CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
NUMBER 13, 2006

PROCESSING DATA ON RACIAL OR ETHNIC ORIGIN FOR ANTIDISCRIMINATION POLICIES: HOW TO RECONCILE THE PROMOTION OF EQUALITY WITH THE RIGHT TO PRIVACY?

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This paper was also published as part of the 2006 Jean Monnet Working Paper Series.

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PROCESSING DATA ON RACIAL OR ETHNIC ORIGIN FOR ANTIDISCRIMINATION POLICIES: HOW TO RECONCILE THE PROMOTION OF EQUALITY WITH THE RIGHT TO PRIVACY?*

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*Citation: Julie Ringelheim, *Processing Data on Racial or Ethnic Origin for Antidiscrimination Policies: How to Reconcile the Promotion of Equality with the Right to Privacy,?* Center for Human Rights and Global Justice Working Paper No. 13, 2007/Jean Monnet Working Paper 08/06, *available at* www.chrgj and www.JeanMonnetProgram.org.

Abstract

The fight against discrimination has now become a major concern of the European Community. In this context, one issue has come to the forefront: that of the processing of data related to the forbidden grounds of discrimination, in particular racial or ethnic origin. Indeed, the experience of various countries demonstrates the critical role that data and statistics can play in the elaboration, implementation and assessment of policies aimed at combating racial and ethnic discrimination. Yet, many EU member states remain deeply reluctant to collect this type of data. The objection most commonly raised is that processing data on racial or ethnic origin would infringe upon the right to privacy. Two aspects of the right to privacy are at stake: first, it is widely believed that collecting these data would infringe personal data protection rules. Second, the idea of classifying people into racial or ethnic categories is itself contentious, as some fear it would conflict with the notion of individual self-determination.

This paper aims to explore to what extent and under which conditions the data needed to combat racial and ethnic discrimination can be collected, while fully respecting the rights of individuals. Considering first the issue of personal data protection, the paper shows that although data revealing racial or ethnic origin are subject to a special protection regime under European personal data protection norms, their processing is not prohibited in an absolute way. Second, the paper examines the problem of constructing racial or ethnic categories and classifying individuals into them. It observes the emergence in international human rights law of a norm according to which classification of individuals into racial or ethnic categories should in principle be based on self-identification. It then considers the practices of four states in this relation: the United States, the United Kingdom and the Netherlands all have developed different classification systems for the purposes of their antidiscrimination policies. In France, by contrast, there is *a priori* a strong opposition towards classifying people on the basis of racial or ethnic origin. Yet, the idea of developing means to better measure racial or ethnic discrimination has emerged in the French public debate and is the subject of intense discussions. Examination of states' practices enables to highlight the tensions and difficulties raised by the enterprise of classifying individuals into racial or ethnic categories in the antidiscrimination context. As far as classification criteria are concerned, it is argued that, despite their shortcomings, both self-identification and place of birth criteria are compatible with human rights requirements. The paper concludes that human rights standards, and in particular the right to privacy, do not preclude the collection of data on racial or ethnic origin for antidiscrimination purposes, but rather define fundamental safeguards that must be respected when gathering this type of information.

Processing Data on Racial or Ethnic Origin for Antidiscrimination Policies:

How to Reconcile the Promotion of Equality with the Right to Privacy?

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INTRODUCTION

As a result of the new powers attributed to the European Community by the 1997 Treaty of Amsterdam, the fight against discrimination has become a major concern of the European Union. With the insertion of Article 13 in the Treaty of Rome, the European Community was granted the competence to take action to combat discrimination based on racial or ethnic origin, as well as on sex, religion or belief, disability, age and sexual orientation.[2] European authorities were particularly prompt in making use of this new provision. As soon as 2000, two directives were adopted on this basis: Directive 2000/43/EC (called the "Race Directive") prohibits racial and ethnic origin discrimination in a large range of areas, in particular, employment, social protection, education, and provision of goods and services, including housing,[3] while Directive 2000/78/EC (the "Framework-Directive") forbids discrimination based on age, disability, religion and sexual orientation, but covers only the field of employment.[4]

In this context, one issue has come to the forefront: that of the processing of data related to the forbidden grounds of discrimination, in particular racial or ethnic origin. EU policy-makers have found that precise and reliable data documenting the scale and nature of discrimination affecting the groups protected by the directives were often unavailable in member states. This lack of data has been identified as a serious obstacle to policy

[2] "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." (Article 13 EC). Previously, the European Community's competence with respect to discrimination was limited to discrimination on grounds of gender and nationality. See M. Bell, *Anti-Discrimination Law and the European Union*, Oxford, Oxford University Press, 2002, at 32-53.

[3] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin (OJ L 180 of 19 July 2000, p. 22).

[4] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303 of 2 December 2000, p. 16). The Directive prohibits discrimination in access to employment, self-employment and working conditions, including dismissals and pay and membership of organizations.

developments and analysis in the field of antidiscrimination.[5] Accordingly, the European Commission has undertaken to encourage member countries to develop mechanisms designed to gather adequate information on discrimination. One of the objectives of the Community action program established to combat discrimination (2001-2006) was precisely to foster better understanding of issues related to discrimination through improved knowledge of this phenomenon and evaluation of the effectiveness of policies and practice.[6] [7]

Indeed, the experience of various countries, like the United States and Canada, but also the United Kingdom, which is part of the European Union, demonstrates the critical role that race or ethnic data and statistics can play in the elaboration, implementation and assessment of policies aimed at combating racial and ethnic discrimination. Data collection is also an old concern of international bodies tasked with monitoring antidiscrimination. The United Nations Committee on the Elimination of all forms of

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[5] European Commission, *Equality and non-discrimination in an enlarged European Union*, Green paper, DG for Employment, Social Affairs and Equal Opportunities, 2004, at 22. (available at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf). See also European Commission, *Report on the implementation of the action plan against racism – mainstreaming the fight against racism*, DG for Employment, Social Affairs and Equal Opportunities, January 2000, at 9. (available at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf).

[6] Council decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ L 303 of 2 December 2000, at 23, Article 2. The program indicates that as part of its initiatives, it will support "the development and dissemination of comparable statistical series data on the scale of discrimination" and "the development and dissemination of methodologies and indicators to assess the effectiveness of anti-discrimination policy and practice." (Council decision 2000/750/EC, appendix).

[7] In this framework, the European Commission supported various studies on the issue of data collection and measurement of discrimination: T. Makkonen, European Network of Legal Experts in the non-discrimination field, *Measuring Discrimination – Data Collection and EU Equality Law*, European Commission, DG for Employment, Social Affairs and Equal Opportunities, 2007; P. Simon (coord.), *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands*, Medis Project (Measurement of Discrimination), European Commission, DG for Employment, Social Affairs and Equal Opportunities, August 2004 (study commissioned under the Community action programme); N. Reuter, T. Makkonen and O. Oosi (eds), *Study on Data Collection to measure the extent and impact of discrimination in Europe*, European Commission, DG for Employment, Social Affairs and Equal Opportunities, December 2004. These three reports are available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (last accessed: February 2007). See also E. Olli and B. K. Olsen (ed.), *Towards Common Measures for Discrimination: Exploring Possibilities for Combining Existing Data for Measuring Ethnic Discrimination*, November 2005, published by Centre for Combating Ethnic Discrimination and Danish Institute of Human Rights, with the support of the European Community Action programme to combat discrimination.

Racial Discrimination (CERD),[8] the European Commission against Racism and Intolerance (ECRI)[9] as well as the Advisory Committee on the Council of Europe Framework Convention on the Protection of National Minorities[10] are regularly calling upon states to gather and produce information reflecting the situation of racial or ethnic minorities in a number of areas of social and economic life. Those bodies insist that accurate data is essential to reveal direct or indirect forms of discrimination and to elaborate sound antidiscrimination policies. Likewise, the Durban Declaration and Plan of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (September 2001), urges states to collect, analyze and disseminate reliable statistical data to assess regularly the situation of individuals and groups victims of racial discrimination.[11]

Yet, many EU countries remain deeply reluctant to collect this type of data. Several arguments are raised in this regard. The objection most commonly voiced is that processing data on racial or ethnic origin would infringe upon the right to privacy. EU countries have all adopted far-reaching legislations on personal data protection, based on the EU Directive on the subject. Under this directive, data revealing racial or ethnic

[8] See UN CERD Committee General Recommendation IV concerning reporting by states parties, HRI/GEN/1/Rev.7 (12 May 2004). See also M. Banton, "Ethnic Monitoring in International Law: the Work of CERD," in A. Krizsan (ed.), *Ethnic Monitoring and Data Protection – The European Context*, CPS Books, Budapest, Central European University Press, 2001, 62-85.

[9] ECRI is a body of the Council of Europe. ECRI general policy Recommendation No. 1 on combating racism, xenophobia, anti-Semitism and intolerance recommends that governments "collect, in accordance with European laws, regulations and recommendations on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-Semitism and intolerance." (4 October 1996, CRI (96) 43 rev.). This recommendation is regularly repeated in country reports. See for instance the third Report on France, CRI (2005) 3, 25 June 2004, § 114; third Report on Germany, CRI (2004) 23, 5 December 2003, § 91; third Report on Belgium, CRI (2004) 1, 27 June 2003. See, more generally, I. Gachet, "The Issue of Ethnic Data Collection From the Perspective of Some Council of Europe Activities," in A. Krizsan (ed.), 2001, *supra* note 8, 45-61.

[10] The Advisory Committee, in its outline for country reports, indicates that states should provide "factual information (…) such as statistics and the result of surveys." The document also states that "where complete statistics are not available, governments may supply data or estimates based on *ad hoc* studies, specialized or sample surveys, or other scientifically valid methods, whenever they consider the information so collected to be useful." (Outline for reports to be submitted pursuant to Article 25 para. 1 of the Framework Convention for the protection of national minorities, adopted by the Committee of Ministers on 30 September 1998 at the 642nd meeting of the Ministers' Deputies.) See also, *inter alia*, the 2d Opinion of the Advisory Committee on Denmark, 9 December 2004, ACFC/INF/OP/II(2004)005, § 60 and its first Opinion on Spain, 27 November 2003, ACFC/INF/OP/I(2004)004.

[11] Durban Declaration and Plan of Action, § 92 (available at www.un.org/WCAR/durban.pdf).

origin, along with data on religion, health or sexual orientation, are defined as sensitive data. And as a matter of principle, the processing of sensitive data is, indeed, prohibited. However, this prohibition is not absolute: the directive allows for exceptions, under certain conditions. It is thus far from clear that European norms make it illegal to collect racial or ethnic data for the purposes of antidiscrimination.[12] But beyond the issue of personal data protection, the mere possibility of classifying people in ethnic or racial categories is controversial. This concern can also be related to the right to privacy, insofar as the latter is interpreted as embodying a principle of individual autonomy. Apart from the vexing question of how "race" and "ethnicity" should be defined, one may wonder to what extent the assignment of people to a racial or ethnic category is compatible with respect for individuals' right to freely determine certain issues essential to their self-understanding. This raises two sub-questions: how are the categories to be delineated? And on the basis of which criteria are individuals to be sorted out in them?[13]

This paper argues that while the collection of data revealing racial or ethnic origin raises thorny questions that must be addressed thoroughly, it also represents a crucial tool for the fight against discrimination. Starting from this consideration, it explores to what extent and under which conditions, the data necessary for the fight against racial and ethnic discrimination can be collected, while fully respecting the rights of individuals. As will be seen, human rights standards and in particular the requirements of the right to privacy do not preclude the collection of such data, but rather provide essential

[12] Similar questions arise with respect to data on discrimination based on some of the other grounds mentioned in Article 13 EC, namely religion, disability and sexual orientation. Data on these features are also defined as "sensitive data" by European personal data protection instruments. This paper, however, only deals with the collection of data on ethnic and racial origin for two reasons: first, they raise specific difficulties, due to the ambiguities of the notions of "race" and "ethnicity"; second, they are, among the different types of data defined as sensitive, those which are the most often collected world-wide. Within the EU, according to P. Simon, while statistics on sexual orientation are never collected in EU states, data on religion is recorded in some countries in various ways, often depending on the public financing of religious groups. As for disability, statistics derive from the attribution of social benefits or medication care services. (P. Simon, 2004, *supra* note 7, at 8).

[13] The matter of categories and classification points towards a third source of preoccupation: there is a fear that introducing racial or ethnic categories in official statistics and routinely classifying people along this taxonomy would reinforce cleavages and eventually run against the goal of fighting discrimination and promoting a more equal society. This question will be discussed more thoroughly in a further paper in the light of the various conceptions of equality. For an analysis of the issue of data collection in the context of antidiscrimination along these lines, see O. De Schutter, "Three Models of Equality and European Anti-discrimination Law", *Northern Ireland Quarterly*, vol. 57, No. 1, 2006, 1-56.

indications on the safeguards that must be respected when processing this information. However, while these requirements are well-defined for what concerns personal data protection, they remain hazier with regard to the definition of categories and classification methods.

The discussion will be based on the examination of the laws and practices of five legal systems: the United States, the European Union, and three of its Member States, the United Kingdom, the Netherlands, and France. The United States has a long experience in the area of measuring racial or ethnic discrimination. Since the adoption of the civil rights legislations in the 1960s, it has developed extensive antidiscrimination programs, combined with sophisticated systems of statistical monitoring, which imply the processing of data relating to race or ethnicity. Within the EU, the United Kingdom deserves special attention, since it is, at present, the sole member state that produces statistics broken down by self-declared ethnic affiliation, as part of its antidiscrimination scheme. The Netherlands has also developed statistical monitoring mechanisms in the field of antidiscrimination, but its statistics on "ethnic minorities" or so-called "allochtones" are based on indirect criteria, namely the country of birth of the persons concerned or of their parents. France, by contrast, is characterized by a strong opposition, deeply ingrained in the political culture, to identifying individuals on the basis of their ethnic origin. Nonetheless, the idea of introducing devices aimed at measuring discrimination and at monitoring equality programs, inspired by foreign examples, has emerged in the French public debate.

The first part of the paper explains in more detail why data related to racial or ethnic origin can be so important for developing and implementing antidiscrimination laws and policies. It also describes the various data collection methods that can be used for these purposes. (**I**). Part II addresses the issue of personal data protection. It focuses on European norms and seeks to clarify their implications with regard to the processing of data revealing racial and ethnic origin for the purposes of antidiscrimination. (**II**). Part III grapples with the problem of constructing categories reflecting racial or ethnic origin. It first observes the emergence in international human rights law of a norm according to

which the classification of an individual as member of a racial or ethnic group should in principle be based on self-identification. It then describes the practices of the U.S., the U.K. and the Netherlands in categorizing their population, before looking at recent debates on the subject in France. Lastly, it discusses the advantages and limits of the two main classification criteria presently used by the states examined: self-identification and place of birth or nationality of origin. The discussion highlights some tensions and dilemmas revealed by the examination of states' practice, and which appear as inherent to the exercise of classifying people for antidiscrimination purposes. (**III**).

