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Ethno-racial identity (politics) by law: "Fraud" and "choice"

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Following an introduction to the changes in how ethno-racial identity is conceptualized in the social sciences and humanities by the destabilization of categorical frameworks, the author looks at how law reacts to these discussions and paradigm shifts, and argues that legal and administrative approaches face severe linguistic and conceptual limitations by operating within a "choice" and "fraud" binary. The article then questions if the free choice of identity exists as a principle of international minority protection law, a legal field that arguably represents a global political and ethical consensus. The author makes two claims. First, according to the basic tenet of legal logic, a proper right to free choice of identity allowing people to opt out of racial, ethnic, or national (minority) communities would necessitate the freedom to opt in to the majority or to any chosen group. The second claim, however, is that international law would not actually construct an approach to opting in. Thus, the right to free choice of identity is not an autonomous, *sui generis* right under international law.

Keywords: free choice of identity; assimilation; classification; census; ethnocorruption; multiracial; racial passing; racial migration; immutability; racial fraud; elective race

The context: law versus social sciences, reductive language, and conceptual limitations

Conceptualizing ethnic, racial, or national identity is a central issue in social sciences[1] (Barth 1969; Brubaker 2004; Brubaker and Cooper 2000, 1–47; Brubaker, Loveman, and Stamatov 2004, 31–64; Laitin 1998; Tajfel 1981). Identity politics, political activity, and "theorizing founded in the shared experiences of injustice of members of certain social groups" (Heyes 2016) have been among the influential trends of the second half of the twentieth century.[2] Challenging dominant oppressive characterizations in order to achieve self-determination, rather than organizing solely around belief systems, programmatic manifestos, or party affiliation, identity political formations typically aim to secure the political freedom of a specific marginalized constituency, which asserts or reclaims ways of understanding its distinctiveness (Heyes 2016). As Heyes (2016) puts it, "identity politics starts from analyses of oppression to recommend, variously, the reclaiming, redescription, or transformation of previously stigmatized accounts of group membership." Building on Taylor (1989), the underlying concept is that identity is characterized by an

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emphasis on inner voice and a capacity for authenticity – that is, an ability to find a way of being that is somehow true to oneself. As Heyes (2016, 85), citing Kruks (2001), points out,

> What makes identity politics a significant departure from earlier, pre-identitarian forms of the politics of recognition is its demand for recognition on the basis of the very grounds on which recognition has previously been denied: it is qua women, qua blacks, qua lesbians that groups demand recognition. The demand is not for inclusion within the fold of 'universal humankind' on the basis of shared human attributes; nor is it for respect "in spite of" one's differences. Rather, what is demanded is respect for oneself as different.

The centrality of the "subjectified" approach draws significant criticism. Some radical feminist activists, such as so-called Trans-Exclusionary Radical Feminists, for example, argue that trans women are not actually women and that they thus infiltrate women's spaces. In this line of thinking, "biological determinism is only a fallacy when it is used against them, not when they use it against others."[3] In other words, a world of unfettered subjectivity allowing the right to change one's gender risks obscuring power hierarchies, and thus hijacks traditional political movements that focus on vulnerabilities. They argue that the shift to subjective preferences hijacks the focus from collective and structural social inequalities, and depoliticizes the feminist movement and theory. In analogy, the case of "opening the gates for transracial migration," allowing, say, whites to identify as black, not only relativizes the reality of the social construction of race, but also questions the reality of racism and race-based social oppression.

This essay explores the concept of free choice of ethno-racial identity and legal and administrative approaches to choice in particular. The scope of this analysis is limited to what international law, international documents, treaty bodies, and other international advisory and explanatory instruments say on the question. Although the analysis is primarily legal in nature, this project also implicates social scientists, in that the underlying question pertains to how law reacts to current discussions and paradigm shifts on ethno-racial identity within the humanities and social sciences.

Cases, issues, and approaches in various national jurisdictions may be extremely diverse and reflect vastly differing social, political, and legal environments. International law has been chosen as the subject of this inquiry because it arguably represents a global political and ethical consensus (or in the case of regional bodies or documents a regional consensus, while still broad and international). It should be added that legal texts are more often outcomes of political compromises (rather than consensus), and rarely is there a fully coherent philosophical or conceptual framework behind legislative solutions. Ironically, courts, practitioners, and academics are bound to interpret these texts as doctrinally coherent and work with presupposition that there is a coherent theoretical framework.

The past decades brought a transformation in how the terms of ethno-racial[4] meaning are assigned and conceptualized in social sciences and humanities, and to a certain degree in politics. The shift centers on the destabilization of categorical frameworks, where race as a social classification lost stability, self-evidence, and clarity. This trend is seen in the multiracial movement, the growing body of literature on "racial passing,"[5] and Brubaker's (2016b) recent work on "racial migration," which explores how race and gender are conceptualized as more similar than different in the sense that the juxtaposition of the fluidity and artificiality of gender with the immutability and givenness of race is being questioned.[6] Reflecting on the Rachel Dolezal case,[7] Brubaker uses trans narratives as a "master story," arguing that race and ethnicity may actually be additional forms of identity and social practice that are fluid in the ways that chosen identities are (such as work, marriage, bearing children, religion, or the management or transformation of bodies). "Transracial people" can legitimately move among ethno-racial categories (Brubaker 2016a). The

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color line may be sharp and rigidly policed in theory but is often blurred and porous in practice. Even multiple forms of betweenness or new categories outside existing frameworks can be conceptualized, blending and blurring putative objectivity with affiliative self-fashioning; race, like gender, is "something we do rather something we have" (Brubaker 2016b). As Brubaker points out, even the core questions are multilayered: do race and ethnicity have a fixed meaning susceptible to verification, or are these categories expressive and affiliative through self-discovery and public disclosure? Voluntarists, constructivists, and liminals argue over whether one can change "genuine" racial identity (or even reject the existence or legitimacy of such categorization) or if it is only the social validation of particular public expressions that can be altered. Brubaker (2016a) also emphasizes that illuminative as the race-gender parallel is, racial identity undoubtedly has supra-individual elements such as biogenetic and trans-generational history, genealogical facts of ancestry, social facts of classification systems and categorization practices, and historical facts of enslavement, oppression, and discrimination. Social scientists emphasize the lack of linguistic and conceptual resources, cultural tools, and proper vocabulary for thinking about racial identity in subjectivist-individualist terms, as an inner essence independent of the body and knowable only to the individual. Even the conceptual multiplication of sex and gender is absent from discussions on race or ethnicity (Brubaker 2016a).

