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Identity, Nation, National Minorities and Ethnocorruption [1]

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1. INTRODUCTION

The past few months, for various reasons, without doubt opened a new phase in European anti-discrimination policies. Following the European Union's 1997 European Year Against Racism efforts, dozens of conferences, action plans and programs were being launched. As for the most recent developments: both the new Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms[2] on behalf of the Council if Europe, and the June 2000, Council Directive Implementing the Principle of Equal treatment Between Persons Irrespective or Racial or Ethnic Origin on behalf of the EU[3] are definitely milestones[4] in minority-protection frameworks. The implications of these policies and black letter accommodations however, are more far-reaching then the providing of new anti-discrimination measures; they touch

[1] Draft. Please do not cite.
[2] Enabling anti-discrimination clauses' scope for "any right set forth by law (Article 1. 1.)
[3] Broadening its application over the traditional state-based, public sphere, incorporating private fields.
[4] Such as by incorporating indirect discrimination, for example.

upon more fundamental jurisprudential and policy-determinations regarding general minority (right) protection-schemes.

Upon the coming into force of the new EU Directive and the preparations of the Community Action Programme to Combat Discrimination (2001-2006), I find myself authorized to share some of my doubts and puzzles regarding recent (European) constitutional developments in the terrain of ethnic-national minority protection and claims accommodation...

1.1. IDENTITY POLITICS AND JURISPRUDENTIAL CAVEATS

The politics of identity is a controversial and ardent topic in contemporary constitutional theory. As it will be shown, East-European minority politics may provide another angle to the study of this sensitive and complicated issue.

It is the Murphy-law of prejudice that when it comes to the maltreatment of members of various ethnic groups no serious definitional or recognition-difficulties arise. Just as (despite the Census Office's multiracial affiliation recognition) a racially profiling American policeman will not be troubled by identifying minority drivers, no racist East European waiter in a restaurant will have problems spotting out a Roma customer and denying service to her. It is because when it comes to discrimination or ethnic hostility, it is always the daily practice of the majority that will define membership in the discrete and insular minority group.

Defining qualification requirements therefore to minority groups seems to pose difficulties only in the context of minority-identity based preferences. This anomaly is however more then of theoretical jurisprudential interest, as in some cases the entire effectiveness of the aimed minority protection schemes may depend theron. [5]

The conditions of post-communist state-citizen relationship in many regards question the functioning of general minority protection models. In the CEE region the general social attitude towards certain institutions is simply different from that in the Western part of Europe or in the US. Mentioned here can be the alienated mentality, which sees politics in general "an amusement for the idle rich", an unfair game of the social elite. State policies therefore are also seen with a selfish and morally unrestrained suspicion: tax-evasion is not considered a morally condemnable activity, avoiding compulsory military service with falsified medical records showing unfitness is regular behavior,[6] bribing a policeman is considered an economically advantageous and socially acceptable phenomena, etc.

It is thus fearful that having a post-communist mentality towards state policies with an ethnicized system of preferences, due to the lack of political

[5] Apart from the "ethnocorruption"-phenomena (to be analyzed below), take the example of a simple, in nature "positively discriminating" institution: the preventing and prosecuting of indirect discrimination, for instance. Without an appropriate, by data protection standards acceptable and legally workable definition for the thus favored group as well as the reliable and empirically producible statistical measuring of, let us say its representation in employment, education or procurement, claims for such protection can hardly be granted or considered. For a specific example, see the difficulty of legally combating Roma school segregation and employment discrimination, where, in accordance with European data protection guidelines, the *formal* and quotable registration or classification the aforementioned ethnic group is prohibited and non-existent.

cultural and public moral restraints, these preferences will simply be seen as services provided by the (alienated, thus for no sympathy or co-operation eligible) state. What seems to be in the centerfold of East European minority politics is thus "*ethnocorruption*", that is the utilizing and misusing of remedial measures for private and from the legislator's intentions independent means.

The trigger for procedural possibilities of administrative misusage is the basic tenet of liberal identity philosophy: the free choice of identity. In the level of the first semantic layer, this legal principle (similarly to the freedom of thought or conscience) is not very meaningful, as it logically may not be restricted, since identity is a mere intellectual and emotional (that is non-legal or political) phenomena. Legal rights however always carry an obligation towards the state.

It comes to be a different question, whether the state should or could accept the individual's arbitrary, random, or even declared malevolent choice of identity when seeking for preferential treatment. As a matter of law, even if one openly admits or states a fraudulent cause for utilizing minority preferences, e.g. enrolling under minority quotas to educational institutions; under the tenet of identity choice freedom there is no legal, political, or even moral basis for questioning such self identity-classification.

In this paper the demons of ethnocorrpution will be demonstrated through the case study of a Hungarian legislation and its possible progeny.

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[6] In 2000, 73,4% of the drafted were medically incapable for the one-year military service. (Népszabadság, 2000,

1.2. MINORITIES: CONSTITUTIONAL SEMANTICS

The legal protection and international political recognition of domestic minority groups – be them racial, ethnic, national, or for that matter religious, sexual, or disabled – is one of the most successful and dominating ideas of the 20th century's constitutional developments.[7] Dozens of international documents, most national constitutions and several fundamental laws contain or set forth provisions accepting and recognizing individual minority and group-rights.

Surprisingly, despite the almost century-long history of internationally considered minority politics and constitutionally recognized minority group aspirations, neither the scope and limits of such protections, nor the jurisprudential foundations, or the practically applicable legal definition[8] of the so widely applied minority concept had been developed or crystallized -- or for that matter even sufficiently debated.

The relevance of the issue overreaches the intellectual desirability of terminating the logical nonsense-situation, where the core concept behind and underlying an in both extensity and intensity growing set of institutions remains

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11 October, p. 3.)

[7] The idea, of course, is hardly a revolutionary one, since modernity as such was about dismantling and destroying feudal corporatism.

