

Studies in International Minority and Group Rights

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The Interrelation between the Right to Identity of Minorities and Their Socio-Economic Participation

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between the different communities through education. The European Court of Human Rights looks with increasing suspicion at states' practices which result in fact in isolating minority pupils from other children in the education system. Yet, simply guaranteeing equal access to existing institutions may not be enough to meet the requirements of minority educational rights: arguably, the instruction provided in mainstream establishments must itself be transformed in order to address minorities' needs and aspirations. Two crucial changes are increasingly called for by international human rights bodies: on the one hand, the development of multicultural and intercultural forms of education in order to allow the minority to be taught, and obtain recognition of, its own culture within common schools; on the other, the introduction of special measures in order to compensate the social disadvantage experienced by certain minorities and achieve effective equality.

OVERRULING MURPHY'S LAW ON THE FREE CHOICE OF IDENTITY
AND THE RACIAL-ETHNIC-NATIONAL TERMINOLOGY-TRIAD: NOTES
ON HOW THE LEGAL AND POLITICAL CONCEPTUALIZATION
OF MINORITY COMMUNITIES AND MEMBERSHIP BOUNDARIES
IS INDUCED BY THE GROUPS' CLAIMS

András L. Pap

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 – armoured by powerful data protection guarantees – a number of international human rights commitments are interpreted in a way which suggest that they recognize the free choice of identity in both the positive and the negative sense, in the real world there are no definitional or identification problems for those who engage in discriminatory behaviour. When it comes to the ill-treatment of members of various minority groups, no difficulties in definitions arise for the discriminating party. In fact, sometimes conceptual ambiguities may only even worsen protections provided for the victimized group.

This chapter investigates the constitutional dilemma that characterizes all minority protection mechanisms, be they remedial in nature, recognizing collective ethnocultural claims, preferential treatment, or protections offered from racially motivated violence or discrimination: they need to institutionalize some kind of a definition for the targeted groups, as well as membership requirements within the community despite concerns over data protection or historically embedded moral misgivings. The failure to do so seriously impedes the prospects for efficient legal protection, as shown by the widespread practice of "ethnic cheating" or "ethno-corruption" and the reluctance to apply antidiscrimination and hate crime laws due to data protection misgivings in Eastern Europe. Also, people (the legislator, the majority, the taxpayers, and the international community) have an arguable right to properly identify the beneficiaries of the affirmative action and minority rights regimes, if not for other reasons, then due to the budgetary burdens of these policies and the responsibility for a sustainable and transparent policy-making and enforcement.

The issue highlights the complexity of minority identification, which is manifest 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 will 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 in the latter.

In what follows, I will first unfold the Murphy's paradox on 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. I will argue that the legally undefined (thus, practically unrestrained) right to minority identification may in practice actually 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, the subsidiary guarantee for free choice of identity in fact may become an obstacle for rights protection and may prevent authorities from prosecuting perpetrators who base their action on perceived ethno-racial identity. I will claim that external perception of ethno-national identity in certain situations consequently deems the right to choose identity illusory.

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 excluding 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 (minority) communities, the very right necessarily includes the freedom to opt in somewhere. I will argue that this is hardly something international law would set forth.

Continuing the line of substantial content-focused inquiry, I will turn to analyzing the habitually used definitions and conceptualizations for minority groups and membership criteria. My aim is to motivate two claims.

First, concerning minority groups, the traditional racial-ethnic-national minority terminology triad is unhelpful and I call for a more for complex, functional set of definitions, which reflect on the socio-political realities. I will claim that group-recognition is always politicized, and the form and substance of recognizing certain group's legal and political aspirations will depend on the nature of their claims and its compatibility with the majority culture, for example the length of their historic coexistence or the basis for group-formation. 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 – minority rights may be dignity-based identity-claims; equality-based (synchronic or diachronic) justice claims, or even reciprocate diaspora claims¹ –will significantly shape their perception and reception.

Even though I will call for a complex set of criteria for distinguishing minority groups, including for example dignity-based identity-claims, equality-based—synchronic or diachronic—justice claims, reciprocate Diaspora claims, I will reiterate the binary anti-discriminatory and preferential treatment-seeking logic within these group-forming claims.

Second, concerning the definition of membership criteria for minority groups, I will, again, 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 fact that classifications and terminology have serious political and legal consequences. For example, the American Supreme Court will always use strict constitutional scrutiny if "racial" classifications are involved in the case (which in most cases will lead to striking down the legislative act in question),² but will often settle for a less rigorous standard, the so called

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 neighboring states). See for example András L. Pap *Minority Rights and Diaspora Claims: Collision, Interdependence and Loss of Orientation*. In: Osamu Idea et al. (ed.) *Beyond Sovereignty: From Status Law to Transnational Citizenship?*, Slavic Eurasian Studies No. 9. Sapporo, 2006, Slavic Research Center, Hokkaido University, pp. 243–254.

² Strict scrutiny is applied if either a "fundamental" constitutional right is infringed, or when the government action involves the use of a "suspect classification". To pass strict scrutiny, the law or policy must (i) be justified by a compelling governmental interest, (ii) it must be narrowly tailored to achieve that goal or interest, and (iii) it must be the least restrictive means for achieving that interest. It is thus commonly held that strict scrutiny is "strict in theory, but fatal in fact," since governmental restrictions on constitutional rights that undergo strict scrutiny are mostly found invalid.

intermediate scrutiny for other, say "ethnic" groups or classifications based on "national origin". Also, "national minorities" will enjoy international protections not afforded for other ethno-culturally defined groups like immigrants. Using examples and case studies from various jurisdictions, this chapter will argue that instead of an empty typology, the morphology 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.

1. THE PARADOX OF FREE CHOICE OF IDENTITY

The free choice of (ethno-national) identity is rarely declared in an explicit form, yet it is a core principle of international minority protection law. At the level of the first semantic layer, 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 applications of legal, political, and most of all fiscal nature, the free choice of identity means more than a reversed declaration of a negation, a prohibition articulated for the state not to intervene into the citizen's life in these matters. A closer scrutiny shows that the free choice of identity has two dimensions for state responsibility: a positive and a negative one.

