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Depriving Small Ethnic Minorities of Legal Existence? The Supreme Court on Ethnicity in 1920s Estonia

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Abstract. This article discusses the issue of legal existence of ethnic minorities by asking whether and how legal recognition of ethnic groups as collective entities has affected individual freedom of ethnic self-identification. To this end, the article analyses court cases concerning the ethnicity record in identity documents in 1920s Estonia. It appears that the court decisions, all of which covered the right of individuals to select the ethnicity record "German", as a side effect of relying on the Cultural Autonomy Law, explicitly declared small and marginal ethnic groups that did not meet the requirements of the law to be legally non-existent and prohibited the individual freedom to self-identify with these ethnic groups. However, these decisions appeared to have no significant impact on the individual freedom of choice. The results of the article thus show that the link between legal recognition of ethnic minorities as collective entities and individual freedom of ethnic self-identification is not unambiguous. Whether and to what extent restrictions on the freedom of choice were implemented in practice may have been dependent on such social conditions that are not immediately apparent from legal norms.

Keywords: Ethnic minorities, cultural autonomy, legal existence, Supreme Court, interwar Estonia, Germanisation

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At least since the rise of nationalism in the late 19th century, increasing legal significance has been attributed to ethnicity, a social category, on the nature of which even academic circles have not reached a consensus.[1] Despite the vagueness of this social category, states of different times and geographical areas, including both empires and nation states, have developed systems of sometimes extreme sophistication that draw legal boundaries between ethnic groups and determine which social groups can be formally considered ethnicities and which cannot. Such legal categorisation tends to be arbitrary and confusing, often does not take into account the informal grouping of society, and at times does not have much practical value.[2]

Legal recognition of the existence of particular ethnic groups or ethnic minorities as such is one of the crucial aspects of ethnic categorisation. Thus, several studies have addressed this issue, particularly the tendency of states to limit such recognition arbitrarily.[3] Studies imply that such restrictions can particularly endanger small or weak ethnic

1 In this article, *ethnicity* is used as a generic term for communities that are defined and delimited by a variety of characteristics but primarily exist due to the cognitive perception of rigid boundaries between them. For the background of this terminological choice, see F. Barth. Introduction. – Ethnic Groups and Boundaries: The Social Organization of Culture Difference. Ed. by F. Barth. Waveland Press, Long Grove, 1998, 9–38; C. Lorenz. Representations of Identity: Ethnicity, Race, Class, Gender and Religion. An Introduction to Conceptual History. – The Contested Nation: Ethnicity, Class, Religion and Gender in National Histories. Ed. by S. Berger, C. Lorenz. Palgrave Macmillan, Basingstoke, 2008, 24–59; S. Malešević. The Sociology of Ethnicity. Sage, London, 2004. https://doi.org/10.4135/9781446215029.

2 For the variety of formal categorisation practices at different times and in different geographical areas, see e.g. A. Bonnett, B. Carrington. Fitting Into Categories or Falling Between Them? Rethinking Ethnic Classification. – British Journal of Sociology of Education, 2000, 21, 4, 487–500. https://doi.org/10.1080/713655371; J. Cadiot. Searching for Nationality: Statistics and National Categories at the End of the Russian Empire (1897–1917). – The Russian Review, 2005, 64, 3, 440–455. https://doi.org/10.1111/j.1467-9434.2005.00369.x; D. I. Kertzer, D. Arel. Censuses, Identity Formation, and the Struggle for Political Power. – Census and Identity: The Politics of Race, Ethnicity, and Language in National Censuses. Ed. by D. I. Kertzer, D. Arel. Cambridge University Press, Cambridge, 2002, 1–42; B. Kuzmany. Objectivising National Identity: The Introduction of National Registers in the Late Habsburg Empire. – Nations and Nationalism, 2023, 29, 3, 975–991. https://doi.org/10.1111/nana.12950; P. Mateos. A Review of Name-Based Ethnicity Classification Methods and Their Potential in Population Studies. – Population, Space and Place, 2007, 13, 4, 243–263. https://doi.org/10.1002/psp.457; V. Messing, A. L. Pap. Cacophony in Conceptualizing and Operationalizing Ethnicity: The Case of Roma in Hungary. – Ethnic and Racial Studies, 2024, 47, 9, 1920–1940. https://doi.org/10.1080/01419870.2024.2328327; A. Morning. Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round. – Social Statistics and Ethnic Diversity: Cross-National Perspectives in Classifications and Identity Politics. Ed. by P. Simon, V. Piché, A. A. Gagnon. Springer, Cham, 2015, 17–37. https://doi.org/10.1007/978-3-319-20095-8_2; A. L. Pap. 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, 2015, 46, 2, 153–232.

3 See e.g. G. Baranowska. Legal Regulations on National and Ethnic Minorities in Poland. – Przegląd Zachodni, 2014, 2, 35–48; T. Magazzini. When Ethnicity is "National": Mapping Ethnic Minorities in Europe's Framework Convention for the Protection of National Minorities. – Ethnic and Racial Studies, 2024, 47, 9, 1812–1833. https://doi.org/10.1080/01419870.2024.2328338.

minorities,[4] probably because such minorities often lack vocal and accomplished advocates and are thus easy to silence into nonexistence. Usually, this means that culturally and socially existent but marginalised ethnic groups are not recognised as collective legal entities by relevant legislation or court decisions.[5] Depending on social conditions, this legal existence of collective entities may also affect individuals to the extent to which they are allowed to self-identify with a particular ethnic group or to the extent to which the legal existence of ethnic groups entails benefits, such as the right to native language education or the right to vote and be elected to ethnically based representative bodies. The relationship between collective recognition and individual freedom of self-identification is, however, complex and can manifest in various ways. In censuses, for example, collective recognition often determines which ethnic groups individuals can self-identify with.[6] Scarce historical research has shown that there have also been administrative restrictions on the existence of ethnic groups and individual freedom of choice in vague connection with census data, whereas larger and socially influential ethnic groups have been in a favoured position.[7]

While in historical research, there are thus some hints at the complex relationship between the legal existence of ethnic minorities and individual freedom of self-identification, this topic is generally neglected by historians. Discussing this connection, however, would help better understand the minority issues that societies faced in the past. Thus, this article focuses on a distinctive example from interwar Estonia, the minority policy of which has attracted much and generally positive attention at the time and since. Particularly the cultural autonomy for ethnic minorities established in 1925 as a unique solution to the minority problem has been consistently discussed by several researchers who, over decades, have published numerous studies on its establishment, implementation, international reactions and perspectives for wider

4 In this article, the term *ethnic minority* is used in a quantitative sense, referring to any collective entity composed of individuals who self-identify in various life situations (for example, for a census) with a group that is numerically in a clear minority in a particular country without regard to migration background, autochthony, inner cohesion of community or other abstract factors sometimes considered important in terms of minorisation.

5 See e.g. B. Dobos. The Question of Recognising New Minorities in Hungary. – Hungarian Journal of Legal Studies, 2025, 65, 4, 432–453. https://doi.org/10.1556/2052.2024.00557; F. Palermo, J. Woelk. No Representation Without Recognition: The Right to Political Participation of (National) Minorities. – Journal of European Integration, 2003, 25, 3, 225–248. https://doi.org/10.1080/0703633032000133574; A. Petričušić. The Rights of Minorities in International Law. – Croatian International Relations Review, 2005, 11, 38/39, 47–57.

6 See e.g. A. Morning. Ethnic Classification in Global Perspective.

7 For late imperial Austria, see e.g. B. Kuzmany. Objectivising National Identity.

use.[8] Interwar cultural autonomy has also been compared with the one currently in force in Estonia to point out the advantages of the former model over the present one.[9] This extensive research could easily give the impression that interwar Estonia had an exemplary minority policy without major complications.