[8] It should be noted, that most legal concepts, by nature, are ambiguous (such as life, family, etc.), yet when there is legislative and legal interest in providing (legally comprehensible) definitions therefor (such as the beginning

undefined and unregulated. Leaving open procedural possibilities for legally permitted misusage of the set forth institutions may not only prevent the working of remedial measures, but can also carry the risk of a malevolent destruction of the entire legal and institutional framework.[9]

In accordance with the already invoked Murphy-law of prejudice, defining the target-group hardly ever creates difficulties in discriminatory and hostile activities,[10] the question seems to be a (in my evaluation) rather sensitive (and for the vulnerability of the entire structure responsible) peculiarity of minority protection, that is anti-discrimination and affirmative action policies.

Dominant seems to be the view in the Western world, that remedying wrongs done to ethnic, national and racial minorities can best be accomplished by measures utilizing and building on race and ethnicity. As Justice Harry Blackmun expressed in his separate opinion in the cornerstone American affirmative action case Bakke:[11] *„To get beyond racism, we must take account of race ... and ... to treat some persons equally, we must ... treat them differently."*

Therefore the (both conceptual and practical) need for legally and administratively applicable defining of the thus applied minority concept is twofold:

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of life, or life of the fetus from the aspect of inheriting; family for tax, and civil legal purposes, etc.) the legal system demanded and succeeded in the creation of such conceptualizing.

[9] Due to enormous differences in political culture (what by the way works as a prudentially unarticulated and policy-wise uncommunicated, but tacitly existing policy guideline), electoral accommodations in Hungary for example, which provide additional rights (being based solely on the individual's uncontrolled affiliation choice) in political participation, would most likely have lead to serious and in outcome catastrophic misusage in the more "obnoxious" former-Yugoslavia.

[10] See for example pre-Holocaust legislation defining the legally discriminated ethnic Jewry; South-African apartheid census categories, or even pre-desegregation American legal conceptualizing of blackness.

a) it is both a reasonable and legitimate expectation on behalf of the legislator and the thereby burdened majority to have clear-cut overview of and control over the actual size and "strength" of the benefited group;[12] and

b) for the (from misusage protected) administrative operation of such institutions it is often a technical must.

The unresolvedness of defining the scope and subjects of minority protection schemes may have even more far-reaching consequences. In states with substantial minorities outside its borders their very domestic minority protection and favoring measures will be formulated with an eye (sometimes both) on their kins in the neighboring countries – hoping for benevolent reciprocity.

As it will be demonstrated, in Hungary for example (a state without substantial domestic, but large out-of-border minorities) the main debates on the so called "status law", that is a framework legislation setting forth preferential domestic treatment for non-citizen Hungarian nationals, are ironically not about the scope and terrain of the actual substantive preferences

[11] Regents of University of California v. Bakke, (438 US 265, 1978)

[12] The legally constituted possibilities for "ethnic cheating;" that is behavior in conformity with the wording, but in sharp contradiction to the spirit of the affirmative and anti-discriminational laws is an alarming phenomena – to gain greater and greater importance with the further development of such policies.

to be incorporated therein,[13] but about the definitional puzzle of how to draw the limits of its subjective application.

What is more, the practical consequences of the definition controversy will not only lead to Constitutional Court decisions annulling legislative enactments or procurement government decisions (be they too widely tailored when defining scopes, or assessing too brave an affirmative action), but private actors: universities, non-profit organizations and other non-governmental organizations will also be destined to cope with the same (annoying) ambiguities upon launching benevolent quotas or preferential policies.[14]

In the following, while investigating the question of defining the minority status and the constitutional meaning of „identity," I shall limit my research to that of ethnic, national and racial minorities.[15] Thus, due to the spatial and conceptual limits, the examination of the classificational problems of religious, sexual, physically disabled or other minority groups will not, or will only tangentially be assessed.[16]

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[13] That should comply to international as well as EU norms, expectations and practices.

[14] As held to be found in Fried's case report: "Neither Congress nor the Court attempted to define what constitutes a minority community or its needs, and neither examined how those needs might be served by a minority broadcaster. We are left with nothing more then the assumption that such racially defined communities exist, that they have distinct needs as to broadcast services, that minority license owners will best discern those racially circumscribed needs, and that minority owners will be more powerfully motivated to serve them once discerned. This is a cascade of non-sequiturs and begged questions." Charles Fried: Metro Broadcasting, Inc. v. FCC: Two concepts of equality, 104 *Harvard Law Review*, 1990, In.: Garvey-Aleinikoff, p. 601.

[15] Since identity-affiliation requirements and conditions in relation of other minority groups (e.g. in the case of sexual-, war veteran-, medically defined, etc. groups) are easier and less problematic to establish. When talking about theoretical distinctions and concepts, I will even use the terms (national, ethnic, racial) interchangeably.

[16] This is not to suggest that the legal/political classification of these groups would be fully unproblematic. Religious sects claim being subjects of discrimination as compared to traditional churches, for example and feminist literature also challenges the homogeneity of "gender" experience (see other mosaics of identity modifying the picture, such as being a minority female for instance). There is a strong debate going on in trying

I shall discuss the following topics:

a) the appearance and changing role of the minority status – as recognized in constitutional policies;

b) selected international and domestic statutory solutions;

c) fundamental (jurisprudential as well as technical) controversies within the models;

d) possible options for conceptual and practical clarity.

