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Who and what is Jewish? A case study for
an intersecting legal conceptualization
of race, ethnicity, nationality and religion

Intersections. EEJSP

9(3): 167–187.

<https://doi.org/10.17356/ieejsp.v9i3.1279>

<https://intersections.tk.hu>

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Abstract

Focusing on Jewishness, which is placed at the intersection of race, ethnicity, nationality and religion, the article provides a case study of the complexity of legally validated ethno-racial classifications. The case of the Jewry is chosen due to its peculiar history and contemporary experience of persecution and discrimination, the myth, and the challenging legal concept of assimilation, and the unique case of Israel, the ‘official national homeland’ of the Jewry offering an official definition, which may also serve as a reference point for the Diaspora.

Keywords: constitutional identity; definition; DNA; fraud; Israel; Jewish

1 Introduction

Using the example and case study of the Jewry, this article provides an overview of the multidimensional complexity of legally validated ethno-racial classifications. Legal constructions and definitions are endpoints of a long chain of intellectual, social, cultural and political debates and struggles, situated in the seething cauldron of multifaceted personal and collective identity formations and power relations. The broader context of the text is to show how law operates as a technology for conceptualization and operationalization of race and ethnicity. The case of the Jewry is particularly compelling in understanding the dynamics of subjective and external conceptualization and operationalization. The horrors of the Holocaust were a singular force to discredit ‘objective’ ethno-racial classifications both in social sciences and in the legal-administrative scene. However, while identity politics has been the dominant trend in the second half of the 20th and in the 21st century, ethno-racial self-identification is still not the only operationalizing model legal regimes apply, especially with recent trends in the ‘re-biologization,’ ‘molecularization’ or ‘genetic re-inscription’ of ethno-racial conceptualization. Furthermore, through the new ‘biotechnological imaginary’ new entrepreneurs and gatekeepers and new languages have appeared. Responding to policy, commercial or political need and will, the ‘scientific’ language to describe and encapsulate ethnicity has been revisited. The development of cheap

and fast genetic analysis brought a sweeping change in how the understanding of race and ethnicity is perceived, lived and operationalized, making way in a multitude of areas in law enforcement, immigration, (personalized and race-conscious) medicine, nationalism (in terms of how ethno-national ancestry and geology is understood), and how public and private imagination relates to ethno-racial identification. The diverse conceptualization and classification of the 'Jewry' is particularly accentuated by these developments, where since

the advent of the new millennium, there has been a fundamental challenge to [...] reducing the phenomenon of race to either biological essentialism (which asserts biological and immutable differences among races) or social constructionism (which denies a biological basis to race) is fruitless in the age of genomics. (Suzuki & Vacano, 2018, p. 2)

Brubaker (2018, pp. 62, 63, 67–68) argues that it 'is not simply reauthorized by the return of biology; it is reconstructed [by ...] a shift from objectivist to subjectivist understandings', alongside a shift from typological to populationist understandings of difference in biology. The 'return of biology' is a complex phenomenon, with potential for social progress, equality and dignity, along reshuffling debates on national identity, or even decriminalizing police investigations (Brubaker, 2018, pp. 87–90).

These following pages will point to the lack of a homogenous unified theory or framework of regulatory philosophies and practices to operationalize race, ethnicity, nationality, or religion and culture. Defining Jewishness, placed at the intersection of all the above categories, provides an intricate example for navigating in the codification- and classification-labyrinth. The case of the Jewry is particularly complex due to its peculiar history and contemporary experience of (i) persecution and discrimination; (ii) the myth, and the challenging legal concept of assimilation (and the related phenomenon of passing and covering); and (iii) the unique case of Israel, the 'official national homeland' of the Jewry offering a (non-exclusionary, yet articulate) official definition, which may also serve as a reference point for the Diaspora. Hence, it offers a singular opportunity to demonstrate the complexity of the political and legal operationalization and conceptualization through the lenses of legal concepts like the right to the choice of identity, privacy (personal data protection), constitutional identity, constitutional theocracy (in the case of Israel with a unique endorsement of a particular branch of the dominant religion), incorporating genetic research in immigration law, as well as fraud and ethno-corruption. The article sets forth various, often competing concepts of Jewishness and the cases are meant to highlight key dilemmas rather than claiming this to be a kaleidoscopic picture of conceptualization. Let us first start with problem mapping and subsequently exploring some of these questions in the context of the Jewry.

2 In search of appropriate conceptual and linguistic tools

Analyzing political and legal measures that serve to operationalize race, ethnicity or nationality brings together legal, historical, and political scholars (see e.g., Smith, 2020; or Stergar & Scheer, 2018). Brubaker (2015; 2016) argues that just like gender, the color line may be sharp and rigidly policed in theory but is often blurred and porous in practice.

The lack of a solid and up-to-date vocabulary is particularly stark in the field of law, where the hermeneutic givens of legal interpretation require clear unambiguous conceptualization, involving definitions, classification, registration and targeting policies. It is, thus, intriguing that law, especially international law, habitually operates with the concepts of race, ethnicity, and nationality when setting forth standards for the recognition of collective rights, protection from discrimination, or establishing criteria for asylum or 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.

