Nationalities Papers (2021), 49: 2, 213–220
doi:10.1017/nps.2020.51

SPECIAL ISSUE ARTICLE

Conceptualizing and Operationalizing Identity, Race, Ethnicity, and Nationality by Law: An Introduction

András L. Pap*

Centre for Social Sciences Institute for Legal Studies (formerly Hungarian Academy of Sciences), Budapest, Hungary; Institute of Business Economics, Eötvös University (ELTE), Budapest, Hungary; National University of Public Service, Faculty of Law Enforcement, Budapest, Hungary; Ludovika University of Public Service, Faculty of Law Enforcement, Budapest, Hungary; Central European University, Nationalism Studies Program, Vienna, Austria.
*Corresponding author. Email: pap.andras.laszlo@gmail.com

Keywords: genocide; ethnic voting; minority rights; national identity; race

Analyzing political and legal measures that serve to operationalize race, ethnicity, or nationality is a growing area of nationalism studies that brings together legal, historical, and political scholars (Dobos 2020; Sansum and Dobos 2020; Smith 2020; Stergar and Scheer 2018). In 2018, I convened a research group involving over 50 scholars from various disciplines on "Identity, Race and Ethnicity in Constitutional Law," under the auspices of the International Association of Constitutional Law.[1]

The aim was to create a forum for academics working in different fields of law and other areas of social sciences to create novel and illuminating intersections for understanding how the multifaceted and complex phenomena of race, ethnicity, and identity are conceptualized and operationalized. The challenge and goal is to bridge and cross-fertilize discourses and narratives on race (in the US), ethnicity (in various jurisdictions), the continental European framework of collective, claim-based national minority rights, and the conceptual and policy toolkit of aboriginal/indigenous law, in order to assess how substantive or procedural law encapsulates identity. Authors of the special issue are members of the Research Group and this is first of the hopefully many more such collaborative efforts to surface.

The broader aim of this project is to map the role and potential of law to conceptualize and operationalize (i) race, ethnicity, and nationality; (ii) the various types and forms of political and legal institutions, as well as policies built on these social constructs; (iii) and the role of identity and modes of identification in the conceptualization and operationalization. As argued earlier (Pap 2017 and Brubaker 2015), the past decades brought transformative changes in how the meaning of the terms of (first of all gender, but also) ethno-racial identity are assigned and conceptualized in social sciences and humanities, and to a certain degree in politics and law. Brubaker (2015) emphasizes the lack of linguistic and conceptual resources, cultural tools, and proper vocabulary for thinking about racial identity. The lack of a solid and current vocabulary is particularly stark in the field of law, especially international law, which habitually operates with the concepts of race, ethnicity, and nationality when setting forth standards for the recognition of collective rights or protection from discrimination, establishing criteria for asylum, labeling actions as genocide, or requiring a "genuine link" in citizenship law, without actually providing definitions for these groups or of membership criteria within these legal constructs.

There are a number of focal points for discussion in this broadly defined project. One is to standardize the conceptual toolkit of subjective/choice-focused, objective/standard-based, and fraudulent operationalization of ethno-racial categories. These inquiries tackle the question of

what role public law plays in the political minefield and labyrinth of identity politics. The aim is to map out the landscape of the various ways law conceptualizes ethnicity and race, and to show the diversity, complexity, and often inconsistency of the various operationalizing methods—as well as to point to the lack of a single, overarching model or strategy. Even though the methodology of the analysis centers on law (legislation, case law, and jurisprudence), since law is arguably a tool to operationalize politics and social movements (i.e. theory, ideology, or activism), the potential target audience goes beyond legal academia.

It needs to be emphasized that the practical trigger for this project is that ambiguity in terms of the targeted communities and membership boundaries for minority protection mechanisms and social inclusion measures may hinder the achievement of policy goals. In addition, the potential for abuse can open avenues for further discrimination and marginalization.