2. DEFINING THE MINORITY STATUS[17]

In consistency with the mentioned Murphy-law of never having to worry about defining the minority groups in question, when it comes to maltreatment; throughout history, national and ethnic minority groups from time to time were subjects of both legal and illegal atrocities, physically violent or „only" legally discriminatory treatment. In order to reduce the risk of such bitter future ill-

to define the medical boundaries of the „disabled group". In Hungary for example, the blind will receive a special state aid others will not. It has therefore been questioned why specific social security preferences and benefits as provided for seriously disabled will not cover people with diabetes, or nephritis, or why are people with severe mental retardation not included in the "disabled" group when giving out, for example, public transportation benefits. (For more, see Tausz Katalin: *Egyenlőtlenségek és különleges bánásmód. Adalékok a fogyatékosok esélyegyenlőségéről szóló törvény születési történetéhez.* In.: Halmai Gábor (ed.) *A hátrányos megkülönböztetés tilalmától a pozitív diszkriminációig,* AduPrint-INDOK, Budapest, 1998)

[17] It is my submission, that the unfolding of the concept and constitutional meaning of the notoriously repeated or wildly improvised national/ethnic/racial/etc. minority provisions is more then of *l'art pour l'art* dogmatic importance, as the (seemingly intentionally maintained) ambiguity may lead to serious jurisprudential and political annoyances. Similarly, I see the European (and global international) community endangered by appealing, in the benign sense policy-wise correct and politically fruitful catch-words, which when cemented into constitutionally binding formats, actually create uncontrollable and jurisprudentially impermissible constitutional (thus political) solutions, settings and frameworks. In the following therefore, I shall briefly discuss a jurisprudentially important, and politically puzzling issue corollary to the more and more conscious European security and minority-policy: the unresolvedness of the more and more frequently utilized legal definition of the minority concept.

treatment, driven by the determination of securing both individual dignity and collective self-determination (whatever the latter appealing phrase was meant to mean) both the international community and the domestic legislators were destined to implement minority-protecting clauses. Following a somewhat simplistic classification, this ethnic/racial/national minority protection may appear on three conceptual levels:

a) in the sphere of individual rights;

b) at the constitutional philosophical level, through recognizing ethnicity/nationality/race/etc. as a constitutionally relevant and political nation- constituting factor; and

c) as the basis for affirmative, beneficial treatment.

2.1. INDIVIDUAL RIGHTS

The *first* conceptual level where minority status may be assessed is that of asserting and introducing the basic (and without doubt legitimate) requirements of maintaining one's minority identity (and all applications thereof) to the universal human right and dignity concept. Bragyova describes minority rights as:

> *„claims to the minimal conditions for the use of rights to which every member of the community is entitled; thus minority rights are subsidiary*

rights; they have a subsidiary function in the sense that they make possible to members of the community to be in the position to exercise or make use of their general rights."[18]

The prohibition of minority affiliation based discrimination, as well as the securing of the free identity- and tradition maintenance are the fundamental guarantees against the traditionally fearful homogenizing and forcefully assimilating majority aspirations. This layer of minority identity protection can be seen as a concrete and practical right provided for the autonomous individual -- similarly to other first generation rights.

2.2. NATION CONSTITUTING ELEMENTS

The *second* (already somewhat problematic) layer of minority recognition is on the conceptual, constitutional level of defining the political nation and its constituencies. The ancient (posed by Abbé Sieyés)[19] question of „civic" versus „ethnic" nationalism is at stake here. In other words, at the time of the nation-building and nation state development, the initial academic (sometimes bitterly vivid practical) question was needed to be answered: is it the *demos* or the *ethnos* that constitutes the political community?

[18] Following the interpretation given by A. Bragyova 'equality' means equality of general rights, and 'egality' refers to the requirements of the same special rights for every citizen. In: András Bragyova: *Are There Any Minority Rights?,* Archiv für Rechts- und Sozialphilosophie, 80, 1994, p. 494.
[19] Emmanuel Joseph Sieyés: *What is the Third Estate?* (S.E. Finer ed., M Blondel trans., 1963) 1789

Defining nation thus is not an easy task, as there are the two historical models of

a) the German „ethnic nation," presupposing a prepolitical community (of race, language, history, etc.) and not claiming it being identical with the political nation (state); and

b) the French „demos" model of seeing simply the entirety of the citizenry forming a political nation to choose from.

However, (not only the historical and political, but also the) the constitutional developments of the past 200 years brought a considerable confusion in the model-selection process, as with the overall (verbal) acceptance of national self-determination ideals (may them be referring to territorial autonomies or other forms of collective rights), the "politically correct" nation-concept became more and more minority-conscious. Yet, (as we will see in the analysis of the respective documents) lacking a universally accepted, legally and politically interpretable understanding of the above mentioned concepts and ideals, the „minoriticization" causes a substantial jurisprudential frenzy.

Legislators were (especially those of accession-seeking transitionary democracies) thus faced with two options: they could follow the classic, yet politically (sometimes even in the literary sense) non-correct liberal constitutional framework, and see the ethnically neutral nation as a totality of free and equal individual citizens, where collective rights (lacking their subjects) cannot be granted. In this model, group interests can only be understood in the

terrain outside constitutional law, based on the first generational individual freedoms of association, petition, etc.; where no party, association, organization, or even the state is entitled to broadcast these group aspirations.[20] The other approach grants ethnicity (race, nationality, etc.) the status of a nation-constituting element, where the individual is entitled to rights (only) upon its membership within one of the nation-constituting ethnicities, as state power belongs to the collectivity of the ethnic (national) groups.

Apart from the case of ethnically homogenous (homogenized, separated, federalized, etc.) situations, the two nation-formation concepts are in theoretical contradiction and the constitution-makers had to make decisions in the case.

Again ironically, Western advocators (hoping for ethnic tension-settlement) in the last 10 years consequently opted for ethnicizing politics. Driven by the desires to provide adequate protection-measures for the respective groups, and following the easier path of adhering to traditional ethnicized patterns in grating ethnicity a fundamentally distinctive and prime politically identifying force, which will prescribe most political divisions and will form the basis of the political community. This approach is aimed at securing ethno-political balance through the instruments of constitutional group-equal (or rather group-conscious) regulatory mechanisms in a *ius cogens* nature. It has been the hint (based on an almost century long reign of ethnicity-protection measures which rarely were implemented in Western societies and demanded and

[20] See Schlett István, *Nemzet és polgár, A nemzeti és etnikai kisebbségi törvény tervezeteihez*, Világosság,

counseled to others only) that in certain ethno-political and political-cultural situations the classical liberal, majority-based democratic arguments and state structuring methods are inadequate, and stronger, more fundamental instruments are needed to involve minorities into the decision-making procedure, as, for one reason or another, political and administrative decisions cannot be left to the majority alone. In these situations, according to ethnicity-recognition theorists, traditional liberal and democratic principles should be set aside, creating instead a legally secured „paternalistic" multiethnic society.

