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Is there a legal right to free choice of ethno-racial identity? Legal and political difficulties in defining minority communities and membership boundaries

I. Introduction

Consider the following paradox: while sociologists, anthropologists, constitutional scholars, philosophers and policy makers may endlessly dwell on the difficulty of benchmarking or defining membership criteria for minorities, and a number of international human rights commitments are interpreted in a way which suggest that they recognize the free choice of identity, hate crimes perpetrators are rarely puzzled by the complexity of identity formation of their victims. When it comes to the ill-treatment of members of various minority groups, categorization, definition making, or classification of those minority groups is never an issue for the discriminating party. In fact, these conceptual ambiguities may even worsen protections provided for the victimized group, as they make it difficult to define or identify target groups and beneficiaries.

This essay investigates the constitutional dilemma that characterizes all ethno-racial minority protection mechanisms, be they remedies, demands for collective ethno-cultural recognition, systems of preferential treatment, or protections offered from racially motivated violence or discrimination. All of these mechanisms need to institutionalize some kind of a definition for the targeted groups, and/or membership requirements within the community to be effective. The failure to do so seriously impedes the prospects for efficient legal protection, exemplified by the documented practice of "ethno-corruption", which will be discussed later in this paper, and the reluctance to apply anti-discrimination and hate crime laws, in part due to concerns over data collection in Eastern Europe and elsewhere. Citizens in each

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community, as well as members of the international community, arguably have a right to properly identify the beneficiaries of affirmative action and minority rights regimes because of the budgetary burdens of these policies—not to mention the need for sustainable and transparent policy-making and enforcement schemes.

I will show that these definitional issues and the potential for exploitation highlight the complexity of minority identification, which manifests in the vastly different approaches law and legal measures need to follow when providing protection from victimization in hate crimes and discrimination on the one hand, and accommodating multicultural (or other) diversity-claims on the other. I argue that, although the legislative goal to design a precise set of requirements is common to both approaches, perception will be the crucial concept in the former, while choice and identification are paramount in the latter.

In the first part of the essay, I will analyze the habitually used definitions and conceptualizations of minority groups and membership criteria. My aim is motivated by two claims. First, concerning minority groups, the traditional terminology "triad," which categorizes minorities into racial, ethnic, and national minority groups, is unhelpful. I call for a more for complex, functional set of definitions, which reflect socio-political realities. I claim that group recognition is always political, and the form and substance of recognizing a certain group's legal and political aspirations will depend on the nature of their claims and its compatibility with the majority culture. My basic argument is that (i) the origin of the group; (ii) the basis for group-formation; and (iii) the aspirations, needs, and demands of the group towards the majority will significantly shape their perception and the reception of their claims

– which can be dignity-based identity-claims, equality-based justice claims, or even reciprocal Diaspora claims.[1]

Second, concerning the definition of membership-criteria for minority groups, I argue that external perception-based group membership will need to be distinguished from choice-based affiliation criteria, which may include objective requirements.

Besides purely academic interest, this project is triggered by the idea that classifications and terminology have serious political and legal consequences. For example, the Supreme Court of the United States assesses the constitutionality of legislation using different levels of scrutiny, based on whether or not the case involves a "suspect class."[2] The Court will always use the heightened strict scrutiny standard if racial, ethnic, or national classifications are involved in the case (which, in most cases, will lead to striking down the legislative act in question), but will employ the less rigorous standard of intermediate scrutiny for other, so-called semi-suspect classifications, such as gender.[3] Specialized treaties apply to "national minorities," who enjoy international protection pertaining to linguistic and cultural rights not afforded for other racially or ethno-culturally defined groups.

Using examples and case studies from various jurisdictions, this part of the paper will argue that instead of an empty typology, the substance of group claims is what matters. I also claim that both in distinguishing between minority groups and in conceptualizing group membership, the question of external perception and the nature of the group-related claims will be of corollary importance.

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[1] In certain ethno-political situations (in Hungary, for example), the approach to ethnic and national minority rights is defined by reference to ethnic kin's Diaspora-rights (in the neighbouring states). *See, e.g.*, Andras L. Pap, *Minority Rights and Diaspora Claims: Collision, Interdependence and Loss of Orientation, in* Beyond Sovereignty: From Status Law to Transnational Citizenship?, 243 (Osamu Idea et al. ed., 2006).

[2] *See, e.g.,* *Hirabayashi v. United States*, 320 U.S. 81 [5] (1943)(explanatory parenthetical); *Korematsu v. United States*, 323 U.S. 214 (1944) (explanatory parenthetical).

[3] Strict scrutiny is also employed for cases involving "fundamental freedoms."

The second part of the essay turns to unfold the paradox of free choice of identity. I will highlight the theoretical contradictions and practical malfunctions within the reading that recognizes the free choice of identity as a principle of international minority rights protection law, arguing that the legally undefined (thus, practically unrestrained) right to minority identification may, in practice, lead to inherent inefficiencies in rights protection in two distinct ways.

First, when it comes to protection from discrimination, or racially motivated hate crimes, hate speech, or even genocide, data protection regulations for sensitive, identity-based information, may become an obstacle for rights protection by hindering efforts to identify minority groups in practice. This may provide justification for authorities' reluctance to prosecute perpetrators who base their actions on perceived ethno-racial identity.

The second consequence of the, in my opinion, false understanding of free of choice identity as a legal right protected by international instruments concerns remedial measures, affirmative action and minority rights as ethno-cultural claims. If we were to accept the existence of such a legal right, the subsequent lack of requirements for both minority group-recognition and membership opens the possibility for misusing these rights, enabling members of the majority to enjoy preferences they should not be eligible for, and sidelining those whom these policies should be targeting. The paradox lies within the basic tenet of legal logic: if there is a right to free choice of identity allowing human beings to opt out from racial, ethnic or minority communities, the very right necessarily needs to include the freedom to opt in somewhere, either to the majority or to any chosen minority group. I will argue that the latter is hardly something international law would set forth, and the former, the right to assimilate into the majority, also only exists only in a rather limited way.

I will be using examples form Central and Eastern Europe, mostly Hungary, Macedonia, Moldova and Romania. Cases will cover the forced imposition of the ethnic identity of the majority, as well as a practice where data protection arguments – the reluctance to recognize and register ethnicity by authorities in the name of privacy – are used forh educational segregation, obstructing educational desegregation, and refusing to prosecute racially motivated hate crimes, by failing to acknowledge the racist component. A cynical approach to the principle of free choice of identity, and the failure to properly distinguish it from perceived ethnicity, also leads to discrepancies concerning remedial measures, such as affirmative action and minority rights as ethno-cultural claims, as the lack of requirements for both the group and membership within the group will allow members of the majority to make use of these measures. It will be shown that an institutionalized cynicism cannot only obstruct and discredit minority rights, but allows for potential electoral gerrymandering.

II. The racial-ethnic-national triad – and beyond: Conceptualizing minority communities and membership boundaries

The following pages will focus on the conceptualization of the term "minority." The term implies that the group in question is in an inferior position is the given society: numerically and/or otherwise. And, for some reason, the very characteristics that form these groups are considered precious, sensitive, or valuable and are distinguished from other characteristics by the very protection and recognition of this legal and political minority status.

We may begin our analysis by stating that some identities, personality traits, or characteristics that the political decision makers deem valuable and worthy of recognition and protection are externally (objectively) defined while others are subjectively determined. The

question of which groups are worthy of this special status will always be a political issue and depend on the given political community, be it the international community of states drafting human rights or minority rights treaties or national legislators enacting domestic laws. Adopted in 1992, the United Nations Minorities Declaration in its article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity.[4] Since religious and linguistic groups are easily identifiable by the very claims they make, my analysis here will be limited to groups that are defined by ancestry or physical appearance: ethnic, national, and racial another feature used broadly in international human rights law and domestic civil rights and anti-discrimination laws.[5] I will call this the national-ethnic-racial minority triad and will deconstruct this framework in the following pages. To do this, I provide two lines of analysis: one pertaining to the conceptualization of the minority communities, and the other focusing on defining membership criteria for the group.

(i) What makes a minority?

As mentioned above, the concept of a minority involves an inferior position in the given society.[6] It is important to note that there is a difference in the sociological and legal understanding of the word. In the usual sociological and political understanding a minority is a group that does not make up a socially or politically dominant majority of the total population of a given society.[7] A sociological and/or political minority is not necessarily a numerical minority—it may include any group that is inferior or subordinate with respect to a

[4] "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity." UN Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities, 92nd plenary meeting, 18 December 1992, A/RES/47/135, 47/135., *available at* http://www.un.org/documents/ga/res/47/a47r135.htm

[5] *See, e.g.,* the International Convention on the Elimination of All Forms of Racial Discrimination, or the ILO Discrimination (Employment and Occupation) Convention (date, year, explanatory parenthetical)

[6] *See* Minority Rights: International Standards and Guidance for Implementation, UN Office of the High Commissioner for Human Rights, 2010, *available at* http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf, p. 2.

[7] *Id.*

dominant group in terms of social status, education, employment, wealth, or political power.[8] The term is comfortably understood as including people with disabilities, economic minorities (working poor or unemployed), age minorities (who are younger or older than a typical working age), and sexual minorities.[9] In this understanding, the term "minority" should not necessarily refer to a numerical status: given the structural disadvantages they face, for example, women are habitually referred to as minorities, despite the fact that there are slightly more women than men in most societies.[10] In apartheid South Africa, despite its demographic superiority, the black community has been included in the general racial minority discourse.[11] While the socially disadvantaged position is also not unproblematic to define, there is a widespread consensus that in the *legal* discourse of minority rights, the numerical aspect, in addition to the other kind of inferiority, is an essential requirement.[12]

In addition to being in a socially and (or) numerically inferior position, there are other group characteristics that are essential to the granting of minority status. As discussed above, the group characteristics that are deemed worthy of special protection and recognition will vary depending on the history and current political climate of the society in question, as well

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[8] This issue raises a number of questions. For example, according to census figures released in December, 2012, after 2043, whites will no longer make up the majority of Americans. Considering this, *New York Times* columnist Charles Blow asks "[w]hen will public displays of white pride become culturally acceptable? Will they forever be freighted with the weight of history — tantamount to gloating about privilege? Or should all racial and cultural pride be viewed more or less the same?" Charles M. Blow, *The Meaning of Minority*, The New York Times, December 12, 2012. (check this)

[9] *Id.*

[10] *See e.g.,* Helen Mayer Hacker, *Women as a Minority Group,* Social Forces, 30, 60-69 (1951) (explanatory parenthetical); Margrit Eichler, The Double Standard: A Feminist Critique of Feminist Social Sciences, 94 (1980) (explanatory parenthetical).

[11] *See supra* n. 8.

[12] *See e.g.,* Will Kymlicka and Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Context, Concepts, in* Citizenship in Diverse Societies 1, 18-20 (Will Kymlicka and Wayne Norman eds, 2000) (parenthetical). Will Kymlicka, while arguing against Iris Marion Young, claims that if women were included in the minority rights discourse it would simply make the concept of collective rights unsustainable, as some 80 per cent of the population could belong one of the minority groups. *See e.g.,* Will Kymlicka, Multicultural Citizenship. A Liberal Theory of Minority Rights131–151 (1995); Will Kymlicka, *The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies*, Int'l Soc. Sci. J., 61, 97-112 (2010). (parantheticals for both, I think?)

as the history and origins of the minority groups, and the nature of the claims they make. One commonly held, but false, assumption is that immutability or the lack of choice concerning identities or group characteristics is a decisive factor in qualifying as a protected minority.[13] This fallacy becomes obvious when you examine religious group membership. Consider the following: just because a person or a group could change religion (as a marker or even in some cases a constitutive element of national minority identity) does not make religious identity less worthy of protection.[14] Similarly, legal scholar Laurence Tribe argues that if a medical treatment were developed which could change skin pigmentation, allowing blacks to turn white (or vice versa), racial discrimination would nevertheless be unacceptable.[15] The fundamental question, then, is what are the political and legal standards for recognizing or constituting minorities? In other words, which are the personal or group characteristics that constitutes a basis for recognition and protection? And who is to decide? Does it fall within the competence of domestic politics or are there international standards and requirements?

In 1987, the Secretariat of the UN issued a compilation of proposals for the official definition of minorities.[16] All we can abstract from the thick volume is that international documents operate with a three-element set of characteristics for minorities: ethnicity, religion and language, while additional elements of individual declaration and consciousness of

[13] *See, e.g.,* Anthony R. Enriquez: Assuming Responsibility For Who You Are: The Right To Choose "Immutable" Identity Characteristics, New York University Law Review Vol. 88:373 April 2013 (explanatory parenthetical)

[14] A similar argument is used int he context of discrimination against LGBT people. Marcy Strauss cites Norris, J., concurring in Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring), cert. denied, 498 U.S. 957 (1990): "Courts should consider sexual orientation immutable because it "would be abhorrent for government to penalize a person for refusing to change [it]." Marcy Strauss: Reevaluating Suspect Classifications, Seattle University Law Review, Vol. 35: p. 163., Virginia Journal of Social Policy & the Law Vol. 19:2; *see also* Tiffany C. Graham: The Shifting Doctrinal Face of Immutability, Virginia Journal of Social Policy & the Law . 19:2 (explanatory parenthetical)

[15] Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theory,* 89 Yale L.J. 1067, 1073–1074 (1980).

[16] UN Working Doc. E/CN.4/1987/WG.5/WP1. *See also* Nicola Girasoli, National Minorities: Who are they? 33 (1995) (Explanatory parenthetical here)

belonging occasionally replace pre-established communal membership as the basis and source of rights and protective entitlements.[17]

It is also worth mentioning that the language used in Article 27 of the International Covenant on Civil and Political Rights referring to minorities that "exist" in states is somewhat ambiguous, as it suggests objective criteria for establishing their very existence. [18] Although failing to provide guidelines of any sort, in its General Comment 23, the UN Human Rights Committee opined that "[t]he existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria." [19]As it has been demonstrated above, the concept of "minorities" is fluid and ambiguous.

(ii) Typologies for minorities

Usually typologies help us understand the internal logic and substance of concepts and institutions. In the following section, I will focus more closely on the national-ethnic-racial triad discussed in the previous section. Despite the fact that the discourse on minority rights is essentially law-based, legislators and drafters of international documents refrain from defining these concepts, and we have to settle for vague descriptions of race, ethnicity, and national minorities.

A. Race

[17] F. Capotorti, the Special Rapporteur of the Sub-Commission of the Commission of Human Rights defines the concept of minority as a group as (i) numerically inferior to the rest of the population of a state and in a non-dominant position. (ii) whose members have ethnic, religious or linguistic characteristic which differ from the majority by virtue of language, ethnic group or religion, (iii) exhibit, even implicitly, a sentiment of solidarity for the purpose of preserving their culture, traditions, religion or language. UN Doc. E/CN.4/Sub.2/1977/385 rev. 1, p. 102. *See also,* Girasoli *supra*; Geoff Gilbert, *The Legal Protection Accorded to Minority Groups in Europe*, Neth. Yearbook of Int'l L., 67 (1992). The 1989 International Labour Organization (ILO) Indigenous and Tribal Peoples Convention,[1] Article 1, para. 2 (add year, fix cite), also states that "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."

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

[19] UN Human Rights Committee: The rights of minorities (Art. 27) 08/04/94. General Comment 23

Race is a controversial category. In social science literature, it is widely understood to be a social construct rather than a biological trait (in the biological sense, the entirety of humanity constitutes one single race) without a theoretically or politically uniform definition.[20] Appropriately, then, there are no uniform and universally acceptable criteria for membership within the racial groups. Race-based international and domestic legal instruments identify race with physical appearance, and, under the logic of the anti-discrimination principle, put perception and external classifications in the center when prohibiting discrimination, or violence on racial grounds.[21]

B. Ethnicity

Ethnicity is an even more vague concept. First, it is often used as a synonym for race, referring to physical appearance. The Grand Chamber of the European Court of Human Rights, for example, spoke about racial discrimination against the Roma minority, a group most commonly referred to as an ethnic minority, [22] when ruling against the Czech Republic

[20] John Tehranian, Performing Whiteness: Naturalization Litigation and The Construction of Racial Identity in America, Yale L. J. 817, 822 (2000); *see also* Ian F. Haney-López, The Social Construction of Race, in Critical Race Theory: The Cutting Edge 163-176 (Richard Delgado and Jean Stefancic eds., 2000).

[21] One of the most widely cited definitions for race and ethnicity comes from the opinion of Lord Frazer for the House of Lords in the Mandla v Dowell Lee ([1983] 1 All ER 1062)-ruling, which concerned whether Sikhs were a distinct racial group: "For a group to constitute an ethnic group ... it must, ... regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (**1**) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (**2**) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to these two essential characteristics, the following characteristics are in my opinion, relevant: (**3**) either a common geographical origin, or descent from a small number of common ancestors; (**4**) a common language, not necessarily peculiar to the group; (**5**) a common literature peculiar to the group; (**6**) a common religion different from that of neighbouring groups or from the general community surrounding it; (**7**) being a minority or being an oppressed or a dominant group within a larger community ..." Using these criteria, he held that Sikhs "are a group defined by a reference to ethnic origins for the purpose of the Act of 1976, although they are not biologically distinguishable from the other peoples living in the Punjab". " See, Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination, A Discussion Paper, Human Rights Commission, Ireland, 24th March 2004.

[22] Classification of the Roma has been a source of much controversy. For example, in 2004 the Irish Government, in the course of its reporting to the United Nations Committee on the Elimination of Racial Discrimination, declared that Irish Travellers, "do not constitute a distinct group from the population as a whole

in the segregation case of *D.H. and Others v. the Czech Republic* in January 2007.[23]. This discussion, if anything, illustrates the difficulty in defining ethnicity.

