in each province.[281]

Supposedly, the courts exist to enforce the law and to guarantee the fundamental rights are respected.[282] However, in the past, the Court largely functioned to enact the political will of the New Order. Even though the Court had the ability to resist political pressure from the au-

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pendensi Peradilan (LeIP), Koalisi Pemantau Peradilan) that have monitored the courts have contributed toward the structural reformation of administrative courts in Indonesia.

[280] Case law: 31/ Pdt. P/2012/PN. Mkt.

[281] For instance, in Jakarta, there were approximately 184 Chinese organisations being targeted for the land confiscation. It was also happened in West Java which contained 148 organisations as well as in Central Java which comprised 100 Chinese organisations and so on.

[282] Varun Gauri & Daniel M. Brinks, *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge, Cambridge University Press, 2008, p. 5.

thoritarian regime of Soeharto, the hand of the regime was able control and manipulate the courts.[283] The Indonesian Supreme Court and its judges did not have freedom to make independent decisions during the reign of Soeharto.

After the 1998 reform, the courts improved their systems, making them more transparent, accountable, modern, effective, and most importantly, by bringing justice back to the people. The Indonesian Supreme Court now publicises their verdicts and uploads them to its website, allowing everybody to access the legal reasoning of the judges. Famous judges also take part in public debates, such as Adi Andojo Soetjitpto, Bismar Siregar, Asikin Kusumahatmadja, and Benjamin Mangkudilaga who are —to use the term of Satjipto Rahardjo— 'progressive judges.'[284] These judges are not only required to be talented and skilful, but also have a 'sixth sense' for seeking justice.[285] One outcome of the 1998 reform was the development of Law No. 48 of 2009 about the power of the judges. Law No. 48 of 2009 is a pivotal piece of legislation for the Court. For instance, Article 5[286] of this law is the most discussed Article in the circle of Indonesian legal scholars. By interpreting the sense of justice in society, judges are able to respect and understand living law, public discourses in the media, waves of political situations, and social movements —all of which can influence to the verdict of the judges. The aforementioned case law on land conflict of Chinese community, challenged the New Order's policy through the Administrative Court. However, in the courts, the judges did not consider the case from a human rights perspective, or interpret good governance and the rule of law idea when making their verdicts.

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[283] Tom Ginsburg and Tamir Moustafa, *Rule by Law the Politics of Courts in Authoritarian Regimes.* Cambridge, Cambridge University Press, 2008, p. 4.

[284] Satjipto Rahardjo, *Penegakan Hukum Progresif*, Jakarta, Penerbit Buku Kompas, 2012, p. 252.

[285] Adi Andojo Soetjipto. *Hakim Tunggal yang Gagap Hukum*. Kompas-Opinion. On March, 9, 2015.

[286] Article 5 (1) The judge and constitutional judge must search, obey, and understand legal values and the sense of justice which lives in the society; (2) The judge and constitutional judge must have integrity, and character polite, honest, fair, professional, and track record in legal field; (3) The judge and constitutional judge must adhere the code of conduct and guidance of good judge behavior.

Another important case related to the issues faced by ethnic minorities is the forced changing-name of Chinese people. These cases will be elaborated later in the section of the principle of human rights. Many case law concerning changing-name appear to contain of 'discriminatory legal reasoning' by judges. However, many judges have made decisions about changing-name based on discriminatory interpretations of the law; justifications included that adopting an 'Indonesian' name 'has a positive influence on the renewal of the nation, thus fostering a sense of one country, one nation, and one country of Indonesia can be realised,'[287] and that it could help people ' integrate and adapt to the circumstances of local communities',[288] or 'it is a moral obligation to adjust to the cultures, behaviours and life of Indonesia' etc.[289] These arguments recognise Indonesian citizens of Chinese descent as foreigners rather than having rights of full citizenship. For instance, consider the case law below, where a Chinese person requested to change the name of their daughter. The judge responded:

> Consider that to become a great Indonesian citizen always demanded formal requirements according to the National Law also requires the existence of national consciousness and loyalties [...] Consider that private names, families, tribes and clans that comes from another culture and nation [...] Consider that the plaintiff request to change name from a Chinese name (OM/ Initial) to an Indonesian name (MIW/ Initial) is a normal situation, and the attitude of plaintiff must be respected, because it helps the process of integration and also ensuring the homogeneity of Indonesian citizens.[290]

It is plain to see that; the legal reasoning of the judge in this case cannot be easily reconciled whilst existing in the 'era of emancipation.' The use of 'homogeneity of Indonesian citizens' may be a discriminatory phrase, and a sentence which should not appear in the legal reasoning of a judge. It seems that the judge also insinuated that there are private

[287] Ambon Court Decision with the Number of Case: 54/Pdt. P/2012/PN. AB.

[288] Mojokerto Court Decision with the Number of Case: 31/ Pdt. P/2012/PN. Mkt.

[289] (1) Sidoarjo Court Decision with the Number of Case: 781/Pdt. P/2012/PN. Sda, (2) Mojokerto Court Decision with the Number of Case: 31/ Pdt. P/2012/PN. Mkt, (3) Ambon Court Decision with the Number of Case: Perkara 54/Pdt. P/2012/PN. AB, (4) Kudus Court Decision with the Number of Case: 113/Pdr. P/2011/PN. Kds, (5) Surabaya Court Decision with the Number of Case: 387/Pdt. P/ 2009/PN. Sby.

[290] Mojokerto Court Decision with the Number of Case: 31/ Pdt. P/2012/PN. Mkt.

names, families, tribes, and clans which are prohibited in the Indonesian culture.

In the current situation, the Indonesian Courts need judges who understand and respect human rights. Some cases of land conflict have demonstrated that the judges instead favour a formalist, as opposed to more humanitarian or progressive, interpretation of the law. The case of Alumni Ta'wa School Foundation where the judges stated that the appeal of plaintiff cannot be accepted because one of the letters of appeals was only signed solely by the head of the foundation, without any other members of the organisation. In this sense, the dimension of human rights had disappeared from this Administrative Court.[291] Mainstreaming a more human right informed approach in the courts should be considered alongside improvements in transparency, accountability, effectivity, and cost-efficiency.[292]

[291] Samarinda Court Decision with the Number of Case: 61/Pdt.G/ 2012/PN.Smda.

[292] It is now clear that the administrative courts in Indonesia receive support from a wide range of institutions, whose human resources are utilised to solve problems effectively. As a state institution, administrative courts must follow the principles of transparency, accountability, effectiveness, efficiency, and be cost effective. In the Supreme Court's blue-print, reformation of the administrative courts has become the agenda of Mahkamah Agung Indonesia. With the birth of administrative courts law in accordance with Law No. 51 of 2009 which was supported by court reformation, it is now easy to conduct a resourceful study. Now that the principle of transparency is being upheld it is easy to observe the court process. Many court decisions are now available online, a move which has made them more accessible to a higher number of legal scholars. This technology-based e-court system has resulted in the court being considered to be transparent. It is also expected that increase in transparency will help prevent misleading adjudication. For example, the judges refused an appeal from a petitioner who accused government of confiscating his piece of land. The adjudication was based on evidence that showed the government's actions were supported by the law. Analysis of published adjudications, will allow people to understand the adjudication process, ensuring it that the decision-making process no longer appears to be 'a black mystery box,' but a transparent procedure that produces justice. By doing so, judges will possess an unquestionable authority. The crisis of trust in the i court system is gradually diminishing with transparency. UU No. 51 Year 2009 guarantees that money in the form of bribes or lobbying groups can no longer affect the judicial process. As what is poured in section 25 Article (2) states that judges are compensated in several ways; an increased salary, additional professional fees, and living expenses. section 25 Article (4) adds that judges' prosperity is delivered in the form of: a. state professional residence; b. health insurance; and c. state transportation. This prosperity given is expected to increase the quality of their adjudication that turn will lead to legal security and justice. An attempt to increase human resources in the body of administrative court is also taking place. To support the optimisation of civil service arbitration tribunals, the capacity of additional institutional apparatus is also taking being increased. For example, the government has now made it compulsory

2.6 Provisional findings

This research found that the general norms of good governance are relevant to the legal system of good governance for ethnic minorities in Indonesia. Thus, the norms for the government and legal protection for people, especially with regards to ethnic minorities are regulated in the Indonesian Constitution and legislation. After 1998, the amended Indonesian Constitution stipulated sufficient norms for administrative authorities to provide fulfil maxims such as equality before the law and the prohibition of discrimination. Additional regulations, such as the Act of Citizenship and Human Rights Act state further norms for the government and yield more legal protection for people. Thus, the Indonesian legal systems, de facto, sufficiently respect the concept of good governance. By this I mean that good governance is a legal concept which has strengthened the norms for the government and legal protection of ethnic minorities. Therefore, good governance can also be as an important development in the trajectory of a human rights provision in Indonesia.

The trajectory of human rights provision in the Indonesian Constitution has risen and fallen over time. Meanwhile, the short history of Article 28 of the 1945 Constitution has played a significant role in the establishment of good governance and ethnic minority protection. During Guided Democracy and the New Order, this Article was merely ornamental, as human rights legislation was rarely implemented or enforced. The original text of Article 28 prior to the amendment was 'the freedom to associate and to assemble, to express written and oral opinions, and so on and so forth shall be regulated by law.' After the amendment from 1999 to 2002, the principles of good governance, democracy, rule of law, and ethnic minority rights began to colour the legal system. The current Constitution, from an administrative law perspective, observes principles of good governance and ethnic minority recognition

for a clerk of court to have completed their undergraduate studies in law. It is expected that this will cause an improvement in the administrative courts in the near future. The most sophisticated result of the change in legislation is the formation of a special court and the appointment of an *ad hoc* judge who can examine, administer justice, and pass adjudication which requires specialism and experience in a particular field.

which are implemented through Articles like the right to equal treatment before the law, the rights to work, and the rights to citizenship status (Article 28D). After the 1998 reformation, all people, including ethnic minorities are entitled to enjoy access to information from a transparent public entity in accordance with the rights to information (Article 28F). The most powerful Article that supports the position of ethnic minorities is Article 28I (2) which states 'every person shall have the rights to be free from discriminatory treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.' Furthermore, other pieces of legislation also support the position of ethnic minorities, for example, the Act of Citizenship and the Human Rights Act.

The Act of Citizenship supposedly encourages the government to realise good governance and protect ethnic minorities. The realisation of good governance as a legal concept may strengthen the norms for the government and legal protection of people. The government has full responsibility to recognise and respect the fundamental rights of its citizens. The history of the Act of Citizenship in Indonesia, shows that unfortunately, there have been many obstacles to overcome in the pursuit of a fair Act of Citizenship – as mentioned earlier, Law No. 2 of 1958 caused many Indonesian citizens of Chinese descent to lose their citizenship and become stateless. Issues of citizenship did not improve for some time until after the 1998 reformation. At the end of 2006 reform groups successfully issued Law No. 12 of 2006 which advocated for the idea of equality before the law and the prohibition of discrimination. By introducing this law, ethnic minorities are now better protected by the government, and this law has also encouraged good governance to be established in government bodies. Furthermore, the Act of Citizenship also supports another regime of regulation, namely, the Human Rights Act.

The Human Rights Act of Indonesia is a codification of various fundamental rights. In addition, from an administrative law perspective, this act is a norm that the government must respect, fulfil and to use as legal guidance in the decision-making process, as well as a review norm

that the courts, the Ombudsman and Commission can refer to when solving problems related to ethnic minorities. Furthermore, this Act provides legal protection of various rights. These various fundamental rights are norms for the government to respect, recognise and fulfil them as well as 'review norms' for the courts, the Indonesian National Commission of Human Rights and Indonesian Ombudsman. However, legal protection in Indonesia has been challenged on many occasions, particularly under authoritarian regimes. Even though Soeharto issued Presidential Decree No. 50 of 1993 on Human Rights Commission, this legislation was little more than an ornamental façade. Substantive human rights provisions were only introduced after the 1998 reformation. Law No. 39 of 1999 protects several fundamental rights including the rights to life (Article 4), the rights to use all effective national legal means (Article 7), the rights to justice (Article 17), and the rights to legal aid (Article 18), etc. These fundamental rights, from an administrative law perspective, result in the realisation of one of the principles of good governance, namely the principle of human rights. However, this law is not the sole piece of regulation that can be used as the legal basis for human rights protection. Other regulations that contribute to eradicating discrimination include Article 156 of the Indonesian Criminal Code, Law No. 40 of 2008 on the Eradication of ethnic and racial discrimination, the anti-cyber racism law, and Article 28 (2) of Law No. 11 of 2008. Of course, I focus on elaborating on the main framework of legislation in Indonesia for legal protection of ethnic minorities which is comprised of Article 28 of the 1945 Constitution, the Act of Citizenship and the Human Rights Act— together these pieces of legislation can be understood as the network of legal norms that establish the pillars of good governance and ethnic minority emancipation.

After exploring legislation, I described the roles of institutions above. These institutions have contributed to the reinforcing of the norms for the government and legal protection of ethnic minorities. Each administrative authority serves functions that are relevant to establishing good governance and ethnic minority protection. The executive power of the administration tries to implement these legal norms,

especially Article 28 of the 1945 Constitution. Then, the Ombudsman and the National Commissions on Human Rights of Indonesia also controls the acts of the administration by ensuring the protection of ethnic minorities from maladministration and human rights violations. Finally, the courts, which have the power of legally binding verdicts that can resolve ethnic minorities' problems by assuring legal certainty.

Furthermore, I begin with an analysis of the role of administrative authorities in the context of strengthening the norms for the government and legal protection of ethnic minorities. Towards the end of his reign, Soekarno became tyrannical, causing difficulties for some minorities by issuing Presidium of the Cabinet Decision No. 127 / V / Kep / 12/1966, which later became the legal basis that legitimised the forced changing of Chinese names. Personally, Soekarno thought name-changing to be unnecessary, and did not advocate for it himself. In spite of this, the Soekarno's period was difficult time for ethnic minorities. Later, Soeharto issued Presidential Decree No. 14 of 1967 which prohibited Chinese religious or cultural affairs from being celebrated publicly. During New Order, Chinese-Indonesians suffered from seizure of their land and properties, and people who resisted these policies where either exiled or detained. Many secret letters were issued by government bodies (such as the Ministry of Finance) who acted to refuse the function of the courts to authorise the seizure of Chinese's properties. Moreover, the National Land Agency issued a similar letter to approve illegal the confiscation the Chinese land. At last, the fall of Soeharto's regime has provided a chance for change, to improve the dignity of ethnic minorities. The fall of Soeharto's regime became fresh air for the beginning journey of good governance.

Post 1998, the administration has demonstrated a better understanding of good governance and ethnic minority protection. Now I believe, on many occasions, the law is able to work effectively and human rights can flourish in Indonesia. The government has tried to develop the idea of good governance. One example being the National Action Plan of Human Rights, which formulates its objectives of human rights policies, programs of empowerment of government bodies, and encourages

people more participate. Jokowi's administration issued the Presidential Regulation No. 75 of 2015 which stated how the administrative authorities can achieve the aim of Article 28 of the 1945 Constitution; ensuring that everyone has the rights to access justice, and that special services are provided to ensure equal opportunities so that ethnic minorities benefit from emancipation and justice. Furthermore, the current administration, has tried to provide some specialised services to minority groups including 'special treatment and protection for the vulnerable communities such as people with disabilities, the elderly, poor people, women, children, refugees, indigenous people, and migrant workers.'

Two institutions, the Indonesian National Commission of Human Rights and the Indonesian Ombudsman act as a fourth power that can help fulfil the rights of ethnic minorities. One advantage of these institutions is that they function as autonomous institutions and can proactively investigate suspected maladministration and human rights violations even if no complaint has been submitted. On the other hand, the courts (the District, Administrative, and Supreme Courts) require active participation of complainants. If no case is submitted, a Court cannot offer a verdict. The Commission and the Ombudsman can play actively which based on their own initiatives. The Commission, in addition, can investigate discrimination at the local level. This is similar to the National Ombudsman, which can investigate cases of maladministration which involve with ethnic minorities in local cities. There are two main differences between the Commission and the Ombudsman: firstly, their legal basis - the National Commission is mostly based on Law No. 39 of 1999 regarding the Human Rights Act, whereas the Ombudsman is based on Law No. 37 of 2008. Secondly focus of the National Commission is on human rights violations, whereas the Ombudsman's focus is on maladministration. From an Indonesian administrative law perspective, the authority of Ombudsman to investigate maladministration is stipulated in the Indonesian Ombudsman Act, and the authority to engage in public service oversight in stated in the Indonesian Public Service Act No. 25 of 2009. The Indonesian Ombudsman and Indonesian National Commission of Human Rights are pivotal institutions in context of legal

protection of ethnic minorities. Unsurprisingly, both these institutions often walk the same path; human rights violations conducted by the administration are sometimes also considered maladministration from the point of view of Ombudsman.

The last power relevant to the dignity of ethnic minorities are the courts. The courts play an important role in resolving the problems of ethnic minorities. When the Chinese communities' land was confiscated by Soeharto's military forces, the 1998 reformation gave sufficient courage to the heart of Chinese communities for them to challenge the government, and act through the courts. In Soeharto's era, many Chinese schools were disbanded and had their archives destroyed along with records of their land ownership, this disgraceful act was accompanied with the violent expulsion of Chinese teachers. Sadly, most case law of Chinese organisations that were submitted to the courts were dismissed by the judge.

3. Specific legal norms for the government and legal protection of ethnic minorities: a case study of Chinese and Turkish communities

3.1 The principle of transparency

3.1.1 Introduction

The principle of transparency may foster the strengthening of the norms for the government and legal protection of ethnic minorities in Indonesia. The principle of transparency and its requirement to provide open access to public information, meetings and the decision-making process is investigated in this section. The government of Indonesia created a regulation about public disclosure, Law No. 14 of 2008. This law states that every person has their own basic need for information. As other people, Chinese and Turkish communities in Indonesia use the freedom of public information to protect their interests. Generally speaking, governments facilitate transparency in order to ensure better communication with the people. For example, The Indonesian National Commission of Human Rights, the Ombudsman, the courts, and several ministries promote the principle transparency by publicising their regulations, documentation, policy papers, annual reports, research projects,

and blueprints. Because sufficient knowledge about relevant pieces of information is required before ethnic minorities can participate in the public sphere.[293] Hence, the government should regulate its information effectively.[294] The Public Disclosure Act encourages ethnic minorities in Indonesia to recognise their information rights and to participate in the legal field. The Public Disclosure Act also obligates administrative authorities to publish their own information. From this point, the Ombudsman, the Indonesian National Commission of Human Rights, and the courts publish their annual reports from which we can see their involvement with the administrative authorities and issues of good governance and ethnic minority protection. Thus, we have a better understanding of how far the government institution conducts an annual report in the accessible, available, and readable formulation. Access to these reports allows the public to evaluate governments' performance.

3.1.2 Legal framework of the Public Disclosure Act

Indonesia, like many other countries, has a Public Disclosure Act. This Act may reinforce the norms for the government and legal protection of ethnic minorities. This Act has also obliged governments to publish their public information,[295] for example, the Ombudsman announces their annual report on their website, the Human Rights Commission broadcast their research and executive summaries of investigations on the internet, and the courts circulates their verdicts in the special Directorate of Court decisions. These public institutions publish their documents in accordance with the Public Disclosure Act that requires all public information to be open and accessible in accordance with Article 2 Law No. 14 of 2008.[296]

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[293] John D. Skrentny, *The Minority Rights Revolution*, Cambridge, The Belknap Press of Harvard University Press, 2004, p. 4.

[294] Ian Brown & Christopher T, Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Era,* Cambridge, MIT Press, 2013, p, xi.

[295] Transparency International, *Fighting Corruption in South Asia: Building Accountability*. 2014.

[296] Article 2 (1) All Public Information is open and accessible by every user of Public Information; (2) An exception to the Public Information is information that is restricted and limited; (3) Every public information applicant shall be able to obtain Public Information fast

It is useful to publish public information. One publication based upon research by the Anti-Discrimination Movement through Indonesian National Commission of Human Rights contains a critique of the letter evidencing Indonesian citizenship (SBKRI) and how these were used to target citizens of Chinese descent. Another curious aspect of this publication is that it was published by the Anti-Discrimination Movement which consists of Chinese activists and the liberal Islamic group, Nahdlatul Ulama, who fight against racism and intolerance.[297] This publication is required reading for someone who wants to understand the extent of discrimination towards Chinese-Indonesians in Indonesia. This publication is public information which needs to be widely disseminated; even though regulation prohibits requesting the SBKRI, in practice, there are many infringements of this rule. Therefore, circulating this information could stimulate a better understanding of public servants of how to treat Chinese people in properly and in accordance with the law. On the other hand, this publication can be used by the Chinese community to challenge officers when they complete their application for marriage certificates, identity cards, passport renewals, drive licence, and so on, but are asked to provide SBKRI to obtain these documents.

The way the Indonesian National Commission of Human Rights published their report on the SBKRI is in line with the objectives of Public Disclosure Act, namely to secure the rights of citizens to know public information, to encourage participation and government transparency according to Article 3 Law No. 14 of 2008.[298]

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and promptly at low cost and in a simple manner; (4) Public Information that is classified as confidential information pursuant to the Law, ethics, and the interest of the public, based on an examination in terms of the consequences that occur if the information is provided to the public and after careful consideration that covering up Public Information can protect a larger interest rather than opening it or vice versa.

[297] Wahyu Effendi, et al, *Tionghoa dalam Cengkeraman SBKRI.* Jakarta, Gandi & Komnas HAM, 2008.

[298] Article 3 (a) To secure the right of the citizens to know the plan to make public policies, public policy programs, and the process to make public decisions, as well as the reason of making a public decision. (b) To encourage the participation of the society in the process of making a public policy; (c) To increase the active role of the people in making public policies and to manage the Public Agencies properly; (d) To materialize good governance, i.e. transparent, effective and efficient, accountable and responsible; (e) To know the rationale of a public policy that affects the life of the people; (f) To develop sciences and to sharpen

A good quality information service encourages the Indonesian National Commission of Human Rights to publish its own investigations and research on crimes against humanity case. The 1965 tragedy was investigated by the Indonesian National Commission of Human Rights which issued an executive summary of their investigation. One case in North Sumatera, described the arbitrary detention of 200 persons in a Chinese school. As in other cases where this happened, there were also mass killings, robberies, and riots, and torture.[299] The findings of the investigation into the 1965 tragedy describe many cases where Chinese people were among the victims. The public can easily access this investigation through the Indonesian National Commission of Human Rights' website. This publication can be understood as part of a transparent system. Indeed, a transparent system shines the light on information cloaked in shadows.[300] With the publication of information on the 1965 tragedy, people learn about the human rights violations and how to prevent similar events from happening in the future. The Commission has also published various other reports about other human rights violations.

The courts also use the internet to publish information. Some cases involving discrimination against Chinese people can be found on the Supreme Court's website. For instance, the case of Ta'hwa School Alumni Foundation whose land had been occupied by military forces in Samarinda.[301] In Surabaya on March 2, 1928 Hwie Tiau Ka Kwan Hwee was founded to operate a school in the land of 2000 meters. This land was later seized by the military.[302] Another land conflict case described the problems of the Chinese Stichting Batavia School.[303] With a trans-

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the mind of the nation; and/or (g)To enhance the information management and service at Public Agency circles, so as to produce good quality information service.

[299] Komnas HAM. Pernyataan Komnas HAM tentang Hasil Penyelidikan Pelanggaran HAM yang Berat Peristiwa 1965-1966. Komnas HAM RI, p. 7.

[300] Howard Dierking, *Engineering good government*, Daniel Lathrop & Laurel Ruma, *Open Government. Collaboration, Transparency, and Participation in Practice,* O'Reilly Media, 2010, p. 71.

[301] Samarinda Court Decision with the Number of Case: 61/Pdt.G/ 2012/PN.Smda.

[302] Administrative Court Decision with the Number of Case: 18/G/2008/PTUN-Jkt.

[303] Supreme Court Decision No. 378 PL/ Pdt/2009.

parent system, it is possible to analyse the legal reasoning of the judges in verdicts involving ethnic minorities.

3.1.3 Transparency facilitates comprehensive information about ethnic minorities

The principle of transparency may help develop comprehensive information on ethnic minorities in the context of reinforcing the norms for the government and legal protection of ethnic minorities. For example, the principle of transparency may help the public to better understand ethnic minorities lives. Better transparency also extends access to a variety of opinions from society, consequently this can lead the public to re-examine their own positions and become more tolerant, and while this has been the case in some parts of Indonesia, other parts are very much in need of greater transparency before they follow suit.[304] The objective, indeed, is not only the publication itself, but also to encourage the participation of ethnic minorities. Indeed, open government or governmental information should not only provide data via the Internet, but seek participation and interaction as avenues of engagement.[305] In this context, it will be interesting to see the roles of government institutions with regards to the principle of transparency. The Indonesian National Commission of Human Rights, for instance, is one interesting example of the implementation of the principle of transparency. The Indonesian National Commission of Human Rights is responsible for monitoring discrimination and informing the public of their findings (see Article 8 of Law No. 40 of 2008 and Article 2 of Government Regulation No. 52 of 2010). Thus, writing and publishing reports to the public can be considered one of the duties of the Indonesian National Commission of Human Rights as a means of promoting transparency. In literature, the principle of transparency is said to enable citizens to have an equal

[304] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 46.

[305] Anneke Zuiderwijk, Mila Gasco, Peter Parycek, Marijn Janssen. *Special Issue on Transparency and Open Data Policies: Guest Editors' Introduction*. Journal of Theoretical and Applied Electronic Commerce Research. Vol. 9. Issue 3. 2014.

channel of access to human rights.[306] Therefore, communities who are the subjects of these reports may have an increased capacity to engage with human rights. This report can be described as human rights education or a strategic legal pattern for how ethnic minorities deal with the National Human Rights Institution's legal procedures.

The anti-discrimination report, written in accordance with Law No 40 of 2008, contains important information for ethnic minorities, and is composed of ideas and information that promote equality.[307] Article 2 of Government Regulation No. 56 of 2010 states that 'the National Human Rights Commission monitors all of the forms of eradication of racial discrimination.' Without a doubt, this report outlines objectives and methods for reducing prejudice and stereotyping against ethnicity and race. Moreover, the report exposes and criticises class fragmentation in post-industrial society.[308] Further, the Indonesian National Commission of Human Rights was obliged to compile this report in accordance with Article 8 Law No. 40 of 2008.[309]

These articles play a vital role in Indonesian human rights by describing how to establish not only a report, but true superintendence. Superintendence means real supervision that not only describes, but also makes commands with imperative obligations. If this report is recognised as obligated information, the administration should make this information publicly available. Persuasive information is needed to em-

[306] Louisa Brown. *Transparency as Professionalism. An Interview with Xingzui Wang*, Yale Journal of International Affairs Volume 97. 2014.

[307] Alan Patten, *Equal Recognition. The Moral Foundations of Minority Rights,* Princeton, Princeton University Press, 2004, p. 100.

[308] Loïc Wacquant, *Marginality, Ethnicity and Penality in the Neo-Liberal City: An Analytical Cartography*. Ethnic and Racial Studies 2014. Vol. 37, No., p. 1687-1711.

[309] Article 8 (2) superintendence consists of: a. superintendence and supervision of towards public policy and local government in protecting against racial and ethnic discrimination; b. investigation fact and control individuals, communities, governmental bodies, and the private sector that suspected discriminatory offenders against racial and ethnic discrimination; c. to give recommendations to the government and local government from the report of superintendence of racial and ethnic discrimination; d. superintendence and supervise the government and the local government in implementing the eradication of racial and ethnic discrimination. e. Giving advice and recommendations to the parliament about The Commission' superintendence if government bodies or local government do not follow The Commission's advice.

phasise that no individual or group occupies a superior or inferior position— all are equal.[310] The Commission is obliged to guarantee that the voice of the victim is heard and to ensure that they receive necessary support.[311] This is why the principle of transparency is crucial to the circulation of these reports. One necessity for true transparency in the legal tradition of open data, is that data can be processed, accessed and presented easily.[312] The objectives of the sub-commissions are issued in these reports, indeed, people interested in about discrimination cases can learn how to deal with and fight against discrimination from these reports. In addition, this transparency provides individuals with information to strengthen their own self-protection.[313] A report on Law No. 40 of 2008 by the commission may safeguards ethnic minorities from discrimination.

Another important consideration is that the report on Law No. 40 of 2008 endows ethnic minorities' lives with fundamental rights which cannot be denied. As people living in Indonesia, ethnic minorities deserve to acquire the public information and can enjoy the implementation of the principle of transparency. Indeed, the principle of transparency may also help to circulate affirmative action materials, such disseminating job information on preferential employment and admissions practices, classroom integration, and case law concerning discrimination dealing with education policy.[314] The report of anti-discrimination trends, as other tools of transparency, promotes equal treatment leg-

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[310] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace*, New York, State University of New York Press, 2006, p. 51.

[311] Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*. Harvard Human Rights Journal/ Vol. 13., p. 12.

[312] Anneke Zuiderwijk, Mila Gasco, Peter Parycek, Marijn Janssen. *Special Issue on Transparency and Open Data Policies: Guest Editors' Introduction*. Journal of Theoretical and Applied Electronic Commerce Research. Vol. 9. Issue 3. 2014.

[313] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security,* Democracy or Peace, New York, State University of New York Press, 2006, p. 52.

[314] Samuel Leiter and William M Leiter, *Affirmative Action in Antidiscrimination Law and Policy*. An Overview and Synthesis. 2002. State University of New York., p. 1.

islation ranging from Law No. 40 of 2008, Law No. 39 of 1999 on human rights, and Law No. 29 of 1999 on the ratification of CERD. Furthermore, this report acknowledges that special acts of government such as Presidential Instruction No. 26 of 1998 concerning Public Servants, which states that all governmental apparatus, without exception, are obligated to respect differences of race, religion, ethnicity, gender, nationality, etc.

Indeed, the principle of transparency is supported by regulations which provide citizens with general rights of access to documents.[315] There is also a mutually beneficial relationship between transparency and anti-discrimination law; Anti-discrimination law facilitates transparency to become an equal subject and promote human rights-based perspectives. On the other hand, the principle of transparency allows anti-discrimination law to be easily distributed and circulated.

By reporting on discrimination cases, for instance, the Indonesian people have become aware that prejudice and discrimination are real and prevalent, and this knowledge has motivated them to take action against it. Hence, the principle of transparency can establish an open society to change and inform that despite the differences among us there is a common interest— to make a better, fairer future. Greater transparency can also cultivate a like-minded society that shares common ideas and values.[316] Reporting on cases being investigated by the Commission is beneficial to promoting the values of equal rights. The implementation of the principle of transparency can be seen in the existing reports of the Commission. In the 2011 report, the Commission wrote a report on the lasting effects of the 1998 mass riots and concluded that the ensuing social trauma has caused ethnic minorities, especially Chinese-Indonesians, to live in a waking-nightmare.[317] Thousands of people were

[315] Bernd van der Meulen, Transparency & Disclosure. *Legal dimension of a strategic discussion*, European Food and Feed Law Review. 270, 2007.

[316] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 55.

[317] The Working Group for the Report of Discrimination. *Indonesia Human Rights Report of the 2011 Law No. 40 of 2008*, Indonesia Human Rights Commissions.

killed, tortured, raped, and had their housing burned, without any prosecution of the suspected criminal offenders. To reduce discrimination, the criminal justice system needs effective shock therapy.[318]

The 2013 report provides a picture of the various discrimination cases reported to the Commission ranging from hatred crime in media, discrimination in the workplace, use of racial slurs in education, etc. The role of NGOs in assisting the victims of discrimination is substantial. By accessing this information, people especially ethnic minorities can improve their awareness of the roles of NGOs that can assist them in fighting discrimination. This report mentions active NGOs and foundations such as Paguyuban Sosial Marga Tionghoa Indonesia (Indonesian Chinese Families Assembly), Institute Kewarganegaraan Indonesia (Institute for Indonesian Citizenship), Lembaga Bantuan Hukum (the Legal Aid Institute), all of whom occupy meaningful positions with regards to advocating on issues of discrimination and to help minorities participate in the complaint mechanism process.[319] For example, the Institute for Indonesian Citizenship works to support basic civil registration in Tangerang, Serang, Bogor, etc. On many occasions, this basic civil registration is required to access healthcare, education and other public services. Sometimes, citizens are refused public services because they do not have an identity card.[320] Thus, the 2013 report contains information that may be beneficial for ethnic minorities.

The 2016 report describes a detailed picture of discrimination against Chinese-Indonesians in Southeast Sulawesi and West Kalimantan. In Southeast Sulawesi, the report describes discrimination in education and employment. For instance, virtually no Chinese people work in go-

[318] Kathleen M. Blee, *Racial Violence in the United States*. Ethnic and Racial Studies. Vol 28. No. 4., p. 599-619.

[319] The Working Group for the Report of Discrimination. *Indonesia Human Rights Report of the 2013 Law No. 40 of 2008,* Indonesian National Commission of Human Rights.

[320] Interview with Indradi Kusuma, Executive Secretary of Institute for Indonesia Citizenship, September 2015. Some Chinese communities in Tangerang, Serang, and in other regions nearby Jakarta experienced discriminatory public service. Chinese-Indonesians are prevented from owning an Indonesian identity card and are still considered as the foreigners despite having been born in Tangerang or Serang, and always been Indonesian nationals.

vernment positions, only one urban village head in Donggala. Generally, Chinese-Indonesians are employed in the business sector. Stereotyping of Chinese pupils in public school is rife, often forcing them to enrol in Chinese private schools. In Singkawang and Pontianak, West Kalimantan, Confucians have faced many problems. In these two cities, followers of Confucianism have experienced difficulties when registering their religion on their formal identity card, or when trying to find a place to worship. This situation is exacerbated because educational resources about Confucianism are limited, a consequence of which is that public awareness of the religion is low. The 2016 report can be seen as a report from below;[321] it was written by the local official representatives of the Indonesian National Commission of Human Rights. The local office selects the cases and conducts research on specific issues of discrimination.[322] Reports of discrimination triggered the local office also to form a 'contact hypothesis' to understand the pattern of discrimination that minority communities are subjected to. The contact hypothesis states that increased contact with individuals with different backgrounds, customs, beliefs, languages, nationalities, ethnicities, and races results in lower levels of negative stereotypes, prejudice, and xenophobia in the public.[323] The 2016 report was produced by a local office in collaboration with the Confucian community, the Supreme Council for Kongzism of Indonesia, and Chinese youth organisations.

This report provides detail about the legal situation of anti-Chinese discrimination in certain areas, is crucial to developing human rights protection for ethnic minorities, and is an example of transparency in practice. It is the duty of governments to circulate such reports about the serious discrimination problems in Indonesia. The normative section of the government requires a level of transparency that enables individu-

[321] Interviewed with Muhammad Nurkhoiron in November 2016.

[322] The Working Group for the Report of Discrimination, *Indonesia Human Rights Report of the 2011 Law No. 40 of 2008*, Indonesian National Commission of Human Rights.

[323] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, 46.

als to make autonomous decisions and protect their own interests.[324] With sufficient information, ethnic minorities can defend their individual, social, political, cultural, economic and civil rights.[325] Similarly, with enough information, ethnic minorities can participate with the government and have access to justice. For instance, the 2013 report details a complaint made by the Institute for Indonesian Citizenship where a bank (BTN) illegally requested an SBKRI from a Chinese person, who was then refused service. In such case, the Institute for Indonesian Citizenship occupies a fundamental role. This Institute challenged Bengkalis Immigration Affair for denying service to Chinese people. Again, Immigration Affairs continues to make requests for SBKRI.

Through the report on anti-discrimination, we can see that few cases of discrimination have been reported to the Commission. [326] In 2013 reports only 12 complaints were collected ranging from insulting speech by police officers in Yogyakarta and South Sumatera, denial of service by Bank BTN and Panin Bank, maladministration by Immigration Affairs, and misuse of power in land ownership registration by the administrative authority of Yogyakarta.[327] Indeed, reporting on these cases and how the Commission deals with these cases provides an example to the public of how to fight against discrimination. Hence, I consider the publication of anti-discrimination information as a key function of the principle of transparency. Not only the commission, but the administration should make their publications more transparent to promote tolerance and peace, and thus make other groups more knowledgeable about ethnic minority groups.[328] A positive example is the Ministry of

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[324] Samuel Leiter and William M Leiter, *Affirmative Action in Antidiscrimination Law and Policy*, Albany, State University of New York Press, 2011, p. 74.

[325] Andrew Smith, *Rethinking the 'everyday' in 'ethnicity and everyday life.'* Ethnic and Racial Studies, 2015. Vol. 38, No. 7, 1137-1151.

[326] Interview with Yosep Stanley Adi Prasetyo member of Indonesia Human Rights Commission 2007-2012

[327] The Working Group for the Report of Discrimination. Indonesia Human Rights Report of the 2013 Law No. 40 of 2008. Indonesian National Commission of Human Rights.

[328] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 53.

Justice, who circulated the report of CERD on their website. This report contains the information about the anti-discrimination monitoring conducted by the government, again, this activity can be seen as the implementation of the principle of transparency.

The anti-discrimination report brings the understanding of the difficulties that ethnic minorities often face when dealing with administrative problems. There is a report on maladministration and human rights violations of basic civil registration rights in Tangerang. In the era of social media, ethnic minorities are able to advocate and to establish their own image. A plethora of information is easily accessible via the Internet that can be utilised by individuals to defend their position.[329] However, many groups have been left behind by these technological advances. For example, Tangerang Chinese (*Cina Benteng*) often live without internet access, and therefore cannot reap these benefits. In this sense, they are different to more prosperous Chinese communities. The richest person in Indonesia, according to Forbes magazine, is Robert Budi Hartono (Chinese name: Oei Hwie Thjong) who owns a large tobacco company in Indonesia. *Cina Benteng* are essentially the opposite, with little access to capital, politics, or the administration. The 2011 report describes the situation of *Cina Benteng* in Tangerang:

> The Commission found indications that violations of UU No. 40 of 2008 have occurred in Tangerang, namely administrative discrimination against Chinese residents in Banten Province. Some residents have experienced arbitrary obstacles in getting identity card (KTP). Based on this finding, the Commission sent a supervision team of Law No. 40 of 2008 to the location on November 15, 2011. *Cina Benteng* have lived for many decades in villages such as Lebak Wangi, Mekarsari, and Neglasari in Tangerang. Their human rights have been infringed upon in many different ways including not being recognised politically, and having their civil administrative, economic and health care rights ignored. [...] Moreover, during the 2009 general election they were expelled from Lebak Wangi village and refused their right to vote, because most people in this community do not have an identity card. The difficulties that *Cina Benteng* face in obtaining an identity card mean they cannot apply for a marriage certificate, family certificate, passport, or other crucial documents. Public servants often extort them and ask for large sums of money. The public office also frequent-

[329] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 55.

> ly requests an SBKRI. [..] Some witnesses revealed that a public servant ordered them to surrender 80,000 IDR. However, the identity card which was promised by the public servant was never received. Furthermore, the public servants in Mekarsari Village insisted that Chinese-Indonesians will continue to be refused service when attempting to obtain an identity card. [...] the Government of Tangerang has stated that the basic civil registration and getting identity cards are free of charge. [...] The Government insists no discrimination towards *Cina Benteng* took place.

From this report, we can see that the principle of transparency has failed at the local level in Tangerang, because the administrative authority claims that no discrimination against Chinese took place, but as the above report shows, this is clearly not the case. Legal segregation is alive in practice rather than in the system, not all human resources have a proper understanding of discrimination.[330] The stories above show how discriminated people are forgotten by modern bureaucracy. When Chinese people cannot access the administration, they cannot access their fundamental rights such as education and healthcare that are provided by the government of Indonesia. The Commission's report privileges the perspective of the victim and respects their rights. Of course, the story established in the report is that combating discrimination will promote discourses of emancipation. People who read this report can recognise what ethnic minorities do when they suffer from discrimination. In other words, this report is a part of government transparency whereby the Commission provides in-depth information about ethnic minorities. Partial transparency cannot speed up the process of integration and assimilation.[331] We can read reports about the difficulties that the administration causes for ethnic minorities, and we could conclude that this is a simple problem of administration. However, the reality of a person not owning an identity card is in an inability to access education, vote in an election, receive health care in the hospital, and to be barred from other matters of civil administration (marriage, divorce, birth cer-

[330] Maykel Verkuyten, Barbara Kinket, & Charlotte, *Preadolescents' Understanding of Ethnic Discrimination*. The Journal of Genetic Psychology. 1997, 158 (1), p. 97-112.

[331] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 55.

tificate for children, and so on). In reality, 'a simple problem of administration' poses a huge threat to life. Without proper transparency, the government is no different to a government who promotes systematic violence.[332]

In addition to the anti-discrimination reports that are published by the National Commission under Article 8 of Law No. 40 of 2008 and Article 2 of Government Regulation No. 52 of 2010, the Indonesian Government is also obliged to submit and publish a periodic report on the implementation of International Convention on the Elimination of all form of Racial Discrimination. After ratifying this convention, the Indonesian Government accepted a duty to submit a report on the realisation of this convention every two years. Unfortunately, the latest report was published on 17 March 2006. Therefore, the Indonesian Government has violated norms for the government by failing to submit or publish the periodic report on multiple times; by 2018 the government should have published nine reports. These reports are important, because they allow people can to have a better understanding of the current situation of the implementation of this convention—something that is particularly relevant to the interests of ethnic minorities. The implementation of this convention is important to the position of ethnic minorities in public life. As seen in the third (2006) report, there is some understanding of the situation of administrative discriminatory practice that Chinese-Indonesians face, for example the continued requests for SBKRI. From this report, we can also learn about the implementation of the government's plan, action, programs and policies to combat discrimination. Due to a lack of commitment to the norms for the government transparency, reports on the implementation of the CERD have been absent for many years. Submitting and publishing this report is part of the norm of transparency and should be important proof of the commitment of Indonesian government to combatting discrimination and providing access to public information about the implementation of anti-discrimination law.

[332] Slavoj Žižek, *Violence Six Sideways Reflections*, New York, Picador, 2008, p. 2.

3.1.4 Transparent procedures and the function of the online mechanism

Transparent procedures and an online complaints mechanism may help to strengthen the norms for the government and legal protection of ethnic minorities. The increasing modernisation of Indonesian government has created a critical need for information and communication technology to be improved all across many segments of Indonesian society. From my perspective, improvements in information and communication technology offer an opportunity to better facilitate access to justice. Currently, the Indonesian Ombudsman is the only public institution that provides an online complaints system. This system is an excellent example of how a government institution can provide a transparent and accessible procedure. One benefit of the new complaints system is that it may facilitate ethnic minorities to submit complaints through the Ombudsman. Information regarding the complaints submission is important public information that must be circulated widely. The distribution of public information is required by Article 4 Law No. 14 of 2008[333] which guarantees that everyone has the right to know public information.

The online complaints system of the Ombudsman is a good example of how information technology can be utilised to support to strengthen the complaints procedure and make it more accessible. Generally speaking, submitting reports to administrative authority is not always easy. For instance, when submitting a report to the police, a complainant must first discuss the incident with an investigative agency before submitting a report to the front-line officers. This then becomes a report of suspected criminal action (Article 1 (24) Law No. 8 of 1981). Supposedly, every person has the right to submit either a written or oral report to

[333] Article 4 (1) Every individual has the right to obtain Public Information pursuant to the provisions of this Law. (2) Every individual has the right: a. to see and to know about Public Information; b. to attend public meetings that are open to the public in order to obtain Public Information; c. to get a copy of the Public Information by applying for it pursuant to this Law; and/or d. to disseminate Public Information pursuant to the regulations of the laws. (3) Every Public Information Applicant has the right to request for Public Information and has to state the reason for such request. (4) Every Public Information Applicant has the right to file a suit in court if he/she is obstructed from obtaining, or fails to obtain Public Information pursuant to the provision of this Law.

police, who have had a duty to respond with a letter of acceptance in accordance with Article 108(1) and (6). This is why few reports are sent to the police; the mechanism provided by the police is not very user friendly, and thus people are dissuaded from using it. The same is true for the courts and the Commission, neither of which have an online complaint system.

3.1.5 Transparency requirements of the National Action Plan on Human Rights

In the National Action Plan on Human Rights, the idea of transparency has flourished and become one of its central objectives, and may reinforce the norms for the government and legal protection of ethnic minorities. The implementation of human rights is not possible without a good, transparent system. The principle of transparency is required by every governmental including administrative body and it is a basic obligation of every public institution to make information about their activities freely available. Moreover, there is a relationship between transparency and intergroup violence—knowledge and information can promote peace. The principle of transparency may even have the potential to establish citizen diplomacy.[334]

The Indonesian administration unveiled the National Action Plan on Human Rights to encourage the protection of human rights for citizens in accordance with the State ideology, Pancasila. The National Action Plan on Human Rights was issued during Susilo Bambang Yudhoyono's regime by Presidential Regulation No. 23 of 2011, and was intended to be a 'living document' for implementing human rights according to its focus, potency, and problems in society. Following the issuing of this Act, the principle of transparency began to emerge in the report of the implementation on the National Action Plan on Human Rights. This report was then sent to governments including administrative authorities' bodies and distributed to the public, allowing everyone to follow the changing situation of human rights implementation

[334] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 45.

in Indonesia according to the guidance of the National Action Plan on Human Rights. The report was composed of preparations for the ratification of the international covenant on human rights, harmonisation of human rights regulation among the international, national and local levels, human rights education, establishing human rights standards, and societal communication services. Here, the principle of transparency has facilitated the distribution of documents relating to the National Action Plan of Human Rights, and people, including ethnic minorities were able to learn about the human rights plan in any government body.

President Jokowi updated the National Action Plan on Human Rights through Presidential Regulation No. 75 of 2015. The National Action Plan on Human Rights has become a template for how administrative authorities should conduct themselves. The principle of transparency in Presidential Regulations is still required and can be established by evaluating, monitoring, and implementing human rights programs.

Making an organisation transparent involves several prerequisites such as an appropriate culture, sophisticated training, and active two-way communication among stakeholders.[335] For example, Presidential Regulation No. 23 of 2011, identified that the geographical reality of Indonesia and the educational standard of the people living on remote islands poses significant logistical barriers to transparency measures. Therefore, the principle of transparency and socialisation of administrative decisions has become a priority.

> Presidential Regulation No. 23 of 2011 stipulates [strategic] open access to communication and information for people who are not easily able to acquire an education because of geographical reasons or where people are at risk of natural/ social catastrophes, such as vulnerable indigenous people. [Action plan] To develop an information network and communication requires preparing skilful trainers. Official attachment to Presidential Regulation No. 23 of 2011.

Another issue of transparency raised in the National Action Plan on Human Rights is professionalism. It is vital that public servants employed as human rights trainers act with integrity. The lack of profes-

[335] Richard W. Oliver, *What is Transparency?* New York, McGraw-Hill, 2004, p. 69.

sionalism is the main obstacle to the government's transparency program. On the other hand, activists and members of the Commission have requested the government to be more transparent. With the principle of transparency, they can work together to improve their capacity to provide accurate legal information that will also help combat discrimination.[336] For example, in the case of Chinese-Indonesians who have a problem to access to public service without showing an SKBRI, and their position would be quite different if they would be aware that this request is prohibited.

As mentioned in Presidential Regulation No. 13 of 2011, the thousands of islands that comprise Indonesia pose a logistical difficulty to the circulation of information about the National Action Plan on Human Rights. Presidential Regulation No. 23 of 2011 promotes the establishment of an information network to foster emancipatory human development and distribution of the human rights program and directly to meet the logistical difficulties posed by Indonesia's geography. The Government controls the quantity and quality of information with a specific audience in mind.[337] Presidential Regulation No. 23 of 2011 has a particular focus on vulnerable indigenous people who do not have access to the formal education system. Here, we can see the beneficial function of transparency on the publication of information regarding affirmative action. Citizens outside of urban, metropolitan society also need information, such as vulnerable, indigenous people who are officially considered 'uneducated.' This Presidential Regulation also provides a plan for expanding access to education to all citizens. Interestingly, the Turkish community has been particularly active in providing education facilitation outside of Java, such as in Aceh (Al Fatih Boarding School) and Kalimantan (Banua). Establishing schools and providing education is in line with this Presidential Regulation.

Even though the term 'transparency' does not appear in the text of Presidential Regulation No. 23 of 2011 (or its official attachment),

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[336] Louisa Brown. *Transparency as Professionalism. An Interview with Xingzui Wang*. Yale Journal of International Affairs Volume 97. 2014.

[337] Archon Fung, Mary Graham, David Weil. *Full Disclosure the Politics, Perils and Promise of Target Transparency,* Cambridge, Cambridge University Press, 2007, p. 38.

the spirit of this law has stimulated openness on policies and provided a platform for human rights programs. The administration has realised that achieving the goals of human rights education requires a transparent system to circulate basic information about human rights. Some ministries involved in this action plan include the Ministry of Communication and Informatics, the Ministry of Public Work, the Ministry of Transportation, the Ministry of National Education, etc. The underlying idea is that improvements to the principle of transparency and information accessibility can encourage positive feelings and empathy towards others and can foster a marketplace of ideas where to false opinions about ethnic minorities can be contested.[338]

Furthermore, Jokowi's action plan differs from its predecessor in several respects; this plan, broadly reflected his policies in several areas including integration, sustainability, objectivism and professionalism, broadening participation, empowerment, accountability, and punctuality. Jokowi realised that one objective of government intervention is to provide society with sufficient information to establish an informed public that makes socially beneficial decisions. Therefore, Jokowi selected transparency to be one of the key principles of the National Action Plan on Human Rights with the aim of ensuring that citizens can enjoy access to relevant information about the implementation of the Plan itself. Hence, with reference to the National Action Plan on Human Rights, Presidential Regulation No. 75 of 2015 explicitly defines transparency.

> The principle of transparency means planning, monitoring, evaluating, and reporting on the implementation of the work of the National Action Plan on Human Rights, and reporting these results regularly through media so that people are able to easily access to information about the outcome of the National Action Plan on Human Rights.

The principle of transparency has been integrated into every single stage of the plan. Presidential Regulation No. 75 of 2015 states that the monitoring of the human rights program should also be clear, acces-

[338] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 47.

sible, and available. The first problem for the National Action Plan on Human Rights is insufficient resources to ensure it is properly implemented. Presidential Regulation No. 75 of 2015 elucidates some problems ranging from the lack of knowledge about the substance of the National Human Rights Action Plan, the deficiency of the integration program between ministers, central governmental bodies and the local government, the inadequacy of facilitation in achieving outcomes of the national action, and the absence of the skilful human rights workers to interpret the national human rights plan.

3.1.6 Transparency in anti-discrimination law

The principle of transparency in anti-discrimination law may toughen the norms for the government and legal protection of ethnic minorities. Three post-1998 reformation regulations promote the recognition of fundamental human rights; Law No. 39 of 1999 concerning Human Rights, Law No. 26 of 2000 concerning the Court of Human Rights, and Law No. 29 of 1999 concerning the Ratification of the International Convention of the Elimination of All Forms of Racial Discrimination. On September 7, 2005, the Indonesian Parliament began its discussion of the draft for Law No. 40 of 2008, henceforth called the Anti-Discrimination Law.[339] Whilst debating Law No. 40, some members of parliament raised points directly addressing issues of transparency in relation to Anti-Discrimination Law. As a consequence of this debate, parliament proposed a more transparent government with an open public policy, and a more accountable decision-making process. This facilitates a more knowledgeable public capable of making, more informed decisions about their interest.[340]

In October 2008, the chairman of the special committee for the draft of Anti-Discrimination Law, Murdaya Poo, warned that lack of the principle of transparency is a significant barrier to obtaining infor-

[339] Laporan Ketua Panitia Khusus Rancangan Undang-Undang tentang Penghapusan Diskriminasi Ras dan Etnis dalam Rapat Paripurna DPR RI Selasa, 28 Oktober 2008, Pimpinan Pansus RUU Tentang Penghapusan Diskriminasi Ras dan Etnis, Ketua Mudaya Poo.

[340] Anoeska W.G.J. Buijze, *The principle of transparency in EU Law*, 's-Hertogenbosch & Utrecht, Utrecht University & Uitgeverij BOX Press, 2013, p. 83.

mation that can be used to improve awareness about minority issues. Differences in ethnicity and race should not mean differences in the rights and duty.[341] Every individual has a right to information and each administrative authority has duty to provide that information the public. A transparent government is required to ensure racial tolerance is a part of public policy.[342] The principle of transparency, also has general functions that are of particular importance to ethnic minorities such as reducing corruption and impropriety, increasing public awareness of government agency activities, enabling lawyers and other parties to analyse the outcome of case law, facilitating important updates to sources of legal knowledge, and preventing legal malpractice.[343]

The principle of transparency became a key topic during the debating process of Law No. 40 of 2008, particularly the role that it can play in combating discrimination. Indeed, Law No. 40 of 2008 is an important regulation regarding anti-discrimination enforcement. Despite ratifying the International Convention of the Elimination of All Forms of Racial Discrimination, additional regulation was needed to reduce discriminatory action towards ethnic minorities in Indonesia. The importance of regulation was promoted in response to of the lasting social trauma of the 1998 mass riot. An Islamic political party member (The National Awakening Party/ PKB) on September 7th, 2005 provided this valuable remark on this regulation.

> After the three-decade tyrannical rule of the New Order Government, social conflict arose from racist sentiment which has since been successfully resolved. However, institutional racism still afflicts the military, and has a continuing influence upon their actions including engaging in torture and intimidation. Therefore, after the New Order collapsed the fire of racial sentiment roared until reaching its apex, the 1998 mass riots, which was followed by the cases of Sambas and Poso (racial and ethnic mass killings). [...] Fraction of National Awakening in Parliament heard that several government bodies established an 'ethnic gang' who were able to make decisions

[341] Laporan Ketua Panitia Khusus Rancangan Undang-Undang tentang Penghapusan Diskriminasi Ras dan Etnis

[342] Albert Yaputra, Pendapat Fraksi Partai Demokrat atas Usul Inisiatif anggota DPR-RI terhadap Rancangan Undang-Undang Republik Indonesia tentang Penghapusan Ras dan Etnis. On September, 7, 2005.

[343] Lynn M. Lopucki*, Court-System Transparency*. Iowa Law Review. Volume 94. 2009.

about the recruitment of public servants, control the decision-making process and budgeting of infrastructure. [...] In practice, discrimination can still be seen ethnic and racial exclusive forums which are used to play economic and political games, consequently, this can disturb the social cohesion of the multicultural society of Indonesia. This is really ironic, in the middle of globalisation and improving public awareness.[344]

A huge problem of discrimination is exclusivism and negative sentiments directed towards particular races and ethnicities. The principle of transparency provides emancipatory information to all people regardless of race and ethnic background. In other words, the principle of transparency would prevent public information from becoming the property of a select few, and therefore further development of Indonesia's information technology infrastructure is a critical endeavour. The principle of transparency requires information technology to circulate public information to everyone and to make it easily accessible. The value of optimism is that it has a potential to stimulate innovations in information and communication technologies, that may have benefits for the principle of transparency.[345] The principle of transparency provides the administration with great legitimacy.[346]

Law No. 40 of 2008 inspires the implementation of equality and emancipatory values; regardless of ethnicity and race, everyone is equal before the law and the government. With a transparent government, people can establish social awareness on preventing of social conflicts such as the 1998 riots and the mass violence of Sambas and Poso.

The 1998 riots were a violent explosion of deep-seated tensions in Indonesia. Therefore, information about the legal procedures of anti-discrimination law should be widely circulated to the public. In addition, Panda Nababan from the Indonesian Democratic Party-Struggle (PDI-P) believes that administrative authorities should inform people of

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[344] Fuad Anwar, *Pendapat Fraksi Kebangkitan Bang DPR RI terhadap RUU Usul Inisiatif Anggota DPR RI tentang Penghapusan Diskriminasi Ras dan Etnis*. On September, 7, 2005.

[345] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 46.

[346] Bernd van der Meulen, *Transparency & Disclosure. Legal dimension of a strategic discussion*. 2007. European Food & Feed Law Review. 270.

progress in the prosecution of discriminatory offences. If the legal process is transparent and is seen to be effective, it is less likely that people will engage in vigilantism.[347] Furthermore, Law No. 40 of 2008 recommends that people choose legal means of addressing crime rather than seeking revenge against offenders. Defacing places of worship place was more common during the 1998 reformation after the growth in popularity of conservative groups and right-wing communities in Indonesia. Hence, an accessible channel for the submission of complaints about discrimination must be provided.

Whilst Law No. 40 of 2008 supports an accessible way to submit complaints, it also is relevant to simultaneously strengthening the transparency of government and protection of ethnic minorities. Law No. 40 of 2008 is a different regulation to the International Convention of the Elimination of All Forms of Racial Discrimination. Particular articles, namely Article 15 and Article 16 are the basis of criminal provisions in this regulation. These articles condemn everyone who commits hate crimes. This criminal provision faced a tough debate in parliament.

> Discussions about the criminal provision ground to a halt because of disagreements about the minimum punishment for offenders found guilty of hate crimes. As far we know minimum punishments are only applicable to serious crimes which are considered to be damaging to society, for instance, terrorism, drug crime, and money laundering. Finally, after much political debate and insights from criminal law expert, Prof. Dr. Harkristuti Harkrisnowo, parliament agreed that hate crimes are not sufficiently serious for a set minimum punishment. With shock therapy, a suitable prevention action plan, appropriate punishment of hate crimes according to the criminal code, the elimination of hate crime is possible. Coming to this agreement marked the removal of all obstacles to issuing this regulation.[348]

Members of Parliament wanted to make this regulation work effectively in legal practice because criminal provisions are used to prosecute discriminatory offences. Even though the regulation has now been is-

[347] Panda Nababan. Pendapat Fraksi Partai Demokrasi Perjuangan Dewan Perwakilan Rakyat Republik Indonesia atas RUU Usul Inisiatif Anggota DPR RI menjadi RUU DPR RI tentang Penghapusan Diskriminasi. On September, 7, 2005.

[348] Laporan Ketua Panitia Khusus Rancangan Undang-Undang tentang Penghapusan Diskriminasi Ras dan Etnis dalam Rapat Paripurna DPR RI Selasa, 28 Oktober 2008, Pimpinan Pansus RUU Tentang Penghapusan Diskriminasi Ras dan Etnis, Ketua Murdaya Poo.

sued, it is rare for it to be used to prosecute a someone who has committed a discriminatory offence. From the perspective of the principle of transparency, criminal provisions and enforcement of the law need to be strengthened. The principle of transparency has become a practical perspective on the issue of the criminal justice system in terms of surveillance and investigation of human rights violations as criminal offences.[349] How many people are familiar with the anti-discrimination law? Very few people are aware of this law. For instance, the Chinese-Indonesian community has not yet filed a report of a discriminatory offence under Law No. 40 of 2008. Similarly, the Turkish community has not complained through the police using Article 15 or Article 16.

Another important consideration is that the principle of transparency is needed to support the criminal justice system. For example, to a certain extent the police and public prosecutors try to keep the media informed of any updates on important criminal investigations. During the investigation of hate crime cases, for instance, the police and the public prosecutors routinely explain the progress of the investigation. Of course, when providing information to the media, the police and the public prosecutor keep legal documents, legal proceedings, investigation records, and forensic reports confidential. However, basic information is provided by the police or public prosecutors normatively as a general progress report of the investigation of cases. They do not provide details about the cases. Meanwhile, in Indonesia, judges never have a chance to explain the cases to the public. Instead, members of the public are permitted to attend court hearings in the Courtroom. Moreover, the Supreme Court publishes all verdicts, so that people can access the cases from which they want to learn. Therefore, we can analyse the legal reasoning of the judges in the consideration of each verdict. Unfortunately, this regulation has not been issued in any verdict to date. Until the end of 2016, only two cases relating to Jokowi (one of insulting Jokowi on the hoax of his mother who has Chinese descent by Magazine of Obor Rakyat and author of book entitled Jokowi Undercover) have been decided by using Article 16 of this regulation.

[349] Valerie Caproni, *Surveillance and transparency.* Lewis & Clark Law Review. Vol 11: 4.

Generally speaking, Law No. 40 of 2008 encourages the administrative authorities to be more transparent to all people without any discrimination. When the government allows people to see what they are doing, people can intervene and influence government actions, and finally hold the government to account.[350] Transparent administration is demanded to provide access to economic rights and promote prosperity of ethnic minorities.[351] Transparent public policy is demanded to give legal protection to ethnic minorities.[352] The openness of decision-making, rights of access to documents and the accessibility and quality of legislation, and consequently, the principle of transparency is an instrument that brings the government closer to its citizens.[353] One practical aspect of transparency is to reduce the document cost and ensure there is no fee for the user to access public data. Digitising data and circulating information via the internet is much more economical and efficient than rather than printing each document individually.[354] The disclosure of public information is the basis of freedom of information in the judicial system and the rule of law.[355] The principle of transparency can help to develop an analytical, empirical approach to predicting legal outcomes by opening data sources such as court opinion, statutes, regulation, and commentary.[356] Until recently, all of these were closed, when members of parliament formulated Law No. 40 of 2008 with the aim of encouraging better transparency practices in government and to ensure information is provided without any discrimination.

[350] Anoeska W.G.J. Buijze, *The principle of transparency in EU Law*, 's-Hertogenbosch & Utrecht, Utrecht University & Uitgeverij BOX Press, 2013, p. 83.

[351] Albert Yaputra, Pendapat Fraksi Partai Demokrat atas Usul Inisiatif Anggota DPR RI terhadap Rancangan Undang-Undang Republik Indonesia tentang Penghapusan Diskriminasi Ras dan Etnis. On September, 7, 2005

[352] Arbab Papeka, Pendapat Fraksi Partai Amanat Nasional. On September, 7, 2005.

[353] Christian Timmermans, *Subsidiarity and transparency*. Fordham International Law of Journal, Volume 1, 1998.

[354] Lynn M. Lopucki, *Court-System Transparency.* Iowa Law Review. Volume 94. 2009.

[355] Valerie Caproni, *Surveillance and transparency*. Lewis & Clark Law Review. Vol 11: 4.

[356] Lynn M. Lopucki, *Court-System Transparency*. Iowa Law Review. Volume 94. 2009.

3.1.7 Provisional Findings

This section explains the good governance principle of transparency and its specifications (e.g. opening meetings, publications, and the decision-making process) and the contributions that this principle has made to reinforcing the norms for the Indonesian Government and legal protection of ethnic minorities.

The Public Disclosure Act encourages the opening up of public information, which is then accessible to ethnic minorities who can obtain relevant public data. Law No. 14 of 2008 concerning Public Disclosure stipulates guidance to every public entity on how to provide public information at low cost and a simple manner. My research found that the Indonesian government has provided sufficient information to public that is also helpful to ethnic minorities. Although the government does not guarantee ethnic minorities access to public information, though it is making an attempt to improve the function of transparency to protect people from social and ethnic conflict. Supposedly the Indonesian government take affirmative action to ensure ethnic minorities' access to public information. However, the norm of public disclosure can help administrative authorities to empower ethnic minorities. For example, Law no. 14 of 2008 encouraged the Ombudsman to circulate their annual report through its website, the National Commission on Human Rights of Indonesia to publish their research and executive summaries of investigations on human rights violation, and the courts to upload its verdicts on its website. This means that public information related to three institutions—the Indonesian National Commission of Human Rights, the Ombudsman, and the courts— is now readily available to ethnic minority communities. By using and understanding this information, ethnic minorities can learn how to best deal with these institutions. For instance, the Ombudsman receives many complaints of maladministration and seems to receive support from the public, which has generated more awareness of their work, which in turn has resulted in more ethnic minorities submitting their complaints to the Ombudsman. In this sense, the principle of transparency of the information system has helped a public institution get closer to people it serves. Another

important aspect of transparency is the publication of documents. For instance, the National Commission published an executive summary of its investigation into the crimes against humanity of 1965 tragedy, including the verification of evidence for the case of 200 people who were arbitrarily detained in a Chinese School in North Sumatera. From that executive summary, people can learn about the 1965 tragedy in North Sumatera, and other mass killings, robberies, riots, and torture.

This section also explains the relation of transparency in the public discourse of good governance and ethnic minorities. The information relevant to ethnic minorities interests must be easily available. The principle of transparency is known to encourage better understanding about ethnic minorities among the public and can help to reduce cultural conflict among communities. The principle of transparency can result in a broader spectrum of views from people being heard in public, thus leading everyone to evaluate their own positions and perhaps become more tolerant. The Indonesian National Commission of Human Rights has a crucial position in providing a positive counterpart to ethnic profiling (Article 8 of UU No. 40 of 2008). The 2016 report on discrimination by the National Commission, found that there is discrimination against Chinese in Southeast Sulawesi and West Kalimantan. In Southeast Sulawesi, the Commission describes Chinese who were being discriminated against in education and employment. In West Kalimantan, the Chinese Confucians faced problems when attempting to register their religion on their identity cards, meaning their rights of religious recognition had been abandoned. Information about such cases of discrimination should be circulated for better reference to know the ethnic minorities' problems.

3.2 The principle of participation

3.2.1 Introduction

This section elaborates on different types of ethnic minority participation in Indonesia, as principle of participation elaborated in chapter 2 and worked out here in specified norms of the principle of participation. These specifications, including citizen's panels, such as the Consultative Body on Indonesian Citizenship (Baperki), which cham-

pioned the interest of Chinese Indonesians, and the Society for Social and Economic Solidarity with Pacific Countries (PASIAD) which promotes the interest of the Turkish community. These organisations also served broader communities of Indonesians. Furthermore, community-level participation is also an important component for both Chinese and Turkish-Indonesians. By the same token, Turkish people, in particular, have made major contributions to the establishment of Indonesian schools. Meanwhile, the Chinese community has been active in their advocacy on anti-discrimination issues, for example, by voicing support for the Eradication of Racial and Ethnic Discrimination Act. I use the CLEAR method to measure the presence of discrimination, participation and response by the administrative authorities, especially in Yogyakarta, Chinese-Indonesians are excluded from the rights to land ownership. Hence, I will analyse the participation of Chinese people in Yogyakarta with regards to how they have protected their interest by submitting complaints.

3.2.2 Chinese and Turkish citizen's panels

In the context of the principle of participation, a citizen's panel is a way of strengthening the norms for the government and legal protection of ethnic minorities. A citizen's panel is a meeting of a number of individuals who become involved in making recommendations to the public entity. In Indonesia, Chinese community often provides recommendations on the basis of large numbers of participants. For example, in 1954 Chinese people established Baperki (an organisation that focused on the equal treatment between citizens and combating discrimination towards ethnicity).[357] Baperki grew to have a large membership, served by over, 100 local offices.[358] This organisation was effective in influencing the process of amendment of the 1945 Constitution during the political debate of the 1955-1959 Konstituante (the Constitutional Assembly), and their arguments were persuasive enough to influence the resultant legisla-

[357] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Seattle, University of Washington Press, 2011, p. 149.

[358] Oei Tjoe Tat, *Memoar Oei Tjoe Tat. Pembantu Presiden Soekarno*, Jakarta, Hasta Mitra, 1995, p. 84.

tion substantively. The organisation also criticised the Act of Citizenship which they suspected would be used in a discriminatory manner. During the period of Guided democracy, Baperki was the most active organisation that advocated for the equal treatment of citizens. Simultaneously, Baperki demonstrated itself to be a competent legal movement, based on citizen's panels, in campaigning for anti-discrimination issues.

On some occasions, it is not easy to encourage the public to participate.[359] However, if a legal movement such as citizen's panel is successful, this participatory community can become a historical bloc that encourages groups of active social agents to influence those in power.[360] Effective participation is comprised of mass communication, cumulative bargaining, and self-government.[361] Good participation can foster the establishment of better decision making, mutual understanding and solid commitments.[362] Therefore, good participation can make democracy more meaningful.[363]

Citizen's panels enable ethnic minorities to reasonably communicate their interests in the public sphere.[364] The numbers of participants are an important element for justifying their power in influencing the policy making process. A citizen's panel is useful to assess the power relations between citizens and the administrative authorities.[365] The Baperki people's forum involved large numbers of permanent members that have

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[359] Ernesto Laclau, *On Populist Reason*, London & New York, Verso, 2005, p, 13.

[360] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy,* London & New York, Verso, 1985, p. 42.

[361] Aviad Bar-Haim. *Participation Programs in Work Organizations: Past Present and Scenarios for the Future*. London, Quorum Books, 2002, p. 104.

[362] Adrian Wilkinson, Paul J. Gollan, Mick Marchington, *The Oxford Handbook of Participation in Organizations*. Oxford, Oxford University Press, 2010, p. 169.

[363] John Gastil, *Democracy in Small Group. Participation, Decision Making and Communication*, Philadelphia, New Society Publishers, 1993, p. 4.

[364] Xenia Chryssochoou and Evanthia Lyons, *Perception of (In)compatibility between Identities and Participation in the National Polity of People Belonging to Ethnic Minorities.* See, Assad Azzi, Xenia Chryssochoou, et al. *Identity and Participation in Culturally Diverse Societies*, Oxford, Blackwell, 2011, p. 69.

[365] John Gaventa, *Towards Participatory Governance: Assessing the Transformation possibilities.* See, Samuel Hickey and Giles Mohan. *Participation from Tyranny to Transformation. Exploring New Approaches to Participation in Development*, London & New York, Zed Books Ltd, 2004, p. 30-35.

influenced the policymaking process of the amendment of constitution and citizenship, and thus can be described as an effective citizen's panel. The participation of Baperki's membership was prevalent throughout political debate in the Parliamen, and demonstrates that motions to appeal, to criticize, to order and to amend regulation are key parts of an effective legal movement.[366] Overall, citizens' panels encourage the principle of participation in large numbers to offer constructive recommendations.

Indeed, citizens' panels are usually established by, and make recommendations to the public authorities responsible for the issue at hand. However, they operate autonomously to the public authorities in question. Membership of the panel is permanent and often involves a fairly large number of people who are consulted throughout the policymaking process.[367]

Baperki provides a working example of mass participation with the policymaking process. This organisation has a large membership consisting of both Chinese-Indonesians and non-Chinese Indonesians, for example, the membership of the Niki-Niki branch in province of East Nusatenggara is composed of 90% local, native people.[368] Similarly, the Turkish community have also been active in Indonesia, often with a focus on education. Supporters of Fethullah Gulen, the *Hizmet* community, have established business and education support agencies such as Pasiad. This organisation has created a network of large contacts with Asian business groups and provides them with professional assistance.[369] In 2016 more than 150 Turkish professionals in Indonesia worked with the Indonesian native people to establish and maintain a good quality of education.

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[366] Michael K Middleton, *Participation for All: A Guide to Legislative Debate*, New York, IDEBATE Press, 2007.p. 9-10.

[367] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 109.

[368] Oei Tjoe Tat, *Memoar Oei Tjoe Tat. Pembantu Presiden Soekarno*, Jakarta, Hasta Mitra, 1995, p. 74.

[369] Greg Barton, *Turkey's Gulen Hizmet and Indonesia's neo-modernist NGOs: remarkable examples of progressive Islamic thought and civil society activism in the Muslim world*. See., Fethi Mansori & Shahram Akbarzadeh. *Political Islam and Human Security*, Cambridge, Cambridge Scholars Press, 2006, p. 157.

From the perspective of the citizen's panel, Pasiad has extensive contact with the administrative authorities and civil society and contributes a positively to influence to education policy. Since 1995, Pasiad has built nine schools in Indonesia, some of which have since been presented with many science Olympiad medals and trophies.[370] Cooperation between Pasiad and the administrative authorities have also improved the interpretation of Law No. 20 of 2003 on the National Education System.[371] For instance, they often give their insights into how to better implement education policy to the Ministry of Education. Unfortunately, due to the failed coup on July 15, 2016, Erdogan declared a state of emergency in Turkey, and conducted many human rights violations. The Turkish Embassy in Jakarta also pressured the Indonesian government to close Turkish schools in Indonesia that are managed by ex-Pasiad members.[372] However, due to the influence of the *Hizmet* group in government, the Indonesian government denied the Turkey's Embassy request. This can be seen as another example of the how citizen's panels can be effective in protecting the interests of minority groups.

Pasiad and Baperki are prime examples of citizen's panels. The participation of Turkish and Chinese people is composed of: 1) large numbers of people (for instance more than a hundred of members); 2) bottom-up lines of communication and discussion, where grassroots members can make significant contributions; 3) presenting recommendations to the administrative authorities. The huge numbers of people participating reveals the power of their collective bargaining.[373] Pasiad and Baperki are able to accumulate and demonstrate power which can be deployed to influence politics and law. Citizen's panels ensure that the

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[370] Dewi Mulyani, *Pengaruh Kerjasama Pasiad Indonesia dengan Indonesia Di Bidang Pendidikan menengah*. JOM FISIP Volume 2 No. 2 October 2015.

[371] Mudzakir Ali, *PASIAD Education System in Indonesia: Qualitative Investigation*. MAGNT Research Report Vol 3(9)., pp. 265-274.

[372] Some informants inform that the cooperation among PASIAD and the Indonesia government already finished before the 15/ 7 failed Coup in Ankara. Therefore, the PASIAD received the letter from the ministry of foreign affairs to disband its organization because it has no longer recommendation from the Turkey's Embassy in Jakarta anymore.

[373] Adrian Wilkinson, Paul J. Gollan, Mick Marchington, *The Oxford Handbook of Participation in Organizations.* Oxford, Oxford University Press, 2010, p. 187.

elite committees consult people from grassroots communities. A proposal that emerges from these grassroots is an example of counter-hegemony to the dominance of market and state agencies in the public discourse.[374] Recommendations from a citizen's panel provide important insight for the administrative authorities to consider in the policy making process. In particular, Pasiad plays a role in educational policy reform, while Baperki contributed to issues of citizenship and amendment of the 1945 Constitution.

In the 1956-1959 Konstituante, a citizen's panel organised by Baperki influenced the political debate on Article 6 which stated that the President must be a native Indonesian (*pribumi*). Making such a distinction can only be understood as exclusionary towards other ethnic groups. Yap Thiam Hien, a human rights lawyer, and Siauw Giok Tjhan, the charismatic chairman of Baperki, opposed this Article, arguing that the word *pribumi* should be erased to ensure equal treatment.[375] Yap and Siauw's critique was accepted by many members of the Konstituante. On many occasions, ethnic exclusion also appeared as forced assimilation. At the time Indonesia was involved in nation building, part of which encouraged Chinese-Indonesians to change their names as part of an assimilation program. Even though, Soekarno was an assimilationist. Soekarno, the first president, did not support assimilation and changing-name. As he stated

> Cak Siauw said do not talk about assimilation, all right Bung Siauw, I am not talking about assimilation, I have my name: Soekarno, is that a native Indonesian name? No— this name comes from Sanskrit. Cak Ruslan's name is Arabic and so the question is 'what is in a name?' If your brother wants to become Indonesian, it is not necessary to change your name. That is a private interest. It is like religion, which too, is private.[376]

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[374] Boaventura De Sousa Santos & Cesar A Rodriguez-Garavito, Law and Globalization from Below Towards a Cosmopolitan Legality, Cambridge, Cambridge University Press, 2005, p. 4.

[375] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Seattle, University of Washington Press, 2011, p. 50.

[376] Siauw Tiong Djin Siauw Giok Tjhan. *Perjuangan Seorang Patriot Membangun Nasion Indonesia dan Masyarakat Bhineka Tunggal Ika.* Jakarta, Hasta Mitra Penerbit Buku Bermutu, 1999, p. 369.

Regarding this matter, Baperki had forged of political alliance with Soekarno. Unfortunately, Baperki became caught in a political trap when Soekarno decided to revert to the 1945 Constitution. The 1945 Constitution is a document, without proper human rights regulation.[377] The return to the first Constitution negatively impacted the position of Chinese community because of the lack of human rights provisions. The dark side of Soekarno revealed itself in a tyrannical style of leadership during the disbandment of the Konstituante in 1959. He became an all-powerful leader supported by the military forces of General A.H Nasution.[378] However, he kept his promise to ethnic minorities that he would provide opportunities for them to participate in his cabinet. During the last period of his reign, he worked with the Chinese professional lawyer, Oei Tjoe Tat whom he appointed as one of his state ministers.

Yap Thiam Hien and Oei Tjoe Tat played an important role in Baperki by watching and monitoring discriminatory regulation which could damage Chinese groups. They insisted that, the 1958 Act of Citizenship was a necessity. The problem of this regulation started during the cold war, Mao Zedong wanted to strengthen his country's power and declared all Chinese descent around the world to be citizens of China. As elaborated in the section concerning the Citizenship Act Law No. 2 of 1958 had catastrophic consequences. As discussed earlier many Indonesian citizens of Chinese descent lost their citizenship and became stateless. Through its members in the Konstituante and connections to political parties such as Indonesia Nationalist Party (PNI), Indonesia Communist Party (PKI), Great Indonesia Party (Partindo), and Baperki campaigned on this issue in Parliament. Baperki's citizen's panels are ex-

[377] According to Todung Mulya Lubis, Soepomo resisted the idea of human rights, he drafted the 1945 Constitution in the spirit of 'family', rather than human rights or individualism. Rights should be suspended and people must think about duty first. When General Dharsono was suspected of subversive offences against the government, the judge stated that the principle of individual should be erased because it opposes Pancasilan ideology and the spirit of family. Todung Mulya Lubis, *In Search of Human Rights Legal-Political Dilemmas of Indonesia's New Order*, Jakarta, PT. Gramedia Pustaka Utama, 1993, p. 4-6.

[378] Herbert Feith, *The Decline of Constitutional Democracy in Indonesia.* Ithaca, Equinox Publishing, 1968, p. 578.

amples of legal agitation involving many people, using effective communication, and making recommendations for the reform of regulation.

This political participation as a specification of principle of participation urged the amendment of the Citizenship Act, is an example of active participation by ethnic. When Baperki presented their anti-discrimination recommendations for the amendment of the Constitution, Soekarno and his political ally reverted to the 1945 Constitution. Nevertheless, Baperki coloured the public discourse of the Konstituante with their ideas of emancipation, rule of law, democracy, and anti-discrimination. In other words, Baperki was a catalyst for emancipatory discourse.

Although not as large as Baperki, Pasiad demonstrates the power that intimate participation and solidarity can have in establishing a legal and political community. They used what I call a 'strategic model' based on political, economic, legal, and scientific rationality.[379] Pasiad are responsible for some well-regarded educational institutions: (1) Pribadi Bilingual Boarding School Depok, was established in 1995 consisting of both primary and secondary schools. (2) Semesta Boarding School which is located in Semarang. (3) Fatih Boy's Bilingual School, founded in 2005 in Aceh. (4) Kharisma Bangsa School of Global Education, located in Tangerang. (5) Teuku Nyak Arif Fatih Bilingual School, also located in Aceh. (6) Kesatuan Bangsa School Yogyakarta Bilingual Boarding School. (7) Pribadi School Bilingual Boarding School Bandung. (8) Banua South Kalimantan High School Bilingual Boarding School. (9) Sragen Bilingual Boarding School, and so on.[380] Through Pasiad, the Turkish *Hizmet* community has established power in Indonesian civil society and has become involved with and participated in the policy making process in education.

When the Turkish embassy wanted to disband these schools, the Indonesian government refused and replied that the Turkish embassy will have no influence on the direction of Indonesian government poli-

[379] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, London & New York, Verso, 1985, p. 44.

[380] Awaludin Marwan, *Turkish in Indonesia: Fighting to Achieve the Good Governance Rights.* Swara Justisia Faculty of Law Ekasakti University. Vol. 1. 2015.

cy. Some parents of pupils from schools also intervened, requesting the government to be more unequivocal towards the Turkish government. The Turkish *Hizmet* community successfully influenced public opinion of the importance of the schools and their position in education. I refer this stage as 'mobilisation of socio-political solidarities' in the legal field.[381] The way that the Turkish community operates the school is interesting; they are an inclusive educational institution groups which allows thousands of Indonesian pupils to access education in their schools. `Just as Baperki was formed by professional lawyers such as Yap Thiam Hien and Oei Tjoe Tat, the Turkish group in Indonesia appointed Todung Mulya Lubis as their chief advocate for defending their civil and political rights in 2016. These professionals, indeed, are quite important actors in participating through citizen's panel. The advantage of citizens' panels is that they can also provide some professional guidance on the reconstructing of recommendations.

Professionals are required to ensure that the process and results of citizens' panel are of a high quality. For example, Baperki appointed its own elite members as advocates, such as Yap Thiam Hien who graduated from Leiden University, and Oei Tjoe Tat who obtained his bachelor from *Rechthogeschool*. Yap and Oei were active lawyers in defending minority rights through their legal analysis in parliament and other channels. Meanwhile, Pasiad appointed Todung Mulya Lubis who obtained his doctorate in human rights at University of California, Berkeley. Professionals and experts can assist citizen's panels to be more effective when lobbying and making recommendations.

3.2.3 Chinese and Turkish community-level participation

Community-level participation can be seen as an effort to reinforce the norms for the government and legal protection of ethnic minorities, and exists as a specification of the principle of participation. The implementation of community-level participation of ethnic minorities in Indonesia is well delineated in legal practice. Public input to the government which involves individuals as well as organisations can be

[381] Ernesto Laclau, *On Populist Reason*, London & New York, Verso, 2005, p. 15.

a beneficial, democratic example of community level participation.[382] Community level participation is a means of the principle of participation that both Turkish and Chinese people engage with the Indonesian government. Indeed, the principle of participation is unlikely to cause radical changes to the legal system, but instead is more likely to result in finely balanced and delicately integrated evolution of laws as they stand.[383] The increased participation achieved by issuing this law may contribute to improving the government and ensure that policy and actions reflect the will of the people. If the lack of democratic institutions is a pivotal obstacle to ethnic groups obtaining their rights, the administrative authorities will suffer a crisis of legitimacy.[384]

> Community-level participation can be described as an informal or structured opportunity for individuals and organisations who are not affiliated with the public authorities, to express their views and thoughts regarding policy principles and policy proposals as well as to engage in debate on these matters with public representatives. This type of participation can take a variety of forms, including public hearings, the right to speak during meetings, surveys, and other opportunities to respond to drafts of proposals made by the public entity. [...] A characteristic of community-level participation is that the outcomes are not legally binding. The outcomes of consultation are at times far from encouraging. However, public input—at least in theory—is considered beneficial, particularly with a view to exercising due care in the decision-making process. [385]

During this law-making process of the anti-discrimination law, The Chinese community endeavoured to develop multicultural regulation through Law No. 40 of 2008 on the Eradication of Ethnic and Racial Discrimination. Drafting regulation and intervening in public policy can result in an evolution of changes with successful participation by ethnic minorities. However, the principle of participation also faces some challenges to achieving a common, good conception of justice where the ba-

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[382] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 111.

[383] Allen Buchanan. *Better Than Human. The Promise and Perils of Enhancing Ourselves*. Oxford, Oxford University Press, 2011, p. 27.

[384] Allan Buchanan, *Human Rights, Legitimacy, The Use of Force.* Oxford, Oxford University Press, 2010, p. 14.

[385] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 111.

sic interests of all members of society are fulfilled.[386] Of course, the principle of participation is very important for ethnic minorities. The principle of participation has many functions. For instance, the principle of participation can be defined as the way that one may demonstrate dissatisfaction with the status quo.[387] The principle of participation should also be accompanied with the faithful intuition of people that the changes will generate satisfactory and meaningful.[388] Notwithstanding, an individual is often unable to fulfil their interests because of the political will of majority.[389] Yet, the participation of vulnerable people is really important. The common political fact portrays the subordinate position of these groups of vulnerable people, the task of law is to redress the power imbalance present in societal structure that consists of oppressors and oppressed.[390] In this sense context, the participation of the Chinese and Turkish communities as ethnic minority groups in Indonesia is a vital to reducing the gap between the majority and minority under the idea of democracy, the rule of law, and good governance.

Generally speaking, the structural determination present in society produces hierarchical relationships. The principle of participation may play a part in resolving the silent aspiration of the soundless voice of ethnic groups,[391] and may provide a counter-weight to their subordinate position.[392]

The most important example of Chinese community participation emerged out of a collaboration between can be seen in the way of the Chinese community and Murdaya Poo (a prominent PDI-P politician of PDI-P) collaborated on the development of Law No. 40 of 2008 con-

[386] Allen Buchanan, *Human Rights, Legitimacy, & the Use of Force*, Oxford, Oxford University Press, 2010, p. 17.

[387] Renata Salecl, *(Per) Versions of Love and Hate*, London & New York, Verso, 2000, p. 15.

[388] Alain Badiou, *Theoretical Writings*, London, Continuum, 2004, p. 72.

[389] Renata Salecl, *(Per) Versions of Love and Hate,* London & New York, Verso, 2000, p. 13.

[390] Louis Althusser, *Politics and History: Montesquieu, Rousseau, Hegel and Marx, Paris,* Presses Universitaires de France, 1949, p. 31.

[391] Renata Salecl & Slavoj Žižek, *Gaze and voice as love objects*. Durham & London, Duke University Press, 1996, p. 7.

[392] Alan Patten, *Equal Recognition. The Moral Foundations of Minority Rights*, Princeton, Princeton University Press, 2014, p. 48.

cerning the Eradication of Ethnic and Racial Discrimination. The participation of Chinese minorities has been influential on the formation of the anti-discrimination law in parliament. Murdaya Poo, a Chinese businessman and politician was appointed as a chairman of drafting the anti-discrimination law, played an especially significant role. Although the draft of this anti-discrimination law was proposed in 2004, progress stalled until September 2005 because it could not be parsed into definitive regulation.[393] The Chinese community including NGOs, experts, and foundations enthusiastically participated in discussions about the draft.[394] At the same time, Murdaya Poo also mentioned that many non-Chinese organisations and representatives also participated including: The Indonesian National Commission of Human Rights. NGOs including Lembaga Advokasi Masyarakat (ELSAM), Solidaritas Nusa Bangsa (SNB), Paguyuban Yongding, Aliansi Pelangi Antar Bangsa, Legal experts such as Loebby Lukman, Satya Arinanto, and HS. Dillon, Religious communities such as Persatuan Gereja-Gereja di Indonesia (PGI), Konferensi Wali Gereja Indonesia (KWI), Majelis Ulama Indonesia (MUI), Parisada Hindu Walubi. and Nahdlatul Ulama, Educational institutions, for instance University of Indonesia and Bandung Institute of Technology.

The most compelling evidence for the importance of minority participation in Indonesia, as a specification of the principle of participation, is the successful collaboration the special committee under Murdaya Poo and the Chinese community in the development of pivotal anti-discrimination regulation. However, Law No. 40 of 2008 was also too ambitious; the government hoped by passing this law that they would erase

[393] On 7th September 2005, the draft of anti-discrimination law was proposed in the parliament after previous members of parliament failed to finalise the draft. However, the draft took much time was assumed. The special committee (*panitia khusus*) intended the 8th October 2008 (the Youth Pledge) to be the deadline for political debate so that the resulting regulation could be issued soon after. This draft was discussed in the parliament at least nine times: 13th and 27th of September, 7th and 5th of February 2007, 5th, 7th, 14th, 21st, and 28th July, then it continues on 14th May 2007, 13rd, 20th, 21st, and 22nd September 2007. Discussion was then postponed due to a need to solve criminal provisions. Chairman of special committee report, Mudaya Poo on 28 October 2008.

