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The Position of Ethnic Minorities From the Connection Between Theory of Justice and Good Governance

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Abstract

Ethnic minorities are sometimes presented as "outsiders," "awkward," "alien," and many other pejoratives by the "leviathan of majority". This article will theoretically analyze how ethnic minorities struggle to pursue justice and access their right to good governance. Rawls's theory of justice simply seems as the support of "majorities" sense of justice, which disregards the sense of justice by minority. Because of the color of their skin, language, cultural identities, and national origin, ethnic minorities are trapped under the battle of power holders that can be explained by the notion of biopolitics. Biopolitics is a method of investigating the interconnection between human body and power relation. Furthermore, the position of ethnic minorities in these power battles is appeared such homo sacer. Homo sacer is one who has been condemned and may be killed by anybody in a figure of Roman law. The concept of homo sacer can be used to explain the position of ethnic minorities who have always been victimized. In addition, to establish a concrete example of a case about problems faced by ethnic minorities, I will discuss the protection of ethnic minorities through the framework of law and democracy in Indonesia and the Netherlands.

Keywords

ethnic minorities, justice, good governance, biopolitics, homo sacer

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This article will discuss the position of ethnic minorities as homo sacer. Often, they experience significant barriers to accessing justice and good governance. This theoretical perspective will be used to explore both an Indonesian and a Dutch context. In other words, this discussion is primarily focused on philosophical discourses rather than case law study. As supported by a wealth of literature, it is uncontroversial to state that ethnic minorities have a weak position in society (Agamben, 1995; Benhabib, 2004; Knepper, 2008; Löfstrand 2015; Pentassuglia, 2009; Ram, Sanghera, Abbas, Barlow, & Jones, 2000; Skrentny, 2004; Wacquant, 2014). Therefore, theoretical analysis to investigate the position of ethnic minorities and to develop empowerment strategies is demanded. I argue that ethnic minorities as homo sacer is a potential fact and that discrimination and stereotyping must be solved through the implementation of good governance. If justice is the aim, the concept of good governance is the way to realize this aim (Marwan, 2018).

Furthermore, good governance requires good regulation and institutions to support the legal protection of ethnic minorities. In Indonesia and the Netherlands, human rights regulation is needed to foster the position of ethnic minorities. In Indonesia, the primary piece of human rights regulation is Law No. 39 of 1999 concerning human rights (*Undang-Undang Hak Asasi Manusia*). However, in the Netherlands, ethnic minorities utilize the Equality Treatment Act (*Algemene wet gelijke behandeling*) to fight against discrimination. Meanwhile, the main institutions that support minorities in these countries are the Indonesian National Commission on Human Rights (*Komisi Hak Asasi Manusia*; Setiawan, 2013) and the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*). These regulations and institutions are pivotal components to developing the system of good governance for ethnic minority protection (Marwan, 2018).

To identify good governance, the development of democracy and rule of law in Indonesia and the Netherlands must be discussed. By the same token, good governance can be understood as a marriage between the concept of democracy and rule of law, often called democratic rule of law. Herewith, strengthening the position of ethnic minorities also improves the quality of democracy and rule of law within a country. A democracy that includes all will facilitate better ethnic minority participation. With regard to rule of law, good governance requires the state to use its authority to provide affirmative action to ethnic minorities properly.

Ethnic minorities are a group that has an ethnic identity who often experience discrimination. As other minority who suffer from discrimination, the position of minority is subjugated by majority (Benhabib, 2004). When discrimination often occurs on the basis of their religion, beliefs, political opinion, nationality, sex, sexual orientation, or civil status (Benhabib, 2004), ethnic minorities have frequently suffered from this discrimination in the public sphere or private life. Herewith, the attempting effort to solve this problem of discrimination needs to be reconstructed. This article tries to investigate the ideas of justice, rule of law and democracy and to explain the condition of ethnic minorities through the notions of biopolitics and homo sacer. On the discourse of justice, ethnic minorities are often to be forgotten as well as their existence in the discourse of rule of law and democracy. Meanwhile, biopolitics

may explain how people are oppressed through pseudo objectification and the mode of production through knowledge (Foucault, 2004). Ethnic minorities may be subjugated by this pseudo objection and mode of production through knowledge that controlled by majority. At the same time, the position of ethnic minorities can be explained from the perspective of homo sacer. Agamben (2005) argues that homo sacer may make a distinction between *bios* (human life) and *zoe* (animal life), the position of ethnic minorities often obtains the pejorative branch such a *zoe* in political life. Ethnic minorities suffering from discrimination, stereotyping, prejudice, xenophobia, and ethnic violence is required to be thought how they may pursue the idea of justice and to be emancipated.

I discuss the idea of justice, as Rawls's theory of justice dominates the intellectual discourses and his theory of justice strongly tends to support the existence of the will of majority. I try to connect this idea of justice with the idea of good governance. Good governance may become an instrument to achieve this idea of justice. In other words, an outcome of the implementation of good governance is a realization of the idea of justice. This connection between the idea of justice and good governance will be elaborated on in the section of "the constellation between theory of justice and good governance" below. In that section, I explain that Rawls's theory of justice refers to concept of social contract, putting ethnic minorities at risk. Social contract can be dominated by majority. Majority creates the decision for the whole society. Herewith, the theory of justice needs the support of good governance to keep on the track of protection for all people. Two principles alongside good governance are the principle of properness and protection of fundamental rights. The principle of properness may guide government to devote itself to prohibition of misuse of power, carefulness, reasonableness, proportionality, equality, and so on, as well as encouraging government to provide a good complaint mechanism. The protection of fundamental rights stimulates people, including those part of an ethnic minority, to take actions to fight against discrimination ranging from submitting objections to the administration, complaints to the ombudsman, and appeal to the court.