(i) 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. Thus, 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, or any other group) 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 Minorities³ 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

³ H(1995)010, Strasbourg, February 1995.

connected to that choice."⁴ 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. Article 8 of the European Data Protection Directive⁵ 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.⁶

⁴ Under the United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135, 92nd plenary meeting, 18 December 1992.) Article 3. 2. "No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration." According to Article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Adopted by General Assembly resolution 47/135 of 18 December 1992) "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."

⁵ 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.

⁶ 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. 3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy. 4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of

(ii) The positive aspect of free choice of identity encompasses the individual's right to join a group or community.⁷ In such an explicit form the freedom to choose one's identity is rarely declared in legally binding documents.⁸ The Hungarian minority rights act⁹ is one of the few notable exceptions. Its preamble states that "the right to national and ethnic identity is a universal human right" and this statement is reiterated in Article 3 (2): "The right to national or ethnic identity is a fundamental human right, and is legally due to any individual or community." Article 7 declares that "(1) 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." Under this provision "no one is obliged to make a statement concerning minority affiliation, with the exception of ... an Act or a legal provision concerning its implementation may require the individual's declaration with regard to the exercise of some minority right."

This seems to provide 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:¹⁰ "34. 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

the supervisory authority. 5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority. Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority. 6. Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission. 7. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed."

⁷ 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.

⁸ In the *Lovelace case* (*Lovelace v. Canada*, Communication No. R/6/24/ para. 14) the Committee clarified that if the domestic legislation confines a minority right attached to the membership in a minority community, it should be objectively and reasonably justified. 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, para. 4) 1990. 08.22.).

⁹ Act LXXVII of 1993 on the Rights of National and Ethnic Minorities.

¹⁰ Referring to Article 3 f the FCPNM 3.

Convention. 35. 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. 36. Paragraph 1 further provides that no disadvantage shall arise from the free choice it 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."

Similarly, the June 1990 Copenhagen Concluding Document on the Human Dimension of the CSCE, on which most multilateral and bilateral treaties build states that "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."¹¹ 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."

According to these interpretations, 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 means that actually there is an "objective" definition for the minority community (the nation, the national or ethnic minority) and the state is authorized to either establish these criteria or adopt definitions provided by non-state agents, like self-declared representatives of

¹¹ "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. ... (35) The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities. The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned."

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 or declare affiliation is a different issue, falling more or less within the competence of the legislator. (Although not entirely: The practice of the AC of the FCNM limits arbitrary distinctions and endorses a more and more inclusive approach in this regard.)

In my opinion, however, this interpretation is not supported by the statutory language. If we 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. As devastating the practical consequences as they 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. It is noteworthy that in its Recommendation 1735, in 2006 on the concept of the "nation", the Council of Europe explicitly declared that 'to date there was "no common European legal definition of the concept of 'nation'".¹²

In sum, the principle or right to free choice of identity as a legal right does not seem to be a theoretically coherent and practically sustainable one. The requirement of the active, affirmative involvement of the individual, accompanied with the prohibition of mandatory inclusion in the enjoyment of certain collective rights, along with the prohibition on collecting sensitive data does not create an autonomous, *sui generis* right (for the free choice of identity), lacking the right of choice for opting in to a chosen group.¹³

This unrestrained right to minority identification in both the positive and the negative (that identifying and de-identifying) sense, which, as I argued above, is a necessary and unavoidable condition for a legal right

¹² Para 1.

¹³ As Gábor Kardos points out in this volume, the word "exist" in Article 27 of the Covenant on Civil and Political Rights should definitely be interpreted. (*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.*) In its General Comment 23, the UN Human Rights Committee came to the following conclusion: "Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term 'exist' connotes" (UN Human Rights Committee: The rights of minorities (Art. 27) 08/04/94. General Comment 23) Later the Committee added: "The 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." (Id.).

to exist, however, it 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 in fact may 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 many European states have the same or similar experiences.

(i) *The Murphy-Law of Discrimination*

Hungary is one of the (many) countries in which extensive legal restrictions on the collection of non-anonymous data concerning ethnic, national or religious identity have prompted law enforcement authorities to simply deny that ethnicity is of significance in their actions. The data protection law¹⁴ prohibits the handling of sensitive data, such as ethnic origin, without the concerned person's explicit permission. Unable to distinguish between perceived ethnicity and the expressions of personal declarations regarding ethno-national affiliation, officials habitually claim that the recording of the identity of racial violence victims would run against statutory provisions, even though the Criminal Code acknowledges certain racially motivated crimes,¹⁵ such as "violence against members of a community" (formerly national, ethnic or racial minorities and religious groups) or "incitement against community", all of which presuppose membership in the given (racially or ethno-nationally defined) community. 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, referring to data protection constraints, hardly ever acknowledge the quintessential ethnic component (the racial motivation) of a hate crime.

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 the determination of racially motivated criminal activity. Thus, law enforcement officers, who are the prime

¹⁴ Act No. 63 of 1992.

¹⁵ The Criminal Code includes provisions on: genocide; apartheid; violence against member(s) of a community; incitement against community; ban of using totalitarian symbols; ban of denying genocide or crimes against humanity committed by totalitarian regimes. See Lúdia Balogh: Racist and related hate crimes in Hungary – recent empirical findings, *Acta Iuridica Hungarica*, 52:4, 296–315 (2011).

decision-makers as to the legal classification of a given offense will follow the easier way, and become very reluctant to classify incidents, 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 behaviour.

As mentioned above, the Hungarian Criminal Code criminalizes several types of behavior that may fall under the racially motivated category. While genocide and apartheid obviously never occur in official statistics, the case is also similar with "violence against members of a community."¹⁶ In recent years for example, the following number of instances had been registered:¹⁷ 2 in 2005, 2 in 2006, 3 in 2007, 11 in 2008, 25 in 2009, 19 in 2010. This should by no means imply that racially motivated hate crimes and violence are rare in Hungary, but rather that law enforcement agents, as well as prosecutors and courts are reluctant to recognize racist motivation in violent and non-violent crimes committed against Roma victims and use nuisance instead.¹⁸

In general, as Farkas (2004) points out,¹⁹ 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.