The first set of questions for this broader project concern whether there are even existing legal definitions for the "source" of identity, be it race, ethnicity, nationality, or even religion. The analysis has two dimensions: definitions and classifications pertaining to the groups, and how membership criteria are established in these groups/communities. As for the first subset, besides official recognition requirements for religious institutions and churches, the analysis should include debates on ethno-racial census categories; definitions used for national minorities and indigenous/aboriginal groups and castes; and enumerated racial or ethnic groups for anti-discrimination and hate crime legislation, affirmative action, or other forms of preferential treatment (see for example the difficulties defining explicitly targeted minority communities and agents of collective minority rights). Here, policies on the political participation of minorities, minority policies in the fields of education and employment, and naturalization policies should be scrutinized, along with the question of how family law introduces and operationalizes racial or ethno-religious identity in creating separate clusters for jurisdiction and substantive law, for example, in Israel, South Africa, and Greece.

Several doctrinal and practical issues arise in this cluster of questions. Consider for example census debates. In the US, the multiracial category movement went beyond academic circles into the spheres of political mobilization. Challenging census identity categories is also a recurring theme in post-Yugoslav debates, involving harsh census election campaigns, ethno-national boycotts by ethnic entrepreneurs, and the phenomenon of protest-identifications such as "Jedi," "Smurf," or "in love" (Bieber 2015). Loveman (2014) demonstrates the case of Latin-America, which not only has a rich history of "fraud" (racial drift) in census reassignment due to bribes offered to parish priests in colonial times, but which has completely erased race from the census for decades. Classification is also central to refugee procedures, where race, ethnicity, or membership in a "particular social group" are crucial elements in the basis for persecution. The asylum-seeker will make a claim pertaining to her affiliation and recipient authorities will carry out a validation procedure, first establishing whether the group in question is actually in danger of persecution, and second, whether the claimant is a member of the group. The dilemma assessed in the special issue on whether hate crimes should be conceptualized as identity or minority protection instruments also relates to these questions.

A second point for analysis pertains to the question of whether the definitions and classifications concern the majority community (or communities), or only minorities, and whether there are illuminative differences depending on the object of legal and political classification. Here, binary societies with a dominant majority and a single ethno-racial or national minority are of particular interest. The Hungarian and Israeli cases evoked in the special issue show how defining the titular (ethno-)national majority is the core of the nation-building and nationalist project, as nationalism is also framed in reference to ethnic kins in Diaspora. Various formations of constitutional nationalism for the Diaspora such as the Israeli law of return, the Basic Law on the "nation state," status laws, and ethnicized external citizenship policies must serve as a source of further analysis, especially if there is an asymmetry in terms of how the state classifies and operationalizes ethnicity for minorities, "others" to the nation-constituting majority. Consider for example the

https://doi.org/10.1017/nps.2020.51 Published online by Cambridge University Press

circle of ethnocorruption performed by the Hungarian legislation in arguably using minority politics as tools for Diaspora politics and kin politics used as tools for vote creation¸ yet having an uncontested, sincere, genuine core commitment for transnational, post-sovereign nation building.

A third set of questions concern the ever-recurring issue of whether the dominant legal conceptualization centers on *subjective* or *objective* criteria and definitions. There are several ways to categorize: Legal regimes may institute fully subjective, fully objective, or hybrid models. According to Rich (2014), ethno-racial classification has four dimensions: documentary race concerns the decision one makes by checking boxes in response to administrative data collection efforts; social race concerns involuntarily affiliation assigned by third parties, based on perceived appearance or social practice; private race refers to personal views about one's racial identity; and finally, public race pertains to racial identification where an individual is prepared to be recognized as having by others in social life. Also, in some cases, the authorization for setting standards of "objective membership criteria" are transferred to agents of the communities.

Legal regimes will differ whether it concerns a broad set of services available for members of indigenous communities, political rights for national minorities, or affirmative action measures for ethno-racial minorities. When it comes to measures protecting victimization in hate crimes or discrimination, legal regimes mostly rely on the self-assessment of the victims in regards of their (actual or presumed) membership in the protected groups, although in asylum law or war crime cases—where the consequences of such classifications are particularly grave—group membership is often up for rigorous scrutiny. Likewise, for regimes protecting the freedom to exercise religious identity, even though faith is a deeply personal, subjective attribute, judicial bodies often delve into scrutinizing the sincerity of religious claims or the relevance of a religious practice.