I. Data on Racial or Ethnic Origin as a Tool to Combat Discrimination

1.1. How Data on Racial or Ethnic Origin Can Help Combating Discrimination

Data on ethnic or racial origin can contribute in several important respects to the fight against discrimination.[14] First of all, in order to elaborate sound antidiscrimination policies, states need to correctly grasp the contours of the problem: they must be able to identify the groups exposed to discrimination, the areas in which discrimination occurs as well as the nature and scale of discrimination. To this end, they need to have access to reliable statistical information on the situation of members of vulnerable groups in the diverse fields of social life. Once legislations and policies are in place, the regular production of new statistical studies makes it possible to assess their impact and effectiveness. Second, the collection of data revealing ethnic or racial origin at the level of companies or other institutions enables public authorities to monitor the

[14] See *inter alia* T. Makkonen, European Network of Legal Experts in the Non-Discrimination Field, *Measuring Discrimination – Data Collection and EU Equality Law*, European Commission, DG for Employment, Social Affairs and Equal Opportunities, 2007, at 12-13; E. Olli and B. K. Olsen (ed.), 2005, *supra* note 7, at 10; ECRI, Seminar with national specialized bodies to combat racism and racial discrimination on the issue of ethnic data collection, Explanatory Note, Strasbourg, 17-18 February 2005 (on file with the author); N. Reuter, T. Makkonen and O. Oosi (eds), 2004, *supra* note 7, at 14; J. A. Goldston, "Ethnic data as a tool in the fight against discrimination", European Conference on Data to Promote Equality, Helsinki, Finland, 9 December 2004, p. 12, available at http://www.europa.eu.int/comm/employment_social/fundamental_rights/events/helsinki04_en.htm; K. Negrin, « Collecting Ethnic Data: An Old Dilemma, The New Challenges », April 2003, eumap, http://www.eumap.org/journal/features/2003/april/oldilemma; J. A. Goldston, "Race and Ethnic Data: A Missing Resource in the Fight Against Discrimination", in A. Krizsan (ed.), 2001, *supra* note 8, 19-41.

implementation of antidiscrimination legislation and supervise compliance. Thus, under title VII of the U.S. 1964 Civil Rights Act, "every employer, employment agency, and labor organization subject to this title" is required to "(1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation…" Accordingly, since 1966, all companies with more than 50 employees and a contract with the federal government, and all firms with more than 100 employees whether or not they have a contract with the federal government, have been asked to report to the competent federal agency, on a yearly basis, the composition of their workforce broken down by ethno-racial identity, by gender, and by job group.[15]

Furthermore, the processing of personal data is necessary for the implementation of certain types of positive action measures. At the European level, the Race Equality Directive (2000/43/EC), authorizes EU member states, "with a view to ensuring full equality in practice", to maintain or adopt positive action measures – defined as "specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin" -, but do not oblige them to do so.[16] Positive action can take different forms, which do not necessarily involve preferential treatment.[17] In particular, it may consist in the establishment of a "diversity plan" or "equality scheme", aimed at remedying the under-representation of disadvantaged groups in an institution or company's workforce. This requires the setting of quantified objectives (targets and goals) to be achieved through various initiatives, including raising staff awareness and revising practices which hinder minorities' participation.[18] Employers committed to such a plan must have the means to monitor the ethnic or racial origins of their personnel in order to determine whether

[15] Public Law No. 88-352, § 709, 79 Stat. 241, 262. See A. Morning and D. Sabbagh, *Comparative Study on the Collection of Data to Measure the Extent and Impact of Discrimination – Report on the United States*, Medis Project, European Commission, DG for Employment, Social Affairs and Equal Opportunities, May 2004, at 23.
[16] Article 5 of Council Directive 2000/43/EC. See also Article 7 of Council Directive 2000/78/EC.
[17] See C. Costello, "Positive Action," in C. Costello and E. Barry (eds), *Equality in Diversity – The New Equality Directives*, Irish Centre for European Law, 2003, 177-212; O. De Schutter, 2006, *supra* note 13, at 33-34.
[18] See P. Simon, 2004, *supra* note 7, at 24-25.

disadvantaged groups are fairly represented and to assess whether the plan's objectives are met.[19] In other words, they need to carry out "ethnic monitoring"; a practice described by the British Commission for Racial Equality as the process used "to collect, store, and analyze data about people's ethnic backgrounds", which may serve to "highlight possible inequalities; investigate their underlying causes; and remove any unfairness or disadvantage."[20] While the Equality Directives do not establish a legal duty for employers to monitor the composition of their staff, Article 11(1) of the Race Directive and Article 13(1) of the Framework Directive state that Member States should take "adequate measures to promote social dialogue (…) with a view to fostering equal treatment, including through the monitoring of workplace practices (…)." States, therefore, should at least contemplate with social partners the option of setting up a monitoring system to promote equality.[21] In Great Britain, under the Race Relations (Amendment) Act 2000, the Home Secretary has imposed on a large number of public authorities an obligation to set an "equality scheme" in order to fulfill their duty to promote equality between persons of different "racial groups".[22] For private employers, the introduction of such plan remains voluntary.[23] Besides, in certain countries, positive action measures can take the form of preferential treatment for members of disadvantaged groups, as is the case in the United States with affirmative action programs in higher education and employment.[24] These modalities necessarily imply the processing of data

[19] See *The Business Case for Diversity: Good Practices in the Workplace*, September 2005, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (Unit D3), at 26.
[20] Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities*, at 3 (available at www.cre.gov.uk/duty_ethmon.pdf).
[21] T. Makkonen, 2007, *supra* note 14, at 20 and 41.
[22] Race Relations (Amendment) Act 2000, article 71 (2). See C. O'Cinneide, *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality*, London, Equality and Diversity Forum, 2003, at 29-30. Public authorities concerned are central government departments, local authorities, police, other criminal justice authorities, health authorities, educational authorities and regulatory bodies. See also B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart Publishing, Oxford, Portland Oregon, 2000, Recommendation 25, at 63.
[23] C. O'Cinneide, 2003, *supra* note 22, at 65-78.
[24] On affirmative action and its various modalities, see S. Leiter and W. M. Leiter, *Affirmative Action in Antidiscrimination Law and Policy – An Overview and Synthesis*, New York, State University of New York Press, 2002; M. Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry*, Yale, Yale University Press, 1993. With regard to EU member states, the European Court of Justice (ECJ) can specify the conditions under which special measures involving preferential treatment are compatible with the principle of antidiscrimination under EU law. To this date, this question has only arisen before the

on racial or ethnic affiliation or origin in order to identify the potential beneficiaries of the programs.

Finally, statistical data may be crucial to enable victims to prove discrimination in legal proceedings. In the famous *Griggs v. Duke Power Co.* case (1971),[25] the U.S. Supreme Court ruled that when statistics indicate that an apparently neutral rule or practice produces a disproportionate adverse impact - or "disparate impact" - on the members of a racial group, the burden of proof shifts and it is for the defendant to demonstrate that the measure is justified by "business necessity". Absent such justification, the rule or practice is deemed discriminatory and there is no need to prove a discriminatory intent. While the reach of this doctrine has been restricted by the U.S. Supreme Court in subsequent case law,[26] the notion of disparate impact was resolutely embraced in EU law under the name of "indirect discrimination".[27] It emerged in the European Court of Justice (ECJ) case-law related to sex discrimination[28] and was initially codified in the 15 December 1997 Council Directive 97/80/EC on the burden of proof in cases of discrimination based on

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ECJ in the context of measures established in favor of women. On this case-law, see O. De Schutter, 2006, *supra* note 13, at 35-46; M. P. Maduro, "The European Court of Justice and Anti-discrimination Law", *European Anti-discrimination Law Review*, No. 2, 2005, 21-26 and D. Caruso, "Limits of the Classical Method: Positive Action in the European Union After the New Equality Directives", *Harvard International Law Journal*, vol. 44, No. 2, Summer 2003, 331-386. For a comparison of EU and US approaches to affirmative action, see K. Thomas, "The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.", *Columbia Journal of European Law*, vol. 5, 1999, 329-354.

[25] *Griggs v. Duke Power Co.*, 410 U.S. 424 (1971).

[26] *Griggs* was decided under Title VII of the Civil Rights Act. In *Washington v. Davis* (426 U.S. 229 (1976)), the Court refused to extend this doctrine to the Equal Protection Clause and ruled that it was necessary to prove "a racially discriminatory purpose" in order to establish a violation of this provision. In the context of Title VII of the Civil Rights Act, the *Griggs* ruling was significantly restricted in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989). This prompted the federal Congress to adopt the Civil Rights Act 1991 (Pub. L. No. 102-66, 105 Stat. 1071), which limits the implications of the *Wards Cove Packing Co.* ruling. For a recent account of the evolution of the disparate impact doctrine in U.S. law, see M. Selmi, "Was the Disparate Impact Theory a Mistake?", *UCLA Law Review*, vol. 53, 2006, 701-782.

[27] M. Finlay, "Indirect Discrimination and the Article 13 Directive," in C. Costello and E. Barry (eds), 2003, *supra* note 17, 135-150; T. Loenen, "Indirect Discrimination: Oscillating Between Containment and Revolution", in T. Loenen and P. R. Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives*, The Hague, Martinus Nijhoff, 1999, 195-211.

[28] See *inter alia* M. Finlay, 2003, *supra* note 27, at 137-144; O. De Schutter, "Le concept de discrimination indirecte dans la jurisprudence de la Cour de Justice des Communautés européennes (égalité de traitement et liberté de circulation)", in E. Bribosia, E. Dardenne, P. Magnette and A. Weyembergh (dirs), *Union européenne et nationalités*, Bruxelles, Bruylant, 1999, 11-44.

sex.[29] Under this Directive, indirect discrimination was described as a situation where "an apparently neutral provision, criterion or practice *disadvantages a substantially higher proportion of the members of one sex* unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex".[30] This approach necessarily requires the use of statistics as a means of proof: statistical data are needed to establish that a "substantially higher proportion" of women than men, or vice versa, are adversely affected by a specific measure.

However, a different notion of indirect discrimination was enshrined in the two Equality Directives: "indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin *at a particular disadvantage* compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".[31] This new definition – based on the concept of "particular disadvantage" imposed on a group of persons - was subsequently enshrined in Directive 2006/54/EC which concerns the field of sex discrimination.[32] Unlike the definition contained in the abovementioned Burden of Proof Directive, this understanding of indirect discrimination does not necessarily depend upon statistics. This broader approach – inspired by the ECJ case-law in the area of free movement of workers[33] - was favored to facilitate the task of the victim, precisely because finding statistics broken down by racial or ethnic origin appeared problematic in a number of EU member states.[34]

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[29] OJ L 14 of 20 January 1998, p. 6.
[30] Article 2(2) of Directive 97/80, my emphasis.
[31] Article 2(2)b of Directive 2000/43/EC, my emphasis. See also Article 2(2)b of Directive 2000/78/EC.
[32] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 26 July 2006, p. 23. Article 2(1)(b) of this directive describes indirect discrimination as occurring "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary". Interestingly, this directive contains a reference to statistics in another passage: "[f]or the sake of a better understanding of the different treatment of men and women in matters of employment and occupation, comparable statistics disaggregated by sex should continue to be developed, analyzed and made available at the appropriate levels." (Preamble, Recital 37).
[33] See *O'Flynn v. Adjudication Officer* Case C-237/94 [1996] ECR I-2617.
[34] Ch. McCrudden, "Theorising European Equality Law", in C. Costello and E. Barry (eds), 2003, *supra* note 17, 1-38, at 30; S. Fredman, "Equality: A New Generation?", *Industrial Law Journal*, vol. 30, No. 2,

Nevertheless, while leaving for domestic authorities to decide by which means a presumption of direct or indirect discrimination can be established,[35] the directive expressly states that national rules may provide for indirect discrimination "to be established by any means *including on the basis of statistical evidence*."[36] [37]

1.2. The Significance of Statistics and The Various Modes of Data Collection

The turn to statistics signals an important change in the way discrimination is apprehended. It goes hand in hand with the recognition that discrimination does not reduce to marginal and isolated acts; to the expression of a limited number of prejudiced individuals; but has a structural and institutional character in a society.[38] It supposes acknowledging that discrimination may be unconscious[39], that it can be embedded in certain habits or practices that have never been questioned,[40] and that putting these

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June 2001, at 162; C. Barnard, "The Changing Scope of the Fundamental Principle of Equality?", *McGill Law Journal*, vol. 46, 2001, 955-977, at 970.

[35] "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice." (Preamble, § 15 of Directive 2000/43/EC and Directive 2000/78/EC). The Race Directive as well as the Framework Directive provide that when the alleged victim of discrimination establishes facts from which it may be presumed that there has been direct or indirect discrimination, "it shall be for the respondent to prove that there has been no breach of the principle of equal treatment" (Article 8(1) of Directive 2000/43/EC; Article 10(1) of Directive 2000/78/EC).

[36] Preamble of Directive 2000/43/EC and Directive 2000/78/EC, § 15, my emphasis. According to O. De Schutter, the choice left to member states betrays the original intent of the Commission as expressed in the anti-discrimination package it presented on 25 November 1999. The Commission intended to allow for victims of discrimination to present statistical data in order to establish a presumption of discrimination, shifting the burden of proof to the defendant. However, as a result of discussions within the Council, Member States are now free to decide whether or not to allow victims to rely on statistical data to sustain their claim. (O. De Schutter, 2006, *supra* note 13, at 14-16).

[37] Note that the use of statistical data as a means of proof in discrimination litigation may raise controversies, in relation, in particular, to the way the relevant pool of comparison should be measured and the adverse impact assessed: see T. Makkonen, 2007, *supra* note 14, at 36-38.

[38] P. Simon, 2004, *supra* note 7, at 28. On the notion of "institutional discrimination" as developed in U.S. and British law, see Ch. McCrudden, "Institutional Discrimination", *Oxford Journal of Legal Studies*, Vol. 2, No. 3, Winter 1982, 303-367. See also S. Fredman, 2001, *supra* note 34, at 164 (discussing the notion of "positive duty" to promote equality, introduced by the U.K. Race Relations (Amendment) Act 2000).

[39] See in particular Ch. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism", *Stanford L. R.*, vol. 39, 1987, at 317.

[40] See for instance the observations of Justice Ginsburg in her dissent in the *Adarand* case: "Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that

phenomena into light requires looking beyond individual cases and comparing the situation of groups.[41] On a different note, it may be observed that during the 20th century, statistics have progressively acquired a major role in guiding governmental action. More particularly, they have become essential in constructing a social phenomenon as an object of political action. By linking together a multiplicity of individual situations, they transform it into a global object, on which political action can bear.[42]

Statistics, however, are not the only type of data likely to document discrimination. It is important to keep in mind that they also have their flaws and limitations. First and foremost, they do not provide explanations for what they measure.[43] Statistical tools, therefore, must be complemented with other types of information, which can better illuminate the nature and operation of the discrimination phenomenon. These approaches include victim surveys, attitude surveys and discrimination testing.[44] The authors of a study on data enabling to measure the extent and impact of discrimination insist that "no particular data collection method is enough in and of itself in order to obtain a satisfactory picture of the extent and nature of discrimination." They recommend, therefore, the adoption of "a multimethod and multi-disciplinary approach to measuring discrimination."[45]

Data useful for antidiscrimination policies can thus be collected by different actors, at various levels, and through a variety of methods.[46] These distinctions are important to

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must come down if equal opportunity and non-discrimination are ever genuinely to become the country's law and practice." (*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), here at 274).

[41] See *inter alia* Ch. McCrudden, "Theorising European Equality Law", in C. Costello and E. Barry (eds), 2003, *supra* note 17, at 22-28. See also the classical article of O. M. Fiss: "Groups and the Equal Protection Clause", *Philosophy and Public Affairs*, No. 2, Winter 1976, reprinted in M. Cohen, Th. Nagel, and Th. Scanlon (eds), *Equality and Preferential Treatment*, Princeton, Princeton University Press, 1977, 84-154.

[42] A. Desrosières, *La politique des grands nombres – Histoire de la raison statistique*, Paris, La Découverte, 2000 (2d ed.), esp. at 22 and 249. On the relations between official statistics and modern government, see also P. Starr, "The Sociology of Official Statistics", in W. Alonso and P. Starr (eds), *The Politics of Numbers*, New York, Russel Sage Foundation, 1987, 7-57.

[43] See N. Reuter, T. Makkonen and O. Oosi (eds), 2004, *supra* note 7, at 20-21. See also P. Gordon, "The Racialization of Statistics", in R. Skellington with P. Morris, *'Race' in Britain Today*, Sage Publication, London, Thousand Oaks, New Dehli, 1996, 2d ed., 20-42, at 40.

[44] See the different data collection methods discussed in N. Reuter, T. Makkonen and O. Oosi (eds), 2004, *supra* note 7, at 20-26. See also E. Olli and B. K. Olsen, 2005, *supra* note 7, at 15-16.

[45] N. Reuter, T. Makkonen and O. Oosi (eds), 2004, *supra* note 7, at 4-5.

[46] For an overview of data collection methods, see N. Reuter, T. Makkonen and O. Oosi (eds), 2004, *supra*

point out, as they may impact on the assessment of the legal implications entailed by the processing of data revealing racial or ethnic origin. The first situation to envisage is where these data are collected by public authorities. In certain states, information on racial or ethnic affiliation or origin is requested in the census, while in other countries, data on peoples' origin is included in population registers. In both cases, the data are collected on the entire population and on a nominative basis. However, data collected through census must then be anonymized, while information inserted in population registers remain nominative and can be consulted by the administration to fulfill its duties. In addition, public statistical agencies produce surveys based on population samples, which focus on specific issues, such as the Labor Force Survey (LFS) and the Survey on Income and Living Conditions (SILC).[47] Furthermore, where an equality monitoring system is in place, data must be collected at the level of public institutions in order to identify discriminatory practices and measure progresses towards equal opportunities within these institutions. In this case, the collection may be either nominative or anonymous, depending on the objective sought.[48] Second, private employers may also have reasons to collect data on the racial or ethnic background of their staff: either because they have adopted an equality plan and want to monitor the situation of their employees in their company, or because they want to rebut a legal accusation of indirect discrimination. Here too, data may be nominative or anonymous, comprehensive or sample-based, depending on what exactly is to be measured. Third, data on peoples' racial or ethnic affiliation or origin may attract interest from independent academics who want to study discriminatory processes in society, as well as from non governmental organizations who seek either to publicly denounce general discriminatory practices or help individual victims to provide evidence supporting an allegation of discrimination. A particular method of collecting information on discrimination that has been used by academics, NGO's as well as by the British Commission on Racial Equality

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note 7, at 20-27.