Legal and administrative classifications: choice, subjectivity, and ambiguities

In the legal-administrative realm, identity issues surface as matters of "choice" and "fraud." It is ironic that law, especially international law, habitually deals with the concepts of race, ethnicity, and nationality[8] when setting forth standards for the recognition of collective rights, protection from discrimination, or establishing criteria for asylum or labeling actions as genocide, without actually providing definitions for these groups[9] or of membership criteria within these legal constructs. It is hardly surprising that the legal conceptualization of membership choice is also absent in any explicit form. Although defining membership criteria is closely intertwined with conceptualizing the group itself, this project is limited to navigating among these unidentified and shifting concepts. In order to contextualize the overview of what international law has to say about "choice and fraud," I will briefly highlight some of the cases in which these issues come up.

Contemporary national legal systems usually refrain from providing legal or administrative definitions for membership criteria in ethno-racial communities. An important exception is the unique indigenous/aboriginal legal and policy framework, which habitually sets forth rigid and explicit membership requirements for indigenous communities. Here, the state either provides strict administrative definitions by employing some form of objective criteria[10] or by officially endorsing tribal norms. In these cases, the individual's freedom to choose his or her identity comes up only in the context of leaving the group and excluding him- or herself from preferential treatment. International bodies or state authorities limit their involvement in membership issues to rare and complex cases involving peculiar interplays between indigenous/tribal and state law (often involving conflicts between what Kymlicka 1995 calls internal restrictions of minority groups toward their members and essential constitutional principles. Internal restrictions of individual rights are imposed in the name of the integrity of the groups, and mostly concern underprivileged members, women, and children.) The *Kitok*[11] and *Lovelace* cases[12] are well-known examples, but there are several others. In the USA, several cases concerned membership in Native American tribes. In the leading 1978 case *Santa Clara Pueblo vs. Martinez,* the US Supreme Court confirmed "a tribe's right to define its own membership for tribal

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purposes … as central to its existence as an independent political community."[13] Another notable case for an official definition on membership in an ethno-national community, this time concerning the ethno-religious majority, is Israel's Law of Return, constructed to invite all Jews to settle in their national homeland. The Law of Return actually reflects the Nuremberg Laws in providing a definition of Jewishness under the state's immigration policy (Kimmerling 2002; Weiss 2002).

The European model for national minorities habitually refrains from creating strict administrative definitions for membership. In most cases, a formalized self-declaration suffices for eligibility to receive collective rights, with occasional additional objective requirements such as proven ancestry (by some sort of official documents) or proven knowledge of the minority language (for more on this, see, for example, Valentine 2003–2004). Curiously, states are more reluctant to define membership criteria for domestic minority groups than for the titular majority population, a practice often followed in legislation implementing ethnicized concepts for external dual citizenship or status law-like diaspora provisions.[14]

In the USA, critical race theory and the multiracial movement have also prompted the abandonment of objective, usually judicially formulated,[15] systems of racial classifications in favor of racial self-identification. For example, in 2007, the US Equal Employment Opportunity Commission, which requires employers with more than 100 employees to collect and report racial composition, implemented self-identification and abandoned the third-party classification system based on a visual survey and the employers' perceptions. Still, countless doctrinal and practical issues arise. Consider, for example, census debates. In the USA, the multiracial category movement went beyond academic circles into the spheres of political mobilization.[16] Challenging census identity categories is also a recurring theme in post-Yugoslav debates, involving harsh census election campaigns, ethno-national boycotts by ethnic entrepreneurs, and the phenomenon of protest-identifications such as "Jedi," "alien," "Smurf," "Martian," "Klingon," or "in love" (Bieber 2015). Bieber shows that in Kosovo, there has not been a single uncontested census since 1971, and in Bosnia-Herzegovina, no census was held from 1991 to 2013. Loveman (2014, 74) examines the case of Latin America, which not only has a rich history of "fraud" (racial drift) in census reassignment due to bribes offered to parish priests in colonial times, but which has also erased race from the census for decades.

It should be added that even when the protection of certain groups comes up in such egregious situations as genocide, devising definitions for group-membership proves difficult and case law is inconsistent. As Monika Ambrus (2012, 942) points out, a tough discussion concerning the definition of justiciable victims of genocide is relevant not only to legal academia, but also in the international judicial fora. The objective approach calls for the judicial body to examine the objective existence of the racial or religious identity of the victim – that is, whether or not the victim actually belonged to a certain racial or religious group or actually possessed the so-called objective features that identify the members of these groups. In the *Akayesu* case,[17] for instance, the International Criminal Tribunal for Rwanda endorsed this standpoint. The chamber stated that in order to qualify as genocide, acts must have been committed against members of a certain group, specifically because they belonged to this group.[18] In the *Akayesu* case, although the acts in questions constituted serious bodily and mental harm inflicted on the victim, they were committed against a Hutu woman, and hence do not constitute acts of genocide against the Tutsi group.[19] Unlike the objective view, the subjective approach focuses on the identification of victims by the perpetrator. In the *Gacumbtsi* case, for instance, the trial chamber held that