Thus, operationalization strategies for ethno-national identity can be manifold. Legislative and policy strategies can rely on self-identification; identification by other members or elected, appointed representatives of the group—leaving aside ontological questions regarding the authenticity or genuineness of these actors; TPI, "third party identification" (See Farkas 2017), that is classification made by outsiders, relying on the perception of the majority; or by outsiders but using "objective" criteria, such as names, residence, and so forth. For anti-discrimination measures, subjective elements for identification with the protected group are irrelevant, and external perceptions should serve as the basis for classification. Policies implementing this anti-discrimination principle may rely on a number of markers: skin color, citizenship, place of birth, country of origin, language (mother tongue, language used), name, color, customs (like clothing), religion, parents' origin, or even diet. Defining membership criteria is completely different 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 also needs 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.

Contemporary national legal systems usually refrain from providing legal or administrative definitions for membership criteria in ethno-racial communities. An important exception is the unique indigenous/aboriginal legal and policy framework, which habitually sets forth rigid and explicit membership requirements for indigenous communities. Here, the state either provides strict administrative definitions by employing some form of objective criteria or by officially endorsing tribal norms. In these cases, the individual's freedom to choose her identity only comes up in the context of leaving the group and excluding herself from preferential treatment. The European model for national minorities habitually rejects creating strict administrative definitions for membership. In most cases, a formalized self-declaration suffices for eligibility to receive collective rights, with occasional additional objective requirements such as proven ancestry (by some sort of official documents) or the proven knowledge of the minority language. Curiously, states are more reluctant to define membership criteria for domestic minority groups than for the

https://doi.org/10.1017/nps.2020.51 Published online by Cambridge University Press

titular majority population, a practice often followed in legislation implementing ethnicized concepts for external dual citizenship or Diaspora provisions similar to those of status law (Pap 2015; Pap 2017).

Besides a general scrutiny of how law recognizes identity, a fourth, separate question of choice pertains to such identities. Special attention should be dedicated to criticism surrounding the "subjectified" approach, as in a world of unfettered subjectivity allowing the right to change one's race or gender, arguably, risks obscuring power hierarchies, and may highjack traditional political movements that focus on vulnerabilities, and collective and structural social inequalities. It also potentially depoliticizes the feminist, civil rights, or human rights movements and theory. The concept of "harassment" is particularly illuminating, as it is focuses on the existence of an "intimidating, hostile, degrading, humiliating or offensive environment" (to use the wording of the EU Race Directive[2]). The flexibility of anti-discrimination law, as well as its unique terminology and conceptualization, enables activist interpretation to broaden its scope to cover novel, subtle, and complex inequalities and grievances, in the case of harassment, allowing entire organizations or subunits to be sanctioned along with individuals (see Pap 2019). Legal standards relying solely on the subjective feeling of the complainant in regards to an intimidating and humiliating environment, however, are not without their risks. While they are powerful and empowering tools for victims and members of marginalized communities, they can lead to lawlessness if there are no constraints to sanctioning based on declarations of feelings. For comparison, in asylum law, standards have been developed to ascertain and operationalize the objective standards for "well founded-ness" in its central concept of "well-founded fear of persecution" (Zagor 2014).