[47] T. Makkonen, 2007, *supra* note 14, at 14.

[48] The British Commission for Racial Equality however recommends that ethnic data collected by institutions carrying out ethnic monitoring be linked to the individual for all employment monitoring, as well as for monitoring ongoing services such as health, housing, social services, higher education, and pupils' attainment. (Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities*, at 16).

is "situation testing". It consists in "a form of social experiment in a real life situation" :[49] two or more individuals are matched for all relevant characteristics other than the one that is expected to lead to discrimination. They apply for a job or some other good or try to get access to a public place like a bar or discotheque, and the treatment they receive is closely monitored to detect whether there is an abnormal difference in the way members of one group are treated compared to the other group. Some jurisdictions, including France, allow for the use of situation testing to prove a breach of the principle of equal treatment.[50]

Now, a state willing to develop a fully-fledged statistical monitoring system in employment will need to collect data at two levels:

- On the one hand, it will need to know which percentage of the general population belongs to the various racial, ethnic or national groups, at the national level and in the different regions of the country. These data are obtained either through census or through population registers.

- On the other hand, data on racial or ethnic affiliation or origin will have to be gathered at the level of relevant sectors or entities: companies (public or private), public services, schools, or others. By comparing the proportion of individuals belonging to protected groups present in these specific entities with their percentage in the overall population, as showed by the census or population registers, one can identify instances of under-representation, potentially due to discrimination, taking into account, if relevant, diploma's and qualifications.[51]

[49] N. Reuter, T. Makkonen and O. Oosi (eds), 2004, *supra* note 7, at 24 and T. Makkonen, 2007, *supra* note 14, at 30-31. A series of studies based on testing were conducted during the 1980s under the supervision of the International Labor Organization in four European countries – Belgium, Germany, the Netherlands and Spain. These studies aimed to document discrimination against migrant workers in employment. See R. Zegers de Beijl (R.), *Documenting Discrimination against Migrants Workers in the Labour Market. A comparative study of four European countries*, Geneva, ILO, 2000.

[50] See I. Rorive and P.-A. Perrouty, "Réflexions sur les difficultés de preuve en matière de discriminations", *Revue du droit des étrangers*, No. 133, 2005, 161-175, at 168-172. In France, the Court of cassation ruled in a decision of 11 June 2002 that evidence gathered through testing was admissible in criminal proceedings (Cass. Fr. (ch. crim.), 11 June 2002, No. 01-85.559).

[51] See P. Simon, 2004, *supra* note 7, at 38-39. On the methods used to determine cases of "under-representation" or "under-utilization", see P. Simon, 2004, *supra* note 7, at 39-42.

To be sure, the gathering of data exclusively within an institution already makes it possible to assess to a certain extent its internal practices: it permits to "compare the proportions of employees from different ethnic groups in different departments or grades over time, and see whether any differences are narrowing, increasing, or staying the same." [52] Anonymous surveys based on population samples or situation testing can also provide useful information for identifying certain forms of discrimination and for improving knowledge about these phenomena. However, only the combination of data on the entire population and at the level of institutions or companies permits to detect whether certain groups are under-represented in specific institutions or companies, as well as to evaluate employers' practices and measure progresses on a continuous and systematic basis.[53]

II. Privacy as Personal Data Protection

2.1. U.S.-Europe: Diverging approaches to Personal Data Protection

This section considers the problem raised by the processing of information revealing racial or ethnic origin from the perspective of personal data protection. Interestingly, while this issue is perceived as deeply problematic in Europe, it does not yield much debate on the other side of the Atlantic. As a matter of fact, existing regulations on data processing is much more far-reaching in EU countries than in the U.S. Unlike European Union member states, the U.S. does not have a general legislation at the federal level regulating the processing of personal data by public and private actors. Rather, it has adopted *ad hoc* sectoral laws, targeting specific activities, and focusing mainly on governmental action.[54] The most comprehensive legislation is the Privacy Act of 1974,[55]

[52] Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities*, at 22.
[53] I thank Ginette Herman and Nicolas Perrin for kindly reviewing this section. All remaining errors are, of course, my own responsibility.
[54] For a general account of privacy laws in the U.S., see Privacy International, *Privacy and Human Rights – An international survey of privacy laws and developments – The United States of America*, November 2004 (available at www.privacyinternational.org, last accessed February 2007). For a comparison of U.S. and European approaches to data privacy, see F. Bignami, "Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network", *Mich. J. Int'l. L.*, vol. 26, Spring 2005, 807-868; J. R. Reidenberg, "Resolving Conflicting International Data – Privacy Rules in Cyberspace", *Stanford L. R.*, vol.

which concerns the collection and use of personal information by federal agencies. In addition, the U.S. Census Bureau activities are regulated by Title 13 of the United States Code.[56] While authorizing the Census Bureau to conduct census and surveys, this law protects the confidentiality of all information collected under the authority of the same Title.[57] But beyond the legal framework, it seems that in the eyes of the general public, racial and ethnic data are not viewed as especially sensitive and therefore requiring an enhanced protection.[58] The question of the legitimacy of the state processing data on race or ethnicity has, however, arisen in the public debate with the "Racial Privacy Initiative" – a proposition submitted to referendum in California in 2003 (Proposition 54), which aimed at prohibiting public authorities from classifying by race, ethnicity, color or national origin[59]. Yet, the driving force behind this initiative appears to be primarily an opposition to affirmative action: the major motivation of the Proposal's supporters was to make it impossible for the government to implement preferential treatment based on race.[60] In any case, the initiative was defeated with 64 percent of the vote.[61]

52, May 2000, 1315-1376; P. M. Schwartz, "Privacy and Participation: Personal Information and Public Sector Regulation in the United States", *Iowa Law Review*, vol. 80, 1995, 553-618.

[55] 5 U.S.C. § 552a(2000).

[56] Public Law 13, 71st Congress, June 18, 1929.

[57] See the information provided on the U.S. Census Bureau's website: http://www.census.gov/privacy/files/data_protection/002777.html. In 1995, the Census Bureau created a Disclosure Review Board (DRB), entrusted with reviewing specifications for all census data products made available to the public or other government agencies, and determining that no product format is approved that contains any degree of disclosure risk. See A. Morning and D. Sabbagh, 2004, *supra* note 15, at 36. D. J. Sylvester and Sh. Lohr argue that the willingness of Americans to provide data to public authorities through census or other official surveys can be explained by the fact that officials have managed to persuade the public that data concerning them would be kept confidential and be used only for their intended purpose. According to these authors, history of official data collection practices in the United States reveals that from the mid-nineteenth century onwards, the federal government has adopted measures to ensure the confidentiality of submitted data, precisely in order to foster trust of individuals in federal statistical agencies and thereby their willingness to provide the information asked from them. See D. J. Sylvester and Sh. Lohr, "The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice", *Denver University Law Review*, vol. 83, 2005, 147-207.

[58] A. Morning and D. Sabbagh, 2004, *supra* note 15, at 37. Interestingly, according to D. J. Sylvester and Sh. Lohr, certain types of personal data are also considered sensitive under American privacy legislations, and benefit accordingly from a higher level of protection than other data. But the information concerned includes mainly financial and medical data, and not racial or ethnic data. (D. J. Sylvester and Sh. Lohr, 2005, *supra* note 57, at 195).

[59] The text of the Proposition is available at http://www.adversity.net/RPI/rpi_mainframe.htm (last visited: February 2007).

[60] See R. Amar, "Unequal Protection and the Racial Privacy Initiative", *UCLA Law Review*, vol. 52, 2005, 1279-1312.

[61] R. Amar, 2005, *supra* note 60, at 1281.

The situation is very different in Europe. In many European states, there is widespread sense that having the state or private actors collecting data on racial and ethnic affiliation or origin poses major privacy problems. Doubts about the legality of this practice are combined with fears about the risk of abuses of these data by state authorities. This understandable anxiety is nourished by traumatic historical experiences,[62] above all, the memory of Holocaust, where data systems, particularly population registers, played a significant role in the persecution and extermination of Jews and Roma's.[63] Yet it is important to highlight the double-edged nature of racial or ethnic data.[64] Like other types of data, they can be used for good or for bad purposes. W. Selzer, author of several studies on abuses of population data systems, stresses that "most population data collection efforts are not associated with such targeting and misuse. Indeed, national population data systems are often the only source of reliable data needed to plan and monitor developments efforts in many fields."[65] While at certain points in history, they have been used to discriminate or oppress, data on racial or ethnic origin can also serve to put into light persistent disadvantages and discriminatory practices. They can be invoked by minorities themselves to claim equal access to economic, social and political resources.[66] If we admit that having accurate information on the situation of disadvantaged groups is necessary for the development of an appropriate equality policy, we have to wonder whether and how such data can be gathered in a way that protects the population concerned from all risk of abuses. This is precisely the thrust of personal data protection rules. In fact, European norms on this matter do not prohibit in an absolute way the processing of data on racial or ethnic origin. Rather, they severely restrict it by laying down stringent conditions that are additional to the general safeguards governing

[62] J. A. Goldston, 2001, *supra* note 14, at 25; L. A. Bygrave, *Data Protection Law – Approaching its Rationale, Logic and Limits*, The Hague, London, New York, Kluwer, 2002, at 108-109.
[63] See W. Seltzer, "Population Statistics, the Holocaust, and the Nuremberg Trials", *Population and Development Review*, vol. 24, No. 3, September 1998, 511-552 and W. Seltzer, "On the Use of Population Data Systems to Target Vulnerable Population Subgroups for Human Rights Abuses", *Coyuntura Social*, No. 30, 2005.
[64] I. Székely, "Counting or Numbering? Comparative Observations and Conclusions Regarding the Availability of Race and Ethnic Data in Some European Countries", in A. Kriszan, 2001, *supra* note 8, 267-282, at 279.
[65] W. Seltzer, 2005, *supra* note 63.
[66] See J.-L. Rallu, V. Piché and P. Simon, « Démographie et ethnicité : une relation ambiguë », in G. Caselli, J. Vallin et G. Wunsch (eds), *Démographie : analyse et synthèse*, t. VI *Population et société*, Paris, éditions de l'Institut national d'études démographiques, 2004, 481-515, at 485; M. Nobles, *Shades of Citizenship – Race and the Census in Modern Politics*, Stanford, Stanford University Press, 2000.

the collection, storage, use and disclosure of any personal data.

2.2. European Norms on Personal Data Protection

At the European level, norms governing the processing of personal data are defined in several instruments. Article 8 of the European Convention on Human Rights protects the right to private life generally.[67] The first European legally binding document dealing specifically with personal data protection is Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, opened for signature in 1981 in the framework of the Council of Europe. In the European Union, Directive 95/46/EC of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data was adopted on 24 October 1995.[68] The inclusion of the right to personal data protection in the Charter of Fundamental Rights of the European Union, proclaimed in December 2000 at the Nice Council Meeting,[69] demonstrates the importance attached to this issue within the EU. Regard must also be had to the sectorial recommendations developed by the Committee of Ministers of the Council of Europe. While not binding on states, these recommendations have been included by various member states in their legislation.[70] Among them, Recommendation No. (97)18E concerns the protection of personal data collected and processed for statistical purposes[71] and Recommendation No. (91)10E the communication to third parties of personal data held by public bodies.[72]

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[67] This provision has been interpreted by the European Court of Human Rights as protecting the individual in the context of collection and storage of personal data concerning him or her. See Eur. Ct. H.R. (GC), *Rotaru v. Romania*, Judgment of 4 May 2000 (Appl. No. 28341/95), § 43.
[68] OJ L 281 of 23 November 1995, p. 31.
[69] OJ C364, 18 December 2000, p. 1. Article 8 of the Charter of Fundamental Rights provides that: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority." See J. A. Cannataci and J. P. Mifsud-Bonnici, "Data Protection Comes of Age: The Data Protection Clauses in the European Constitutional Treaty," *Information & Communication Technology Law*, vol. 14, No. 1, 2005, 5-15.
[70] J. A. Cannataci and J. P. Mifsud-Bonnici, 2005, *supra* note 69, at 7.
[71] Adopted by the Committee of Ministers on 30 September 1997.
[72] Adopted by the Committee of Ministers on 9 September 1991.

2.2.1. General Principles

It must first be emphasized that the abovementioned norms are only concerned with *personal* data, defined under Directive 95/46/EC as "any information relating to an identified or identifiable natural person." The directive further specifies that "an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."[73] Thus, when data are collected on an anonymous basis or once they are made anonymous, they do not, as a rule, constitute 'personal data' and do not engage personal data protection rules. Indeed, the storage and disclosure of aggregate data that cannot be traced to any identifiable individual, in principle cannot threaten anyone's privacy. However, while statistics, as they are released, provide aggregate results on a given population and do not disclose information related to particular individuals, the carrying out of statistical operations may come under personal data protection laws insofar as they are based on microdata, typically personal data.[74]

Considering the data collection methods reviewed in the earlier section, a distinction must be made between those that involve the treatment of personal data and those that do not, as only the former engage data protection laws. *Situation testing* does not involve processing of personal data. *Anonymous workplace monitoring* does not imply either handling personal data, except in instances where it is possible to indirectly identify data relating to particular individuals on the basis of the published (anonymous) results of the operation. In contrast, population *census*, *administrative records* maintained by central or local authorities, and *non-anonymous workplace monitoring* do require the processing of personal data. These operations, therefore, come under data protection laws.[75] As far as *sample surveys* are concerned, T. Makkonen explains that while they "are generally rendered anonymous at an early stage, the conducting of surveys usually requires

[73] Directive 95/46/EC, article 2(a).
[74] T. Makkonen, 2007, *supra* note 14, at 53.
[75] T. Makkonen, 2007, *supra* note 14, at 53.

processing of personal data for the purposes of constructing the sample frame and/or at the input stage, and therefore some parts of the process may also engage data protection laws. But once the data are rendered anonymous, e.g. when they are released in an aggregate from, they do not, as a rule, constitute personal data anymore and are therefore not concerned with by the data protection laws."[76]

An important notion informing the European personal data protection regime is that of "informational self-determination" (*informationelle selbstbestimmung*). This concept was coined by the German Constitutional Court in its landmark 1983 Census case,[77] on the basis of the principle of human dignity and the right of free development of personality set down in Articles one and two of the German Constitution. It amounts to the recognition of the right of individuals to determine in principle himself on the disclosure and use of his personal information. In the view of the German Constitutional Court, this right is essential to protect the individual but also the free democratic order: "Inconsistent with the right of informational self-determination would be a societal order and assisting legal order in which the citizen no longer knew the who, what, when and how of knowledge about him."[78] The Constitutional Court, however, does not conceive it as an absolute right: it does not always entail the possibility for individuals to oppose the processing of personal data. Exemptions may be justified by a predominant public interest. But the right to informational self-determination implies that individuals must be given the means to participate in, and have a measure of influence over, the processing of data concerning them.[79] "Rather than giving exclusive control or a property interest to the data subject, the right of informational self-determination compels the State to organize

[76] T. Makkonen, 2007, *supra* note 14, at 53.
[77] 65 BVerfGE 1, decision of 15.12.1983. On the legal and social background to this decision, see P. Schwartz, "The Computer in German and American Constitutional Law: Towards an American Rights of Informational Self-Determination", *American Journal of Comparative Law*, vol. 37, 1989, 675-701, at 686-689; and D. H. Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada and the United States*, Chapel Hill and London, The University of North Carolina Press, 1989, at 79-83.
[78] 65 BVerfGE 1, at 42-43, as quoted by P. Schwartz, 1989, *supra* note 77, at 690.
[79] On the notion of informational self-determination, see L. A. Bygrave, 2002, *supra* note 62, at 63 and 117-118; E. J. Eberle, "The Right to Information Self-Determination", *Utah L. Rev.*, 2001, No. 4, 965-1016; P. M. Schwartz, "Privacy and Participation: Personal Information and Public Sector Regulation in the United States", *Iowa L. Rev.*, vol. 80, 1995, 553-618; P. Schwartz, 1989, *supra* note 77.

data processing so that personal autonomy will be respected."[80] Hence, the State must adopt measures to structure the handling of such information with a view to allowing individuals affected to anticipate who will use data concerning them and for which purpose.[81]

These notions are reflected in Council of Europe Convention n°108 as well as in Directive 95/46/EC.[82] The Council of Europe Convention, which is only concerned with *automatic* processing of personal data, formulates important basic principles for the protection of personal data. These principles have been developed further, and extended to non-automatic means, by Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[83] This directive covers both public and private sectors but does not apply to activities falling outside the scope of Community law, notably processing operations concerning public security, defense, and activities of the state in area of criminal law.[84] Both instruments define general rules applicable to the treatment of any sort of personal data. In addition, they set out stricter requirements in the case of certain categories of personal data considered especially sensitive, which include, in particular, data revealing racial or ethnic origin.[85] (see *infra* 2.2.2.).