> [m]embership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria … Evidence must also be tendered to show either that the victim belonged to the targeted ethnical, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the said group.[20]

In the *Muhimana* case, which involved a Hutu woman who was mistakenly perceived as Tutsi and was raped, the court finally endorsed the approach that a victim of genocide can be identified by the perception of the perpetrator.[21] In the Naletilić and Martinović case, the International Criminal Tribunal for the former Yugoslavia also confirmed the position that mistakenly harmed victims are also victims of persecution because they "have no influence on the definition of their status" and they "are discriminated [against] in fact for who or what they are on the basis of the perception of the perpetrator's identification of the group."[22] Ambrus also points to the fact that the Yugoslavia tribunal, starting with the *Kvočka*-case,[23] accepted that "persons suspected of being members of these groups are also covered as possible victims of discrimination." As Ambrus summarizes the approach of international criminal tribunals,

> strictly speaking, racial and ethnic groups are psychological and social constructs, and do not have an "objective" existence. These ethnic or racial groups "are subjectively established," depending on particular conceptions of in-groups and out-groups in society. Since these conceptions vary in time and space, different proxies are used to single these groups out. In other words, the perpetrators can create a group; i.e., a group that does not necessarily have an "objective" existence. It is, however, essential that the features the perpetrators perceive are based on national, ethnic, racial, or religious proxies; e.g., language, skin color, and so on.[24]

Classification is also central to refugee procedures, where race, ethnicity, or membership in a "particular social group"[25] are crucial elements in the basis for persecution. The asylum-seeker will make a claim of affiliation and recipient authorities will carry out a validation procedure, first establishing whether the group in question is actually in danger of persecution, and second, whether the claimant is a member of the group. "The production and reception of the refugee legal narrative is a complex phenomenon involving several narrators with sometimes conflicting stories and objectives."[26]

Rich's (2014) seminal essay on "elective race" focuses on the moral and ethical implications of individuals' inconsistent public declarations of racial identity in the name of autonomy and self-expression, for example, in seeking protection from racial discrimination in employment law, even if previously they have not publicly identified as members of a protected minority.[27] This fits well in American legal scholars' long-held debates on reconceptualizing the broader concept of equality law, replacing the doctrine of "immutability," which afforded protections of features (such as race and ethnicity) automatically if these character traits cannot be changed. The new immutability doctrine,[28] extending protection to all identities that could be, but should not be required to be, abandoned (as they are fundamental and core to personhood), invokes questions about moral judgments of individual responsibility involving accidents of birth and "luck egalitarianism." The underlying rhetorical dilemma pertains to whether society subscribes to a narrative that builds upon a romanticized story of self-discovery and authentic self-actualization, or if race remains to be seen as an objectively assigned characteristic, where even passing is a politically and morally charged trespassing. In the latter line of thinking, if categorization is changed, it is only due to the objective correction of a previously mistaken administrative action.[29]

Even nationality, conceptualized in the strictest sense of referring exclusively to citizenship (the least controversial identity form among those closely linked to ethnicity and race) raises questions of choice. Mandatory pledges of allegiance[30] may be seen as a form of restriction, as people are obliged to perform speech acts that express choices. International law also has a long history of distinguishing among citizenships on the basis of the existence of a "genuine link,"[31] the lack of which may lead to denying consular or other forms of protection by states. There are also limits to the recognition of nationality rooted in "Olympic identity" for athletes who engage in "country swapping," or the practices of "flags of convenience," "quickie citizenship," "passport bartering," or "athletic mercantilism."[32]

In sum, legal and administrative approaches to the subjectivity of ethno-racial identity stand in sharp contrast to the sensitive and nuanced discourse in social sciences and humanities. The conceptual toolkit available for the policy and legal arenas is limited only to "choice" and "fraud."

Self-identification and "fraud"

The terms "ethnocorruption" and "racial fraud" have surfaced in political, policy, and academic discussions about preferential treatment policies and affirmative action, as well as the collective rights-based minority rights framework in Europe. The concept of fraud is difficult to ascertain as an analytic category. In fact, it involves value and normative judgments. It is the perception that building on the loopholes of the legal conceptualization and classification, identity-based policies are intentionally abused by persons who are not members of the authentic, genuine, legitimate target group. By intentional, I mean that the abusers are presumed to be aware of the discrepancy and of the impropriety of their actions.

Consider, for example, the well-documented case of Hungary, where the exercise of minority rights does not depend on minimal affiliation requirements. Deets and Stroschein (2005, 292) documents how

> [a]ccording to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German-minority programs (providing extra classes of a useful language-education), which, by the census, was about 8,000 more than the number of ethnic Germans who are even in Hungary.

The Minority Rights Ombudsman pointed out that in the 2001 census, 62,233 people claimed to be German, while in 2011, there were 46,693 students (ages 6–14) enrolled in the German minority education scheme (Deets 2002, 39). Hungary has also established relatively potent "minority self-government" structures, which exist parallel to local municipal administration and operate with their own budgets.[33] The decision to vote in the elections for these bodies is left solely to the political culture and conscience of the majority. In order to demonstrate the fallacies of the legal framework, some Roma politicians publicly decided to run under different labels. To express their admiration for German football, for example, a small village's entire football team registered as German minority candidates for the election.[34] (In most of the reported 17 cases, they ran as Slovakian). Carstocea reports similar cases from Romania.[35]

Additional reports of categorical fluidity in the USA exist outside of the recent Dolezal affair. For example, in a 1984 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 (Rotunda 1993). Media sources mention blond, blue-eyed 5-year-old children being registered to prestigious kindergartens that use affirmative action quotas under "non-white" application schemes.[36] In the infamous 1988 *Malone*