A fifth notable point of discussion centers on "fraud." In connection with preferential treatment policies and affirmative action, as well as the collective rights-focused frameworks for national minorites 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 is the perception that building on the loopholes of the legal conceptualization and classification, identity-based policies are intentionally used—or rather abused—by persons who are not members of the authentic target group. Intentionality could mean that the abusers are presumed to be aware of the discrepancy and the inadequacy of their actions. Ethno-racial fraud roots in cynicism and/or opportunism and can be practiced by individuals and the state. Examples for the former include racial fraud in relation to "elective race" in the US (Rich 2014), or the experience of ethno-corruption in relation to minority rights in continental Europe. Here, several ethical and epistemological questions are to be addressed: for example, is it even fraudulent to apply for ethnically carved external citizenship, absent an "ethnic identity," if the individual meets the legal criteria in a regime where the state created a "corrupted" ethnic cluster, passportizing external populations for political purposes? More generally, the ethics of whitewashing or passing, that is coping with and reacting to structural injustices and inequalities of an ethno-racially oppressive society need to be expounded. Another detailed analysis could concern cynical, morally or politically corrupted constructions of ethnicity or race by the state. This official or state ethno-corruption includes several practices. Consider for example peculiar constructions of constitutional identity, that surface in two dimensions: the state endorsing certain cultural values and imposing actual obligations on individuals, for example mandatory oaths, pledges of allegiances, and loyalty clauses. Further case studies for state ethno-corruption can include the analysis of the very process by which states create legislative frameworks for national minorities by delineating deserving and non-deserving groups and creating "hierarchies of ethnicity." Such policies might include marginalizing ethno-racial minorities by conceptualizing them as a national minority, or the aforementioned ethnic engineering that applies ethnic selectivity in (re)ethnicized citizenship or status laws for political or strategic identarian purposes. State-driven ethno-corruption can surface in several forms: for example, when race/ethnicity is rendered invisible in failing to prosecute hate crimes or combating systematic discrimination (e.g. in educational or housing segregation). Furthermore, disparate treatment in legislation when

https://doi.org/10.1017/nps.2020.51 Published online by Cambridge University Press

robustly different, asymmetrical regimes define and operationalize minority and majority ethnicity could be another example, similarly to when the dignity and the identity of the ethnic majority is provided special legal recognition and protection. Racial profiling and other forms of *institutional discrimination* are arguably also forms of official ethno-corruption.

It is against this backdrop of questions and issues that the collection of case studies within the articles of the special issue should be seen. The snapshots of case studies, although illuminating and instructive in their own, demonstrate the complexities and often inconsistencies in operationalizing race, ethnicity, and nationality.

Opening this special issue, Alon Harel explores a recent Israeli legislation, the Basic Law, and in particular its provision on declaring "Israel the nation state of the Jewish people," which points to long debates on legal and political interpretations of the "Jewish character of the state." Harel claims that the way this law anchors the Jewish identity of the state in its formal constitutional structure is designed to accentuate the ethnic superiority of Jews in Israel and to limit some of the traditional rights cherished by liberals. As the right to national self-determination in the state of Israel is granted exclusively to the Jewish nation, this he argues is a direct reaction to proposals that recognize some degree of collective self-determination to Palestinians within the State, emphasizing the asymmetry of Jewish and Palestinian citizens, as the former enjoy collective and individual rights, while the latter enjoy only individual rights—or, at most, limited collective rights. The law also addresses the relations between Israel and the Jewish people in the Diaspora. Harel's essay opens the floor for further discussions, in the illuminating and peculiar case of Israel and the Jewry, which is special for several reasons: Jews are classified and operationalized as a racial, ethnic, and national minority in addition to being a religious group and a cultural community (and of course all sorts of variations, such as ethno-religious, ethno-cultural). Historical and contemporary case studies, ranging from the Nurnbergian laws to judicial and legislative debates in Israel and the Diaspora, all show how legal categories and political constructs can encapsulate the multifaceted and multilayered questions of defining Jewish identity, and whether the definition concerns membership in a racial, ethnic, national, religious, or cultural community. The case of "Jewishness" is of particular interest due to its history and contemporary experience of persecution and discrimination; the myth, and the challenging legal concept of assimilation (and the related phenomenon of covering); and the unique case of Israel—"official national homeland" of the Jewry—offering a non-exclusionary, yet articulate official definition, which not only provides a fertile ground for scholars interested in constitutional identity, constitutional nationalism, definitions for the majority, or the question of constitutional loyalty, but also the potential implications of these legal and political commitments and classifications for Jews living in the Diaspora.

