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Ethnic Data Protection and Collection: The Case of Hungary

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Abstract

This article first outlines some general features and problems related to generating and processing data pertaining to ethno-racial and national identification, mapping out the landscape of classifications and definition-making. It then uses the case of Hungary to demonstrate the intricacies of the subject matter at a country-specific level, highlighting inconsistencies in the normative framework– and policy design.

Keywords: identification, census, fraud, Roma

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This article begins by outlining general questions related to classifications and definition-making, as well as generating and processing data pertaining to ethno-racial and national identification. It then applies this roadmap to the case study of Hungary, illustrating the controversies of normative framework– and policy design on a country-specific level.

1. Conceptualization and definition-making: the epistemological and political framework

Conceptualization and definition-making pertaining to ethno-racial and national communities is surrounded by a minefield of philosophical and political considerations. Making ethnicity¹ visible in normative and administrative frameworks always arises in connection with a specific legal institution, defined and accentuated by a policy measure, and is intrinsically connected to certain notions of social justice and equality. Protective measures for racial, ethnic, or national communities can be targeting a number of things, such as: socioeconomic equality, de facto freedom of religion, the protection of potential pogrom victims and the prevention of brutal ethnic conflicts, decreasing cultural conflicts between majority and genuine minority or immigrant groups, combating racial segregation or apartheid, or race-based affirmative measures of compensatory, remedial, or transitional justice. In line with this, laws protecting minorities may take several forms, ranging from affirmative action and social protection measures, through declarations of religious and political freedom, to setting forth cultural or political autonomy, or controlling political extremists. The context-dependent meaning of minority protection may also refer to a widely diverse set of policies such as equal protection (non-discrimination), participatory identity politics (the political participation of identity-based groups in political decision-making), cultural identity politics (the recognition of identity-based groups in cultural decision-making by the State), the protection of historically rooted identity-based sensitivity (the criminalization of hate speech, holocaust denial, etc.), affirmative action, special constitutional constructions form-fitted for the needs of indigenous populations, policies recognizing claims which mirror the State's ethnic kin's diaspora claims abroad, the right to traditional, pre-colonization life, or simply measures designed to maintain international security.

Fraser (1995) points to the difference between redistribution and recognition goals, and McCrudden (2005) suggests that there are at least four different meanings of equality, and that

what might be suitable in one context might not be suitable in another. First, what he calls the ‘individual justice model’ focuses on merit, efficiency, and achievement and aims to reduce discrimination. Second, the ‘group justice model’ concentrates on outcomes and on the improvement of the relative positions of particular groups, with redistribution and economic empowerment at its core. Equality as the recognition of diverse identities is the third dimension, because the failure to recognize diversity is a form of oppression and inequality in and of itself. Finally, the fourth conception of equality includes social dialogue and representation, in other words, the meaningful articulation of group priorities and perspectives. Each of these conceptions of equality have different legal concepts at their core, corresponding respectively to direct discrimination, indirect discrimination and group-level marginalization and oppression, cultural and linguistic rights, and participation in political and public policy decisions.

Conceptualization of the targeted communities on the most abstract level is already surrounded by ambiguities and the terms are used in vastly differing ways in academic literature, as well as in legal and administrative documents, depending on the social and geographic context. For example, ‘race’ is used in reference to quite a different set of human conditions in the US as it is in continental Europe. A controversial category, it is generally not considered to be a fruitful analytical concept in the social sciences, where it is widely understood to be a social construct rather than a biological trait (in the biological sense, the entirety of humanity constitutes one single race) without a theoretically or politically uniform definition (see e.g. Tajfel 1981). For a legal analysis, however, there are calls for some sort of definition, conceptualization, and analysis, because countless domestic and international legal documents apply the term, either in conjunction with ‘ethnicity’ or alone, when setting forth the prohibition of discrimination, genocide, hate crimes, and other forms of persecution and marginalization.

‘Ethnic’ communities are referred to in an even more complex environment. The international legal terminology habitually differentiates between ‘national’ and ‘ethnic’ minorities on the grounds that the latter, unlike the former, do not have nation states as national homelands (Hannum 2000). In this way, ethnic minorities are a sort of hybrid category, blending, and often mirroring, the claims made by racial and national groups.

2. Normative frameworks I: defining the groups

Based on claims and aspirations, Will Kymlicka (2001) distinguishes between several ethno-cultural groups in the West: (i) national minorities, complete and functioning societies in historic national homelands which are either sub-state nations or indigenous peoples; (ii) immigrants, who do not want to engage in competing nation-building strategies, but want to negotiate the terms of integration (food, customs, holidays); (iii) voluntarily isolationist ethno-religious groups, which are unconcerned about marginalization and seek exemption from certain laws; and (iv) racial caste groups and Metics. Minority rights claims, he concludes, may vary from immigrant multiculturalism to multination federalism, Metic inclusion, or religion-based exemptions from general laws. As argued above, policies recognizing minority rights include adjusting society's perception of equality by including certain groups as eligible claimants for equal treatment. Even if, in theory, the existence of a minority should not depend on the State's decision, in practice, this epistemological process of broadening the agents of ethno-cultural justice and equality will always include a political decision and a value judgment. The process of recognizing minorities as minorities, or indigenous communities as groups worthy of *sui generis* recognition is highly politicized, and recognition is one of the social and political tools available for valuing core identities; conversely, misrecognition is often interpreted as a cultural devaluation that produces specific forms of discrimination, social disadvantage, or material deprivation. Recognition not only encapsulates politicized interpretations of equality, but is also tied to policies of protection and empowerment. As a form of symbolic justice, such normative recognition is always situated in discourses of privilege and oppression, as well as 'need', 'worthiness' and 'deservingness'.

In technical terms, questions of recognition surface in the enumeration of recognized national minorities, debates on census categories, groups brought under the auspices of anti-discrimination and hate crime statutes, or even being listed as tribes or aboriginal groups under the purview of indigenous law.

An additional point for analysis pertains to the question of whether the definitions (where applicable) concern the majority groups as well, or only minority communities (or even only the ethno-racial and national majority), and if so, if there are illuminative differences. Here, status law-like legislation and preferential naturalization policies are the dominant direction for research.

3. Normative frameworks II: defining membership

Ethno-national identity can be defined in several ways: (i) through self-identification; (ii) by other members or elected, appointed representatives of the community (leaving aside legitimacy– or ontological questions regarding the authenticity of these actors); (iii) through classification by outsiders, based on the perception of the majority; (iv) by outsiders using ‘objective’ criteria; (v) by using proxies such as names, residence, etc.

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 using some kind of objective criterion or it officially endorses tribal norms.

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 purposes ... as central to its existence as an independent political community’.² Israel provides another notable example of an official definition on membership in an ethno-national community – this time concerning an ethno-religious majority. Israel’s Law of Return, reflecting the Nuremberg Laws, invites all Jews to settle in their national homeland and, in so doing, provides a definition for what it means to be Jewish under the State’s immigration policy (See e. g. Weiss 2002; Kimmerling 2002).

Recent developments in identity politics – political activity and ‘theorizing founded in the shared experiences of injustice of members of certain social groups’ (Heyes 2016) – brought attention to the dangers of the ‘subjectified’ approach. In a world of unfettered subjectivity, giving people the right to change their race or gender, arguably, risks obscuring power hierarchies, and thus highjacks traditional political movements that focus on vulnerabilities and collective and structural social inequalities, and depoliticizes the feminist, civil rights, or human rights movement and theory. Nevertheless, the past decades brought transformative changes in how gender and ethno-racial terms are assigned and conceptualized in social sciences and humanities, and to a certain degree in politics and law. The shift centres on destabilizing categorical frameworks, such as race and gender, so that they are no longer clear or self-evident, allowing transgender and transracial people to legitimately move between gender and ethno-racial categories. As Brubaker (2016) shows, just like gender, the colour line may be sharp and rigidly policed in theory, but is often blurred and porous in practice. Even the core questions

are multi-layered: 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.

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 for collective rights. It is a rare exception to institute objective requirements, such as proven ancestry (by some sort of official documents) or the proven knowledge of the minority language (See Valentine). 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 provisions targeting the diaspora.³

In the US, critical race theory and the multiracial census category movement also brought about the abandonment of objective, usually judicially formulated⁴ systems of racial classification and made racial self-identification the dominant approach. For example, in 2007, the US Equal Employment Opportunity Commission, which requires employers with more than 100 employees to collect and report racial composition data, changed to self-identification from third-party classification, which was based on visual survey and categorization according to the employers’ perception.