Among the general principles applicable to all kind of personal data, a first fundamental requirement is that they must be processed fairly and lawfully.[86] The principle of fairness entails a requirement of proportionality: the processing must be carried out in a manner

[80] P. Schwartz, 1989, *supra* note 77, at 690.
[81] P. Schwartz, 1989, *supra* note 77, at 690.
[82] See F. Bignami, 2005, *supra* note 54, at 818.
[83] For an analysis of Directive 95/46/EC, see L. A. Bygrave, 2002, *supra* note 62, 57-69; F. Bignami, 2005, *supra* note 54, at 819; S. Simitis, "From the Market to the Polis: The EU Directive on the Protection of Personal Data", *Iowa L. Rev.*, vol. 80, 1995, 445-469 and G. Pearce and N. Platten, "Achieving Personal Data Protection in the European Union", *Journal of Common Market Studies*, vol. 36, No. 4, December 1998, 529-547.
[84] Directive 95/46/EC, article 3(2). A Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matter, proposed by the European Commission in October 2005 (COM (2005) 475 of 4 October 2005), is currently under discussion within European institutions.
[85] Directive 95/46/EC, article 8; Council of Europe Convention, article 6.
[86] Directive 95/46/EC, article 6(1)(a). See also Council of Europe Convention, Article 5(a).

that does not interfere unreasonably with the privacy and autonomy of the data subject (i.e. the individual about whom data is held).[87] Another basic rule is that personal data must be collected for specified, explicit and legitimate purposes, and cannot be used in a way incompatible with those purposes.[88] The data collected must be adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed.[89] Furthermore, the data must be accurate and, where necessary, kept up to date.[90] They must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they were collected or for which they are further processed.[91] Moreover, the data subject should be informed of the processing and its purpose[92], and must have the right to access to and rectify data concerning him.[93] States have to ensure that appropriate security measures are taken to protect personal data against unlawful forms of processing.[94]

The European Union Directive also contains as specific reference to statistics: it specifies that insofar as personal data have been collected lawfully and for legitimate objectives, the further processing of these data for historical, statistical or scientific purposes, should not generally be considered incompatible with the purposes for which the data have originally been collected, provided that Member States ensure suitable safeguards.[95] Such safeguards must in particular rule out the use of the data to take decisions on data subjects.[96] They may also consist in the obligation to obtain prior authorization from the national data protection authority for the planned operation or the requirement that the data be pseudonymized or anonymized whenever possible.[97]

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[87] T. Makkonen, 2007, *supra* note 14, at 55.
[88] Directive 95/46/EC, article 6(1)(b). See also Council of Europe Convention, Article 5(b).
[89] Directive 95/46/EC, article 6(1)(c). See also Council of Europe Convention, Article 5(c).
[90] Directive 95/46/EC, article 6(1)(d). See also Council of Europe Convention, Article 5(d).
[91] Directive 95/46/EC, article 6(1)(e). See also Council of Europe Convention, Article 5(d).
[92] Directive 95/46/EC, articles 10 and 11.
[93] Directive 95/46/EC, article 12. See also Council of Europe Convention, article 8(c).
[94] Directive 95/46/EC, article 17(1). See also Council of Europe Convention, article 7.
[95] Directive 95/46/EC, article 6(b). On rules applicable to the use of personal data for statistical purposes, see also Article 9(3) of the Council of Europe Convention No. 108.
[96] Directive 95/46/EC, Preamble, § 29.
[97] See T. Makkonen, 2007, *supra* note 14, at 56. Member states must also comply with the principles spelled out in the Recommendation No. R (97) 18E of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes. In particular, personal data collected and processed for statistical purposes shall be made

2.2.2. The Sensitive Data Regime

Apart from these general rules, Directive 95/46/EC, like the Council of Europe Convention No. 108, singles out certain types of personal data as requiring a heightened level of protection. These "special categories of data" or "sensitive data" include data revealing racial and ethnic origin as well as those revealing political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health and sexual life.[98] The special regime to which the processing of such data is subject, is precisely based on the consideration that the features at stake are sources of discrimination: the handling of these data thus creates a particular risk of discriminatory treatment.[99]

Under the Council of Europe Convention, sensitive data "may not be processed automatically unless domestic law provides appropriate safeguards".[100] Directive 95/46/EC is more restrictive in appearance: under Article 8(1), Member States are required to prohibit the processing of such data. Yet, Article 8(2) enumerates several exceptions to this prohibition. Three of them are relevant for our discussion:

- (i) the processing of sensitive data is not prohibited when the data subject has given his explicit consent to the processing of those data.[101] The data subject's consent is understood as "a freely given specific and informed indication of his

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anonymous as soon as they are no longer necessary in an identifiable form (Principle 3.3.), thus immediately after the end of data collection or of any checking or matching operations which follow the collection, except if identification data remain necessary for statistical purposes and the identification data are separated and conserved separately from other personal data, unless it is manifestly unreasonable or impracticable to do so (Principles 8.1. and 10.1), or if the very nature of statistical processing necessitates the starting of other processing operations before the data have been made anonymous and as long as all the appropriate technical and organizational measures have been taken to ensure the confidentiality of personal data (Principles 8.1 and 15).

[98] Directive 95/46/EC and the Council of Europe Convention No. 108 use the phrase "special categories of data" but the terms "sensitive data" are widely used in the literature on personal data protection. The list of "special categories of data" included in Article 8 of the European Union Directive slightly differs from that found in Article 6 of the Council of Europe Convention. Data on trade-union membership is mentioned in the Directive but not in the Council of Europe Convention, while data relating to criminal convictions is cited in the latter but not in the former. It can also be noted that the Council of Europe Convention only refers to "racial origin" while the European Union Directive uses the terms "racial and ethnic origin".

[99] O. De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi,* coll. "Travail et Société", Bruxelles, Bern, Berlin, Franfurt/M., New York, Oxford, Wien, ed. P.I.E. Peter Lang, 2001, at 33-52.

[100] Council of Europe Convention, Article 6.

[101] Directive 95/46/EC, article 8 (2) (a).

wishes by which he signifies his agreement to personal data relating to him being processed".[102] The laws of the Member State can however provide that the prohibition may not be lifted by the data subject's giving his consent.

Even without the consent of the data subject, the processing is permitted in several situations, among which:

- (ii) where it is necessary for the purpose of carrying out the obligations and specific rights of the controller (i.e. those who hold the data) in the field of employment law in so far as it is authorized by national law providing for adequate safeguards;[103] or

- (iii) where it is necessary for the establishment, exercise or defense of legal claims.[104]

Clearly, these exceptions make it possible for states to authorize the processing of data revealing racial or ethnic origin in the framework of antidiscrimination policies in three situations: where it is done with the consent of individuals concerned, where it is necessary to carry out a monitoring obligation imposed by employment law, or where it is necessary to enable a person to establish, exercise or defend a legal claim.[105] In addition, Article 8(4) of the Directive allows for Member States to lay down, for reason of substantial public interest, additional exemptions to those mentioned in Article 8(2), either by national law or by decision of the privacy supervisory organ, and provided that suitable safeguards are ensured. One of this provision's objectives is to facilitate scientific research and government statistics, by allowing the processing and storing of sensitive data in central population registers, census registers or other similar documents. Article 8(4) thus offers another possible basis for authorizing the collection and treatment

[102] Directive 95/46/EC, article 2(h).
[103] Directive 95/46/EC, article 8 (2) (b).
[104] Article 8 (2) (e).
[105] For a more thorough analysis of the relevance of these exceptions for the issue of data collection in equality policies, see O. De Schutter, 2006, *supra* note 13, at 28-32. See also T. Makkonen, 2007, *supra* note 14, at 58-61.

of sensitive data where this is required to combat discrimination and promote equality. Indeed, these objectives certainly qualify as "substantial public interest".[106] It is precisely on this basis that ethnic monitoring has been justified in the United Kingdom.[107] 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.[108] The Dutch Data Protection Act transposing the European Directive (*Wet bescherming persoonsgegevens*, 2000) also contains a specific exception to this effect but sets out different conditions.[109] The processing of personal data concerning a person's race (*sic*) is allowed when it is carried out for the purpose of granting a preferential status to persons from a particular ethnic or cultural minority group with a view to eradicating or reducing actual inequalities, provided that: 1° this is necessary for that purpose; 2° the data only relate to the country of birth of the data subjects, their parents or grandparents, or to other criteria laid down by law, allowing an objective determination whether a person belongs to a minority group; and 3° the data subjects have not indicated any objection thereto in writing. Therefore, individuals may refuse to provide this information, but must express their refusal in writing.[110]

In brief, the sensitive data regime does not constitute an obstacle to collecting data revealing racial or ethnic origin, where this is necessary for implementing voluntarist antidiscrimination laws and policies. The exemptions to the prohibition of the processing of sensitive data foreseen in Directive 95/46/EC provide states with a legal basis to allow the treatment of such data for antidiscrimination purposes, while requiring the provision of adequate safeguards. Apart from the requirements specific to sensitive data, the general rules on personal data protection are of course also applicable to sensitive data. In

[106] O. De Schutter, 2006, *supra* note 13, at 26-28; T. Makkonen, 2007, *supra* note 14, at 61.
[107] T. Makkonen, 2007, *supra* note 14, at 61.
[108] Paragraph 9, Schedule 3 of the Data Protection Act 1998.
[109] Article 18 of the Data Protection Act of 6 July 2000 (*Staatsblad* 2000, 302) as amended. See the unofficial translation of the Act, available on the website of the Dutch Data Protection Authority (*College Bescherming Persoonsgegevens*): http://www.dutchdpa.nl/indexen/en_ind_wetten_wbp_wbp.shtml.
[110] Data Protection Act, Article 18.

particular, the data subject must be informed of the collection of data concerning him or her and the data collected must be adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed. From this latter principle, T. Makkonen infers that in so far as doing so does not compromise the objective of the operation, "the controller should opt for secondary rather than primary data collection, anonymous rather than nominal surveys, sampling rather than full-scale surveys, and for voluntary rather than compulsory survey."[111] However, as this author admits, for what concerns employment monitoring, non-anonymous forms of monitoring provide some significant benefits over anonymous ones.[112]

III. Privacy as Individual Self-Determination

The discussion in the last section may seem to assume that race and ethnicity are objective attributes of individuals that can be easily grasped, the only problem being to protect people from unwanted registration or abusive use of this information. Obviously, this is not the end of the issue. The operation through which individuals are classified as belonging to one or another "racial" or "ethnic" group or as having a certain origin is itself the subject of controversies. Taking into account the complexity of the race and ethnicity concepts, this section examines the various methods used to classify individuals in categories reflecting racial or ethnic affiliation or origin. It shows that the approach based on self-identification benefits from an increasing legitimacy at the international level. The principle according to which individuals should be classified on the basis of their own self-understanding can, indeed, be grounded on the concept of privacy, insofar as the latter is understood as embodying a principle of individual self-determination. (**3.1**). I then turn to states' practices in categorizing and classifying their population. The U.S., the U.K. and the Netherlands have all developed their own system of categories and classification methods. The case of France is also interesting to look at, since this country is notoriously opposed to racial or ethnic classifications. Yet, the issue has surfaced in the public debate and certain proposals have been made with a view to introducing some

[111] T. Makkonen, 2007, *supra* note 14, at 56-57.
[112] T. Makkonen, 2007, *supra* note 14, at 42.

form of ethnic discrimination measurement mechanisms. (**3.2.**). Lastly, the tensions and dilemmas inherent to the enterprise of racial or ethnic classifications for antidiscrimination purposes are discussed. (**3.3**).

3.1. Categories and Classifications: A Human Rights Perspective

3.1.1. Conceptualizing Racial and Ethnic Categories

"Race" and "ethnicity" are muddy and contested concepts. John Rex once wrote that the "problem of race and racism challenges the conscience of the sociologist in the same way as the problem of nuclear weapons challenges that of the nuclear physicist."[113] As emphasized by M. Banton, the meaning attributed to the word "race" has shifted throughout history, as new modes of explanation of human variation have arisen.[114] But by the mid-nineteenth century the dominant conception was that the world's population was divided into distinct "races", understood as biological categories, and therefore natural and immutable, which determined individuals' abilities and intelligence.[115] "Certain somatic features (some real and some imagined) were socially signified as natural marks of difference (e.g. skin colour), a difference that became known as a difference of 'race'. Moreover, these marks, conceived as natural, were then thought to explain the already existing social position of the collectivity thereby designated by the mark (…)."[116] This understanding of race served to justify domination, exploitation and even extermination.[117] Needless to say, these appalling pseudo-scientific theories were

[113] J. Rex, "Race Relations in Sociological Theory", *The Theoretical Problem Stated*, London and New York, Routledge, 1970, reprinted in L. Back and J. Solomos (eds), *Theories of Race and Racism – A Reader*, London and New York, Routledge, 2000, 119-124, at 119.
[114] M. Banton, "The Idiom of Race – A Critique of Presentism", in L. Back and J. Solomos (eds), *Theories of Race and Racism – A Reader*, London and New York, Routledge, 2000, 51-63, at 51. For a more through study of the successive modes of theorizing race, see M. Banton, *Racial Theories*, Cambridge, Cambridge University Press, 1998 (2d ed.).
[115] R. Miles, "A Propos the Idea of 'Race' … Again", reprinted in L. Back and J. Solomos (eds), 2000, *supra* note 14, 125-143, at 125.
[116] R. Miles, "A Propos the Idea of 'Race' … Again", reprinted in L. Back and J. Solomos (eds), 2000, *supra* note 14, at 137.
[117] J. Rex, "Race Relations in Sociological Theory", reprinted in L. Back and J. Solomos (eds), 2000, *supra* note 114, at 119. See also B. J. Fields, "Slavery, Race and Ideology in the United States of America", *New Left Review*, 1990, 95-118.

refuted throughout the 20th century. There is clear consensus today among scientists that the concept of race is deprived of any objective basis. Instead, "race" is now largely seen as a "social construct"; a social artefact, which results from a process through which social significance is attributed to some contingent attributes like skin color, and whose emergence, salience and influence can be studied and analyzed.[118] This approach to racial phenomenon is epitomized by the rise of the "racialization" concept in social science, described by K. Murji and J. Solomos as "the processes by which ideas about race are constructed, come to be regarded as meaningful, and are acted upon".[119] Yet, although socially constructed, "race" continues to have serious impact on social relations, representations and practices.[120] It has very concrete effects in real life. While the reality and objectivity of the race notion is strongly contested, racially-based social structure of inequality and exclusion persist. It is therefore possible for there to be 'racial discrimination' but no separate races in the biological sense of the term.[121] Besides, in some countries, race, however it is understood, is reclaimed by certain groups as a basis for their collective identity.[122]

As for the notion of "ethnicity", it is increasingly used when referring to relations between groups of different cultures or national origins. While race is largely grounded on phenotypical differences, typically skin color, "ethnicity" is understood as based on cultural ties and commonality of descent. Nonetheless, there is no consensus among

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[118] K. Murji and J. Solomos, "Introduction: Racialization in Theory and Practice", in K. Murji and J. Solomos (eds), *Racialization – Studies in Theory and Practice*, Oxford, Oxford University Press, 2005, 1-27, at 1.

[119] K. Murji and J. Solomos, 2005, *supra* note 118, at 5. In the same vein, H. Winant proposes the notion of "racial formation processes". See H. Winant, "The Theoretical Status of the Concept of Race", reprinted in L. Back and J. Solomos (eds), 2000, *supra* note 114, 181-190 and H. Winant, "Race and Racism: Towards a Global Future", *Ethnic and Racial Studies*, Vol. 29, No. 5, 2006, 986-1003, at 987.