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

¹⁶ "Violence against a member of a community" is defined by Act IV (1978), Article 174/B.

¹⁷ Source: Unified Police and Prosecution Statistical Database.

¹⁸ Even though anti-Roma incidents (with Roma being practically the only visible minority in Hungary, given the lack of large migrant communities) are virtually nonexistent, in a number of recent cases, authorities actually were able to charge and sentence Roma defendants for racially motivated crimes against Hungarians. (Some of them actually being members of the extreme rightist, racist paramilitary organization, the Hungarian Guard). See http://helstnki.hu/dokumentum/General_climate_of_intolerance_in_Hungary_2010107.pdf

¹⁹ Farkas, Lilla (2004). *The Monkey that does not See*, Roma Rights Quarterly, 2004/2.

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".²⁰

(ii) *The Trap of Ethno-Corruption*

If disregarding existing objective, or at least externally defined classifications for group affiliation was an inherently problematic and hypocritical aspect of the free choice of identity as a negative right, another, obvious fallacy concerns remedial measures, affirmative action or minority rights as ethno-cultural claims. Here the lack of requirements for both the group and membership within the group may allow members of the majority to make use of these measures.²¹

²⁰ 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.

²¹ 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

Again, let us see 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. For example, Deets (2002) documents how school officials pressure parents of 'Hungarian' students to declare their children 'German': "according 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."²² Hungary 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.

Thus, in Hungary, citizens, regardless of their ethnic origin, can vote for minority self-government candidates. This enables members of the majority to take advantage of the various remedial measures. For example, the non-Roma wife of the mayor of Jászladány – a village notorious for segregating Roma primary school children from non-Roma – held an elected office in the local Roma minority self-government. Likewise, non-Roma parents can claim that they are Roma in order to conceal racial segregation.²³ Hungarian minority representatives 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.²⁴ Similarly, both the President of the National Romanian Minority Self-Government²⁵ in Hungary and the (Romanian) Secretary for

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."

²² Deets, Stephen (2002). *Reconsidering East European Minority Policy: Liberal Theory and European Norms*, *East European Politics and Society* 16:1.

²³ 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-Roman parents signed a petition in which they too claimed to be Roman.

²⁴ 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.

²⁵ The President did not predict that more than 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"

Romanians Living Outside Romania²⁶ 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. In their view, the answer lies in the fact that "Gypsies" and Hungarian immigrants who moved from Romania are running as Romanians.²⁷

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, Slovakian). Also, there are several municipalities where (according to the national census) nobody identified herself as a member of any minority group, yet numerous minority candidates were registered.²⁸ Following the 2010 elections, several new members of both the Romanian and Ukrainian minority self government 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 do not understand it.²⁹ In a 2010 libel case, acquitting the defendant, the editor-in-chief of a minority newspaper who called newly elected members of the Romanian minority self-government "ethno-business doers and no members of the Romanian minority community in Hungary", a court decision formally admitted the existence of ethno-business in minority self-government elections.³⁰

The examples of 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.³¹ On another occasion, 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

running in their veins. See the summary of an interview with Kreszta Trajan, *Népszabadság*, 2002.08.21.

²⁶ See the statement of Doru Vasile Ionescu in *Népszabadság*, 2002.08.15.

²⁷ 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.kisebbsegombudsman.hu/data/files/187663711.pdf>.

²⁸ See *Népszabadság*, 2002.08.15.

²⁹ See for example http://index.hu/belfold/2011/02/05/megalakult_a_szerb_es_ukrain_kisebbseg_onkormanyzat/, or http://nol.hu/belfold/kakuktkojasok_balhe_a_roman_kisebbsegnel.

³⁰ <http://www.emasa.hu/print.php?id=6880>.

³¹ Interview with Mr. Heizler, id.

Roma and request minority education, which provides extra funds for the school. No Roma live in the village.³² Ethno-corruption is prevalent at many other facets of collective rights. In 2010 the parliamentary commissioner for minority rights (a specialised 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.³³

Similar cases can be cited from several jurisdictions.³⁴ Even where ethno-racial classifications are legally defined and are up to extensive judicial interpretation, such as the US for example (for a detailed case study see below). For example, 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.³⁵ Also, in 1988, two Irish-American firemen were dismissed from the Boston Fire Department after finding out that they had been hired as black applicants.³⁶ "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 action program... 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..."³⁷ In his dissent to (the affirmative action case of) *Metro Broadcasting, Inc. v. Federal*

³² Jozsef Nagy: *Angyalok kertje, Népszabadság*, 2010 July 7. http://nol.hu/lap/gazdasag/20100707-angyalok_kertje.

³³ <http://kisebbssegombudsman.hu/hir-526-rovid-osszegzes-nemzeti-es-etnikai.html>.

³⁴ The partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hattjeve 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."

³⁵ Gotanda, *op. cit.*, 29.

³⁶ See Ronald Rotunda, *Modern Constitutional Law, Cases and Notes*, American Casebook Series, West Publishing Co., 1993, p. 544.

³⁷ *Ibid.*

Communications Commission,³⁸ Justice Kennedy refers to the *Storer Broadcasting* case,³⁹ where the firm 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. "If you assume 20 years to a generation, there were over 24 generations from 1492 to the *Storer* case. That means that Mr. Liberman was as closely related to 16,777,216 ancestors."⁴⁰ Similarly, media coverage's mention for example, blond, blue-eyed 5 year old children being registered to prestigious kindergartens (guided by affirmative quotas) under "non-white" application schemes, and so forth....⁴¹

Of course, the similarities are outnumbered by the differences between the Hungarian and the American cases: in the latter jurisdiction procedures and substantive legal measures are available to overrule misusing ethnic identification as a source for preferential treatment. As argued above: in order to design a theoretically coherent and practically sustainable minority rights regime, some form of classifications and qualifications need to be included in the legal system.

2. IDENTIFYING WITH WHAT? CONCEPTUALIZING MINORITIES

Having started with the conceptualization of the right to choose a *minority* identity, it is now inevitable to turn to the analysis of what kind of minority would be the object of this choice. Can we even think about a right to choose a racial minority identity, or does this right pertain only to national minorities? More importantly, what kinds of minorities are there? 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 in 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

³⁸ 497 US 547, (1990).