This article shows the cacophony of models and design in the legal conceptualization of the Jewry, focusing on three areas. The first set of questions concern the triadic cluster of concepts: race, ethnicity or nationality. The second dimension of scrutiny concerns how legal-administrative conceptualization operationalizes 'choice' and 'fraud.' A third point for analysis pertains to the question whether the definitions (where applicable) concern the majority groups as well, or only minority communities, and if yes, whether there are illuminative differences. Here the Israeli case, and formations of constitutional nationalism such as the Israeli law of return or the Basic Law on the 'nation state' shows how defining the titular (ethno-)national majority is the core of the nation-building and nationalist project, as nationalism, and it is also framed in reference to ethnic kins in Diaspora.

3 The Jewish race, ethnicity, nationality, religion

The relevant socio-legal classifications have two dimensions: one concerning the groups, the other pertaining to membership criteria. This section will address the first. Jews, the Jewry is a group that, depending on the context, can be conceptualized and classified as a racial, an ethnic, a national, a religious or even a cultural community. In some jurisdictions all of these classifications may coexist, in others, only one, or some. In order to understand the relevance of the classification question, we need to look at its actual: practical, economic, political, legal procedural consequences. For example, if a community is included as a separate entry in the census (either as a racial, ethnic or national minority), besides symbolic recognition, population statistics may be used as an important tools and reference points for all sorts of policy design. Thus, from the legal perspective, the terms 'race', 'ethnicity', 'nationality', and even 'culture' or 'religion' will imply clusters of statuses with relevance for a certain type of treatment. An employee may seek exemption for going to work, or a student may request a raincheck for a test for reasons of a religious holiday, and their chances for success will depend on the political and legal status of the religious belief in question. Let us now explore the substance and practical composition of these status-groups!

The legal, political and theoretical definition of the core concepts: nationality, ethnicity, race are far from unambiguous: *Race* is a controversial category, and in continental Europe its use is mostly limited to race-based discrimination. In social science literature, 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 Tajfel, 1981; Pap, 2023). Race-based international and domestic legal instruments identify race with the apprehension of physical appearance and put perception and external classifications in the center when prohibiting discrimination or violence on racial grounds. It is rarely distinguished from *ethnicity*, and the two terms are often used interchangeably by lawmakers (and drafters of international documents) and, most of all, judicial bodies. Despite academic interest and insistence in differentiating between the two concepts, legal formulations seem to be incognizant, and even appear to be unobservant and indifferent concerning a potential difference between the two terms. For example, under Article 1 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, ‘the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.’

The European Court of Human Rights’ terminological assessment in the *Sejdic and Finci v. Bosnia and Herzegovina* judgment,¹ which involved a Jewish applicant, further complicates the issue:

Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person’s ethnic origin is a form of racial discrimination.

The probably most important international document on national minorities, the 1995 Council of Europe Framework Convention for the Protection of National Minorities, fails to provide a definition for its targets. A relevant definition, also endorsed by the European Parliament’s 2005 resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, is provided by the 1993 recommendation (no. 1201) of the Parliamentary Assembly of the Council of Europe in an additional protocol regarding the rights of national minorities in the European Convention on Human Rights, and holds:

‘National minority’ refers to a group of persons in a state who: reside on the territory of that state and are citizens thereof; maintain longstanding, firm and lasting ties with that state; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.

When it comes to defining *national minorities*, we can settle for a definition that describes these groups as ones that are based on their claims for collective rights, bypass the anti-discriminatory logic, and seek recognition of cultural and political rights, particularly autonomy or the toleration of various cultural practices that differ from the majority’s, which often require formal exceptions from generally applicable norms and regulations (see also Kymlicka, 2001).

¹ Applications nos. 27996/06 and 34836/06.

Ethnic minorities are, nevertheless, multifaceted groups. While many of their claims are grounded in the anti-discrimination rhetoric employed by racial minorities, some 'ethnically defined' groups may also have cultural claims (and protections) that national minorities would make. In this way, ethnic minorities constitute a sort of hybrid categorization that blends and often mirrors the claims made by racial and national groups. Let us see how this all translates to the question of what the Jewry 'is'!

First, it has to be noted that investigating the racial-ethnic-national triad is made difficult by the fact that historically the use of terms has often changed and a given community may have been referred to differently. Also, the terms are used quite differently in various jurisdictions. Consider for example the case of American Jews: Goldstein shows how as

an historically persecuted group that has enjoyed a rapid social ascent, Jews have often been torn between their self-perception as 'outsiders' and their desire to be accepted as 'insiders.' Since 'insiders' and 'outsider' have been represented in government policy by the categories of 'black' and 'white,' Jews have found it difficult to find a comfortable space in the American racial schema, a tension often revealed when the government has attempted to categorize them within the larger black-white system. (Goldstein, 2005, p. 80)

In the early twentieth century concerns were raised among Jewish leaders about the attempt of federal agencies to classify Jews racially as 'Hebrews,' lest they be considered non-white, but in the late twentieth and early twenty-first centuries, when many American Jews appeared frustrated that government racial categories made no room for them to identify in any way other than white (Goldstein, 2005, p. 81). Goldstein explains how 'Immigration officials, [...] discarded the racial categorization of Jewish immigrants as "Hebrews" in 1943. [...] [A]rmed services changed the means by which it identified Jews on dog tags from an "H" for "Hebrew," a racial designation, to a "J" for "Jew," a religious one' (Goldstein, 2005, p. 95; also see Brodtkin, 1998). These dynamics point to the historically changing tones and meanings of terms like race and ethnicity, as well as the changing positions and policies of representatives of various Jewish communities.

