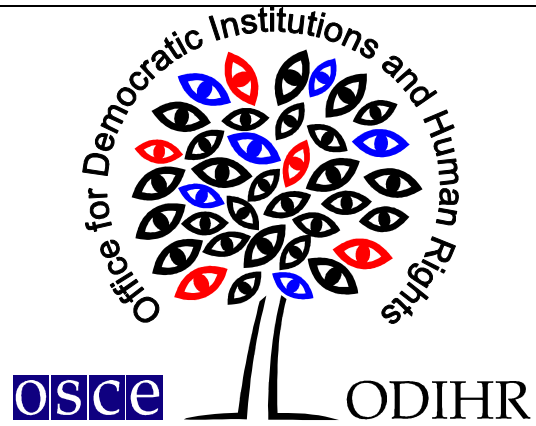


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OPINION

on the proposed exclusion of the heading regarding ethnic identity from civil status documents in Moldova

This Opinion has been prepared by the OSCE ODIHR

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1. INTRODUCTION

1. *By letter dated 15 June 2010, the Minister of Justice of Moldova requested the OSCE ODIHR to provide an opinion on a proposal to exclude the heading regarding ethnic identity from civil status documents in Moldova.*
2. *The proposed exclusion of the heading on ethnic identity was in direct response to the 27 April 2010 Judgment of the European Court of Human Rights (hereinafter “the ECtHR”) in the case of Ciubotaru v. Moldova¹ (hereinafter “the Ciubotaru judgment”), finding a violation on account of the fact that the applicant was not able to have his claim of belonging to a certain ethnic group examined in light of objectively verifiable evidence. The ECtHR found that Moldova had not complied with its positive obligations to safeguard the applicant’s right to respect for his private life and concluded that this violated the applicant’s rights under Article 8 of the European Convention on Human Rights² (hereinafter “the ECHR”). The proposed solution excluding the heading on ethnic identity was therefore presented with the aim of addressing the found violation.*
3. *This Opinion was drafted in response to the said request of the Minister of Justice of Moldova.*

2. SCOPE OF REVIEW

4. This Opinion has been prepared taking into account Moldova’s international commitments,³ including its commitments as a participating State of the OSCE,⁴

¹ *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010.

² Article 8 of the ECHR states that:

“1. Everyone has the right to respect for his [...] private life.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

³ Moldova is a party to, among other international treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005 (ratified and in force as of 12 September 1997); the Framework Convention for the Protection of National Minorities, CETS No.: 157 (ratified on 20 November 1996, in force from 1 February 1998); the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No.: 108 (ratified on 28 February 2008, in force from 1 June 2008); the International Covenant on Civil and Political Rights (acceded on 26 January 1993); and the International Convention on the Elimination of All Forms of Racial Discrimination (acceded on 26 January 1993).

⁴ Moldova is a participating State to the OSCE and is accordingly bound by OSCE commitments. Of particular importance for this Opinion are Sections (32) and (33) of the 1990 OSCE Copenhagen Document. For a compilation of relevant OSCE Commitments, see OSCE ODIHR, OSCE Human Dimension Commitments, Volume 1: Thematic Compilation (2d. ed. 2005), available at:

[<www.osce.org/publications/odihr/2005/09/16237_440_en.pdf>](http://www.osce.org/publications/odihr/2005/09/16237_440_en.pdf).

focusing in particular on relevant international standards pertaining to a person's right to self-identification and the protection of national minorities.

5. The Opinion relates to the proposal "for excluding the heading regarding the ethnic identity from civil status documents", as mentioned in the letter of the Ministry of Justice of Moldova, dated 15 June 2010. The OSCE ODIHR understands this to mean that the Ministry of Justice opts for excluding the heading regarding ethnic identity from the State Population Registry database and from birth certificates.
6. In view of the fact that the proposed amendments are not in the form of a specific text of a draft law, the OSCE ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations and comments on any related legislation of the Republic of Moldova which the OSCE ODIHR may wish to make in the future.