Even when the protection of certain groups comes up in such egregious situations as genocide, definition-making for group membership proves difficult and case-law is inconsistent. As Ambrus (2012, 942) points out, there is a harsh ongoing discussion around defining the justiciable victims of genocide. According to the dominant ‘objective approach’, the judicial body examines the objective existence of the racial or religious identity of the victim; that is, whether they 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*-case⁵, for instance, the International Criminal Tribunal for Rwanda (ICTR) stated that in order to qualify as genocide, acts must have been committed against members of a specific group, and specifically because they belonged to this group.⁶ Although the acts in question constituted serious bodily and mental harm inflicted on the victim, they were committed against

a Hutu woman, and were therefore held not to constitute acts of genocide against the Tutsi group.⁷

Classification is also central in refugee procedures, where race, ethnicity, or membership of a ‘particular social group’ (See Sternberg 2011) that is subject to persecution is crucial; in such cases, the asylum seeker will make a claim pertaining to their 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. As Zagor (2014) points out, the production and reception of the refugee legal narrative is a complex phenomenon involving several narrators with sometimes conflicting stories and objectives.

Rich’s seminal essay (Gear-Rich 2014) on ‘elective race’ focuses on the moral and ethical implications of individuals’ inconsistent public declarations on racial identity in the name of autonomy and self-expression, for example with regard to seeking protection from racial discrimination in employment law, even if they have previously not publicly identified as members of a protected minority.⁸ This fits well in American legal scholars’ long-held debates on reconceptualizing the broader concept of equality law, replacing the previously held doctrine of ‘immutability’, which afforded protections of features (such as race and ethnicity) automatically if these characteristics cannot be changed. The new immutability doctrine (see for example Clarke 2015) extends protection to all identities that can, but shouldn’t, be required to be abandoned, as they are fundamental and core to personhood; this invokes questions on moral judgments about individual responsibility involving accidents of birth and ‘luck egalitarianism’. The underlying rhetorical dilemma pertains to whether society subscribes to the narrative that builds on a romanticized story of self-discovery and the public disclosure through which the authentic self is actualized, or whether race is still seen as an objectively assigned characteristic, where even ‘passing’ is a politically and morally charged trespass, and if categorization is changed, it is only because an objectively mistaken administrative action has been corrected. (See Brubaker 2016; Bowker and Star 2000).

4. Conceptual and practical dilemmas

A number of conceptual and practical questions arise from the above. The first centres around how legal-administrative conceptualization operationalizes ‘fraud’. In connection with

preferential treatment policies and affirmative action, as well as the collective rights-based minority rights framework in Europe, the experience of ‘ethno-corruption’ and ‘racial fraud’ surfaced in political, policy, and academic discussions. The concept of fraud is difficult to ascertain as an analytic category. In fact, it involves value and normative judgments. It can best be defined as intentionally using identity-based policies, building on the loopholes of the legal conceptualization and classification, or rather that they are abused by persons who are not members of the authentic, genuine, legitimate target group. ‘Intentional’ implies that the abusers are presumed to be aware of the discrepancy, and the inadequacy of their actions. (It needs to be noted that this definition implies predefined boundaries and definitions for ‘authentic’ and ‘genuine’ group characteristics.)

Another core concept is ‘choice’. The first layer of analysis includes an assessment of whether law, international or domestic, recognizes the right to the free choice of identity (see Pap 2017). A third pertains to the potential clash between privacy, the protection of sensitive ethno-racial data, and human rights and minority protection, where processing ethno-racial data may hinder policy implementation. This connects to political and philosophical dilemmas on policymaking whether ‘exclusive’ or ‘explicit, but non-exclusive’ targeting should be applied. A further theoretical question arises regarding whether or not an asymmetry in classification (whether it applies to minorities or the titular majority community) is itself problematic in various areas (such as census, education, anti-discrimination law, and electoral provisions).

Following the aforementioned conceptual and structural clusters, the subsequent chapters provide a non-exhaustive overview of inconsistencies in the Hungarian legislative and policy framework. The goal is to demonstrate the degree of divergence and asymmetry in normative approaches. Without a thorough comparative dataset, we are unable to pass judgment on whether the Hungarian case is egregious, or what the optimal degree of convergence of normative and policy frameworks should be.

5. Normative frameworks I: Defining the groups in Hungary

5.1 Recognized ethno-national minorities

In Hungary, in order to contextualize minority policies, we need to reach back to the Treaty of Versailles of 1920, when Hungary lost two thirds of its territory and the corresponding population to its neighbouring states. Ever since, Hungary has aspired to regain its former glory

and territorial integrity, or at least take responsibility for ethnic kin in the neighbouring countries. This has been a cornerstone of politics, and since the political transition of 1989, it has also been seen as a constitutional responsibility and a foreign policy priority. Throughout the 1990s, when new Central and Eastern European democracies were torn between meeting requirements for European integration and giving in to nationalists revivals, successive Hungarian governments used all the tools at their disposal to strengthen ties between the national homeland and ethnic kin in the diaspora. Hungary negotiated and signed bilateral agreements on minority rights with neighbouring states (Jeszenszky 1996), joined European minority rights treaties and conventions focusing on traditional, national minorities (such as the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages), and did everything in their power to pressure neighbouring states to do the same. Many argue that the reason why the first right-wing conservative government elected after the political transition adopted an extremely generous model for accommodating multiculturalism for indigenous minorities – meaning traditional national minorities, and specifically those with homelands in neighbouring states with large Hungarian minorities – was to indirectly create a politically marketable model for neighbouring countries. As the Organization for Security and Co-operation in Europe (OSCE), noted (NDI, OSCE/ODIHR 2006, 10):

The government's stated purpose for creating the Minority Act was to assure the cultural autonomy of minorities [...] However, another important factor in the development of the Act was Hungary's desire to protect the rights of the large number of ethnic Hungarians living in neighbouring countries. By developing the MSG [minority self-government] system and other minority institutions, the government hoped to build leverage that it could use in bilateral negotiations with neighbouring states on guaranteeing the rights of Hungarians living abroad.

The comprehensive law on the rights of national and ethnic minorities was adopted in 1993, and defined national and ethnic minorities as groups that have been present in the territory of Hungary for over 100 years, and that:

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.

The law also enumerated the following 13 recognized minorities: Armenian, Bulgarian, Croatian, German, Greek, Polish Romanian, Ruthenian, Serb, Slovak, Slovenian, Ukrainian, and Roma. A complicated procedure was set forth to extend the list, involving a popular

initiative, an advisory opinion from the Hungarian Academy of Sciences, and a vote in the Parliament amending the Act. No such initiatives have been successful so far.

It is a rather peculiar legislative and conceptual design that the law, in addition to defining what constitutes a minority on a general level, also enumerates the 13 recognized groups; this means that the Parliament will actually need to pass a formal amendment to these provisions for a new group to qualify. The House (which is sovereign), however, is not obliged to vote affirmatively on the question. This is in sharp contradiction with the otherwise clearly defined requirements.⁹

The Act guarantees cultural and linguistic rights for the recognized groups, contains provisions on the establishment and maintenance of minority education, and establishes a unique Hungarian institution, the minority self-government. Funded by local authorities, or by the State where national-level bodies are concerned, minority self-governments are elected bodies that operate at the local, regional, and national level and that have special competences for protecting cultural heritage and language use, fixing the calendar for festivals and celebrations, fostering the preservation of traditions, participating in public education, managing public theatres, libraries, and science and arts institutions, awarding study grants, and providing services to the community.

Viktor Orbán's Fidesz party gained a supermajority in 2010, allowing him to reformulate the constitutional and public law landscape, and a new minority law was adopted. Act CLXXIX of 2011 on the Rights of Nationalities basically preserved the earlier institutional and conceptual framework. However, the new law brought about a peculiar change in terminology, as one might expect when reconceptualization is taking place in the background. 'National and ethnic minorities', which were the subjects and 'objects' of the old law, became 'nationalities', and 'nationality self-government' replaced the old term 'minority self-government'. There is no evidence (for example, in parliamentary debates or government documents) that this shift in terminology was based on overarching theoretical or conceptual reasoning or that it has been accompanied by systematic political commitments.

5.2 *Census categories*

While the minority rights act specifies 13 nationalities, the census operates with five more: 'Hungarian', 'Arab', 'Chinese', 'Russian' and 'Vietnamese';¹⁰ there was also a spare field for the indication of any other ethnic ties. Apparently, no public or doctrinal debate was raised with regard to the reason behind such asymmetry. It needs to be noted that census data has relevance

beyond providing background information for prudent government planning. Pursuant to Article 2. § (3) of Government Decree 428/2012. (XII. 29.) on the conditions of disbursements through budget allocations for national minorities, ‘[t]he budgetary allocation to fund the operations of municipal national minority self-governments and some national minority self-government is defined as a proportion of the average funding available for all local national minority self-governments’ (Móré 2014). The issue is relevant in the context of voting, as according to Article 56 (1) of the new minority law, elections for new local national minority self-governments must be held when the number of persons belonging to that minority in the municipality reaches 30. The number is determined by aggregating minority affiliation responses in the most recent census questionnaire. Nevertheless, according to Article 242 (2), 25 persons will suffice to meet this requirement until 2024.