The 'classic' racial legal-administrative classification for Jews are the Nazi laws, transforming religion into an ethno-racial category for those with at (least one) grandparent registered as Jewish (see, e.g., Meinecke et al., 2009; see also Schweitzer, 2005). In the post-Holocaust era, most legal systems will include anti-Semitic discrimination or hate crimes to be included in the respective discrimination or hate crimes statutes under the auspices of *race*. However, this does not preclude fierce terminological debates.

In the US, for example the *Shaare Tefila Congregation v. Cobb* case (481 US 615 (1987)) arose out of the desecration of a synagogue, and raised the question of whether Jews constituted a racial group in this particular understanding. Two lower courts held that because there was no distinct race or ethnic group at issue, no racial prejudice may be established. The Supreme Court reversed, adding that 'Jews [...] are [...] part of what today is considered the Caucasian race' (Pp. 481 U. S. 617-618.). On the other hand, in the 1977 *United Jewish Organizations v. Carey* (430 U.S. 144 (1977)), in the context of gerrymandering, the Court held that Hasidic Jews enjoy no constitutional right to separate community recognition for the purposes of redistricting. Yet, in 2002, the United States Court of Appeals in New York's Second Circuit ruled that Yankel Rosenbaum, a yeshiva student stabbed

during the 1991 Crown Heights riots, had been denied federal civil rights as a Jew, even though he was (racially) white and his alleged attacker, Lemrick Nelson, was black (Goldstein, 2005, p. 100).

A more recent, highly mediatised controversy concerns a December 2019 executive order by President Trump (White House, 2019), extending civil rights protection to Jews under the Civil Rights Act.² The law specifically targets higher education and anti-Semitic incidents, and was held to expand the recognition of Judaism beyond religion. The Department of Education can withhold federal funding from any college or educational program that violates Title VI, according to the Civil Rights Act, which does not cover discrimination based on religion, only race, color, or national origin. In 2004 the government already declared that it will

exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics. Thus, for example [...] alleged race or ethnic harassment against Arab Muslim, Sikh and Jewish students. (U.S. Department of Education, 2004; see also Stern, 2019)

The debate on whether Jews are ‘white’ is still lively in the US. Consider the suspension from ABC News of actor and media personality Whoopi Goldberg after questioning whether the holocaust was about race, since both Germans and Jews are white, (see e.g., Bauder, 2022) or whether Jews (or for example Orthodox Jews) could be considered as a non-white or underrepresented group under new Hollywood diversity guidelines (see e.g., Feinberg, 2020; Rosenberg, 2020).

The Supreme Court of the United Kingdom also passed a high-profile judgement in the *R (E) v Governing Body of JFS* case ([2009] UKSC 15 & 1), which concerned the Jewish Free School’s policy of denying entry to people whom they defined as belonging to a different religion. Here a child was refused admission to JFS, because he was not regarded as Jewish by the Office of the Chief Rabbi, because, despite his Jewish faith and practice, and that his father was Jewish by birth, he was not descended from a woman whom the Chief Rabbi regarded as Jewish, as she only converted to Judaism before the child’s birth, and in an Orthodox synagogue. The court held that a criterion in an oversubscription policy of a faith school which gave priority to those regarded as ‘Jewish by birth’ constituted racial discrimination under the Race Relations Act 1976.

The debate on the classification of the Jewry also remains unresolved in the UK. Consider for example recent demands towards the BBC to apologize for initiating a debate whether Jewish people qualify as an ethnic minority (Liphshiz, 2021).

It is also fairly common to have the Jewry included in legislation for *national minorities*. Within the auspices of the Framework Convention for the Protection of National Minorities, the following states have reported to have recognized the Jewry within the scope of the treaty: Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Croatia, Denmark, Estonia, Finland, Georgia, Latvia, Lithuania, Moldova, Norway, Poland, Romania, the Rus-

² Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.

sian Federation, Serbia, Slovakia, Switzerland, the UK, Ukraine (Framework Convention for the Protection of National Minorities (ETS No. 157). The following States Parties to the European Charter for Regional or Minority Languages have included Yiddish among the recognized 'regional or minority languages': Bosnia and Herzegovina, Finland, Netherlands, Poland, Romania, Slovakia, Sweden, Ukraine (States Parties to the European Charter for Regional or Minority Languages and their regional or minority languages, 2020). Numbers on these factsheets are often outcomes of long political and public debates. For example in Hungary, in 1990 the Jewish community was among the eight so-called co-opted minorities that were supposed to be provided a form of parliamentary representation according to legislation that was amended before actually being implemented. The Jewish community in has been divided on the question of seeking recognition as a (national or ethnic) minority. In 2005, the Federation of Hungarian Jewish Communities (MAZSIHISZ) launched a popular initiative, but failed to build up support on behalf of the community (ABH: 977/H/2005; for more see Pap, 2017; for a general assessment Kovács, 1994).

There are, of course countless cases where petitioners claim discrimination for being Jewish, in the sense of being members of the *religious community*. Consider for example the 1986 *Goldman v. Weinberger* case (475 U.S. 503 (1986)), where the US Supreme Court justified to prohibit a Jewish Air Force officer to wear a yarmulke when in uniform, or more recent cases where observant Jewish tenants in the UK (Savill, 2009) and the US (n. d., 2015) sue building management for having installed automatic motion-detection led lighting and key fobs that force them to violate Sabbath-rules if they want to leave their homes. As we will see in the subsequent discussion, what signifies as 'Jewish religion' is also far from being uncontested, for example in the context of naturalization or private law in Israel, as various branches of Judaism will be recognized differently.