We can argue that if we want grasp the substance of these definitions in the racial and ethnic minority concept there is one common element: the protection from maltreatment (discrimination, hate crimes, hate speech, physical violence). Reflecting an anti-discrimination logic, the groups need to be defined by following the perpetrators' method:

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in terms of race, colour, descent or national or ethnic origin." While Ireland refuses to grant this status, Romani Gypsies and Irish Travellers have been held to be "ethnic" groups for the purpose of the Race Relations Act in the UK. In *Commission for Racial Equality v Dutton,* the Court of Appeals found that Romani Gypsies were a minority with a long, shared history, a common geographical origin and a cultural tradition of their own. ([1989] 2 WLR 17, CA.) (dealing with the case of a London publican displaying a sign saying "No travellers" in his window). In *O'Leary v Allied Domecq* (*P O'Leary and others v Allied Domecq and others* , a similar decision was reached with respect to Irish Travellers. (unreported) 29 August 2000 (Case No CL 950275–79), Central London County Court, Goldstein HHJ., Case No. CL 950275-79 29(Unreported*)); see also* Robbie McVeigh, "*Ethnicity Denial" and Racism: The Case of the Government of Ireland Against Irish Travellers*, Translocations: The Irish Migration, Race and Soc. Transformation Rev., 90-123 (2007) (exp paran). The European Court of Human Rights in *Chapman v. the United Kingdom* also accepted that gypsies constituted a distinct ethnic group in Britain by saying, "[T]he Applicant's occupation of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle." (Application No. 0002723895). In *Hallam v. Cheltenham Borough Council,* the House of Lords also held that a local council's refusal to let public rooms to a gypsy family for a wedding amounted to discrimination on racial grounds for the purposes of the Race Relations Act. ([2001] UKHL 15,). Likewise, when dealing with a number of Planning Act cases involving illegally encamped gypsies, it said that one of the matters a court should take into account when considering an application for an injunction, was "the retention of his [the gypsy Respondent's] ethnic identity" (Wrexham Borough Council v. Berry [2003] UKHL 26, at paragraph 41.) In Koptova v. Slovakia the CERD Committee upheld a complaint against Slovakia over local councils barring Roma families from living in their areas and over subsequent attacks on other Roma families. (13/1998). In Lacko v. Slovakia, while it did not find a violation of the Convention, the Committee recommended stronger action by the Slovak authorities to stop discrimination against Roma in bars and restaurants. (11/1998*); see also* Travellers as an ethnic minority under the Convention on the Elimination of Racial Discrimination, A Discussion Paper, Human Rights Commission, Ireland, 24th March 2004 (fix). According to the European Court of Human Rights. "Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person's ethnic origin is a form of racial discrimination" *See* Sejdic and Finci v. Bosnia and Herzegovina (application nos. 27996/06 and 34836/06, 43. The Rwanda Tribunal in the case *Kayishema* came to the conclusion that Tutsi formed an ethnic group because the perpetrators of genocide committed against them shared that belief thanked to the government issued identity cards describing them as such. *Prosecutor v. Kayishema and Ruzindana,* Judgment, 21 May 1999, para. 98. The Permanent Court of International Justice also stated in the Case of *Greco-Bulgarian "Communities"*. "The existence of communities is a question of fact; it is not a question of law." (Permanent Court of International Justice, Advisory Opinion, *Greco-Bulgarian "Communities"* Ser. B. No.17, p.16) Later on the Court added that a minority community is: *"a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another."(*Ibid. p. 26)**.**

[23] Application No. 57328/00.

basing the definition of the group on the perception of either biologically determined characteristics or cultural attributes.[24]

[24] It needs to be added that even when the protection of certain groups comes up in such egregious situations as genocide, definition-making for group-membership proves difficult and case law is inconsistent. As Monika Ambrus points out "[A] discussion is going on over which approach should be applied . . . to the identification of the members of a protected group . . . The objective approach means that the judicial body examines the objective existence of the racial or religious identity of the victim; that is, whether or not the victim actually belonged to a certain racial or religious group or actually possessed the so-called 'objective' features that identify the members of these groups." Monika Ambrus, *Genocide and Discrimination: Lessons to Be Learnt from Discrimination Law*, Leiden J. of Int'l L., 25, 942 (2012). In the *Akayesu* case (P*rosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998), for instance, the International Criminal Tribunal for Rwanda (ICTR) endorsed the objective approach. The Chamber stated that for any of the acts charged under Article 2(2) of the Court's Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group (paras 521-523). The Chamber held that "Although the above acts constitute serious bodily and mental harm inflicted on the victim, the Chamber notes that they were committed against a Hutu woman. Consequently, they cannot constitute acts of genocide against the Tutsi group." Paras 720-721, see Ambrus p. 943. "Opposed to this view, the subjective approach focuses on the identification of the victims by the perpetrator. In the Gacumbtsi case, for instance, the Trial Chamber of the ICTR held that "[m]embership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria. . . . Evidence must also be tendered to show either that the victim belonged to the targeted ethnical, racial, national or religious group or that the perpetrator of the crime believed that the victim belonged to the said group." [Prosecutor v. Sylvestre Gacumbsti, Judgement, Case No. ICTR-2001-64-T, T.Ch. III, 17 June 2004, paras. 254–255], Ambrus, p. 944. In the Muhimana case, in which, mistakenly, a Hutu woman, perceived as Tutsi, was raped, the court finally endorsed the approach that a victim of genocide can be identified by the perception of the perpetrator. (Prosecutor v. Mikaeli Muhimana, Judgement and Sentence, Case No. ICTR- 95-1B-T, T.Ch. III, 28 April 2005). The Chamber in the Naletilić and Martinovićcase also confirmed the position that mistakenly harmed victims are also victims of persecution because they 'have no influence on the definition of their status', and they 'are discriminated in fact for who or what they are on the basis of the perception of the perpetrator's identification of the group. (Prosecutor v.MladenNaletilić and Vinko Martinović, Judgement, Case No. IT-98-34-T, T.Ch., 31 March 2003, para. 636.); *see also* Ambrus, p. 948. Ambrus, also points to the fact that the International Criminal Tribunal for the former Yugoslavia, starting from the Kvoč ka case (Prosecutor v. Miroslav Kvočka, Dragoljub Prcać , Milojica Kos, Mlado Radić, Zoran Žigić, Judgement, Case No. IT-98-30/1-T, T.Ch., 2 November 2001), which was later confirmed in the Naletilić and Martinović cases (Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, Case No. IT-98-34-T, T.Ch., 31 March 2003, para. 636.), accepted in persecution cases that 'persons suspected of being members of these groups are also covered as possible victims of discrimination'. (For a recent adoption of this view in the case law, see Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, ICC-02/05–01/09, P.T.Ch. I, 4 March 2009, para. 23.) Op cit., p. 944 and 946–947. As Ambrus summarizes the approach of international criminal tribunals, "strictly speaking, racial and ethnic groups are psychological and social constructs, and do not have an 'objective' existence. These ethnic or racial groups 'are subjectively established, depending on particular conceptions of in-groups and out-groups in society. Since these conceptions vary in time and space, different proxies are used to single these groups out. In other words, the perpetrators can create a group; i.e., a group that does not necessarily have an 'objective' existence. It is, however, essential that the features the perpetrators perceive are based on national, ethnic, racial, or religious proxies; e.g., language, skin color and so on." Also see R. Young, 'How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide', (2010) 10 International Criminal Law Review 1, at 2 and 10.

In a sense, however, ethnic minorities are multifaceted groups. While many of their claims are grounded in the anti-discrimination rhetoric employed by racial minorities, some "ethnically defined" groups (such as the Roma in Europe) may also have cultural claims (and protections) that national minorities would make. The international legal terminology habitually differentiates between the two groups on the grounds that ethnic minorities are different from national minorities in the sense that they do not have nation states as national homelands.[25] In this way, ethnic minorities are a sort of hybrid categorization, blending and, often mirroring, the claims made by racial and national groups. Given the overarching importance of the anti-discrimination logic in the substantive meaning of these terminologies, in the following, for most of the arguments set forth in this article, I will combine the two terms.

C. National Minorities

While perhaps the clearest of the three categories, precisely defining "national minorities" has a proven problematic. Much like the previous two typologies discussed, I argue that this group can be distinguished based on the nature of their claims. Even though in its Recommendation 1735 issued in 2006, the Council of Europe explicitly declared that 'to date there was "no common European legal definition of the concept of 'nation,'"[26] we can conclude that national minorities are groups that, based on their claims for collective rights, bypass the anti-discriminatory logic and seek recognition of cultural and political rights, particularly autonomy or the toleration of various cultural practices that differ from the

[25] See, e.g., Hurst Hannum, International Law. In: Encyclopedia of Nationalism, Academic Press, 2001, pp. 405-419 (ex paran).
[26] Para 1.

majority's, which often require formal exceptions from generally applicable norms and regulations.[27] In this case, we are dealing with claims for preferential treatment.[28]

The first stage of international minority rights protection, the League of Nations era, centered on national minorities.[29] The universal human rights scheme under the aegis of the United Nations emphasized the protection of racial minorities while being ambivalent about national (and ethno-cultural) minorities. This schema created a special cluster of rights provided for aboriginal and indigenous peoples, clearly distinguishing these groups as exceptions from general rules on self-determination and other sovereignty-like claims.[30]

(iii) Membership criteria in minority groups

It needs to be reiterated that legal attempts to classify race, ethnicity or nationality will always be arbitrary. In Rwanda, for example, the use of pre-genocide ID-cards that indicated ethnicity (enabling with devastating consequences the distinguishing between Hutu and Tutsi)

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[27] *See, e.g.,* Kymlicka, Will: Western Political Theory and Ethnic Relations in Eastern Europe. In: Will Kymlicka and Magda Opalski (eds.), Can Liberal Pluralism be Exported?, Oxford University Press, 2001. pp. 13-107. (paran)

[28] "Will Kymlicka provides a somewhat reformulated account for the national-ethnic dichotomy: "Cultural minorities can be divided into two kinds, … nations and ethnicities. A nation is a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language or culture … An ethnic group, on the other hand, is a group with common cultural origins, but whose members do not constitute an institutionally complete society concentrated in one territory. For Kymlicka there are two kinds of multicultural societies, multinational societies and polyethnic societies, and many contemporary societies are both." Iris Marion Young: A multicultural continuum: A critique of Will Kymlicka's ethnic-nation dichotomy, Constellations Volume 4. no 1. Blackwell, Oxford, 1997, p. 49.

[29] It should be noted that while using universal language, not only did the League-structure fail to establish a universal standard for minority protection or definition, it was actually predicated on the concept of underprivileged minorities, which in most cases was actually not the case. For example, some minorities constituted majorities in the former „oppressive" empires (such as the Hungarians for instance) or the ones that were economically, socially, politically or for other reasons more developed then the majority (like the Germans in Bohemia). For more *see e.g.,* Claude, Inis: National Minorities: An International Problem, Harvard University Press, Cambridge, 1955 (ex paran); Will Kymlicka: Minority rights, The Princeton Encyclopedia of Self-Determination, Encyclopedia Princetoniensis, http://pesd.princeton.edu/?q=node/256 (ex paran)

[30] *See, e.g.,* Will Kymlicka: *The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies", I*nternational Social Science Journal Vol. 199 (2010), pp. 97-112. Reprinted in Steven Vertovec and Susanne Wessendorf (eds.): The Multiculturalism Backlash: European discourses, policies and practices(Routledge, London, 2010), pp. 32-49, *see also* Will Kymlicka: The Shifting International Context: From Post-war Universal Human Rights to post-Cold War Minority Rights: In. Multicultural Odysseys, Navigating the New International Politics of Diversity, Oxford, 2007, pp. 27-55 (all need parans)

dated back to colonial times. The system, introduced by the Belgians in 1933,[31] formalized and concretized ethnic identity in a rather peculiar way:

> In pre-colonial times, there were no ethnic groups per se, but 15-18 tribes that cut across ethnic divisions. The categories of Hutu and Tutsi did exist, but they were more social divisions that allowed for mobility. A Hutu could become a Tutsi by acquiring a certain number of cattle, for example. When the Germans, and subsequently the Belgians, colonized Rwanda, they ethnicized these categories. The imperial powers created their own history of Rwanda's people, in order to divide the previously unified Rwandans, making them easier to rule. According to the colonizer's "false teachings", the Twa were the original inhabitants, followed by the Hutu, and then the Tutsis, which the colonizers believed to be a superior, non-African race. This was based on the now largely dismissed Hamitic hypothesis, which stated that the Tutsis were descended from a line of Caucasoid tribes originating in Ethiopia that traced their origins back to biblical times.[32]

Initially people having 10 or more cows were classified as Tutsi and those with fewer as Hutu (the Twa were not mentioned). After the initial determination, classification went by parentage. In 1995, following the genocide, the old identity cards were abolished and new ones were issued which omitted ethnicity. While this process was somewhat unique to Rwanda, and a wider mark of the colonial system, the arbitrariness with which these initial ethnic determinations were made is not unparalleled. The Soviet Union, whose internal passports from 1932 contained data on ethnicity, is another example. While Post-Soviet states habitually eliminated these categories, when this so-called "fifth line"[33] was introduced for the first time, the person was able to choose ethnicity,[34] but later the parents' ethnicity was inherited. In case of mixed families, a choice had to be made.[35].

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[31] http://www.preventgenocide.org/edu/pastgenocides/rwanda/indangamuntu.htm

[32] Carse Ramos, Transitional Justice, Victimhood and Collective Narrative in Post-Genocide Rwanda (June 6, 2013) (unpublished M.A. Thesis, Central European University) (on file with the Central European Universtiy Library). *See also e.g.*, Sarah Freedman, Harvey Weinstein, Karen Murphy, and Timothy Longman,*Teaching History after Identty-Based Conflicts: The Rwanda Experience,* Cooperative Education Rev. 52, 663-690 (2008): 663-690; Christopher Taylor, Sacrifice as Terror (2009); and Nigel Eltringham, Accounting for Horror (2004).

[33] Followed surname, name, patronymic and date and place of birth.

[34] Sven Gunnar Simonsen, Inheriting the Soviet Policy Toolbox: *Russia's Dilemma over Ascriptive Nationality*, Europe-Asia Studies 51, 1071 (1999).

[35] *See* Salenko, *Country Report: Russia* (EUDO Citizenship Observatory, July 2012), 2.

For ethno-racial minority rights/claims following the anti-discrimination principle, subjective elements for identification with the protected group are irrelevant, and external perceptions serve as the basis for classification. Policies implementing this anti-discrimination principle may rely on a number of markers: skin color, citizenship, place of birth, country of origin, language (mother tongue, language used), name, color, customs (like diet or clothing), religion, parents' origin, or even eating habits.[36] Defining membership criteria comes up in a completely different way when group formation is based on claims for different kinds of preferences and privileges. In this case, the legal frameworks may establish a set of objective criteria that needs to be met besides subjective identification with the group. The following policy options can be distinguished: (a) the indigenous or aboriginal model, used in North and Latin America, Australia and New Zealand; (b) the European model for national minorities[37] and the (c) Rare, unique and atypical hybrid model for rigid classifications.

(a) The indigenous/aboriginal model

In the American, Australian, and New Zealand indigenous or aboriginal model we see rigid membership requirements for the indigenous communities, where the state either provides for strict administrative definitions using some kind of an objective criteria,[38] or it officially endorses tribal norms.[39] In these cases the individual's freedom to choose her identity only comes up in the context of leaving the group and excluding herself from preferential treatment. Regarding membership issues, international bodies or state authorities restrain their involvement to rare and complex cases where tribe or group membership questions arise due to peculiar interplays between indigenous/tribal and state law (often

[36] "Ethnic" statistics and data protection in the Council of Europe Countries. Patrick Simon, 2007., p. 19.
[37] *Supra 41.*.
[38] US 1/8 policy for recognition of Native American status.
[39] E.g., formal adoption of dual legal system by the Ecuadorian government and incorporation of *justicia indigena* into their constitution.

involving conflicts between internal restrictions and essential constitutional principles.) The *Kitok*[40] and *Lovelace* cases[41] are well known examples, but there are many others. In the U.S., several cases concerned membership in Native American tribes. In the leading 1978 case *Santa Clara Pueblo vs. Martinez,* the Supreme Court confirmed "a tribe's right to define its own membership for tribal purposes … as central to its existence as an independent political community."[42]

This model, while grounded in indigeneity in the Americas and Oceania, is restricted neither topically nor geographically. The primary emphasis here is the rigidity of the

[40] Ivan Kitok v. Sweden, Communication No. 197/1985, CPR/C/33/D/197/1985 (1988). Ivan Kitok, a Saami and a descendent of a family with a long tradition of reindeer herdering, due to financial difficulties was forced to give up herding in order to seek other employment. Having moved out of the Saami village, he lost his Saami status under the Swedish Reindeer Husbandry Act, which authorizes the Saami community (living in the designated villages) to establish requirements for recognized membership in the community and to make decisions on (re)admitting members to the community. This meant that Kitok lost his rights to hunt, fish and water on the community's lands and was permitted only to graze his reindeer and participate in other traditional activities associated with herding, and to hunt and fish on community lands in exchange for a payment. He applied to the Human Rights Committee seeking to have the 1971 Act declared in violation of the rights defined in the ICCPR for participating in his culture (reindeer herding). The HRC denied his claim, on the basis 1971 Act was a justifiable restriction on the right of Kitok to membership in the Saami community and to participate in his culture, because the ultimate objective of the Act was the protection and preservation of the Saami as a whole. *See.*Hossain, Kamrul. (2009). *The human rights committee on traditional cultural rights : The case of the arctic indigenous peoples*, Veintie, Tuija and Virtanen, Pirjo K. (eds.); *see also* Local and global encounters: Norms, identities and representations in formation. Helsinki, Renvall Institute. p. 29-42 (Paranthetical here); Fergus MacKay: A Briefing on Indigenous Peoples' Rights and the United Nations Human Rights Committee, Forest Peoples Programme, 2001 (parenthetical)

[41] Supp. (No. 40) at 166, UN Doc. A/36/40 (1981). Sandra Lovelace was born and registered, under Canadian law, as a Maliseet Indian, who thereby was entitled an indigenous person to live on a designated reserve and to enjoy subsidized social benefits. However, under the Indian Act, after marrying a non-Indigenous man, she lost her official status as an Indian and the attendant benefits, including the right to live on the reserve. According to the law, following a marriage with a non-indigenous person, only men could retain Indian status. The HRC held that Canadian law violated Article 27 of the ICCPR by denying Ms. Lovelace's right to enjoy her culture in community with other members thereof, because her culture did not exist beyond the bounds of the reserve on which she was denied a legal right to reside. It also found that the section of the Indian Act in question, was not reasonable or required "to preserve the identity of the tribe." "Lovelace raises a number of issues of interest. First, the essential issue here is one of identity and the power of the state to define a person as Indigenous or non-Indigenous. . . It should be noted that the classificatory scheme used by the Canada that was challenged in this case, was justified by the state on the basis that it represented traditional Indigenous classifications or customs, which traced membership through the male line. The appropriateness of the use of this sexually discriminatory scheme was debated by Indigenous peoples in Canada, . . . Fergus MacKay: A Briefing on Indigenous Peoples' Rights and the United Nations Human Rights Committee, Forest Peoples Programme, 2001.pp. 22-23.

[42] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). In some cases membership has extremely severe consequences. For example in Mdewakanton Sioux Tribe runs a lucrative gaming establishment on federal trust land located near Prior Lake, Minnesota, where portions of the gaming revenues are distributed, per capita, to the Tribe's members, amounting to over $400,000, per year, per adult recipient. *See* Smith v. Babbit (100 F.3d 556).

categorization schema. Turning to India, the same sort of analysis can be applied to cases involving preferential treatment measures set forth by the Constitution that occur within the caste system. In *Arumugam v. S. Rajgopal*[43] the issue was whether a member of the Adi Dravida Hindu Caste and a Hindu converted to Christianity and reconverted to Hinduism could again become a member of the caste. The Supreme Court of India held that although usually conversion entails exclusion from this set of preferences, as the caste system is predominantly a feature of Hindu society, if the plaintiff is accepted and recognized by other caste members as a fully reintegrated member, the Court may consider him a member.[44] Mixed marriages in India are another interesting case. Sometimes marrying into a group will enable spouses to be eligible for certain preferences provided for the group, but even more important are rules concerning children from mixed marriages.[45]In sum, under the indigenous/aboriginal schemes, there are thoroughly spelled out legal definitions for group

[43] AIR 1976 SC 939

[44] The Court also noted that not all castes set forth Hindu religion membership requirements. In these cases conversion will not necessarily lead to membership loss. According to the Court therefore "the correct test to be applied in such cases is to determine what are the social and political consequences of such conversion and that must be decided in a common sense practical way rather then on theoretical or theocratic grounds." Singh, p. 831. A similar membership case was the N.E. Horo v. Jahanara Jaipal Singh, where the issue was raised out of a rejection of the nomination papers of the respondent by the Returning Officer on the ground that she was not a member of the Scheduled Tribe anymore, and was therefore not eligible to contest from the parliamentary constituency. The Court held that she actually acquired membership in the tribe upon her marriage with her deceased husband. (AIR 1972 SC 1840*); see also* Singh p. 832 (parenthetical).

[45] Consider for example the Committee on the Elimination of Discrimination Against Women's concerns raised against Canada: "17. The Committee is concerned that the Convention has not been fully incorporated into domestic law and that discriminatory legislation still exists. In particular, the Committee is concerned at the fact that the Indian Act continues to discriminate between descendants of Indian women who married non-Indian men and descendants of Indian men who married non-Indian women with respect to their equal right to transmit Indian status to their children and grandchildren. … 18. The Committee recommends that the State party ensure the full incorporation of all substantive provisions of the Convention into domestic law. The Committee recommends that the State party take immediate action to amend the Indian Act to eliminate the continuing discrimination against women with respect to the transmission of Indian status, and in particular to ensure that aboriginal women enjoy the same rights as men to transmit status to children and grandchildren, regardless of whether they have married out or of the sex of their aboriginal ancestors. It also recommends that the State party find measures to ensure that section 67 of the Canadian Human Rights Act is interpreted and applied in a way that provides full protection for aboriginal women against discrimination and full redress for any human rights violations." Compilation of General Comments & Concluding Observations Relevant to the Rights of Indigenous Women Adopted by the Committee on the Elimination of Discrimination Against Women (CEDAW) 1993-2010, *available online at* http://www.forestpeoples.org/sites/fpp/files/publication/2011/06/cedaw-compilationfinaleng.pdf

membership, while the free choice of identity only pertains to excluding oneself from the preferential treatment.