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case, two Irish-American firefighters were dismissed from the Boston Fire Department after the department discovered that they had been hired as black applicants.[37] In November 1990, the San Francisco Civil Service Commission ruled that one firefighter was an Italian-American masquerading as a Mexican-American and was thus ineligible for an affirmative action program.[38] Some Hispanic San Francisco firefighters have 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.[39]

In his dissent in Metro Broadcasting Inc. v. Federal Communications Commission,[40] Justice Anthony Kennedy refers to the Storer Broadcasting case, in which one of the parties benefited from selling a station to the Liberman family, which qualified as Hispanic for having traced their ancestry to Jews being expelled from the Spanish Kingdom in 1492. Kennedy writes, "[i]f you assume 20 years to a generation, there were over 24 generations from 1492 to the Storer case.[41] That means that Mr. Liberman was as closely related to 16,777,216 ancestors."[42]

By lacking objective criteria for ethno-racial categories, these cases not only trigger academic and political debates, but also pose difficulties for legal resolution. Having argued that legal and administrative approaches to ethno-racial identity face severe linguistic and conceptual limitations by operating within a "choice" versus "fraud" binary, I turn to an analysis of whether or not the choice of identity exists as a principle of international minority protection law, a field that arguably represents a global political and ethical consensus. Throughout the analysis, I will make two claims. First, I will argue that according to the basic tenet of legal logic, a proper right to free choice of identity allowing people to opt out of racial, ethnic, or national (minority) communities would necessitate the inclusion of the freedom to opt in either to the majority or to any chosen minority group. My second claim is that international law would not actually construct an approach to opting in. In sum, I will argue that the right to free choice of identity is not an autonomous, *sui generis* right under international law.

The content of free choice of identity

The free choice of identity as a freestanding right or principle is not declared explicitly in international legal documents. As an initial question, we need to define the substance and meaning of this right or principle. At the surface, the choice of identity, similarly to the freedom of thought or conscience, logically may not be restricted by law, as it is a mere intellectual and emotional (that is, non-legal or political) phenomenon, and law only regulates human behavior. As a practical matter, with legal, political, and fiscal implications, the free choice of identity is more than a prohibition on the state's intervention in its citizens' lives in identity-related matters. As Rich argues, ethno-racial identification has four dimensions: documentary race concerns the decision one makes by checking boxes in response to administrative data collection efforts; social race concerns involuntary affiliation assigned by third parties, based on perceived appearance or social practice; private race refers to personal views about one's racial identity; and finally, public race pertains to the racial identification an individual is prepared to be recognized as having by others in social life.[43]

Closer scrutiny shows that the free choice of identity has two dimensions for state responsibility – a positive one and a negative one. According to the basic tenet of legal logic, a proper, *sui generis* right to free choice of identity allowing people to opt out of racial, ethnic, or minority (minority) communities would necessitate the freedom to opt

in somewhere, either to the majority or to any chosen minority group. Let us observe the relevant international legal language.

Opt out: the negative aspect of free choice of identity

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

According to the Council of Europe's Framework Convention for the Protection of National Minorities Article 3.1,

> every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice. (H(1995)010, Strasbourg 1995)

This right to opt out is guaranteed by powerful data protection regulations, as the prohibition on collecting data on mandatory, state-imposed ethnic identity practically also provides protection against involuntary official classification. 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 – have influenced the continental European legal framework, which establishes strict barriers to processing and collecting ethno-national data. Article 9 of the European Data Protection Regulation[44] creates a special category for sensitive data, and apart from a very narrow set of exceptions (set forth by law, having the explicit consent from the person in question, or anonymization), prohibits the processing of data revealing racial or ethnic origin. It needs to be noted, though, that the need to collect ethnic data is also supported by various international documents, such as Patrick Simon's (2007) study on the relationship between ethnic statistics and data protection, published by the European Commission against Racism and Intolerance (ECRI). The report underlines the vital importance of collecting anonymous ethnic data (Simon 2007, 3–7), repeating a 1996 recommendation by ECRI.[45] The study cites the European Commission's report on the implementation of equal opportunity principles,[46] which affirms that the enforcement of anti-discrimination laws unavoidably presupposes the compilation and use, among other categories of information, of reliable ethnic data and argues that collection and processing of even sensitive data in the service of implementing anti-discrimination measures do not violate the EU's data protection law. Since the racial and employment directives[47] 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 necessity (Simon 2007). The preambles to the racial and employment directives mention data collection for statistical purposes as a permissible tool for fighting discrimination.[48]

It is important to reiterate that (1) when authorities conceptualize racial motivation and perception in the context of ethno-racial discrimination, the information used is not sensitive personal data; thus, it can be registered and taken into consideration in official proceedings and (2) in order to substantially meet international minority rights obligations, laws can require either a declaration or registration of minority group identity for voluntarily exercising collective rights. The Permanent Court of Justice, the League of Nations' predecessor to the UN's International Court of Justice, announced in 1928 that states could require

declarations of ethno-national identity, but could not question these declarations, even though this invites risk for some amount of fraud and abuse of the system.[49] In practice, states are obliged to demand declarations of ethno-national identity if discrimination or hate bias crimes are committed on grounds of presumed or perceived identity or group membership.

International law also recognizes the right to retain ethno-national identity in the sense that no one should be forced to assimilate into the majority. For example, Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities says, "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."[50] Under 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 the Explanatory Report to the Council of Europe's Framework Convention for the Protection of National Minorities (FCPNM 3, para 36, Article 3),

> no disadvantage shall arise from the free choice [the convention] guarantees, or from the exercise of the rights which are connected to that choice. This part of the provision aims to secure that the enjoyment of the freedom to choose shall also not be impaired indirectly.