The underlying idea therefore is to perceive minorities (let them be ethnic or of other character) as constitutive elements of the political nation,[21] in other words, granting ethnicity the status of a fundamental and formally decisive element in forming the political corpus. Following this lineage of thought, decision-making authority is thus, not only divided on an ethnic basis, but the entire system of political organization is to be based on communal and ethno-arithmetical considerations.

In sum, in many post-communist constitutions (including the ones, where political practice turned out to be a rather violently homogenizing and anti-minority oriented one) appeared thus constitutional clauses referring to both the individual protection and the (rather ambiguous) collective constitutional recognition of ethnic and national minorities -- without a sufficiently precise definition of what is really to be understood under these terms.

1991/3, p. 167-169

2.3. POSITIVE DISCRIMINATION

The *third* conceptual layer (consciously incorporated into European anti-discrimination policies) where defining minority status comes up, is the question of minority rights, which serve as a basis for preferential treatment.

Sajó[22] draws attention to the inherent contradiction between the requirement of equality of law, and minority group aspirations for preferential (thus unequal) treatment. The most affective strategy to follow therefore (on behalf of the group rights' advocators), Sajó suggests, is to lobby for an overall accepted, absolute and universal language of minority identity protection; since accepting the right for minority identity-forming (and all the practical applications thereof) as an unconditionally valid and binding human right, forces the state (all states, since we are talking about an absolute human right) to accommodate all minority protection claims.

The constitutional (both „globalized" domestic and international) developments of the 20th century brought a tacit (that is lacking a sufficiently precise argumentation) victory of the above mentioned lobby-strategy.

However, the conceptual ambiguity raises two problems: either minority right declarations remain redundant[23] (that is their content is already needed to

[21] Which, it should be stressed, can conceptually only be a *single* one.
[22] Sajó András: *Nemzeti kisebbségek védelmének gondjai egy nacionalista államban*, Világosság, 1994/1, p. 5.
[23] Ibid.

have been secured by other universal human rights); or minority rights aimed at material equality way overreach claiming equal shares for fundamental rights, and spell out claims for preferential treatment[24] -- without articulating or involving the proper extents, procedures and motives of the legislator.

With minority rights having entered a new era of constitutional recognition: that is being accepted as a universal human right, ethnicity, race and national affiliation (policy-wise rightly) became the basis for a (one way or another[25]) tax-paid preferential treatment.

Due to this fact, it is my submission that the legal climate for defining the qualifying conditions for being subjects of minority protection clauses, in my opinion, had substantially changed. As long as minority belonging could only be experienced as an inhumane and unacceptably arbitrary basis for atrocities and ill-treatment, it was tolerable, maybe even for the benefit of both the philanthropic community and the concerned parties not to form a legally applicable definition for the minority status. As soon as being member of a minority group involves positive additional rights accountable on the state (and thus on the majority) however, I believe conceptual clarity is a constitutional and political-must.

[24] Sajó brings the following example: if minority identity-protection constitutional clauses are taken seriously, then minority language protection and minority education rights necessarily entail the unconditional right to set up a private (minority) university, even if establishing institutions of higher education would normally be a privilege of the Parliament. The thus established institutions should then be eligible for all the state funding the other, under „normal procedure" established state-recognized universities are entitled to – yet again, all without a parliamentary decision. Ibid., p. 6.

3. FROM TAUTOLOGY TO ABSURDITY – BLACK LETTER EXPERIENCES

For spatial reasons my case studies carried out in the area will not be included here. Suffice it to say, that neither multilateral-, nor bilateral international legal documents or agreements between states[26] with mutual minorities are likely to engage in the detailed description of (their own) minority-affiliation conditions either. In fact, most of the documents usually avoid addressing even the collective nature of such rights, and restrict themselves to the descriptions of the consensual soft law-like co-joint declarations.

Furthermore, scrutinizing domestic constitutional provisions, it can similarly be established, that the languages utilized are mostly identical, repetitive versions of the rights set forth in international documents, and from our purpose similarly tautological in nature – providing no guidance whatsoever as to how the practical applicability of the minority definition should be understood.

Having thus, searched international, and fundamental internal documents, we may conclude that the only place (if at all), where we may actually find hints on the definitive character of these protection-mechanisms, is at a lower rank in

[25] See labor regulations binding the private market, for example.
[26] As an example, for a collection of bilateral documents between states burdened by minority-problems, see the bilateral documents between Hungary and its neighbors, at : http.www.htmh.hu.

the hierarchy of norms: either in specific minority acts, or in specialized laws provided for, let us, say, general organization-registration, or second-rate information in naturalization and citizenship bills.

The Estonian legislature's solutions shows a typical example of how (again, if at all) the legal comprehension of minorityness works: The answer to the question of what is to be meant by minority belonging (e.g. who, and upon what grounds can qualify for the aforementioned entitlements), we can only abstract from the National Minorities Cultural Autonomy Act,[27] which holds, that *„National minorities for this act are Estonian citizens, who live on Estonian territory, have long, firm and continuos relationships with Estonia, are different from Estonians in their ethnic origin, cultural peculiarity, religion or language and are motivated from the will to preserve together its cultural customs, religion or language, which is the basis for their shared (common) identity."*[28] Furthermore providing, that *„the cultural autonomy of national minorities can be formed by the German, Russian, Sweden and Jew and those numbering over 3000."*[29]

Thus, upon unfolding these, lower layers of minority-law, do we actually get acquainted with the real meaning of the aesthetic legal terminology. In the Estonian case for example, the law thus implicitly defines the prerequisites (being one of the enumerated ones, or collecting, probably 3000 signatures) for

[27] Adopted by *Riigikogu* (the Parliament) on 26th October, 1993. See, http://www.riik.ee/saks/akt/10.shtml
[28] Article 1.
[29] Article 2.

the groups (being registered organizations in the administrative sense) to be fulfilled in order to have legal standing as minorities. Estonia by the way is among the very few countries, which actually adopted minority laws, and even in this case the legal description of the minority status is rather weakly formulated, as it only refers to the qualifications of the group, while remaining completely silent on the individual affiliation-question.