5.3 The case of the Roma

A number of inquiries focused on how Hungarian legislators have conceptualized Europe’s largest unique minority community, the Roma. Conceptualization, policy design, and targeting will be completely different when referencing the holders of minority (cultural) rights, beneficiaries of social inclusion policies, or victims of discrimination. While terminology in legislative and policy documents is not a reliable signifier for policy frameworks, it might reveal contradictory group conceptualizations and inconsistent policymaking. Arguably, the inconsistent labelling of the Roma as an ethnic, racial, and national minority reflects the lack of consistent conceptualization, raising questions about whether social inclusion, anti-discrimination, or a cultural rights-oriented approach should dominate policies (See Pap 2015; 2019).

When it comes to the Roma, the function and design of the aforementioned minority self-governments is quite controversial. Generally, while acknowledging that the minority self-government system serves as a ‘training school’ for up-and-coming Romani politicians, giving them skills that they can use in the mainstream political arena, observers are quite critical of the institutional design (Curejova 2007; Kovats 1996; Majtényi 2005; 2007; Thornberry 2001; Barany 2002). As Melanie Ram (2014, 30) notes:

[the minority self-government system], which at times has been touted as a possible model for other countries, has not brought a substantial improvement in Roma lives. While it has increased participation of Roma to some extent, it has hardly enhanced social inclusion of Roma, largely because its mandate is limited to cultural autonomy

(basic education, media, language, and promotion of culture). The language provisions are simply not so helpful for a community that largely speaks Hungarian at home, and local self-governments do nothing to directly address either discrimination or socioeconomic inequalities.

According to the previously mentioned OSCE report:

The MSGs tend to marginalize Romani issues by depositing them in a parallel, fairly powerless, quasi-governmental structure rather than addressing them through established governing bodies (NDI, OSCE/ODIHR 2006, 6)

Roma often approach their MSG expecting assistance related to a broad number of issues including housing, employment, discrimination and utility services. [...] in areas where the MSG has no mandate. [...] This lack of authority leaves MSGs as a 'half-way house' between a government institution and an NGO, with an undefined, under-funded mandate. [...] As consultative bodies, the MSGs have not proven to be effective in promoting Romani interests on a broad array of mainstream policy debates' (NDI, OSCE/ODIHR 2006, 22)

While other minorities are primarily concerned with protection of cultural and linguistic autonomy, the Roma population faces an almost opposite challenge, needing more integration to combat segregated education, discrimination, unemployment, and problems with housing and healthcare' (NDI, OSCE/ODIHR 2006, 5).

Cahn (2001) argues that the framework is not only 'largely inappropriate for addressing the situation of Roma', but has also 'reified the exclusion of non-white minorities in Hungary'; indeed, Hungarian Roma leaders repeatedly call for a redistribution-oriented, rather than a recognition-oriented, minority policy.¹¹ According to Molnár and Schaft (2003, 41), 'Roma self-governments see as their main objective the improvement of social conditions in their community rather than the preservation of minority culture and the strengthening of minority identity. The ambitions of local Roma leaders are influenced primarily by the marginalization of their community, while the protection of Roma identity remains secondary'

To be fair, as Vizi (2013) points out, despite all its flaws, for the first time in Hungarian history, the 1993 law formally recognized the Roma as a group with legitimate claims for a separate identity. Admittedly, the law facilitated a peculiar nation-building project (see, for example, Fosztó (2003)) by conceptualizing a Roma national minority as a distinct political group and incorporating all of its diverse subgroups. Also, the law successfully endorsed the cultural aspirations of certain Roma communities to a certain degree, and created a Roma political elite (Bíró 2013). On the other hand, its declaration concerning the prohibition of discrimination, a daily experience of Roma in Hungary in all facets of life, received very little attention. For example, the first comprehensive anti-discrimination law was adopted only in 2003 – 10 years after the minority rights law – and was necessitated only by EU-accession obligations. Meanwhile, in 2000, only three years before the law's adoption, the Constitutional Court rejected complaints pertaining to the lack of such a legislation (Hungary: Decision No.

45/2000 (XII. 8.). 2000). Thus it is not surprising that the law was unfit to meet the dire need for social inclusion among Roma communities. Despite the shockwave of the new market economy, which hit the impoverished Roma the hardest, there were no serious attempts to institutionalize social inclusion measures targeting the Roma in the first decade or so after the political transition; this is because Hungarian legislators prioritized enhancing exportable cultural identities for national minorities. Yet again, this particular piece of legislation never had such aspirations.

Another important remark needs to be made in defence of the 1993 framework: as controversial as it might have been to conceptualize the Roma as a national minority (especially given the lack of a grassroots Roma ‘nationalist’ cultural and political elite at the time), it would have been politically and morally unacceptable to exclude them from the communities addressed by the minority rights act. It is important to note that, as Judit Sansum Molnár (2017, 186) points out, ‘Roma’ was the most commonly used word in the almost year-long debate over the 1993 bill and was used almost twice as often as ‘German’ or ‘Slovak’, which were the next most commonly used.

The 2011 Act not only re-labelled Hungarian minorities from ‘national and ethnic minorities’ (*nemzeti és etnikai kisebbségek*) to ‘nationalities’ (*nemzetiség*) but also officially replaced the term *cigány* with ‘Roma’. There is no indication that abandoning the ‘ethnic’ and ‘minority’ terms had the Roma in mind. One can argue that to (re)label a piece of legislation in this way makes it conceptually solid and more coherent, leaving other ethnic minorities’ claims and policies to other legislative endeavours. A rather curious development, however, concerns the Roma minority self-governments only, because they have formally been involved in social inclusion measures, creating an even more confusing hybrid, mutant model. In Annex 2 to the first version of the Hungarian National Social Inclusion Strategy (2011), the government signed a framework agreement assigning competences such as supervising schools, developing new employment schemes, and monitoring programmes, to the National Roma Self-Government. In fact, it has been appointed as one of the core implementing bodies of the Strategy.

The new legislation clearly signals that, on the one hand, the legislature conceptualizes Roma issues foremost as issues of identity politics. On the other hand, government rhetoric and initiatives use cultural identity as a tool for social integration and present it in a simplified, essentialist manner.¹² For example, the updated version of the integration plan (Hungarian National Social Inclusion Strategy II, 2014) under the auspices of the Hungarian National Social Integration Strategy (2011), which was adopted in order to reflect policy aims set forth by the

European Framework for National Roma Integration, calls for the integration of a social inclusion approach to Roma educational and cultural programmes (Dinók 2012).

Flaws in the Strategy and its policy environment have been thoroughly criticized in the monitoring report commissioned by the Decade of Roma Inclusion Initiative¹³ and compiled by a coalition of most of the relevant NGOs¹⁴ in Hungary (Balogh et al. 2013, 9–10). For example, the report points out that:

some of the missing policies are closely connected with anti-discrimination and equal opportunities policies. [...] Abolishing the institution of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities [...] has resulted in far less powerful institutional tools for combating discrimination. Hungarian authorities do little to sanction hate speech, and criminal law provisions designed to protect groups facing bias are more often applied by the authorities to sanction Roma rather than non-Roma. In case of most hate crimes, no proper criminal procedure is launched. Romani women and children suffer extreme forms of exclusion, too. At the local level, the powerless position of minority self-governments has been further weakened: their consent is not obligatory any longer to decide on matters affecting the local Romani community.

Also, ‘the circumstance that public security measures are connected with the measures aimed at the Roma inclusion is quite problematic, since this gives the impression that ethnic origin is connected to criminality’ (Balogh et al. 2013, 37).

Again, to be fair to the Hungarian legislature, the following points need to be made. First, the *minority rights* framework is not to be blamed for what it does not aim for, and it does not claim to be the materialization of a holistic project for all Roma-related issues. It is a piece of legislation focusing on culture-centred collective rights. Second, it should be mentioned that it would have been politically impossible not to include the Roma in the enumeration of minority communities unless objections were raised by representatives of the community. This was the case of the Jewry, whose representatives clearly expressed their desire to be left out of the 1993 framework, but not with the Roma. While the 2011 relabelling arguably only clarified the scenario, an overall valid criticism of conceptualizing the Roma foremost as a national minority is that it derails public and political discussion and perception, weakens problem-sensitivity, and shifts the focus from other, arguably more stringent issues.

Yet, criticism is (at least) fourfold. (i) This approach and legal framework fails to comprehend the complexity of Roma-related issues, or even to comprehend the essential differences that the various policy models (minority rights, anti-discrimination, social inclusion) carry and require. (ii) This collectivist approach neglects the individual justice-based, anti-discrimination-oriented approach, and anti-discrimination and equal opportunities policies are inadequate. (iii) One can argue that the Roma are used as a bargaining tool for diaspora

politics. (iv) It might also be argued that (at least in 1993) the entire Roma nation-building project was an essentially colonialist/patriarchal endeavour, lacking genuine grassroots initiatives.