4 Identity and operationalization: authority, choice, contestation, and fraud

A further, even more intricate question that comes up in relation to ethno-national policies is the form and means of operationalization. Ethno-national group affiliation can be defined in several ways: through self-identification; by other members or elected, appointed representatives of the group (raising legitimacy-, and ontological questions regarding the authenticity or genuineness of these actors); classification by outsiders, through the perception of the majority; or by outsiders but using 'objective' criteria, such as names, residence, et cetera. There are three important dimensions here: (i) who gets to define (the individual, the community, others, or the state); (ii) if the regime relies on a subjective decision, are there any constraints on choice; and (iii) whether 'fraud' is conceptualized and sanctioned.

There is a large stock of literature on bending and expanding the boundaries of ethno-racial legal classification (see for example Kennedy, 2001; Clarke, 2015). There are also numerous projects on distinguishing and sorting these phenomena. For example, Dobai and Hopkins (2022) explain how psychological accounts differentiate between identity 'fabrication,' 'concealment,' and 'discretion.' They discuss both 'passing' and 'covering' under (pro-active or reactive) identity 'concealment,' the motivation for which may include the desire to:

secure material benefits; avoid conflict; take pleasure from seeing others' assumptions blinding them to the reality before them; test (and expose) majority group members' attitudes; or allow themselves opportunities to experience the world in new ways. The myth of Jewish assimilation is intrinsically connected to the 'passing', a concept and practice widely discussed in American literature, as throughout history many have concealed their 'true' racial identities and assumed a white one in order to reap the economic, political, and social benefits associated with whiteness (Yang, 2006, pp. 367–369, 373) As for the related 'reverse passing', Beydoun and Wilson (2017) identify it as the representation oneself on legal and administrative documents for certain. They may also do so in cultural spheres, which they term as 'cultural reverse passing'. For a recent example for this consider the case of US Republican congressman George Santos who admittedly lied about being Jewish (and also about financial statements, as well as being a volleyball star and an associate at Goldman Sachs). His defense was particularly curious, when claiming that he meant only that he was 'Jew-ish,' when posing in a campaign position paper as a 'proud American Jew' and a descendent of Holocaust-survivors (Oppenheimer, 2023).

A special case between passing and fraud refers to cases when applicants seek to invalidate certain contractual legal obligations, mostly marriages on the basis of (intentional or even unintentional) misrepresentation pertaining to the ethno-racial status of the partners, the knowledge of which would have prevented them from entering the contract. Such claims based on ethno-racial representation were often brought during the Holocaust. Schweitzer (2005) documents how Hungarian children, often jointly with their parents would ask to have their illegitimacy declared (especially if only their father was legally Jewish) to escape persecution and deportation.

The question of passing is particularly relevant in the case of Jews, whose unique historical struggle and experiment with assimilation has constantly been met with the bi-political reality of the external others, often the openly anti-Semitic state or other, informal establishments defining who is actually Jewish (see e.g., Sartre, 1995).³ Consider for example Jerome Karabel's overview of the intricate way American elite university administrators operationalized the 'undesirable' in admission procedures to single out Jewish applicants in the 20th century (Karabel, 2005).

There are different types of recent cases of potential fraud that involve the Jewry. See for example recently introduced preferential naturalization programs introduced by the Spanish and Portuguese government targeting descendants of Sephardic Jews expelled in 1492, which incentivized a wave of religiously non-Jewish Hispanic Americans, Venezuelans and Mexicans (who claim to have Sephardic ancestry) to take use of the measures (Romero, 2018). The policies intended to recover the 'silenced memory', as Spanish foreign minister, José Manuel García-Margallo stated, of 'Sephardic Jews whose ancestors had fled the Iberian Peninsula, forced, in order to live in Spain or its colonies, to choose between exile or conversion to Christianity, or worse.' The proof of Jewish identity ranges from last names to cultural customs in the home to intermarriages among families with traditional

³ Or consider the saying attributed to Herder or Fichte, 'A Jew Can Read German. A Jew Can Write German. But a Jew Cannot Think German' (Rousseau, 1990, p. 439).

Sephardic Jewish names (although to be naturalized, applicants whose families had maintained double lives as Catholics must seek religious training and undergo formal conversion to Judaism) (Carvajal, 2012). Consider for example the Portuguese citizenship acquired by Russian oligarch Roman Abramovich (also owner of English Premier League football club Chelsea) as a Sephardic Jew (Carneiro & Godinho, 2022; also see Casey, 2021).

In a related 1990 US Supreme Court case, in his dissent in *Metro Broadcasting, Inc. v Federal Communications Commission* (497 US 547, (1990)). Justice Kennedy referred to the *Storer Broadcasting* case (see *Storer Broadcasting Co.* (87 F.C.C.2d 190 (1981)), in which one of the parties benefited from selling a station to the Liberman family, which qualified as Hispanic because of having traced their ancestry to Jews being expelled from the Spanish Kingdom in 1492. Kennedy writes, '[i]f you assume 20 years to a generation, there were over 24 generations from 1492 to the Storer case. That means that Mr. Liberman was as closely related to 16,777,216 ancestors' (Rotunda, 1993).

Another issue concerns fraudulent claims submitted for Holocaust restitution payments. In the US charges were brought against 17 people believed to have knowingly defrauded the Conference on Jewish Material Claims Against Germany involving \$42 million and 5,600 applications over 16 years (Suddath, 2010; Berger, 2013).