[394] Interview with Eddy Setiawan (Researcher at Institute for Indonesia Citizenship) on 8th October 2016.

discrimination from Indonesia. During the law-making process of this draft, the passive sounding 'anti-discrimination law' was replaced with the more radical 'eradication of ethnic and racial discrimination,' however, resolving the complicated issues of racial discrimination are unlikely to be resolved by a small linguistic shift. On this issue Murdaya Poo had this to say:

> About the changing-title of the draft, originally titled 'the draft of anti-discrimination law' which became 'the draft on eradication of ethnic and racial discrimination' because the word 'anti' refers only to an idea without action or activity to fight discrimination. Furthermore, the term 'anti-discrimination' implies the prohibition of *all* forms of discrimination, without any limit. However, this draft is only concerns ethnicity and race [...] Moreover, 'eradication' implies a need for sustainable activity and real action to tackle discrimination. The new title of the draft, 'the eradication of ethnic and racial discrimination' has a more positive meaning than the draft of anti-discrimination. This draft aims to emphasize the commitment of the nation of Indonesia to law enforcement and implementing fundamental rights in accordance with the 1945 Indonesia Constitution.[395]

Murdaya Poo and Members of Parliament wanted to inject 'spirit' into the law, not only to have an Equal Treatment Act in place, but also to go beyond the legal text and eradicate ethnic and racial discrimination. Nonetheless, the draft of eradication of ethnic and racial discrimination depicts a pivotal administrative step towards embracing tolerance and anti-discriminatory practice. Astonishingly, Murdaya Poo, the Chinese groups, the pluralist community, and human rights activists intervened in the public debate happening in Parliament.[396] It must be remembered that multicultural groups have successfully promoted their discourses, not only in anti-discrimination law, but also to urge the elimination of all discrimination. Another often overlooked point raised by Murdaya Poo is that this law serves only to protect ethnic and racial minorities, and that unfortunately, religion, nationality, and gender,[397]

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[395] Chairman of special committee report, Mudaya Poo on 28 October 2008.

[396] Louis Althusser, *Writings on Psychoanalysis Freud and Lacan,* New York, Columbia University Press, 1996, p, 116.

[397] Regarding gender issues, Indonesia has signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women, by issuing the Law No. 7 of 1984. Therefore, issues gender discrimination issues are already accounted for within CEDAW and its implementation in the legal practice. Provision concerning domestic violence in family or

and so on are not protected by law.

In particular, religion has been the centre of much debate during the creation of the regulation, and consequently was excluded from the remit of Law No. 40 of 2008. Murdaya Poo also outlined that the scope of human rights regulation is restricted by the Article 28J which states that 'in exercising his/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, security and public order in a democratic society.' Hence, the objective of implementation of human rights, still requires restrictions based on morality, religious values, security, and public order.[398] Therefore, people and organisations involved in community level participation must obey the law.

There is much to be learned by analysing the success of the legal movements of the Chinese community. Sadly, by comparison their Turkish counterparts have had much more limited success.

On July 15th, 2016 in Turkey a Coup d'état was declared by military groups attempting to overthrow Erdogan's administration. In response, the Turkish government announced a state of emergency and arrested 120 journalists, shut down 180 media outlets, dismissed 2,465 judges and prosecutors, and detained 27,239 people.[399] A further consequence of this political situation was the Turkish government and its embassies conducting a witch-hunt of Fethullah Gulen supporters (the *Hizmet*). The Turkish Embassy and its consulate regularly visited and lobbied Indonesian administration for the detainment and deportation

neighbourhood is present in Law No. 23 of 2004 on domestic violence which also protects women and children.

[398] Some legal scholars reveal this restriction as limited freedom in Indonesia, especially when we talk about human rights. Not all human rights regimes can exist in Indonesia, even though human rights are universal principles. The cultural relativism is inclined to influence the form of national human rights formation. See about cultural relativism and human rights. Alison Dundes Renteln. *Relativism and the Search for Human Rights.* American Anthropologist, New Series, Vol. 90. No. 1 (Mar., 1988), pp. 56-72.

[399] Alliance for Shared Values. *The Failed Military Coup in Turkey & The Mass Purges a Civil Society Perspective.* Peace Island Institute, Rumi Forum, Niagara Foundation, Dialogues Institute of Southwest, et al, 2016.

of the *Hizmet* community, and conducted a smear campaign against Turkish schools and the Fethullah Terrorist Organization (FETO).[400]In addition, Erdogan declared that there would be 'no safe place in the world for the *Hizmet*.'[401] In response the Headquarters of the Indonesian National Police informed the *Hizmet* community, as long as, they were not in violation of the Indonesian criminal code, should not be afraid of living in Indonesia, and that they will be protected by the Police.[402] Nonetheless, he Turkish *Hizmet* in Indonesia were subject to intimidation by militant Erdogan supporters who sent them death threats. This case was reported to the Indonesian National Police (the Police Report number: LP/1140/XI/ 2016).

In order to reinforce their position, the *Hizmet* have always been active in Indonesia in community level participation as a means of protecting their fundamental rights as Indonesian residents. On December 5th, 2016, the *Hizmet* held a focus group discussion and strengthened their legal network by collaborating with the Indonesian National Commission of Human Rights, the Indonesian National Police, the Directorate of Human Rights of the Minister of Justice, the United Nations High Commissioner for Refugees (UNHCR), Immigration Affairs, the Ombudsman, the Minister of Education, and also Islamic mass organisations like Muhammadiyah and Nahdlatul Ulama.[403] This forum was an example of effective and significant community level participation by the Turkish community in Indonesia. This forum talks about current situation of legal protection of Turkish communities in Indonesia.

One such problem concerned tensions between the Turkish Government (where in Indonesia is represented by Turkish Embassy)

[400] Interviewed with AR (initial), the identity of informant must be kept confidentially for security reason in September 2016.

[401] Hiçbir ülke FETÖ için ğüvenli siğinak değildir (No state will be safed for the hizmet). See., http://www.trthaber.com/haber/gundem/hicbir-ulke-feto-icin-guvenli-siginak-degildir-272161.html 19th September 2016.

[402] Interviewed with some generals of the Indonesian National Police in the Headquarters of Indonesian National Police in December 2016.

[403] A Focus Group Discussion on Human Rights Protection of Turkish Community in Indonesia, 5th December 2016 at Kharisma Bangsa School, Jakarta.

and the Turkish Hizmet Community. This tension resulted in the Turkish Hizmet Community facing administrative and security problems and difficulties in Indonesia. One example of a problem caused by Turkish Embassy in Indonesia involved YT (initials only for reasons of security and privacy reasons). At the end of August, YT visited the Turkish embassy in Jakarta to apply to have a marriage certificate translated and legalised. One of the staff members of the embassy requested him to submit his passport. Instead of returning his passport, the Turkish Embassy provided a one-way travel document to Turkey. Of course, he did not want this document, but the embassy staff insisted that he must return to Turkey due to an allegation that he was a member of *Hizmet* to prove his innocence before the Court. He was afraid that he would have been detained on arrival if he had flown to Turkey. A few months later, he asked his Turkish family to request his passport to be returned by the public authorities in Turkey. No explanation was provided by the public authority, and the members of his family who asked for his passport were captured and detained by the police.[404] YT contacted the UNHCR to ask whether he is eligible for asylum or not. However, the UNHCR initially decided not to accept the case of Turkish asylum seekers in Jakarta.[405] Normally, the UNHCR of Indonesia receives application by people from countries such as Afghanistan, Syria, Iraq, African countries, and undocumented migrants.[406] As such YT did not fit the typical profile of a person applying to for the UNHCR for asylum. In general, Turkish people in Indonesia, tend to have professional careers in positions as teachers or entrepreneurs, but a certificate of asylum would prohibit them from continuing to work (see Presidential Regulation No. 15 of 2016 on the service of illegal immigrants and Immigration Regulation No. 1489UM.08.05 of 2010).[407]A further con-

[404] Interview with YT (initial name for the security, privacy and confidential reasons) in October 2016.

[405] Dina Hapsari, private communication with the UNHCR lawyer in September 2016.

[406] Jeffrey Savage, a meeting of Turkish society human rights condition in Indonesia, in December 2016.

[407] Sulistiono Directur Intellegent Immigration Affairs in a Focus Group Discussion on 5th December 2016.

sequence of YT's difficulties with the Turkish embassy was that he also faced a problem with Indonesian immigration law Indonesia; because he had no passport he was unable to renew his residence permit.

A second case was that of a father who applied for an extension to his daughter's passport. In Turkish law, children's passports are valid for a shorter time (5 years) than an adult's passport (valid for 10 years). The Turkish embassy exploited this fact by revoking the passports of people involved in the *Hizmet* when they apply renew their passport. This father, who I refer to as ME (initials again, to protect his identity), had his request to extend his daughter's passport refused by the Turkish Embassy. ME visited the embassy several times but returned each time more hopeless than the last. At the same time, his residence permit for him and his family was approaching expiration. He feared that without a residence permit and a valid visa, the Turkish Embassy would oppress them and force them to go back to Turkey. Reports of prosecution of many people in Turkey was particularly scary for a family with two young children.[408] ME's family had heard that even pregnant women were imprisoned and forced to give birth in jail. ME tried visited the UNHCR with his legal and human rights adviser, to convince them to issue his family with asylum seeker's certificates. Without these certificates, it was certain that they would be deported to Turkey. The UNHCR of Indonesia learned of similar situations in other countries, and finally decided to issue some certificates to ME's family.[409] This is the first instance where Turkish people have received certificates of asylum in Indonesia. Obviously, ME and his family were relieved to not be deported to Turkey, and felt that living in Indonesia was much safer.

As above cases show, community level participation, as one of the specifications of the principle of participation, has shown some effectivity in influencing the public entity to accept some Turkish people as asylum seekers. ME lives in Semarang where there have been fewer prob-

[408] Interview with ME (initial name for security, privacy and confidentiality) in November 2016.

[409] Jeffrey Savage, a meeting concerning the condition of Turkish human rights in Indonesia, in December 2016

lems with the local immigration affairs office.[410] However, since his residence permit was issued by the Tangerang Immigration Affairs, he had also to register his asylum certificate there. Unfortunately, the head of Tangerang Immigration Affairs refused to provide the registration service. He said to ME, 'why have you only just told me that you are in trouble? You should consult with me before registering with the UNHCR. If you are upset, you come to me. But when you are happy you do not remember me."[411] Making emotive statements concerning 'sadness' and 'happiness' is a breach of professional and ethical standards that the public administration should abide by; communication should be neutral, impartial, and independent. The remarks of the above Indonesian immigration officer may be a covert signal of a willingness to be bribed. Despite their desperation, the Turkish community has declined to succumb to such offers.

The cases above have brought the Turkish community together, especially those in the *Hizmet* in Indonesia resulted in a strengthening of their network and resisting the Turkish Embassy. The *Hizmet*'s strategy of community level participation from has included trying to persuade more relevant institutions to support their position in Indonesia. They have contacted institutions ranging from the Indonesian National Police, the Minister of Justice and Human Rights, members of the Indonesian National Commission of Human Rights, the Ombudsman, the UNHCR, the Minister of Foreign Affairs, Islamic mass organizations such as Muhammadiyah and Nahdlatul Ulama, Immigration Affairs, the Witness and Victim Protection Agency, the Coordinating Minister of Political, Legal and Security Affairs. In Indonesia, the gravity of impact of the failed coup can be seen in the cases of death threats which were reported to the Indonesian National Police. Furthermore, the Indonesian National Police has requested that the Turkish community intensify their coordination with the police officers in order to pre-

[410] November 2016 discussion with Albert, staff member responsible for supervising foreigner's residence permits at Semarang Immigration Affairs.

[411] Interview with ME Interview with ME (initial name for the security, privacy and confidentiality) in November 2016.

vent potential human rights violations.[412] Other high-ranking officers of police stated that Indonesia has already ratified many international human rights instruments, thus preventing another country from giving direct instructions that would violate human rights on Indonesian soil. Moreover, the Indonesian Constitution states that everyone's fundamental rights in Indonesia are protected, including the Turkish people.[413]

However, currently Indonesia has no asylum seeker protection regulation, so asylum seekers must consult the UNHCR to obtain a certificate of asylum. So, as it stands, it is not possible for members of the Turkish community in Indonesia to be awarded refugee status in Indonesia, they can only register with the UNHCR when their travel documents become invalid. Asylum seekers must remain in Indonesia until their destination country has accepted their application. Immigration affairs cannot help a Turkish individual who has not have valid travel documentation, even if they have a credible human rights issue— they are concerned only with administration and bureaucracy. As an administrative authority, the immigration officer must obey the guidance of immigration law.[414] However, the UNHCR have proposed some additional recommendations the Indonesian government, to address members of the Turkish community who have become victimised by the Turkish administration. Of course, Indonesia does not want to intervene in national politics of Turkey, but to extend and to issue residence permits that is within the remit of the Indonesian government's jurisdiction. The UNHCR has urged Immigration Affairs to do more in the name of human rights and the Indonesian Constitution.[415]

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[412] Police Commissioner General (Komjen Lutfhi Lubihanto) The Head of Intelligence and Security Affairs of Indonesia National Police at Focus Group Discussion in Kharisma Bangsa School on 5th December 2016.

[413] Police Inspector General I Ketut Untung Yoga the Head of International Relationship Affairs of Indonesia National Police at Focus Group Discussion in Kharisma Bangsa School on 5th December 2016.

[414] Sulistiono, Director of Intelligence at Immigration Affairs in a Focus Group Discussion on 5th December 2016.

[415] Dina Hapsari, the UNHCR at Focus Group Discussion in Kharisma Bangsa School on 5th December 2016.

Nonetheless, today the *Hizmet* community does not need to worry, the Indonesian government guarantees that its government bodies will not bend to the will of the Turkish Embassy. The Minister of Foreign Affairs communicated with members of the Indonesian National Commission of Human Rights, arguing that the Indonesian government cannot influence Turkey's internal politics or be a part of prosecution process to the *Hizmet* group.[416] Another important consideration, is that the position of *Hizmet* in Indonesia is sufficient to ensure they survive and remain safe. Even so, they should remain cautious and continue to build their capacity to participate. By doing so, they can demonstrate that *Hizmet* is an organisation based on ideas of peace, tolerance, and rationality—not a terrorist organisation as the Turkish embassy claims. In the meantime, the ideas of modern education, tolerance, peace, and love, that are promoted by the *Hizmet* can colour their participation.

Generally speaking, issues relating to participation in the public that affect the Turkish community, also apply to the Chinese community. Hence, community level participation, as one of examples of specification of the principle of participation, can be seen in the role of Murdaya Poo and the Chinese community as well as the Turkish community in Indonesia.

As described above, Chinese and Turkish communities have participated ion in public debate observed in at a community level. They retain their rights to raise their voice in the public sphere. A minority tried to establish their own solidarity to collect a critical mass of people for effective participation. In my examples, Murdaya Poo and the *Hizmet* group were able to move effectively because of the bottom-up support from their constituents. Murdaya Poo and his Chinese-Indonesians community encouraged Indonesian Government to have an anti-discrimination law. The Hizmet group that consists of hundreds Turkish families attempted to safeguard their fundamental rights in Indonesia. On many occasions, numbers have been important in yielding a political power and heroism to adequately confront injustice. Without a doubt, power

[416] Discussion with members of the National Commission of Human Rights of Indonesia, Siti Noor Laila and Roichatul Aswidah in November 2016.

can be measured through how many people involved and the quality of the opinions is brought by political actors.[417]

3.2.4 Demonstration: citizens' initiative or anarchy?

If there is an infringement of the norms for the government and legal protection of ethnic minorities, the implementation of good governance has failed. Of course, 'the power of the people' always sounds appealing. Heroism and idealism were inspirational to the 1965 revolution and the 1998 reforms and the accompanying mass student demonstration. But what about mass demonstrations where the main message is one of racial hatred? Rizieq Syihab and Basuki Tjahja Purnama (Ahok) share similar attitudes towards the Quran; both have publicly stated 'please do not be lied to on the basis of the Quran.' Nevertheless, only Ahok was prosecuted for blasphemy according to Article 156 of the Criminal Code—and why? Because he is Chinese and he is Christian. Perhaps, in reality, the Indonesian criminal justice system has become a criminal racist system.

This case arose after Ahok gave a speech about the cultivation program in the thousand islands in which he cited the Quran. In fact, he did not intend to discuss the Quran; his main objective was promoting the Jakartan Government's fishing cultivation program. But, during his speech, he claimed that the Quran may be used to convince people to not vote for him. His speech was recorded and uploaded in to YouTube and broadcast over social media. Some Muslim Indonesians felt that his speech was blasphemous and arranged a huge demonstration.

A mass demonstration of Muslims formed despite Ahok's public apologies. He had no intention of hurting anyone, especially the Muslim community. Nonetheless, right wing Islamic groups protested on October 21, 2016. During this protest, hate speech was spread on posters, graffiti, and online during the demonstration. The mass demonstration against blasphemy was in fact an anti-Chinese movement, as revealed by posters and leaflets used phrases reading 'expel Chinese,' 'Chinese pervert,' 'the dangers of Chinese,' etc. Meanwhile, police of-

[417] Alain Badiou, *Metapolitics*. London & New York. Verso, 2005, p. 60.

ficers responded cautiously and carefully to the demonstration. Tito Karniavan, the head police officer, guaranteed the demonstrators' freedom of expression but cooperated closely with Gatot Nurmantyo TNI Commander in ensuring that the mass demonstration did not descend into anarchy.

Although Indonesia issued Law No. 40 of 2008 on the Eradication of Racial discrimination, it is rarely used in the Courtroom to combat hate crime and racial discrimination. Article 16 of Law No. 40 of 2008 stipulates that the punishment for hate speech and spreading racial hatred is imprisonment for five years and a fine sum of 500 million rupiah. Article 16 has only been used twice between 2008 and 2016.The first was the so-called Obor Rakyat case, when Police officers investigated the Obor Rakyat newspaper after it printed the headline 'Jokowi is the son of a Chinese bitch!' The second use of this article was in response to the publication of a book entitled 'Jokowi Undercover.' The police decided that statements in the book could qualified as a hate crime in accordance with Article 16, but the public prosecutor dropped the case.

Similarly, the police neglected to cite article 16 following this mass demonstration by the Islamic Defenders Front (Front Pembela Islam/ FPI) and its allies on 21st of October. Racist campaigning and hate speech dominated this demonstration. But despite these crimes, no one was prosecuted. The mass demonstration against blasphemy, demanded that the police arrest Ahok. By November 4, 2016, the mass demonstration flooded the centre of Jakarta. A million people came to Jakarta to join the demonstration. Unlike previous demonstrations, this protest was orderly and peaceful. Public figures like Aa Gym (Abdullah Gymnastiar) and his students, helped with the clean-up operation after the demonstration. This was a much more sympathetic demonstration. The anti-Chinese sentiments largely disappeared. Even so, racist posters and graffiti reading 'destroyer of Indonesia,' 'heathen,' 'blood for religion,' 'ready for holy death,' and so on were found after the protest. Towards the end of the demonstration there was some rioting, fighting against the police, and burning of cars.

This demonstration took place during a local election in Jakarta, the Jakartan Gubernatorial election of 2017, and marked a peak in the volatility of recent Indonesian politics. The results of the first round of voting are as follows: Agus Harimurti Yudhoyono and Sylviana Murni obtained 17.05% of the vote (939, 609 votes), Basuki Tjahaja Purnama and Djarot Saiful Hidayat received 42.91% of the vote (2,357,587 votes), and Anies Rasyid Baswedan and Sandiaga Uno received 40.05% of the vote (2.200.636 votes). Because no overall majority was secured by any of the candidates, a second round of voting took place. On 19 April 2017, the second round of voting found the winners were Anies and Sandiaga who received 57% of the vote (3,240,332 votes) whereas Basuki and Djarot only got 42.05% of the vote (2,351,245 votes).[418] The mass demonstrations almost certainly contributed to Ahok's defeat in this Jakarta Gubernatorial Election.

Indonesian Muslims rallying against Ahok formed a mass demonstration on 2nd December 2016 and afterwards.[419] Large numbers of Muslims in white Islamic dress marched in the centre of Jakarta. Their protest called for the police to detain Ahok for alleged blasphemy. These demonstrations influenced Ahok's defeat in the Jakarta gubernatorial election of 2017 and resulted in him being imprisoned for two years after he was found guilty of blasphemy. His Chinese-Christian identity played a significant role in the demonstration, election campaign and court hearing. For security reasons, the Court had to be moved to another location, namely the demonstrations in Ragunan, South Jakarta. The blasphemy case rested upon a part of a speech, he gave to citizens

[418] Electoral Commission of Jakarta (2017).

[419] My observational field notes from the middle of demonstration. On 2nd December 2017, I came to the street in Monas where the demonstration took. At 9:00 am the orators already started to speak through sound systems which equipped in many places. I saw many flags held by people. Flags that I could recognised were those of the Islamic Defence Front (FPI), Hizbut Tahrir Indonesia (HTI), Muslim Students Association (HMI), and many other Islamic communities. Many brochures, leaflets, posters, and pictures used slogans and propaganda such as 'blood for Holy Quran,' 'Dignified life or syahid (victory) death,' 'detain Ahok,' 'Go to Hell Communism,' etc. I realised that many truck and busses that were parked nearby had which come from outside of Jakarta. There was also a speech about claiming that the Santa Claus hats in supermarkets during the Christmas period violates the principles of Islamic values.

of the of Thousand Islands regarding a fish cultivation program; 'in your heart, you might feel that you could not vote for me, because somebody lied to you using Surah al-Maidah, verse 51. In doing so, you did not need feel guilty, because you are being fooled. Don't you agree with me?[420]

Because of this speech, Ahok was prosecuted for blasphemy. The Court delivered verdict that Ahok had committed to blasphemy and would be sentenced to two years in prison. There are several aspects about the court's verdict in the Ahok case that should be examined. Firstly, factual considerations by judges about witnesses. The judges seemed to privilege report witnesses such as Habib Novel Chaidir Hasan, Gusjoy Setiawan, and Pedri Kasman.[421] Meanwhile, the eyewitnesses who were present (such the urban village head of Panggang Island and some fisherman) when Ahok delivered his speech did not consider the speech blasphemous, and only remembered Ahok's remarks about the fish cultivation program.[422] Furthermore, report witnesses (e.g. those who did not attend Ahok's speech, but watched it on social media platforms including facebook, youtube, whatsapp, etc) were more likely to believe that Ahok committed blasphemy. Second, the judges cited Constitutional Court's verdict No. 65/ PUU. VIII/ 2010 which stipulates that the witnesses must have experienced the event personally. Despite this, the judge categorised the report witnesses (who did not have any personal experience of the case) as primary witnesses—even people who watched videos of the speech were categorised as eyewitnesses by the Constitutional Court. Third, interestingly, the judges heard from expert witnesses in religious studies who tried to interpret the use of the word 'auliya (leader, friend, family, etc) in Al-Maidah verse 51 of the Holy Quran. It was interesting to note how far the judges went to understand the interpretation of 'auliya' as one of their main

[420] North Jakarta District Court's verdict Number 1537/ Pid. B/ 2016/ PN. Jkt Utr., p. 607.

[421] North Jakarta District Court's verdict Number 1537/ Pid. B/ 2016/ PN. Jkt Utr., p. 595.

[422] North Jakarta District Court's verdict Number 1537/ Pid.B/ 2016/ PN. Jkt Utr., p. 596-598.

considerations. Normally, the judges use regulation and evidence alone to issue a verdict rather than a wider variety of legal texts (e.g. books and journal articles). Fourth, the judges attested that Ahok, in accordance with Article 156a, engaged in improper conduct on purpose. On many occasions, Ahok had mentioned Al-Maidah verse 51. One example, was in a reference to a Mosque development project, when he mentioned the Wi-Fi network was named 'Al-Maidah 51' and had 'kafir' as its password. Fifth, the judges argued that holy books of any religion must be respected. Furthermore, the judges reminded Ahok that, as a public servant, he must preserve his integrity and politeness. Lastly, that the judges made the absurd argument that a request to refrain from voting for a leader of a different religion is legal—, and cannot be labelled racism—if this is not racism, I ask, what is?"[423]

From the above case, we can learn that discrimination is not only suffered by ethnic minorities from lower and middle-class society. Ahok provides an example of discrimination affects the upper class. At the same time, discriminatory movements can be used in politics and to win elections. Although it is difficult to conclusively prove direct causality of the influence religious populism on electoral success, the Ahok case is an example of how an anti-blasphemy demonstration affected his defeat in an election. Additionally, his case was prosecuted by the judges who have made imbalanced considerations and showed a poor understanding of ethnic sensitivity.

3.2.5 The CLEAR method: a case study of Yogyakarta

As I elaborated in chapter 2, the CLEAR Method can be used as an instrument to observe and measure public participation with regards to strengthening norms for the government and legal protection of ethnic minorities which is comprised of 1) capacity; 2) commitment; 3) organisation; 4) proper conduct of administration; 5) response of administration. I use this tool to analyse the case of land ownership in Yogyakarta. The problem originates from Deputy Governor's letter No. K.098/I/A/1975 which stipulates that the Governor of Yogyakarta forbids non-

[423] North Jakarta District Court's verdict Number 1537/ Pid.B/ 2016/ PN. Jkt Utr., p. 609.

native Indonesian citizens from land ownership. This letter aimed to provide 'an affirmative action' to make more opportunities for native Indonesians to own their own land. This letter was issued on March 5, 1975 and became the main legal basis for prohibiting of Chinese-Indonesian people from acquiring a land title registration.[424]

The CLEAR method can be used to explore some dimensions of this case. *First,* can citizens participate in policy making process and submission of complaints? The most affected targets of this policy are Chinese-Indonesians who live in Yogyakarta. They are mostly educated people and are aware of legal procedures that can be used to resist this policy. Several times, they have submitted letters of complaint to the of Yogyakarta. By sending these letters, Chinese-Indonesians in Yogyakarta have made an effort to communicate with the Governor of Yogyakarta. Crucially, Yogyakarta has obtained special rights to self-government as a quasi-kingdom within Indonesia. Thus, the Sultan also acts as Governor.

Second, Chinese Indonesians are devoted and committed to participation. They strived to send a letter to the Governor of Yogyakarta concerning their exclusion from land ownership. Unfortunately, the Deputy Governor's letter continues to be used as the legal grounds for forbidding Indonesian citizens of foreign descent from owning land. On September 11, 2015, the Yogyakarta Land Agency (a district or municipality level agency) sent a letter to the Provincial Land Agency to request a more detailed explanation. A complaint was sent by Tan Susanto Tanuwijaya who brought sum of land with the size of 1066 m^2, but the Yogyakarta Land Agency referred to the deputy governor's letter concerning 'unification of policy on giving land titles to non-native Indonesian citizens.'[425] As a result, Tan Susanto's right to land ownership was rejected, despite the absence of any national regulation prohibiting Chinese-Indonesians from owning land. As an Indonesian citizen, Tan filed an administrative complaint expressing his disappointment that his restriction from land ownership was based grounds of ethnicity.

[424] Deputy Governor of Yogyakarta's letter No. K.098/I/A/1975. On March 5, 1975.

[425] The District of Yogyakarta Land Agencies' letter No. 1087/34.71-300/VIII/2015, September 11, 2015.

Third, the system for handling objections, complaints and participation provided by the Governor of Yogyakarta is insufficient to facilitate complainants or people engaged with renewing public policy. The Land Agency in Yogyakarta does not provide a channel to receive objections from citizens concerning the prohibition of Chinese-Indonesian from owning land. Moreover, the District of Bantul Land Agency also continued in 'quasi surveillance' of land buyers; if a land buyer looks like an Indonesian citizen of Chinese descent, they may receive different treatment. For instance, the District of Bantul Land Agency would change a land title from 'right to ownership' to 'right to use' after a Chinese-Indonesian registered a title. Furthermore, a letter issued by the District of Bantul Land Agency stated considerations of the letters such as 1) after analysis, the land buyer was found to be an Indonesian citizen of Chinese descent; 2) until the present time, our actions are based on the Deputy Governor's letter concerning unification of policy for giving land titles to non-native Indonesian citizens, and Supreme Court's verdict No. 56/TUN/2003 of May 18, 2005[426] (I describe this case law later). Some Chinese-Indonesians have tried to submit complaints, but they have not received a reasonable response. The District of Bantul Land Agency just simply referred to Deputy letter repeatedly without adequate explanation. Hence, the channel of the principle of participation is blocked and there are no appropriate local administration procedures for reviewing the policy, apart from sending a letter.

Fourth —are people asked to participate? In the Yogyakarta case, the Governor of Yogyakarta, Hamengkubuwono X appeared defensive of his policy. Not all letters received a response from the Governor - despite the fact that it is a legal requirement. One reply by the Governor (in response to a letter by a Chinese-Indonesian) stated the following 'in response to your letter on September 17, 2010, we argue that the Deputy Governor's letter concerning 'unification of policy for giving land titles to non-native Indonesian citizens' is still in effect and has not been amended. Therefore, we regret any inconvenience caused by prohibi-

[426] The District of Bantul Land Agencies' letter No. 1917/ 8- 34. 02/ IX/ 2005. On September, 2013.

tion of land ownership for non-native Indonesian citizens. Hence, your objection concerning land ownership has been rejected."[427] The support that this reply lends to the Deputy Governor's letter is problematic because it continues to exclude Chinese-Indonesians from owning land.

Regarding the issue of prohibition of owning land, Chinese-Indonesians who live in Yogyakarta and have been affected by the Deputy's letter tried to request help from the National Commission of Human Rights. Shortly after, the Commission made a recommendation stating that the Deputy Governor's letter of 1975 violated human rights. Therefore, they insisted that the Governor of Jakarta should withdraw the letter and cease implementing this discriminatory policy. The Commission attempted to mediate the conflict between Chinese-Indonesian citizens and the Governor of Yogyakarta, however, the Governor of Yogyakarta rejected the Commission's invitation. The Governor claimed that the Deputy Governor of Yogyakarta's letter contained an 'affirmative action' (often used for the protection of vulnerable people such as children, women, elderly people, people with disability, and ethnic minorities), this letter was issued with the intention of protecting the vulnerable and poor Indonesian natives, and ensuring that they had sufficient land. Therefore, he claimed that this letter was not discriminatory However, the Commission insisted that this claim is false, and that the governor's definition of 'affirmative action' was misleading— his actions did not benefit vulnerable groups. The Commission defines affirmative action as action that is used to empower vulnerable people by addressing legal barriers and unequal treatment. Furthermore, the rights of citizens, can only be limited by national regulation; as such the Deputy Governor's letter is not sufficient legal grounds to limit the rights of Chinese-Indonesians.[428]

Over time, public pressure requesting the repeal of the Deputy Governor's letter has been growing. Until 2014 only 10 complaint letters had been submitted to the Commission and approximate-

[427] Governor of Yogyakarta's letter no. 43/ 3703. On November 5, 2010.

[428] The Indonesia National Commission of Human Rights' Letter No. 037/R/Mediasi/VIII/2014.

ly 3 letters have been sent to the Ombudsman regarding this issue. Moreover, the provincial parliament indicated they wanted to use their autonomy from the rest of Indonesia to issue new local regulations that would have similar implications to the Deputy Governor's letter. The Yogyakarta Government decided to make a local regulation to strengthen their authority to manage land. Responding to this initiative, many Indonesian citizens of Chinese descent organised themselves to resist the draft of this local regulation. The Yogyakarta Land Solidarity Forum for Indonesians (Forum Peduli Tanah DIY demi NKRI) was instrumental in opposing the racist policies that were established in Yogyakarta under Chairman of Ir. Zealous Siput Lokasari and its secretary, Hari Purnomo, Chairman I Agus Indriarto, and Chairman II Willie Sebastian. They wrote an open letter which was published in the Java Post, appearing as a full page spread on page 9. This forum discovered that the current Governor of Yogyakarta and the local parliament were responsible for the foreclosure of land belonging to Chinese-Indonesians. Meanwhile, according to *Sultan Grond* (SG) and *Rijksblad* 16/1918 the Dutch Colonial Government gave the lease of the land right to the Governor of Yogyakarta. After independence, all land became the property of the Indonesian Government. Furthermore, Indonesian Agrarian Law No. 5 of 1960 stipulates that all land belongs to the Indonesian Government. However, the draft of local regulation, that intended to return ownership of colonial territory to the Governor of Yogyakarta. Hence, the Yogyakarta Land Solidarity Forum for Indonesians protested against the draft of distinguished status of Yogyakarta. They sent a critical letter which was published on November 26, 2016.[429] In accordance to this protest, the chairman of this association made the following statement.

The Governor of Yogyakarta's policy constitutes racial discrimination in the form of misuse of power and violations of state-ideology and the Indonesian Constitution. Additionally, the Indonesian National Commission of Human Rights has recommended that the Governor

[429] *Forum Peduli Tanah DIY demi NKRI Forpeta NKRI*. Surat terbuka. Jawa Pos, November 28, 2016.

should abolish this racially discriminatory policy, unfortunately, the Commission's recommendation has been ignored by the Governor."[430]

This prohibition of land ownership was not only contested through administrative complaints, but also in Court. Cassation on Supreme Court concerning the appeal sent by Handoko, an advocate who lives at 153 Tamansiswa Street, Yogyakarta. He challenged the Deputy Governor's Letter which made distinctions between native and non-native Indonesian citizens. In Handoko's opinion, the Deputy Governor's letter resulted in arbitrary treatment, misuse of power and discrimination against non-native Indonesians. Unfortunately, the Supreme Court's verdict supported previous lower court decisions which stated that the Deputy Governor's Letter was not a product of regulations (i.e. this letter was not qualified as an administrative decision). But as an appellant in the judicial procedure, Handoko was doomed to lose and pay the court's fee. This verdict is nonsensical. First, it says that the Deputy Governor's verdict cannot be classified as law — but why does not the Court declare that this letter has no legally binding powers or consequences? It should follow that any letter that does not qualify as a legal product, also does not have any legally binding powers. It means that every instance of restricting instance of Chinese-Indonesians from owning being land in Yogyakarta has been an illegal act.[431] However, the Court stated that Handoko was the party who lost in the case. Moreover, Handoko has continued to fight against discriminatory public policy. He argues 'if racism still exists in this world, a racist government is worst."[432]

Finally, the response of the administrative authorities has not been sufficient to solve problem of discriminatory land ownership policy in Yogyakarta. Furthermore, in the Court's verdict, the Governor of Yogyakarta proposed several exceptions to the Court: 1) the Deputy

[430] Ir Zealous Siput Lokasari, Chairman of Yogyakarta Land Solidarity Forum for Indonesian (FORPERTA) and Finance manager of Indonesian People for Anti-Discrimination (GRANAD) on 8 November 2017.

[431] Indonesian Supreme Court No. 179 K/ TUN/ 2017.

[432] Interview with Handoko on 8 November 2017, a plaintiff of case law against Deputy Governor.

Governor's letter cannot be subject to appeal through the Administrative Court. Subjects of appeal must be concrete, individual and final. Yet, I argue that in practice the Deputy Governor's letter fulfilled all requirements to sue in the Court; 2) the appeal seemed to be shaky and unclear; 3) the ninety-day period in which appeals can be filed has passed. The Deputy governor's letter was published on March 5, 1975; thus, more than ninety days have passed meaning the time for appeal has expired. Moreover, the Court agreed with the Governor's argument that the Deputy Governor's letter was a discretionary policy according to Article 1:9 of Governmental Administrative Act No. 30 of 2014. The logic of the administration authority's responses to the appeal is bizarre and difficult to understand or accept.

Last but not least, the CLEAR method can be used to create an overview of the case of land ownership in Yogyakarta; the capacity of Chinese-Indonesians who have suffered under discriminatory land ownership policy is sufficient for them lodge a complaint through the administrative authority and followed with an appeal to the courts. However, the channels of participation within the administration are limited, and the response of the administrative authority is inappropriate to resolve the issues of the discriminatory policy.

3.2.6 Provisional findings

This section elaborated upon the good governance principle of participation and its implementation with regards to fulfilment of the norms for the government and legal protection of Chinese and Turks in Indonesia. The principle of participation has been specified in more detail in the context of citizen panels, community-level participation and has been evaluated using the CLEAR method. Ethnic minorities are able to submit an appeal or complaint to the courts, the Indonesian Ombudsman, or the Indonesian National Commission of Human Rights. Besides the exertion of the constitutional motive by ethnic minorities, the effect of participation on decision-making law by ethnic minorities has been very influential some time ago and since the beginning of Indonesian independence.

Since the 1945 revolution, ethnic minorities have been involved with participating in governmental law-making process. The Chinese community widely participated in these procedures during the Consultative Body on Indonesian Citizenship/ Baperki was established in 1954. Baperki is best defined as a citizen's panel, comprising of large numbers of people involved in mass communication that present recommendations to the administration. One such important recommendation is for an equal treatment of citizens without discrimination in the arenas of law, politics, society, economics, culture, etc. Citizen's panels are also seen in the activities of Pasiad. Generally speaking, Pasiad is an organisation of Turkish descent in Indonesia that has effectively participated in education and government. Pasiad built many schools and has actively participated in providing recommendations for the public policies regarding education. This example demonstrates that ethnic minority communities can exert influence on politics and government, such as the contributions of Pasiad to educational policy reform, and Baperki's insights and influence the idea of citizenship in the 1956-1959 Konstituante and the resulting Act of Citizenship. As a large organisation of Chinese-Indonesian descent, Baperki was successful in reforming Article 6 of the 1945 Constitution which originally stipulated that the president of Indonesia must be a native Indonesian, which instead now states that the president of Indonesia must be an Indonesian citizen. The use of the word 'native' was a form of ethnic discrimination as pointed out by Yap Thiam Hien, the human rights lawyer who was on the front line of those who intervened with the discriminatory formulation of Article 6. He argued that this article must guarantee equality before the law, human rights, and the rule of law.

Lastly, this section elaborated upon citizen's panels, a form of participation that involves a large number of people who participate to formulate recommendations for a public entity. In Indonesia, this type of participation is most evident in the actions of Pasiad and Baperki which have been effective in showing solidarity, and protecting their cultural interests and rights. Another mode of participation can be seen in various other approaches by Turkish and Chinese including filing

complaints to the Ombudsman, the Indonesian National Commission of Human Rights, and the courts. This more direct means of participation can be defined as the implementation of constitutional motives where ethnic minorities use legal channels to protect their own interest.

Another interesting feature of discrimination can be seen in Jakarta Gubernatorial Election and Ahok's case on blasphemy. In this case, religious intolerance was close to discrimination and political strategy to defeat Ahok in Jakarta Gubernatorial Election and blasphemy. Islamic extremist groups rallied for demonstration and protested on arresting Ahok due to his allegation on blasphemy. At the beginning, a mass demonstration attacked Ahok and scattered hate speech. This demonstration had also directly influenced voters and the court to defeat Ahok in election and sentenced him for 2 years in prison. During the Jakarta Gubernatorial Election and until Ahok's court hearing, the demonstrations broadened in scope, and deteriorated into anti-Chinese themes. Despite this, no Chinese-Indonesians took action to submit a complaint through courts and commission.

After the Ahok case, Yogyakarta case is one most obvious case of existing discrimination, and is thus important to be analysed. The Yogyakarta Deputy Governor's Letter has become a legal ground for the prohibition of Chinese-Indonesian land ownership. Despite Chinese-Indonesians protests and complaints through the National Commission of Human Rights, and this Commissions decision this letter that is an improper affirmative action and racist, the Yogyakarta Governor and Land Agency in Yogyakarta continue to prohibit Chinese-Indonesians from owning land.

3.3 The principle of human rights

3.3.1 Introduction

This section discusses the good governance principle of human rights from an administrative law perspective, with particular reference to the right to good governance for Chinese and Turkish people who live in Indonesia. I focus on a few specific cases such as the discrimination of forced changing-name, arbitrary foreclosures of property ordered by the

administrative authorities, and the 1965 and 1998 incidents in Indonesia. In the beginning of this section I elaborate upon the implementation of the right to good governance. Unfortunately, the right to good governance for Turks and Chinese that live in Indonesia is a complicated tale. For example, Chinese-Indonesians in Tangerang often do not have access to a birth certificate, which in turn prevents them from accessing further legal documents such as an identity card, driver's licence, or passport. Furthermore, without a birth certificate, an Indonesia citizen cannot access public service or engage in legal participation. This obstruction is best understood as a structural barrier that thwarts Chinese-Indonesians in Tangerang access to birth certificates. Tangerang has a large administrative problem related to equal treatment for Chinese-Indonesians, many of whom have experienced extreme delays to receiving a birth certificate. For example, Oey Endah, who was born on May 12, 1952 only received her birth certificate at age 64. For more than half a century, Oey lived without such document. Chinese-Indonesians in Tangerang live just like half-citizens without access to education, healthcare, and public services. Without birth certificate and other following documents, they are rejected when trying to access services in Indonesia.

The political climate for Turkish people living in Indonesia is similarly. Political chaos in Turkey in 2016, was followed by mass killings, detention, press censorship, disbandment of schools, and mass terminations. These effects were felt as far away as in Indonesia where the Turkish embassy conducted a witch-hunt of the *Hizmet* community (Gulen followers in Indonesia). In fact, in Indonesia, there have been death threats, robberies, disbandment of schools, illegal surveillance, and after the Coup d'état. A political purge by the Turkish government and interventions by the Turkish Embassy in Jakarta caused some problem for Turkish people to face difficulties by administrative authorities in Indonesia. For instance, the Turkish Embassy withdrew the passports of suspected *Hizmet* supporters, causing immigration problems within the jurisdiction of Indonesian law. Without a passport, a Turkish person cannot complete their residence permit or visa in Indonesia. In one other case, a new-born Turkish baby had their Turkish passport application

rejected by the Turkish Embassy in Jakarta, causing another problem with immigration law. Without a passport, this baby is stateless.

This section also explores the discrimination of changing-name in the context of the good governance principle of human rights. Under Soeharto's New Order administration, it was suggested that Chinese-Indonesians should change their names from a 'Chinese name' to an 'Indonesian name.' Other issues include cases of arbitrary foreclosure by the administrative authorities and military forces of Chinese buildings, property, and land. The final cases described in this section are the crimes against humanity of 1965 and 1998. The victims of these incidents were not only Chinese, but also hundreds of thousands of Indonesian natives. However, (as discussed earlier in this research) Chinese-Indonesians were just one of the many groups that were victimised. The cruel discrimination and criminal offences which have not yet been solved are a result of the lack of commitment of the government to good governance and rule of law.

3.3.2 The right to good governance of Chinese people

Observing the principles of good governance is a maxim to optimise the fulfilment of non-discrimination, impartiality, objectivity, fairness and responsive bureaucracy.[433] Indeed, good governance is a legal concept that encourages the strengthening norms for the government and legal protection of ethnic minorities. In Indonesia regulations such as the Act of Citizenship (Law No. 12 of 2006), Civil Administration Act (Law No. 24 of 2013) and General Principles of Governmental Administration (Law No. 30 of 2014) are adequate to foster the existence of the right to good governance. In essence, these laws, are similar to Article 41 of the Charter of Fundamental Rights of the European Union which stipulates the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions; the right to be heard, the right to have access to his or her file, the right to get replacement for any damage, and language rights. However, many prob-

[433] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 123.

lems in Indonesia have arisen due to a lack of administrative justice in Indonesia; one example concerns undocumented people with uncertain legal status. Many citizens in Tangerang do not have sufficient access to equip themselves to obtain administrative necessities such as identity cards, birth certificates, and other important documents. This problem can easily turn into 'soft' discrimination or unequal treatment.[434] This section will elaborate on how important government activities are to ensure administrative justice, and the extent of the government's commitment to guaranteeing the right to good governance.

Good governance is a valuable instrument that can help people to access their fundamental rights through suitable procedures and ensure the proper conduct of governments. One particular example which I will elaborate upon is the right to g obtain a birth certificate. A birth certificate, for example, is a gateway document which a citizen can use to support applications for other legal documents. With sufficient documents, everyone is able to access education, healthcare, public services, etc. Many Chinese-Indonesians in Tangerang do not have a birth certificate or did not have a birth certificate for a long time, and thus experienced difficulties when trying to access public service. The Benteng Chinese have been in Tangerang for many years. 'Benteng' means 'fortress' in Indonesian, and is used to refer to residents of Tangerang who are of Chinese descent. For many years, many have not been issued birth certificates, and as a result, do not have proper access to their fundamental rights. For instance, they experience difficulties when trying to access healthcare, open a bank account, enter education, etc. Fortunately, the Institute for Citizenship (an NGO which campaigns on issues of citizenship and equal treatment, and has connections with the administrative authorities) can provide assistance in finding a solution. Furthermore, Civil Registration Affairs also launched a program in 2012 to register all people regardless of their ethnic background.[435] Since the program began, thousands of people have been registered and acquired their birth certificates.

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[434] Stephen May, et al, *Ethnicity, Nationalism, and Minority Rights*, Cambridge, Cambridge University Press, 2004, p. 3-5.

[435] Interview with Eddy Setiawan, a senior researcher at the Institute for Citizenship in August 2017.

The Institute for Citizenship undertakes advocacy work in the Benteng Chinese region. Although they mainly provide assistance with the registration of Chinese people, they also support native Indonesians people who have similar problems with acquiring birth certificates. The Institute for Citizenship has been cooperating with the Civil Registration Affairs to ensure that every resident has a certificate.[436] Hence, the role played by Civil Registration Affairs is crucial in the fulfilment of the right to good governance. In addition, civil registration affairs provide an additional public service by registering as many people as they can, after they have received assistance from the Institute for Citizenship.

The Institute for Citizenship has now been incorporated with Civil Administration Affairs for many years. They offer legal assistance in several cities such as the city of Tangerang (Kota Tangerang), the District of Tangerang (Kabupaten Tangerang), South Tangerang, Lebak, and Serang. The Institute for Citizenship also tried to work in Cilegon, however the volunteer team did not succeed as planned, and thus the program of birth certificate registration could not proceed.[437] The Institute needed many volunteers to assist with delivering this program, but only a small number of volunteers could be recruited. The area where the Institute for Citizenship operates is quite large, which is testament to the commitment of the Minister of Justice and Human Rights and the Minister of Interior Affairs to fulfilling everyone's right to a birth certificate. The sheer number of people requiring administrative help, and the fact that this population is spread over many cities poses a huge challenge for the Institute for Citizenship. The institute also performs similar advocacy work in other regions such as West Java, especially the Cities of Bekasi and Bogor.

Many Chinese-Indonesians who do not have birth certificates, such as the Benteng Chinese community, have experienced serious administrative difficulties. In literature, people who live without documenta-

[436] Interview with Indradi Kusuma, a general secretary at the Institute for Citizenship in September 2016.

[437] Interview with Eddy Setiawan, a senior researcher at the Institute for Citizenship in August 2017.

tion live a life without legal certainty.[438] At the level of international law, there are many human rights instruments to support undocumented people, but in Indonesia access to public services requires documentation. In this sense, the right to good governance can only be applied when people have fundamental rights to acquire birth certificate regardless of ethnicity, religion, social status, economic class, etc. Thus, the government must provide a system which ensures everyone can obtain a birth certificate. The right to good governance can empower people to intervene with government policy and action. In other words, the rights to good governance also can be interpreted as the rights to freedom from arbitrary administration.[439] Moreover, in the past, the administrative authorities have even refused to provide public service to Chinese-Indonesians. However, the report on Law No. 40 of 2008 by the National Commission of Human Rights (described in detail in the previous section) also illustrated the administrative law barriers that the Benteng Chinese faced. In the 2011 report on anti-discrimination law, the Commission found that although identity card applications are free, members of Benteng Chinese community were being charged a sum of 80,000 IDR.[440] This extortion of minorities by administrative authorities showed that the right to good governance had deteriorated even further. Members of the administrative authorities felt as though that they had more power, and thus were of a higher social class than 'ordinary people.' In other words, these administrative authorities looked down the people, they were supposed to serve. This, in turn, fuelled their tendency to become corrupt and oppressive. For example, several instances of the extortion of Benteng Chinese people were included in

[438] On the issue of refugee law, Seyla Benhabib avowed that between 1920-1935 the definition of a refugee was a person who was no longer offered legal protection by their state of origin. Sadly, it is often difficult for immigrants to enter Western countries where they hope to build a better life. Moreover, in international law discourses, one equipped with travel documents could cannot be a subject of international law. The concept of sovereign state is much stronger than any humanitarian reason. Seyla Benhabib, *The Rights of Others Aliens, Residents, and Citizens.* Cambridge, Cambridge University Press, 2004, p. 68.

[439] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 11-15.

[440] The Working Group for the Report of Discrimination. Indonesia Human Rights Report of the 2011 on Law No. 40 of 2008, Indonesia Human Rights Commissions.

the 2011 report of the National Commission, in which the victims acted as witnesses of the violation of anti-discrimination law. In this report, the Commission wrote:

> The extortion of four Benteng Chinese by public servants was announced by the witnesses in a public press broadcast on television channel of 'Trans 7,'. Following this appearance, the witnesses were invited to meet the urban village head of Mekarsari and Neglasari. At this meeting, all four witnesses were threatened and pressured by the sub-district head of Mekarsari and Neglarasi who angrily requested evidence of their complaint. Because the witnesses have sufficient proof, they were helped to acquire their identity cards. During the investigation by the Commission, the witnesses were asked to remain anonymous because of concerns about their security. [...] Meanwhile, the Municipality of Tangerang asserted that no discrimination occurs in the process of identity card applications, and that the investigation would prove their innocence. In other words, the Municipality of Tangerang does not legally recognise the existence of the term 'Benteng Chinese.' According to four people who do not have access to an identity card, it may trigger from the application by third party and incomplete documents requirement. [....] The Municipality of Tangerang claimed there is no discrimination toward the Benteng Chinese, because many of residents follow the municipality program that they call 'Multiguna' which provides social security to every resident in Tangerang including to (a) free health care at 25 hospitals (b) free education.[441]

The four witnesses who reported extortion by public servants whilst applying for an identity card represent only a small portion of the number of people who have not been able to obtain an identity card in Tangerang. These people need proper administrative authorities. Essentially, a progressive and responsive administrative authority is required to solve such a serious problem with administration, and to ensure that no single resident is without an identity card. Therefore, the right to good governance is relevant to the application process for birth certificates and identity cards. Owning an identity card and birth certificate is a right of all residents, and so it is the obligation of the government to provide the service for each resident's application. Nevertheless, the reality in Mekarsari and Neglasari shows this does not always happen.

If the government had integrated the right to good governance into legal norms in legislation, the aforementioned cases of Mekarsari and

[441] The Working Group for the Report of Discrimination. Indonesia Human Rights Report of the 2011 on Law No. 40 of 2008, Indonesia Human Rights Commissions.

Neglasari would have not occurred. The right to good governance, in essence, appears in the Act of Citizenship. The Act of Citizenship declared that all citizens would receive equal treatment (Article 2 of Law No. 12 of 2006). As such, public services must be provided to all citizens regardless of ethnicity, race, religion, social class, economic, gender, and sexual orientation in accordance with this Act. Furthermore, this Act stipulates that citizens should be able to access public services. Supposedly, the Benteng Chinese people in Mekarsari and Neglasari are Indonesian citizens who are eligible for public services from governmental bodies. It is a moral normative maxim of government to deliver a good quality of public service in accordance with another equally important law: The Government Administration Act, Law No. 30 of 2014. This Act obliges the administrative authority not only to obey the statutes, but also to listen to the voice of society (Article 7 point 2f), provide public information to the people (Article 7 point 2g), and to issue governmental policy in according to the needs of society (Article 7 point 2j). If citizens have a problem with an administrative barrier, the administrative authority also has space to use 'discretion' (Article 1 point 21 or Article 93). Article 9 of Government Regulation No. 48 of 2016 provides guidelines to the government to prevent arbitrary treatment. The situations in Mekarsari and Neglasari requires a smart, creative and progressive administration that observes their obligation to deliver public service (Law No. 25 of 2009 concerning Public Service). Furthermore, the Civil Administration Act also mandates the government to record and deliver identity cards and birth certificates to all residents. A birth is a special event according to the statute of civil administration, therefore it must be recorded, noted, and copied onto a birth certificate (Article 27 of Law 2013). The duty of civil administration affairs is to record every special event such as the birth of a new-born baby (Article 32) and to deliver at birth certificate (Article 33 of the Governmental Regulation No. 37 of 2007). The administrative authorities always provide residents with data and public services, which now also supported with electronic residence cards (the Government Regulation No. 102 of 2012).

The resources of the administration are sufficient to help people to deal with administrative residence problems. There is adequate legal ground to support people in Mekarsari and Neglasari to access public services. Even though suspected discrimination was contested by the Municipality of Tangerang, unequal service is still present in the public sphere. Benteng Chinese are well known as a community who have been neglected by the public services of administration.

In many instances, an intermediary agency can play an important role in solving an administrative problem. Forthwith, the Institute for Citizenship is an equally important organisation which can support people to deal with administrative law problems. Hereafter, the Institute for Citizenship is not only concerned with helping the Chinese people, but all citizens regardless of ethnic background. Thus far, the government has focused on providing birth certificates to citizens of age 0-18, but the Institute for Citizenship and its volunteers (around 10 volunteers) are trying to help as many people of all ages as they can.[442]

After the Institute for Citizenship began providing legal assistance for undocumented persons, there has been positive changes and administrative progress. For instance, Tangerang Civil Registration Affairs issued a birth certificate to Theresia Leonie, a baby who was born in Tangerang on July 22nd, 2014. This certificate was issued a year after Theresia was born.[443] Supposedly, a new-born baby should obtain a birth certificate once they are born, but Theresia received her birth certificate one year late.

Furthermore, with legal assistance from the Institute for Citizenship, the Tangerang Civil Registration also released the birth certificates of people who were born in 1980s, over twenty years ago. For instance, Selven, born on August 18, 1987;[444] Budiyanto, born on May, 28, 1980;[445]

[442] Interview with Eddy Setiawan, a senior researcher at the Institute for Citizenship in August 2017.

[443] Excerpt of Birth Certificate No. 3603-LT-23062015-0082.

[444] Excerpt of Birth Certificate No. 3603-LT-31082015-0247.

[445] Excerpt of Birth Certificate No. 3603-LT-11102015-0152.

Yusman, born on June 11, 1982;[446] Mei Lan, born on May 28, 1981;[447] Cimoy, born on May 25, 1982;[448] etc. Most of these examples are of people with Chinese names who only just obtained their birth certificate, even though they were born over twenty years ago. Of course, in addition to people with Chinese names such as Mei Lan, Cimoy, etc, there are other examples such as Yusman, Budiyanto (which are common, 'Indonesian-sounding' sounding names in Indonesia) who have also experienced administrative difficulties. In addition, The Institute for Citizenship also helped people who were born in the 1960s and had not yet been issued a birth certificate. Lin Cin Ok[449] , born on April 20, 1969 was also assisted by the Institute for Citizenship. Lin Cin Ok, the fourth son of Tan Lian Nio, acquired his birth certificate on October 20, 2015, at the age of 48. Even more extreme was, Oey Endah[450], born on May 12, 1951, who obtained her birth certificate aged 64 years old. This delay in providing birth certificates is an example of a suspension of the right to good governance. A birth certificate is a document which should be provided to people at birth. However, many Benteng Chinese in Tangerang, received their birth certificate late.

As the cases above show, administrative problems are one of primary legal barriers that prevent people from enjoying their rights. I believe that the enjoyment of rights, life, liberty and pursuit of happiness should always be at the heart of modern politics. Many scholars argue that proper institutional expressions of emancipation and human rights can foster a better life for human beings.[451] In all the above cases, I have

[446] Excerpt of Birth Certificate No. 3603-LT-29052015-0314.

[447] Excerpt of Birth Certificate No. 3603-LT-22102015-0199.

[448] Excerpt of Birth Certificate No. 3603-LT-27092015-0095.

[449] Excerpt of Birth Certificate No. 3603-LT-16102015-0238.

[450] Excerpt of Birth Certificate No. 3603-LT-19092015-0309.

[451] The community-state can be seen as establishing social order since the Greek polis, the Roman City, and the medieval cavities. Even though these are evidence of a natural hierarchy, human beings are still driven to fulfil their own self-interest. Social order is the most important thing, even if it requires a sacrifice of death to maintain and strengthen the sovereign which unlimited, uncontrollable, and total. The American Declaration of Independence began to struggle against tyranny and promote the objectives of The Enlightenment. Firstly, civil and political rights must be imagined for everyone. Costas Douzinas. *Human Rights and Empire. The Political Philosophy of Cosmopolitan*, Routledge, New York & London, 2007, p. 34-36.

concluded that the Tangerang administration did not sufficiently convey this institutional expression of emancipation to all of its citizens. The cases of Benteng Chinese and many others who have been unable to acquire birth certificates are problems which much be solved urgently or the administration risks losing its legitimacy. Legitimacy generates a normative and sociologically informed legal norm which ought to attain the demand of justice.[452] The subordinate position of ethnic minorities results in unequal treatment by public services. Hence, the right to good governance for ethnic minorities has been jeopardised. Furthermore, discrimination, maladministration and arbitrary conduct of administrative authorities are evidence of a failure to provide ethnic minorities with equal treatment.[453]

3.3.3 The right to good governance of Turkish people

The fulfilment of the right to good governance may fortify the norms for the government and legal protection of ethnic minorities. Generally speaking, Turks who are suspected to be involved with the Gulen movement have experienced many difficulties with the Turkish Embassy in Indonesia, which ultimately resulted in further difficulties with the Indonesian government. Whilst we should acknowledge the efforts of the long arm of Erdogan in many countries, we must also recognise that the Indonesian government also caused anxiety of policy for Turks living in Indonesia. The refusal of the Turkish embassy to renew passports for the Turkish people suspected of being part of the Hizmet community has created serious problems. As a result, many Turkish people living in Indonesia have faced complications with Indonesian Immigration Affairs. This has presented a challenge to Indonesian government to

[452] A public standard of legitimacy is required to encourage people committed to democratic principles to distinguish between legitimate institutions and illegitimate ones. Legitimacy assessments can be used to criticise and intervene with governments, and to evaluate if they are fulfilling the fundamental rights of people. Legitimate institutions are those that are committed to solving problem, providing public goods, demonstrating credibility, and arriving at peaceful solutions without conflict. Allan Buchanan, *Human Rights, Legitimacy, The Use of Force.* Oxford, Oxford University Press, 2010, p. 106-108.

[453] John D. Skrentny, *The Minority Rights Revolution,* Cambridge, The Belknap Press of Harvard University Press, 2004, p. 3.

continue upholding the rights to good governance of Turkish people living in Indonesia. On the other hand, many incidents after the failed coup d'état and the human rights violations in Turkey that have required the Indonesian government's commitment to good governance and legal protection.

The Indonesian administrative authorities' commitment to good governance was directly challenged by the Turkish Embassy two weeks after failed coup in Turkey. On June 28, 2017, (as mentioned several times in the above sections, but which I describe here in more detail in relation to the right to good governance) the Turkish Embassy issued a press release recommending the Indonesian administrative authorities to disband some schools that they claimed were affiliated with the Gulen Movement, which they label as a terrorist organisation, —'Fethullah Gulen Terrorist Organization' (FETO). The press release appears below.

> The situation that unfolded in Turkey was an attempted coup to overthrow the democratically-elected Government. This attempt was foiled by the Turkish people in unity and solidarity. The Turkish Armed Forces were not involved in the coup attempt in their entirety. It was conducted by a clique within the Armed Forces and received a well-deserved response from our Nation. Life in Turkey returned to normal on 16 July 2016. Our President and Government are in charge. [...] The Turkish Government will take all the necessary steps to punish the clique that were responsible for the attempted coup. It is clear that the coup attempt was supported by the FETÖ terrorist organisation. This attempt showed the true colours of the FETÖ terrorist organisation and its leader Fethullah Gülen, who lives in the USA. There are a number of schools in Indonesia, which are linked to this terrorist organisation. According to Indonesian officials, their umbrella organisation in Indonesia, i.e. PASİAD was shut down on 1 November 2015. The Embassy, long been expressing concerns about the activities of the FETÖ terrorist organisation in Indonesia to top Indonesian officials. Below is a list of education facilities in Indonesia, which are linked to the FETÖ terrorist organisation:
>
> 1) Pribadi Bilingual Boarding School, Depok
> 2) Pribadi Bilingual Boarding School, Bandung
> 3) Kharisma Bangsa Bilingual Boarding School, Tangerang Selatan
> 4) Semesta Bilingual Boarding School, Semarang
> 5) Kesatuan Bangsa Bilingual Boarding School, Yogyakarta
> 6) Sragen Bilingual Boarding School, Sragen
> 7) Fatih Boy's School, Aceh
> 8) Fatih Girl's School, Aceh
> 9) Banua Bilingual Boarding School, Kalimantan Selatan.[454]

[454] Press release from the Embassy of The Republic of Turkey on June, 28, 2017.

The Turkish Embassy tried to convince the Indonesian government to take action against Gulen movement affiliated schools by declaring them a terrorist organisation. At least, the disbandment of these schools could prove the 'solidarity' amongst the brotherhood. As the Turkish Embassy in Indonesia mentioned, the relationship between Indonesia and Turkey is one of close cooperation in the UN, G-20, Developing-8 (D-8), Organization of Islamic Conference (OIC), and in many other opportunities they have acted in a strategic partnership. Furthermore, the Turkish Embassy also attempted to present countries that complied with the Turkish government's wishes as 'examples of good countries', for example Jordan, Azerbaijan, Somalia, and Niger. The Turkish Embassy also paid a compliment to Northern Cyprus, which they said acted in 'true solidarity' in their support of Turkey. Despite this strong relationship, Indonesia disappointed its Turkish allies, in favour of upholding its own laws and constitution.

If the Indonesian government obeyed the recommendation of the Turkish Embassy to disband the schools, they risked infringing upon people's rights and Indonesian law. For instance, they could risk infringement of Article 28D: 1 of the Indonesian Constitution concerning legal protection and fair treatment, and Article 35 of Law No. 39 of 1999 concerning the right to peace of mind. These articles can be considered the legal grounds for the rights to good governance. Luckily, for now, the Indonesian government has shown itself to be committed to preventing further violations of the right to good governance. The Indonesian Minister of Education, Muhadjir Effendy refused to close the schools because these schools do not belong to Gulen movement, but Indonesian foundations which have been organised by native Indonesian people.[455] Furthermore, the Cabinet Secretary, Pramono Anung, also warned the Turkish government not to intervene with domestic Indonesian politics by giving the recommendation to disband the Indonesian schools.[456] However, the rights to good governance were

[455] *Tolak Permintaan Turki, Mendikbud Pastikan 9 Sekolah Tak Akan Di tutup*. Kompas, 1 Agustus 2016., See also., *Turki Minta Indonesia Tutup 9 Sekolah Terkait Fethullah Gulen, Ini Respons Mendikbud*. Kompas, 29 Juli 2016.

[456] *Diminta Tutup Sekolah, Istana Minta Turki Tak Campuri Urusan Indonesia.* Kompas,

failed on one occasion, Fethullah Gulen Chair (a research centre) in Islamic State University (UIN), Syarif Hidayatullah, Jakarta was disbanded. The University dissolved the research centre after an intervention by the Indonesian Minister of Religion and the Turkish Embassy in Jakarta.[457]

After the failed coup Turkey, Erdogan seized more power. By May 2017, Erdogan's regime had detained approximately 113,260 people.[458] Erdogan has not only violated human rights within his own land, but also abroad. The Stockholm Center for Freedom calls this the 'long arm' of Erdogan, which has reached as far as the US, The Netherlands, Germany—but the security services in these countries have paid attention and effectively protected people from the long arm of Erdogan. This long arm has also played a significant role in Southeast Asia, especially Malaysia, where on October 13th 2016, two *Hizmet* supporters were 'disappeared'— Alettin Duman (49), the founder of Time International School in Kuala Lumpur, and Tamer Tibik (43), a member of the Malaysian-Turkish Chamber of Commerce and Industry.[459] This 'accident' further tainted the of Malaysian government's reputation for protecting international human rights. According to Article 3 of the Universal Declaration of Human Rights (UDHR), everyone has the right to security. The Malaysian government should guarantee this right to every resident who lives on their soil. The close relationship between Erdogan and Najib Razak resulted in an infringement of human rights. Furthermore, illegal practices including kidnapping and forced detention have continued to be tolerated by the Malaysian government.

On May 2nd, 2017, the Malaysian government arrested Ismet Ozcelik (58) who held a UNHCR asylum seeker's certificate. After pressure from

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29 Juli 2016.

[457] *Menerima Tekanan dari Kedubes Turki, Fethullah Gulen Chair UIN Berhenti*. Kompas, 29 Juli 2016.

[458] http://edition.cnn.com/2017/04/14/europe/turkey-failed-coup-arrests-detained/index.html.

[459] Stockholm Center for Freedom. *Erdogan's Long Arms: The Case of Malaysia. Turkey's Witch-Hunt Abductions Abroad*. 2017. Stockholm Center for Freedom, p. 10.

the UNHCR, the Malaysian government, released Ismet. However, at the request of the Turkish government, the Malaysian police later detained Ismet again, along with his son, Suheyl Ozcelik, and his Turkish friend Erdem Eroglu. A 'selfie' photo of Najib Razak and Erdogan that appeared on social media is public sign of the close relationship between the two authoritarian leaders. The Malaysian government acted as if it had been their pleasure to deport Turkish people without trial at the request of the Turkish government. In total, the Malaysian government has deported at least seven people to Turkey. The most recent incidents include the detention of Ihsan Aslan, a Turkish businessman, and Turgay Karaman a teacher in Time School.[460]

The failed coup in Turkey was followed by a huge crackdown by the Turkish government. For example, hundreds of thousands of people had their jobs terminated, hundreds of journalists were detained and media outlets were forcibly shut down. The reaction of the Turkish government is beyond the limitation of the due process of law, and constitutes multiple violations of the general principles of human rights. The most significant violation has been the mass detention of people considered to be 'enemies of the state.' And, during detention, prisoners have been tortured and suspicious deaths have been reported as 'suicide.'[461] The reaction of Turkish government is to blame (Fethullah Gulen's sympathizers) Gulenist or *Hizmet* movements and to label them as repressive. Erdogan has never presented any evidence of Gulen's involvement in the coup. Furthermore, if Gulen is the suspect why are his hundreds of thousands of sympathisers also oppressed by Erdogan?

Even if Gulen was involved with the coup, it does not necessarily mean that all followers of *Hizmet* contributed to the Coup and should be prosecuted and imprisoned; only a tyrant punishes innocent people as criminals. Many *Hizmet* followers are teachers who are not active in politics. But the Turkish government has labelled Gulen and the *Hizmet* as a new common enemy of Turkey. The Turkish embassy has been the

[460] Stockholm Center for Freedom. *Erdogan's Long Arms: The Case of Malaysia. Turkey's Witch-Hunt Abductions Abroad.* 2017. Stockholm Center for Freedom, p. 12.

[461] Stockholm Center for Freedom. *Suspicious Deaths and Suicides in Turkey*, 2017, Stockholm Center for Freedom.

most significant actor in the global witch-hunt of the *Hizmet* movement. In the Netherlands and Germany, the Turkish embassy has withdrawn Turkish passports of people who suspected as being Gulenist, Kurdish, or being members of opponent groups. However, both the Dutch government and German government have shown their commitment to the protection of human rights for all residents, including *Hizmet* people who live on their soil.

Unlike Malaysia, the Dutch and German governments have refused to surrender to the Turkish government's request to deport *Hizmet* people to Turkey. Moreover, the European Union has been closely following the progress of case law which accuse Erdogan of human rights violations in the European Court of Human Rights.

In Indonesia, the Turkish embassy requested the disbandment of schools affiliated with the *Hizmet* movement, but due to the Indonesian government's strong commitment to human rights and education, they refused. In other instances, the schools were founded by Indonesian organisations consisting of a membership of Indonesian people. The Presidential Office also warned Turkey not to intervene with the domestic policy of Indonesia, as described earlier in this section.

After Jokowi visited Turkey on July 6th, 2017, Erdogan complimented the Indonesian government's anti-terrorism program. Erdogan then suggested that Gulen was a terrorist organisation who must also be fought. Later, the Turkish embassy in Jakarta sent another press release one year after the Coup, reiterating their request for the Indonesian government to disband schools which they claimed were related to terrorist groups. Of course, Indonesia's government did not want to disband the schools; there was no legal grounds to do so. In a July 2017 interview with *Tempo* magazine, Gulen stated that there is no connection between Indonesian schools and the *Hizmet* movement; Some schools were simply built by the Turks and Indonesian people who have similar visions of education.[462]

The case of death threats has also been reported in Indonesia and have caused Turks to live in fear. The Indonesian police and the

[462] Tempo Magazine, edition 48/ 17 on July 18, 2017

Indonesian National Commission of Human Rights have worked hard to guarantee the security to all residents, including Turks, in accordance with Article 28D, item 1 of the Indonesian Constitution. Most Turkish people living in Indonesia are highly skilled migrants whose presence is beneficial for Indonesia. Indonesians do not want to be involved with the internal political conflict in Turkey. But the Indonesian government supposedly does care about the protection of human rights. The death threats have since been investigated by the Indonesian National Police, who concluded that Erdogan sympathisers were trying to terrorise *Hizmet* members. Some pro-Erdogan terror suspects planned to go even further; one report submitted to the Indonesian Police, stated that suspects were which: 'attempting to kill of Hizmet supporters, and to cause their blood to flow,' an intention that is made all the more concerning by the reports claim that 'in Indonesia the cost of an assassin is cheap, for the cost of two boxes of cigarettes an assassin can be hired to murder someone' (report number TBL/801/ XI/ 2016/ Bareskrim).

To a degree, the Indonesian National Police has performed a great job in ensuring security and legal protection for members of *Hizmet* in Indonesia. Fortunately, no-one (including the Turkish paramilitary or intelligence services) has been able to kidnap or kill members of the *Hizmet* community in Indonesia. However, false rumours were spread that submitting a report to the police required bribing police officers with large amounts of money. Nevertheless, some cases submitted by the Turks have not required bribes and have been accepted free of charge as required by the Indonesian Criminal Justice System. For instance, two cases of robbery have been investigated by the Indonesian police. The first incident, reported by AH, occurred in Sleman. On January 23rd, 2017, AH was robbed and has his two laptops were stolen, each of which contained a large amount of data about schools. During the incident, he and his friends realised that unfamiliar Turks in the community had been asking many questions about AH and his friend's activity in the neighbourhood. The loss of AH's laptops was not an isolated incident, another Turk, HY, had a similar experience. His laptop, along with his external hard drive, was stolen on March 13th, 2017 at 02:00 am. These

incidents were unusual as both seemed to target laptops, raising questions about what the perpetrators were looking for?

By investigating these reports, the Indonesian National Police have helped guarantee the Turks' security in Indonesia, unlike in Malaysia and other countries which have cooperated with the Turkish Embassy mentions (Jordan, Azerbaijan, Somalia, Niger, Northern Cyprus, and so on). The Indonesian government, especially the Indonesian National Police, have placed an emphasis on due process, human rights, the rule of law, and the fulfilment of rights to good governance. Therefore, it is not an easy choice for the Indonesian Government to bends to the will of the Turkish Embassy and deport *Hizmet* Turks from Indonesia to Turkey. Another side to the story is the difficulty Indonesian Government faces by confronting the Turkish government as happened in the Netherlands, Germany, etc. For instance, the Dutch government expelled the Turkish Minister of Families after delivering a speech during the Turkish referendum in March 2017. However, the Indonesian Government has taken a less confrontational stance towards the Turkish Government and trying to fulfil the rights to good governance.

On one particular occasion, the political standing of the Indonesian government created difficulty for *Hizmet* Turks in Indonesia. Although the Indonesian government is keen to uphold the rule of law, they tend to take a 'black letter law' approach,' which results in a narrow interpretation of immigration law. Immigration Affairs appeared to be conducting doing business as usual when renewing the passports of ET's (initial name) children. ET's children's passports expired on May 7th, 2017, meaning that for six months, they could not travel abroad except to their home country, Turkey. However, returning to Turkey after the failed Coup d'état posed serious risks; they assumed that in Turkey, they could easily be suspected of being members of the opposition and be detained in a camp. This presented a dilemma for ET; approaching Indonesian Immigration Affairs was likely to result in more trouble than it would solve. Just like ME and YT, ET decided to apply for asylum for his children. Luckily, the application of asylum seeker was issued and accepted by the Local Immigration Affairs. Unlike with ME,

ET children's asylum seeker's certificates were immediately recognised by Immigration Affairs.[463] In the case of an expired passport, Indonesia takes little action to help *Hizmet* Turks who have difficulties with the Turkish Embassy. Otherwise, the Turkish Embassy frequently lobbies the Indonesian government, in particular the Minister of Education, the Minister of Foreign Affairs, the Minister of Labour, Immigration affairs, police officers, Intelligence Affairs, and so on to discriminate against the Turkish Hizmet group who live in Indonesia. However, the Indonesian Government is determined to remain neutral.

There are many other instances of other new-born Turkish babies have becoming stateless after the Turkish embassy has refused to provide administrative services. This is a particularly nonsensical policy; the new-born baby is also treated with suspicion by Turkish Embassy; while a new-born baby is obviously innocent of any political involvement. Yet, the Turkish Embassy has insisted on not providing administrative services to the new-born babies of *Hizmet* Turks. Several cases of this, are described below. On December 5th, 2016, AV's (initials) son was born in South Tangerang. AV tried to submit a passport application for his child on December 16th, 2016. He visited the Turkish Embassy to complete the documents required for his new-born baby's passport. After waiting for an hour, his application was rejected.

> 'I came to the embassy on December 16th, 2016 for my new-born son's ID and passport. After waiting for an hour, an officer came and told me to fill a form which said that our address had moved from Turkey to Indonesia. He took all of the forms and documents, then let me go and waited for the process. I tried to send some emails to the Turkish Embassy inquiring about the progress of my new-born baby's passport, but the officers told me that my application has not progressed.'[464]

Moreover, AV felt that, the Turkish Embassy expected him to return to Turkey where he can be arrested. AV believes that many innocent people have been detained in Turkey after the failed Coup, and that if they returned to Turkey, his family would become a target of detention. Even with these fears, AV was still shocked that the Turkish Embassy

[463] Personal conversation with ET in November, 2016.

[464] Personal conversation with AV in December, 2016.

rejected his application outright. Another similar case is that of MAU (an initial name) who had a similar experience when applying for a passport and ID card for his baby. But the Turkish Embassy suspended his application with suspicious conduct. He recounts his story below.

> 'On December 13th, my second daughter was born at the hospital in Jakarta. After I received her birth certificate from the hospital, on 19 December 2017, I sent an email to the Turkish Embassy, applying for her ID card and passport. One day after sending the application, I received a reply from the Turkish Embassy requesting a copy of my work permit. I sent all the documents which they requested, but did not receive any further replies.'[465]

They visited the Turkish Embassy a few days later to inquire about the progress of their daughter's passport application. Unfortunately, he was unable to find a person responsible for the processing of applications. He left the embassy feeling disappointed. Despite this, MAU did not give up pursuit of his goal. After a week, he returned to the embassy, where he was able to speak with the secretary, who requested that he return to Turkey because of suspected affiliation with opposition groups against government. At that moment, he was so scared that he left the embassy as fast as he could.

A further case involved AS who faced the same problem as MAU. AS was living in South Kalimantan. On December 9th, 2017, he had a new-born baby. Later, he made an application for a passport to his new-born baby. Due to the lack of response by the embassy. The official staff replied that the embassy was rigorously screening 'people linked to Gulen and responsible groups for the failed coup in Turkey.'[466]

Many *Hizmet* Turks understand that interacting with administrative affairs at the Turkish Embassy is risky; stories like that of YT have been scattered around the *Hizmet* community in Indonesia. Therefore, the precautionary measure of only bringing photocopies of passport to the Turkish Embassy has become common practice; the embassy has been known to forcefully withdraw the passports of *Hizmet* Turks; without a passport, it is easier for the embassy to send them back to Turkey.

[465] Personal conversation with MAU in December, 2016.

[466] Personal conversation with AS in December, 2016.

Furthermore, without a passport, they are more likely to have a problem with Indonesian immigration affairs. AK, who lived in South Kalimantan had another similar story to the other *Hizmet* Turks discussed previously. AK's baby was born on 7th December 2016. He sent a passport application to the Turkish Embassy after receiving a birth certificate from Indonesian Civil Administration Affairs. However, he received no response the Turkish Embassy, even after sending more than six emails to the embassy, so he decided to call them.

> 'I had not gotten any response from the Turkish Embassy about my new-born baby's passport application. I started to call them. But the explanation was so weird. They said, 'due to the state of emergency in Turkey, your application could not proceed quickly.' I could not go leave Indonesia with my kids without their passports in my hand. A new-born baby's application must take no more than 10 days."[467]

He did not cease his attempts to contact to the Turkish Embassy, until he received a warning that the state of emergency in Turkey meant that the Turkish government could take action against the opposition. Luckily, AK and other *Hizmet* Turks have already obtained birth certificates from Indonesian Civil Administration Affairs. Despite the political conflict in Turkey, the services provided by Indonesian Civil Administration Affairs have not been affected; everyone who is born, whether or not they are Indonesian citizens, has a right to a birth certificate. Another case was that of GS (initial name) who lives in Banda Aceh. His child was born on January 1st, 2017. Again, the Turkish Embassy flatly rejected his application. He worried that 'I cannot travel by flight with my family, even to domestic destinations."[468] GS's friend, who also lives in Banda Aceh, had a similar problem; FT (initial name) also had a new-born baby, and despite having contacted the Turkish Embassy both by phone and email, did not receive a response. He added that his baby still 'has not received a Turkish ID and passport. It makes me so worried, therefore I cannot focus on anything else."[469]

[467] Personal conversation with AK in December, 2016.

[468] Personal conversation with GS in January, 2017.

[469] Personal conversation with FT in January, 2017.

Sorrow and sadness are expressed by many *Hizmet* Turks' families who have a new baby born. Even though they are grateful for their new-born baby as a 'gift from God,' the complicated administrative requirements of the Turkish Embassy are unwanted. In Banda Aceh, three new-born babies have unresolved passport application because of the Turkish Embassy's conduct. YSC was a third person harmed by the improper conduct of the Turkish Embassy. Regarding the application for his new-born baby's passport, YSC stated that:

> 'As an ordinary Turkish citizen, I submitted a passport application for my new-born baby. My child was born on November 25th, 2016. Yet, the Turkish Embassy has not helped me to proceed with obtaining my child's ID. This conduct has violated the Constitution of Turkey and principles of human rights. Furthermore, I felt that the staff of the Turkish Embassy in Jakarta discriminated against me. Because, many other Turks who have requested documents, have still been provided service by the embassy. But I did not obtain any proper response from the embassy.'[470]

Some Turks who have been harmed by the Turkish Embassy accused MKSD (the Turkish Ambassador), and other staff members of the embassy such as Mr. HA and Ms. H, as the main perpetrators of maladministration and human rights abuses. The refusal to deliver administrative services has caused a problem for Turks under Indonesian Immigration Law; without a passport, they cannot apply and extend their residence permit. In the case of new-born babies a solution has been stipulated clearly. Indonesian immigration affairs have stated that a birth certificate is adequate for a new-born baby to remain in Indonesia. Therefore, new-born babies are now eligible to stay in Indonesia with only a birth certificate. The Indonesian National Commission for the Rights of Children has also supported the position of the Turks and their children that have lived in Indonesia by providing a guarantee that it will protect their human rights. Hence, the right to good governance of Turkish babies born in Indonesia is adequately fulfilled. This case received support not only from their lawyers, but also the Indonesian National Commission of Human Rights, Indonesian National Commission of the Rights of Children, Indonesian Civil Administration Affair, the Witness and

[470] Personal conversation with YSC in November, 2016.

Victim Protection Agency, etc.

> My final example of difficulties with a passport application for a new baby, was that of HY. He had been living in Pekanbaru for several years with his wife and children. On December 21st, 2016, he went to the Turkish Embassy to request a passport for his baby. He reported that 'after I waited for four hours, an official staff member came and told me to go home because the embassy will not serve my request.'[471]

HY was not involved with any of the groups on the *Hizmet* Turks' organisation list. He studied for his doctoral thesis at Riau University and did not engage with institutions that the what Turkish Embassy considered to be 'FETO schools.' Other organisations are affiliated with the *Hizmet* movement include trading associations, travel businesses, journals and magazines, and some small corporations, etc. However, the disrespectful conduct of the Turkish Embassy is not part of my concern. Instead, I focus on the response of the Indonesian Government to the problems of *Hizmet* Turks, to ascertain whether they are devoted to the fulfilment of the right to good governance. In the case of new-born babies, the Indonesian government has issued a tremendous policy that ensures Turkish people's right to good governance. Turkish babies are innocent human beings who must be protected by Indonesian law. The right to good governance demands a government that is fair and just in the administrative field. By providing a birth certificate, and stating that this alone is sufficient for a baby to stay in Indonesia, the Indonesian government ensures the fulfilment of one of the rights of good governance.

Difficulties arise for Turkish new-born babies when their family wants to go abroad, they are not permitted to travel due to their lack of a passport. The Indonesian Government cannot help Turkish new-born babies without passports to travel abroad. They must have a Turkish passport. This case is the most complicated problem—although the Indonesian Government wants to help Turkish families with new-born babies, they must still act within the law. New-born Turkish babies can access some aspects of right to good governance, but, this right is not always fully fulfilled.

[471] Personal conversation with HY in December, 2016.

Unfortunately, not all actions of the Indonesian government are respectful of the right to good governance. Even though the top level of administration (ministers, other public-institutions, police, intelligence, etc.) is usually helpful and supportive of the position of *Hizmet* Turks in Indonesia, lower and mid-level staff have often discriminated against them. For instance, the multilateral general directory of the Indonesian minister of foreign affairs, issued a letter concerning the disbandment of Pasiad (one of the biggest international organisations affiliated with the Gulen movement). While the Minister of Foreign Affairs himself has never issued any policies concerning Pasiad or Gulen Movement, this directory tried to disband Pasiad with its letter. This letter was issued on October 27th 2015, signed by members of various public institutions including Intelligence Affairs, the Police, and some ministers. The Directory's letter (number 21687/ TI / 11/ 2015/ 51) insisted upon the termination of cooperation between the minister of education and Pasiad.[472] Pasiad is a legal entity which is protected by Indonesian Mass Organisation Law, therefore this letter might infringe upon the right to good governance, because there are no legal grounds to disband the organisation. Sadly, the *Hizmet* Turks have never complained about this letter; however, this maladministrative letter could become the object of a lawsuit in court. Indeed, this letter also infringed upon the right to freedom of association that is protected by Article 28 of the Indonesian Constitution. Yet, no action has been taken by the Turkish Hizmet community to challenge this letter.

A following letter was also issued by the Planning Cooperation Bureau of the Minister of Education in 2015, concerning the legal status of Pasiad. By referring to the letter of the Multilateral General Directory of Indonesian Minister of Foreign Affairs, this bureau sent a letter to Pasiad requesting them to 'change the teachers' in their schools. Again, this bureau's letter (number 99383/ A1.3/ LN/ 2015) did not respect the right to good governance.[473] Why must the disbandment of an organi-

[472] The Multilateral General Directory of Indonesian Minister of Foreign Affairs letter number 21687/ TI/ 11/ 2015/ 51 concerning to the termination of cooperation between the minister of education and PASIAD.

[473] The planning cooperation bureau of the minister of education's letter number 99383/

sation lead to changing the teachers in the schools? Most worryingly, these letters marked an attempt by middle and low-ranking officials to undermine existing anti-discrimination legislation; actions which have contributed to the bleak picture of good governance in Indonesia. Such behaviour can be classified as the administrative discrimination by the government.

To summarise, the right to good governance, in essence, has been respected by Indonesian Government. In the case of requests by the Turkish Government to disband schools t, the Indonesian Ministry of Education refused and argued that the schools could be disbanded since they obey Indonesian Education Law. In new-born babies who are refused Turkish passports, the right to good governance is fulfilled by the actions of Indonesian Civil Administration who have issued birth certificates to Turkish new-born babies who required them. Furthermore, Indonesian Immigration Affairs now consider a birth certificate as a sufficient document for new-born baby to stay in Indonesia. In addition, Immigration Affairs do not require them to have a passport and residence permit to stay in Indonesia. Sadly, Turkish families with newborns do encounter difficulties with travelling abroad because of their children have not been provided with passports; a passport is required by the immigration checking gate when travelling abroad. Finally, the Minister of Foreign Affairs and Minister of Education, bypassed the court in order to disband Pasiad. From this case, we can see that the right to good governance was violated as there was no legal grounds to disband this organisation.

3.3.4 Changing name: an ironic discrimination

Discrimination may result from the infringement of norms for the government and legal protection of ethnic minorities. The case example of forced changing-name is such an example of this discrimination. The name is a private matter. In many Eastern value systems, a name can signify the wishes, hopes, and expectations of a family. However, the Indonesian New Order regime acted as though a change of name meant

A.1.3/ LN/ 2015 concerning to legal status of PASIAD.

nothing at all when dealing with Chinese-Indonesians. The problem was that they only targeted Chinese-sounding names and not Javanese, Batak, Balinese, or Ambonese names. In his autobiography, Oey Tjoe Tat described the occasion when he asked Soekarno about changing-name and whether he needed to change his name to become one of his ministers; Soekarno replied that 'but for me, Colonel Van Pieters, Douwes Dekker, and John Lie are more Indonesian.'[474] Soekarno disagreed with Oey's plan to change his name. Soekarno's argument was that although these names did not sound Indonesian, that these names will always be remembered because of their contribution to the Indonesian nation. However, these words were of little consequence as he later issued Presidential Decree No. 240 of 1967 concerning changing-name.

Despite the official suggestion for changing-name was issued in Soekarno's era, the changing-name was reinforced in the New Order era. Presidium Cabinet's Decision No. 127/U/Kep/12/1966 was formulated to oppress Chinese-Indonesians by encouraging them to change their name. This decree concerned a general policy relating to Indonesian citizens of foreign descent, which made special stipulations for people of Chinese descent (Article 5) who used a 'Chinese' name, suggesting that they adopt an 'Indonesian' name. After the issuing of this decree, many Chinese-Indonesian citizens started to change their names. However, some opposition came from Yap Thiam Hien (a charismatic Chinese lawyer and defender of human rights), who insisted upon keeping his name declaring 'my name is my identity!'[475] Still, many Chinese-Indonesian citizens submitted changing-name applications through the Court. Sadly, ethnic prejudice was not only in the words of —witnesses and judges, but also in those of— applicants; anxiety, fear, and feelings of inferiority accompanied many Chinese-Indonesians during the application process of changing their names through the Court.[476]

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[474] Oei Tjoe Tat, *Memoar Oei Tjoe Tat. Pembantu Presiden Soekarno*, Jakarta, Hasta Mitra, 1995, p. 107.

[475] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Seattle, University of Washington Press, 2011, p. 308-309.

[476] Sidoarjo Court decision number: No. 781/Pdt. P/2012/PN. Sda; Lumajang Court decision number: No. 684/Pdt. P/ 2012/PN. Lmj; Mojokerto Court decision number: No: 31/

The judges sincerely believed that changing-name would be beneficial to Chinese-Indonesians, and reduce their chances of being victimised, but the judges did not consider that their words and actions actually involved discriminating against the people they were intending to help— this is what I call 'ironic discrimination.' Likewise, not all Chinese-Indonesians were reluctant to change their name; some of them were happy or indifferent and changed their names voluntarily. But, without a doubt, some Chinese-Indonesians were coerced into changing their names and were subjected to ironic discrimination.