To further accentuate the context of this article, it needs to be emphasized that choices between ‘ethnic’ or ‘national minority’ conceptualizations have multi-layered political and policy implications. Positioning the Roma as a historically rooted ‘national minority’ can be linked to, and abused as, a tool for racializing, essentializing, othering, marginalizing, and scapegoating discourses, where cultural specificities are used to explain criminality and poverty, which in turn allow for securitized policies and blatant ‘correctional’ segregation and paternalistic and patronizing rhetoric and policies.¹⁵ While the 2011 law arguably clarifies the legislative approach in which the Roma are foremost a national minority, it creates the potential for derailing public and political discussion and perception; it also raises the general question of whether only old, historical, and traditional groups can seek recognition as national minorities, or whether this also applies to all, new, immigrant, and ethno-racial communities.

6. Normative frameworks II: defining membership in Hungary

6.1 *Self-identification*

In Hungary, declarations based on self-identification is the dominant institution. In fact, the wording of Article 7 (1) of the 1993 Act even suggested that there is a right to choose one’s ethnic identity: ‘The admission and acknowledgement of the fact that one belongs to a national or ethnic group or minority is the exclusive and inalienable right of the individual’. The 2011 Constitution, the Fundamental Law, and the act on nationalities applies a vaguer construct, allowing for an interpretation in which there are ‘objective’ criteria for a ‘genuine’ identity. According to the Constitution, Article XXIX, ‘Every Hungarian citizen belonging to a nationality shall have the right to freely express and preserve his or her identity’. The preamble of the law on nationalities repeats this.

Unrestricted self-identification led to a widespread practice of what is commonly termed ‘ethno-business’ or ‘ethno-corruption’. Deets (2002) documents how school officials pressure parents of ‘Hungarian’ students to declare their children ‘German’. He states, ‘According to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German minority programmes, which, by the census, was about 8,000 more than the number of ethnic Germans who are even in Hungary’. The Minority Rights Ombudsman’s 2011 report

drew attention to a school that advertises its German minority class as a ‘window to Europe’, while not requiring either of the parents to even speak German, nor setting eligibility requirements for the students or an actual curriculum on German ethnography or culture (‘*A kisebbségi általános iskolai nevelés-oktatás helyzetéről*’ [On the status of minority elementary school education] 2011). In the 2001 census, 62,233 people claimed to be German, while 46,693 students were enrolled in the German minority education scheme (The Minority Rights Ombudsman 2011, 39), and there was German minority education in several municipalities where neither the 2001 nor the 1944 census (which pre-dated the mass expulsion of some 380,000 ethnic Germans from Hungary) indicated the presence of an ‘ethnic’ German community.

Minority self-government elections have also been constant sources of fraud because there are no restrictions on the right to vote at these elections. In 2005, after repeated reports of the permanent abuse of the electoral scheme, a ‘soft’ form of registration was implemented in which minority voters need to sign up in a special register, but no objective criteria or formal requirements for affiliation have been set forth. The 2011 law has subsequently preserved this. If they are willing to spend some time navigating the bureaucracy, Hungarian citizens, regardless of their ethnic origin, can vote for minority self-government candidates. Although the phenomenon is not widespread, this enables members of the majority to abuse the system by taking over minority self-governments. For example, the non-Roma wife of the mayor of Jászladány – a village notorious for segregating Roma, primarily through schools – held an elected office in the local Roma minority self-government.¹⁶

According to a poll by the think tank *Századvég* in December 2012, 49% of Hungarians had heard about candidates running in minority elections without actually being a member of the given group (Magyar Nemzet Online 2012). Carstocea (2011, p. 20) showed that about 40% of the Romanian self-governments were reported to be headed by non-Romanians. At one point, a faction of the Ukrainian self-government failed to stand up during the Ukrainian national anthem, and on the basis of being Hungarian, requested that no Ukrainian be spoken during official sessions because they did not understand it (Index.hu 2011; Nol.hu 2011).

Finally, in 2010, a Hungarian appellate court recognized the existence of ethno-business in minority self-government elections (Magyar Nemzet Online 2012). The defendant, an editor-in-chief of a minority newspaper, was brought up on libel charges for calling newly elected members of the Romanian minority self-government ‘ethno-business doers and not members of the Romanian minority community in Hungary’.¹⁷ The court acquitted him.¹⁸

In order to demonstrate the fallacies of the legal framework, some Roma politicians decided to run under different labels (in most of the 17 reported cases, they ran as Slovakian). There are also several municipalities where (according to the national census) nobody identified as a member of any minority group, yet numerous minority candidates were registered (See Heizler 2002).

These loopholes in the legal regime sometimes result in complete absurdity. In order to express their admiration for German football, for example, a small village's entire football team registered for the election as German minority candidates.¹⁹ In 2010, the mayor of a marginalized village on the verge of bankruptcy, unable to finance its public school, requested that all 13 students declare themselves Roma and request minority education (József Nagy 2010). As previously discussed, this qualified the school for extra funding. No Roma officially lived in the village (Judit Nagy 2010).

Ethno-corruption is also prevalent in many other facets of collective rights. In 2010, the parliamentary commissioner for minority rights (a specialized ombudsman) published a lengthy report showing how members of the majority benefited from a government programme designed to employ members of the Roma minority community (see also Aurescu 2012). As the above cases demonstrate, the institutionalized cynicism concerning preferential treatment for minorities may have far-reaching consequences. Besides obstructing and discrediting minority rights, there is also potential for electoral gerrymandering.

An important provision of the post-2010 legal framework concerns *sui generis* parliamentary representation for the recognized minorities, a question that has been on the agenda of Hungarian politics and legislation since the 1989 political transition. The 13 recognized groups have thus been entitled to win preferential seats – one per community – in the 199-seat Parliament. These seats form part of the contingent of 93 seats that are distributed based on national lists, and nomination of candidates is the prerogative of the national-level self-governments. In other words, the parliamentary representation of minorities is tied to the minority self-governments, which implies that other players, such as parties for example, have no influence on the composition of the list and cannot nominate candidates. Citizens can choose to vote either for a party or for their respective minority list. It takes only a relatively small number of votes, approximately 20,000–25,000, to gain a preferential mandate. One can only enrol in one minority register. Hence, the expression of multiple identities is not supported in electoral law. Given the continuous tradition of ethno-corruption and the Orbán government's well-documented gerrymandering efforts, some argue that this might have been a non-

negligible motivation for the legislation (Pap 2018a). In the 2014 elections, no minority representatives were elected, and in 2018, only a single German, who happens to be a member of Orbán's Fidesz party, was elected.

According to the 2013 Act XXXVI on Electoral Procedures, the rules for registering in the nationality voter rolls are no different from the rules applicable to nationality self-government elections – essentially, a principle of free and unfettered self-identification prevails in this context.²⁰

6.2 *Third-party identification*

Third party identification is also applied in Hungary. For example, Farkas (2017) explains that since 2005, Hungarian schools have been obliged to implement a centrally organized competence assessment of students in grades 4, 6, 8 and 10, coupled with a questionnaire estimating the proportion of Roma students taking part in the assessment. The estimates are made by headmasters. The estimated data on Roma children is collected by the Educational Authority through the National Assessment of Basic Competence by a 'School Questionnaire', compiled by teachers. However, as it does not contain guidance on how to determine ethnic origin, teachers rely on their own perception (Chopin, Farkas, and Germaine 2014, 54). Furthermore, as a comprehensive study by the Open Society Foundations (Chopin, Farkas and Germaine 2014, 54) points out,

Sociological surveys conducted by the Institute of Sociology and Economy within the Academy of Science, as well as by private research companies, rely on previous statistics (national representative Roma survey of 1993 and 2003, population census of 2001 and ethnic statistics collected before 1993 by the Ministry of Cultural Affairs) and field work undertaken in schools and Roma settlements. These sociological surveys are unofficial sources of ethnic data in public education. They are based on third-party identification of Roma ethnic origin by school directors, field researchers and more recently on (multiply) socially disadvantaged status.

The latest comprehensive Roma survey in 2013 was based on third-party identification by local governments (Pénzes et al. 7–8.). Judgments in the so-called *Hajdúhadház* desegregation case, brought by the Chance for Children Foundation, was also premised on third-party identification-based ethnic data, collected by a court-appointed public education expert in tandem with the elected local Roma leaders (Chopin, Farkas, and Germaine 2014, 61–62).

In addition, NGOs and law enforcement bodies (courts, equality body and the ombudsman) collect perceived ethnic data when adjudicating discrimination complaints (Chopin, Farkas, and Germaine 2014, 54).

Another case for third-party identification practices is adoption, where prospective parents can indicate in formal documents if they do not want to adopt a Roma child. There is no official form or box to be ticked for this declaration, but there is room for personal remarks on adoption documents. Authorities (child services) will subsequently need to make decisions on qualifying potential children for adoption.

6.3 *Community agency*

The perception and declaration of members of community organizations is also used in Hungary. One such area is scholarship programmes, where some sort of NGO or minority self-government endorsement is required. A more detailed discussion on the Roma follows in Section 6.6.