Access to justice is the important instrument to be provided for people, including ethnic minorities. Herewith, rule of law and democracy may contribute to strengthening the position of ethnic minorities in the context of facilitating the rule of game on the one hand and encouraging participation in the other hand. Rule of law simply contains the separation of power among the following three elements: legislative, executive, and judiciary. Each power should respect the spirit check and balances (von Hayek, 1973). Rule of law also facilitates access to justice. With the proper implementation of rule of law, the legal system can be a tool to prevent the birth of a tyrannical form of government. By the same token, besides rule of law, ethnic minorities can play "their cards in the field of democracy." Democracy inspires participation. With active participation, access to justice and the control over government can be realized effectively (Mill, 1976). With the concept of democracy and rule of law, this article will examine the position of ethnic minorities into the Indonesian and Dutch legal systems, especially in the aspects of Constitution, anti-discrimination law, and other relevant regulations that are beneficial for ethnic

minorities. While this article analyses the position of ethnic minorities protection in Indonesian and Dutch legal system, the purpose of this article is to discuss (theoretically or philosophically) the issue of ethnic minority protection with a small example of the Indonesian and Dutch context.

The Connection Between Theory of Justice and Good Governance

The connections between good governance and justice can be observed from many different angles. Firstly, both good governance and justice are mutually beneficial. The concept of good governance supports the existence of justice and vice versa. Secondly, there is not much contrast between the two concepts; it could even be said that the essence of good governance is justice itself. Third, the aims of justice and good governance are very similar, namely to establish proper distribution and recognition of rights. Many have contributed to theoretical explanations of the concept of justice ranging from influential enlightenment thinker Immanuel Kant and socialist philosopher Karl Marx (Peffer, 1990) to the contemporary philosophy of 1970s and up to the present day including Rawls (1971), Dworkin (2011), Hart (1963), Derrida (1990), Lacan (1991), Sen (2009), Walzer (1983), Frazer (1997), Sunstein (1997), Tuebner (2008), Marc Galanter, and many other scholars who have discussed the scope, limit, ontology, epistemology, and axiology of justice. Many accounts of justice evoke concepts related to issues of good governance. At least, both the concepts of justice and good governance generate mutually supporting network of ideas. Rawls (1971) argues that the subjects of justice are laws, institutions, social systems, decisions, judgment, and imputations. Good governance is also concerned with these subjects and, in particular, to prevent bad governance from influencing these laws, institutions, and social systems, and so on. Good governance's normative standards of "good" and "bad" can be used similarly within the concept of justice. On the other hand, ideas of "just" and "unjust" that emerge from the concept of justice can also be utilized by good governance.

I see the commitment of the Dutch and Indonesian Governments to pursue the concept of good governance and justice in issuing the National Action Plan of Human Rights and specifically including a section about the prevention of ethnic discrimination. The Dutch Government released a *Nationaal Actieplan Mensenrechten*, in which one of the subsections addresses the prevention of ethnic profiling. Furthermore, the Dutch Government provides education and training for the prevention of ethnic profiling and encouraging diversity in the workplace. This is done throughout the police, immigration office, security affairs, and so on. Meanwhile, the Indonesian Government also issued the *Rencana Aksi Nasional Hak Asasi Manusia*, which may be interpreted as an effort of the government to encourage public participation in the submission of complaints and access to information. This effort can be seen as an attempt to prevent maladministration and discrimination. The document of the National Action Plan of Human Rights may be seen as an endeavor of the Dutch and Indonesian Governments to show their commitment to good governance and ethnic

minority protection. In addition, this document may be displayed as an exertion of the government to pursue justice for all people including ethnic minorities. However, from a theoretical perspective, the concept of good governance and justice obtained various views and critiques.

To the cynic, good governance can appear to be a technical instrument that is used by Western international organizations to control third-world countries (Pureza, 2005). While this may be partially true, the modifier good conjures universal ideas of morality, ethics, and philosophical matters. According to Kant, the concept of good provides metaphysical encouragement to search for the highest truth. Obligations can be established from the interpretation of justice as the work of fulfilling rights and searching for valid norms (Kant, 1887). Hence, by interpreting justice, establishing valid norms, and fulfilling rights, one can come closer to good governance. Good governance can be played on the moral ground which can be obtained after one should imagine ideal justice, rights, and order. Indeed, justice is vital for good governance. Rawls (1971) argues that "justice is the first virtue of social institutions, as truth is of systems of thought." Justice can provide a package of wisdom, sagacity, common sense, and judiciousness all of which are beneficial to good governance. On the other hand, the concept of "goodness" that emerges from the concept of good governance can encourage the realization of a sense of "rightness" which can inspire commutative justice. The concept of commutative justice is a notion that asserts respectfulness toward property belonging to another person. Kant provides an example of how one ought to buy a horse based on the common price of the market. Hence, the right to property and personal rights are respected by proper transactions or interactions (Kant, 1887). However, the mutually beneficial connection between justice and good governance is not always optimistic. Derrida expounds the common concept of justice and is more pessimistic and satirical. He says that in Greek, the word "justice" is used as a common abstract noun, in English, it can also be used as a noun indicating the title or status of a person. But it is also possible to imagine justice becoming a verb "to justice" or "justicing." Doing so emphasizes the procedural nature of justice and thus facilitates novel perspectives from which the concept can be analyzed. Of course, justice according to Derrida (2005) is only a word, nothing more. If the concept of justice is only a matter of words, it will make a smaller contribution to fostering good governance than the other way around.