(b) The European national minority model

The European model for national minorities usually refrains from creating strict administrative definitions for membership. In most cases, a formalized declaration suffices, with occasional additional objective requirements, such as proven ancestry (by some sort of official documents) or the proven knowledge of the minority language.[46] Curiously, states are more reluctant to define membership criteria in domestic minority groups than in the titular majority population, a practice often followed in legislation implementing ethnicized concepts for external dual citizenship or status law-like Diaspora provisions.[47] The more vague the requirements, the larger the risk for misusing the law.

It needs to be noted that group membership also comes up in the context of drafting affirmative action and ethnicity-based social inclusion policies. These frameworks usually incorporate external perception, self-declaration, and anonymized data.[48] A special form of opting in to groups concerns mixed partnerships or marriages. For example, non-Roma partners or spouses of Roma are usually considered members of the minority community, especially when membership is intertwined with discrimination and marginalization.[49] In all

[46] For more on this *see., e.g.,* Valentine, John R.: Toward a Definition of National Minority , 32 Denv. J. Int'l L. & Pol'y 445 (2003-2004) (paren)

[47] Examples can be brought from a number of European states, from Hungary to Lithuania. *See, e.g.*, Report on the Preferential Treatment of National Minorities by their Kin-State, adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19-20 October 2001), CDL-INF(2001)019 (paren)

[48] *See, e.g.,* How to reconcile the promotion of equality with the right to privacy? Center for human rights and global justice working paper nr. 13 (paren)

[49] For example, in the case of Mrs. Gyuláné H, several human rights organizations joined forces to initiate litigation claiming racial discrimination on behalf of woman who was sterilized without consent. The plaintiff was not Roma, only her husband, but the facts of the case indicated this "extended ethnicity". Fehér Füzet 2009–2010. A Nemzeti és Etnikai Kisebbségi Jogvédõ Iroda beszámolója (ed. Iványi Klára) , Budapest, Másság Alapítvány – Nemzeti és Etnikai Kisebbségi Jogvédő Iroda, 2011, *available at* http://dev.neki.hu/wp-content/uploads/2013/05/494_NEKI-feher_fuzet-2009-2010.pdf

of these cases privacy concerns are raised.[50] It is important to reiterate that (i) in the ethno-racial anti-discrimination context, one can argue that when establishing racial motivation and assessing perception, personal sensitive data are not used at all, so processing these data in criminal or administrative procedures is undoubtedly permitted; (ii) in order to substantially meet international minority rights obligations, laws can require either a declaration or registration of minority group identity for voluntarily making use of collective rights.[51] Overall, the European national minorities model, which is known for a potential for systematic abuse, lacks strict administrative definitions for the target groups and community membership and the law hardly ever goes beyond broad declarations and vague or loose ancestry or affiliation requirements.

(c) Hybrid models for rigid classifications

There are unique historical and contemporary examples for strict legislative regulation of ethno-racial group membership. In the cases presented below, group definitions are provided by individual affiliation rules. The common element in these models is that, because of the importance of the legal status that is attached to ethno-racial group membership, there is a pressing political need to prevent the permeation of group membership. Usually the rationale behind these strict rules is to limit membership within the nation-constituting majority and not the framing of minority policies. In the following section, I will provide two detailed case studies for this model: the historical model for defining whiteness in the United

[50] See infra 51. or Andras L. Pap -- Balázs Majtényi: Minority regimes at work – Hungarian experiences on the interrelated complexities of data protection and minority protection,, In. István Horváth – Márton Hornok (ed.s) Minority politics within the Europe of regions, Scientia, Cluj-Napoca, 2011, pp. 351-366

[51] In the *Rights of Minorities in Upper Silesia (Minority Schools)* the Permanent Court of Justice accepted that a declaration on behalf of a minority pupil on his origin or mother tongue required by law as a precondition to be admitted to a minority language school is not violating equal treatment (Permanent Court of International Justice, Judgment, *Rights of Minorities in Upper Silesia (Minority Schools),* Ser. A. No. 15, pp. 30-33) Consequently, members of the group should give evidences of their subjective view on their identity, if they would like to enjoy minority protection.

States and defining Jewry in Israel. Even though in the latter case study the definitional questions concern the majority in Israel, its inclusion can be justified for three reasons: (i) Jews are minorities in many countries, and intricate legal and political debates surround the question whether they are racial, ethnic, religious or even national minorities;[52] (ii) States are just as reluctant to provide legal definitions for the titular majority as minority groups and (iii) Membership criteria for the majority may be essential if free choice of identity is to become an actual, fully-fledged legal right, including the right to assimilate or integrate and opting out from the minority community.

These cases are selected because they provide vivid demonstrations of how the political and legal conceptualization of ethno-racial and/or national group membership is embedded in the given social and historical context, as well as the situational interplay between minorities and the majority. The peculiarity of the cases stems from the idea that, outside the narrowly defined indigenous-aboriginal context, judicial or legislative authorities rarely provide blunt rulings on specific substantive group membership criteria.[53]

(1) Race and whiteness in the United States

The American case is peculiar because race and ethnicity are central to personal status. Race was not only seen as a presupposed juridical concept, but was rebutted, shaped and defined by extensive litigation. Unlike in Europe, American jurisprudence has a long history of formulating the legal construction of race. Initially, as determined by a 1790 Act of Congress, citizenship was reserved for "white persons" only. Litigating race-based naturalization refusals, which question the authorities' classifications of the petitioners as "not

[52] For example, in Hungary in Jews were recognised as a national minority eligible for parliamentary representation by Act XVII of 1990, and after the law was repealed and the new minority law was passed, an initiative was launched by representatives of one of the Jewish communities for recognition as a national or ethnic (they never specified) minority community. The case even reached the Constitutional Court decision No 977/H/2005. AB határozat.

[53] See for example infra notes 74, 75, 79.

white," was the first movement towards the juridical grasping of the minority concept. In the subsequent years up until 1952, when racial restrictions were removed,[54] 52 such prerequisite cases[55] were recorded.[56]

Prerequisite litigation led to a case-to-case development of the definition of minority. Litigation occurred over whether applicants from Hawaii, China, Japan, Burma, Mexico, Armenia, etc. were "white" or not. The need to define race by the instrument of law was rooted in the institutionalized practice of race-based discrimination between "legally white" and other persons. In these cases, two established conceptual rules of hypodescent to approach racial classification evolved:[57] the rule of recognition, relying on the visible characteristics of non-white ancestry, and the rule of descent. Judicial practice was nevertheless quite inconsistent.[58]

In 1878, in the first prerequisite case,[59] the Ninth Circuit held that Chinese could not be white – in accordance with the ordinary understanding held throughout the country, or "the well settled meaning in common popular speech."[60]

A few decades later, in *Ozawa v. US*,[61] when a light-skinned Japanese made a claim for naturalization, the U.S. Supreme Court held that it is not only the skin color and popular perception that matters, but that scientific categorization is also relevant. The Court found that Japanese are to be classified as members of the "Mongolian" race, and they cannot be

[54] Naturalization was limited to African-Americans and "Whites" until 1940. At that time, Nazi Germany was the only other nation that limited naturalization on the basis of race. Carrie Lynn Okizaki: "What are you?": Hapa-girl and multicultural identity, University of Colorado Law Review, Spring 2000, p. 478
[55] That is cases on naturalization prerequisites.
[56] *See* López, Ian F: White by Law, The Legal construction of Race, New York University Press, 1996.
[57] *See* Neil Gotanda: A critique of „Our constitution is color-blind", Stanford Law Review, November 1991, vol. 44, No. 1, pp. 1-69.
[58] See López, supra .
[59] Re Ah Yup, for more *see* Appendix II.
[60] Okizaki, 478.
[61] Ozawa v. US, 260 US 178 (1922)

Caucasian. In the same year, when Bhagat Singh Thind,[62] a "high caste Hindu of full Indian blood"[63] applied for citizenship on the grounds that as a "Caucasian" he was found to qualify as "white person" under federal naturalization laws. The Supreme Court refused to equate "white person" with "Caucasian" as understood by contemporary anthropology. The Court held that such an interpretation defied "common understanding," stating, "[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today'... "[64] Prior to 1922:

> [T]wo competing doctrines characterized the racial prerequisite cases: the common knowledge test and the scientific evidence inquiry....*Ozawa* and *Thind* ... represented the ultimate triumph of the common-knowledge test in judicial racial determination ... as scientific evidence suggested that individuals with brown or even black skin color who were anthropologically Caucasian would count as whites. Such outcome would have undermined and delegitimated the carefully constructed system of racial hierarchy that dictated social relations.[65]

The common-knowledge test meant nothing else but a performative whiteness, determined and evaluated by the judges. When setting criteria for "performative whiteness," the degree of cultural assimilation, value system adaptation (such as practicing Christianity, for example)[66] of the applicants, and the initial Europeanity of the kin-group were weighed.[67]

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[62] US v. Thind, 261 US 204 (1922)
[63] Gotanda, op. cit., 29.
[64] Id.
[65] *See* Terhanian *supra* n. 22.
[66] *See*, e.g., US v. Cartozian, where Christianity (and the applicants relation to European aristocracy) was considered a sufficient (from Kurds or Arabs distinguishing) performative whiteness criteria.
[67] Tehranian argues in the performative approach to defining race, "the potential for immigrants to assimilate within mainstream Anglo-American culture was put on trial. Successful litigants demonstrated evidence of whiteness in their character, religious practices and beliefs, class orientation, language, ability to intermarry, and a host of other traits that had nothing to do with intrinsic racial grouping. Thus, a dramaturgy of whiteness emerged, in response to the interests of society as defined by the class in power – an 'evolutionary functionalism', whereby courts played an instrumental role in limiting naturalization to those new immigrant groups whom judges saw as most fit to carry on the tradition of the 'White Republic'. The courts thereby sent a clear message to immigrants: the rights enjoyed by white males could only be obtained through assimilatory behaviour. White privilege became a quid pro quo for white performance." The underlying idea is clear: whiteness, e.g. formal acceptance in the mainstream Anglo-Saxon culture is not a "naturally determined,

Neither of these judicially-developed conceptual rules of hypo descent proved efficient for the increasing number of mixed-race children, whose number increased over time. As early as 1662, for example, a Virginia statute attempted to draw legal boundaries around the concept of race, setting the mother's race as decisively determining the child's.[68] This approach proved unsatisfactory, since it was impossible to tell from which (maternal or paternal) line the child received his or her "category." In light of the complications involved in tracing lineage, the blood-algebraical methods of calculation reigned, at first with "adopting one-fourth, one-sixteenth, and one-thirty-second formulations as bright lines for establishing race".[69] However, as more and more biracial children were born, and more of them could claim themselves as "white," even stricter hypo descent philosophies formed. The "one-drop rule" (the possession of which will make the person black) was adopted, maintaining the social reality of white superiority through the fiction of two distinct (definable) races.[70] The doctrine of seeing race as an immutable fact developed.[71] It is also worth mentioning that, although in 1870 Congress actually gave "persons of African nativity" equal naturalization rights, due to the discriminative and segregating policies of the time all but one of the prerequisite cases' applicants were claiming white racial identity.[72]

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exogenous variable in the equation. Instead it is an outcome, a reward dependent on performance and assimilation". Ibid. p. 836.

[68] See Okizaki, op. cit.

[69] Ibid., p. 473.

[70] It is important to note that we see just the opposite in the above described cases concerning strict norms on tribal membership (effecting members, mostly women marrying outside the tribe) which may lead to the gradual disappearance of the tribe.

[71] Gotunda quotes Justice Cardozo in Morrison v. California (291 US 82 (1933) and Justice Steward's dissent in Fullilove v. Klutznik (448 US 448 (1980) holding that "*[t]he color of a person's skin and the country of his origin are immutable facts."* See Gotanda, op. cit. p. 24.

[72] Tehranian even mentions a contemporary survival of the immigration and naturalization performative racial criteria progeny. Although with the McCarran-Walter (Immigration and Nationality) Act of 1952, Congress finally abandoned the race-based system of naturalization in existence since 1790 – and thus, after 1952, members of any ethnicity and race could become citizens – there was still a quota system in place based on national origins until 1965 Even now, Tehranian argues, the system is not color-blind: *"* However, despite these reforms, a performative/white bias continues to exist in the immigration system. First of all, the new system's per-country allocations continue to limit immigration from historically excluded countries, effectively limiting

The relevance of these cases is not purely historical. We see several examples of contemporary litigation along similar lines. In 1987, the US Supreme Court discussed the question of whether or not Arabs qualify as whites. In *Saint Francis College v. Al-Khazraji*,[73] an Iraqi-born American professor sued his college for racial discrimination after being denied tenure. The college argued that since Arabs are "Caucasians," and racial discrimination cannot take place between whites. The Supreme Court disagreed, holding that persons of Arabian ancestry can, indeed, be protected from racial discrimination.[74]

A few years later, in *Sandhu v. Lockheed Missiles & Space Co.*,[75] the Lockheed Missiles Space Company almost succeeded in avoiding an anti-discrimination lawsuit by

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immigration by individuals of certain nonwhite races. … For example, the final report of the Commission on Immigration Reform in 1997 called for the 'Americanization' of new immigrants through a 'process of integration by which immigrants become part of our communities and by which our communities and the nation learn from and adapt to their presence.' In particular, the report emphasized the importance of these new immigrant groups to conform to white, Christian, Western European norms, especially in their adoption of English as their primary language. Here, the old quid pro quo present in the racial-prerequisite cases of the early half of the century is repeated: If you can assimilate yourself into the White Republic, you will gain the privileges of whiteness…The rhetoric of isolationists and other advocates of tighter borders has even made this quid pro quo explicit. White performance is still a condition of white privilege." op.cit, p. 842

[73] 481 U.S. 604 (1987)

[74] *Id.* "A person of Arabian ancestry may be protected from racial discrimination under § 1981. The Court of Appeals properly rejected petitioners' contention that, as a Caucasian, respondent cannot allege the type of discrimination that § 1981 forbids, since that section does not encompass claims of discrimination by one Caucasian against another. That position assumes that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law. In fact, 19th-century sources commonly described "race" in terms of particular ethnic groups, including Arabs, and do not support the claim that Arabs and other present-day "Caucasians" were then considered to be a single race. Moreover, § 1981's legislative history indicates that Congress intended to protect identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. However, a distinctive physiognomy is not essential to qualify for § 1981 protection. Thus, if respondent can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin or his religion, he will have made out a § 1981 case." Pp. 609-613. (this will need to be cut to under 50 words)

[75] 26 Cal. App. 4th 846, 850 (Cal. Ct. App. 1994). The issue before the court was whether Dale Sandhu, an "East Indian" from Punjab, India could sue under the Fair Employment and Housing Act for race-based employment discrimination. Lockheed argued that Sandhu was Caucasian and therefore could not bring suit on a race theory. The Court rejected such a narrow definition of race and held that a cognizable claim for race discrimination may be brought on the basis of Sandhu's allegations. The Court concluded that Sandhu's allegation that he was subject to a discriminatory animus based on his membership in a group which is perceived as distinct when measured against other Lockheed employees, and which is not based on his birthplace alone, was sufficient to make out a cognizable claim for racial discrimination.

claiming that the plaintiff's being an Indian male made him technically Caucasian,[76] making him ineligible to sue.[77] Again, the Court disagreed.[78]

Another case that reveals the ambiguities of the legal status of race centers around American Jewry.[79] The case arose out of the desecration of the congregation's synagogue, and raised the question of whether Jews constituted a racial group. Two lower courts held that because there was no distinct race or ethnic group at issue, no racial prejudice may be established. The Supreme Court reversed.[80] On the other hand, in *United Jewish Organizations v. Carey,*[81] in the context of gerrymandering, the Court held that Hasidic Jews enjoy no constitutional right to separate community recognition for the purposes of redistricting.[82]

The lesson learned here is intriguing: strict classifications that may be inclusive in one historic moment may provide precedent for exclusionary measures in another context. In this way, we can see how evolving ideas of race have both informed and been informed by

[76] Note that Indians were considered non-whites, and as a consequence of that denied naturalization (reserved for whites only) in earlier decisions.

[77] Defendants in Ortiz v. Bank of America ((E.D.Cal. 1982) 547 F.Supp. 550.) argued similarly, claiming that 'whites' may not claim discrimination by other "whites," in the case, where a woman of Puerto Rican descent alleged that she was denied promotions and terminated from her employment because of her "national origin and accent." The rationale was echoed in Baruah v. Young (D.Md. 1982, 536 F.Supp. 356), decided in the same year. There the plaintiff, a native of India and a nontenured associate professor at the University of Maryland, alleged employment discrimination based on national origin and race (as well as age) after the school hired a "white American national" for his position,. The court held that being "non-white and a native of India, may entitle him to recover upon proof of discrimination on either [race or national origin]."

[78] "Lockheed argued ... that Sandhu was Caucasian and therefore could not bring suit on a race theory. We reject this narrow definition of race and hold that a cognizable claim for race discrimination may be brought on the basis of Sandhu's allegations". Sandhu v. Lockheed Missiles & Space Co. 26 Cal. App. 4th 846 (Cal. 1994).

[79] Shaare Tefila Congregation v. Cobb, 481 US 615 (1987).

[80] „Jews can state a § 1982 claim of racial discrimination, since they were among the peoples considered to be distinct races, and hence within the protection of the statute at the time it was passed. They are not foreclosed from stating a cause of action simply because the defendants are also part of what today is considered the Caucasian race." Pp. 481 U. S. 617-618.

[81] 430 U.S. 144 (1977).

[82] To attain a nonwhite majority of 65% in a voting district in which also a Hasidic Jewish community was located, through a race-based redistricting plan the Jewish community was divided and split between two senatorial districts. Petitioners, on behalf of the Hasidic community alleged that the plan violated their rights for equal treatment. The Court of Appeals classified petitioners as white voters, and held that no claim of the plan cancelling out the voting strength of whites as a racial group can be sustained.

jurisprudence, making the American case unique by operationalizing and thoroughly reasoning various conceptions for race.

(2) Jews in Israel

Israel's curious hybrid legal system, melding together secular and (fundamentalist) religious constitutional elements into an ethnic democracy, makes it one of the only modern states which defines its national constituencies, and the majority, on rigid, ethnic grounds. Turning the state of Israel into the home of Jews by virtue of their Jewishness makes Israel one of the unique exceptions amongst countries that absorb immigrants, in the sense that its endorsement of immigration by inviting all Jews to make *aliyah* only applies to a specific ethnic group.[83] Reflecting on the horrors of the Nazi regime, the Israeli Jewish state defines its constituency more or less in accordance with the broader definition of the Nuremberg Laws, "using affirmative action (or corrective discrimination) on behalf of the world Jewry after the Holocaust. … intended to grant citizenship to almost everyone who suffered persecution as a Jew…"[84]

According to the law on the establishment of the State of Israel, its founders proclaimed the renewal of the Jewish State in the Land of Israel, which would open wide the gates of the homeland to every Jew.[85] The Law of Return (1950)[86] grants every Jew, wherever she may be, the right to come to Israel as an *oleh* (a Jew immigrating to Israel) and become an

[83] Yfaat Weiss, *The Golem and its creator, or how the Jewish nation-state became multiethnic.* In Daniel Levy and Yfaat Weiss: Challenging ethnic citizenship. German and Israeli Perspectives on Immigration, p. 85 (Berghahn, New York, 2002).
[84] Baruch Kimmerling: *Nationalism, identity, and citizenship. An epilogue to the Yehoshua-Shammas debate.* In Daniel Levy and Yfaat Weiss: Challenging ethnic citizenship. German and Israeli Perspectives on Immigration, Berghahn, p. 190 (New York, 2002).
[85] Declaration of Establishment of State of Israel, 14 May 1948.
[86] Law of Return, 5710-1950, Passed by the Knesset July 5th, 1950. See: http://www.ilrg.com/nations/il/; From the 'Lectric Law Library's stacks Israel's Law Of Return Giving Every Jew The Right To Automatically Acquire Citizenship.