Interwar Estonian minority policy was, of course, actually much more complicated. As has been shown recently, already in the first years of independence the attitudes of politicians gradually turned from being highly minority-friendly to protecting the interests of Estonians at the expense of minorities.[10] However, most research addressing minority issues in relation to and beyond cultural autonomy largely revolves around the larger minority groups (Germans, Russians, Swedes and Jews),[11] while the smaller ones have been discussed only briefly and rather

8 A selection of relevant studies: T. Aava. Minorities and the State: Non-Territorial Autonomy in Estonia in the Late Tsarist and Interwar Periods. PhD dissertation, University of Vienna, 2023; K. Alenius. The Birth of Cultural Autonomy in Estonia: How, Why, and for Whom? – Journal of Baltic Studies, 2007, 38, 4, 445–462. https://doi.org/10.1080/01629770701682723; K. Aun. The Cultural Autonomy of National Minorities in Estonia. – Yearbook of the Estonian Learned Society in America, 1951/1953, 1, 26–41; M. Housden. Ambiguous Activists. Estonia's Model of Cultural Autonomy as Interpreted by Two of Its Founders: Werner Hasselblatt and Ewald Ammende. – Journal of Baltic Studies, 2004, 35, 3, 231–253. https://doi.org/10.1080/01629770400000091; M. Housden. Cultural Autonomy in Estonia: One of History's 'Curiosities'? – The Baltic States and Their Region: New Europe or Old. Ed. by D. J. Smith. Rodopi, Amsterdam, 2005, 227–249. https://doi.org/10.1163/9789401201438_012; K. Laurits. Saksa kultuuromavalitsus Eesti Vabariigis 1925–1940: Monograafia ja allikad. Rahvusarhiiv, Tallinn, 2008; D. J. Smith, J. Hiden. Ethnic Diversity and the Nation State: National Cultural Autonomy Revisited. Routledge, London, 2012. https://doi.org/10.4324/9780203118320; D. J. Smith. Estonia: A Model for Inter-War Europe? – Ethnopolitics, 2016, 15, 1, 89–104. https://doi.org/10.1080/17449057.2015.1101841; V. Vasara. Das estnische Parlament und die Deutschbalten: Zu den Debatten bis zur Verabschiedung der Kulturautonomie 1925. – Nordost-Archiv, 1995, 4, 2, 479–500.

9 See e.g. K. Kössler, K. Zabielska. Cultural Autonomy in Estonia Before and After the Soviet Interregnum. – Solving Ethnic Conflict through Self-Government: A Short Guide to Autonomy in South Asia and Europe. Ed. by T. Benedikter. EURAC, Bolzano, 2009, 56–60; M. Lagerspetz. Cultural Autonomy of National Minorities in Estonia: The Erosion of a Promise. – Journal of Baltic Studies, 2014, 45, 4, 457–475. https://doi.org/10.1080/01629778.2014.942676; D. J. Smith. The "Quadratic Nexus" Revisited: Nation-Building in Estonia Through the Prism of National Cultural Autonomy. – Nationalities Papers, 2020, 48, 2, 235–250. https://doi.org/10.1017/nps.2018.38.

10 M. Kuldkepp. Vähemusrahvuste küsimus Eesti riikluse tekke-ja algusperioodil. – Õpetatud Eesti Seltsi aastaraamat 2020. Õpetatud Eesti Selts, Tartu, 2022, 167–190.

11 See e.g. T. Aava. Jewish Autonomy in Interwar Estonia and the Life Trajectories of Its Leaders. – S: IMON Shoah: Intervention. Methods. Documentation, 2023, 10, 1, 37–56. https://doi.org/10.23777/sn.0123/art_taav01; K. Alenius. Dealing with the Russian Population in Estonia, 1919–1921. – Ajalooline Ajakiri = The Estonian Historical Journal, 2012, 1/2, 167–182; M. Kuldkepp. The Political Choices and Outlooks of the Estonian Swedish National Minority, 1917–1920. – National Identities, 2021, 23, 4, 409–431. https://doi.org/10.1080/14608944.2021.1873930; M. Kuldkepp. "A Union of Friendship Between Two Entire Nationalities": The Estonian Swedes and the German-Swedish Bloc in the 1929 Estonian Parliamentary Elections. – Acta Historica Tallinnensia, 2024, 30, 1, 50–82. https://doi.org/10.3176/hist.2024.1.02; Die Deutsche Volksgruppe in Estland während der Zwischenkriegszeit und aktuelle Fragen des deutsch-estnischen Verhältnisses. Ed. by B. Meissner, D. A. Loeber, C. Hasselblatt. Bibliotheca Baltica, Hamburg, 1997; D. J. Smith. Retracing Estonia's Russians: Mikhail Kurchinskii and Interwar Cultural Autonomy. – Nationalities Papers, 1999, 27, 3, 455–474. https://doi.org/10.1080/009059999108966.

in passing.[12] As a result, little is known about the social and legal position of such smaller ethnic groups and about the situation of individuals who self-identified with them. While marginal minorities might seem insignificant at first glance, research in recent years has highlighted topics which could call this insignificance into question. This research indicates that analysis of the membership registration of cultural self-governments, the constitutional freedom of ethnic self-identification and the connection between them would benefit from taking the role of small minorities into account.

While national registers, as lists of members of cultural self-governments, were merely intended to keep records of membership, recent research implies that their impact was not limited to this. Several studies show that the Law on the Cultural Self-Government of Ethnic Minorities,[13] the frame law of cultural autonomy, had an influence on the 1920s legal practice of ethnicity determination, particularly on the issue of whether and under what conditions individuals should have had the right to select the ethnicity record in their identity documents.[14] It is noteworthy that while in all disputed cases the Supreme Court granted the freedom of the complainants to change the previous ethnicity record to "German" according to section 20 of the constitution, it also emphasised that this freedom only applied to those individuals who wished to self-identify with ethnic groups that met the conditions set out in the Autonomy Law (i.e. Germans, Russians, Swedes and minorities with at least 3,000 members) since only these were recognised as ethnic minorities. What, if anything, these decisions actually meant for the small minority groups and their members has, however, remained unclear.

12 See e.g. K. Alenius. "Away with German and Russian Influence!" Ethno-Political Considerations in the Reorganisation of the Estonian School System in the Early 1920s. – Zeitschrift für Ostmitteleuropa-Forschung, 2007, 56, 3, 347–363. https://doi.org/10.25627/20075638726; K. Katus, A. Puur, L. Sakkeus. Development of National Minorities: Republic of Estonia up to 1944. – Trames, 1997, 1, 3, 221–246. https://doi.org/10.3176/tr.1997.3.01.

13 Hereinafter the Autonomy Law or Cultural Autonomy Law. For the original Estonian version, see Wähemusrahwuste kultuur-omawalitsuse seadus. – Riigi Teataja, 1925, 31–32, 153–156. Further references to and quotes from the law are from the English translation published in the official journal of the League of Nations: Law on the Cultural Autonomy of Racial Minorities in Esthonia. – League of Nations, Official Journal, 1925, 6, 6, 788–791.

14 See e.g. K. Rebane. Vähemusrahvuste õiguste kohtulik kaitse riigikohtu administratiiv-osakonna praktikas 1920–1940. Magistritöö, Tartu Ülikool, 2019; K. Rebane. Rahvuse vaba määramine – kas põhiseadusega tagatud kodanikuõigus II maailmasõja eelses Eesti Vabariigis? – Juridica, 2019, 10, 723–730; T. Tark. Die deutsche Kulturselbstverwaltung und die Änderung der Volkszugehörigkeit in Estland in den 1920er Jahren. – Jahrbücher für Geschichte Osteuropas, 2022, 70, 1/2, 131–158. https://doi.org/10.25162/jgo-2022-0005; T. Tark. Does Non-Territorial Autonomy Essentialise Ethnicity? Cultural Autonomy Legislation in Interwar Estonia. – Nations and Nationalism, 2025, 31, 2, 509–522. https://doi.org/10.1111/nana.13088; T. Tark. Rahvuse määramisest Eesti Vabariigis: 1928. aasta rahvuse muutmise seaduse eelnõu. – Akadeemia, 2025, 9, 1588–1622.

Equally unclear is what prompted the Supreme Court to make decisions that restricted the constitutional freedom of ethnic self-identification and why these restrictions were based on the Autonomy Law. The latter deserves particular attention, since the impact of this law has hitherto been rather underestimated or taken for granted.[15]

Thus, this article takes a closer look at the court cases dealing with the ethnicity record in identity documents. It focuses on the question of whether and to what extent the court's reliance on the Cultural Autonomy Law affected the legal existence of small ethnic minorities as collective entities and the individual freedom to self-identify with these ethnic groups. The analysis demonstrates that while the court decisions indeed deprived small ethnic minorities of legal existence and, accordingly, restricted the constitutional freedom of ethnic self-identification, their impact on small minorities and individuals remained low. The article thus finally explains the reasons for this curious situation.