Ironic discrimination can be seen in the legal reasoning of the judges of many changing-name cases. In the case of changing-name of Oei Meme, who wanted to change her name into Melissa Irene Wiedinata, the judge said the changing name was necessary because it could help 'one integrate and adapt into the local communities' and that 'it is morally compulsory to adjust to the dominant culture, behaviours, and lifestyle of Indonesia.'[477] Another case of changing-name was that of Whi Ken Kuk, who became Selvi Lengkong in the Ambon District Court. The judge also claimed that the changing-name 'has a positive influence on the improvement of the nation, and helping to strengthen the sense of belonging to the Indonesian country, nation, and language.'[478] The

Pdt. P/2012/PN. Mkt; Ambon Court decision number: No. 54/Pdt. P/2012/PN. AB; Kudus Court decision number: No. 113/Pdr. P/2011/PN. Kds; Semarang Court decision number: No 326/Pdt. P/2012/PN Kbm; Mataram Court decision number: No. 387/Pdt. P/ 2009/PN. Sby; Surabaya Court decision number: No. 472/Pdt. P/ 2010/ PN/Sby; Kambanjahe Court decision number: No.07/Pdt. P/2014/PN. Kbj; Pasuruan Court decision number: No. 08/ PDT. P/ 2015/ PN Psr; Bondowoso Court decision number: No. 08/Pdt. P/2012/PN. Bdw; Sungailiat Court decision number: No. 08/Pdt. P/2014/PN. Sgt; Sungailiat Court decision number: No. 10/ Pdt/ 2014/ PN. Sgt: Slawi Court decision number: No 11/Pdt/P2015/PN. Slw; Rantau Prapat Court decision number: No. 26/ Pdt. P/ 2015/ PN-RAP; Madiun Court decision number: No. 27/Pdt. P/2015/PNMad; Pasuruan Court decision number: No. 28/Pdt. P/ 2012/ PN. Psr; Madiun Court decision number: No. 28/Pdt. P/2015/PN Mad; Sungailiat Court decision number: No. 30/ Pdt. P/ 2012/ PN SGT; Situbondo Court decision number: No. 33/ Pdt. P/ 2014/ PN. STB; Baturaja Court decision number: No. 42/Pdt.P/2014/PN. Bta; Pasuruan Court decision number: No. 45/ Pdt. P/ 2014/ PN. Psr; Denpasar Court decision number: No. 52/ Pdt. P/2015/PN. DPs; Barabai Court decision number: No. 1/ Pdt. P/2014/PN. Brb; Bulukamba Court decision number: No: 06/ Pdt. P/ 2014/PN.BLK; Pasuruan Court decision number: No: 07/ Pdt. P/ 2011/ PN. Psr.

[477] Mojokerto Court decision number: 31/ Pdt. P/2012/PN. Mkt.

[478] Ambon Court decision number: 54/Pdt. P/2012/PN. AB.

legal reasoning of the judges appears like the logic of the dominant political majority coercively providing suggestions to an oppressed minority, which can be rightly described as forced assimilation. The phrases 'positive influence,' 'adjusting to the dominant cultural community,' and 'lifestyle of Indonesians,' seem to be a 'soft' form of ironic discrimination.

The issue of ethnic sub-ordinance ought to be a sensitive one, which must be treated carefully by the judge and considered within the principles of equality. The use of unnecessary words and phrases comprised ironic discrimination, for instance: 'using the Chinese name was not comfortable anymore for applicant,' and 'changing-name can be make it easier for children at school' (regarding—Jen Wha who became Faryda).[479] In the case of Tan Swie Hong (who became Nikmatur Rohmah), the judges said that 'the changing-name is not a violation of law in society."[480] The last statement, could be interpreted as implying that not changing-name can be classified as violation of law in society. It is clearly inappropriate for a judge to say such a thing in a Courtroom. To say that better integration is not achieved through education, language training, intercultural festivals, but simply by changing-name is inappropriate. However, this was the argument that was commonly presented by judges. For instance, in the case law of Joen Sin became Chandra, the judges mentioned that the applicant wanted to be more involved with Indonesian society.[481] The same happened in the case law of Oey Sioe Poo, where the judge argued that changing-name can help unify the applicant with the Indonesian people and will be beneficial for the applicant's future.[482] Similarly, in case law where Kwan Khe Tie became Maria Christie, the Court's decision stated that changing name can encourage the applicant to be integrated into Indonesian culture more quickly.[483] A further example of ironic discrimination was in the case changing-name case law

[479] Pasuruan Court decision number: No. 08/ PDT.P/ 2015/ PN Psr.

[480] Bondowoso Court decision number: No. 08/Pdt. P/2012/PN. Bdw.

[481] Sungailiat Court decision number: No. 08/Pdt. P/2014/PN. Sgt.

[482] Pasuruan Court decision number: No. 28/Pdt. P/ 2012/ PN. Psr.

[483] Madiun Court decision number: No. 28/Pdt. P/2015/PN Mad.

of Liem Oka Djaja (who became Kristiandi Liem), who was encouraged to change name in order to assimilate more easily.[484] Again, when Hoei Swie Lian became Anastasia Paulina, the Court stated that changing-name can help an applicant blend in Indonesian society.[485]

Another justification for changing-name is that having a normal name is deemed necessary. A 'normal' name, in the eyes of applicants and judges, is an Indonesian name— the name used by most Indonesian people. Chinese names were considered unfamiliar. For instance, in the case law of Joen Sin became Chandra, the judges praised Joen Sin, who for wanting to convert his Chinese childhood name to one more familiar to the Indonesian people.[486] An almost identical problem is found in the case law of Tan Swie Hong, where the application was sent to the Court to request a name change a because she had married an Islamic teacher and wanted to have an Islamic Indonesian-sounding name.[487] On the other hand Sek Wei Fa (who became Fardhi Seputra) believed that an Indonesian sounding name would make it easier to access the administration, public entities, and aspects of bureaucracy.[488] Curiously, Wong Pe Pong (who became Ferly Oei) argued that adopting an Indonesian sounding name was symbolic of their commitment to becoming a 'real' Indonesian and discarding their Chinese cultural heritage.[489] In the case law of Oei Bie Hwa (who became Elizabeth Lisawati), the judges considered adopting an Indonesian sounding names to be one of the most important steps to becoming recognised as an Indonesian.[490] Even the Chinese script (hànzì) and speech sounds of Chinese were a problem for of Loei Jet Gin (who became Melina), who was afraid that these ethnic signifiers could lead to her being targeted and victimised. Thus, she wanted her new name to only use Indonesian letters and sounds.[491] In

[484] Sungailiat Court decision number: No. 30/ Pdt. P/ 2012/ PN SGT.

[485] Situbondo Court decision number: No. 33/ Pdt. P/ 2014/ PN. STB.

[486] Sungailiat Court decision number: No. 08/Pdt. P/2014/PN. Sgt.

[487] Pasuruan Court decision number: No. 08/ PDT. P/ 2015/ PN Psr.

[488] Barabai Court decision number: No. 1/ Pdt. P/2014/PN. Brb.

[489] Bulukamba Court decision number: No. 06/ Pdt. P/ 2014/PN.BLK.

[490] Pasuruan Court decision number: No. 07/ Pdt. P/ 2011/ PN. Psr.

[491] Rantau Prapat Court decision number: No. 26/ Pdt. P/ 2015/ PN-RAP.

the case of Oet Sioe Poo—who became Endah Sutanto, the Court's decision corroborated this perspective, arguing that changing his name could help the applicant to fit into society. A Chinese name might be difficult for Indonesians to say, whereas an Indonesian name will likely be easier.[492] In the case law of Kwan Khe Tie, the judges argued that Chinese names are incompatible with Indonesian culture.[493]

Analysis of these case law show that judges have made absurd connections between changing-name and living law (see cases mentioned previously). Some Courts have stated that changing-name does not violate living law, or the values of society. In the case law of Sui Fun (who became Julius Jansuri), the judges argued that changing name did not infringe upon living law or the protected, noble titles of Indonesian barons.[494]Another case law that mentioned 'living law' was that of Goe Koeslinah Swie (who became Maria Rosari kuslina). In this instance, the judge claimed that changing-name did not infringe upon societal morality and ethics.[495] In this sense, changing-name is a sensitive topic to discuss; it is deeply personal to the individual making the application, thus the judges must be sensitive to human rights. Furthermore, the judges must adopt a neutral position when establishing legal reasoning and be careful not to discriminate against minorities' names. The other sides of some case law on changing-name were seen referring a letter which was not required to proceed, namely: SBKRI such as Goe Koeslinah Swie (now Maria Rosari kuslina), Tjoa Swie Gwan (now Soegianto) and Swei Se Pang (now Albertus Indra Pangau). Some case law also still mentioned the colonial era list of specific civil registration for the Chinese, which was supposedly nullified when Indonesia gained independence.

3.3.5 Land confiscation and maladministration

Land confiscation by the government should always be conducted within the norms for the government and legal protection for people. If

[492] Pasuruan Court decision number: No. 28/Pdt. P/ 2012/ PN. Psr.

[493] Madiun Court decision number: No. 28/Pdt. P/2015/PN Mad.

[494] Sungailiat Court decision number: No. 08/Pdt. P/2014/PN. Sgt.

[495] Pasuruan Court decision number: No. 45/ Pdt. P/ 2014/ PN. Psr.

not, the administrative decision concerning land confiscation may constitute maladministration. Arbitrary foreclosures were a tragic and terrifying reality for Chinese-Indonesians under the New Order. Some land and property belonging to Chinese-Indonesians was confiscated by the Indonesian New Order Government. My analysis of these cases finds that good governance was markedly absent, as discriminatory laws became the legal grounds for foreclosure of land. Soeharto's regime, as previously mentioned, used the legacy of colonial laws such as *Koninklijk Besluit* No. 64 (*Staatsblad* 1970 Jo. STB. 1937 No.573) and *Ordonnantie* No. 250 (*Staatsblad* 1909 jo. STB 1917 No.497) to legitimise his policy of arbitrary foreclosure. Colonial-era class stratification had already established differences between European, foreign oriental and indigenous people under Article of 16 of Indies statute (*Indische staatsregeling*). This Article has remained in Indonesian law after independence, and was abused by the New Order government as a means of justifying discriminatory policies. However, the intergroup law of Article 16 was written by some Dutch legal scholars' van Vollenhoven and Kollewijn, actually introduced to respect customary law and reject superiority of Western culture.[496] But, these inherited regulations were used by Soeharto's New Order Government to distort his power. For example, Article 5bis of *Koninklijk Besluit* equipped the Governor-General of the Dutch East Indies with this broad authority to disband mass groups which violate the public interest. Soeharto used this Article to justify disbanding Chinese groups, in effect acting just as the colonial era Governor Generals had. In doing so he was also able to confiscate property and land without permission from the courts.

During the New Order government, the function of the courts was abandoned with regards to land confiscation. For instance, foreclosures were enforced by the army, municipality, or other governmental bodies which used 'secret letters between departments' to justify their actions. For instance, as mentioned in a previous section, the Minister of Finance issued a secret letter entitled 'guidance for ex-alien's asset confiscation

[496] S. Pompe and C. De Waaij-Vosters, *The end of hukum antargolongan? Bidragen tot de Taal-,Land- en Volkenkunde,* 145 (1989), No. 2/3, Leiden, 365-369.

on March 4th, 1997'. This letter stated that to accelerate the assimilation process, the seizure of ex-alien's assets must be prioritised, without permission from the court (*afwezigheid verklaring*).[497] Another secret letter was written by the General Director of Social Politics, Soetoyo on 17 January 1997. This letter expressed concern over attempts to rebuild racially exclusive organisations that had already assets confiscated by the government. This letter instructed local level governments to monitor the development of racially exclusive activities that opposed the government.[498] A further secret letter was issued by the Land Agency that prevented racially exclusive organisations from filing lawsuits against the government. This letter also averred that any means of seizing land were permitted as long as asset foreclosure was beneficial to the government's interest.[499] Furthermore, the New Order Government also promoted surveillance of 'racially exclusive organisations' that had taken on new names. For instance, the Ministry of Social Affairs increased its surveillance of Nam An Kong Hwee when it became Karya Selatan Foundation.[500] As a means of manipulating the official account of history, the Minister of Education and Cultural Affair insisted that references to the list of racially exclusive organisations should not appear in school curricula.[501] Through this letter, the Ministry of Education attempted to suppress the stories discrimination against Chinese organisations being. Furthermore, the government was deliberately vague about their definition of 'racially exclusive organisations,' thus enabling them to apply the label in a wide variety of situations. Another government institution, the Ministry of Justice also increased the severity of systematic discriminatory treatment through a secret letter concerning the disbanding of racially racial organisations.[502] Another consequential New Order policy was the issuing of a list of racially exclusive organisations in each region

[497] The Minister of Finance's secret letter number S-928/A/51/0397.

[498] The General Director of Social Politics of the Minister of Interior Affairs Secret letter number: T. 472/ 948.

[499] The Land's Agency's secret letter number X 500-87.

[500] The Minister of Social Affairs' Secret Letter Number 55/ BOS/ BBS/ II/ 97.

[501] The Minister of Education and Cultural Affair Number 2841/ F1.4/E 96.

[502] The Minister of Justice's secret letter Number 02.UM.01.10-19.

ranging from Aceh to Papua. For instance, in central Java, many racially exclusive racial organisations existed and were present on the list including Aan Gie Hwee, Budi Luhur, Chinese Education of Hwee Koan, Chung Hua Chung Hui. These secret letters were used to justify and implement the 'illegal land confiscation operations.'

These secret letters not only affected Chinese organisations and associations, but also individuals. For instance, the government targeted people such as Enok Sarifah, (whose parents' land was leased leased by the Governor of West Java),[503] Petrus Tjokkro and his associates (whose grandparents' land was occupied by the regent of Belitung),[504] Abdul Chakim (whose grandparent's land was confiscated and used as a military residence in Tegal),[505] and Nanik Priyanti (whose parent's land was used for a high school)[506] all had their land confiscated. These cases of land confiscation, indeed, were all examples of maladministration, since land was confiscated without any judiciary assessment. The right to freedom from discrimination was also neglected because these cases mainly involved Chinese-organisations as the victims.

This policy triggered arbitrary foreclosures, one example being the case of Chinese High School Batavia, which I mentioned earlier. After the 1965 coup, Chinese High School Batavia was targeted by the military; Soeharto's army came to the school whilst teachers were teaching the students, they then used violence to expel the teachers, pupils, and burned the school's documents. Both the building and 37,248 m^2 of land were confiscated by the army. The school had originally legally acquired the land on October 19th, 1938 at North Bandengan Street Number 8, Penjaringan, Jakarta. They bought that land before the notary, Sie Khwan Djioe in Batavia.[507] During Soeharto's reign, the foundation surrendered in fear to the government's policy of seizing their land and buildings, and also avoided legal action. But, after the collapse of

[503] Bandung Court decision number: 46/G/2012/PTUN-BDG.

[504] Tanjungpandan Court decision number: 20/Pdt. G/2012/PN. Tdn.

[505] Tegal Court decision number: 24/Pdt. G/2014/PN.

[506] Surabaya Court decision number: 479/ Pdt. G/2014/PN. Sby.

[507] Bojonegoro district court's verdict 22 No. PDT.G/ 2008/ PN.BJN.

the New Order in 1997, the foundation sued the administrative authorities through the Court, and requested their land back. Unfortunately, the lawsuit was defeated, and the Court ruled in favour of the defendants.

The foreclosure of Chinese High School Batavia is one example of an action that was justified by the colonial-era policy, *Koninklijk Besluit No. 64*. *Ordonantie* No. 250 was another piece of colonial legislation that was also used to legitimise violence, torture, arbitrary expulsion, and forced foreclosure. This legislation stipulated that membership of a Chinese secret organisations was a criminal offence; anyone found to be involved with a secret Chinese secret organisation could face 3 months in prison and a maximum fine of 100 IDR.[508] In effect, this law was used to oppress and victimise a vulnerable group and to protect the interests of the majority.[509] Soeharto also used Law No. 2 of PNPS of 1962 that prohibited organisations that are out of line with the 'Indonesian national character.' Both *Ordonnantie* No. 250 and Law No. 2 of PNPS of 1962 essentially had the same objectives of restricting the right to freedom of association, and the right to property of Chinese-Indonesians.

Government sponsored seizure of land was amongst the most discriminatory actions of the New Order. Examples include, the cases of Hwie Tiau Ka Kwan and the Ta'hwa School Alumni Foundation. Hwie Tiau Ka Kwan was established in 1820 with the objectives of being a place of worship, and a space to build social and business networks. The Ta'hwa School Alumni Foundation was founded in 1948 and had a focus on education. Both organisations became victims of land confiscation. Hwie Tiau Ka Kwan bought 2,003m^2 of land on March 2, 1928. This land purchase was also authorised by the Rechter Commissaris of the Raad van Justitie in Surabaya. Sadly, under Soeharto's New Order

[508] Article 1 stated a punishment of 3 months imprisonment a maximum fine of hundred rupiah for Chinese people who : 1) have a document, stamp, note, or anything was given by a secret Chinese organisation; 2) wear ID of membership of secret Chinese organisation; 3) gather at a meeting with members of secret Chinese organisation; 4) inviting other people to join a secret Chinese organisation; 5) donating money to a secret Chinese organisation; 6) other activities which appear to help secret Chinese organisation.

[509] Costas Douzinas*, The End of Human Rights. Critical Legal Theory at the Turn of the Century*, London, Hart Publishing, 2000, p. 42.

Government, Hwie Tiau Ka Kwan had their land confiscated without due process and without legal approval by the Court. The given reason for the confiscation was that Hwie Tiau Ka Kwan's land was included on the list of 'racially exclusive organisations.'[510] Ta'hwa School Alumni Foundation also bought land in 1948, on which they which built a school which operated for over a decade. The New Order government confiscated this land in 1980. The government used the land to build a shopping centre, 'Pinang Babaris.'[511] After the 1998 reformation, these organisations sued the government in an attempt to have their land returned. The cases shared a similar modus operandi to other cases, for instance: the Chinese Gang Hidjaz High School Foundation in Pontianak[512] and the Sumber Kasih Foundation[513] who also had land that was confiscated by the government without an explanation.

Many Chinese-Indonesian organisations who were victims of arbitrary foreclosure later tried to sue the administrative authorities. Harapan Sinar Bahagia Foundation, also known as the Toa Pek Kong Foundation, brought its case to Bojonegoro District Court. The land that belonged to the foundation was seized by the Municipality of Bojonegoro, according to Regent of Bojonegoro's Decision Number. 188/219/SK/409.12/1997. Before the expropriation, the municipality of Bojonegoro had leased the land for a few decades.[514] Another case was that of Hoa Tjiao Kung Hwa, whose land was also seized by the government. In this instance, the land was confiscated because the organisation was on the government's list of racially exclusive organisations, and was thus prohibited. This organisation's land was used for a primary school and the youth association's office.[515] In addition to arbitrary foreclosure orders being issued by the central government, municipalities also took part in the arbitrary foreclosure of land belonging to Chinese Indonesians. For example, the municipalities of Bojonegoro, Gowa, Mojokerto, and many others par-

[510] Jakarta administrative Court's verdict number: 18/G/2008/PTUN-Jkt.

[511] Samarinda Court decision number: 61/Pdt.G/ 2012/PN.Smda.

[512] Pontianak Court decision number: 40 PK/TUN/2007.

[513] Supreme Court decision number: 1929/ K/ Pdt/ 2011.

[514] Bojonegoro Court decision number: 22 PDT.G/ 2008/ PN.BJN.

[515] Supreme Court decision number: 172 PK/TUN/2016.

ticipated in similar arbitrary actions. One of these Municipalities confiscated land belonging to the Worship Association of Tri Dharma of Hok Sian Kiong. This association was oppressed by manipulating their legal status and including them on the list of racial exclusive organisation, therefore, it was easy to take over their land.[516]

Another example was that of Kouk Min School, who bought land in 1949 only to have it confiscated in 1958 after being accused of isolating themselves on the basis of ethnicity with no intention of integrating. Their land was allocated to a public school.[517] A further case is that of Kematian Tjirebon Indonesian Foundation (formerly known as Kian Gie Hwee) was founded on January 25th, 1906. They owned 24.000 m^2 of land which was used as a public cemetery. Again, the government seized this land and used it for housing and a supermarket. In this case, the Regent of Cirebon had issued Regent's Decree number 590/ Kep. 96-Tapem/ 2003 to amend the legal status of land ownership and its function.[518] Changing the function of land, became the government's tactic of choice to justify the seizure of property. Each of these examples demonstrate that Chinese organisations were targeted by arbitrary foreclosures by a government that neglected constitution; the government defied concepts of good governance, democracy, the rule of law, and justice. The forced foreclose without a court judgment was widespread across Indonesia. Indeed, these actions can be understood as systematic robbery by a tyrannical government.

3.3.6 The events of 1965 and 1998

This section elaborates on the 1965 and 1998 incidents in which many members of the Chinese community were victims, and explores these events with reference to good governance's role in is strengthening norms for the government and legal protection of ethnic minorities. I describe the circumstances of the 1965 incident as a starting point for a comprehensive analysis of the position of Chinese community during

[516] Supreme Court decision number: 243 K/ TUN/ 2012.

[517] Medan Court decision number 460. K/ Pdt. 2012.

[518] Supreme Court decision number 477 K/ Pdt/ 2007.

and following these incidents. The primary targets of the 1965 incident were members of Indonesian Communist Party (PKI), but shortly after that, it became clear that many of victims were not members of this political party. Other victims included those who were members of organisations that were affiliated with the PKI, supporters of Soekarno— many of whom were Chinese. Like the other victims, Chinese-Indonesians were arbitrarily detained, expelled, had their property confiscated, and their organisations prohibited. So, although the purported motive of the 1965 incident was an attack on the Indonesian Communist Party (PKI) and Soekarno's supporters, many of those who were affected were Chinese. Conversely, race played a much more explicit role in the riots of 1998. Chinese stores and Chinese-towns became major targets of the riot. During the riot, there was a mass rape of Chinese women, an incident that has not yet been solved by the criminal justice system. Both incidents demonstrate the vulnerability of the Chinese community. The sheer number of victims in of 1965 purge is shocking. Studies concerning this incident have reported varying figures, but all agree that the number is extremely large. However, even until today, the events of 1965 have not been properly addressed by the courts.

The lack of commitment to good governance is evident in the unsolved law enforcements of crimes against humanity. There was escalated crimes against humanity in 1965. The Indonesian National Commission of Human Rights has carried out an investigation into the 1965 killings. According to their report, there is abundant evidence of crimes against humanity including mass killings, arbitrary imprisonment, extermination, enslavement, forced expulsion, torture, rape and sexual harassment, and forced disappearances.[519] Unfortunately, the Commission's document of investigation was not followed up by the public prosecutor, the one who actually has the ability to prosecute those suspected of committing crimes. The public prosecutor claimed the evidence were inadequate to continue with the investigation. The stagnation in the prosecution of the crimes against humanity of 1965 indicates a lack of

[519] Komisi Nasional Hak Asasi Manusia, Pernyataan Komnas HAM tentang Hasil Penyelidikan Pelanggaran HAM yang berat peristiwa 1965-1966, Jakarta, 23 Juli 2012.

commitment to good governance by the Indonesian government, and presents a serious political dilemma. The Indonesian Government has not always been transparent in reporting on the progress of victims' reparations and transitional justice. This, combined with the lack of channels for public participation has caused the search for truth to stagnate. In addition, the use of human rights legislation has failed to challenge the dominant account of the 1965 tragedy.

The 1965 crimes against humanity began after the attempted coup. In the early morning of 1st of October 1965, the Minister of the Chairman of the Armed Forces, Ahmad Yani, and five of his generals along with one other mistaken target were captured by the Cakarabirawa battalion led by Lieutenant Colonel Untung. The generals and the soldier were killed and thrown into a hole in the ground. During a broadcast on Republic of Indonesian Radio, an anonymous person announced that members of the '30th September Movement' were responsible for this incident. Without Ahmad Yani— his primary rival in controlling the military— Soeharto was able to purge the 30th September movement and seize power. Soeharto accused the Indonesian Communist Party and members of the military as being responsible for the attempted coup. This purge resulted in 1,500,000 people being detained and 100,000 people being murdered. These are amongst the worst disasters of human rights that began in 1965 afterwards.[520] At that moment, the State of Indonesia failed to defend good governance and its principles; the rights to life, legal certainty, and security, were deeply violated.

Official reports stated that the that generals' bodies had been mutilated, had their eyes had gouged out, and had their genitals dismembered— however autopsies found no evidence of this. Suharto deliberately misrepresented the sadism of the killings to scandalise the PKI, making it easier to justify a violent response.[521] Providing a truthful ac-

[520] John Roosa, *Dalih Pembunuhan Massal. Gerakan 30 September dan Kudeta Suharto*. Translated by Hersri Setiawan, Jakarta, Indonesian Institute of Social History and Hasta Mitra, 2008, p. 5.

[521] Ben Anderson, *How Did the Generals Die? Indonesia*, Volume 43 (April 1987), p. 109-134, https://cip.cornell.edu/DPubS?service=UI&version=1.0&verb=Display&handle=seap.indo/1107009317

count of history should be an obligation of the government. However, the current official version of history that is written in the PKI betrayal museum, and taught in history lessons at schools has been manipulated and never revisited.

The 1965 crimes against humanity caused much damage and sorrow. The Commission of Human Rights' investigation found evidence of mass killings in Buru Island, Sumber Rejo, Argosari, Balang Island, Kemarau Islands, Tanjung Kasu, Nanga-Nanga, Solo, Ameroro, Nusakambangan, Nirbaya, and many other cities. The Commission has not provided exact figures of number of victims who were killed during the purge. At the same moment, the Commission found evidence of exterminations of 300 people in Sragen, 1000 people in Sikka-Maumere, and 600 people who died in Surabaya's jail. The investigation also discovered evidence of enslavement, mainly in the Buru Islands where 11,500 people were forced to work without pay or social security. The Commission also discovered that 41,000 people were expelled from their homes and a further 32,774 simply disappeared. The Commission also uncovered 35 cases of rape and sexual harassment by members of the military.[522]

Most seriously, the IPT 65[523] concluded that Indonesia committed genocide similar to the Armenian slaughter in Turkey, Stalin's gulags, the Holocaust, the People Republic of China's communalisation, and the Hindu-Muslim tragedy of British India. Chinese-Indonesians and communist sympathisers were the main targets of the Indonesian genocide. Ethnic motives fuelled the mass killings in Medan, Makassar and Lombok. These killings have been classified as a genocide according to the Genocide Convention. Between 1965 and 1966, many members of the Chinese community were targets of murder. IPT 65 also uncovered killings, extermination, enslavement, forced eviction or movement of civilians, arbitrary appropriation of independence or other physical freedoms that contravene international law, torture, rape or sexual en-

[522] Komisi Nasional Hak Asasi Manusia, Pernyataan Komnas HAM.

[523] International People's Tribunal 1965 is a social foundation which concerns in the issue of crimes against humanity in Indonesia during 1965. This organisation was established in The Hague and registered in the Dutch Chamber of Commerce as non-profit organisation.

slavement, forced prostitution, and forced disappearances of a person.[524] The coup resulted in a crackdown and left these crimes against humanity unsolved. In the aftermath of the failed coup and the ensuing mass violence, notions of anti-Chinese sentiment began to rise. These notions were further stoked by anti-communist propaganda, demonstrations against the People's Republic of China, the creation of local anti-Chinese policies in East Java and other areas, and damage to property. Chinese-Indonesian private property was destroyed after the failed Coup of 1965.[525]

Indeed, Chinese-Indonesians suffered immensely during the crackdown by the Indonesian military which resulted in many human rights violations. In addition to the confiscation of their property (as described in the previous section), Chinese organisations were disbanded and had their members detained arbitrarily without trial. Baperki's leaders, such as Siauw Giok Tjhan, Oei Tjoe Tat, Go Gian Tjwan and many other Chinese activists, were detained for many years without the proper legal procedures of the court.

> 'I was detained after the failed coup without the court's permission. And I do not what mistake I made that resulted in me being detained. I devoted myself to the country of Indonesia. In the past, I supported the guerrilla as part of the Chinese-Indonesian Youth Movement before Indonesian independence. After many years of dedicating my soul to this country, the New Order put me in jail.'[526]

Go Gian Tjwan was detained by the New Order after the failed coup in 1965. But until today, he has never received an official explanation from the police or military officer or government for why he was e detained. He had to wait many years to even have a court hearing. However, many years he passed without any a clear explanation on why he was still remained to stay in the imprisonment. He assumed that he was detained due to his involvement with Baperki, the Indonesian

[524] http://www.tribunal1965.org/en/final-report-of-the-ipt-1965/ the latest visited on October 24th, 2017.

[525] Robert W. Goodfellow, *Sing Wis, Ya Wis: What is the past is past. Forgetting what it was to remember the Indonesian killings of 1965*. PhD thesis, University of Wollongong Thesis Collection, 2003.

[526] Interview with Go Gian Twan, a vice-chairman of Baperki on May 4, 2016

Communist Party (PKI) and a group of Soekarno's sympathisers. He began to suspect that his arrest was a result of his involvement with the PKI. During his interrogation, the military and police repeatedly asked about his involvement with the failed coup and his role in Baperki. But until to the end of his time in jail, he had never obtained an official letter of suspicion for this detention. Another important case concerns the detention of Baperki's leader was also brought to the, along with Oei Tjoe Tat. Yosep Adi Prasetyo, an editor of Oei Tjoe Tat's biography, said that, 'Pak Oei— 'Pak' is title similar to Mr. in Indonesia—was detained with inadequate legal reasoning.'[527] Oei stayed in prison for seven years without a verdict stating his guilt or innocence. During the imprisonment, Oei, Go, and other Chinese activists, like the other political prisoners were not allowed to meet with visitors except close family members. They were not also allowed to read newspapers or books (except religious books) — the New Order did not permit them get to updates on the political situation.

The 1965 crimes against humanity are amongst the darkest moments of Indonesian history, yet, this tragedy also marked a pivotal juncture in Indonesian politics. The purge of the PKI also served an additional function; without the PKI's opposition, the gate for foreign investment was opened.

> 'What followed in the autumn of 1965 is incomprehensible. Suharto and Nasution ordered loyal troops to flush out, arrest, and murder the supporters of the left. Students, and the children of the wealthy whom the PKI had never succeeded in reaching, were brought out onto the streets. Muslim gangs started a *jihad* (holy war) against the PKI, and were joined by conservative nationalists —partly to take revenge on the left, which had wanted to redistribute the land, and partly to eliminate rival Chinese businessmen. The PKI, left-wing nationalists, and the trade-union movement were crushed. Between half a million and a million people were murdered, mostly in Central and East Java, in Bali and in North Sumatera. […] The militaristic New Order led a purge and assumed state power. Then the doors were opened to technocrats and foreign capital; The US, Japan, Holland, and a number of other Western nations, together with the IMF provided substantial economic support.'[528]

[527] Interview with Yosep Adi Prasetyo on October 10, 2016

[528] Olle Törnquist, *Dilemmas of Third World Communism. The Destruction of the PKI in Indonesia*, London, Zed Books Ltd, 1984, p. 54-55.

Capitalism became increasingly prevalent after the collapse of Soekarno's regime. Conflict between political elites caused a popular mobilisation of the lower class and worsening violence. This case resulted in Soeharto and his affiliates becoming the victors, and ultimately defeating the Indonesian Communist Party (PKI) and widespread mass killings.[529] In this way, these incidents demonstrate that the absence of good governance became an obstacle to solving the wave of killings and discrimination. Furthermore, the truth cannot be seen clearly; official state accounts manipulated the collective memory of Indonesia, presenting the anti-communist stance as a necessity. The New Order Government declared communists to be evil, foreign, anti-Indonesian, and anti-God. Therefore, their lives did not need to be respected; their civil, political, social, economic, and cultural rights were vacated. Pramoedya Ananta Toer gave '*pengkhianatan*' (treachery) as an example of one of the key words generated by the New Order Government. In a similar manner, Goenawan Muhammad revealed that the status quo's fear of communism can be called '*komunistofobia*.'[530]

Because many members of the Chinese community were involved with the PKI, other Chinese people were mistakenly associated with the party. Furthermore, the Chinese community in Indonesia was often associated with the People's Republic of China, and thus by extension, communism. For these reasons, Chinese people were targeted by the Indonesian New Order regime. Communist-phobia, was a major cause of Chinese imprisonment during this time.

Another important consideration to make when analysing these cases is that ex- political prisoners were discriminated against during the New Order regime; their identity cards were labelled 'E/T,' meaning 'eks-tapol' (ex-political prisoner). They were obliged to attend a never ending- *santiaji* course to cleanse their name. Government permission was needed if they wanted to travel. In addition, they also were prohib-

[529] Maxwell Ronald Lane, *Mass mobilisation in Indonesian politics, 1960-2001: towards a class analysis*, PhD Thesis at University of Wollongong, 2009, p. 64.

[530] Robert W. Goodfellow, *Sing Wis, Ya Wis: What is the past is past. Forgetting what it was to remember the Indonesian killings of 1965,* University of Wollongong Thesis Collection, 2003, p. 54.

ited from employment in civil, military, educational, journalistic, and political positions. This discrimination was not limited to the political prisoners themselves, but also affected their families. For example, family members also had difficulties when trying to access the labour market and education. Their children were called 'anak PKI' (communist's child) and were condemned and barred from the public sphere.[531] Some of them were also subjected to violence and imprisonment.

Generally speaking, discriminatory conduct by the government was widespread in the public services, education, health care, and labour market. A million Indonesians suspected of being involved with the PKI were labelled 'tidak bersih lingkungan' (environmentally unclean - not fit for society) because involvement with the PKI was suspected. These suspicions were often based on ethnicity, institutional affiliation, and marital status rather than concrete evidence. In their daily lives, these individuals became targets of scapegoating and blackmailing.[532]

Besides the human rights violations of political prisoners, it is also important to realise that, Indonesian Government, failed to safeguard the concept of good governance and eradicate the widespread violence in various regions of Indonesia. In addition, military forces and a civil paramilitary bloc played a significant role in the brutal violence which could have been prevented by the government. A guerrilla army under the instruction of General Sarwo Edhie, the army their cooperated with BANSER (the paramilitary wing of Nahdatul Ulama) and, ANSOR (the youth wing of Nahdatul Ulama) to purge the to purge the PKI and their sympathisers. Their actions were cruel, and even people who were simply suspected of being involved with PKI or being pro-

[531] Andrew Marc Conroe, *Generating History: Violence and the risks of remembering for families of former political prisoners in post-new order Indonesia.* PhD thesis at the University of Michigan, 2012, p. 6-8. During Soeharto's new order government, the political prisoners who involved with the attempted coup were divided among a classification system of A, B, and C. Category A were the ones who involved directly with the Coup and Indonesian Communist Party and its affiliated organisations. At the same time, category B were consisting of people who insufficient evidence to being sued into the Court and be sent to Buru Island as known as the penal Island. The last, category C were the one who opposite with the government and had left inclination of political orientation.

[532] Martha Stroud, *Ripples, Echoes, and Reverberations: 1965 and now in Indonesia*, PhD thesis at University of California, Berkeley, 2015, p. 51.

Soekarno were arrested, imprisoned or killed.[533] Furthermore, students (*mahasiswa*) were another group who were targeted during the purge, particularly those connected to leftist political parties who were often arrested or killed. Meanwhile, anti-leftist student movements including Kesatuan Aksi Mahasiswa Indonesia (Indonesian Students Action Front-KAMI) and groups related to Masyumi and other Islamic student organisations grew in popularity and were used by Soeharto for the counter-revolution. This counter-revolutionary movement had an extensive network, especially at the local level, and was known as Sekretariat Bersama Organisasi Mahasiswa Lokal (Joint Secretariat of Local Student Organisations-SOMAL). This organisation played a significant role in fighting the Consentrasi Gerakan Mahasiswa Indonesia (Indonesian Concentration of Students Movement-CGMI) that was affiliated with the PKI and the Gerakan Mahasiswa Nasional Indonesia (the Indonesian National Students Movement-GMNI) that was affiliated with PNI.[534] The violence affected a large area. Based upon these incidents, I conclude that, the Indonesian Government, here, again failed to implement good governance. Worse still, military officers were directly involved in discrimination, maladministration, corruption, and support of violence at that time. The lack of good governance after the failed coup of 1965 resulted in the victims, including the Chinese community living in fear. Some even chose to flee the country, deciding to apply for asylum rather than staying in Indonesia. One informant said 'many Chinese activists were targeted by Indonesian New Order, and decided to live abroad rather than be victimised in Indonesia.'[535] The lack of good governance, resulted in increased insecurity vulnerable groups. Moreover, good governance grew ever more absent under the militarization of the New Order Government.

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[533] Robert W. Goodfellow, *Sing Wis, Ya Wis: What is the past is past. Forgetting what it was to remember the Indonesian killings of 1965.* University of Wollongong Thesis Collection, 2003, p. 67.

[534] Maxwell Ronald Lane, *Mass mobilisation in Indonesian politics, 1960-2001: towards a class analysis*, PhD Thesis at University of Wollongong, 2009, p. 116.

[535] Interview with Liem Soei Liong in June 2016

Plainly put, the militaristic government of this time was dysfunctional; the police, nor the courts, public prosecutors, or any justice system could prevent the mass killing. Moreover, the government was also occupied and dominated by the military. Since the 1960s, the military forces were keen to expand their power. Under their doctrine of *Tri Ubaya Cakti* (Three Sacred Pledges), they created the idea of 'Total People's Defence' which was comprised of civil defence (*Pertahanan Sipil/ Hansip*) and a People's Resistance Force *(Perlawanan Rakyat*). They had an imagined duty to combat the infiltration of foreign ideas in public discourse.[536] After Soeharto's government collapsed, it was necessary to investigate the mass killings, arbitrary imprisonment, extermination, enslavement, forced expulsion, torture, rape/ sexual harassment, and forced disappearance. In response to these cases, the Commission gave two recommendations, below:

1. According to Article 1:5 and Article 20:1 of Law No. 26 of 2000 concerning human rights, the Public Prosecutor is requested to follow up [the findings of Commissions] for the further [criminal] investigation;
2. According to Article 47:1 and 2 Law No. 26 of 2000 concerning human rights, the results of the Commission's investigations can be used to pursue a resolution of the dispute through a non-judicial approach with the aim of achieve a sense of justice for victims and their families, (Truth and Reconciliation Commission/ KKR).[537]

It is undeniably true that the government has the authority to compel the public prosecutor to conduct further investigations. Undoubtedly, the government has the power to ensure rehabilitation and reparation for the victims and their families. However, the government's lack of transparency, insufficient levels of public participation, and deficiency in protecting human rights indicate that the government is not truly committed to solving human rights violations. The crimes against humanity

[536] Farabi Fakih, *The Rise of the Managerial State in Indonesia: Institutional Transition during the early independence period. 1950-1965*, PhD Thesis at Leiden University, 2014.

[537] Komisi Nasional Hak Asasi Manusia, Pernyataan Komnas HAM.

of 1965 have yet to be solved. Even the more recent crimes against humanity committed in 1998 have been forgotten in the discourse of law enforcement.

The 1998 mass riots resulted in tragic reports of mass rape and sexual harassment. The National Commission on Violence Against Women reported that mass rape and sexual harassment affected 168 women, 20 of whom died. 152 of these victims were from Jakarta, and the remaining 16 victims were from Solo, Medan, Palembang and Surabaya.[538] President BJ Habibie apologised and condemned the mass rape and sexual harassment, 'I heard reports from the women's coalition about violence against women during the mass riot in May 1998, I am really saddened by this violence which has violated the cultural norms of the nation of Indonesia.'[539] By the same token, the Commission suspected that a syndicate that played a significant role in instigating the exterminations, arson attacks, and robberies, was also responsible for mass rape and sexual harassment. The mass rape and sexual harassment are amongst the most difficult consequences of the May 98 riot; 20 women were killed and the rest live with physical and psychological trauma. On the other hand, attempts to investigate these incidents of mass rape and sexual harassment have been met by threats from the military.

> 'Do not continue searching for the victims. If you continue, you will get to know. Remember, you have a family, don't you? If you still love yourself and your family, you must obey me. This is not a game' (quotation from blackmail threat addressed to volunteers who investigated the mass rapes and sexual harassment incidents in question). One threatening phone call from June 1998 stated 'I already sent one bomb - wasn't that enough? I know where your kids go to school, their uniform, and what time they go to school.' [540]

Uncovering the truth is not easy work. Especially when the potential perpetrators retain their grip on power. Despite the barbarous actions of the tragedy, no perpetrator has ever been prosecuted. Some of these reports of were extremely tragic. For example, on May, 13th, 1998, sever-

[538] Komnas Perempuan, *Temuan Tim Gabungan Pencari Fakta Peristiwa Kerusuhan Mei 1998. Tim Relawan untuk Kemanusiaan,* Publikasi Komnas Perempuan, 2006, p. 72.

[539] Presidential statement on July, 15, 1998.

[540] Komnas Perempuan, Temuan Tim Gabungan., p. 75.

al young people came with two trucks to a house/store, where they committed a robbery, stripped and raped mother and her daughter. They then burned the house and store, and the left the mother and her daughter to die in the fire.[541] Many other heinous offences were also reported.

The crimes committed in the May riots of 1998, cannot be separated from anti-Chinese violence. Widespread violence was present in Solo, Medan, and Jakarta. Similar patterns of violence spread across Indonesia suggesting that all the incidents shared an intellectual actor. Between May 13th and 15th riots began in Glodok, Pluit, Tanjung Priok, Jatinegara, and Tangerang.[542] In these riots approximately 704 buildings and houses were destroyed and burned, and many people were killed. Therefore, this moment is often considered to be a turning point in the crisis of trust in the government.[543] Hence, some scholars describe the May riots as anti-Chinese and an example of 'racialised state-terrorism.'[544]

It is inconceivable that these incidents were able to take place in a country which avows its commitment to rule of law in its Constitution, especially, the mass rape of Chinese women. Some have claimed that this mass rape was a rumour and did not happen. However, a voluntary team of investigators found that the mass rape was coordinated by an organised group of perpetrators. The mass rapes appear to share similar modus operandi; they happened during the riots, and the suspected perpetrators were not from neighbourhood where the crime happened, they came from outside of the area in trucks and cars. After robbing Chinese owned stores, these people raped Chinese women. Some Chinese women survived because local people from the neighbourhood rescued them. On May 13th, 1998, a group of rioters came to a rob a

[541] Komnas Perempuan, *Temuan Tim Gabungan Pencari Fakta Peristiwa Kerusuhan Mei 1998, Tim Relawan untuk Kemanusiaan,* Publikasi Komnas Perempuan, 2006, p. 71.

[542] Jemma Elizabeth Purdey, *Anti-Chinese Violence in Indonesia 1996-1999*, PhD thesis at University of Melbourne, 2002, p. 99.

[543] Johanes Herlijanto, *The May 1998 Riots and The Emergence of Chinese Indonesians: Social Movements in the Post-Soeharto Era.* The 18th Conference of International Association of Historians of ASIA (IAHA), December 6-10, 2004, Academia Sinica, Taipei.

[544] Jemma Elizabeth Purdey, *Anti-Chinese Violence in Indonesia 1996-1999*, PhD thesis at University of Melbourne, 2002, p. 100.

Chinese-store. The leaders of this group ordered the rioters to bring the Chinese women who they found in the store to a school to be raped. Fortunately, this particular incident was foiled after the neighbourhood intervened and saved these Chinese women's lives.[545] The mass rape of 168 victims is a tragic sorrowful story, and one which continues to be discredited by the administration: 'Despite denials by some of the political class, these incidents actually happened'. The mass rape was not a hoax, and the victims have had to live with trauma.'[546] The lack of prosecution for these crimes is one of the most concerning aspects of the 1998 incidents. Any attempt to solve these cases must be careful and be sensitive to the needs of the victims, many of whom are traumatised. One informant said 'I have a friend whose daughter was one of the victims in 1998. And, now, they don't want to live in a house in Chinatown. They prefer to stay in an apartment with special security.'[547] Two decades after the 1998 reformation, this prosecution and investigation of the mass rape has almost disappeared. Most crucially, real commitment from government is needed to solve this case.

Justice must be sought regarding all potential crimes against humanity through both litigation and as non-litigation approaches. Doing so requires an increased commitment to good governance by the Indonesian government. This section demonstrated the absence of good governance for the Chinese community who were victimised in 1965 and 1998. Therefore, the commitment to resolve these problems should be a priority of future Indonesian governments.

3.3.7 Provisional findings

This section discussed the good governance principle of human in relation to the fulfilment of the norms for the Indonesian Government and the legal protection of Chinese and Turks in Indonesia. The section on the principle of human rights also explains the implementation of the right to good governance with reference to Chinese and Turkish

[545] Komnas Perempuan, *Temuan Tim Gabungan Pencari Fakta Peristiwa Kerusuhan Mei 1998, Tim Relawan untuk Kemanusiaan,* Publikasi Komnas Perempuan, 2006, p. 89

[546] Interview with Sri Palupi in December 2016

[547] Interview with AS (initial name for the security reasons) in December 2016

communities in Indonesia and examples of how ethnic discrimination has manifested in Indonesia including changing-name, land confiscation, and the incidents of 1965 and 1998. The right to good governance of the Chinese community have been infringed upon as evidenced by many violations of the right to access to civil administration, especially Benteng Chinese experienced difficulties with obtaining a birth certificate. According to the Indonesian Administration Act, after an Indonesian Citizen is born, they are entitled to a birth certificate within 60 days. However, Oey Endah and many other Benteng Chinese were prevented from accessing this right for many years. Another problem regarding the implementation of the right to good governance is that of the Turkish community. Their organisation, PASIAD was disbanded by the Indonesian Ministry of Foreign Affairs without referring to the Indonesian Mass Organisation Act or an assessment by the courts. However, the Indonesian government has strived to respect the right to good governance of Turkish new-born babies, who have been allowed to stay in Indonesia without a residence permit, and providing them with a birth certificate issued by Indonesian Civil Administration Affairs.

Another important case with regards to good governance is the arbitrary confiscation of land during the New Order. These seizures were coordinated via secret letters of the Ministry of Finance. After the fall of the New Order, Chinese-Indonesians who had lost their land tried to appeal through the courts, and although most were defeated, at last they challenged the arbitrary foreclosure. The New Order Government, acted arbitrarily and discriminated against Chinese-Indonesians, for example by officially suggesting that they should change their names. Many Chinese-Indonesians did not have a problem with changing their names, and agreed to do so voluntarily. However, some were resistant to this New Order policy. For example, Yap Thiam Hien insisted that he would keep his name, stating 'My name is my identity!' The New Order regime also caused ethnic violence in the tragedies of 1965 and 1998. Although Chinese-Indonesians were not the only victims of the mass killings of 1965 and 1998, many Chinese-Indonesians suffered in these incidents; they were expelled, killed, tortured, and their human rights were violat-

ed from many years. Many Chinese-Indonesians activists were detained arbitrarily due to their involvement with pro-Soekarno groups and the Indonesian Communist Party.

4. Provisional conclusions of chapter 3

This chapter explains that the general aspects of the legal system in Indonesia reinforce the concept of good governance. The Indonesian legal system consists of norms for the government and legal protection of ethnic minorities, for example Chinese and Turkish communities. At the same time, the good governance principles of transparency, participation, and human rights have influenced the norms for the Indonesian Government and the legal protection of people. The governmental authorities, the courts, the Ombudsman and the National Human Rights Institution used these principles to address the problems of Chinese and Turks living in Indonesia. After 1998, the amended Indonesian Constitution formulated adequate norms for the administrative authorities to facilitate maxims such as equality before the law, prohibition of discrimination which stipulates as the norms for the government as well as legal protection of ethnic minorities. In addition to the Constitution, regulations such as the Act of Citizenship and Human Rights Act also oblige equal treatment and legal protection of ethnic minorities. Thus, I argue that the Indonesian legal system is likely sufficient from a good governance perspective to combat discrimination and maladministration. In other words, good governance is a legal concept which strengthens the norms for the government and legal protection of ethnic minorities, something which can be seen in the Indonesian legal system.

The Indonesian legal system provides suitable legislation to realise the concept of good governance. For instance, Article 28 of the Indonesian Constitution states the obligation of administrative authorities to fulfil the principles of equality before the law, legal certainty and freedom from discrimination. This formulation is more than sufficient to establish a concept of good governance. In addition to the Constitution, many pieces of legislation also contain the substance of good governance with the aim of protecting ethnic minorities. For ex-

ample, the Indonesian Act of Citizenship and Human Rights Act also oblige the administrative authorities to realise the ideas of good governance. These pieces of human rights legislation were later implemented by the Indonesian Government. Furthermore, the government issued the National Human Rights Action Plan that also can delineate the formation of guidance in realizing the idea of good governance. The National Human Rights Action Plan is covered by the Presidential Regulation No. 75 of 2015 which contains several ideas of good governance including transparency, professionalism, and effectiveness.

Another important consideration is that the concept of good governance can provide inspiration that supports the Ombudsman's fight against maladministration and discrimination. The Ombudsman receives many complaints including cases concerning corrupt public servants and discrimination against ethnic minorities. The Turkish and Chinese communities often use the Ombudsman's services to defend their interests. An often-overlooked point is the role of the Indonesian National Commission of Human Rights in investigating and monitoring discrimination cases in accordance with anti-discrimination law, namely Law No. 40 of 2008. Every year the Commission produces a report on their activities, part of which focuses upon trends in discrimination. In these reports, Chinese-Indonesians were identified as a vulnerable ethnic group whose members are regularly victimised.

At the same time, the court's legally binding power has the potential to foster ethnic minority protection, but I have not seen much evidence that the courts play a significant role in discrimination cases or that it pursues the idea of a 'good' court settlement. The judges' lack of knowledge of human rights is one of the reasons for the relative absence of good governance. After analysing some case law, I found many instances of disappointing legal reasoning by judges in lawsuits concerning land conflict, changing-name, and so on.

On many occasions, ethnic minorities (such as Turkish and Chinese people) have attempted to access information useful to empowering their position. However, the principles of transparency existed more in the text of legislation rather than in practice. The principle of trans-

parency is regulated in the Public Disclosure Act, but there is a lack of sufficient data to indicate whether or not ethnic minorities utilise this Act. However, the Public Disclosure Act may encourage the government to publish their public information which may help people, including ethnic minorities, to participate. One example of participation is also procedure related to the submission of a complaint. The Turkish and Chinese communities have also attempted to lodge complaints of discrimination through the Ombudsman, the National Commission of Human Rights, and appeals to the courts. There have been some success stories of ethnic minority participation, for instance, Baperki and Pasiad have both gained a significant amount of influence whereby they have wielded to represent the interests of the communities they serve, particularly as a means of participating in the policy making process. Still, the administrative authorities have frequently failed to protect the fundamental rights of minorities. This is especially clear in the case of the Chinese school that wished to reclaim land confiscated by the New Order administration, or the reports of members of the Turkish community whose residence permits have been under threat due to the Turkish embassies' witch-hunt of the Gulen movement (*Hizmet*). As these examples show, not all forms of participation have been successful in restoring justice in the context of the Indonesian legal situation. The very worst events in Indonesian history are the crimes against humanity of 1965 and 1998, and there has been a notable absence of good governance in the government's approach to resolving the cases of mass killings, riots, torture, and forced disappearances. The Indonesian government is not sufficiently transparent, and does not provide adequate opportunities for civil participation, effectively abandoning the value of human rights. Finally, and importantly, I believe that the Indonesian administration and society needs the idea of good governance to properly prosecute the perpetrators and healing the trauma of victims of the crimes against humanity of 1965 and 1998, either through litigation (The ad hoc Human Rights Court) or non-litigation (the Truth and Reconciliation Commission of Indonesia).

CHAPTER 4

Good Governance and Ethnic Minorities in The Netherlands

1. Introduction
2. General legal norms of good governance and ethnic minorities
   - 2.1 Introduction
   - 2.2 Article 1 of Dutch Constitution
   - 2.3 Legislation on equal treatment, non-discrimination and human rights
   - 2.4 Legislation on legal protection, preventive and repressive approaches
   - 2.5 Institutions dealing with the norms for the government and legal protection of ethnic minorities
     - 2.5.1 The administrative authorities
     - 2.5.2 The National Ombudsman
     - 2.5.3 The Netherlands Institute for Human Rights
     - 2.5.4 The courts
   - 2.6 Provisional findings
3. Specific legal norms for the government and legal protection of ethnic minorities: a case study of the Chinese and Turkish communities
   - 3.1 The principle of transparency
     - 3.1.1. Introduction
     - 3.1.2. Transparency and the Dutch Government Information Act
     - 3.1.3 The role of transparency in promoting cooperation and peace between ethnic groups
     - 3.1.4. Access to information
     - 3.1.5. Transparency in practice: integration policy
     - 3.1.6. Provisional findings
   - 3.2 The principle of participation
     - 3.2.1 Introduction
     - 3.2.2 Constitutional motive
     - 3.2.3 Citizen's panels and community-level participation
     - 3.2.4 The implementation of ethnic minority participation
       - 3.2.4.1 Position of the stranger in the Dutch courtroom
       - 3.2.4.2 Participation regarding Turkey crackdown on freedom
       - 3.2.4.3 Ethnic minority that complains about discrimination through the Netherlands Institute for Human Rights
     - 3.2.5 The CLEAR method
     - 3.2.6 Provisional findings
   - 3.3 The principle of human rights
     - 3.3.1 Introduction
     - 3.3.2 The right to good governance
     - 3.3.3 The right to freedom from discrimination
     - 3.3.4 Legal protection of ethnic minorities
     - 3.3.5 Ethnic profiling
     - 3.3.6 Provisional findings
4. Provisional conclusions

1. Introduction

This chapter describes the potential for the concept of good governance to strengthen the norms for the government and legal protection for people, especially for ethnic minorities. This chapter also elaborates on the implementation of good governance principles e.g. transparency, participation and human rights. These principles are also used by the governmental authorities, the Ombudsman, the National Human Rights Institutions and the courts to solve problems experienced by ethnic minorities, especially Chinese and Turkish people in the Netherlands. Chinese and Turkish people are both ethnic minority groups in the Netherlands. Their identity and ethnicity may result in unequal treatment and discrimination which this research attempts to investigate.

Ethnic identity is always, and necessarily, a politics of the creation of difference in the field of law.[548] I propose that good governance can be used to harmonise the dissonance that arises from these differences.[549] Article 1 of the Dutch Constitution obligates governmental authorities to observe the principles of equal treatment and non-discrimination with regards to religion, belief, political opinion, race, and sex.[550] Equal treatment as an obligation of governmental authorities has become a political trademark of the Dutch administration. Cities such as Amsterdam, Utrecht, Rotterdam, and The Hague are thought of as 'super-diverse cities', and examples of 'the world in a city'. The local and municipal Dutch governmental authorities have an obligation to assist people of various ethnicities, nationalities, and backgrounds to create protective anti-discrimination policies.

It is interesting to analyse these policies from the perspective of good governance. Good governance has implications in two areas: obligations and protections. The Dutch government has demonstrated a commitment to obeying its obligation to treat all people equally, as evi-

[548] Seyla Benhabib, *Democracy and Difference. Contesting the Boundaries of the Political.* Princeton, Princeton University Press, 1996, p. 3.

[549] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 63.

[550] *Legal measures to combat racism and intolerance in the member States of Council of Europe*, European Commission against Racism and Intolerance (ECRI), 2006.

denced by the issuing of the National Action Plan of Human Rights and the implementation of anti-discrimination legislation. This chapter will elaborate on Dutch anti-discrimination legislation and institutions that deal with ethnic minority protection, and explore specific legal cases involving Turkish and Chinese ethnic minorities with reference to my selected principles of good governance.

From the perspective of good governance, the norms for the governments and legal protection of people can be seen in the Dutch Constitution and other important pieces of legislation. Article 1 of the Dutch Constitution has occupied a fundamental position in political debate since 1983 (section 2.1). From a good governance perspective, the Equal Treatment Act has also been instrumental to the evolution of social protection. Furthermore, people may ask ethical questions about how distributive justice can be achieved. Indeed, law functions to protect individual dignity from subordination and discrimination.[551] It is vital that ethnic minorities, such as Turkish and Chinese people, are not neglected in the public sphere. In this era of modern social imaginaries, the politics of the recognition of all identities is promoted by democratic governments.[552] The application of human rights norms that ensure the fulfilment of the 'rights of others,'[553] is strengthened with the support of the Ombudsman, the Netherlands Institute for Human Rights, and the courts (section 2.5). I conclude by arguing that the governments can produce ethnic fairness in the decision-making process, law-making, and dispute settlements if the administration conducts itself properly, whilst under the observation of independent institutions such as the Ombudsman, the Netherlands Institute for Human Rights, and the courts.[554] After explaining the role of administrative authorities, the Ombudsman, the Netherlands Institute for Human rights and the

[551] Ronald Dworkin, *Justice for Hedgehogs*. Cambridge, The Belknap Press, 2011, p. 112.

[552] Charles Taylor, *A Secular Age.* Cambridge, The Belknap Press of Harvard University, 2007, p. 158.

[553] Seyla Benhabib, *The Rights of Others Aliens, Residents, and Citizens.* Cambridge, Cambridge University Press, 2004, p. 6.

[554] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights*. 1995. Clarendon Press., p. 131.

courts, I will describe the implementation of transparency (section 3.1), participation (section 3.2) and human rights (section 3.3).

2. General legal norms of good governance and ethnic minorities

2.1 Introduction

This section describes the regulations which are the basis for the concept of good governance from an administrative law perspective and focused on the norms for the government and ethnic minority protection in the Netherlands. I begin with several questions: to what extent does Dutch law support the implementation of good governance and ethnic minority protection? What is the history of equality and equal treatment in the Dutch Constitution with regards to ethnic minority protection from a good governance perspective? How necessary is the Equal Treatment Act? And, to what extent does GALA guarantee the legal duties of government with regards to the protection of ethnic minorities? I begin this discussion with an exploration of Article 1 of the Dutch Constitution, and follow with an analysis of other legislation relevant to good governance and ethnic minority protection, such as the Equal Treatment Act and GALA. Additional regulation that has also contributed to the establishment of good norms and fundamental rights include the Government Information Act, the Netherlands Institute for Human Rights Act, the Municipal anti-discrimination service Act, provisions against hate crime in the Dutch Criminal Code, etc. A comprehensive analysis of the legislation is pivotal to supporting the concept of good governance and ethnic minorities. In the Netherlands, I have identified two main types of problems with the implementation of good governance and ethnic minority protection; those relating to substantive norms, and those relating to procedural norms. Problems that concern the position of ethnic minorities are seen in case law, include representation in the media, ethnic profiling, social barriers in the labour market, difficulty in accessing goods and services, right wing populist movements, hate crime, and so on and so forth. Fortunately, the Netherlands has relatively adequate substantive norms, which will be elaborated upon below. In addition, procedural norms support ethnic

minorities to solve their problems through an accessible and responsive standard.

2.2 Article 1 of the Dutch Constitution

Article 1 has the potential to be legal grounds that reinforce the concept of good governance. This article may stipulate the norms for the government and legal protection of ethnic minorities. At the same time, this article also exists as the symbol of the country as a multicultural nation which obliges the government to treat people equally. The Netherlands is a pluralistic and multicultural country. It respects all religions (*godsdienstige*), ideologies (*levensbeschouwingen*), lifestyles (*leefstijlen*), beliefs (*levensbeschouwingen*), and value patterns (*waardepatronen*).[555] The explanatory memorandum to Article 1 of the Dutch Constitution emphasises these values. The role of the government in a pluralist democracy is to protect social diversity,[556] including ethnicity. Article 1 appears to be the primary legal root of further regulations that guarantee equal treatment. Article 1 contains an adequate concept of good governance which establishes the legal principle of combating discrimination. Therefore, the Dutch government provides the right to file a complaint for ethnic minorities, including Chinese and Turkish people on Dutch soil. Good governance ensures the rationalisation of legal norms and effective enforcement.[557] In 2004, Article 1 was strengthened after considerable political debate in the Dutch Parliament around the issue of the increasing numbers of ethnic minorities in the country.[558]

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[555] See., Kamerstukken II 2003/04, 27 925, nr. 120. Tweede Kamer der Staten-General.

[556] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*. Oxford, p. 2.

[557] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 3.

[558] In 2004, political debate in parliament, ended with an indispensable Article 1. In the Dutch parliament, debate about the need for Article 1 was split between two reasons. Firstly, changes in global geopolitics such as the effect of September 9/ 11 tragedy, the war on terror to Afghanistan and Iraq, etc. Secondly, actual data about the integration of minorities, Imams' statements about homosexuality and the position of women. The report of the General Intelligence and Security Service (AIVD) 2004 stated that the number of Muslims was growing. However, many Muslims had experienced ill-treatment by some politicians using freedom expression to insult them through media. See., Kamerstukken II 2003/04, 27 925, nr. 120. Tweede Kamer der Staten-General.

However, the spirit of equal treatment is not a new concept in the Netherlands. The 1814 Dutch Constitution introduced a system of justice to protect what was called 'the inestimable privileges of civil liberties and personal safety' or '*de onschatbare voorregten van burgerlijke vrijheid en persoonlijke veiligheid*.' Freedom and liberty are the institutional expressions of emancipation and the objectives of the Enlightenment.[559] Consequently, no one can be charged with committing a crime without a fair trial.[560] This section is an example of the existence of the spirit of equality. Similarly, the introduction of proportional representation in 1917 and universal suffrage in 1919 are evidence of the long history of equal treatment in Dutch law. Equality treatment with regards to state funding, including social benefits, was also instigated by the 1917 Dutch Constitution.[561]

The Dutch people are familiar with the word equality. Equality might denote shared social meanings in society.[562] The concept of a pluralist society is supported by Article 1,[563] which was created during the amendment of Dutch Constitution in 1983. Curiously, Article 1 is rarely used as the formal legal basis for argumentation in the Courtroom, or in the investigations of the Ombudsman and the Netherlands Institute for Human Rights— but it still has its relevance. For example, Article 1 of the 2008 Constitution of the Kingdom of the Netherlands has been very influential, and is often cited in Dutch political debates about equal treatment. The topic of equality has been the centre of much discussion. In addition, Article 1 provides a legal baseline for other pieces of anti-discrimination legislation, such as (among others), the Equal Treatment Act. Any differential treatment based on ethnicity or race, fuels further

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[559] Costas Douzinas, *Human Rights and Empire the Political Philosophy and Cosmopolitanism*, Oxford & New York, Routledge, 2007, p. 36. Douzinas stated that freedom and equality have been used by people to struggle against tyranny, prejudice, and oppression.

[560] Grondwet voor de Vereenigde Nederlanden 1814

[561] Wim J. M Voermans. *The Constitutional Revision Process in the Netherlands. Sensible Security Valve or Cause of Constitutional Paralysis?* See., Xenophon Contiades. *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA.* Oxford&New York, Routledge, 2013, p 257

[562] Joseph Raz, *Multiculturalism.* Ratio Juris. Vol 11. No. 2 September 1998 (193-205).

[563] Costaz Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism.* Oxford&New York, Routledge, 2007, p. 40.

stereotyping and prejudice. Hence, Article 1 and additional specific legislation are demanded to eradicate discrimination.

The explanatory memorandum of Article 1 of the Dutch Constitution states that the Constitution was formed with a consideration of the pluralistic nature of the Netherlands. (*grondrechten in een pluriforme samenleving*).[564] I argue that Article 1 reflects Kymlicka's notion of the emergence of multiculturalism in the Constitution. Hence, Article 1 can be understood as the constitutional affirmation of the idea of multiculturalism.[565] Similarly, this affirmation has become a part of the wider policy making process. The political debate during the formulation of Article 1 resulted in the prohibition of discrimination, and the protection of freedom of expression, freedom of association, the right to access education.[566] Finally, Article 1 can be considered an ideological and rhetorical triumph, wherein ethnic minority rights are protected by the government.[567]

Acknowledging pluralism, prompts the responsibility to advocate for the basic needs of all members of society, such when the Minister for Administrative and Kingdom Relations raised a question in Parliament about fundamental rights in a pluralistic society. The Minister felt that responding to the needs of citizens was an obligation of securing fundamental rights in a pluralistic society. The terminology of a pluralistic society was also used as the political basis for new human rights regulation. In addition, Article 1 can be a tool for the extension of jurisdiction related to fulfilling fundamental rights.[568] In this research, the spirit of Article 1 appeared in my analysis of Chinese and Turkish legal cases. With substantial legal standing, ethnic minorities may feel more secure and participate more readily with the Dutch legal system.[569]

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[564] Kamerstukken II 2003/04, 27 925, nr. 120. Tweede Kamer der Staten-General.

[565] Will Kymlicka et al, *Multiculturalism and the Welfare State. Recognition and Redistribution in Contemporary Democracies*, Oxford, Oxford University Press, 2006, p. 56.

[566] Kamerstukken II 2003/04, 27 925, nr. 120. Tweede Kamer der Staten-General.

[567] Costaz Douzinas, *The End of Human Rights. Critical Legal Thought at the Turn of the Century*, Oxford&Porthland, Hart Publishing, 2000, p. 344.

[568] See., Twedee Kamer, vergaderjaar 2006-2007, 30 900, nr. 3. Memorie van Toelichting Voorstel van wet de Ieden Halsema en van Gent houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet.

[569] Interview with Ali Dogan on January, 15, 2016. A lawyer at van Akenborgh Dogan

2.3 Legislation on equal treatment, non-discrimination and human rights

The Equal Treatment Act is a piece of legislation which supports the concept of good governance by providing norms for the government and legal protection of ethnic minorities. This Act also obligates to everyone and the private sector to respect equal treatment. Although the Equal Treatment Act now plays an important role in protecting the position of minorities, it received many challenges during the process of issuing the Act. In the 1970s, Equal Treatment legislation in the Netherlands developed to promote a more legal protection based approach towards equality and non-discrimination.[570] A significant portion of Parliaments' agenda in 1967-1968, involved discussions of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination with the Committee on Foreign Affairs and Justice.[571] In 1994, equal treatment legislation was issued by the government which guaranteed equal treatment to all persons regardless of their religion, belief system, political opinion, race, sex, nationality, sexuality or civil status. The Equal Treatment Act itself, has a long journey which began in 1988, when the Christian Democratic Appeal (CDA) proposed the legislation.[572] Ethnic minorities need a juridical structure to defend their social position.[573] The Equal Treatment Act may become a juridical structure for the legal protection of ethnic minorities. The official explanation of the Equal Treatment Act provided three reasons for the proposition of the draft. First, the obligation of the government to recognise the personal dignity of human beings and to promote participation of all citizens. Second, the political situation was influenced by both global geopolitics and contemporary discourses of human rights in the Netherlands— namely,

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Advocaten.

[570] Jenny Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From specialised Equality Body to Human Rights Institute*. The Equal Rights Review, Bol 8 (2012).

[571] Eerste Kamer Der Staten-General (Tweede Kamer, zitting 1967-1968) 9723 (R663) en 9724.

[572] Nederlands Dagblad on June, 31, 1988. Kamernotities.

[573] John D. Skrentny, *The Minority Rights Revolution*. Cambridge, Belknap Press, 2004, p. 160.

the intervention of the International Convention on Human Rights, the Regional Human Rights Act (European Convention of Human Rights) and the expression of the amended 1983 Constitution, which included several human rights provisions in the Dutch penal and civil codes, and the equal treatment of men and women Act of 1989. Third, the urgency of the establishment of a specific committee to oversee compliance with anti-discrimination law became a central theme of combating prejudice.[574]

The introduction of the Equal Treatment Act can be seen as an indication of a new social sensitivity to approaching problems of inequality. Societies are not simply comprised of a majority and a minority, but rather a multiplicity of different social and cultural groups.[575] This regulation obliges the government to guarantee the fundamental rights of minorities and provide a means for participation to minorities and in this regards is an example of a regulation that serves the goal of good governance.[576] However, a study of the trajectory of Dutch legal history reveals that this legislation was not initially successful, and it was only through immense effort and persistence that it was eventually issued. The draft was initially proposed in 1988, but at that time, the draft of the Equal Treatment Act failed to be approved. It later resurfaced in 1990 when the Christian Democratic Appeal (CDA) formed a political coalition with the Labour Party (PvdA). Yet the discussions stalled during the debate about gay rights, which was met with opposition by some parties.[577] On February 18th, 1994, a social movement that supported the draft of Equal Treatment Act, collected 213.000 signatures from citizens.[578] The Catholic church warned of social damage if the Equal Treatment Act became law. However, sympathy for the social move-

[574] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3. Memorie van Toelichting Algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, hetero-of homoseksuele gerichtheid of burgelijke staat (Algemene wet gelijke behandeling).

[575] Joseph Raz, *Multiculturalism.* Ratio Juris. Vol 11. No. 2 September 1998 (193-205).

[576] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*. Oxford, p. 107.

[577] De Telegraaf, Kamer eist duidelijkheid over voorhereiding wet Gelijke Behandeling. June, 27, 1990.

[578] Leeuwarder courant. Gelijke Behandeling. February, 19, 1994.

ment grew after public outcry in response to the termination of a homosexual teacher's employment in Amersfoort and this public support finally allowed Parliament to pass the draft.

After the Equal Treatment Act was issued, the prohibition of discrimination became much stronger.[579] Some provisions of this Act mention extra protections with regards to gender, protection for women during pregnancy and motherhood, ethnic minorities and cultural minority groups in underprivileged positions, and religious communities. These formulations reflect the principles of relativism in the universal idea of human rights.[580] By 'relativism' I mean that the Articles of this Act recognise that some demographics require protections that others do not. The official explanation of the Equal Treatment Act includes a discussion of the risks of ultra-secularism; the government aims to respect freedom of religion within the principle of the separation of church and state.[581] At least, the Equal Treatment Act provides legal certainty and jurisdiction to minority groups.[582] With guarantees of legal certainty, ethnic minorities are able to abolish xenophobia in the public sphere.[583] Ethnic minorities can lodge complaints to protect their interests.[584] With legal certainty, the government ensures basic liberal procedures and the standard liberal package to ethnic minorities.[585] One reason that equal treatment is required is to ensure that the basic need of all citizens are met; minorities often experience restricted access to hous-

[579] Tetty Havinga, *The Effects and Limits of anti-discrimination law in the Netherlands.* Institute for Sociology of Law, 20 (2002) 75-90.

[580] Annelies Riles, *Anthropology, Human Rights and Legal Knowledge: Culture in the Iron Cage.* The American Anthropological Association, Vol. 108, Issue 1. Pp. 52-65. 2006.

[581] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3. Memorie van Toelichting Algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, hetero-of homoseksuele gerichtheid of burgelijke staat (Algemene wet gelijke behandeling).

[582] Jenny Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From specialised Equality Body to Human Rights Institute.* The Equal Rights Review, Bol 8 (2012).

[583] Joseph Raz, *Multiculturalism*, Ratio Juris. Vol 11. No. 2 September 1998 (193-205).

[584] Costaz Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism*. Oxford&New York, Routledge, 2007, p. 37

[585] Alan Patten, *Equal Recognition. The Moral Foundations of Minority Rights.* Princeton, Princeton University Press, 2004, p. 152.

ing, health care, culture, welfare, and education— the Equal Treatment Act aims to address this imbalance.[586]

Returning to the history of the Equal Treatment Act, the term 'equal treatment' has been a part of Dutch political discourse since 1963. On February 27th, 1963, the Minister of Justice met with Parliament, where they discussed the Geneva Convention on equal treatment, with reference to the social security of Dutch citizens and foreigners.[587] Nearly 20 years later, on June 21st, 1984, the Parliament and Minister of Social Affairs agreed to the need to strengthen the Committee for Emancipation by improving the monitoring of equal treatment.[588] In the past, specific institutions had been established to oversee particular elements of equal treatment, such as the Equal Pay Commission in 1975, the Equal Treatment Commission of Men and Women in 1980.[589] The history of anti-discrimination discourse in the Netherlands is long and prolific.[590] The political discussion of the draft of Equal Treatment Act began on August 30th, 1988, but this draft was suspended before it could be issued.[591] By February 1994, the real political debate about issuing equal treatment legislation included members of the First Chamber of the parliament, the Minister of Interior Affairs, the Minister of Justice, Minister of Education, and the Minister of Finance. Each political party gave their opinion about the proposed draft of the Equal Treatment Act, including the Christian Democratic Appeal (CDA), the Green left, the People's Party for Freedom and Democracy (VVD), the Democrats 66 (D66), the Reformed Political Party, and the Labour Party (PvdA).[592]

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[586] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3. Memorie van Toelichting Algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, hetero-of homoseksuele gerichtheid of burgelijke staat (Algemene wet gelijke behandeling).

[587] Tweede Kamer, Zitting 1962-1963. 48ste vergadering.

[588] Tweede Kamer, 21 Juni 1984. 116. Vaste commissie voor het emancipatiebeleid.

[589] Jenny Goldschmidt, *Protecting Equality as a Human Right in the Netherlands. From specialised Equality Body to Human Rights Institute.* The Equal Rights Review, Bol 8 (2012).

[590] Janny Dierx & Peter Rodrigues. *The Dutch Equal Treatment Act in Theory and Practice.* Roma Rights General 2003.

[591] Tweede Kamer, 97ste vergadering. 30 Agustus 1988.

[592] Eerste Kamer 21ste vergadering. 22 Februari 1994.

In the Second Chamber of Parliament, CDA tried to persuade Members of Parliament that the draft should offer protections regarding belief, race, gender, sexual orientation, and economic position.[593] Although almost all Members agreed that an Act was needed to implement the spirit of Article 1 of the Constitution, some members continued to resist the draft of the Equal treatment Act. VVD, for example argued that the draft needed to be formulated more clearly.[594]

Despite dynamic political debate parliament, legal protection of ethnic minorities is required in the development of a constitutional and democratic state.[595] After equal treatment was established, ethnic minorities have been offered the opportunity to lodge a complaint if they experience discrimination.[596] Furthermore, the Act is a tool that has an effect on the recognition of identity.[597] In this research, I have identified many cases of Chinese and Turkish people approaching the Netherlands Institute for Human Rights to file complaints about discrimination conducted by the private sector or public servants. The Equal Treatment Act can be wielded as an instrument in the fight against discrimination. Primarily, Chinese people in the Netherlands have used this weapon to fight for equal access to good and services,[598] whereas Turkish people have mainly fought discrimination in the labour market.[599] Indeed, the Equal Treatment Act is at the very heart of multicultural legal civilization of the Netherlands, and is pivotal to the regulation and protection of human rights.

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[593] Kamerstuk Twede Kamer 1991-1992 kamerstuknummer 22014 ondernummer 5, Memorie van Antwoord

[594] Kamerstuk Twede Kamer 1991-1992 kamerstuknummer 22014 ondernummer 12, Nader Gewijzigd Voorstel van Wet.

[595] John Rawls, *Lectures on the History of Political Philosophy*. Cambridge, The Belknap Press of Harvard University Press, 2007, p. 278.

[596] Tetty Havinga, *The effects and limits of anti-discrimination law in the Netherlands.* International Journal of Sociology of Law 20 (2002) 75-90.

[597] Costaz Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism.* Routledge, Oxford&New York, 2007. p. 240-282.

[598] Oordeelnummer 2015-56. College voor de Rechten van de mens; Oordeelnummer 2015-55. College voor de Rechten van de mens, and Oordeelnummer 2015-26. College voor de Rechten van de mens.

[599] the Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Report of the Netherlands.

The explanatory memorandum of the Equal Treatment Act consists of two areas of focus. Firstly, access to goods and services should be available to everyone in the Netherlands, including ethnic minorities. These provisions must be obeyed by the private sector, the government and all institutions which fulfil a public function such as relating to housing, healthcare, culture, education, or welfare. Secondly, provisions relating to labour and employment must be enforced in the areas of vocational training, promotion, wages, and dismissal.[600] In 1994, a Turkish-Dutch football player was refused membership by a football club— this incident stimulated debate about discrimination and mobilised support for the need for anti-discrimination legislation.[601] The Equal Treatment Act provides substantial protection to ethnic minorities. I was unable to find evidence of Chinese and Turkish contributions to the formulation of the Equal Treatment Act; rather they became beneficiaries of this regulation. They can participate by lodging complaints without making any direct contribution to issuing of the draft.

In addition, the Equal Treatment Act simply provides dual protections by prohibiting both direct and indirect discrimination (Article 1).[602] The official explanation defines direct discrimination as that which explicitly targets an individual or group based upon their membership of a protected demographic. For instance, Schippers Bouwconsult BV

[600] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3. Memorie van Toelichting Algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, hetero-of homoseksuele gerichtheid of burgelijke staat (Algemene wet gelijke behandeling).

[601] The main actor responsible for this mass mobilization was Mr Wil Hendriks, a lawyer in Utrecht. He rejected the warning from Roman Catholic Bishops about the dangers of the law. He believed that by promoting the Equal Treatment Act, injustice and discrimination could be reduced. In a newspaper article, he wrote about the suffering of Surinamese people who were refused by service public servants, the rejection of a Turkish football by club because of his descent, and the termination of the employment of a homosexual teacher because of his sexual orientation. Leeuwarder courant. Gelijke Behandeling. February, 19, 1994.

[602] Article 1, for the purposes of this Act and the provisions based upon it the following definitions shall apply: discrimination: direct and indirect discrimination, as well as the instruction to discriminate; direct discrimination: discrimination between persons on the grounds of religion, belief, political opinion, nationality, race, sex, heterosexual or homosexual orientation or civil status; indirect discrimination: discrimination on the grounds of other characteristics or behaviour than those meant under (b), resulting in direct discrimination.

annulled a working contract because they discovered one of their business partners was of Turkish descent. In a telephone conversation on 8th October 2015, Schippers Bouwconsult BV does not conduct business with people of Turkish descent.[603]

In contrast, indirect discrimination does not require an explicit reference to ethnicity, but includes any instance where ethnicity is the motivation of a discriminatory action.[604] Indirect discrimination are actions that are implicitly discriminatory, rather than explicit. For instance, a mother, who only spoke Turkish, visited the dentist. She was accompanied by her son who was acting as her translator. However, the nurse insisted that the Turkish woman must speak Dutch, and that she would not deliver service otherwise. This case was later submitted to the institute. After a hearing, the institute issued an opinion of indirect discrimination.[605]

Indirect discrimination is best understood from the perspective of symbolic violence.[606] Symbolic violence is transmitted through language, regulations, and interactions[607] which are disseminated through non-neutral media (language, regulations, and interactions). which can result in oppression and exploitation.[608]

Some cases that have been sent to the Netherlands Institutes for Human Rights and the Ombudsman include: Turkish people with Arabic sounding names experiencing discrimination in the labour market,[609]

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[603] Oordeelnummer 2017-22, On 24 February 2017, College voor de rechten van de mens.

[604] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3. Memorie van Toelichting Algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, hetero-of homoseksuele gerichtheid of burgelijke staat (Algemene wet gelijke behandeling).

[605] Oordeelnummer, Number 2006-254, On 20 December 2006, College voor de rechten van de mens.

[606] David L. Swartz, *From Critical Sociology to Public Intellectual: Pierre Bourdieu&Politics.* An Article in the book's edited by David L. Swartz &Vera L. Zolberg. *After Bourdieu Influence, Critique, Elabouration,* New York, Boston, Kluwer Academic Publishers, 2004, p. 351.

[607] Pierre Bourdieu, *On Television*, New York, The New York University Press, 1996, p. 63.

[608] David Swartz, *Culture and Power: The Sociology of Pierre Bourdieu*, The University of Chicago Press, 1997, p. 252.

[609] Oordeelnummer 2015-102. College voor de rechten van de mens.

and discriminatory inspections of Chinese people at Schiphol Airport.[610] Unsurprisingly, the Equal Treatment Act has become a popular means of requiring private and public institutions to combat discrimination.[611] Thus, the Equal Treatment Act has been influential reforming administrative and legal approaches, and implementing ethnic equality.[612] This Act is also used by ethnic minorities to protect their interests in the market and their rights to access to goods and services.

2.4 Legislation concerning legal protection, preventive and repressive approaches

The Netherlands' General Administrative Law Act (GALA) (*Algemene wet bestuursrecht* or Awb), is comprised of rules for orders (*besluiten*) issued by the administration and has established a legal protection. Indeed, administrative law has two concerns; norms for the government and legal protection of ethnic minorities. In addition, administrative law encourages a preventive approach which consists of involving people in the decision-making process (the non-contention phase) and a repressive approach which is the phase after a decision has been made (the contentious phase). In the latter phases, people may appeal to the court in accordance with GALA.

Why is GALA relevant to be used for legal protection of ethnic minorities? Simply put, GALA has become a legal instrument or administrative standard that provides binding norms for administrative procedures and the substance of decisions (some norms also for other types of administrative activities like private and factual acts), and facilitates the participation of interested parties.[613] In other words, GALA functions also as an administrative and legal control of administrative authorities' decisions in the system of democratic rule of law. Furthermore, GALA

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[610] Rapportnummer: 2003/222. Datum 25 July 1998., Rapportnummer: 1998/537. Datum 3 December 1998., Rapportnummer: 2001/246. Datum 14 August 2001.

[611] Alan Patten, *Equal Recognition. The Moral Foundations of Minority Rights*. Princeton, Princeton University Press, 2004, p. 160.

[612] John D. Skrentny, *The Minority Rights Revolution.* Cambridge, The Belknap Press of Harvad University Press, 2004, p. 38.

[613] L.J.A. Damen, *Bestuursrecht. Systeem, Bovoegdheid, Bevoegdheidsuitoefening Handhaving.* Boom Juridische Uitgevers, 2005, p. 39.

is the codification of administrative law norms and procedures in the Netherlands that entered into force after it was issued in 1994. Before GALA was issued, the Administrative Decision (Review) Act of 1963 (*Wet beroep administratieve beschikkingen*) was used to regulate the system of administrative orders, this law was later replaced by Administrative Decisions (Appeals) Act (*Wet administratieve rechtspraak overheidsbeschikkingen*) of 1976, which enabled administrative decisions to be challenged in the Administrative Court. Then in 1983, the Dutch Administrative Law was envisaged in an Act of Parliament in accordance with Article 107 of the Dutch Constitution.[614] Chapter 1 of GALA[615] outlines the definition and scope of legal protections offered by the Act. For ethnic minorities to participate in the decision-making process, they must be aware whether they qualify as an interested party in accordance with Article 1:2 of GALA. A decision can be challenged, in accordance with definition and scope—particularly Article 1:3, that decision is made by an administrative authority. Furthermore, chapters 2 to 5 of GALA are composed of 'open standards' which state the administrative authority's obligation to act with due care, and supply reasons for its decisions and the enforcement of relevant regulation. Relevant to remark here is that the norms of chapter 2 are relevant for all types of legal relations (public, private, and factual) and based on Article 3.1-2 the norms in divisions 3.2-3.4 in principle not only for decisions but also for private and factual activities of administrative authorities. Ethnic minorities can be involved with the administrative procedure and access their rights to legal protection under chapters 6, 7, and 8 of GALA.

[614] Tom Barkhuysen, Willemien Ouden and Ymre E. Schuurmans, *The Law on Administrative procedures in the Netherlands*. NALL 2012, April-June.

[615] GALA contains many sections. Section 1 is concerned with definition and scope: administrative authorities, interested parties, decisions, individual decisions, applications, policy rule, administrative court sand so on and so forth are defined. Section 2 concerns dealing between individuals and administrative authorities, section 3 and 4 stipulates how the administrative authorities generate decisions. Section 5 comprises rules and safeguards for administrative enforcement. Section 6, 7, 8 contain rules for objections, appeals and legal protection against administrative decisions. Section 9 describes the complaint handling process against administrative conduct. The last sections of GALA are section 10 and section 11. Section 10 consists of the delegation of power and section 11 states that the report of implementation must be produced every 5 years

GALA provides a mechanism that enables everyone to protect their rights, and stipulates several norms for the administration to observe. Moreover, GALA presents an opportunity for ethnic minorities to take part in administrative decision-making. Ethnic minorities can also utilise GALA to establish legal protection against arbitrariness, misuse of power, and maladministration. In accordance with GALA, the possibility to lodge objections is integrated into the administrative decision-making process.[616] One result of this is that, during the decision making process, the administration must obey administrative norms such as the principles of properness including carefulness (Article 3:2), the prohibition of misuse of power (Article 3.3), prohibition of arbitrariness (Article 3:4 and Article 5:13), legal certainty (Article 4:23 and Article 5:22), proportionality (Article 3:4 (2)), and the duty to give reasons (Article 3:46, Article 3:47, Article 3:48). These norms are equitable instruments, which ethnic minorities, can use as standards to evaluate the performance of administrative authorities and whether or not they obey the law. For instance, ethnic minorities can use these norms to evaluate whether or not the administration is observing the principle of carefulness and if they need to pay more attention to: a) treatment, b) research, c) consultation, and d) publication.[617] An authority that loses or otherwise damages documents sent by ethnic minorities, violates the principle of carefulness and is eligible to be criticised for doing so. GALA enables ethnic minorities to observe whether or not an authority has conducted adequate research to inform the decision-making process; a decision must be based on sufficient information and relevant fact in accordance with Article 3:2. Furthermore, ethnic minorities can use division 3.4 as a guideline for superintendence, and to discern whether or not an authority has obeyed the uniform public preparatory procedure.

The most important component of GALA is that it enables civilians to superintend the implementation of principles of transparency and participation. First, people (including ethnic minorities) can access the

[616] Arie Janssen Bok, *Chronicle 1999, Administrative Law/ Droit administratif*. European Review of Public Law, London 2000, Vol. 12.1., p. 193-214.

[617] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 85-86.

implementation of transparency through the application of Article 3:13, Article 3:46, and Article 3:7 of GALA. If a decision affects one or more interested parties, the administrative authority shall provide them with the draft decision under Article 3:13. Another curious aspect of GALA is that it provides a procedure for objection or appeal, in accordance with Article 3:46, and that those affected by the decision ought to be notified. In addition, the principle of transparency has been developed in GALA through some Articles, which can be used by ethnic minorities if they wish to know the reasons behind an administrative decision; every decision ought to be made based on proper reasoning (Article 3:46) and these reasons must be announced (Article 3:47).

If an ethnic minority, wishes to contribute to the decision-making process, GALA provides tremendous opportunity to do so. For example, division 3:4 concerns the uniform public preparatory procedure. This division is significant because it allows everyone, including ethnic minorities, to provide input before an administrative decision is made. Ethnic minorities can work with this procedure and participate if they desire. Furthermore, division 3:4 concerns the extended preparatory procedure for the administration to make proper decisions and orders. This article can be seen as the solution of the problem when an interested party is not taken into account in the decision-making process.[618] Thus, under this article, GALA provides a procedure for an interested party to be directly involved (*rechtstreeks betrokken*) with administrative decisions.[619] Under Article 3:15, if ethnic minorities are negatively affected by a decision, they can express their views about this decision. Ethnic minorities may request that the draft of a decision be revoked or amended. The time limit for an appellant to express an objection to a decision is six weeks. However, the administration has the authority to accept or reject any such request.

Although GALA does not specifically protect ethnic minorities, it is often used in conjunction with other pieces of legislation that do,

[618] Tom Barkhuysen, Willemien Ouden and Ymre E. Schuurmans, *The Law on Administrative procedures in the Netherlands.* NALL 2012, April-June.