Israeli citizen.[87] In Israel, official documents,[88] such as identity cards, contain the holder's affiliation with one of the "ethnic communities" (Jewish, Moslem, Christian or Druze).[89] Alongside the rights and obligations incumbent on all citizens, the members of the different communities (there is no separation of state and religion in this regard) are subject to those laws applying to their specific groups. For marriage and divorce, for instance, they appear before their own courts.[90] Under the Law of Return's preferential naturalization conditions only Jews are favored, since Israeli nationality is automatically accorded to them on request and the authorities recognize their Jewish status.[91] The Israeli public discourse is very aware of how crucial this issue is, especially since another important question lies behind it: the relationship between secular and religious state powers and functions. The issue has been a

[87] "1. Every Jew has the right to come to this country as an *oleh*. 2. (a) *Aliyah* shall be by *oleh*'s visa. (*Aliyah* means immigration of Jews, and *oleh*, plural: *olim*, means a Jew immigrating, into Israel.) (a) The rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law, 5712-1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion. (Amendment No. 2), 5730-1970, Passed by the Knesset March 10th, 1970) 4B. For the purposes of this Law, "Jew" means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion. 3A. (a) A person shall not be registered as a Jew by ethnic affiliation or religion if a notification under this Law or another entry in the Registry or a public document indicates that he is not a Jew, so long as the said notification, entry or document has not been controverted to the satisfaction of the Chief Registration Officer or so long as declaratory judgment of a competent court or tribunal has not otherwise determined."] See www.jajz-ed.org.il. Of course, even in Israel "ethnic Jewry" is not the only way of acquiring naturalization and membership in the Israeli nation, since (regardless of race, religion, creed, sex or political belief) citizenship may be acquired by: a) birth; b) naturalization; c) residence; and d) the Law of Return. See: http://www.lectlaw.com (add actual cite)

[88] The Registration of Population Ordinance of 1949 provides for establishing a National Register for inhabitants who shall be registered according to: "nationality, ethnic group\ community and religion", Ibid.

[89] The population registry law, 5725-1965 holds: "3A. (a) A person shall not be registered as a Jew by ethnic affiliation or religion if a notification under this Law or another entry in the Registry or a public document indicates that he is not a Jew, so long as the said notification, entry or document has not been controverted to the satisfaction of the Chief Registration Officer or so long as declaratory judgment of a competent court or tribunal has not otherwise determined." The outcome is that should the applicant fail to demonstrate credibly her Jewishness, she will be registered after the passport she holds.

[90] *See, e.g.,* The Rabbinical Court's Jurisdiction (Marriage and Divorce) Law 1953 Enactment: "Matters of marriage and divorce of Jews in Israel, being nationals or residents of Israel, shall be under the exclusive jurisdiction of the Rabbinical Courts and marriages and divorces of Jews shall be performed in Israel in accordance with Jewish Law (Halakha)", Ibid.

[91] They also receive special assistance helping to settle in Israel.

source of severe political controversies,[92] as well as several highly-debated cases in front of the Supreme Court of Israel.

Oswald Rufeisen, a Polish Jew, who converted to Christianity during World War II, and became a monk named Brother Daniel, brought the first notable U.S. Supreme Court case on the issue.[93] Born in Poland in 1922 to Jewish parents and educated in Jewish values, in his adolescent years Rufeisen was an active member of a Zionist youth organization and with the outbreak of the war was even imprisoned by the Gestapo. Having managed to escape, and procuring certificates testifying him being a German Christian, he became the secretary and translator at the German police and helped informing inhabitants before ghetto deportations. Prior to converting to Christian faith and joining the Carmelite order, Rufeisen also fought as a partisan, and was therefore decorated by the Russians. After having moved to a Carmelite monastery in Israel, he waived his Polish citizenship. His application for an immigrant's certificate and registration as a Jew in his identity card was rejected by the Minister of the Interior on the basis of the Government Ordinance of 20/7/58, which set forth that only a person who declares in good faith that he is Jewish and does not belong to another faith may be registered as Jewish. Subsequently (by a 4:1 verdict) his petition to the Supreme Court in 1962 was also rejected.[94] Consulted by the Court, the Chief Rabbi of Israel confirmed that Brother Daniel must be considered Jewish.[95] Nonetheless, the Court refused to accord Jewish

[92] For example, in 1958 the National Religious Party resigned from the government when it was not willing to support is demands not to accept declarations regarding ethnicity by new immigrants automatically but rather to check their statements. From 1972 onwards, the Agudat Israel Party and Orthodox rabbis (in Israel and the Diaspora) have been insisting that the term "in accordance with Halacha" be added after the word "conversion" in the Law of Return. With society being deeply split between fundamentalists and seculars as it is, the amendment had numerously been promised to be implemented (first in 1977 by Prime Minister Menachem Begin), yet it never was actually introduced.
[93] His life was the basis of Lyudmila Ulitskaya's 2006 novel, Daniel Stein, Interpreter.
[94] Holding that "The space reserved for ethnic group under section 4(1) of the Population Registration Ordinance 1949/5709 shall remain empty. Nor is there any anomaly in this since not all applicants for an Identity card are able to complete this section, for example, someone who has no religion." For more, see www.jajz-ed.org.il/50/act/shvut/10.html (insert actual cite)
[95] *Id.*

nationality to any individual who had been born Jewish but who had voluntarily converted to another religion. [96]

This decision was based not on any legal criteria but on public opinion, save for the performative aspect of Jewry. The judgment subsequently became law by the 1970 amendment to the Law of Return. In the words of Judge Berensohn: "An apostate Jew cannot be considered Jewish in the sense understood by the Knesset in the Law of Return and in the popular acceptation of today."[97] In Judge Berensohn's view, no matter how proud the applicant is of his Jewish affiliations, an apostate has dissociated himself from the religion, the people, and the community of Israel. The same person cannot be both Jewish and Christian.

There was another significant Supreme Court case[98] on the issue.[99] The petitioner, Binyamin Shalit, a Jew born in Haifa, married a non-Jewish Scots woman in Edinburgh. He brought his wife back to Haifa, where two children were born to them – a son in 1964 and a daughter in 1967. When the petitioner, who at the time of the proceedings was an officer serving in the Israel Navy, came to register his children in accordance with the demands of the Registration of Inhabitants Ordinance and the Population Registry Law (both of which require that the particulars with regard to religion and ethnic affiliation be given), he declared that his children were without religion but Jewish by ethnic affiliation. The registration officer, however, wrote "no registration" against the latter item, in accordance with directives issued by the Minister of Interior to all registration officers in 1960.

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[96] *Id.*
[97] *Id.*
[98] *Binyamin Shalit, Petitioner, v. 1. Minister of Interior*, 2. Haifa Registration Officer, Respondents (H.C. 58/58). Judgment given on January 23, 1970.
[99] Law of Return: Backgrounder High Court ruling in 'Who is a Jew?' case; The opinions of the nine Justices of the Supreme Court are summarized here by The Jerusalem Post Law Editor Doris Lankin, see: http://www.jajz-ed.org.il/50/act/shvut/20.html, citation-marks omitted. (insert actual cite)

The judgment was delivered by Justice Cohn, who pointed out that "a registration officer may not correct an entry, or fill in an omission, in the register in respect to ethnic affiliation, religion of personal status, save with the consent of the person to whom the entry relates."[100] For this reason the administrative decision was overruled.

Justice Silberg explained the difference between the latter case and the Rufeisen case, which dealt with the extreme example of a Jew who had converted to Christianity but still wished to be regarded as Jewish for purposes of the Law of the Return. The Law uses the "ordinary man's concept of a 'Jew'" – which could certainly not be equated with a convert to Catholic monasticism—thus, this approach will be preferred over the Halachic rule of "once a Jew always a Jew."[101] In the present case there was no question of interpreting the term "Jew" according to any secular law, since the Population Registry Law does not contain the word "Jew" at all. Instead, it talks of "ethnic group" and raises the question of whether a person can be said to be Jewish from an ethnic viewpoint even though his mother is not Jewish. If, in answering this question, no general definition for "Jewish" can be found anywhere else except in the Halacha, then there would be no alternative but to adopt the Halachic test, even though the Registration Law is a secular one.

The consequences of adopting the petitioner's definition of "Jewishness," continued Justice Silberg, would be clear and catastrophic. This is because anyone who argues that a person can be Jewish ethnically without being Jewish by religion must inevitably be forced to the conclusion that Christians and Moslems, if they feel a close affinity with Israeli-Jewish culture and values, can also demand to be registered as ethnically Jewish. The effect of this on the Jews of the Diaspora would be equally traumatic. If the High Court of Justice in Israel were to rule that a Christian or Moslem could still belong to the Jewish community, this

[100] Id.
[101] The Halacha is the body of religious Jewish Law. See http://www.jlaw.com/ (insert actual cite here)

would weaken the defenses against assimilation set up by the Jewish communities abroad and destroy their communal structure.[102]

Another front in this battlefield is the question of conversion-recognition.[103] Shoshana Miller converted to Judaism in the United States within the framework of the Jewish Reform Movement. She had taken a conversion course under the supervision of a rabbi, in which she studied Jewish religious commandments, the philosophy and history of the Jewish People, as well as the Hebrew language, and she also underwent immersion in a ritual bath. This was recognized when she arrived in Israel in October 1985 and was given a certificate under the Law of Return of 1950 as an *olah*. She then went to the Ministry of Interior to receive her identity card, introduced herself as Jewish, and presented her conversion certificate. To her surprise, she was refused registration.[104] She was referred to the Rabbinical Court to receive confirmation of her conversion and was informed that she might either be registered as a Christian, or leave her registration blank. She was also informed later that the respondents were prepared to register her as "Jewish (Converted)" – referring to both the national group and religion. The High Court of Justice held that neither the minister of interior nor any

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[102] *Id.* As a conclusion, Justice Silberg responded to the petitioner's question as to how it was possible that the son of a Jewish mother who joins the Fatah and aspires to destroy Israel, should be deemed to be ethnically, Jewish, while the son of a non-Jewish mother, who sheds his blood for Israel and is prepared to sacrifice his life for his country, should be considered a stranger and a gentile. He said that the Fatah son of the Jewish mother is a bad and wicked Jew, of whom there are many in the circles of the Jewish New Left, whereas the petitioner's children are good, charming non-Jews who because of their parents' obstinate aversion to religion have been denied an entrance to the Jewish nation. "Jewishness," he continued, is not a prize, like an honorary doctorate, to be conferred on someone for his efforts on behalf of the Jewish people. On the contrary, "Jewishness" is a religious, legal description bestowed only under certain specific conditions, which the petitioner's children unfortunately have not met. If the petitioners had not been so fanatically atheistic, he continued, they could have arranged for their children to be converted.

[103] In practice, certain population categories are specifically affected by these contradictions: namely, immigrants who are recognized as Jewish by the Registry Office and not by the Halacha -- in particular, immigrants who have a Jewish father but a non-Jewish mother, and immigrants who have converted to Judaism, particularly outside Israel, by synagogues not recognized by the Chief Rabbinate of Israel (Reform and Conservative Synagogues, for instance). All these are eligible for citizenship as Jews under the Law of Return but cannot contract a religious marriage in Israel.

[104] Asher Felix Landau, The Shoshana Miller Case – Unity of the Jewish People is paramount, The Jerusalem Post Law Report, See www.jajz-org.il/50/act/shvut/21html (insert actual cite)

registration officer had the power to make additions to the particulars specified in the Population Registry Law, so this augmented registration was not allowed.[105]

[105] Several similar cases followed the Miller-suit. In a 1995 decision the Israeli High Court of Justice gave de facto recognition to Reform and Conservative conversions performed in Israel for the purposes of civil issues (i.e. registration), restricting thereby religious community (orthodox rabbinate) jurisdiction to personal status issues. (Such as marriage or divorce.) Civil issues, held the Court, are in the exclusive competence of the secular parliament, the Knesset. See High Court of Justice rules on Registration of Converts, November 15, 1995, www.jajz-org.il/50/act/shvut/21html. Another controversial area is that of the Ethiopian Jewry, which has won its fight to be recognized as Jews for *aliyah* purposes.. But the "Falas Mura", Ehiopian Jewish converts to Christianity, have not. The Ethiopian community in Israel remains divided as to whether they should be admitted. In January 1996, the Knesset Absorption Committee recommended that the Government encourage relevant organizations to bring them back to Judaism and then allow them to immigrate. The problem is that some of them reject the assertion that they are Christians and are offended by demands that they convert. Another, more difficult obstacle, is that the Ethiopian government does consider them Christians and deported several persons in 1993 for teaching the Falas Mura about Judaism. See Falas Mura: Still Waiting, Israel Yearbook and Almanac, 1994, See www.jajz-org.il/50/act/shvut/23html bid. The conversion cases are still fiercely debated. See for example, Ethan Bronner: Israel Puts Off Crisis Over Conversion Law, The New York Times, July 23, 2010. As a recent development, in October 2011, Judge Gideon Ginat of the Tel Aviv District Court ruled that award-winner Israeli author Yoram Kaniuk could register his official religious status as "without religion." The 81 years old plaintiff, a veteran of the 1948 War of Independence asked the court to order the Interior Ministry to allow him "to be liberated from the Jewish religion" by changing his "religion" entry in the Population Registry from "Jewish" to "without religion." The ministry had refused his earlier request. In his petition, Kaniuk explained that he had no wish to be part of a "Jewish Iran" or to belong to "what is today called the religion of Israel." He sought to equate his standing to that of his grandson, born in 2010, who was registered as "without religion" at the Population Registry. Originally classified as a Christian American, the infant was born in Israel but was defined by the Interior Ministry as an American Christian because her own mother was born in the United States and is a Christian. After some discussion, Population Registry officials agreed to change the baby's status. When Kaniuk requested the same change be made to his own religious status, officials said he needed to obtain court approval for the amendment. After the ruling, he said that *"This is a ruling of historic proportions ... The court granted legitimacy to every person to live by their conscience in this land, in ruling that human dignity and freedom means a person can determine their own identity and definition. In this way I can be without religion but Jewish by nationality."* See http://www.haaretz.com/print-edition/news/israel-court-grants-author-s-request-to-register-without-religion-1.387571 It is interesting to note that in order to "to recover Spain's silenced memory", as foreign minister, José Manuel García-Margallo stated, „five hundred and twenty years after the start of the Inquisition, Spain opened the door to descendants of Sephardic Jews whose ancestors had fled the Iberian Peninsula, forced, in order to live in Spain or its colonies, to choose between exile or conversion to Christianity, or worse. … Top government officials pledged to speed up the existing naturalization process for Sephardic Jews who through the centuries spread in a diaspora — to the Ottoman Emoire and the south of Italy; to Spain's colonies in Central and South America; and to outposts in what are now New Mexico, Texas and Mexico. … The proof of Jewish identity among the anousim — Hebrew for the forced ones crypto Jews or Marranos, which in Spanish means swine — is often pieced together like a mosaic of broken Spanish tiles. Clues range from last names to cultural customs in the home to intermarriages among families with traditional Sephardic Jewish names. … To be naturalized and become citizens, secular bnei anousim Jewish applicants whose families had maintained double lives as Catholics must seek religious training and undergo formal conversion to Judaism", since what the government meant by Jews is "the Sephardic descendants who are members of the Jewish community." Doreen Carvajal. A Tepid 'Welcome Back' for Spanish Jews, *N.Y.T.*, December 8, 2012

As we can see, the Israeli case study is instructive for at least two reasons. Besides providing a peculiar reference for what it takes to be Jewish in the Diaspora, it also serves as one of the few contemporary illustrations for defining membership in the majority community.

(iv) Conclusion: Recognizing minorities

Based on the claims they make, Will Kymlicka distinguishes between several ethno-cultural groups in the West:[106] (i) National minorities, complete and functioning societies in historic national homelands which are either sub-state nations or indigenous peoples; (ii) Immigrants, who do not want to engage in competing nation-building strategies, but want to negotiate the terms of integration (food, customs, holidays); (iii) Voluntarily isolationist ethno-religious groups, which are unconcerned about marginalization, and seek exemption from certain laws; and (iv) Racial caste groups and Metics.[107] Minority rights claims, he concludes, may vary from immigrant multiculturalism to multination federalism, Metic inclusion, or religion-based exemptions from general laws. In line with this assessment,[108] instead of a semantic analysis of the types of minorities, I propose a categorical distinction for minorities based on the aim of the particular protection mechanism sought. The achievement

[106] Kymlicka, Will: Western Political Theory and Ethnic Relations in Eastern Europe. In: Will Kymlicka and Magda Opalski (eds.), Can Liberal Pluralism be Exported?, Oxford University Press, 2001. pp. 13-107.

[107] He admits though that some groups like the Roma in Europe or African Americans are peculiar and atypical.

[108] "According to Kymlicka, justice for national minorities requires self-government rights of the national minority to govern their own affairs within their own territory, alongside and distinct from the larger society… Polyethnic rights, on the other hand give special recognition to cultural minorities in order to compensate for the disadvantages they would otherwise have in political participation and economic opportunity in the larger society. The objective of polyethnic rights is thus to promote the integration of ethnic minorities into the larger society, whereas self-government rights of national minorities have a separatist tendency. …. The distinction between national minority and ethnic minority turns out to be a distinction between a (n immigrant – added by ALP) cultural group that wishes to and has the right to be a separate and distinct society, on the one hand, and a cultural minority that wishes to or is expected to integrate into a larger nation." Iris Marion Young: A multicultural continuum: A critique of Will Kymlicka's ethnic-nation dichotomy, Constellations Volume 4. no 1. Blackwell, Oxford, 1997, p 49-51. "This sort of linguistic and institutional integration does not require complete cultural assimilation, and immigrants in many Western democracies are allowed and indeed encouraged to maintain some of their ethnocultural practices and identities. And they are increasingly given various rights and exemptions – what I called 'polyethnic' rights, but which might better be called 'accommodation rights.' – to enable the maintenance of these practices even as they integrate into common institutions." Will Kymlicka: Do we need a liberal theory of minority rights? Reply to Carens, Young, Parekh and Frost, p. 73.

of equality may also require preferential treatment or positive action, depending on whether we endorse a formal or a material equality-concept. The very idea of minority rights includes adjusting society's perception of equality by including certain groups as eligible claimants for equal treatment. Even if, in theory, the existence of a minority should not depend on the State's decision, in practice this process of broadening of the agents of ethno-cultural justice and equality will always include a political decision and a value judgment. The process of recognizing minorities as minorities, as groups worthy of *sui generis* recognition (that other groups do not have), is highly politicized.