MINORITY ISSUES IN EARLY 1920s ESTONIA

The newly independent Estonia had a rather small proportion of ethnic minorities. According to the 1922 and 1934 censuses, Estonians as the largest ethnic group made up almost 90% of the population, whereby the total number and proportion of minority individuals gradually fell between the two censuses. The census data show that five larger minority groups (Russians, Germans, Swedes, Latvians and Jews) together constituted almost the entire minority population in Estonia, two largest among them being Russians with 8.2% of the country's entire population and Germans with 1.7% and 1.6% in 1922 and 1934, respectively. The total number of smaller minorities, however, remained below 1.5% throughout the two decades of Estonian independence.[16] As a result, while the Declaration of Independence from 1918 was addressed to

15 For one recent example, see e.g. J. Schnur, M. Leppik. Kaassõna. – Riigiõiguse aastaraamat 2021. Eesti Teaduste Akadeemia riigiõiguse sihtkapital, Tallinn, 2021, 325–331 (328). For contemporary overviews, see e.g. S. v. Csekey. Strafrechtlicher Schutz des freien Nationalitätsbekenntnisses. – Glasul Minorităţilor, 1927, 5, 4, 149–154; S. v. Csekey. Estland. Staatsgericht (Verwaltungsabteilung) Tartu (Dorpat). Jeder Staatsbürger ist frei in der Bestimmung seiner Nationalität. – Zeitschrift für Ostrecht, 1927, 1, 3, 391–393; E. Maddison, O. Angelus. Das Grundgesetz des Freistaats Estland vom 15. Juni 1920. Carl Heymanns, Berlin, 1928, 34–35.

16 Rahva demograafiline koosseis ja korteriolud Eestis: 1922 a. üldrahvalugemise andmed. Vihk I. Riigi Statistika Keskbüroo, Tallinn, 1924, 31; Rahvastiku koostis ja korteriolud. 1. III 1934 rahvaloenduse andmed. Vihk II. Riigi Statistika Keskbüroo, Tallinn, 1935, 47–53.

"all the peoples of Estonia" and formulated extensive rights to minorities, only a few larger minority groups were able realistically claim these rights.

Indeed, most of the small minorities did not play a significant role in society due to their small size as well as lack of internal cohesion and organisational capacity. They thus had minimal or no opportunities to exercise some minority rights provided for by the constitution, such as the right to communicate with the state and local authorities in their own language (sections 22–23) or to receive native language education (section 12).[17] This was a practical issue since officials could not be expected to be proficient in any languages spoken by every Estonian citizen, and it was also not realistic to offer education in every minority language, especially if the number of pupils with the respective native language was extremely small in a particular settlement.[18] The lack of skilled elites who would have fought for the collective interests of the small minorities also contributed to their weak position. At the same time, individuals may not even have been particularly interested in such primarily linguistic minority rights, even if they self-identified with one of those small minorities.[19]

The situation was different with the largest minority groups, Germans and Russians, whose elites held political power in the Estonian area during the pre-independence centuries, and who the state authorities thus perceived as problematic and a potential security threat.[20] Estonian minority policy particularly revolved around the German minority. There were historical reasons for this, but not necessarily the perception of Germans as historical enemies and oppressors, although Estonian nationalist historiography intensely disseminated such views back then.[21] The problem, as reflected by the press, tended to be rather the opposite, i.e. the excessive attraction of Germans, primarily manifested in the

17 Eesti wabariigi põhiseadus. – Riigi Teataja, 1920, 113–114, 897–901 (here 898). For the English translation, see The Constitution of the Esthonian Republic (passed by the Constituent Assembly on the 15th of June 1920). Ühiselu, Tallinn, 1924.

18 The limited applicability of native language education was already acknowledged during the discussions on the Law on Public Primary Schools in the Constituent Assembly. See T. Tark. Valikuline kohustus: emakeelne kooliharidus sõdadevahelises Eestis. – Ajalooline Ajakiri, 2021, 175, 1/2, 53–78 (here 57). https://doi.org/10.12697/AA.2021.1-2.03.

19 For an analysis of such trends using the example of the Ingrian Finns, see K. Alenius, "Away with German and Russian Influence!", 359–362.

20 For more detail about state authorities' attitudes towards Germans and Russians, see e.g. K. Alenius. Under the Conflicting Pressures of the Ideals of the Era and the Burdens of History: Ethnic Relations in Estonia, 1918–1925. – Journal of Baltic Studies, 2004, 35, 1, 32–49. https://doi.org/10.1080/01629770300000211; K. Alenius. Dealing with the Russian Population in Estonia; H. Rohtmets. Vergeltung am Erzfeind? Die Staatsbürgerschaftsfrage der Deutschbalten in der neugegründeten Republik Estland. – Forschungen zur Baltischen Geschichte, 2011, 6, 141–162.

21 For a historiographical overview, see T. U. Raun. The Image of the Baltic German Elites in Twentieth-Century Estonian Historiography: The 1930s vs. the 1970s. – Journal of Baltic Studies, 1999, 30, 4, 338–351. https://doi.org/10.1080/01629779900000161.

popularity of German-language schools that provided – as was widely believed – high-quality education. Thus, the issue of Germanisation became the subject of sharp social discussions throughout the first two decades of Estonia's independence.[22] The tension of the situation was increased by the fact that the German minority elite was sufficiently consolidated, active and skilled in defending their interests. Consequently, the state authorities were forced to respond to their demands, which ultimately affected the country's minority policy, including relevant legislation and legal practice.

At the end of 1918, during the beginning of state-building, the state authorities started the systematic fight against Germanisation, which was mainly carried out through education policy. By the end of 1918, native language primary schools were made compulsory for pupils with the principle of obligatorily native language education settled with the 1920 Law on Public Primary Schools. However, the school system was in fact not based on pupils' native language. As the law provided, native language in the sense of the law had to be determined according to pupils' ethnic belonging. In practical terms, when distributing pupils between schools, education officials were not required to know what the child's first acquired or best-spoken language was, which could usually be the main determinants of native language, but rather the child's ethnicity, which in turn was determined by the ethnicity of the parents.[23]

Decision-making inside the school system was, however, largely case-based and vague until October of 1919, when a government regulation introduced new identity documents, which, apparently on the initiative of the Ministry of the Interior, contained an ethnicity record.[24] From now on, education officials could rely on this document without the need to apply intuition or require evidence that actually proved nothing. Yet in the long term, this seemingly unambiguous system of ethnicity determination appeared to be problematic, not least because personal self-identification was often not taken into account when issuing identity documents. Instead, officials could indicate the ethnicity of the applicants as "Estonian" if the latter did not actively express the wish to have another ethnicity recorded. Furthermore, both applicants for

22 For more detail, see e.g. T. Tark. Rahvuskuuluvuse tähendus riigi ja üksikisiku perspektiivist Eestist Saksamaale 1941. aastal ümberasunute elulooliste andmete põhjal. PhD dissertation. Tartu Ülikooli Kirjastus, Tartu, 2021.

23 Awalikkude algkoolide seadus. – Riigi Teataja, 1920, 75–76, 593–599. For the implementation of such school system see T. Tark. Valikuline kohustus.

24 Määrus isikutunnistuste kohta. – Riigi Teataja, 1919, 91–92, 722. According to the regulation, the Ministry of the Interior was responsible for developing the design of the identity documents.

identity documents (especially if they did not have school-age children at the time of issuing the document) and the officials who issued these documents might sometimes not have understood what was meant by ethnicity (it was, for example, often confused with citizenship or place of origin) or what the practical effect was on the applicants' future lives. Thus, identity documents issued from the autumn of 1919 onwards could contain ethnicity records that the document owners might not have been satisfied with later.[25]

Dissatisfied people found the opportunity to overcome their unfortunate situation in 1920, when the first constitution of the Republic of Estonia was adopted in the summer and entered into force in December. Section 20 of the constitution provided for every adult Estonian citizen's freedom to determine his or her ethnic belonging[26] and thus raised public awareness of the possibility of formally self-identifying with the desired ethnic group either on emotional or instrumental grounds. Apparently, there were quite a few people from the beginning who wanted to exercise this constitutional freedom of ethnic self-identification and, accordingly, change the ethnicity record in their identity document. This fact was referred to in a regulation from the Minister of the Interior issued in the spring of 1921, several months after the constitution came into force. This was the first legal act directly showing that the ethnicity record in an identity document was assumed to be a form of expression of the exercise of the constitutional freedom of ethnic self-identification. Based on this assumption, the regulation restricted the individual freedom of choice on the grounds that it could only be used once when issuing the identity document. Changes to this document had to be possible only in cases where the document was issued before the constitution came into force and the applicant was able to prove that the previous ethnicity record was incorrect.[27] Later practice showed, however, that the ministry's officials did not fully adhere to this regulation, but made decisions at their own discretion.

Documentation from the first half of the 1920s concerning the ethnicity record in identity documents reveals that people generally wanted to change their previous ethnicity to German. However, this was not a widespread phenomenon, the total number of applications per year was on average around one hundred and this number included any combination of initial and desired ethnicity.[28] Accordingly, social tension

25 T. Tark. Rahvuskuuluvuse tähendus, 70–77.
26 Eesti wabariigi põhiseadus, 898.
27 Siseministri määrus isikutunnistuste paranduste kohta. – Riigi Teataja, 1921, 22, 137.
28 For relevant documentation from 1921 to 1924, see Rahvusarhiiv (National Archives

around this issue was relatively modest and without legal consequences. Yet, the situation escalated in 1925, when the Cultural Autonomy Law was passed and the German minority elite began preparation to establish their cultural self-government.