A pessimistic tone sounds again in Derrida's thought; he argues that justice is the same kind of force that obliges people to speak English despite it not being their native language, in the name of naturalization. Even if a minority speaks the language of the majority, there will always a distance between their way minorities use and perceive words in their native tongue and any second languages that they acquire (Derrida, 1990). This statement echoes Lacan's (1991) psychoanalysis which makes the observation that justice is almost to a fantasy, a dream, or a wish of people who are hegemonically oppressed by the master's discourse or the discourse of the majority. This interpretation positions the concepts of good governance and justice as utopian. The concepts of good governance and justice are just a fantasy—justice is only a word, nothing more. This theoretical standing represents the critical side of justice and,

indeed, the dark side of the concept of good governance and justice. This reflection generates the notion that good governance and justice have similar theoretical pitfalls. In essence, the concepts of justice and good governance cannot be distinguished; justice is good governance and good governance is justice. From a more critical perspective, both good governance and justice require the law. Derrida argues that the law and justice are different; justice is an impossibility and the law comprises violence. There is no law without violence as stated by Benjamin in *Zur Kritik der Gewalt* (Derrida, 1990). Lacan (1991) shares a similar view to Derrida, he asserts that the law is a wall or barrier to the pursuit of justice. One Lacanian, Yannis Stavrakakis (1999), adds that justice is utopian, while injustice is a real presence in our social arrangements and political orders. This point is often overlooked in postmodern legal theories, which view grand narratives as worthless. Even justice and good governance have idealistic purposes, meaning many postmodern philosophers do not believe in them. The law, justice, good governance, the various public institutions, the court, police, and so on, are all angles of the network of arbitrary text and meaning in all of their absurdity.

However, in the neoliberal corner, philosophers like John Rawls still provide hope for justice. He insists that the concept of justice has been part of widespread discussions in the past. For example, Aristotle relates the concept of justice to practical proper actions such as keeping a promise, paying your debts, and respecting others (Stavrakakis, 1999). The key phrase in defining justice is proper action. The moral indication of the definition of justice is also important, the maxim of keeping a promise also means that one is prohibited from lying. The moral foundation of justice is likely to become the substance of good governance. The public entity and citizens can achieve prosperity without having to lie. Hence, Rawls imagines a well-ordered society that is made up of law-abiding citizens (Schaefer, 2007). Hereafter, Rawls emphasizes a social contract theory. The social contract creates social cooperation that generates the foundations of government and its structures (Rawls, 1971). From this, I again see the similarity of purpose between justice and good governance, both of which aim to strengthen the social contract among people within a country. No one can be excluded from the discussion and renewal of the social contract. At the very least, a good social contract should propose legal protection for vulnerable people. Some basic rights (e.g., 44cial, economic, cultural, civil, and political) must be covered by the rule of law.[1] Rawls's theory of justice emphasizes that the improvement of the social contract has benefits for improving respect for basic rights. Both justice and good governance have the same purpose of making distribution and recognition possible. Through fulfilling basic rights, the fundam34tal system of public bodies is to create a pattern of activities that encourage people to act together to generate a greater sum of benefits and to share with a greater number of people (Rawls, 1971).

Unfortunately, the benefit for a greater number of people can be defined as putting a minority group at risk. The notion of a greater number of people may be used by the right-wing political movement. In the Netherlands, Geert Wilders with his political party, the Party for Freedom (PVV), has tried to use the agitation of anti-immigrant, Islamophobia, and so on, as the speech for political campaign. Despite Wilders has

ever brought through the court in accordance with the Dutch Constitution (Articles 6 7) and the Dutch Criminal Code (Article 137c, Article 147, Article 261, Article 262, and Article 266), due to his act to make a short movie of "Fitna," he insisted to speak under the name of the freedom of speech and the representation of the "silent majority" of Dutch population. Similarly, in Indonesia, Rizieq Syihab and his Islamic Defender Front scattered political propaganda on anti-Chinese sentiment, anti-foreigner, and religious intolerance throughout the public sphere and social media. His political activities have been supported by some Indonesian people and resulted in the prosecution of the Chinese governor of Jakarta in 2016 for a case of blasphemy, as well as defeat in local elections. On some occasions, the positions of ethnic minorities in the Netherlands and Indonesia are not secured. They are a potential target group for discrimination. Yet the notion of justice, indeed, is the fulfillment of fundamental rights and security.