The political element in the success of certain groups' recognition as minorities can best be demonstrated with the dynamic interpretation of the scope of the Council of Europe Framework Convention for the Protection of National Minorities.[109] For example, at the time of ratification, the German minority in South Jutland was identified as the only recognized national minority subject to the Framework Convention in Denmark. In 2000, the Advisory Committee urged the Danish government to reconsider the scope of application of the Framework Convention, in order to possibly include Far-Oese, Greenlanders and the Roma.[110]

The process of politicization is vividly demonstrated by the U.S. jurisprudence. For example, in the 1974 case of *Morton v. Mancari*,[111] the US Supreme Court held that hiring preferences within the Bureau of Indian Affairs did not constitute racial discrimination, since the purpose of the preference was not racially motivated but by the desire to give Indians a

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[109] Strasbourg, 1.II.1995, http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm (insert cite)

[110]Council of Europe (COE). Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Denmark, adopted on 22 September 2000, Strasbourg: COE, 22 September 2000,Doc.no. ACFC/INF/OP/I(2001)005,*available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Denmark_en.pdf

[111] *Morton v. Mancari*, 417 U.S. 535 (1974).

greater participation in their own self-government, to further the Government's trust obligation toward the Indian tribes, and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[112] The goal of the hiring preference was to make the Bureau more responsive to the interests of the people it was serving: American Indians. This, the Court said, showed a clear recognition that Indians had a unique legal status, giving this hiring preference more justification.[113] The Court continued that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[114] By the same token, 25 years later in 2000, the Supreme Court held in *Rice v. Cayetano*[115] that eligibility to vote in elections for the Board of Trustees of the Office of Hawaiian Affairs could not be restricted to persons of "Native Hawaiian" descent, since "Native Hawaiians" do not enjoy tribal status.[116]

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[112] *Id.* at 542.
[113] *Id.* at 546.
[114] *Id.* at 554.
[115] *Rice v. Cayetano,* 528 U.S. 495 (2000).
[116] For example, copying an earlier legislation passed in 1993, the Hungarian minority Act (Act CLXXIX of 2011 on the Rights of Minorities) defines national and ethnic minorities as *„§ (1) ... ethnic groups resident in Hungary for at least one century are minorities which are in a numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of collective affiliation that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities."* Appendix No. 1 of the Act enumerates the 11 recognized groups (Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romania, Ruthenian, Serbian, Slovak, Slovene and Ukrainian., while Article 148 specifies the procedures for other minorities to be recognised: *„ (3) If a minority other than those listed in Appendix No. 1 wishes to verify that they meet the relevant conditions, minimum one thousand electors forming part of that minority may initiate that the minority be declared an ethnic group native to Hungary. ... The procedure shall be governed by the provisions of the Act relating to the initiation of national referenda... In the course of its procedure, the National Election Committee shall seek the position of the President of the Hungarian Academy of Sciences with respect to the existence of the statutory conditions."*. This means that Parliament will actually need to pass a formal amendment to these provisions if a new group would qualify. This framework raises a number of questions. For example, the House (being sovereign), is not obliged to vote affirmatively on expanding the number of recognized minorities, even if they met the above criteria. Several Parliamentary and Constitutional Court decisions have been passed on petitions of various ethno-national groups, like the Jews, Aegean Macedonians, Russians, the Bunyevac, or the Huns seeking recognition. Another set of issues concern the question of who is to verify or question whether the 100-year requirement has been fulfilled, and when is the clock supposed to start ticking. When will the Chinese minority (a considerable population since the political transition) be entitled to seek recognition? What about the Palestinians, who may claim some 600 hundred years of presence if „Ismaelite" merchants are considered? Consider also the case of Albania, where there are only three national minorities recognized: the Greeks, the

It can be seen that the reception of groups' claims for protection and recognition and institutionalizing these through the inclusion in the privileged club of minorities will depend on how instances such as how compatible these claims are with the majority culture, how long is the group's common history with the majority, or whether there are historical or contemporary political sensitivities involved. Due to several centuries of peaceful coexistence and the generally "non-harmful" nature of the Amish's religion, the US Supreme Court allowed for an exception from the generally applicable mandatory school attendance requirement based on the freedom of religion.[117] Bans on visible and politically loaded expressions of Islamic religion, such as women wearing headscarves, have, on the other hand, been repeatedly upheld by various judicial organs including the European Court of Human Rights.[118] In Central-Eastern Europe, headscarves worn by Roma women in traditional communities trigger no public response -- most likely related to the fact that this socio-economically marginalized communities are not envisioned as agents of a cultural takeover or a security threat. At the same time, in the UK, in similar cases involving turbans worn by Sikhs, legislative and judicial tolerance includes exemptions from wearing a helmet even while riding a motorbike or working on a construction site (with the additional rule that liability for injuries is restricted to those that would have been sustained if the he had been

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Macedonians, and the Montenegrins and Roma and Vlachs/Aromanians are only recognized as linguistic minorities, since Albanian law lists three criteria for minority status. First, the members of the group must share the same language which has to be other than Albanian. Second, they have to be able to prove their distinct ethnic origin or national identity with documents. Finally, they either have to have connections with a kin state or distinct customs and traditions. See: European Roma Rights Centre. *Roma and Egyptians in Albania: From Social Exclusion to Social Inclusion: Summary of the World Bank Needs Assessment Study on Roma and Egyptians in Albania.* 2005., MARUSHIAKOVA, Elena and Vesselin Popov. New Ethnic Identities in the Balkans: the Case of the Egyptians. *Philosophy and Sociology* (2:8), 2001, pp.465-477.

[117] *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

[118] *See, e.g.,* Leyla Şahin v. Turkey (Application no. 44774/98) (parenthetical); Dahlab v. Switzerland (Appl. Nr. 42393/98.)

wearing a safety helmet).[119] I argue that the perception of Sikhs as a "harmless" group in the UK, with no apparent or manifest social, cultural, or political conflicts with the majority society, played into the Court's decision-making process. While building minarets[120] may trigger political debates, non-visible Islamic religious claims pertaining to slaughtering (and requiring exemptions from generally applicable norms on food processing), which do not reach the threshold of political debates are usually accommodated.[121] These debates, whether in relation the Sikhs in the UK or German citizens of Turkish descent or Maghrebi immigrants in France, are racial, and national or ethnic minorities is irrelevant.

The pertinent questions, rather, relate to what legal instruments can be called for in advocacy and along which lines are policies drafted. A useful inquiry is not semantic, but one focusing on the morphology of claims and the socio-legal climate. I argue for a more complex set of criteria for distinguishing between minority groups, taking into consideration at least (i) The origin of the group; (ii) The basis for group-formation; and (iii) The aspirations, needs, and demands of the group towards the majority. Let us not forget, minority rights may be (i) dignity-based identity-claims; (ii) equality-based (synchronic or diachronic) justice claims; or even (iii) reciprocal diaspora claims. I argue that protective measures for racial, ethnic, or national minorities (i.e. minority rights in the broad sense) can be targeting a number of different things, such as:[122] socio-economic equality, de facto freedom of religion, the

[119] The Motor-Cycle Crash Helmets (Religious Exemption) Act 1976 passed by the British Parliament in 1976, Section 2A **"exempts any follower of the Sikh religion while he is wearing aturban" from having to wear a crash helmet. Insert cite**

[120] *See, e.g.,* Swiss vote to ban minaret construction, CNN, November 29, 2009, http://edition.cnn.com/2009/WORLD/europe/11/29/switzerland.minaret.referendum/index.html?eref=rss_world

[121] *See e.g.,* Religious slaughter of animals in the EU, Library Briefing, Library of the European Parliament 15/11/2012, *available at* http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI(2012)120375_REV2_EN.pdf

[122] *See, e.g.,* András Bragyova: Are There Any Minority Rights? Archiv für Rechts- und Sozialphilosophie, 80/1994. or András Sajó: Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe. Roundtable (Chicago) Special Issue, 1993

protection of potential pogrom victims and the prevention of brutal ethnic conflicts, decreasing cultural conflicts between majority and genuine minority or immigrant groups, combating racial segregation or apartheid, or race-based affirmative measures of compensatory, remedial, or transitional justice. In line with this, minority law, the law of balancing obligations and freedoms pertaining to assimilation and dissimilation, may take several forms, ranging from affirmative action and social protection measures to declarations of religious and political freedom to setting forth cultural or political autonomy, or controlling political extremists. The context-dependent meaning of minority-protection may also refer to a widely diverse set of policies, such as equal protection (non-discrimination); participatory identity politics (the political participation of identity-based groups in political decision-making); cultural identity politics (the recognition of identity-based groups in cultural decision-making by the state); the protection of historically rooted identity-based sensitivity (the criminalization of hate-speech, holocaust-denial, etc.); affirmative action; special constitutional constructions form-fitted for the needs of indigenous populations; policies recognizing claims which mirror the state's ethnic kin's Diaspora claims abroad; right to traditional, pre-colonization life; or simply measures designed to maintain international security.

I claim that group recognition is always political, and the form and substance of recognizing a certain group's legal and political aspirations will depend on the nature of their claims and on how compatible those may be with the majority culture. Thus, the length of historic coexistence or even the basis for group-formation will be critical elements in this process.

III. Free choice of identity: a legal right or a controversial policy?

1. The paradox of free choice of ethno-racial or national identity

The free choice of identity is rarely declared in an explicit form, yet it is a core principle of international minority protection law. At the surface level, the choice of identity, similarly to the freedom of thought or conscience, logically may not be restricted, as it is a mere intellectual and emotional (that is, non-legal or political) phenomena. Seeing it as a practical matter, with legal, political, and most of all fiscal implications, the free choice of identity means more then a prohibition for the state to intervene into the citizen's life in identity matters. A closer scrutiny shows that the free choice of identity has two dimensions for state responsibility: a positive and a negative one.

(i) Negative Aspect

The negative aspect of the free choice of identity creates a prohibition for the state to create an official, mandatory ethno-national identity (and classifications and registries) for individuals. People have an unconditional right to opt-out from any socio-legal construct that incorporates ethno-national classifications. This obligation (and people's right to formally assimilate or integrate into the majority) is reiterated in several international documents and domestic legislative acts.

For example, according to the Council of Europe's Framework Convention for the Protection of National Minorities Article 3.1: "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice." [123] Under the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, "[n]o disadvantage shall result for any person belonging to a minority as the consequence of the

[123] H(1995)010, Strasbourg, February 1995.

exercise or non-exercise of the rights set forth in the present Declaration."[124] This right to opt out is guaranteed by powerful data protection regulations. With the painful memories of the Holocaust, population transfers, and state-organized ethnic cleansing (all of which were built on easily accessible official registries containing data on ethno-national affiliation), the continental European legal framework establishes strict barriers to processing and collecting ethno-national data. For example Article 8 of the European Data Protection Directive[125] creates a special category of sensitive data, and apart from a very narrow set of exceptions (set forth by law or having the explicit consent from the person in question), prohibits the processing of data revealing racial or ethnic origin.[126] It needs to be noted, though, that authorization to collect ethnic data is also corroborated by various international documents, such as Patrick Simon's study on the relationship between ethnic statistics and data protection, published by the European Commission against Racism and Intolerance (ECRI).[127] The report underlines the vital importance of collecting anonymous ethnic data[128] – something that has been previously emphasized by the ECRI in a 1996 recommendation.[129] The study cites the European Commission's report on the implementation of equal opportunity

[124] A/RES/47/135, 92nd plenary meeting, 18 December 1992.) Article 3. 2.
[125] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
[126] "1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life. 2. Paragraph 1 shall not apply where: (a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or (b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards; or (c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or (d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or (e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.
[127] "Ethnic" statistics and data protection in the Council of Europe Countries. Patrick Simon, 2007.
[128] *Id.* pp. 3 and 7.
[129] General Policy Recommendation No. 1, CRI (96) 43 rev.

principles,[130] which affirms that the enforcement of non-discrimination unavoidably presupposes the compilation and use, among other categories of information, of statistics of reliable ethnic data. The EU's Data Protection Directive will not be contravened by the collection and processing of data, even sensitive data, if it serves the cause of implementing anti-discrimination measures. Since the racial and employment directives[131] instated in community law the concept of "indirect discrimination" (exemplified by an apparently neutral measure that nevertheless incommensurately disadvantages a group marked by the protected attribute), the collection of statistical data in this context has become a logical and unavoidable necessity.[132] The Preambles to the racial and employment Directives make express mention of data collection for statistical purposes as a permissible tool of fighting discrimination.[133]

International law also recognizes the right to retain ethno-national identity in the sense that no one should be forced to assimilate into the majority. For example, Article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities sets forth that "[s]tates shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity." [134] According to the

[130] COM(2006) 643 of 30/10/2006. *See also* the European Parliament's report in September of the same year on the transposition of the Racial Directive. Cite, paranthetical

[131] Racial Equality Directive 2000/43/EC; Employment Equality Framework Directive 2000/78/EC

[132] Simon, *supra*, n. 76

[133] Preamble to Council Directive 2000/43/EC of 29 June 2000 implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin: "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence." (15) Preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation: "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence."

[134] Adopted by General Assembly resolution 47/135 of 18 December 1992

Explanatory Report to the Council of Europe's Framework Convention for the Protection of National Minorities[135] "no disadvantage shall arise from the free choice [the Convention] guarantees, or from the exercise of the rights which are connected to that choice. This part of the provision aims to secure that the enjoyment of the freedom to choose shall also not be impaired indirectly."[136] Similarly, the June 1990 Copenhagen Concluding Document on the Human Dimension of the CSCE, on which most multilateral and bilateral treaties are built, states that:

> [T]o belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice. Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.[137]

The 2012 Ljubljana Guidelines on Integration of Diverse Societies by the Organization on Security and Co-operation in Europe (OSCE) is the international document that gives the most detailed guidance. According to part II, para 6:

> Identities are subject to the primacy of individual choice through the principle of voluntary self-identification. Minority rights include the right of individual members of minority communities to choose to be treated or not to be treated as such. No disadvantage shall result from such a choice or the refusal to choose. No restrictions should be placed on this freedom of choice. Assimilation against one's will by the State or third parties is prohibited. International minority rights standards are clear in establishing that affiliation with a minority group is a matter of personal choice, which must, however, also be based on some objective criteria relevant to the person's identity. No disadvantage shall result from the choice to affiliate with a given group. The principle of freedom of choice should be reflected in legislation and in integration policies. This means, for example, that authorities should not affiliate persons with a specific group based on visible

[135] Referring to Article 3 f the FCPNM 3. Para 36.

[136] http://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H(95)10_FCNM_ExplanReport_en.pdf insert cite

[137] "IV. (32) To belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice. Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. … (32.6) … No disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights. (33) The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity."

> characteristics or other presumptions without their consent.[138] The prohibition of assimilation against one's will means that nobody can be forced to declare his/her identity. If this is declared, the choice should be open and not limited to closed lists of identities. This does not imply that any chosen identity can necessarily claim recognition.[139] Objective criteria, relevance and other factors need to be taken into account, and some aspects may fall under a State's margin of appreciation. … While any form of assimilation that one has not chosen – even indirect and involuntary – is prohibited, the principle of freedom of choice implies that consciously chosen assimilation has to be allowed and may not be either stigmatized or subtly discouraged by majorities or minorities. This means that the State is also responsible for creating an environment in which individuals can make such a choice freely and at any time.[140]

In 2010, the European Court of Human Rights followed a similar logic in *Ciubotaru v. Moldova* case.[141] Here, Mihai Ciubotaru, a university professor, sought to have his ethnicity changed from Moldovan to Romanian on his birth and marriage certificates. Moldova refused on the grounds that since neither of his parents had been recorded as ethnic Romanians in their birth and marriage certificates, it was impossible for him to be recorded as an ethnic Romanian. In the applicant's view, the forced imposition of the Moldovan ethnic identity on him constituted an interference with his right to identity and consequently with his right to respect for his private life—under which the authorities had a positive obligation to allow him freely to choose his association with any cultural group, including Romanian, without being required to provide evidence. According to the Government, a blanket acceptance of requests concerning changes in ethnic identity, based solely on the applicants' declaration but not on evidence, could lead to serious consequences, such as people declaring themselves to be ethnic French, German or English. Referring to earlier case law, the Court noted that, along with name, gender, religion and sexual orientation, an individual's ethnic identity constitutes

[138] This is also set forth in The Language Rights of Persons Belonging to National Minorities under the Framework Convention, Thematic Commentary no. 3, adopted by the Advisory Committee on 24 May 2012.
[139] In 1991, the Report of the CSCE Meeting of Experts on National Minorities adds that *„not all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities."*
[140] http://www.osce.org/hcnm/96883
[141] Application No. 27138/04

an essential aspect private life and identity, and falls under the protection of Article 8 of the European Convention on Human Rights.[142] The Court held that it understood that authorities should be able to refuse a claim to change ethnicity in official records when it is based purely on unsubstantiated subjective grounds. In this particular case, Moldova's legal requirements created insurmountable barriers on an individual wishing to record an ethnicity other than what Soviet authorities defined for his parents.[143] The Court observed that Ciubotaru's claim was based on more than his subjective perception of his own ethnicity, and he was able to provide objectively verifiable links with the Romanian ethnic group, such as language, name, empathy and others. The State's failure was due to the fact that it was impossible for the applicant to even have his claim examined, whether or not his belonging to a certain ethnic group could have been objectively verified. In regards to the requirement by the Moldovan authorities for the applicant to prove the ethnic origin of his parents, the Court did not dispute it being compatible with the Convention. The Court explicitly stated that it does not dispute the right of a Government to require the existence of objective evidence of a claimed ethnicity.

Finally, under Article 8(1) of the (non binding) 2007 United Nations Declaration on the Rights of Indigenous Peoples, "[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."[144] Article 8(2) continues, "[s]tates shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities."[145] Article 33 adds that "1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and

[142] See S. and Marper v. the United Kingdom GC nos.30562/04 and 30566/04, § 66, 4 December 2008
[143] *Ciubotaru v. Moldova,* Application No. 27138/04, , para 57
[144] http://undesadspd.org/indigenouspeoples/declarationontherightsofindigenouspeoples.aspx
[145] Id.

traditions. … 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."[146]

So far, what we have seen is that the right to free choice of identity as a *sui generis* right does not exist under international law. The core of what exists entails the following: (i) states cannot create mandatory ethno-racial or national classifications; (ii) states cannot deny the right of individuals not to affiliate involuntarily with any given group – most of all for statistical and census-purposes; (iii) the state cannot forcefully assimilate individuals into the majority; and (iv) insofar as individuals do not wish to make use of minority rights or preferential treatment, the state cannot make arbitrary ethno-racial classifications. In addition to this, if individuals decide to seek affirmative action, preferential treatment or minority rights, under international law, states are indeed authorized to establish (objective) criteria for membership in the groups and the recognition of identification. In effect/practice, states are explicitly obligated to do so if discrimination or hate bias crimes are committed on grounds of presumed or perceived such identity or group membership. States also cannot legally question individuals' identification with the majority, but there are no narrowly tailored litigable state obligations for the cultural and social integration and assimilation of persons belong to minorities.

(ii). Positive Aspect

The positive aspect of the free choice of identity encompasses the individual's right to join a group or community.[147] In such an explicit form, the freedom to choose one's identity is rarely declared in legally binding documents.[148] The 1993 Hungarian minority rights act[149]

[146] United Nations Declaration on the Rights of Indigenous Peoples, Art. 33 (2007).
[147] The positive dimension of the free choice of identity also includes a set of obligations on behalf of the state, say registering names in minority languages.
[148] In the *Lovelace case* the UN Human Rights Committee clarified that if the domestic legislation confines a minority right attached to the membership in a minority community that should be objectively and reasonably

was one of the few notable exceptions. Its preamble stated that "the right to national and ethnic identity is a universal human right," and this statement is reiterated in Article 3(2), which states, "[t]he right to national or ethnic identity is a fundamental human right, and is legally due to any individual or community."[150] Article 7 further declares that, "The admission and acknowledgement of the fact that one belongs to a national or ethnic minority is the exclusive and inalienable right of the individual".[151] This statutory language, repealed in 2011,[152] provided a somewhat different interpretation from that provided by the Explanatory Report to the Council of Europe's Framework Convention for the Protection of National Minorities:

> Paragraph 1 firstly guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. This provision leaves it to every such person to decide whether or not he or she wishes to come under the protection flowing from the principles of the Framework Convention. This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.[153]

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justified. *Lovelace v. Canada,* Communication No. R/6/24/ para 14. At the same time, the watchdog of the International Covenant on the Elimination of the All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination in its General Recommendation VIII underlines that "such identification shall, if no justification exists to the contrary, be based on the self-identification by the individual concerned." (Committee on the Elimination of Racial Discrimination*,* General Recommendation No. 08: Identification with a particular racial or ethnic group (Art.1, par.1 & 4) 1990. 08.22.)

[149] Act LXXVII of 1993 on the Rights of National and Ethnic Minorities

[150] Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, http://www.minelres.lv/NationalLegislation/Hungary/Hungary_Minorities_English.htm

[151] United Nations Declaration on the Rights of Indigenous Peoples, Art. 7 (2007).