A further source of controversy surrounds claims in the US by inmates requiring tastier kosher food, where prison authorities are defenseless even if having doubts about their religious or ethnic affiliation, and religious meals cost four times as much as standard ones (Alvarez, 2014; also n. d., 2014). (It has been argued that not only does a kosher diet allow a break from the usual ritual of prison life but may also allow for inmates to sit apart in the kosher meal section.) Some prison administrators have made attempts to require that a religious test has been taken or requiring ancestral documentation, but under the law, a declaration that the Jewish 'belief is sincerely held' suffices and no further set of proof is allowed to be required.

Besides 'passing' and 'fraud' there are other forms of contestation of racial and ethno-national classifications. A particularly interesting case concerns communities that successfully survived Nazi and WWII German rule by contesting being Jewish. Levin (2014) documents the case of 'Bukharan Jews,' the indigenous Jewish population of Central Asia, and Feferman (2011, p. 277) provides a detailed account of how and besides the Mountain Jews in the North Caucasus, the Karaites (a group with Jewish ancestry emerging in the seventh century and rejecting mainstream Jewish interpretation of Tanakh) in Persia, Turkey, Egypt, Crimea, and Lithuania, succeeded in being recognized as not Jewish.

On the other hand, there are other contemporary examples for claims pertaining to Jewish heritage and ethno-national identity: 'From Ethiopia, Madagascar, Zimbabwe, and South Africa to Cameroon, Ghana, Rwanda, and Nigeria, ethnic groups in Africa increasingly claim Jewish descent.' Assertions can be grouped into three categories: vague Israelitism (a belief in Israelite ethnogenesis, the invocation of cultural and linguistic similarities with Hebrew, and the linkage of local experiences of oppression to the Holocaust), Hebraic eclecticism (the mixing of local cultural practices and Christian rituals with Jewish religious customs and the Judaizing of non-Jewish rituals and dogma), and orthopraxis (a strict adherence to the principles and practices of 'normative Judaism' in terms of the observance of Jewish holidays and dietary laws, the study of the Torah and the Hebrew language, and so forth) (Ejiofor, 2022, p. 15).

5 The constitutional identity of the Jewish majority

The case of how being Jewish is defined and operationalized in Israel is worthy of attention for several reasons. In general, any inquiry on race, ethnicity or nationality will raise the question if it makes a relevant difference whether definitions or operationalizing schemes pertain to minorities or the titular (ethno-)national majority. Defining Jewish is not only the core of the nation-building and nationalist project in the Jewish State, a state defining itself as Jewish at the level of constitutional identity, but it also has a multifaceted relevance for Jews in the Diaspora. Although obviously not binding directly either in the legal or the political sense for other sovereign states and legal regimes, or even for collective or individual identification, the conceptualization for who and what is Jewish is omnipresent as a phantom point of reference (and also as a dormant option for immigration) for Jews throughout the Diaspora (as well as potentially for the anti-Semite). Also, Israeli nationalism is in part framed in reference to ethnic kins in Diaspora. The 2018 Basic Law: Israel—the nation state of the Jewish people provides that

The State of Israel is the nation state of the Jewish People, in which it realizes its natural, cultural, religious and historical right to self-determination. [...] The State shall be open for Jewish immigration, and for the Ingathering of the Exiles. [...] The State shall strive to ensure the safety of members of the Jewish People and of its citizens, who are in trouble and in captivity, due to their Jewishness or due to their citizenship. [...] The State shall act, in the Diaspora, to preserve the ties between the State and members of the Jewish People. The State shall act to preserve the cultural, historical and religious heritage of the Jewish People among Jews in the Diaspora.

Classifications and operationalization of the Jewry in Israel will have two sets of separate streams: defining ‘who is Jewish’ for immigration/preferential naturalization purposes, and for categorization pertaining to the personal status of Israeli citizens and residents. For the first cluster, operationalization relies on a mixture of religious and ethnic criteria, for the second, a politically contested particular stream of religious denomination’s criteria is applied. The consequences of these classifications are direct and apparent in people’s lives, their impact and relevance go far deeper than symbolic politics or abstract constitutional identity. Hence, harsh political debates and a continuous legal contestation surrounds these legal constructs because these are some of the most important areas where the political, social, and cultural divides tormenting Israeli society surface. Technically speaking, and reverting to the above typology on classification, the Israeli case brings a combination of providing definitions by the state, actually the ‘majority state’, but also relying on representatives of the community, in this case the leadership of a narrowly defined segment of the dominant religious community. We will also see here legal operationalization of genetic data, along the recognition of an ethnic definition, when Jewishness is proven by archival evidence of ancestors’ historical official, administrative classification as Jewish (by religion). This amalgam of tools and markers for divergent administrative purposes is necessitated by Israel’s curious hybrid legal system, melding together secular and (fundamentalist) religious constitutional elements into an ethnic democracy, making it one of the few modern states which define its national constituencies, and the majority, on rigid, ethno-religious grounds (and a legal system that has no qualms about authorizing the leadership of a par-

particular religious stream to authenticate membership in the religious community.) Let us now turn to the two legal clusters where the 'who is Jewish' question surfaces.