Similarly, the June 1990 Copenhagen Concluding Document on the Human Dimension of the CSCE, on which most multilateral and bilateral treaties are built, states,

> 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 … No disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights. 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.[51]

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

> Identities are subject to the primacy of individual choice through the principle of voluntary self-identification. Minority rights include the right of individual members of minority communities to choose to be treated or not to be treated as such. No disadvantage shall result from such a choice or the refusal to choose. No restrictions should be placed on this freedom of choice. Assimilation against one's will by the State or third parties is prohibited … No disadvantage shall result from the choice to affiliate with a given group. The principle of freedom of choice should be reflected in legislation and in integration policies. This means, for example, that authorities should not affiliate persons with a specific group based on visible characteristics or other presumptions without their consent.[52] The prohibition of assimilation against one's will means that nobody can be forced to declare his/her identity. If this is declared, the choice should be open and not limited to closed lists of identities. While any form of assimilation that one has not chosen – even indirect and involuntary is prohibited, the principle of freedom of choice implies that consciously chosen assimilation must be allowed and may not be either stigmatized or subtly discouraged by majorities or minorities. This means that the State is also responsible for creating an environment in which individuals can make such a choice freely and at any time.

Furthermore, in line with UN Principles and Recommendations for Population and Housing Censuses, paragraph 15 of the Ljubljana Guidelines continues,

> censuses should not require compulsory declaration of belonging to specific identities or groups, since nobody should be compelled to declare his or her belonging to a minority. Census forms should not limit respondents to closed lists, as self-identification implies also choosing one's preferred designation.

At the same time, paragraph 5 declares that

> [T]he legislative and policy framework should allow for the recognition that individual identities may be multiple, multilayered, contextual, and dynamic. Individual identities can be and in fact increasingly are *multiple* (a sense of having several horizontal identities; for instance, belonging to more than one ethnicity), *multilayered* (various identities coexist and overlap in the same person, such as ethnic, religious, linguistic, gender, professional, and the like), *contextual* (the context might determine which identity is more prominent at a given moment), and *dynamic* (the content of each identity and the attachment of individuals to it changes over time). In order to build and sustain just, stable, and peaceful democracies it is necessary to recognize the distinct characteristics of groups while also acknowledging the heterogeneity and fluidity within those groups … In addition, members of majorities and minorities should accept that their identities – like the one of the State – may change and evolve, including through contact and exchange with other groups. The recognition of the multidimensional diversity inherent in societies, groups, and individual identities should inform the entire legislation and the formulation of integration policies. This means, for example, that identification with multiple identities and contextual affiliations should be permitted, including in the census; that closed lists of identities in the census are to be discouraged; and that everyone should have the right to change his or her affiliation over time. [Emphasis original]

Coming back to censuses, paragraph 15 holds that

> States enjoy a wide margin of appreciation regarding the instruments and mechanisms for data collection. These might include official censuses. However, censuses should not require compulsory declaration of belonging to specific identities or groups, since nobody should be compelled to declare his or her belonging to a minority. Open lists ensure that the results reflect individual choice and avoid the problem that sometimes groups do not feel represented in official census categories. The questionnaire and census methodologies should be elaborated in consultation with minority representatives and translated into relevant minority languages.

Paragraph 43 adds,

> Despite the perceived link between language and identity, any language competence or lack thereof, as well as the mere use of a language, must not automatically be linked to affiliation with a particular group or with the enjoyment of linguistic rights.[53]

Finally, under Article 8(1) of the (non-binding) 2007 United Nations Declaration on the Rights of Indigenous Peoples 2007, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." Article 8(2) continues, "States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities." Article 33 adds that

> 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions … 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

So far, what we have seen is that the right to free choice of identity as a *sui generis* right does not exist under international law. The core of what exists entails the following: (1) states cannot create mandatory ethno-racial or national classifications, (2) states cannot deny the right of individuals to decline involuntary affiliation with any given group – especially for statistical and census-purposes, (3) the state cannot forcefully assimilate individuals into the majority, and (4) insofar as individuals do not wish to make use of minority rights or preferential treatment, the state cannot make arbitrary ethno-racial classifications.

As we will see, in addition to this, if individuals decide to seek affirmative action, preferential treatment, or minority rights, states are indeed authorized under international law to establish (objective) criteria for membership in the groups and the recognition of identification. In effect and in practice, states are obliged to do so if discrimination or hate bias crimes are committed on the grounds of presumed or perceived identities or group membership. Also, under international law, while states cannot legally question individuals' identification within the majority, there are no narrowly tailored litigable state obligations for the cultural and social integration and assimilation of persons belonging to minorities. This leads us to the second dimension of the right to free choice of identity.

Opt in: the positive aspect of free choice of identity

The positive aspect of the free choice of identity encompasses the individual's right to join a group or community.[54] In such an explicit form, the freedom to choose one's identity is rarely declared in legally binding documents. The aforementioned 1993 Hungarian Minority Rights Act (Act LXXVII of 1993 on the Rights of National and Ethnic Minorities) was a notable exception. Its preamble called the right to national and ethnic identity "a universal human right." That principle was reiterated in Article 3(2), which said, "The right to national or ethnic identity is a fundamental human right, and is legally due to any individual or community." Article 7 further declared, "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." This statutory language, repealed in 2011,[55] provided a quite different interpretation from the one in the Explanatory Report to the Council of Europe's Framework Convention for the Protection of National Minorities:

> Paragraph 1 firstly guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. This provision leaves it to every such person to decide if he or she wishes to come under the protection flowing from the principles of the Framework Convention. This paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity.[56]