Another field for community ethnic data generation is NGO strategic litigation. Farkas (2017, 28) documents how, in the case of *Chance for Children Foundation v Taktaharkány*, data pertaining to students' Roma ethnicity was collected by the equality body, the Equal Treatment Authority, together with the president of a local Roma minority self-government and the headmaster of a local school. The Roma leader provided information on typical Roma names in the village and the streets in the segregated Roma neighbourhood. In another project, the Hungarian Helsinki Committee developed a method for collecting data on ethnic origin in relation to stop-and-searches by the police. The method involved representatives of the local Roma communities and self-governments, and has been approved by the Data Protection Commissioner and used in a countrywide research project called STEPPS (see Miller 2008). The latest comprehensive Roma survey, mentioned above, based on third-party identification by local governments, often also included local Roma self-governments as respondents (Pénzes, Pásztor, and Tátrai 2018, 7–8).

6.4 *Proxies*

Using proxies for identifying ethnicity is not a well-established practice in Hungary. It was however used in the aforementioned strategic litigation cases on educational desegregation, where place of residence as well as first and last names were used to identify Roma pupils (Chopin, Farkas, and Germaine 2014, 50).

6.5 Objective criteria

We also see examples of quasi-objective requirements for assessing ethno-national group membership in Hungarian law. One pertains to the passive right to vote for minority/nationality self-governments. According to the legal framework, Article 54 of the 2011 Act, candidates need to declare that they speak the language of the respective group and have ‘knowledge of its culture and traditions’ (See Dobos 2016). Although no tests are being conducted or any procedures set forth to verify or validate these declarations, in theory they serve as objective criteria.

We see a similar, although more thoroughly policed, requirement for preferential naturalization of ethnic Hungarians – members of the titular majority community. According to Article 4 of Act LV of 1993 on citizenship, anyone ‘whose ascendant was a Hungarian citizen, or who demonstrates the plausibility of his or her descent from Hungary’ can be naturalized on preferential terms, provided that the person proves a knowledge of the Hungarian language.

The theoretical question arises as to whether language requirements are technical criteria for eligibility, or substantive criteria for group membership.

6.6 The case of the Roma

Any legal tools developed for the purpose of minority protection can, in practice, be abused in order to procure preferences for members of the majority community. In Hungary, it is a habitual practice, with Roma being the victims (see Pap 2015; 2018b). Sometimes, educational segregation is achieved by Roma parents being pressured to request specialized minority education, aimed originally at safeguarding Roma culture (Balogh 2012a; 2012b; Balogh et al. 2013). The result is that Roma children are provided low-quality Roma folklore classes once a week, but are kept in separate, segregated classes in inferior conditions (See Lakatos 2010).²¹

In most cases, financial incentives are the reason for this, since schools receive additional public funding for minority education – which is often the only source of extra income for educational institutions in underdeveloped, poor regions or small villages. In order to secure this funding, the school administration and teachers will do anything it takes: learn a

language, get training in Roma ethnography and culture, and incentivize parents to request minority education.

What we see is that existing policies and programmes are conceptually confused: there is no clear agenda for who is to be targeted. Priority is given to Roma children, other disadvantaged children, and high-achieving pupils; regardless of the selection criteria, there is a lack of clarity on what the actual goals are: the construction of a (new) Roma (national) intelligentsia, the enhancement of individual life chances for Roma and/or disadvantaged students, or the improvement of the integrity of the society as a whole. Without a clear aim, the success of these measures is hard to assess. These policy choices are intrinsically connected to classification models; exclusive targeting requires data collection and a definition of eligibility, or at least a public declaration or NGO endorsement. Explicit but non-exclusive policies do not require data collection, but carry the risk of abuse and ethno-corruption.

Below, I provide a sample of programmes and projects in the field of Roma education active in 2017 in order to demonstrate the diversity and divergence of these projects.²²

'For the Road' programme ('Útravaló')

This programme is funded by EU Structural Funds and managed by the 'Human Capacities Grant Management Office', a Hungarian State agency. Applicants can be mentors and mentees (in pairs). The services include a scholarship (€25–€50 per month) and mentoring. The aim is the prevention of early school-leaving and the facilitation of high school graduation. The beneficiaries are 7th–12th grade pupils with (multiple) disadvantages (among them the Roma) who achieve at least a medium grade point average (GPA). The type of targeting is explicit but not exclusive; at least 50% of places are reserved for Roma pupils. As for the operationalization of Roma ethnicity, it comprises a written self-declaration signed by the applicant or their parent/guardian (in the case of minors) and a recommendation issued by the local/regional/national Roma self-government.

'Study Hall' programme ('Tanoda')

As above, this programme is funded by EU Structural Funds and managed by the 'Human Capacities Grant Management Office'. NGOs and churches are eligible to apply. The services provided are extracurricular after-school (afternoon and weekend) activities, tutoring, and infrastructure (a study room and IT services). The expressed aim is the prevention of early school-leaving and the improvement of academic performance. The beneficiaries are 7th and 8th

grade pupils with disadvantages, particularly Roma children. The type of targeting is explicit but not exclusive; the proportion of beneficiaries should be at least 30% Roma, 49% disadvantaged children, and 70% recipients of child welfare benefit (pupils may belong to more than one of these categories). Roma ethnicity is established by a written self-declaration.

'Big Girl' Programme ('Nagylány'/'Bari Shej'/'Fátă Máré')

Again, this programme is funded by EU Structural Funds and managed by the 'Human Capacities Grant Management Office'. Municipalities, Roma Councils, NGOs and churches are eligible to apply. The services provided are mentoring and support groups (and, optionally, tutoring, training courses, leisure/cultural activities, and in-kind support). The expressed aim is the prevention of early school-leaving and early marriage/motherhood. The beneficiaries are Roma girls and/or disadvantaged girls (at risk of school drop-out), aged 10–18 years. The targeting is explicit but not exclusive; applicants are encouraged to involve (multiply) disadvantaged girls (preferably at least 50%) and female mentors of Roma origin. A written self-declaration is sufficient to establish Roma ethnicity.

The programmes above target social inclusion; the following aims for collective minority rights.

(Optional) Roma Minority Education

This is governed by Act CLXXIX of 2011 on the Rights of National Communities (replacing the former Act on the Rights of National and Ethnic Minorities) and applies to the 13 recognized communities, among them the Roma. It is funded by the Hungarian national budget and is managed by municipalities (within the framework of public education institutions and services). The services provided include kindergarten and elementary and secondary education in the minority language (if relevant); curricula include additional content (compared to mainstream curricula) on national cultural heritage and history. The expressed aim is to support the cultural (and linguistic) autonomy of national minorities living in Hungary (among them the Roma). The beneficiaries are children from minority communities (who opt for it); the type of targeting is exclusive, although leftover places are available for interested non-members of the community. Roma ethnicity is operationalized by an official request and written self-declaration, signed by the applicant and their parent/guardian.

There are also a number of 'honours' programmes with a focus on assisting high-achieving Roma youth.

Roma Special Colleges (Roma Szakkollégiumok)

These institutions have mixed funding from EU Structural Funds and churches, and are managed by the ‘Human Capacities Grant Management Office’. Higher education institutions and churches are eligible to apply, and the services provided are diverse: accommodation in dormitories with study infrastructure (IT, library), scholarships (up to approximately €200), training courses, seminars, events, mentoring, and tutoring. The expressed aims are also diverse; they include improving the coexistence of Roma and non-Roma communities and facilitating the construction of a (new) Roma intelligentsia and a new generation of Roma leaders. The beneficiaries are Roma and/or disadvantaged students in higher education, and hence, the type of targeting is explicit but not exclusive (at least 60% of the students should be Roma). The operationalization of Roma ethnicity is based on self-identification via a motivation letter addressing the issue of Roma identity.

Romaversitas

These programmes are mainly funded by private donors and are managed by the Romaversitas Foundation (based in Budapest). Applicants may be individuals or services, which can include tutoring, mentoring, coaching, seminars, summer camps, language courses, IT training, or internship programmes, and the expressed aim is to support Roma students ‘to successfully graduate and become highly skilled professionals in their chosen field’. The beneficiaries are Roma secondary school students, Roma students in higher education, and Romaversitas alumni. The type of targeting is explicit and exclusive. The operationalization of Roma ethnicity is not specified, but a motivation essay is required, together with a CV and photograph.

Roma Education Fund’s Scholarship Programmes

These programmes are composed of the Roma Memorial University Scholarship Programme (RMUSP) and the Roma International Scholar Programme (RISP). They are funded by private donors and managed by the Roma Education Fund (with headquarters in Budapest). The applicants are individuals (students) from Albania, Bulgaria, Bosnia and Herzegovina, Croatia, the Czech Republic, Hungary, Kosovo, Montenegro, Macedonia, Romania, Serbia, Slovakia, and Turkey (RISP additionally accepts applicants from Ukraine, Russia and Moldova). The services include scholarships (RMUSP: €80 per month plus tuition fees up to €1,200 per year; RISP: covering the costs of academic mobility). According to the website, the expressed aim is ‘to contribute to the emergence of a critical mass of Roma, higher education graduates, confident and proud of their Roma identity [...] as well as remain solidly connected to the Roma community and support its further advancement and inclusion’. The beneficiaries

are Roma students, and the type of targeting is explicit and exclusive. As for the operationalization of Roma ethnicity, self-identification, a 'Roma Essay' and the presentation of Roma-related activities are required. RISP additionally requires a mandatory recommendation letter by 'the leader of a legally registered Roma organization'.