5.1 Jewish for the purposes of immigration and naturalization

Turning the state of Israel into the home of Jews by virtue of their Jewishness makes Israel one of the unique exceptions amongst countries that absorb immigrants, in the sense that its endorsement of immigration by inviting all Jews to make *aliyah* only applies to a specific ethnic group (Weiss, 2002, p. 85). Reflecting on the horrors of the Nazi regime, the Israeli Jewish state defines its constituency more or less in accordance with the broader definition of the Nuremberg Laws. As Kimmerling (2002) puts it, 'using affirmative action (or corrective discrimination) on behalf of the world Jewry after the Holocaust. [...] intended to grant citizenship to almost everyone who suffered persecution as a Jew.'

Under the 1948 law on the establishment of the State of Israel, its founders proclaimed the renewal of the Jewish State in the Land of Israel, which would open wide the gates of the homeland to every Jew (Declaration of Establishment of State of Israel, 14 May 1948). The 1950 Law of Return (Law of Return, 5710-1950, 1950) grants every Jew, wherever she may be, the right to come to Israel as an *oleh* (a Jew immigrating to Israel) and become an Israeli citizen. The Law of Return's preferential naturalization conditions only apply to Jews, and Israeli nationality is automatically accorded to them on request, and they also receive special assistance helping them to settle in Israel. The authorities also recognize their status as Jewish. For the purposes of this Law, 'Jew' means 'a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.' Under the law, the preferential naturalization is extended 'in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.' It needs to be added that 'ethnic Jewry' is not the only way of acquiring naturalization, as (regardless of race, religion, creed, sex or political belief) citizenship may be acquired by: birth, naturalization and residence, even the Law of Return is inclusive in the sense that it allows naturalization in a broader circle and extends to family members.

Being recognized as Jewish nevertheless is a crucial issue as since 1949 the National Register for inhabitants has a rubric for 'nationality, ethnic group, community and religion,' and official documents, such as identity cards, contain the holder's affiliation with one of the 'ethnic communities' (Jewish, Muslim, Christian or Druze). The Chief Registration Officer's decision on this is subject to judicial review, and the consequences are crucial, as in Israel an important set of rights and obligations are dependent on which community one is a member of. For example, as it will be shown, there will be separate courts and legal regimes for religious family law. If an applicant fails to demonstrate credibly her Jewishness, she will be registered after the passport she holds. The relationship between secular and religious state powers has been a source of severe political controversies, as well as several highly debated cases in front of the Supreme Court of Israel. For 50 years, the Agudat Israel Party and Orthodox rabbis (in Israel and the Diaspora) have been insisting that the term 'in accordance with Halacha' be added after the word 'conversion' in the Law of Return.

In practice, certain population categories are specifically affected by the competing criteria for Jewishness. For example, immigrants who are recognized as Jewish by the Registry Office and not by the Halacha—in particular who have a Jewish father but a non-Jewish mother, or who have converted to Judaism, particularly outside Israel, by synagogues not recognized by the Chief Rabbinate of Israel (Reform and Conservative Synagogues, for instance). All these are eligible for citizenship as Jews under the Law of Return but cannot contract a religious marriage in Israel. Thus, another front in this battlefield is the question of conversion recognition. In a 1995 decision⁴ the Israeli High Court of Justice gave de facto recognition to Reform and Conservative conversions performed in Israel for the purposes of civil issues (i.e., registration), restricting thereby religious community (orthodox rabbinate) jurisdiction to personal status issues. In 2000 the court reiterated⁵ that a conversion need not be approved by the Chief Rabbinate for the purpose of the Law of Return and the civil registration. and in 2004 it was decided⁶ that the Law of Return also applies to a non-Jew who, while residing lawfully in Israel underwent conversion, in Israel or abroad. The question is still far from resolved. In March 2016,⁷ the High Court of Justice ruled in favor of recognizing Orthodox conversions performed by private rabbinical courts. This opened the door for Conservative and Reform movements to petition for the recognition of their own conversions in Israel, which are also performed by private rabbinical courts, yet it is too early to call for a new era.

McGonigle and Herman (2015, p. 473) point to research showing that there are roughly 14 million Jews around the world, but over 23 million people eligible for citizenship under the Law of Return. Since the 1990s about a million immigrants arrived from the former Soviet Union, a third of whom are recognized as Jews, and the government decided that converting people who are of Jewish descent (*zera Yisrael* or ‘the seed of Israel’) non-Jewish family members of Jews are important national priorities, and a state conversion agency was established, along the operationalization of a military conversion system for soldiers to convert during their military service. Still, the size of the only potentially Jewish population in Israel continues to grow (Stern, 2017, p. 14). As Stern (2017, p. 13–14.) points out,

Most prospective converts [...] do not want to lead a religious lifestyle. [...] This means that in order to convert they have to pretend. For them, the road to Judaism and to full inclusion in the Jewish nation passes through falsehood. [...] In practical terms, the dispute affects several sectors of the population [such as the] approximately 100,000 immigrants from Ethiopia [or] individuals who converted abroad [and] find that the validity of their conversion is called into question in Israel.

In 2011, Judge Gideon Ginat of the Tel Aviv District Court ruled that award-winner Israeli author Yoram Kaniuk could register his official religious status as ‘without religion.’ As Fisher points out, this may be in line with what David Ben-Gurion, founder and

⁴ HCJ 1031/93 *Psaro (Goldstein) v The Ministry of Interior*, 1995.

⁵ HCJ 5070/95 *Na’amat – Movement of Working Women and Volunteers*, 2002.

⁶ HCJ 2597/99 *Rodriguez-Tushboim v Minister of Interior*, 2004.