Rawls also proposes two important aspects of justice, namely, protection of fundamental rights and security. The protection of basic rights as standard judicial practice is fostered by the equal treatment of people. Security (provided by the police, tax authorities, etc.) ensures safeguarding of people by protecting them from torture, harm, disappointment, and so on (Pogge, 2007). Above all, I conclude that there are four pivotal components of the marriage of good governance and justice, creating legitimacy, equality, properness, and good recognition/distribution. Legitimacy (as defined by Rawls, 1971, not to be confused with the administrative law) can be realized when social values are shared fairly and proportionally (e.g., rights, liberties, opportunities). Furthermore, the value of utilitarianism in the theory of justice can also produce greater benefits to many people and can cause legitimate expectations to be strengthened (Rawls, 1971). Otherwise, illegitimacy can become widespread when people are forced to speak in the language of majority, what Derrida (1990) calls the "dominant part of juridico-ethico-political sphere." Equality is another important aspect. The lack of discourse within the social contract is caused by the existence of individuals who have particular dealings with property, wealth, prestige, power, and their influence will dominate the form of agreement (Rawls, 1971). However, the spirit of egalitarianism in theories of justice and good governance can encourage emancipation. Supposedly, everyone has equal basic liberties, and socioeconomic inequality is reduced by egalitarianism (Rawls, 1971). Next, the pertinent concept of properness is particularly crucial. Kant (1887) believes that the administration of justice is necessary to evaluate whether an action is just or not. Of course, we do not want the law to exist as Derrida understands it, the term "law enforcement" in the legal dictionary incorporates a suggestion of force, why must the law be "enforced"? What is the emergence of law being enforced? and so on (Derrida, 1990). We also want to avoid laws that pursue justice and good governance from suffering what Lacan (1991) describes as the chronic illness of law, whereby authority abandons virtue and justice. Last but not least, Rawls argued that the topics of recognition and redistribution are of high importance in the dictionary of justice and good governance. By prioritizing basic rights (social, cultural, economic, civil, and political), the rights to vote, freedom of expression, freedom of assembly, the right to property, and freedom from arbitrary

detention can establish real emancipation (Rawls, 1971). Following from Rawls's and other postmodern legal theories, the ideas of justice and good governance can be realized and provide examples for the establishment of good access to justice (van Rooij, 2008) that everyone regardless of background can have better access to the court, the administrative complaints system, the ombudsman, national human rights institutions, and so on.

Problems with access to justice may be happened to ethnic minorities due to limited legal channels. However, the Netherlands provides 38 antidiscrimination services (ADV) at the municipal level. Besides the General Equal Treatment Act (AWG), ethnic minorities can also utilize other regulations such as the Equal Treatment between men and women, the civil code, and criminal code to access justice in the Netherlands. In the Netherlands, the criminal code stipulates prohibition of discrimination in accordance with Articles 137c,[2] 137d,[3] 137e,[4] 137f,[5] 137g,[6] and 429.[7] Similarly, the National Commission of Human Rights of Indonesia has established local offices enabling local people to submit complaints of discrimination. In addition to the Human rights Law No. 39 of 1999, there is a more specific piece of legislation, such as Law No. 40 of 2008 concerning the elimination of racial discrimination. This law stipulates prohibition of hate speech in accordance with Article 16. In my view, the formulation of legal norms and institutions is sufficient to handle discrimination. However, when I interviewed human rights activists in Indonesia and the Netherlands, they believe that, in reality, the participation of ethnic minorities is inadequate, and the response of government to handling case is limited. These human rights activists argued that the governments of Indonesia and the Netherlands maintain the status quo and seem to avoid using their authority to protect minorities.

The Emergence of Good Governance: Biopolitics and Homo Sacer

In order to explain the problems experienced by ethnic minorities, I refer to theories that I use to analyze "the original sin" of discrimination. Foucault's *biopolitics* is used to examine the frame of power which interplays upon ethnic groups. It is certain that ethnic minorities are oppressed groups, but, from another perspective, they also have their own power of resistance. Meanwhile, Agamben's homo sacer is useful in describing the embedded fate of ethnic minorities and their victimization. I argue that *biopolitics* and homo sacer are required to properly explore the problem of sociolegal-pathology and that good governance may provide a worthy solution.

Ethnic Minorities Under the Shadow of Biopolitics

Biopolitics can be used to explain how the law is composed of pseudo objectivization for the control of society and to restrain the mode of production through knowledge (Foucault, 2004). The position of ethnic minorities is as vulnerable individuals who face the power of objectivization by the majority. Foucault's analysis of power states that every power has its own history, own trajectory, own techniques, and tactics of

manipulating people (Baxter, 1996). People cannot truly be said to have "free will," they will have been manipulated by the dominant power relation, providing only the illusion of choice. The power is producing the illusion of a moral perception and some moral therapeutics for the body of the people (Foucault, 1[illegible]). Because of physical and cultural differences, this may result in ethnic minorities living under the politics of fear. This is one of the difficulties faced when attempting to eliminate stereotyping, discrimination, and prejudice because the image of the body of ethnic minorities was forbidden by the power relation. The body is manipulated, shaped, trained, regulated, and so on, by the army, schools, and hospitals (Foucault, 1997). Hence, we can see that humans are not truly subjective and that consciousness is manipulated and molded by discourses. Things that are often thought of as private, subjective, and a matter of one's own are actually the result of the manipulation of discourses of sexuality, perception, mind-set, taste, hobbies, sense of humor, criteria, and so on (Bourdieu, 1996). Therefore, biopolitics is a useful theory, relevant to exploring the issue of good governance and ethnic minorities. Biopolitics can be useful in the analysis of governmental policy as an instrument of manipulation by which to discipline and subjugate ethnic minorities. While in the legal public's perception, the practice of antidiscrimination is widespread, the reality is that it is far from guaranteed that stereotyping has been eradicated. Perhaps the Foucault's notion of the subconscious homophobia of "the new Victorians"[8] should be extended to include an analysis of race; despite legislative progress, racial bias is still abundant.[9]