3. EXECUTIVE SUMMARY

7. The Ministry of Justice's proposal "for excluding the heading regarding the ethnic identity from civil status documents" lies within the State's margin of appreciation – it does not appear to be problematic with regard to international standards pertaining to a person's right to self-identification and the protection of national minorities.
8. However, the exclusion of references to ethnic identity in civil status documents and in the State Population Registry database fails to fully address the problem highlighted in the Ciubotaru judgment. Namely, it will not remedy the fact that the procedure will remain disproportionately burdensome for persons wishing to change the ethnic identity recorded in their children's birth certificates⁵ under the currently applicable law. Regardless of whether ethnic identity is excluded from the civil status documents and database, it is recommended that:

A. the existing procedure for changing one's recorded ethnicity under the Law on Documents pertaining to Civil Status be amended, so that any person who believes that his or her existing record on ethnicity is incorrect could either ask for it to be rectified, or deleted [paras 27-30].

B. the procedure for changing one's recorded ethnic identity, whether through rectification or deletion, should be fair, and regulations establishing such procedure should not create insurmountable barriers [para 31].

⁵ See paragraph 16 below.

4. ANALYSIS AND RECOMMENDATIONS

4.1 The concept of ethnicity

9. There is not one universally accepted definition of the concept of ethnicity, or ethnic group. According to one definition, an “ethnic group” is “a collectivity within a larger population having real or putative common ancestry, memories of a shared past, and a cultural focus upon one or more symbolic elements which define the group’s identity”.⁶ The United Nations and the Council of Europe both recommend that such definitions be determined by their national context.⁷
10. The ECtHR has sought to define the concept of ethnicity by correlating it to the concept of race, as follows: “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”.⁸
11. Within the academia, most scholars agree that that there are objective characteristics (e.g., common language and cultural practices) as well as subjective characteristics (e.g., the belief in a common descent) that make up ethnic groups/minorities, and that ethnic identification usually arises out of and within interaction between groups.⁹ Many scholars also point to the recent emergence of a trend to increasingly accept self-identification, not ascribed, contested or subject to proof, as a key entry point to ethnic identity – i.e., the growing acceptance of so-called “endo-definitions” of ethnic or minority groups – especially on the European continent.¹⁰ Furthermore, there is a broad consensus among scholars that a person’s ethnic identity is neither predetermined by ancestry nor is it static, and that the strength, salience, scope, content, and consequences of ethnic identity are variable across time and context.¹¹

4.2 Ethnic identity as a protected characteristic of the right to respect for private life

12. It is by now established in the case-law of the ECtHR that ethnic identity is a detail pertaining to the individual’s identity which is protected by Article 8

⁶ “Ethnic statistics and data protection in the Council of Europe Countries,” ECRI 2007, p. 27, < http://www.coe.int/t/dghl/monitoring/ecri/activities/themes/Ethnic_statistics_and_data_protection.pdf >.

⁷ See the OSCE ODIHR *Hate Crime Laws. A Practical Guide (2009)*, page 42.

⁸ See *Sejdić and Finci v. Bosnia and Herzegovina*, ECtHR [GC] Judgment of 22 December 2009, para 43.

⁹ Ulrike Schmidt, *Language Loss and The Ethnic Identity of Minorities*, European Centre for Minority Issues, ECMI Issue Brief #18 (November 2008), page 4.

¹⁰ *Ibidem*, page 10-11.

¹¹ Rogers Brubaker, *Ethnicity, Race, and Nationalism*, Annual Review of Sociology 2009, pages 28-31.

ECHR.¹² Under the principle of personal autonomy, which underlies the guarantees provided by Art. 8 ECHR, protection is afforded to the personal sphere of each individual, including the right to establish details of their identity as human beings.¹³ Ethnic identity is protected because it constitutes an essential aspect of a person's private life and identity, along with other aspects such as name, gender, religion and sexual orientation.¹⁴

13. As a protected characteristic of the right to respect for private life, a person's ethnic identity engages certain obligations on the part of the State. Namely, States are bound by negative obligations (e.g., to desist from imposing upon a person an ethnic identity which he or she justifiably considers alien to himself or herself), as well as by positive ones (e.g., to allow and even facilitate the establishment of open relationships between individuals which make liberty worth having).¹⁵ This is so because "[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings".¹⁶ The ECtHR has further observed that "there is an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle [...] not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community".¹⁷
14. Outside the ECHR framework, analogous "positive obligations" safeguarding the ethnic identity can be found in the Council of Europe's Framework Convention for the Protection of National Minorities, which calls upon States "to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage".¹⁸ Similarly, the OSCE Copenhagen Document provides that "[t]he participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity".¹⁹

¹² See *S. and Marper v. the United Kingdom*, ECtHR [GC] Judgment of 4 December 2008, para 66, and *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 49.