³⁹ "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).

⁴⁰ Rotunda, *op. cit.* p. 544.

⁴¹ *Ibid.*

characteristics by the very protection and recognition of this minority status: a legal and political status that is given them.

Findings of the previous section allow us to conclude that some identities, personality traits or characteristics that the political class, the legislator deems valuable and worthy of recognition and protection are externally, others are subjectively defined. The question of which groups are worthy of this special recognition and protection will be a political question and always 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. Since religious and linguistic groups are easily identifiable by the very claims they make most of all for participation in social life, my analysis will be limited to groups that are defined by ancestry, physical appearance, that in other words fall under the auspices of the national-ethnic-racial minority triad, which I will try to deconstruct in the following pages. I will provide two sets of analysis: one pertaining to the conceptualization of the minority communities, and the other focusing on defining membership criteria for the group. I will argue that the classic national-ethnic-racial minority typology is unhelpful, and I offer a more complex set of criteria for classifying policies, one which reflects on the aforementioned complexity of group affiliation, and recognizes that the two sets of classifications, that is group formation and group membership, are intertwined.

(i) *What Makes a Minority?*

In 1987 the Secretariat of the UN issued a compilation of proposals for the official definition of minorities.⁴² 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 (including and adding maybe culture), with the occasional additional elements of individual declaration and consciousness of belonging replacing sui generis pre-established communal membership as the basis and source of rights and protective entitlements. "F. Capotorti, the Special Rapporteur of the Sub-Commission of the Commission of Human Rights ... defines the concept of minority as a group as follows: 1. Which is numerically inferior to the rest of the population of a state and in a non-dominant position; 2. whose members .. have ethnic, religious or linguistic characteristic which differ from the majority by virtue of language, ethnic group or

⁴² UN Working Doc. E/CN.4/1987/WG.5/WP.1. For more see, Girasoli, *op. cit.* p. 33.

religion; 3. Which exhibits, even implicitly, a sentiment of solidarity for the purpose of preserving their culture, traditions, religion or language."⁴³

As mentioned above, the concept of a minority involves an inferior position in the given society. It is important to note that there is a difference in the sociological and legal understanding of the word. In the sociological, political, and also, common sense understanding⁴⁴ a minority is a group that does not make up a socially or politically dominant majority of the total population of a given society. Thus, a sociological and political minority is not necessarily a numerical minority—it may include any group that is inferior or subordinate with respect to a dominant group in terms of social status, education, employment, wealth and political power. The term is comfortably used by 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. In this understanding the term minority should not necessarily refer to a numerical status: given the structural disadvantages they face, women are habitually referred to as minorities, despite the fact that there are slightly more women than men in most societies.⁴⁵ Drawing on the parallels of anti-apartheid and anti-(racial)discrimination international norms, in apartheid South-Africa, despite its demographic superiority, the black community could obviously have been included in the general racial minority discourse. 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.⁴⁶

In addition to being in a socially and (or) numerically inferior position there are other group characteristics, which are essential to the minority status. As argued above, the group characteristics that are deemed worthy of special protection and recognition will vary depending on the history,

⁴³ UN Doc. E/CN.4/Sub.2/1977/385 rev. 1, p. 102. See Nicola Girasoli, *National Minorities—Who are they?*, Akadémiai Kiadó, Budapest, 1995:36. Also see *The Legal Protection Accorded to Minority Groups in Europe*, Netherlands Yearbook of International Law, 1992, Vol. 23, pp. 67–104.

⁴⁴ See for example http://en.wikipedia.org/wiki/Minority_group.

⁴⁵ See for example Hacker, Helen Mayer. 1951. Women as a minority group. *Social Forces*, 30, 1951, pp. 60–69. or Eichler, Margrit: *The Double Standard: A Feminist Critique of Feminist Social Science*, New York: St. Martin's Press, 1980, pp. 94–95.

⁴⁶ See Kymlicka arguing against Iris Marion Young and claiming 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 Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995): 131–151.

political climate etc. of the given societies, as well as the history, origins of the groups, and the nature of the claims they make. One commonly believed although obviously 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. Just because a person or a group could change her/his religion (as a marker or even in some cases a constitutive element of national minority identity) does not make it less worthy of protection. Similarly, Laurence Tribe argues that if a medical treatment was developed which could change skin pigmentation, thus allowing blacks to turn white, racial discrimination would nevertheless not become acceptable.⁴⁷ The fundamental question is what are the moral and international or domestic legal standards for recognising or constituting minorities? In other words, which are the personal or group characteristics that constitute 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?

(ii) *Typologies for Minorities*

Usually typologies help understand the internal logic and substance of concepts and institutions. Traditionally,⁴⁸ international law applies a threefold definition, distinguishing between national, ethnic and racial minorities. In all cases, 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 with the following vague descriptions:

- (a) Race is a social construct (in the biological sense the entire humanity constitutes one single race) without a theoretically or politically uniform definition for races as well as membership within the racial groups. Race-based international and domestic legal instruments identify race with physical appearance and, following a perception, external identification based anti-discrimination logic, prohibit discrimination, maltreatment, violence, etc. on racial grounds.
- (b) Ethnicity is an even vaguer concept. First, it is a synonym for race, referring to physical appearance. For example, the Grand Chamber of

⁴⁷ See Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theory*, 89 Yale L.J. 1067, 1073–1074 (1980).

⁴⁸ The racial category was dropped rather early on at UN level, while the OSCE and the CoE focus on national minorities, the UN rather on ethnic, religious and linguistic minorities.

the European Court of Human Rights, ruling against the Czech Republic in the segregation case of *D.H. and Others v. the Czech Republic* in January 2007,⁴⁹ spoke about racial discrimination against the Roma minority, a group habitually referred to as an ethnic minority.⁵⁰ We can thus argue that if we want grasp the substance of these definitions, in the racial and ethnic minority concept there is a common element: the protection from maltreatment (discrimination, hate crimes, hate speech, physical violence). It is the expression of the anti-discrimination principle in the broad sense, and the protected group is defined by the external perception of either biologically determined characteristics or cultural attributes. Ethnic minorities are, however, a Janus-faced group, they may have 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.⁵¹

- (c) 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: autonomy or the toleration of various cultural practices that differ from the majority's, and which often

⁴⁹ Application No. 57328/00.