[619] P.J.J. van Buuren and T.C. Borman, *Algemene wet bestuursrecht. Textst en commentaar*, Kluwer, 2007, p. 68-69.

for example the Equal Treatment Act, Immigration Law or the Dutch Immigration Act, etc. GALA codified general rules containing administrative norms and legal protections which apply in principle to everyone, including ethnic minorities. In addition, a key component of GALA is that it provides a mechanism to lodge an appeal to with the Administrative Court on district level. The functions of the Administrative Court are to conduct fact-finding, and encourage the judges to establish the truth by examining witnesses, evidence, judicial experts, and so forth.[620] Hence, the rights to appeal that are protected by GALA provide access to justice. Access to justice in the Dutch legal system has, on some occasions, been inspired by the Strasbourg case law on Article 6 of ECHR (the right to a fair trial).[621] De Moor-van Vugt argues that GALA, as a codification of Dutch administrative law, also yields what she calls 'the rights of defense' and 'the right to a hearing.'[622] The norms of GALA are absolutely pivotal to a civilian who wishes to lodge a complaint with the administrative authorities. The pertinent Articles of GALA which pledges access to justice are Article 7:1 and Article 8:1.

Article 7:1

1. A person who has the right to appeal a decision to an administrative court must first lodge an objection, unless:
   a. the decision was taken in an objection procedure or administrative appeal procedure,
   b. the decision is subject to approval,
   c. the decision grants or refuses approval,
   d. the decision was prepared in accordance with division 3.4, or
   e. the appeal is directed against the failure to take a timely decision.
2. The decision on the objection is open to appeal; the appeal is subject to the same rules as apply to lodging an appeal against the decision objected to.

People have the right to lodge an objection against the administrative authority before they bring it to the administrative court. Lodging

[620] Andre Verburg and Ben Schueler, *Procedural Justice in Dutch Administrative Court Proceedings*. 2014. Utrecht Law Review, Vol. 10 Issue 4.

[621] Tom Barkhuysen, Alex Brenninkmeijer, Michiel van Emmerik, *Access to Justice as A Fundamental Rights in Dutch Legal Order*. In, E.H. Hondius. Netherlands Reports to the Fifteenth International Congress of Comparative Law, Bristol 1998., p. 400.

[622] Adrienne de Moor-van Vugt, *The Ghost of the 'Criminal Charge': the EU Rights of the Defence in Dutch Administrative Law.* European Administrative Law Review, Vol. 5 BR, 2. 1-16.

an objection with the administrative authority is normally compulsory before a person can submit an appeal to the court. Although not specifically mentioned in the article, ethnic minorities benefit from this Article as it enables them to challenge a decision which infringes upon their interests. Everyone, as long as they are an interested party in accordance with Article 1:2—someone whose interests are immediately affected by administrative decision— can utilise the article as the legal grounds to lodge an objection against administrative decisions. Article 7:1 is formed from a mixture of legal reconsideration (*bestuurlijke heroverweging*) and legal protection (*rechtsbescherming*). At least two functions are embedded in Article 7:1, namely: to open up the possibility of resolving conflict between people and authorities before being brought to the Administrative Court, and to require the court to clearly define a problem.[623]

Article 8:1

1. An interested party may appeal a decision to the district court.
2. Where the interested party is a public employee within the meaning of Article 1 of the Public Employees Act, affected in that capacity, or a conscript within the meaning of Chapter 2 of the National Service Framework Act, affected in that capacity, or a surviving relative or successor in title of such a person, an act of an administrative authority other than a decision is equated with a decision.
3. The following are equated with a decision:
   a. a written refusal to approve a decision laying down a generally binding regulation or policy rule or revoking or determining the entry into force of a generally binding regulation or policy rule, and
   b. a written refusal to approve a decision taken in the preparation of a private-law juridical act.

If ethnic minorities are an interested party (*belanghebbende*) in accordance with Article 1:2, they are eligible to appeal an administrative decision in the district court. Article 8:1 requires open access to legal protection (*de toegang geopend tot de rechtsbescherming*).[624] This article can be acknowledged as bridging legal ground between conflicting people and authorities, as it requires government representatives to meet and di-

[623] P.J.J. van Buuren and T.C. Borman, *Algemene wet bestuursrecht. Textst en commentaar*, Kluwer, 2007, p. 311.

[624] P.J.J. van Buuren and T.C. Borman, *Algemene wet bestuursrecht. Textst en commentaar*, Kluwer, 2007, p. 349.

rectly communicate with the aggrieved party. In other words, this article can be recognised as one of the legal instruments that provides access to justice in Dutch administrative justice system.

Ethnic minorities can submit appeals through the administrative court to defend their interests, such appeals regarding work permits,[625] asylum,[626] family reunification,[627] social benefits,[628] civic integration,[629] detention,[630] and so on and so forth. Indeed, GALA is very important for ethnic minorities to be able to defend their rights to lodge a complaint, normally first to the administrative authority about its conduct in a particular matter, and after that a request to an Ombudsman in accordance with Article 9:18 of GALA. The role of the Ombudsman's role, and examples of their work will be analysed in detail in the next section. If ethnic minorities experience administrative discrimination, they can submit a complaint to the Ombudsman. The Ombudsman will investigate complaints concerning the conduct of public servants. Additionally, if ethnic minorities want to challenge administrative decisions, they can go the Administrative Court.

2.5 Institutions that deal with the norms for the government and legal protection for ethnic minorities

In this section I will outline the institutional settings which are relevant to good governance and ethnic minority protection. I describe the role of the administration both at the national and municipal level, the Netherlands Institute for Human Rights, the Ombudsman and the courts. In December 2013, the Government released the National Action Plan of Human Rights which has become a guideline for the

[625] One of the examples about asylum case is the case of ECLI: NL: RVS: 2010: BK9022, AWB 08/1309 of Gelderland District Court on 19 March 2009.

[626] Case of AWB 08/ 24520 of s-Gravenhage District Court, on 13 November 2008.

[627] Case of AWB 07/ 36514 of s-Gravenhage District Court, on 9 December 2009.

[628] Case of ECLI: NL: RVS: 2014: 641, AWB 12/4778 of the Central Netherlands District Court, on 6 April 2009.

[629] Case of ECLI: NL: RVS: 2015: 122, AWB 13/ 4650 of District Court of East Brabant on 28 March 2014.

[630] Case of ECLI: NL: RBSGR: 2009: 17522, AWB 08/ 17522 of s-Gravenhage District Court, on 7 July 2008.

eradication of racial or ethnic discrimination. The Institute and the Ombudsman can investigate discrimination, and the courts can deliver verdicts on lawsuits related to ethnic minorities.

2.5.1 The administrative authorities

The administration should guarantee fundamental rights to citizens.[631] In the Netherlands, the administration provides a National Action Plan of Human Rights (*Nationaal Actieplan Mensenrechten*),[632] which forms part of the national strategy to eliminate discrimination. In the Netherlands, the battle against racism and discrimination attracts a great deal of attention in political debate and in the media, especially in relation to problems in the labour market, Islamophobia, and prejudice.[633] This is why the administration must provide a complaints mechanism, anti-discrimination programs, and resolve budget issues (budgeting is the most debatable topic of anti-discrimination policy). This is especially important, as racial discrimination is the most common form of discrimination in the Netherlands, accounting for 43.3% (12.163 reports) of all reports of discrimination in 2014.[634] Although these figures are a large, they demonstrate that the administration has successfully encouraged citizens to register incidents of racial discrimination.[635] On the other hand, the government has also hindered the fight against discrimination, for example by disbanding the National Ethnic Minorities Consultative Committee (LOM) which had been an effective organisation previously; I will elaborate upon the function of the LOM later in the section of this chapter about participation.[636]

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[631] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 5.

[632] *Nationaal Actieplan Mensenrechten Bescherming en bevordering van mensenrechten op nationaal niveau*. Ministerie van Binnenlandse Zaken en Koninkrijkselaties, 2013.

[633] Iris Andriessen, Henk Fernee, Karin Wittebrood, *Ervaren Discriminatie in Nederland*, Sociaal en Cultureel Planbureau, 2014, p. 11-13.

[634] *Registratie discriminatieklachten bij antidiscriminatievoorzieningen 2014, Methode en uitkomsten*, Centraal Bureau voor de Statistiek, 2015, p. 5.

[635] *ECRI Report on the Netherlands (Fouth Monitoring Cycle)*, The European Commission against Racism and Intolerance (ECRI), 2013.

[636] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Report of the Netherlands

Equally important to the issuing of fundamental rights is that the administrative authorities create policies, programs, procedures, and budgets that attempt to alleviate the oppression of minorities.[637] The administration has equipped an internal control mechanism to ensure proper conduct of its public servants.[638] Since the Municipal Anti-Discrimination Services Act (*de Wet Gemeentelijke anti-discriminatievoorzieningen*) came into effect on July 23rd 2009, the complaint-filing system has been enhanced. In 2014, 9.778 discrimination cases were reported to the anti-discrimination bureau. This represents a significant increase from previous years; 6.074 reports were filed in 2010, 6.391 in 2011, 6.245 in 2012, and 6.186 in 2013.[639] Furthermore, a sensitisation of the administration is required.[640] Indeed, they must try to hear the voice of ethnic minorities.[641] The administration should provide a positive response to the complainant such as advice, information, legal aid, legal assistance, etc. in every single discrimination case (Articles 4, 7, 8, 9, and 10 of the Municipal Anti-Discrimination Service Act). The National Action Plan of Human Rights prioritises improving professional assistance and empowering citizens to register incidents of discrimination.[642] This research indicates that the response of the administration to discrimination complaints from ethnic minorities has improved over time. The administrative authorities provide explanations of the discrimination complaints when they are an involved party in the hearing process of a dispute. On this topic, Marja Manders (Senior Adviser of International Affairs and Local Human Rights Policies in the Municipality of Utrecht) said 'We do our best to respond to the aspirations of various commu-

[637] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 63.

[638] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 6.

[639] Wies Dinsbach, Jessica Silversmith, Erik Schaap, Rita Schriemer, Kerncijfers 2012-2014. Landelijk overzicht van Klachten en meldingen over discriminatie, geregistreerd bij de antidiscriminatievoorzieningen. 2015. Landelijke Brancheorganizatie van Antidiscriminatiebureaus (LBA) en Samenwekende Antidiscriminatievoorviegen Nederland (SAN)., p. 6.

[640] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*. Oxford, p. 67.

[641] Alan Patten, *Equal Recognition the Moral Foundations of Minority Rights,* Princeton, Princeton University Press, 2014, p., 196.

[642] *Nationaal Actieplan Mensenrechten Bescherming en bevordering van mensenrechten op nationaal niveau.* Ministerie van Binnenlandse Zaken en Koninkrijkselaties, 2010.

nities, but we also still need better planning to deal with the super diversity of the city."[643] However, on many occasions, the administrative authorities have also provided reasons in cases involving equal opportunity of employment,[644] ethnic profiling at Schiphol Airport,[645] police misconduct,[646] social benefit cases,[647] and immigration,[648] etc. The administrative authorities should manage the administration of justice against discrimination.[649]

2.5.2 The National Ombudsman

The Ombudsman is the fourth state power —in addition to the executive, judicial and legislative—that controls and prevents of maladministration and discriminatory administration.[650] In the Netherlands, the idea of good governance has become the basis for the Ombudsman's operations; good governance also means respecting human rights. If people file complaints of discriminatory conduct by the administration, the Ombudsman investigates these complaints seriously.[651] In the Netherlands, the Ombudsman also has a strategic role in initiating campaigns that aim to prevent discrimination. For example, the Ombudsman has produced and circulated anti-discrimination leaflets (*brochures stop discriminatie!*) on a number of topics including nationality, sexual orienta-

[643] Interview with Marja Manders, Senior Adviser of International Affairs and Local Human Rights Policies in the Municipality of Utrecht, in September 2016.

[644] Oordeelnummer 2009-67, College voor de Rechten van de mens, Oordeelnummer 2015-42, College voor de Rechten van de mens.

[645] Rapportnummer: 2003/222. Datum 25 July 1998., Rapportnummer: 1998/537. Datum 3 December 1998., Rapportnummer: 2001/246. Datum 14 August 2001.

[646] Case of ECLI: NL: RBSGR: 2012: BW1274, District Court 's-Gravenhage, on 19 March 2012.

[647] Case of ECLI: NL: RVS: 2014: 565, AWB 12/ 2375, District Court of Utrecht on 19 February 2014.

[648] Case of ECLI: NL: RVS: 2011: BT 2163, District Court of Amsterdam, on 21 September 2011, Case of ECLI: NL: RBSGR: 2012: BW1274, District Court's-Gravenhage, on 19 March 2012.

[649] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 67.

[650] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 12.

[651] Interviewed with Addie Stehouwer Deputy National Ombudsman on 19 November 2015.

tion, disability, skin colour and religion.[652] The Ombudsman was established through the National Ombudsman Act of 1981, with the aim of protecting individual citizens from maladministration.[653]

In general, the Ombudsman, has authority to control and monitor the performance of public institutions.[654] In the Netherlands, the Ombudsman is able to conduct investigations based on complaints by citizens about the manner in which an administrative authority has acted towards him and whether or not the administrative authority conducted itself properly the performance of public servants who are accused of abusing their power (see section 9:27 General Administrative Law Act).

In theory, the Ombudsman has a broad jurisdiction, that is to oversee all public institutions related to individual complaints and to ensure that the rights of citizens are respected. The Ombudsman is a type of institution which has a long history of protecting the fundamental rights of citizens, long before the concept of national human rights institutions had been established. Although many discrimination issues are dealt with by the Netherlands Institute for Human Rights, many are also sent to the Ombudsman. For example, in Utrecht, alleged maladministration and discrimination against a Turkish person by the police, was reported by Steunpunt Anti-Discriminatie (STAD) to the National Ombudsman.[655]

Furthermore, the Ombudsman has the authority to correct maladministrative acts performed by public servants. In fact, they can also encourage the awarding of compensation for damage caused as a result of arbitrary actions of civil servants. The Ombudsman also has a function of conducting independent investigations, thus their decisions can be said to adequately bridge conflicts between government organisa-

[652] Stop discriminatie, Openbaar Ministerie. De Nationale Ombudsman.

[653] Act of 4 February 1981 (Bulletin of Acts and Decrees 1981, 35), most recently amended by Act of Parliament of 12 May 1999 (Bulletin of Acts and Decrees 1999, 214).

[654] UN General Assembly Resolution 63/ 169 on the role of the Ombudsman that quotes to human rights standards, the rule of law, and the idea of justice and equality. Another act mentioned such as UN General Assembly Resolution 65/ 207 in order to promoter human rights within international law instruments.

[655] Rapportnummer: 2000/ 246, datum: 12 July 2000.

tions and citizens.[656] To ensure that their independent and nonpartisan status is maintained, employees of the Ombudsman are not affiliated with any political party, in accordance with Section 5 of the National Ombudsman Act.[657] Mostly people that qualify as suitable employees of the Ombudsman do so because of their 'outstanding integrity.'[658]

Human resources are the 'raw materials' of Ombudsman, thus it is vital for that staff members act with integrity and professionalism to ensure the provision of a high-quality service. With regards to public services, they protect the freedom of all people in the Netherlands, and hold the administration to account.[659] The main objective of the Ombudsman is to act the public interest. The Ombudsman can monitor almost all levels of government, and is thus endowed with a wide authoritative range.[660]

The number of incoming complaints and the independence from other administrative structures, contribute to the reputation of the Ombudsman as a respected official power. The Ombudsman is able to supervise and evaluate the work of the government.[661] They use good governance as a guideline for their work. The maps of good and bad governmental performance can be illustrated through their annual report which is presented to the parliament.[662] The Ombudsman has the authority to conduct interviews with employees of public institutions and discuss any problems with the relevant ministries.[663] One function

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[656] A. N. Patterson, *The Ombudsman*, U.B.C. Law Review. Vol. 1. (777) 1959-1963.

[657] The Ombudsman may not: (a) be a member of a public body for which elections take place in a manner prescribed by law; (b) hold public office for which he receives a fixed salary or remuneration; (c) be a member of a permanent government advisory body; (d) act as an advocate, solicitor, or notary.

[658] Lester B. Orfield, *The Scandinavian Ombudsman*. Administrative Law Review. 7. 1966-1967.

[659] Laurence W. Maher, *Complaining to The Ombudsman*. Legal Service Bull., 11 (1976-1977).

[660] Richard S. Arnold, *An Ombudsman for Arkansas*. Arkansas Law Review (327) p, 1967-1968.

[661] David C. Cummins. *Ombudsman in Ohio*. Ohio State Law Journal. Vol. 30. 1969.

[662] A. N. Patterson, *The Ombudsman*. U.B.C. Law Review. Vol. 1. (777) 1959-1963.

[663] Laurence W. Maher, *Complaining to The Ombudsman*. Legal Service Bull., 11 (1976-1977).

of the Ombudsman is to conduct capacity building and training for public servants, to ensure that they properly understand legislation and policies.[664] Contributing to the training of civil servants, the police, and members of the judiciary is an approach that aims to improve the provision of public services.[665]Improvements to the quality of employee performance, can reduce maladministration, defined as unjust practice of the administrative authorities.[666] 'The Dutch Ombudsman is also concerned with issues of anti-discrimination. If discrimination cases involve the administration, the Ombudsman can investigate these cases. We received some complaints of discrimination cases that were conducted by the government and police. However, the legal framework that we used is not focused on the concept of human rights. We have merely been shown to work based on integrity and good governance to combat maladministration,' Martin Blaakman reckoned.[667] Thus, maladministration that affects ethnic minorities, is a kind of discrimination. The Ombudsman can evaluate whether procedures are applied properly by the administration or not. They are bound by a complaints mechanism, people must file a complaint about the administrative conduct in accordance with chapter 9: 2 the General Administrative Law Act (GALA).

2.5.3 The Netherlands Institute for Human Rights

From a good governance perspective, the National Human Rights Institute (as the fourth power) has expanded the meaning of democratic systems of checks and balances on the exercise of power.[668] They are provide advice and guidance to the administration which is based on main-

[664] Anita Stuhmcke & Anne Tran, *The Commonwealth Ombudsman.* An Integrity Branch of Government? Alternative Law Journal (233) 2007.

[665] Interviewed with Addie Stehouwer Deputy National Ombudsman on 19 November 2015.

[666] Innis G. Macleod, *The Ombudsman.* Administrative Law Review. (93). 1966-1967.

[667] Interview with Martin Blaakman, a senior legal expert of Ombudsman in September 2015.

[668] Linda C. Reif. *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*. Harvard Human Rights Journal/ Vol. 13., p. 12.

streaming human rights into public services.[669] On December 6th, 2011 an Act of Parliament published in the Bulletin of Acts and Decrees, announced the formation of the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*)—the official name for the national human rights institution of the Netherlands.[670] According to the Netherlands Institute for Human Rights Act of 2011, the institute has several responsibilities: investigation (Article 3 a), making reports (Article 3 b), giving advice (Article 3 c), providing information (Article 3 d), and advising the government on ratification of human rights treaties (Article 3 g).[671]

Theoretically, the Netherlands Institute for Human Rights is an institution that is an authority that is responsible for ensuring international human rights standards are applied into national law.[672] As a formal public institution, the Netherlands Institute for Human Rights adopted the Paris Principles from the General Assembly of the United Nations Resolution of 48/134 on 20th December 1993. There is an urgent need to establish a competent national institution which has a mandate to implement legislative or constitutional texts, and has responsibility for harmonising the legal framework to promote and protect human rights, resolve human rights violations, write reports, build networks, and combat all forms of discrimination.[673] The Paris Principles also provide a

[669] C. Raj Kumar. *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights.* AM. U. International Law Review. 2004-2004, p. 284.

[670] Previously, an organisation called the Equal Treatment Commission (CGB) existed, which handled human rights violations, especially with regards to equal rights. However, after the establishment of the Netherlands Institute for Human Rights, all tasks of the Equal Treatment Commission were transferred to the new institution. the Netherlands Institute for Human Rights has a legal jurisdiction applicable in the European Netherlands and the Caribbean Netherlands (the Islands of Bonaire, Saba and St. Eutatius, etc). See, Staatsblad 2001, 573. Wet van 24 November 2011, houdende de oprichting van het College voor de rechten van demens.

[671] Jenny Godlschmidt, *Protecting Equality as a Human Right in the Netherlands from Specialised Equality Body to Human Rights Institute*. The Equal Rights Review, Vol. 8. 2012.

[672] Lee Bon Leong, *International Institutions for the Protection of Human Rights.* Law Review. Vol/ 72. 1969.

[673] Gauthier de Beco, *National Human Rights Institutions in Europe.* Human Rights Law Review. 7.2. The idea of the Paris Principles was discussed in the first International Workship on National Institutions for the Promotion and Protection of Human Rights, presented by the Commission on Human Rights, organised by Commission nationale consultative des droits de l'homme (CNCDH) France and the Danish Centre for Human Rights.

guarantee that the National Human Rights Institute is provided with sufficient operational funds (approximately € 5 million)[674] and enlist representatives from all groups in society.[675] The Paris Principles also encourage domestic enforcement of human rights standards by delivering human rights education to the public[676] and building competence to resolve complaints through a quasi-judicial procedure.[677]

In the Netherlands, the quasi-judicial mechanism (*oordelen*) is widely used by ethnic minority communities.[678] In this study I will describe how the Chinese and the Turkish communities submit complaints of discrimination. The quasi-judicial mechanism (*oordelen*) through the Netherlands Institute for Human Rights has become one of the main legal channels, in addition to civil, administrative, criminal, and various other legal regimes used by ethnic minorities.[679] Other cases involving ethnic minorities are processed through the type of courts, particularly when the applicants desire a legally binding verdict and/or have cases related to residence permits, work permits, or family reunification.[680] A quasi-judicial mechanism has made it possible for members of the Chinese and Turkish communities to file complaints about the rights regarding equal employment, access to goods and services, the right to be heard, and the right to be provided with reasons, etc. It is now possible to file discrimination reports against individuals as well as institutions including governmental

[674] Jenny Godlschmidt, *Protecting Equality as a Human Right in the Netherlands from Specialised Equality Body to Human Rights Institute*. The Equal Rights Review, Vol. 8. 2012.

[675] Ken Marijtje Prahari Setiawan, *Promoting Human Rights. National Human Rights Commissions in Indonesia and Malaysia,* PhD Thesis at van Vollenhoven Institute, Leiden University, 2013, p. 5.

[676] Linda C. Reif, The Ombudsman, *Good Governance and the International Human Rights System*, Dordrecht, Springer Science Media, 2004., p. 4.

[677] Ken Marijtje Prahari Setiawan, *Promoting Human Rights. National Human Rights Commissions in Indonesia and Malaysia,* PhD Thesis at van Vollenhoven Institute, Leiden University, 2013, p. 5.

[678] Interviewed with Mieke Janssen, Director of Art 1 Midden Nedeland on November 2015.

[679] Interviewed with Hanna Nierstrasz, anti-discrimination consultant at Art 1 Midden Nederland on November 2015.

[680] Interviewed with Ali Agayev, advocate at Fouws Advocaten on December 2015.

bodies,[681] civil society foundations,[682] and the private sector.[683]

In addition, the Netherlands Institute for Human Rights also writes special reports that describe trends in discrimination. One such report discussed the Elimination of All Forms of Racial Discrimination (CERD).[684] This report made recommendations of actions that could be beneficial to the fight against discrimination. The Institute has protected the rights of citizens through the instrument by of a quasi-judicial procedure; such as in the baby milk powder cases that targeted members of the Chinese community,[685] and Islamophobia in the labour market that has affected the Turkish community, these cases be will elaborated in a later section.[686]

2.5.4 The courts

The courts play an important role in shaping the general values of society.[687] Both Chinese and Turkish minority groups have used the courts to protest against discrimination. Such cases tend to concern social welfare,[688] residence permits,[689] and access to the labour market.[690]

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[681] Some cases of the Netherlands Institute for Human Rights are discussed relating to the private sector later in this chapter including De Belastingdienst, Het Regionale politiekorps Brabant Zuid-Oost, Immigratie en Naturalisatiedienst van het Ministerie van Justitie, etc.

[682] Some cases are discussed on relating to foundations in this chapter including Stichting VU-Vumc, Stichting Woonwaard North-Kennemerland, Stichting Havensteder, etc.

[683] Some cases are discussed on relating to governmental bodies by this chapter such as DeltaISI BV, ING BV, PEAK-IT BV, Yacht BV, etc.

[684] Interview with Odile Verhaar an expert at the Netherlands Institute for Human Rights, November 2015.

[685] Oordeelnummer 2015-56. College voor de Rechten van de mens, Oordeelnummer 2015-55. College voor de Rechten van de mens, and Oordeelnummer 2015-26. College voor de Rechten van de mens.

[686] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrmination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Report of the Netherlands.

[687] Hector Fix-Fierro. *Courts, Justice and Efficiency. A Socio-legal study of economic rationality in adjudication*. Oxford and Portland, Oregon, Hart publishing. 2003, p. 15.

[688] Case of ECLI: NL: RVS: 2011: BT 2163, District Court of Amsterdam, on 21 September 2011, Case of ECLI: NL: RVS: 2015: 1738, AWB 14/ 490, District Court of North Netherlands, on 30 June 2015.

[689] Case of ECLI: NL: RVS: 2010: BK 9022, AWB No. 08/ 1309, District Court of Zutphen on 31 January 2010, See also, Case of ECLI: NL: RVS: 2015: 1738, AWB 14/ 490, District Court of North Netherlands, on 30 June 2015,

[690] Case of ECLI: NL: RVS: 2015: 909, AWB 13/ 16464, The District Court of Hague, on

Only the courts have the ability to make legally binding decisions, whereas the recommendations of the Netherlands Institute for Human Rights and the Ombudsman are optional and advisory. Of course, the Ombudsman and the Netherlands Institute for Human Rights make their own contributions to combatting discrimination through persuasive, cooperative, active, and administrative approaches. The most common reason that people complain through the courts are that the only institution that can produce a legally binding verdict, and thus is more powerful related to the legal enforceability of the decision than other institutions.[691]

The courts have a duty to foster legal protection,[692] and interpret and implement the idea of human rights.[693] Hereby, we can see that the courts often refer to human rights law, such as the Charter of Fundamental Rights of the European Union, European Convention of Human Rights, and International Covenant on Civil and Political Rights.[694] They want to ensure that the law shall be enforced without any discrimination on the grounds of sex, race, skin colour, language, religion, political opinion, nationality or social origin, property, birth or civil status.[695] In addition, the Constitution states that the courts have authority over civil law (Article 112) and criminal law (Article 113). These articles open up

25 March 2015, See also. ECLI: NL: RBDHA: 2015: 12632 The District Court of Hague on 04 September 2015, see also, Case of ECLI: NL: RBSGR: 2008: BD3789 District Court of Hague on 05 Juni 2008., see also, Case of ECLI: NL: RBSGR: 2012: BW1274 the District Court of 's-Gravenhage on 19 March 2012, see also, ECLI: NL: CRVB: 2010: BM7006, Central Board of Appeal, on 25 May 2010, see also, ECLI: NL: RBSGR: 2012: BW 1274, District Court's-Gravenhage on 19 March 2012, ECLI: NL: RBSGR: 2010: BQ3897 Rechtbank's-Gravenhage on 19 December 2010.

[691] Interviewed with Ali Agayev, advocate at Fouws Advocaten on December 2015.

[692] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*. Oxford, p 26.

[693] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity, and Integrity under the European Convention on Human Rights*. Leiden, Martinus Nijhoff Publisher, 2009, p. 30.

[694] Case of ECLI: NL: RVS: 2010: BK 9022, AWB No. 08/ 1309, District Court of Zutphen on 31 January 2010, Case of ECLI: NL: RVS: 2011: BT 2163, District Court of Amsterdam, on 21 September 2011, Case of ECLI: NL: RVS: 2015: 1738, AWB 14/ 490, District Court of North Netherlands, on 30 June 2015.

[695] Loukis G. Loucaides, *The European Convention on Human Rights*. Collected Essays. Leiden, Martinus Nijhoff Publishers, 2009, p. 58.

the channels for ethnic minorities to file an appeal related to the protection and fulfilment of their fundamental rights. Several cases have emerged from civil law cases relating to the labour market, access to goods and services, housing, etc. If ethnic minorities are unfairly targeted by criminal investigations, they can challenge such unfair decisions in the courts.[696]

2.6 Provisional findings

This section argues that the general legal norms are adequate to cover the concept of good governance which may reinforce the norms for the government and legal protection of ethnic minorities. The Constitution and legislation provide sufficient norms for the government, and also protect ethnic minorities. Moreover, governmental authorities, Ombudsman, the Netherlands Institute for Human Rights, and the courts can implement these norms and legal protection.

Dutch law states the norms for the government and legal protection of ethnic minorities, in Article 1 of the Dutch Constitution, the Equal Treatment Act and GALA. Additional anti-discrimination and equal treatment legislation include provisions against hate crime in the Dutch Criminal Code, the Government Information Act, the Netherlands Institute for Human Rights Act, the Municipal anti-discrimination service Act, and so on. Of course, the idea of equal treatment became explicit in law in 1983, after the amendment of the Dutch Constitution. However, the basic idea of equality has its roots in the 1814 Dutch Constitution, and has continued to develop until the present day. Article 1 states the obligation of the government to treat everyone equally, and provides a fundamental right of equality to everyone regardless of his or her ethnicity, nationality, gender, and so on. This article can be used as one of the legal groundings for the formulation of good governance and ethnic minority protection. Equal treatment discourses proliferated in the 1970s and stimulated the promotion of equality and anti-discrimination. However, as discussed in the previous section, due to fierce politi-

[696] Case of ECLI: NL: RBSGR: 2012: BW1274, District Court 's-Gravenhage, on 19 March 2012.

cal debate in parliament, the Dutch Equal Treatment Act only became law in 1994. Many political parties such as Christian Democratic Appeal (CDA), the Green Left, the People's Party for Freedom and Democracy (VVD), the Democrats 66 (D66), the Reformed Political Party, and the Labour Party (PvdA) had differing opinions on the urgency and importance of the Equal Treatment Act. The Equal Treatment now regulates the prohibition of direct and indirect discrimination. Two interesting arenas are discrimination in the labour market and access to goods and services, instances of which I will explore in detail later in this chapter. GALA can be beneficial legislation for ethnic minorities to evaluate administrative decisions; it enables ethnic minorities to monitor whether or not the government observe their obligations. At the same time, GALA also provides norms for the government and legal protection of ethnic minorities. The government must abide by these norms that include carefulness (Article 3:2), duty of due care and balancing interest (Article 3:4), prohibition of arbitrariness and its review of discretionary power and proportionality (Article 3:3 and Article 3:4). Meanwhile, ethnic minorities can also evaluate the implementation of transparency throughout the use of Article 3:13, Article 3:46, and Article 3:7 of GALA. If an ethnic minority becomes an interested party, they can express their view on the draft of the decision (Article 3:4 and Article 3:15). Providing an opportunity for ethnic minorities to express their opinion on the draft of a decision can be seen as an application of the principle of participation.

Another important consideration, is the vital role of the administrative authorities in realising good governance and ethnic minority protection. The Dutch government's National Action Plan of Human Rights provides guidance for all government bodies to combat discrimination and provide equal treatment. At the local level the administrative authorities have also established Anti-Discrimination Bureaus which serve significant functions including providing advice, information, legal aid, legal assistance, and so on and so forth. The Netherlands Institute for Human Rights and the Ombudsman are also important institutions which provide support to ethnic minorities. The Netherlands Institute

for Human Rights' functions include conducting investigations, making reports, giving advice, providing information, ratifying human rights treaties, and so on. The institute can also provide semi-adjudication to resolve reports of discrimination. Meanwhile, the institute has jurisdiction to handle discrimination cases which involve the private sector. On the other hand, the Ombudsman can conduct investigations when the administration has been reported to have conducted discrimination. In fact, the Dutch Ombudsman has received such reports of discrimination. The Ombudsman utilises the impartial instruments of the idea of good governance to evaluate whether the administration has conducted discrimination. In addition, the Ombudsman also conducts public campaigns against racism, for example by producing and circulating anti-discrimination posters and leaflets. The courts are endowed with the ability to make legally binding and enforceable decisions that the Netherlands Institute for Human Rights and Ombudsman are not. The courts have received lawsuits submitted by ethnic minorities relating to social benefit, asylum applications, residence permits, access to the labour market, integration, hate crime, and so on and so forth. The courts have a fair, evaluative instrument which uses both national legislation and international human right treaties to make decisions about ethnic minorities' cases.

3. Specific legal norms for the government and legal protection of ethnic minorities: a case study of Chinese and Turkish communities

3.1 The principle of transparency

3.1.1 Introduction

Referring back to chapter 2, we saw that a specification of the main function of transparency is to improve the access to public information. The principle of transparency is one of the principles of good governance which encourages the opening of meetings, and the publication of official documents and openness in the decision-making process. This principle may also foster improvements to the norms for the Dutch governments and legal protection of ethnic minorities who live in the Netherlands. Here, the Dutch Government Information Act is

the primary legislation that provides a mechanism for the access of public information. The principle of transparency also facilitates increased participation. Hence, ethnic minorities may also benefit from transparency. This section will also describe, how the normative framework (as described in section of transparency in chapter 2) contributes to the realisation of (1) the principle of transparency in the Dutch Government Information Act; (2) the function of transparency as an instrument for establishing social harmony among ethnic groups in the Netherlands; and (3) the notion of transparency in legal practice. First, the Dutch Government Information Act contains several articles, which may be utilised by ethnic minorities to defend their interests. Second, the relationship between transparency and ethnic minority protection can be understood as promoting social harmony. Without a doubt, the Dutch Government Information Act and Equal Treatment Act run in tandem. The mutual support that these acts provide each other establishes a double protection of administrative norms and safeguard the people, including ethnic minorities. I also describe the procedure for accessing information which can function to empower ethnic minorities by providing an opportunity to develop their legal awareness. As I have stated before, access to sufficient public information is essential to building a legal shield from administrative problem, something that ethnic minorities in particular, can benefit from. Last but not least, I will explore the realisation of transparency in practice, primarily with reference to the implementation of rights-to-know protection and integration policy

3.1.2 Transparency and the Dutch Government Information Act

The Government Information Act has made a significant specification to the principle of transparency throughout the public-sector in the Netherlands. This Act sometimes also referred to as the Government Information Act (*Wet openbaarheid van bestuur*, WOB) which stipulates norms for the government and legal protection for people, with regards to ethnic minorities. In addition to the Government Information Act, GALA also legislates upon specifications of the transparency. For example, division 3.4. stipulates that civilians (including ethnic minori-

ties) are entitled to access drafts of administrative decisions, when this decision is open to objection or appeal in accordance with Article 3:5. Moreover, under Article 3:47 of GALA, ethnic minorities are entitled to access the reasoning for an administrative decision if it directly affects their interests. In other words, GALA and the Government Information Act, serve similar functions of generating specification of the principle of transparency. By the same token, ethnic minorities can benefit from the Government Information Act, as it provides them with a means to obtain relevant public information and administrative decisions which affect their position.

The Government Information Act, as specification of the principle of transparency, contains the obliges the public entity to disclose public information (Article 2) and stipulates the rights of people to request public information (Article 3). Moreover, this Act allows anyone to request public information, and requires the public entity to reply within two weeks, stating whether the request for information will be granted or not (Article 6). Another norm stated in The Dutch Government Information Act, states the rights of civilians to be provided with copies of public documents, to take notes about the documents, to be provided with a summary of relevant information, and to be supplied with information that is related to the requested documents (Article 7). Of course, certain documents are exempt from requests (Article 10).[697] Anyone, in-

[697] 1. Disclosure of information pursuant to this Act shall not take place insofar as: a. this might endanger the unity of the Crown; b. this might damage the security of the State; c. the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons. 2. Nor shall disclosure of information take place insofar as its importance does not outweigh one of the following: a. relations between the Netherlands and other states or international organisations; b. the economic and financial interests of the State, other bodies constituted under public law or the administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2; c. the investigation of criminal offences and the prosecution of offenders; d. inspection, control and oversight by administrative authorities; e. respect for personal privacy; f. the importance to the addressee of being the first to note the information; g. the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties. 3. Subsection 2, chapeau and at b, shall apply to the disclosure of environmental information concerning confidential procedures. 4. Subsection 2, chapeau and at g, shall not apply to the disclosure of environmental information. It is possible to refrain from disclosing such information pursuant to this Act if its publication would make damage to the environment more likely.

cluding ethnic minorities, can use this Act as a legal instrument to request public information that is relevant to their interests.

Equally important, is that the Dutch government public information is easily accessed. Ethnic minorities can request public information by telephone, email, or letter. Of course, this Act does not provide specific privileges to ethnic minorities, rather, this Act provides a legal standard for everyone regardless of ethnic background, nationality, religion, gender, and so on. Furthermore, after obtaining information, ethnic minorities are able to use this information as they wish —both for commercial and non-commercial interests. For instance, Chinese and Turkish people, could utilise public information to deal with immigration issues, social benefit, civic integration, or on the other hand to support commercial ventures such as opening Chinese or Turkish restaurants or stores; Government data has economic value which can be beneficial to anyone who requests it for business purposes.[698]

On some occasions, minorities encounter discrimination when attempting to access public information. The reaction of the public entity towards minorities can, sometimes be blunt and unsympathetic. The Government Information Act can be used to counter the stagnation of unpleasantly bureaucracy.[699] In the Netherlands, the Minister of the Interior and Kingdom Relations, issued a program 'Open Government in the Netherlands. Action Plan 2016-2017', which obliges the government to publish data and information to improve the relationship between the public entity and people. As part of this plan The Dutch Government has implemented a project entitled 'Pleasant contact with the government' (*Prettig Contact met de Overheid*). In addition, the Dutch government makes data available to the public, and actively communicates with people to ensure that their decisions are supported by the public. Hence, policies and programs are shared publicly, and informa-

[698] Mireille van Eechoud, *Friends or Frous? Creative Commons, Freedom of Information Law and the European Union Framework for Reuse of Public Sector Information*. See., Lucie Guibault and Christina Angelopoulos. *Open Content Licensing: From Theory to Practice*. Amsterdam, Amsterdam University Press, 2011, p. 169-170

[699] Albert Meijer, Paul Hart and Ben Worthy, *Assessing Government Transparency: An Interpretative Framework. Administration & Society.* Sage, August 19, 2015., p. 1-26.

tion about finances, local authority decision-making and so on are made available. This principle of transparency programme is also based on the Government Information Act and emphasises how it can improve the quality of the relationship between applicants and public authorities.[700] In addition, anyone can access public information concerning the economy, migration and integration, social security, healthcare, housing, education, science, etc. via the government's online 'data portal'.[701] This platform, from the perspective of transparency, can empower civilians to be 'supervisors' of e-Government.[702]

3.1.3 The role of transparency in promoting cooperation and peace between ethnic groups

As mentioned above, the principle of transparency can potentially encourage peace between ethnic groups. The principle of transparency may foster the implementation of good governance which aims to toughen the norms for the government and legal protection of ethnic minorities. In addition, the principle of transparency enables people to maximise their capacity to make informed objections against the arbitrary administration and to use information for political bargaining.[703] Ethnic violence is a potential outcome of an arbitrary administration. With greater transparency, ethnic minorities can utilise government information to fight against arbitrary conduct of administration, which could also have the additional benefit of potentially creating peace among ethnic groups. Indeed, the principle of transparency can result in more security and peace.[704] For example, if the cause of ethnic

[700] Open Government in the Netherlands. Action Plan 2016-2017, The Ministry of the Interior and Kingdom Relations, p. 15. Transparency and openness are different in some substances. For instance, transparency restrains exception and restriction toward several data, such as national security, private information, business data of particular companies, and soon. Yet, openness tends to focus to share all information. Openness stands on no burden between secret and public. Then, openness focuses on public domain.

[701] https://data.overheid.nl/.

[702] Corien Prins, et al, *Supervisors of e-Government*. See, e-Government. Amsterdam, Amsterdam University Press, 2011, p. 167-169.

[703] The District Court of Amsterdam, AWB 15/ 3940, ECLI: NL: RVS: 2017: 3422, on July 22, 2016.

[704] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information*

conflict is a lack of faith in government, the principle of transparency can address this weakness. The principle of transparency does not simply open public information in its entirety, but stipulates some restrictions of access to certain information, documents and data. The judge's legal reasoning in the District Court of Amsterdam was that there must be some restrictions upon transparency to protect the interests of individuals.[705] Hence, the principle of transparency can also be used to restrict access to pejorative information which stimulates ethnic conflict. The principle of transparency can help guarantee the validity of public information which in turn can help prevent information being misinterpreted. 'Public information must made be equally available to all ethnic groups in order to prevent jealousy and to build trust between the government and ethnic minorities or among ethnic groups. Otherwise, resistance may stimulate conflict between ethnic groups,' testified Radj Ramcharan (an activist and social worker in Utrecht).[706]

It is also important to consider the publicity of government's research. Hereby, the Social and Cultural Planning Office of the Netherlands plays a significant role in publishing research that concerns ethnic minorities. The publication of studies of the lives of ethnic minorities can stimulate better understanding of ethnic minorities in the Netherlands. For instance, the Social and Cultural Planning Office of the Netherlands has published one study entitled 'the Turks in the Netherlands and Germany' (*Turken in Nederland en Duitsland*). One of the key findings of this study was that Turkish people face more discrimination in the Dutch labour market than the German labour market. The Turkish-Dutch face difficulties in the recruitment process, and feel that 'native' Dutch people are considered to be preferable employees.[707] This publication is an important document for the public; it de-

Revolution May Not Lead to Security, Democracy or Peace, New York, State University of New York Press, 2006, p. 24-26.

[705] District Court of Amsterdam, 201408963/ 1/ A3, ECLI: NL: RVS: 2017: 211, on August, 16, 2017.

[706] Interview with Radj Ramcharan, An activist and social worker in Utrecht. In September 2016.

[707] Jaco Dagevos, et al, *Turken in Nederland en Duitsland*. The Social and Cultural Planning Office of the Netherlands, 2006, p. 66.

bunks the conception that discrimination is a 'hoax,' and depicts the reality of racism in the Netherlands. Therefore, it is important for the government to require private companies to abide by objective standards of recruitment and to prevent discrimination in labour market. A similar study into the position of Chinese people in the Netherlands was also published by the Social and Cultural Planning Office. This study identified several groups of Chinese immigrants who live in the Netherlands. The first of these groups are Chinese migrants who came to the Netherlands before the 1990s to seek jobs as blue-collar workers. The next wave (in the 2000s) of migrants were much more likely to be skilled professionals and students. The second generation of Chinese immigrants appeared to be well integrated with Dutch culture and dominant political institutions.[708] As with the research into Turkish-Dutch people, this publication can also establish a better understanding of ethnic groups. Through the principle of transparency it possible to circulate ethnographical information that is beneficial to developing between among ethnic groups by improving mutual understanding. Herewith, the Government Information Act obliges the government to make this research publicly available.

Moreover, there is a connection among the principle of transparency, equal treatment and the fulfilment of human rights from the principles of good governance. The principle of transparency, for the most part, underpins the fulfilment of human rights and prevents of violations of equal treatment.[709] Three components, namely: the principle of transparency, equal treatment and human rights contribute to creating harmony between ethnic groups. In other words, the connection between these components can promote cooperation and peace between ethnic groups. Everyone, including ethnic minorities, deserves access to information. This access can create incentives to engage with the public sphere.[710] In the Netherlands, the Equal Treatment Act and the

[708] Mérove Gijsberts, Willem Huijnk, & Ria Vogels, *Chinese Nederlanders.* The Social and Cultural Planning Office of the Netherlands, 2011, p. 12.

[709] District Court of East-Brabant, AWB. 13/ 5901, ECLI: NL: RVS: 2017: 2611. September 27, 2017.

[710] Archon Fung, Mary Graham, David Weil, *Full Disclosure. The Politics, Perils, and Prom-*

International Convention on the Elimination of All Forms of Racial Discrimination (CERD) are the main pieces of legislation that prohibit violations of the information rights of ethnic minorities. When equal rights to access are properly implemented,[711] ethnic minorities, including the Turkish and Chinese people, are provided with 'a legal safeguard' before the courts, the National Ombudsman, and the Netherlands Institute for Human Rights. The government's contribution to combating discrimination is often disappointingly meagre from the point of view of ethnic minorities. Therefore, the government, must address their shortcomings to preserve peace and tolerance between through the principle of transparency exercises. The 2015 CERD report, argued that the government must do more to combat discrimination in the labour market, public services, political debate, and access to goods.[712] The principle of transparency provides the 'architecture for choice' which can facilitate people to make informed decisions.[713] With sufficient information, ethnic minorities are better equipped to understand their legal standing in the position complaints process, and be able communicate better with other ethnic groups.[714]

The principle of transparency not only provides open access to information, but can improve the capacity of people.[715] In the Netherlands, people use transparency to collect information for survival, especially with regards to the labour market. Chinese and Turkish people in the Netherlands often look for information relating to anti-stereotyping

ise of Targeted Transparency. Cambridge, Cambridge University Press, 2007, p. 2.

[711] John D. Skrentny, *The Minority Rights Revolution*. Cambridge, The Belknap Press of Harvard University Press, 2004, p. 4.

[712] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all forms of racial discrimination (CERD) on the Examination of the combined nineteenth to twenty-first Periodic Reports of the Netherlands.

[713] Daniel Lathrop & Laurel Ruma, *Open Government. Collaboration, Transparency, and Participation in Practice.* Cambridge, O'Reilly Media, 2010, p. 24.

[714] Ian Brown & Christopher T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Era*, Massachusetts&Cambridge, MIT Press, 2013, p. 25-27.

[715] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*. Leiden, Martinus Nijhoff Publishers, 2009, p. 14.

and prejudice in the recruitment process.[716] Of course, one of the elements of the principles of transparency is making sure that all people, including ethnic minorities, can benefit from information disclosure.[717] With enough information, ethnic minorities can respond to discrimination in the labour market with regards to selection, appointment, termination of employment, and terms and conditions of employment, etc.[718] The principle of transparency can also help address one of the main problems that ethnic minorities face; being uninformed with regards to legal rights and the law.[719] In this sense, the principle of transparency can function to prevent conflict in the labour market; everyone can have better understanding of their roles and responsibilities regarding fulfilling and respecting the rights of others.

From the perspective of transparency, Article 1 of the Equal Treatment Act is the measure by which the law can establish whether discrimination has occurred during a request to access information. Sometimes, ethnic minorities (particularly blue-collar workers) attempt to solve disputes and problems through violence; an increased awareness of legal means of dispute resolution could potentially reduce this violence. Particularly, prevention of ethnic conflict among workers and job seekers.

Importantly, the principle of transparency is a legal norm which must be obeyed by the administrative authorities.[720] The prevention of discrimination by administrative authorities with the support of transparency can reduce ethnic conflict. And, Article 1 of the Dutch Equal Treatment Act is the main legal basis for investigating discrimination and is the instrument by which direct or indirect discrimination are measured. In addition to public institutions, private sector organisa-

[716] The Netherlands Institute for Human Rights. 2014 Annual Report, p. 6.

[717] Adrian Henriques, *Corporate Truth. The Limits to Transparency*. 2007. Earthscan., p. 54

[718] The Netherlands Institute for Human Rights. 2014 Annual Report., p. 6.

[719] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*. Leiden, Martinus Nijhoff Publishers, 2009, p. 19.

[720] Richard W. Oliver, *What is Transparency?* New York, McGraw-Hill, 2004, p. 19.

tions must also be aware of their obligations with regards to equal treatment.[721] This means that Article 1 provides a legal standard for anti-discrimination in matters of transparency. Hence, the guarantee of equal access to information, and validity and accuracy of this information, contributes to generating peace between ethnic groups. In this sense, they can be considered two sides of the same coin, they exist in mutual symbiosis; one cannot exist without the other without compromising the mission of transparency.

3.1.4 Access to information

Disclosure of information policies, in the context of principle of transparency, serve several functions, namely: to provide better quality public information, to enable civilians to utilise public information to improve the fulfilment of their fundamental rights, and to reduce the risks and damage that can result from invalid information.[722] Hence, access to information is the main concern when implementing the principle of transparency, which may help to reinforce the norms for the government and legal protection of ethnic minorities. Access to information is particularly important to ethnic minorities. It is difficult to imagine living without ease of access to information; a person must first understand their rights if they are to deal with administrative problems. From this perspective, information becomes a basic need alongside food, water, housing, and so on. Everyone has an interest in exercising their right to access information.[723] For this reason, many countries have created legislation that regulates access to public information and provide a mechanism by which people can request information.[724] In the Netherlands, the Equal Treatment Act can be interpreted as an

[721] Tetty Havinga, *The Effects and Limits of anti-discrimination law in the Netherlands*. Institute for Sociology of Law, 20 (2002) 75-90.

[722] Archon Fung, Mary Graham, David Weil, *Full Disclosure. The Politics, Perils, and Promise of Targeted Transparency*. Cambridge, Cambridge University Press, 2007, p. 6.

[723] Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice the Role of Presuit Investigatory Discovery*. University of Michigan Journal of Law Reform. Vo. 40: 2.

[724] OECD, *Good overnance for Digital Policies. How to Get the Most Out of ICT. The Case of Spain's Plan Avanza*. Secretary General of the Organization for Economic Co-operation and Development, 2010.

additional Act that supports the Government Information Act. Ethnic minorities are entitled to access documents according to Article 1 (a) of the Government Information Act including written documents or other material containing data which are produced by an administrative authority. Article 1 of the Equal Treatment Act makes sure that there is no discrimination —direct or indirect— that impedes ethnic minorities access to information. Access to legal information also protects ethnic minorities from abuse and governmental corruption.[725] Ethnic minorities also have the legal standing to request information from an administrative authority, agency, service, or company according to Article 3 (1) of the Government Information Act, which states 'anyone may apply to an administrative authority or to an agency, service, or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter.' Hence, ethnic minorities, as included by 'everyone,' have the right to access information.

The principle of transparency guarantees access to information for all people, including ethnic minorities. Moreover, the principle of transparency has appeared in case law in arguments that emphasise the importance of access. Through the principle of transparency, ethnic minorities can access information. If they become an interested party, and use this public information to lodge an appeal before Administrative Court. In one case handled by the District Court of the North-Netherlands, an appellant argued that to oversee the function of government bodies, we indeed desire transparency. The principle of transparency makes it possible for a civilian to access policies and information related to the appellant's interest. In addition, the principle of transparency, encourages the administration to provide good services and valid information.[726] Access to information and transparency are demanded to improve the performance of the administration. The principle of transparency is known as an instrument for evaluating the quality of public information

[725] Transparency International, *Corruption Risks in Europe*. 2012. Transparency International.

[726] The District Court of North-Netherlands, AWB 15/ 3503, ECLI: NL: RVS: 2017: 2190, on August 16, 2017.

provided by the administration. The principle of transparency enables civilians to research and scrutinise public data.

In one case, an appellant used the principle of transparency as the basis of their legal argument after experiencing inadequate communication with a public authority. After making an initial request for documents, the appellant had to file a second request because they felt that the authority had not provided sufficient information.[727] Another appellant submitted an appeal before the District Court of Gelderland, arguing that the administrative authorities was not acting transparently. The appellant had previously requested documents relating to a decision for which he was an interested party. Although the administrative authority responded to this request, the amount of information they provided was overwhelming— much of it was in Dutch (a language the appellant was not fluent in) and it was not clear which parts of the information were relevant to him. Consequently, the appellant was unable to make use of the information (for example, to lodge an objection to the decision), and so he filed a complaint on the grounds that the administrative authority did not make the reasons or explanations for the decision transparent.[728] These appeals about administrative transparency demonstrate that currently, the administrative authorities does not have a mechanism that provides fully equal access to information.

Equally, important, the principle of transparency serves many functions, and can be interpreted in multiple ways. For example, the principle of transparency can be used by ethnic minorities to access information to achieve particular objectives, and to build the politics of recognition and redistribution.[729] In the Netherlands, the principle of transparency can also enable ethnic minorities to defend their interests in the labour market. Besides Article 1, Article 5 also plays a significant role in protecting the interests of ethnic minorities in the labour market. This article states that there must be no place for discrimination in any part

[727] The District Court of the Zeeland-West Brabant, AWB 16/ 817, ECLI: NL: RVS: 2017: 1654, on June, 21, 2017

[728] The District Court of Gederland, ECLI: NL: RVS: 2017: 1451, on May 2017.

[729] Will Kymlicka, *Contemporary Political Philosophy an Introduction*. Oxford, Oxford University Press, 2002, p. 332.

of the labour market including public advertising of employment, procedures leading to filling of vacancies, job placement, the commencement or termination of an employment relationship, the appointment and dismissal of civil servants, terms and conditions of employment, permitting staff to receive education or training during or prior to employment, promotion, and working conditions. Ethnic minorities can utilise their rights to access information to learn about their rights in the labour market, and improve their own legal capacity to complain against discrimination.[730] The Netherlands Institute for Human Right's Report of 2014, states that complaints regarding recruitment and selection are in total 52 complaints, while the terms and conditions of employment also accounted for 21 complaints.[731] From the principle of transparency perspective, the high number of complaints is evidence of the problems in recruitment and conditions of employment, which may be a result of mismanagement of information. The recruitment process for government employees is subject to a higher degree of scrutiny than in the public sector, which one would imagine would make it more difficult for the government to discriminate against employees. Despite this, the Ministry of Finance has been accused of discriminating against its own employees on two separate occasions. The first case of suspected discrimination regarded a Turkish man who suspected his ethnicity influenced the termination of his employment.[732] In the second instance, a Chinese woman felt that her gender and ethnicity were factors that prevented her from being promoted as quickly as her native Dutch, male colleague— who was also on a higher salary.[733] In this sense, the principle of transparency facilitates full access to, and enjoyment of the economy.'[734]

[730] Transparency International, *Fighting Corruption in South Asia: Building Accountability*. 2014.

[731] The Netherlands Institute for Human Rights. 2014 Annual Report., p. 38.

[732] Oordeelnummer 2015-42. College voor de Rechten van de mens.

[733] Oordeelnummer 2009-67. College voor de Rechten van de mens.

[734] Adrian Henriques, *Corporate Truth. The Limits to Transparency,* London, Earthscan, 2007, p. 51.

Implementing the principle of transparency and providing proper access to information poses many challenges to the administrative authorities; the principle of transparency and proper access to information requires hard work; it will not simply build itself. The principle of transparency as a legal culture is devoted to openness and will only be achieved with the dedication of professional leadership.[735] In other words, it requires significant commitment and highly skilled human resources. By the same token, the principle of transparency may increase people's understanding of government.[736] The principle of transparency guarantees several fundamental rights such as the right to know, the right to free speech, the right to remain silent and the right to privacy.[737] Finally, principle of transparency can redistribute power from the government, to the citizens, which allows them to challenge the government and market.[738]

3.1.5 Transparency in practice: integration policy

Integration requires the principle of transparency to establish good administration that facilitates access to information for ethnic minorities. The problem for immigrants, many of whom are ethnic minorities, is that they cannot avoid integration policy. Integration is defined as a two-way process that involves both immigrants and their host societies.[739] Integration policy influences incoming immigrants to adapt their lifestyles so that they are suitable for life in their new home.[740] In the

[735] Richard W. Oliver, *What is Transparency*? New York, McGraw-Hill, 2004, p. 31.

[736] Daniel Lathrop&Laurel Ruma, *Open Government. Collaboration, Transparency, and Participation in Practice*. 2010. O'Reilly Media., p. 24.

[737] Adrian Henriques, *Corporate Truth. The Limits to Transparency,* London, Earthscan, 2007, p. 51.

[738] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 91.

[739] Linda Bakker, Sin Yi Cheung, and Jenny Phillimore, *The Asylum-Integration Paradox: Comparing Asylum Support Systems and Refugee Integration in the Netherlands and the UK*. International Migration, Vol. 54 (4) 2016.

[740] Gabriele Ballarino&Nazareno Panichella, *The Occupational Integration of Male Migrants in Western European Countries: Assimilation or Persistent Disadvantage*? International Migration Vol. 53 (2) 2015.

Netherlands, the Immigration and Naturalization Service (IND) is responsible for the notion's integration policy. This institution provides rigorous information about civic integration including requirements, costs, digital application forms and procedures. All information about integration is provided by IND in both Dutch and English on their website. Indeed, the principle of transparency is desired to ensure that there is sufficient access to information regarding integration policy. The implementation of the principle of transparency can create stronger norms for the government and legal protection of ethnic minorities.

Integration is a vital process in a multicultural society. Civic integration is a negotiation between differing contexts and cultures, past and present, country of origin and country of destination, and language proficiency.[741] The integration examinations are largely concerned with knowledge of the Dutch society and Dutch language skills (both speaking and reading). IND requests that incoming immigrants from outside of the EU pass the integration exam. Basic language skills are the foundation of communicating with the community and gaining access to the labour market. IND regulates civic integration for people who want to come to the Netherlands, people who request continued residence or permanent residence, and naturalisation.[742] On its website, IND publishes detailed requirements for civic integration that must be met by new immigrants, or people who want to extend their residence permit. Costs of the integration exam are also published on this website.[743] Providing this information on an accessible platform is an example of how IND contributes to ensuring it is transparent about the process of civic integration. The principle of transparency encourages public authorities,[744] such as IND, to share valid, accurate information, and to be more ac-

[741] Linda Bakker, Sin Yi Cheung, and Jenny Phillimore. *The Asylum-Integration Paradox: Comparing Asylum Support Systems and Refugee Integration in the Netherlands and the UK*. International Migration, Vol. 54 (4) 2016.

[742] *https://ind.nl/EN/individuals/Residence-Wizard/other-information/civic-integration.*, accessed on August, 2, 2016.

[743] *https://ind.nl/EN/individuals/Residence-Wizard/other-information/civic-integration.*, accessed on August, 2, 2016.

[744] Anoeska Buijze, *The Six Faces of Transparency*. Utrecht Law Review, Volume 9, Issue 3 (July) 2013.

countable. The principle of transparency is important to developing an equal civic integration system. With the principle of transparency, integration policy can support minorities to acculturate with the hegemonic culture.[745] Recent immigrants to a country can sometimes accidentally commit crimes and unlawful acts because of a lack of knowledge about the legal culture of the host county.[746] Immigrants who are ethnic minorities are also at a higher risk of feeling unwelcome in the labour market. Many immigrants are penalised for various reasons such as language skills, lack of educational background, and an inferiority complex that leads them to pursue low-skilled and low-paying jobs.[747]

Some immigrants send money that they earn back to their home country, and after sufficient saving they may move back to their country of origin. These immigrants are less likely to be concerned with integration than those who are more permanent residents.[748] Moreover, the wide problem of civic integration for ethnic minorities exists under the shadow of racial discrimination in the labour market,[749] education,[750] law enforcement,[751] and access to goods or service.[752] The Dutch government has tried to improve its integration policy, with the aim of re-

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[745] Christine B. Avenarius, *Immigrant Networks in New Urban Spaces: Gender and Social Integration*. International Migration, Vol. 50 (5) 2012.

[746] Paul Knepper, *Rethinking the Racialization of Crime: The Significance of Black Firsts*. Ethnic and Racial Studies, 2008. Vol. 31. No. 3., p. 503-523.

[747] Gabriele Ballarino&Nazareno Panichella, *The Occupational Integration of Male Migrants in Western European Countries: Assimilation or Persistent Disadvantage?* International Migration Vol. 53 (2) 2015.

[748] Gabriele Ballarino&Nazareno Panichella, *The Occupational Integration of Male Migrants in Western European Countries: Assimilation or Persistent Disadvantage*? International Migration Vol. 53 (2) 2015.

[749] Monder Ram et al, *Ethnic Minority Business in Comparative Perspective: The Case of the Independent Restaurant Sector*. Journal of Ethnic and Migration Studies, Vol. 26, No. 3., p. 495-510.

[750] Evelyn Hello, Peer Scheepers&Peter Sleegers*, Why the More Educated are Less Inclined to Keep Ethnic Distance: An Empirical Test of Four Explanations*. Ethnic and Racial Studies. Vol. 29. No. 5.

[751] Francois Bonnet and Clotilde Caillault, *The Invader, the Enemy Within and They-who-must-not-be-named: how police talk about minorities in Italy, the Netherlands and France*. Ethnic and Racial Studies 2015. Vol. 38, No. 7, p. 1185-1201.

[752] Christina Boswell, *Combining Economics and Sociology in Migration Theory*. Journal of Ethnic and Migration Studies. 2008. Vol. 34, No. 4., p. 549-566.

ducing discrimination. With greater transparency, the government can provide sufficient information to protect ethnic minorities from discrimination.

> The goal of Dutch integration policy is to improve migrants' position in society and ensure that they enjoy equal status relative to similar groups who are not migrants. Knowledge, training, and practical experience of the position of migrants in Dutch society are vital for good integration policy. The annual reports on integration are the backbone of the knowledge infrastructure. These reports fulfil the recommendation to provide comparative statistics on the economic, social and cultural rights of people from a migrant background and the rest of the population.[753]

As stated in the International Covenant on Economic, Social and Cultural Rights: Sixth periodic report, the Dutch government intends to continuously improve its integration policy so that the fundamental rights of ethnic minorities are respected. Thus, it may be concluded that equal treatment should be considered in civic integration legislation. To put it more simply, the Dutch government also wants to ensure that information about civic integration is equally accessible by minorities and non-minorities. The principle of transparency encourages the Dutch government to share detailed information on civic integration. The information provided by the Dutch government is sufficient to encourage recent ethnic minority immigrants to participate in the civic integration program.

The principle of transparency can contribute to the legitimacy of government, and public's faith in public institutions.[754] IND provides detailed information on civic integration and people also can talk to members of IND staff if they have a query. Forms and applications are available through DigID (a digital identity management system for governmental agencies of the Netherlands) on the IND website. Interestingly, Turkish people (and family members) are in a unique position with regards to civic integration, because they are exempt from being required

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[753] *International Covenant on Economic, Social and Cultural Rights*. *Sixth periodic report*. The Kingdom of the Netherlands. February 2016.

[754] Anoeska Buijze, *The Six Faces of Transparency*. Utrecht Law Review, Volume 9, Issue 3 (July) 2013.

to take the civic integration exam.[755] This information is available on the IND website, and obvious importance to Turkish people and their families. From the perspective of transparency, this can be considered this to be an excellent example the administration providing easy access to information relevant to the interests of ethnic minorities. Turkish people participate in the civic integration programme at higher rates than any other group, as can be seen from the evaluative report of the Dutch Integration Act of 2006. A breakdown of the proportion of nationalities of participants in the civic integration programme are as follows: Turkish 21 %, Moroccan 15 %, Chinese 6 %, Brazilian 6 %, Thai 6 %, Indonesian 4 %, and Filipino 3 %.[756] Of course, this participation is not for the benefit of ethnic minorities in the programme, rather it assesses whether they are able to integrate with Dutch society. From this perspective, the civic integration could be considered more beneficial for the majority than the people within the programme. On some occasions, new immigrants, face risky situations when the receiving country imposes an assimilation policy rather than integration (changing-name, eradicating cultural value country of origin, banning the mother tongue, forced marriage with the native, and soon).[757]

Civic integration can also be used to combat racial discrimination and promote human rights. The Netherlands Institute for Human Rights publishes reports about racial discrimination in the Netherlands, one of which specifically states that civic integration, especially language requirements, do not necessarily fulfil the anti-discriminatory aims of integration.

The 2009 evaluation of the civic integration abroad (Wib) showed that the basic integration examination provides only a very limited con-

[755] A Turkish family member whose Family members are understood to be the spouse of the Turkish national, their blood relatives in the descending line below the age of 21 or their dependants and the blood relatives in the ascending line of this national and of his spouse, who are their dependants. A spouse is considered equal to a registered partner. https://ind.nl/EN/individuals/Residence-Wizard/other-information/civic-integration., accessed on August, 2, 2016.

[756] *Evaluatie wet inburgering buitenland (WIB).* Het Ministerie van Sociale Zaken en Werkgelegenhed. 2014.

[757] Gabriele Ballarino & Nazareno Panichella, *The Occupational Integration of Male Migrants in Western European Countries: Assimilation or Persistent Disadvantage?* International Migration Vol. 53 (2) 2015.

tribution to integration, especially as concerns the integration of groups in a vulnerable position, like illiteracy rates and women with little education. The importance of this contribution does not outweigh the interest of the family members affected; who need to put their desire to live together on hold.[758]

Language examination forms only a part of the civic integration exam, basic knowledge of Dutch society is assessed too. Integration should include topics such as education and training, the labour market, health, and housing.[759] Most people that pass the Dutch civic integration exam are those that have certificates of higher education. People who are less educated tend to fail the integration exam; it appears that the Dutch government does not want to accept unskilled migrants. Failure to pass the civic integration exam results in the applicant's residence permit being revoked.[760] In several cases, ethnic minorities who fail the make appeals to the Court. For instance, one Chinese person lodged an appeal through the court because his application to extend his work permit was rejected by the IND, despite being able to renew their residence permit. This Chinese person argued that without a work permit, their residence permit was meaningless; how could they afford to live if they could not work?.[761] Another case, was concerned a Turkish person who was fined € 500 for after failing to pass the integration exam. They decided to challenge this situation in Court.[762]

Last but not least, the principle of transparency is demanded in integration policy for three main reasons. *First*, to ensure immigrants and ethnic minorities have an adequate understanding of the objectives of

[758] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all forms of racial discrimination (CERD) on the Examination of the combined nineteenth to twenty-first Periodic Reports of the Netherlands.

[759] Linda Bakker, Sin Yi Cheung, and Jenny Philimore, *The Asylum-Integration Paradox: Comparing Asylum Support Systems and Refugee Integration in the Netherlands and the UK*. International Migration, Vol. 54 (4) 2016.

[760] Het Ministerie van Sociale Zaken en Werkgelegenhed. Het Ministerie van Sociale Zaken en Werkgelegenhed, 2014.

[761] Case of ECLI: NL: RBDHA: 2015: 13842, the District Court of Hague, on 20 November 2005.

[762] Case of ECLI: NL: CRvB: 2011: BR4959. The Central Board of Appeal, on 16 August 2011.

the government's integration policy; as mentioned above, that Dutch integration policy has the goal of enhancing the status and position of immigrants and ethnic minorities in society. *Second,* to ensure that sufficient information about the documentation and procedures relevant to integration policy are accessible to those who need it. *Third,* the principle of transparency can help combat discrimination and prevent maladministration in the field of integration.

3.1.6 Provisional findings

The good governance principle of transparency fortifies the norms for the government and legal protection of ethnic minorities. The Dutch governmental authorities have used this principle to solve problems of ethnic minorities in the Netherlands, especially the Chinese and Turkish communities. Ethnic minorities require transparency to be able to empower their position. The principle of transparency was developed by the Dutch Freedom of Information Act or the Government Information Act (*Wet openbaarheid van bestuur*; WOB). This Act states the obligation of the administration to disclose public information (Article 2) and the right to request public information (Article 3). Furthermore, this Act stipulates the right of everyone (regardless of ethnicity, nationality, gender, and religion) to access public information by telephone, email or letter. Of course, there are some restrictions on the information that can be requested and these exemptions are detailed in Article 10. Meanwhile, one of the broader functions of greater transparency is that it can prevent social conflict between ethnic groups. Greater transparency can help ethnic minorities to improve their legal awareness and encourage them to use the proper legal channels for dispute resolution. The principle of transparency, for the most part, can provide ethnic minorities with access to information which can be used to fight against arbitrary administration. Arbitrary authorities' conduct may cause ethnic conflict and resistance. Therefore, the principle of transparency is needed to empower the people and control the administrative authorities. Furthermore, the principle of transparency acts as a bridge between the rights to know and the right to freedom from discrimination. Providing information about the lives of ethnic minorities

(such as the public research by the Social Cultural Planning Office, and information about combating discrimination) can help establish social harmony and understanding between ethnic groups. The exploration of case law has shown that the principle of transparency has been used by ethnic minorities to access their rights. Article 1 (a) of the Dutch Government Information Act provides the legal right for ethnic minorities to request written documentation or other materials that contain data that is produced by an administrative authority. The argument for transparency and access to information has also appeared in some case law. Ethnic minorities can request valid information or additional documents which are related to their interests. Ethnic minorities can criticise the administrative authority if they recognise that the administrative authority is not fulfilling their obligations. Indeed, ethnic minorities' rights to know are guaranteed under the Dutch Government Information Act. With regards to integration policy, the principle of transparency is a necessity; the principle of transparency can help ensure that ethnic minorities have access to information that is beneficial to their interests, for example understanding the objectives of the Dutch government's integration policy; to improve migrants' position in society and guarantees they can enjoy equal treatment. Currently, the Dutch Immigration and Naturalisation Service (IND) provides relatively adequate information about all aspects of civic integration including requirements, costs, the procedure, a digital application form, etc. Another important finding here is the vital role that the principle of transparency plays in combating discrimination and maladministration in the field of integration.

3.2 The principle of participation

3.2.1 Introduction

In this section I will analyse ethnic minority participation based upon the indicators which were discussed in chapter 2. The principle of participation and its specifications, as described in chapter 2, consists of (1) an assessment of the constitutional motive of ethnic minorities; (2) the legal movement of ethnic minorities through citizens panels and community-level participation; (3) the implementation of ethnic minority participation in legal practice; (4) the application of the CLEAR

Method in the legal field. Indeed, the principle of participation is a way of strengthening the norms for the government and legal protection of ethnic minorities.

First, ethnic minorities often submit complaints of discrimination to the Netherlands Institute for Human Rights, the Ombudsman, and the courts. I acknowledge these activities as an example of exerting constitutional motive. Second, ethnic minorities also have contributed to citizens panels and community-level participation. Third, with regards to the implementation of ethnic minority participation in the legal practice, I describe participation of ethnic minorities through the lodging of appeals through the Administrative Court. The Court has a function of controlling the administration. In the vast majority of cases, ethnic minorities appeal concern residence permits, social benefits, unreasonable detention, and refugee status —which are the responsibility of the Immigration and Naturalization Service (IND), the local administrative authorities, and the Police. The first example of ethnic minority participation is that of Turkish people in the Netherlands following the Turkish government's Turkey's crackdown on freedom after the failed coup is analysed here. In particular, I have selected and investigated the legal reasoning of judges who presided over the *Hizmet* Case in the District Court of Hague. More broadly, I explore the implications of the Turkish coup and the particularly the victimisation of the *Hizmet* community and the response of the Dutch administration were investigated.

The final part of this section describes the principle of participation of ethnic minorities using the CLEAR Method by analysing (1) the capacity of ethnic minorities (2) the institutional instruments that facilitate ethnic minority participation, namely: the anti-discrimination bureaus, and (3) the response of the administration to ethnic minority participation. I conclude that despite high numbers of reports, participation, ethnic minorities are still a vulnerable group.

3.2.2 Constitutional motive

Constitutional motive, as one of specifications of the principle of participation, is a form of participation that is used as a means of pro-

tecting the interests of individuals.[763] This specification can also support the reinforcement of the norms for the government and legal protection of ethnic minorities. Ethnic minorities use legal channels to protect their individual interests. There are at least three components that support the constitutional motive of ethnic minorities. First, the means of participation, namely legal means as the main objective involved by objection, appeal, and complaint of ethnic minorities. Ethnic minorities lodge an objection, appeal or complaint against discrimination through the Netherlands Institute for Human Rights, the Ombudsman, and the courts. These three institutions represent the legal channels after the administrative act has been taken. Second, the purpose of protecting of individual interests. Sometimes, the meaning of an individual's experience can have symbolic value that is meaningful to an entire demographic.[764] The Chinese and Turkish cases which have been submitted to the Netherlands Institute for Human Rights, the Ombudsman, and the courts, are largely objections, appeals or complaints by individuals; yet I argue that these cases of individual discrimination reflect the general oppression of ethnic minority groups. Third, there is a connection between the legal channels and the objectives of ethnic minorities. Minorities actively participate as means of controlling the administrative authorities, in the frame of the rule of law, democracy and to improve the legal status of their position.[765] Ethnic minorities fight against discrimination by using their constitutional motive and rights to objection, appeal, and complain.[766] Moreover, these forms of specification

[763] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018, p. 9

[764] Jeanette Rodriguez & Ted Fortier, *Cultural Memory. Resistance, Faith, and Identity,* Texas, The University of Texas Press, 2007, p. 3.

[765] Assaad E Azzi, et al, *Identity and Participation in Culturally Diverse Societies. A Multidisciplinary Perspective*. Malden, Wiley-Blackwell, 2011, p. 37.

[766] G.H. Addink. *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018.

from the principle of participation can be understood as an element of the rule of law and the representation of democracy where people have the opportunity to fight against inequality[767] and strive to create more inclusive administrative authorities.[768] On the other hand, responding to administrative actions or decisions by submitting an appeal or a complaint, reflects the implementation of the concept of the rule of law and democracy.[769]

In the Netherlands, the Chinese and Turkish people have the legal rights to lodge complaints, objections, and appeals. As has been elaborated upon in previous chapters, Chinese and Turkish participation consists of individual and representative complaints (see Article 10a/e of the Netherlands Institute for Human Rights Act). The Ombudsman[770] and the Netherlands Institute for Human Rights have a strategic role in stimulating the participation of ethnic minorities.[771] On several occasions, institutions including the administration,[772] the private sector,[773] and social foundations have violated discrimination law.[774] The annual report of the Netherlands Institute for Human Rights presents the numbers of reports that they receive, providing a picture of how many people deploy their constitutional motive through the institute. In 2012, the front office of the Netherlands Institute for Human Rights answered

[767] John Stuart Mill, *Essays on Equality, Law, and Education*. Toronto, University of Toronto Press, 1984, p. 334-335.

[768] Iris Marion Young, *Inclusion and Democracy.* Oxford, Oxford University Press, 2000, p. 54.

[769] Brian Z. Tamanaha, *On the Rule of Law, History, Politics, Theory, On the Rule of Law, History, Politics, Theory*. Cambridge, Cambridge University Press, 2004, p. 102.

[770] Linda C. Reif, The Ombudsman, Good Governance and the International Human Rights System. Dordrecht, Sringer Scgience Media, 2004, p. 6.

[771] Linda C. Reif, The Ombudsman, Good Governance and the International Human Rights System. Dordrecht, Sringer Scgience Media, 2004, p. 3.

[772] Oordeelnummer 2015-42. College voor de Rechten van de mens and Oordeelnummer 2014-86. College voor de Rechten van de mens.

[773] Oordeelnummer 2015-87. College voor de Rechten van de mens and Oordeelnummer 2012-64. College voor de Rechten van de mens.

[774] Oordeelnummer 2013-131. College voor de Rechten van de mens, Oordeelnummer 2012-162. College voor de Rechten van de mens and, Oordeelnummer 2012-71. College voor de Rechten van de mens.

1281 questions, 1147 of which were about equal treatment,[775] in 2013, the Institute answered 2581 questions, 2006 of which concerned equal treatment[776] and in 2014 the institute responded to 2303 questions, 1657 concerned equal treatment.[777] By complaining through the Netherlands Institute for Human Rights, ethnic minorities exert their constitutional motive through legal channels to combat discrimination. The provision of a proper channel of ethnic minority participation is an indicator of a healthy constitutional democracy.[778] The National Human Rights Institutions such as the Netherlands Institute for Human Rights, have the legal basis to become quasi-juridical-channels which can help ethnic minorities to lodge complaints and protect their individual interests.[779] In the Netherlands, Chinese and Turkish people have submitted complaints about equal treatment to the Netherlands Institute for Human Rights. At time of writing, the Institute has issued 24 opinions on cases concerning Chinese people and 179 opinions concerning Turkish people.[780]

Besides complaining through the Netherlands Institute for Human Rights, ethnic minorities can also register complaints through the Ombudsman. Unlike the Netherlands Institute for Human Rights, which can handle cases involving the private sector (Article 11 of the Netherlands Institute for Human Rights Act 2011), the Ombudsman is only concerned with complaints about the administrative authorities. Complaints sometimes fail because they are not submitted according to the correct procedure. For example, complaints should first be sent to the administrative authority before being filed with the Ombudsman (Article 9: 20 GALA).[781] But most complaints were

[775] Netherlands Institute for Human Rights. Annual Report 2012., p. 10.

[776] Netherlands Institute for Human Rights. Annual Report 2013., p. 12.

[777] Netherlands Institute for Human Rights. Annual Report 2014., p. 11.

[778] Jessica J. Kulynych, *Performing Politics: Foucault, Habermas and Postmodern Participation*. Polity, Vol. 30, No. 2 (Winter, 1997), pp. 315-346.

[779] Linda C. Reif, The Ombudsman, Good Governance and the International Human Rights System. Dordrecht, Springer Science Media, 2004, p. 4-5.

[780] https://www.mensenrechten.nl/ accessed on April, 28, 2016.

[781] Interviewed with Martin Blaakman on February, 12, 2016.

submitted directly to the Ombudsman. Indeed, the Ombudsman is an effective way to control the administration.[782] Although the Ombudsman decisions are not legally binding, their interventions are still quite powerful. Therefore, the number of discrimination complaints submitted to the Ombudsman are evidence of the public trust and regard for the institution. The Ombudsman's work reflects the objectives of ethnic minorities' constitutional motives. This is especially clear in their functions of informing, consulting and approving/ deciding upon problems.[783] The Ombudsman received 39,715 complaints in 2012,[784] 38,033 in 2013,[785] and 36,278 in 2014.[786] Although many complaints are submitted to the Ombudsman, only some are investigated by the Ombudsman. In 2015, the Ombudsman investigated 118 complaints of discrimination.

2010	2011	2012	2013	2014	2015
48	50	47	55	46	118

Number of investigations conducted by the Ombudsman.
Source: The National Ombudsman 2015

Submitting a complaint is one of example of constitutional motive that ethnic minorities deploy as a form of small group democracy.[787] Minorities are often victims of discrimination and hate.[788] Data from the Ombudsman and the Netherlands Institute for Human Rights pro-

[782] Linda C. Reif, The Ombudsman, Good Governance and the International Human Rights System. Dordrecht, Sringer Scgience Media, 2004, p. 6.

[783] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018, p. 9.

[784] Summary annual report of the National Ombudsman 2012.

[785] Summary annual report of the National Ombudsman 2013.

[786] Summary annual report of the National Ombudsman 2014.

[787] John Gastil, *Democracy in Small Groups. Participation, Decision Making, and Communication*, Philadelphia, New Society Publishers, 1993, p. 3.

[788] Alan Patten, *Equal Recognition the Moral Foundations of Minority Rights*. Princeton, Princeton University Press, 2014, p. 151.

vide an illustration of how frequently ethnic minorities participate by complaining. Of course, it is important to remember that many discriminatory incidents go unreported. The constitutional motives of ethnic minorities can help create beneficial legal channels that can also be used to protect their interests in the courts. Constitutional motive is a legal means of ethnic minorities fighting for their rights. Raising an issue in courts is considered a more 'civilising' act than direct action such as public demonstrations or strikes. Furthermore, the courts have the power to deliver legally binding verdicts.[789] In other words, the courts, in the context of good governance, can be a gate to justice[790] and human rights[791] for ethnic minorities.

Submitting a case to a court is a powerful way to register complaints about discrimination and protection of ethnic minorities interests.[792] The legally binding power of the Court is an attractive option for ethnic minorities who pursue the fulfilment of their rights. Until 2015, the *rechtspraak* shows that the courts issued 3935 verdicts concerning appeals submitted by Turkish people, and 1850 verdicts concerning appeals submitted by Chinese people.[793] Some cases were handled by the Council of State (*Raad van State*), accounting for 1319 Chinese cases, and 1639 Turkish cases.[794] Cases submitted to the *rechtspraak* by Chinese and Turkish people concerned criminal cases, discrimination, civil/ tort cases, taxation, immigration, etc. Meanwhile, the Council of the State is interested in cases on topics including work permits, visas, basic registration, and Dutch citizenship, etc. Herewith, the power of the judges means that many problems are resolved in courts. Bringing a case to a

[789] Patrick Polden, *A History of the Country Court 1846-1971,* Cambridge, Cambridge University Press, 2004, p., 22.

[790] Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity, and Integrity under the European Convention on Human Rights*. Leiden, Martinus Nijhoff Publisher, 2009, p. 31-33

[791] Loukis G. Loucaides, *The European Convention on Human Rights. Collected Essays*, Leiden, Martinus Nijhoff Publishers, 2009, p. 56-58.

[792] John D. Skrentny, *The Minority Rights Revolution*. Cambridge, The Belknap Press of Harvard University Press, 2004, p. 65.

[793] https://www.rechtspraak.nl Accessed on April, 28, 2016.

[794] https://www.raadvanstate.nl Accessed on April, 28, 2016.

court provides ethnic minorities with definitive answers to their legal position.[795]

Speaking about the principle of participation, legal participation is the similar to as political participation—both are forms of performative resistance.[796] Meanwhile, participation itself is a social movement that engages the connection between development and intervention with the decision-making process.[797] However, constitutional motive can encourage people to be a good citizen, and to participate[798] using legal approaches. We can see how Chinese and Turkish people fight to protect their individual interests by sending complaints respective appeals to the Netherlands Institute for Human Rights and the Ombudsman and the courts. In addition, Chinese and Turkish people can also request help from Anti-Discrimination Bureaus which are provided by local administrative authorities. As mentioned in previous sub-chapters, at least 7.235 reports were sent to the Anti-Discrimination Bureaus in 2015, compared with 3.614 reports to the police, and 429 reports to the public prosecutor.[799] Clearly, submitting a complaint to an Anti-Discrimination Bureau is a far more popular way to exert constitutional motive than through either the police or the Public Prosecutor. From a constitutional motive perspective, ethnic minorities use the complaint mechanism as a legal instrument to protect their individual interests, for example to in the struggle against discrimination, politics of intolerance, abuse of power, maladministration, and unequal treatment, etc.

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[795] Stephen May, et al, *Ethnicity, Nationalism, and Minority Rights*. Cambridge, Cambridge University Press, 2004, p. 5.

[796] Jessica J. Kulynych, *Performing Politics: Foucault, Habermas and Postmodern Participation*. Polity, Vol. 30, No. 2 (Winter, 1997), pp. 315-346.

[797] Samuel Hickey & Giles Mohan, *Participation: from tyranny to transformation? Exploring new approaches to participation in development*. London, Zed Books, 2004, p. 62.

[798] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018, p. 9.

[799] the Netherlands Institute for Human Rights Submission for CERD of 2015.

3.2.3 Citizens' panels and community-level participation

Citizens' panels and community-level participation by ethnic minorities, as the specified by the principle of participation, take several forms in the Netherlands. A citizen's panel is also a method of fortifying the norms for the government and legal protection of ethnic minorities. How do ethnic minorities participate with the Dutch legal framework? Some legal sources can be used by ethnic minorities to participate such as the Act on Minority Policy Consultation, the right of association (Article 8) and the right of assembly (Article 9) of the Dutch Constitution. On some occasions, ethnic minorities have been involved with policy decision-making process. They have also actively developed social capacity within their communities by establishing social foundations and organisations. One such institution was called the National Consultation Platform on Minorities (Landelijk Overleg Minderheden/ LOM). This organisation was considered to be the most effective channel by which of ethnic minorities could influence public policy. Meanwhile, citizens' panels have been utilised by political parties as a means of connecting with constituents. In addition, ethnic minorities can participate by working in education and contributing to culture, and public dialogue. Social foundations that were formed by ethnic minorities have demonstrated significant examples of community-level participation in the Netherlands.

The LOM was established in 1997 in response to the Act on Minority Policy Consultation. The LOM was a citizens' panel that provided ethnic minorities an opportunity to discuss drafts of regulation and issues of public policy. This organisation was funded by the government and consisted of representatives from various ethnic minorities including the Turkish, Southern European, Caribbean, Surinamese, Moroccan, and Chinese people, etc. Although the LOM made many contributions and suggestions concerning integration policy, cultural connections between people, and eliminating discrimination. Unfortunately, the Dutch Government withdrew funding and disbanded the organisation. Although there were obvious logistical challenges for a singular organisation like the LOM to fairly represent the interests of multiple mi-

nority groups, there is still a clear need for such an organisation to provide a bridge of communication between the administrative authorities and vulnerable groups.[800] In addition, the LOM was an effective institution that scrutinised and consulted government policies, such as subsidy schemes for minority foundations, and integration policies.[801] I argue that this organisation was an effective citizens' panel that facilitated the amplification of ethnic minority voices.

After the LOM was disbanded, ethnic minorities continued to participate in other forms of citizens' panels, for example by joining or forming political parties. Recommendations are more effective when supported by a large group of people, commonly a political party. Many minorities have joined political parties that advocate for their interests, mostly parties considered to be on the 'left' such as the Labour Party (PvdA), Socialist Party (SP), Green Left, Democrats 66, but also centre-right parties such as Christian Democratic Appeal (CDA), the People's Party from Freedom and Democracy (VVD) and other parties. Thus, ethnic minorities have been able to respond to drafts of regulations and public policies through their representation in parliament. For instance, NIDA Rotterdam, a social foundation and local political party,[802] presented recommendations to local police forces and municipalities concerning monitoring and prosecuting Islamophobia. NIDA also intervened with the local government to request an Islamic cemetery, a tree-planting program and gathered public support to demonstrate about issues in Gaza. One member of NIDA said 'we organized the biggest protest for Gaza in the Netherlands; more than 10.000 people marched for

[800] *ECRI Report on the Netherlands (Fouth Monitoring Cycle. 2013)*. The European Commission against Racism and Intolerance (ECRI), p. 23.

[801] A. Kasem, Jonneke de Jong, Niels Buller, Evaluatie Landelijk Overleg Minderhedenbeleid. *Onderzoek doelmatigheid en doeltreffendheid van het LOM-beleid.* Het Ministerie van Sociale Zaken, 2016, p. 48.

[802] NIDA is a local political party in the municipality of Rotterdam which was established in 2013. Under party leader, Nourdin El Quali (a former member of Green left party), the party won two seats in the 2014 municipal election. NIDA is inspired by Islam; its name comes from the Quran, meaning 'call' or 'voice'. Thus NIDA means 'the voice of Rotterdam.' Before DENK was established, many Turkish people joined this political party, although there are also Morrocan and Dutch members also.

justice.'[803] Although many people consider NIDA to have a membership that is primarily Turkish-Dutch, it is an explicitly multicultural organisation. 'We have a pretty multicultural background,' said Ali Agayev, Board member of NIDA.[804] Although other parties have since attracted Turkish people, NIDA's board claims they have still many Turkish members who support the organisation.

Meanwhile, ethnic minorities also participate at the community-level participation by establishing and operating social foundations. One main example is in the field of education; both the Turkish and Chinese communities have contributed to education policy and established schools. In 2001, 45 Chinese schools in the Netherlands organised themselves into a consortium called 'Stichting Chinees Onderwijs in Nederland' (Chinese Education Foundation in the Netherlands).[805] These schools promote Chinese education, language, and culture in the Netherlands. Thus, Chinese language and culture has become an interesting topic to study. The Chinese community also collaborate with the Confucius Institute which mainly focuses on preserving Chinese cultural heritage.[806] In the Netherlands, Chinese people also have their own professional media outlet, CRTV, which consists of a radio station, magazine, and a television station.[807] Some Chinese organisations, such as De Chinese Burg, serve a function of acting as a bridge between the Chinese community and the Dutch community. De Chinese Burg was established on March 6th, 1987 by young Chinese people who wanted to connect Dutch and Chinese culture.[808] Similar Turkish organisations such as Cosmicus Foundation[809] and the Witte Tulp are also involved in

[803] NIDA representative from the Council of Rotterdam, interview on February 2, 2018.