[152] In 2011 the law was replaced by Act CLXXIX of 2011 on the Rights of Nationalities, which substantially modified the language. The preamble now merely states that "every citizen forming belonging to a nationality has the right to freely declare and preserve their identity", and all Article adds is that "Declaring affiliation with a nationality is the individual's exclusive and inalienable right. (2) No one may be obliged to make a declaration on the issue of affiliation …" Under a 2013 amendment to the Hungarian constitution, Article XXIX(3) of the Fundamental Law sets forth the following:"(3) A cardinal Act shall determine the detailed rules relating to the rights of nationalities living in Hungary, the nationalities, the requirements for recognition as a nationality and the rules relating to the election of their local and national self-governments. By virtue of such cardinal Act, recognition as a nationality may be subject to national status of a specific period and to the initiative of a specific number of individuals who declare to be members of such nationality."

[153] Referring to Article 3 f the FCPNM 3. Paras 34-36.

According to this interpretation, the unrestrained right to freely associate oneself with a (minority) community thus clearly falls outside the scope of the "free choice of identity," which is limited to giving freedom to opt-out. It also stipulates that there is actually an "objective" definition for the minority community (the nation, the national or ethnic minority), and implies that the state is authorized to either establish these criteria or adopt definitions provided by non-state agents, like self-declared representatives of minority communities or other (academic or political) bodies fulfilling this task. The process of how the state comes to define the objective entity with which individuals can choose to identify, declare affiliation is a different issue, falling more or less within the competence of the legislator.

In line with UN Principles and Recommendations for Population and Housing Censuses,[154] paragraph 15 of the 2012 Ljubljana Guidelines[155] adds that "censuses should not require compulsory declaration of belonging to specific identities or groups, since nobody should be compelled to declare his or her belonging to a minority. Census forms should not limit respondents to closed lists, as self-identification implies also choosing one's preferred designation." Paragraph 5 also declares that:

> [T]he legislative and policy framework should allow for the recognition that individual identities may be multiple, multilayered, contextual and dynamic. ... In addition, members of majorities and minorities should accept that their identities – like the one of the State – may change and evolve, including through contact and exchange with other groups. … This means, for example, that identification with multiple identities and contextual affiliations should be permitted, including in the census; that closed lists of identities in the census are to be discouraged; and that everyone should have the right to change his or her affiliation over time. [Emphasis original]

Coming back to censuses, paragraph 15 also holds that:

[154] http://unstats.un.org/unsd/demographic/sources/census/docs/P&R_%20Rev2.pdf
[155] *Supra* n. 163.

> …policies should … be based on statistical evidence, especially when they cover aspects relevant to minority rights and integration, such as ethnicity, language and others, and should also allow for multiple identification. States enjoy a wide margin of appreciation regarding the instruments and mechanisms for data collection. These might include official censuses. However, censuses should not require compulsory declaration of belonging to specific identities or groups, since nobody should be compelled to declare his or her belonging to a minority. Open lists ensure that the results reflect individual choice and also avoid the problem that sometimes groups do not feel represented in official census categories. The questionnaire and census methodologies should be elaborated in consultation with minority representatives and translated into relevant minority languages. [156]

Paragraph 43 adds, "Despite the perceived link between language and identity, any language competence or lack thereof, as well as the mere use of a language, must not automatically be linked to affiliation with a particular group or with the enjoyment of linguistic rights."[157]

The OSCE language on the question of the positive dimension of the free choice seems somewhat incoherent. While there is recognition of the fluid and multifaceted feature of identification, and a requirement for the law to accommodate it, an unconditional or even an explicit obligation to recognize one's decision to opt into a chosen group is not set forth.

Yet, if we were talk about the right to choose one's identity as a legal right, the negative dimension of the right to free choice of identity logically cannot exist without the positive side. The positive dimension of free choice means that the individual has a right to opt into a chosen group. As devastating the practical consequences may be, if there is a right to free choice of identity allowing human beings to opt out from minority groups, the very right includes the freedom to opt in – unless the state takes the courage to define groups and membership criteria within the group. The principle of free choice of identity as a legal right does not seem to be a theoretically coherent and practically sustainable one, nor is it

[156] See - UN Principles and Recommendations for Population and Housing Censuses, Rev. 2, 2007 (ST/ESA/STAT/ SER.M/67/Rev.2).
[157] See the Language Rights of Persons Belonging to National Minorities under the Framework Convention, Thematic Commentary no. 3, adopted by the Advisory Committee on 24 May 2012, paragraph 16.

supported by statutory language. The requirement of the active, affirmative involvement of the individual in group membership, accompanied by the prohibition of mandatory inclusion by the state, along with the prohibition of collecting sensitive data, does not create an autonomous, *sui generis* right (for the free choice of identity), since it cannot include the right (of choice) to opt in to a chosen group.

This unrestrained right to minority identification in both the positive and the negative (identifying and de-identifying) sense, which is a necessary and unavoidable condition for a legal right to exist, may lead to inherent inefficiencies in rights protection in two distinct ways. First, when it comes to combating discrimination, hate crimes or hate speech, data protection, aimed at guaranteeing the free choice of identity, it may, in fact, become an obstacle for protection. Second, concerning remedial measures and collective rights, the lack of requirements for both minority group-recognition and membership opens the possibility for misusing these rights. I will bring examples for both phenomena from Hungary, yet several European states have the same or similar experiences.[158]

(i) Murphy's law of discrimination[159]

Hungary is one of the (many) countries where legal restrictions on the collection of non-anonymous data concerning ethnic, national or religious identity are often interpreted by the police and prosecutors in a way that that suggests ethnicity is of no significance in

[158] *See, e.g.,* Alfred F. Majewicz, Tomasz Wicherkiewicz: Minority Rights Abuse in Communist Poland and Inherited Issues, Acta Slavica Iaponica Volume 16 (1998), http://src-h.slav.hokudai.ac.jp/publictn/acta/16/alfred/alfred.html, or Florian Bieber: Minority Rights in Practice in South Eastern Europe, Discussion Paper, An initiative of the King Baudouin Foundation in partnership with the Charles Stewart Mott Foundation and the Soros Foundations, September 2004, , http://www.kbs-frb.be/uploadedFiles/KBS-FRB/Files/Verslag/MRP_discussion_paper.pdf

[159] By this concept I mean the following: when it comes to discrimination or hate crimes, perpetrators will never have difficulties identifying their victims; yet when it concerns legal remedies, ill-framed, or ill-interpreted legal provisions (some formally adopted on behalf of the minorities) or obstructing practices, mostly centered around privacy (data protection) provisions prohibiting ethno-racial classifications (the processing of ethno-national data) will prevent action. In this way, it is like the adage for which it is titled: Anything that can go wrong will go wrong.

criminal activity. The Hungarian data protection law prohibits the handling of sensitive data, such as ethnic origin, without the concerned person's explicit permission.[160] Unable or unwilling to distinguish between perceived ethnicity and the expressions of personal declarations regarding ethno-national affiliation, officials habitually claim that the recording of racial violence victims would run against statutory provisions. This is despite the fact that the Criminal Code acknowledges certain racially motivated crimes,[161] such as "violence against members of a community" (formerly national, ethnic or racial minorities and religious groups) or "incitement against a community," all of which presuppose membership in the given (e.g. racially or ethno-nationally defined) community.[162] The determination of the nature of the crime upon which the indictment will be brought to court is in the sole competence of the prosecutor, who will, because of the previously discussed data protection constraints hardly ever acknowledge the quintessential ethnic component (the racial motivation) of a hate crime. In general, as Lilla Farkas points out, because Hungarian law allows for the handling of data on racial and ethnic origin only with the consent of the person concerned, the effect is a severe impediment on the prospect of litigation against indirect discrimination or institutional racism. [163]

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[160] Act No CXII of 2011 on Informational Self-Determination and Freedom of Information

[161] See Lídia Balogh: Racist and related hate crimes in Hungary – recent empirical findings, Acta Iuridica Hungarica 52, No 4 (2011), pp. 296–315.

[162] The current Criminal Code, Act C of 2012 on the Criminal Code, which entered into force on July 1, 2013, contains the following provisions: (i) 'Violence against a member of a community'(Article 216)[162]; the protected grounds are membership (or perceived membership) in a national, ethnic or racial group, or in "other social groups", particularly based on disability, gender identity or sexual orientation; the available sanction ranges from 2 up to 8 years imprisonment, preparation for the crime: up to 2 years imprisonment; (ii) 'Incitement against a community'(332); the protected communities are: the Hungarian nation, national, ethnic or racial groups, or in "other social groups", particularly based on disability, gender identity or sexual orientation; the available sanction is up to 3 years imprisonment; (iii) Public denial of the crimes committed by the Nazi or Communist regimes (Article 333); the provision covers the questioning, minimalisation and the legitimisation of the crimes of the above mentioned totalitarian regimes, including the Holocaust, the available sanction is imprisonment up to 3 years, (iv) 'Using a totalitarian symbol' ('Article 335); the provision list the following symbols: swastika, SS-badge, arrow-cross, hammer-and-sickle, red cross –, the offence is considered to be a delinquency.

[163] Farkas, Lilla (2004). The Monkey that does not See, Roma Rights Quarterly, 2004/2

It is hardly surprising that the number of prosecuted hate crimes is strikingly low: According to the available official data[164] the number of prosecuted "violence against member of a community" offences and the number of final court decisions, establishing that a hate crime was committed, was the following in the last years in Hungary:[165] 2009: 7, 2010: 12, 2011: 28, 2012: 16, 2013 (January-June): 17.

As pointed out by Hungarian human rights NGOs, one of the reasons for the low number of criminal offences officially qualifying as hate crimes is due to the fact that the authorities fail to take into consideration the bias motivation of crimes in the course of the criminal proceedings, which results in classifying the given crime as a less serious criminal offence than hate crime. This may happen intentionally, when police officers or prosecutors decide to avoid collecting evidence for the perpetrators' bias motivation, and opt for the simple and safe qualification and classify the case as a simple "bodily harm" instead of "violence against a member of a community." As noted by the EUMC almost a decade ago: *"[i]n Hungary, the low levels of registration under the various specific racially motivated crimes were attributed to law enforcement agents, as well as prosecutors and courts, being very reluctant to recognize racial motivation in violent and non-violent crimes committed."*[166]

In Hungary, in line with the legally articulated declaration to refrain from any kind of involuntary official classification of ethnicity, no specific legally binding instructions exist for

[164] *See* Website of the Prosecution Service (www.mklu.hu) and data requests from the Prosecution Service.

[165] Criminal data – including data on crimes motivated by hatred or prejudice – is available via two databases, both maintained by the General Prosecutor's Office (*Legfőbb Ügyészség*): Unified Criminal Statistics of the Investigation Authorities and the Public Prosecution *(Egységes Nyomozóhatósági és Ügyészségi Bűnügyi Statisztika – ENYÜBS)* on cases registered by the police and prosecution, and Prosecution Information System *(Vádképviseleti Informatikai Rendszer – VIR)* on criminal court cases. The data in both databases refer to the articles of the 1978 Criminal Code[165], or from July 2013, to the articles of the 2012 Criminal Code. However, there is no comprehensive mechanism for monitoring and data collection on hate crimes and racial/ethnic incidents in Hungary.

[166] Robin Oakley (on behalf of the EUMC): Policing Racist Crime and Violence: A Comparative Analysis, European Monitoring Centre on Racism and Xenophobia, September 2005, p. 16., http://fra.europa.eu/sites/default/files/fra_uploads/542-PRCV_en.pdf

the determination of racially motivated criminal activity. Lw enforcement officers, who are the primary decision makers of the legal classification of a given offense, become very reluctant to classify incidents and conflicts as racially motivated.

Although it will always be the law-school-graduate prosecutor who will decide on what grounds to indict the defendant, she will usually follow the police's determination on the nature of the criminal offense in question. As for the police, in order to avoid making an uncomfortable and (given the widespread anti-Roma or xenophobic sentiments in Hungarian society) unpopular decision, and lacking any legally binding guidance, we see a very strong reluctance to recognize racial motivation in violent criminal behavior.

In general, with Hungarian law allowing for the handling of data on racial and ethnic origin only with the consent of the person concerned, the effect is a severe impediment on the prospect of litigation against indirect discrimination or institutional racism.[167]

If we take the authorities' explanation at face value, and accept that data protection and thereby the guarantees for the choice of ethno-national identity are used here, what are the lessons from this fallacy of the free choice discourse? The answer is simple: when it comes to abuse, discrimination, and violence, the work of identifying group membership is always done by the abusers and the discriminators. Choice is eliminated by the *perception* of the outsiders. The right to choose identity is consumed by the actions of "others".[168]

Having shown the failure of Hungarian authorities to properly respond to hate crimes when the victims are Roma and other minorities, it is particularly striking to see that in more and more cases involving violence between Roma and white Hungarians, often actual

[167] Farkas, *supra.*

[168] The fact that EU law recognizes discrimination on the basis of perceived ethnic affiliation as equivalent to discrimination on „actual" ethnic grounds is irrelevant for my arguments, which simply points to the external nature of ethnic classification.

members of racist hate groups, Roma are charged with racially motivated hate crimes.[169] The criminal offence of "violence against member of a community" contains an open-ended list as far as possible victims of hate crimes are concerned, as it refers to members of "other social groups". This practically results in individuals from any group being classified as a hate crime victim, and not only members of underprivileged, vulnerable communities who may face discrimination because of their inherent (unchangeable, fundamental, immutable) characteristics. Criminal provisions originally adopted in order to protect minorities can be used to punish members of minority groups, and courts impose harsh sentences on the perpetrators. Under the wording of the law, fans of sports clubs or even members of hate groups could theoretically be included. This is in spite of a case in 2011 where the Supreme Court of Hungary held that members of an organization which was established against a national, ethnic, racial, religious or other social group and which openly opposed legal rules may not be entitled to enhanced criminal law protection; thus they may not qualify as protected group.

The criminal provisions initially aimed at protecting minorities are also used to punish members of minority groups involved in inter-ethnic incidents, and courts impose harsh sentences on the perpetrators. The several decisions where Roma were convicted for hate crimes have come under severe criticism from human rights NGO's.[170]

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[169] See http://helsinki.hu/wp-content/uploads/General_climate_of_intolerance_in_Hungary_20110107.pdf

[170] For example in the small town of Sajóbábony, with a high Roma population rate, on 14 November 2009, only a few month after a series of targeted murders against Roma were committed, a public forum was organized by the extreme right-wing Jobbik party. Roma were not allowed to enter, and after the event, some were threatened. The next evening three out of the approximately 100 members of the New Hungarian Guard (the "successor" of the dissolved Hungarian Guard, an association dissolved by the Supreme Court for carrying out racist activities) were attacked by Roma locals and one of their cars was seriously damaged by wooden sticks and axes, and passengers suffered light injuries. The victims claimed that their Hungarian ethnicity was the cause of the attack, while the defendants argued that they wanted to protect their families from the neo-Nazi (New) Hungarian Guard. Nine Roma suspects were placed in pre-trial detention and were sentenced to 2.5 and 4 years. The appellate court even raised the sentences. See Romas Sentenced for Hate Crime Against Hungarians, (July 13, 2012), at http://tasz.hu/node/2785W, Those Racist Roma Again" (May 15, 2013, HCLU), at

Hungary provides other examples for Murphy's Law of ethnic classification. Data protection arguments – the reluctance to recognize and register ethnicity by authorities in the name of privacy – are used for educational segregation, or obstructing educational desegregation at the very least.[171]

The European Court of Human Rights repeatedly finds East European authorities engaging in illegal, discriminatory segregation in the public educational system.[172] While some mayors and school headmasters voluntary obey the law and manage to design effective desegregation models, those resistant to do so are incredibly difficult to force using the law, since Hungarian (as many continental) courts, usually prefer decline to follow an activist approach, and follow narrow, textual interpretations, will not consider themselves an appropriate forum to deal with abstract questions of identification or classification, and will frown on depositions asking them to establishing who the Roma students are. Defendants in these trials often reject arguments pertaining to segregation, arguing that they have no knowledge concerning the ethnicity of the students and so they could not possibly segregate

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http://tasz.hu/node/3543, http://helsinki.hu/en/general-climate-of-intolerance-in-hungary, http://gyuloletellen.hu/node/3.

[171] Although not very common, but another case for using minority protection schemes in a cynically abusive manner concerns covering segregation when Roma parents are pressured to request a specialized minority education, aimed originally at safeguarding Roma culture. See the report of the Parliamentary Commissioner for (Ombudsman) for Minority Rights. See Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosa: Jelentés a nemzeti és etnikai kisebbségi általános iskolai nevelés-oktatás helyzetéről (NEK-411/2011), OBH, Budapest, 2011. október 5., 78. p.,<http://www.kisebbsegiombudsman.hu/data/fi les/217986220. pdf> pp. 20-22. The ombudsman reaffirmed these findings in his report on 2011 pre-school report in regards of Roma kindergartens. Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosa: Jelentés a nemzeti és etnikai kisebbségi óvodai nevelés helyzetéről (NEK-368/2010), OBH, Budapest, 2011. március, 28. p. <http:// www.kisebbsegiombudsman.hu/data/fi les/205104474.pdf>, p. 42. Cases have also been documented when non-Roma parents claim that they are Roma in order to conceal racial segregation. For a detailed case description see Roma Rights 2003/1-2, pp. 107-108. Either way, the result is that Roma children are provided low-quality Roma folklore classes once a week, but are kept in separate, segregated classes, among inferior conditions.[171] See Lídia Balogh: "Minority Cultural Rights or an Excuse for Segregation? Roma Minority Education in Hungary." In Daniel Pop (ed.): Education Policy and Equal Education Opportunities . New York: Open Society Foundations, 2012. pp. 207-222.

[172] *D.H.* and Others *v*. the *Czech Republic* (No. 57325/00), Horváth and Kiss v. Hungary (No. 11146/11)

on this basis and certainly could not introduce ethnicity-based desegregation instruments. How is this possible?

In Hungary, as in many places across Europe, there are tragic, historical precedents when censuses and other administrative lists have been used to identify people as enemies of the state and as tools to discriminate against them. There is an understandable shyness towards practices that include collecting ethnic data without the explicit permission of the concerned persons, or policies that would curtail the free choice of (ethnic) identity. In line with European legislation,[173] Hungarian law allows for the handling of data on racial and ethnic origin only with the consent of the person concerned.[174] According to the Hungarian Privacy Act– such data is "special" (or "especially sensitive").[175]

Under the Act, special data may be processed under the following circumstances: a) When the data subject has given his consent in writing, b) When processing is necessary for the implementation of an international agreement promulgated by an act concerning the data, or if prescribed by law in connection with the enforcement of fundamental rights afforded by the Fundamental Law, or for reasons of national security or national defense, or law enforcement purposes for the prevention or prosecution of criminal activities, or c) When processing is necessary for the performance of a task carried out in the public interest. In the approach widely accepted in Hungarian professional literature, the term "data" must be

[173] In line with Article 6 of the 1981 Council of Europe Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, Article 8 of the European Data Protection Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data) creates a special category of sensitive data and apart from a very narrow set of exceptions (set forth by law or having the explicit consent from the person in question), prohibits the processing of data revealing racial or ethnic origin.
[174] The law, of course, does not prohibit the anonymous collection of census data and law can, in principle, prescribe other circumstances when ethnic data can be collected.
[175] Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Article 5 (2).

interpreted extensively to mean any fact, information, or knowledge that can be linked to a person. As Majtényi, Székely and Szabó describe:

> Hungary's information rights regulations do not distinguish between data and information; legal professionals use the two terms interchangeably. Beyond data identifying natural persons, personal data includes everything that can be correlated with a specific person with the help of the identifying data. The information does not necessarily have to be factually true. Indeed, false information could constitute a special case of personal data, as long as it satisfies the rest of the criteria. In this way, data implying Roma origin is regarded as personal data even if the subject in question does not happen to be Roma as well as in cases where he does declare himself to be Roma. Finally, the notion of 'data' also comprises inferences drawn from one or—as is typically the case—several pieces of information. For instance, information must be considered personal (even sensitive) data if it is an inference, whether well-founded or unjustified, from other data (such as a surname more often borne by Roma individuals than by others) that does not in itself necessarily imply minority status.[176]

Under this approach, absurdly, even the following statements may constitute a violation of data protection laws: "Nelson Mandela was a black human rights activist" or "Benjamin Netanjahu is Jewish".[177] Not only inferred data (which is what journalism is built on), but also false data—for example the statement that "Stevie Wonder is white"—would be illegal under data protection laws.