3.1. HUNGARY

The 1993 Hungarian Act on National and Ethnic Minorities 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 listing within the Act, these are Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Roman, Rusin, Serb, Slovak, Slovene, and

Ukrainian. In order to register a new minority group, a popular initiative signed by 1000 citizens needs to be addressed to the Speaker of the Parliament.[30]

3.1.1. DOMESTIC CONTROVERSIES

As long as domestic matters go, the Hungarian legislator thus never abandoned the liberal standpoint of accepting the individual's free choice of identity, and even built a politically relevant set of institutions thereon. Hungary has a well-developed system of minority protection mechanisms, centered around a unique legal institution of the minority self-governments, where all individuals claiming to have minority identity are entitled to vote.

Nevertheless at firs blush, the legal and administrative definition of the minority group as a collective body may seem satisfactory in the Hungarian model. What will be the source of problems and anomalies, is the lack of defining the requirements and affiliation conditions of the individual group belonging and thereby the eligibility for the minority based system of preferences.

Driven by the desire to set an example for the neighboring states with substantial Hungarian minorities, the Hungarian legislator, thus also opted for a

[30] The law also provides for the free choice of minority identity (as an individual minority right), recognized multiple identity (ties) and reassures this choice being voluntary, by banning any compulsory or mandatory choice or declaration regarding minority identity. As a procedural guarantee, no administrative (state) register may contain any data relating to religious or minority affiliation. For more, see Trócsányi Sára – Farkas Mirella, *Faji eredet, vallási hovatartozás az adatkezelésben*, Constitutive and Legislative Policy Institute (COLPI), 1997, Budapest

politically aesthetic, commendably liberal model, based on the unconditional individual choice of identity. No defining guidelines whatsoever are set forth to define who should (or could) declare him/herself belonging to a minority group.

This leads to several controversies, some of which are worth separate mentioning:

Ad. 1) The functioning of the institutions and policies built upon the institutionally uncontrolled and non-guaranteed minority affiliation regulations produces a very volatile and upon political culture-dependent, vulnerable system. Mentioned already was for example, the unlikelyness of the desirability of the electoral technique used in the Hungarian minority self-government schemes (that is, leaving the decision whether to vote or not for minority self-governments solely to the political culture and conscience of the majority) for the Voivodina or Kosovo, where the majority would probably without a moment of hesitation elect *its* politicians into the *minority* positions.

But the Hungarian solution may carry a dangerous temptation for majority political parties in Hungary too,[31] as the law on local governments allows for the election of additional minority council members (one for each recognized minority) under highly preferential conditions; with very few, far less votes then those required for a regular mandate. (Consider for example the local assembly of a small village consisting of ten members, "supplemented" with 13 party soldiers ran under minority candidacies.)

Ad. 2) Without going into an in depth analysis and criticism of the Hungarian statutory model,[32] two both procedural and material controversies need to be pointed out. Both of the material requirements (100 years presence and 1000 signatures as a special popular initiative) for qualifying as an ethnic or national minority seem problematic. The Act, beside defining the two group constituting requirements, also contains a taxation of the 13 by the Act recognized minority groups, which means that the Parliament will actually need to pass a formal amendment to these provisions if a new group qualifies. The House (being sovereign) however, is not obliged to vote affirmatively on the question, which is in clear contradiction with the otherwise *cogens* requirements. The law therefore utilizes a language, which appears absolute at first sight, and seems to set forth the collective *right* of establishing a minority group (that is a right to be registered and recognized as such) but in fact it remains politics-dependent. (See again the window-shopping attitudes of the legislators.)

The another (both theoretical and practical) question is, whether who is to verify or question whether the 100 years requirement is fulfilled or not, and when is the clock supposed to start ticking? Several cases may be brought to demonstrate how legitimate these questions are. When will the (in bigger numbers since the transition present) Chinese minority be entitled to seek recognition? What about the Palestinians, who may (from the historical point of

[31] The ombudsman for ethnic and national minority rights pointed out in his parliamentary report that for financial political gains candidates often falsely claimed minority affiliation.

view correctly) claim some 600 hundred years of presence, as referring back to „Ismaelite" merchants?[33]

Not only does this model make it difficult for new (such as the Chinese for example) groups to gain recognition, but also opens the floor for legally permitted misusage. For example, upon the letter of the law, by seeking registration of the Hungarian Francophone community, a thousand friends of French art and cuisine the may easily find a way for tax-paid support of their cultural leisure-activities…

Thus, the Hungarian lesson of the generous recognition of the free choice of identity as a basis for politically relevant institution building is ambiguous, and warns about the outcomes being volatile and indeed very much political culture-dependent. Several misusages of the institutions had been reported and documented, where in order to receive state funded language instruction for example, entire communities declared themselves Germans.[34]

3.1.2. THE „STATUS LAW"

[32] Which was again, I find it important to stress, created with Janus-faced considerations to set a positive example for the neighboring states.

[33] Both groups have estimated numbers of 10,000, while some question certain recognized minorities (such as the Rusin for example) to have fulfilled the statutory numerical requirements. (The same doubts were raised on that of the 100 years presence of the Greeks.) The legislator of course, if free to recognize any group as a national or ethic minority (even lacking the general conditions), yet the statutory language setting forth the requirements therefor seems absolute and general, thus is somewhat misleading.