CULTURAL AUTONOMY AS A DECISIVE FACTOR

The establishment of cultural autonomy in Estonia was a slow and tense process, although it had already been declaratively granted to ethnic minorities in the Declaration of Independence (point 2) and in the constitution (section 21).[29] The first draft law for cultural autonomy was developed in the *Riigikogu*, the Estonian parliament, in 1921 after the German minority elite, expressing the wish to exercise the promised autonomy, discovered that this was not possible without a special law. Yet, the adoption of such a special law proved to be difficult, the drafts mainly initiated by representatives of the Baltic German Party in parliament were repeatedly rewritten and the related discussions in the parliamentary committees and plenary were heated. The law was finally adopted on 12 February 1925.[30]

One of the central points of contention was the question of which individuals could or should benefit from autonomy. The two related fundamental questions were whether members of an ethnic group should have been compelled to become members of the respective cultural self-government and whether anyone who would self-identify with an ethnic group could become a member of its cultural self-government. Both issues caused considerable confusion among politicians, which ultimately made the Autonomy Law a legal tangle.[31] As stipulated in the adopted law and relevant implementing regulations, joining the national register was voluntary, but those who wished to join had to prove their ethnicity. The wording of the relevant legislative pieces shows that these two ideas were not as unambiguous and compatible with each other as they perhaps might seem at first glance.

of Estonia, RA), Tallinn, ERA.14.1.665; RA, ERA.14.1.709; RA, ERA.14.1.910; RA, ERA.14.1.1013. See also Valitsusasutiste tegevus 1918–1934. Riigikantselei, Tallinn, 1934, 215.

29 Manifest kõigile Eestimaa rahwastele. – Riigi Teataja, 1918, 1, 1–2 (here 1); Eesti Wabariigi põhiseadus, 898.

30 For the adoption of cultural autonomy in Estonia, see e.g. K. Alenius. The Birth of Cultural Autonomy; D. J. Smith, J. Hiden. Ethnic Diversity and the Nation State; V. Vasara. Das estnische Parlament und die Deutschbalten.

31 See more T. Tark. Does Non-Territorial Autonomy Essentialise Ethnicity.

In terms of the court cases analysed in this article, the most relevant provisions regarding complex membership issues are sections 8 and 9. According to the English translation published in the Official Journal of the League of Nations, section 8 reads as follows: "The term 'minorities' within the meaning of this law shall apply to the German, Russian and Swedish peoples and also to minorities living in Esthonian[32] territory whose total number is not less than 3,000."[33] This section makes explicit that – in terms of the same law, which is a very important nuance – only the aforementioned ethnic groups were to be recognised as ethnic minorities. The section did not stipulate that no other ethnic group could be an ethnic minority in Estonia outside the autonomy legislation, in other areas of life. This is also evident from section 15, according to which the cultural self-government was to cease its activities if the number of adults in the national register fell below half of the total number of members of the relevant ethnic minority according to the last census. Therefore, at least in the organisation of censuses, the concept of ethnic minority had to have a broader meaning than that provided for by the Autonomy Law, otherwise the content of section 15 would become nonsense.

The possible different meanings of "ethnic minority" are particularly important in the light of section 9 which, following the logic of the previous section, explained the inclusion criteria by formulating a specific provision for individual membership:

> The fact that a member of a minority belongs to an autonomous organisation shall be established by the national register, in which Esthonian citizens of the nationalities mentioned in paragraph 8, who are at least 18 years old, may have their names entered.
>
> Children of the registered members of a minority shall be considered, up to the age of 18 years, as belonging to the same minority as their parents. If the parents are of different nationalities, the nationality of the children shall be fixed according to the joint wish of the parents. If an agreement is not arrived at, the child shall belong to the father's nationality. Minors who have reached their eighteenth year and are children of members of a racial[34] minority shall

32 In the 1920s, "Esthonia" was the standard English form of the name "Estonia" in international communication and English-language legal texts.

33 Law on the Cultural Autonomy of Racial Minorities in Esthonia, 789. At that time and later, in addition to those explicitly mentioned, only Jews and Latvians crossed the 3,000 mark.

34 In this translation of the law, the words *racial* and *national* were used interchangeably as synonyms. Thus, the former should not be interpreted as a reference to phenotype. For this conceptual ambiguity, see more e.g. D. I. Kertzer, D. Arel. Censuses, Identity Formation, and the Struggle for Political Power, 12; C. Lorenz. Representations of Identity, 35–41.

> not be considered as belonging to that minority unless they have registered within the year.[35]

This section and even more clearly the explanatory memorandum to the law make explicit that belonging to a certain ethnic minority was the same as belonging to the national register of the cultural self-government of that minority.[36] It was a controversial provision for at least two reasons. First, national registers of cultural self-governments were meant to be a practical tool for keeping track of individuals who were entitled to benefit from cultural autonomy and there was no practical need for and benefit of such an equation since it was not possible to fully restrict the exercise of all minority rights and freedoms to only those on the national register. Second, while section 8 was clear in limiting its validity only to the context of autonomy, this limitation is not so obvious in this section. Therefore, this section alone could have made those ethnic minorities that did not have a cultural self-government with a national register or the right to create one legally non-existent in the eventuality that an institution (for example, the Ministry of the Interior or the Ministry of Education, which were most involved in the issue of ethnicity determination) had interpreted it as generally applicable. In fact, this provision was not applied in practice, not least because it would have caused massive confusion.[37] Nevertheless, as analysed in more detail below, sections 8 and 9 together with the government regulations, issued in the following months after the adoption of the Autonomy Law to regulate the maintenance of national registers, had a wider impact beyond cultural autonomy, as they later became highly relevant for the Supreme Court.

The two government regulations on membership issues were the Regulation on Compiling the Electoral Rolls for the First Cultural Council Elections of the German Minority of the Republic of Estonia, issued in April 1925, and the Regulation on the Maintenance of National Registers, issued in June.[38] Both regulations appear to be at odds with section 9 of the Autonomy Law. According to this section, individuals would have belonged to an ethnic minority if they were included in the respective national register. The section did not specify what would have been the applicants' ethnic belonging before including their names

35 Law on the Cultural Autonomy of Racial Minorities in Esthonia, 789.

36 For the explanatory memorandum, see Lisa nr. 87. – II Riigikogu protokollide lisad. VII istungjärk. Riigikogu, Tallinn, 1925, columns 209–219.

37 T. Tark. Does Non-Territorial Autonomy Essentialise Ethnicity, 515.

38 Määrus Eesti Wabariigi Saksa wähemusrahwuse esimese kultuurnõukogu walimiste walijate nimekirja kokkuseadmise kohta. – Riigi Teataja, 1925, 65–66, 346–347; Rahwusnimekirjade pidamise määrus. – Riigi Teataja, 1925, 101–102, 469–470.

in the register, which means that, in legal terms, this might have been undefined. Thus, the section implies that the determination of ethnicity should have taken place at the moment a person was included in the national register. According to the regulations, however, it was necessary to prove belonging to the respective ethnic minority for inclusion. A "document of legitimation" was supposed to be used as proof, that is, the identity document with ethnicity record as made explicit in the April regulation. The regulations also established the condition that if a person who wished to be included in the electoral roll or national register had some other ethnicity recorded in their identity document, they were obliged to apply first to the Ministry of the Interior for a change.

The regulations relied on identity documents because these documents were already the basis for ethnicity determination in any situations where this proved necessary. In other words, ethnic belonging and, accordingly, individual freedom to decide on one's belonging were implicitly associated with what was stated about it in one's identity document. Thus, this connection between ethnic belonging and an ethnicity record in identity documents developed early on into a universally recognised social agreement. While not being explicitly stipulated in any legislation, even the Supreme Court took this social agreement into account in its later practice. Perhaps this connection, perceived as self-evident, was the reason why it was easy to adopt the established practice in maintaining national registers. Consequently, a new reality emerged. All those who wanted to join a national register, but whose ethnicity record in the identity document did not match their wish, were forced to go through an extensive bureaucratic process to prove their ethnicity.