[120] M. Bulmer and J. Solomos, "Introduction: Re-thinking Ethnic and Racial Studies", *Ethnic and Racial Studies*, Vol. 21, No. 5, September 1998, 819-837, at 823; H. Winant, 2006, *supra* note 118, at 987-989; H. Winant, "The Theoretical Status of the Concept of Race", in L. Back and J. Solomos (eds), 2000, *supra* note 114, at 184.

[121] T. Makkonen, 2007, *supra* note 14, at 74.

[122] H. Wintant observes: "Today the race concept is more problematic than ever before. Racially-based social structures – of inequality and exclusion, and of resistance and autonomy as well – persist, but their legitimacy is questioned far more strongly than it was in the past. And racial identities also seem to be less solid and ineffable than they did in previous ages. While racial identity remain a major component of individuality and group recognition, it partakes of a certain flexibility and fungibility that was formerly rare." (H. Winant, 2006, *supra* note 118, at 987).

social scientists about how exactly it should be defined.[123] One particularly influential theory is that of anthropologist F. Barth, who argues that the fundamental characteristic of ethnic identities is that they mark a boundary between one group and others, while the criteria on which this differentiation is grounded can vary over time, as a result of changing social, political or economic context.[124] It must also be stressed that the frontier between the concepts of "race" and "ethnicity" tends to be blurred.[125] Stressing the complexity of present-day conceptualization of these notions, M. Bulmer and J. Solomos observe:

> "…race and ethnicity are not 'natural' categories (…). Their boundaries are not fixed, nor is their membership uncontested. Race and ethnic group, like nations, are imagined communities. People are socially defined as belonging to particular ethnic or racial groups, either in terms of definitions employed by others, or definitions which members of particular ethnic groups develop for themselves. They are ideological entities, made and changed in struggle. They are discursive formations, signaling a language through which differences that are accorded social significance may be named and explained."[126]

Moving now to the field of policy-making, it must be highlighted that public authorities who wish to develop mechanisms to measure the racial or ethnic affiliations or origins of their population for the purposes of their antidiscrimination policy, face two basic decisions. First, they must delineate the categories in which individuals will be broken

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[123] On the different understandings of ethnicity, see J.-L. Rallu, V. Piché and P. Simon, « Démographie et ethnicité : une relation ambiguë », in G. Caselli, J. Vallin et G. Wunsch (eds), *Démographie : analyse et synthèse*, t. VI *Population et société*, Paris, éditions de l'Institut national d'études démographiques, 2004, 481-515, at 481-482; A. Bastenier and F. Dassetto, *Immigration et espace public – La controverse de l'intégration*, Paris, CIEMI-L'Harmattan, 1993, at 139-147; J. L. Comaroff, « Ethnicity, Nationalism, and the Politics of Difference in an Age of Revolution », in E.N. Wilmsen and P. McAllister (eds), *The Politics of Difference: Ethnic Premises in a World of Power*, Chicago/London, University of Chicago Press, 1996, 162-183; A. Morning, "Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round" forthcoming in *Population Research and Policy Review* (on file with the author).

[124] F. Barth (ed.), *Ethnic Groups and Boundaries – The Social Organization of Difference*, Oslo, Universitetsforlaget, 1969, 9-38.

[125] See D. I. Kertzer and D. Arel: "The compulsion to divide people into racial categories has never been far from the drive to divide them into ethnic categories. In fact, the two concepts are often blurred, a confusion having largely to do with a belief that identity can be *objectively* determined through ancestry". (D. I. Kertzer and D. Arel, « Censuses, identity formation, and the struggle for political power », in D. I. Kertzer and D. Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses*, Cambridge, Cambridge University Press, 2002, 1-42, at 11). See also A. Morning, forthcoming, *supra* note 123, at 5.

[126] M. Bulmer and J. Solomos, 1998, *supra* note 120, at 822.

down. Since race and ethnicity are social constructs, such categories will inevitably depend on the distinctions that have become salient in the society concerned. Another consideration likely to influence the definition of categories is the varying connotation of the term "race" according to the social context: "In the UK and USA the use of 'racial' language is commonplace and widely accepted at the level of both legislation and every-day speech (…)." In other countries, like Austria, Germany, France or Sweden, in contrast, "it is widely considered inappropriate to use 'racial' language in everyday speech, let alone in legislation."[127] Relevant categories can thus vary from one country to the other. The second decision to be made by policy-makers is that of determining the criteria on the basis of which people should be classified in these categories.

3.1.2. Classification Criteria

There are several ways in which individuals can be classified in racial, ethnic or similar categories. Four different approaches can be distinguished:[128]

- Self-reported identity or self-identification: individuals are asked to declare which group they feel they are part of. They often have to choose from a pre-established list of groups, which may or may not contain a final open category, leaving space for adding a response not included in the list.[129] Self-identification is the method used nowadays for census.

- Identification by community members: individuals are considered as part of a group if they are recognized as such by the members of this group. In other words, an individual's affiliation to a group depends on whether or not the other group's members perceive him or her as a fellow member. [130]

[127] T. Makkonen, 2007, *supra* note 14, at 74.
[128] See Ch. A. Ford, « Administering Identity: The Determination of « Race » in Race-Conscious Law », *Calif. L. Rev.*, vol. 82, 1994, 1231-1285, at 1239 and P. Simon, 2004, *supra* note 7, at 35-38.
[129] In certain countries other than those studied in this paper, the "ethnicity question" on the census takes the form of an open-ended question. On the different answer formats to "ethnicity questions" in national census, see A. Morning, forthcoming, *supra* note 123, at 17-18.
[130] This method is used in the United States to classify American Indians in "federally recognized tribes" for purposes of U.S. law and tribal court jurisdiction. See Ch. A. Ford, 1994, *supra note* 128, at 1263.

- Identification by a third party (other than community members) based on visual observation: an individual is considered as member of a particular group if he or she is perceived as such, on the basis of his or her physical appearance, by an external observer who is carrying out the classification.

- Classification by a third party based on objective or indirect criteria: individuals are classified into pre-defined categories on the basis of indirect indicators, such as their country of birth, the nationality of their parents, or the language spoken. These criteria are said to be objective in the sense that they are not based on feelings of affiliation or perception by others, but on factual information on places and practices that can objectively be assessed.

3.1.3. The Emergence of a Norm of Self-Identification

There are various indications that, at the international level, self-identification comes to be viewed as the most appropriate method to classify individuals into racial or ethnic categories. In 1990, the UN Committee on the Elimination of Racial Discrimination issued a recommendation stating that the identification of individuals as being members of a particular racial or ethnic group "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned."[131] A similar rule can be derived from the Council of Europe Framework-Convention on the Protection of National Minorities (1995),[132] which lays down that every individual shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and that no disadvantage shall result from this choice.[133] Accordingly, states cannot treat individuals against their will as members of a national minority group.[134] In the view of

[131] General Recommendation VIII, 38th session, 1990, UN doc. A/45/18 at 79 (1991).
[132] Opened for signature in the framework of the Council of Europe in 1995, it has entered into force on 1st February 1998.
[133] Article 3(1) of the Framework-Convention on the Protection of National Minorities.
[134] H.-J. Heinze, "Article 3", in M. Weller (ed.), *The Rights of Minorities in Europe – A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford, Oxford University Press, 2005, 107-137, at 119.

the Advisory Committee for the Framework Convention – the body entrusted with supervising compliance with this Convention –, the right not to be treated as a person belonging to a national minority extends to census situations and entails that questions on one's ethnicity cannot be made mandatory.[135] The European Commission against Racism and Intolerance (ECRI) has, for its part, consistently recommended, in its General Policy Recommendations and country reports, that ethnic data be collected in accordance with three principles: confidentiality, informed consent and voluntary self-identification.[136] Likewise, the Durban Declaration and Plan of Action states that information documenting racism, racial discrimination, xenophobia and related intolerance shall be collected with the explicit consent of the victims and be based on their self-identification.[137]

This trend is also reflected in national census practices, where self-identification is increasingly used as the criteria for racial or ethnic classification.[138] Thus, "[t]he notion that only the individual has the right to decide which identity category he or she should be placed in is a powerful force in the world today."[139] As a matter of fact, with regard to determining an individual's identity, self-identification criteria appears as the most in accordance with the notion of individual self-determination or autonomy, which implies that individuals should have the right to freely decide on issues of essential importance to their life or self-understanding. This notion is regarded by a large number of authors to be at the core of the right to privacy. Several decisions of the U.S. Supreme Court's case-law provide support for this view. For instance, in the 1992 case of Planned Parenthood v.

[135] See e.g. Opinion of the Advisory Committee of the Framework Convention on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, § 19 and Opinion on Poland, 27 November 2003, ACFC/INF/OP/I(2004)005, § 24. See also H.-J. Heinze, 2005, *supra* note 134, at 127-128 and R. Hofmann, "The Framework Convention of the Protection of National Minorities: An Introduction", in M. Weller (ed.), 2005, *supra* note 134, at 22-23. The Advisory Committee also expressed the view that the collection of personal data on an individual's affiliation with a particular national minority without his or her consent and without adequate legal safeguards does not comply with Article 3 FCNM. See H.-J. Heinze, 2005, *supra* note 134, at 130.

[136] ECRI, *Seminar with national specialized bodies to combat racism and racial discrimination on the issue of ethnic data collection (Strasbourg, 17-18 February 2005), Report,* CRI(2005)14, at 4.

[137] This information shall be collected "with the explicit consent of the victims, based on their self-identification and in accordance with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees" (Durban Declaration and Plan of Action, § 92(a). Available at www.un.org/WCAR/durban.pdf).

[138] See J.-L. Rallu, V. Piché and P. Simon, 2004, *supra* note 123, at 500 and 509.

[139] D. I. Kertzer and D. Arel, « Censuses, identity formation, and the struggle for political power », in D. I. Kertzer and D. Arel (ed.), 2002, *supra* note 125, 1-42, at 34.

Casey, the Supreme Court stated: "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[140] Numerous commentators of the U.S. Supreme Court's case-law have advanced, under various justifications, that the notion of autonomy, usually in combination with dignity or identity, is the principle underlying the privacy concept.[141] Some authors insist more particularly on the relationship between autonomy and identity: for J. Kahn, "privacy recognizes and protects the condition necessary for proper individuation and realization of the self over time (…). Privacy, in short, provides principles for negotiating the legal management of personhood in a manner that facilitates the development and maintenance of a coherent individual identity (…)."[142] Another interesting version of the autonomy-based conception of privacy is that proposed by J. Rubenfeld.[143] This author argues that rather than as a right to defend a predetermined, given, identity, privacy should be understood as a right to resist coercive and standardizing power of the state. "The principle of the right to privacy is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens. It is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."[144] In Rubenfeld's view, the right to privacy guarantees people's ability to meaningfully govern themselves by protecting them against being pervasively molded into standard, rigid, normalized

[140] 505 U.S. 833, 951 (1992).
[141] See in particular J. Kahn "Privacy as a Legal Principle of Identity Maintenance", *Seton Hall Law Review*, Vol. 33, 2003, 371-410, at 381-386 and references quoted; D.A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution", *Hastings Law Journal*, vol. 30, 1979, 957-1018; J. A. Eichbaum, "Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy", *Harv. C. R.-C.L.L.Rev.*, vol. 14, 1979, 361-384; L. Henkin, "Privacy and Autonomy", *Colum. L. Rev.*, Vol. 74, 1974, 1410-1433 (arguing that the famous US Supreme Court case on regulation of access to abortion *Roe v. Wade* was less about privacy than about recognizing a new zone of autonomy). European authors who endorse the view that the right to privacy is based on or amounts to the principle of self-determination include F. Rigaux (*La protection de la vie privée et des autres biens de la personnalité*, Bruxelles, Paris, Bruylant, LGDJ, 1990); O. De Schutter ("La vie privée entre droit de la personnalité et liberté", *Rev. trim. dr. h.*, 1999, 827-863) and S. Gutwirth (*Privacy and the Information Age*, transl. by R. Casert, Lanham, Boulder, New York, Oxford, Rowman & Littlefield Publishers, 2002).
[142] J. Kahn, 2003, *supra* note 141, at 373.
[143] J. Rubenfeld, "The Right to Privacy", *Harvard Law Review*, vol. 102, 1989, 737-807.
[144] J. Rubenfeld, 1989, *supra* note 143, at 784.

roles.[145]

Since the year 2000, the themes of autonomy and identity have also emerged in the case law of the European Court of Human Rights on the right to respect for private life, enshrined in Article 8 of the European Convention on Human Rights. In its 2001 judgment in *Bensaïd v. United Kingdom*, the Court declares that Article 8 "protects a right to identity and personal development".[146] In *Mikulic v. Croatia* (2002), where paternity proceedings were at stake, it specifies that private life "includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity."[147] The same year, in *Pretty v. United Kingdom*, the Court asserts that the "notion of personal autonomy is an important principle underlying the interpretation" of the right to private life.[148] In subsequent case-law, the Court draws a link between the idea of autonomy and the notion of identity: while dealing with claims of transsexuals to have their post-operative gender identity recognized in official documents, the European Court asserts that "[u]nder Article 8 of the Convention (…), where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."[149]

To be sure, the European Court never asserted that privacy entails an absolute right to obtain official recognition for any freely chosen identity. In *Bensaïd v. United Kingdom*, the applicant was an Algerian citizen living in the United Kingdom and suffering from schizophrenia, who alleged that his planned expulsion to Algeria would deprive him of

[145] J. Rubenfeld, 1989, *supra* note 143, at 805.
[146] Eur. Ct. H.R. (3d section), *Bensaid v. United Kingdom*, Judgment of 6 February 2001 (Appl. No. 44599/98), § 47.
[147] Eur. Ct. H.R. (1st section), *Mikulic v. Croatia*, Judgment of 7 February 2002 (Appl. No. 53176/99), § 53.
[148] Eur. Ct H. R. (4th Section), *Pretty v. United Kingdom*, Judgment of 29 April 2002 (Appl. No. 2346/02), *Rep*. 2002-III, § 61.
[149] Eur. Ct. H. R. (GC), *Christine Goodwin v. United Kingdom*, Judgment of 11 July 2002 (Appl. No. 28957/95), § 90. See also Eur. Ct. H. R. (1st Section), *Connors v. United Kingdom*, Judgment of 27 May 2004 (Appl. No. 66746/01): the rights protected by Article 8 of the Convention are "rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community." (§ 82).

access to his treatment and thus expose him to the risk of relapsing into hallucinations and psychotic delusions. In this context, the Court's concern was with the person's ability to preserve a stable identity, which it saw as "an indispensable precondition to effective enjoyment of the right to respect for private life."[150] On the other hand, in *Mikulic* and in the transsexuals cases, what the Court posits is the right of individuals to have certain details of a pre-existing and "objective" identity established or recognized. Tellingly, in *Mikulic*, the Court stresses that the paternity proceedings instituted by the applicant were intended to determine her legal relationship with her presumed natural father "through the establishment of the *biological truth.*"[151] Similarly, in the transsexuals cases, the fact that the applicants had undergone a sex re-assignment surgery and that their bodily appearance had therefore been transformed to match their psychological gender identity, was determining in leading the Court to rule that their "new" post-operative sex identity had to be recognized in official documents by public authorities.

However, the issue of racial or ethnic identity presents a crucial difference with the latter two examples: race and ethnicity do not correspond to any "biological truth"; they have no biological basis that would enable them to be determined regardless of the social processes in which they are embedded. Such identity depends as much on the perception of the surrounding society as on the subjective feelings of the individual concerned. A compelling argument can thus be made that since there is no scientific means to ascertain in an objective manner a person's racial or ethnic identity, such determination should be left to the individual who is best placed to decide which group(s) he or she identifies the most with. Although the European Court never ruled on this issue, it can be argued that for the state to classify individuals as members of a certain racial or ethnic group without consideration for their own feelings of identity would conflict with respect for individuals' autonomy and self-understanding, thus infringing on their right to privacy.

Yet, this reasoning rests on the assumption that what is to be determined is the person's ethnic or racial *identity*. But it is questionable whether the same analysis would hold

[150] *Bensaïd v. United Kingdom*, *supra* note 146, § 47.
[151] *Mikulic v. Croatia*, *supra* note 147, § 55, my emphasis.

when the object of the classification is not individuals' identities but *whether they belong to a disadvantaged group*, whose members are the victims of racial or ethnic discrimination. Arguably, in this latter situation other classification criteria could be deemed legitimate from a privacy viewpoint, in particular objective or indirect criteria such as the country of birth or the nationality of the parents. To grapple with this question, it is important to devote some attention to the ways in which classifications are carried out in practice by different states. In fact, the examination of states' classification practices shows that, while the self-reported identity approach is increasingly favored, it is not universally applied. (**3.2.**) Furthermore, it appears that the application of the self-identification criterion may raise some difficulties. (**3.3.**).