[34] Under conditions of a more sever ethnic conflict, such as Kosovo or even the Voivodina for example, the majority's affinity to misuse these legally provided institutions can be expected to increase…

In line with the practice of other Central-East European states, the Hungarian parliament scheduled to pass its "status law." These framework legislations provide for schemes of rights and preferences available for out-border nationals; expressing thereby official commitment towards non-citizen nationals.

In its initial concept and legislative drafts the government, supported by radical Romanian and Slovakian Hungarian minority representatives, was dedicated to the idea of creating a constitutionally cognizable bond with the out-border nationals. The initial "status law" was aimed at creating some kind of an "out-of-state-citizenship," the legal and political manifestation of cohesion and common belonging of all Hungarian "nation-citizens."

Eversince the post World War I Versailles treaties, when approximately two-third of the multiethnic Hungarian state territory (including compact ethnic Hungarian blocks) had been divided amongst its (in part newly formed) neighbors, the concern for non-citizen nationals had always been in the centerfold of Hungarian foreign policy.

With Hungarian EU-accession perceived at the doorsteps, and some neighbor states seen as being lagged behind in a distance of several decades of economic development, concerns for Hungarian minorities arose in a new context. Politicians envision that apart from already existing assimilationist and chauvinistic political pressures, for the first time in history, the Mother State will belong to a different political and economical regime and community then the

"hosts" of its 3-3,5 million nationals – seeing therein a threat to undisturbed relationships. (Besides a considerably large group living in the Vovodina, Hungarians constitute approximately 7 percent of Romania's population and 10 percent of Slovakia's.)

Compared to the initial drafts, the bill (scheduled to be passed by June, before the summer adjourning) in front of the parliament however is a more pacified, putatively Euro-conform framework-legislation – providing preferences in travel, as well as granting subsidies for education, culture, health services, family welfare, and the ability to work in Hungary. Due to budget constraints, EU expectations and diplomatic sensitivity, the government abandoned its initial radical abstract political rhetoric of national identification, and the bill is now only referred to as the "benefit law," officially called the "Act on Hungarians living in the neighboring countries."[35]

The law is to be applied for all Hungarian national citizens of Romania, Slovakia, Yugslavia, Ukriane, Croatia, Slovenia and (the in terms of minority population least significant and only EU-member) Austria, provided that they do not have or applied for Hungarian citizenship or permanent residency. Also, persons facing criminal charges, extradition, or those committed immigration forfeiture are excluded from the benefits provided by the law. Otherwise, the preferences are provided on an unconditional basis, stemming from Hungarian nationality; and are twofold, some may be used in Hungary (travel benefits,

[35] See also, Hungary update in East European Constitutional Review, Winter 2001, Vol. 10 No 1.

health care, an annually 3 months work permission, educational grants), while others (mostly grants and educational support) "back home."[36]

Besides creating new and stronger ties to the mother countries, according to government officials, the bill intends to encourage ethnic Hungarians to stay in their countries and is in fact (at least partly) aimed at preventing large-scale immigration to Hungary, should Schengen restrictions become enforceable.

The most ardent domestic political debate[37] however arose from the various legislative approaches in identifying who would be considered Hungarian (for the purposes of the law.) In fact, the contradiction between the basic liberal tenet of the free choice of identity and the desire to reduce (the legal) options for both politically and financially undesirable misusage is perhaps the most controversial aspect of the law. While the bill stands on the basis of the individual's free and uncontrollable ethnicity/nationality affiliation choice, in order to receive the "status Hungarian" identification document, which is required for all benefits, a recommendation by a civic organization beyond in the host state is needed. The id. card is valid for five years and is issued by the Hungarian authorities.

[36] According to government estimates, 2-2,6 million nationals are expected to seek "status Hungarian" recognition and some 750,000 are expected to take use of the benefits and preferences. The government claims that the law, which is intended to take effect on January 1, 2002, would cost the state approximately 5-6 billion forints (approximately $16-20 million) annually, which will come out of budget reserves, however to which the additional taxes (levied on migrant workers) would bring back some 4-4,5 billion.

[37] Two of the three opposition parties in parliament have severely criticized the text, claiming first of all that the government is significantly underestimating the cost of the law. The Socialist party estimated that some 1 million people would be taking use of the health care benefit, which could cost around 15 billion forints ($50 million) alone, and the annual price of the proposed legislation would actually ad up to around 60 billion forints. Additional concerns were raised regarding the labor market's capacity to deal with the estimated additional 700,000 legal laborers. Oppositions liberals expressed a grave criticism towards the law's entire concept,

Earlier drafts included the requirement of some proficiency of the Hungarian language,[38] affiliation with a Hungarian educational institution, or some sort of documentable ancestry, a "Hungarian-sounding name", membership in some Hungarian minority organization, or at least a reliable church registry. Critics claim that all of these criteria will seem difficult to reconcile with the legal comprehension of national identity, which barely accepts or tolerates any of such restrictions.

For the final draft, the government contented that the basis for the entire scheme of preferences is to compensate Hungarian nationals for their involuntary minority status, and as due to the vastly different conditions of culture, identity, and even language awareness within the potentially covered population, they simply found it impossible to come up with a fair and equitable legal definition for who should be covered by the law.

Thus, although most politicians find it unacceptable to impose any restrictions on the individual's ethnic declaration, both the whereabouts, the powers and the procedural possibilities of the "recommending" bodies remained vague and undefined by the bill. Furthermore, nor the composition, neither the

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claiming that the intricate web of preferences and benefits (most of which would be available in Hungary) does not support staying but, in fact encourages immigration.