In the Dutch and Indonesian context, ethnic minorities may seem to become a target of discipline. Simply put, having a name that sounds like it represents an ethnic minority can create problems in the public sphere. The Dutch and Indonesian Governments do not force ethnic minorities to change their names and assimilate in this way. However, due to stereotyping and a lack of acceptance by wider groups in society, ethnic minorities' names have generated problems for the individuals in question. Therefore, they seem to be required to change their name in accordance with the larger population. This can be seen as a case of operationalization of discipline.

In Indonesia, the New Order Government issued the Presidential Decree No. 240 of 1967 concerning changing-name for Chinese-Indonesians. From this regulation, Chinese-Indonesians have been suggested to change their name to become more of a traditional "Indonesian name." Many Chinese-Indonesians have officially changed their name through the court. One legal case concerning changing-name in Mojokerto Court (2012) shows that some of the reasons for Chinese-Indonesians to change their name include the following: (1) because "one integrates and adapt[s] into the local communities" and (2) because "it is morally compulsory to adjust to the dominant culture, behaviors, and lifestyle of Indonesia." The reasons are quite vague from the perspective of equal treatment, minority rights, and multiculturalism. One's name can be considered to be something private and sacred to be changed, yet ethnic minorities are "forced" to change their name. This case is very similar to a separate situation in the Netherlands. Luckily, there is no Dutch regulation to suggest that ethnic minorities must change their name. However, in the Dutch labor market, studies have shown that individuals with Arabic-sounding names have faced greater difficulties in finding a

job. The 2015 CERD Report of the Netherlands Institute for Human Rights cited a study entitled "Liever Mark dan Mohammeden" by the Dutch Social Cultural Bureau, mentioning that ethnic minorities with "Arabic-sounding names" often obtain barriers to entering the labor market because of their perceived ethnicity. On May 12, 2014, for example, a Turkish individual applied to a job vacancy for the role of Programme Management Officer at Yacht BV. He was rejected for an interview. He then reapplied, this time with a typical Dutch name, "Martin van Dongen," and was invited for an interview shortly after applying. In this process, the applicant felt discriminated against based on his ethnicity and submitted a complaint through the Netherlands Institute for Human Rights. Through the above examples, it is possible to see how ethnic minorities are disciplined in the labor market and public sphere due to their "uncommon name" in comparison to the wider population.

Observation of the position of ethnic minorities at a microphysical level is quite interesting but also complicated. Biopolitics may become a view of a political anatomy of detail (Foucault, 1978). At a microphysical level, consideration is paid to the way that ethnic minorities deal with issues of discrimination in accessing goods and services, in the labor market, in immigration and integration policy, in concerning criminal offenses, and so on. The notion of biopolitics not only shows the weakness of ethnic minorities but also the angles from which minorities produce their own power. The fearless speech of ethnic minorities should be fostered to be a guideline for democracy, ethics, and be understood as reflecting the characteristic of "the good citizen" of Athenian democracy (Lacombe, 1996). The competition for power between ethnic minorities which enables them to exercise a legal strategy of defending their rights through the antidiscrimination bureaus, the National Human Rights Institutions, the ombudsman, and the courts can be seen from the perspective of biopolitics.

Ethnic Minorities as Homo Sacer

After the 1965 failed coup d'état in Indonesia, Soeharto's government enacted a purge of the "betrayers" and was also suspected responsible for the deaths of many victims. Moreover, the International People's Tribunal issued a verdict that Indonesian Government committed genocide, targeting Chinese-Indonesians in Aceh, Medan, and Lombok, Indonesia. To this day, Chinese-Indonesians continue to be subordinated. Meanwhile in the Netherlands, discrimination is also a major issue. Some prominent cases include a Turkish football player who was barred from joining by a football club in 1994 and a Chinese woman who was prevented from buying baby milk powder in a Dutch supermarket. These cases demonstrate the position of ethnic minorities as homo sacer, who suffers due to their social status.

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. Therefore, homo sacer becomes hunted by people (Agamben, 1995).[10] Agamben's concept of homo sacer was influenced by Pompeius Festus's work "On the Significance of Words" where the function of "the

sacred man" in ancient Roman Law is described. Agamben quotes a translation of Festus's work in his explanations of the concept of homo sacer: The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunician law, it is noted that "if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide." This is why it used to be customary for a bad or impure man to be called sacred.