The following article by Amanda Haynes, Sindy Joyce, and Jennifer Schweppe (in this special issue) delves into the legal, political, and symbolic aspects of (striving for) the recognition of ethno-cultural groups as distinct "ethnic minority" groups. The case study here involves Irish Travellers, a traditionally nomadic ethnic minority indigenous to Ireland, which is recognized as an ethnic minority in adjacent jurisdictions in England and Wales Northern Ireland. Advocates' claims for similar recognition have consistently been denied in Ireland, although Travellers had been identified and explicitly named as a protected group in equality legislation, as well as by laws addressing incitement to hatred. The authors document how subsequent to sustained campaigning and criticism from Ireland's independent statutory Equality Authority and various international monitoring bodies (like the International Convention on the Elimination of Racial Discrimination, the European Commission against Racism and Intolerance, the European Framework Convention on National Minorities, and the Rights of the Child European Commission), Traveller ethnicity was finally recognized by the Prime Minister of Ireland in 2017. Exploring the wording, reasoning, and legal significance of the statement of recognition the authors conclude that while it does not actually afford the community any additional rights, it may give a firmer basis for arguing for the activation of these pre-existing rights.

https://doi.org/10.1017/nps.2020.51 Published online by Cambridge University Press

Besides being a fascinating ethno-political thriller, the Irish case is instructive and although unique, in certain aspects it is also typical: in Ireland, there is no agreed legal definition for "ethnic groups," and as the authors explain, even the census problematically conflates ethnic, national, and racialized identities, asking respondents to specify their "ethnic or cultural background." The case of the Travellers' modest success can provide valuable insights into the global the workings of the identity-politics-driven lobby for recognizing more and more identities, and the dynamics of construing the hierarchy of valued identities.

Carola Lingaas (in this special issue), the author of the next article, focuses on how the term "national group" is conceptualized in jurisprudence and the case law of genocide, where the uncertain boundaries between the protected victim groups result in definitional inconsistencies in the application of the law. As she eloquently explains, international criminal law narrowly protects four enumerated groups from the crime of genocide: national, racial, ethnic, and religious. Focusing on the "national group," the article examines whether the seemingly static legal framework can account for fluid identity fault lines. In the area of criminal law, the principle of legality has a particularly narrow interpretation, as the law must indicate the prohibited conduct unambiguously and an individual cannot be sentenced if the law does not prescribe punishment. The stage is set by the case of Rwandan génocidaire Jean-Paul Akayesu, the first ever genocide trial before an international criminal court, where, citing the 1955 Nottebohm decision rendered by the International Court of Justice, judges of the International Criminal Tribunal for Rwanda (ICTR) held that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. Hence, objective legal bonds in the politico-legal sense seem to dominate definition, rather than defining membership of a national group in an ethnographical, social psychological, cultural, or sociological sense. Lingaas points out that it should be irrelevant whether or not there are objective differences as long as the perpetrator considers them to be real. Thus, a definition based on the group's objectively determinative characteristics rather than its presumed identity is problematic, because, in fact, the perpetrator always has the definitional power over the victims. The fault line between groups, especially in conflicts, Lingaas argues, is often symbolic and based on a construction of opposing, and often changing irreconcilable identities. But in a world of fluid group identities, how can law remain the static pole? The author's thorough analysis of international and domestic case law points to a shift from the initial, objective feature-based and citizenship-focused approach. For example in 2004, in stark contrast with earlier case law, the European Court of Human Rights showed openness to accept the killing of two Lithuanian partisans in 1953 to fall under the definition of the crime of genocide, as they were held to be more than members of a political group, and rather constituting a "significant part of the Lithuanian nation as a national and ethnic group." Lingaas warns that this may lead to a dilution of the law of genocide.

From Yugoslavia to crimes committed by South American military juntas, the author gives several examples of judicial practice being inconsistent in what should be given more weight—the perpetrator's perception, objective features like the group members' common language and culture, or the individuals' understanding that their group was of a distinct ethnicity—and concludes that the interpretation of the law has evolved in better taking into account the multifaceted levels of group identities. At the same time, however, such interpretation does not cohere with the perpetrator's definitional power over his/her victim group. Moreover, she adds, such broad interpretation begs the question of whether the intentionally excluded political, gender, cultural, ideological, linguistic, or economic groups will (have to) be granted protection under the law of genocide if their group characteristics can be connected, in any conceivable manner, to the larger concept of nationality.