This complicated process would perhaps not have been a problem if the Ministry of the Interior had followed the constitution to the letter and granted the applications of everyone who desired to change the ethnicity record in their identity document. Instead, the ministry had already rejected such applications in the first half of the 1920s, though relatively rarely. Given the rarity of rejections, the officials apparently did not see such ethnicity changes as too great a risk from the perspective of the country's main ethnic group at that time. Yet in spring 1925, when the above-mentioned April regulation was established and thus formal confirmation was given for the possibility of such changes, the German-language press began actively to promote this possibility in its calls to register for the election. As a result, hundreds of applications were submitted during 1925 to change the ethnicity to German, and the

Ministry of the Interior, seeing an increasing problem in the situation, began to reject applications much more often than before.[39]

In 1925, the changes of ethnicity records in identity documents were, however, no longer just a matter of particular individuals, but also in the interest of the German minority elite and their soon to be established cultural self-government. The committee preparing the cultural self-government was in contact with numerous applicants, often helping them submit applications and making suggestions for efficient communication with the Ministry of the Interior.[40] The committee members also quickly became aware of the rejection of applications. Thus, in autumn 1925, the first people filed complaints in court, apparently with the encouragement and support of the committee. In the following years, dozens more people took legal action with the support of the active German Cultural Self-Government the contribution of which was, for example, help finding lawyers. Altogether 38 cases, mainly represented by the lawyers Woldemar Hartmann and Walter von Stackelberg, finally obtained Supreme Court decisions.[41]

COURT CASES ABOUT ETHNICITY IN IDENTITY DOCUMENTS

Court cases about ethnicity records in identity documents were spread over several years, reaching decisions from 1926 to 1930. Of the 38 complaints, 32 concerned the Ministry of the Interior's refusal to change the document; six cases from 1928 were, however, related to the ministry's unjustified suspension of the processing of applications.[42] The administrative department of the Supreme Court, which processed the complaints, satisfied almost all of them, with two exceptions. The reasons for rejections were procedural rather than substantive, yet

39 T. Tark. Die deutsche Kulturselbstverwaltung.

40 D. J. Smith, J. Hiden. Ethnic Diversity and the Nation State, 48.

41 In an earlier study, 35 cases were discussed, yet this study does not include all relevant court files, while cases that did not directly concern the ethnicity record in identity documents were included. See K. Rebane. Vähemusrahvuste õiguste kohtulik kaitse, 20–27.

42 These six cases are not relevant to this article, but it is worth briefly mentioning that in all cases the court upheld the complaints and ordered the ministry to fulfill its legal obligations. See Bernhard Jürgens against the Ministry of the Interior. RA, ERA.1356.2.597; Alma Pajo against the Ministry of the Interior. RA, ERA.1356.2.617; Senta Treffner against the Ministry of the Interior. RA, ERA.1356.2.647; Balduin Eskenson against the Ministry of the Interior. RA, ERA.1356.2.587; Ida Eichen against the Ministry of the Interior. RA, ERA.1356.2.585; Eduard Eichen against the Ministry of the Interior. RA, ERA.1356.2.584.

one of these rejections helps contextualise the other cases and therefore, regardless of its procedural nature, will be briefly discussed below.[43]

From the complaints submitted to the Supreme Court starting in autumn 1925, the first 10 reached a decision on 26 February 1926 with nine approved and one rejected. In this rejected case, the complainant, Elfriede Treumann, requested the ethnicity record in the identity document of her minor (15 years old) daughter to be made according to the ethnicity of the daughter's deceased father. When rejecting the complaint, the court pointed out that the complainant had not submitted evidence to the Ministry of the Interior about the ethnicity of the child's father.[44] Of broader significance in this case is, however, the fact that the daughter of the complainant was a minor and thus not yet able to exercise the constitutional freedom of ethnic self-identification. Therefore, some kind of special law was necessary to resolve the difficult situation, and thus, the Supreme Court decided to apply section 9 of the Autonomy Law, since it provided a guideline for determining the ethnicity of minors. Although this guideline was in fact intended to be applied only to include minors in the national registers, it may have been reasonable to rely on it in this case in the absence of more appropriate legislation.

However, the court could have approached the cases of adults who wanted to change the ethnicity record in their own identity document in a different way. Since none of the parties disputed that the moment of ethnicity determination and thus the exercise of the respective constitutional freedom occurs when filling in or changing the ethnicity record in the identity document, then, from such a starting point, neither the Ministry of the Interior nor any legal act should have restricted legally capable adults in the selection and change of an ethnicity record as long as there were no circumstances that would have made the personal ethnicity determination impossible.[45] Any such restrictions

43 In another case, the complaint of a married woman was rejected on the grounds that, according to the Baltic Private Law, she had no right to authorise a lawyer to represent her in court without her husband's written permission. Thus, in this case, the court lacked any substantive arguments on the issue of ethnicity determination. For this case see Beatrice Mill against the Ministry of the Interior. RA, ERA.1356.2.613. Baltic Private Law was adopted in 1865 and still in force in independent Estonia since new private law could not be established within two decades of Estonia's first independence period. See P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – Juridica International, 2000, 5, 104–118 (here 108).

44 Decision in the case of Elfriede Treumann against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.649. In fact, both the application and complaint were accompanied by certificates (thereby not identical) stating that the minor in question as well as her father had belonged to a German-language congregation. The judges did not comment on either certificate, thus failing to assess their suitability as evidence. See Certificate issued by the pastor of the St. Nicolas' congregation, August 1925. RA, ERA.14.1.1127; Certificate issued by the pastor of the St. Nicolas' congregation, 23 September 1925. RA, ERA.1356.2.649.

45 In one exceptional case from 1929, this nuance was also emphasised by the lawyer

were at least not self-evident and natural, but would have required substantial justification.

The Supreme Court, however, took a different position without explaining its motivation. As exemplified by the case of Martha Thiel, the first nine decisions regarding adults make evident that the court relied heavily on sections 8 and 9 of the Autonomy Law in these cases in a similar way to the above-mentioned minor's case:

> According to § 20 of the constitution, every Estonian citizen is free in determining his or her ethnicity and in those cases where personal determination is not possible, it shall happen according to the procedure prescribed by law. There is no general special law which would determine the procedure and conditions for the actual use of the right to determine ethnicity. However, in the Law on the Cultural Self-Government of Ethnic Minorities (*R*[*iigi*] *T*[*eataja*] no. 31/31 – y. 1925), this question is generally resolved for those ethnicities that are recognised as ethnic minorities in Estonia, according to § 8 of the mentioned law. § 9 of this law provides that "The fact that a member of a minority belongs to an autonomous organisation shall be established by the national register, in which Esthonian citizens of the nationalities mentioned in paragraph 8, who are at least 18 years old, may have their names entered".[46] From the explanatory memorandum to the Law on the Cultural Self-Government of Ethnic Minorities (Minutes of the II *Riigikogu*, session 7, y. 1925, pp. 209–219) submitted to *Riigikogu* by the General Committee, we incidentally read that the regulations of the draft law on the right to determine one's ethnicity submitted to *Riigikogu* by the General Committee must be understood to mean that "inclusion in the national register is optional, based on the principle of the recognition of ethnicity by those citizens who are at least 18 years old" and "the determination of ethnicity of every individual citizen happens through the free determination by the person him or herself". *Riigikogu* has passed the parts of the draft law on determining the belonging to the ethnic minority submitted by the General Committee without changes and therefore the explanatory memorandum of the General Committee must be considered when interpreting this law. In accordance with § 20 of the constitution and § 8 of the Law on the Cultural Self-Government of Ethnic Minorities, § 5 of the Regulation adopted by the Government of the Republic on 17 April 1925 (*R. T.* no. 65/66 – y. 1925) provides that inclusion in the German national register will be "based on the data received from the police and municipality governments as well as on the declarations of individual citizens about their ethnicity".
>
> The second subsection of the same section provides that "in cases where personal declaration about one's own ethnicity differs from the data received

Walter von Stackelberg. See Stackelberg to the Supreme Court in the case of Kurt Frey, 19 November 1929. RA, ERA.1356.2.589.

46 The translation of this quote comes from the official translation by the League of Nations. The remainder of this passage and all the quotes presented below are the author's.

from the municipality governments or police, the person who made the declaration will be included in the list if he or she submits to the authority which draws up the lists a corresponding confirmation from the Ministry of the Interior about the correction of ethnicity in his or her relevant documents of legitimation (identity document, etc.) within the term prescribed by § 5 and 11".