Homo sacer has no space to live, is banished from the city, and is strictly prohibited. People put a curse on bare life as the sin or deviant acts of homo sacer. Furthermore, homo sacer can be categorized as having zero-status and a worthless life is of no value to civilization. Therefore, Agamben argues that "homo sacer" is a person outside human jurisdiction, without being brought into the realm of divine law. In other words, homo sacer is anyone who lives under the politics of fear and insecurity and who is not treated as being human. Any mechanism of power is calculated to bar home and city to a marginalized person through isolation. Homo sacer was a phenomenon of the ethnographic concept of taboo when it was used in ancient Roman law, but the myth of the story can also describe the discourses of the social sciences between 1890 and 1940. In Rome, the status of homo sacer could not only be accorded to one who committed extraordinary crimes but also to those who were involved in political resistance, opposition, and protest against their representatives (in the last-mentioned case, it was issued by the plebeian courts). Agamben used homo sacer to demonstrate that what happened in the past, namely the exposed life of people declared to be in this category, still remains in the present time. Homo sacer can simply be defined as one who is banned and may be killed by anybody without any punishment being meted out to the killer and who is also excluded from being a sacrifice. Furthermore, anybody may join the witch hunt and look for homo sacer to murder. In addition, there was pride in being selected to be sent to God in the ritual of sacrifice, but homo sacer was excluded from this holy ceremony because he was considered to be sinful and impure. In the present time, the process of killing homo sacer cannot be seen physically in taking the life of another human being but rather in the killing of political, social, cultural, civil, and economic rights. In the case of ethnic minorities, this may occur in "Symbolic killing; abandoning the right to freedom from discrimination." Although now primarily symbolic, this violence still causes pain and destroys the lives of those condemned as homo sacer; they are taboo figures, more animal than human, uncivilized, and sinful. To be excluded from society psychologically or physically is to be subjected to terror in everyday life. Homo sacer is an exception when someone can be killed without punishment. Such exceptions have always been scarce. Even in Roman Law, any little hole in the Law of the Twelve Tables (the foundation of Roman Law) which allowed people to be put to death without trial, deployed an unlimited authorization to kill. Someone who was excluded from the ritual practice then would begin to fear being killed later. Sovereignty holds a monopoly on violence. Homo sacer was prevented from deciding his own fate. Only the law, religious institutions, and citizens are responsible for manipulating the dignity of homo sacer. Populations tend to protect and distance themselves from criminals,

liars, and the unstable, in other words a person such as homo sacer. The weakest individual is the one who is chastised legally, socially, and spiritually or one of that group. In the 1920s, the governments exploited "the Myth of the State" to condemn homo sacer. In ancient times, for example, in the Battle of Veseris (340 BC), homo sacer had to be burned, profiled, and cleaned to prevent catastrophe or disaster. The fate of homo sacer is similar to that of anyone exiled from their people and treated as inhuman. Homo sacer must live in concentration camps and be monitored constantly (Knepper, 2008).

In some ways, the societal position of homo sacer mirrors that of ethnic minorities. Although modern law prohibits murder and some countries have abolished the death penalty, nevertheless the discrimination that ethnic minorities experience can be thought of as "symbolic death." They are unfairly targeted by racial profiling used by the police. Similarly, they face many barriers in gaining economic rights. They are the objects of acts of hatred and suffer the blockage of access to the economic sphere, as well as being targets of "the not-in-my-property syndrome" (van der Bracht, Coenen, & Van de Putte, 2015). Of course, they are also frequently the target of monitoring by the national security services (Löfstrand, 2015). Their access to education is restricted (Everett, 2011) and so on. In this way, ethnic minorities can be considered as being a modern-day homo sacer and receive similar treatment. Agamben believes that dictatorships have always existed and will always exist—even in the era of democracy. The method by which power holders create dictatorships is through establishing a state of emergency—for instance, the current "war on terror" (Agambern, 2005). In such situations, notions of populism become more widely held, and as a result, ethnic minorities experience more problems. Social hate toward immigrants, refugees, and foreigners increases in the public sphere. If the concept of homo sacer makes a distinction between *bios* (human life) and *zoe* (animal life), then ethnic minorities are assigned *zoe*, and as such, their fundamental rights are abandoned by administrative authority and society (Mills, 2008).

Strengthening the Rule of Law

From a good governance perspective, the rule of law in the common law tradition, the German *Rechtsstaat*, the French *L'Etat de droit*, and Italian *Stato in Diritto* are all based on constitutionalism, rule-based decision-making, and the equality of treatment for all (Addink, 2019). The Constitution of Indonesia states that Indonesia is a nation that is based on the rule of law (Article 1: 3). Similarly, the Dutch Constitution protects the fundamental rights of citizens under the law (Article 6: 1).

During the amendment of the Dutch Constitution in 1983, Article 1 was created which stipulates that "all persons in the Netherlands shall be treated equally regardless his or her religion, belief, political opinion, race, sex and other grounds." Although a general piece of legislation, this article empowers the position of minorities, including ethnic minorities. In the past, this article was initiated by the first Ruud Lubbers cabinet, with his political party Christian Democratic Appeal (CDA). At the same

time, the members of parliament held a political debate between the Labour Party (PvdA) and the People's Party for Freedom (VVD) and other politicians concerning this Article. After Article 1 was issued, this Article also encouraged the creation of the Equal Treatment Act in the Workplace Act (ETWA) in 1989, as well as other equal treatment legislation. Unfortunately, the General Equal Treatment Act was not issued until 1994, which established the Equal Treatment Commission. The existence of equal treatment and the Equal Treatment Commission in 1994 was crucial to develop the quality of rule of law, especially with regard to ethnic minority protection. Ethnic minority protection also seemed to flourish in Indonesia during the amendment of the Constitution in 1999–2000. Article 28 of the Indonesian Constitution stipulates the human rights protection chapter. This amendment was a catalyst for the reinterpreting human rights law and the National Human Rights Institution in Indonesia. The Constitution may become a highest legal base for creating the faith in rule of law. Constitutional amendments, especially those that create human rights provisions, are beneficial to strengthening the concept of ethnic minority protection and rule of law.