The last article by Pap (in this special issue), the guest editor, uses Hungary as a case study, focusing on legislative policies and the practical application of hate crimes: in doing so, it presents yet another example for the various ways that legal policy can be misguided in the labyrinth of identity politics, minority protection, and penal populism. Here too, the research is necessitated by

https://doi.org/10.1017/nps.2020.51 Published online by Cambridge University Press

the fact that inappropriate tailoring of criminal measures can both raise rule of law concerns and impede the initial goal of the legislative measure. Hate crime legislation and the very concept of hate crimes raises a number of theoretical questions with practical implications. What is the moral and political basis of this heightened legal protection: are hate crimes essentially minority or identity-protection mechanisms? Is there a requirement for the protected characteristic to be inducing some sort of social vulnerability, or is any form of victimization related to any form and type of characteristic the individual considers relevant to her personality worthy of protection? Even if we single out certain identities, such as race, ethnicity, religion, or sexual orientation, does belonging to the majority exclude victimization? Also, what happens if the group happens to be the majority locally, but a minority in the national setting? Furthermore, can members of right-wing majority extremist hate groups qualify as hate crime victims, if attacked by members of an ethno-racial minority group? How should membership in the predefined protected groups be ascertained? Is it via the declaration of the identity of the victim, or does the (potentially mistaken) perception of the offender or the majority community matter? Furthermore, how are open-ended lists or vaguely defined criteria for protected characteristics, so often and laudably applied in anti-discrimination legislative frameworks, compatible with the principle of legal certainty?

The most commonly used protected classes in hate crimes legislation include a wide range of groups such as age, citizenship, disability, ethnicity, family responsibility and status, gender, matriculation, membership to a labor organization, national origin, personal appearance, political orientation, religion, sexual orientation, social status, drug addiction, criminal record, pedophilic tendencies, mental infirmity, pregnancy, being a physician engaging in performing abortions, etc. (see Schweppe 2012). Groups included in hate crime legislation have specific "tools of political and legal persuasion: a well-recognized history of oppression; an established currency in human rights discourse; the backing of an influential social movement; and the capacity to establish empirical credibility for the targeted violence they experience" (Mason 2013). Besides the fierce political and academic debates concerning the "hierarchy of legitimate victims," as Schweppe (2012) observes, citing Jacobs and Potter (2001), hate crime laws are also appealing to politicians, since "except for the inclusion of sexual orientation, politicians faced a no lose proposition. By supporting hate crime legislation, they could please the advocacy group without antagonizing any lobbyists on the other side … without making hard budgetary choices. The hate crime laws provided an opportunity to denounce two evils—crime and bigotry—without offending any constituencies or spending any money" (179). However, and this is the broader question implied in the article, the overexpansion of hate crime laws emerging from increasing advocacy efforts by special interest groups may lead to a slippery slope of legal favoritism and the proliferation of protected characteristics, arguably actually transforming identity politics into a form of penal populism (Walker 2017, 1422, 1427). On the other hand, developing "moral fault lines" by distinguishing between victim groups and the failure to include demands for recognition can be seen as exclusion by the "rejected" groups who promote social equality through the criminal justice system, who can argue that by creating hierarchies of victims in hate crimes statutes, the criminal justice system actually discriminates arbitrarily between social groups.

In sum, this special issue has provided snapshots of the many research avenues to explore how politics and law conceptualizes and operationalizes race, ethnicity, or nationality. The guest editor would like to thank *Nationalities Papers*, a traditional venue for such discussions, and special issues Editor Myra Waterbury in particular.

Disclosure. Author has nothing to disclose

Funding Information. The research project was partly financed from the SASPRO Programme. The research leading to these results has received funding from the People Programme (Marie Curie Actions) European Union's Seventh Framework

Programme under REA grant agreement No. 609427. The research has been further co-funded by the Slovak Academy of Sciences and by DEMOS (Democratic Efficacy and the Varieties of Populism in Europe) H2020 RIA project, as well as the 129018, 129245 and 134962 Hungarian National Research and Innovation Grants.

Notes

1 https://www.iacl-aidc.org/index.php/en/research/research-groups/identity-race-and-ethnicity-in-constitutional-law

2 Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

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Cite this article: Pap, A. L. 2021. Conceptualizing and Operationalizing Identity, Race, Ethnicity, and Nationality by Law: An Introduction. *Nationalities Papers* 49: 213–220, doi:10.1017/nps.2020.51