[804] Interview on February 10, 2018.

[805] http://www.chineesonderwijs.nl/ accessed on February 10, 2018.

[806] By the same token, Leiden University and Groningen University work with the Confucius Institute to learn Chinese language and culture. These universities have a mutual cooperation with some Chinese Universities to create new prospective studies into Chinese language and culture.

[807] http://www.crtv.nl/events/, accessed on February 10, 2018.

[808] http://www.chinesebrug.nl/, accessed on February 10, 2018.

[809] http://www.cosmicus.nl/, accessed on February 10, 2018.

education.[810] 'Sometimes, we provide some insights to the Dutch government to improve education policy here, in the Netherlands.[811] The Turkish community has also established a business association called HOGIAF.[812] The Turkish equivalents to CRTV, are Zaman Vandaag and Zaman Hollanda. This social foundation was built by the Turks for a charity called 'Time to Help.'[813] They also created a forum for dialogue named Platform INS.[814] By organising themselves, ethnic minorities can improve their participation at the community-level. In other words, collective movements make community-level participation more powerful. Forming such organisations is an example of exercising the rights of association (Article 8 of the Dutch Constitution) and the rights of assembly (Article 9 of the Dutch Constitution). Some organisations, like NIDA have advocated for the right to freely practice one's religion or belief (Article 6 of Dutch Constitution), by forming citizens panel to combat discrimination against Muslims in the Netherlands. Community-level participation has been utilised by ethnic minorities in many fields including education, media, business, and culture. Last but not least, ethnic minorities participation through citizens' panels and community-level participation rely on several rights, such as the right of association, the right of assembly, and the right to profess freely their religion or belief in accordance with Dutch Constitution. The popularity of Citizens' panels and community-level participation, as the specifications of the principle of participation, demonstrate that ethnic minorities are able to access their rights and use them protect their interests. By implementing these rights via citizens panels and community-level participation, they are able to struggle against discrimination.

3.2.4 The implementation of ethnic minority participation

This section explores the principle of participation from a good governance perspective, with reference to ethnic minority participation in

[810] http://www.stichtingwittetulp.nl/, accessed on February 10, 2018.

[811] Interview a Turk who works in education, September 2016.

[812] https://hogiaf.nl/en/, accessed on February 10, 2018.

[813] https://www.timetohelp.nl/, accessed on February 10, 2018.

[814] http://www.crkstudio.nl/platformins/ accessed on February 10, 2018.

the Netherlands. The submission of appeals or complaint is one method that can strengthen the norms for the government and legal protection of ethnic minorities. First, I describe the position of ethnic minorities before the courts; they can submit objections, appeals, or complaints regarding issues such as immigration, civic integration, social benefit, and discrimination. Second, I examine the participation of a Turkish person who was involved with the Gulen movement and has been victimised after the failed coup in Turkey. This person lodged a complaint through the courts to appeal the rejection of his asylum application. Third, the way that the complaint was handled by the Netherlands Institute for Human Rights.

3.2.4.1 Position of the stranger in the courtroom

A curious aspect of the courts is how they deal with the legal standing of what I call 'the stranger' and providing access to justice through the courts. As mentioned, in the section on GALA, individuals (including ethnic minorities) who are an interested party (*belanghebbende*), in accordance with Article 1:2 of GALA, can lodge an appeal with the Administrative Court (Article 8:1 of GALA). Ethnic minorities may use the courts to request fulfilment of their rights, for example by requesting social benefits. These social benefits represent part of the political economy of the welfare state. The welfare state not only ensures the fulfilment of basic rights, but also seeks to guarantee a minimum standard of living and well-being, and protects people from other social risks.[815] For example, one interesting example concerns a Chinese family who filed an appeal to receive support for their housing, childcare, and healthcare. The family ceased to receive social benefits on January 24th, 2012 because they were no longer lawful residents of the Netherlands. Prior to this, the Social Insurance Office of Utrecht had been providing them with a monthly grant of € 853, which the family had argued was insufficient to meet their needs. During the proceedings, the courts cited Article 8 of the European Convention of Human Rights (ECHR) on

[815] Hector Fix-Fierro, Courts, *Justice and Efficiency. A Socio-legal study of economic rationality in adjudication*, Oxford and Portland, Oregon, Hart Publishing, 2003. p. 15.

the right to respect private and family life.[816] This example demonstrates that non-citizens have an adequate position in the Netherlands and that they can be protected by both international and national instruments of human rights.

Another interesting case concerned the termination of the social benefits of a Turkish family, which was later resolved in by the courts. Their benefits stopped because of an amount of money in their bank account was discovered that was deemed too high for them to qualify for social benefits. Social Investigation Affairs found that the family had € 7,402.60 in their Turkish family bank account. During the Court hearing, the Turkish family explained that this money was from the sale of their house and land in Turkey on August 24th, 2012. Therefore, they lodge an appeal through the courts, explaining that the benefits they were receiving were not sufficient to cover their daily expenditure.[817] They were unaware that the money in their home origin country would make them ineligible for social benefits. Regardless, they had a genuine need for social benefit to survive on Dutch soil. Indeed, the courts have demonstrated it has a strategic role in recognising the identity of ethnic minorities.[818] Hence, the courts make sure that if there is a clash of political dynamics, the government still protects equal rights.[819]

One function of the courts is to control the administrative authorities.[820] Many of these cases, especially those relating to residence permits, are the responsibilities of the Immigration and Naturalization Service (IND), the local authorities, and the police.[821] The courts can issue a verdict about the performance of these institutions with regards

[816] Case of ECLI: NL: RVS: 2014: 565, AWB 12/ 2375, District Court of Utrecht on 19 February 2014.

[817] Case of ECLI: NL; CRVB: 2015: 1231, Central Board of Appeal, on 14 April 2015.

[818] Costaz Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism*. New York&Oxford, Routledge, 2007, p. 34.

[819] John D. Skrentny, *The Minority Rights Revolution.* Cambridge, The Belknap Press of Harvard University Press, 2004, p. 83.

[820] Marc Galanter, *Lowering the Bar Lawyer Jokes & Legal Culture*, Wisconsin, The University of Wisconsin Press, 2005, p. 11.

[821] Case of ECLI: NL: RVS: 2011: BT 2163, District Court of Amsterdam, on 21 September 2011,

to anti-discrimination law. A Chinese national was arrested at Schiphol airport on December 3rd, 2011. Before he came to the Netherlands, the European Arrest Warrant already identified him as a criminal offender who had been involved in an organised or armed robbery in November 2001 in Hungary. However, he applied for an asylum residence permit in the Netherlands, and wanted to be tried under Dutch law.[822] The courts were able to dictate to the administrative authorities, such as the Immigration and Naturalization Service and the Police, in this case. Therefore, this case is evidence that anyone is able to file an appeal to the courts as long as the defendant (the object of complaint) is within the territory of the country that is responsible for its jurisdiction.

Another case regarding residence permits is that of a Turkish person who was rejected by the Immigration and Naturalization Service (IND). He came from a politically active family —his parents and his sister were political prisoners of the Turkish government. He was Kurdish in origin, and involved with The Peace and Democracy Party (Party of Baris ve Demokrasi Partisi) which is an opposition party in Turkey. He requested for a temporary residence permit in the Netherlands. Unfortunately, on May 21st, 2014 this request was rejected by IND.[823] The situation in Turkey was not taken into account by the Dutch administrative authorities; the applicant was at risk of persecution and imprisonment in his home country. But the applicant also filed the appeal because of his detention in the Netherlands. The courts will ensure that prisoners' rights are consistent with human dignity.[824]

On January 21st, 2009, the Amsterdam District Court released their verdict on the Geert Wilders hate crime case, where Wilders was accused of insulting Muslims after comparing Islam to Nazism. The Public Prosecutor indicted Wilder for hate speech in his 2007 film '*Fitna*.' The

[822] Case of ECLI: NL: RBSGR: 2012: BW1274, District Court's-Gravenhage Datum 19 March 2012.

[823] Case of ECLI: NL: RVS: 2015: 2782, AWB 14/ 13966, the District Court of Hague, on 24 August 2015.

[824] Varun Gauri&Daniel M Brinks, *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World.* Cambridge, Cambridge University Press, 2008, p. 44.

Court delivered a verdict of not guilty, and issued no punishment to Wilders, citing the right to freedom of expression; the Netherlands provides extra protections of this right to politicians during political campaigns and debate in Parliament. Furthermore, 8 appellants filed appeals against Wilders' actions. The Court provides an opportunity for appellants to respond to the verdict in a Court hearing. Hence, these 8 appellants were not only listened to outside of the Court, but also within the Courtroom. After Wilders' film '*Fitna*' was released, the Police, the Public Prosecutor and the Dutch administrative authorities received many complaints about this film. Some NGO's, associations of ethnic minorities, and academics actively protested in the media and on the street.[825] Meanwhile, 8 appellants stood bold and brave before the Court to fight against discrimination. These appellants not only brought their own critiques of the film, but also additional evidence; appellant 1 brought a copy of the August 8th, 2007 edition of Volkskrant (a Dutch broadsheet newspaper) with a headline quoting Wilder's claim 'Enough is Enough: Ban the Quran.' Appellant 2 provided additional examples of hate speech by Wilders, including a radio's broadcast from September 7th, 2007 where he made a joke comparing the Quran to Donald Duck. Appellant 2 brought an additional edition of Volkskrant which quoted Wilders as saying, 'the Quran is the Mein Kampf of a religion that seeks to eliminate others; a book that calls non-Muslims 'unbelieving dogs'.[826]' Another document brought by appellant 2 was the February 9th, 2008 edition of De Limburger in which Wilders argued that 'the role of Quran is terrible.' Appellant 3 criticised Wilders' argument about the 'Third Islamic invasion of Europe.' Appellant 4 argued that Wilders' film infringed upon regional human rights instruments in Europe. Appellant 5 also condemned Wilders statement connecting Hitler's Mein Kampf to the Quran. The Court then evaluated these opinions and facts using the objective standards of the Dutch Constitution (Article 6 and Article 7) and the Dutch Criminal Code (Article 137c, Article 147, Article 261,

[825] Massademonstratie op de Dam. De Volkskrant, March 25, 2008. See., https://www.volkskrant.nl/opinie/massademonstratie-op-de-dam~a2454959/

[826] 'De koran is het Mein Kampf van de religie dat beoogt anderen te elimineren. Een boek dat niet-moslims ongelovige honden noemt.'

Article 262, and Article 266).[827] The appellants (ethnic minorities and human right defenders) were able to express their views in Court to fight discrimination.

3.2.4.2 Participation and the Turkish Government's crackdown on freedom

This section describes an interesting case of a Turkish person who was connected with the Gulen movement in Turkey. After the failed Coup d'état in Turkey, the crackdown on freedom in the country escalated. Some Turkish people fled to the Netherlands to request asylum. One such requests went to the courts. The legal reasoning of the judge is particularly important in this case. The judge found that the defendant (the State Secretary for Security and Justice) had falsely claimed that the appellant (a member of the *Hizmet* movement) had submitted an incoherent declaration. The judge used Article 3 (6) of the Alien Act to evaluate the administrative authorities' decision. Moreover, the judges disputed the claim that the appellant had failed to make credible and coherent statements, arguing that he was coherent and clear during the hearing. The judges used objective standards to oversee the case. In addition, by citing Article 106 of the Alien Act and Article 8:75, the judges ordered the government to pay compensation to the appellant. The appellant was granted refugee status; if he had been deported back to the Turkey, he would have been at risk of torture, detention and gross human rights violations.

Many Turks have left their country in search of a safer place to live. Another example also resulted in a Turkish man appealing an administrative decision in the Court. He fled to the Netherlands to escape from the post-coup purge. Unfortunately, his asylum application was rejected, and he was instructed to leave the Netherlands. The State Secretary for Security and Justice insisted that proper evidence and valid information was absent from his asylum application. However, this Turkish plaintiff continued to appeal due to his fear of being deported back to Turkey,

[827] Case of ECLI: NL: GHAMS: 2009: BH0496, January 21, 2009, The District Court of Amsterdam,

where he would likely be detained. After the coup on July 15, 2016, the plaintiff left Turkey because of his involvement with the Gulen movement. After staying in Kyrgyzstan for a couple months, he moved to the Netherlands to apply for asylum. Separated from his family, this Turkish man sought for justice and security in the Netherlands.

> 'He has been interested in Hizmet movement since 1991 when he began to attend regular Hizmet meetings to discuss with trusted experts. After attending many meetings, the plaintiff became a fundraiser for Hizmet, inspired by the spiritual leader, Fethullah Gulen. Then, the plaintiff established a company with other members of Gulen's movement that funded to educational and humanitarian projects. Before the Gulen conflict between Erdogan escalated, his business partner was appointed as a stakeholder in the Turkish government in December 2013. However, when the conflict among Gulen and Erdogan deteriorated, Gulen's followers were subjected to harsh treatment by the Turkish government, who labelled them a terrorist organisation, and were accused of involvement in the coup. After the attempted Coup on September 24th, 2016, the Turkish police inspected his house and sought a warrant. But he and his wife already buried Gulen's lecture CDs and books in the garden. Unfortunately, the police found a copy of a CD which containing Gulen's sermons. His wife was detained, but he was able to escape and flew to Kyrgyzstan. His wife was released because she was not a member of the Hizmet movement, but a member of the socialist party. The Turkish police continue to visit his house once a month to search for him.'[828]

The credible threats to his safety meant that this man was fearful of returning to Turkey. Of course, he feared that he would be detained for his involvement with Gulen after he arrived at the airport in Turkey. The Dutch authorities stated that he had insufficient proof and documents to support his asylum application. On December 12th, 2016, the plaintiff arrived in the Netherlands. He was refused entry by IND because he did not have a valid visa or residence permit. But, he decided to apply for asylum on December 13th, 2016. The Dutch authorities rejected his application on December 27th, 2016 and informed him that he must leave the Netherlands immediately, also imposing a two-year entry ban. The day after the rejection, the plaintiff lodged an appeal through the Administrative Court. The Dutch authority dismissed the plaintiff's application because he was not equipped with a valid travel document

[828] Case of ECLI: NL; RVS: 2017: 1327, the District Court of Hague, May, 29, 2017.

(Article 3 of Dutch immigration law) had failed to comply with the correct procedure and does not have a valid travel document for entry into the Netherlands, (see Article 31 and 30 of Dutch Immigration law). However, the Court acknowledged that the plaintiff had no option but to leave Turkey because he was likely to be victimised in the purge after the coup, and that the reason that he could not provide the proper documents was that he had destroyed documents that could identify him as a member of the Gulen movement.

Political tensions after the Turkish coup d'état revealed the dynamics between the Dutch government and the Turkish government, and also between different factions of Turkish citizens who living in the Netherlands— many of whom are Erdogan supporters. Some of Erdogan's followers even physically attacked a Gulenist priest. Gulen followers in the Netherlands are targeted and victimised by Erdogan supporters; they receive death threats, and are subjected to hate speech and violence, and have had their buildings destroyed.[829] The political climate on social media has been particularly hostile to Gulen's followers. On September 29th, 2016, Dutch police arrested two Turkish people who were alleged to have alleged to have published insults, death threats and hate speech on social media.[830] Many Hizmet followers work in education, but after the coup many Turkish families withdrew their children from Hizmet-run schools, fearing these schools could be targeted by the Turkish government.[831] As a result, Schools such as Cosmicus College in Rotterdam and The Witte Tulp have lost many students.

Tears were shed in Amsterdam after Ali Ekrem Kaynak, one of the co-founders of fast food chain Halal Fried Chicken, was murdered. Turkish politics were suspected to be the reason behind the killing; he

[829] *Erdogan's Long Arm in Europe: The Case of the Netherlands*, Stockholm centre for freedom, 2017

[830] Nog twee arrestaties om Turkse spanningen. https://www.telegraaf.nl/nieuws/1270945/nog-twee-arrestaties-om-turkse-spanningen, Telegraaf, September, 29, 2016.

[831] Zeker honderd kinderen weg bij Gulenscholen Amsterdam. https://www.volkskrant.nl/binnenland/zeker-honderd-kinderen-weg-bij-gulenscholen-amsterdam~a4366477/, Volkskrant, August, 29, 2016. See also., Leegloop op Turkse Scholen door spanningen, https://www.telegraaf.nl/nieuws/380764/leegloop-op-turkse-scholen-door-spanningen, August, 23, 2016.

may have been killed because of his alleged links to Gulen. Kaynak was shot several times and later died of his injuries in hospital on September 28th, 2016. Three men were alleged to have been involved this murder.[832] The darkness that surrounds Gulen's followers causes them to live in fear and terror. Tension, violence, hate speech, and death threats oppress Turkish people who are connected with Fethullah Gulen. There is little that the Dutch government can do, except ensuring the security of Dutch-Turkish citizens and all people who live in Dutch soil.

> 'After failed the Coup in Turkey, our community become so afraid and terrified of violence. The Dutch police have worked so hard to protect us from potential damage and danger. The municipality has also been active in consolidating their power to ensure our safety. Surveillance cameras have been installed throughout our neighbourhood. We are lucky to live in the Netherlands.'[833]

Even though the Dutch government and police take care of all people who live in the Netherlands, including Gulen's followers, attacks on social foundations, schools, and individuals that are affiliated with Gulen have increased in frequency after the coup. Some Turks even asked King Willem-Alexander to restore peace amongst the Turkish community in the Netherlands.[834] Another group from the Turkish community formed a demonstration in Amsterdam, demanding an investigation into the Coup in Turkey.[835] Although the Coup happened far away in Turkey, political tension arose in the Netherlands. With regards to these problems, to what extent does good governance play a role in resolving political externality of Turkish politics? How does the Dutch government re-

[832] Turkish politics possible motive in Amsterdam fast food murder. https://nltimes.nl/2017/09/12/turkish-politics-possible-motive-amsterdam-fast-food-murder, September 12, 2017. See also, A Turkish businessman killed in Amsterdam over his alleged links to Gulen movement. https://stockholmcf.org/a-turkish-businessman-killed-in-amsterdam-over-his-alleged-links-to-gulen-movement/, September 14, 2017. However, another story behind the shooting was also business conflict rather than politics and his alleged connection to Gulen's adherents. See also., Werd zakenconflict Kaynak fataal? https://www.telegraaf.nl/nieuws/346464/werd-zakenconflict-kaynak-fataal, September, 12, 2017.

[833] Interview with (AA) one of Gulen's followers in the Netherlands, October, 2017.

[834] Koning moet Turken verzoenen. https://www.telegraaf.nl/nieuws/1285893/koning-moet-turken-verzoenen, October, 03, 2016.

[835] Gulenbeweging Nederlan veroordeelt coup. https://www.telegraaf.nl/nieuws/392984/gulenbeweging-nederland-veroordeelt-coup, July, 29, 2016.

spond to the requests of the Turkish government to discriminate, expel, and neglect Gulen's followers? For instance, the Malaysian government deported some of Gulen's followers back to Turkey, which was regarded by the Turkish government as 'a gift' of their great alliance. However, so far, the Dutch government has appeared to devote itself to good governance, rule of law, and democracy.

The right wing political party, PVV requested the Turkish embassy to be expelled from the Netherlands.[836] After the coup, Turks have become a controversial topic in the media and political sphere. In addition to, PVV, Emile Roemer (Socialist Party) and Gert-Jan Segers (Christian Union) have argued for the suspension of EU financial support for Turkey (valued at 600 million euros).[837] Indeed, the coup brought not only higher tensions between Turkish communities in the Netherlands, but also between the Dutch government and the Turkish government. For example, Joost Lagendijk, former Green Left Member of European Parliament was denied access to Turkey. He arrived at Sabiha Gokcen Airport, an after waiting for several hours, he was informed that he was not allowed to enter Turkey. Lagendijk was previously a member of the European Parliament 1998-2009 and was often asked by media to explain and analyse political developments of Turkey. He was openly critical of Erdogan's policies, particularly with regards to the detention of dissenters and the undemocratic purge of the Coup.[838] Day by day, the relationship between Turkey and the Netherlands deteriorated.

In the Netherlands, several attacks have caused political terror and. On July 16th, 2016—the day after the coup— a crowd of people threw stones at the windows of the Zaandam Animo Foundation, a Hizmet affiliated organisation. In Rotterdam, NIDA Foundation (a political party with connections to Hizmet) was also targeted by unknown people on

[836] PVV: Stuur Turkse ambassadeur weg. https://www.telegraaf.nl/nieuws/161502/pvv-stuur-turkse-ambassadeur-weg, May, 11, 2017.

[837] Kamer wil financiele steun Turkije opschorten. https://www.telegraaf.nl/nieuws/1271569/kamer-wil-financiele-steun-turkije-opschorten, September, 27, 2016.

[838] Oud-europarlementarier Lagendijk in Nederland om visum Turkije aan te vragen. https://www.volkskrant.nl/binnenland/oud-europarlementarier-lagendijk-in-nederland-om-visum-turkije-aan-te-vragen~a4383914/ September, 26, 2017.

July 17th, 2016. Violence erupted at Apeldoorn De Ijssel, a training centre and the Amsterdam Sara Burgerhart Activiteitencentrum (SBAC) and the Gouden Generatie Foundation on July 22nd, 2016. A mysterious attacker threw Molotov cocktails at the Unie van Betrokken Ouders in Apeldoorn,.[839] On July 19th, 2017, Necmi Kaya, a former imam who is connected to the Gulen movement was attacked by two men in the courtyard of the Selimiye mosque courtyard during the noon prayer. He was hit hard and his clothing was badly damaged. He sued after the incident and felt depressed after being attacked. His family became scared, and fearful.[840] Turkish people with connections to Gulen often receive threats and harassment, for example Huseyin Atasever and Hayan Buyuk who were called 'traitors' and 'betrayers' by other Turkish people in the street.[841]

On March 11th, 2017, a massive riot of Turkish people formed in response to the Dutch government's refusal to allow a Turkish minister to campaign in the Netherlands. Prime Minister Mark Rutte stated that Dutch public space was not a place for political campaigning by other countries.[842] This policy was supported by the House of Representatives in The Hague, and the Mayor of Rotterdam, Ahmed Aboutaleb, who added that the Dutch government did not want to help Erdogan to become more tyrannical.[843] However, a large demonstration of Turkish people was held in the front of the Turkish Embassy in support of the Turkish minister's visit. But Dutch police insisted that the Turkish Minister of Family Affairs, Betul Sayan Kaya, would not be allowed to campaign. She criticised the Dutch government's policy on her twitter account below.

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[839] *Erdogan's Long Arm in Europe: The Case of the Netherlands.* Stockholm centre for freedom, 2017, p. 17-18.

[840] *Erdogan's Long Arm in Europe: The Case of the Netherlands.* Stockholm centre for freedom, 2017, p. 18-19.

[841] *Erdogan's Long Arm in Europe: The Case of the Netherlands.* Stockholm centre for freedom, 2017, p. 20.

[842] Turkse minister: Nederland kan ons niet tegenhouden. https://www.telegraaf.nl/nieuws/1330701/turkse-minister-nederland-kan-ons-niet-tegenhouden, March, 4, 2017.

[843] Turkse minister naar Rotterdam. https://www.telegraaf.nl/nieuws/1330771/turkse-minister-naar-rotterdam, March, 3, 2017.

> 'We are not allowed to enter into our Consulate which is part of our homeland. Is this really the heart of the cradle of civilization? […] Europe, so-called centre of contemporary civilization! We are not allowed to step in Turkish Consulate General, our own land […] But Turkish people from all over Europe are here with us tonight. We will never surrender to this oppressive mentality […] Democracy, fundamental rights, human rights, and freedoms. All forgotten in Rotterdam tonight. Merely tyranny and oppression […] As an elected Minister, a Turkish citizen and a woman I will never give up against this unlawful treatment.'[844]

This message was strong enough to bolster support for the demonstration. Although, she accused the Dutch government of tyranny and oppression, but she conveniently neglected to mention her own Government's involvement in arbitrary detentions and human rights. Sadly, the demonstration in Rotterdam became violent and refused to dissolve. The police decided to take action, and arrested twelve Turkish rioters, seven rioters were also injured during the protest. The Turkish rioters were charged with committing violence, destroying public facilities, and insulting police officers. A few days later, similar incidents followed in Amsterdam.[845] Terror and fear were relentless for followers of Gulen.

Hizmet Turks have often fled to the Netherlands request political asylum. The *Hizmet* movement is thought of as a skilful and educated community. Accepting members of this movement, may have increased political tensions with Turkey and Erdogan supporters, but has also has the potential to result in highly skilled migrants moving to the Netherlands. Some *Hizmet* asylum seekers have felt that the procedure to obtain a certificate of asylum was slower than it should be. 'I applied some months ago. But the process took longer than the for other asylum seekers. More than a hundred of my *Hizmet* brothers are still waiting for a decision. Likewise, we are waiting for uncertainty.'[846]

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[844] Twaalf aanhoudingen, zeven gewonden tijdens onrustige nacht bij Turks consulaat in Rotterdam. https://www.volkskrant.nl/buitenland/turkse-minister-uitgezet-noodbevel-voor-centrum-rotterdam~a4473277/, March, 12, 2017.

[845] Snelrecht en boetes voor Turkse relschoppers. https://www.telegraaf.nl/nieuws/1328059/snelrecht-en-boetes-voor-turkse-relschoppers, March, 15, 2017.

[846] Interview with OD (initial name), June 2017.

3.2.4.3 Complaining about discrimination through the Netherlands Institute for Human Rights

The Netherlands Institute for Human Rights receives complaints about alleged discrimination free of charge.[847] The Institute is equipped with the power to conduct investigations, to bring parties together to resolve an issue, and to issue their opinions (*oordelen*).[848] Complaints concerning administrative authorities, private sector, and civil society foundations can be submitted to the institute. Although the opinions of the Institute are not legally binding, a majority of their recommendations are voluntarily implemented by the parties concerned.[849] The Institute's opinion can be appealed in courts if one party is unsatisfied, but this is very uncommon.[850] Cases relating to administrative authorities are very rare. However, one instance was a that of a Turkish man who filed a complaint against the State Secretary for Finance (Staatssecretaris van Financiën) after his employment was terminated.[851] A person from the Art. 1 Middle-Gelderland, acting as his representative, visited the institute to seek justice. This man felt discriminated against in his workplace when his colleague shouted 'you're in the Netherlands? you have to go somewhere else? Back to Turkey!'[852] The State Secretary for Finance did not accept the Institute's invite to mediation, and instead terminated the Turkish man's employment. Another instance was that of a Chinese woman who felt she was discriminated against because of her gender and ethnicity, specifically with regards to pay and promotion. At the time, the applicant, an auditor at the Ministry of Finance's office, was paid a monthly salary of € 3,649.33. Problems began on October 1st, 2005 when a native Dutch

[847] Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Dordrecht, Springer Science Media, 2004, p. 4.

[848] National Human Rights Institutions, *History, Principles, Roles and Responsibilities.,* Office of the United Nations High Commissioner for Human Rights, 2010, p. 77.

[849] Interviewed with Odile Verhaar in December 2015.

[850] Interviewed with Richard de Groot in January 2015.

[851] Oordeelnummer 2015-42. College voor de Rechten van de mens.

[852] Free translation from 'je bent toch in Nederland? Anders ga je toch ergens anders naar toe? Dan ga je toch terug naar Turkije.' See., Oordel 2015-42. College voor de Rechten van de mens.

man entered a new position with a monthly salary of €. 4.867.16.[853] The applicant felt that the discrepancy between their salaries was a result of her gender and ethnicity. Indeed, gender discrimination in workplace is dilemmatic problem.[854]

One well-known case of discrimination against Chinese people in the Netherlands are the 'baby milk formula' cases. In China, potentially inaccurate reports of contaminated milk formula created increased demand for the import of 'safe' formula from other countries. People in the Netherlands (often reported as Chinese people) exploited this lucrative opportunity, and bought large amounts of milk formula to sell at a high mark-up, resulting in shortages of milk formula in the Netherlands.[855] In response, many retailers imposed limits on the amount of formula that a customer could buy. Sadly, several incidents that emerged from this situation constituted racial discrimination. Two such cases are often grouped together, one involving Jumbo Supermarket and another involving Kruidvat (a Dutch pharmacy chain). In their CERD report, the Netherlands Institute for Human Rights stated that that these cases infringed upon the victims' rights to equal access to good and services (Article 7 of the Equal Treatment Act). The first of these incidents occurred on January 24th, 2015, when a Chinese woman visited Jumbo supermarket to buy baby milk formula, but was refused service by the cashier.[856] Later, the woman and her daughter lodged a complaint through the Institute. A similar incident also happened in Kruidvat; on May 29th, 2013, a cashier refused to sell baby milk formula to a woman of Chinese descent. Later that day, the woman's husband, who is not of Chinese descent, visited Kruidvat later that day and the cashier sold the baby milk powder without question.[857]After the cases were received by the Institute they conducted a rigorous investigation and legal analysis of

[853] Oordeelnummer 2009-67. College voor de Rechten van de mens.

[854] Paul Burstein, *Attacking Sex Discrimination in the Labour Market: A Study in Law and Politics*. Social Forces. Vol. 67:3, March 1989.

[855] Oordeelnummer 2015-56. College voor de Rechten van de mens.

[856] Oordeelnummer 2015-55. College voor de Rechten van de mens.

[857] Oordeelnummer 2014-26. College voor de Rechten van de mens.

the cases.[858] Their decisions are based on facts and make considerations based on a strong legal rationalisation, with the justification that these strict procedures will produce effective results. Typically, their recommendations aim to be 'less-coercion and more persuasion.'[859]

By the same token, discrimination in the labour market is also problematic in the Netherlands; ethnic minorities face particular difficulties when attempting access to the labour market.[860] For instance, on May 12th, 2014 a Turkish man applied to a vacancy for Programme Management Officer at Yacht BV. Unfortunately, he was not selected for interview. He suspected that his Turkish/ Arabic sounding name influenced his rejection, so he submitted a virtually identical application, but under a Dutch-sounding name, 'Martin van Dongen.' With this application, he was invited for an interview. However, he was not successful in his interview, and again suspecting that his ethnicity was a factor, submitted a complaint through the Institute.[861]

Another Turkish man origin lodged a similar complaint after he applied for a job at PEAK-IT BV. The applicant was searching for a job as an IT office administrator with a company engaged in the field of management consultancy and infrastructure. In fact, the corporate lawyer's response was disrespectful to the job applicant, saying: 'I noticed right away that the CV of WM was a crazy resume. It is a very minimal CV [..] a somewhat foolish CV. Did he complete the training? And has he done a migration (working permit) in last two years? Which month was it completed?'[862] The applicant felt that that his Turkish or Arabic-sounding name was the main reason that he was rejected.

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[858] Rachel Murray, *National Human Rights Institutions. Criteria and Factor for Assessing Their Effectiveness.* Netherlands Quarterly of Human Rights, Vol, 25/ 2, 189-220. 2007.

[859] Thomas Pegram, *Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions.* Human Rights Quarterly 32 (2010) 729-760.

[860] *Labour Market Developments. Federal Reserve Bulletin.* Vol. 36. May 1950. Number 5., See also, Kenneth M. Davidson, *Prudential Treatment and Equal Opportunity*. Law Review. 53 (1976)

[861] Oordeelnummer 2015-43. College voor de Rechten van de mens.

[862] Het viel mij gelijk op dat het CV van WM een gek CV was. Het was een zeer minimaal CV. [..] Beetje gek CV. Heeft hij opleiding afgerond? En heeft hij een migratie gedaan van 2 jaar? In welke maand is dat afgerond? Oordeelnummer 2015-102. College voor de Rechten van de mens.

Nowadays, it is well-known that having an Arabic-sounding name can reduce access to the Dutch labour market. Considered undesirable, the Dutch labour market effectively 'excludes' non-native names from the labour market. Cases of such discrimination can be brought to the Institute for an investigation consisting of: firstly, discerning whether or not discrimination has occurred, and what remedial action is appropriate. Secondly, if the verdict finds that no violation of equal treatment has occurred, then the complaint shall be dismissed.[863] Often it is decided that further investigation is required before the final decision is made, or the complaint is forwarded to a more appropriate authority.[864]

The Institute has the function to investigate complaints from. At this point, a forum of adjudication is a representation of the idea of the supremacy of the rule of law.[865] The Netherlands Institute for Human Rights, as is generally true for national human rights institutions, has a mandate to conduct investigations relating to discrimination in the public and private sectors.[866] In this regard, these institutions have significance from the perspective of good governance, namely because they provide a constitutional complaint mechanism for ethnic minorities. The provision of this mechanism protects the interests of individuals in the scheme of checks and balances of power[867] and endows the Netherlands Institute for Human Rights with the necessary power to protect human rights.

3.2.5 The CLEAR method

By using the CLEAR method, as one of specifications of the principle of participation, becomes clear that the Chinese and Turkish peo-

[863] National Human Rights Institutions. History, Principles, Roles and Responsibilities., Office of the United Nations High Commissioner for Human Rights, 2010, p. 89.

[864] National Human Rights Institutions. History, Principles, Roles and Responsibilities., Office of the United Nations High Commissioner for Human Rights, 2010.

[865] C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, AM. U. International Law Review, 2004-2004, p. 284.

[866] Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*. Harvard Human Rights Journal/ Vol. 13., p. 12.

[867] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 105.

ple in the Netherlands are ethnic minorities in the shadow of the majority of institutional bodies. In addition, the CLEAR Method can be utilised as an instrument to investigate the efficacy of public participation in relation to strengthening the norms for the government and legal protection of ethnic minorities. *First,* as ethnic minorities, they are stereotyped in literature as dirty, chaotic, tribal, irrational, emotional, sexual, exotic, lazy, overly physical, and criminal.[868] The capacity of ethnic minorities also faces challenges; they are stigmatised and subjected to prejudice regarding '4D' factors (dirty, dangerous, demeaning, and demanding).[869] The political and legal participation of ethnic minorities reveals some problems such as level of education, profession, age, resources, skills, and knowledge.[870] Analysing the patterns of lawsuits filed by ethnic minorities indicates that ethnic minorities who have lower socioeconomic status are more likely to experience discrimination. More prosperous ethnic minorities seem to face fewer problems. 'Many cases were submitted by ethnic minorities, most of whom were working class' said Brenda Ottjes (director of Tumba).[871] A similar statement was made by Mieke Janssen (director of Art 1 Middle Netherlands), 'problems of inequality in the labour market, tend to affect blue-collar workers.'[872] Meanwhile, Cyriel Triesscheijn stated, 'people come here (to the anti-discrimination bureau) mostly because they have difficulties getting access to justice, because they are vulnerable, and we need to help them.'[873]

Chinese and Turkish people tend to submit complaints concerning employment, access to basic needs and a residence permit and so on rath-

[868] Melissa F. Weiner, *Whitening a Diverse Dutch Classroom: White Cultural Discourses in An Amsterdam Primary School.* Ethnic and Racial Studies. 2014. Vol. 38. No. 2, 359-376. p. 359-376.

[869] Andrei Sevilă. *No Land's Man: Irregular Migrants Challenge to Immigration Control and Membership Policies.* Ethnic and Racial Studies. 2015. Vol. 38. No. 6, p. 911-926.

[870] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018, p. 14

[871] Interview with Brenda Ottjes, director of Tumba in Leeuwarden in June 2016.

[872] Interview with Mieke Janssen, director of Art 1 Middle Netherlands in September 2016.

[873] Interview with Cyriel Triesscheijn, director of RADAR Rotterdam in June 2016.

er than problems to do with capital market, intellectual property, corporate law, anti-dumping, and monopolies, etc.—which I argue are problems of people of higher socio-economic status. This is evident in the 2014 annual report of the Netherlands Institute for Human Rights which states that most common type of cases that are reported to the institute are problems with recruitment and selection for employment, accounting for at 52 opinions or 29 % of the total opinions issued by the institute.[874] For the most part, the participation of ethnic minorities is not strong enough; they often do not have a lawyer to accompany them to solve a case. Most of these lawsuits concern having job applications rejected. Ethnic minorities who struggle to have their basic needs fulfilled tend to have low-levels of education, low sources of capital, and a weak legal network.[875] Ethnic minorities are often insecure when they need to deal with the government. One Turk told me 'Even though the Dutch government is doing nice things for us, I do not know, I still feel uncomfortable.'[876]

Second, even though the commitment of ethnic minorities to participate and to lodge a complaint against discrimination is fragile, they are supported by the Anti-discrimination bureaus. Furthermore, the data from the Netherlands Institute for Human Rights and the Ombudsman, indicates that Chinese people are less likely to use these legal channels than Turkish people; The Chinese people are 'quieter' than the Turkish people. Until 2017, the Netherlands Institute for Human Rights had only received 24 reports from Chinese people, the Ombudsman, only 26.[877] Participation is much higher in the courts for both groups— more than a thousand cases have been submitted by Chinese and Turkish people to the courts. An analysis of the legal participation of ethnic minorities reveals that Chinese and Turkish people participate in different ways; Chinese people seem less interested in to lodging complaints with the Institute, but are very keen to send appeal to the courts.

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[874] Netherlands Institute for Human Rights. Annual Report 2014., p. 38.

[875] John D. Skrentny, *The Minority Rights Revolution*, Cambridge, The Belknap Press of Harvad University Press, 2004, p. 39.

[876] Interview with AA in February 2017. He requested me to keep his identity anonymous. He is an important person in a Turkish Community in the Netherlands.

[877] https://www.nationaleombudsman.nl/ On April, 28, 2016.

In 2014, the number of reports of discrimination increased to 15,897— more than double the figure from 2013 (7,235 cases)[878]. In 2015 the number had reduced to 4,506 cases.[879] This trend provides an insight into how the administration responds and reacts to the complaints of the citizens. Although the number of complaints is high, some informants stated that ethnic minorities still experience difficulties with participation. Ali Dogan, a Turkish lawyer and social activist, said, 'we lack capacity to fight against discrimination, because not all minorities in the Netherlands understand their rights or the complaints procedure.'[880] Sinan Evsen, a social activist, shared a similar opinion, 'minorities' knowledge about discrimination is quite limited. Therefore, it is difficult for them to become active in combating discrimination.'[881] However, ethnic minorities can access the complaints mechanism; participation is facilitated by the government. According to the literature, ethnic minorities are vulnerable and unable to resist.[882] That ethnic minorities tend to be less likely to complain, may increase the risk of them being victimised. The fearless speech of ethnic minorities that do complain is an example of the democratic, ethical, and personal characteristics of the good citizen of Athenian democracy.[883] The administration ensures that the market becomes a site of distributive justice and politics of recognition.[884] The facilitation of the Dutch complaints procedure is a systematic and accessible infrastructure[885] that can help peo-

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[878] Moniek Coumans, *Registratie discriminatieklachten bij antidiscriminatievoorzieningen 2014*, 2015, Centraal Bureau voor de Statistiek., p. 4.

[879] Ilse Mink & Saskia van Bon, *Discriminatie cijfers in 2016*. Een rapport over registraties van discriminatie-incidenten door de politie en meldingen bij antidiscriminatievoorzieningen en andere organisaties in Nederland. Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Politie, and Art 1., p. 17.

[880] Interview with Ali Dogan, a Turkish lawyer and social activist, October 2015.

[881] Interview with Sinan Evsen, a Turkish social activist, September 2016.

[882] Michel Foucault, *Madness and Civilisation. A History of Insanity in the Age of Reason,* New York, Vintage Books., 1972, p. 159.

[883] Michel Foucault, *Fearless Speech*, Los Angeles, Semiotext(e), 2001, p. 22.

[884] Michel Foucault, *The Birth of Biopolitics.* Lectures at College de France 1978-1979, New York, Palgrave Macmillan, 2004, p. 31.

[885] Michel Foucault, *Discipline & Punish the Birth of the Prison*, New York, Vintage Books., p. 147.

ple obtain justice. Ethnic minorities in the Netherlands are clearly vulnerable people; more complaints are filed regarding ethnicity than any other form of discrimination. However, the high number of complaints is not necessarily a sign of effective participation by ethnic minorities. Arnold Helmantel, a member of Tumba (an anti-discrimination bureau) stated that 'much more discrimination occurs, but people just simply do not want to submit reports. Minority groups must be active to participate.'[886]

Race is the most frequently reported ground of discrimination with 16,225 reported cases in 2014. Since 2011, the numbers of racial discrimination reports have risen. Two possible explanations must be considered. *First*, the high number of complaints represent the poor situation of ethnic minorities in the Netherlands. Or, *second*, that ethnic minorities are group that is most likely to complain if they are discriminated against. The image of ethnic minorities has been bruised by negative stereotyping and prejudice, the process of 'othering' can even result in minorities' behaviour being considered a representation of madness.[887] Unfortunately, domination is ever-present in the public sphere.[888] Therefore, resistance to discrimination is vital to achieve real emancipation for all of ethnicities. Submitting a complaint to Anti-Discrimination Services (ADV) and other governmental bodies is one of judicial options available for the protection of the fundamental rights of ethnic minorities. The right to complain is a part of free speech (*parrshesia*) for ethnic minorities[889] and is one of the basic rights that should be guaranteed by the administrative authorities.

In a democratic system, one role of the people is to control the administrative authorities.[890] In the Netherlands, ethnic minorities including the Turkish and Chinese communities can participate in this role.

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[886] Interview with Arnold Helmantel, a member of Tumba, June 2016.

[887] Michel Foucault, *Madness and Civilisation. A History of Insanity in the Age of Reason,* New York, Vintage Books., 1972, p. 251.

[888] Dany Lacombe. *Reforming Foucault: A Critique of the Social Control Thesis.* The British Journal of Sociology, Vol. 47, No. 2 (Jun, 1996), pp. 332-352.

[889] Michel Foucault. *Fearless Speech*, Los Angeles, Semiotext(e), 2001, p. 11.

[890] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 72.

In particular, this enables them to oversee the role of the administration in handling the cases of discrimination, for example in the labour market. Of course, this also includes employment provided by the administrative authorities. As discussed earlier, numerous employees of the Netherlands Ministry of Finance office have submitted complaints of discrimination. The administrative authorities should respond to the complaints of the Turkish people when they have a problems in selection, recruitment, promotion, and termination in the labour market.[891] Furthermore, the administrative authorities should also ensure equal treatment is provided to Chinese people who want to open businesses.[892] With this regulation, the natural mechanism of the market represents the anti-discrimination effect of the political economy, where the administration becomes the operator for verification or falsification of a standard of truth in governmental practice.[893]

Third, the organisation of administrative authority is adequate to encourage ethnic minorities to submit complaints. Public institutions are mentioned above, namely the Anti-Discrimination Bureaus, the Netherlands Institute for Human Rights, the Ombudsman, and the courts. The government facilitates legal means to achieve progress for ethnic minorities, thus encouraging an evolutionary process towards democratic institutions.[894] Besides the administrative authorities, including agencies of civil society also make contributions to the establishment of ethnic minority participation. Non-governmental organisations have emerged as important institutional bodies for voluntarism and reform.[895] Examples of semi-government organisations that provide pub-

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[891] Jaco Dagevos, Rob Euwals, Merove Gijsberts, & Hans Roodenburg, *Turken in Nederland en Duitsland*. Sociaal en Cultureel Planbureau. De Arbeidmarktpositie vergeleken, p. 67.

[892] Merove Gijsberts, Willem Huijnk, Ria Vogels. *Chinese Nederlanders van horeca naar hogeschool.* Sociaal en Cultureel Planbureau, 2011, p. 78.

[893] Michel Foucault, *The Birth of Biopolitics.* Lectures at College de France 1978-1979, New York, Palgrave Macmillan, 2004, p. 32.

[894] Abdulhadi Khalaf&Giacomo Luciani, *Constitutional Reform and Political Participation in the Gulf.* Dubai, Gulf Research Centre, 2006, p. 16.

[895] Gerard Clarke, *The Politics of NGOs in South-East Asia,* New York&Oxford, Routledge, 1998, p. 26.

lic service by providing legal aid to ethnic minorities include Stichting Bureau Discriminatie Zaanstreek, Artikel 1 Midden Nederland, Radar voor Gelijke Behandeling Tegen Discriminatie.

The anti-discrimination bureaus receive government subsidies and engages with the population at the grassroots level. For instance, on International Human Rights Day on December 10th, 2015, Art. 1 Middle Netherlands held an open forum for a discussion about equal treatment in the Netherlands, and hosted public lectures, public meetings, a music concert, social theatre, and a human rights campaign.[896] Anti-discrimination services are closely integrated with society. They want people to actively participate by submitting complaints when they suffer from discrimination. They sacrifice the comfort of working in an office by organising people on the street during mass demonstrations. Their power is that of the people, these social movements support their programmes and activities. They accompany people to the Netherlands Institute for Human Rights and help settle disputes, give advice, and assist in registering cases. For instance, in 2013, 952 cases were registered at RADAR that were processed for further lawsuit settlements.[897] Fighting against discrimination through the judicial system can help guarantee that the offenders are punished according to their conduct. The anti-discrimination bureaus work from a legal basis that emphasises the importance of the law, and its contribution to the production of the systems of rights, legitimacy, and political power.[898] Some anti-discrimination bureaus are also involved in legal reform and aim to improve anti-discrimination regulation. Legal reform is a paradoxical process, involving both the thinning of the mesh and the widening of the net of social control.[899] Participation is a means by which the people

[896] See., http://humanrightsutrecht.blogspot.nl/2015/11/internationale-dag-van-de-mensenrechten_18.html

[897] *Radar Voor Gelijke Behandeling Tegen Discriminatie. Jaarbericht 2013.* Discriminatie, Meld Het, Meteen. 2014. RADAR.

[898] Patrick Fitzsimons, *Michel Foucault: Regimes of Punishment and the Question of Liberty*. International Journal of the Sociology of Law (1929) 27, 379-399.

[899] Dany Lacombe, *Reforming Foucault: A Critique of the Social Control Thesis*. The British Journal of Sociology, Vol. 47, No. 2 (Jun, 1996), pp. 332-352.

themselves[900] can challenge potentially arbitrary conduct of administration. Through active participation and the accessible facilitation of complaints, the administration can take into account the feelings, opinions, and desires of ethnic minorities.[901] With active participation, ethnic minorities can fight to protecting their interest against policies that harms or injures them.

3.2.6 Provisional findings

The good governance principle of participation has an important function with regards to reinforcing the norms for the government and legal protection of ethnic minorities. Institutions such as the administrative authorities, the Ombudsman, the Netherlands Institute for Human Rights and the courts play a significant role in implementing the principle of participation which may improve and strengthen norms for the government and legal protection of ethnic minorities.

Ethnic minorities have lodged many discrimination objections, appeals, complaints through the Netherlands Institute for Human Rights, the Ombudsman, and the courts. I consider these activities a form of exerting constitutional motive. Constitutional motive is a mode of participation through legal means, with the intent of protecting individual interests. Ethnic minorities defend their interests by reporting instances of discrimination; in 2014, the Netherlands Institute for Human Rights received 2303 reports, and the Ombudsman accepted 118 reports of discrimination— thousands more lawsuits were filed by Turkish and Chinese people in the courts. Ethnic minorities can also participate in the decision-making process in the Netherlands through citizens' panels and community-level participation. First, through the National Consultation Platform on Minorities (Landelijk Overleg Minderheden/ LOM), which provided a forum for minorities to discuss drafts of regulation which affected them. This forum represented various ethnic groups including Turkish, Southern European, Caribbean, Surinamese,

[900] Samuel Hickey & Giles Mohan, *Participation: from tyranny to transformation? Exploring new approaches to participation in development.* London, Zed Books, 2004, p. 63.

[901] Michel Foucault, *Fearless Speech*, Los Angeles, Semiotext(e), 2001, p. 76.

Moroccan, and Chinese people, etc. Unfortunately, due to budget cuts, this institution was disbanded by the Dutch government. Other examples of citizens' panels that are accessed by ethnic minorities are political parties. Ethnic minorities often join 'left-wing' political parties such as the Labour Party (PvdA), Socialist Party (SP), Green left, Democrats 66, but also some have joined more centrist and right-wing parties. For instance, local political parties like NIDA Rotterdam established programs to combat Islamophobia, and advocate for an Islamic cemetery. Ethnic minorities, in the context of good governance with regards to the principle of participation, can also participate through community-level participation, for instance, by establishing schools and educational services. The Chinese community built a union of 45 Chinese schools under the Stichting Chinees Onderwijs. The Turkish community has also contributed to education by establishing the Cosmicus Foundation and the Witte Tulp. Through conducting interviews, I have learned about the contributions that ethnic minorities have already made to education policy in the Netherlands.

Ethnic minorities have the legal standing to lodge an appeal to the courts if they are an interested party (*belanghebbende*) in accordance with Article 1:2 of GALA, and therefore they may appeal to the Court (Article 8:1 of GALA). In section 5.4.1, I described some examples of case law regarding social benefits, detention, asylum applications, and of course, Wilders' film *Fitna*. Ethnic minorities are provided with legal standing in Dutch law. One especially interesting case was the Hizmet lawsuit in the District Court of Amsterdam. Analysing this case reveals the connection between the position of Turkish people who are threatened by the Turkish government and the consequences of these circumstances in the Netherlands. Furthermore, I discussed some cases that were submitted to the Netherlands Institute for Human Rights. These cases primarily concerned discrimination in the labour market and access to goods and services as submitted by Turkish and Chinese people in the Netherlands. By using the CLEAR method, I evaluated ethnic minority participation in the Netherlands. Based on literature and interviews that I conducted, the capacity of ethnic minorities is inadequate for fully ef-

fective participation. Even though the number of discrimination reports is high, human rights activists and ethnic minority communities often argue that the legal capacity of ethnic minorities is insufficient to fight against discrimination. Furthermore, most human rights activists and ethnic minorities concluded that much discrimination goes unreported. Lastly, the response of administrative authorities tends to be sufficient to the requests of ethnic minorities, especially the effective and tremendous advocacy of anti-discrimination bureaus at the local level.

3.3 The principle of human rights

3.3.1 Introduction

Here, we will specify the good governance with regard to the principle of human rights from an administrative law perspective in the Netherlands. In the battle against discrimination, the government has an obligation to protect ethnic minorities from infringement of equal treatment legislation and the establishment of good administrative behaviour.[902] Herewith, the National Action Plan on Human Rights (*Nationaal Actieplan Mensenrechten*)[903] obliges the administration to ensure it pays attention to the dignity of ethnic minorities. This plan is a statement of the government's commitment to combat structural exclusion. Ethnic minorities are often ineligible for the rights of political participation, social services, and sometimes even international recognition of their status without any restrictions.[904] Most obviously, in the Netherlands, Article 1 of the Equal Treatment Act can be used as a legal basis for the prevention and reparation of both direct and indirect discrimination against ethnic minorities. However, the beauty of the text of the law is only skin deep; the reality is that, without proper implementation, legislation alone will not prevent abuse of power.[905] In the

[902] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 122.

[903] *Nationaal Actieplan Mensenrechten Bescherming en bevordering van mensenrechten op nationaal niveau.* Ministerie van Binnenlandse Zaken en Koninkrijkselaties, 2010.

[904] Alison Brysk&Gershon Shafir, *People out of Place. Globalization, Human Rights and the Citizenship Gap*. Oxford&New York, Routledge, 2004, p. 6.

[905] Mervyn Frost, *Constituting Human Rights. Global civil society and the society of democratic states.* London&New York, Routledge, 2002, p. 18.

Netherlands, the police misconduct is common.[906] The administrative authorities should attempt to eliminate discrimination by issuing public policies, programs, budgets, and affirmative action that aim to emancipate ethnic minorities.[907]

The administrative authorities are responsible for the citizenship gap and the consequences of inequality for second-class citizens.[908] The notion of human rights intervenes with the State sovereignty by imposing international standards of protection for individual citizens from arbitrary treatment.[909] If Chinese and Turkish people in the Netherlands are members of a subordinate cultural class, the government should attempt to address this situation. Turkish and Chinese people have the right to enjoy human rights legislation in the Netherlands. Generally, Turkish and Chinese people are able to access the rights to good governance and the right to work in the Netherlands. However, the implementation of human rights legislation is yet to be fully satisfactory. Arbitrary conduct by public servants, prejudice in the labour market, and reduced access to goods and services still exist.

3.3.2 The right to good governance

One of the specifications of the principle of human rights is the right to good governance. The realisation of the right to good governance may help to fortify the norms for the government and legal protection of ethnic minorities. The right to good governance requires the administration to act in accordance with principles of non-discrimination, impartiality, objectivity, proportionality, rationality, fairness and responsive bureaucracy.[910] Hence, the spirit of the right to good gover-

[906] Oordeelnummer 2009-67. College voor de Rechten van de mens, Oordeelnummer 2015-42. College voor de Rechten van de mens.

[907] David Robertson, *Dictionary of Human Rights*, London&New York. Europa Publication Limited, 1997, p. 13

[908] Alison Brysk&Gershon Shafir, *People out of Place. Globalization, Human Rights and the Citizenship Gap*. Oxford&New York, Routledge, 2004, p. 3.

[909] Ann Marie Clark, *Diplomacy of Conscience. Amnesty International and Changing Human Rights Norms*. Princeton, Princeton University Press, 2001, p. 10.

[910] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook*

nance is present in principles which can be found in the GALA, in civil and political rights, and in the right to request Ombudsman. As mentioned in previous sections, the GALA provides access to participation, and protects the rights of objection and appeal which enable ethnic minorities to monitor and evaluate the administration's implementation of impartiality, proportionality, fairness etc. Meanwhile, the implementation of civil and political rights illustrates the commitment of the Dutch government to facilitate equality before the law, freedom of association, and due process of law. The right to request Ombudsman can be used by ethnic minorities to protect them from maladministration. In addition, the right to good governance can also be seen in Article 41 of the Charter of Fundamental Rights of the European Union. The implementation of this right is analysed below.

First, aspects of the right to good governance are present in several pieces of legislation such as GALA, the rights to object and appeal to an administrative authority and the Court (Article 7:1 and Article 8:1). Indeed, GALA provides this legal protection to all people, including ethnic minorities. As mentioned in the section on participation and GALA, ethnic minorities have the opportunity —as long as they become an interested party— to participate in the decision-making process, by lodging an objection or appeal. These schemes, in other words, are in the spirit of good governance. These schemes provide a standard from which ethnic minorities can evaluate whether or not the government obeys the main principles of administrative law, such as the prohibition of misuse of power (Article 3.3), prohibition of arbitrariness (Article 3:4 and Article 5:13), legal certainty (Article 4:23 and Article 5:22), proportionality (Article 3:4 (2)), carefulness (3:2), and reasonableness (Article 3:46, Article 3: 47, Article 3:48). With GALA, ethnic minorities can also ask the government to pay more attention to human rights. These structures of power produce a social system which constrains the behaviour of the administration and impels them to recognise human rights.[911] In the Netherlands, the administrative authorities'

Human Rights and Good Governance, SIM Special No. 34, Utrecht 2010, p. 123.

[911] Mervyn Frost, *Constituting Human Rights. Global civil society and the society of dem-*

supports anti-discrimination services that are independent and nonpartisan. These services provide impartial legal assistance and education, conduct anti-discrimination campaigns, and facilitate the complaint mechanism. The impartiality of these institutions helps guarantee that ethnic minorities are the real beneficiaries of rights, and that social exclusion is reduced.[912] Discrimination is an act of infringement of human rights legislation and thus demonstrating the need for a complaint mechanism.[913] Article 9:1 is the legal instrument proves that empowers ethnic minorities to critique improper conduct by public servants and administrative institutions.

GALA can be used to develop the right to good administration which functions to challenge government arbitrariness. For example, On May 26th, 2011, a Chinese person arrived in the Netherlands and began working in a Chinese restaurant as a chef. A labour inspector discovered that he was working without a permit, and imposed a fine of €18,000. The chef filed an appeal with the administrative court, arguing that the Ministry had violated Article 3:3 of GALA which states 'an administrative authority shall not use the power to make a decision for a purpose other than for which it was conferred.' He asked for the Court to condemn the actions of the Ministry which he claimed had used their power to impose a fine for another purpose.[914] Although the Court decided the appeal was unfounded, it is interesting to note that Article 3:3 of GALA was the basis of an attempt to challenge the Ministry with the aim of disputing the proportionality of their actions.

Second, political and civil rights in this context refer to Article 2 of the International Covenant on Civil and Political Rights (CCPR). This article contains the spirit of anti-discrimination. GALA and Article 2 of CCPR provide instruments for people to fight against discrimination in legislation or public institutions. Moreover, Article 2 can also be used

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ocratic states. London&New York. New York&Oxford, Routledge., p. 24.

[912] Costas Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitan*. New York&Oxford, Routledge, 2007, p. 96.

[913] Richard Falk, *Achieving Human Rights.* New York&Oxford, Routledge, p. 118.

[914] Case of ECLI: NL: RVS: 2015: 1160, AWB 14/ 629, the District Court of North Netherlands, 15 April 2015.

by ethnic minorities to lobby parliament, establish campaigns in media, and collect public support. This Article also provides the opportunity to submit a complaint to the United Nations Human Rights Office of the High Commissioner. One such case was submitted by Mohammad Rabbae on November 15th, 2011, who complained about the incitement of racial or religious hatred by politicians. Furthermore, this submission also asserted the right to an effective remedy, the right to equality of the law without discrimination, protection of a minority, the right to fair hearing, and the right to be free from incitement of racial and religious hatred.[915]

Racism and anti-immigrant sentiments have proliferated rapidly alongside increasingly influential populist right-wing politicians. In response, ethnic minorities have submitted complaints to the administration to combat this wave of immigrant hatred, escalated incitement, discrimination and violence against Muslims and non-Western migrants. The Right wing has stoked and exploited fear of a 'third Islamic invasion of Europe'; the first being the Islamic invasion of Spain, the second by the Ottoman Empire, and now by Muslim immigrants.[916] Under Article 2 of the CCPR, ethnic minorities can request governments to intervene with the incitement of hatred, participate in the creation of legislation to prevent racial discrimination, lodge complaints through the courts and pressure for a judicial remedy for the damage of discrimination.[917] Furthermore, by referring to this Article, ethnic minorities can build a popular political campaign against racial or ethnic discrimination.

Third, under Article 9:18 ethnic minorities are provided with the right to request an Ombudsman, and thus be able to participate and protect their interests. There is a close relationship between the investigations of Ombudsman into discrimination,[918] and the fulfilment of

[915] United Nations Human Rights Office of the High Commissioner. CCPR/ C/ 117/ D/ 2124/ 2011.

[916] United Nations Human Rights Office of the High Commissioner. CCPR/ C/ 117/ D/ 2124/ 2011., p. 4.

[917] United Nations Human Rights Office of the High Commissioner. CCPR/ C/ 99/ 3/., p. 69.

[918] Anita Stuhmcke & Anne Tran. *The Commonwealth Ombudsman. An Integrity Branch*

ethnic minorities rights.[919] The right to request an Ombudsman assists the Chinese and Turkish people to defend their fundamental rights. Examples of incidents where an Ombudsman has been involved include Turkish complaints about of police discrimination,[920] immigration,[921] and Islamophobia,[922] etc. With regards to Chinese people, an Ombudsman has been requested to investigate incidents of arbitrary inspection by the taxation department, discriminatory official screening at airports,[923] and misconduct by IND.[924] The role of the Ombudsman is to review complaints regarding suspected maladministration.[925] Modern administrative authorities have been constructed to be the most effective enforcers and enablers of citizenship rights.[926] The Ombudsman can investigate discriminatory maladministration conducted by the administrative authorities, and evaluate whether the administrative authorities have properly observed its obligations to respect, protect and to fulfil fundamental rights.[927]

The existence of a properly controlled administration may help ethnic minorities to feel that their opinion upon the fulfilment of their human rights is considered.[928] The government should prevent and resolve the conduct of administrative authorities that fail to act according to a binding principle.[929] In the Netherlands, GALA is one piece

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of Government? Alternative Law Journal (233) 2007.

[919] Trevor Buck, Richard Kirkham, & Brian Thompson, *The Ombudsman Enterprise and Administrative Justice.* Farnham, Ashgate, 2001, p. 18.

[920] Rapportnummber: 2001/058. Datum 27 March 2001.

[921] Rapportnummer: 1998/ 090. Datum 26 March 1998.

[922] Rapportnummer: 2000/246. Datum 12 Juli 2000.

[923] Rapportnummer: 2001/ 246. Datum: 14 August 2001.

[924] Rapportnummer: 2010/ 305. Datum 19 October 2010.

[925] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 122.

[926] Alison Brysk&Gershon Shafir, *People out of Place. Globalization, Human Rights and the Citizenship Gap.* New York&Oxford, Routledge, 2004, p. 5.

[927] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 169.

[928] Mervyn Frost, *Constituting Human Rights. Global civil society and the society of democratic states*. London&New York. 2002. Routledge., p. 22.

[929] G.H. Addink, Et al. *Sourcebook. Human Rights and Good Governance*., p. 122.

of legislation that is often used with a focus upon reparations. Chinese and Turkish people often use this law as the legal basis for defending their interests in the area of work permits,[930] Dutch citizenship,[931] basic registration,[932] residence permits,[933] etc. Through the GALA, they can inform a judge of administrative law or a public servant of an administrative authority have about their needs. After all, the administration is able to decide which administrative authorities have a competency to handle a complaint with regards to; possibilities for appeal, notification of decisions, data protection and responding to requests for information.[934] These administrative activities must be conducted in good faith, and with integrity, professionalism and proper behaviour— all of which can be overseen by the Ombudsman.[935]

Below I provide examples of cases submitted to the Ombudsman that demonstrate the role of the institution. For instance, on July 16th, 1997 a Turkish refugee felt that they were subjected to improper conduct by the administration, and lodged a complaint through the Ombudsman.[936] Another case concerned improper inspection at Schiphol Airport; a Chinese man felt that he was a victim of racial discrimination so he submitted a complaint through the Ombudsman on February 23rd, 1999.[937] Another incident that took place at Schiphol involved the arrest of a Chinese brother and sister by Airport Authorities. During the inspection, the Chinese man fell ill, so his sister requested medical assistance, but they ignored her. On July 15th, 2003, she visited the Ombudsman

[930] Case of ECLI: NL: RVS: 2015: 3935: The District Court of Hague, on 23 December 2015.

[931] Case of ECLI: NL: RVS: 2015: 3115, the District Court of West Brabant, 7 October 2015.

[932] Case of ECLI: NL: RVS: 2014: 1786, the District Court of Central Netherlands, on 21 May 2014.

[933] Case of ECLI: NL: RVS: 2015: 1745, the District Court of West Brabant, on 3 June 2015.

[934] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 123.

[935] Trevor Buck, Richard Kirkham, & Brian Thompson, *The Ombudsman Enterprise and Administrative Justice.* Farnham, Ashgate, 2001, p. 58.

[936] Rapportnummer: 1999/ 191. Datum: 21 April 1999.

[937] Rapportnummer: 2001/ 246. Datum: 14 August 2001.

to complain about improper conduct by the inspector.[938] On May 9th, 1998, another Chinese man who had flown to the Netherlands was interrogated at Schiphol from 10:15 until 14:00 without being provided with an adequate reason; The airport inspector acted upon suspicion without sufficient evidence. This Chinese man reported the incident to the Ombudsman.[939] The Ombudsman deals with a complex legal regime, but their focus is to struggle against hierarchies with the aim of improving public service by administrative authorities.[940] Some cases that have been submitted concerned administrative decisions, while the Ombudsman is more focused on the conduct. Consequently, not all complaints are followed up by the Ombudsman. For instance, cases submitted to the Ombudsman concerning Chinese and Turkish people whose asylum requests were rejected by IND were dismissed by the Ombudsman, as these cases were outside of their remit.[941]

Ethnic minorities' right to good governance, in the context of principle of human rights from good governance perspective, can be supported by the Ombudsman, by ensuring that civilians receive proper treatment by the administrative authorities.[942] For instance, the administrative authorities must not arbitrarily deport people.[943]

3.3.3 The right to freedom from discrimination

Another specification of the principle of human rights is the right to freedom from discrimination. The fulfilment of the right to freedom from discrimination can reinforce the norms for the government and legal protection of ethnic minorities. This right to freedom from discrim-

[938] Rapportnummer: 2003/ 222. Datum: 15 July 2003.

[939] Rapportnummer: 1998/ 537. Datum: 13 December 1998.

[940] John McMillan, *The Ombudsman and the Rule of Law*. Linda C. Reif, *The International Ombudsman Yearbook*, 2004, International Ombudsman Institute, Leiden, Martinus Nijhoff Publishers., p. 9.

[941] Rapportnummer: 2010/ 305. Datum 19 October 2010, Rapportnummer: 2008/ 319. Datum 29 December 2008, Rapportnummer: 2000/ 022. Datum 29 December 2008, Rapportnummer: 2010/ 305. Datum 19 October 2010, Rapportnummer: 1998/ 090. Datum 26 March 1998.

[942] Gabriele Kucsko-Stadlmayer, *European Ombudsman-Institutions*, Springer, 2008, p. 66

[943] National Ombudsman Launches Investigation into Deportation Flights. The Hague, 13 February 2014, a press release.

ination is guaranteed in the Netherlands under Article 1 of the Dutch Constitution, the Equal Treatment Act, and Article 137c-h of the Dutch Criminal Court. In addition, national legislation, regional and international law also state the rights to be free from discrimination, including Article 14 of the European Convention of Human Rights, Article 7 of the Universal Declaration of Human Rights of 1948, Article 26 of the International Covenant on Civil and Political Rights of 1966, Article 2 (2) of the International Covenant on Economic, Social, and Cultural Rights of 1966, and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. However, in the Netherlands these rights have come under threat by populist right-wing political movements. After Geert Wilders argued in a 2014 political speech that there should be 'fewer Moroccans', many complaints were submitted by ethnic minorities. Of course, this statement did not directly damage the Turkish and Chinese communities, but they understand the precarious nature of anti-immigrant sentiment; what is at first limited to a one ethnic group can quickly become more generalised. For instance, in 2014 Meldpunt Discriminatie Deventer, Art. 1 Noord Oost Gelderland, and Ieder1Gelijk received 1154 complaints,428 of which concerned Wilders' speech.[944] However, this incident was a turning point for the right to freedom from discrimination. In the Dutch political context, hate crime and discrimination has increased over time. The current wave of right wing politicians has exploited the issue of immigration, which has resulted in increasing discrimination.

In 1991, Frits Bolkestein, the leader of the right-wing Liberal Party began to promote the idea that Western culture was superior to all others. He declared that integration policy failed because it was multicultural and provided social welfare for the working class.[945] Bolkestein is one of the key figures contributors to anti-immigrant discourse in the

[944] Melpunt Discriminatie Deventer, Art 1 Noord Oost Gelderland, Ieder1Gelijk (Gelderland-Zuid). Discriminatiecijfers 2014. 2015. Antidiscriminatievoorzieningen Oost-Nederland. Melpunt Discriminatie Deventer, Art 1 Noord Oost Gelderland, Ieder1Gelijk (Gelderland-Zuid)., p. 10.

[945] Justus Uitermark, *Dynamics of Power in Dutch Integration Politics*, Amsterdam, Amsterdam University Press, 2012, p. 15-19.

Netherlands, alongside others including Pim Fortuyn, Theo van Gogh, Ayaan Hirsi Ali, and Geert Wilders. The existence of the populist right wing poses a huge challenge for ethnic minority protection and good governance. These political movements frequently promote hate against outsiders or foreigners under a banner of 'freedom of speech'. The current political situation is very complicated and requires the implementation of good governance to ensure the equal treatment of all people. Although, good governance also guarantees freedom of expression, the right wing has abused and exploited this right, and infringed upon the rights of minorities to be free from discrimination. This section elaborates upon recent influential actors of right wing discourses. Populist right wing discourse has prompted xenophobia and challenged the legal background of anti-discrimination law enforcement and case law in the Netherlands.

In 1997, Pim Fortuyn wrote a publication entitled 'Against Islamisation of Our Culture'. His position was that Islam is a religion which does not respect the separation of state and religion; he claimed that this religion is in opposition to Dutch liberal culture. He liked to be known as 'the Samuel Huntington of Dutch politics,' (who made many disparaging comments about Islam).[946] In November 2001, he was elected as the leader of Liveable Netherlands, a new Dutch political party. In the parliamentary elections, he created his own party, The Lijst Pim Fortuyn (Pim Fortuyn List/ LPF).[947] Furthermore, during an interview with Volkskrant on February 9th, 2002, he stated that there is no room for immigrants and refugees in the Netherlands. On May 6th, 2002, he was killed by five gunshots fired by Volkert van der Graaf, an environmentalist and animal rights activist from Harderwijk. This tragedy resulted in an outburst of public emotion. For Fortuyn's fans, he was a charismatic politician with an ability to 'speak the language of the

[946] Wim Lunsing, *Islam versus Homosexuality? Some reflections on the Assassination of Pim Fortuyn*. Anthopology Today, Vol. 19, No. 2 (Apr., 2003), pp. 19-21.

[947] Freek Colombijn, *The Search for an Extinct Volcano in the Dutch Polder. Pilgrimage to Memorial Sites of Pim Fortuyn*. Anthopos, Bd. 102, H. 1 (2007), pp. 71-90. Hungtinton is well known as the author of 'Clash of Civilizations.'

people.'[948] Fortuyn was the first right wing figure in recent years who was able to dominate the media, attract much public attention, and create mass emotion. As a gay politician, he was in a position to improve gay rights. Sadly, and predictably, his anti-immigrant arguments, and hatred of Muslims caused damage to the ideas of emancipation and good governance. His anti-Islam position resulted in a wave of Islamophobia, which minorities were afraid to report. Todd H Green argues that the exploitation of the fear of Islam has created what he calls 'professional Islamophobia' which includes the 'Islamophobia Industry' and an 'Islamophobia network' that consists of right-wing politicians, activists, authors, and artists who have made a career of insulting Muslims and Arabs. Professional Islamophobia has generated profit through media, publishing, and fundraising. The anti-Muslim campaigns of Brigitte Gabriel, Frank Gaffney and David Yerushalmi have raised over $ 40 million.[949]

In response to the 9/11 tragedy, the Madrid and London bombings, xenophobia has escalated across the entire political spectrum that has caused an obsession with pseudo-protection of native people against 'the strangers'. Xenophobia has also coloured the political debates about asylum, integration, immigration, family reunification, and deportation policies.[950] However, one particular isolated, tragic incident was marked a real turning point for xenophobia's entrance to the mainstream; the murder of Theo van Gogh. This event signified the extreme political tension that resulted from critiques of Islam and minorities in the Netherlands. November 2nd, 2004, was a sad day for Dutch society. Why must he be killed? The cruel assassination in which, Van Gogh was slaughtered like a sacrificial animal, was claimed as an act of 'holy war' by Mohammed Bouyeri, a 23-year-old Moroccan-Dutchman.[951] The assassination stim-

[948] Peter Jan Margry, *The Murder of Pim Fortuyn and Collective Emotions. Hype, Hysteria and Holiness in the Netherlands?* Anthropologisch tijdschrift 16 (2003), p. 106-131.

[949] Todd H. Green, *Professional Islamophobia*, Minneapolis, Augsburg Fortress, 2015, p. 205-211.

[950] Jolle Demmers and Sammer S. Mehendale, *Neoliberal Xenophobia: The Dutch Case. Global, Local, Political*, Vol. 35, No. 1 (Jan-Mar 2010), pp. 53-70.

[951] Ian Buruma, *Murder in Amsterdam the Death of Theo van Gogh and the Limits of Tolerace*, The Penguin Press, 2006, p. 1-5.

ulated increased hatred of immigrants and Islam. Mohammed Bouyeri represented the radical side of conservative Islam that justifies violence as a means of entering heaven. Although, many schools of Islam teach peace, love and friendship, the perception of immigrants and Muslims in the Netherlands became increasingly negative. Theo was the grand-nephew of famous Dutch painter Vincent van Gogh, he was an artist, TV presenter, and provocateur. Before focussing on Muslims, he targeted Christians and Jews. His short film, 'Submission' (made in collaboration Ayaan Hirsi Ali) criticised the position of women in Islam. In the film, verses of the Quran were projected onto a naked (other than a hijab and transparent clothing) woman. This film stimulated much anger in some Muslim communities,[952] however, the insults to Islam and immigrants cannot end justify murder and violence.

Discourses of xenophobia have had implications for immigration, integration, deportation and treatment policy in the Netherlands. During the coalition between the socialists and the liberals of the Dutch Purple Cabinet of 1994, neoliberal policies had been implemented widely, encouraging a fully marketed society and a system of voluntary social apartheid.[953] From the perspective of good governance, administrative authorities that side with the majorities' interest, provoke discrimination against minorities. However, the Dutch legal system provides access to justice and allows people to lodge a complaint against administration's decision and conduct. Yet, the growing pressure of the right wing on the administration and its policies means that fear can become an obstacle to those who wish to complain. Furthermore, the right wing does not solely campaign on negative issues. For instance, Fortuyn promoted gay rights, Wilders campaigns for freedom of expression, and Ayaan Hirsi Ali delivers a message of gender emancipation—but still, these figures fuel hate rather than love and peace.

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[952] Patrick Grant, *Osama, Theo and the Agreement*. Fortnight, No. 433 (Feb., 2005), pp. 18-19.

[953] Jolle Demmers and Sammer S. Mehendale, *Neoliberal Xenophobia: The Dutch Case. Global, Local, Political*, Vol. 35, No. 1 (Jan-Mar 2010), pp. 53-70. Dommers and Mehendale argue that neo-liberal policies encourage the transformation of 'patients turned into clients, public space into private opportunity, job security into flex-work, subcontracting and outsourcing, citizens into consumers.'

Ayaan Hirsi Ali was born in Somalia, and was raised in Ethiopia, Kenya and Saudi Arabia, and later arrived in the Netherlands to claim asylum. She entered into politics and became a member of Dutch Parliament in 2002. After a problem with her asylum application, she was resigned from parliament in 2006 and moved to the United States where she works as a spokesperson for the American Enterprise Institute, often speaking on the topic of the position of women in Islam. She collaborated with Theo van Gogh on the short controversial film, 'Submission.'[954] As an ex-Muslim who had lived in many majority Muslims countries, she knew in detail and understood gender violations in Islamic culture. Like Afshin Ellian, who actively wrote articles that criticised Islam, Hirsi Ali now lives in a high security safehouse after has receiving many death threats.[955]

Another significant right-wing agitator is Geert Wilders, the founder and leader of the Party for Freedom in the Netherlands (PVV). His endorsement of anti-immigration and anti-Islam policies brought him to popularity. Ian Buruma had argued that Wilders would have remained in local politics (i.e. Municipality or provincial council), if he had not begun to exploit hatred of Islam. Wilders has even been taken to Court for his short film *Fitna* (2008) which represented Islam as a violent religion.[956] *Fitna* presented women as victims of Islam, a religion that promoted anti-Semitism and anti-Western sentiment, a hegemonic movement that was a grave threat to western values. Anti-film *Fitna*.[957] Wilders has often compared the Quran with Hitler's Mein Kampf, and insists on a Muslim ban.[958] Wilders has also argued that Europe is un-

[954] Todd H. Green, *Professional Islamophobia*. Minneapolis, Augsburg Fortress, 2015, p. 205-211.

[955] Ian Buruma, *Murder in Amsterdam the Death of Theo van Gogh and the Limits of Tolerance*. London, The Penguin Press, 2006, p. 25.

[956] Todd H. Green, *Professional Islamophobia*. Minneapolis, Augsburg Fortress, 2015, p. 205-211.

[957] Farida Vis, Liesbet van Zoonen and Sabina Mihelj, *Women responding to the anti-Islam film 'Fitna': voices and acts of citizenship on Youtube.* Feminist review, No. 97, religion&spirituality (2011), pp. 110-129.

[958] Duke University Press, *Anatomy of Islamophobia*. World Policy Journal, Vol. 28, No. 4 (Winter 2011/2012), pp. 14-15.

dergoing a process of 'Islamification' and that it may become 'Eurabia' (a portmanteau of Europe and Arabia). However, his critique of Islam is only a cynical instrument used to win votes. His argument is absurd; he argues that immigrants are more likely to commit crime, which may have been true of the first wave of immigrants— but now these immigrants (and later waves of immigrants) are well integrated and there is no evidence to suggest that they commit crime at higher rates than other groups.[959] Yet, crime is a potent, emotive issue and has been effective in rallying support for Wilders. By insulting ethnic minorities Wilders has attracted much attention. On March 12th, 2014, Wilders and members of PVV came to Loosduinen (a district of The Hague). The visit was broadcast by NOS news, and Wilders delivered his controversial speech 'fewer Moroccans.' This was first time he was accused of hate speech. His complete statement is below:

> The most important thing for the people here on the market is the Hagenaars, Hagenezen and Scheveningers, such Léon always calls (you people who trust on) truth and justice. For those people, what we (have to) do now. To vote for a safer and better social (political party) and (can solve) all problem of a city with less burdens and if can also be less Moroccans.[960]

Wilders' speech was suspected to constitute hate crime. Even though this statement specifically targeted Moroccans, other immigrants became worried about the dynamics of this political development in the Netherlands. Almost all immigrants (including Surinamese, Eastern Europeans, Asians, Arabs, Africans, and Latinos) were cautious and suspicious of Wilders' political standing. However, many working-class Dutch people began to support his cause. A second statement by Wilders was made on March 19th, 2014, when PVV had an election campaign meeting in Grand Café De Tijd in The Hague. He asked to the audience 'Do you want more or less Moroccans in this city?' And, the crowd answered 'fewer Moroccans.' Wilders was suspected of committing a hate

[959] Joshua E. Keating, *Fear Factor.* Foreign Policy, No. 192 (March/ April 2012), p. 25.

[960] '*Belangrijkste is toch voor de mensen hier op de markt de Hagenaars, Hagenezen en Scheveningers zoals Léon dat altijd netjes en terecht noemt. Voor die mensen doen we het nu. Die stemmen nu op een veiliger en socialer en in ieder geval een stad met minderlasten en als het even kan ook wat minder Marokkanen.*' ECLI: NL: RBDHA: 2016: 15014, the District Court of Hague, 19 December 2016.

crime according to Article 137c and 137d of Dutch Criminal Code and Article 1 of CERD on the prohibition of racism against nationality, ethnic, origins, and race. Judges decided to punish Wilders for hate crimes related to his discriminatory remarks. This verdict found him guilty, but the judges did not give him a sentence of imprisonment or a fine.

Many human rights activists were disappointed with this verdict. Wilders committed a grave act, but walked free without a penalty, even though he was found guilty. However, this verdict marked a step forward compared to previous proceedings against him; up until this point Wilders had never been prosecuted for racist criminal offences, he had become legally 'bulletproof' to accusations, despite his despicable actions. So, relatively speaking, a guilty verdict— even without punishment— was a victory. The Court argued that Wilders' comments were discriminatory. The judges also cited Article 1 of the CERD which prohibits of racism against nationality, ethnic, origins, and race. Article 1 of CERD obliges the government to uphold rights of people to be free from discrimination. A huge wave of over 6500 complaints against Wilders represented the power of participation; The verdict stated that these cases were evidence that the court needed to pay more attention. Discriminatory remarks by politicians have, on some occasions, triggered violence towards ethnic minorities.[961] Indeed, this is violation of the right to freedom from discrimination.

3.3.4 Legal protection of ethnic minorities in court decisions

From my research findings about the role of the courts in combating against discrimination in the context of the principle of human rights from good governance perspective, I conclude that the courts serve several functions: First, hearing the interests of appellants. The rights to be heard make it possible for ethnic minorities to express their appeals;[962] the court must listen to the plaintiffs' aspiration. The court

[961] Wilder said that the government must impose a hard-line immigration policy. Sadly, this statement triggered an attack upon Nasir Galid, a refugee in Amsterdam, by two men in their early 30s. After Galid later died of his. https://www.washingtontimes.com/news/2014/oct/19/dutch-battle-surge-of-desperate-violent-muslim-ref/, Sunday, October 19, 2014.

[962] Monica Heller, *Language, Power, and Social Process*. Berlin, Mouten de Gryuter, 2008, p. 3.

provides the opportunity for minorities to be heard. The voice of ethnic minorities will be advocated with all respect.[963] Second, the pursuit of human rights approaches. The Dutch courts are familiar with using human rights law to analyse the case law of ethnic minorities. This means that the supporting legal systems are implemented well by the court.[964] It can be concluded that the Courts have promoted fundamental rights.[965] Third, coercive control of the administrative authorities. The courts have the capacity to intervene with the administrative authorities if they discover discrimination.[966] That compensation can be paid to victims is evidence that the administrative authority is willing to accept responsibility for misconduct or mistakes.[967] Fourth, the quantification of damages. The Courts will evaluate the pecuniary damage caused ethnic minority by discrimination. Ethnic minorities may require reimbursement for out-of-pocket expenses, economic loss, cost of transport necessitated by the injuries, cost of paid help, etc.[968]

Moreover, the courts can solve the problems of ethnic minorities; this institution has a wide authority to interpret human rights instruments in case law. Articles 93 and 94 of the Dutch Constitution provide legal grounds for the Courts to utilise international or regional treaties. For instance, a Chinese person from Fuqing, Province of Fujian, China, fled his home country because of homophobic discrimination by his neighbours and the police, and requested asylum in the Netherlands. The Court used the 1951 Geneva Convention on the Status of the Refugee, rather than the Dutch Alien Act to deal with this Chinese appellant's

[963] Jennifer Corrin Care*, Civil Procedure and Courts in the South Pacific*, London, Cavesdish Publishing, 2004, p. 298.

[964] Monica Heller, *Language, Power, and Social Process*. Berlin, Mouten de Gryuter, 2008, p. 63.

[965] Kenneth P. Miller, Direct Democracy. 2009. Cambridge University Press., p. 7.

[966] Jennifer Corrin Care, Civil Procedure and Courts in the South Pacific, London, Cavesdish Publishing, 2004, p. 110.

[967] Ian Cram, *A Virtue Less Cloistered. Courts, Speech and Constitutions.* Oxford, Hart Publishing, 2002, p. 14.

[968] Jennifer Corrin Care, *Civil Procedure and Courts in the South Pacific*, London, Cavesdish Publishing, 2004, p. 23.

case.[969] By referring to a variety of human rights instruments as one of its objective standards, this institution expands its 'toolbox' for analysing case law related to ethnic minorities.[970] Another case related to how the court refers to human rights instruments concerned a Chinese man who acquired a disability in a workplace injury. After the injury, he became isolated and was tortured his community, thus he decided to flee to the Netherlands. The Court applied Article 3 of European Convention of Human Rights (ECHR) to urge the prohibition of torture.[971]

Human rights and anti-discrimination law should be implemented.[972] Several instances of discriminative authorities related to acquiring as residence permit demonstrate that the main actor responsible for immigration, IND, sometimes neglects the guidelines provided by the administrative authorities. Applicants have often felt that IND's communication has been poor, and that clear reasons for their rejection are not provided. One Chinese national filed a complaint with the court because he was felt discriminated against because of his nationality and ethnicity by the police and IND. When attempting to leave the Netherlands, the Police discovered he had been living in the Netherlands illegally, and detained him. Simultaneously, the Immigration and Naturalisation Service (IND) rejected his application without providing sufficient reasons.[973] At least by complaining, he was able to force the administrative authority to give reasons for its decisions in the Courtrooms. The obligation to provide reasons, as part of the spirit of the right to good administration, must be applied in this case and other residence permit cases in the Courtrooms.[974] When provided with good and reasonable explanations, the applicant will be able to better understand their position.

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[969] Case of AWB 08/ 12467, The District Court of s-Gravenhage, on November 24, 2008.

[970] Richard Falk, *Achieving Human Rights*. New York&Oxford, Routledge, 2009, p. 27.

[971] Case of ABW 11/ 1353, The District Court of s-Gravenhage, on February 1, 2011.

[972] John D. Skrentny, *The Minority Rights Revolution*. Cambridge, The Belknap Press of Harvard University Press, 2004, p. 337.

[973] Case of ECLI: NL: RBSGR: 2008: BD3789, the District Court of Hague, on 05 June 2008.

[974] Irena Culculoska, *The Rights to Good Administration.* Iustinianus Primus Law Review. Vol. 5-2. See also, Margaret Vala Kristjansdottir. *Good Administration as a Fundamental Rights. Stjornmal & Stjornsyla*. Icelandic Review of Politics and Administration, Vol. 0, Issue 1 (237-255).

The Courtrooms also provide adequate opportunities to hear the voice of ethnic minorities. Their voice, the voice of the hopeless, often lacks the lack volume needed be heard clearly in the Courtrooms;[975] ethnic minorities must make themselves heard and speak louder to protect their fundamental rights. One example of this effect is demonstrated by a case of a Chinese national. The extension to his residence permit application was rejected by the Immigration and Naturalisation Service (IND). The reason given for the rejection was that he did not have enough money to fulfil the requirements for an extension of his residence permit. In courts, he was able to[976] explain in detail about his income in the Asian hospitality industry; his salary was sufficient for survival in the Netherlands.[977] The opportunity for him to explain in could be seen as an expression of the right to be heard from a good governance perspective; the administrative authorities should listen to the aspirations of citizens. The administrative authorities have learned how to deal with the voices of people. Everyone should receive security and enjoyment of their fundamental rights.[978]

Both the right to be heard and the obligation of the administrative authorities to provide reasons for the decisions are important rights which should never be denied. When the voices of ethnic minorities resonate with the true melody of a song they can become a beautiful weapon[979] in the courtrooms. This also preserves the logical and consistent actions of the court in pursuit of the implementation of the concept of democratic rule of law.[980] The substance of democracy means that the

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[975] Francis L Wellman, *Day in Court. The Subtle Arts of Great Advocates*. New York, The Macmillan Company, 1910, p. 26.

[976] Ronald Dworkin, *Is Democracy Possible Here Principles for a New Political Debate*. Princeton, Princeton University Press, 2006, p. 20.

[977] Case of ECLI: NL: RBDHA: 2015: 12632, District Court of Hague, on 04 September 2015.

[978] A. R. Mowbray, *The Development of Positive Obligation under the European Convention on Human Rights by the European Court of Human Rights*. Oxford, Hart Publishing, 2004,

[979] Francis L Wellman, *Day in Court. The Subtle Arts of Great Advocates*. New York, The Macmillan Company, 1910, p. 27.

[980] Alan M. Dershowitz, *Fundamental Cases: The Twentieth-Century Courtroom Battles That Changed Our Nation*, Texas, Recorded Books, 2006, p. 6.

government should facilitate structural responsibility for ethnic minorities with legal security provided by the court.[981] Basically, ethnic minorities are weak and vulnerable people who require affirmative action by the administrative authorities that supports their participation.[982] Judges and magistrates do not belong to the exploitative class; courts of justice are not tools to oppress ethnic minorities and defend the bourgeoisie.[983] The court can be an institution which impartially evaluates ethnic minorities' cases.[984] The court can construct the ethnic minority justice.[985]

Requesting for a reduction or removal of a fine related to violations of the Alien Employment Act is one approach used by ethnic minorities in the Courts. On March 28th, 2008, a plaintiff appealed the decision of the Ministry of Social Affairs and Employment to impose a fine of € 8.000 for a violation of the Alien Employment Act. On December 4th, 2007, an inspector discovered that a Chinese person working in the kitchen of a restaurant was without a work permit. During the case, the plaintiff presented an employment contract from the restaurant, and a letter from the Chinese government, however the ministry argued that these pieces of evidence were not valid proof that he had not violated the Alien Employment Act. However, the plaintiff felt that he was discriminated against when was asked to pay a fine; he felt that his nationality and ethnicity influenced his treatment by the Minister.[986]

Another case of labour market discrimination involved a Turkish person who worked and lived in the Netherlands, who filed a complaint with the court after being fined a large sum of money. The

[981] Ronald Dworkin, *Is Democracy Possible Here Principles for a New Political Debate*. Princeton, Princeton University Press, 2006, p. 20.

