

Collecting Racial or Ethnic Data for Antidiscrimination Policies:

A U.S.-Europe Comparison

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Introduction

With the 1997 Treaty of Amsterdam, a new Article 13 was inserted in the Treaty of Rome, conferring the European Community the competence to take action to combat discrimination based not only on sex, but also on racial or ethnic origin, as well as on religion or belief, disability, age and sexual orientation.² This marks a turning point for the European Community: so far, its competence with respect to discrimination had been limited to the fields of gender discrimination in the labor market and free movement of EU nationals.³ European authorities were particularly prompt in making use of the new powers conferred to them by Article 13. As soon as 2000, two directives were adopted on this basis: Directive 2000/43/EC (the so-called “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,⁴ while Directive 2000/78/EC (or the “Framework-Directive”) forbids discrimination based on age, disability, religion and sexual orientation, but covers only the field of employment.⁵ The fight against discrimination, including racial and ethnic discrimination, has thus become a major concern of the European Union.

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 developments and analysis in the field of antidiscrimination.⁶ Accordingly, the

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).

³ See Mark Bell, *Anti-Discrimination Law and the European Union*, 32-53 (Oxford University Press, 2002).

⁴ 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, at 22). On the social and political circumstances surrounding the adoption of this directive, see Andrew Geddes and Virginie Guiraudon, *The Europeanization of Anti-Discrimination in Britain and France*, in Ch. Bertossi (ed.), *European Anti-Discrimination and the Politics of Citizenship – Britain and France* 125-142 (Macmillan, 2007); and Virginie Guiraudon, *Construire une politique européenne de lutte contre les discriminations : l’histoire de la directive “race”*, 53 *Sociétés Contemporaines* 11-32 (2004).

⁵ 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, at 16). The Directive prohibits discrimination in access to employment, self-employment and working conditions, including dismissals and pay and membership of organizations.

⁶ European Commission, *Equality and non-discrimination in an enlarged European Union*, Green paper, DG for Employment, Social Affairs and Equal Opportunities 22 (2004), available at http://ec.europa.eu/employment_social/publications/booklets/fundamental_rights/index_en.htm (last accessed: August 2008). See also *Non-discrimination and equal opportunities: A renewed commitment*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

European Commission has undertaken to encourage member countries to develop mechanisms designed to gather adequate information on discrimination.⁷ Since 2000, it has commissioned or supported a number of studies on various aspects of the question of the collection of data needed for measuring discrimination and implementing antidiscrimination laws and policies. In particular, it has asked a group of researchers to examine the mechanisms put in place by different countries to measure the extent and impact of discrimination. The countries considered included non-European states, namely the United States, Canada and Australia, in addition to the United Kingdom and the Netherlands who are members of the EU.⁸

Indeed, the experience of various countries demonstrates the critical role that race or ethnic data and statistics can play in the elaboration, implementation and evaluation of policies aimed at combating racial and ethnic discrimination. The United States is a case in point: since the civil rights legislations were adopted in the 1960s, the processing of information on racial-ethnic affiliations of individuals has been an integral part of the mechanisms put in place to give effect to these laws. As a matter of fact, gathering such data is necessary to produce statistics highlighting the socio-economic situation of different racial or ethnic groups as well as to implement affirmative action programs to promote equality for disadvantaged communities. Data collection is also a significant concern of international bodies tasked with monitoring antidiscrimination. The United Nations Committee on the Elimination of all forms of Racial

Committee of the Regions, 2 July 2008, COM(2008)420 final, at 7, *available at* http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (last accessed: August 2008).

⁷ 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. (Council decision 2000/750/EC of 27 November 2000 establishing a Community action program 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).