⁵⁰ 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." *Sejdic and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06, 43. Also, 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. In international law the classic wisdom in this question came from the Permanent Court of International Justice 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).

⁵¹ See for example Hurst Hannum, *International Law*. In: *Encyclopedia of Nationalism*, Academic Press, 2001, pp. 405–419.

require formal exceptions from generally applicable norms and regulations. In this case we are thus dealing with claims for preferential treatment.⁵²

The first stage of international minority rights protection, the League of Nations-era centred around national minorities.⁵³ The universal human rights scheme under the aegis of the United Nations emphasizes the protection of racial minorities, while being ambivalent about national (ethno-cultural) minorities (especially if they are not indigenous) as far as binding international treaties go, and creates a special cluster of rights provided for aboriginal people, clearly distinguishing it as an exception from general rules on self-determination and other sovereignty-like claims.⁵⁴

(iii) *Membership Criteria in Minority Groups*

As argued above, 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 colour, citizenship, place of birth, country of origin, language (mother tongue, language used), name, colour, customs (like diet or clothing), religion, parents' origin, eating habits, etc. Defining membership criteria comes up in a completely different way when preferential treatment or ethno-cultural group rights create a group with its members seeking different kinds of preferences

⁵² 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.

⁵³ 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 than the majority (like the Germans in Bohemia).

⁵⁴ See for example 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.

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 for example in North- and Latin-america, Australia and New Zealand; (b) European models for national minorities; (c), what Kymlicka calls generic minority rights, applicable for all groups,⁵⁵ and (d) Rare, unique and atypical hybrid models for rigid classifications.

(a) *The Indigenous/Aboriginal Model*

In the North-American, Australian and New Zealander 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, or it officially endorses tribal norms. 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 the system of preferences. 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 involving conflicts between internal restrictions and essential constitutional principles.) The Kitok⁵⁶ and Lovelace-cases are well known examples, but there are many others. To turn to India, in the *Arumugam v. S. Rajgopal*⁵⁷ case the issue was whether a member of the Adi Dravida caste and a Hindu converted to Christianity and reconverted to Hinduism could again become a member of the caste. The Supreme Court held that although usually conversion entails exclusion from this set of preferences, as caste is predominantly a feature of Hindu society, if the plaintiff is accepted and recognized by other caste members as a fully reintegrated member, he may be considered so by the Court as well.⁵⁸

⁵⁵ Id.

⁵⁶ *Ivan Kitok v. Sweden*, Communication No. 197/1985, CPR/C/33/D/197/1985 (1988).

⁵⁷ AIR 1976 SC 939.

⁵⁸ 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 than on theoretical or theocratic grounds." Singh, p. 83. A similar membership case was the *N.E. Horo v. Jahanara Jaipal Singh* (AIR 1972 SC 1840) where the issue was raised out of a rejection of the nomination papers of the respondent by the

Another interesting case concerns mixed marriages. 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.⁵⁹

(b) – (c) *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. 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.⁶⁰ The vaguer the requirements, as seen from the admittedly extreme Hungarian example, the risk for misusing the law increases.

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. See Singh p. 832.

⁵⁹ 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*, <http://www.forestpeoples.org/sites/fpp/files/publication/2011/06/cedaw-compilationfinaleng.pdf>.

⁶⁰ Examples can be brought from a number of European states, from Hungary to Lithuania. See for example 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.

It needs to be added that group membership also comes up in the context of drafting affirmative action and ethnicity-based social inclusion policies. These frameworks usually incorporate perception, self-declaration and anonymized data. Also, 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. Furthermore, as mentioned above, in all of these cases privacy concerns are often raised. 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, thus 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 for voluntarily making use of collective rights.⁶¹

The authorization to collect ethnic data, which, is intrinsically connected to the free choice of identity, is 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).⁶² The report underlines the vital importance of collecting anonymous ethnic data⁶³ – something that has been emphasized by the ECRI in a 1996 recommendation.⁶⁴ The study cites the European Commission's report on the implementation of equal opportunity principles,⁶⁵ 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. Neither will the EU's Data Protection Directive 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

⁶¹ As Gábor Kardos points out in this volume, 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.

⁶² "Ethnic" statistics and data protection in the Council of Europe Countries.

⁶³ pp. 3 and 7.

⁶⁴ General Policy Recommendation No. 1, CRI (96) 43 rev.

⁶⁵ 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.

employment directives 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.⁶⁶ Let us also remember that the Preambles to the racial and employment Directives make express mention of data collection for statistical purposes as a permissible tool of fighting discrimination.⁶⁷

(d) *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 out rule 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, I will provide two detailed case studies for this model: the historical model for defining whiteness in the United States and defining Jewry in Israel. In the latter case study the definitional questions concern the majority in Israel, but its inclusion can be justified by two 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.⁶⁸ (ii) Also, as we have seen,

⁶⁶ Simon *ibid.* (2007, pp. 68–69).

⁶⁷ 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."

⁶⁸ 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

states are just as reluctant to provide legal definitions for the titular majority, as often they refrain from providing definitions and affiliation requirements for the minority communities. And lastly, membership criteria for the majority may be essential if free choice of identity was to become an actual, fully-fledged legal right, since it is to this group, where members of minorities presume to have a right to assimilate to, when using their right to opt out from (the no longer) their minority identity.

The reason for the lengthy presentation of these cases lies in the fact that 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, the situational interplay between minorities and the majority. The peculiarity of the cases stems from the fact that outside the narrowly defined aboriginal context, such blunt rulings on specific substantive group membership criteria are rarely provided by judicial or legislative authorities.

(1) *Race and Whiteness in America*

The peculiarity of the American case lies in the fact that due to it being corollary regarding personal status race, was not only seen as a presupposed juridical concept, but was rebutted, shaped and defined by extensive litigation. Unlike in the continent therefore, American jurisprudence has a long history of formulating the legal construction of race.