It follows from the above that general principles of the right to determine ethnicity are set out in § 20 of the constitution and in the Law on the Cultural Self-Government of Ethnic Minorities, and, since the regulation issued by the Government of the Republic being based on § 17 and 29 of the latter law explicitly provides the right and possibility to correct the notes on ethnicity relying on the declarations of citizens. Since there are no restrictions on the right to determine one's own ethnicity for those Estonian citizens who are at least 18 years old in the applicable laws and binding regulations, if they determine their ethnicity according to one of those ethnicities that are recognised as ethnic minorities the Ministry of the Interior has no legal basis to arbitrarily impose restrictions and to refuse to correct the notes on ethnicity in the identity documents.[47]

This landmark judgement has several underlying assumptions. First, by stating that "[t]here is no general special law which would determine the procedure and conditions for the actual use of the right to determine ethnicity", the judges assumed that a special law was necessary for ethnicity determination in any case, regardless of a person's age or legal capacity, otherwise there would have been no need for such a statement. Second, by stating that the issue of ethnicity determination was "generally resolved for those ethnicities that are recognised as ethnic minorities" in the Cultural Autonomy Law, the judges assumed that the scope of this law can be expanded into a general special law on ethnicity determination. Third, by emphasising the explicit possibility of changing the ethnicity record in an identity document provided for in the April 1925 regulation, the judges assumed that, since the complaints specifically

47 Marta Thiel'i voliniku vann. adv. Valter Stackelberg'i kaebus siseministri resolutsiooni peale 31. aug. 1925 a. rahvuse nimetuse parandamise asjas. – 1926. aasta Riigikohtu otsused. "Õiguse" väljaanne, Tartu, 1927, 23–24. The decision in the file of Martha Thiel's case: Decision in the case of Martha Thiel against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.644. Analogous decisions of the same date: Decision in the case of Voldemar Rose against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.631; Decision in the case of Johanna Rautsa against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.625; Decision in the case of Helene-Marie Mend against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.610; Decision in the case of Herbert Mend against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.611; Decision in the case of Emma Liva against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.605; Decision in the case of Karl Johan Lipping against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.604; Decision in the case of Harry Lipping against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.603; Decision in the case of Valeska Grosset against the Ministry of the Interior, 26 February 1926. RA, ERA.1356.2.592.

concerned the ethnicity records in the identity document, but not any other expression of ethnic belonging, there should be a clarifying legal act that would regulate the role of identity documents. These assumptions together make evident that the judges were not willing to recognise the constitutional freedom of ethnic self-identification as completely unrestricted.

In the light of the explicit constitutional freedom, however, the court had little legal means to set such restrictions as would have satisfied the Ministry of the Interior. There was a tiny chance to go along with the argument of the ministry and the prosecutor that this constitutional freedom could only be used once when issuing a new identity document.[48] The court, however, initially ignored this argument (as well as the reference to the relevant 1921 regulation of the Minister of the Interior) and later explicitly rejected it. It is possible that the judges were affected by the argument of the lawyer Woldemar Hartmann who, during the discussion of one case, stated that when a person could use the freedom of ethnic self-identification only once, there would actually no longer be a freedom.[49] In the midst of this complex situation, the judges may have had difficulty finding legal arguments to refute Hartmann's claim and justify the ministry's statements instead. The Autonomy Law, at the same time, allowed for a simplified motivation for the inevitable decision of declaring the activity of the Ministry of the Interior unconstitutional and simultaneously helped place arbitrary restrictions on full freedom.

The Ministry of the Interior, of course, was not satisfied with restrictions that did not help fight Germanisation and thus, after the first 10 cases, more of the same followed. While the Supreme Court forced the Ministry of the Interior to process the complainants' applications again and satisfy them, the ministry nevertheless continued to reject new applications. A few of those new cases added smaller details to this years-long legal saga. The court deemed it necessary to emphasise first, that the surname could not be a reason to reject an application; second, that it was not always obvious that a person had already used the freedom of ethnic self-identification in cases where the second identity document was based on the first one issued before the entry into force

48 See e.g. Minutes of the court hearing in the case of Emma Liva, 26 February 1926. RA, ERA.1356.2.605; Minutes of the court hearing in the case of Herbert Mend, 26 February 1926. RA, ERA.1356.2.611; Minutes of the court hearing in the case of Johanna Rautsa, 26 February 1926. RA, ERA.1356.2.625; Minutes of the court hearing in the case of Karin Kengsep, 26 October 1926. RA, ERA.1356.2.599.

49 Minutes of the court hearing in the case of Herbert Mend, 26 February 1926. RA, ERA.1356.2.611.

of the constitution; third, that the constitution did not provide that ethnicity can be determined only once, thus refuting the main argument of the Ministry of the Interior and its 1921 regulation; and finally, that the Ministry of the Interior had no right to require applicants to submit evidence about their ethnicity when processing applications.[50] Some other cases, however, did not offer any new arguments.[51] Thus, over years, an established legal practice emerged.

It is impossible to know whether, and if so how, the decisions could have been different if a person had filed a complaint against the Ministry of the Interior with the desire to self-identify as a member of any ethnic minority other than German. Apparently, the court would not have had any reason to alter its decision if the requested ethnicity had been a legally recognised ethnic minority. However, it is unclear what would have happened if the complainant had desired to belong to an unrecognised ethnic minority. Much would have then probably depended on the competence of lawyers and the willingness of judges to change the previous legal practice in the light of a new situation. It is nevertheless doubtful that the court would have reached a position in such hypothetical cases that any special law was not needed to determine the ethnicity of an adult and legally capable person.

What prompted the court's perceived need to restrict complete freedom of choice in this way is not immediately obvious, but can at least partially be explained by the fact that this perceived need was not unique to Estonia. Although in Europe, the principle of personal freedom of ethnic self-identification has been internationally and domestically recognised at least since late imperial Austria, there have always been difficulties in implementing this principle in legal or administrative practice. It was and is typical that in disputed cases the freedom of choice tends to give way to 'objective' features or external evaluation that should support any personal choice. The need to impose some kind of restriction has thus constantly accompanied European legal practice of ethnicity determination for more than a hundred years.[52]

50 Relevant cases, respectively: Harry Umblia against the Ministry of the Interior. RA, ERA.1356.2.650; Hildegard Lane against the Ministry of the Interior. RA, ERA.1356.2.600; Ernst Lindemann against the Ministry of the Interior. RA, ERA.1356.2.602; Paul Riik against the Ministry of the Interior. RA, ERA.1356.2.630. The decision of 20 December 1926 in the case of Ernst Lindemann that allowed multiple ethnicity determinations for a person later became a kind of precedent, to which the lawyers representing the complainants repeatedly referred.

51 Decision in the case of Elisabeth Wiren against the Ministry of the Interior, 30 March 1928. RA, ERA.1356.2.655; Decision in the case of Aleksander Treikeller against the Ministry of the Interior, 30 March 1928. RA, ERA.1356.2.648; Decision in the case of Johannes Blumberg against the Ministry of the Interior, 17 May 1929. RA, ERA.1356.2.581.

52 See e.g. B. Kuzmany. Objectivising National Identity; L. Djordjević. Introduction: Ethnic

What can be considered special in the Estonian case, however, is the fact that arbitrary restrictions were not justified by 'objective' features or the need for an external evaluation, but in a simplified manner only by existing legislation.

The court's simplified approach may have appeared to create some legal clarity on a difficult issue, yet such simplification of ethnicity, which did not cease to be an ambiguous and complex concept, began to complicate the handling of further complaints. On 19 December 1929, the Supreme Court again issued decisions in 10 cases at once. These decisions were largely based on previous ones, but one particularly interesting argument was added. Specifically, the representative of the Ministry of the Interior (or more precisely, the Ministry of Courts and the Interior, as it was called at that time) argued during the hearing of one of these cases that the Supreme Court's previous practice would lead to the abuse of the freedom of ethnic self-identification. Arguably, in conditions of such complete freedom, one could also "consider oneself to belong to some coloured race".[53] Judges, in turn, to react to the arguments of the Ministry of the Interior and, in conditions where they had already defined ethnicity according to the Autonomy Law, were now forced to explicitly construct two opposing meanings of this concept to show the irrelevance of the ministry's argument:

> The Law on the Cultural Self-Governments of Ethnic Minorities does not make a citizen's membership in a certain cultural self-government of an ethnic minority dependent on the citizen's membership in a certain ethnicity as race, but rather provides an opportunity for citizens to recognise themselves as belonging to the ethnocultural association permitted in the Republic to which they feel close, regardless of ethnicity as race. Therefore, the Ministry of Courts and the Interior has no legal basis to refuse to correct the ethnicity records made in the identity documents of Estonian citizens who are 18 years old. The requirement laid down in the note to section 6 of the Regulation on the Maintenance of National Registers adopted by the Government of the Republic and published in *Riigi Teataja* nr. 101/102 – y 1925, that the applicant must submit the necessary evidence of his or her ethnicity, is not in accordance with the law, because the Law on the Cultural Self-Government of Ethnic Minorities, on the basis of sections 29 and 30 of which the Regulation was adopted, does not contain such a requirement. There is no provision in the law to allow one to demand recognition of belonging to an ethnicity

Data and Minority Protection. – Journal on Ethnopolitics and Minority Issues in Europe, 2020, 19, 2, 1–13; K. Nieminen. Implicit and Explicit Boundaries of Belonging: Indigenous and Minority Identities. – Research Handbook on Law and Courts. Ed. by S. M. Sterett, L. D. Walker. Edward Elgar Publishing, Cheltenham, 2019, 365–378; A. L. Pap. Is There a Legal Right to Free Choice.