⁸ Patrick 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, European Commission, DG for Employment, Social Affairs and Equal Opportunities (2004). Other reports on the issue of data collection and antidiscrimination include Jacques Dahan, Joan Stavo-Debaugue and Dominique Thomas-Hislair, *The Fight Against Discrimination and the Promotion of Equality: How to Measure Progress Done*, European Commission, DG for Employment, Social Affairs and Equal Opportunities (2008); Timo Makkonen, *European Handbook on Equality Data*, European Commission, DG for Employment, Social Affairs and Equal Opportunities (2007); Timo Makkonen, *Measuring Discrimination – Data Collection and EU Equality Law*, European Commission, DG for Employment, Social Affairs and Equal Opportunities (2007); Niklas Reuter, Timo Makkonen and Olli 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 reports are available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (last accessed: August 2008). See also Eero Olli and Birgitte Kofod Olsen (ed.), *Towards Common Measures for Discrimination: Exploring Possibilities for Combining Existing Data for Measuring Ethnic Discrimination* (November 2005); and *Common Measures for Discrimination II – Recommendations for Improving the Measurement of Discrimination* (2006). Both reports have been published by Norwegian Equality and Anti-discrimination Ombud and Danish Institute of Human Rights, with the support of the European Community Action Programme to combat discrimination (2001-2006).

Discrimination (CERD),⁹ the European Commission against Racism and Intolerance (ECRI)¹⁰ as well as the Advisory Committee on the Council of Europe Framework Convention on the Protection of National Minorities¹¹ 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.¹² The International Labour Organisation has taken similar view, stating in a global report on discrimination that “gathering statistics on discrimination on a regular basis is crucial to making it visible and developing cost-effective measures to tackle it.”¹³

⁹ See UN CERD Committee General Recommendation IV concerning reporting by states parties, HRI/GEN/1/Rev.7 (12 May 2004). See also Michael Banton, *Ethnic Monitoring in International Law: the Work of CERD*, in Andrea Krizsan (ed.), *Ethnic Monitoring and Data Protection – The European Context* 62-85 (Central European University Press, 2001).

¹⁰ ECRI is a body created within the Council of Europe – a European international organization distinct from the European Union, whose activities focus in particular on human rights protection. It is within the Council of Europe that the European Convention on Human Rights had been adopted and, accordingly, that the European Court of Human Rights has been set up. On ECRI’s position on the issue of racial or ethnic data collection, see ECRI general policy Recommendation No. 1 on combating racism, xenophobia, anti-Semitism and intolerance, which 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, under the heading “Monitoring the situation”. See, for instance, third Report on the Netherlands, CRI (2008)3, adopted on 29 June 2007, para. 114; third Report on France, CRI (2005) 3, adopted on 25 June 2004, para. 114; third Report on Germany, CRI (2004) 23, adopted on 5 December 2003, para. 91. See, more generally, Isil Gachet, *The Issue of Ethnic Data Collection from the Perspective of Some Council of Europe Activities*, in Krizsan, *supra* note 9, 45-61.

¹¹ The Framework Convention on the Protection of National Minorities has been concluded in the framework of the Council of Europe. The Advisory Committee is a group of experts, created within the Council of Europe, whose task is to assist the Committee of Ministers of the Council of Europe in supervising implementation of this Framework Convention. In its 2008 Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, the Advisory Committee invites state parties to “regularly collect data and gather up-to-date information on the socio-economic and educational situation of persons belonging to national minorities in order to compare the latter with the situation of the majority population. The availability of reliable data, disaggregated by age, sex and geographical distribution, is an important condition for the development of well-targeted and sustainable measures, which meet the needs of the persons concerned. It is also crucial for the formulation of effective policies and measures to tackle discrimination in areas such as access to employment and housing.” (ACFC/31DOC(2008)001, adopted on 27 February 2008, para. 30). See also the Advisory Committee’s state opinions, in particular, Second Opinion on Sweden, 8 November 2007, ACFC/OP/II(2007)006, para. 33; Second Opinion on Austria, 8 June 2007, ACFC/OP/II(2007)005, para. 15 and 47; Second Opinion on the Czech Republic, 24 February 2005, ACFC/INF/OP/II(2005)002, para. 30. More generally, on data collection and minority protection, see Julie Ringelheim, *Minority Protection, Data Collection and the Right to Privacy*, 6 *European Yearbook on Minority Issues* (forthcoming 2008).