The cases arouse of the fact that by a 1790 Act of Congress, citizenship was reserved for "white persons" only. Thus, litigating race-based naturalization refusal, the questioning the authorities' classifications of the petitioners as 'not white' was the first notion towards the juridical grasping of the minority-concept. "From the first prerequisite case in 1878 until racial restrictions were removed in 1952,⁶⁹ fifty-two racial prerequisite cases⁷⁰ were reported."⁷¹

Prerequisite-litigation led to a case-to-case development, for example deciding whether applicants from Hawaii, China, Japan, Burma, Mexico,

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.

⁶⁹ 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.

⁷⁰ That is cases on naturalization prerequisites.

⁷¹ See López, Ian F. *White by Law, The Legal construction of Race*, New York University Press, 1996.

Armenia, etc. were "white" or not. The need to define race by the instrument of law, thus 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:⁷² the rule of recognition, that is relying on the visible characteristics of non-white ancestry; and the rule of descent. Judicial practice was nevertheless quite inconsistent.

In 1878, in the first prerequisite case⁷³ the (circuit) court held that Chinese could not be white – as according to the ordinary understanding held throughout the country, in accordance with "the well settled meaning in common popular speech."⁷⁴

A few decades later, in *Ozawa v. US*,⁷⁵ on the other hand, when a light-skinned Japanese claimed for naturalization, the Court held that it is not only the skin-color, but the scientific categorization is also relevant; and found that Japanese are to be classified as members of the "Mongolian" race, thus they cannot be Caucasian. In the same year, however, when Bhagat Singh Thind,⁷⁶ a "high caste Hindu of full Indian blood"⁷⁷ applied for citizenship on the grounds that as a "Caucasian," he was found to qualify as "white person" under federal naturalization laws. Still, the Supreme Court refused to equate "white person" with "Caucasian" as understood by contemporary anthropology. The Court held that "common understanding" would exclude a person, who looked like claimant saying that 'it 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'...⁷⁸

Prior to 1922, thus "two 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.

⁷² See Neil Gotanda: A critique of "our constitution is color-blind", *Stanford Law Review*, November 1991, vol. 44, No. 1, pp. 1–69.

⁷³ *Re Ah Yup*, for more see Appendix II.

⁷⁴ Okizaki, p. 478.

⁷⁵ *Ozawa v. US*, 260 US 178 (1922).

⁷⁶ *US v. Thind*, 261 US 204 (1922).

⁷⁷ Gotanda, *op. cit.*, 29.

⁷⁸ *Ibid.*

Such outcome would have undermined and delegitimated the carefully constructed system of racial hierarchy that dictated social relations.⁷⁹ The common-knowledge test meant nothing else, but a performative whiteness, determined and evaluated by the judges. When setting criteria for "performative whiteness," both the degree of cultural assimilation, and value system adaptation (such as practicing Christianity, for example)⁸⁰ of the applicants, as well as the initial Europeanity of the kin-group was weighed.⁸¹

However, neither of these judicially developed conceptual rules of hypodescent 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.⁸² Later this approach also turned out unsatisfactory, since it was impossible to tell from which (maternal or paternal) line the child received his/her "category." Following this then, the blood-algebraic methods of calculation reigned, at first with "adopting one-fourth, one-sixteenth, and one-thirty-second formulations as bright lines for establishing race."⁸³ However, as more and more biracial children were born, and more of them could claim themselves "white," this led to the formulation of even stricter hypodescent philosophies, and the "one drop rule" (the possession of which will make the person black) was adopted: maintaining the social reality of

⁷⁹ See John Tehranian, *Performing whiteness: Naturalization litigation and the construction of racial identity in America*, *Yale Law Journal*, January, 2000, Vol. 109, No. 4, p. 822.

⁸⁰ See for example, *US v. Cartozian*, where Christianity (and the applicants relation to European aristocracy) was considered a sufficient (from Kurds or Arabs distinguishing) performative whiteness criteria.

⁸¹ 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, exogenous variable in the equation. Instead it is an outcome, a reward dependent on performance and assimilation." *Ibid.* p. 836.

⁸² See Okizaki, *op. cit.*

⁸³ *Ibid.*, p. 473.

white superiority through the fiction of two distinct (definable) races.⁸⁴ Thus the doctrine of seeing race, racial identity as an immutable fact developed.⁸⁵ 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, all but one of the prerequisite cases' applicants were claiming white racial identity.⁸⁶

The relevance of these cases is not purely historical. We see several contemporary litigations along similar lines. In 1987 for example, the US Supreme Court actually had to discuss questions whether or not Arabs

⁸⁴ 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.

⁸⁵ Gotunda quotes Justice Cardozo in *Morrison v. California* (291 US 82 (1933)) and Justice Stewart's dissent in *Fullilove v. Klutznick* (448 US 448 (1980)) holding that "The color of a person's skin and the country of his origin are immutable facts." Also, alternative systems of purely academic classifications, such as the "mulattos", the "named fractions," the "named fractions," (that is, assigning labels according to the fractional composition of ancestry), "majoritarian", and "social continuum" were also developed, without incorporating however, any legally observable principles or guidelines. Race therefore, remained a more or less consistent practice of classification in a socially determined and determinative way. It is interesting to see, that even in the time when a) race was a clear division line in terms of rights and personal status; and b) personal documents contained such data – the legislated legal classification was far from transparent, therefore it was the Court and the administrative practice that needed to evolve the rule of recognition. See Gotunda, *op. cit.* p. 24.

⁸⁶ 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. Thus, after 1952, members of any ethnicity and race could become citizens; "yet the quota system based on national origins, which limited annual immigration from each nationality to two percent of the respective nationality's share of the United States population in 1890, remained intact. It was not until 1965 that Congress finally did away with the quota system—a system that placed heavy restrictions on immigrants from anywhere in the world besides Western Europe. 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 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.

qualify as whites. In *Saint Francis College v. Al-Khazraji*,⁸⁷ an Iraqi-born American professor sued its college for racial discrimination when denying tenure. The college argued that since Arabs are "Caucasians", between whites hardly any racial discrimination can take place. The Court held that persons of Arabian ancestry can indeed be protected from racial discrimination.