[982] Seyla Benhabib, *The Democratic Moment and the Problem of Difference*. See., Seyla Benhabib. *Democracy and Difference. Contesting the Boundaries of the Political*. Princeton, The Princeton University Press, 1996, p. 4

[983] Max Travers, *The British Immigration Courts. A study of law and politics*. Bristol, The Policy Press, 1999, p. 119.

[984] Roger Cotterrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory*, Aldershot, Ashgate Publishing Limited, 1988, p. 23.

[985] Max Travers, *The British Immigration Courts. A study of law and politics*. Bristol, The Policy Press, 1999, p. 118.

[986] Case of ECLI: NL: RVS: 2010: BK 9022, AWB No. 08/ 1309, District Court of Zutphen on 31 January 2010.

Ministry of Social Affairs and Employment found that was working in the Netherlands without a work permit, and issued him with a fine of €264,000. Although he had German residence and work permits, the Ministry of Social Affairs and Employment argued that it did not automatically give him the right to work in the Netherlands. The Turkish person expected that the Court to reduce or remove the fine. He argued that he was willing to apply for a work permit in the Netherlands, just as he had in Germany. The Ministry of Social Affairs and Employment wanted to punish his actions, insisting that if he wanted to work in the Netherlands, he must first be in receipt of a valid work permit.[987]

In addition to challenging the severity or appropriateness of fines, some complaints regarding work permits cases, have attempted to overturn the rejection of work permit applications. One such case was submitted by a Chinese person to the administrative court (Council of State) on November 11th, 2015, claiming that the Institute for Employee Benefit Schemes had unfairly rejected his application. The plaintiff was unable obtain a work permit despite having some relevant training, it was considered to be insufficient to cover the formal requirements.[988]

An analysis of the legal reasoning of judges can reveal how equal treatment values are dealt with in the courtroom. For example, the court often mentions European treaties which emphasises that free movement of workers shall be secured within the EU. This means that the right to access the labour market is afforded to everyone in Europe. However, problems emerge when EU countries manipulate working permit requirements, so they act as barriers to foreign workers.[989] With regards to the labour market, the courts often refer to anti-discrimination law. Namely, the rights of workers to be employed without discrimination, and to be able to practice a profession, are protected by both European and national legislation. Ethnic minorities are entitled to defend their

[987] Case of ECLI: NL: RVS: 2013: BZ 1632, AWB 11/295, the District Court of s'-Hertogenbosch, on 12 November 2014.

[988] Case of ECLI: NL: RVS: 2015: 3432, AWB 14/ 9243, the District Court of Hague, 11 November 2015

[989] Case of ECLI: NL: RVS: 2013: BZ 1632, AWB 11/295, the District Court of s'-Hertogenbosch, on 12 November 2014.

rights and to have their matters heard in public through the courts.[990] By referring to anti-discrimination and equal treatment legislation at the international, regional and national level, the courts create networks of mutual recognition of ethnic minority rights.[991]

3.3.5 Ethnic profiling

One of the most controversial issues debated in the Netherlands is ethnic profiling. Ethnic profiling is an approach used by the authorities like the Police, Immigration Affairs, Security Affairs, Counter-Terrorism Agencies, that makes generalisations about suspects based on ethnicity, race, and nationality.[992] In the Netherlands, ethnic minorities are subjected to ethnic profiling, and as a result they are often treated like criminals. Police often stop and search people from ethnic minority backgrounds without adequate reasons. Sometimes the Police do not even provide a reason, and do not apologise when their search finds nothing. The Police aggressively request ID, interrogate 'suspects' in public, and cause fear and embarrassment in ethnic minorities without providing sufficient reasons or evidence—sometimes using excessive physical force when doing so.[993] However, the Dutch government is trying to eliminate the practice of ethnic profiling by police. For example, consider the 'Universal Periodic Review: National report submitted by the Kingdom of the Netherlands,' from February 3th, 2017:

> The Police are expected to take a proactive approach to preventing and discouraging crime at an early stage. In doing so, it is important to exercise due care at all times. Preventing ethnic profiling is crucial to the legitimacy of, and the public confidence in, the police. The actions taken to prevent ethnic profiling focus on education and training, fostering good relations, diversity in the work force, and efforts to improve the complaints procedure. Within these four pillars, good progress has and is being made. To do so,

[990] Max Travers, *The British Immigration Courts. A study of law and politics*. Bristol, The Policy Press, 1999, p. 96.

[991] Costaz Douzinas, *The End of Human Rights. Critical Legal Thought at the Turn of the Century*. Oxford, Hart Publishing, 2000, p. 344.

[992] *Ethnic Profiling*. 2009. ENAR. Open Society Justice Initiative and European Network against Racism, 2.

[993] *Equality Under Pressure: The Impact of Ethnic Profiling.* Open Society and Amnesty International. 2013.

the police launched the three-year programme 'The power of difference' in 2015. The progress made in these areas is reported annually via the National Action Programme to combat Discrimination.[994]

Filing complaints with the Ombudsman is one means of challenging ethnic profiling.[995] One Turkish person filed a complaint criticising the police for treating her violently. Following a dispute over a divorce settlement, the police conducted a raid of her house, causing some damage to her property in the process. She also reported that the police used unnecessary force, stating that her that her arm was gripped too firmly, and that she was thrown out into the street.[996] In performing its duties, the Ombudsman upholds the principles of a democratic legal framework, meaning that no violence may be committed by state officials based on wholly or partially improper motives.[997]

The Ombudsman also has a function of eradicating discrimination by controlling the performance of civil servants. If civil servants discriminate whilst performing their duties, they cause maladministration and injustice.[998] For example, the Ombudsman report number 1998/241 tells an act of discrimination committed by police in South-East Brabant against some Turkish people. On July 4th, 1996, an applicant reported to the Ombudsman that a police officer entered their cafe and acted arbitrarily, and that the police officer made the sarcastic comment, 'the Turks enjoy!'.[999] Respect for human rights is a positive basis for the standard administrative control of the Ombudsman, so they have the authority to investigate and resolve violations of human rights.[1000] Improper be-

[994] Universal Periodic Review 3rd Cycle: National report submitted by the Kingdom of the Netherlands on February 3, 2017, p. 8.

[995] Trevor Buck, Richard Kirkham, & Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*. Farnham, Ashgate, 2001., p. 60.

[996] Rapportnummer: 1999/ 287. Datum: 28 Juni 1999.

[997] Michael Frahm, *Australasia and Pacific Ombudsman Institutions,* Berlin&New York, Springer, 2013, p. 52

[998] Gregory J. Levine, *The Engaged Ombudsman, Morality and Activism in Attaining Administrative Justice*. Linda C. Reif, *The International Ombudsman Yearbook. International Ombudsman Institute.* Leiden, Martinus Nijhoff Publishers, 2004, p. 132-136.

[999] See., Rapportnummer: 1998/241. Datum: 25 Juni 1998. Free translation from 'Turken heeft uitgelaten!'.

[1000] Gabriele Kucsko Stadmayer, *European Ombudsman-Institutions*. New York, Singer-

haviour of civil servants is the main focus of the Ombudsman. Civil servants should act properly with positive devotion and integrity, the Ombudsman can compel them to adjust their behaviour.[1001]

Any abusive behaviour by administrative authorities can cause residents to lose respect and faith in them. The arrogance of administrative authorities can be controlled in many ways, one being through the Ombudsman. For instance, one report concerns a complaint made about the Royal Military Police (KMA) for actions on the Dutch-German border, where they inappropriately questioned the relationship between a driver and their Chinese passenger. After examining their identity documents, the police accused them of involvement in a human trafficking syndicate.[1002] Because the people in the car were a young Chinese woman and an elderly man, the nature of their relationship was questioned by the police. The driver was unsatisfied by the way the police handled the event, and eventually reported it to the Ombudsman. After an investigation, the Ombudsman accepted the complaint and granted a statement in support of the plaintiff.

In another instance, a Turkish man felt that the police unfairly violated his privacy; policemen entered his home without a warrant and began searching his house as part of an investigation regarding the theft of a bag. He felt discriminated against after being accused of being a theft and felt that his privacy had been violated. On February 18th, 1997, he filed a complaint about conduct of the Middle-Gelderland Police.[1003] For the Ombudsman, human rights law is used as maxim for the standard of control against the organs of the administration,[1004] including the police. Police should respect the privacy and the civil rights of every citizen. The Ombudsman will investigate a complaint under some regulations, such as the Code of Criminal Procedure, GALA, Civil Code and other

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Verlag/Wien, 2008, p. 37.

[1001] Michael Frahm, *Australasia and Pacific Ombudsman Institutions,* Berlin&New York, Springer, 2013, p. 6.

[1002] Rapportnummer 2013/ 069. Datum: 20 June 2013.

[1003] Rapportnummer 1998/ 441. Datum: 12 October 1998.

[1004] Gabriele Kucsko Stadmayer, *European Ombudsman-Institutions*. New York, Singer-Verlag/Wien, 2008, p. 36.

relevant regulations, after which they decide whether the complaint is well-grounded (*gegrond*) or not true (*niet gegrond*).

Complaints about the Police are often sent to the Ombudsman, who can then then conduct an investigation. The Ombudsman has immunity from being criminalised by the police, thus protecting their investigatory powers.[1005] In an investigation into criminal proceedings, a Turkish man reported a police officer who refused to call a doctor when he experienced pain, and told him 'You don't have to be such a dickhead!' On June 20th, 2000, he filed a complaint with the Ombudsman about the behaviour of police officer, suspecting that his treatment was influenced by his ethnic background.[1006] Of course, Police exist to investigate criminal activity, however, they must respect fundamental rights when doing so. The Ombudsman can conduct investigations into allegations of police misconduct.[1007] These complaints often come from ethnic minorities, especially the Turks who are frequently mistreated by to the Police. One Turkish man who felt that he was being harassed by the police.[1008] Indeed, Police ethics should be upheld. When the Ombudsman investigates cases involving the police, they use an eclectic legal framework based on various citations of the Police Act 1993. The Ombudsman has a legal framework which authorises extensive and thorough investigations. In another case, the Police repeatedly and arbitrarily raided a Turkish owned cafe. Although the business permit, allows the cafe to be open late at night, and they also hold a permit for the sale of alcohol, the Police continued to conduct investigations.[1009] Eventually, the cafe owner, who is of Turkish descent, delivered a complaint through the National Ombudsman, alleging that the local Police of South-East Brabant were discriminating against him because of his, and his clientele's ethnicity. The Ombudsman's complaint mechanism is open and

[1005] Gabriele Kucsko Stadmayer, *European Ombudsman-Institutions*. New York, Singer-Verlag/Wien, 2008, p. 15.

[1006] Rapportnummber: 2001/058. Datum 27 March 2001.

[1007] Robert P Davidow, *Criminal Procedure Ombudsman Revisited*. The Journal of Criminal Law of Criminology. 1982. Vol. 73, No. 3.

[1008] Rapportnummer: 2000/221. Datum 21 June 2000.

[1009] Rapportnummer: 1998/241. Datum 25 Juni 1998.

easy to access. The public can easily contact the Ombudsman, for example their telephone number can be called free of charge.[1010] Reports relating to allegations of discrimination are also produced by local anti-discrimination bureaus, such as the Anti-Discriminatie Steunpunt (STAD) in Utrecht. For example, on June 4th, 1999, a police officer suspected a Turkish Muslim was inebriated. During the ensuing investigation, the suspect was beaten by the Police officers. He was also forced to pay a fine of € 180. On January 18th, 2000, this incident was reported to the Ombudsman.[1011]

Ethnic profiling is a serious problem in the Netherlands, and must be addressed urgently. The government and the Ombudsman should issue a programme to combat ethnic profiling. The prevention of ethnic profiling requires strong commitment from the Dutch administration, and must allow the people to monitor their progress. The lack of data on the incidence of ethnic profiling makes it difficult to know exactly how widespread the practice is. However, mainstreaming a human rights approach into government policy is necessary to solve the problem of ethnic profiling.

3.3.6 Provisional findings

The principle of human rights appears in regulation, case law, and field research as seen above. As one of the principles of good governance, the principle of human rights can help fortify the norms for the government and legal protection of ethnic minorities, especially Chinese and Turkish communities living in the Netherlands. This principle has been implemented by the administrative authorities, Ombudsman, the Netherlands Institute for Human Rights and the courts. As I will demonstrate, the principle of human rights is beneficial for ethnic minorities, particularly because these institutions are obliged to combat discrimination.

[1010] Interviewed with Addie Stehouwer Deputy National Ombudsman on 19 November 2015.

[1011] Rapportnummer 2000/246. Datum 12 Juli 2000.

The right to good governance is a right that belongs to all people including ethnic minorities and includes the right to monitor the implementation of administrative norms, and the right to request to the Ombudsman. The right to good governance has been cited in some of the legal arguments used by ethnic minorities who have sued the government in courts. For instance, in the 2011 Chinese restaurant case, when the appellant requested appeal through the courts that contained the administrative authority to obey the principle of proportionality. The right to good governance can also be observed in the implementation of civil and political rights in the Netherlands. Article 2 of the International Covenant on Civil and Political Rights reflects the idea of anti-discrimination. Under Article 2, ethnic minorities can conduct political campaigns in the media, and collect public support, etc. Ethnic minorities can also lodge complaints with the Ombudsman if they experience discrimination. Improper conduct by the administrative authorities (for instance as in the Schiphol cases) can be challenged through the Ombudsman's investigation. Article 5 of the Equal Treatment Act protects the right to free choice of employment, thus securing ethnic minorities' rights in the Dutch labour market. However, people with Arabic-sounding names often appear to be unwelcome in the labour market and encounter numerous obstacles to recruitment and promotion. Furthermore, Dutch law guarantees the right to freedom from discrimination under Article 1 of the Dutch Constitution, the Equal Treatment Act, and Article 137 c-h of the Dutch Criminal Code. However, the political tradition of the Dutch debate also provides freedom of expression which has been exploited by political right-wing groups to promote hatred of ethnic minorities. The origins of this wave of populism began with Bolkestein in 1991, who promoted the superiority of the Western culture. Many other politicians including Pim Fortuyn, Theo van Gogh, Ayaan Hirsi Ali, and Geert Wilders have since followed suit. The right to freedom from discrimination was debated during Wilders' court case about his insulting of ethnic groups, racism, and inciting hatred and discrimination. Equally important, is that equal access to goods and services in the Netherlands is also sometimes infringed upon, despite Article

7 of the Equal Treatment Act explicitly prohibiting such discrimination. In 2014, a report into equal access to goods services contained 677 reports of discrimination, a similar number to the previous three years. Human rights provisions are used as objective standards by judges to resolve cases of discrimination case or case law that have been submitted by ethnic minorities. Articles 93 and 94 of the Dutch Constitution provide a legal baseline for the judge to use international or regional human rights norms to make —in the frame of the development of case law—a decision in a conflict between different persons. For example, a case submitted by a Chinese appellant, was evaluated using the 1951 Geneva Convention of Status of Refugee. On the other hand, other cases have been assessed using the European Convention of Human Rights and CERD. Reports of ethnic profiling are common; ethnic minorities are often stopped without explanation and treated with a lack of respect by the police, immigration, security, and counter-terrorism agencies. Ethnic minorities are interrogated without sufficient evidence and are made to feel afraid and ashamed. Worse still, ethnic minorities are sometimes treated with more physical force than is necessary. After making mistakes the police and other security are usually reluctant to apologise. Many cases of ethnic profiling have been reported to the Ombudsman which has since conducted investigations into these matters.

3.4 Provisional conclusions of chapter 4

Generally speaking, the existing Dutch legal system has stipulated the concept of good governance which can fortify the norms for the government and legal protection of ethnic minorities. The Constitution and other key pieces of legislation should provide enough norms for the government as well as legal protection of ethnic minorities. At the same time, these institutions support the implementation of these norms and protection, which in turn, empowers the position of ethnic minorities from a good governance perspective.

In other words, the implementation of good governance can be seen in Dutch legal norms for the government and the legal protection af-

forded to ethnic minorities in the Netherlands. The Dutch legal norms of government are stipulated in the Dutch Constitution and other pieces of legislation — both of which also offer legal protection to ethnic minorities. These laws are implemented by Dutch administrative authorities, which may be in turn be disciplined by the Netherlands Institute for Human Rights, the Ombudsman and the courts. This 'web of law' is comprised of the Constitution, legislation and governance, all of which contribute to the picture of good governance in the Netherlands. On the whole, good governance is relatively well-implemented in the Dutch legal system. However, some problems such as discrimination in the labour market, unequal access to goods and services, ethnic profiling, right wing populism, and hate crimes continue to be issues in the Netherlands.

Article 1 of the 1983 Dutch Constitution explicitly formalised equal treatment into Dutch law— although the spirit of equality was present as long ago as the 1814 Dutch Constitution. This Article has become one of the legal baselines for the implementation of the idea of good governance and ethnic minority protection. This Article reflects the spirit of the Equal Treatment Act which prohibits both direct or indirect discrimination in the labour market and access to goods and services. Although this act was discussed in the 1970s, due to increased tension in political debate in the Dutch Parliament, the Equal Treatment Act was only issued in 1994. Besides the Equal Treatment Act, GALA, stipulates the norms for administrative authorities and legal protection of ethnic minorities. Ethnic minorities can research their legal standing to improve their access to justice in accordance with Article 8:1 of GALA. Other regulations, such as the Dutch Criminal Code and international and regional human rights treaties have also strengthened the norms of administrative authorities and legal protection of ethnic minorities in the Netherlands.

Furthermore, for the most part, the administration plays a significant role in the eradication of ethnic discrimination. The Dutch government released the National Action Plan of Human Rights which has become valuable legal guidance to combat discrimination. At the

local level, under the Municipal Anti-Discrimination Service Act (*Wet Gemeentelijke anti-discriminatievoorzieningen*), the administrative authorities established anti-discrimination bureaus which serve pivotal functions including providing advice, information, legal aid, and legal assistance to people affected by discrimination. Meanwhile, the Netherlands Institute for Human Rights serves functions of conducting investigations, making reports, giving advice, providing information, ratifying human rights treaties, and so on. The Institute receives discrimination reports and can provide an opinion on whether they believe discrimination has occurred. The Dutch Ombudsman is another important institution for combatting discrimination, and has the special function of investigating public servants and government bodies. The Ombudsman has also conducted a public campaign named 'stop discrimination.' The final institution in the Netherlands relevant to anti-discrimination the court, which has the power to assess the norms of administrative authorities and legal protections for ethnic minorities. If they feel they have been discriminated against, ethnic minorities can submit a lawsuit to the courts. Often these concern social benefits, asylum applications, residence permits, exclusion from the labour market, integration, and hate crimes, etc. Of course, the court has its own objective standards. Sometimes, ethnic minorities can lose lawsuits if they have insufficient evidence, legal arguments, or inadequate preparation.

After examining the role of institutions that deal with ethnic minorities, this provisional conclusion summarises the implementation of the principles of transparency, participation and human rights. The development of the principle of transparency in the Netherlands can be beneficial for ethnic minorities. The Dutch Government Information Act stipulates the obligation for administrative authorities to disclose public information (Article 2) and the right to request public information (Article 3). I have found that transparency can also be beneficial to developing social harmony and legitimacy between ethnic groups. Information about combating discrimination and research into the lives of ethnic minorities has been published by the Dutch Social Cultural

Planning Office. Furthermore, transparency provides civilians with better access to information relevant to legal practice. For instance, transparency can facilitate ethnic minorities' understanding of Dutch integration policy, thus meaning they are less likely to make mistakes that could jeopardise their integration.

Furthermore, analysing the implementation of the principle of participation reveals the constitutional motive of ethnic minorities to lodge a complaint or an appeal of discrimination. Thousands of reports have been submitted by ethnic minorities to the Netherlands Institute for Human Rights, the Ombudsman, and the courts. However, based on a literature review, interviews, and field research, I argue that the capacity of ethnic minorities is inadequate to facilitate effective participation. Through a CLEAR method evaluation, the capacity of ethnic minorities to resist is insufficient, despite the support of responsive administration, especially the anti-discrimination bureaus. With regards to participation, the now disbanded National Consultation Platform of Minorities (LOM) facilitated excellent participation. Furthermore, analysis of case law has revealed that minorities have legal standing to sue if they are discriminated against in areas such as social benefit, detention, asylum application, and hate crime—the case of Wilders' film, *Fitna*. One particularly interesting case is that of the *Hizmet* member who sued in the courts, revealing the position of Turks that are threatened by the Turkish government in the Netherlands.

In addition, the right to good governance can be seen by considering ethnic minorities' ability to monitor the implementation of administrative norms for the government, gaining civil and political rights, and exercising their right to request to the Dutch Ombudsman. Although Article 5 of the Equal Treatment Act prohibits discrimination in the labour market, and Article 7 requires equal access to goods and services, discrimination is a continuing problem; Turkish and Arabic-sounding names are a barrier to employment, and Chinese women are refused service in supermarkets because of their ethnicity. The political tradition of Dutch debate has unfortunately generated gross right-wing politicians who exploit racism and free speech. Most recently, Geert Wilders, who

despite being found guilty, went unpunished for his crimes of inciting hatred. Ethnic minorities are targeted and their human rights are under threat by populism.

CHAPTER 5

Good Ethnic Minority Governance: A Comparison of Good Governance and Ethnic Minority Protection in the Netherlands and Indonesia

1. Introduction
2. Good ethnic minority governance
3. Good ethnic minority regulations
4. Good ethnic minority institutions
5. The principle of transparency
   - 5.1 Public disclosure act and public engagement
   - 5.2 Transparency and preventing social conflict
6. The principle of participation
   - 6.1 A Constitutional motive
   - 6.2 CLEAR method
   - 6.3 Citizen's panel and community-level participation
7. The principle of human rights
8. Provisional findings

1. Introduction

This chapter forms the comparative part of the investigation on good governance and ethnic minorities in the Netherlands and Indonesia. The research found that in the Netherlands and Indonesia, good governance is a pivotal concept with regards to the norms for the government and legal protection of people. After describing the Dutch and Indonesian general norms of good governance in the legal systems on norms and involved institutions in chapter 3 and chapter 4, I ask the following question: how can the concept of good governance strengthen the norms for the government and legal protection of ethnic minorities? The general aspects of the Dutch and Indonesian systems may be sufficient from the point of view of good governance in terms of whether they can toughen the norm for government and legal protection of ethnic minorities. These norms and protections may be particularly beneficial for Chinese and Turkish communities living in the Netherlands and Indonesia. From an administrative law viewpoint, people includ-

ing ethnic minorities supposedly have the opportunity to be involved in decision-making processes (the non-contention phase) and can lodge an appeal or objection to challenge an administrative decision (the contention phase). The position of ethnic minorities in this research is explored through an analysis of the Dutch and Indonesian legal systems, and case law and field research in both countries. Of course, searching for similarities and differences between the legal norms and practices in the Netherlands and Indonesia will help establish patterns that can inform new theoretical. One of my initial findings was that the content of the legal norms that concern good governance and ethnic minorities are very similar in both countries. From these similarities, I develop a concept of good ethnic governance which is composed of good ethnic minority regulations and good ethnic minority legal institutions (section 2, 3, and 4). To a certain extent, the principles of good governance are worked out in the legal practice, such as the principle of transparency (section 5), the principle of participation (section 6) and the principle of human rights (section 7). Overall, the concept of good governance is demanded to ensure emancipation for minorities. It is similarly important to answer questions about how the principles of good governance (e.g. transparency, participation and human rights) are implemented by the administrative authorities, the Ombudsman, the National Human Rights Institution and the courts.

2. Good ethnic minority governance

Good ethnic minority governance can be established through the implementation of the concept of good governance which reinforces the norms for the government and legal protection of ethnic minorities. This research found that the Dutch and Indonesian legal systems adequately appeal to the concept of good governance which fortifies the norms for the government and legal protection of ethnic minorities throughout their constitutions, legislations, and institutions. Moreover, similar the administrative law doctrine has developed in both countries to reinforce the first phase of proper administration, for example the prohibition of the misuse of power, prohibition arbitrariness, legal cer-

tainty, equality, proportionality, and carefulness in practicing the state power. The concept of governance is all about power.[1012] Managing the power of government authorities requires the idea of good governance as opposed to bad governance. Good governance aims to prevent the will of the majority from oppressing minority groups.[1013] This research found that ethnic minorities are vulnerable groups at risk of discrimination and abuse of power. This research has discovered that the application of concepts such as 'ethnic sensitivity' in the law-making process and law enforcement are evidence of good governance practices.

To establish patterns of good ethnic minority governance between Indonesia and the Netherlands, requires viewing the two legal systems from similar angles. Patterns of similarities between these legal systems can inspire new theories and solutions to ethnic minority justice. Of course, there are also multiple, differences between the legislature of the Netherlands and Indonesia as can be seen in the table below.

[1012] John Stuart Mill, *Essays on Equality, Law, and Education,* Toronto, University of Toronto Press, 1873, p. 6.

[1013] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 63.

Table of similarities and differences of legal systems between the Netherlands and Indonesia on good governance and ethnic minorities

No.	System of legal protection of ethnic minorities	Similarities	Differences	
			The Netherlands	Indonesia
Legal norm				
1.	The Constitution	Recognition of equal treatment	Article 1 of Dutch Constitution, prohibits discrimination on the grounds of religion, belief, political opinion, race, sex, or on any other grounds	Article 28I (2) No specific formulation prohibiting discrimination upon the grounds of religion, belief, political opinion, race or sex. Only describes the right to be free from discriminatory treatment based upon any grounds whatsoever
			The right to inviolability of every person (Article 11), right to have freedom and liberty (Article 15), the right to respect privacy (Article 10), the right to justice (Article 17), the right (subsidized) representation (Article 18), the right to work (Article 19), the right to have a basic standard of living (Article 20), the right to education (Article 23), the right of public access to information (Article 110), capital punishment may not be imposed (Article 114)	The right to life (Article 28A); rights of social security (Article 28 A (1)); children's rights (Article 28B (2)); the rights of access to education and science (Article 28 C (1)); the right to improvement through collective struggle (Article 28C (2)); the right to equal treatment before the law, the right to work, and the right to citizenship (Article 28D); freedom of religion (Article 28E); the right to information (Article 28F); the right to be free from torture and obtain political asylum (Article 28 G); the right to property, health care, and public service (Article 28 H); the right to freedom from enslavement, freedom from discrimination, and cultural identities (Article 28I); and the duty to respect the human rights of others (Article 28J)

2.	Equal treatment and human rights legislation	Protecting minorities from discrimination and stereotyping Prohibition of discrimination in the labour market Access to goods and services	Equal Treatment Act	Equal Treatment Act
			Direct discrimination and indirect discrimination (Article 1)	No regulation on direct and indirect discrimination
			It does not have a general principle which regulated. Even though, general principle is mentioned in Equal Treatment Act, it is existed explicitly	Basic principles of protection of human rights are stated in Articles 2-8 including the protection, enforcement, and fulfilment of human rights as a responsibility of government.'
			No mention of the protection of indigenous people	Specifically states the rights of indigenous people in Article 6
			No regulation of the non-derogable rights	The rights to life (Article 9) Prohibition of slavery (Article 20)
			No mention of these rights.	Family rights (Article 10 Right to develop skills (Article 11) The right to obtain information (Article 14) Rights to justice (Article 17) Rights to security (Article 28)
			Prohibition of discrimination on the grounds of gender is regulated by other regulation (Equal Treatment (Men and Women) Act)	Women rights (Article 45) The political rights of women (Article 46)
			The rights of people with disability is regulated by specific regulation, namely: act on equal treatment on the grounds of disability or chronic illness	The rights to special facilities and treatment (Article 41)

3.	Preventive and repressive legal protection	Dutch GALA and Indonesia government's administration act promote a concept of good administration and legal protection of people	Obligating the duty to give reasons (Article 3:46 to Article 3:48) and people can express their views about administrative decision (Article 3:15). Providing the rights to lodge an objection to the administration (Article 7.1) and suing an administrative decision in the Court (8:1)	No mention of the rights to objection or appeal. But the participation of people is guaranteed by Article 7 (g) Law No. 30 of 2014
Legal Institution				
1.	The administrative authorities	The national action plan of human rights	The important role of anti-discrimination bureaus	There is an absence of anti-discrimination bureaus
		Public Disclosure Act which ensuring everyone can submit a request to access to public information and the government has an obligation to give public information to people		
		Providing public information		
		Making a report on anti-discrimination trend		
2.	The Ombudsman	Receiving complaints Investigation maladministration and discrimination	A complaint must be sent to the administration that can then submit it to the ombudsman	Not necessary to send complaints to the administration. People can contact the ombudsman directly.
3.	The National Human Rights Institution	Receiving complaints of discrimination and has ability to investigate the private sector	The institute does not have much authority to engage with criminal investigations of discrimination cases	The institute has authority to engage with criminal investigations in accordance with the human rights court act.
4.	The courts	Receiving lawsuits submitted by ethnic minorities	The Court plays a pivotal role in solving ethnic minorities' problems.	The Court only plays a minor role in fostering the position of ethnic minorities.
The most controversial issues				
1	Politicians, media, etc.	Populism and racial discrimination waves	Wilders and PVV, anti-immigrant movements, Islamophobia, etc.	Rizieq and FPI, anti-Chinese sentiment, 'corruption.' etc.
2	Other issues	The right to good governance exists	Discrimination in the labour market, access to goods and services, and ethnic profiling	Unsolved problem of the crimes against humanity in 1965 and 1998, labour market and access to goods and services

The most controversial issues in the political-legal arenas in the Netherlands and Indonesia concern the rise of right wing anti-immigrant populism. In the Netherlands, Wilders and his PVV party actively promote anti-immigrant and Islamophobic sentiment, particularly targeting Turkish and Moroccan communities. Meanwhile, in Indonesia Rizieq and his organisation (FPI) promote anti-tolerance and anti-Chinese sentiment. In addition, widespread corruption in Indonesia cannot be separated from the legal culture of the administrative authorities is a source of discrimination against the Chinese and Turkish people, who often struggle to obtain the proper public services that they are entitled to in Indonesia.

Despite the problems described above, Indonesia and the Netherlands still have sufficient regulation to reinforce the norms for the governments and provide legal protection of people with regards to combating discrimination. Furthermore, the differences between the legal systems of Indonesia and the Netherlands begins with their legal norms. *First*, the legal norms of the Netherlands and Indonesia offer different norms for the administrative authorities and different protections to ethnic minorities. For instance, Article 1 of the Dutch Constitution states that religion, belief, political opinion, race, and sex, are legally protected categories, and as such it is prohibited to discriminate on these grounds. Thus, ensuring that minority groups are protected by the Constitution. Similarly, Article 28 of the Indonesian Constitution also promotes the right to be free from discriminatory treatment. Another contrast is at the level of legislation, that the Dutch Equal Treatment Act distinguishes between 'direct' and 'indirect' discrimination, whereas the Indonesian Human Rights Act does not. This differentiation enables the Netherlands to prosecute instances of 'soft discrimination.' On the other hand, the Dutch Equal Treatment Act does not mention values or abstract basic principles such as democracy, the rule of law, and even human rights— all of which are stated in the Indonesia Human Rights Act (Articles 2-8). Further, Indonesia's Human Rights Act also regulates various other rights ranging from non-derogable rights such as the rights to life (Article 9), the right to be free from slavery (Article 20), and other rights including family rights (Article 10), right to develop (Article

11), the right to obtain information (Article 14), rights to justice (Article 17) and rights to security (Article 28). Thus, the Indonesian Equal Treatment Act provides a broad range of human rights protection which can be used by ethnic minorities to defend their rights. *Second,* the legal processes of the public institutions of the Netherlands and Indonesia are very different. In the Netherlands, ethnic minorities first must submit a complaint to the administrative authority before it can be submitted to the Ombudsman (Article 9:20 of GALA). The procedure for submitting a complaint to the Indonesian Ombudsman is quite different; according to Article 7 (a) Law No. 37 of 2008, an individual can go directly to the Indonesian Ombudsman with their complaint about maladministration. In addition, the position of the Indonesian Ombudsman is also strengthened with a criminal provision that prohibits the obstruction of their investigations, (Article 44). In the Netherlands, besides the Ombudsman, the Dutch administrative authorities also provide Anti-Discrimination Bureaus which are also crucial to combat discrimination. Similarly, the Indonesian Government has shown a strong commitment to human rights by opening local branches of the Human Rights Commission and the Ombudsman in several cities. These institutions exist at the local level and can thus play a function of receiving complaints from residents. Additionally, the Indonesian National Commission of Human Rights can be involved with criminal investigations according to the Human Rights Court Act. The last institution is the Court; both the system and process for administrative justice in the Dutch Court and Indonesian Court are very similar. The way that the Indonesian Court publishes verdicts and the efficiency of their bureaucracy is commendable; the problem of the Indonesian Court is the capacity of the judges, most of whom only have a limited understanding of good governance and interpretation of human rights instruments.

Above all, good ethnic minority governance demands solutions to ethnic discrimination in Indonesia and the Netherlands. I propose that good ethnic minority governance is comprised of two primary components; good ethnic minority regulations and good ethnic minority institutions.

3. Good ethnic minority regulations

As mentioned above, the Dutch and Indonesian legal system are sufficient from the point of view of good governance with regards to strengthening the norms for the government and legal protection of ethnic minorities. These regulations are the raw material for establishing good ethnic minority regulations. A pivotal requirement of good ethnic minority regulations can be built by reconnecting the network of legal norms in Indonesia and the Netherlands that support multicultural justice. It is vital that the idea of multiculturalism is integrated into regulations.[1014] Good ethnic minority regulations are those that acknowledge the voice of ethnic minorities. Indeed, ethnic minorities often experience difficulties when accessing the electoral and legislative processes because they are considered 'unrepresentative factions.'[1015] Opening the gate of participation and providing sufficient information to ethnic minorities is the most relevant obligation stated by good governance. For good ethnic minority regulations to be established, a legal basis in the constitution and legislation is required. I argue that Article 1[1016] of the Dutch Constitution and Article 28[1017] of the Indonesian Constitution provide a sufficiently robust baseline for the aspect of good ethnic minority regulations.

Article 1 of the Dutch Constitution can foster the creation of a legal regime of good ethnic minority regulations, because it aims to establish the recognition of various values, cultural identities, and social diversity.[1018] Furthermore, Article 28 of the Indonesian Constitution enlightens

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[1014] Joseph Raz, *Multiculturalism.* Ratio Juris. Vol. 11. No. 3 September 1998 (193-206).

[1015] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 132.

[1016] Article 1 'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.

[1017] Article 28D '(1) Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.' Article 28I '(2) Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment. (3) The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations.'

[1018] Kamerstukken II 2003/04, 27 925, nr. 120. Tweede Kamer der Staten-General.

the public policies with the notion of human rights.[1019] Without a doubt, Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution are central to political debates that concern the government response to discrimination. In the Netherlands, Article 1 of the Dutch Constitution is relevant to the political debate about Wilders' racist speech, populism, racism, Islamophobia, and anti-immigrant discourses. Correspondingly, Article 28 of the Indonesian Constitution is used by human rights activists when combating anti-Chinese sentiment, right-wing Islamic fundamentalism, and 'corruption,' etc.

On December 11, 2015, the Indonesian President Jokowi argued that the implementation and the recognition of human rights is required by the Constitution. Forthwith, he stated that the values of humanity must be an inspiration for the relationship between the people and the government.[1020] Article 28 of the Indonesian Constitution can encourage the government to respect its obligation to attending to the interests of ethnic minorities. Similarly, the Dutch prime minister, Mark Rutte emphasised the contribution of Article 1 of the Dutch Constitution in encouraging an inclusive, liberal and open government that values above all else, equality.[1021] Unsurprisingly, the content of both countries' constitutions is very different. For example, unlike Article 1 of the Dutch Constitution, Article 28 of the Indonesian Constitution makes no explicit mention of religion, belief, political, opinion, race, sex, any other grounds. However, the spirit is the same; both protect the ideas of equal treatment and freedom from discrimination. Indeed, the above articles are both examples of multicultural legal norms that foster the establishment of good ethnic minority regulations, such a law ensures that everyone is treated equally. However, it is important to remember that the articles of the Constitution are too abstract to develop a notion of good

[1019] Denny Indrayana, *Indonesian Constitutional Reform 1999-2002: AN Evaluation of Constitution-Making in Transition,* Jakarta, Kompas Book Publishing, 2008, p. 217.

[1020] http://setkab.go.id/sambutan-presiden-joko-widodo-pada-peringatan-hari-hak-asasi-manusia-ham-se-dunia-di-istana-negara-jakarta-11-desember-2015/ last visited March, 30, 2017.

[1021] Theo Brand. Pleur Op of Keurig Christen. Wie Is Echte Mark Rutte. http://www.nieuwwij.nl/opinie/pleur-op-keurig-christen-is-echte-mark-rutte/ Last visited March, 30, 2017.

ethnic minority regulation. Herewith, good ethnic minority regulations can be yielded by legislation such as the Dutch Equal Treatment Act or the Indonesian Human Rights Act of Law No. 39 of 1999 are needed.

On February 22, 1994, Mr. Glasz of the Christian Democratic Appeal party (CDA) revealed the draft of the Dutch Equal Treatment Act aimed to promote participation of ethnic minorities to enjoy a better social life (*het maatschappelijk leven*).[1022] In 1991, before the Equal Treatment Act had been issued, politicians from the Christian Democratic Appeal party (CDA) and the Labour Party (PvdA) aimed to create a policy that supported the emancipation of ethnic minorities.[1023] A similar situation occurred in Indonesia during the 1998 reform, Muladi, the Minister of Justice, argued that the Indonesian government should promote an 'Indonesian bill of rights.' Muladi's version of Equal Treatment Act emerged from his interpretation of human rights as a notion that comes from Almighty God and the mandate of the Indonesian Consultative Assembly's decree of XVII/MPR/1998.[1024] The Human Rights Act is needed for meaningful prosecution of human rights violations of the past.[1025] Of course, the Dutch Equal Treatment Act and the Indonesian Equal Treatment Act can be considered as human rights legislation that provide the raw material for good ethnic minority regulations. These pieces of human rights legislation could act as standards for public policy and promote diversity and respect for ethnic diversity.[1026] This law also contains universal moral respect and egalitarian reciprocity as a meta-norm that encourages ethnic minorities to become a part of the political membership of society.[1027] Herewith, human rights are required to ensure that policy is sensitive to the feelings, hopes, aches and concerns

[1022] *Het 21ste vergadering*. Dinsdag 22 Februari 1994. Eerste Kamer.

[1023] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3.

[1024] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia. Proses Pembahasan Rancangan Undang-Undang tentang Hak Asasi Manusia. 2001.

[1025] Jalan Lain Mengadili Soeharto. SUAR Vol. 07. No. 02 of 2006., p. 14.

[1026] Seyla Benhabib, *Democracy and Difference. Contesting the Boundaries of the Political*. Princeton, Princeton University Press, 1996, p. 69.

[1027] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*. Cambridge, Cambridge University Press, 2006, p. 12.

of others.[1028]

The Dutch Equal Treatment Act is often used by ethnic minorities when participating in the legal field to defending their rights and interests in the arenas of labour market,[1029] social benefits,[1030] residence permits,[1031] civic integration, work permits,[1032] Dutch citizenship,[1033] basic registration,[1034] family reunification,[1035] detention, hate crimes, unequal treatment,[1036] etc. Above all, the right to freedom from discrimination is the most significant issue for ethnic minorities in the public sphere. In June 2015, the Netherlands Institute for Human Rights submission to the UN Committee on the Elimination of all forms of racial discrimination (CERD) played a significant role in understanding patterns of discrimination.[1037] Approximately 7,235 suspected discrimination cases where registered at the municipality level anti-discrimination bureaus, thus demonstrating that there is a great demand for the implementation of anti-discrimination legislation in the Netherlands.[1038] In the past, formulating the draft of the Equal Treatment Act was a difficult task, for instance, Heijne Makkreel of the People's Party for Freedom and Democracy (VVD) argued that the formulation of human rights

[1028] Joseph Raz. Multiculturalism. Ratio Juris. Vol. 11. No. 3 September 1998 (193-206).

[1029] Case of ECLI: NL: RBHAA: 2006: AY3923. District Court Haarlem, on 03 July 2006.

[1030] Case of ECLI: NL: RBOT: 2010: BN3935, District Court Rotterdam, on 12 August 2010.

[1031] Case of Case of ECLI: NL: RVS: 2015: 1745, the District Court of West Brabant, on 3 June 2015.

[1032] Case of Case of ECLI: NL: RVS: 2015: 3935: The District Court of Hague, on 23 December 2015.

[1033] Case of Case of ECLI: NL: RVS: 2015: 3115, the District Court of West Brabant, 7 October 2015.

[1034] Case of Case of ECLI: NL: RVS: 2014: 1786, the District Court of Central Netherlands, on 21 May 2014.

[1035] Case of ECLI: NL: RBDHA: 2014: 16229, District Court of Hague, on 16 December 2014.

[1036] Case of ECLI: NL: RBHAA: 2006: AY3923. District Court of Haarlem, 03 June 2006.

[1037] The Netherlands Institute for Human Rights Submission to the eighty-seventh session of the UN Committee on the Elimination of all form of racial discrimination (CERD) on the Examination of the combined nineteenth to twenty-first Periodic Reports of the Netherlands.

[1038] Inhoudsopgave Bijlage bij voortgangsbrief discriminatie. 2015. College de rechten van de mens.

provision in the Constitution was more important than by an the Act of Parliament; Glastra van Loon from the Democrats 66 party (D66) complained that the draft of Equal Treatment Act was too 'noisy' and required much unnecessary energy; De Boer of the Green left party stated that the draft was too broad and liquid.[1039] However, the draft was still supported by many human rights groups including Amnesty International, E-Quality, Art.1, Refugee Work (VluchtelingenWerk), Gender Network Group Association (Netwerk VN-Vrouwenverdrag), Aim for Human Rights, and the Dutch Section of the International Commission of Jurists (Nederlands Juristen Comité voor de Mensenrechten).[1040] This also illustrated the important position that the Equal Treatment Act occupies in supporting other existing human rights instruments such as regional human rights provisions, regional human rights regulation (the European Convention on Human Rights), national regulation (Equal Treatment Act Concerning employment between men and women), Articles of the Civil Code, and International Human Rights Treaties and many other pieces of human rights regulation.[1041]

The Indonesian Government created the Equal Treatment Act to improve the fulfilment of universal moral human rights values in a national context. Ethnic minorities are able to defend their rights through challenging governance based on the rights to equal treatment, the rights to be recognized, guaranteed, protected and treated fairly before the law, and the rights to freedom from discrimination according to Article 3 of Law No. 39 of 1999 on human rights. Another aspect that this law regulated was 'equality before the law'. Herewith, Muladi, the Minister of Justice included protections for non-derogable rights in the draft of the Human Rights Act, thus guaranteeing ethnic minorities' right to life, the right to be free from torture, and the right not to be enslaved, etc.[1042] In 1999, the Human Rights Act was a sign of humanisation and

[1039] Het 21ste vergadering. Dinsdag 22 Februari 1994. Eerste Kamer.

[1040] Memorie van Toelichting, wet college voor de rechten van de mens. Kamerstukken II 2007/08 861, nr. 19

[1041] Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3.

[1042] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia. Proses Pembahasan Rancangan Undang-Undang tentang Hak Asasi Manusia, 2001.

democratisation of the post-authoritarian regime. Although Soeharto's New Order release a package of human rights legislation including (1) Law No. 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, (2) Presidential Decree No. 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child, (3) Presidential Decree No. 50 of 1993 concerning Establishing the National Commission of Human Rights, these were only cynical, cosmetic acts, performed to legitimise the gloomy era of the New Order.[1043]

Both the Dutch Equal Treatment Act and the Indonesian Equal Treatment Act regulate various components of rights which facilitate ethnic minorities to participate in the labour market, access goods and services, and other rights. The Indonesian Equal Treatment Act includes a variety of human rights provisions including women rights, the rights of people with disabilities and the rights of children, etc. The Dutch Equal Treatment Act also prohibits discrimination on the grounds of religious, belief, political opinion, race, sex, nationality, sexual orientation or civil status. Additional, specific regulations were issued for the protection of the rights of people with disabilities (Act on Equal Treatment on the Grounds of Disability or Chronic Illness), and women's rights (equal treatment (men and women) Act. In Indonesia, many pieces of legislation have accumulated into the establishment of good ethnic minorities policy, for example the Indonesian Civil and Political Rights Acts, the Anti-Discrimination Act (Law No. 40 of 2008). Whilst in the Netherlands, ethnic minorities may benefit from protection offered by the Dutch Civil Code sections 7: 646 (prohibition of discrimination related to men and women),[1044] 7: 647 (termination of

[1043] Ken Ward, *Soeharto's Javanese Pancasila*, see also: Sidney Jones, *New Order Repression and the Birth of Jemaah Islamiyah*. In Edward Aspinall & Greg Fealy, *Soeharto's New Order and its Legacy. Essays in honour of Harold Crouch.* The Australian National University, 2010, p., 27-45.

[1044] (1) It is prohibited for employers to discriminate between men and women in entering into an employment agreement, providing training and instruction to an employee, in the conditions of employment, in granting promotion and in terminating an employment agreement; (2) Derogation from subsection 1 is permitted in entering into an employment agreement and in providing training and instruction in those cases in which the sex is determining. Section 5(3) of the Equal Opportunities Act applies *mutatis mutandis* in those cases*;*

an employment agreement),[1045] and 7:649 (prohibition of discrimination in the labour market).[1046] Other pieces of the Dutch criminal code that also regulate hate crimes such as prohibition of discrimination, violence, incitement, and insults, include Articles 137c,[1047] 137d,[1048]

(3) Derogation from subsection 1 is permitted in case of stipulations relating to the protection of women, in particular in connection with pregnancy or motherhood; (4) Derogation from subsection 1 is permitted in case of stipulations aimed at placing female employees in a preferred position in order to remove or reduce actual inequalities and provided that the different treatment is reasonably proportionate to the intended purpose; (5) For the purposes of this section discrimination between men and women is understood to mean both direct and indirect discrimination between men and women. Direct discrimination is understood to include discrimination on the grounds of pregnancy, childbirth and motherhood. Indirect discrimination is understood to mean discrimination on the grounds of other qualities than sex, for example married state or family circumstances, resulting in discrimination on the grounds of sex, etc.

[1045] (1) The termination of an employment agreement by the employer in contravention of Section 646(1) or on account of the fact that the employee has invoked Section 646(1) either at law or otherwise, is voidable. (2) If the employee has not invoked this ground for annulment within two months after the notice of termination, his right to do so lapses. Section 55 of Book 3 is not applicable. (3) The right of action in connection with the annulment is prescribed by the lapse of six months after the day as of which the employment agreement was terminated.

[1046] (1) It is prohibited for employers to discriminate between employees in the conditions of employment on the grounds of the employment agreement being either for a fixed period or permanent, unless such discrimination is objectively justified. (2) Termination of the employment agreement by the employer on account of the fact that the employee has invoked the provision of subsection (1) either at law or otherwise, is voidable. Section 647, subsections (2) and (3) are applicable. (3) Any stipulation in contravention of subsection (1) is null and void. Etc.

[1047] Under 137c "(1) Any person who orally or by means of written material or images gives intentional public expression to views insulting to a group of persons on account of their race, religion or belief, sexual orientation, or physical, psychological or intellectual disability is liable to a term of imprisonment not exceeding one year or to a third-category fine. (2) If a person makes an occupation or habit of committing the above offence, or if it is committed by two or more persons acting in concert, the penalty may be increased to a term of imprisonment not exceeding two years or to a fourth-category fine."

[1048] Any person who orally or by means of written material or images publicly incites hatred of or discrimination against other persons or violence against the person or the property of others on account of their race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability is liable to a term of imprisonment not exceeding one year or to a third category fine. (2) If a person makes an occupation or habit of committing the above offence, or if it is committed by two or more persons acting in concert, the penalty may be increased to a term of imprisonment not exceeding two years or to a fourth-category fine." In Article 90 quater discrimination is defined as "as any form of distinction, any exclusion, restriction or preference, the purpose or effect of which is to nullify or infringe upon the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social or cultural fields or any other field of public life".

137e,[1049] 137f, [1050] 137g,[1051] and 429[1052]. In the Netherlands, the network of legal norms is more than sufficient to build an adequate legal basis for good ethnic minority regulation. Good ethnic minority regulation can be interpreted as that which provides deliberative democratic processes and aims to involve all ethnic groups.[1053] Good ethnic minority regulations can be delineated as the fundamental obligation of governance to enact proper decisions. The spirit of universal human rights should always be present in the law if a government wishes to establish cosmopolitan[1054] between among different ethnic groups.[1055]

[1049] Any person who for reasons other than the provision of factual information: makes public an utterance which he knows or can reasonably be expected to know is insulting to a group of persons on account of their race, religion or belief, sexual orientation, or physical, psychological or intellectual disability or which incites hatred of or discrimination against other persons or violence against the person or property of others on account of their race, religion or belief, sex, sexual orientation, or physical, psychological or intellectual disability; distributes any object which he knows or can reasonably be expected to know contains such an utterance or has in his possession any such object with the intention of distributing it or making the said utterance public; is liable to a term of imprisonment not exceeding six months or to a third category fine. (2) If a person makes an occupation or habit of committing the above offence, or if it is committed by two or more persons acting in concert, the penalty may be increased to a term of imprisonment not exceeding one year or a fourth-category fine."

[1050] Anyone who participates in or provides financial or other material support to activities aimed at discrimination against people because of their race, their religion, their beliefs, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental disability, shall be punished with imprisonment of not exceeding three months or a fine of the second category

[1051] "(1) Any person who, in the exercise of his office, profession or business, intentionally discriminates against persons because of their race shall be liable to a term of imprisonment not exceeding six months or a fine of the third category. (2) If the offence is committed by a person who makes a habit of it or by two or more persons in concert, a term of imprisonment not exceeding one year or a fine of the fourth category shall be imposed."

[1052] "(1) Any person who in the exercise of his profession or business makes a distinction between persons on account of their race is liable to a term of detention not exceeding one month or a third category fine. (2) ..."

[1053] Seyla Benhabib. Democracy and Difference. Contesting the Boundaries of the Political. 1996. Princeton University Press., p. 71.

[1054] Cosmopolitanism is simply to think globally in the international political discourses. Santos emphasizes the notion of cosmopolitanism bottom up. Starting from local level and bring it to the international political discourses. Boaventura de Sousa Santos. If God Were a Human Rights Activist: Human Rights and the Challenge of Political Theologies. Law, Social Justice & Global Development. 2009, accessed on 14 March 2018, available at http://www.boaventuradesousasantos.pt/media/If%20God%20were%20a%20Human%20Rights%20Activist_LawSocialJustice_09.pdf.

[1055] Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge,

As was noted in chapters 3 and 4, the Dutch Equal Treatment Act, the Indonesian Equal Treatment Act, and other pieces of legislation that support ethnic minorities are 'the weapons' of Turkish and Chinese people in legal battles concerning their rights. Of course, there is no easy solution to solving the problem of discrimination against ethnic minorities. Yet, at least those network of good ethnic minority regulation can encourage the search for a common language between different ethnicity, culture, identities, in the pluralistic political community.[1056] Sadly hate speech and discrimination is not uncommon on Dutch and Indonesian soil by populist anti-immigrant groups such as the Party for Freedom (PVV) in the Netherlands or Islamic right-wing groups such as or the Islamic Defenders Front (FPI) in Indonesia, as mentioned earlier in this chapter. Good governance provides the correct guidance for a progressive government that wants to find solutions to discrimination. The governmental authorities must be active and provide suitable channels for ethnic minorities to participate and to complain or to appeal if their rights have been violated. At least, the administrative authorities should provide the protection of poly-ethnic rights to ethnic minorities. Poly-ethnic rights are rights that respect a plurality of ethnic groups who are all allowed to express their cultural identities and religious practices without infringing upon the dominant institutions.[1057] Thus, the administrative authorities require multicultural policies that defend the rights of all people.[1058]

4. Good ethnic minority institutions

When the administrative authorities obey good governance, and are devoted to the norms for the government and legal protection of ethnic minorities, I describe them as 'good ethnic minorities institutions'. The power of the governments must guarantee a balance between the ma-

Cambridge University Press, 2004, p. 21.

[1056] Joseph Raz, Multiculturalism. Ratio Juris. Vol. 11. No. 3 September 1998 (193-206).

[1057] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 30.

[1058] Daniel I O'Neillllll, *Multicultural Liberals and the Rushdie Affairs*, A Critique of Kymlicka, The Review of Politics, Vol. 2 (Spring, 1999), pp. 219-250.

jority and minority.[1059] Herewith, the power of the governments (such as the executive of administrative power, the judiciary of Court's power, the fourth power of the Ombudsman and the National Human Rights Institutions) must empower the position of ethnic minorities. In the Netherlands, the Minister of Interior Affairs issued the Dutch National Plan of Action of Human Rights in 2013 which prohibited ethnic profiling by the Police, and aims to enhance ethnic minority participation. By the same token, after the 1998 reforms, the Indonesian Government produced the Indonesian National Plan of Action on Human Rights 1999-2003. The administration has a significant role in abolishing racial discrimination through the implementation of the national plan. Sadly, the national plan is only a 'paper tiger' and though its stated aims are honourable, they have not been implemented. The text is only superficially beautiful; like a body without organs. The politics of fear is widespread and eternal in the heart of ethnic minorities, discrimination continues in education, healthcare, the media, and politics, etc. Good ethnic minority institutions are required to ensure the commitment of the administrative authorities to combating discrimination supporting poly-ethnic to express their identities.

Good ethnic minority institutions demand the recognition of the position of ethnic minorities. Disseminating information about the participation of ethnic minorities is not philanthropy, but an obligation of the administrative authorities. Therefore, ethnic minority rights should not be a result of kindness, charity, generosity of the government, but should be embedded into the obligations of the administrative authorities and the rights of citizens.[1060] The 2015 Dutch CERD Report stated that the Dutch National government could do more to combat discrimination, and was disappointed about the disbandment of the National Consultative Platform on Minorities.[1061] Meanwhile, the 2006 Indonesia

[1059] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 74.

[1060] Seyla Benhabib. *The Rights of Others. Aliens, Residents and Citizens*. Cambridge, Cambridge University Press, 2004, p. 25.

[1061] The Netherlands Institute for Human Rights Submission to the eighty-seventh session of the UN Committee on the Elimination of all form of racial discrimination (CERD) on the Examination of the combined nineteenth to twenty-first Periodic Reports of the Netherlands.

CERD report of CERD found that local government officials in Batam, Semarang, and Solo have continued to request an SBKRI from Chinese-Indonesians as a means of extorting them.[1062] These events demonstrate a lack of commitment to implementing good governance related to norms for the government and legal protection of the people. But, of course, it is not easy to create good ethnic minorities institutions. To do so, the administration work hard to integrate multiculturalism into its bureaucracy. Multiculturalism will have been successfully implemented when no group of people feel that they live in a country with many aliens or strangers, but they are surrounded by friends and family.[1063] Ethnic minorities, even those that are naturalised citizens, still feel danger and fear—thus, much work must be done to overcome these feelings.

Good ethnic minority institutions require not only a good administration, but also 'healthy' institutions; a 'good' ombudsman, 'good' human rights commissions, and 'good' courts. The Ombudsmen and the National Commission of Human Rights of both the Netherlands and Indonesia are the most pro-active institutions that are able to combat discrimination. The function of these two institutions of fourth power is to ensure that the government can addresses inequality and attempts to produce a new emancipatory social structure.[1064] One weakness of the Ombudsman is that it cannot investigate the private sector actor—only the administrative authorities' conduct. Fortunately, the National Human Rights Institutions can intervene with cases of discrimination in the private sector. The Indonesian Ombudsman and the National Commission of Human Rights must learn from the Dutch Ombudsman and the Netherlands Institute for Human Rights how to evaluate reports of investigation or mediation. Moreover, the recommendations of the Dutch institutions are more effective than the Indonesian Ombudsman and National Human Rights Institutions. For example, The Dutch

[1062] Report of International Convention on the Elimination of all Forms of Racial Discrimination on April, 4, 2006.

[1063] Joseph Raz, *Multiculturalism.* Ratio Juris. Vol. 11. No. 3 September 1998 (193-206).

[1064] Adrian Favell*, Applied Political Philosophy at the Rubicon: Will Kymlicka's Multicultural Citizenship. Ethical Theory and Moral Perspective*, Vol.1, No. 2, Nationalism, Multiculturalism and Liberal Democracy (Jun., 1998), pp. 255-278.

Ombudsman's recommendations and the Netherlands Institute for Human Rights' opinion (*oordelen*) were implemented or voluntarily accepted in more than 70 % instances.

On the other hand, the Dutch institutions are worse than their Indonesian counterparts with regards to proceduralism. The Dutch Institutions, especially the Ombudsman and the Netherlands Institute for Human Rights seem to be bureaucratic. In the Netherlands, if someone wants to lodge a complaint through the Ombudsman, their complaint must first be sent to the administration (Article 9: 20 of GALA). In contrast, people can submit directly to the Indonesian Ombudsman. This approach contains strengths and weakness. In strengths side, the complaint can promote trust in the administrative authorities and helping to learn from the mistakes. In weakness side, this complaint causes more bureaucratic and useless when the administration does not want to consider its conduct. Another difference between the Dutch Institutions and Indonesian institutions is 'the gate.' The gate of the institutions has symbolic significance; the gates of the Dutch Ombudsman and the Netherlands Institute for Human Rights are always locked and closed—no-one can enter without an appointment or a good explanation to the telephone, one may get the impression of these institutions is that they have an unwelcoming and distant appearance. A personal experience with the Netherlands Institute for Human Rights was that when I sent them an email asking whether I can conduct some interviews for my PhD thesis. Unfortunately, they did not reply to my email. With the help of some Dutch colleagues I was able to enter via 'the back door'[1065] finally meet a senior adviser at the Institute. I was very happy to interview someone from the Netherlands Institute for Human Rights, but I got a feeling this institution was not as 'friendly' as they implied in their report. The Netherlands Institute for Human Rights' 2014 report stated that they received 2.303 questions regarding equal treatment and human rights issues.[1066] I talked with other people who have interacted with the

[1065] 'The back door' approach is used in ethnographic research to refer to informal means of obtaining data e.g. lobbying and personal conversations, rather than submitting a formal research letter and conducting interviews.

[1066] Netherlands Institute for Human Rights. Annual Report 2014., p. 11.

Netherlands Institute for Human Rights, some of whom had similar experience to me. 'I tried to email the institute several times, but I did not get any response. I went to the institute's office and ring the bell at the gate. Due to my poor English skills, I found it difficult to explain that I needed their help to aid my problem. Shortly after, they refused to let me enter.' MD (a pseudonym) said.[1067]

After reflecting upon the above experience, I argue that, a good ethnic minority institution craves communication with the people. Moreover, empowering and encouraging ethnic minority groups to participate in public conversation, helps them to build legal arguments in pursuing responsive formation of public policies in free processes of communication is a pivotal action of state institution.[1068] Good ethnic minority institutions also stipulate the good contact with a variety of groups, including ethnic minority groups.[1069] Cultural identity must be considered alongside the basic needs of life, such as food, clothes and housing, but also the cultural identities protection. In order to respect a plurality of identities it is important to integrate multicultural values into policy and that the administration makes considerations about the distribution and decentralisation of power. This activity requires good communication between dominant political institutions and ethnic minorities.[1070] Furthermore, a good ethnic minority institution will provide an emancipatory space for communication that will privilege the voices of ethnic minorities.[1071] A good ethnic minority institution is sensitive and responsive to the needs of disadvantaged cultural minorities and strives to improve the provision of equal treatment.[1072]

[1067] A personal conversation with MD in September 2017.

[1068] Seyla Benhabib*, Democracy and Difference. Contesting the Boundaries of the Political*. Princeton, Princeton University Press, 1996, p. 74.

[1069] Frederik Stjernfelt, *Liberal Multiculturalism as Political Philosophy of Will Kymlicka*. The Monist, Vol. 95, No.1, Dilemmas of Multiculturalism (January, 2012), pp. 49-71.

[1070] Brian Walker, *Plural Cultures, Contested Territories: A Critique of Kymlicka*. Canadian Journal of Political Science Vol. 30, No. 2 (Jun., 1997), pp. 211-234.

[1071] Adrian Favell, *Applied Political Philosophy at the Rubicon: Will Kymlicka's Multicultural Citizenship*. Ethical Theory and Moral Perspective, Vol.1, No. 2, Nationalism, Multiculturalism and Liberal Democracy (Jun., 1998), pp. 255-278.

[1072] Daniel I O'Neillll, *Multicultural Liberals and the Rushdie Affairs, A Critique of Kymlicka*, The Review of Politics, Vol. 2 (Spring, 1999), pp. 219-250.

Equally important, is the role of the Ombudsmen and National Human Rights Institutions in the investigation of patterns of discrimination, which can inform what action is required. The work of these two institutions relevant to establishing good ethnic minority institutions. I argue that if these two institutions do not work correctly, the complaints of ethnic minorities are doomed to be ignored. Fortunately, in the Netherlands and Indonesia these two institutions are often effective and have become well respected. In the Netherlands, Chinese and Turkish people can lodge a complaint through the Netherland Institute for Human Rights. A Chinese woman who was refused service by a cashier at a supermarket received support from the institute to fight against racial discrimination.[1073] Turkish people with Arabic-sounding names have faced discrimination in the labour market[1074] and have subsequently submitted multiple complaints through the institute.

Meanwhile, the Dutch Ombudsman has also received several complaints from Turkish and Chinese people demonstrating channels of direct participation has been provided and protected. Examples of these complaints include the suspicious maladministration of immigration problems with IND's (the Dutch Integration and Immigration Service) procedure,[1075] improper conduct by police officers,[1076] and discriminatory behaviour by a public servant.[1077] Furthermore, the Ombudsman is another legal channel that ethnic minorities can access to defend their interests.[1078] If the administrative authority does not misuse its power, then discrimination will be eradicated. [1079] On other occasions, the Dutch Ombudsman has distributed pamphlets entitled 'stop discrimi-

[1073] Oordeelnummer 2015-56. College voor de Rechten van de mens.

[1074] Oordeelnummer 2015-43. College voor de Rechten van de mens.

[1075] Rapportnummer: 2003/ 222. Datum: 15 Julie 2003.

[1076] Rapportnummer: 1999/ 287. Datum: 28 Juni 1999.

[1077] Rapportnummer: 1998/ 537. Datum: 13 December 1998.

[1078] John McMillan, *The Ombudsman and the Rule of Law*. In, Linda C. Reif, The Ombudsman, *Good Governance and the International Human Rights System*, Dordrecht, Springer Science Media, 2004, p. 7.

[1079] Robin S. Heyer, *Citizens Champion, Ombudsman*. San Fernando Valley Law Review. Vol. 1: 122, 1968.

natie' (stop discrimination).[1080] Unsurprisingly, the Dutch Ombudsman's handbook of 'Guidelines on Proper Conduct' also stipulates 'the rights to freedom from discrimination.'[1081] The Dutch Ombudsman plays a significant role in combating administrative discrimination. The institution is sometimes called 'the semi-official Robin Hood,' a testament to the unique position of Ombudsman.[1082] The concept of an ombudsman emerged from Scandinavia as an institution that had a function of supervising other government bodies with the aim of preventing abuse of power.[1083] The Ombudsman ensures that ministers, municipalities and other civil servants obey the law.[1084] Indeed, this institution can be classified as a good ethnic minority institution. The Ombudsman is an institution which I call the guardian of good governance; I believe its inclusion in the network of good ethnic minority institution is vital. In Indonesia, ethnic minorities are much less used to the Ombudsman defending their interests. Public trust in the official legal dispute mechanism is low in Indonesia. Despite this, the Ombudsman has received several complaints, the clear majority of which concern government seizure of land belonging to Chinese-Indonesians in Yogyakarta. A letter issued by the local government prohibits Chinese-Indonesians from owning a piece of land in Yogyakarta. Three such cases have been received by the Ombudsman,[1085] and have resulted in an investigation of the Land Agency of Yogyakarta and a legal audit of the local administrative authorities' regulation. In this case there was a clear misuse of power is by the local administrative authority. In other words, the administrative authorities' maladministration directly caused discrimination in the same times. The local administrative authority should disentangle any consideration of ethnicity from the rights to land ownership. The origi-

[1080] Stop discriminatie, Openbaar Ministerie. De Nationale Ombudsman.

[1081] Guidelines on proper conduct. De Nationale Ombudsman.

[1082] David Roberts, *The Ombudsman Cometh.* The Advocate. 1972 (360).

[1083] Lester B. Orfield, *The Scandinavian Ombudsman*. Administrative Law Review. 7. 1966-1967.

[1084] Stig Jägerskiöld, *The Swedish Ombudsman*. University of Pennsylvania Law Review. Vol. 109. 1077.

[1085] The Indonesia Ombudsman's Reports on 08 March 2016.

nal intention of the Sultan of Yogyakarta (Paku Alam) was to counter the colonial-era hierarchy which endowed the Chinese community with greater rights to land than native Indonesians; this letter would make it harder for Chinese people to buy land, and easier for native Indonesians. This reasoning is preposterous because the Indonesian Constitution and agrarian law both prohibit ethnic discrimination in matters regarding land ownership. The Ombudsman tried to help Chinese-Indonesians by intervening with this maladministration. It is important to realise that the Ombudsman is an institution that can provide hope to ethnic minorities.

Beside the Ombudsman and National Human Rights Institutions, the courts are one of the most important institutions from a good governance perspective, and crucially the only institution that can produce a legally binding verdict. Sometimes, the courts dispute the case of undocumented migrants who lodges an appeal.[1086] The position of the courts is fundamental to recognising and defending the rights of undocumented people that live on Dutch soil. The rights to access justice and legal dispute settlement for undocumented people are also provided by the courts. Unlike the Ombudsman and National Human Rights Institutions, which can conduct proactive investigations, the court is rather passive, and must receive an appeal in order to investigate discrimination. However, the legally-binding power of the courts offer powerful protection to undocumented ethnic minorities than either the Ombudsman or the National Human Rights Institution. For instance, if deportation is discriminatory, ethnic minorities are able to legally challenge such a decision through the courts. On one such occasion, a Chinese person lodged an appeal through the Court stating that he felt his ethnicity was a factor in his deportation order.[1087] This person then applied for asylum in the Netherlands, but IND (Immigration and Naturalisation Service) did not grant asylum. The person later fought this decision of deportation through the Court.

[1086] Case of ECLI: NL: RBSGR: 2002: AE7853 District Court of 's Gravenhage, 12 August 2002.

[1087] Case of ECLI: NL: RBSGR: 2009: BK3090. District Court of 's Gravenhage, 10 November 2009.

In Indonesian regulations, the courts are entrusted with improving the quality of ethno-cultural justice, but in practice, I would say that the courts have failed to make progress in protecting ethnic minorities. The courts continue to back the pro-assimilation mentality of the New Order's regime which coerced Chinese-Indonesians to change their names in the name of national unity. The judges in some courts have expressed inappropriate appreciation to Chinese people who change their names.[1088] Worse still is the lack of action in addressing the case of Chinese-Indonesian land since the 1965 accident, despite the wealth of evidence that Chinese-Indonesians have presented to the courts. Many Chinese landowners had owned their land since 1928, but the corrupt New Order government seized their land illegally.[1089] My impression of these court decisions is that the judges have neglected to consider human rights in their legal reasoning. The judges have also failed to mention the important role of good governance which is crucial in preventing the administration from misusing its power.

The courts must be an institution which strives to be a good ethnic minority institution. Without progressive judges and good bureaucracy in the courts, ethnic minorities' struggle will be without much hope. In an authoritarian context, the courts cannot be impartial, sensitive, independent or responsive. A modern court should always listen to the voice of marginalised groups.[1090] Producing justice is the responsibility of the court as the judiciary power, people submit their hope to the court when they face unjust treatment by the administrative authorities or other parties. Therefore, the courts are regarded as a justice system. If the courts fail to respect the will of the people, then the legal system within a country cannot guarantee order, legal certainty, or prosperity.[1091] Reassuringly, my research has found that the Indonesian Court has shown commit-

[1088] Mojokerto Court Decision with the Number of Case: 31/ Pdt. P/2012/ PN. Mkt.

[1089] Administrative Court Decision with the Number of Case: 18/G/2008/PTUN-Jkt.

[1090] Tom Ginsburg and Tamir Moustafa, *Rule by Law the Politics of Courts in Authoritarian Regimes.* Cambridge, Cambridge University Press, 2008, p. 4.

[1091] Varun Gauri & Daniel M. Brinks, *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge, Cambridge University Press, 2008, p. 5.

ment to modernising their system of bureaucracy, particularly with regards to the principle of transparency. They have uploaded almost every verdict on their website, allowing anyone to scrutinise and learn from their legal reasoning. This has the potential to be especially beneficial for ethnic minorities as they are able to observe patterns in discrimination cases and manage their legal strategy accordingly.

With regards to ethnic minorities, the most important interplay of power within the government is between the public authorities discussed above. The executive of the administrative power, the judiciary's power, and the fourth power of the Ombudsman and the National human rights institutions are pivotal to establishing good ethnic minority institutions. Good ethnic minority institutions support ethnic minorities to take part in democratic struggle to improve their rights.[1092] At the same time, good ethnic minority institutions encourage special representation rights for ethnic groups that face systematic disadvantages or administrative barriers in the political process.[1093] For instance, the National Consultative Platform on Minorities of the Netherlands, which has since been disbanded. Furthermore, good ethnic minority institutions also open possibilities for the provision of poly-ethnic and accommodation rights which can produce social capital for ethnic minorities that enable them to thrive in their host countries.[1094] Another important aspect of the work of good institutions for ethnic minorities is advocating for multicultural policies that preserve ethnic minority identities and culture, as well as from those of the majority.[1095] Last but not least, it is vital that state power must guarantee the facilitation of ethnic minority participation with dominant political institutions.[1096]

[1092] Adrian Favell, *Applied Political Philosophy at the Rubicon: Will Kymlicka's Multicultural Citizenship*. Ethical Theory and Moral Perspective, Vol.1, No. 2, Nationalism, Multiculturalism and Liberal Democracy (Jun., 1998), pp. 255-278.

[1093] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 32.

[1094] Erik Christensen, *Revisiting Multiculturalism and its Critics.* The Monist, Vol. 95, No. 1, Dilemma of Multiculturalism (January, 2012), pp. 33-48.

[1095] Brian Walker, *Plural Cultures, Contested Territories, A Critique of Kymlicka*. Canadian Journal of Political Science Vol. 30, No. 2 (Jun., 1997), pp. 211-234.

[1096] John Tomasi, *Kymlicka, Liberalism and Respect for Cultural Minorities*. The Monist,

5. The principle of transparency

The principle of transparency, another of the principles of good governance, may foster improvements to the norms for the Indonesian and Dutch Governments and legal protection of ethnic minorities who live in either country. This research identified four main topics that arise at the juncture of transparency and ethnic minority protection in the Netherlands and Indonesia. First, a comparison between the Public Disclosure Acts of each country and their importance for ethnic minority protection. Second, the functions of transparency in encouraging people and civil society to hold the government to account. Third, the principle of transparency's role in preventing social conflict. Fourth, problems of access to official information that arise when translations fail to meet the linguistic needs of ethnic minorities.

First, the legal norms generated by the Dutch Government Information Act and Indonesian Public Disclosure Act, Law No. 14 of 2008 are similar; both use the term 'everyone' in the formulation of their articles. The use of 'everyone' in the formulation of transparency legislation includes ethnic minorities as legal subjects, and thus upholds their legal rights to request information. The Dutch Government Information Act and Indonesian Public Disclosure Act do not discriminate against nationality, gender, ethnicity, race, sexual orientation, etc. Therefore, the use of 'everyone' is indeed a pivotal word order to enable all people to participate in lodging a request for information from public bodies. A Public Disclosure Act obliges the establishment of transparency. Furthermore, the principle of transparency facilitates ethnic minorities to have access to information, meetings, and publications from the public entity.[1097] In other words, ethnic minorities are supported to understand information about goods and services that are provided by government bodies.[1098]

Vol. 95, No.1, Dilemmas of Multiculturalism (January, 2012), pp. 33-48.

[1097] Daniel Lathrop & Laurel Ruma, *Open Government. Collaboration, Transparency, and Participation in Practice*, O'Reilly Media, 2010, p. 28.

[1098] Archon Fung, Mary Graham, David Weil, *Full Disclosure. The Politics, Perils, and Promise of Targeted Transparency*, Cambridge, Cambridge University Press, 2007, p. 5-8.

Furthermore, the inclusion of 'everyone' in the Dutch Government Information Act can be seen in Article 3 (1) which stipulates that 'everyone may apply to an administrative authority or to an agency, service, or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter.' Meanwhile, Indonesia's Public Disclosure Act has an almost identical formulation in Article 2 (1); 'every piece of public information is open and accessible by every user of public information.' Both Public Information Act serves dual functions of legally guaranteeing the principle of transparency, and ensuring that these rights are extended to everyone. This second function is particularly significant with regards to ethnic minority justice, as 'everyone' categorically includes ethnic minorities. Inclusive participation— which requires accessible, transparent information— secures the legitimacy of the government.[1099] This Act not only mentions 'citizens' or 'Indonesians' or 'Dutch', but includes everyone including immigrants, refugees, and national minorities.

Second, the principle of transparency encourages and enables ethnic minorities and government institutions to combat discrimination. Ethnic minorities and anti-discrimination bureaus in the Netherlands are very active in combating discrimination; public information is vital to this fight. Transparent meetings happen frequently where Anti-Discrimination Bureaus, the Municipalities, Police, and the Immigration Agency discuss the issue of discrimination. Herewith, the principle of transparency enables frictionless communication between these institutions, thus maximising the efficiency with which they are able to tackle discrimination.[1100] This is also true in Indonesia, where the readily available public information encourages civil society to advocate for ethnic minority groups. The work of NGOs has been especially fruitful in

[1099] Anneke Zuiderwijk, Mila Gasco, Peter Parycek, Marijn Janssen, *Special Issue on Transparency and Open Data Policies: Guest Editors' Introduction*. Journal of Theoretical and Applied Electronic Commerce Research. Vol. 9. Issue 3. 2014.

[1100] Wies Dinsbach, Jessica Silversmith, Erik Schaap, Rita Schriemer, Kerncijfers 2012-2014. Landelijk overzicht van Klachten en meldingen over discriminatie, geregistreerd bij de antidiscriminatievoorzieningen. 2015. Landelijke Brancheorganizatie van Antidiscriminatiebureaus (LBA) en Samenwekende Antidiscriminatievoorviegen Nederland (SAN), p. 6.

combating discrimination with the use of public information. For instance, the anti-discrimination movement (GANDI) has utilised public information to provide legal assistance to the Chinese community in Yogyakarta whose land was seized by the local government. Thus, the principle of transparency is one of the core principles of good governance which has the aim of protecting the rights to know and the right to free speech.[1101]

Third, the role of transparency can make public information available that can be used to promote peace among the ethnic groups. In other words, greater transparency has a protective function of reducing social conflict.[1102] In the Netherlands, the government regularly releases publications about the ethnic groups. Publications about the Turkish community and second generation of Chinese immigrants in the Netherlands were published by the Social and Cultural Bureau. These reports were empirical studies of each respective community and are valuable to fostering understanding and mutual recognition between ethnic groups. Presently, the function of transparency in preventing social conflict in Indonesia depends on the work of the National Commission of Human Rights and their reports that are compiled in accordance with the Anti-Discrimination Law No. 40 of 2008. Furthermore, the 2016 report of the National Commission reported on discrimination against Chinese Confucians and ethnic-discrimination in the job market.

Fourth, the problem of language for ethnic groups. Ethnic minorities are not always fluent in the official languages of the country that they are resident, first generation migrants are particularly vulnerable, as they are more likely to be uninformed about legislation. If an immigrant is unable to find out what their rights are, they are at greater risk of having those rights infringed. In the Netherlands, the situation is relatively good; many official documents pertaining to immigration law are provided in English in addition to Dutch, and public servants

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[1101] Adrian Henriques*, Corporate Truth. The Limits to Transparency,* London, Earthscan, 2007, p. 51.

[1102] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 46.

speak English fluently. On the other hand, English is rarely spoken by public servants in Indonesia, and most documents are only available in Indonesian. However, in the Netherlands, English is a much more popular second-language than Dutch, and thus it can serve as a partial solution to communicating with non-Dutch speaking immigrants. The IND provides public information in English which can be beneficial for ethnic minorities. Nonetheless, it remains hard for people who do not speak English, even in the Netherlands. Good governance urges multicultural policies to consider and respect linguistic diversity. Kymlicka argued that recognition of certain minority language rights can empower minority groups to engage with the dominant political institutions.[1103] It will be interesting to see if the removal of linguistic barriers to understanding public information will result in increased participation of ethnic minorities.

5.1 Public Disclosure Acts and public engagement

The Public Disclosure Act and ethnic minority involvement in decision making process are both encouraged the concept of good governance which reinforces the norms for the government and legal protection of ethnic minorities. Ensuring that public information is clear, accessible and easy to understand requires the establishment of a 'good' information system. The Public Disclosure Act in both the Netherlands and Indonesia forms the legal basis to build an information system.[1104] Analysing the Dutch Government Information Act and the Indonesian Public Disclosure Act reveals many similarities between the two laws; both regulations share the same legal spirit of creating a regime of the principle of transparency. The principle of transparency will support the fulfilment of human rights.[1105] A transparent administrative authorities not only provides public information, but also encourages people to ac-

[1103] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 45-47.

[1104] Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice the Role of Presuit Investigatory Discovery*. University of Michigan Journal of Law Reform. Vo. 40: 2.

[1105] Louisa Brown, *Transparency as Professionalism. An Interview with Xingzui Wang*. Yale Journal of International Affairs Volume 97. 2014.

cess information.[1106] Furthermore, the principle of transparency can be seen as a promise of the modern social contract between a government and its people.[1107] In Article 2 of the Dutch Public Disclosure Act, it is stated that the 'administrative authority shall, in the exercise of its functions, disclosure information in accordance with present Act'.

Similar words are found in the Indonesian Public Disclosure Act in Article 3 of Law No. 14 of 2008 which states 'the objective of this regulation is to secure the citizens' right to know public policies; to encourage participation, to establish good governance by developing the principle of transparency, effectiveness, efficiency, etc.' Henceforth, the Dutch Information Act and the Indonesian Public Disclosure Act are conceptually similar in that they strive for equality in accessing public information and the establishment of good governance. Ensuring that the function of government bodies is transparent will help people to know which institution to approach for a specific issue.[1108] Greater transparency will create a system which provides functioning channels of political communication between citizens and the government.[1109] In addition, Article 2 of the Dutch Public Information Act and Article 3 of the Indonesian Public Information Act have the same aim of establishing the principle of transparency. Herewith, I argue that the principle of transparency will be particularly beneficial for ethnic minority protection. The Dutch Government Information Act and the Indonesian Public Disclosure Act require the government response to be prompt and punctual. Furthermore, Article 6 of the Dutch Government Information Act states that the administrative authorities must make a decision on whether or not to proceed with an information request within two weeks of receiving the request. Similarly, the Indonesian

[1106] Anneke Zuiderwijk, Mila Gasco, Peter Parycek, Marijn Janssen. *Special Issue on Transparency and Open Data Policies: Guest Editors' Introduction*. Journal of Theoretical and Applied Electronic Commerce Research. Vol. 9. Issue 3. 2014.

[1107] Christian Timmermans, *Subsidiarity and transparency.* Fordham International Law of Journal. Volume 106. 1998-1999.

[1108] Anoeska Buijze, *The Principle of Transparency in EU Law*, 's-Hertenbosch. Uitgeverij BOXPress, 2013, p. 84.

[1109] Michel Foucault, *The Birth of Biopolitics.* Lectures at College de France 1978-1979, New York, Palgrave Macmillan, 2004, p. 3-7.

Public Disclosure Act states that an administrative authority should respond no later than ten working days after the date of receipt of an information request (Article 22 on Law No. 14 of 2008).

A Public Disclosure Act may ensure that an applicant (including ethnic minorities) will be able to obtain public documents easily. The above articles guarantee the time frame that an applicant can expect to wait after submitting a request. The most important element of a Public Disclosure Act is that it enables an applicant to access information other legal rights. The ability to access this information can further develop the principle of transparency. The principle of transparency is an instrument that can increase the quality of democracy by increasing the public's capacity to make informed decisions.[1110] For this reason, it is vital that the public have access to legislation and other documents relating to regulation. In Indonesia and the Netherlands, all pieces of legislation are available on the internet. By having access to the legislation people can read and become autodidact legal scholars. In the colonial era, professionals known as *pokrol bambu* (street lawyer) were fluent in Dutch and could thus read the Criminal and Civil Code, and provide legal assistance and services for a fee.[1111] This demonstrates that formal legal training is not necessary to understand the law; one can become an expert by reading legislation. In addition to regulations, the government also provide other types of public information that can benefit for ethnic minorities. On the other hand, the administration must obey the principles of proportionality and carefulness when publishing public information and data.[1112] According to section 7 of the Dutch Government Information Act the administrative authorities will provide a copy of documents, allow the applicant to take notes, provide a summary of documents, and supply information contained in the document. In addition, people can easily visit the official websites of govern-

[1110] Anoeska Buijze, *The Principle of Transparency in EU Law*, 's-Hertenbosch. Uitgeverij BOXPress, 2013, p. 83

[1111] Daniel S Lev, *Legal Evolution and Political Authority in Indonesia. Selected Essays.* The Hague, London, and Boston, Kluwer Law International, 2000.

[1112] G.H. Addink, Gordon Anthony, Antoine Buyse and Cees Flinterman (eds.), *Sourcebook Human Rights and Good Governance*, SIM Special No. 34, Utrecht 2010, p. 177.

ment bodies and check if the document they require is available. Most public documents are available on the Dutch government's website, including public documents related to ethnic minority interests, such information about immigration, the National Plan of Action on Human Rights, Equal Treatment Legislation, etc.

Meanwhile, the Indonesian Public Disclosure Act regulates access to public information according to Article 9, 10, and 11 of Law No 14 of 2008 which comprises (1) information to be supplied and published periodically which contains information regarding public agency, information activities, performance, financial reports and regulations; (2) information to be published immediately; (3) information to be available at any time such as the decisions of public agencies, agreements between the administration and a third party, working procedures, project plans and estimated annual expenses, etc. In other words, I say that the Indonesian public disclosure system is a disciplined, transparent system. Herewith, disciplinary power is exercised through the techniques of objectification, classification, and normalization, a power deployed through the whole socio-political body.[1113] Applicants can choose what public information they want to know. Of course, we can see the potential that the principle of transparency has to contribute to ethnic minority protection in the Netherlands and Indonesia; people, including ethnic minorities can access public information that can empower their position. However, in this research, there is no data available on how increased transparency supports ethnic minorities to directly struggle against the public entity.

Sadly, ethnic minorities' anxiety about challenging the administrative authority often outweighs their motivation to fight for their rights to know. The Turkish and Chinese communities often appear to prefer silence to resistance. Herewith, the principle of transparency and providing public information is merely the obligation of government rather than rights of residents in Indonesia. Furthermore, some information cannot be accessed under the Dutch Government Information

[1113] Dany Lacombe, *Reforming Foucault: A Critique of the Social Control Thesis*. The British Journal of Sociology, Vol. 47, No. 2 (Jun, 1996), pp. 332-352.

Act and the Indonesian Public Disclosure Act. Both Acts restrict access to information which may endanger the security of the administrative authorities, military intelligence, corporate and private sector business information. These restrictions are outlined in Article 10 of the Dutch Government Information Act.[1114]

Meanwhile, the restrictions of the Indonesian Public Disclosure Act are found in Article 6 of Law No. 14 of 2008 (see footnote).[1115] Information that is not categorised as public information is prohibited from being distributed includes confidential information of the administrative authorities, business information, personal rights, etc. More detailed restrictions are defined in Article 17 which organises what types of information are provided to the public.

As shown in the above discussion, the regime of the principle of transparency stipulates some restrictions to protect public order and private rights. Openness may result in an increase in demand for informa-

[1114] 1. Disclosure of information pursuant to this Act shall not take place insofar as:
   a. this might endanger the unity of the Crown;
   b. this might damage the security of the State;
   c. the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons.
2. Nor shall disclosure of information take place insofar as its importance does not outweigh one of the following:
   a. relations between the Netherlands and other states or international organizations;
   b. the economic and financial interests of the State, other bodies constituted under public law or the administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2;
   c. the investigation of criminal offences and the prosecution of offenders;
   d. inspection, control and oversight by administrative authorities;
   e. respect for personal privacy;
   f. the importance to the addressee of being the first to note the information;
   g. the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties

[1115] Article 6 (3) The Public Information that may not be supplied by a Public Agency as referred to in paragraph (1) are:
   a. information that may jeopardize the state;
   b. information relating to protection of the business from unhealthy business competition;
   c. information relating to personal rights;
   d. information relating to office secrets;
   e. the required Public Information is not within its authority or not yet documented.

tion that might be 'noisy' and disruptive.[1116] At the same time, widespread access to public information may have negative consequences, for instance terrorists could exploit information to support their radical, violent agendas.[1117] Therefore, the principle of transparency should organise which information becomes public, and which remains secret. Information related to business competition, national security, personal rights, and so on should be protected by the governments. Both the Netherlands and Indonesia have similar restrictions on information with the aim of providing security for people, the economic sector, individual rights, confidentiality in the investigation of criminal offenses, monetary policies, etc. Indeed, there are two sides of transparency, firstly, the principle of transparency ensures the rights to information and the rights to know according to Article 19 of the United Nations Universal Declaration of Human Rights.[1118] Secondly, the principle of transparency also protects common interests by carefully regulating circulation of public information.[1119] The provision of public information within tightly controlled restrictions generates a 'space' is, which I call 'the space of the game'.

In addition, the legal bases of the principle of transparency (e.g. the Public Disclosure Acts of Indonesia and the Netherlands) have made many significant contributions to improving public participation. From this point of view, the principle of transparency stimulates ethnic minority participation. The roles of NGOs, scholars, the media, and other democratic agents are so pivotal to intensifying ethnic minority participation. To be able to participate meaningfully, a person needs information to inform their decision. In doing so, the principle of transparen-

[1116] Bernard I Finel & Kristin M. Lord. *The Surprising Logic of Transparency*. International Studies Quarterly (1999) 43, 315-339.

[1117] Sam R. Bell, *Opening Yourself Up. The Role of External and Internal Transparency in Terrorism Attacks. Political Research Quarterly*, Vol. 67, No. 3 (September, 2014), pp. 603-614.

[1118] Jonathan Fox, *The Uncertain Relationship between Transparency and Accountability. Development in Practice,* Vol. 17, No. 4/5 (Aug., 2007), pp. 663-671.