⁷ HCJ 7625/06 *Ragachuva v The Ministry of Interior*.

first Prime Minister of Israel opined: ‘To his mind, the establishment of a Jewish state expressed the new Jewish nationalism, in contrast to Jewish life in the Diaspora, which was based on religion’ (Fisher, 2013, p. 221).

There have been very instructive cases on the question of a secular national identity. As Tamar Hostovsky-Brandes shows (Hostovsky Brandes, 2018, p. 50), in 2008, in *Ornan v Ministry of the Interior*,⁸ a group of Israeli citizens appealed to the High Court of Justice, requesting a declaratory ruling stating that their nationality is ‘Israeli,’ with the intention of using the ruling as a public document for the registration of nationality by the population registrar administered by the Ministry of Interior. The Court denied the appeal, holding that ‘the existence of an Israeli nationality has not been proven.’ Reaffirming the 1972 similar case of *Tamarin v. The State of Israel*,⁹ it adopted a distinction between citizenship and nationality, perceiving citizenship as a legal status, and seeing nationality as first and foremost a solidarity group. The Court argued that the formation of an Israeli nation necessarily comes at the expense of the Jewish nation and as an empirical fact, this Israeli nation has not been formed.

5.2 Jewish for the purposes of personal law

As mentioned above, in Israel, citizens are designated to ‘ethnic communities’ (Jewish, Muslim, Christian or Druze), and official documents contain these data. This also serves as the basis for membership in crucial ethno-religious communities that define and demarcate legal statuses for private law. As Yedidia Stern summarizes,

Israeli society is composed of four major identity groups that are fairly equal in size with no clear hegemonic center: ultra-Orthodox (Haredi) Jews, national religious (a.k.a. Modern Orthodox) Jews, secular Jews, and Arabs. Since the Israeli education system is divided into separate streams, with each serving one of the four identity groups, we can be fairly precise in projecting that the future demographics of the county will be roughly one quarter ultra-Orthodox, another quarter Arab, approximately 15 percent national-religious, and the balance—some 38 percent—secular Jews. (Stern, 2017, p. 3)

In contrast to the Zionist idea of designing the Jewish nation state on (at least partially) ethnic grounds, in Israel, the personal status of all citizens is determined on the basis of religious categories and in religious courts. Thus, all matters associated with marriage, divorce, and a number of other issues, religion is the deciding factor. In practical terms this means the prohibition of a marriage where only one of the spouses is Jewish, or same-sex marriage (Cohen, 2016/2017). A state-run religious establishment is the operational arm, including the Rabbinical Courts and the Chief Rabbinate, headed by two Chief Rabbis who are Israel’s highest religious authorities and the religious hierarchy’s senior representatives in public matters. Rabbinical Courts are religious courts appointed by the state to administer the Orthodox religious monopoly in matters pertaining to individual

⁸ CA 8573/08 *Ornan* (02/10/2013).

⁹ CA 630/70 *Tamarin v State of Israel* PD 26(1) 197 (1972).

status (Fisher, 2013, p. 220). The Orthodox Rabbinate and the Rabbinical Courts were established in the 1920s, as part of the adoption of the Ottoman ruling system that gave religious authorities the privilege of ruling on matters of personal status, and was legally re-established after 1947 within the context of a larger commitment to the Ultra-Orthodox (Fisher, 2013, p. 220).

The Central Bureau of Statistics (CBS) found that between 2004 and 2006, 9.6 to 12 per cent of Israeli couples married outside Israel. More than sixty thousand Jewish couples during those years chose to cohabit without marriage. In 2011 the *Haaretz* reported twenty thousand Israeli Jews marry abroad annually (Ellenson, 2017, p. 274), with Cyprus the most popular nearby destination. Although the High Court of Justice recognizes these marriages (HCJ 143/62 *Funk-Schlesinger v Minister of Interior* [1963] HC 58/68), but private international law can always bring surprises. As Julia Lerner (2017) shows, the formation of personal identities often takes place within the dynamics of bureaucratic categorization, where Israeli born citizens only find out at the age of 16–18 when applying for their ID card or registering for the military service that they are misplaced within the matrix of ethnobiology and the halacha. Thus, there are developments, when in certain cases the ‘nationality’ category within ID-cards can be left blank or have ‘without religion’, in order to open an option for ‘in-betweenness’. However, this only caters to ‘proper, indigenous, ethnic’ Jews, but not to many immigrants or children of mixed marriages, who, mostly can only have ‘converted’ or their previous nationality registered (Lerner, 2017, p. 279).

5.3 Jewish genes at the intersection of old and new forms of biopolitics

Besides religious, cultural and archive-based ancestral identification, with recent developments in molecular biology, the administrative operationalization of genetic data emerged as an additional form of classification to determine Jewishness—despite the obvious risk of re-inscribing racial essentialism. Jewish genetic tests open up new avenues to recognize and validate Jewishness, allowing for both restrictions and expanding the limits of group boundaries. Curiously, in several legal procedures genetic definitions of Jewishness also need to be approved and recognized by the rabbinate. It also needs to be added that the consideration of molecular information as a source of establishing Jewishness takes place in a socio-political environment, where laws and cultural norms (including some of the religious leadership) regarding the use of artificial reproductive technologies are quite permissive, due to their utility in tackling Israel’s ‘demographic problem’, that is, in maintaining a Jewish majority (McGonigle & Herman, 2015, p. 477).