3.2. The Practice of Classification (or non-Classification): the United States, the United Kingdom, the Netherlands and France

3.2.1. Racial Classifications in the United States

In the U.S., contrary to the other countries under study in this paper, racial classifications have always been present in laws and institutions. A question on race has appeared on the census since the first one held in 1790.[152] However, the purposes and political use of these classifications have radically changed. In the first part of U.S. history, racial categorizations were used to segregate and oppress. When civil rights legislation was adopted in the 1960s, the decision was taken, after some discussions, to maintain racial categories and statistics in order to help implementing antidiscrimination laws and policies. The goals of racial classifications were thus completely reversed: they now served to remedy the effects of past discrimination and promote equality.[153]

Another distinguishing element of the U.S. is that "race" constitutes the pivotal concept

[152] P Skerry, *Counting on the Census? Race, Group Identity, and the Evasion of Politics*, Brookings Institution Press, Washington D.C., 2001; M. Nobles, *Shades of Citizenship – Race and the Census in Modern Politics*, Stanford, Stanford University Press, 2000, at 75-79; M. Nobles, « Racial Categorization and Census », in D. I. Kertzer and D. Arel (eds), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses*, Cambridge, Cambridge University Press, 2002, 43-70, at 49-51.
[153] M. Nobles, 2000, *supra* note 152; P. Simon, 2004, *supra* note 7, at 49.

of its categorization system.[154] The categories used by all federal agencies, including the U.S. Census Bureau, in their statistical activities, have been defined in the Statistical Policy Directive No. 15, issued in 1977 by the Office of Management and Budget (OMB). This document establishes a uniform list of racial and ethnic categories applicable throughout the U.S. Federal statistical system. It distinguishes between five groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black; White; and Hispanic. While the first four groups are considered as "races", the "Hispanic" option is defined as being an "ethnic category". It appears on a different line than the race question on the census and can be combined with any race. Its definition is based on cultural elements: Hispanics are "people of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin." Interestingly, in the beginning of the 1990s, the proposal was made to integrate the "Hispanic-origin" option among the racial categories. This would have made census categories "consistent with emergent usage in law and politics, where Hispanics have come to be treated as a distinct racial groups with a history of discrimination."[155] Initially, this proposal was supported by most Hispanic organizations. But after some tests revealed that the number of individuals who identified as Hispanic was significantly higher when "Hispanic origin" was presented as a separate ethnic category than when it was included among the racial categories, Hispanic organizations expressed strong opposition to it and the idea was abandoned.[156] This episode illustrates tellingly how slippery is the distinction between "race" and "ethnicity" in the U.S. context.

The taxonomy set by Directive No. 15 has been enormously influential. The five standards categories have come to be adopted by state and local governments as well as private actors and academic researchers.[157] They now form what D. A. Hollinger calls the "ethno-racial pentagon", among which residents of the United States are routinely asked

[154] P. Simon, 2004, *supra* note 7, at 56.
[155] P. Skerry, 2000, *supra* note 152, at 40.
[156] P. Skerry, 2000, *supra* note 152, at 39-40. On the "Hispanic category" and the understanding problems it sometimes creates for census respondents, see P. Skerry, 2000, *supra* note 152, at 62-66.
[157] M. Omi, "Racial Identity and the State: the Dilemmas of Classification", *Law & Inequality*, vol. 15, 1997, 7-23; A. Morning and D. Sabbagh, 2004, *supra* note 15, at 44.

to identify themselves and their contemporaries.[158] For M. Nobles, the directive "acts as a "gatekeeper" to an official statistical existence. Invested with this power and visibility, the directive has become a referent for groups seeking official recognition."[159] Directive No. 15 was revised in 1997. The major innovation was the introduction of the possibility to classify individuals in more than one racial group, in response to the claims of self-called "mixed race" or "multiracial" Americans, who demanded to have their multiple racial affiliations reflected in the official classification.[160] Another modification – based on socio-economic reasons - consisted in the division of the "Asian or Pacific Islander" category into two racial groups: the "Native Hawaiian or other Pacific Islander" on the one hand, and "Asians" on the other hand.[161] Accordingly, the 2000 census distinguished between the five following racial groups: Blacks, Whites, Native Americans, Asians, Native Hawaiians and Other Pacific Islander; and for the first time, people were allowed to check more than one box.[162] As was the case before, the "Hispanic origin" question appeared on a separate line.

While the census classification rests on individuals' self-identification, this is not the only method used in the U.S. system. In other contexts, the classification can be based on visual observation by a third party. According to P. Skerry, racial and ethnic enrollment data relied on by the Office of Civil Rights at the U.S. Department of Education are often based on observation by school officials.[163] This is said to be largely the case in the employment field: employers who are required to report, on a yearly basis, on the ethno-racial distribution of their workforce to the Equal Employment Opportunity Commission (EEOC) for the purpose of monitoring compliance with antidiscrimination legislation, usually rely on observer identification, through informal on-site "visual surveys" conducted by supervisors.[164] This practice has long been encouraged by federal

[158] D. A. Hollinger, *Postethnic America*, Basic Books, New York, 1995.
[159] M. Nobles, 2002, *supra* note 152, at 59.
[160] The "mixed race" or "multiracial" movement in the U.S. is discussed further in the next section (3.3.).
[161] A. Morning and D. Sabbagh, 2004, *supra* note 15, at 57-63.
[162] In fact, very few did so: only 2.8% of the population declared affiliation with more than one race. As was already the case before, people could also tick the "some other race" box and write it in the space provided. See P. Simon, 2004, *supra* note 7, at 59.
[163] P. Skerry, 2000, *supra* note 152, at 53.
[164] A. Morning and D. Sabbagh, 2004, *supra* note 15, at 54; P. Skerry, 2000, *supra* note 152, at 53; Ch. A. Ford, 1994, *supra* note 128, at 1245-1252.

regulators, on the ground that inquiries about employees' racial or ethnic affiliation were too sensitive.[165] However, it is very doubtful that this classification method is in line with the now emerging principle of individual autonomy.[166] In addition, some have pointed out that this creates a major inconsistency in the U.S. monitoring system: it implies that the two main sources of information used to track discrimination in the employment context – the census on the one hand, information provided by employers on the other hand – are collected through two different classification modes, namely self-identification and observation identification. And these different procedures can yield different results.[167] Interestingly, a document published in 2003 by the EEOC indicates a change of position of the federal agency with regard to the way employers should collect information on their employees' racial or ethnic affiliation. It is now stated that self-identification should be "the preferred method of identifying the race and ethnic information necessary for the EEO-1 report." Employers are strongly encouraged to rely on this method. Yet, "[i]f self-identification is not feasible, (…) observer identification may be used to obtain this information."[168]

3.2.2. Ethnic Classifications in the U.K.

In the United Kingdom, the insertion of a question on ethnicity in the census is a recent phenomenon, dating back to 1991. This innovation is directly related to the development of the antidiscrimination legislation. Following the adoption of the Race Relations Act in 1976, public authorities found themselves in need of statistical data in order to carry out the requirements and objectives of the fight against discrimination. As soon as 1978, the government demanded that a question on ethnicity be inserted in the 1981 census with a view to obtaining authoritative and reliable information about ethnic minorities.[169] This proposal elicited a vigorous debate about the possibility and legitimacy of asking people

[165] Ch. A. Ford, 1994, *supra* note 128, at 1250; A. Morning and D. Sabbagh, 2004, *supra* note 15, at 54.
[166] See above, section 3.2.
[167] This inconsistency is heavily criticized by Ch. A. Ford in Ch. A. Ford, 1994, *supra* note 128.
[168] EEOC (2003), Federal Register, at 34967, quoted by A. Morning and D. Sabbagh, 2004, *supra* note 15, at 66.
[169] See J. Stavo-Debauge, *Comparative Study on the Collection of Data to Measure the Extent and Impact of Discrimination – Report on England*, Medis Project, European Commission, DG for Employment, Social Affairs and Equal Opportunities, 2004, at 81.

to identify by race or ethnicity. Some argued that such question was morally and politically objectionable, that it would reify the concept of "race", and that the results could be used to put minorities at a further disadvantage.[170] The scientific validity of such operation was also contested.[171] Eventually, the proposal was dropped.

The lack of information continued to cause difficulties to the Commission for Racial Equality, the body entrusted with implementing the objectives of the Race Relations Act, and the government asked the OPCS (*Office for Population Censuses and Surveys*) to resume work on the issue. New tests were conducted to find an appropriate formulation. The ethnic question was finally introduced in the 1991 census. Interestingly, the various tests carried out by the OPCS between 1975 and 1989 revealed that there was little opposition among minority members themselves to being questioned on their ethnic background. Rather, objections pertained to the way the question was formulated.[172] In the 1991 census, people were asked to choose between the following categories: White, Black-Caribbean, Black African, Black Other ("please describe"), Indian, Pakistani, Bangladeshi, or Chinese. They could also opt for the "any other ethnic group" box and write in their affiliation. Lastly, it was specified that persons descended from more than one ethnic or racial group, could either tick the group to which they considered they belonged, or opt for the "any other group" box and describe their ancestry in the space provided. While debates around the ethnic question continued after 1991, the focus

[170] R. Ballard, « Negotiating Race and Ethnicity: Exploring the Implications of the 1991 Census », *Patterns of Prejudice*, vol. 30, No. 3, 1997, 3-33; L. Simpson, "'Race' Statistics: Their's and Our's", *Radical Statistics*, No. 79-80, 2002 (available at www.radstats.org.uk); Ph. H. White and D. L. Pearce, "Le groupe ethnique et le recensement britannique", in *Les défis que pose la mesure de l'origine ethnique: science, politique et réalité*, Conférence canado-américaine sur la mesure de l'origine ethnique (1-3 avril 1992), Statistique Canada/U.S. Bureau of the Census, September 2003, 309-346, at 315-316. On the significance of ethno-racial classifications in Britain, see also A. Favell, *Philosophies of Integration – Immigration and the Idea of Citizenship in France and Britain*, New York, Macmillan Press, St. Martin Press, 1998, at 119-120.

[171] P. Simon, 2004, *supra* note 7, at 50-51.

[172] For a description of the various formulations experimented, see P. H. White and D. L. Pearce, 2003, *supra* note 170, at 316-333; K. Sillitoe and P. H. White, "Ethnic Group and the British Census: The Search for a Question", *Journal of the Royal Statistical Society. Series A (Statistics in Society)*, Vol. 155, No. 1, 1992, 114-163; and J. Stavo-Debauge, 2004, *supra* note 169, at 87-99. The strongest opposition to the proposed classifications came from people of Afro-Caribbean descent: They "proved to be far more sensitive than their Asian and African counterparts about the possibility that their association with ethno-national labels such as "West Indian" or "Afro-Caribbean" might seem to imply that they were in some way not British." (R. Ballard, 1997, *supra* note 170, at 11).

noticeably changed: the possibility of having such item on the census was not contested anymore. Instead, the content of the categories and the formulation of the question was the subject of heated discussions.[173] Some criticized the scheme on the ground that the categories were based on a mix of racial and ethnic elements, arguing that it contributed to the "racialization" of ethnic groups.[174] On the other hand, several groups campaigned to have a category reflecting their own collective identity added to the form.[175] In consequence of these discussions, several changes were made in the 2001 census form. One major modification was the breakdown of the "White" category in several sub-groups to reflect internal diversity: "British", "Irish", and "Any other White background" (with a blank box). Further, people were now offered the possibility to report a "mixed race" background, by choosing between: "White and Black Caribbean"; "White and Black African"; "White and Asian" or "Any other Mixed background" ("please write in").[176]

The various institutions conducting ethnic monitoring use the same categories as those appearing on the census. The Commission for Racial Equality (CRE), in the Codes of Practice it has issued to provide public authorities with instructions about how to monitor equality in employment and service delivery, strongly recommends integrating the census categories.[177] As for the classification criteria, the CRE considers that self-classification should always be used "wherever possible": public authorities should aim at using self-classification as far as possible but when such method does not enable them to obtain the minimum information needed, they may consider using other-classification to top any missing information. The CRE insists, however, that this should be a last resort; people should first be offered further chances to classify themselves. Moreover, they should have

[173] On the debates surrounding the ethnic question in the census after 1991, see P. Gordon, 1996; and J. Stavo-Debauge, 2004, *supra* note 169, at 127-138.
[174] See, in particular, R. Ballard, 1997, *supra* note 170. See also the observations of M. Banton on the relation between the collection of statistics and "race-making processes": M. Banton, "Historical and Contemporary Modes of Racialization", in K. Murji and J. Solomos (eds), 2005, *supra* note 118, 51-68, at 63.
[175] J. Stavo-Debauge, 2004, *supra* note 169, at 113-114; P. Simon, 2004, *supra* note 7, at 66. See also our discussion in section 3.3.1.
[176] Another change in the 2001 census consisted in the addition of a question on religion, to which people were not obliged to respond.
[177] Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities*, at 10

the opportunity to confirm or correct the classification made on their behalf. The Commission further specifies that while using other-classification to top information about ethnic background is not against the Data Protection Act and its principles, it may be unlawful to use the judgments made on this basis for any purpose other than monitoring equality.[178] In sum, in Great-Britain classification based on self-identification is the norm, while other-classification is accepted in limited circumstances and under the important condition that individuals concerned be given the opportunity to correct or confirm the information.

3.2.3. "Allochtones" and Ethnic Minorities in the Netherlands

Two features characterize the Dutch approach to ethnic statistics. First, these statistics rest on information provided by municipal population registers and not by census. In fact, no census has been carried out in the Netherlands since 1971. This practice has been vigorously contested during the 1970s, as constituting an intrusion in private life, contrary to the right to privacy. Fearing a boycott by a significant part of the population which would have rendered its results unreliable, the authorities renounced the planned 1981 census.[179] Second, ethnic classifications are based on indirect criteria, namely the country of birth of the person concerned or the country of birth of his or her parents. Contrary to the U.S. and the U.K. systems, the Dutch model, therefore, does not rely on self-identification.

The term "ethnic minorities" appeared in the official language in the 1980s. In 1983, the Dutch government launched a "minorities policy" aimed at promoting the socio-economic integration of certain disadvantaged immigrants groups (*Minderhedennota*). The phrase "ethnic minorities" (*etnische minderheden*) covers a limited list of groups specifically enumerated in the governmental document. They are defined on the basis of two elements: their country of origin and their socio-economic situation. The ethnic minority policy only applies to immigrants for the presence of which the authorities feel a

[178] Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities*, at 14-15.
[179] V. Guiraudon, K. Phalet and J. Ter Wal, *Comparative Study on the Collection of Data to Measure the Extent and Impact of Discrimination – Report on the Netherlands*, Medis Project, European Commission, DG for Employment, Social Affairs and Equal Opportunities, 2004, at 30.

special responsibility, either because they come from former colonies (Surinamese, Antillans, Arubans and Moluqans), or because they have been recruited by the government to work in the Netherlands (Moroccans, Turks, and Southern Europe immigrants workers (Italians, Spaniards, Portuguese, Greeks and (ex-)Yugoslaves)). Additionally, a group is considered a minority only if its members are structurally in a disadvantaged socio-economic situation. The list of "ethnic minorities" targeted by the policy has been adapted and changed over time: in particular, groups from EU countries have been removed from the list.[180]

While "ethnic minorities" remains the central notion used in public policy, the term "allochtones" has appeared in administrative practice following the 1989 report "Allochtones' policy" (*Allochtonenbeleid*) issued by the academic advisory body for the government.[181] In 1995, the category "allochtones" was introduced in official statistics to designate individuals with a foreign background living in the Netherlands. It was formally defined by the national statistics agency (the *Centraal Bureau voor de Statistiek* or CBS) in 1999 as including "every person living in the Netherlands of which at least on of the parents was born abroad." This category, therefore, conflates foreigners and Dutch citizens with foreign origins. People are classified as allochtones by the national statistics agency (CBS) on the basis of information available in the administration system at the municipal level (*Gementelijke Basisadministratie*). Since 1999, a further distinction is made by the CBS between "Western allochtones" (coming from European countries (except for Turkey), North America, Oceania as well as Japan and Indonesia) and "non-Western allochtones" (those with Turkish, Asian, African or Latin American origins). The third generation of immigrants is automatically classified as "autochtonous" as opposed to allochtonous. However, while avoiding using the term allochtones in their

[180] See D. Jacobs et A. Rea, « Construction et importation des classements ethniques : Allochtones et immigrés aux Pays-Bas et en Belgique », *Revue européenne des migrations internationales*, vol. 21, No. 2, 2005, 35-59; V. Guiraudon, K. Phalet and J. Ter Wal, 2004, *supra* note 179, at 11.