The Roma Graduate Preparation Programme (RGPP)

Formerly the 'Roma Access Programme' (RAP), this programme is funded by private donors and implemented by Central European University (CEU), Budapest. The applicants can be individuals from Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Greece, Hungary, Italy, Kosovo, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Turkey, or Ukraine, and the expressed aim is to help Roma graduates 'with an interest in social sciences and humanities to compete for places on Master's-level courses at internationally recognized universities'. The services provided include preparatory programmes, mentoring, and scholarships covering living expenses, accommodation, health insurance, and travel costs. The beneficiaries are 'outstanding Roma graduates'. The type of targeting is explicit and exclusive and the operationalization of Roma ethnicity is based on self-declaration, presenting Roma-related activities (CV and motivation letter), an 'identity essay', and a recommendation letter from a recognized Roma organization (advised).

The above sample shows programmes targeting cultural identity politics, remedial programmes (opportunity levelling, economic empowerment) and honours programmes. As noted above, they all have different understandings of social equality: the individual justice model centred on merit, efficiency, and achievement aims to *reduce discrimination* in education – this should be guiding the honours programmes. The group justice model focuses on outcomes and the improvement of the relative positions of particular groups, with *redistribution* and economic empowerment at its core – these are the social inclusion programmes. Seeing equality as the *recognition* of diverse identities implies that the failure to accord diversity is a form of oppression and inequality in and of itself: collective minority rights education programmes (fostering social dialogue, participation and *representation*, the meaningful articulation of group priorities and perspective) aim to address these. And, as noted earlier, data collection and generating models should be designed in sync.

Minority protection institutions are also abused in the well-documented practice when, in violent conflicts between racist hate groups and members of the Roma community, Roma

are charged with racially motivated hate crimes (See Pap 2018b). We also see data protection arguments, i.e. the reluctance of authorities to recognize and register ethnicity used for obstructing educational desegregation, data protection arguments used as an excuse not to prosecute racially motivated hate crimes (under-policing), and data protection arguments used as an excuse not to monitor ethnic profiling (over-policing). ‘Ethno-corruption’ is also apparent where the majority take advantage of preferential treatment in education and affirmative action measures in the labour market.

In 2009, the data protection and the minority rights ombudsmen published a joint recommendation on ethnic data collection. As Hermanin and Atanasova (Chopin, Farkas, and Germaine 2014, 61–62) point out,

events preceding the joint statement were twofold. On the one hand, fraudulent participation of majority citizens in minority elections and the State Audit Office’s investigation into spending earmarked for the Roma had revealed that majority citizens abuse the self-identification-based categorization of ethnic minorities by exercising minority rights — such as participation in the election of local minority representatives — and accessing positive action measures. On the other hand, hate speech and hate crime prompted a response from the ombudsmen.

As they explain (Chopin, Farkas, and Germaine 2014, 61–62), the joint recommendation focuses on the need to distinguish among the justifications and methodologies for ethnic data collection in the fields of countering discrimination, positive action measures, policing hate crimes, and ensuring minority rights. The document points out that the right to equal treatment outweighs the right to protection of personal data when it comes to investigating hate crimes and tackling discrimination, mainly because the potential violation of the latter is formal. The recommendation emphasizes that, given that discrimination and hate crime are based on perceived ethnic origin, ethnic data in these fields ought to be collected on the basis of third-party identification, whereas self-identification is of little relevance. Furthermore, the ombudsmen established objective criteria (primary and secondary) for third-party identification, held that local minority representatives must be involved in third-party identification, and emphasized that data must be collected anonymously.

As demonstrated above, the Hungarian case is instructive in that (i) it shows how (in line with Murphy’s Law on abusing law and human rights in particular) discriminators, political entrepreneurs, or impostors conveniently rely on and abuse the privacy regulations and the political sensitivities preventing precise definition-making and classifications in legal frameworks, (ii) how this leads to a widespread and well-documented practice of ‘ethno-corruption’ and fraud in electoral law, minority rights, and affirmative action measures, which

(iii) actually prevents both effective policymaking and implementation. Furthermore, (iv) the freedom (free choice of ethno-national identity) does not appear to be a sustainable legal right in most policy areas, (v) sometimes minority protection instruments can be turned against the very community they target (in the case of hate crimes, or a special form of segregation), and (vi) inconsistent and insufficient classifications are often a consequence or a symptom of inconsistent political and policy conceptualization.

Conclusion

This article provided an overview of the issues concerning the generating and processing of ethno-racial and national data, mapping out the landscape of classifications and definition-making. It has been argued that for anti-discrimination measures, subjective identification with the protected group is irrelevant and external perceptions serve as the basis for classification. Policies implementing this anti-discrimination principle may rely on a number of markers: skin colour, citizenship, place of birth, country of origin, language (mother tongue, language used), name, customs (like diet or clothing), religion, parents' origin, or even eating habits. Defining membership criteria comes up in a completely different way when group formation is based on claims for different kinds of preferences and privileges. In this case, subjective identification with the group is an essential requirement, but the legal frameworks may establish a set of objective criteria that additionally need to be met. In the context of drafting affirmative action and ethnicity-based social inclusion policies, external perception, self-declaration, and anonymized data collection may be varied and combined. A special form of opting into groups concerns mixed partnerships or marriages, where protections are extended to victims of discrimination by association.

When it comes to choosing legal or policy means to identify community membership, solutions should be tailored to match the respective policy frameworks. Thus, for hate crimes and discrimination, the perception of the majority and the perpetrators should be taken into consideration; in political representation, the perception of the minority community should matter; and in preferential treatment (remedial measures and affirmative action), self-identification along with community identification or endorsement should be key.

Notes

¹ Despite the differences, duly addressed in the article, in the context of data generation and processing, ‘ethnicity’ and ‘ethnic’ are used synonymously with ‘race’ and ‘racial’, and ‘nationality’ and ‘national’, unless explicitly noted otherwise.

² *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

³ Examples can be brought from a number of European States, from Hungary to Lithuania. See, for example, Report on the Preferential Treatment of National Minorities by their Kin-State, adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19–20 October 2001), CDL-INF(2001)019.

⁴ 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 towards the juridical grasping of the minority concept. In the subsequent years up until 1952, when racial restrictions were removed, 52 such prerequisite cases were recorded (see for example Haney-López 2006; Kennedy 2004).

⁵ *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998.

⁶ Paras 521–523.

⁷ Paras 720–721, (see Ambrus 2012, 943).

⁸ 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 in concentration camps during WWII, Fred Korematsu passing as Clyde Sarah (see for example Yang 2006; Pember, n.d.).

⁹ A number of Parliamentary and Constitutional Court decisions have been passed on petitions of various ethno-national groups seeking recognition; these include Jews, Aegean Macedons, Russians, the Bunyevac, and Huns.

¹⁰ <https://www.ksh.hu/nepszamlalas/docs/kerdoivek/szemely.pdf>

¹¹ For an academic assessment of the ‘redistribution–recognition dilemma’, which is conceptualized as an analytically distinct category of justice, see Fraser (1995).

¹² See, for example, a speech delivered by the Minister of Human Resources (Balog 2014).

¹³ For the assessment of the decade, see Mirescu and Kóczé (2011), Jang (2015).

¹⁴ For the role of NGOs, see Kocze (2012).

¹⁵ Note, for example, how the Advisory Committee on the Framework Convention for the Protection of National Minorities Strasbourg (2016) reacted with consternation on legislation exempting certain schools from the requirements of the Equal Treatment Act, allowing de facto ‘benevolent segregation, or as coined by Zoltán Balog, former Calvinist priest-turned-minister of human resources: a “tender loving attainment process”’. The Advisory Committee expressed deep concern for this development, calling it extremely worrying and stating that it runs diametrically contrary to principles of integration and equal treatment.

¹⁶ https://www.politicalcapital.hu/konyvtar.php?article_read=1&article_id=850

¹⁷ For the purposes of this discussion, ethno-corruption and ethno-business can be understood as synonymous.

¹⁸ <http://www.emasa.hu/print.php?id=6880>

¹⁹ Interview with Mr. Heizler, Népszabadság (the leading Hungarian daily), 2002.07.24.

²⁰ According to Act XXXVI of 2012 on the National Assembly, Section 86, requests for registration as a nationality voter shall contain: a) an indication of the nationality; b) a declaration by the voter, in which the voter professes to belong to said nationality; c) an indication of whether the voter also requests to be registered as a nationality voter with regard to the election of Members of Parliament.