53 Minutes of the court hearing in the case of Paul Riik, 13 December 1929. RA, ERA.1356.2.630.

> that does not have cultural self-government in the Republic of Estonia, or even to a coloured race.[54]

This addition to the argumentation of court decisions clearly demonstrates how the complexity of the issue led the judges astray. First of all, while previously the freedom of ethnic self-identification was limited to those ethnic groups that met the conditions set by the Autonomy Law, now it was limited to those that already had their own cultural self-government, and these were only Germans and Jews. The judges probably did not intend to impose such a restriction with this decision inasmuch as there is no explanation in the argumentation that would have explicitly revoked earlier, differently worded and less restrictive decisions. Perhaps due to this presumably unintended error, the sentence is not found in the later decisions.[55] Yet the questionable argumentation was not limited to this mistake.

First, while the Autonomy Law did define ethnic minorities, it did so merely through a national register without any substantive defining characteristics. The judges' argument that the Autonomy Law refers to ethnicity as "ethnocultural association" was probably drawn on the explanatory memorandum to the law that explicitly defined the concept referred to by the Estonian word *rahvus* as cultural community rather than tribe (*sugu*; the word *rass* in the meaning of race was not used), yet the law itself does not contain such definitions, and any definitions should have been valid only for autonomy, not for identity documents.[56] The court also did not consider a hidden but important political nuance. Defining ethnicity as "ethnocultural association" in the form of a cultural self-government was not a self-evident principle but merely resulted from

54 Quote translated from the case of Paul Riik: Decision in the case of Paul Riik against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.630. Analogous decisions of the same date: Decision in the case of Meta Riik against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.629; Decision in the case of Marie Adamson against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.577; Decision in the case of Klara-Elisabet Fromhold-Treu against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.590; Decision in the case of Alma Pajo against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.618; Decision in the case of Viktor Sihle against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.639; Decision in the case of Helmi Sitska against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.640; Decision in the case of Alma Zero against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.642; Decision in the case of Jenny Taube against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.643; Decision in the case of Valentiina Tomingas against the Ministry of the Interior, 13/19 December 1929. RA, ERA.1356.2.646.

55 Decision in the case of Ellen Frey against the Ministry of the Interior, 4 April 1930. RA, ERA.1356.2.588; Decision in the case of Kurt Frey against the Ministry of the Interior, 4 April 1930. RA, ERA.1356.2.589; Decision in the case of Harry Ojasuu against the Ministry of the Interior, 1 April 1930. RA, ERA.1356.2.616; Decision in the case of Karlos Schüler against the Ministry of the Interior, 1 April 1930. RA, ERA.1356.2.636.

56 Lisa nr. 87, column 212.

Estonian politicians' attempts to link the compiling of national registers of cultural self-governments with the constitutional freedom of ethnic self-identification in order to avoid the compulsory national registers desired by German minority politicians.[57] While this definition might have been somewhat reasonable for the organisation of cultural self-governments, if ethnicity as such was to be defined so narrowly outside the context of cultural autonomy, only Germans and Jews and not even the Estonian majority could have legally existed in interwar Estonia.

The second problematic nuance was related to the judges' obvious reaction to the exaggerated speech of the representative of the Ministry of the Interior. They were inevitably in need to respond to the argument about the hypothetical absurd situations to which full freedom of ethnic self-identification could lead. Whereas in previous cases it was rather implicit that the judges also saw such a hypothetical risk as something that should be minimised with legal means, it now becomes obvious. The decision shows that judges could not without reservations reject the argument of the Ministry of the Interior, as they probably did not want Estonians to start self-identifying as belonging to a "coloured race" either. Thus, the court's argument implies how the judges perceived ethnicity not merely as a cultural community that could have a legal framework such as a cultural self-government, but also as something inherent that apparently could not be one's free choice. In constructing this dual meaning of ethnicity, the court did not explain why the ethnicity record in the identity document affecting all adult Estonian citizens should not have been associated with the other, broader definition, but with the definition of the Autonomy Law, which applied only to a limited number of citizens. The most obvious alternatives in this situation, however, would have been to build on the idea of inherent nature of ethnicity and thus reject the constitutional freedom of ethnic self-identification, or, conversely, completely reject the idea of inheritance, which, as the court's argumentation implies, was unacceptable to both the judges and society.

Like many of their colleagues in many parts of Europe earlier and later, the Estonian judges aimed to find a balance between full freedom of choice and the perceived inherent nature of ethnicity, and thus, tried to rule out any situations that crossed the implicit red line in ethnic self-identification. That this balancing with the help of the Autonomy Law finally affected small, weak and harmless minorities and individuals who, by self-identifying with such minorities, apparently did not cross

57 T. Tark. Does Non-Territorial Autonomy Essentialise Ethnicity.

any red lines, was rather an unintended side effect, since the issue of the legal existence of small minorities was not the focus of the cases and the judges were actually not motivated to restrict the freedom of choice of their members.

THE IMPACT AND LIMITATION OF COURT DECISIONS

Analysis of the court cases demonstrates that although they were caused by the desire of numerous people to self-identify with the German minority and the interest of the German minority elite to achieve the self-identification of many people as German, the Supreme Court in Estonia in the 1920s had little legal opportunity to impose restrictions on this trend, even if the judges had the moral willingness as members of society to do so. Instead, by imposing restrictions on the selection of the ethnicity record in identity documents based on the definition of ethnic minority and the list of recognised minorities in the Cultural Autonomy Law, the court – at least theoretically – deprived those persons who wished to self-identify with ethnic groups that did not meet the conditions of the law (i.e. those ethnicities not recognised as existing legally as ethnic minorities) of freedom of choice. However, this restriction would actually have affected small minorities and their members only if these court decisions had been systematically taken into account when issuing and changing identity documents.

Yet, the Ministry of the Interior together with the Police Administration, which was partially involved in the processing of applications for ethnicity changes, two institutions directly affected by the court decisions, generally did not adhere to the interpretation of these decisions when processing new applications. In the second half of the 1920s, that is, after the first court decisions, on several occasions people were granted the right to select some of those small and legally non-existent minorities as the ethnicity record in their documents.[58] There is only one exceptional case from 1931 when the ministry rejected

58 See e.g. The decision on the application of Evdokia Trass to change the ethnicity in the identity document from Russian to Ukrainian, 11 May 1927. RA, ERA.1.6.115; The decision on the application of Boris Verzinsky to change the ethnicity in the identity document from Russian to Polish, 8 September 1928. RA, ERA.1.6.125; The decision on the application of Anna Linde to change the ethnicity in the identity document from Estonian to English, 4 October 1928. RA, ERA.1.6.125; The decision on the application of Johann Abraitis to change the ethnicity in the identity document from Polish to Lithuanian, October 1929. RA, ERA.1.6.141.

the application of a certain Valentin Raban to replace his initial ethnicity record with "French" on the grounds that "according to the Supreme Court's explanation, it is permissible to demand recognition of belonging to those ethnicities that have cultural self-government in the Republic of Estonia", thus relying on the most restrictive interpretation, which the judges abandoned in their later decisions.[59] As the uniqueness of this case suggests, the court decisions appeared to have no wider impact on the handling of ethnicity records in identity documents, both when making changes and presumably also when issuing new documents, and their only effect was thus to pressure the Ministry of the Interior to revise its rejections in each particular case. At the same time, this unique case shows that the possibility of implementing court decisions in administrative practice was recognised.

The limited wider social impact of court decisions is also evident in the further legislative activities of politicians, particularly in the alterations of the Regulation on the Maintenance of National Registers. Although the Supreme Court had explicitly stated that the demand for evidence about ethnicity in this regulation was not lawful, which could have led to a respective change, this happened neither immediately after the relevant court decisions nor later.[60] The regulation's conflict with the law might have been easy to ignore so far as the identity documents were used as a proof and people were expected to have the freedom to select the ethnicity record in this document. Yet, from 1930 new identity documents with a new design were issued that no longer contained an ethnicity record. This situation should now have clearly highlighted the unlawfulness of the regulation. Instead of altering the regulation now, in these new conditions, a new system of 'evidence' was developed. According to this system, anyone wishing to be included in a national register had to submit a personal declaration of their ethnicity and two witnesses had to sign it to confirm that the declaration was true.[61] This new system implies that the perceived need to restrain Germanisation outweighed the authority of the court decisions.

Against the background of these developments, it appears that while the court decisions placed restrictions on the definition of ethnic

59 The decision on the application of Valentin Raban to change the ethnicity in the identity document to French, 26 February 1931. RA, ERA.1.6.151.