There are only a few promising good examples when official stakeholders realize the fallacy of these arguments and decide to endorse constructive approaches and methodologies. A notable good practice example from Hungarian case law came up in a strategic litigation lawsuit brought in 2006 by the Chance for Children Foundation[178] against the City of Hajdúhadház and two municipal schools on charges of discrimination.[179] In this case, Judge Tamás Endre Tóth appointed an expert to investigate allegations of segregation. Adopting a

[176] László Majtényi, Iván Székely and Máté Dániel Szabó (2006): Roma támogatások és jogosultságok egyéni követésének lehetőségei (Possibilities for tracing individual Roma subsidies and entitlements), Budapest: Eötvös Károly Institute., p. 10.

[177] See Balázs Majtényi-András L. Pap: Should ethnic data be standardized? Different situations of processing ethnic data (co-authored with Balázs Majtényi). In: Máté Dániel Szabó (ed.) Privacy protection and Minority Rights. Budapest, Eötvös Károly Policy Institute, 2009, pp. 63–88.

[178] 'Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány '(CFCF). CITE

[179] Judgement No. 6P. 20.341/2006/50. CITE

rather peculiar method, the expert proceeded to ask a committee composed of members of the local Roma government to identify, based on names and home addresses, which of the pupils - all of whom were admittedly personally known to the representatives in question - they recognized and considered as Roma. In the next step, the data were rendered anonymous and used to supply a percentage ratio of Roma and non-Roma pupils among the children attending the schools concerned.[180] In a statement, which the Court admitted for the most part,[181] counsel for the plaintiff insisted that the sensitive data – proving segregation – had not been processed unlawfully, considering that the appointed expert and the local elected Roma representatives used the latter's official knowledge to define whom they knew to be Roma. Moreover, the information was submitted to the court in anonymous form as pure statistical data, and was unsuited to identify specific natural persons. At the stage when the expert report was filed, the ability to identify individuals in a way that could raise concerns over privacy and data protection was out of the question. Beyond any issues raised by the provisions of the Data Protection Act, counsel also underlined the importance of considering the implications of the minority law, which assigns to local minority self-governments the essential task of protecting their communities, as well as vesting them with special rights in minority education. She asked how the duty of protecting interests could possibly be fulfilled if the local minority representatives did not know whether the person on whose behalf they took action was Roma or not. The members of the Roma minority self-government of the City of Hajdúhadház maintained daily contact with the members of the local Roma community, living together with them on or near the settlements and representing them on a daily basis to the staff and teachers of the accused schools. Years of experience in this small town had

[180] *Id.*
[181] Based on the litigation documents and the kind personal account of Ms. Lilla Farkas, counsel for the plaintiff.

taught them not only which members of the community professed themselves to be Roma, but also whom the defendants regarded as belonging to that minority. In other words, counsel was of the opinion that, pursuant to the anti-discrimination act, it was not the ethnic background professed by the subject her/himself that had to be demonstrated but the defendant's assumption about the ethnic belonging of the subject.[182] The Data Protection Act does not regulate the processing of data on perceived ethnicity but those data that derive from self-professed ethnic belonging. Finally, the counsel asked the Court, should the defendant claim that its own assumptions about which of the children were Roma diverged from those formed by the minority representatives, the Court then order the defendant to come out and specifically say which pupils it regarded as Roma and on what grounds. Unsurprisingly, the defendants demurred.

In a peculiar legal and socio-political climate, data protection measures can, in practice, be used as tools for ethnic discrimination and the further marginalization and discrimination of many groups, such as the Roma in Hungary. Furthermore, we actually see that in violent conflicts between racist hate groups and members of the Roma minority community, the latter can be charged with racially motivated hate crimes. If there is a will, there is a way for a constructive, pro-minority interpretation of the privacy provisions.

(ii) The trap of ethno-corruption

If the failure to spell out objective criteria, and to recognize externally-defined classifications for group affiliation was an inherently problematic and hypocritical aspect of the free choice of identity as a negative right, another fallacy concerns remedial measures, such as affirmative action or minority rights as ethno-cultural claims. Here, the lack of

[182] *Id.*

requirements for both the group and membership within the group may allow members of the majority to make use of these measures.[183]

Again, let us turn to Hungarian experiences, from a jurisdiction where the law explicitly declares the free choice of identity. In the Hungarian model, the exercise of minority rights is not dependent on minimal affiliation requirements. In the area of education, at least three forms of ethno-corruption exist. Deets documents how school officials pressure parents of "Hungarian" students to declare their children "German": "[A]ccording to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German-minority programs, which, by the census, was about 8,000 more than the number of ethnic Germans who are even in Hungary."[184] The Minority Rights Ombudsman,

[183]In the case of Kosteski v.The Former Yugoslav Republic of Macedonia (13 April 2006, Application no. 55170/00) the European Court of Human Rights agreed with the government in dismissing the applicant's claims for preferential treatment due to the failure to provide proper proof that he is a member of a religious community (in which case he would have been eligible to take extra days off from work on religious holidays.) The applicant claimed that the Government had failed to show why he should be required to prove that he belonged to a particular religion and suffer particular consequences if he failed. He argued that the requirement for unspecified evidence was an imposition on his inner conscience and made him feel of an inferior status as no others had been subject to additional conditions in order to join the Muslim religion. The Government submitted that given that the applicant's name and way of life had not indicated membership of the Muslim confession and that he had first declared himself to be a believer in proceedings to justify his absence from work, as well as the fact that that in a period of eight years he had changed his beliefs three times, but most of all since the applicant was requesting the exercise of a right, it was not enough for him subjectively to assert the position. The Court noted that the applicant had no knowledge of the Muslim faith, did not follow its diet and had previously been observing non-working Christian holidays by taking the relevant days off. Citing cases concerning conscientious objection where the authorities were held to have legitimately required strong evidence of genuine religious objections to justify exemption from the civil duty (e.g. N. v. Sweden, no. 10410/83, Commission decision of 11 October 1984, D.R. 40 p. 203, Raninen v. Finland, no. 20972/92, Commission decision of 7 March 1996), the Court held that "while it may be that this absence from work was motivated by the applicant's intention of celebrating a Muslim festival, [the ECHR] is not persuaded that this was a manifestation of his beliefs in the sense protected by article 9 of the convention" "While the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by Macedonian law …. Where the employee … seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion … The applicant however was not prepared to produce any evidence that could substantiate his claims. To the extent therefore that the proceedings disclosed an interference with the applicant's freedom of religion, this was not disproportionate and may, in the circumstances of this case, be regarded as justified … namely, as prescribed by law and necessary in a democratic society for the protection of the rights of others.

[184] Deets, Stephen (2002). Reconsidering East European Minority Policy: Liberal Theory and European Norms, East European Politics and Society 16:1

in its 2011 report drew attention to a school which advertises its German minority class as a "window to Europe," while not requiring either of the parents to even speak German, or requiring eligibility requirements for the students or an actual curricula on German ethnography or culture.[185] The Minority Rights Ombudsman also pointed out that at the 2001 census 62,233 people claimed to be German, while in 2011 there were 46,693 students (aged 6-14 years) enrolled in the German minority education scheme.[186] The Ombudsman also drew attention to the fact that German minority education takes place in several municipalities, where neither the 2001, nor the 1944 census (which predated the mass expulsion of some 380,000 ethnic Germans from Hungary) indicated the presence of a German minority.[187] A similar trend can be seen when looking at minority education initiatives targeting Romani students. In most cases, financial incentives are the obvious reason for this, since schools receive additional public funding for minority education – which is often the only source of extra income for educational institutions in underdeveloped, poor regions or small villages. In order to secure this funding, school administration and teachers will do anything it takes: learning a language, getting training in Roma ethnography and culture, and pressuring parents to request minority education.[188]

The issue is not new; consider a 1911 case in the northern Moravian town of Hohenstadt/Zábřeh, where grocer Johann Lehar wanted to send his six-year-old daughter to a school at which German was the language of instruction so she could have greater career prospects. Using as evidence his participation in German organizations, Lehar argued that he

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[185] See A kisebbségi általános iskolai nevelés-oktatás helyzetéről (NEK-411/2011), OBH, Budapest, 2011. október 5., 78. p., <http://www.kisebbsegiombudsman.hu/data/fi les/217986220. pdf> p. 20.
[186] *Id* at 39.
[187] *Id.* at.39, *see also supre* n. 35.
[188] *See also* Lakatos, Szilvia: A romani nyelv helyzete a magyarországi közoktatásban (PhD-dissertation), Pécsi Tudományegyetem „Oktatás és Társadalom" Neveléstudományi Doktori Iskola, Pécs, 2010, <http://nevtud.btk.pte.hu/fi les/tiny_mce/Romologia/Kutatas% 20-%20Fejlesztes/phd-doli-v%C3%A9gleges.rtf

was German. However, in Moravia, ethno-national categories had been institutionalized in 1905, and for the voting rolls, he had claimed he was Czech (partly because at a time of nationalist boycotts, he had been afraid he would lose his largely Czech clientele). The case went all the way to the Administrative Court in Vienna, where Lehar argued:

> [I]t is completely impossible to determine whether my ancestors were of Germanic of Slavic origins. The various professions of nationality made by my ancestors, however, as well as their linguistic competencies, would in any case have been different at different points in time. Feelings alone are decisive in measuring belonging to one or the other nation, and this cannot be determined through the procedures of a court. [189]

Legal tools developed as instruments for minority protection can, in practice, be abused to preference members of the majority community. Minority protection schemes can also be used in a cynically abusive manner, particularly in relation to segregation: either when Roma parents are convinced or forced – without their informed consent – to request

[189] See Tara Zahra, "Reclaiming Children for the Nation: Germanization, National Ascription, and Democracy in the Bohemian Lands, 1900-1945," *Central European University*, Vol. 37, No. 4 (2004), 513.) The court, however, had decided the previous year that a person's declaration of ethno-national identity was not enough to determine in which "nation" a person belonged, thus Lehar was also considered as Czech and the daughter was to be sent to a school at which Czech was the language of instruction. In 1910, the Administrative Court in Vienna actually decided against the decades-long principle of self-declaration of ethno-national identification in a case concerning the national belonging of some of the members of one Moravian town's German school board. The court decided that in dealing with questionable identifications, a person's "[national] attribution has to be determined by tangible evidence, and it is admissible for this purpose to include in the evidence activities in the private, social, and public life (of the person in question) which are credible and serious manifestations of national attribution." See Stourzh, G., *Ethnic Attribution in Late Imperial Austria: Good Intentions, Evil Consequences*, in: R. Robertson – E. Timms (eds.) *The Habsburg Legacy. National Identity in Historical Perspective* [Austrian Studies; 5], Edinburgh 1994, 67-83,", p. 76.) Later that same year, the Administrative Court heard a reclamation case concerning children and their schooling in another Moravian town. Asserting that school boards were "semi-official national organs," the court decided that the "nation" and collective rights were more important than the individual and individual rights, recognizing, "the right of every nation in the province to its members." Authorities would now have to examine a person's allegedly questionable declaration based on "objective, concrete traits." (Zahra, p. 511.) In 1911, before the elections that year, the Habsburg state drafted a survey to decide a person's ethno-national identity in case of contested claims. The questionnaire asked whether the person and his or her children attended a Czech or a German school, of which associations the person was a member, which language the person declared he or she spoke on the previous census, which language the person used with family members and in public, and to which nationality the person believed he or she belonged. (Stourzh, p. 75.) As Tara Zahra shows, surveys of the parents of schoolchildren often contained conflicting answers or the parents clearly did not want to choose an ethno-national identification.(Zahra, pp. 512-513).

specialized minority education for their children[190] or when non-Roma parents claim that they are Roma in order to conceal racial segregation.[191] Another scenario concerns cases where foundations of national minorities are helped to recreate their culture as a way to pressure neighboring states, so that the demand for minority rights is "fueled by supply."[192] Deets is correct in concluding that the Hungarian government has an interest in developing programs that offer incentives to local governments to 'create' minority children.[193]

Hungary has also established a relatively potent form of autonomous minority institution, the "minority self-government" structure (bodies that exist parallel with local municipal administration), and the decision to vote at these elections was left solely to the political culture and conscience of the majority. After repeated reports on permanent abuse of the electoral scheme, in 2005 a "soft" form of registration was implemented, where minority voters need to sign up in a special register, but there are no objective criteria or formal

[190] See Lídia Balogh: "Minority Cultural Rights or an Excuse for Segregation? Roma Minority Education in Hungary." In Daniel Pop (ed.): Education Policy and Equal Education Opportunities. New York: Open Society Foundations, 2012. pp. 207-222 and Balogh, Lídia: "Jog a kultúra őrzésére – vagy ürügy a szegregációra? A roma nemzetiségi oktatás mint kétélű kard Magyarországon". Pro Minoritate 2012/Tavasz pp. 207-223. In its report on minority education the Parliamentary Commissioner for (Ombudsman) for Minority Rights pointed to several instances where the voluntary, informed choice of parents can be seriously questioned, and evidence points to various forms of pressure in regards of requests for minority education. See Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosa: Jelentés a nemzeti és etnikai kisebbségi általános iskolai nevelés-oktatás helyzetéről (NEK-411/2011), OBH, Budapest, 2011. október 5., 78. p.,<http://www.kisebbsegiombudsman.hu/data/fi les/217986220. pdf> pp. 20-22. The ombudsman reaffirmed these findings in his report on 2011 pre-school report in regards of Roma kindergartens. Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosa: Jelentés a nemzeti és etnikai kisebbségi óvodai nevelés helyzetéről (NEK-368/2010), OBH, Budapest, 2011. március, 28. p. <http:// www.kisebbsegiombudsman.hu/data/fi les/205104474.pdf>, p. 42. In one of the minority kindergartens, actually a completely different dialect was taught from what the Roma families spoke (or understood.) Id. p. 43. Also, Roma language is instructed in several kindergartens, where Romungo Roma live, who have been only speaking Hungarian for generations. Id. p. 44.

[191] For a detailed case description see Roma Rights 2003/1-2, pp. 107-108. In the summer of 2003 the Roma Press Center's fact finding revealed that at one point non-Roma parents signed a petition in which they too claimed to be Roma.

[192] See Andreea Carstocea: Ethno-business – the Manipulation of Minority Rights in Romania and Hungary In: Tul'si Bhambry, Clare Griffin, Titus Hjelm, Christopher Nicholson, Olga G. Voronina (eds.) Perpetual motion? Transformation and transition in Central and Eastern Europe & Russia, UCL, School of Slavonic and East European Studies, 2011, p. 19.

[193] Deets, *supr*a n. 187.

requirements for affiliation are set forth. The 2011 law has subsequently preserved this.[194]If they are willing to spend some time navigating the bureaucracy, Hungarian citizens, regardless of their ethnic origin, can vote for minority self-government candidates. Although the phenomenon is not widespread, this also enables members of the majority to abuse the system by taking over the minority self-governments. For example, the non-Roma wife of the mayor of Jászladány – a village notorious for segregating Roma primary school children from non-Roma students – held an elected office in the local Roma minority self-government.

According to a poll by the think tank Századvég in December 2012, 49% of Hungarians had heard about candidates running in minority elections without actually being a member of the given group.[195] Hungarian minority representatives also repeatedly claim that the fact that some candidates ran as "Gypsies" in one election and then later as Germans in the following term (which is permitted by both the law and the ideal of multiple identity-formation) proves the flourishing of local ethno-business.[196] Similarly, both the President of the National Romanian Minority Self-Government[197] in Hungary and the (Romanian) Secretary for Romanians Living Outside Romania found it worrisome that the 2002 local elections brought an increasing number of candidates for Romanian minority self-governments, while the number of those identifying themselves as Romanian in the national census is decreasing.[198] In their view, the answer lies in the fact that "Gypsies" and

[194] Act CLXXIX of 2011 on the Rights of Nationalities
[195] http://www.szazadveg.hu/files/hirek/nemzetiseg_sajto.pdf
[196] See the minority-ombudsman's annual parliamentary reports or an interview with Antal Heizler, President of the Office for National and Ethnic Minorities, Népszabadság (the leading Hungarian daily), 2002.07.24.
[197] The President did not predict that more then 7 out of the 17 local self-governments running in the 2002 elections in Budapest (and some 30 out of the 48 registered nationally) would be "authentic Romanian." Out of the 13 local Romanian minority self-governments operating between 1998 and 2002, he estimated that only three have "real Romanian blood" running in their veins. See the summary of an interview with Kreszta Trajan, Népszabadság, 2002.08.21.
[198] See the statement of Doru Vasile Ionescu in Népszabadság, 2002.08.15. fix cite

Hungarian immigrants who moved from Romania are running as Romanians.[199] According to political scientist Andreea Carstocea, the minority most affected by the phenomenon was the Romanian minority in Hungary, where approximately forty percent of the Romanian self-governments were said to be headed by non-Romanians. [200]

In order to demonstrate the fallacies of the legal framework, some Roma politicians publicly decided to run under different labels (in most of the reported 17 cases, they ran as Slovakian). There are also several municipalities where (according to the national census) nobody identified herself as a member of any minority group, yet numerous minority candidates were registered.[201] Following the 2010 elections, several new members of both the Romanian and Ukrainian minority self-governments were accused of not being actual members of the minority community by other members of the newly elected self government. A faction of the National Ukrainian Self-government failed to stand up during the Ukrainian national anthem, and claiming that they are Hungarian, requested that no Ukrainian be spoken during official sessions, because they did not understand it.[202] Finally, in 2010, a Hungarian appellate court finally recognized the existence of ethno-business in minority self-government elections.[203] The defendant, the editor-in-chief of a minority newspaper, was brought up on libel charges for calling newly elected members of the Romanian minority self-government "ethno-business doers and no members of the Romanian minority community in Hungary."[204] The court acquitted him.[205]

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[199] In 2005 the law was amended, introducing a self-assessment based registration requirement for the elections, but, according to analysts and the minority rights ombudsman, no significant changes followed in electoral behaviour and results. See his report: http://www.kisebbsegiombudsman.hu/data/files/187663711.pdf

[200] Carstocea, p. 20. Fix cite

[201] See Népszabadság, 2002.08.15.

[202] *See, e.g, http*://index.hu/belfold/2011/02/05/megalakult_a_szerb_es_ukran_kisebbsegi_onkormanyzat/.; http://nol.hu/belfold/kakukktojasok__balhe_a_roman_kisebbsegnel

[203] http://www.beol.hu/bekes/kozelet/nem-ragalmazas-az-etnobiznisz-letezik-335133

[204] For purposes of this discussion, ethno-corruption and ethno-business can be understood as synonymous.

[205] http://www.emasa.hu/print.php?id=6880

These loopholes in the legal regime sometimes result in complete absurdity. In order to express their admiration of German football, for example, a small village's entire football-team registered as German minority-candidates for the election.[206] In 2010 the mayor of a marginalized village at the edge of bankruptcy, unable to finance its public school, requested all 13 students to declare themselves Roma and request minority education. [207] As previously discussed, this qualified the school for extra funds. No Roma officially lived in the village.[208]

Ethno-corruption is also prevalent in many other facets of collective rights. In 2010, the parliamentary commissioner for minority rights (a specialized ombudsman) published a lengthy report showing how members of the majority benefited from a government program designed to employ members of the Roma minority community.[209] As Carstocea argues, based on a 1999 Helsinki Committee report, the phenomenon is a direct consequence of the principle of free choice on which the provisions of the 1993 Minority Act are based.[210]

Similar cases can be cited from several jurisdictions.[211] Carstocea reports that a comparable phenomenon to those in the Hungarian case have occurred in Romania in the past few years. For example, Oana Manolescu was:

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[206] Interview with Mr. Heizler, supra n. 201.