¹² Durban Declaration and Plan of Action, § 92.

¹³ Equality at Work: Tackling the Challenges – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 96th Session, para. 42 at 11 (International Labour Office, 2007).

Yet, many EU countries remain deeply reluctant to collect this type of data. 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, which are based on two major instruments: the Council of Europe 1981 Convention (No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data¹⁴ and Directive 95/46/CE 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 (hereinafter the “Personal Data Directive”).¹⁵ Under these two instruments, data revealing racial or ethnic origin, along with data on religion, health or sexual orientation, are regarded as sensitive data, whose treatment must be restricted. The Personal Data Directive, as a matter of principle, prohibits the processing of sensitive data. However, this prohibition is not absolute: as will be explained, 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.¹⁶ 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” are to 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?

This article 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 indications on the safeguards for individuals on which personal information is processed.

¹⁴ This Convention has been opened for signature on 28 January 1981. In addition, Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, has been interpreted by the European Court of Human Rights as protecting the individual from the processing of personal data, i.e. data which may be traced back to an identified or identifiable individual. See Eur Ct HR (GC), *Rotaru v Romania* (Appl. No. 28341/95) judgment of 4 May 2000, para. 43.

¹⁵ OJ L 28 of 23.11.1995, p. 31.

¹⁶ 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 (see Ann Morning, *Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round*, 27(2) *Population Research and Policy Review* 239 (April 2008)).

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 is based on the examination of the laws and practices of five legal systems. The United States deserves special attention. As already noted, it has a long experience in the area of measuring racial or ethnic discrimination and dealing with this sort of categories. 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. Besides, the legal systems of the EU and of three of its member states, the United Kingdom, the Netherlands and France, are considered. The United Kingdom (since 1991) is, with Ireland (since 2006),¹⁷ one of the two sole EU countries that currently produce statistics broken down by self-declared ethnic affiliation, as part of their antidiscrimination scheme. However, the Netherlands also produces statistics related to ‘ethnic minorities’ or so-called ‘*allochtons*’, but its classification system is grounded on different bases: it relies on indirect criteria, namely the country of birth of the persons concerned or of their parents. France, by contrast, is a country 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 and is now openly discussed.

The first part of the paper explains in more detail how data related to racial or ethnic origin help 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. Analysis of states’ practices reveals the persistent ambiguities and difficulties affecting the various attempts to grasp racial or ethnic affiliations of individuals for the purpose of combating discrimination. Self-identification criterion, which seems *a priori* the most in line with human rights law, is not devoid of problem. But relying on the place of birth

¹⁷ Rebecca Chiyoko King-O’Riain, Counting on the ‘Celtic Tiger’ – Adding ethnic census categories in the Republic of Ireland, 7(4) Ethnicities 516 (2007). For an overview of where each EU member states stand with regard to the collection of data related to ethnicity and religion, see Dahan, Stavo-Debaugue and Thomas-Hislaire, *supra* note 8; and Patrick Simon, “Ethnic” Statistics and Data Protection in the Council of Europe Countries - Study Report, ECRI, Council of Europe (2007), available at http://www.coe.int/t/e/human_rights/ecri/ (last accessed: August 2008) (this latter report concern the states members of the Council of Europe, which has a larger membership than the European Union).

or nationality of origin of individuals also entails some knotty issues. However, it is argued that these tensions and dilemmas, which appear as inherent to the exercise of classifying people in racial or ethnic groups, do not justify renouncing to gathering information indispensable for antidiscrimination efforts. Rather, they call for a joint reflection, by lawyers, demographers, social scientists, on the best ways to obtain the necessary data while guaranteeing individuals' rights and autonomy (III).

I. Racial and Ethnic Data as a Tool to Combat Discrimination

1.1. The uses of Racial and Ethnic Data in Antidiscrimination Policies

Ethnic or racial data can contribute in several important respects to the fight against discrimination.¹⁸ Five different uses are distinguished here: general monitoring; independent research; targeted monitoring at the level of organizations and implementation of equality plans; affirmative action involving the provision of preferential treatment; and proof of discrimination in courts.