[38] This is the, quite puzzling, case regarding access to one of the Hungarian national relics, the "Holy Crown," which from its initial exhibition site, the National Museum was moved to the Parliament. Due to security reasons the entry thereto is limited to supervised, guided and rather expensive visiting tours. Prime Minister Orbán in a radio interview informed the public that all Hungarians (nationals, not (only) citizens) will nevertheless be provided free access. To the question of the interviewing journalist, regarding how "Hungarian-ness" will be adjudged, i.e. will it entail out-of-border non-citizen nationals, the Prime Minister (which I thought then to be but a bon mot) replied that no one asking for admission in proper Hungarian will be charged. In fact this turned out to be the practice; upon my question regarding admissibility, the receptionist at the counter (where only the "foreigner" price was indicated) confidently reassured that this is the practice to be followed, and no passports or id cards were asked for.

fairness, or the equal applicability of the decision-making process of these institutions had been defined by he bill's drafters. All the Bill says is that the "recommending bodies must represent the totality of the given Hungarian national community."

Churches for example are one of the potential and technically speaking reasonable candidates for acting in this capacity, raising however serious state neutrality concerns, as the passing or even verifying of constitutionally relevant declarations seems to contradict the state-church separation dogma.

A very serious source of source of skepticism therefore grows from the possibility that the law might encourage people to falsely claim that they are Hungarian in order to qualify for its benefit.[39]

It is thus generally feared that, considering the post-communist mentality towards state policies, a carelessly ethnicized system of preferences (due to the lack of political cultural and public moral restraints) will simply be seen as a set of services provided by the (alienated, thus for no sympathy or co-operation eligible, in case of the status law, even foreign) state. Ethnic cheating, that is utilizing and misusing remedial measures for private and from the legislator's intentions independent means, may thus be a regular phenomenon. If simply upon a fictional declaration ethnicity superior health care benefits, educational

[39] Representatives of Roma organizations also raised concerns whether the law would recognize Hungarian Roma identity.

possibilities and work permits will be made available, the danger of such misusages is not insignificant.

Especially not so, if we consider the alarming cases of Hungarian "ethnocorruption," where loyalty towards the state –as not being a foreign one— may be presumed stronger.

As practice showed, if a parental declaration on the child's ethnicity provides an opportunity for state funded language instruction in kindergarten, or when collecting 1000 signatures one can register a non-existing minority and thus receive some financial benefits; or if only upon nominating them under minority electoral rolls a political party may double its representatives in local legislative bodies (which are again not risky and illegal transactions but legally open possibilities under the law) – these options are not seen as morally condemnable cheating, but rather as an additional service and optimization options offered by the state.[40]

[40] While the EU was yet reluctant to issue any official comments on the bill or its applicability to harmonization requirements before its passing, neighbor-state authorities were openly critical. Damian Brudasca, the chairmen of the Romanian Parliament's Foreign Affair's Committee (a member of the nationalist Big-Romania Party) declared the bill as an intrusion to Romania's sovereignty, and an action that will destabilize the region; and Claude Baláz, the Slovakian government member responsible for "out-border Slovakian affairs" pointed out that the Slovakian law only provides for domestic benefits and preferences, whereas the Hungarian model constitutes discriminative treatment and severe intrusion to internal affairs. Both governments expressed concerns regarding the fact that the Hungarian government failed to initiate any negotiations with them while drafting the legislation. The general Hungarian public seems to be supportive, yet it is divided on the issue. According to a recent survey, 60% supports the bill, while 30% is explicitly against it. In general, despite negative demographic trends, large scale immigration, or population transfer (of the kins) would be opposed by 75%, dual citizenship supported only by 42%, and 42% of the population (especially those living close to the borders) is even against eased work permit issuing. The dynamics of attitudes towards migration clearly mirrors the "host state's" economic conditions. Hungarians in Ukraine and Romania are more open to the mother state's offerings then their kins living in Voivodina or Slovakia. According to survey estimates, generally 80% (in Ukraine 86%, in Transsylvania 80%, in the Voividina 75%, in Slovakia 64%) of Hungarians would apply for the beneficial status. Fifty to seventy-five percent of the Hungarian minority thinks about migrating at some point (especially if the econo-political gap between the mother and the host states would deepen), yet (as the government repeatedly pointed out) upon an effective connection-insurance provided by for example this the law, only half would actually be willing to do so. The Hungarian minority, which is receptive and has high expectations towards the

The peculiarity and general lesson of the Hungarian case lies in pointing to the sensitivity of the identity issue: i.e. that the main debates are not about the scope and terrain of the actual substantive preferences, but about the definitional puzzle of how to draw the limits of subjective application. It is very telling how Romanian Prime Minister Adrian Nastase expressed fears that all of a sudden, some seven million "Hungarians" may appear in Romania...

4. PERPLEXITIES AND DILEMMAS – MODEL-FORMING

As we have seen, the constitutional definition of ethnicity is a crucial point in adjudging and determining the required and desirable level of ethnicizing politics. The legislature has basically two options:

a) a formal, in a way exclusive, and to some extent inevitably rigid classification, usually accompanied by some form of registration; or

b) accepting the (in terms of the applications, by the recent developments modified) liberal standpoint and leaving ethnic affiliation-selection to the inner, personal and moral decision of the individual, and paying the price of the above already mentioned (in effect often illiberal) ambiguity.

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bill, also shares mixed feelings. They both fear that it may trigger hostility in their host state, and at the same time lead to rejection from Hungarians who might feel frustrated by such a burdensome positive discrimination and still see them as second rate Hungarians.

In pursuing a workable and legally applicable definition for minority conceptualizing, one inevitably faces numerous questions.

Ad 1.) The first dilemma is the (seemingly) inherent logical contradiction between preferential treatment administration and personal *data protection*.

The issue is no different form the above already discussed one: a collective right based preference seriously questions individual substantiality, and once such an institution (and the benefits thereof) has been accepted by the group members concerned, it may seem a legitimate requirement to reveal and demonstrate the minority identity, which serves as a basis for the preferential treatment.

Ad 2.) Most of all in transitional East-European societies there are reasonable and legitimate historically rooted concerns about the (re)establishment of a minority-register. The nervous reactions of group advocates are fully legitimate on the level of (collective) *psychology*, however form the legal point of view, it is of substantial importance to underline, that there is a feasible option to set up lists, registers or other legally controllable mechanisms for minority-affiliation testing, while fully conforming to even the strictest data-protection regulations.