[1119] James E. Alt & David Dreyer Lassen, *Transparency, Political Polarization, and Political Budget Cycles in OECD Countries*. American Journal of Political Science, Vol. 50, No. 3 (Jul., 2006), pp. 530-550.

cy can support people to make better choices to realise their goals.[1120] Herewith, public information can also bolster the position of the anti-discrimination bureaus in the Netherlands and NGOs in Indonesia. By the same token, in the Netherlands, anti-discrimination bureaus must be transparent to reinforce their functions of providing legal aid, registering complaints of discrimination, conducting human rights campaigns, establishing anti-discrimination networks, and so on (Article 4, 7, 8, 9 and 10 of the Municipal Anti-Discrimination Service Act). Similarly, in Indonesia, public information must be provided by NGOs, for instance the Indonesian Citizenship Institution (IKI), and the Legal Aid Institution (LBH) to deliver legal assistance to people. From the perspective of deliberative democracy, social consensus requires sufficient, accurate public information which enables actors to communicate easily in establishing an agreement.[1121] Of course, the onus is on the government to ensure that any communication has been correctly understood.[1122]

In order to perform their work as advocates for ethnic minorities, the anti-discrimination bureaus must have access to basic public information such as human rights legislation, legal procedural process related to complaints, the government's programs, etc. Several Dutch anti-discrimination bureaus including Rotterdam-RADAR, Amsterdam-MDRA, Art 1-Utrecht, Tumba-Frysland, are involved with analysing public information relating to anti-discrimination regulation as part of their broader role in combating discrimination. These bureaus actively fight against discrimination by organising meetings, documentation, and information related to issues of combating discrimination. Broadly speaking, the work of the bureaus can be split into two strands: first, preventing discrimination by reinforcing human rights educa-

[1120] Anoeska Buijze, *The Principle of Transparency in EU Law*, 's-Hertenbosch & Utrecht, Utrecht University, Uitgeverij BOXPress, 2013, p. 78.

[1121] Catharina Lindstedt, *Transparency is not enough: Making Transparency Effective in Reducing Corruption.* International Political Science Review. Vol. 31, No. 3 (June 2010), pp. 301-322.

[1122] Jason Bridges, *Rationality, Normativity, and Transparency*. Mind, New Series, Vol. 118, No. 470 (Apr., 2009), pp. 353-367.

tion, building social networks, and coordinating with other stakeholders (Immigration Affairs, Police, Municipalities, and so on); second, attending to complaints of discrimination and referring these complaints to competent institutions. Anti-discrimination bureaus can also provide legal advice, for instance, the MDRA-Amsterdam has provided legal advice to at least 52 people.[1123] In this context, the principle of transparency fosters the public dissemination of information which encourages the government to receive feedback from society.[1124] Therefore, anti-discrimination bureaus are transparent institutions that utilise public information for the benefit of society, and in particular those who are at greater risk of discrimination.

In Indonesia, the principle of transparency supports NGOs to be more active in participating with the government. For instance, the Indonesian Citizenship Institution (IKI) as discussed above, acquired public information on the procedure for birth certificate and ID card applications in Tangerang, Banten. From this public information, IKI was able to strengthen their program that supports people to apply for birth certificates and ID Cards. Many Benteng Chinese in Tangerang previously experienced significant had difficulties with accessing public services because many do not have a birth certificate or ID Card.[1125] Similarly, in the 1970s, the Legal Aid Institution also advocated for some Chinese people who were threatened with eviction.[1126] Under Soeharto, access to public information was extremely limited. Even well-connected people such as Adnan Buyung Nasution, the Director of The Legal Aid Institution (who was close with Governor of Jakarta Ali Sadikin) found it difficult to acquire information.

Clearly, a lot can be learned from the Dutch and Indonesian approaches to transparency, as is evident by the significant contributions they have made in empowering the public to participate with their government. Indeed, the principle of transparency is a necessity to stimulat-

[1123] Meldpunt Discriminatie Regio-Amsterdam. Jaarverslag 2015., p. 7.

[1124] David Stasavage, *Transparency, Democratic Accountability and the Economic Consequences*. American Journal of Political Science, Vol. 47, No. 3 (Jul., 2003), pp. 389-402.

[1125] Interview with Indradi Kusuma in September 2016.

[1126] Legal Aid Institution's archives on case law in 1971.

ing, empowering, and strengthening civil society and public institutions to combat discrimination. The work of transparency is related to the demand and supply of information.[1127]

5.2 Transparency and preventing social conflict

The principle of transparency and preventing social conflict may foster the implementation of good governance which toughens the norms for the government and legal protection of ethnic minorities. Greater transparency can produce information about various communities and contact among the groups which can foster to make better social relationship.[1128] In the Netherlands and Indonesia, the principle of transparency can be used to reduce social conflict between different ethnic groups. As previous chapters have explained, the relationship between the principle of transparency and peace among ethnic groups is very important. The National Human Rights Institutions of Indonesia and the Netherlands play significant roles in distributing information about ethnic minorities. At least, they present the report of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). These reports state the value that the principle of transparency has in combating discrimination. As an idea, the principle of transparency has an epistemological and metaphysical structure; the former provides an accumulation of experience and knowledge, and the latter is concerned about intuitions of people.[1129] With the principle of transparency, civil society can hold the government to account.[1130] Henceforth, democratic regimes are characterised by transparent institutions, lead-

[1127] Ronald B. Mitchell*, Sources of transparency: Information Systems in International Regimes*. International Studies Quarterly, Vol. 42, No. 1 (Mar., 1998), p. 109-130.

[1128] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 50.

[1129] Amy Kind, *What's so transparent about transparency? Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 115, No. 3 (Sep., 2003), pp. 225-244.

[1130] Jonathan Fox, *The Uncertain Relationship between Transparency and Accountability*. Development in Practice, Vol. 17, No. 4/5 (Aug., 2007), pp. 663-671.

ership, policymaking and processes.[1131] Furthermore, the principle of transparency, has several functions: (1) protecting ethnic minorities by informing the public properly for preventing social conflict; (2) the principle of transparency also encourages everyone, including ethnic minorities to act as *homo economicus*; to look for a better life of prosperity and welfare. One way in which this might manifest is by deploying the rights to know for entering the market, access to goods and services, etc.

The principle of transparency and preventing social conflict are intimately related. The principle of transparency cannot function in a marketplace of ideas that is distorted by racism.[1132] In the Netherlands, the Social and Cultural Bureaus play pivotal roles in describing the position of ethnic minorities. When they publish research about the Chinese and Turkish people who live in the Netherlands, this information can be used help people to understand ethnic minorities' socioeconomic-cultural history. One study undertaken by the Social and Cultural Bureaus found that the majority of (71,500) Chinese immigrants came to the Netherlands from the People's Republic of China and Hong Kong, but some also came from Indonesia and Suriname.[1133] One of the functions of this research was to inform the contribution made to society by the Chinese population in the Netherlands. The Social and Cultural Bureaus have also conducted similar research on the Turkish population in the Netherlands and Germany, and their position in the labour market. And, the research found that Turkish people face unfavourable conditions in the labour market in the Netherlands.[1134] This information must be reported sensitively to increase feelings of empathy towards ethnic minorities who experience grave difficulties when attempting to access economic fields. Of course, there is always a risk that information

[1131] Sam R. Bell, *Opening Yourself Up. The Role of External and Internal Transparency*. Political Research Quarterly, Vol. 67, No. 3 (September, 2014), pp. 603-614.

[1132] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 53.

[1133] Merove Gijsberts, et al, *Chinese Nederlanders van horeca naar hogeschool*. 2011. Sociaal en Cultureel Planbureau., p. 182.

[1134] Jaco Dagevos, et al, *Turken in Nederland en Duitsland. De arbeidsmarktpositie vergeleken*. 2006. Sociaal en Cultureel Planbureau, p. 60.

could be used by right wing group to attack ethnic minorities. But, at the same time, NGOs, international human rights agencies, scholars, and so on could use this data to promote more recognition of ethnic minority protection. In Indonesia, studying the position of ethnic minorities is the responsibility of the Indonesian National Commission of Human Rights. According to Article 8 of Law No. 40 of 2008 and Article 2 of Government Regulation No. 52 of 2010, the Commission has the authority to make reports on trends of discrimination. In the 2011 report, for instance, the Commission included a summary of their investigation on crime against humanity. The report states that Chinese-Indonesians living in cities were targeted and victimised.[1135] Unfortunately, no official report about Turkish people living in Indonesia has been compiled by the Commission or any other the public institution. One important case, following the Turkish government's retaliation to the attempted coup of 2016, resulted in multiple human rights violations including attempts to target expatriate Hizmet Turks. Therefore, from a human rights perspective, it is important to consider the increasingly vulnerable position of Turks who live in Indonesia. Members of the Turkish community have already submitted complaints to the Commission about the effect of human rights violations in Turkey on Turks that live in Indonesia. In response, the Commission sent an official letter to all the Turkish people that live in Indonesia, that explicitly states that they are protected by the Indonesian Government. At any time when a Turkish person feels they are in legal danger (for example with immigration affairs), they can show this letter. The letter helps to ensure that the fundamental rights of Turkish people will be protected according to Indonesian Constitution.

It is important to remember that all resistance involves an intersection between information, community attitudes, and violence.[1136] This is why it is so important for the government to manage public information with validity, accuracy, and to promote good governance and ethnic mi-

[1135] The Working Group for the Report of Discrimination, Indonesia Human Rights Report of the 2013 Law No. 40 of 2008, Indonesia Human Rights Commissions.

[1136] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 48.

nority protection. In addition, the principle of transparency supports freedom of the press, but also prevents the media from distorting the truth; lies and hoaxes can be debunked if facts are easily accessible.[1137] Of course, the problems of wilful misinterpretation and misrepresentation of public information will always persist, but the principle of transparency will continue to act as a valuable counterbalance to dishonesty.[1138] For instance, if a media organisation reported that Chinese-migrants have made few contributions and are less integrated with Dutch society in the Netherlands, people would able to evaluate the veracity of such a claim by referring to official reports.. In the Netherlands, a study conducted by the Social and Cultural Bureaus identified four distinct groups of Chinese people; people who arrived before 1990, people who arrived between 1990 and 1999, people who arrived after 2000, and second-generation immigrants. The study found that those who arrived after 2000 were more likely to be highly skilled professionals than those who arrived earlier. Additionally, second-generation Chinese immigrants were found to be well educated and better integrated with dominant Dutch political institutions.[1139]

The 2015 CERD report, presented by the Netherlands Institute for Human Rights, discussed discrimination against Chinese-Dutch people in the marketplace. One case in detailed in this report, involved Jumbo Supermarket and Kruidvat Supermarket who became the focus of a public scandal after refusing to serve Chinese people baby milk formula on the basis of ethnicity, consequently damaging the reputations of these retailers.[1140] Clearly, this report shows that private companies must consider the way they treat ethnic minorities if they wish to main-

[1137] James E. Alt & David Dreyer Lassen, *Transparency, Political Polarization, and Political Budget Cycles in OECD Countries*. American Journal of Political Science, Vol. 50, No. 3 (Jul., 2006), pp. 530-550.

[1138] Beverly R. Walther, *Discussion of Information Transparency and Coordination Failure: Theory and Experiment.* Journal of Accounting Research, Vol. 42, No. 2 Studies on Financial Reporting, Disclosure and Corporate Governance (May, 2004), pp. 197-205.

[1139] Merove Gijsberts, et al*, Chinese Nederlanders van Horeca naar hogeschool*, 2011. Sociaal en Cultureel Planbureau., p. 183.

[1140] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Report of the Netherlands.

tain good public relations. People must not receive differential treatment based on ethnicity. Service staff or cashiers cannot be allowed to discriminate against customers based on ethnicity. Without reporting about these cases, the public may not have a clear understanding of what is prohibited and what is allowed. Of course, ethnic discrimination can be sharp (direct discrimination) or soft (indirect discrimination) — the CERD report makes this classification and distinction clear.

Meanwhile, in Indonesia, increased public disclosure could encourage ethnic minorities to become more educated about the situation of government treatment of ethnic minorities. In the 2006 CERD Report, the Indonesian government is quite self-critical, particularly of the municipalities that have continued to discriminate against Chinese-Indonesians. Unlike native Indonesians, Chinese-Indonesians are often requested to provide to show an SBKRI (Letter of Evidence of Indonesian Citizenship) in the municipalities of Batam, Semarang, and Solo. This letter has become an instrument by which public officials extort bribes from Chinese-Indonesians in exchange for public service.[1141] Herewith, improvements to public information has resulted in fundamental information becoming available to everyone, and thus can be used to effectively mobilise against discrimination. For example, now, people are empowered to refuse requests for an SBKRI. Henceforth, public information can also be used by the ethnic minorities themselves to empower their social capital to defend their fundamental rights.

Generally speaking, many countries have implemented the rights to know; Sweden was the first in 1966, Colombia in 1988, and since 2002, even Zimbabwe and Tajikistan have introduced the principle of transparency protections.[1142] Thus, the principle of transparency has become an international trend,[1143] and is thought of as medicine for the

[1141] Report of International Convention on the Elimination of all Forms of Racial Discrimination on April, 4, 2006.

[1142] Jonathan Fox, *The Uncertain Relationship between Transparency and Accountability*. Development in Practice, Vol. 17, No. 4/5 (Aug., 2007), pp. 663-671.

[1143] Ronald B. Mitchell, *Sources of transparency: Information Systems in International Regimes.* International Studies Quarterly, Vol. 42, No. 1 (Mar., 1998), p. 109-130.

sickness of corruption that afflicts public institutions.[1144] This has been symbolically reflected in a corresponding trend in architecture —glass, crystal, finely woven diaphanous fabrics, and lattice screens have become commonplace materials in government buildings, displaying the mechanisms of the administration to the public.[1145] In the legal field, the principle of transparency describes the obligation of state institutions to provide public information and the fulfilment of the people's rights to know. In other words, the principle of transparency aims to clarify the responsibilities of government, politicians and public servants.[1146] Furthermore, weak transparency is unlikely to be effective in motivating people to participate.[1147] Of course, the principle of transparency is a vital concept to strengthening public advocacy in civil society.[1148]

The Social and Cultural Bureau's report 'Mark en Mohammaden' (Mark and Mohammad) explored the issue of ethnic discrimination in the labour market. A key finding of this study was that ethnic minorities with 'Arabic sounding names' regularly face barriers to entering the labour market because of their perceived ethnicity. The 2015 CERD of the Netherlands Institute for Human Rights' report integrated these findings into their own report to ensure that the issue received more attention.[1149] The Social and Cultural Bureaus have produced pivotal pieces of public information which ethnic minorities and equal treatment activists should know. Their research on Chinese-Dutch people describes

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[1144] Catharina Lindstedt, *Transparency is not enough: Making Transparency Effective in Reducing Corruption*. International Political Science Review. Vol. 31, No. 3 (June 2010), pp. 301-322.

[1145] Deborah Ascher Barnstone, *Transparency, A Brief Introduction.* Journal of Architectural Education (1984-), Vol. 56, No. 4 (May, 2003), pp. 2-5.

[1146] James E. Alt & David Dreyer Lassen, *Transparency, Political Polarization, and Political Budget Cycles in OECD Countries.* American Journal of Political Science, Vol. 50, No. 3 (Jul., 2006), pp. 530-550.

[1147] Amy Kind*, What's so transparent about transparency? Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 115, No. 3 (Sep., 2003), pp. 225-244.

[1148] Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*. Yale Law & Policy Review, Vol. 31, No. 1 (fall 2012), pp. 79-140.

[1149] Oordeelnummer 2015-43. College voor de rechten van de mens and Oordeelnummer 2015-102. College voor de rechten van de mens.

that the first Chinese immigrants to the Netherlands came to work in the restaurant industry.[1150] In the Netherlands, the first wave of Chinese migrants were known as the peanut sellers, later generations of migrants now occupy a much more privileged position in labour market.

Chinese restaurants and catering businesses continue to be the most common form of employment for Chinese people in the Netherlands; over 43 % of Chinese employed within these Chinese economic industries. Interestingly, unemployment for Chinese-Dutch people is quite low (approximately 6%).[1151] Other ethnic minorities experience similar problems, particularly in the labour market. For instance, the Turkish people living in the Netherlands, have encountered numerous legal barriers to entering the market. Another piece of research by the Social and Cultural Bureaus also described the changing position of Turkish people working in the Netherlands, who first came to the Netherlands in the early 1960s as 'guest workers'. The primary barriers for first-generation Turkish immigrants to accessing the Dutch labour market included a low level of education, a lack of Dutch language, socio-cultural integration, racial discrimination, and government policies.[1152] Education was also a major barrier for the first generation of Chinese immigrants, only 35% of whom completed primary school.[1153] The following generations of immigrants and ethnic minorities who have remained in the Netherlands have received a better education and become more integrated with the dominant political institutions. Despite their relatively low unemployment rate, Chinese people in the Netherlands often have low incomes —one of five has income of less than 10,000 euros per annum compared to national average salary 37.000 euros per year.[1154]

[1150] Merove Gijsberts, et al*, Chinese Nederlanders van Horeca naar hogeschool*, 2011. Sociaal en Cultureel Planbureau., p. 183.

[1151] Merove Gijsberts, et al, *Chinese Nederlanders van Horeca naar hogeschool*, 2011. Sociaal en Cultureel Planbureau., p. 185.

[1152] Jaco Dagevos, et al, *Turken in Nederland en Duitsland*. De arbeidsmarktpositie vergeleken. 2006. Sociaal en Cultureel Planbureau., p. 67.

[1153] Merove Gijsberts, et al. *Chinese Nederlanders van Horeca naar hogeschool*, 2011. Sociaal en Cultureel Planbureau., p. 183.

[1154] Merove Gijsberts, et al, *Chinese Nederlanders van Horeca naar hogeschool*., p. 186, See also, Modaal Inkomen 2017, available at https://www.gemiddeld-inkomen.nl/modaal-

As demonstrated by the above discussion, research and accurate information about ethnic minorities is needed to fight against prejudice, stereotyping, discrimination, etc. Herewith, the principle of transparency provides strong incentives for multicultural solidarity.[1155] Public information also been used by NGOs in Indonesia to provide legal assistance to ethnic minorities. For instance, NGOs in Donggala need access to public information to substantiate their advocacy for ethnic minority groups.[1156]

6. The principle of participation

The principle of participation, a principle of good governance, may help to toughen the norms for Indonesian and Dutch Government and legal protection of ethnic minorities who live in either countries. This principle is also implemented by administrative authorities, the Ombudsman, the National Human Rights Institution and the courts to protect ethnic minorities. In this section I will elaborate upon the principle of participation of ethnic minorities with the specification of principle of participation and what it comprises: first, the existence of constitutional motives for ethnic minorities who lodge a complaint with a governmental institution as a type of direct participation; second, using the CLEAR method to oversee the participation of ethnic minorities in the Netherlands and Indonesia; third, the social phenomena of citizen's panels and community-level participation. Although the Netherlands and Indonesia are democratic countries, and people are able to enjoy political freedom, the principle of participation of ethnic minorities is still insufficient to eradicate discrimination. But, democracy without the principle of participation is meaningless.[1157] Thus, the implementation of good governance and democracy can disrupt the social hierarchy.[1158]

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inkomen-2017/, accessed on 14 March 2018.

[1155] Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy or Peace,* New York, State University of New York Press, 2006, p. 50.

[1156] The Working Group for the Report of Discrimination, Indonesia Human Rights Report of the 2016 Law No. 40 of 2008, Indonesia Human Rights Commissions.

[1157] John Stuart Mill, *Essays on Equality, Law, and Education,* University of Toronto Press, 1984, p. 333-336.

[1158] Iris Marion Young, *Inclusion and Democracy.* Oxford, Oxford University Press, 2000.,

First, constitutional motives encourage ethnic groups to defend their interests through legal means. For example, Turkish and Chinese people in Indonesia and the Netherlands lodge complaints through the ombudsman, the National Human Rights Institutions, and appeals to the courts. Constitutional motives are the psychoanalytic jurisprudence[1159] that ethnic minorities play to protect their individual interests through dispute resolution.[1160] On some occasions, ethnic minorities use the legal means instead of political movements, demonstrations, and propaganda. In the Netherlands, the participation of ethnic minorities is much higher than in Indonesia. For example, approximately 200 discrimination cases were reported to the Dutch Ombudsman from 2013-2015, at the same time, only a few cases were submitted to the Indonesian Ombudsman. In total, the Dutch Ombudsman receives between 35,000-38,000 complaints each year, whereas the Indonesian Ombudsman only receives between 5.000-9.000, despite Indonesia having a much larger population.

The Ombudsman is believed to be an institution that provides instruments for effective the principle of participation, particularly with regards to ethnic minorities. In 2013, the Dutch Ombudsman received numerous complaints the Tax Department (5,068 cases), municipalities (5,023 cases), the police of (2,792 cases), the Employee Insurance Agency (UWV) (2.466 cases), the Central Judicial Collection Agency (CJIB) (1,086 cases).[1161] In addition, the Ombudsman received 55 complaints related to discrimination in 2013. After receiving a complaint, the Ombudsman conducts an investigation into the alleged maladministration or discrimination.

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p. 53-55.

[1159] Jacques Lacan, *The Other Side of Psychoanalysis.* Book XVII. Translated with Notes by Russell Grigg. 1991. New York, Norton & Company., p. 29.

[1160] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018.

[1161] The Netherlands Ombudsman Report of 2014.

On the other hand, in Indonesia, the Indonesian local administrative authorities received the most complaints from the public; in 2013, of 45.02% of local administrative authorities were criticised regarding their service provision. In total, the Indonesian Ombudsman received 5.173 reports, 13% of which concerned complaints with the Police in 2013. Of all the reports only 125 or 2.4% were concluded to constitute maladministration.[1162]

Second, an evaluation of ethnic minority participation in the Netherlands and Indonesia using the CLEAR method will generate a comprehensive picture of the legal field. The CLEAR method aims to investigate several variables from (1) the ability of ethnic minorities to participate; (2) the administrative authorities' commitment to providing channels or legal means of participation; (3) the participatory channels that are available to ethnic minorities; (4) the need of participation by ethnic minorities; (5) the administrative authorities' response to the participation of ethnic minorities. In both Indonesia and the Netherlands, ethnic minorities tend to have little knowledge of the legal system. For instance, most Turkish people in Indonesia do not have access to someone with a legal background who can provide specialist advice about participating in politics and government. In the Netherlands, Turkish and Chinese people rarely contact the Ombudsman and the Netherlands Institute for Human Rights. However, both the Indonesian and Dutch governments have shown dedication to improving the fulfilment of human rights in their human rights action plan. The Dutch National Action Plan of Human Rights promises to combat the issue of ethnic profiling in many fields of administration. Meanwhile in Indonesia, the National Action Plan of Human Rights aims to improve the protection of ethnic minorities by strengthening transparency and professionalism of public servants. Further, ethnic minorities in both countries are provided with suitable legal channels to submit complaints concerning discriminatory treatment. These legal channels are, of course, the National Human Rights Institutions, the Anti-Discrimination Bureaus (in the Netherlands), the

[1162] Indonesia Ombudsman report of 2013.

Ombudsmen, and the courts. These institutions should be sufficient for ethnic minority justice to prevail. Unfortunately, according to literature reviews, field research and interviews, ethnic minorities appear reluctant to participate, instead they are often silent and passive their host. However, it is important to recognise that it is the responsibility of the administration to empower ethnic minorities to participate. When the administration's response is good, ethnic minorities are satisfied that their voice has been heard. However, if the response is deemed to be insufficient then ethnic minorities can sue through the courts. The courts are the final option available to ethnic minorities who wish to defend their interests. Unfortunately, the courts have repeatedly been ineffective in protecting ethnic minorities in Indonesia; the confiscation of land in Yogyakarta, the crimes against humanity in the past, hate crimes, are yet to be satisfactorily resolved (See chapter 3).

Third, the social phenomena of citizen's panels and community-level participation in the Netherlands and Indonesia are unique from a legal perspective. Citizen's panels are less commonly used by ethnic minorities in the Netherlands, and thus the Turkish and Chinese communities make a smaller contribution in law making process, especially in the process of issuing Equal Treatment Act in 1994. Both communities seemed to be absent during the process of drafting the Equal Treatment Act, despite it being very relevant to their interests. On the other hand, in Indonesia the Chinese community has made many significant legal contributions to legislation that protects their interests, for example in Constitutional Assembly 1956-1959, the Act of Citizenship (Law No. 12 of 2006) and the Anti-Discrimination Law (Law No. 40 of 2008).

In the Netherlands, Community-level participation was present in the form of the of the National Consultative Platform for Minorities which aimed to communicate the interests of ethnic minorities to the government, thus providing a means for the Turkish and Chinese communities to participate in the policy making process. Sadly, this platform was later disbanded by the Dutch Government.

6.1 A constitutional motive

A constitutional motive may fortify the realisation of the concept of good governance which strengthens the norms for the government and legal protection of ethnic minorities. A constitutional motive drives ethnic minorities to lodge a complaint through three main legal channels: The Ombudsman, the National Human Rights Institutions, and the courts. In practice, additional legal channels are available, but my research is focused upon these three institutions. These three legal channels are necessary because ethnic minorities want to defend their interests or request for protection from discrimination. Each institution functions to process a particular type of complaint. First, the ombudsman is only concerned with the activity of public institutions and public bodies, for example the Dutch Ombudsman has investigated the Schiphol cases that were discussed in chapter 4,[1163] misuse of power by police,[1164] complaints with public services,[1165] discrimination in the public sector,[1166] problems with immigration services,[1167] etc. The ombudsman is an instrument that ethnic minorities can wield to successfully challenge the government, and in many cases, receive reparation for the damage caused by administrative discrimination.[1168] Furthermore, the Ombudsman also provides a legal space for ethnic minorities to exercise their constitutional motives. The Indonesian Ombudsman is very similar, and also plays a role in protecting ethnic minorities' constitutional motives. Ethnic minorities can submit complaints to the Indonesian Ombudsman regarding problems relating to immigration,

[1163] Rapportnummer: 2003/222. Datum 25 July 1998., Rapportnummer: 1998/537. Datum 3 December 1998., Rapportnummer: 2001/246. Datum 14 August 2001.

[1164] Rapportnummer: 2000/ 246, datum: 12 Juli 2000, see also., Rapportnummer 2000/221. Datum 21 June 2000, Rapportnummer: 1998/241. Datum 25 Juni 1998.

[1165] Rapportnummer 2013/ 156. Datum: 25 Oktober 2013.

[1166] Rapportnummer 2000/246. Datum 12 Juli 2000.

[1167] Rapportnummer: 1998/ 090. Datum 26 March 1998., and see, Rapportnummer: 2010/ 305. Datum 19 October 2010.

[1168] John W. Wade, *Tort Law as Ombudsman.* Oregon Law Review. Vol. 65, 1986.

land ownership,[1169] and economic affairs.[1170]

The Ombudsman is most effective in encouraging the administrative authorities on central level to obey the idea of good governance in Indonesia and the Netherlands. The constitutional motives of ethnic minorities can be executed through the investigations of the Indonesian Ombudsman or the Dutch Ombudsman. Moreover, the Ombudsman, can investigate violations of integrity and maladministration that could harm ethnic minorities.[1171] For example, immigration is a field that often causes a great deal of anxiety for ethnic minorities, and an area in which discrimination is often felt. As a result, matters relating to immigration are commonly the subject of complaints submitted to the Indonesian and the Dutch ombudsmen. Of course, the focus this research is not on immigration law, although the topic is clearly something that warrants further research. From the point of view of ethnic minorities, institutions of immigration are often discriminatory. Immigration law, by the way, tend to discriminate foreigner which compared to national citizens. However, immigration agency does not allow to exploit people in the position of vulnerable for instance extorting migrants to obtain illegal fee, every treatment must be based on law, prohibiting arbitrariness, and respecting international human rights treaty. Hence, the Ombudsman can be understood as a mediator of conflicts between ethnic minorities and public institutions (like Immigration Affairs). Though immigration problems exist in both Indonesia and the Netherlands, different ethnic minority groups in each country have demonstrated varying strategies (both in magnitude and type) in response to discrimination. For instance, Turkish people reported police discrimination to the Dutch Ombudsman. The Turks used their constitutional motives to ask the Ombudsman to investigate improper conduct of the police. Sadly, it is often difficult to provide sufficient proof of discrimination. Even when ample evidence satisfactory outcomes are disappointingly rare. In

[1169] The Indonesia Ombudsman's Reports on 08 March 2016. No. Reports Registration: 0052/ LM/ III/ 2016/ Yog.

[1170] The Indonesia Ombudsman's Report. Case No. 0104/LM/VII/2014/BNA.

[1171] Laurence W. Maher, *Complaining to The Ombudsman*. Legal Service Bull., 11 (1976-1977).

Indonesia, complaining to the government is still taboo— ethnic minorities often remain silent. For this reason, I am especially impressed by the courageous efforts of the Turkish and Chinese communities' actions in submitting their complaints to the Ombudsman.

Second, ethnic minorities can access the National Human Rights Institutions as a means of deploying their constitutional motive and defending their fundamental rights. If the Ombudsman's concern is integrity of the administrative authorities, then the National Human Rights Institutions are of course concerned with human rights protection. The Indonesian National Commission of Human Rights and the Netherlands Institute for Human Rights have multiple functions to protect ethnic minorities. In the Netherlands, ethnic minorities complaining through the Netherlands Institute for Human Rights to deploy their constitutional motives in response to discrimination in the labour market,[1172] when accessing goods and services,[1173] or ethnic profiling by Police officers,[1174] etc. Similarly, the National Commission of Human Rights of Indonesia has received many complaints from ethnic minorities concerning discrimination in labour market, ethnic bullying, immigration problem, crimes against humanity,[1175] genocide.[1176]

An important aspect of the National Human Rights Institutions is that they have authority to investigate of the private sector, whereas the ombudsman does not. The National Human Rights Institutions can play beyond the public arenas and touch the private sector in accordance with the Paris Principles. Therefore, ethnic minorities can fight for their emancipation by exerting their constitutional motive through National Human Rights Institutions when they suffer discrimination in the private sector. For instance, the Netherlands Institute for Human

[1172] Oordeelnummer 2015-43. College voor de rechten van de mens. See also, Oordeelnummer 2015-102. College voor de rechten van de mens.

[1173] Oordeelnummer 2015-55. College voor de Rechten van de mens. See also, Oordeelnummer 2014-26. College voor de Rechten van de mens.

[1174] Oordeelnummer 2014-86. College voor de Rechten van de mens.

[1175] Komnas HAM Republik Indonesia. Hasil Penyelidikan Pelanggaran HAM yang Berat Peristiwa 1965-1966. 2012, Komnas HAM RI.

[1176] See., http://www.tribunal1965.org/id/1965-genosida-ala-indonesia/ , November, 08, 2016.

Rights condemned the actions of the supermarkets that refused service to Chinese women who were trying to buy baby milk formula.[1177] The institution also criticised the employer who was found to have discriminated against a person with an 'Arabic-sounding' name.[1178] Similarly, the National Human Rights Institution of Indonesia has also received complaints from ethnic minorities that are examples of exerting their constitutional motives. Ethnic minorities can fight back when the private sector discriminates against their ethnicity. For instance, complaints concerning the termination of the director of PTPN IV's employment[1179], and the misrepresentation of Jakartan culture in a documentary film[1180] are two examples of cases that have been submitted to the Indonesian National Commission of Human Rights. The Commission has since investigated both of these complaints.

Another means by which ethnic minorities exercise their constitutional motive is through the legal basis of the Dutch Equal Treatment Act and the Indonesian Human Rights Act. These two main acts dispute settlements are supported by Article 3 a of the Netherlands Institute for Equal Treatment Act, and Articles 76 and 89 of the Indonesian Human Rights Act. These supporting articles endow institutions with the power of investigation. Hence, the constitutional motives of ethnic minorities in the Netherlands and Indonesia are protected by law. Indeed, constitutional motive is the most relevant concept where it concerns refers to the execution of human right legislation. These institutions have a function of ensuring that human rights instruments are implemented.[1181] Although these institutions do not explicitly refer to 'good governance,' their work

[1177] Oordeelnummer 2015-56. College voor de Rechten van de mens, Oordeelnummer 2015-55. College voor de Rechten van de mens, and Oordeelnummer 2015-26. College voor de Rechten van de mens.

[1178] Oordeelnummer 2015-43. College voor de Rechten van de mens.

[1179] Indonesian National Commission of Human Rights 2014 reports on discrimination against ethnicity.

[1180] Indonesian National Commission of Human Rights 2014 reports on discrimination against ethnicity

[1181] Linda C. Reif, *Building Democratic Institutions: the Role of National Human Rights Institutions in Good Governance and Human Rights Protection*. Harvard Human Rights Journal/ Vol. 13.

certainly shares the same spirit.[1182] Sadly neither these, the Ombudsmen nor the Human Rights Institutions have legal binding power; they can only make recommendations to pressure the government to change legal circumstances. Furthermore, the Dutch institution's recommendations tend to be more effective when compared with their Indonesian counterparts. Sadly, the Indonesian' institution also does not have a tool to evaluate whether its recommendations are effective. The Netherlands Institute for Human Rights' opinion and the Dutch Ombudsman's recommendation are voluntarily implemented in more than 80 % of cases. Still, legally binding powers are reserved solely for the courts. In the Netherlands and Indonesia, ethnic minorities can file a lawsuit with the courts which can be understood as an example of constitutional motive in action. The vast majority of lawsuits filed in the Netherlands by ethnic minorities are related to social benefit problems, [1183] residence permit cases,[1184] labour market cases and so on.[1185] Meanwhile, in Indonesia, ethnic minorities, particularly Chinese-Indonesians have also the courts in the case to resolve conflicts over land ownership and[1186] changing-name cases. Thus far I have not been able to find an example of a lawsuit filed by a Turkish person living in Indonesia. The role of the courts is a pivotal element to make human rights legislation to be considered and more powerful to become the legal basis of the verdict which has a le-

[1182] C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights,* AM. U. International Law Review, 2004-2004.

[1183] Uitspraak 201009845/ 1/ V6 de Raad van State Datum 21 September 2011, Uitspraak 201406604/ 1/ V6 de Raad van State Datum 3 Juni 2015, and Uitspraak 201009845/ 1/ V6 de Raad van State Datum 3 Juni 2015.

[1184] Uitspraak 200903135/ 1/ 6 de Raad van State Datum 31 Januari 2010, Uitspraak 201406604/ 1/ V6 de Raad van State Datum 3 Juni 2015.

[1185] Rechtbank Den Haag, Datum uitspraak 04 September 2015. ECLI: NL: RBDHA: 2015: 12632, Rechtbank Den Haag Datum 05 Juni 2008. ECLI: NL: RBSGR: 2008: BD3789, Rechtbank's-Gravenhage Datum 19-03-2012. ECLI: NL: RBSGR: 2012: BW1274, Centrale Raad van Beroep. Datum 25-05-2010. ECLI: NL: CRVB: 2010: BM 7006, Rechtbank's-Gravenhage. Datum 19-03-2012. ECLI: NL: RBSGR: 2012: BW 1274. Rechtbank's-Gravenhage. Datum 19-12-2010. ECLI: NL: RBSGR: 2010: BQ3897

[1186] Case law: 31/ Pdt.P/2012/PN. Mkt, Ambon Court Decision with the Number of Case: 54/Pdt. P/2012/PN.AB

gal binding effect.[1187] Thus, a malfunction of the courts, jeopardises.[1188] Submitting lawsuit into the court is an example constitutional motive which pursues the legal binding effect.

6.2 The CLEAR method

The CLEAR method can be used to analyse the reinforcing of the norms for the government and legal protection of ethnic minorities. The CLEAR method, as one of specifications of the principle of participation, can be used to evaluate three elements of the principle of participation, namely, the ability of the participant to participate, the facilitation of this participation, and the response of the administration to it. The principle of participation is a concept which allows people to express their needs to the administration.[1189] Without the possession of legal capacity by the people proper facilitation, and a responsive government, it is difficult to ensure the participation of ethnic minorities. The legal channels for participation of the Netherlands and Indonesia are discussed above; the National Human Rights Institutions, the Ombudsman and the court all facilitate the principle of participation. Another advantage of the CLEAR method is that it can assess the role of administration and law enforcement bodies, including, for example the Dutch Anti-Discrimination Bureaus, and the local offices of, the Indonesian National Commission of Human Rights.

The CLEAR method elucidates that the rights to complain must be equipped with suitable facilitation.[1190] In both Indonesia and the Netherlands the police received reports of discrimination. As estab-

[1187] Varun Gauri & Daniel M. Brinks, *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge, Cambridge University Press, 2008, p. 5-6.

[1188] Tom Ginsburg and Tamir Moustafa, *Rule by Law the Politics of Courts in Authoritarian Regimes*, Cambridge University Press, 2008, p. 3-6.

[1189] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, London & New York, Verso, 1985, p. 24-28.

[1190] G.H. Addink, *Local and Regional Participation in Europe; A comparative explanatory study on the application of the participation principle at local and regional level within the framework of the Council of Europe,* Utrecht 2009, available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/docs/provincie_utrecht_1_en.pdf, last visited March 1st 2018.

lished above, hate crimes are prohibited by both Dutch and Indonesian Law (Law No. 40 of 2008). The police play a significant role in attending to complaints of discrimination. They may use mediation as a method to solve the problem of discrimination between the parties. Each year, the Dutch police receive more than two thousand reports of hate crime. By contrast, the Indonesian police receives very few reports of hate crime. Interestingly, the Indonesian cybercrime unit is very active in banning and prosecuting hate speech on social media. People are able to report discriminatory content on social media through the police office.

In Indonesia, right wing Islamic groups spread anti-Chinese and anti-communist sentiment, and try to stoke disharmony between Muslims and non-Muslims. Meanwhile, in the Netherlands, populist Islamophobia and anti-immigrant movements have caused an increase in hate towards ethnic minorities. Hence, the anti-discrimination bureaus have an important role to play. From the perspective of the CLEAR method, the anti-discrimination bureaus effectively facilitate the participation of ethnic minorities. These institutions receive thousands of reports of discrimination per year, demonstrating that there is a demand for their existence. The work of Rotterdam-RADAR, Amsterdam-MDRA, Art 1-Utrecht, Tumba-Frysland and other anti-discrimination bureaus have been successful in facilitating the participation of ethnic minorities. Art-1 Utrecht, for instance, provided assistance to a Turkish person who was excluded from Yacht B.V.'s recruitment process despite meeting the person specification required for the role. After suspecting that he had been discriminated against because of his 'Arabic sounding' name, he then re-submitted an otherwise identical application under a fake 'Dutch-sounding' name and was subsequently invited to an interview.[1191] This person reported this incident to Art 1 of Utrecht and brought this case to the Netherlands Institute for Human Rights.

Anti-discrimination bureaus are pivotal institutions from the concept of the Clear method. 2014 saw a record number (9.778) of reports of discrimination.[1192] Anti-discrimination bureaus are the most accessi-

[1191] Oordeelnummer 2015-43. College voor de Rechten van de mens.

[1192] Wies Dinsbach, Jessica Silversmith, Erik Schaap, Rita Schriemer, Kerncijfers 2012-

ble public institutions that can register of discrimination. These institutions do not only facilitate the registration of incidents, but also provide legal advice and assistance, conduct research, and establish a network of activists, human rights scholars, and NGOs etc (see Articles 4, 7, 8, 9, and 10 of the Municipal anti-discrimination service Act). As they are the most easily accessible institutions, it is important that ethnic minorities are aware with their functions and procedures. For example, not every complaint can proceed to further stage; of the 744 reports received by Ieder1Gelijk in South Gelderland, only 261 were selected for investigation.[1193] Anti-discrimination bureaus have, become a crucial institution in supporting the legal infrastructure of ethnic minority participation.

In Indonesia, the local offices of the National Commission of Human Rights serve a similar function to the Dutch Anti-Discrimination Bureaus. In 2015, the local branches of the Commission conducted an evaluation of the implementation of anti-discrimination acts. The CLEAR method emphasises the importance of local representatives of national legal infrastructure. For example, the local office of West Kalimantan found that Confucians (most of whom are the Chinese) were receiving disproportionately low support from the government when compared to other religions (in terms of subsidies, religious education in schools etc). The local office was able to attract attention to the issue from the media and government to improve the treatment of Confucians in Pontianak.[1194]

From the perspective of the CLEAR method, the legal infrastructure of the Netherlands and Indonesia is important; multiple public institutions are available to ethnic minorities (the National Human Rights Institutions, Ombudsman, Anti-discrimination Bureaus, the Police, the

2014. Landelijk overzicht van Klachten en meldingen over discriminatie, geregistreerd bij de antidiscriminatievoorzieningen. 2015. Landelijke Brancheorganizatie van Antidiscriminatiebureaus (LBA) en Samenwekende Antidiscriminatievoorviegen Nederland (SAN).

[1193] Melpunt Discriminatie Deventer, Art 1 Noord Oost Gelderland, Ieder1Gelijk (Gelderland-Zuid). Discriminatiecijfers 2014. 2015. Antidiscriminatievoorzieningen Oost-Nederland. Melpunt Discriminatie Deventer, Art 1 Noord Oost Gelderland, Ieder1Gelijk (Gelderland-Zuid).

[1194] The Working Group for the Report of Discrimination. Indonesia Human Rights Report of the 2011 Law No. 40 of 2008, Indonesia Human Rights Commission.

local offices). The existence of legal channels for ethnic minorities to participate is provided. However, there is a stark contrast between the style of ethnic minority participation between the two countries, and how the governments respond to this participation. To describe these differing styles of participation I use the metaphor of the 'loud people' of the Netherlands and the 'quiet people' in Indonesia. In 2014, the Netherlands received 15.897 reports of discrimination through the Anti-Discrimination Bureaus, the police, public prosecutors, etc.[1195]In contrast, only 10 reports were filed with the Indonesian National Commission of Human Rights in 2014. The much larger number of reports submitted in the Netherlands does not mean that discrimination is worse rather, people in the Netherlands are more likely to register their complaints; public awareness of the complaints procedure is high, and people understand their fundamental rights and the basic logic of the legal game. Conversely, the Indonesian people prefer to harmonise with the system, especially in Javanese culture.

Furthermore, the principle of participation and its specifications in Indonesia and the Netherlands is guaranteed by the Constitutions and national legislation. The use of the word 'everyone' unambiguously includes ethnic minorities within legislation that guarantees the right to participate with the government. Article 1 of Dutch Constitution and Article 28 of the Indonesian Constitution yields the legal power and legal basis for ethnic minorities to become more involved with public participation. These articles not only protect the interests of the majority, but encourage everyone to take part in political life. Additional legislation provides even more opportunities for ethnic minorities to participate. Similarly, Article 3 of the Indonesian Human Rights Act also uses the word 'everyone' when guaranteeing the fundamental rights of equal treatment, the right to be recognised before the law, and the right to live free from discrimination. The existence of national legislation is needed to empower and strengthen the position of marginalised or vulnerable

[1195] Centraal Bureau voor de Statistiek, Registratie discriminatieklachten bij antidiscriminatievoorzieningen 2014. Methode en uitkomsten, 2015, Centraal Bureau voor de Statistiek, 12.

groups.[1196] The equivalent Dutch legislation, the Equal Treatment Act combats against discrimination and ethnic stereotyping. Ethnic minorities are able to lodge complaints regarding discrimination in the labour market in accordance with Section 5 of the Dutch Equal Treatment Act. In addition, in the case of violation of access to goods and services ethnic minorities can submit a complaint using section 7 of the Dutch Equal Treatment Act.

In Indonesia, despite substantial human rights provisions, reports of discrimination are rare —excluding internet hate crime, fewer than 30 reports are received per year.[1197] People must be more brave and proactive, and report cases of discrimination the National commission, police, Ombudsman, and other legal institutions.

My analysis of, ethnic minority participation reveals an interesting legal phenomenon; in the Netherlands, Turkish people in the Netherlands submit thousands of lawsuits to the court and hundreds of cases to the Ombudsman. Meanwhile, Chinese people rarely lodge a complaint or appeal either in the courts, the Netherlands Institute for Human Rights, or the Ombudsman. Almost the opposite is true in Indonesia, where the Turkish people have submitted zero lawsuits to the courts, and only a single case to the National Commission of Human Rights and the Ombudsman. On the other hand, the Chinese community in Yogyakarta has sent many complaints regarding the prohibition of land ownership on grounds of ethnicity through the Ombudsman, the Indonesian National Commission of Human Rights, and the courts.

From the above discussion, it should now be clear that maximising the capacity of people to participate is an important step to increasing participation itself.[1198] Meaningful support for victims of discrimination may help provide the courage that is needed for the fight of combat-

[1196] Allen Buchanan, *The Heart of Human Rights*. Oxford, Oxford University Press, 2013, p. 50.

[1197] Sekretariat Jenderal Dewan Perwakilan Rakyat Republik Indonesia, Proses Pembahasan Rancangan Undang-Undang tentang Hak Asasi Manusia, 2001.

[1198] Gerard Clarke, *The Politics of NGOs in South-East Asia.* Oxford & New York, Routledge, 1998, p. 25-27.

ting discrimination in the labour market and another public sphere.[1199] Only through active participation of community can ethnic minorities make their aspirations heard by the government.[1200] In this section, a CLEAR method analysis has shown that the legal infrastructure of the Netherlands and Indonesia is suitable to supporting ethnic minority participation. Without the principle of participation, individually or collectively, achieving one's goals will be difficult.[1201] With effective campaigns and legal pressure, ethnic minorities can terminate the racist fantasies of the majority.[1202]

6.3 Citizen's panels and community-level participation

Citizen's panels and community-level participation, as the specifications of the principle of participation, can be seen the specifications of the principle of participation which may bolster the norms for the government and legal protection of ethnic minorities. Citizen's panels and community-level participation have been possible methods of participation) for ethnic minorities in Indonesia and in the Netherlands. Prior to Indonesian independence, Chinese-Indonesians made many contributions to politics, government, education, etc.[1203] Chinese-Indonesians were also active in promoting human rights during the process of formulating the Human Rights Act in 1999. By way of contrast, neither Chinese or the Turkish people living in the Netherlands, as mentioned above, were present during the creation of the Equal Treatment Act in 1990-1994. Most of the political support for the draft of the Equal Treatment Act came from international and local human rights organisations,[1204]

[1199] Paul Burstein, *Attacking Sex Discrimination in the Labor Market: A Study in Law and Politics*. Social Forces. Vol. 67:3, March 1989.

[1200] Michael K Middleton, *Participation for All: A Guide to Legislative Debate*, New York, IDEBATE Press, 2007, p. 8-12.

[1201] Adrian Wilkinson, Paul J. Gollan, Mick Marchington, *The Oxford Handbook of Participation in Organizations,* Oxford, Oxford University Press, 2010, p. 187.

[1202] Awaludin Marwan, *Radical Subject of Zizekian Study: Racist Fantasy Termination! Protection Chinese Ethnic Minorities in the Era of Gus Dur*. Berlin, Lambert Academic Publishing, 2013, p. 5-14.

[1203] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Seattle, University of Washington Press, 2011, p. 10-15.

[1204] Some groups who involved in the political debate to support the draft of Equal Treat-

scholars, human rights activists, etc. Currently, in the Netherlands, there are members of parliament from both Turkish-Dutch and Chinese-Dutch backgrounds politicians in the Dutch parliament. Denk, a political party started by Turkish-Dutch people now has two representatives in parliament. Broadly speaking, Denk campaigns under a banner of anti-discrimination, multiculturalism and social democracy. The party has also made use of citizen's panels and community-level participation to empower their constituents to participate. However, Denk is still a young party and will need more time before they can compare favourably to the prolific participatory movements of Baperki in Indonesia.

Citizen's panels, one of the specifications of the principle of transparency, are large numbers of people who group together to pressure public bodies, this group has an official status and representative in government bodies. The biggest Chinese-Indonesian citizen's panel was Baperki (the consultative body of Indonesian citizenship) which, in the 1960's, had over 100 local branches and a membership exceeding a million members.[1205] Part of Baperki's success was a result of having several members in parliament and the Konstituante after the 1955 general election. Their focus was promoting equal treatment among citizens and fighting against discrimination.[1206]The most significant achievements of Baperki's legacy in Indonesia are the roles that they played in the amendment of the Indonesian Constitution, and influencing the law-making process of the Citizenship Act. Their participation effectively achieved their legal goals by influencing public policy and legislation.[1207] Although most of the members of Baperki were Chinese-Indonesian, no rules barred other ethnicities from becoming members; one local

ment Act ranging from Amnesty International, E-Quality, Art.1, Refugee Work (VluctelingenWerk), Gender Network Group Association (Netwerk VN-Vrouwenverdrag), Aim for Human Rights, and the Dutch Section of the International Commission of Jurists (Nederlands Juristen Comité voor de Mensenrechten). See., Tweede Kamer, vergaderjaar 1990-1991, 22 014, nr. 3.

[1205] Oei Tjoe Tat, *Memoar Oei Tjoe Tat. Pembantu Presiden Soekarno*, Jakarta, Hasta Mitra, 1995, p. 84

[1206] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Seattle, University of Washington Press, 2011, p. 149.

[1207] Michael K Middleton, *Participation for All: A Guide to Legislative Debate*, New York, IDEBATE Press, 2007, p. 9-10.

branch in Niki-Niki, East Nusa Tenggara even had a membership that was 90 % local people.[1208] Of course, Baperki's primary focus was on the issue of citizenship rather than to empower a particular ethnic group.

In the 1956-1969 Konstituante, Baperki used a citizen's panel to exert pressure during the debate of Article 6, which stated 'the Indonesian president must be a native Indonesian.' In response, Yap Thiam Hien (a human rights lawyer, public defender at Legal Aid Institute, and professional lawyer in a modern law firm) argued the use of 'native' was discriminatory. Article 6 made distinctions between native and non-native, and sadly, in practice Chinese-Indonesians were deemed to be the latter. Yap Thiam Hien thought that Chinese-Indonesians who identified as Indonesian and who loved the nation this would feel betrayed by the Constitution. The constitution is a sacred text and the highest legal source.[1209] If even the text of the constitution is discriminatory, the reality of legal practice will be even worse. Through Baperki, Yap Thiam Hien fought against the discriminatory wording of the constitution. He insisted that the word 'native' must be deleted from Article 6. He believed that the equal treatment must be included in the Constitution.[1210] The values of society should be reflected in the Constitution.[1211]

At the time, Chinese-Indonesians were forced to obey the concept of assimilation rather integration. Assimilation tries to erase the cultural identities of minorities and forces them to become more similar to the majority. Baperki resisted programmes of assimilation such as changing-name, mixed marriage, etc. Instead Baperki campaigned for integration, a concept that recognises the value of cultural diversity. Soekarno, the Indonesian first president, was convinced by Baperki to adopt the concept of integration rather than assimilation.[1212] In addi-

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[1208] Oei Tjoe Tat, *Memoar Oei Tjoe Tat. Pembantu Presiden Soekarno*, Jakarta, Hasta Mitra, 1995, p. 74.

[1209] David Sciulli, *Theory of Societal Constitutionalism. Foundations of a Non-Marxist Critical Theory.* Cambridge, Cambridge University Press, 1991, p, 25.

[1210] Daniel S Lev, *No Concessions. The Life of Yap Thiam Hien, Indonesian Human Rights Lawyers,* Seattle, University of Washington Press, 2011, p. 50.

[1211] H. Jefferson Powell, *A Community Built on Words the Constitution in History and Politics*. Chicago & London, The University of Chicago Press, 2002, p. 53-9.

[1212] Siauw Tiong Djin. *Siauw Giok Tjhan, Perjuangan Seorang Patriot Membangun Na-*

tion, Baperki's membership featured professional and intellectual lawyers such as Yap Thiam Hien and Oei Tjoe Tat who were devoted to equal treatment.

During the era of parliamentary democracy, Indonesia revised the Act of Citizenship, which resulted in a catastrophe that affected many Chinese-Indonesians. Yap Thiam Hien and Oei Tjoe Tat and the Baperki were vocal critics of this decision because the change in the law caused hundreds of thousands of Chinese-Indonesians to lose their citizenship and become stateless. As a professional and intellectual, Yap and Oei engaged in grassroots activism and gave legal assistance to those who had been affected by the new citizenship system.[1213] Part of Yap and Oei's activism involved actively engaging with the Baperki congress and discussing the legal problems of citizenship and equal treatment. Baperki's success in solving problems demonstrates the effectivity of the citizen's panel.

Citizen's panels were an important and part of Baperki's congresses. Many people were attended these events, and the recommendations that emerged from the debates were then used to lobby and pressure politicians and parliament. Baperki also worked closely with the Indonesian Nationalist Party (PNI), Indonesian Communist Party (PKI), Great Indonesian Party (Partindo), even some Islamic parties and some independent politicians including Muhammad Yamin (one of the first Indonesian legal scholars to propose a concept of democracy and human rights).[1214] The combination of a huge membership and intellectual figures made Baperki a very influential political force and an effective exercise of a citizen's panel.

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sion Indonesia dan Masyarakat Bhineka Tunggal Ika, Jakarta, Hasta Mitra Penerbit Buku Bermutu, 1999, p. 369.

[1213] Awaludin Marwan, *Radical Subject of Zizekian Study: Racist Fantasy Termination! Protection Chinese Ethnic Minorities in the Era of Gus Dur*. Berlin, Lambert Academic Publishing, 2013, p. 3-6.

[1214] Muhammad Yamin, *Sapta Darma. Jaitu Apologi-Pembelaan Tindakan-Politik Tiga Djuli Didepan Mahkamah Tentara Agung di Djogjakarta 1948 Dengan Menguraikan Nasionalisme Patriotik Indonesia Atas Dasar Tiang Tudjuh Untuk Mendjundjung Kedaulatan Indonesia Meliputi Seluruh Bangsa dan Segenap Tanah Air.* Tanpa tahun. Jakarta, NV. Nusantara, 1957, p. 26.

Sadly, Baperki was disbanded by Soeharto, but the struggle against racism continues. After the 1998 reform, Chinese-Indonesians re-entered the political sphere. Prominent Chinese-Indonesian politician, Murdaya Poo from PDI-P successfully brought the draft of anti-discrimination law to parliament. Although the legislation process was lengthy, the draft of anti-discrimination law, Law No. 40 of 2008 has now been successfully issued. I argue that this success is a result of ethnic minority participation by the Chinese community who proposed the draft of anti-discrimination law. This regulation is now the most powerful piece of legislation that can be used to combat against racial and ethnic discrimination.[1215]

The existence of anti-discrimination law is a reflection of the successful community-level participation by the Chinese-Indonesian community. The magnificent strategy of Chinese-Indonesians was also supported by many other actors including such as the National Commission of Human Rights of Indonesia, who provided official backing to the political movement in promoting anti-discrimination law. In the addition to the Commission, several NGOs were involved with the law-making process including Lembaga Advokasi Masyarakat (ELSAM), Solidaritas Nusa Bangsa (SNB), Paguyuban Yongding, Aliansi Pelangi Antar Bangsa, Majelis Tinggi Agama Konghucu Indonesia (MATAKIN), etc.[1216]

7. The principle of human rights

The principle of human right is one of principles of good governance that may be beneficial for the norms for Indonesian and Dutch Government and improving legal protection of ethnic minorities who live in either country. If the power of the administrative authorities fails to exercise good governance, the chance of maladministration increases. In this research, I found both the Netherlands and Indonesia continue to treat ethnic minorities as vulnerable group. In the Netherlands, this treatment can manifest in exclusion from the labour market and re-

[1215] Chairman of special committee report, Mudaya Poo on 28 October 2008.

[1216] Chairman of special committee report, Mudaya Poo on 28 October 2008.

stricted access to goods and services. In Indonesia minorities have been victims of grievous crimes against humanity, genocide, and mass violence.

As mentioned earlier, ethnic minorities in the Netherlands are scapegoated by populist right wing movements, whilst in Indonesia, ethnic minorities are oppressed by the Islamic right wing, who stir anti-Chinese sentiment. Further, ethnic minorities are at risk on treated as the enemies of the dominant political institutions. Although the Netherlands and Indonesia have ratified the International Convention on the Elimination of All Forms of Racial Discrimination, discrimination still flourishes like flowers in the springtime. In the Netherlands, reports of racial discrimination accounts for 1,765 cases, or 40,7 % of all reports of discrimination.[1217] Meanwhile, in Indonesia, the tragedies of 1965 and 1998 including the genocide of Chinese groups are yet to be meaningfully addressed—even after the Indonesian National Commission of Human Rights sent their investigatory report to the public prosecutor to be scrutinised in the courts. Sadly, the enforcers of the law have shown no will to finalise the criminal justice process.

Ethnic minorities are vulnerable people who are at risk of becoming victims of discrimination.[1218] They are stereotyped as dirty, ignorant, poor, primitive and uncivilised which has resulted in their exclusion from participating in politics, accessing public services and integration programs. In the Netherlands, the Equal Treatment Act was issued to solve prejudice in the workplace and in the public spheres. With similar, intention, Indonesia issued anti-discrimination Law No. 40 of 2008. These two regulations are operated by the national human rights institutions of each country. Indeed, the government must guarantee that the citizens can enjoy their fundamental rights regardless of ethnicity, race, nationality, or skin.[1219] Political tolerance can be established

[1217] Moniek Coumans, *Registraties Discriminatieklachten bij Antidiscriminatievoorzieningen 2015*. Methode en uitkomsten. September 2016. CBS., p. 7.

[1218] Seyla Benhabib*, The Rights of Others Aliens, Residents and Citizens.* Cambridge, Cambridge University Press, 2004, p. 56.

[1219] Costas Douzinas, *The End of Human Rights. Critical Legal Theory at the Turn of the Century*, Oxford, Hart Publishing, 2000, p. 297.

when there is mutual recognition between the majority and the minority.[1220] My research elaborates upon the implementation of anti-discrimination law and the role of the national human rights institutions in solving the problems of vulnerable ethnic minorities. Vulnerable ethnic minority groups are groups whose fundamental rights are denied when accessing public services or markets. Vulnerable ethnic groups should be protected by the government. Of course, the government should guarantee multicultural justice for all citizens regardless of ethnicity and race.[1221]

One who truly believes adores in the concept of good governance cannot let ethnic minorities become victimised. If the administrative authorities observe the idea of good governance, ethnic minorities should be invited to be a part of the policy making process,[1222] therefore, eliminating the chance that ethnic minorities will become victimised. However, the Turkish and Chinese communities in the Netherlands and Indonesia are examples of people who have been subjected to this exclusion. Meanwhile, dominant political institutions are inclined to become tyrannical and employ extraordinary police measures.[1223] The prohibition of ethnic profiling in the Dutch National Plan of Action on Human Rights is an effort to protect ethnic minorities from discrimination. However, ethnic profiling itself is a way that tyrannical governments and racist people exercise their power. Good governance can be used address the disparity between ethnic groups and establish a fairer balance between minority and majority. Although, often the minority is cheated by power granted through legal means[1224] Ethnic minority protection is sometimes thought of as the charity of government or society,

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[1220] Will Kymlicka, *Contemporary Political Philosophy an Introduction*, Oxford, Oxford University Press, 2002, p. 332.

[1221] Will Kymlicka, *Multicultural Citizenship a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 113.

[1222] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 109.

[1223] Georgio Agamben, *State of Exception.* Chicago, The University of Chicago Press, 2005, p. 5.

[1224] William E. Connolly, *The Complexities of Sovereignty*. In., Matthew Calarco and Steven DeCaroli. *Giorgio Agamben. Sovereignty & Lif*e, Stanford, Stanford University Press, 2007, p. 33.

this must change— it must be recognised as an obligation of government.[1225]

Interestingly, the right to good governance, as one of the specifications of the principle of human rights, is a part of both the Indonesian and Dutch legal systems. Civilians and/or ethnic minorities can monitor the implementation of administrative norms by the government and struggle for their fundamental rights. They have also the opportunity to exert their civil and political rights and the right to request to the Ombudsman. In the Netherlands, ethnic minorities are provided with legislation that protects their right to monitor the government to ensure they use their power appropriately (Article 3.3), do not apply policies arbitrarily (Article 3:4 and Article 5:13), provide legal certainty (Article 4:23 and Article 5:22), and observe the principles of proportionality (Article 3:4 (2)), carefulness (3:2), and duty to giver reasons (Article 3:46, Article 3: 47, Article 3:48). For instance, a Chinese person filed a case of appeal after being fined for violating the terms of their work permit using Article 3:3 of GALA. This Article has become a legal argument for ethnic minorities to defend their interest. Moreover, ethnic minorities can fight to ensure their civil and political rights are fulfilled by lobbying parliament, conducting anti-discrimination campaigns via media, and building public support. Using the basis of CCPR (civil and political rights), ethnic minorities are able to fight discrimination in an international forum, such as the case submitted by Mohammad Rabbae to the United Nation Human Rights Office. Rabbae complained about Geert Wilders insulting ethnic minority groups, inciting hatred and discrimination. Additionally, ethnic minorities, are entitled to request help from the Ombudsman. For instance, if ethnic minorities are victims of police brutality and state violence, they can send a violent incident report to the Ombudsman. Even though ethnic minorities are at risk of becoming victims of discrimination, they are provided some opportunities to pursue their rights to good governance.

[1225] Thanos Zartaloudis, *Soul blind or On Profanation*. See in., Justin, Clemens, Nicholas Heron & Alex Murray. *The Work of Giorgio Agamben. Law, Literature, Life*, Edinburg University Press, 2008.

Aspects of the right to good governance, as one of the specifications of the good governance principle of human rights, can also be seen in the Indonesian legal system in accordance with Indonesian law, namely in the Administrative Government Act and Public Service Act. Despite the existence of these protections, administrative discrimination is still a problem. One example of this are the difficulties that Benteng Chinese people in Tangerang often encounter when attempting to obtain a birth certificate. Fundamentally, a birth certificate is the primary document of citizenship; without a birth certificate, one cannot acquire other documents such as an identity card, driver's license, passport, marriage certificate, and so on and so forth. Without a birth certificate, the Benteng Chinese faced barriers to accessing to education, health care and justice. Similarly, the Indonesian government has seemed reluctant to use their authority of discretionary power to provide support to Turkish people that live in Indonesia. After the failed coup, the Turkish people, especially those associated with the Hizmet or Gulen movement have been, threatened or targeted by the Turkish embassy and Turkish government. Fortunately, there is evidence that the Indonesian government has a degree of devotion to good governance. For example, they gave permission for a Turkish new born baby to remain in Indonesia after the Turkish Embassy refused to issue a passport., because they suspected that the family of the new born baby were connected to the Fethullah Terrorist Organisation (FETO). However, the Indonesian Civil Administration Act, now allows new-born babies to live in Indonesia with an Indonesian birth certificate alone.

Although ethnic minority are legally entitled to the rights to good governance in both Indonesia and the Netherlands, these rights are often unfulfilled and thus they are at risk of becoming victimised. Sadly, this right to good governance, is often infringed upon because ethnic minorities are vulnerable people. In Indonesia, for instance, even when ethnic minorities are legally Indonesian citizens, they are often treated as foreigners. Under the New Order government, Chinese-Indonesians were forced to change their names. This assimilationist policy is not compatible with the ideas of good governance and multicultural soci-

ety. Good governance can inspire the government to abide with administrative norms and protect the rights of civilians.[1226] At the same time, the concept of multiculturalism encourages discourses of the politics of recognition, cultural diversity, the politics of redistribution, and so on.[1227] Regretfully the, legal reasoning provided by judges in changing-name continues to be discriminatory. Another example of abandoning the rights to good governance, is the forced foreclosure of Chinese-Indonesians' assets by the New Order government. The administration

[1226] Good governance encourages the protection of minority rights as dignity of the human being. Through the spirit of good governance, the State carries out its duties such as to guarantee the security of the life of citizens, to manage an effective and accountable framework of public service to everyone, to promote the economic, social, and cultural rights of minorities. Good governance is a norm for the legislative, the judicative, and the administrative entities responsible for establishing a citizen's right. Good governance perspectives can be utilized to interpret the fairness of regulations drawn up by parliament, to oversee the performance of the government's policy programs, how the court decided procedural justice, to protect the rights of ethnic minorities, and the Ombudsman encourages good public services directed to ethnic minorities. Ethnic minorities as a legal group have their own right to realize the principle of legal certainty, the principle of proportionality, an independent judicial control and protection of human rights. The protection of ethnic minorities is regarded as a moral and legal norm that the State must respect, protect, and fulfil minority rights. Minority rights as legal rights and duties are the point at which the law with its coercive resources respectively protects and restricts individual freedom, including ethnic minority freedom. It might be also these rights on individuals from the law's coercive machinery. Thus, the perspective of good governance provides administrative and also coercive force to the government to realize its obligations, including protecting ethnic minorities rights. G.H. Addink (Forthcoming), *Good Governance: Concept and Context*. Oxford, p. 13.

[1227] Ethnic minorities may be defined as 'deviant' simply because they differ in race, culture, gender, ability, or sexual orientation from the so-called 'normal' citizen. Warm discourses about multiculturalism, politics of difference, identity politics, the politics of recognition have become a topic in the academic world, law reform, media and public sphere. Kymlicka mentioned that the protection of minority rights is an important discourse to respond toward 'being neglect' and exercise fairness to minorities in 'cultural market-place.' Through realizing the good governance principles, this 'cultural market-place' can be prevented by the development of principles of good minority rights administration. Will Kymlicka. *Contemporary Political Philosophy an Introduction.* 2002. Oxford University Press., p. 332. Furthermore, Dworkin states that the task of the government, over and beyond collecting taxes and properties owned by the citizens, should provide subsidies to ethnic minorities as the poor and marginalized communities. According to Dworkin that human rights, including the protection of ethnic minorities, is an objective scheme that every human being is to live dignity and well. With the realization of the principles of good governance, the development of economic rights, social and culture of ethnic minorities is going well too. See., Ronald Dworkin, Justice for Hedgehogs, Cambridge, The Belknap Press of Harvard University Press, 2011, p. 419; Ronald Dworkin, *Principles for a New Political Debate. Is Democracy Possible Here?* Princeton, Princeton University Press, 2006, p. 95; See also., Ronald Dworkin, *Justice in Robes*, Cambridge, The Belknap Press of Harvard University Press, 2006, p. 106-108

revived colonial regulation (such as *Koninklijk Besluit* and *Ordonnantie*) to justify their policy of seizing land and property that belonged to Chinese-Indonesians' without the need for permission from the courts. These actions in particular are an example of how Chinese-Indonesians were treated as someone whose fundamental rights were abandoned.

Meanwhile, in the Netherlands, ethnic minorities (especially the Chinese and Turkish people) struggle to prosper in labour market. Hundreds of reports of discrimination in the labour market are submitted to the Dutch National Institute for Human Rights every year. People with Turkish or Arabic-sounding names face discrimination in recruitment, promotion, terms of employment and workplace conditions and so on and so forth. One example of this type of discrimination was a Turkish person who was not invited for an interview by PEAK-IT BV, because of their Turkish or Arabic-sounding name. In the Netherlands, ethnic minorities sometimes experience problems with accessing goods and services. The famous 'baby milk formula' case is an example of the gloomy situation for ethnic minorities. As described in chapter 4, this case concerns a Chinese mother who was refused service when trying to buy baby milk formula in a supermarket. Article 7 of the Equal Treatment Act stipulates that access to goods and services must be provided without discrimination.

Ethnic minorities continue to be discriminated against in the Netherlands and Indonesia. For example, the Dutch police, security and immigration services have often unfairly and arbitrarily targeted ethnic minorities. Such ethnic profiling generates shame and fear for ethnic minorities and reduces a sense of belonging to the country. The distance gap between the treatment of ethnic minorities and native people widens when ethnic profiling continues. Crime rates and stereotyping encourage the police to focus on ethnicity rather than sufficient evidence and thorough investigation. Ethnic profiling, indeed, positions minorities who are targeted and hunted. In Indonesia, ethnic minorities feel fear related to the unresolved incidents of 1965 and 1998 in which hundreds of thousands of victims were killed. Prosecution of these mass killings remains to materialise. Rather than pursuing the truth or sub-

stantive reparations, the country has instead engaged in 'social amnesia.'; it is easier to forget than to accept the fake truths of heinous crimes against humanity. Sadly, for ethnic minorities (particularly Chinese-Indonesians) this approach has not been conducive to achieving justice or reconciliation.

8. Provisional conclusions

1. Generally speaking, the Dutch and Indonesian general legal norms are adequate from a good governance perspective with regards to the norms for the government and legal protection of ethnic minorities. These norms and protection can be implemented if the principles of good governance (e.g. transparency, participation, and human rights) receive proper attention in legal practice. Supposedly, the administrative authorities, the Ombudsman, the National Human Rights institution and the courts can do better to protect ethnic minorities. Discrimination and ethnic violence remain a problem which must be eliminated by the government.
2. Constitutional norms in Indonesia and the Netherlands provide a norm for the government and legal protection of ethnic minorities, as written here in this section, concerning Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution. The main difference is that the Indonesian Constitution does not mention the protection for specific demographics, for instance, religion, belief, political opinion, race and sex. However, in regard to these articles, I argue that they have more similarities to become a basic constitutional norm to provide a norm and protection of ethnic minorities. Why? Because both these articles are clearly enough mentioned prohibition discrimination and promotes equal treatment.
3. Legislation setting concerning good governance and ethnic minorities in Indonesia and the Netherlands also comprises of similarities and differences. This is particularly evident in the Dutch Equal Treatment Act and the Indonesian Human Rights

Act. The Dutch Equal Treatment Act stipulates the prohibition of discrimination in the labour market (Article 5) and access to goods and services (Article 7). The Indonesian Human Rights Act states various rights including family rights (Article 10), the right to develop his or her own skill (Article 11), the right to justice (Article 17), the right to security (Article 28), etc. In addition, the Netherlands also provides the Equal Treatment Act for men and women and protecting people with disabilities. I argue that the main substance of the Indonesian Human Rights Act and the Dutch Equal Treatment Act is similar; they both provide norms and protections for ethnic minorities in the labour market, address access to goods and services, and the right to freedom from discrimination. The difference is that only Indonesian legislation concerning human rights equal treatment is included in one (quasi-codification) piece of legislation, namely: the Human Rights Act (Law No. 39 of 1999).

4. In both Indonesia and the Netherlands, the norms for the administration are stipulated in legislation. In Indonesia, the general norms of good governance are composed of legal certainty, beneficiary, impartiality, properness, prohibiting misuse of power, and good public service (Article 10 of Law No. 30 of 2004 concerning Government Administration). In the Netherlands, a similar spirit to these norms can be found in GALA. GALA obligates the government to obey norms including the prohibition of misuse of power (Article 3.3), the prohibition of arbitrariness (Article 3:4 and Article 5:13), legal certainty (Article 4:23 and Article 5:22), proportionality (Article 3:4 (2)), carefulness (3:2), and reasonableness (Article 3:46, Article 3: 47, Article 3:48). Indeed, these norms compel administration to follow 'the right track' in accordance with the law. The administration must not only be controlled by the majority alone, but must be impartial, proportional, and follow the law.
5. Both the Dutch and Indonesian governments have issued national action plans of human rights which have become pivotal

documents for good governance and ethnic minority protection. In addition, the Dutch government introduced the Municipal Anti-Discrimination Service Act. This Act obliges the local government to give advice, information, legal aid, and legal assistance in every single discrimination case (Articles 4, 7, 8, 9, and 10 of the Municipal Anti-Discrimination Service Act). These norms (including the national action plans of human rights) provide guidance to combat discrimination. Furthermore, the Netherlands Institute for Human Rights Act of 2011 states that the institute has several responsibilities: investigation (Article 3 a), making reports (Article 3 b), giving advice (Article 3 c), providing information (Article 3 d), and ratification of human rights treaties, (Article 3 g). This institution was created based on the Paris Principles that emerged from the General Assembly of the United Nations Resolution of 48/134 on 20th of December 1993. The Indonesian National Commission of Human Rights serves similar functions; to research, disseminate, monitor and mediate human rights issues (Article 76 (1)) in accordance with Law No. 39 of 1999 concerning the Human Rights Act. Hence, The Indonesian National Commission of Human Rights and The Netherlands Institute for Human Rights have almost indistinguishable roles with regards to human rights violations. The Indonesian National Commission of Human Rights has the extended authority to act as a quasi-prosecutor in the Indonesian Human Rights Court (Law No. 26 of 2000).

6. The, Dutch and Indonesian Ombudsman have a significant role in controlling norms of governments and the legal protection of ethnic minorities. Ethnic minorities can access the Dutch Ombudsman based on chapter 9: 2 of the General Administrative Law Act (GALA). Ethnic minorities in Indonesia are entitled to request an Ombudsman in accordance with Article 3 Law No. 37 of 2008 which states that the basic values of the Ombudsman are justice and non-discrimination.
7. Another important power that controls the norms for the

government and legal protection of ethnic minorities are the courts. The Dutch courts are endowed with power by the Dutch Constitution and legislation. The Dutch Constitution states that the Court has authority over civil law (Article 112) and criminal law (Article 113). In addition, GALA also stipulates that the role of the administrative courts is to challenge administrative decisions (Article 8.1). While Indonesian Court, encourages the judges to seek justice from the living law of the nation in accordance with Article 5 of Law No. 48 of 2009 about the power of the judges. Consequently, Indonesian judges must interpret law through Indonesian national and local cultural values when solving case law.

8. In legal practice, the principle of transparency can be seen in Indonesia and the Netherlands in their own Public Information Act. On the one hand, the Dutch Government Information Act contains the obligation of the public entity to disclose public information (Article 2) and stipulates the rights of people to request public information (Article 3). On the other hand, the Indonesian Public Disclosure Act requires all public information to be open and accessible in accordance with Article 2 Law No. 14 of 2008. Hence, we can see that open access for public information is part of the norms of government, yet, at the same time as the right to know for people, including ethnic minorities.
9. Alongside each other, the principle of participation in the Netherlands and Indonesia exists to yield an empowered position of ethnic minorities. In the Netherlands, division 3:4 of GALA (a uniform public preparatory procedure) allows people, including ethnic minorities, to give insight before an administrative decision is taken. Concomitantly, ethnic minorities can also express their own views about that administrative decision in accordance with Article 3:15 of GALA. In Indonesia, in accordance with Article 96 Law No. 12 of 2011 concerning Establishment of Laws and Regulations, people can propose their own draft of

legislation to the parliament. People also can challenge administrative decisions to the Indonesian Administrative Court in accordance with Law No. 51 of 2009. Last but not least, under Article 2 of the CCPR and Article 1 of CERD, ethnic minorities can ask governments to combat an incitement of hatred. Hence, ethnic minorities can also participate in the creation of legislation to prevent racial discrimination, lodge complaints through the courts and pressure for a judicial remedy for the damage of discrimination in Indonesia and the Netherlands as the implementation of the principle of human rights.

CHAPTER 6
Theoretical Reflections, Conclusions and Recommendations

1. Theoretical reflections
2. Conclusions
3. Recommendations
4. Final concluding remarks

This chapter summarises the basic arguments used to answer the main research questions: 1) To what extent has the idea of good governance contributed to strengthening the establishment of the proper obligation to governance and legal protection of ethnic minorities in Indonesia and its comparison with the Netherlands? 2) How do good governance principles such as transparency, participation and human rights foster the fulfilment of legal protection of ethnic minorities in Indonesia and the Netherlands? 3) How are the principles of good governance interpreted and implemented by the courts, the ombudsman and the national human rights institutions to solve the problems of ethnic minorities? These questions became the basic guidance for a study of relevant literature and field research. These research questions also guided my investigation into whether or not the Indonesian and Dutch legal systems, from an administrative law perspective, reflect the concept of good governance and if the norms for the government and legal protection of ethnic minorities are sufficient, especially with regards to Chinese and Turkish people living in Indonesia. From an administrative law viewpoint, all people regardless of their ethnic background should have the opportunity to be involved with preventive procedures during the decision-making process (the non-contention phase i.e. before a decision is taken) and have access to a repressive approach, for example making an appeal through courts or a complaint through the

Ombudsman and National Human Rights Institutions (the contentious phase i.e. after a decision is taken). However, as cases explored in previous chapters have shown, ethnic minorities face systematic discrimination and are often victims of maladministration and mismanagement. This research found that ethnic minorities are a vulnerable group that often experience difficulties and barriers when attempting to access public services. These problems can be analysed using principles of good governance such as the principle of transparency, the principle of participation and the principle of human rights. After analysing my research findings, I formulated an idea of good ethnic minority governance. Good ethnic minority governance is a notion of governance whereby 'good' regulations and institutions are created for the protection of ethnic minorities. Indeed, implementing the concept of good governance requires a coherent system of good regulations,[1228] in order to guarantee the realisation of norms for government and the legal protection of ethnic minorities.

With regards to the originality of this research, it does not contain only the legal protection of ethnic minorities, but also the norms for the government. Simply put, this research assesses both norms and rights. Furthermore, several terms should be clarified here ranging from the concept of good governance, the concept of human rights, and good governance principle of human rights. Good governance is a legal concept concerned with the strengthening of norms for government and legal protection of ethnic minorities. Meanwhile, the concept of human rights is a fundamental right which every human being is entitled to. These two concepts are connected, interact and sometimes even overlap. However, the principle of human rights is quite different from the concept of human rights more generally. The principle of human rights is a part of the concept of good governance. The good governance principle of human rights comprises the right to good governance —as learned from Article 41 of the European Charter for Human Rights— and the

[1228] G.H. Addink. *Good governance: a norm for the administration or a citizen's right?* in G.H. Addink et al. (eds) Grensverleggend Bestuursrecht, Alphen aan den Rijn, Kluwer, 2008, p. 3-35.

legal norms for government on implementing an international human rights treaty. In addition, the principle of human rights also involves people in the decision-making process before an administrative decision is taken and the right to lodge an objection, appeal, or complaint through the administrative authorities, the courts, and the Ombudsman. Meanwhile, this research is interested in the implementation of the concept of good governance and the principles of human rights. transparency, and participation in Indonesia and the Netherlands. This research argues that the comparison between Indonesia and the Netherlands is viable and interesting because these countries not only share a long legal history, but are also similar with regards to legal norms and the function of public institutions. In addition, I have selected Turkish and Chinese communities in Indonesia and the Netherlands for comparison because these communities are sample groups from the whole population of ethnic minorities who living in both countries. Meanwhile, they are well established minority groups in Indonesia and the Netherlands who have present in both countries for over 20 years. This research discusses the position of these two minority groups from an analytical framework formed by the principle of transparency, the principle of participation and the principle of human rights. From the six total principles of good governance (properness, effectiveness, accountability, transparency, participation, and human rights) only three principles were selected for my analytical framework using the following criteria (1) the principle should have a direct benefit for ethnic minorities (2) the principle should be relevant to empowering the capacity of ethnic minorities (3) the principle must provide an innovative approach to analysing ethnic minorities' problems. After applying the above criteria, the three principles that I feel are most suitable for my investigation are transparency, human rights, and participation.

One further outcome of this journey has been my arrival at a new concept of 'good ethnic minority governance' which is outlined in section 2 of this chapter. Furthermore, this research conceptualises good governance as being comprised of two sides: the obligation of governance and fundamental rights protection. In my conclusions, I begin with a sum-

mary of my research findings in Indonesia and the Netherlands and then provide more conclusive answers to the main research questions. This chapter also proposes some recommendations for the future legal models for norms for the governments and the protection of ethnic minorities.

1. Theoretical reflections

Now that good governance from an administrative law perspective on norms for the governments and ethnic minority protection in the Netherlands and Indonesia have been explored in detail, it is time to use these findings to develop good ethnic minority governance through theoretical and empirical reflection. Good ethnic minority governance is a notion of governance that aims to mainstream good governance into the foreground of ethnic minority issues, encourage properness of public institutions and facilitate participation. Indeed, a nuanced understanding of the idea of governance requires a multidisciplinary approach[1229] that includes insights from economics, social, cultural, symbols, literature, art, politics, and so on— such an involved analysis is outside the scope of this thesis. Thus, I have focused on a deep analysis of the legal, administrative law approach[1230] to the notion of good ethnic minority governance.

[1229] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 1

[1230] Indonesian administrative law also studies, monitors, controls and reviews administrative decisions. Herewith, administrative authorities are required to use their own mechanism to evaluate decisions, thus guaranteeing that decisions are not only reviewed by the administrative judge in the judicial process, but that all decisions are checked to ensure they adhere to formal law and do not violate public interests. Civil servant oversight is another equally important factor to be considered. Before the Indonesian Government Administration Act and Indonesian Civil Servant Act had been issued, civil servant oversight 3e monitored in accordance with customary administrative law and an official letter issued by the Ministry of Civil Service, which regulated the position, rights and duties of civil servants (See, E. Utrecht. *Pengantar Hukum Administrasi Negara Indonesia*. Jakarta, N.V. Penerbitan dan Balai Buku Indonesia, 1955, p. 70-95). Presidential Decree No. 319 of 1968 marked another interesting attempt to improve the quality of civil servants, largely through a programme of public institution reforms. One particular objective of these reforms was to develop civil servants and government administration with the aim of increasing effectivity, efficiency, stability, sustainability, and protecting the needs of society. The development planning for this law stressed the need for better education and training for civil servants was to empower the civil service workforce to properly serve people at from the national level to the provincial level. Kuntjoro Purbopranoto. Perkembangan Hukum Administrasi Negara. Jakarta, Badan Pembinaan Hukum Nasional Departemen Kehakiman, 1981, p. 131-132. More

In both the Netherlands[1231] and Indonesia,[1232] reports of the International Convention on the Elimination of All Forms of Racial Discrimination is quite disappointing; ethnic minorities remain in a weak position. To improve this situation, the notion of good ethnic minority governance is needed. State power is often unenthusiastic about observing the ideas of good governance.

The legal approach to good ethnic minority governance delineates that the legal norms represent a tremendously tolerant legal system. The spirit of emancipation is present in both the Dutch Constitution and the Indonesian Constitution. Equal treatment is a key theme of both Dutch and Indonesian legislation. However, I see little evidence of good ethnic minority governance in legal practice in either the Netherlands or Indonesia. The performance of administrative authorities does not elucidate exciting news. When public institutions are not truly transparent, people do not really have much passion to participate in politics and government, and human rights appear to have been abandoned, we must re-

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reading about Indonesian law, see also, W. F. Prins. *Inleiding in het administratief recht van Indonesie*, Groningen, J.B. Wolters, 1950; W.F Prins and R. Kosim Adisapoetra. *Pengantar Ilmu Hukum Administrasi Negara*, Jakarta, Pradnya Paramita, 1976; E. Utrecht. *Pengantar Hukum Administrasi Negara Indonesia.* Jakarta, N.V. Penerbitan dan Balai Buku Indonesia, 1955; Philipus M. Hadjon. *Pengantar Hukum Administrasi Negara.* Yogyakarta, Gadjah Mada University Press, 1993 Muchsan. *Pengantar Hukum Administrasi Negara Indonesia.* Yogyakarta, Liberty, 1982 Marbun & Moh Mahfud MD. Pokok-pokok *Hukum Administrasi Negara.* Yogyakarta, Liberty, 1987; Juniarso Ridwan, Achmad Sodik Sudrajat, *Hukum Administrasi Negara dan Kebijakan Layanan Publik*, Bandung, Penerbit Nuansa Cendekia, 2009; Amrah Muslimin. *Beberapa Azas Azas dan Pengertian-Pengertian Pokok tentang Administrasi dan Hukum Administrasi Negara*, Bandung, Penerbit Alumni, 1980; Murtir Jeddawi. *Hukum Administrasi Negara*. Yogyakarta, Total Media, 2012; M. Nata Saputra. *Hukum Administrasi Negara.* Jakarta, CV. Rajawali, 1988; Diana Halim Koentjoro. *Hukum Administrasi Negara,* Bogor, Ghalia Indonesia, 2004,

[1231] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Report of the Netherlands.

[1232] See., Indonesian CERD Report of 2000. However, in practice, discrimination still exists in the public sphere and Chinese people are still subject to stereotyping, prejudice, hate crime, etc. On this topic, the report of CERD of Indonesia has this to say: 'in practice some people, especially native Indonesians, make use of this opportunity for their own interests. For example, banks sometimes require the SBKRI in lending money to customers despite Presidential Instruction No. 26 of 1998 forbidding racial discrimination that has stipulated that SBKRI would not be needed to borrow money from banks. In this regard, the local Governments of Batam, Semarang, and Solo have abolished the requirement of SBKRI for borrowing money from banks.'

pair the house and wait for the sunny day when the sun rises to shine its light. Good ethnic minority justice is the outcome, destination, and objective of public life. Law enforcement that ignores the discourse of governance is simply a performance of procedural requirements, and lacks substantial justice, or even worse descends into corruption and abuse of power. This absence of good ethnic minority governance is especially conspicuous in the stagnation of the prosecution of the 1965 and 1998 crimes against humanity in Indonesia. Sadly, law enforcers continue to exalt the black letter law, insisting there is insufficient evidence to prosecute the lawsuit. Although the investigation of the Indonesian National Commission of Human Rights has concluded, their findings have not resulted in any prosecutions or further action.

Good ethnic minority governance is the idea that all ethnic groups should be treated equally regardless of their background. On some occasions, affirmative action may be required to redress the balance between ethnic groups.

Good ethnic minority governance depicts ethnic minorities as members of vulnerable groups that are worthy of protection, which is why public institutions must be more active to stimulate ethnic minority groups to participate in politics and government. On the other hand, understanding good ethnic minority governance is valuable to ethnic minorities living in the Netherlands and Indonesia to equip their social capital in their struggle against discrimination and defending their fundamental rights. I argue that the spirit of good ethnic minority governance is also present in Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution. Ethnic minorities can advocate for their position procedurally using the legal basis of Dutch Equal Treatment Act or the Indonesian Equal Treatment Act, and easily access institutional support (the administration, the courts, the fourth power of the Ombudsman and the Netherlands Institute for Human Rights). Thus, good ethnic minority governance illuminates the situation of ethnic minorities and enables them to request public institutions to be more transparent, empower their public participation and receive their fundamental rights.

2. Conclusions

This section offers a brief overview of my research findings about good governance and its relationship to ethnic minorities in Indonesia and the Netherlands. The main argument avowed in this chapter is the pivotal role of the concept of good governance in strengthening norms for administrative authorities and ethnic minority protection. The idea of good ethnic minority governance is present in Article 1 of the Dutch Constitution, Article 28 of the Indonesian Constitution, the Dutch Equal Treatment Act, and the Indonesian Human Rights Act, etc. The expectation to 'be good' is a compulsory obligation of the Indonesian and Dutch governments to treat everyone equally, regardless of religion, belief, ethnicity, political opinion, race, and sex. As elaborated on in the section of definitions on ethnic minorities in chapter 2, Kymlicka states that an ethnic minority is a group who in many times struggling to a recognition of their ethnic identity through encouraging the institutions and laws to respect their cultural differences.[1233] Furthermore, Wacquant argues that ethnic minorities are a target group with their ethnicity becoming an object of a punitive management of marginality.[1234] Meanwhile, Stephen et al, defines ethnic minorities as a group of migrants or forced to be assimilated and naturalised, but sometimes government acts more tolerant to respect their ethnicity and religious identity.[1235]

Good ethnic minority governance can be defined as that which practically realises the moral obligation of equal treatment for ethnic minorities. Good ethnic minority governance is supported by the ideas of rule of law and democracy in Indonesia and the Netherlands. Sadly, in the Netherlands, discrimination, Islamophobia, anti-immigrant movements and ethnic profiling, and so on are rife, despite the presence of laws forbidding them. Similarly, anti-Chinese sentiment, xenophobia, discrimination and corruption are common in Indonesia - all

[1233] Will Kymlicka, *Multicultural Citizenship. a Liberal Theory of Minority Rights.* Oxford, Oxford University Press, 1995, p. 11

[1234] Loïc Wacquant, Marginality, Ethnicity and Penalty in the Neo-Liberal City: An Analytical Cartography. Ethnic and Racial Studies 2014. Vol. 37, No., p. 1687-1711.