¹³ See *Burghartz v. Switzerland*, ECtHR Judgment of 22 February 1994, para 24, and *Christine Goodwin v. the United Kingdom*, ECtHR [GC] Judgment of 11 July 2002, para. 90.

¹⁴ See *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 53.

¹⁵ See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, (Oxford University Press, 2nd edition), page 362.

¹⁶ See *Niemietz v. Germany*, ECtHR Judgment of 16 December 1992, para 29. See also *Botta v. Italy*, ECtHR Judgment of 24 February 1998, para 32, where the Court held that "the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings".

¹⁷ See *Muñoz Díaz v. Spain*, ECtHR Judgment of 8 December 2009, paragraph 60.

¹⁸ See Art. 5 of the Framework Convention for the Protection of National Minorities, CETS No.: 157.

¹⁹ See Section (33) of the 1990 OSCE Copenhagen Document.

15. On a more general note, the UN International Covenant on Civil and Political Rights and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities re-affirm that one of the main purposes of the UN is to promote the respect for human rights and fundamental freedoms for all “without distinction as to race, sex, language, or religion”.²⁰ The Declaration further notes the particular importance of implementing human rights with regard to “national or ethnic, religious and linguistic minorities”.²¹

4.3 Permissible collection of ethnic data by the State

16. The OSCE ODIHR notes that currently in Moldova, information about ethnic identity is recorded in each individual’s personal entry in the State Population Registry database. While the ethnic identity is not indicated on any identity papers issued to individuals or on birth, marriage, divorce or death certificates, it does appear on the birth certificates of an individual’s children under “parents”. Furthermore, information concerning individuals’ ethnic identity also appears in criminal judgments and in various documents issued by the prosecuting authorities where the ethnic identity of defendants, victims and witnesses is mentioned.²²

17. The focus of international human rights law is generally on avoiding unwanted registration and abusive use of ethnic data. Nevertheless the collection of such information by state authorities is permissible in certain situations and with the observance of specific standards.

18. Thus, the collection of data relating to ethnic groups is recognized as playing an increasingly important role in the fight against discrimination. In order to elaborate policies designed to promote equality, States must be able to identify the nature and extent of discrimination, the groups affected by discrimination, and the fields in which discrimination occurs. To that effect, the monitoring bodies of some international treaties call for the collection of data on the enjoyment by national minorities of specific rights. Examples include the Advisory Committee of the Council of Europe Framework Convention on National Minorities²³ and the

²⁰ See the Preamble of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by the UN General Assembly resolution 47/135 of 18 December 1992, and Art. 2 of the International Covenant on Civil and Political Rights.

²¹ See the Preamble of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by the UN General Assembly resolution 47/135 of 18 December 1992.

²² See *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 20.

²³ In its latest advisory opinion on Moldova, the Advisory Committee under the Framework Convention on National Minorities mentioned the role which the Population Register plays in data collection and stressed the “need for additional, reliable and up-to-date information on the socio-economic and educational situation of persons belonging to national minorities” (*Advisory Opinion on Third Report of Moldova under the Framework Convention*, ACFC/OP/III(2009)003, paragraph 56). The Advisory Committee added that such data can be collected through labour force or household surveys or through sociological surveys and studies.

United Nations CERD Committee under the International Convention on the Elimination of All Forms of Racial Discrimination.²⁴ It should be borne in mind that when information about individuals' ethnic origin is collected, processed and disseminated, state authorities should assure compliance with safeguards set forth in the Recommendation (97) 18 of the Council of Europe's Committee of Ministers "On the protection of personal data collected and processed for statistical purposes", and in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.²⁵

19. A survey of national practice,²⁶ European Union law and international human rights law underlines that gathering information relating to ethnic status is permitted in *each* of the following three scenarios:
- it is done with the consent of the individuals concerned
 - it is necessary to carry out a monitoring obligation imposed by international law
 - it is necessary to enable a person to establish or defend a legal claim (such as discrimination in housing or education etc.).²⁷
20. As such, the collection, storing and processing of ethnic data does not *per se* violate international law, provided that it is done with the observance of adequate safeguards.