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 employment, education, health sector or other fields of social life. Furthermore, once legislations and policies are in place, the regular production of new statistical studies makes it possible to assess their impact and effectiveness.

Similarly, independent researchers who seek to study discrimination phenomenon and the impact of discrimination on groups subject to it, need to process data related to racial or ethnic backgrounds of individuals. These studies may also inform policy-makers on how to design adequate policies to combat discriminatory processes.

Next, the collection of data revealing ethnic or racial origin at the level of companies or other institutions enables public authorities to monitor the implementation of antidiscrimination legislation and supervise compliance. Thus, under title VII of the U.S. 1964 Civil Rights Act, all employers with fifteen or more employees are required to make and keep records relevant to the determinations of whether unlawful employment practices have been or are being committed, and preserve such records for such periods as

¹⁸ See, e.g., Makkonen, *Measuring Discrimination*, supra note 8, 12-13 (2007); Olli and Olsen, supra note 8, at 10; Reuter, Makkonen and Oosi, supra note 8, at 14; James A. Goldston, *Race and Ethnic Data: A Missing Resource in the Fight Against Discrimination*, in Krizsan, supra note 9, 19-41.

specified by Equal Employment Opportunity Commission (EEOC) regulation. Moreover, 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 EEOC and Office of Federal Contract Compliance Programs (OFCC), on a yearly basis, the composition of their workforce broken down by ethno-racial identity, by gender, and by job group.¹⁹ These companies therefore have to carry out “ethnic monitoring”, a practice described by the former British Race Equality Commission (now merged with the Disability Rights Commission and Equal Opportunities Commission to form the Equality and Human Rights Commission) 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 Besides, monitoring the racial or ethnic make-up of its employees allows the organization itself to get a general picture of the impact of its policies on different groups. Where it observes that one category of individuals identified by race or ethnicity are abnormally underrepresented or disadvantaged, this may lead it to adopt measures aimed at remedying this situation and promoting equality between different racial or ethnic groups. In particular, such measures may consist in the establishment of a “diversity plan” or “equality scheme”. This requires the setting of quantified objectives (targets or goals) to be achieved through various initiatives.²¹ In the language of EU law, ethnic monitoring and equality plan constitute one form of “positive action”. This notion, which bears obvious similarities with the US concept of “affirmative action”, is defined in the Race Directive (2000/43/EC) as “specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin”²². The Directive specifically authorizes member states to adopt such measures “with a view to ensuring full equality in practice” but do not oblige them to do so. Importantly, positive action programs do not necessarily involve preferential treatment.²³

¹⁹ Public Law No. 88-352, § 709, 79 Stat. 241, 262. According to J. D. Skentry, it was mainly administrative pragmatism which led the EEOC and OFCC to adopt such an approach to fulfill their missions of ensuring compliance with nondiscrimination legislations. Given their limited budget and restricted enforcement powers, the race-based reporting system was deemed the most efficient technique enabling the two agencies to identify major problem of employment discrimination. See John D. Skentry, *The Ironies of Affirmative Action – Politics, Culture, and Justice in America*, 120-139 (The University of Chicago Press, 1996).

²⁰ Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities* (2002), at 3, *available at* <http://www.equalityhumanrights.com> (last accessed: August 2008). [hereinafter: *Ethnic Monitoring - A Guide for Public Authorities*]. On 1st October 2007, the Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission merged into the new Equality and Human Rights Commission. Note that 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. (Makkonen, *Measuring Discrimination*, *supra* note 8, at 20 and 41).

²¹ See European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *The Business Case for Diversity: Good Practices in the Workplace*, at 26 (September 2005); Simon, *supra* note 8, at 24-25.

²² Article 5 of Council Directive 2000/43/EC. See also Article 7 of Council Directive 2000/78/EC.