In 2010, the European Court of Human Rights followed a similar logic in the *Ciubotaru v. Moldova* case.[57] Mihai Ciubotaru, a university professor, sought to have his ethnicity changed from Moldovan to Romanian on his birth and marriage certificates. Moldova refused the change on the grounds that since neither of his parents had been recorded as ethnic Romanians on their birth and marriage certificates, it was impossible for him to be recorded as an ethnic Romanian. In the applicant's view, the forced imposition of the Moldovan ethnic identity constituted an interference with his right to identity, and consequently, with his right to respect for his private life. Therefore, the authorities had an obligation to allow him to freely choose his association with any cultural group, including Romanian, without being required to provide evidence. According to the government, a blanket acceptance of requests concerning changes in ethnic identity, based solely on the applicants' declaration but not on evidence, could lead to serious consequences, such as people declaring themselves ethnic French, German, or English. Referring to earlier case law,[58] the court noted that, along with name, gender, religion, and sexual orientation, an individual's ethnic identity constitutes an essential aspect of private life and identity and thus falls under the protection of Article 8 of the European Convention on Human Rights. The court held that it understood that authorities should be able to refuse a claim to change ethnicity in official records when it is based purely on unsubstantiated subjective grounds; however, in this case, Moldova's legal requirements created insurmountable

barriers for an individual wishing to record an ethnicity other than what Soviet authorities defined for his parents. The court observed that Ciubotaru's claim was based on more than his subjective perception of his own ethnicity, and he could provide objectively verifiable links with the Romanian ethnic group, such as "language, name, empathy, and others." Thus, the state's failure was due to the fact that it was impossible for the applicant to even have his claim examined, whether or not his belonging to a certain ethnic group could have been objectively verified. The court did not deem the Moldovan authorities' requirement that the applicant prove his parents' ethnic origin to be incompatible with the convention. The court explicitly stated that it does not dispute the right of a government to require the existence of objective evidence of a claimed ethnicity.

In the aforementioned *Lovelace* case, the UN Human Rights Committee also held that if domestic legislation confines a minority right to the members of a minority community, it should be objectively and reasonably justified.[59] The 2012 Ljubljana Guidelines on Integration of Diverse Societies by the OSCE part II, para 6 uses a similar language:

> International minority rights standards are clear in establishing that affiliation with a minority group is a matter of personal choice, which must, however, also be based on some objective criteria relevant to the person's identity … If … declared, the choice should be open and not limited to closed lists of identities. This does not imply that any chosen identity can necessarily claim recognition.[60] Objective criteria, relevance, and other factors need to be taken into account, and some aspects may fall under a State's margin of appreciation.

Furthermore, paragraph 15 holds, "In this sense, policies should also be based on statistical evidence, especially when they cover aspects relevant to minority rights and integration, such as ethnicity, language, and others."[61]

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

A third dimension, the "right to stay"

Although not a separate dimension within the logic of law, a distinct difference in situations needs to be mentioned: in addition to cases concerning opting in and out, the "right to stay" – the prohibition of forced assimilation[62] – concerns a specific form of opting in. The status and position of members of national minorities who wish to assert their right to recognition and acceptance as such mark this difference.

Conclusions

Inspired by the trend in social sciences to destabilize race as a social classification and to question the immutability and givenness of race, along with the recognition of multiple identities, this article identified "choice" and "fraud" as the core concepts law uses to reflect on these issues. I first pointed to the inadequacy of the binaried "fraud-choice" legal and administrative conceptualization of the question of ethno-racial identification.

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I provided examples of racial fraud and ethno-corruption before turning to the assessment of "choice" and whether or not the free choice of ethno-racial identity exists in international law. In this regard, I made two claims. First, if the free choice of identity is to be recognized as a legal right, then it logically needs to include both its negative and positive dimension – that is, the right to opt out or in to any chosen ethno-national or even racial group. Second, having scrutinized relevant international documents, I argued that the recognition of this right is not set forth in hard or soft international law. I found that the right to free choice of identity does not seem to be a theoretically coherent and practically sustainable legal concept, nor is it supported by international statutory language. The requirement of the individual's active, affirmative involvement in group membership, accompanied by the prohibition of mandatory inclusion by the state and the prohibition of collecting sensitive data, does not create an autonomous, *sui generis* right for the free choice of identity, since it cannot include the right to opt in to any chosen group.

The lesson learned from this project is that "old" approaches to fixed and uncontested ethno-racial classifications and conceptualizations, the traditional political and ethical consensus that international law arguably represents (and which in the case of minority rights dates to the early twentieth century), are inadequate. Although there is significant interest among scholars, including legal scholars, in this issue, it is still a question which direction legal doctrine and practice will take in light of the seismic developments in how choice and representation of ethno-racial identities are discussed within the social sciences, humanities, and, to a considerable degree, politics. Furthermore, the question remains if a completely new consensus is on the way.

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Notes

1. See, for example, Barth's analytical framework on construction, Tajfel's classic work *Human Groups and Social Categories*, or Brubaker's call for clarifying and deconstructing key concepts in "Beyond Identity" and warning against "groupism," in *Ethnicity Without Groups*, or approaching "Ethnicity as cognition."
2. See second wave feminism, the civil rights movement in the USA, LGBT movements, indigenous movements, for example.
3. Heyes (2016) and Heyes (2003). Also see Jeffreys and Gottschalk (2013).
4. Mindful of the difference, due to spatial limitations, I will use these terms interchangeably. For an assessment on this, see Pap (2015).
5. See, for example, Hobbs (2014), Chanbonpin (2015), Hunter (2011), Ignatiev and Garvey (1996), Ignatiev (1995), Kelly and Nagel (2002), Kennedy (2003), and Overall (2004).
6. Also see Sharfstein (2007).
7. The highly publicized 2015 case concerned 37-year-old Rachel Dolezal, American civil rights activist and former African studies instructor, and president of the National Association for the Advancement of Colored People chapter in Spokane, Washington, when she resigned following allegations of having committed cultural appropriation and fraud, after her white parents stated publicly that Dolezal is a white woman passing as black. Dolezal claimed that her racial identity is genuine, albeit not based on biology or ancestry, as she was born white. See, for example, Brubaker (2016a).
8. For example, in its Recommendation 1735 issued in 2006, the Council of Europe explicitly declared that "to date there was no common European legal definition of the concept of 'nation.'"