[207] Jozsef Nagy: Angyalok kertje, Népszabadság, 2010 July 7. http://nol.hu/lap/gazdasag/20100707-angyalok_kertje

[208] Id.

[209] http://kisebbsegiombudsman.hu/hir-526-rovid-osszegzes-nemzeti-es-etnikai.html

[210] Carstocea, p. 19. Also see: Bogdan Aurescu: The June 2012 opinion of the Venice Commission of the Council of Europe on the act on the rights of nationalities of Hungary, Lex et Scientia Vol. 19. Issue 2. (2012), p. 173.

[211] The partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyev Sejdic and Finci v. Bosnia and Herzegovina (application nos. 27996/06 and 34836/06) case of the European Court of Human Rights holds "Power-sharing arrangements at the State level, particularly those concerning the structure of the House of Peoples and the State Presidency, provide that only those who declare affiliation with one of the three main ethnic groups are entitled to hold a position in these two State organs. It must be added that, in the context of Bosnia and Herzegovina, ethnic affiliation is not to be taken as a legal category, since it depends exclusively on one's self-classification, which represents stricto sensu a subjective criterion. It actually means that everyone has a right to declare (or not) his or her affiliation with one ethnic group. It is not obligatory to do so. There is neither a legal obligation to declare one's ethnic affiliation, nor objective parameters for establishing such affiliation. Affiliation becomes an important issue only if an individual wishes to become involved in politics. A declaration of ethnic affiliation is thus not an objective and legal category, but a subjective and political one."

> [E]lected to Parliament as deputy representing the Albanian minority in the 2000 elections, who, it was later claimed, was an ethnic Romanian with no link to the Albanian community. Another case is that of Gheorghe Firczak, whom we find in 1996 as an unsuccessful candidate on the list of the Free-Democrat Hungarian Party of Romania. After a short period in the ranks of a Romanian mainstream party (the Social Democrat Party) he founded the Cultural Union of Ruthenians in Romania whose interests he has represented in Parliament since 2004…Maybe the most contested and reported case is that of the MP representing the Macedonian minority. A former leader of the coal miners syndicate, he set up the Association of Slav-Macedonians several months before the 2000 elections. Despite the fact that he had admitted he had no links whatsoever with the Macedonian language or culture, he managed to secure a place in Parliament. [212]

As the above cases demonstrate, the institutionalized cynicism concerning preferential treatment for minorities may have far-reaching consequences. Besides obstructing and discrediting minority rights, there is also a potential for electoral gerrymandering.

Even where ethno-racial classifications are legally defined, they are open to extensive judicial interpretation, such as in the United States (for a detailed case study see above). In 1984, in a Stockton, California city council recall election, Mark Stebbins, a light brown haired, white skinned, blue-eyed candidate publicly identified himself as "black" and ran as a black candidate.[213] Media sources mention blond, blue-eyed 5-year-old children being registered to prestigious kindergartens (guided by affirmative quotas) under "non-white" application schemes. [214] In 1988, two Irish-American firemen were dismissed from the Boston Fire Department after finding out that they had been hired as black applicants.[215] In November 1990 the San Francisco Civil Service Commission ruled that one firefighter was an Italian-American masquerading as a Mexican-American and thus, ineligible for an affirmative

[212] Carstocea, p. 20.
[213] Gotanda, op. cit., 29.
[214] See Ronald Rotunda, Modern Constitutional Law, Cases and Notes, American Casebook Series, West Publishing Co., 1993, p. 544.
[215] Id.

action program.[216] Some San Francisco Hispanic firefighters have now proposed the creation of a 12-member panel of Hispanic firefighters to rule on ethnicity. They also argued that people of Spanish decent should be disqualified as Hispanics for purposes of affirmative action.[217]

In his dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*,[218] Justice Kennedy refers to the Storer Broadcasting case,[219] in which one of the parties benefited from selling a station to the Liberman family, who qualified as Hispanic because of having traced their ancestry to Jews being expelled from the Spanish Kingdom in 1492. Kennedy writes, "[i]f you assume 20 years to a generation, there were over 24 generations from 1492 to the Storer case.[220] That means that Mr. Liberman was as closely related to 16,777,216 ancestors."[221]

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[216] 966 F.2d 503, 59 Fair Empl.Prac.Cas. (BNA) 63, 59 Empl. Prac. Dec. P 41,531 John P. O'SHEA, San Francisco Firefighter; Matthew Plescia; Daniel A. Sullivan; James R. Hentz; Ronald J. Van Pool; Michael C. Papera; Patrick M. Skain, Plaintiffs-Appellants, v. CITY OF SAN FRANCISCO; San Francisco Fire Department; San Francisco Civil Service Commission; Art Agnos, Mayor of the City and County of SanFrancisco, Defendants-Appellees, and San Francisco Black Firefighters Association; Chinese for Affirmative Action, Defendants-Intervenors. No. 91-15120.
United States Court of Appeals, Ninth Circuit. Argued and Submitted March 13, 1992. Decided June 8, 1992. Also see Tseming Yang: Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society, Santa Clara Law Digital Commons Faculty Publications Faculty Scholarship, 2006, file:///C:/Users/6710s/Documents/edits/Choice%20and%20Fraud%20in%20Racial%20Identification-%20The%20Dilemma%20of%20Policin.pdf

[217] Aniel Seligman -- Patty de Llosa: Fortune, January 14, 1991, http://money.cnn.com/magazines/fortune/fortune_archive/1991/01/14/74547/

[218] 497 US 547, (1990)

[219] "The Court fails to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require. The Commission, for example, has found it necessary to trace an applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy. See Storer Broadcasting Co. (87 F.C.C.2d 190 (1981). I agree that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." See footnote 1 in the Metro opinion. U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[220] "The Court fails to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require. The Commission, for example, has found it necessary to trace an applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy. See Storer Broadcasting Co. (87 F.C.C.2d 190 (1981). I agree that "the very

This argument, intended to be a surreal and unrealistic thought experiment, actually became reality. In 2011, an ultra-orthodox rabbinical court in Israel issued a ruling that recognized the chuetas, descendants from the insular island of Majorca, as Jews. Doreen Carvajal writes

> The island, isolated until a tourist boom that began in the late 1960s, is a sociological preserve for descendants of Jews who formed an insular community of Catholic converts that intermarried through the centuries because of religious persecution and discrimination that barred them from holding certain positions in the Roman Catholic Church through the 20th century. Most carry the names of 15 families with ancestors who were tried and executed during the 17th century for practicing Judaism.[222]

A few months later, in November 2012, more than half a millennia after Spain expelled hundreds of thousands of Jews, the country's government decided to provide a Spanish passport and citizenship to the Sephardic Jews, the descendants of Spain's original Jewish community.[223] A few months later, Portugal followed suit, passing legislation facilitating the naturalization of descendants of Jews who fled due to religious persecution in the 16th century. Citizenship is dependent on belonging to a Sephardic community of Portuguese origin with ties to Portugal, and applicants must be able to show "Sephardic names."[224] The similarities are outnumbered by differences between the Hungarian and American cases. Unlike in Hungary, in the United States procedures and substantive legal measures are available to overrule misusing ethnic identification as a source for preferential treatment. As the inconsistencies of the Hungarian case show, in order to design a theoretically coherent and

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attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." See footnote 1 in the Metro opinion. U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[221] Rotunda, op. cit. p. 544.

[222] See Doreen Carvajal: Majorcan Descendants of Spanish Jews Who Converted Are Recognized as Jews, The New York Times, July 10, 2011.

[223] See Drishya Nair: Spain Invites Descendants of Sephardic Jews Persecuted by Inquisition to Return Home, http://www.ibtimes.co.uk/articles/443399/20130307/sephardic-jews-spanish-citizenship-invited-descendants.htm

[224] Cnaan Liphshiz: Descendants of Jews who fled persecution may claim Portuguese citizenship, The Times of Israel, Jewish Telegraphic Agency April 13, 2013, also see http://eudo-citizenship.eu/news/citizenship-news/844-portugal-follows-spain-extending-citizenship-to-sephardic-jews

practically sustainable minority rights regime, some form of classifications and qualifications need to be included in the legal system.

IV. CONCLUSION

In order to solve the dilemma of choosing or ascribing ethno-national identity, two further, case-specific underlying conceptual questions will need to addressed: (i) What concept of social justice and equality are we endorsing in regard to the given underprivileged or "minority" community, and (ii) How do we define community membership from the conceptual and methodological points of view in light of the first question.

Regarding the first question, as McCrudden points out, there are at least four different meanings of equality, and what may be suitable in one context, may not be in another.[225] What he calls the "individual justice model", focuses on merit, efficiency and achievement and aims to *reduce discrimination*. Second, the "group justice model" concentrates on outcomes and the improvement of the relative positions of particular groups, with *redistribution* and economic empowerment at its core. Equality as the *recognition* of diverse identities is yet another dimension, since the failure to accord diversity is a form of oppression and inequality itself; and finally, the fourth conception of equality includes social dialogue and *representation*, the meaningful articulation of group priorities and perspectives.[226] Each of these conceptions of equality also has a different concept at its core corresponding, respectively to: direct discrimination; indirect discrimination, group-level marginalization and oppression; cultural and linguistic rights; and participation in political and public policy decisions is in the center. Only once the adequate, relevant, practical, ethical, or legal concept

[225] McCrudden, Christopher (2005) 'Thinking about the Discrimination Directives', European Anti-Discrimination Law Review 1: 17–23, p. 18.
[226] Id.

of equality has been decided, can we turn to choosing among models for defining communities and membership.

In regards to the second question, ethno-national identity can be defined in several ways: through (i) self-identification; (ii) by other members or elected, appointed representatives of the group (leaving aside legitimacy-, or ontological questions regarding the authenticity or genuineness of these actors); (iii) classification by outsiders, through the perception of the majority; or (iv) by outsiders but using "objective " criteria, such as names, residence, etc.[227]

The conceptual, theoretical questions discussed above are actually triggered by the needs and imperfections of law and policy makers. We may, nevertheless, need to accept that no overarching theoretical framework, or one-size-fits-all policy-model can be provided. Rather, a case-by-case analysis is called for, tailored for the specific areas and problems in the given society. Sometimes, even a combination of the social equality models and the

[227] In Great Britain ethnic data is collected almost exclusively as self-identification, although identification by a third party is also permissible in certain cases. Self-identification is also used in Canada, in censuses and also as part of the monitoring equality at the labor market (for employers of more than a hundred people and federal contractors). In the USA, the self-identification method is accompanied by visual observation by a third party (especially by employers, schools and police departments as part of equal opportunities programs; thus, identification is often verified by a supervisor, employer or teacher). In the Netherlands, the gathering of ethnic data is based on indirect criteria, such as place of birth. Visual observation by a third party was also used in Hungary, for example in the survey of Hungarian households carried out by the National Statistics Office in 1992-1994. " Ethnic data about respondents were collected by inquirers, while there. was a choice of three options: a) the subject is definitely a Romany, b) the subject is definitely not a Romany, and c) it is unclear if the subject is a Romany or not. …In Slovakia ethnic data have been collected as part of a survey into the ethnic make-up of pupils in school and pre-school facilities, while the identification of Romany pupils was entrusted to the teachers – this was therefore identification by a third party on the basis of visual observation." See the survey submitted by Public Defender of Rights Pavel Varvařovský, on the Ethnic Composition of Pupils of Former Special Schools for the Strasbourg court in 2012. Also see Ringelheim, J. 2006. Processing data on racial or ethnic origin for antidiscriminatory policies: How to reconcile the promotion of equality with the right to privacy? Center for human rights and global justice working paper nr. 13. Available at: http://www.chrgj.org/publications/docs/wp/JMWP%2008-06%20Ringelheim.pdf According to a survey on how Roma can be defined in Hungary, 90,9% held that dark skin color does not make one Roma, likewise, 80 % believed that being married to or living in partnership with a Roma doe not constitute Romaness. Rather, 32,6% held that Roma languages, 65,6% believed that Roma traditions, 89 % held that Roma parents, 65 % held that Roma children make on a Roma. Overall, 77,6 % was on a view that it depends on self-identification. See Romák társadalmi helyzetével és médiában való megjelenésével kapcsolatos lakossági felmérés, 2011, http://static.saxon.hu/websys/datafiles/N/24/24207_keja_lakossagifelmeres.pdf

corresponding definitions and methodology is needed. It is always advisable, for example, to take into consideration what concept of equality and social justice the representatives of the given group would favor – to follow McCrudden's distinction,[228] to make policies not only on the behalf of each given group, but also on their own behalf..[229]

For an instructive case, consider the scholarship determination policies of the Roma Education Fund, created in the framework of the Decade of Roma Inclusion in 2005. Its mission and ultimate goal is to close the gap in educational outcomes between Roma and non-Roma. In order to achieve this goal, the organization, funded by the World Bank, the Open Society Institute, and the C. S. Mott Foundation, amongst others, supports policies and programs, which ensure quality education and integration for Roma students.[230] The Roma Memorial University Scholarship Program applications are screened against eligibility criteria. Applicants need to both declare themselves as Roma and declare to be willing to appear publicly as Roma. Furthermore, as a second, "soft" guarantee for objective "Romaness" they need to submit at least one detailed and informative Reference Letter, describing the academic performance and/or extra-curricular, including Roma-related

[228] Id. p. 19.

[229] For example, liberal ethnic Hungarians living in the neighbouring states never endorsed Hungarian policies extending the right to vote for non-resident dual citizens (See for example a survey conducted by thnik-tanks Political Capital and Kvantum Research: http://www.karpataljalap.net/2012/01/13/kozvelemeny-kutatas-az-erdelyi-magyarok-koreben) and Hungarian Roma leaders repeateddly call for a redistributution, rather than recognition-oriented minority policy. *"The MSG system in Hungary is not specific to the Roma community and includes 12 additional minority groups. ... While other minorities are primarily concerned with protection of cultural and linguistic autonomy, the Roma population faces an almost opposite challenge, needing more integration to combat segregated education, discrimination, unemployment, and problems with housing and healthcare"*, The Hungarian Minority Self-Government System as a Means of Increasing Romani Political Participation, National Democratic Institute Assessment Report, Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), September/October 2006, p. 5. Also see Molnár, Emilia and Kai A. Schaft: Preserving "Cultural Authonomy" or Confronting Social Crisis? The Activities and Aims of Roma Local Minority Self-governments 2000-2001, Review of Sociology of the Hungarian Sociological Association, Volume 9, Number 1, 28 May 2003 ,pp. 27-42 (15): *"Based on surveys filled by presidents of Roma minority self-governments and on a series of interviews, we conclude that in contrast to the spirit of the Minority Act, Roma self-governments see as their main objective the improvement of social conditions in their community rather than the preservation of minority culture and strengthening of minority identity. The ambitions of local Roma leaders are influenced primarily by the marginalization of their community, while the protection of Roma identity remains secondary."*

[230] See http://www.romaeducationfund.hu/ref-one-page

activities of the applicant, such as work with a Roma NGO or political organization. Also, as another tool for deterring and screening potential non-Roma applicants, all new applicants are invited to participate in the Program's Orientation Session and are required to undergo a personal interview. The failure to attend the interviews leads to exclusion from the selection process. It is not entirely clear what equality conception is behind the otherwise highly successful and exemplary project, which provides scholarships to promising Roma students. The general mission statement suggests a redistribution-focus, yet eligibility criteria for the scholarships[231] requires the applicants to be openly declared self-identified Roma, which hints at an identity-based approach (and an indirect preference for Roma activism over colorblind academic performance seems to be implied), while the selection-criteria is also built on competitive grade point average and is also merit-based.[232]

These decisions are hardly easy, and are not solely political, in the sense that legislators or stakeholders simply need to weigh their options. McCrudden[233] warns about the dangers of *false consistencies*, and emphasized the need for a complex approach encompassing several possible conceptions of equality, bringing the example of anti-discrimination policies targeting ageism, which, after all, mostly end up favoring middle-age white men. To return to Hungarian examples, when the legislator deploys a minority concept and an undifferentiated policy framework to be applied for (all) minorities, it will surely not be able to meet the needs and demands of all parties concerned. For example, one scheme can hardly satisfy the German community, where cultural rights are the central (and more or less the only) claims, and the Roma, where protection from discrimination and economic empowerment are the crucial issues. Of course, these decisions are never easy and,

[231] See http://www.romaeducationfund.hu/program-introduction#eligibility_criteria_for_applicants
[232] See http://www.romaeducationfund.hu/program-introduction#selection_criteria
[233] McCrudden, *supra* n. 25.

sometimes, a combination of equality conception, policy, and methodology models is simply not possible, as one would conflict with the other.

When it comes to choosing legal or policy means to identify community membership, solutions can and should combine the above-mentioned options: (i) for hate crimes and discrimination, the perception of the majority and the perpetrators should be taken into consideration; (ii) in political representation, the perception of the minority community should matter; and (iii) in preferential treatment (remedial measures and affirmative action), self-identification along with community identification or endorsement should be key. Policy makers may even find that ethno-corruption is a necessary evil. In fact, building on both ethical and political considerations, "explicit but not exclusive targeting" is currently a dominant approach in the context of the European Union's Roma inclusion policies:

> This approach implies focusing on Roma people as a target group without excluding others who live under similar socio-economic conditions. Policies and projects should be geared towards 'vulnerable groups', 'groups at the margins of the labour market', 'disadvantaged groups', or 'groups living in deprived areas', etc. with a clear mention that these groups include the Roma. This approach is particularly relevant for policies or projects taking place in areas populated by the Roma together with other ethnic minorities or marginalized members of society.[234]

This suggests that, moving forward, it may be impossible to avoid dealing with issues of ethno-corruption.

V. Concluding remarks

In this essay I have argued that the socio-political climate and realities will play a pivotal role in which minorities are recognized and policies are framed. It is a prevailing fact that there are always going to be political arguments that emphasize the social and political costs of policies. This may be the reason for the fact that in some societies aboriginal people's

[234] Vademecum.the 10 Common Basic Principles on Roma Inclusion, http://www.coe.int/t/dg4/youth/Source/Resources/Documents/2011_10_Common_Basic_Principles_Roma_Inclusion.pdf

claims for land rights and traditional life (mostly in areas where majority industrial societies have no interest in), or indigenous national minorities' claims for cultural or territorial autonomy may have a more positive reception than relatively newly arrived ethno-religious immigrant group's demands that may seem oddly egregious or abusive.

I have also argued that, when following a legal approach and using a legal language talking about defining membership in minority communities or establishing definitions for groups, it is the legal (and political) consequence of these definitions that matters. When it comes to taxpayer funded preferential treatment, the goals (why the given community is chosen to be targeted) and means (what procedures are adequate to reach these goals) need to be scrutinized. If, on the other hand, the aim is to set up a well-functioning anti-discrimination framework, the free choice of identity and its data protection guarantees are simply irreconcilable with this goal. No wonder that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination uses the national, ethnic, and racial concepts as one.[235] This is why "working definitions for minorities" may build on "cultural closeness" in naturalization legislation, or the perception of the perpetrator in hate crime policies.

In sum, we need to bear in mind Kymlicka calling the coherence between the target groups and the content of the policies a necessity.[236] If we want to establish morally binding and theoretically solid arguments for accommodating vastly differing claims by minority

[235] "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." International Convention on the Elimination of All Forms of Racial Discrimination Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX)of 21 December 1965

[236] Kymlicka, Will: The Shifting International Context: From Post-war Universal Human Rights to post-Cold War Minority Rights: In. Multicultural Odysseys, Navigating the New International Politics of Diversity, Oxford, 2007, pp. 27-55.

groups, and argue for universal human rights standards, we need to compartmentalize these scenarios. Otherwise, we will be lost in the cacophony of claims and conceptions.