[181] *Wetenschappelijke Raade voor Regeringsbeleid* (WRR) 1989. "Allochtones" were defined in this document as "generally speaking, all persons who come from elsewhere and have durably settled in the Netherlands, including their descendants until the third generation, in as far as the latter want to consider themselves as allochtones. Minorities are allochtonous groups which find themselves in a disfavored position: it has to be assessed periodically which groups have to be considered to be minorities." (WRR 1989 Report, at 10).

respect, since 2000, the CBS started to develop figures on the third-generation of "non-Western allochtones", i.e. persons with at least one grand-parent born in Morocco, Turkey, Surinam or the Antilles.[182]

Although initially a mere statistical category, the term "allochtone" has permeated the political and legislative language. It has been increasingly used in policy documents, academic texts, the media and eventually was adopted in ordinary language. But the meaning of the word allochtones changed in the process: while in official statistics it is meant to designate all person living in the Netherlands with at least one parents born in any foreign country, political authorities tend to use the term allochtones as synonymous with member of an "ethnic minority". And in popular parlance, it has come to designate all persons with non-Western origins. It has thus been endowed with an ethno-cultural connotation.[183]

In the Netherlands as well, public authorities have implemented a monitoring system aimed at remedying discrimination against "ethnic minorities". The 1998 "Act for stimulation of participation of minorities in the labor market"[184] obliged companies with more than 35 employees to define an action plan to promote equality, monitor their workforce composition, and publish a yearly report on the number of people belonging to "ethnic minorities" among their personnel, with a view to achieving a multicultural workplace in the Netherlands. For this purpose, companies had to ask their employees to provide information on their place of birth or that of their parents. In accordance with public statistics' practice, it was on the basis of these criteria that persons belonging to ethnic minorities were identified. This program, however, was terminated by the Dutch authorities in 2003 – a decision heavily criticized by many non-governmental

[182] D. Jacobs and A. Rea, 2005, *supra* note 180.
[183] D. Jacobs and A. Rea, 2005, *supra* note 180.
[184] *Wet stimulering arbeidsdeelsname minderheden* (or Wet SAMEN) (Act for the Stimulation of Participation of Minorities in Employment), adopted on 23 April 1998, entered into force on 1st January 1998. Interestingly, this law, which refers to the notion of "ethnic minorities", replaced a previous law passed in 1994 and entitled "Act on the Promotion of Proportional Labour Market Participation of *Allochtones*" (*Wet bevordering evenredigearbeidskansen voor allochtonen* or Wet BEAA). This is another sign of the tendency in Dutch official language to consider the terms "ethnic minorities" and "allochtones" as synonymous.

organizations active in the field of non-discrimination.[185]

3.2.4. Debates over Classifications in France

France, like many other EU member states, does not classify its population by ethnicity in public census. It only distinguishes on the basis of nationality. As well-known, there is in France a profound opposition to officially identifying individuals through ethnic or racial categories. In the words of sociologist Didier Fassin, the idea of establishing "racial statistics" is in France a "national taboo".[186] This attitude is rooted in the interlocking conceptions of equality and national identity prevailing in French political culture.[187] The dominant view on equality is that it requires the state to treat all citizens alike, and abstain from looking beyond the citizen to consider his or her ethnic origin or cultural affiliation. Any differentiation based on ethnic origins tends to be seen as stigmatizing and opening the door to discrimination. This conception is related to a vision of the nation as a united whole, constituted by an association of individuals, who emancipate themselves from particular communities by acceding to the status of citizen. According to the French Constitutional Council, "the Constitution knows only the French people, comprising all French citizens, without distinction on grounds of origin, race or religion".[188] The principle of the indivisibility of the French people precludes "recognition of collective rights to any group whatsoever defined by community of origin, culture, language or belief."[189]

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[185] On the 1998 "Act for the stimulation of participation of minorities in the labor market", see V. Guiraudon, K. Phalet and J. Ter Wal, 2004, *supra* note 179, at 14-16; M. Gijzen, *Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC – Country Report: The Netherlands*, European Network of Legal Experts in the Non-Discrimination Field, December 2004 (available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/nlrep05_en.pdf, last accessed February 2007).

[186] D. Fassin, "Nommer, interpréter. Le sens commun de la question raciale", in D. Fassin et E. Fassin, *De la question sociale à la question raciale ? Représenter la société française*, Paris, La Découverte, 2006, 19-36, at 20.

[187] See A. Favell, 1998, *supra* note 170, esp. at 71-72; G. Calvès, "'Il n'y a pas de race ici' – Le modèle français à l'épreuve de l'intégration européenne", *Critique internationale*, No. 17, October 2002, 173-186 and G. Calvès, "'Reflecting the diversity of the French Population': Birth and Development of a Fuzzy Concept", *International Social Science Journal*, No. 183, March 2005, 165-174.

[188] Decision 91-290 DC, May 9 1991 (*Statut de la Corse*). This decision concerned the draft legislation granting a new status to Corsica.

[189] Decision 99-412 DC, June 15 1999 (*Charte européenne des langues régionales ou minoritaires*). This decision concerned the question of the ratification of the European Charter on Regional or Minority

Yet, since the 1990s, the question of introducing either ethnic categories or categories based on origin in public statistics has emerged in the public debate. Initially, the interest in such classifications arose from a concern in getting a better knowledge of immigration, more especially of the number of immigrants in France and how they and their offspring integrate into the French society. From the mid-1980s, the issue of immigration has been the subject of a growing debate. The far right spread imaginary figures aimed at demonstrating that the population of North African descent would become preponderant in France in a few generations. In this context, the central statistical agencies sought to develop criteria enabling it to identify French citizens with a foreign background, in order to produce accurate figures and to study how they behave in French society.[190] This prompted a wide polemic on whether and how to deal statistically with diversity of national or ethnic origins.[191]

With the increasing awareness of and reflection on the problem of discrimination, especially in the field of employment, the discussion on the collection of data on racial, ethnic or national origin has evolved towards the issue of their potential usefulness to the struggle against discriminatory practices.[192] Some now argue that introducing such categories in official statistics is necessary to get a clear picture of the problem and design appropriate antidiscrimination policies, citing the British or the Canadian experiences in example. Since the years 2000, several reports on the issue, commissioned by the French government, have suggested, among other measures, the development of some forms of monitoring of workers' ethnic origins in companies. The 2004 report directed by Claude Bébéar, entitled "*Minorités visibles: relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise"* (*Visible minorities: Addressing the*

Languages.

[190] A. Blum, « Resistance to identity categorization in France », in D. I. Kertzer and D. Arel (eds), 2002, *supra* note 152, 121-147, at 122-123; P.-Y.Cusset, "Les statistiques "ethniques": état des lieux, état des problèmes", in *Statistiques "ethniques": éléments de cadrage*, Centre d'analyse stratégique, Rapports et documents, Paris, La Documentation française, 2006, 9-50, at 13-22. See the important survey conducted in 1992 by INED (National Institute of Demographic Studies) and INSEE (National Institute of Economic Statistics), entitled "Geographic Mobility and Social Integration": M. Tribalat, *Faire France*, Paris, La Découverte, 1995.

[191] A. Blum, 2002, *supra* note 190, at 135.

[192] A. Blum, 2002, *supra* note 190, at 135.

challenge of access to employment and integration in the workplace),[193] deplores the "statistical opacity" which "veils discrimination."[194] It further observes that French law does not preclude companies from inquiring about the ethnic origins of its workers, provided that this is done anonymously. In order to evaluate their policy of recruitment and promotion, so as to identify discriminatory practices or processes, the report recommends to companies to conduct, on a yearly basis, a statistical study on the composition of their staff. This, it suggests, should be done through an anonymous questionnaire, asking all employees, on a voluntary basis, to declare whether they consider themselves to be part of a "visible minority". The question could be further refined by inviting people to specify a geographical zone of origin.[195]

The *Fauroux Report* on the fight against ethnic discrimination in employment, submitted less than a year later to the French Minister of Employment, contains a similar suggestion.[196] The report observes that "one of the main weaknesses of the French integration model is the blindness it imposes to itself with regard to the ethnic and even geographic origin of individuals of whom it only wants to know the nationality."[197] Among its main recommendations, the report advocates the collection of data on "ethnic minorities" in companies and, more generally, in all organizations, in order to measure the progress of "diversity".[198] It excludes though making this operation mandatory:

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[193] Cl. Bébar, *Rapport au Premier Ministre – Minorités visibles : relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise – Des entreprises aux couleurs de la France*, November 2004 (hereinafter "Bébéar Report").

[194] Bébéar Report, 2004, *supra* note 193, at 17.

[195] Bébéar Report, 2004, *supra* note 193, at 19-20. A previous report, conducted by J.-M Belorgey in 1999 and commissioned by the Minister for Employment and Solidarity, already proposed to provide that the social balance sheet transmitted to employees' representatives will include data related to employment not only of foreigners but also of "French citizens with a foreign background" ("*...prévoir que le bilan social transmis aux institutions représentatives du personnel comportera désormais non seulement, comme c'est déjà le cas, des données relatives à l'emploi des étrangers, mais aussi à l'emploi des Français d'origine étrangère*"). (*Lutter contre les discriminations*, Rapport à Madame la Ministre de l'Emploi et de la Solidarité, Jean-Micher Belorgey, March 1999, at 55).

[196] *La lutte contre les discriminations ethniques dans le domaine de l'emploi*, Report carried out by a commission presided by R. Fauroux, submitted to J.-L. Borloo, Minister of Employment, social cohesion and housing, July 1995 (hereinafter "Fauroux Report").

[197] My translation. "L'une des principales faiblesses du modèle français d'intégration est la cécité qu'il s'impose vis-à-vis de l'origine ethnique et même géographique des individus dont il ne veut connaître que la nationalité." (Fauroux report, 2005, at 2).

[198] The report, however, notes the existence of disagreements, including among the commission members, with regard to the way data on ethnic minorities can be collected.

measuring diversity should be deemed as one possible instrument available to companies in their efforts to combat discrimination. Finally, the report recommends that the liberty of individuals to freely choose to be identified or not through such diversity measurement mechanism be respected.[199]

In reaction to these proposals, the French Data protection supervisory authority (the *Commission nationale de l'informatique et des libertés* or CNIL)[200] issued in July 2005 a set of recommendations aimed at clarifying the conditions under which employers are allowed to measure the "diversity of origins" of their employees, under the French Data protection Act.[201] While acknowledging that the fight against discrimination in employment is a legitimate objective which serves the public interest, the CNIL recommends that employers do not gather data on "real or supposed racial or ethnic origins of their employees or job applicants", given the absence of any ethno-racial typology defined at the national level which could serve as a benchmark. Such standardized typology should in any case be approved by the legislator. The CNIL adds that information on the name and first name, nationality, or address of the persons provide no adequate criteria on the basis of which they could be classified in ethno-racial categories. It also insists on "the risk of offence against human identity that would result, for the employees who do not want to benefit from advantages based on their "racial" characteristics, from being registered in a file by skin color or "ethno-racial" origin."[202] This last observation raises some doubts as to whether the CNIL correctly understood the mechanism at stake, since the measurement of the composition of a company's staff aims

[199] Fauroux Report, 2005, at 20-24. Other reports contemplating the use of statistical means in antidiscrimination policies include A. Begag, *La République à ciel ouvert*, rapport pour le M. le ministre de l'Intérieur, de la Sécurité et des Libertés locales, Paris, La Documentation française, 2004 (report submitted to the Minister of Interior); D. Versini, *Rapport sur la diversité dans la fonction publique*, rapport présenté à Monsieur Renaud Dutreil, minister de la Fonction publique et de la Réforme de l'Etat (*Report on diversity in public service*, report submitted to the Minister of Public Service and State's Reform), Paris, La Documentation française, 2004. On these various reports, see P.-Y. Cusset, 2006, *supra* note 190, at 27-29.

[200] On the Commission's role, see the French Act on Computing, Files and Liberties of 6 January 1978 (as modified by the Act of 6 August 2004). (*Loi relative à l'informatique, aux fichiers et aux libertés du 6 janvier 1978, modifiée par la loi du 6 août 2004*).

[201] *Recommendations de la Commission nationale de l'informatique et des libertés pour mesurer la diversité des origines*, 9 July 2005, available at http://www.cnil.fr.

[202] My translation. "[La Commission] tient à souligner les risques d'atteinte à l'identité humaine qui résulteraient, pour les employés qui ne souhaiteraient pas bénéficier d'avantages en fonction de leurs caractéristiques "raciales", de leur catégorisation dans un fichier par la couleur de leur peau ou leur origine "ethno-raciale"."

primarily at identifying discrimination but does not imply *per se* the granting of a preferential treatment. However, the CNIL does allow employers who wish to study the diversity of origins of their staff, to use data already available in personnel management files, in particular employees' *nationality* and *place of birth*. Employees must be informed of the treatment of data concerning them and data files constituted for the realization of the study must be destroyed once statistics have been produced. In addition, the carrying out of *ad hoc* surveys through anonymous questionnaires is also admitted and can turn on data that cannot be included in personnel management files, such as *nationality of origin* of employees or job applicants as well as *nationality or place of birth of their parents*. Here too, the individual questionnaires must be destroyed after answers have been treated.

Besides, although the population census contains no question on the geographical origin of respondents' parents, since 1999, questions on the place of birth or nationality of the parents have started to be included in several official sample surveys. This information enables public statistics agencies to study the various migration waves to France, to analyze integration processes, as well as to cast light on the difficulties encountered by persons of certain national origins (especially North African countries) on the labor market.[203] Also to be noted, a law passed in March 2006 authorizes the French body tasked with combating discrimination (the *Haute autorité de lutte contre la discrimination et pour l'égalité – High Authority on the Fight Against Discrimination and for Equality*) to conduct situation testing in order to detect discriminatory practices.[204]

Yet number of researchers and antidiscrimination activists claim that these sources of information remain dramatically insufficient to develop efficient antidiscrimination policies. Another sign of the growing interest of French public officials in the issue of the

[203] P.-Y. Cusset, 2006, *supra* note 190, at 20-22.
[204] *Loi n°2006-396 du 31 mars 2006 pour l'égalité des chances* (Act No. 2006-396 of 31 March 2006 for equal opportunities), J.O. n°79 of 2 April 2006, at 4950. Previously, in a decision of 11 June 2002, the Court of cassation had ruled that evidence gathered through testing by an NGO was admissible in criminal proceedings. (Cass. Fr. (ch. crim.), 11 June 2002, No. 01-85.559). In this case, the testing had been carried out by the NGO *SOS racisme* and concerned discrimination in access to nightclubs.

use of statistics for antidiscrimination purposes, is the organization in October 2006 of a conference on "ethnic statistics" by the *Centre d'analyse stratégique*, an institution working under the direction of the Prime Minister, tasked with assisting the government in defining its socio-economical, environmental and cultural policies.[205] To be sure, despite these developments, the idea of constructing statistics based on ethnic affiliation or origins remains extremely contentious in the French context. It is the subject of heated controversies among politicians, academics, and antidiscrimination NGOs[206]: in late February 2007, a petition signed by researchers, trade-unionists and NGOs members was published in the press, arguing that "ethnic statistics" are useless, dangerous and inadequate, and that information currently available are sufficient to assess discrimination and measure progresses.[207] Advocates of the development of more statistical tools responded with another petition claiming, on the contrary, that existing statistical data are clearly insufficient and inadequate to produce a robust antidiscrimination policy and need to be revised; other forms of data collection should be openly debated and not excluded *a priori* on the ground that they contradict the traditional "republican model of integration".[208]

3.3. Classifications and Antidiscrimination: Tensions and Dilemmas

Much can be said about the manner in which different countries construct and revise categories on racial or ethnic affiliation or origin, the vision of the society that these categorizations convey, how they impact on society and how, in turn, social dynamics can prompt modifications to them.[209] Certainly, even in countries like France that do not count their population by race or ethnicity, these distinctions are present in everyday life and influence social perceptions and attitudes.[210] Still, the formalization of these

[205] *Statistiques "ethniques": éléments de cadrage*, Centre d'analyse stratégique, Rapports et documents, Paris, La Documentation française, 2006.
[206] See Calvès, 2002, *supra* note 187, 173-186 and A. Blum, 2002, *supra* note 190, at 135-140.
[207] "Engagement républicain contre les discriminations", *Libération*, 23 February 2007.
[208] "Statistiques contre discriminations", *Le Monde*, 12 mars 2007.
[209] See P. Skerry, 2000, *supra* note 152; M. Nobles, 2000, *supra* note 152; D. I. Kertzer and D. Arel (ed.), 2002, *supra* note 125.
[210] D. Fassin, 2006, *supra* note 186; D. Jacobs and A. Rea, 2005, *supra* note 180, at 1; K. Murji and J.

categories and their inclusion in public statistics is likely to have a notable impact on social representations.[211] Hence, when public authorities decide to develop statistical tools to better combat discrimination, it is all the more important for them to conduct a thorough reflection on how categories should be constructed, how they should be termed and how people should be classified in them.