4.4 Relevant findings contained in the ECtHR Judgment on the case of Ciubotaru v. Moldova

21. The OSCE ODIHR reiterates that in its judgment on the case of Ciubotaru v. Moldova, the ECtHR found a violation of Art. 8 ECHR on account of the fact that the applicant was not able to have his claim of belonging to a certain ethnic group

²⁴ See the *Concluding Observations on the Fifth to Seventh Reports of Moldova under the Convention* (UN Doc. CERD/C/MDA/CO/7), paragraph 8, requesting Moldovan authorities to collect detailed information on the enjoyment by national minorities and non-citizens of the rights protected under the Convention, disaggregated by gender, age, ethnic group and nationality, and recommending that a coherent system of data collection be developed for that purpose.

²⁵ Such safeguards include: that data be collected for clearly stated, specific and legitimate purposes; that data collection not be excessive in relation to the purpose sought to be achieved; that individuals be allowed to access and rectify data concerning them; and that adequate security precautions be taken to protect such data. For more details, see the full text of CoE Recommendation (97) 18 and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

²⁶ For example, the 1998 UK Data Protection Act expressly allows for the processing of data revealing race or ethnic origin where this is necessary for identifying the existence or absence of equality of opportunities or treatment between persons of different racial or ethnic background, with a view to promote or maintain such equality, and provided that it is carried out with appropriate safeguards for the rights and freedoms of data subjects.

²⁷ In the case of *D.H. v Czech Republic*, ECtHR [GC] Judgment of 13 November 2007, the Court underlined the need for close study of minority outcomes in all fields of socio-economic rights, and the statistical monitoring role in defending or advancing claims of indirect discrimination.

examined in the light of objectively verifiable evidence presented by him in support of that claim.²⁸

22. In particular, the ECtHR noted that according to the Moldovan law, ethnicity is defined by the ethnicity of one's parents. Under Section 68 of the Moldovan Law on Documents Pertaining to Civil Status,²⁹ it is "impossible to rectify the ethnic identity of one's parents in their children's birth certificates if the parents' civil status documents do not contain information concerning the requested ethnic identity".
23. With respect to this provision, the ECHR held that "section 68 of the Law on Documents pertaining to Civil Status and the current practice of recording ethnic identity create insurmountable barriers for someone wishing to have recorded an ethnic identity different from that recorded in respect of his or her parents by the Soviet authorities", which amount to "a disproportionate burden in view of the historical realities of the Republic of Moldova".³⁰ The Court thus concluded that it was *the procedure* that violated Moldova's positive obligations to safeguard his right to respect for his private life, under Art. 8 ECHR, by not enabling the applicant to have his recorded ethnicity changed.³¹

4.5 Assessment of the solution proposed by the Ministry of Justice of Moldova and recommendations for improvement

24. The solution proposed by the Moldovan MoJ is to "opt for excluding the heading regarding ethnic identity from civil status documents".³² This presumably means to exclude the headings on ethnic identity from the State Population Registry database – including, past, present and future entries – and from the birth certificates (which indicate the ethnic identity of the child's parents) – which will be issued in the future. Although international law does not *require* such exclusion,³³ the proposed solution is welcome in so far as it ensures that the State

²⁸ See *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 59.

²⁹ Law (No. 100) on Documents Pertaining to Civil Status, of 26 April 2001.

³⁰ See *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 57.

³¹ *Ibidem*, para. 59.

³² Quote from the Letter filed by the Ministry of Justice of Moldova asking the OSCE ODIHR for an opinion on the proposed amendments.

³³ Note that, *a contrario*, ECtHR case-law requires the exclusion of indications of a person's **religion** from state documents such as civil records, identity cards (see *Sinan Isik v. Turkey*, ECtHR Judgment of 2 February 2010) or even school records (see *Grzelak v. Poland*, ECtHR Judgment of 15 June 2010), based on the negative aspect of Art. 9 ECHR, i.e. the freedom not to disclose or manifest one's religion or belief. Thus, in *Sinan Isik v. Turkey*, the Court expressly indicated, with reference to Art. 46 ECHR, that the deletion of the "religion" box on Turkish identity cards could be an appropriate form of reparation to put an end to the breach in question (paragraph 60 of the Judgment). With respect to indications of ethnicity, however, there are no similar exclusion requirements. The Advisory Committee of the Framework Convention on National Minorities has only indicated that any mention of a person's ethnic origin in