A few years later, in *Sandhu v. Lockheed Missiles & Space Co.*,⁸⁸ the Lockheed Missiles Space Company almost succeeded in avoiding an anti-discrimination lawsuit by claiming that the plaintiff's being an Indian male made him technically Caucasian, thus he should not be eligible to sue.^{89, 90}

Another case revealed the ambiguities of the legal status of race in an issue regarding the Jewry.⁹¹ The case rose out of the desecration of the congregation's synagogue, and raised the question of whether Jews constituted a racial group. The two courts below the Supreme Court held that lacking a distinct race or ethnic group, no racial prejudice may be established. The Supreme Court reversed. On the other hand, in *United Jewish Organizations v. Carey*,⁹² in the context of gerrymandering, the Court held

⁸⁷ 481 U.S. 604 (1987).

⁸⁸ 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.

⁸⁹ Note that Indians were considered non-whites, and as a consequence of that denied naturalization (reserved for whites only) in earlier decisions.

⁹⁰ 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]."

⁹¹ *Shaare Tefila Congregation v. Cobb*, 481 US 615 (1987).

⁹² 430 U.S. 144 (1977).

that Hasidic Jews enjoy no constitutional right to separate community recognition for the purposes of redistricting.⁹³

The lesson learnt here is intriguing: strict classifications that may be inclusive in one historic moment may provide precedent for exclusionary measures in another context.

(2) *Jews in Israel*

Israel's curiously hybrid legal system melding together secular and (fundamentalist) religious constitutional elements into an ethnic democracy is one of the only modern states which define its national constituencies, and the majority nation on rigid, ethnic grounds. Turning the state of Israel into the home of Jews by virtue of their Jewishness, and bearing in mind its Jewish demographic edge, Israel is one of the unique exceptions among countries that absorb immigrants in the sense that its endorsement only applies to a specific ethnic group.⁹⁴ As a matter of fact, reflecting on the horrors of the Nazi regime, the 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..."⁹⁵

According to the law on the establishment of the State, 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...". The Law of Return (1950)⁹⁶ grants every Jew, wherever he may be, the right to come to

⁹³ 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 canceling out the voting strength of whites as a racial group can be sustained.

⁹⁴ 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, Berghahn, New York, 2002. p. 85.

⁹⁵ 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, New York, 2002. p. 190.

⁹⁶ 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.

Israel as an *oleh* (a Jew immigrating to Israel) and become an Israeli citizen.⁹⁷ In Israel, official documents,⁹⁸ such as identity cards also contain the holder's affiliation with one of the "ethnic communities" (Jewish, Moslem, Christian or Druze).⁹⁹ Alongside the rights and obligations incumbent on all citizens, the members of the different communities (there is no separation of state and religion in these regards) are subject to those applying to their specific groups (for marriage and divorce, for instance, they appear before their own courts).¹⁰⁰ Under the Law of Return's preferential naturalization conditions, thus only Jews are favoured, since Israeli nationality is automatically accorded to them on request and if the authorities recognize their Jewish status.¹⁰¹ The Israeli public discourse is very aware of how crucial this issue is, especially since

⁹⁷ "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>

⁹⁸ 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*.

⁹⁹ 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.

¹⁰⁰ See for example 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*.

¹⁰¹ Also, they receive special assistance helping to settle in Israel.

another important question lies behind it: the relationship between secular and religious state powers and functions.

The issue was a source of severe political controversies¹⁰² as well as highly debated Supreme Court cases.

The applicant of the first remarkable Supreme Court case on the issue was Oswald Rufeisen, a Polish Jew, who converted to Christianity during World War II, and became a monk named Brother Daniel.¹⁰³ 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. In advance 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 however 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.¹⁰⁴ Consulted by the Court, the Chief Rabbi of Israel confirmed that Brother Daniel must be considered Jewish. Nonetheless the Court refused to accord Jewish nationality to any individual who had been born Jewish but who had voluntarily converted to another religion.

This decision was based not on any legal criterion but (see for the performative aspect of Jewishness) on public opinion, subsequently to

¹⁰² For example, in 1958 the National Religious Party resigned from the government when it was not willing to support 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.

¹⁰³ His life was the basis of Lyudmila Ulitskaya's 2006 novel, *Daniel Stein, Interpreter*.

¹⁰⁴ Holding that "The space reserved for ethnic group under section 4(r) 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.

become 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 acceptance of today."¹⁰⁵ 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 (as High Court of Justice) case¹⁰⁶ on the issue.¹⁰⁷ 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.

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 or personal status, save with the consent of the person to whom the entry relates." For this reason the administrative decision is overruled.

Justice Silberg explained the difference between the present 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." In the present case, however, there was no question of interpreting the term "Jew" according to any

¹⁰⁵ *Ibid.*

¹⁰⁶ *Binyamin Shalit, Petitioner, v. 1. Minister of Interior, 2. Haifa Registration Officer, Respondents* (H.C. 58/58). Judgment given on January 23, 1970.

¹⁰⁷ Law of Return: Background 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.

secular law, since the Population Registry Law does not contain the word "Jew" at all. But it does talk of "ethnic group" and thus 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, effective definition for "Jewish" can be found anywhere else except in the Halacha, the Jewish law, 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. For 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 would weaken the defenses against assimilation set up by the Jewish communities abroad and destroy their communal structure."¹⁰⁸

Another front in this battlefield is the question of conversion-recognition.¹⁰⁹ 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

¹⁰⁸ Ibid. 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.

¹⁰⁹ 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.

immersion in a ritual bath. At the conclusion of the whole process, she received a conversion certificate, upon which when arriving to 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, presented her conversion certificate, but to her surprise was refused registration.¹¹⁰ She was referred to the Rabbinical Court to receive confirmation of her conversion and was in passing informed that she might either be registered as a Christian, or that the registration of her religion will remain blank. She was later also informed 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 registration officer had the power to make additions to the particulars specified in the Population Registry Law.¹¹¹

¹¹⁰ 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.