The rule of law establishes the function of authority in a government that protects ethnic minorities from violence, monopoly, and oppression. von Hayek (1973) considers the rule of law to be fundamental in ensuring that justice is a part of the legal system, how a parliament constructs fair regulations and a government provides public service in accordance with the constitution. Based on the development of the rule of law, the government will be less arbitrariness, members of society will be more able to actively participate, and the fulfillment of the rights of ethnic minorities will be guaranteed (Mill, 1873).

The concept of the rule of law encourages the protection of individual rights, privacy, property, and so on—including ethnic minority rights—based on substantive values of equality (Tamanaha, 2004).

A shared theoretical space is constructed by good governance and the rule of law for the protection of ethnic minorities (Humphreys, 2010); the principles of legality, separation of powers, judicial control, and protection of human rights (Addink, 2019) are beneficial not only for the majority but also for ethnic minorities including immigrants, refugees, and marginalized groups (national minorities; Moya, 2002). Establishing the concept of "good ethnic minority justice" will be a gesture toward better realizing the rights to life and security for ethnic minorities.

The principle of legality in the rule of law framework should be reflected within the legislative program in formulating a rational legal norm (Raz, 1970), that is, a moral norm in favor of strengthening government transparency and the participation of ethnic minorities (Skrentny, 2004). Laws such as the Dutch Government Information Act and the Indonesian Public Disclosure Act serve as legal instruments for ethnic minorities to access government information and to empower themselves with a strong legal standing.

Legal protection for ethnic minorities under the theoretical framework of the rule of law requires substantive justice. On the morality of law (Murphy, 2005), government, the legislature, and the courts must implement procedures to ensure the provision of a fair social environment, to protect, respect, and fulfill the rights of ethnic

minorities. The rule of law defines justice as the balance of interests, distribution of wealth, fulfillment of rights, availability of freedom, and so on (Rawls, 1971). Establishing a balance of interests between majority and minority is extremely important for creating an equal and antidiscriminatory nation.

Pursuing Democracy

Democracy should not only serve the needs the majority but also to all components of a nation, including ethnic minorities. In practice, this requires that ethnic minorities are involved in decision-making in the context of representative democracy or direct participation by exercising their rights to freedom of expression, freedom of speech, and freedom of the press (Addink, 2019). Good governance aims to encourage democracy to manage and embrace the diversity of the community. The protection of minorities in a democratic country is crucial (Addink, 2019). According to Habermas (1998), social action in the era of democracy can be defined as communal action, based on agreement (*gemeinschaftshandeln*), for instance, ethnic minorities actively participating in democracy through strategic action (*interessenhandeln)* based on legal procedures. Strengthening public participation is encouraged in the August 2013 Strategic Plan of the Netherlands National Human Rights Institute and also in the National Action Plan for Indonesian Human Rights 2011–2014, particularly Presidential Regulation No. 23 of 2011. Administrative planning to take care of the rights of ethnic minorities is an important part of the process for establishing a fully democratic legal system. A truly democratic legal system should actively seek to listen to the voice of minorities (Pentassuglia, 2009).

After existing regulation and institution, which can be used by ethnic minorities to protect their rights, the role of active participation is also a crucial. For instance, Wilders argued "fewer, fewer, fewer Moroccan," which criticized by many people concerning insulting ethnicity. At that time, the Bureau of Statistics reported 12,163 complaints through the ADV in 2014. Some human rights activists argued that complaints against Wilders were made, political tension dominated the submission of complaints. Often activists provide legal assistance to minorities but are reluctant to engage in political debate. Moreover, many of the complaints were not legal complaints but simply reports via e-mail. Legal submission is required to involve the judicial process, which is an effective means for handling discrimination and therefore a more effective means of participation. If participation is a key element of democracy, ethnic minorities may take into account seriously.

Democracy establishes a "room" for involving NGOs, academics, international organizations, and minority representatives in a discussion on the ramifications of the standard of public services for ethnic minorities. The concept of good governance will influence democracy and will help ensure a good balance of power between the majority and minorities (Addink, 2019). Because of this fact, democracies need to pay more attention to the principles of transparency and participation for ethnic minorities. Democracy without good governance is merely chaos and risks the tyranny of majority.