9. Another question arises concerning whether one can choose group type/status for legal classification. For a discussion on whether "albino" is race, ethnicity, color, or medical condition, see Aceves (2015). Also see Lingaas (2016).
10. US 1/8 policy for recognition of Native American status.
11. Ivan Kitok v. Sweden, Communication No. 197/1985, CPR/C/33/D/197/1985 (1988). Ivan Kitok, a Saami and a descendent of a family with a long tradition of reindeer herding, due to financial difficulties was forced to give up herding and seek other employment. Having moved out of the Saami village, he lost his Saami status under the Swedish Reindeer Husbandry Act, which authorizes the Saami community (living in the designated villages) to establish requirements for recognized membership in the community and to make decisions on (re)admitting members to the community. He applied to the Human Rights Committee seeking to have the 1971 law declared in violation of the rights defined in the International Covenant for Civic and Political Rights for participating in his culture (reindeer herding). The committee denied his claim because the ultimate objective of the law was seen to protect and preserve the Saami as a whole.
12. Lovelace v. Canada (Communication No. R/6/24/ para 14 Supp. (No. 40) at 166, UN Doc. A/36/40 (1981)) Sandra Lovelace was born and registered, under Canadian law, as a Maliseet Indian, and was therefore entitled as an indigenous person to live on a designated reserve and to enjoy subsidized social benefits. However, under the Indian Act, after marrying a non-indigenous man, she lost her official status as an Indian and the attendant benefits, including the right to live on the reserve. According to the law, following a marriage with a non-indigenous person, only men could retain Indian status. The HRC held that Canadian law violated Article 27 of the ICCPR by denying Lovelace's right to enjoy her culture in community with other members thereof, because her culture did not exist beyond the bounds of the reserve on which she was denied a legal right to reside. It also found that the section of the Indian Act in question was not reasonable or required "to preserve the identity of the tribe." The HRC came to a different conclusion than in the Kitok case, mostly because here gender, a protected characteristic, was involved.
13. Santa Clara Pueblo v. Martinez, 436 US 49, 72 n.32 (1978).
14. Examples can be found in several 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.
15. For example, as determined by a 1790 Act of Congress, citizenship was reserved for "white persons" only. Litigating race-based naturalization refusals, which question the authorities' classifications of the petitioners as "not white," was the first movement toward the juridical grasping of the minority concept. In the subsequent years until 1952, when racial restrictions were removed, 52 such prerequisite cases were recorded. See, for example, López (1996). Also see Domínguez (1986), Walker (2008), Kennedy (2003), Wright (1995), Onwuachi-Willig (2007), and Ford (1994).
16. See, for example, Harris (1993), Harris and Sim (2002), and Heyes (2006).
17. Prosecutor v. Jean-Paul Akayesu, Judgement, Case No. ICTR-96-4-T, T.Ch. I, September 2, 1998.
18. Paras 521–523.
19. Paras 720–721, see Ambrus (2012, 943).
20. (Prosecutor v. Sylvestre Gacumbtsi, Judgement, Case No. ICTR-2001-64-T, T.Ch. III, June 17, 2004, paras 254–255); see also Ambrus (2012, 944).
21. Prosecutor v. Mikaeli Muhimana, Judgement and Sentence, Case No. ICTR-95-1B-T, T.Ch. III, April 28, 2005.
22. Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, Case No. IT-98-34-T, T.Ch., March 31, 2003, para 636; see also Ambrus (2012, 948).
23. Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlado Radić, and Zoran Žigić, Judgement, Case No. IT-98-30/1-T, T.Ch., November 2, 2001, later confirmed in the Naletilić and Martinović cases (Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgement, Case No. IT-98-34-T, T.Ch., March 31, 2003, para 636.). For a recent adoption of this view in the case law, see Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly

Dissenting Opinion of Judge Anita Ušacka, ICC-02/05–01/09, P.T.Ch. I, March 4, 2009, para 23. See Ambrus (2012, 944, 946–947). Also see Young (2010).