As seen earlier, among the various modes of classifying individuals in categories reflecting racial or ethnic affiliation or origin, the self-identification criterion appears *a priori* as the most in line with the principle of individual autonomy, which can be derived from the right to privacy. Yet, as the overview of states' practice shows, its application to the collection of data for antidiscrimination purposes is not devoid of difficulties. (3.3.1.). As for the second major classification criterion used, namely the place of birth of individuals or that of their parents, it presents significant advantages but also has its limits and shortcomings. (3.3.2).

3.3.1. Limits of the Self-identification Criterion

Collecting data on the basis of self-declared racial or ethnic affiliation for the purpose of implementing antidiscrimination laws and policies does not go without problem. A first difficulty is that discrimination results from the way a person is perceived by others, who are the potential agents of discriminatory practices, and this does not necessarily correspond to the way she sees herself or to her feelings of affiliation.[212] As one author puts it, the "effects of racism all too frequently operate on the level of appearance, not identity."[213] In consequence, some authors argue that the criteria of self-identification may not always be the most appropriate to delineate the members of a disadvantaged group.[214] Another problem is that some people might be reluctant to declare their

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Solomos, 2005, *supra* note 118, at 5.
[211] See M. Nobles, 2000, *supra* note 152, at 181; D. Jacobs and A. Rea, 2005, *supra* note 180, at 2 and 22.
[212] A. Morning and D. Sabbagh, 2004, *supra* note 15, at 49-50; R. Ballard, 1997, *supra* note 170, at 16.
[213] N. A. Denton, "Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?", *Law & Ineq.*, vol. 15, 1997, 83-97, at 92.
[214] For Ch. A. Ford, "[t]he ability of self-reported classification to act as a proxy for "real" patterns of social disadvantage is (…) highly questionable." (Ch. A. Ford, 1994, *supra* note 128, at 1281). See also A. Morning and D. Sabbagh, 2004, *supra* note 15, at 50.

affiliation with a group that is stigmatized in the society in which they live.[215] A further complexity lies in the contrast between the technocratic rationality that requires clear-cut, consistent, and stable categories in order to produce workable statistics, and the reality of personal identity feelings, which can be multiple, overlapping, hazy, and fluctuating.[216] Indeed, social scientists emphasize that identities are fluid and context-dependent; that they are socially constructed and can vary over time and space, depending on the social or political conditions.[217] Statistical template, in contrast, "seeks to construct relevant, sound, coherent and stable categories over time to feed the lengthy series of data required for comparisons and for analyzing trends. Statistics only moderately appreciate subjective definitions and favor "objectivistic" estimations of origin through genealogy. (…) Administrative and legal registries require categories that are well defined and exclusive, as do statistics."[218] Thus, tensions may arise between the constraints of a categorization scheme aimed at identifying discrimination on the one hand, and respect for personal feelings of identity on the other hand.

The evolution of American Indian population figures in the U.S. is a dramatic example of the potential volatility of identifications feelings. Between 1960 and 1990, this population increased by 255 %. According to analysts, this increase is largely due to changes in self-identification, driven by shifts in attitudes toward American Indians and a romanticization of the past.[219] Since 1990, the Census Bureau has abandoned pure self-identification for Indians and requires those identifying as American Indian to name their "enrolled or principal tribe".[220] The debate sparked by the "mixed race" or "multiracial" movement in the U.S. is also a case in point. This movement, which arose in the 1990s, comprised mainly parents in mixed couples, who vigorously contested the obligation to

[215] J.-L. Rallu, V. Piché and P. Simon, 2004, *supra* note 123, at 505.
[216] See P. Skerry, 2000, *supra* note 152, at 49-54; M. Omi, 1997, *supra* note 157, at 13; J.-L. Rallu, V. Piché and P. Simon, 2004, *supra* note 123, at 504-506.
[217] See D. I. Kertzer and D. Arel, 2002, *supra* note 125, at 19.
[218] P. Simon, 2004, *supra* note 7, at 53. It must also be noted that even when classification is based on self-identification, individuals' choice is already constrained by the obligation to opt for one of the pre-defined groups listed in the official form. See L. Simpson, "'Race' Statistics: Their's and Our's", *Radical Statistics*, No. 79-80, 2002 (available at www.radstats.org.uk). In the U.K., however, individuals have the possibility to opt for the "any other ethnic group" box and write in their affiliation.
[219] M. Omi, 1997, *supra* note 157, at 15; P. Skerry, 2000, *supra* note 152, at 52.
[220] P. Skerry, 2000, *supra* note 152, at 52.

classify their children in a single-race category. They claimed that the requirement to choose an exclusive affiliation forced their children to deny the racial heritage of one of their parents. They did not demand though the abandonment of existing racial categories, but rather the addition of a new "mixed-race" option on the list, on the ground that "mixed race" people had a racial identity of their own, which deserved public recognition.[221] While their proposal challenged the premise of mutual exclusivity which characterized U.S. racial categorization so far, the notion of "mixed-race" on which their claim was based itself presumes the existence of discrete races.[222] In any case, their suggestion to add a new "mixed-race" or "multiracial" category to the official racial classification was sturdily opposed by Black leaders who feared that this would lead to a reduction of the numbers of those who identified as "Black" and therefore produce major disturbances in the civil rights laws monitoring and enforcement system.[223] In the words of M. Nobles, "the push for a multiracial census category has led the politics of recognition into direct confrontation with contemporary civil rights politics."[224] Finally, the solution retained by public authorities was to keep the racial categories unchanged but to give individuals the opportunity to declare multiple racial affiliations.[225] The results showed that only 2.8% of the population did so.[226] Yet, in order to integrate them into the civil rights laws monitoring scheme, multiple-race responses had to be reallocated to single race categories. The authorities decided that people "people who marked "white" and a nonwhite race should be counted as members of the nonwhite group. As for the

[221] M. Nobles, 2000, *supra* note 152, at 131.
[222] M. Nobles, 2000, *supra* note 152, at 82.
[223] This opposition was echoed by some legal scholars who argued that the modification of current racial classifications, demanded by the multiracial movement, would jeopardize the fight against discrimination. See Ch. B. Hickman, "The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census", *Michigan L. R.*, vol. 95, March 1997, 1161-1265; T. K. Hernandez, ""Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence", *Maryland L. R.*, vol. 57, 1998, 97-173; and T. K. Hernandez, "Multiracial Matrix: the Role of Race Ideology in the Enforcement of Antidiscrimination Laws – A United States-Latin America Comparison", *Cornell L. R.*, vol. 87, 2002, 1093-1176.
[224] M. Nobles, 2000, *supra* note 152, at 137. She further observes: "Civil rights organizations (…) have largely viewed the multiracial movement as a direct threat to their political and legal interests. (…) With smallers numbers and smaller percentages of the nation's population, they would be weakened in their advocacy. Further, they have viewed multiracial discourse itself as the latest effort to dismiss the continuing social, political, and economic ramifications of race by declaring it to be at once too fluid for simple classification and a matter of individual choice." (M. Nobles, 2000, *supra* note 152, at 137-138).
[225] On the "multiracial" movement, see M. Nobles, 2000, *supra* note 152, at 139-145; P. Skerry, 2000, *supra* note 152, at 52-54; A. Morning and D. Sabbagh, 2004, *supra* note 15, at 57-63.
[226] P. Simon, 2004, *supra* note 7, at 59.

mixed-race individuals without white ancestry, they were to be treated as having whichever racial affiliation they claimed was the basis for discrimination".[227]

This illustrates a broader phenomenon observable both in the U.S. and in the U.K.: while racial and ethnic categories were introduced or maintained to serve the antidiscrimination policies, they have been re-appropriated by the public and came to be seen as an opportunity to express one's identity and obtain public recognition for it.[228] To be sure, there is nothing illegitimate in the fact that certain groups want to assert their identity and have it publicly recognized. But the two logics at play here – that of antidiscrimination and that of identity recognition – may come at odds with each other.[229] Indeed, the more the state refines categories and extents the range of possible responses and combinations, so as to enable individuals to express their sense of identity, the more difficult to use the data become for the antidiscrimination programs.[230] It should also be observed that categorizations aimed at identifying discrimination must take into account the way members of discriminated groups are perceived and named by the dominant society. Equating racial or ethnic differentiations operated in this context with a process of identity recognition may have the discomforting consequence of fueling the idea that these categorizations do reflect the authentic and primary identity of individuals concerned.

3.3.2. Advantages and Limits of the Place of Birth Criterion

Turning now to the other categorization criteria, visual observation by a third party appears difficult to reconcile with respect for individuals' autonomy: it amounts to classifying individuals on the basis of how they are subjectively perceived by the person

[227] A. Morning and D. Sabbagh, 2004, *supra* note 15, at 60. P. Simon criticizes this solution: "One of the weaknesses of this option is that the reallocation procedure uses a reasoning reminiscent of the *one drop rule*, which prevailed during the time of segregation and according to which any person with one drop of black blood was considered black. Here, the reclassification of "mixed race" into a single race replicates the same "minority preference" option by systematically assigning the non-white "race" to mixed white persons." (P. Simon, 2004, *supra* note 7, at 59).
[228] J. Stavo-Debauge, 2004, *supra* note 169, at 113-114; P. Simon, 2004, *supra* note 7, at 66; M. Nobles, 2000, *supra* note 152, at 21-22.
[229] See D. Hollinger, 1995, *supra* note 158, at 49; P. Simon, 2004, *supra* note 7, at 53; Ch. B. Hickman, 1997, *supra* note 223, at 1254-1255.
[230] See A. Morning and D. Sabbagh, 2004, *supra* note 15, at 61.

carrying out the classification, without taking into account their own self-understanding. In fact, as seen above, the use of this method is decreasing in the U.S. and is only marginal in the U.K. (see 3.2.1 and 3.2.2.).

The option retained by the Netherlands – a categorization based on the country of birth – deserves more attention. Compared with the difficulties raised by the self-identification criterion, it presents several advantages. It rests on a stable criterion that can be objectively assessed and does not depend on subjective perceptions. From a privacy perspective, it may in a way appear less intrusive than self-reported classification insofar as individuals are not questioned about their subjective feeling of identity or group affiliation, but are asked to state a fact: their place of birth or that of their parents. Now, it is true that such a method does not take into account individuals' self-definition. However, the use of this criterion highlights that what authorities seek to determine is not peoples' identities but instead whether they belong to a group whose members are discriminated against. Once it has been established that persons with specific national or ethnic origin face substantial discrimination, collecting data on peoples' origins can be deemed an objective mode of identifying the persons who are the most likely to suffer discrimination and whose situation must be followed in order to promote equality. Interestingly, as seen above, the marked opposition towards ethnic or racial categorizations observed in France masks a growing acceptance of origin-based classification. In the last few years, questions on place of birth or nationality of individuals' parents have been increasingly included in sample surveys conducted by official statistical agencies. If French authorities were to move in the direction of developing equality monitoring mechanisms, a classification based on these criteria would be likely to be better accepted by the public.[231]

[231] In 2006, two researchers of the National Institute for Demographic Studies (*Institut National d'Etudes Démographiques* or INED) carried out a survey on a sample of employees and students to assess their reactions when asked to classify themselves along various criteria. The results show that categorizations based on geographic origin were well received by the vast majority of respondents (96 %). Ethno-racial categories, in contrast, elicited more reluctance, especially from immigrants and people with immigrant origins. Interestingly, the opposition was much higher among individuals defining themselves as "Arabs or Berbers", than among those describing themselves as "Blacks" or "Whites". See P. Simon and M. Clément, "Comment décrire la diversité des origines en France? Une enquête exploratoire sur les perceptions des salariés et des étudiants", *Population & Société*, No. 425, July-August 2006. (Available at http://www.ined.fr/fr/ressources_documentation/publications/pop_soc/).

Yet, inquiring routinely on the parents' origin of individuals, and classifying them on this basis, regardless of whether they are citizens of the state, may be resented as a form of stigmatization; as conveying the message that they remain perpetual foreigners. The Dutch experience shows how a new term forged originally as a mere descriptive statistical category like "allochtone" can be transformed when adopted in ordinary language and infused with a racial-cultural connotation.[232] Besides, this classification method is also criticized for technical reasons: mainly, after three generations, the country of birth criteria becomes unreliable; not only information on ascendants' countries of birth may be unavailable but, moreover, it becomes very difficult to classify individuals with multiple origins.[233]

Conclusion

Compelling arguments support the view that, given the magnitude of racial and ethnic discrimination in many countries in Europe, a robust antidiscrimination policy is called for. This requires that states have access to accurate data on the situation of potentially discriminated minorities. Such data are necessary to help designing appropriate policies and assess their effectiveness but also to monitor discrimination in different sectors of social life. Moreover, the collection of information on the racial or ethnic background of employees in companies enables employers to implement equality plans aimed at remedying under-representation of certain groups and at promoting equal opportunities. Statistical data can also be essential to help victims to establish indirect discrimination in legal proceedings.

However, the processing of data revealing racial or ethnic origin that this approach presupposes raises delicate privacy questions. Two aspects of the right to privacy are at stake here: the protection of personal data on the one hand, respect for individual self-

[232] D. Jacobs and A. Rea, 2005, *supra* note 180, at 20-21.
[233] P. Simon predicts that within a few years, self-identification will be necessary in the Netherlands, as it is in the United States and in the United Kingdom. (P. Simon, 2004, *supra* note 7, at 68).

determination, on the other. Personal data protection norms are often thought in Europe to preclude the collection of data on racial or ethnic origin, while this issue does not seem to yield much debate in the U.S. In fact, European-level instruments regulating the processing of personal data do not constitute an insuperable obstacle. It is true that, as a matter of principle, European Community law forbid the processing of "sensitive data", which include data revealing racial or ethnic origin. But there are exceptions to this prohibition, which make it possible for EU states to authorize the collection of data needed to combat racial or ethnic discrimination, especially if this is done with the explicit and informed consent of the persons concerned. At the same time, personal data protection norms provide important safeguards to protect the rights of individuals on whom data are processed. Notably, the purpose of the collection should be clearly stated and legitimate; and no more data than is strictly necessary for this purpose should be collected.

The second problem pertains to the way categories related to racial or ethnic affiliation or origin are drawn and people classified in them. Here, it has been emphasized that increasingly, at the international level, self-identification comes to be seen as the most appropriate criterion for sorting out people into racial or ethnic categories. This is in line with the notion of individual self-determination, which is largely considered as a principle underlying the right to privacy. Arguably, attributing a racial or ethnic identity to individuals without consideration for their self-understanding would be contrary to their right to privacy. However, when classifications at stake do not aim at defining people's identity, but rather at identifying people exposed to discrimination in order to implement antidiscrimination policies, objective criteria such as the place of birth or the nationality of origin of the persons or that of their parents can also be deemed legitimate, insofar as there is a correlation between having a certain origin and the risk of being discriminated against.

The examination of categorization and classification systems put into place by various states shows that both the self-identification and the place of birth criteria present advantages and shortcomings. Each of them permit, in the countries where they are used,

to capture to a large extent individuals belonging to groups exposed to racial and ethnic discrimination. But given the complexity of racial and ethnic notions, each of them also has its limits. As for the definition of categories, there is no universally valid model. A categorization system designed to serve the antidiscrimination policy must be developed in accordance with the specificities of the country: it must take into account the composition of the population, the nature of disadvantaged groups, as well as the prevalent political culture that shapes the way these categories will be received in the society concerned. This also implies that the drawing of categories and the choice of classification criteria cannot be dealt with as a merely technical issue, to be solved by neutral scientific methods. It is an inherently political exercise, which involves questions that may be perceived as very sensitive by individuals. It is of primary importance, therefore, that categories and classification criteria pay due regard to the perspective and sensitivities of those who are the victims of discrimination, and do not only reflect the vision of the dominant majority. Minorities should therefore be given the means to participate in and express their views on this process. Finally, that there is no perfect and universally valid model also means that there is room for diversity and creativity. Countries where these mechanisms do not exist at present may learn from foreign experiences and develop, in association with the minorities concerned, creative ways of measuring discrimination in order to better combat it.