[1235] Stephen May, et al, *Ethnicity, Nationalism, and Minority Rights.* Cambridge, Cambridge University Press, 2004, p. 8

of which have greatly harmed the position of ethnic minorities. As can be seen from the examples concerning baby milk powder[1236] and Arabic sounding names in the Netherlands,[1237] and the crimes against humanity in Indonesia, the metaphor of homo sacer [1238]has applications in the legal field. Ethnic minorities can be thought of as vulnerable groups whose fundamental rights have been forgotten in the Netherlands and Indonesia. Ethnic minorities stand weak against discrimination in many areas, such as accessing goods and services, the labour market,[1239] immigration, integration policy,[1240] criminal offences, [1241] etc. However, from the perspective of good ethnic minority governance, institutions exist in Indonesia and the Netherlands that are purportedly devoted to their constitutions and anti-discrimination law. Institutions such the Dutch and Indonesia administration, the National Human Rights Institution, the Ombudsman, and the courts have an obligation to interpret and realise the ideas of Article 1 of the Dutch Constitution or Article 28 of the Indonesian Constitution. Good ethnic minority governance can also be applied by implementing justice, the rule of law, modernity and democracy as part of good governance in attempting to fulfil the commitments of the main idea of the Constitutions and Human Rights Acts. Indeed, the attention of governments is required to emancipate ethnic minorities, if the government observe their obligation to protect the people. Hence, institutions, such as the anti-discrimination bureaus in the Netherlands and local human rights institutions in Indonesia are fundamental components in the fight against discrimination.

[1236] Oordeelnummer 2014-26. College voor de Rechten van de mens.

[1237] Oordeelnummer 2015-43. College voor de Rechten van de mens.

[1238] Georgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*. Stanford, Stanford University Press, 1995, p. 47. Homo sacer is the ancient concept that when one is condemned because of sin, one is ineligible to be presented as a sacrifice before God. Someone who is condemned to be homo sacer can be killed with impunity.

[1239] Brandon D. Lundy. Ethnic Encounter and Everyday Economics in Kassumba, Guinea-Bissau. Ethnopolitics, Vol. 11, No. 3, p. 235-254.

[1240] Neil McGurty&Iveta Silova. *Ethnic Integration and Cross-Culturalism in Academic Setting: the Case of the Stockholm School of Economic in Rica*. Intercultural Education, 2000. Vol. 11, No. 1.

[1241] Loïc Wacquant, Marginality, *Ethnicity and Penality in the Neo-Liberal City: An Analytical Cartography.* Ethnic and Racial Studies 2014. Vol. 37, No., p. 1687-1711.

Answers and reflections from research questions

The following section provides some answers and reflections that derive from the main research questions which are mentioned above. I begin by considering the contribution of good governance to establishing ethnic minority protection and explore the specific implementation of each of the following principles of good governance: transparency, participation and human rights. I later evaluate the role of public institutions including the administration, the Ombudsman, the National Human Rights Institution, and the courts.

Good governance fosters legal protection of ethnic minorities

The concept of good ethnic minority governance, as elaborated above, is a notion of legal reflection that I arrived at after assessing the contribution of good governance to strengthening norms for the government and the legal protection of ethnic minorities. It is essential for the voice of ethnic minorities to be heard in order to measure the efficacy of law enforcement in cases of discrimination. Much work is needed to fully understand the needs, demands, and desires of ethnic minorities. And again, Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution are the fundamental instruments that guarantee the norms for the governments and the legal protection of ethnic minorities in the Netherlands and Indonesia. These Articles are basic legal principles which must be obeyed by the government, the courts, the private sector, and all elements in both countries. The spirits of liberal egalitarianism and communal emancipation are present in these Articles.

Good ethnic minority governance may be an answer to the first main research question: to what extent has the idea of good governance contributed to strengthening the establishment of the proper obligation to governance and legal protection of ethnic minorities in Indonesia and its comparison with the Netherlands? Good ethnic minority governance centres ethnic minorities. One basic tenet of good ethnic minority governance is that one must respect cultural diversity. Therefore, good governance enhances the legal protection of ethnic minorities not

simply by strengthening the legal position of ethnic minorities. Indeed, good ethnic minority governance is not merely the implementation of the Dutch Equal Treatment Act and the Indonesian Human Rights Act, but rather a consideration of how satisfied ethnic minorities feel.

Some may argue that this is too utopian—but an imagined future is needed to provide inspiration in the struggle for the true emancipation of ethnic minorities. I note that good ethnic minority governance is an abstract outcome, but it could be used to inspire changes to the aims of law enforcement and the objectives of public life. There are many barriers to realising good ethnic minority governance ranging from a lack of transparency of administrative authorities, lack of participation of ethnic minorities, and problems with the implementation of human rights legislation.

Good governance prevents the political system of democracy from descending into chaos. People can become chaotic when the rule of the game is weak. Democracy without good governance results in the tyranny of the majority and the oppression of minorities. Democracy reflects the will of people to establish a civilized and good state of society and set up a democratic government,[1242] but in this system of governance majority groups have more power and hegemony than minorities in the decision-making process and public life. In my research, the institute that I found to be the most devoted to the promotion of good governance was the Ombudsman. Both the Indonesian Ombudsman and Dutch Ombudsman demonstrate outstanding integrity in their work which includes introducing good governance into public discourse. State discrimination towards ethnic minorities should be classified as maladministration. The Ombudsman interprets good ethnic minority governance to understand how problem of discrimination manifest in public entities. The indicators of integrity and good governance were used by the Dutch Ombudsman when investigating the Schiphol cases and the practice of ethnic profiling by the

[1242] John Stuart Mill, *On Representative Government*. Princeton, Princeton University Press, 1976, p. 24. See also, John Stuart Mill, *Essays on Politics and Society,* Toronto, University of Toronto Press, 1977, p. 120.

Dutch police. Similarly, the Indonesian Ombudsman refers to good governance when investigating maladministration. Good governance aims to address the limitations that democracy has in preventing discrimination, racist populism and ethnic mass violence. As a cornerstone, good governance attempts to create a balance between the democracy and the rule of law.

Furthermore, the rule of law also obliges the government to obey legislation. Good governance communicates with the rule of law to prevent maladministration and state discrimination against the residents. Every country self-professes to be a state based on the rule of law. The rule of law requires legislation and legal certainty based on written law. If the administrative authority oppresses its citizens in the name of law, and people do not have a chance to complain against the government, then the quality of rule of law is weak. Good governance encourages public servants to be responsible and stimulates active participation of residents. The rule of law supports the functions of Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution. Good governance also encourages the rule of law to be more responsive and sensitive in the application of the Dutch Equal Treatment Act and the Indonesian Human Rights Act.

Other approaches to implementing good ethnic minority governance include the interpretation and the application of human rights legislation. If the governments actively search for justice to ethnic minorities, they can interpret the regulation with a view to protecting rights violation of ethnic minority rights. Multiple pieces of administrative authority should be involved with enlightening law enforcement when informed by the concept of good ethnic minority justice. The main sources of good ethnic minority justice are the of International Convention on the Elimination of All Forms of Racial Discrimination (CERD). This convention plays a significant role in stimulating the legislation and administrative authorities becoming more empathetic, and provide more attention to ethnic minorities. Both the Netherlands and Indonesia have ratified this convention, but the following question remains: How successfully has the Convention has been implemented into legal practice?

At least, in both countries we can see how the convention has been applied by either the National Human Rights Institutions or the governments. In Indonesia, discrimination against Chinese-Indonesians continues in public services. For example, local public servants often extort Chinese-Indonesians and make unlawful requests for an SBKRI.[1243] Meanwhile, in the Netherlands, the CERD report reveals the prevalence of discrimination in the labour market, goods and services, and improper conduct (such as ethnic profiling) by immigration services and the police.[1244]

There is also a noticeable absence of good ethnic minority justice in the legal response to the incidents of 1965 and 1998. Law enforcement has stalled without sufficient clarification by the government and law enforcers on the progress of the investigation and court hearings. If we cannot deal with the past, how can Indonesia advance towards the bright lights of the future? Ethnic and racial discrimination has escalated in the public sphere following demonstrations on November 4th, 2016, because the Indonesian people have not dealt with the tragedies of the past. Many Chinese victims were killed, robbed, and tortured in mass violence during the 1965[1245] and 1998 tragedies,[1246] which must be resolved by the courts. Good ethnic minority governance requires the prosecution of offenders and reparations for the victims. This situation needs a more transparent government to circulate important documents related to the executive summary of progress of the case, strengthening legal standing of victims to participate more actively, to lodge complaints, and use international human rights networks to pressure the law enforcement.

[1243] Indonesian CERD Report of 2000 by the Indonesian Ministry of Justice and Human Rights

[1244] The Netherlands Institute for Human Rights Submission to Eighty-Seventh Session of the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) on the Examination of the Combined Nineteenth to Twenty-First Periodic Report of the Netherlands

[1245] http://www.tribunal1965.org/en/final-report-of-the-ipt-1965/ the latest visited on October 24th, 2017. See also, Maxwell Ronald Lane, *Mass mobilisation in Indonesian politics, 1960-2001: towards a class analysis*, PhD Thesis at University of Wollongong, 2009, p. 64.

[1246] Jemma Elizabeth Purdey, *Anti-Chinese Violence in Indonesia 1996-1999*, PhD thesis at University of Melbourne, 2002, p. 99.

Good ethnic minority governance is an abstraction of the contribution of good governance to ethnic minority protection. Without good governance, the implementation of norms for the governments and the legal protection of ethnic minorities becomes fragile and at risk. Good ethnic minority governance requires the principles of good governance (transparency, participation and human rights) to be actualised to properly defend the fundamental rights of ethnic minorities. Good ethnic minority governance also invokes the concepts of good governance, democracy and the rule of law simultaneously to support the position of ethnic minorities.

The principles of good governance: transparency, participation and human rights, and their roles in solving the problems of ethnic minorities

Observing the principles of good governance (such as transparency, participation and human rights) may fortify the norms for the government and provide better legal protection of ethnic minorities. *First,* the principle of transparency – and its specifications - is an important element in stimulating ethnic minorities to enhance their legal capacity.[1247] The Netherlands and Indonesia have similar legal norms in their Public Disclosure Acts which yield principles of transparency for legal practice. Both the Dutch Government's Information Act and Indonesia's Public Disclosure Act (Law No. 14 of 2004) use the term 'everyone' to describe who is entitled to the right to know and right to access to public information. This inclusion can empower ethnic minorities to request useful public information to improve their skills, knowledge, and position. Furthermore, transparency can also stimulate ethnic minorities to be more active in combating discrimination. Furthermore, ethnic minorities can work together with relevant institutions such as the anti-discrimination bureaus and other public institutions to access public information if they experience discrimination. Another function of transparency is to prevent social conflict. For instance, the Dutch Social and Cultural Bureaus are required to conduct

[0] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 89-104

public research about ethnic minorities, which has generated a more nuanced understanding of the issues that affect Turkish and Chinese groups in the Netherlands. Similarly, in Indonesia, the report of discrimination trends stipulates the profile of ethnic groups whose fundamental rights must be protected. This information is beneficial to public understanding and can stimulate the social harmony and peace. However, information about ethnic groups is still too scarce. A final, but crucial point related to transparency is that of language. Not all ethnic minorities can speak Dutch or Indonesian, the dominant (and official) languages of the Netherlands and Indonesia, respectively. As a result, large amounts of public information are inaccessible to anyone who does not understand the language it is published in. Therefore, translation of information should be a consideration of transparency regimes in in the future.

The Public Disclosure Acts of the Netherlands and Indonesia can be used by ethnic minorities to lodge a request for public information. The Dutch Government Information Act stipulates in Article 3 (1) that 'anyone may apply to an administrative authority or agency, service, or company carrying out work for which is accountable to an administrative authority for information contained in documents concerning an administrative matter.' Therefore, both countries provide ethnic minorities with the opportunity to request public information from the administrative bodies that is beneficial for the fulfilment of their interest. If they experience difficulties in the labour market or with access to goods and services, public information describes the relevant procedures and mechanisms which can be used to empower ethnic minorities. Similar legislation exists in Indonesia, for example Article (2) of Law No. 14 of 2008 which stipulates that 'all public information is open and accessible to every user of public information.' Through this Article, ethnic minorities have the legal standing to request public information as a user of public information. They can use public information to strengthen their position with regards to immigration, public services, applications for citizenship, in the labour market, etc. If they experience problems when doing so, they can then challenge the public entities' decision to not pro-

vide information via the Indonesian Information Committee which has authority to mediate and adjudicate in matters of public information.

By providing sufficient information, the government facilitates public participation, including that of ethnic minorities, and transparency stimulates better public information. Not only can ethnic minorities participate more easily in public, but the entirety of civil society can engage with the issue of combating discrimination. The most active NGOs in Indonesia that advocate for the issues of minorities and transparent access to public information are the Anti-Discrimination Movement (GANDI), KontraS, ELSAM, and Legal Aid Institutions. Transparency, of course, protects the rights to know and the rights to freedom of speech which can be particularly beneficial to all people, including ethnic minorities. In Indonesia, Turkish and Chinese people frequently access public information to empower their position in the public sphere. The Turks have used public information to defend their fundamental rights during the witch-hunt conducted by the Turkish government after the failed *coup d'etat*. The Turkish embassy asked the Indonesian government to close Turkish schools associated with *Hizmet* groups, but the Indonesian government rejected this request. The Turkish community responded by accessing and deploying public information to protect their position. Comparable activity also took place in the Chinese community in Yogyakarta who challenged the Vice Governor's letter on the prohibition of land ownership for non-native Indonesians.

Through transparency, public information can empower people to struggle for their ideas and to intervene with the government decision-making process. It is the duty of the government to present accurate information according to security, human rights, and environmental factors. Understandability of information is a pivotal element of transparency. Transparency stimulates the interests of groups to observe the weakness and strengths of competing with other political groups and the government. In addition, transparency encourages the freedom of press, freedom of expression and freedom from discrimination. Everyone, including ethnic minorities, engages in economic decision-making. Transparent access to information is vital if people are to make

informed decisions when accessing the marketplace. Transparency is also used to restrict government intervention in the market, which is now commonly managed in a *laissez-faire* approach. This means that ethnic minorities can defend their business interests through transparency. For instance, Turkish and Chinese people can protect their businesses from arbitrary investigations by government which disrupt their business activity.

Second, the participation[1248] of ethnic minorities as such, and its specified norms, are not sufficient to effectively struggle against discrimination. Observation of the way Turks and Chinese engage in active participation, reveals the ways that they exercise their constitutional motive. Ethnic minorities file few complaints through the National Human Rights Institutions, Ombudsman, or the courts in Indonesia. In the Netherlands, ethnic minorities are involved with dispute resolutions at the Netherlands Institute for Human Rights, Ombudsman, and the courts. Interestingly, the Chinese community in the Netherlands participate at much lower levels than other minorities; the Netherlands Institute for Human Rights only received 20 complaints from the Chinese community. The Turkish community, on the other hand, are much more active. The opposite is true in Indonesia where Turkish people have filed zero lawsuits in the courts and only made a single complaint to the Commission and the Ombudsman. However, the legal consciousness and participation of Turks living in Indonesia has increased following the 'witch-hunt' of the *Hizmet* Turkish community by the Turkish government. Furthermore, if we observe the participation of ethnic minorities in the Netherlands and Indonesia from a CLEAR perspective, we can see that the facilitation of participation is adequate both in Indonesia and the Netherlands but that the involvement of ethnic minorities is unimpressive. Many complaints are made to the Dutch Ombudsman, but only a few applications proceed forward to the later stages of the complaint procedures, the same is true at the anti-discrimination bureaus. In total, the Dutch Ombudsman reports that approx-

[1248] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 132-144

imately 38,000 reports from a population of 17 million.[1249] This compares favourably to the Indonesian Ombudsman who receives approximately 5,000-9,000 complaints each year from a population of 250 million.[1250] The Dutch Ombudsman has received complaints from ethnic minorities concerning immigration, police conduct, and improper public service. The function of the Dutch and Indonesian Ombudsman is the same: to preserve the integrity of the administration. However, the public participation of ethnic minorities is crucial to strengthening the efficacy of the Ombudsman in combating maladministration and discrimination. If ethnic minorities do not participate in legal disputes, the government has little incentive to change their strategies for implementing the norms for the government and legal protection of ethnic minorities. Moreover, constitutional motive is a means of participation that can encourage the administration and controlling bodies to perform their roles better. Unfortunately, In Indonesian legal culture, submitting a complaint to the administration is often still considered taboo. The mentality of the Indonesian people, is that of a 'quiet' people, perhaps a result of the trauma and legacy of the guided democracy of Soekarno, the New Order of Soeharto, and even the colonial era.

Meanwhile, in the Netherlands, the Turkish and Chinese communities have also used to the courts to protect their interest in areas related to the labour market, social benefits, residence permits, civic integration, work permits, citizenship, basic registration, family reunification, detention, hate crimes, unequal treatment, etc. In this regard, the participation of ethnic minorities who lodge complaints after experiencing legal problems is sufficient. This is in stark contrast to the situation of the Indonesian Courts. The Chinese community submitted legal cases concerning land ownership and forced changing-name to the courts.

[1249] Summary annual report of the National Ombudsman 2012. Summary annual report of the National Ombudsman 2013, Summary annual report of the National Ombudsman 2014.

[1250] The Indonesia Ombudsman's Annual Report 2002, The Indonesia Ombudsman's Annual Report 2003; The Indonesia Ombudsman's Annual Report 2004; The Indonesia Ombudsman's Annual Report 2005; The Indonesian Ombudsman's Reports, 14 July 2014; The Indonesian Ombudsman's Reports on 08 March 2016; The Indonesian Ombudsman's Reports on 26 April 2016

Meanwhile, as can be seen above, Turkish people who live in Indonesia appear reluctant to use the courts to solve their problems. The reputation of the Indonesian Court is that of a corrupt, inefficient and ineffective institution. Thus, people often prefer to choose alternative dispute paths rather than dealing with the courts. In Indonesia, a single case can take years. Therefore, few ethnic minorities submit complaints to the Indonesian Court.

Another form of constitutional motive is participation with the National Human Rights Institutions. The Netherlands Institute for Human Rights and the National Commission of Human Rights of Indonesia both receive reports of complaints from ethnic minorities. In accordance with Article 3 of the Netherlands Institute for Human Rights Act and Article 76 and Article 89 of the Indonesian Human Rights Act, these institutions are provided with the authority to solve complaints through mediation or semi-dispute settlements. One feature of these human rights bodies is to receive complaints involving the private sector. In the Netherlands, the baby milk powder cases are examples of the prosecution of corporations who engaged in discriminatory practices. In Indonesia, the case of PTPN IV also concerns the prosecution of a private sector. The National Human Rights Institutions is the most favoured institution for ethnic minority to exercise their constitutional motives.

After the participation of ethnic minorities is understood from a constitutional motive perspective, it can be explored in finer detail by the CLEAR method. The CLEAR method focuses on three main factors, namely: the capacity of participants, infrastructure and institutional facilitation, and the quality of the response by the administration. The capacity of participants of ethnic minorities here is not sufficient to advocate for their interests in the legal field. The knowledge and experience of ethnic minorities tends to be limited. They require help from lawyers, anti-discrimination bureaus and NGOs who are willing to accompany and support them with the submission of their complaint to the relevant public institution. Many people from the Turkish community in the Netherlands are highly educated, with some of them also be-

ing lawyers. By the same token, in Indonesia, the Turkish and Chinese communities also have sufficient levels of education. Yet, when dealing with complaints of discrimination, specialist knowledge and experience with discrimination cases is required. Human rights activists, human rights lawyers, and human rights NGOs are knowledgeable about how to respond to incidents. Human rights activists form a network and have personal contacts with the Ombudsman, the National Human Rights Institutions, the media, police officers, etc.

Indeed, the infrastructure of ethnic minority participation is supported with abundant regulations and institutions. As is discussed in section 3 of chapter 5, the existing legislation and the structure are combatting discrimination. Indeed, ethnic minority participation is supported by Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution alongside other pieces of legislation including the Dutch Equal Treatment Act and the Indonesian Human Rights Act. There is also a further formulation about societal participation in the Anti-Discrimination Act of Law No. 40 of 2008. This Article stipulates that every Indonesian citizen has a role in the implementation of protecting and preventing racial and ethnic discrimination. Furthermore, this act also states that every citizen can contribute: a) to improve the empowerment of society; b) to stimulate and to develop the capacity of society; c) to establish active participation by engaging some legal watchdog activities; and d) to give advice, information and responsible opinions. Meanwhile, the existing infrastructure provided by the National Human Rights Institutions, the Ombudsman, and the courts facilitates ethnic minority participation.

The final components of ethnic minority participation are citizen's panels and participation at the community level. The Chinese community in Indonesia have been the most active group of actors that have participated through citizen's panels and community-level participation. Their contribution to the Indonesian rule of law is significant. They have enabled citizens to take part in the law-making process. In particular, the Indonesian Human Rights Act, Citizenship Act, and Anti-Discrimination Act have been informed by such panels. The Turkish

community has been similarly effective in their mass organisational movements, some of which have resulted in parliamentary representation. Unfortunately, there is no evidence to suggest that Dutch human rights legislation has been influenced by the Turkish community in the Netherlands; in 1994, the Equal Treatment Act was formulated by the CDA, PvdA, and many human rights activists —most of whom were Dutch natives.

Third, one comparable aspect of the human rights situation, from a good governance perspective[1251] in the Netherlands and Indonesia is that ethnic minorities are becoming abandoned, marginalised, vulnerable, and victimized. In the Netherlands, ethnic minorities are targeted by populist right-wing movements who promote Islamophobia and anti-immigrant notions. Meanwhile, in Indonesia, the crimes against humanity are still yet to be solved and the government has shown little interest in addressing the social amnesia that shrouds these tragedies. The position of the government is the key to combating discrimination. If the government remains passive in the face of discrimination, the situation will only deteriorate further. The situation of the labour market and access to goods and service in the Netherlands and Indonesia demonstrates the weak position of ethnic minorities. Turks with Arabic sounding names experience discrimination in the labour market. Chinese people are marginalised in the market as evidenced by the baby milk powder cases. Meanwhile in Indonesia, the Chinese-Indonesians in Yogyakarta have been excluded from land ownership. All discrimination against ethnic minorities must be erased to achieve full implementation of the rule of law, democracy, and good governance. In addition to the Dutch Equal Treatment Act and the Indonesian Human Rights Act, ethnic minorities can use the Dutch Criminal Code (hate crimes) and the Indonesian Anti-Discrimination Act, Law No. 40 of 2008 to combat discrimination.

[1251] G.H. Addink (Forthcoming), *Good Governance: Concept and Context*, Oxford, p. 150-155

The body of politics of the government must be more progressive

Governments have their own function of establishing good governance which can reinforce the norms for the government and legal protection of ethnic minorities. I rank the Netherlands Institute for Human Rights and the Indonesian National Commission of Human Rights as the most effective institutions in combating discrimination; these institutions are proactive in promoting equal treatment and the right to freedom from discrimination. In second position is the Dutch Ombudsman and the Indonesian Ombudsman. These institutions also undertake effective investigations of maladministration and discrimination cases. Third, is the Dutch Court which is equipped with suitable judges and often consults human rights instruments when they deal with cases of discrimination. Fourth, there are the Dutch and Indonesian governments which take little practical action to combat discrimination; the only relevant actions being the release of their National Action Plans of Human Rights. These National Action Plans are important documents for providing guidance to human rights enforcement. However, some legal scholars regard these plans as 'paper tigers' rather than substantive legislation. Finally, the lowest ranking institution the Indonesian Court. Even though, in the past decade, this institution has been responsible for significant legal reform, many judges still do not possess a theoretical view of good governance or human rights. My analysis of the legal reasoning provided in discrimination cases found that there was a lack input from human rights and good governance. If ethnic minorities are understood to be vulnerable, the governments must be proactive in promoting the war on discrimination. Good ethnic minority institutions can only be established if administrative authorities are more attentive to the needs of ethnic minorities.

3. Recommendations

Evaluating the role of the government

Currently, the Dutch and Indonesian governments only play a limited role in combating discrimination. Despite being the most powerful institutions that are in a position to promote good governance, the Indonesian and Dutch governments are often inattentive and passive to

the issue of discrimination. Many scholars and activists are particularly disappointed with the Dutch government for disbanding the National Consultation Platform for Minorities (LOM). This research notes that this institution was significant in stimulating participation and appealing to ethnic minorities' interest. For the Indonesian government, the Dutch Anti-Discrimination Bureaus could provide inspiration for new, reformed Indonesian institutions. The establishment of anti-discrimination bureaus in cities would be a significant step in the right direction and could reduce the prevalence of discrimination in the public sphere.

Fundamentally, the government must be neutral and impartial, and not solely obey the will of the majority. However, a protectionist government is needed to intervene with unequal opportunities in the labour market, public services, education, healthcare, immigration, municipalities, etc. Indonesian administrative authorities can engage in a protectionist approach that is suitable for an Indonesian context. The Indonesian Government requires widespread legal reforms for the administrative bodies. The system of registration of discrimination cases should be more progressive to respond more effectively to hate crimes. At the municipality level, the Indonesian Government has no system to receive complaints about discrimination. The physical geography of Indonesia provides many practical difficulties in the fight against ethnic discrimination. The government should be brave and assertive when punishing public servants who are discriminatory. The Indonesian Government has issued significant pieces of human rights regulation such as the Human Rights Act, Anti-discrimination Act or Law No. 40 of 2008, and ratified many international conventions on human rights. The National Action Plan of Human Rights must firmly avow the fight against discrimination. Adopting a system that is similar to the Dutch Anti-Discrimination Bureaus would constitute significant progress, and demonstrate that the government is committed to combating discrimination. Similarly, this research suggests that the Dutch Government should reactivate the National Consultation Platform on Minorities (LOM) which previously effectively represented ethnic minorities' aspirations.

The problematic issues of racial discrimination in Indonesia are those relating to the crimes against humanity, which have yet to be resolved. The prosecution of the 1965 and 1998 tragedies depends entirely on the will of government. The legal proceedings have been finalised by the Indonesian National Commission of Human Rights, and sent to the public prosecutor. The government should be transparent in informing the public of any progress of these cases. Currently, it is undecided whether a reconciliatory or a litigious approach is the appropriate means of resolving these tragedies. In my opinion, the method is of little importance — we can choose either or both. More important is that the current deadlock is broken and that the proceedings continue, make progress and that the public are informed the outcome. Currently, the government appears to show little interest in resolution. The International People's Tribunal concluded stated that the 1965 tragedy constituted a genocide of the Chinese people. Although this precise verdict is debatable and controversial, there is a wealth of evidence that there were many human rights violations during 1965. Thus, the government must request forgiveness and undertake reparations.

There is a similarity in the current situations of both the Netherlands and Indonesia. Right-wing movements are growing more powerful and increasing their influence on the media, which has resulted in a spike in discrimination against ethnic minorities. The Dutch and Indonesian governments should formulate their own concepts of good ethnic minority governance and implement these concept into their public policies. The government's role in reducing discrimination can benefit from greater transparency. This greater transparency can prevent social conflict, facilitate human rights education and stimulate public participation. However, the problem of language must also be attended to legal documents which are still often only available in the official languages of each country, thus rendering them inaccessible to those who are not fluent in Dutch or Indonesian. To achieve better transparency these documents should be translated into many languages.

Demanding active and critical groups

The level of complaints and objections submitted by ethnic minority needs to be improved. Providing good governance courses to citizens, human rights education, and explaining the legal procedures relevant to submitting complaints of discrimination could play a significant role in improving the active participation of ethnic minorities. The participation of ethnic minorities is limited to the Indonesian National Commission of Human Rights, the Ombudsman, and the courts. Similarly, the Chinese community in the Netherlands rarely files complaints with the Netherlands Institute for Human Rights. Potentially, the Netherlands Institute for Human Rights could be more proactive in seeking contact with Chinese groups and establishing a community network. Active and critical groups of ethnic minorities are needed to pursue the goals of good governance, and in particular, good ethnic minority governance. For this to be a reality, ethnic minorities must strengthen their legal capacity to deal with the legal procedures involved in combating discrimination. Ethnic minorities must exercise their constitutional motive to engage with the National Human Rights Institution, Ombudsman, anti-discrimination bureaus, and the courts. On the other hand, ethnic minorities must also become more involved with the law-making process in parliament, the administration, and municipalities, etc. For example, members of the Indonesian-Chinese community were involved in the drafting of the Act of Citizenship/ Law No. 12 of 2006 and anti-discrimination law/ Law No. 40 of 2008. The participation of active ethnic minority groups in the policy making process at the public institution level can help prevent discrimination. In addition, ethnic minority groups can use the CLEAR method to evaluate their participation. Effective participation as envisioned by the CLEAR method requires 1) the skilful performance of ethnic minority participation, 2) the proper facilitation by the government for receiving complaints of discrimination, and 3) responsive feedback from the government.

Mainstreaming good ethnic minority governance in law enforcement

All too often, the legal world is guilty of operating on autopilot. The concept of good ethnic minority governance provides much needed inspiration to depart from the stagnant, passive approaches to discrimination and provides a theoretical framework for the construction of a more sensitive, considerate legal system of ethnic minority protection. This research has found that a gulf exists between text of anti-discrimination legislation and the real-world implementation of this legislation. Therefore, every single case of discrimination requires good and proper law enforcement, and it is vital that human rights legislation is included in verdicts or public policies. On many occasions, law enforcement has lost its way and become disorientated. Good ethnic minority justice requires police philosophers, judge philosophers, minister philosophers; Plato argues that that philosophers are needed to interpret the concept of justice beyond of the immanent text of regulation. Good ethnic minority governance provides spirit to the legal system and its law enforcement that law must listen to the voice of ethnic minorities. Currently, law enforcement tends to be concerned with the practical, rigorous, and the technical rather than the philosophical. Good ethnic minority governance can be used to evaluate whether law enforcement produces justice to the people and ethnic minorities or not. Good ethnic minority governance may enlighten Article 1 of the Dutch Constitution and Article 28 of Indonesian Constitution, the Dutch Equal Treatment Act, and Indonesian Human Rights Act, the hate crime of the Dutch criminal code and the Indonesian Anti-Discrimination Act/ Law No. 40 of 2008 to become more alive and meaningful. From a good ethnic minority governance perspective, these legal norms are more than another line of text, but evocative of heart and good will of human beings and the soul of mankind. I emphasize my practical recommendations, hereby:

1. The Dutch government should reactive the National Consultation Platform on Minorities (LOM) to establish again a forum which can gather the voice of ethnic minorities, because this organization was previously an effective means of representing ethnic minorities in the law-making process;

2. The Indonesian government should introduce an anti-discrimination bureau to provide the legal channel of discrimination complaints, because ethnic minorities may be able to participate better through an anti-discrimination bureau.

4. Final concluding remarks

1. About the terminology

This research uses many terms including 'government,' 'administrative authorities,' 'municipality', and so on. 'Government' refers to all power which comprises executive, legislative, judicative, and Ombudsman/ the National Human Rights Institutions. I use the term 'government' to refer to all the organs of the State or all power above. Meanwhile, an 'administrative decision' is one made by the administrative authorities including the state organs or a juristic person governed by public law. Therefore, I sometimes also utilize the phrase 'administrative authorities' to refer to these institutions. In this research the term 'government,' in many times, is used in the narrow sense of 'the administration,' and more specifically 'the administrative authorities,' unless it is stated explicitly that a broader meaning (i.e. the powers in the State) is intended.

2. The development of approach

My primary approach is good ethnic minority governance. As can be seen in the above sections, good ethnic minority governance is required to encourage the government to be more responsive, sensitive, progressive, and respectful to the voices of ethnic minorities. As a theoretical reflection, I believe the concept of good ethnic minority governance should be expanded in scope and include contributions from the media, corporations, NGOs, international organisations, and so on. Furthermore, good ethnic minority governance could draw further guidance from other scientific approaches including politics, anthropology, ethnography, economics, psychology and so forth. The concept of good ethnic minority governance requires further development, and I intend to utilize and refine this

idea in future research concerning good governance and ethnic minorities. The notion of good ethnic minority governance is one that aims to encourage a legal system composed of good norms and good protection of ethnic minorities. In addition, good ethnic minority governance desires a more transparent government, increased participation society, and the fulfilment of human rights.

3. How are good governance and ethnic minorities elaborated in legal practice?

Good governance has two components; norms of governments and protection of the people. Both components are present in the Dutch and Indonesian Constitutions. However, upon analysis, norms tend to appear more often in legislation concerning administrative law, while, protections appear in the Equal Treatment Act and Human Right Act. With respect to all schools of thought in legal theory, in the case of ethnic minorities, administrative law is often the most effective approach for yielding tangible outcomes when compared to than other regimes of law such as human rights law or criminal law. Why? I explain below.

3.1 Norms for the governments

The norms for the governments are stipulated in the regime of administrative law, for example GALA in the Netherlands and the Indonesian Administrative Court Act (Law No. 51 of 2009), the Indonesian Government Administration Act (Law No. 30 of 2014), and the Indonesian Public Service Act (Law No. 25 of 2008). Administrative law has a tendency to be more effective rather than other regimes of law because it is connected with legal binding power and procedures which must be obeyed by administrative authorities, and is concerned with the legal protection of the appellant. However, in practice, it seems that many problems arise with the implementation of Court's verdicts in Indonesia. However, in the Netherlands the Court's verdicts— especially those of the administrative court— are executed and respected. In case

law, ethnic minorities lodge objections and appeals in accordance with GALA, often regarding issues of asylum, social benefit, and integration. Ethnic minorities consider administrative law to be a suitable way to obtain reparation (a sum of money) and request what they require. In discrimination cases, the verdicts of human rights institutions such as the Netherlands Institute for Human Rights and Indonesian National Commission of Human Rights' serve as voluntary and non-coercive recommendations. Of course, GALA cannot be used if the suspect or defendant is part of the private sector. However, GALA is often used by ethnic minorities to request a binding decision from an administrative authority and the Court in case law concerning immigration, social benefits, and integration. Meanwhile, criminal law is solely focused on the punishment of the perpetrator or offender—the victims, ethnic minorities, are forgotten in this system of justice.

Administrative authorities and the Courts have more a legal binding power to ensure the prohibition of discrimination and misuse of power. They have the authority to create and control the norms of governments such as carefulness (Article 3:2), the prohibition of misuse of power (Article 3.3), prohibition of arbitrariness (Article 3:4 and Article 5:13), legal certainty (Article 4:23 and Article 5:22), proportionality (Article 3:4 (2)), and the duty to give reasons (Article 3:46, Article 3: 47, Article 3:48) in accordance with GALA. Similarly, in Indonesia, they may generate and obey norms including professionalism, non-discrimination, accountability, equality before the law, accessibility, (Article 4 of Law No. 25 of 2009 concerning Public Service) legal certainty, beneficiary, impartiality, properness, prohibition of the misuse of power, and good public service (Article 10 of Law No. 30 of 2004 concerning Government Administration).

These norms are vital to fortify the position of ethnic minorities. Without sufficient norms, ethnic minorities may always be at risk.

3.2 Norms for the protection of ethnic minorities

Norms for the protection of ethnic minorities are provided by the Indonesian Human Rights Act and the Dutch Equal Treatment Act. These norms are also facilitated in international human treaties such as CERD, ICCPR, ECHR. Indeed, theses norms are composed of various rights which were referenced earlier, for example family rights (Article 10), the right to develop his or her own skill (Article 11), the right to justice (Article 17), the right to security (Article 28), the rights of indigenous people (Article 6), the rights to life (Article 9), the prohibition of slavery (Article 20), and so on in accordance with the Indonesian Human Rights Act, Law No. 39 of 1999. In the Netherlands and the prohibition of discrimination in the labour market (Article 5) and access to goods and services (Article 7) is regulated under the Dutch Equal Treatment Act. With these rights, people are endowed with an adequate legal standing to fight against discrimination.

3.3 Principles of good governance

3.3.1 The principle of transparency

The position of Public Disclosure Act is important for the establishment of the principle of transparency in Indonesia and the Netherlands. The Public Disclosure Acts of Indonesia and the Netherlands have been responsive to the needs of ethnic minorities. Therefore, ethnic minorities can use these norms to access public information.

3.3.2 The principle of participation

When the legal infrastructure to support the principle of participation is bestowed, ethnic minorities can easily

participate in legal space. In the Netherlands, division 3.4, Article 3:15, Article 7:1 and Article 8:1 of GALA are sufficient to encourage ethnic minorities to participate in the decision-making process, and submit objections and appeals. Similarly, in Indonesia, people have access to the law-making process in accordance with Article 96 Law No. 12 of 2011 concerning the Establishment of Laws and Regulations. In addition, ethnic minorities can also challenge administrative decisions through the Indonesian Administrative Court in accordance with Law No. 51 of 2009.

3.3.3 The principle of human rights

When examining the principle of human rights, I discovered the spirit of the right to good governance. This right comprises the rights of people to hold the government to account based on various indicators stated in administrative norms (properness, accountability, transparency, effectiveness), and the right to request an Ombudsman and political or civil rights. The fulfilment of these different rights is a promising way of combating discrimination, ethnic profiling, Islamophobia, anti-immigrant sentiment, right-wing populism, and so on.

4. Analysis of the situation in Indonesia

4.1 Constitution and Legislation

Article 28 of the Indonesian Constitution is sufficient from a good governance perspective to generate norms for the government and the legal protection of ethnic minorities. At the level of legislation, regulations such as the Indonesian Human Rights Act, the Act of Citizenship, the Government Administration Act, and the Public Service Act, have proved insufficient to establish an effective anti-discrimination legal system. Despite the adequacy of the text of legal norms, improvement to the implementation of these norms is still required.

4.2 Institutions

Jokowi's Cabinet is too concerned with economic growth rather than the establishment of good governance. The National Action Plan of Human Rights has never been evaluated or discussed widely in the public sphere. Meanwhile, the Indonesian National Commission of Human Rights and the Ombudsman have never been effective in intervening with human rights violations. The courts seem very distant from discourses of human rights.

4.3 Three Principles

First, the Public Disclosure Act, and the principle of transparency cannot work properly without adequate participation by people who request access to public information. Second, support for the principle of participation is often inadequate and thus people do not often use the justice system to defend their own interests. This is especially true for ethnic minorities who tend to be silent and quiet in the face of discrimination. Third, the principle of human rights has been neglected by the government, for instance, the crimes against humanity of 1965 and 1998 have yet to be properly investigated.

5. Analysis of the situation in the Netherlands

5.1 Constitution and Legislation

Article 1 of the Dutch Constitution has inspired much political debate in parliament and Dutch legal discourse. At the level of legislation, the Dutch Equal Treatment Act is sufficient to regulate the prohibition of direct and indirect discrimination. With regards to the formulation of the norms of government and legal protection, GALA is more than adequate for the protection of ethnic minorities.

5.2 Institutions

The National Dutch Administrative Authorities pay little attention to preventing and combating discrimina-

tion. Currently, Rutte's cabinet is conservative and restrictive with regards to immigration policy and pays less attention to equal treatment. In addition, the LOM was disbanded and has not yet been replaced by a suitable alternative. However, the Netherlands Institute for Human Rights and the Ombudsman receive relatively large numbers of complaints about discrimination, and these institutions are responsive in trying to solve problems of discrimination.

5.3 Three Principles

First, the Dutch Government Information Act does not state that the information commission has any responsibility for creating guidelines for the establishment of a public information system, unlike the Indonesian Information Commission. Second, based on my interviews with informants it appears that ethnic minorities do not receive much support or encouragement to participate. Third, ethnic profiling, discrimination in labour market, and Islamophobia are persistent problems in the Netherlands.

6. Conclusions

Having discussed how to construct a comparative law perspective, the conclusions of this section address how constitutions, legislation, and institutions can strengthen the norms of governments and legal protection of ethnic minorities. In essence, constitutional norms in Indonesia and the Netherlands are different largely in terms of words of formulation, rather than substance. Meanwhile, the Dutch Equal Treatment Act stipulates basic legal norms for the prohibition of discrimination in the labour market, access to goods and services, and so on. On the other hand, the Indonesian Human Rights Act protects multiple different rights. At the level of the administrative authorities, the Dutch administration has provided anti-discrimination bureaus, whereas the Indonesian administration has no equivalent institutions. The Indonesian National Commission of Human Rights and the Ombudsman are endowed

with a criminal provision as an extension of their authority. Thus, the Indonesian National Commission of Human Rights can act a quasi-prosecutor in the Indonesian Human Rights Commission, whilst the Indonesian Ombudsman has power to charge someone who interferes with their investigations with criminal punishment. Thus far, I have argued that the Dutch Court is more concerned with the interpretation international human rights treaty, whereas the Indonesian Court is more interested in national law and rarely engages in innovative interpretations of national human right law.

7. Finally, what should be done?

From the perspective of constitutional norms, Article 28 of Indonesian Constitution and Article 1 of the Dutch Constitution are substantial enough to become the fundamental legal foundation for reinforcing the norms of governments and the legal protection of ethnic minorities. Additional sections are not necessary to improve either governments' duties to safeguard ethnic minorities. Indeed, these articles have sufficiently toughened the norms of government to treat people equally and prohibit discrimination. With regards to legislation, the Indonesian Human Rights Act consists of general objectives, various rights (including women's rights, the rights of children, and the rights of persons with disabilities), and the structure of the Indonesian National Commission of Human Rights. It seems that Indonesian Human Rights Act represents a single, complete and detailed codification of human rights and equal treatment provisions. On the other hand, in the Netherlands, human rights and/ or equal treatment provisions are separated into multiple regulations such as the Equal Treatment Act (AWGB), the Act on Equal Treatment on the Grounds of Disability or Chronic Illness (WGBh/ cz), the Equal Treatment in Employment (Age Discrimination) Act (WGB l), and the Equal Treatment (Men and Women) Act. Furthermore, The Dutch National Human Rights Institutions are also regulated by another additional piece of regulation such as the Netherlands Institute for Human Rights Act of 2011 and Municipal

Anti-Discrimination Service of 2009. The Dutch Government needs to consolidate these regulations into a single law in order to make them more effective and systematic.

Codification is the one of many ways to generate more systematic, logical, and less overlapping legal norms. A good example is GALA. The Indonesian Government requires a codification of administrative law such a GALA in the Netherlands. Therefore, the Indonesian Administrative Act (Law No. 51 of 2009), the Indonesian Government Administration Act (Law No. 30 of 2014), the Indonesian Public Service Act (Law No. 25 of 2008), and other related regulations could be unified into one single document, so that it is more readable.

At the level of institutional settings, the administration, the Ombudsman, the Netherlands Institute for Human Rights, and the courts need to be evaluated. The Dutch and Indonesian Administration rarely utilize their National Action Plans of Human Rights as guidelines for combating discrimination. These national action plans must be indicators to delineate the implementation of norms, the reinforcing of administrative authorities, and legal protection of ethnic minorities. Furthermore, the administrations failed to fulfil one of the requirements of these national action plans, namely that they should compile periodic reports on combating racial discrimination in accordance with Article 9 of CERD. I strongly recommend to the Dutch and Indonesian Governments that they need to be more devoted to submitting and publishing periodic report on combating racial discrimination.

The role of the Dutch and Indonesian Ombudsman at the local level is vital to increase proximity to the people who are affected by maladministration. Unfortunately, current political budgeting is not sufficient to adequately support the local Ombudsman to combat maladministration and discrimination. Similar issues apply to the National Human Rights Institutions. For example, the Indonesian National Commission of Human Rights should encourage its local branches to be more progressive. The presence of these local

branches may also provide useful inspiration to the Netherlands, even though many anti-discrimination bureaus already exist at the local level. During my interviews, many informants wondered why there is much more discrimination in local areas. Finally, the courts in Indonesia and the Netherlands need to refer to human rights treaties in international, regional, and national law more often. These human rights norms, indeed, are a legal source which a judge must interpret creatively and progressively.

Summary

Good governance was one of the main topics that was discussed in the Indonesian Constitutional Assembly between 1956 and 1959. Despite these discussions, this concept of good governance was rarely a part of Indonesian legal discourse prior to the fall of the New Order. Likewise, good governance itself, as a means of providing norms for the government and legal protection of ethnic minorities, was also absent during revolution time and under the New Order. Investigating the development of the concept of good governance in the Indonesian legal system has become necessary to enrich Indonesian legal discourse and to empower the position of ethnic minorities in Indonesia.

Between 1950 and 1998, the Indonesian administration seemed to be actively committed to ethnic discrimination and violence. For instance, the Act of Citizenship Law No. 2 of 1958 put Chinese-Indonesians' citizenship in jeopardy, resulting in many Chinese Indonesians becoming stateless. As this Act targeted a specific demographic, the consequence can be best understood as an abandonment of the government norm of equal treatment for all citizens. Just a year later the Indonesian government issued the Government Regulation No. 10 of 1959 concerning prohibition of trading by foreigners, which in reality targeted Chinese-Indonesian traders, who were expelled from their homeland and excluded from the right to own their own business.

In the past, a caste system based on ethnicity was established by the Dutch colonial administration under Article 163 of the *Indies status* or *Indische staatsregeling*. Europeans were placed at the top of this system, native Indonesians at the bottom and 'foreign Orientals' in between. However, these distinctions were not designed to enforce racial segregation, rather they marked an attempt to implement a form of legal

pluralism with the intention of respecting the living law of the native Indonesians. Unfortunately, echoes of the legal legacy of the colonial era were reactivated by New Order Regime as a means of oppressing ethnic minorities. For example, Soeharto used *Koninklijk Besluit* No. 64 on March 28th, 1870 concerning mass groups (*Staatsblad* 1970 No. 64. Jo. STB. 1937 No. 573) to prohibit mass organisations of Chinese people. The New Order also reused *Ordonnantie* No. 250 (originally issued on April 23rd 1909), another piece of colonial legislation, to prevent the formation of secret Chinese organisations in Indonesia (*Staatsblad* 1909 No. 250 jo. STB 1917 No. 497).

The New Order engaged in maladministration and racial discrimination throughout its reign. This is evident both in their regulations and their actions. However, the New Order was not the first Indonesian government who did not abide by the spirit of good governance; good governance was absent in the time of revolution, especially during Guided Democracy (the late period of Soekarno's reign). Prior to the reform era, ethnic minorities were brutally oppressed by the Indonesian government. For example, in 1965 half a million people were killed in the crimes against humanity in what has been classified as a genocide. In 1998, just before the fall of the New Order, approximately 3000 people were killed and hundreds of Chinese women were raped during the race riots of 1998. Clearly, these incidents demonstrated a failure on the Indonesian government's behalf to implement good governance, democracy and rule of law. I argue that this absence of good governance will continue if the Indonesian Government fails to establish the Truth and Reconciliation Commission with regards to investigating and resolving these crimes against humanity.

At present, the Indonesian government has been presented with problematic situations that have produced challenges to the norms of government and legal protection of ethnic minorities in Indonesia. For example, following the failed coup d'état in Turkey on July 15th, 2016, the Turkish government became increasingly hostile to expat Turks suspected to have been involved with opposition movements such as *Hizmet*. Human rights activists refer to this this crackdown as 'the long

arm of Erdogan'— an arm with a global reach that stretches as far as Indonesia and many other countries. The Turkish Embassy in Indonesia has played a significant role in this 'witch-hunt' of Turkish people who live in Indonesia. This problem has become one of the main incidents that I use to investigate the position of the Indonesian Government with respect to the human rights of Turkish people whilst also maintaining good diplomatic relations with Turkey.

I argue that the above cases demonstrate that the Indonesian legal system needs to implement the ideas of good governance to prevent and combat discrimination. Good governance could strengthen the norms of government and the legal protection of ethnic minorities in Indonesia. Therefore, this research, as an administrative law study, is conducted to investigate problems faced by ethnic minorities. Research questions include:

First, to what extent has the idea of good governance contributed to strengthening the establishment of the norms for the government and legal protection of ethnic minorities in Indonesia and the Netherlands?

Second, how do good governance principles such as transparency, participation and human rights foster the fulfilment of the legal protection of ethnic minorities in Indonesia and the Netherlands?

Third, how are the principles of good governance used by the courts, the Ombudsman and the National Human Rights Institutions to solve the problems faced by ethnic minorities?

To attempt to answers these questions, this research utilises good governance as the main perspective and approach and its comparison to the Netherlands. A comparative approach is taken because Indonesia and the Netherlands have many similarities in legal norms, institutional settings, legal history, and perspectives on good governance. Of course, there are some differences, but these differences are largely with regards to implementation, legal culture, and legal procedures— rather than in the substance of legislation or institutional functions. With regards to norms for equal treatment, the most important similarity is that between the substance of Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution.

To explore the position of ethnic minorities in Indonesia and the Netherlands I have employed a legal research methodology. The principles of transparency, participation and human rights were the theoretical lenses through which I observed the position of Turkish and Chinese people. I collected and interpreted the primary legal sources such as the Indonesian and Dutch Constitutions, regulations, explanatory memoranda and case law.

I also conducted interviews with more than 100 informants in Indonesia and the Netherlands, and undertook field research in Jakarta, Semarang, Jepara, Yogyakarta, Padang, and Bangka Belitung in Indonesia, and in Utrecht, Amsterdam, The Hague, Rotterdam, Leeuwarden, Leiden, and Zwolle in the Netherlands. Furthermore, I analysed legal documents, interviews, and notes of observation related to the extent to which the idea of good governance has contributed to empowering the norms of governance and legal protection of ethnic minorities in Indonesia and the Netherlands. I finished data collection at the end of December 2017, whilst I began to focus on writing from previous years.

I developed a normative framework that I have used for a systematic or formal inquiry of good governance and ethnic minorities. From this framework, I began to elaborate on the concept of good governance and explored the discourses of ethnic minorities. From the six principles of good governance (properness, transparency, accountability, effectiveness, participation, and human rights) I selected three principles on which to focus on: transparency, participation and human rights.

I argue that the idea of good governance is not a new concept, developed in the 20th century by international organisations, but one with a much longer legacy than is commonly thought. The idea of good governance has, however, been popularised by international organisations such as the World Bank, the International Monetary Fund (IMF), the Organisation for Economic Cooperation (OECD), the Asian Development Bank (ADB), the Department for International Development (DFID) and the Canadian International Development Agency (CIDA).

Meanwhile, discourses of ethnic minorities demonstrate how often this group is victimised. They are treated as 'outsiders' or 'others' because of their physical appearance, skin colour, culture, and social background. In literature, ethnic minorities are often delineated as an oppressed group and subordinate community. Ethnic minorities can be a national minority group (citizens), migrants or refugees who live in a particular country.

In order to investigate the problem of ethnic minorities, I use three principles of good governance, as mentioned earlier: transparency, participation and human rights. The principle of transparency can be beneficial for ethnic minorities as it enables them to oversee the norms of government to provide adequate public information and to reinforce their right to know. The Dutch Government Information Act and the Indonesian Public Disclosure Act facilitate the norms of government to circulate public information and strengthen the right to know for all people, including ethnic minorities. Meanwhile, the principle of participation encourages people, especially ethnic minorities, to participate actively in politics and government programmes. The principle of participation stimulates ethnic minorities to exercise their constitutional motive to complain, file objections, and appeal against maladministration and damaging administrative decisions. Of course, the principle of human rights is a meaningful instrument for ethnic minorities to fortify their right to good governance.

Good governance and ethnic minority protection in Indonesia

The obligation of the government's commitment to strengthening the norms for the government and legal protection of ethnic minorities is present in the beginning of the Indonesian Constitution; Article 28 which stipulates the rights of freedom of association and speech, the amended constitution of 1999-2002 further guaranteed the right to life (Article 28A); rights of social security (Article 28 A (1)); children's rights (Article 28B (2)); rights of access to education and science (Article 28 C (1)); the right to improvement through collective struggle (Article 28C (2)); the right to equal treatment before the law, the right to work, and

the right to citizenship (Article 28D); freedom of religion (Article 28E); the right to information (Article 28F); the right to be free from torture and the ability to obtain political asylum (Article 28 G); the right to property, healthcare, and public service (Article 28 H); the right to freedom from enslavement, freedom from discrimination, and cultural identities (Article 28I); and the duty to respect the human rights of others (Article 28J). With regards to human rights, the most significant Article of the Indonesian Constitution is Article 28I (2), which states 'every person shall have the rights to be free from discriminatory treatment based upon any grounds whatsoever and shall have the right to protection from such discriminatory treatment.' These basic rights must be guaranteed by the government. During the 1999-2000 amendment of the Indonesian Constitution, human rights provision became an explicit part of the Constitution after Pratialis Akbar (Fraction of Reformation), Muhammad Ali from Indonesian Democratic Party of Struggle (PDI-P), Anwar Sutan Amiruddin (PPTI), Hamdan Zoelva (F-PBB), and Nursyahbani Katja Sungkana (F-UG) argued it was necessary. Many politicians were advocating for human rights to appear in the Constitution. Those who did received support from NGOs, the media, legal scholars, human rights activists, etc. The human rights provision that now appears in the Constitution is responsible for improvements to the quality of good governance in Indonesian politics and the legal system.

The concept of good governance and ethnic minorities have been challenged by the national legislation of Indonesia, after the idea of good governance was reflected in the Indonesian Constitution of Article 28 which concerns human rights and Article 1.3 which concerns the rule of law. Indeed, human rights protection and implementing the rule of law are moral imperatives for governments to realise. This imperative reflects the ideas of good governance. Hence, good governance is a moral obligation of government as a maxim and duty. According to Adnan Buyung Nasution's PhD thesis, the concept of good governance arose in political debates of the 1956-1959 Konstituante. However, this concept could not be seen in practice and explicitly formulated in any kind

of regulations. Later, Indonesia issued two key pieces of national legislation with the aim of protecting ethnic minorities, namely: the 2006 Act of Citizenship and the 1998 Human Rights Act. Historically, the spirit of ethnic minority protection had been absent from the Citizenship Act. After the introduction of Law No. 3 of 1946, the Act of Citizenship, ethnic minorities experienced many administrative barriers or unequal treatment. However, Law No. 2 of 1958 (issued following an agreement between the Indonesian Minister of Foreign Affairs (Prof. Mr. Soenario) and the Chinese Minister of Foreign Affairs (Chou En Lai) resulted in various problems of citizenship. The most problematic outcome was that many Chinese-Indonesians became stateless. This Act resulted in a further discriminatory policy that legally required all Chinese-Indonesians to have a 'Letter of Evidence of Republic of Indonesia Citizenship (SBKRI).' The most recent Act of Citizenship (No. 12 of 2006) has tried to strengthen the emancipation of Indonesian citizens. In the transcript of debate of this Act in parliament, Sudianto Tjen (F-PDI-P) stated that the use of the term *pribumi* (native Indonesian) must not re-emerge in contemporary politics; distinguishing between among 'native' and 'non-native' Indonesians will always result in the suffering of ethnic minorities. This current Act at last sufficiently enshrines the right to equal treatment.

Equally important is the Human Rights Act, which is the piece of legislation that requires good governance and ethnic minority protection. Before the Human Rights Act (Law No. 39 of 1999) was released, there were some existing pieces of relevant human rights legislation. For example (1) Law No. 7 of 1984 on the Ratification of the Convention concerning the Elimination of All Forms of Discrimination Against Women, (2) Presidential Decree No. 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child, (3) Presidential Decree No. 50 of 1993 concerning Establishing the National Commission of Human Rights, and (4) Law No. 5 of 1998 concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. During the debate of the law-making process of Law No. 39 of 1999 concerning Human Rights, Prof Muladi, the Minister of Justice at

that time, emphasised that the Human Rights Act is an Indonesian bill of rights that follows the moral maxims of God almighty and the mandate of the People's Consultative Assembly Decree XVII/MPR/1998 concerning human rights. The most relevant Article of the Human Rights Act with regards to ethnic minority protection is Article 3.3 which stipulates that 'everyone has the right to freedom from discrimination.'

In Indonesia, Article 28 of the Indonesian Constitution, the Act of Citizenship, and Human Rights Act can be seen as the logical moral maxims which strengthen the concept of good governance. At the very least, the valid norm of universal values, the proper duty of government and fundamental rights are present in the Constitution and legislation. Thus, Article 28 of Indonesia Constitution — the latest iterations of the Act of Citizenship and the Human Rights Act —do indeed promote the ideas of equality and liberty. In other words, it can be said that this Article is an enlightened outcome that has emerged from the dialectic of the discourses of good governance in Indonesian politics.

The most significant finding is that the institutional settings of good governance and ethnic minority protection are normatively sufficient to combat racial discrimination. However, Indonesian legal history is tainted by the existence of discriminatory policies. For instance, Soekarno's Cabinet Decision No. 127 / V/ Kep/ 12/ 1961 was used as the legal basis for requiring the changing of Chinese names. This regulation became the 'weird discipline' to make a fake order of homogeneous names of the Chinese-Indonesian.

There has been no single Indonesian regime as discriminatory as Soeharto's in how his policies targeted Chinese-Indonesians. His administration issued Presidential Decree No. 14 of 1967 which prohibited Chinese cultural or religious affairs from being celebrated in public and restricted Chinese worship activities religions, beliefs, and culture. Moreover, in his period of rule, Ministers and public prosecutors wrote secret official letters authorising the seizure of Chinese properties and land. For instance, the Indonesian Minister of Finance issued a letter legalising the seizure of Chinese property without permission of the courts. Other institutions such as the Public Prosecutor, the Land

Agency, and many other government bodies were involved in similar violations of Chinese-Indonesians' rights.

After the 1998 reformation, the ideas of democracy, human rights, the rule of law, and good governance have flourished in Indonesia. The current situation of good governance and ethnic minority protection is avowed in the National Action Plan of Human Rights. Jokowi's government issued Presidential Regulation No. 75 of 2015 which stipulates 'special treatment and protection towards vulnerable communities such as people with disabilities, the elderly, poor people, women, children, refugees, indigenous people, and migrant workers' and the obligation to fulfil human rights 'regardless of religion, tribe, ethnicity, race, social status, economic status, gender, language, political affiliation and so on and so forth when implementing justice and prosperity of society.' From the perspective of good governance, ethnic minorities can play a game of power based on the legal grounds of the National Action Plan of Human Rights. Yet, at the same time, this regulation is also fragile — a paper tiger; cosmetic regulation which despite appearing in black and white is not always enforced in practice.

It is also important that good governance and ethnic minority protection are advocated by the judicative power and the fourth power, namely: the Indonesian National Commission of Human Rights and the Ombudsman. According to Article 76 of Law No. 39 of 1999, the functions of the Indonesian National Commission of Human Rights is to 'study, research, disseminate, monitor and mediate human rights issues.' Some reports of racial discrimination of ethnic minorities are submitted to the Commission which attempts to mediate and resolve problems of human rights violation. For example, in cases of job termination, prohibiting land ownership for specific ethnic groups, and the requirement of SBKRI for accessing public services. The most important role of the Commission is its function as a mediator and an investigator of human rights violations. The Commission was responsible for investigating potential human rights violations against the *Hizmet* Turks in Indonesia after the failed coup d'etat in Turkey who were targeted by 'the long arm' of Erdogan. The other institution besides the

Commission is the Ombudsman, established in March 2000 by President Abdurrahman Wahid (Gus Dur), a well-known campaigner for multiculturalism and inter-religious dialogue. Ahmad Su'adi, a commissioner of the Ombudsman, believes that discrimination by the administration is most rightly classified as maladministration. The Ombudsman, according to Article 3 of Law No. 37 of 2008, promotes a state based on the rule of law and fights discrimination. One such case was when the Ombudsman became involved in the arbitrary detention of a Turkish teacher by Depok Immigration Affairs. In this case, the Ombudsman plays a significant role in ascertaining whether or not maladministration has occurred. Above all, another important institution aside from the Commission and the Ombudsman is the court. The courts play a vital role in the sphere of good governance and ethnic minority protection. The Court and its judges are bound by Law No. 48 of 2009 concerning the Power of Judges to search for the sense of justice which lives in the society (Article 5). In the legal system, the position of the courts is absolutely vital. Unfortunately, attempts to challenge maladministration have often failed, such as the lawsuits of Chinese-Indonesians whose property was seized by the New Order's regime. One particular case law concerning the Chinese High School of Batavia is an example of how '(1) to disband the Hua Chung School and destroy all archives related to land ownership and all permit letters belonging to the school; (2) forced demolition of the building and supporting facilitation of education (3) to expel with torture to the teachers, pupils, and the staffs of Hua Chung Schools.' They wanted their school back, yet the courts issued a verdict that left their wishes unfulfilled.

After my discussion of good governance and ethnic minority protections in regulation and the role of public institutions in Indonesia, I provided a report of research findings on transparency, participation and human rights. With regards to transparency, Indonesia has a Public Disclosure Act, Law No. 14 of 2008. This law provides the legal grounds for ethnic minorities rights to a better understanding of procedures, rights to know, and public information. Ethnic minorities' eligibility to access public information is explicitly stated in Article 2.1 of Law No. 14

of 2008. By accessing public information, ethnic minorities can benefit from information which can be used to support their interests. At the very least, ethnic minorities should be able to access relevant information about laws and procedures of complaint, and thus be able to empower their fundamental rights. For example, executive summaries of the investigations conducted by the National Commission of Human Rights contains vital material to understand the progress of ethnic minority protection within this country. For instance, even brief information on the crimes against humanity committed against Chinese-Indonesians in 1965 should be shared and accessed by ethnic minorities to protect themselves with sufficient knowledge and information. Another function of transparency is to build comprehensive information on preventing social conflict. One pertinent piece of information is the anti-discrimination report, which must be produced according to Article 8 of Law No. 40 of 2008, and Article 2 of Government Regulation No. 52 of 2010 concerning the eradication of racial discrimination. Ethnic minorities can use the information from this report to gain an objective understanding of the realities of the socio-political condition of anti-discrimination law enforcement. In the 2013 report, for instance, many cases of discrimination were reported including hate crimes in the media, and discrimination in the workplace and in education. With access to transparent information, ethnic minorities can equip themselves with relevant knowledge to respond to incidents of discrimination. This example demonstrates that the concept of transparency is a crucial principle in the legal field, and particularly the topics of good governance and ethnic minority protection. In Indonesia, the principle of transparency has inspired an online complaints mechanism and has even been explicitly integrated into the National Action Plan of Human Rights based on the Presidential Regulation No. 23 of 2011, as one of the main instruments of anti-discrimination laws. Unfortunately, the online complaint mechanism is only currently provided by the Ombudsman. Transparency and information technology are mutually connected in the journey to establishing better access to public information. This online complaint system must be expanded to other public institutions.

After discussing the implementation of the principle of transparency, I describe the implementation of the principle of participation. The principle of participation is crucial in ensuring that ethnic minorities in Indonesia have real involvement with the policy making process, are able to complain and can actively defend their rights. However, generally speaking, the participation of ethnic minorities in Indonesia is inadequate. For example, relatively few complaints or reports are filed with the National Human Rights Institution, the Ombudsman, or the courts. Therefore, in reality, they wield little power in judicial interventions against discrimination by law enforcement. However, it is important to view the participation of ethnic minorities from a more holistic perspective, rather than solely based on the submission of complaints. For instance, citizen's panels comprised of ethnic minorities have been key to the Constitutional Amendment and the Act of Citizenship. In 1954, the Consultative Body on Indonesian Citizenship/ Baperki played a significant role in campaigning for the values of egalitarianism and anti-discrimination to be included the Constitutional Amendment and the Act of Citizenship. Similarly, the Society for Social and Economic Solidarity with Pacific Countries (PASIAD) has inspired Indonesian society to establish good, internationally recognised schools in some regions in Indonesia. PASIAD is a Turkish organisation affiliated with Fethullah Gulen's interpretation of Islam, philosophy of peace, and modern education. Of course, improving participation is a key element to strengthening the legal capacity of ethnic minorities. Another form of participation, namely: ethnic minority participation played a significant role in the issuing of anti-discrimination law No. 40 of 2008 concerning Eradication of Ethnic and Racial Discrimination. This regulation was initiated and supported by Chinese and human rights activists such as Murdaya Poo.

The final principle is human rights. With regards to good governance and human rights I found there to be many grave, significant, and unresolved issues in Indonesian legal history. For instance, the problems of rights to good governance are evident in the case of the lack of provision of birth certificates for the Benteng-Chinese community, whose

rights were infringed upon by the Act of Citizenship (Law No. 12 of 2006), civil administration (Law No. 24 of 2013) and general principles of governmental administration (Law No. 30 of 2014). A birth certificate is one of the administrative rights that all residents of Indonesia are entitled to. After a person is born, they have the right to be provided with a birth certificate within 60 days. However, Benteng-Chinese people are exempt from this right — thus constituting a kind of administrative discrimination. For instance, Oey Endah was born on May 12th, 1951 but she only obtained her birth certificate aged 64 years old. Other citizens who belatedly acquired their birth certificates include Lin Cin Ok who received her certificate at aged of 48 years old, and many other Chinese people who were victimised by the administration, particularly Benteng-Chinese living in Tangerang.

The most controversial issues of human rights are those related to the events of 1965 and 1998 that resulted in the victimisation many tragic stories of the many Chinese people who were victimised in the mass riots. Despite this, no lawsuit, no reparation, and no trial have provided a platform for the voices of the victims. I argue that the concept of transparency should be invoked to inform the executive summaries of progress of law enforcement and reparation of these tragedies.

Good governance and ethnic minorities in the Netherlands

Article 1 of the Dutch Constitution is a pivotal piece of legislation for the concepts of good governance and the protection of ethnic minorities. Article 1 mandates the government to preserve a pluralistic, multicultural and poly-ethnic society. This article obliges the power-holders to protect social diversity and ensures that everyone is treated equally. As such, Article 1 is the most fundamental piece of Dutch law in combating discrimination. In 2004, a political debate arose in Dutch parliament around a proposal to retract Article 1 in response to the increasing immigrant population in the Netherlands. Fortunately, the proposal failed and the Article still remains in the latest amendment of the Dutch Constitution. This Article still plays an important role in strengthening the concept of the rule of law in the Netherlands. Article

1 also safeguards democracy and ensures all can participate in politics, regardless of religion, belief, political opinion, race, and gender and sexuality.

At the level of legislation, a key piece of regulation that protects the interests of ethnic minorities is the Equal Treatment Act. Despite being developed in the 1970s, the Equal Treatment Act was only issued in 1994. At the time, the Equal Treatment Act was a controversial issue, especially during the 1990 political debates in parliament on discrimination against homosexuality. The ruling Christian Democratic Appeal (CDA) and their coalition with the Labour Party (PvdA) defended the draft for the Equal Treatment Act. On February 18th, 1994, a petition of 213,000 signatories was presented in support of the draft, and finally the draft was issued and became a general law of equal treatment. This Equal Treatment Act stipulates the prohibition of direct and indirect discrimination (Article 1) on the grounds of religion, belief, political opinion, nationality, race, sex, sexual orientation, or civil status. The most important maxim of equal treatment is defending ethnic minorities' access to goods and services and the labour market. The other piece of pertinent regulation is the General Administrative Law Act (GALA) which ensures everyone is entitled to legal certainty of procedures, and that the administration observes its obligations without misusing its power (Article 3.3), prohibition of arbitrariness (Article 3:4 and Article 5:13), legal certainty (Article 4:23 and Article 5:22), proportionality (Article 3:4 (2)), carefulness (3:2), duty to give reasons (Article 3:46, Article 3: 47, Article 3:48), and so on and so forth. GALA also regulates the rights to access to have objection and appeal to administrative authority and the Court (Article 7:1 and Article 8:1). These articles contain norms for administrative authorities and legal protection of ethnic minorities. With this regulation, ethnic minorities have obtained a legal standing to struggle to protect their rights in the fields of work permits, application for Dutch citizenship, basic registration, residence permit, etc.

Another key aspect of combating racial or ethnic discrimination is the role of public institutions. First, the position of administration which

has issued a National Action Plan on Human Rights (*Nationaal Actieplan Mensenrechten*). This National Action Plan has the function of establishing what the government must do to combat discrimination. When compared with reports of discrimination on the grounds of gender, political opinion, belief, or civil status, racial discrimination accounts for the highest proportion of reports — in 2014 equating for 43.3% of all reports (or 12,163 reports). Clearly, these figures are high and must be addressed properly and carefully. Unfortunately, the role of the government is not entirely satisfactory. The decision to disband the National Ethnic Minorities Consultative Committee (LOM) is one such example of a disappointing decision made by the Dutch government. LOM was the official forum for minorities to communicate with the government and other public institutions. Fortunately, the government still supports the Anti-Discrimination Bureaus to deal with issues of inequality, injustice and improper treatment. These bureaus play a significant role in providing advice, information, legal aid, and legal assistance to victims of discrimination (Articles 4, 7, 8, 9, and 10 of Municipal Anti-Discrimination Service Act). Although Anti-Discrimination Bureaus exist at the municipal level, the central government appears notably less active than the local government in combating discrimination. The most important aspect of this activity at a local level is that the Anti-Discrimination Bureaus in Utrecht, Rotterdam, Leeuwarden, and Amsterdam cooperate freely with the local government, police, and other stakeholders.

Second, the role of the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) also occupies a crucial position. The institute has a function to investigate (Article 3 a), produce reports (Article 3 b), provide advice (Article 3 c), provide information (Article 3 d), and ratify human rights treaties (Article 3 g), in accordance with the Netherlands Institute for Human Rights Act of 2011. After adopting the Paris Principles from the General Assembly of the United Nations Resolution of 48/ 134 on the 20th of December, 1993, the institute received a complaint against the private sector who was suspected of committing human rights violations and unequal treatment on the grounds of religion, belief, political opinion, nationality, race, sex, sexual orienta-

tion, or civil status. In contrast with the Ombudsman (which can only proceed a grievance concerning public administration), the institute has the legal capacity to investigate the private sector. The institute received reports of grievances against Chinese people's access to goods (the baby milk powder cases) and Islamophobia in the labour market towards Turks. Following the National Ombudsman Act of 1981, this institute also fights against discriminatory maladministration by producing and distributing brochures entitled 'stop discrimination.' As part of their anti-discrimination campaign, the Ombudsman receives reports of ethnic profiling by the police. In addition, the Ombudsman has also accepted similar grievances regarding suspected discrimination by the administration including arbitrary inspection procedures at Schiphol Airport.

The last institution which has a legally binding effect is the courts. This is the only the institution that is endowed with the ability to make legally binding decisions. Through the courts, Chinese and Turkish people in the Netherlands have sued the government regarding issues of social welfare, residence permits, labour market cases, etc. On many occasions, the courts have also debated anti-discrimination law and the European Convention of Human Rights when establishing verdicts involving Chinese and Turkish people. Thus, the courts play a significant role in receiving ethnic minorities' complaints and executing legally binding verdicts.

The following section concerns the implementation of the three principles of good governance in the Netherlands: transparency, participation, and human rights. First, implementation of the principle of transparency in the Netherlands is most obvious in statutes of the Public Disclosure Act or the Dutch Government Information Act. This Act ensures that everyone, including ethnic minorities, has a legal understanding of the map of transparency in accordance with Article 1 (a) of the Government Information Act. Everyone, including ethnic minorities, is entitled to access to a written document or other materials containing data, so long as the information is in the public domain. In fact, transparency can also be understood as playing a pivotal role in integration policy. The Immigration and Naturalization Service

(IND) is responsible for providing public information about requirements, costs, digital application forms, and procedures of their services. The Netherlands Institute for Human Rights reported that IND made a distinction among Western and non-Western immigrants, the obligation of the basic integration exam is only obeyed by the migrants from non-Western countries. However, this policy is complicated to explain. Currently, public information about basic integration is presented on the IND's official website in English and Dutch.

Second, with regards to the principle of participation, ethnic minorities participate in relatively high numbers. However, Chinese people have only submitted a few complaints to the Netherlands Institute for Human Rights or the Ombudsman. In contrast, Turkish people seem much more ready to exert their constitutional motive through the Netherlands Institute for Human Rights and the Ombudsman. Both the Chinese and Turkish communities are more likely to submit their complaints through the courts; thousands of cases by both groups have been lodged in the courts. However, from the perspective of the CLEAR method, stereotyping of ethnic minorities in the Netherlands is still problematic. While the opportunity to lodge complaints is provided by governments such as the Anti-Discrimination Bureaus, the Netherlands Institute for Human Rights, the Ombudsman and the courts, this opportunity often goes unseized. From my literature review, my interviews with experts, and field research, I argue that the level of participation by ethnic minorities in the Netherlands is insufficient to effectively resist discrimination. In addition, the response of the government is sufficient.

The final principle of good governance that I reported upon was the principle of human rights. In the Netherlands, the Equal Treatment Act provides umbrella rights in the fight against discrimination. Other regulations that support this act include the Act of Equal Treatment between Men and Women (*Wet gelijke behandeling van mannen en vrouwen*), the Act of Equal Treatment on The Grounds of Disability (*Wet gelijke behandeling op grond van handicap*), the Municipality Anti-Discrimination Act (*Wet Gemeentelijke antidiscriminatievoorzieningen*), etc. If ethnic minorities feel that they have experienced discrimination, they have the right

to file an objection with the administration and the right to request an investigation through the Ombudsman or the Netherlands Institute for Human Rights. A breakdown of the complaints figures for 2014 reveal the magnitude of discrimination in public space (*openbare ruimte*) consists of 677 reports, in public service/ facilities (*collectieve voorzieningen*) composed of 636 reports, and by police or immigration officers service comprises 280 reports.

Legal analysis of good governance and ethnic minorities in Indonesia and the Netherlands

The Dutch Constitution and Indonesian Constitution are the most significant legal norms that regulate the government and legal protections for ethnic minorities. Interestingly, Article 1 of the Dutch Constitution and Article 28 of the Indonesian Constitution share a similar moral substance. The Dutch Constitution states additional rights such as: the right to practice one's religion freely (Article 6), the right of association (Article 8), the right of assembly and demonstration (Article 9), the right to inviolability of every person (Article 11), the right to have freedom and liberty (Article 15), the right to respect privacy (Article 10), the right to justice (Article 17), the right to (subsidized) representation (Article 18), the right to work (Article 19), the right to have a basic standard of living (Article 20), the right to education (Article 23), and the right of public access to information (Article 110).

Indeed, the first chapter of the Dutch Constitution is famous as the section that states fundamental rights provisions. The equivalent parts of the Indonesian Constitution are Articles 28 A-J. I consider Article 28 of the Indonesian Constitution and Article 1 of the Dutch Constitution to be the primary legal sources for the establishment of good ethnic minority justice. In one such debate, Dutch Parliament interpreted Article 1 of the Dutch Constitution as respecting all religions (*godsdienstige*), ideologies (*levensbeschouwingen*), lifestyles (*leefstijlen*), beliefs (*levensbeschouwingen*), and value patterns (*waardepatronen*) in Dutch society. Similarly, Hamdan Zoelva and Muhammad Ali (members of the Constitutional committee of 1999-2002) argued that Article 28 of the Indonesian Constitution needed to include norms of equal treatment and prohibiting discrimi-

nation. Thus, ethnic minority justice has a legal foundation in both the Indonesian and the Dutch constitutions.

Furthermore, the Dutch Equal Treatment Act and the Indonesian Human Rights Act afford the norms of government and legal protection to ethnic minorities. These regulations are the most relevant pieces of legislation for ethnic minorities' safeguarding. The Indonesian Human Rights Act consists of numerous rights including family rights (Article 10), the right to develop his or her own skill (Article 11), the right to justice (Article 17), the right to security (Article 28), the rights of indigenous people in (Article 6), the rights to life (Article 9), the prohibition of slavery (Article 20), and so on. Meanwhile, the Dutch Equal Treatment Act includes the prohibition of discrimination in the labour market (Article 5) and access to goods and services (Article 7). Other Dutch regulations concerning equal treatment include the Equal Treatment Act between men and women and the Equal Treatment Act for people with a disability or chronic illness.

The Equal Treatment Act between men and women stipulates the prohibition of discrimination on the grounds of gender. Furthermore, the rights of people with disabilities are stated by the Act on Equal Treatment on the Grounds of Disability or Chronic Illness. The Dutch Equal Treatment Act also makes a legal distinction between direct and indirect discrimination. The nuance that emerges from this distinction provides ethnic minorities with reinforced 'double' protection. Direct discrimination is discrimination that is explicitly targeted, for instance, a Turkish person was rejected by an employer because they did not want to employ Turkish staff in its working place (See: the Netherlands Institute for Human Rights' Opinion Number 2017-22).

On the other hand, indirect discrimination protection provides ethnic minorities from more implicit, 'hidden' discrimination. One instance of indirect discrimination was an incident where a Turkish woman was forced to speak Dutch by a doctor or else be refused service (See: the Netherlands Institute for Human Rights' Opinion Number 2006-254).

Clearly, there is a plethora of legislation in Indonesia and the Netherlands that prohibits discrimination, and the governments both

have sufficient legal systems to prevent and combat discrimination. Moreover, there are some norms stipulated in Indonesian and Dutch legislation. The Indonesian Administration Act obliges the Indonesian government to obey legal certainty, beneficiary, impartiality, properness, prohibit misuse of power, and provide good public service (Article 10 of Law No. 30 of 2004 concerning Government Administration).

The Indonesian Government also issued the Act of Public Service which espouses values of professionalism, non-discrimination, accountability, equality before the law, and accessibility (Article 4 of Law No. 25 of 2009 concerning Public Service). The Government Information Act and the Public Service Act obligates the Indonesian government to fulfil their commitments impartiality, to be non-partisan, and to produce procedural justice. Thus, these regulations state the duties of the Indonesian Government with regards to preventing and combating discrimination within its own institutions.

In the Netherlands, as mentioned with regards to GALA, this piece of legislation stipulates some norms such as carefulness (Article 3:2), the prohibition of misuse of power (Article 3.3), prohibition of arbitrariness (Article 3:4 and Article 5:13), legal certainty (Article 4:23 and Article 5:22), proportionality (Article 3:4 (2)), and the duty to give reasons (Article 3:46, Article 3: 47, Article 3:48). These norms safeguard the Dutch government and require them to be more devoted to the law. By obeying the law, the Dutch Government can prevent and combat discrimination.

As mentioned above, the Indonesian and Dutch government have issued national action plans of human rights. Many human rights activists have criticised these plans, arguing that without proper implementation these documents are inconsequential to the protection of ethnic minorities. Despite these criticisms, I still consider these documents pertinent to addressing the current problems of ethnic discrimination in Indonesia and the Netherlands. Through the Dutch National Action Plan of Human Rights (*Nationaal Actieplan Mensenrechten*), the Dutch government states that it aims to reduce ethnic profiling by the police by providing education and training, establishing good relations between

police and society, reinforcing diversity in the workplace, and creating an accessible complaints mechanism of complaints.

Through its National Action Plan of Presidential Regulation No. 75 of 2015, the Indonesian government issued their plan for human rights, which stated the duty of the administration to safeguard vulnerable people. However, there has been little progress concerning the quality of obligations of the government and legal protection of ethnic minorities; Jokowi's regime has mainly focused on the development of infrastructure. At the present time, the only 'symbol' of progress in combating hate crime has been the arrest of several members of the Muslim Cyber Army for hate speech offences in February 2018. The most controversial offender, Jonru Ginting, was arrested and sentenced to 18 months' imprisonment. In Indonesia, the Islamic right wing has exploited cyberspace as an arena to incubate hatred against non-Muslims and other minorities. Like Indonesian law generally, the National Action Plan is adequate to combat discrimination, however its implementation leaves much to be desired.

For the idea of good governance to be realised, 'the fourth power' (consisting of the national human rights institutions and the Ombudsman) is needed. The roles of the Indonesian National Commission of Human Rights and the Netherlands Institute for Human Rights are vital, as are those of the Indonesian Ombudsman and the Dutch Ombudsman. As mentioned previously, the Indonesian National Commission of Human Rights is able to investigate cases of suspected human rights violation, including incidents that involve the private sector. For instance, in 2014, cases of racially motivated job termination in Pematangsiantar and inciting racial bullying in a film were reported to the Commission. In accordance with the Paris Principle, and Article 76 of Law No. 39 of 1999, the Commission has the authority to investigate suspected human rights violations committed by the private sector.

Meanwhile, the Netherlands Institute for Human Rights has the authority to investigate human rights violations. By working to promote anti-discrimination, the Netherlands Institute for Human Rights has properly observed their duty in line with the spirit of the development

of the institutional framework of human rights since the concept of national human rights institutions was introduced in 1946— largely a consequence of the Universal Declaration of Human Rights. In 2013, the Netherlands Institute for Human Rights began publishing their strategic plans which are evaluated every three years. This contains statements about the institute's vision, mission, objectives, statutory tasks, strategy choices, proactive agenda, etc. Although the Netherlands Institute for Human Rights was only awarded 'B'-level accreditation in 2012, their performance has since improved with regards to their functions of investigation, monitoring, proposing to legislation-policy-practice, and dispute resolution.

The ombudsman is an institution with a long and extensive legal history of being endowed with the power to oversee governments. In 1713, King Charles XII of Sweden was at war with Russia, and created an office named the *Hogsta Ombudsmannen* to oversee the work of law enforcement and civil servants. This Ombudsman served the function of supporting democratic government institutions and maintaining the integrity of public servants. The Indonesian Ombudsman and the Dutch Ombudsman have similar tasks of monitoring the government, with the aim of preventing maladministration and improper conduct of public servants. People can submit a complaint to the Indonesian Ombudsman concerning discrimination and maladministration in accordance with Article 3 of Law No. 37 of 2008. As was noted earlier, the Dutch Ombudsman can also be accessed by all people, including ethnic minorities in accordance with chapter 9:2 of GALA.

The courts have a particularly significant role in the strengthening norms of governments and legal protection of ethnic minorities. In the Netherlands, ethnic minorities can challenge an administrative decision through the Court in accordance with Article 8.1 of GALA. Hence, they are provided with the opportunity to combat damaging decisions related to their interests, for example, immigration, social benefit, working permit, basis registration, and discrimination. In the Indonesian Courts, judges are authorised to interpret living law in combination with state law in order to solve ethnic minorities' problems. Unfortunately, the au-

thority to interpret living law enabled judges to use discriminatory reasoning changing-name cases. In the vast majority of cases, judges stated that willingness to adopt an Indonesian name is necessary proof of a Chinese-Indonesian's devotion to Indonesian culture.

After examining the role of government institutions, this research describes the implementation of selected principles of good governance: transparency, participation and human rights. The Dutch and Indonesian Public Disclosure Acts are the most important pieces of legislation related to l) the principle of transparency. Article 2 of the Dutch Government Information Act and Article 2 of the Indonesian Public Disclosure Act, Law No. 14 of 2008 stipulate the duties of each government to provide public information. These regulations also yield the norms for the government to publish public information. Thus, ethnic minorities can benefit from the Public Disclosure Acts by using them to access to public information that is relevant to protecting their interests in the Netherlands and Indonesia. In Indonesia, if any person has difficulty attempting to access or obtain public information, he or she can lodge a complaint through the Information Commission, an independent institution which implements the Public Disclosure Act. This Information Commission not only establishes technical guidance on public information service standards, but can also adjudicate conflict between an information appellant and administrative authorities.

The principle of participation is vital to encouraging ethnic minorities to be more active in their participation with politics and law. In Indonesia, people can challenge an administrative decision through the Administrative Court in accordance with Law No. 51 of 2009. For instance, Handoko (a Chinese-Indonesian lawyer) sued the 1975 Yogyakarta Deputy Gubernatorial Instruction because this instruction excludes Chinese-Indonesians from owning land in Yogyakarta.

In the Netherlands, ethnic minorities can also exercise their constitutional motive by suing the courts. For instance, on May 29th, 2017, at the District Court of Hague, a *Hizmet* Turk sued the State Secretary for Security and Justice after this institution rejected his asylum application. This institution claimed the appellant had supplied incoherent evidence

in support of his application. However, during the Court-hearing, the appellant was able to provide suitable that fulfilled the requirements to be eligible to be granted asylum. He convinced the judge that if he had been deported to Turkey, he might be at risk of detention and torture, and thus his human rights were at risk of violation. Finally, the principle of human rights is still a controversial issue in Indonesia and the Netherlands. Indonesia continues to ignore the unresolved incidents of 1965 and 1998. Good governance can be realised only if the Indonesian Government demonstrates serious commitment to proceeding with further investigations through the Indonesian Human Rights Court or the Indonesian Truth and Reconciliation Commission.

In the Netherlands, the growth of right wing populist movements and political parties has contributed to escalating racial discrimination. Geert Wilders has been particularly damaging to the position of ethnic minorities. He exploited freedom of speech in his 'fewer Moroccans' speech and his film '*Fitna*,' as a means of spreading hate speech and racism.

It is for these reasons that I argue the notion of good ethnic minority governance is needed. Good ethnic minority governance aims to redress this balance by listening to the voices of ethnic minorities before the implementation of norms for the government. At the same time, governments must also become progressive in advocating for the needs of ethnic minorities.

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Menanti Gebrakan Komisioner Baru. SUAR Vol. 08. No. 2 Tahun 2007

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4 WNA Turki Ditahan Di Imigrasi. Republika, 25 October 2016

Act of 4 February 1981 (Bulletin of Acts and Decrees 1981, 35), most recently amended by Act of Parliament of 12 May 1999 (Bulletin of Acts and Decrees 1999, 214).

In zowel Nederland als Indonesië zijn rapporten van het Internationaal Verdrag inzake de uitbanning van alle vormen van rassendiscriminatie nogal teleurstellend, daar deze duiden op de continuering van de zwakke positie van minderheden. Om deze situatie te verbeteren is begrip van goed bestuur van etnische minderheden gewenst. De juridische benadering van goed bestuur van etnische minderheden schetst een buitengewoon tolerant wettelijk systeem. De geest van emancipatie is aanwezig in zowel de Nederlandse grondwet als de Indonesische grondwet. Gelijke behandeling is een kernthema in zowel de Nederlandse - als Indonesische wetgeving. In zowel Nederland als Indonesië zie ik echter weinig bewijs voorgoed bestuur van etnische minderheden in de juridische praktijk. Goed bestuur van etnische minderheden portretteert etnische minderheden als kwetsbare groepen die bescherming verdienen. Het is daarom dat publieke instellingen zich actiever dienen op te stellen in het stimuleren van actieve deelname van minderheidsgroepen aan politiek en bestuur. Anderzijds is begrip van goed bestuur van etnische minderheden waardevol voor etnische minderheden in Nederland en Indonesië, teneinde sociaal kapitaal te verwerven in hun strijd tegen discriminatie en het verdedigen van hun fundamentele rechten. Mijn argument is dat de geest van goed bestuur van etnische minderheden eveneens aanwezig is in Artikel 1 van de Nederlandse grondwet en Artikel 28 van de Indonesische grondwet. Etnische minderheden zijn in staat om procedureel te pleiten voor hun positie door gebruik te maken van de wettelijke grondslag van de Algemene Wet Gelijke Behandeling, zoals die in Nederland van toepassing is en de Indonesische Wet Gelijke Behandeling. Ook kunnen zij gemakkelijk toegang krijgen tot internationale ondersteuning (waaronder: de administratie, de rechtbanken, de vierde macht van de ombudsman en het college voor de rechten van de mens. Aldus werpt goed bestuur van etnische minderheden licht op de situatie van etnische minderheden en stelt hen in staat om publieke instituties te verzoeken transparanter te zijn, hun publieke participatie te versterken en hun fundamentele rechten te krijgen.