With regard to the principles of transparency for ethnic minorities, the Netherlands National Human Rights Institute (based on its August 2013 Strategic Plan) has a role in advising on matters of legislation and policy that directly or indirectly relate to human rights issues. Advising ethnic minorities on how and where to obtain transparent information is very important. The Indonesian National Commission of Human Rights encourages the Indonesian Government to implement human rights education and community communication and provides channels for reporting human rights violations (Presidential Regulation No. 23 of 2011 on National Action Plan about Human Rights 2011–2014). These policies will improve outcomes of knowledge and skills for ethnic minorities in accessing information. Democracy emphasizes that public services should serve the interests of all of humanity, which of course includes the interests of ethnic minorities. Mill (1976) highlights the importance of "a good state of society" in building a clean and democratic government. Ensuring that those who participate in democracy are demographically diverse—and that ethnic minorities are included—will validate the legitimacy and sovereignty of a government. Mill's "civilized people" are those who have access to sufficient information and hence are able to properly participate in democracy. Mill's (1977) term "pragmatism" refers to an arrangement of society that protects the people and property of its members as well as maintaining peace among them.

Conclusion

The discourse of justice and good governance may create a reflection of access to justice for ethnic minorities. Imagining everyone regardless of background can have better access to the court, the administrative complaint systems, the ombudsman, and other relevant governmental bodies. These accesses may foster the position of ethnic minorities to secure that their fundamental right is fulfilled. Unfortunately, in pursuing justice, ethnic minorities are targeted to be disciplined and subjugated by governmental policy. From the viewpoint of biopolitics, the majority may establish the notion of homophobia of ethnicity, which means that ethnic minorities are always weak and fragile. Moreover, ethnic minorities are presented as homo sacer, where their existence seems to be sinful and impure. Furthermore, people often "kill" ethnic minorities' right to freedom from discrimination. Herewith, the notion of rule of law and democracy needs to be strengthened. Rule of law may be used to interpret the concept of justice throughout the balance of interests, distribution of wealth, flourishing freedom, respecting fundamental rights, and so on. At the same time, with democracy, ethnic minorities can participate better in public life. Democracy encourages transparency that may be beneficial for ethnic minorities. With sufficient information, ethnic minorities can be empowered, and their legal capacity can be improved.

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Notes

1. Rawls divides the list of basic rights such as the political liberties, liberty of conscience and freedom of association, freedom and integrity of the person, and the rights covered by the rule of law. The political liberties contain freedom of thought, press, assembly, political speech, the rights to vote, and the rights to hold public office. Liberty of conscience and freedom of association which also supports freedom of religion. Freedom and integrity of the person consists of freedom of slavery, psychological oppression, physical injury, and abuse, freedom of movement, and the right to property. The last section is about the rights covered by the rule of law, which composed of freedom from arbitrary detention, the right to access to justice, due process, and so on.
2. Under Article 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."
3. "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."
4. "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."

5. "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."
6. "(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."
7. "(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) . . . ."
8. "The Victorian" was an image of an imperial prudish regime whose evil lay in issues of hypocritical sexuality in the 17 century. Some codes remain with the same motives, discourses, and purpose where the subject of sexuality became a rule in the heart of every household. The notion of the heterosexual Victorian bourgeoisie became the ideal image of a family. Children were prohibited from talking about sex, they had to close their eyes, and all information about sexuality was controlled by the power holders. The idea of "other Victorians" was coined by Steven Marcus where words, gestures, politeness, and so on, were authorized by the regime.
9. Briefly, biopolitics is composed of three main concepts. First, the power of knowledge is controlled using the methods of "discipline and normalization." Discipline can simply be defined as the means of ensuring that everyone obeys the order, and normalization can be explained as the instrument of power that pressures everyone to be "healthy and not insane. " Second, a microphysical view can be used to investigate the subject of research from an ethnographic approach in great detail. Third, the observing of the omnipresence of power. In opposition to the classical Marxist view, where power is always an interplay between the two classes (bourgeoisie and proletariat), biopolitics reveals the contesting power of multiple actors. With regard to the issues of ethnic minorities, biopolitics can provide insights into the problems of institutions and legal norms of discrimination. Therefore, it also can help identify the lack of good governance within state bodies. Especially in the discipline and normalization approach, implementing modern liberal politics provided security and kept the population in a subordinate relationship. Ethnic minorities can be a category of subordinate group whose attitudes, gestures, language, and the way of thinking will be affected by the discipline of integration policies and other Western norms. Members of ethnic minorities are presented as criminal, juvenile, simple, awkward and therefore are deemed to require more discipline than their counterparts in the majority. Of course,

because their way of thinking may be perceived as deviating from that of the majority, ethnic minorities can become labeled as an "insane" group and be subjected to normalization by the power holders. Thus, representations of ethnic minorities and "madness" are potentially closely related.

10. Agamben refers to Latin text too, at homo sacer is est, quem populus iudicavit ob maleficium; neque fas est eura immolari, sed qui occidit, parricidi non damnatur; nam lege tribunicia prima cavetur 'si quis eum, qui eo plebei scito sacer sit, occiderit, parricidia ne sit.' Ex quo quivis homo malus atque im-probus sacer appellari solet. (De verborum significatione).

    Free translation, "it is that people judge for misconduct; it is right to do not care to be sacrificed, but the person who committed suicide, is not condemned for parricide; for it is the law of the tribunes, the first is the warning: 'If any man did, who was at that a plebiscite is sacred to the, kills, murders, neither let there be.' And from this it is accustomed to be called by any other man a bad man and imputes to the sacred-an honest man."

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