²¹ See the reports of the Parliamentary Commissioner for National and Ethnic Minority Rights (Kállai 2011a; 2011b) and the report of the Parliamentary Commissioner for Fundamental Rights and of the Deputy Commissioner for the Protection of the Rights of Nationalities Living in Hungary (Szalayné Sándor and Székely 2014).

²² The data collection was carried out in 2017, hence project specifications and procedures may have changed since then, and needless to say, it was not intended to be representative and to provide a full list of the available models and institutions. See Lídia Balogh & Andras L. Pap: Non-exclusiveness and/or Explicitness? Conceptualizing and addressing the educational disadvantages of the Roma in Hungary, presented at the

European Conference on Educational Research (ECER) of the European Educational Research Association (EERA), University College Copenhagen, August 25, 2017, Symposium: ‘Minority Education and the Ambivalent Consequences of Explicit Targeting’.

References

- “A kisebbségi általános iskolai nevelés-oktatás helyzetéről.” 2011. NEK-411/2011. Budapest: Parliamentary Commissioner for National and Ethnic Minority Rights. http://nemzetisegek.hu/dokumentumok/jelentes_a_nemzeti_es_etnikai_kisebbségi_altalanos_i skolai_neveles-oktatás_helyzeterol.pdf.
- Ambrus, Monika. 2012. “Genocide and Discrimination: Lessons to Be Learnt from Discrimination Law.” *Leiden Journal of International Law* 25 (4): 935–54. <https://doi.org/10.1017/S0922156512000519>.
- Aurescu, Bogdan. 2012. “The June 2012 Opinion of the Venice Commission of the Council of Europe on the Act on the Rights of Nationalities of Hungary.” *Lex et Scientia* 19 (2): 173.
- Balog, Zoltán. 2014. “A Kultúrára Kell Építeni a Felzárkóztatást [Catching up Must Be Built on Culture].” MTI-EMMI. <http://romagov.kormany.hu/balog-zoltan-a-kulturara-kell-epiteni-a-felzarkoztatast>.
- Balogh, Lídia. 2012a. “Jog a kultúra őrzésére – vagy ürügy a szegregációra? A roma nemzetiségi oktatás mint kétélű kard Magyarországon [The Right to Protect Culture – or an Excuse for Segregation? Roma Minority Education, a Double-Edge Sword in Hungary].” *PRO MINORITATE* 20. (Spring): 207–23. <http://www.prominoritate.hu/folyoiratok/2012/ProMino12-1-13-Balogh.pdf>.
- . 2012b. “Minority Cultural Rights or an Excuse for Segregation? Roma Minority Education in Hungary.” In *Education Policy and Equal Education Opportunities*, edited by Pop Daniel, 207–22. New York, NY: Open Society Foundations. <https://www.opensocietyfoundations.org/sites/default/files/education-policy-2012020228.pdf>.
- Balogh, Lídia, Judit Berki, Gábor Daróczi, Borbála Ivány, Angéla Koczé, Zsófia Moldova, Nóra Novoszádék, et al. 2013. *Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in: Hungary*. Decade of Roma Inclusion Secretariat Foundation. <https://www.issuelab.org/resources/15479/15479.pdf>.
- Barany, Zoltan D. 2002. *The East European Gypsies: Regime Change, Marginality, and Ethnopolitics*. Cambridge ; New York: Cambridge University Press.

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- Bíró, András. 2013. "A Debate." In *From Victimhood to Citizenship – the Path of Roma Integration*, by Nicolae Gheorghe and Martin Kovats, edited by Will Guy, 11–40. Budapest: Kossuth Publishing Corporation.
- Bowker, Geoffrey C., and Susan Leigh Star. 2000. *Sorting Things out: Classification and Its Consequences*. First paperback edition. Inside Technology. Cambridge, Massachusetts London, England: The MIT Press.
- Brubaker, Rogers. 2016. "The Dolezal Affair: Race, Gender, and the Micropolitics of Identity." *Ethnic and Racial Studies* 39 (3): 414–48. <https://doi.org/10.1080/01419870.2015.1084430>.
- Cahn, Claude. 2001. "Smoke and Mirrors: Roma and Minority Policy in Hungary." *Der Donauraum* 41 (3). <https://doi.org/10.7767/dnrm.2001.41.3.101>.
- Carstocea, Andreea. 2011. "Ethno-Business – the Manipulation of Minority Rights in Romania and Hungary." In *Perpetual Motion?: Transformation and Transition in Central and Eastern Europe and Russia*, edited by Tul'si Bhambry, Clare Griffin, Titus Hjelm, Christopher Nicholson, and Olga G. Voronina, 16–30. London: School of Slavonic and East European Studies.
- Chopin, Isabelle, Lilla Farkas, and Catharina Germaine. 2014. "Ethnic Origin and Disability Data Collection in Europe: Measuring Inequality—Combating Discrimination." Policy Report. Open Society Foundations.
- Clarke, Jessica A. 2015. "Against Immutability." *Yale Law Journal* 125 (1). <https://www.yalelawjournal.org/article/against-immutability>.
- Curejova, Lucia. 2007. "Hungary: Self-Abusive Governance." *Transitions Online* 08 (22): 1–3. <http://www.tol.org/client/article/18943-self-abusive-governance.html>.
- Deets, Stephen. 2002. "Reconsidering East European Minority Policy: Liberal Theory and European Norms." *East European Politics and Societies: And Cultures* 16 (1): 30–53. <https://doi.org/10.1177/0888325402016001003>.
- Dinók, Henriett. 2012. "Stratégia vs Oktatásügy [Strategy vs Education Politics]." *Fundamentum* 1: 63–66.
- Dobos, Balázs. 2016. "The Minority Self-Governments in Hungary." *Online Compendium Autonomy Arrangements in the World*. <http://www.world-autonomies.info/>.
- Farkas, Lilla. 2017. "Analysis and Comparative Review of Equality Data Collection Practices in the European Union: Data Collection in the Field." European Union. https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45791.
- Fosztó, László. 2003. "Diaspora and Nationalism: An Anthropological Approach to the International Romani Movement." *Regio : Minorities, Politics, Society* 3 (1): 102–20. <http://adatbank.transindex.ro/vendeg/htmlk/pdf4604.pdf>.

-
- Fraser, Nancy. 1995. "From Redistribution to Recognition? Dilemmas of Justice in a 'post-Socialist' age." *New Left Review* 212 (July-August): 68–68. <http://bibliopreta.com.br/wp-content/uploads/2018/01/Fraser-Redistribution-Recognition-Dilema-1.pdf>.
- Gear-Rich, Camille. 2014. "Elective Race: Identifying Race Discrimination in the Era of Racial Self Definition." *Georgetown Law Journal* 102 (5): 1502.
- Haney-López, Ian. 2006. *White by Law: The Legal Construction of Race*. Rev. and Updated, 10th anniversary ed. Critical America. New York: New York University Press.
- Hannum, Hurst. 2000. "International Law." In *Encyclopedia of Nationalism*, edited by Alexander J. Motyl, First edition, 405–19. San Diego: Academic Press.
- Heizler, A. 2002. "Még Nincs Kisebbségi Panasz [There Is No Minority-Complaint Yet]." *Népszabadság*, July 24, 2002. https://adtplus.arcanum.hu/hu/view/Nepszabadsag_2002_07/?pg=503&layout=s.
- Heizler, Antal. 2002. Még nincs kisebbségi panasz [There is no minority-complaint yet] Interview by Gábor Czene. *Népszabadság*. https://adtplus.arcanum.hu/hu/view/Nepszabadsag_2002_07/?pg=503&layout=s.
- Heyes, Cressida. 2016. "Identity Politics." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. <http://plato.stanford.edu/archives/sum2016/entries/identity-politics>
- Hungarian National Social Inclusion Strategy. 2011. "Extreme Poverty, Child Poverty, the Roma – 2011–2020."
- Hungarian National Social Inclusion Strategy II. 2014. "The Permanently Needy – Children Living in Poor Families – The Roma; 2011–2020. Updated Version."
- Hungary: Decision No. 45/2000 (XII. 8.)*. 2000.
- Index.hu. 2011. "Megalakult a szerb és ukrán kisebbségi önkormányzat [The Serbian and the Ukrainian minority self-government was formed]," 2011. https://index.hu/belfold/2011/02/05/megalakult_a_szerb_es_ukran_kisebbségi_onkormanyzat/
- Jang, Minnie. 2015. "A Roma Education | Harvard Political Review." *Harvard Political Review*, February. <http://harvardpolitics.com/world/roma-education/>.
- Jeszenszky, G. (1996), "Hungary's Bilateral Treaties with the Neighbours and the Issue of Minorities", *Ethnos-Nation. Eine Europäische Zeitschrift*, Vol. 4 No. 1–2, pp. 123–128.
- Kállai, Ernő. 2011a. "Jelentés a Nemzeti És Etnikai Kisebbségi Általános Iskolai Nevelés-Oktatás Helyzetéről [Report on the Situation of National and Ethnic Minority Education in Elementary Schools]." Budapest: OBH.
- . 2011b. "Jelentés a Nemzeti És Etnikai Kisebbségi Óvodai Nevelés Helyzetéről [Report on the Situation of National and Ethnic Minority Education in Kindergartens]." Budapest: OBH.