Thus, concerns about the possible future breach of a rule, or an illegal manipulation of the institution may not invalidate any of the arguments which stand for its creation. In the present state of data protection, any involuntary

handling or misuse of minority-sensitive data can only be committed by severely violating (criminal as well as civil and administrative) legal norms.

Ad 3.) On the more jurisprudential level, one cannot get around the problem of unfolding the concept of *free choice of identity*. As it was mentioned above, on 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. Again however, seeing it as a practical matter (with applications of legal, political, and most of all fiscal nature) the *free* choice of identity, in my opinion means nothing more then a reversed declaration of a negation; that is a prohibition articulated for the state not to intervene into the citizen's life in these matters.[41]

The collectively recognized free choice of identity causes considerable theoretical difficulties for the liberal state, as not only the ideal of a constitutional subject above the free individuals is hard to digest, but also the mere fact of the ambiguity of what shall the relationship between the individual

[41] On the level of logical speculation I cannot resist mentioning another, in affirmative action debates consequently overlooked contradiction: If we are to adhere to the somewhat simplistic Jungian obsession of various (majority and minority) forms of social collectivities, the concepts thus constructed are never seen as interdependent. When mentioning past injustice (such as slavery for example) all members of the majority society will be relatively disadvantaged (in affirmative policies) while making up for that injustice. The „majority" however, will also involve individuals and (under other principles) identified and identifiable minority groups, who can with certainty prove their innocence in the original discrimination. See for example a hypothetical example of a historically non-precedental post desegregation (white) immigration wave, or a specific example of a 20th century (let us say 1956) Hungarian immigrant, whose ancestors at the time of slavery, (as legally deprived peasants themselves) were cooking goulash in the Carpatian basin... (Of course, counter arguments may then be brought for claiming the tacit beneficiary affect of such past injustices to all non-black Americans today.) It should also be mentioned that this contradiction only stands for preferential policies outside the terrain of state activism (such as the labor or educational market). State paid compensation for illegal other injustices (as seen in post-nazi and post-communist conditions) is a different issue, staying probably in the discretionary terrain of state policies.

and its groups be. In other words, (double-triple identity forming is unproblematic, but) what shall be done with the individual determined to inconsistently jump between the various collective right-subject groups.

The liberal state only has two (both to some extent somewhat hypocritical) options: a) either upholding the fiction of the „political state" and in reality denying the existence of the ethnic community; or b) doubling the nation-fiction by dividing it into an ethnically neutral political state, and an ethnicity-dependent, more to the private than to the public sphere belonging, collective right-incorporating „cultural-nation."[42]

In sum, it is my conviction, that a fundamental distinction needs to be made between the justified liberal approach of leaving the choice of ethnic belonging to the individual while it is regarding matters of the private and personal sphere (by the way, usually protected by general individual right provisions); and a need for defined legal boundaries as soon as it relates to constitutional issues. In other words, as already mentioned above, as the system of ethnicity-based preferential policies is getting more and more developed, a clear (political) limit needs to be drawn, indicating until when should the State be obliged to accept and support the individual's declaration regarding ethnic belonging.

[42] For more, see Schlett, op. cit. p. 169.

It is my submission that unlike as it has been done in either of the European schemes, it is of crucial importance to clarify what the relationship between ethnicity (minority belonging) and politics is; to what extent should ethnicity (minority belonging) be politicized, and how far should the etatization of ethnicity (minority belonging) be allowed...

6. CLOSING REMARKS

As for regarding specific legislational dilemmas, Hungary is not the only state in the region facing these issues. Although not in the context of out-border preferences, the Slovenian legislator opted for a similar scheme. Having an intricate system of preferences (entailing for instance sui generis parliamentary representation and other participatory rights) for its two ethnic groups (Hungarians and Italians), when defining applicability of the minority provisions, the legislators similarly opted for the free affiliation-choice version. Thus (similarly to the Hungarian status law scheme) membership in the preferentially treated ethnic community was to be based on subjective choice, yet hoped to be subject to some sort of an "objective correction."

The compilation of electoral registers, thus the de facto recognition and affirmation of minority membership, was put in the hands of the respective ethnic communities. Having found the situation (that is granting constitutional

responsibilities to non-governmental organizations) awkward, the Constitutional Court however struck down this model.[43]

The Court ruled that the electoral law is unconstitutional in that it does not define criteria "*according to which the commissions of the Italian and Hungarian self-governing ethnic communities will decide which voters to place on the special register*." The Court pointed out that "*affiliation with an autochthonous Italian or Hungarian ethnic community is a status to which the State attaches certain rights, therefore the criteria for determining whether the citizen is a member ... should be defined by law. ... However, in the decision who will be granted the special rights which the Constitution guarantees exclusively to members of the autochthonous Italian and Hungarian ethnic communities, the deciding factor cannot be just the will of the individual, but legal criteria must also be set*."

According to the Court, lacking such criteria (the enactment of which was required before the upcoming election), the uncontrolled declaration of the individuals would "*not expand the protection of ethnic communities, it would permit uncontrolled misuse, either for exclusively electoral purposes, or with the intention of distorting the true will of the community ... Such an arrangement would nullify the special rights of members of the autochthonous Italian or Hungarian ethnic communities*."

[43] Decision on the election law, Official Gazette of the Republic of Slovenia, No. 20/1998, p. 1308; See Miran Komac, Protection of Ethnic Communities in the Republic of Slovenia, Institute for Ethnic Studies, Ljubljana, 1999, pp. 14-16. and 60-61.

The task of this paper was merely to shed some light on a controversial issue, where the challenge is how to find satisfying legal and political frameworks to prevent "equality" turning into surrendering to majority demands,[44] yet at the same time avoiding the transmuting of substantial legal norms[45] into empty slogans.

[44] Such as in the "equality" of everyone using the majority language for example.
[45] Like that of the principle of non-discrimination.

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