As McGonigle-Herman explain, molecular genetic tests can now be used to measure individuals’ entire genomes, and scientific research has begun to describe the genetic basis for a common ancestry of the whole of the Jewish population (McGonigle & Herman, 2015, p. 474). There are three key ways in which Jewishness has moved to the molecular realm, with genes being defined as Jewish: population genetics; genetic testing for both disease and Jewish identity; and human ova and sperm donation, as in the field of assisted conception (McGonigle & Herman, 2015, pp. 474–475).

As for the latter, even the Orthodox Jewish community has been receptive to reproductive medicine.

Many rabbis will permit married couples to use non-Jewish genetic donor material when no other measures exist to solve infertility challenges, and since Jewishness is halakhically passed from mother to child, non-Jewish sperm can create a Jewish child if the mother is Jewish. However, the inheritance of Jewishness is problematized when a surrogate mother carries a baby. [...] In a recent case [...] a rabbi opined that the baby technically had three parents, and because the surrogate was not Jewish, the child was not Jewish. (McGonigle & Herman, 2015, p. 475)

In practice genetic tests offer the possibility to legitimize some whose Jewishness is questioned. For example, based on DNA test, a rabbi granted a marriage license as a 'bona fide Jew' to an East-European woman (McGonigle & Herman, 2015, p. 476). Even some underserved Jewish communities in Israel, such as the Lemba of southern Africa, Beta Israel of Ethiopia, the Kuki-Chin-Mizo, or the B'nei Menashe from India welcome these developments as proof of authentic Jewishness. Genetic evidence (McGonigle & Herman, 2015) is crucial for halachic validation, as these communities often follow quite different cultural and religious traditions from ex-European Orthodox Jews (for example, the Lemba observe descent passed from father to son) (McGonigle & Herman, 2015). Yet, DNA testing is also used to accentuate barriers. Many Jews from the Former Soviet Union are asked to provide DNA confirmation of their Jewish heritage in order to immigrate as Jews (McGonigle & Herman, 2015, p. 470) (even if the Prime Minister's Office argued that 'We're not talking about a test to determine Jewishness. We're talking about a test to determine a family bond that entitles [the child to] Aliyah.' McGonigle & Herman, 2015, p. 474).

It is important to stress that both the indexical power and validity of these genetic tests, as well as the socio-political operationalization of the concept of 'Jewish genes' is ambiguous.

For example, non-Jewish donor sperm and ova can be used in assisted conception clinics to produce babies that are legally Jewish in the eyes of the State, though only if the gestating womb is Jewish. DNA markers that could be read as Jewish on an individual level, however, need not be identified in these individuals. Conversely, a child could have Jewish genetic material, but without a Jewish mother would not be considered Jewish. (McGonigle & Herman, 2015, p. 475)

Jewishness as a measurable biological category can implicate access to basic rights and citizenship in Israel (McGonigle & Herman, 2015, p. 476; for more on the 'Jewish gene', see Abu El-Haj, 2012; Glenn & Sokoloff, 2010; Ostrer, 2001; Goldstein, 2008; Egorova, 2010).

It needs to be added that new technologies are often used to identify (the genealogy) of various groups—and not individuals—be them the nation-constituting majority or minorities. The above mentioned Igbo nationalist movement, which identifies as Jewish, led to the NGO Jewish Voice Ministries International to conduct DNA tests to 'verify' the Igbo claims of Jewish ancestry and concluded that the results 'did not support their claim to be descendants of the ancient people of Israel,' infuriating many, who claim that 'DNA tests [...] are incapable of proving—or disproving—Jewishness, [... as t]here is no test that can prove Jewishness' (Ejiofor 2022, p. 4).

6 Concluding remarks

The framework of the text was to show how law operates as a technology for conceptualization and operationalization of race and ethnicity in two dimensions: one concerning the groups, the other pertaining to membership criteria. The unique history and persistent experience of persecution and discrimination, along the historically continuous legal, socio-cultural and political challenges to ‘assimilation’, and the emergence of Israel, the ‘official national homeland’ of the Jewry, the question of ‘who and what is Jewish’ provides a conspicuous case study for the study of the dynamics of subjective and external conceptualization and operationalization.

Jews are minorities in many countries, yet intricate legal and political debates surround the question whether they are racial, ethnic, religious or even national minorities, or a cultural community. Sometimes these conceptualizations and classifications even co-exist in one society and legal system. The reason why the ‘who is Jewish’ question is a goldmine for social scientists is that it provides a singular opportunity to explore the complexities of biopolitics, identity politics, religion, minority rights, and genetic data in relation of a group that is already torn between competing cultural, ethnic or religious identity-frameworks, along an ambivalent history and contemporary experience of barriers to assimilation to Diaspora nations. This makes the legally formulated classifications in Israeli constitutional nationalism particularly illuminative. The various, often competing concepts of Jewishness by different actors provide a unique insight into complex legal concepts like the right to the choice of identity, constitutional theocracy, as well as various forms of contesting and bending ethno-racial classifications like ‘concealment,’ ‘passing,’ or ‘covering.’ It had been shown that in addition to self-identification, religious and archive-based ancestral identification, recent and controversial developments in molecular biology emerged as an additional form of classification to determine and validate Jewishness (for religious and official procedures.)

As for a broader lesson: the discussion of ‘who is Jewish’ provides a vivid demonstration of how the political and legal conceptualization of ethno-racial and/or national group membership is embedded in the social and historical context, as well as the situational interplay between minorities and the majority.

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The research project was financed from the 134962 Hungarian National Research and Innovation Grant.