- will in the future no longer impose upon individuals an ethnic identity which they may, objectively or subjectively, perceive as alien to themselves.
25. The proposed solution, however, would leave unchanged the records on the parents' ethnic identity contained in their children's existing birth certificates. Unless the Government undertakes to replace all previously-issued birth certificates to ensure that they no longer indicate the ethnic identity of the parents – a rather substantial undertaking, and one which can be avoided (see below) –, a very large number of individuals (i.e., all Moldovan nationals having children whose birth certificates were issued under the existing law) will continue to have their ethnic identity mentioned in their children's birth certificates.
 26. This would mean that any one of those persons wishing to change the record on his or her ethnicity from that which is registered in his or her child's birth certificate, would still only be able to do so if the requested identity conforms with the recorded ethnic identity of his or her parents.³⁴ This procedure was found by the ECtHR to be disproportionately burdensome in light of the historical realities of the Republic of Moldova, and ultimately in breach of Moldova's positive obligations to safeguard to all persons within its jurisdiction the right to respect for private life under Art. 8 ECHR.³⁵
 27. The OSCE ODIHR therefore recommends that the existing procedure under Moldovan law for changing one's recorded ethnicity be amended as well. This can be done in parallel to the proposed exclusion of the headings on ethnic identity from civil status documents, or indeed instead of the said proposal.
 28. **As a first option**, the law could be amended so as to allow a person *to rectify* the remaining entries (i.e., in the existing birth certificates) on his or her ethnicity, upon application, if he or she believes that the existing entries are incorrect. Such rectification should be allowed based on objectively verifiable links with a particular ethnic group – such as having a real or putative common ancestry, memories of a shared past, cultural affiliation, shared language or traditional origins, etymology of the name, membership in minority community associations, empathy and other objectively verifiable evidence and/or strong subjective perceptions.
 29. In the process of rectifying one's recorded ethnic identity, the recorded ethnicity of his or her parents can be a determining factor but other objective and subjective factors should be taken into account as well. Depending on the circumstances of

identity papers should be consensual or optional (see the Advisory Committee's Second Opinion on Albania, ACFC/OP/II(2008)003; and the Second Opinion on Russia, ACFC/OP/II(2006)004).

³⁴ As mentioned earlier, under Section 68 of the Law on Documents pertaining to Civil Status, changing one's ethnicity in the birth certificate is not possible if one's parents' civil status documents do not contain information on the requested ethnicity.

³⁵ See *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, paras 57 and 59.

the case, these other factors may even prove more relevant and decisive than the recorded ethnicity of one's parents. In this context, state authorities should avoid fixing upon particular narrow objective requirements (such as parentage) when other resources for verifying membership exist, and should remain flexible and avoid overemphasizing particular objective elements at the expense of others.³⁶

30. **As a second option**, the law could be amended so as to allow a person *to delete* the remaining entries (i.e., in the existing birth certificates) on his or her ethnicity, upon application, if he or she believes that the existing entries are incorrect. This second option would appear less burdensome and more expedient from an administrative point of view, and also better tailored to the proposal to exclude the heading on ethnic identity from civil status documents.
31. The overall procedure to change one's recorded ethnic identity – whether through rectification or deletion – should be fair as regards matters of proof and evidence.³⁷ With particular relevance for the option of rectification of one's recorded ethnicity, international law recognizes that the State may require the existence of objective evidence of a claimed ethnicity, and that it may deny such claims if based on purely subjective and unsubstantiated grounds.³⁸ However, within these limits, the procedure for changing one's recorded identity should be fair and regulations should not create insurmountable barriers. Within these guidelines, it is up to the State to determine all the specific details for this procedure so as to strike a fair balance between the competing interests of the individual and the community as a whole.³⁹
32. It is also advisable that state authorities consult with minority communities concerning the impact that such reforms may have upon them.⁴⁰

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³⁶ For an authoritative discussion on how governments should be flexible in recognizing membership in national or ethnic minority groups, see the Human Rights Committee's view on the case of *Sandra Lovelace v. Canada* (Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981)).

³⁷ See *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 51.

³⁸ The Permanent Court of International Justice has stated already in 1925 that while the claim to be a member of national minority should be based on fact, self-identification is the only acceptable method of association (*Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Rep Series A No 7). See also *Ciubotaru v. Moldova*, ECtHR Judgment of 27 April 2010, para 57.

³⁹ See *Paulik v. Slovakia*, ECtHR Judgment of 10 October 2006, para 43.

⁴⁰ See Art. 15 of the Framework Convention for the Protection of National Minorities, CETS No.: 157.