60 For amendments to the regulation, see Rahvusnimekirjade pidamise määruse osalise muutmise määrus. – Riigi Teataja, 1931, 107, 1233; Rahvusnimekirjade pidamise määruse osalise muutmise määrus. – Riigi Teataja, 1933, 1, 3–4; Rahvusnimekirjade pidamise määruse muutmise määrus. – Riigi Teataja, 1934, 97, 1667–1668.

61 T. Tark. Does Non-Territorial Autonomy Essentialise Ethnicity, 517; T. Aava. Minorities and the State, 246.

minorities and the individual freedom to self-identify with any ethnic group, there was no real will in society and state institutions to change the established administrative arrangements of ethnicity determination according to these decisions. There was also no need to strictly adhere to the decisions, since most of the minority rights, such as native language education, were not available to small minority groups due to their small population size. Therefore, the state did not need to allocate expenditure, for example, for maintaining schools in these minority languages, which could have provided a motivation for not recognising the existence of such minority groups.[62] In addition, small minorities, unlike Germans, were not perceived as a threat to the survival of Estonians. In a sense, it was thus precisely the marginality of small ethnic minorities that usually granted the individual freedom to self-identify with them even after the court decisions.

CONCLUSION

Court cases in 1920s Estonia regarding ethnic record in identity documents show that the issue of ethnicity determination was complicated and sensitive leading to controversial decisions. Although all the cases concerned the right of individuals to change the previous ethnicity record in their identity document to "German", the court's reasoning was much broader. Relying on the Cultural Autonomy Law meant that the right of individuals to select the ethnicity record and thus to exercise the constitutional freedom of ethnic self-identification was limited to ethnic groups recognised as ethnic minorities in this law. Since the court relied on the Autonomy Law in making its decisions on an issue that was not related to cultural autonomy, it legally declared small ethnic minorities non-existent outside the specific context of autonomy, while at the same time leaving open whether and to what extent these decisions could or should have had any real meaning and impact on these ethnic groups as collective entities and on individuals desiring to self-identify with them.

Remarkable about these decisions is that although they could have triggered processes with wider impact, both in terms of the possibility of individuals to select the desired ethnicity record for their identity document and in terms of the maintenance of national registers of

62 The cost of minority schools was an important consideration in the eyes of politicians and officials. See T. Tark. Valikuline kohustus, 72.

cultural self-governments, neither of these happened. Those who wished to self-identify with small ethnic minorities were generally able to continue to change the ethnicity record according to their wish and presumably select the desired ethnicity record when they applied for a new document. The requirement for evidence of ethnicity in the Regulation on the Maintenance of National Registers also remained in force, even though the court had declared it unlawful. One of the reasons for this situation was the fact that the court had no need to take a position on small ethnic minorities. Declaring them legally non-existent in terms of issuing and changing identity documents was a side effect of decisions that did not concern these minorities and thus easy to ignore. The second reason was the fact that, while small minorities had almost no social impact, there was clear social and political interest in restraining the much more impactful German minority elite in recruiting members to their cultural self-government and thus the court's argument against the requirement of evidence when including individuals in the national register was ignored.

This article thus highlighted the often neglected complex connection between legal existence of ethnic minorities and personal freedom of choice demonstrating its ambiguity and dependence on social conditions. By discussing this connection in terms of everyday bureaucracy and legal practice, the article showed that while the legal recognition of the existence of ethnic groups as collective entities may affect the individual freedom to self-identify with the desired ethnic group in theory, the consequences are not always obvious in practice. It appears that these consequences depend on various factors, including the complex and multifaceted nature of ethnicity, the understanding of which requires the social context to be taken into account.

KAS VÄIKESEARVULISTE VÄHEMUSRAHVUSTE ÕIGUSLIK EKSISTENTS TÜHISTATI? RIIGIKOHUS RAHVUSEST 1920. AASTATE EESTIS

Triin Tark

Siinne artikkel käsitleb vähemusrahvuste õigusliku eksistentsi problemaatikat, analüüsides näidisjuhtumina Eesti 1920. aastate kohtukaasusi isikutunnistuse rahvusmärke küsimuses. Senine uurimisseis viitab, et Riigikohus tunnistas oma lahenditega õiguslikult eksisteerivateks ainult 1925. aasta vähemusrahvuste kultuuromavalitsuse seaduses nimetatud rahvusrühmi (sakslased, venelased, rootslased ja vähemalt 3000 indiviidi suurused rahvusrühmad), samuti piiras põhiseadusega sätestatud rahvuse määratlemise vabaduse kehtivaks ainult neile indiviididele, kes soovisid ennast määratleda vähemusrahvuste kultuuromavalitsuse seadusega õiguslikult tunnustatud rahvusrühmade liikmetena. Artikkel täpsustab kohtuasjade süvaanalüüsi abil selle potentsiaalselt väikesearvulisi vähemusi negatiivselt mõjutada võinud otsuse tagamaid ja laiemat ühiskondlikku mõju.

Kohtutoimikutest ilmneb, et Riigikohus seisis silmitsi siseministeeriumi ja ühiskonna ootusega aidata võidelda „saksastumise“ vastu. Samas piiras kohtu võimalusi sellele ootusele vastata põhiseaduse paragrahv 20, mille järgi kõik täisealised Eesti kodanikud olid vabad oma rahvust määratlema. Sellegipoolest ei soovinud riigikohtunikud täit rahvuse määratlemise vabadust võimaldada, käies sel moel üht jalga Euroopas varem ja hiljem tavapärase õiguspraktikaga mitte tunnistada täielikku individuaalset valikuvabadust ka siis, kui taoline vabadus on mingite õigusnormidega deklareeritud. Otsides rahvuse määratlemise vabadust piiravale otsusele seadusandlusest argumente, tugines kohus vähemusrahvuste kultuuromavalitsuse seadusele, ehkki selle seos isikutunnistuse rahvusmärkega polnud iseenesestmõistetav. Laiendades sel moel autonoomiaseaduse ulatust, leidis Riigikohus esiteks, et vähemusrahvused saavad Eestis olla vaid need rahvusrühmad, mis vastavad seaduses sõnastatud tingimustele, ning teiseks, et põhiseaduslik rahvuse määratlemise vabadus saab kehtida ainult neile isikutele, kes soovivad ennast pidada kuuluvaks mõnda vähemusrahvusesse selle seaduse mõttes. Kuna see jättis indiviididele täieliku vabaduse määratleda ennast sakslasena, ei vastanud otsused siseministeeriumi ja ühiskonna ootustele.

Kuna rahvuse määratlemise vabaduse piirang oli suunatud mitte endid sakslastena määratleda soovinud isikutele, vaid neile, kes soovisid ennast määratleda väikesearvuliste vähemusrahvuste liikmetena, jäi kohtuasjade ühiskondlik mõju väikeseks. Ilmneb, et otsused, mida toetav argumentatsioon oli potentsiaalselt laiaulatusliku mõjuga, survestasid siseministeeriumi vaid kohtusse pöördunud isikute isikutunnistuse rahvusmärke muutmise taotlusi uuesti üle vaatama ja neid rahuldama. Kuigi kohtulahendid võinuks mõjutada edaspidist isikutunnistuste väljastamise ja muutmise praktikat, seda tegelikult ei juhtunud. Isikutunnistuse rahvusmärke muutmise toimikud näitavad, et ka pärast mitmeid kohtuotsuseid oli üldjuhul (ühe erandiga) võimalik rahvusmärkeks valida mõni õiguslikult mitteeksisteerivaks tunnistatud rahvus. Samuti jättis riigi poliitladvik reageerimata kohtuotsustes sisaldunud argumendile, et kultuuromavalitsuste rahvusnimekirjade pidamise määruses sõnastatud rahvuse tõendamise nõue neile, kes soovisid mõne rahvusnimekirjaga liituda, oli seadusevastane.

Nii demonstreerib Riigikohtust läbi käinud juhtumite analüüs, et rahvusrühmade eksistentsi õiguslik tunnustus ja selle seosed isikliku rahvuse määratlemise vabadusega olid mõjutatud mitmesugustest ühiskondlikest teguritest, mitte ainult mustvalgetest õigusnormidest. 1920. aastate Eestis tagas ühiskonna keskendumine saksastumise problemaatikale selle, et ehkki kohtuasjade kõrvalmõju oli väikesearvuliste vähemusrahvuste õigusliku eksistentsi näiline tühistamine, ei peetud ametkondlikus asjaajamises ilmtingimata vajalikuks kohtuotsuste valguses piirata ennast mõne marginaalse vähemuse liikmena määratleda soovivate isikute valikuvabadust.