- Kennedy, Randall. 2004. *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*. New York: Pantheon.
- Kimmerling, Baruch. 2002. "Nationalism, Identity, and Citizenship. An Epilogue to the Yehoshua-Shammas Debate." In *Challenging Ethnic Citizenship. German and Israeli Perspectives on Immigration*, edited by Daniel Levy and Yfaat Weiss. New York: Berghahn.
- Kócze, Angela. 2012. "Civil Society, Civil Involvement and Social Inclusion of the Roma." *Roma Inclusion Working Papers. Bratislava: United Nations Development Programme*.
- Kovats, Martin. 1996. "The Roma and Minority Self-governments in Hungary." *Immigrants & Minorities* 15 (1 (March)): 42–58. <https://doi.org/10.1080/02619288.1996.9974877>.
- Kymlicka, W. 2001. "Western Political Theory and Ethnic Relations in Eastern Europe." In *Can Liberal Pluralism Be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*, edited by W. Kymlicka and M. Opalski, 13–107. Oxford: Oxford University Press.
- Lakatos, Szilvia. 2010. "A Romani Nyelv Helyzete a Magyarországi Közoktatásban (The Role of Romani Education)." Pécs: Pécs University. http://nevtud.btk.pte.hu/files/tiny_mce/Romologia/Kutatas%20-%20Fejlesztés/phd-doli-v%C3%A9gleges.rtf.
- Magyar Nemzet Online. 2012. "Etnobiznisz: magas az új szabályozás lakossági támogatottsága [Ethno-business: high popular support for the new law]." *Magyar Nemzet* (blog). December 21, 2012. <https://magyarnemzet.hu/archivum/belfold-archivum/etnobiznisz-magas-az-uj-szabalyozas-lakossagi-tamogatottsaga-4108784/>.
- Majtényi, Balázs. 2005. "What Has Happened to Our Model Child? The Creation and Evolution of the Hungarian Minority Act." *European Yearbook of Minority Issues Online* 5 (1): 397–469. <https://doi.org/10.1163/22116117-90000055>.
- . 2007. *A nemzetállam új ruhája [The nation state's new clothes]*. Budapest: Gondolat Kiadó.
- McCrudden, Christopher. 2005. "Thinking about the Discrimination Directives." *European Anti-Discrimination Law Review*, no. 1: 17–23.
- Mirescu, Gabriela, and Angéla Kócze, eds. 2011. "A Look behind the Curtain: Reflections on the Decade of Roma Inclusion." In *Social Inclusion and Cultural Identity of Roma Communities in South-Eastern Europe*, 35–40. Swisspeace.
- Molnár, Emilia, and Kai A. Schaft. 2003. "Preserving 'Cultural Authonomy' or Confronting Social Crisis?" *Review of Sociology of the Hungarian Sociological Association* 9 (1): 27–42.
- Móré, Sándor. 2014. "Népszámlálási Adatokhoz És Konkrét Létszámhoz Kötöttség a Nemzetiségi Önkormányzatok Szabályozásában (Connecting Census to Local Governance)." *Új Magyar Közigazgatás* 2014 (4): 21.
- Nagy, József. 2010. "Angyalok Kertje, (Angels' Garden)." *Népszabadság*, July 7, 2010. http://nol.hu/lap/gazdasag/20100707-angyalok_kertje.
- Nagy, Judit. 2010. "Angyalok kertje." *Népszabadság*, July 7, 2010.

-
- NDI, OSCE/ODIHR. 2006. "The Hungarian Minority Self-Government System as a Means of Increasing Romani Political Participation: National Democratic Institute Assessment Report September/October 2006." National Democratic Institute for International Affairs, Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe. <https://www.osce.org/odihr/25974?download=true>.
- Nol.hu. 2011. "Kakukktojások? Balhé a román kisebbségnél [Cuckoo's eggs? Scandals at the Rumanian minority]," February 9, 2011. http://nol.hu/belfold/kakukktojások__balhe_a_roman_kisebbsegnel-974661.
- Pap, András L. 2017. *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*. 1st ed. Routledge. <https://doi.org/10.4324/9781315168005>.
- Pap, András László. 2015. "Is There a Legal Right to Free Choice of Ethno-Racial Identity? Legal and Political Difficulties in Defining Minority Communities and Membership Boundaries." *Columbia Human Rights Law Review* 46 (2): 153–232.
- . 2018a. *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*. First Edition. Comparative Constitutional Change. Abingdon, Oxon ; New York, NY: Routledge.
- . 2018b. "Rethinking Public Governance in the Field of Policing Minority Communities: The Case of the Roma in Hungary." In *Rethinking Public Governance*, edited by Tibor Babos, Sameeksha Desai, and Andreas Knorr, 98–130. Münster: Lit Verlag Münster.
- . 2019. "Policies for Whom? Roma as Ethnic and/or National Minorities –The Case of Hungary and the European Union." In *Implementation of EU Policies on Social Inclusion of Disadvantaged Populations in Former Socialist Countries*, edited by Elena-Loreni Baciu, Ingrid Fylling, and Janne Paulsen Breimo, 75–98. Routledge.
- Pember, Mary Annette. n.d. "Ethnic Fraud?" *Diverse: Issues in Higher Education* 23 (25): 20–23.
- Pénzes, János, István Zoltán Pásztor, and Patrik Tátrai. 2018. "A Roma Népeség Területi Megoszlásának Változása Magyarországon Az Elmúlt Évtizedekben Changes in the Spatial Distribution of the Roma Population in Hungary During the Last Decade." *Területi Statisztika* 58 (1): 3–26.
- Ram, M. H. 2014. "Europeanization and the Roma: Spreading the Norms of Inclusion and Exclusion." presented at the 10th Biennial Conference of the European Community Studies Association-Canada, May 8.
- Ram, Melanie H. 2014. "Europeanization and the Roma: Spreading the Norms of Inclusion and Exclusion." *10th Biennial Conference of the European Community Studies Association-Canada*, 1–30. http://www.ecsa-c.ca/wp-content/uploads/2014/11/4A_Ram.pdf.
- Sansum Molnár, Judit. 2017. "Az 1993-as magyarországi kisebbségi törvény parlamenti vitája [The debate of the 1993 Hungarian minority rights Bill]." *Regio* 25 (3): 182–202.

-
- Sternberg, Nitzan. 2011. "Do I Need to Pin a Target to My Back? The Definition of 'Particular Social Group' in U.S. Asylum Law." *Fordham Urban Law Journal*.
- Szalayné Sándor, Erzsébet, and László Székely. 2014. "Az Alapvető Jogok Biztosa És a Magyarországon Élő Nemzetiségek Jogainak Védelmét Ellátó Biztoshelyettes Jelentése Az AJB-3894/2012. Számú Ügyben, a Nemzetiségi Középiskolai Oktatás Helyzetéről [Report of the Parliamentary Commissioner for Fundamental Rights and of the Deputy Commissioner for the Protection of the Rights of Nationalities Living in Hungary on Case No. AJB-3894/2012, Regarding the Situation of the Secondary Education of Nationalities]." Budapest: AJBH.
- Tajfel, Henri. 1981. *Human Groups and Social Categories: Studies in Social Psychology*. First Edition. Cambridge [Cambridgeshire]; New York: Cambridge University Press.
- The Minority Rights Ombudsman. 2011. "Jelentés a Nemzeti És Etnikai Kisebbségi Általános Iskolai Nevelés-Oktatás Helyzetéről." NEK-411/2011.
<http://www.kisebbségiombudsman.hu/data/files/217986220.pdf>.
- Thornberry, Patrick. 2001. "An Unfinished Story of Minority Rights." In *Diversity in Action: Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe*, edited by Anna-Mária Bíró and Petra Kovács, First Edition, 46–73. Managing Multiethnic Communities Program Series 3. Budapest: Local Government and Public Service Reform Initiative, Open Soc. Inst.
- Vizi, Balázs. 2013. *Európai Kaleidoszkóp. Az Európai Unió És a Kisebbségek [European Kaleidoscope. The EU and the Minorities]*. Budapest: L'Harmattan.
http://real.mtak.hu/10041/1/15_nemnyilv.pdf.
- Weiss, Yfaat. 2002. "The Golem and Its Creator, or How the Jewish Nation-State Became Multiethnic." In *Challenging Ethnic Citizenship. German and Israeli Perspectives on Immigration*. New York: Berghahn.
- Yang, Tseming. 2006. "Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society." *Michigan Journal of Race and Law* 11: 367.
- Zagor, Matthew. 2014. "Recognition and Narrative Identities: Is Refugee Law Redeemable?" In *Allegiance and Identity in a Globalised World*, edited by Fiona Jenkins, Mark Nolan, and Kim Rubenstein, 311–53. Canberra: Australian National University.