24. See Ambrus (2012). Also see Hoffmann (2014) on the ICTY case law whether members of a victim group – Bosnian Serbs – can be regarded as protected persons even though they formally had Bosnian nationality, the nationality of the aggressors, just like their Bosnian Muslim and Bosnian Croat captors, where the court referred to the distinction between ethnicity as a ground for national allegiance as opposed to a mere legal link between the individual and the state and determining that in cases of inter-ethnic conflicts ethnic allegiance should prevail over formal nationality, at least to the extent of the application of international humanitarian law.
25. See, for example, Sternberg (2012).
26. See, for example, Zagor (2014).
27. Besides the Rachel Dolezal case, consider US Senator Elizabeth Warren "box-checking" as Native American, or the plaintiff of a seminal US Supreme Court case on the internment of Japanese Americans during World War II, Fred Korematsu, passing as Clyde Sarah. See, for example, Yang (2006), Pember (2007), and Garance (2012).
28. See, for example, Clarke (2015).
29. See Rogers Brubaker (2016a). Also see Bowker and Star (1999).
30. See, for example, Jenkins (2014).
31. See the International Court of Justice's seminal Nottebohm decision, requiring an effective link between the national and his or her home country. The 1955 International Court of Justice case concerned a dispute between Liechtenstein and Guatemala. Friedrich Nottebohm, a German national, moved to Guatemala in 1905, starting a successful business. In 1939, he applied for naturalization in Liechtenstein but continued his business in Guatemala. In 1943, following Guatemala's entry into World War II, his possessions were confiscated and he was extradited to the USA as an enemy alien, as Guatemalan authorities did not recognize his naturalization as "effective" and regarded him as still German.
32. See, for example, Spiro (2014).
33. See, for example, Molnár and Schaft (2003) and Ram (2014).
34. An interview with Antal Heizler, president of the Office for National and Ethnic Minorities, *Népszabadság*, July 24, 2002.
35. See Carstocea (2011).
36. See Rotunda (1993).
37. See Rotunda (1993). Also see Ford (1994), Wright (1995), and Pember (2007).
38. 966 F.2d 503, 59 Fair Empl. Prac. Cas. (BNA) 63, 59 Empl. Prac. Dec. P 41, 531 John P. O''SHEA, San Francisco firefighter; Matthew Plescia; Daniel A. Sullivan; James R. Hentz; Ronald J. Van Pool; Michael C. Papera; Patrick M. Skain, plaintiffs-appellants, v. City of San Francisco; San Francisco Fire Department; San Francisco Civil Service Commission; Art Agnos, mayor of the City and County of San Francisco, defendants-appellees, and San Francisco Black Firefighters Association; Chinese for Affirmative Action, defendants-intervenors. No. 91-15120.
39. Daniel Seligman – Patty de Llosa: *Fortune*, January 14, 1991.
40. 497 US 547 (1990)
41. As Kennedy (2003) argues, "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). He continues 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. US v. Storer Broadcasting Co., 351 US 192 (1956).
42. Rotunda (1993).
43. See Rich (2014).
44. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
45. General Policy Recommendation No. 1, CRI (96) 43 rev.
46. COM(2006) 643 of 30 October 2006. See also the European Parliament's report in September of the same year on the transposition of the Racial Equality Directive.

47. Racial Equality Directive 2000/43/EC; Employment Equality Framework Directive 2000/78/EC.
48. Preamble to Council Directive 2000/43/EC of June 29, 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.

49. In the *Rights of Minorities in Upper Silesia* (*Minority Schools*), the Permanent Court of Justice accepted that requiring a declaration on behalf of a minority pupil on his origin or mother tongue as a precondition for admittance to a minority language school does not violate equal treatment (Permanent Court of International Justice, Judgment, *Rights of Minorities in Upper Silesia* (*Minority Schools*), Ser. A. No. 15, 30–33). Consequently, members of the group should give evidence of their subjective view on their identity, if they would like to enjoy minority protection. The 1928 case concerned the 1922 German–Polish Convention relating to Upper Silesia of May 1922, which established

> the unfettered liberty of an individual to declare according to his own conscience and on his own personal responsibility that he himself does or does not belong to a racial, linguistic or religious minority … subject to no verification, dispute, pressure, or hindrance in any form whatsoever by the authorities.

The court held that the

> question whether a person does or does not belong to a racial, linguistic, or religious minority may not be verified or disputed by the authorities … It should be observed that the article does not state in specific terms … such declaration must be a declaration of intention alone and not a declaration determining what such person considers to be the de facto situation in the particular case … If the authorities wish to verify or dispute the substance of a declaration by a person, it is very unlikely that in such cases they would be able to reach a result more nearly corresponding to the actual state of facts … It must be admitted that the prohibition of any verification or dispute on the part of the authorities may lead to certain persons who, in fact, do not belong to a minority, having to be treated as though they belonged thereto. That, in the opinion of the court, is a consequence which the contracting parties accepted in order to avoid the much greater disadvantages which would arise from verification or dispute by the authorities.

50. Adopted by General Assembly resolution 47/135 of 18 December 1992.
51. CSCE (1990, paras 32–33).
52. This is also set forth in The Language Rights of Persons Belonging to National Minorities under the Framework Convention, Thematic Commentary no. 3, adopted by the Advisory Committee on 24 May 2012.
53. Language Rights of Persons Belonging to National Minorities under the Framework Convention, Thematic Commentary no. 3.
54. 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.
55. In 2011, the law was replaced by Act CLXXIX of 2011 on the Rights of Minorities, which substantially modified the language. The preamble now merely states that "every citizen belonging to a nationality has the right to freely declare and preserve their identity" and all Article 11 adds is that "Declaring affiliation with a nationality is the individual's exclusive and inalienable right. (2) No one may be obliged to make a declaration on the issue of affiliation … " Under a 2013

amendment to the Hungarian constitution, Article XXIX(3) of the Fundamental Law sets forth the following:

> (3) A cardinal Act shall determine the detailed rules relating to the rights of nationalities living in Hungary, the nationalities, the requirements for recognition as a nationality, and the rules relating to the election of their local and national self-governments. By virtue of such cardinal Act, recognition as a nationality may be subject to national status of a specific period and to the initiative of a specific number of individuals who declare to be members of such nationality.

56. FCPNM 3, paras 34–36, Article 3.
57. App. No. 27138/04.
58. S. and Marper v. the United Kingdom (2008).
59. It needs to be added that at the same time, the watchdog of the International Covenant on the Elimination of 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 [Article1, paras1 and 4] 22 August 1990).
60. 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."
61. UN Principles and Recommendations for Population and Housing Censuses, ST/ESA/STAT/SER.M/67/Rev.2.
62. Explicitly reiterated in, for example, the above cited 2012 Ljubljana Guidelines, part II, para 6 of the 1990 Copenhagen Concluding Document, or Article 8(1) of the 2007 United Nations Declaration on the Rights of Indigenous Peoples.

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