¹¹¹ 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 rabbinic) 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", Ethiopian 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

(iv) *Conclusion: Recognising Minorities*

As a conclusion to the above, instead of a semantic analysis of the types of minorities, following Kymlicka's approach,¹¹² I offer to use a content-based distinction of the various minority protection mechanisms. The reason for this lies in the fact that even though the antidiscrimination vs. preferential treatment binary seems helpful at first sight, and it can be quite useful in political debates, it is just as simplifying as the empty national-ethnic-racial distinction. The achievement 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 judgement. Thus, the process of recognizing minorities as minorities, as groups worthy of *sui generis* recognition (that other groups do not have) is highly politicized.

status. When Kanluk 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>.

¹¹² "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.

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 Framework Convention for the Protection of National Minorities. For example, at the time of ratification, the German minority in South Jutland were 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 maybe include Far-Oese, Greenlanders and the Roma.

The process of politicization is vividly demonstrated by the American jurisprudence. For example, in 1974, in *Morton v. Mancari*,¹¹³ 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 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." 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, thus giving this hiring preference more justification. The Court said, "The preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." On the same token, in 2000, in *Rice v. Cayetano*,¹¹⁴ overruling two lower court judgments, the Supreme Court held that the state could not restrict eligibility to vote in elections for the Board of Trustees of the Office of Hawaiian Affairs to persons of Native Hawaiian descent, since Hawaiians enjoy no tribal status.¹¹⁵

¹¹³ 417 U.S. 535 (1974).

¹¹⁴ 528 U.S. 495 (2000).

¹¹⁵ For example, the 1993 Hungarian Minority Act defines national and ethnic minorities as groups which have been present in the territory of Hungary for over 100 years and "(§ 1.) constitute a numerical minority within the population of the country, whose members hold Hungarian citizenship and differ from the rest of the population in terms of their own tongue, cultures and traditions, and who prove to be aware of the cohesion, national or ethnic, which is to aim at preserving all these and at articulating and safeguarding the interests of their respective historically developed communities." According to the Act, these minorities are: Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Romanian, Ruthenian, Serb, Slovak, Slovene, and Ukrainian; and in order to register a new minority group, a popular initiative signed by 1000 citizens has to be submitted to the Speaker of the Parliament. Without going into an in-depth analysis of the Hungarian

It can thus be seen that the reception of groups' claims for protection, recognition and institutionalizing these through the inclusion in the privileged club of minorities will depend on how compatible these claims are with the majority culture, how long is the group's common history with the majority, whether there are historical or contemporary political sensitivities involved, etc. Due to several centuries of peaceful coexistence and the generally "non-harmful" nature of the Amish's religion, their claim to depart from generally applicable rules on public schooling, the US Supreme Court allowed for exceptions based on the freedom of religion.¹¹⁶ Bans on visible and politically loaded expressions of Islamic religion such as headscarf on the other hand have been on the other hand repeatedly upheld by various judicial organs including the European Court of Human Rights.¹¹⁷ In Central-Eastern Europe headscarves worn by Roma women trigger no public response, but 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 wearing a safety helmet.) It is safe to presume that the fact that in the UK Sikhs are a "harmless" group, with no apparent or manifest social, cultural or political conflicts with the majority society. Also, on the other hand, less visible and politically sensitive Islamic religious claims pertaining to slaughtering (and requiring exemptions from generally applicable norms on food processing) are usually accommodated. Within these debates whether

statutory model, two controversies—procedural as well as material—need to be pointed out. Both material requirements (100-year presence and 1000 signatures as a special popular initiative) for qualifying as an ethnic or national minority seem problematic. The Act, besides defining the two group constituting requirements, also contains an enumeration of the thirteen minority groups that are recognized by the Act, which means that the 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?

¹¹⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹¹⁷ See for example *Leyla Şahin v. Turkey* (Application no. 44774/98) or *Dahlab v. Switzerland* (Appl. Nr. 42393/98.)

the Sikhs in the UK, or German citizens with Turkish decent or Maghreb immigrants in France are racial, national or ethnic minorities is irrelevant.

The question is what legal instruments can be called for in advocacy and along which lines are policies drafted. Thus, a useful inquiry is not semantic, but one focusing on the morphology of claims and the socio-legal climate. For example based on the claims they make, Kymlicka distinguishes between several ethno-cultural groups in the West:¹¹⁸ (i) national minorities, complete and functioning societies in historic national homelands which are either substate 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; (v) and racial caste groups and Metics.¹¹⁹ Consequently minority rights claims may vary from immigrant multiculturalism, through multination federalism, Metic inclusion, or religion-based exemptions from general laws.

Following this line of thought, I argued 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 (a) dignity-based identity-claims; (b) equality-based (synchronic or diachronic) justice claims, or even (c) reciprocate diaspora claims.

Protective measures for racial, ethnic or national minorities, i.e. minority rights in the broad sense can therefore be targeting a number of different things, such as:¹²⁰ socio-economic equality, de facto freedom of religion, the 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,

¹¹⁸ 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.

¹¹⁹ He admits though that some groups like the Roma in Europe or African Americans are peculiar and atypical.

¹²⁰ For more, see for example 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.

remedial or transitional or justice. In line with this, minority law, the law of balancing obligations and freedoms pertaining to assimilation and dissimilation may therefore take several forms: from affirmative action and social protection measures through 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 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 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. No wonder that in some societies aboriginal people's 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. Thus, when it comes to tax-payer 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, for example, 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, for example, uses the national, ethnic, racial concepts

as one.¹²¹ 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, etc.

I have also made that argument that the free choice of identity is a theoretically deeply problematic concept, if seen as a legal right, because the limits of its exercise are inherently difficult to curb. Again, Article 3 of the FCNM avoids using the term entirely. What it, at best, should mean is that everyone is free to choose between the identities that are objectively available for her: meaning that she may be eligible for a particular treatment when interacting with the state (private matters should not concern the state, unless one applies for preferential treatment.)

In sum, we need to bear in mind Kymlicka (2007) calling the coherence between the target groups and the content of the policies a necessity. Also, if we want to establish morally binding and theoretically solid arguments for accommodating vastly differing claims by minority groups, and argue for universal human rights standards, we need to compartmentalize these scenarios. Otherwise we will be lost in the cacophony of claims.

¹²¹ "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.