²³ See Cathryn Costello, *Positive Action*, in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity – The New Equality Directives* 177-212 (Irish Centre for European Law, 2003); Olivier De Schutter, *Positive Action*, in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Non-Discrimination Law*, *Ius Commune*, Casebooks for the

Thus, an equality plan undertaken by a company can consist in initiatives such as revising organization policies and practices, encouraging members of disadvantaged groups to apply for positions, raising staff awareness and providing diversity training to managers.²⁴ Yet employers committed to such plan must have the means to monitor the racial or ethnic origins of their personnel in order to assess which groups are disadvantaged in their company and whether the plan's objectives are met.

In the U.K., a monitoring duty was first introduced in Northern Ireland in the context of efforts deployed to promote equality between Catholics and Protestants following the Good Friday Agreement reached in April 1998. Under the *Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO)*,²⁵ all private sector employers with more than ten full-time employees (working more than sixteen hours per week) must register with the Northern Ireland Equality Commission and submit annually to the Commission a "monitoring return" indicating the numbers of employees and applicants to position belonging respectively to the Catholic, Protestant and "other" communities. Two years later, the Race Relations (Amendment) Act 2000, applicable to Great Britain, created a "positive duty" for the public sector to take active steps to eliminate unlawful discrimination, foster equality, and in some cases promote good relations between groups. Accordingly, 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".²⁶ This obligation is said to aim "to help bring about a culture change so that promoting equality becomes part and parcel of public authorities core business."²⁷ Similar obligations had been established in the Netherlands under the 1998 Act for Stimulation of Participation of Minorities in the Labour Market²⁸: all companies with more than thirty-five employees

Common Law of Europe 757-870 (Hart Publishing, 2007). For a comparison between affirmative action in US law and positive action in EU law, see Daniel Caruso, Limits of the Classical Method: Positive Action in the European Union After the New Equality Directives, 44(2) Harvard International Law Journal 331 (Summer 2003); Kendall Thomas, The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A., 5 Columbia Journal of European Law 329 (1999).

²⁴ Ronald Craig, Systemic Discrimination in Employment and the Promotion of Ethnic Equality, at 115-124 (Leiden, Boston, Martinus Nijhoff, 2007).

²⁵ 1998 No. 3162 (N.I. 21), 16 December 1998. The FETO was amended by the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 which came into operation on 10 December 2003 and seek to implement Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

²⁶ Race Relations (Amendment) Act 2000, article 71 (2). Public authorities concerned are central government departments, local authorities, police, other criminal justice authorities, health authorities, educational authorities and regulatory bodies. See Colm O'Cinneide, Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality, Equality and Diversity Forum 29-30 (London, 2003); and Commission for Racial Equality, The Duty to Promote Race Equality – A Guide for Public Authorities (2002), available at <http://www.equalityhumanrights.com> (last accessed: August 2008). On the notion of positive duty to promote equality, see also Bob Hepple QC, Mary Coussey and Tuyfal Choudhury, Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, Recommendation 25, at 63 (Hart Publishing, 2000); and Sandra Fredman, Equality: A New Generation?, 30(2) Industrial Law Journal 162 (June 2001).

²⁷ Discrimination Law Review – A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, A Consultation Paper, Department for Communities and Local Government, para. 5.3., at 79 (June 2007).

²⁸ *Wet stimulerende arbeidsdeelsname minderheden* or *wet SAMEN*, adopted on 23 April 1998 and entered into force on 1st January 1998. This law was terminated in 2004.

were required to publish on a yearly basis a report on the number of people belonging to “ethnic minorities” in their workforce, with a view to achieving a multicultural workplace. Moreover, they had to define an action plan aimed at promoting equality for ethnic minorities. This obligation however was terminated by Dutch authorities in 2004 but companies can still carry out ethnic monitoring on a voluntarily basis.²⁹

Besides, in certain countries, positive action or affirmative action may take the form of granting preferential treatment to members of disadvantaged groups, as is the case in the United States with affirmative action programs designed to promote access for discriminated groups to higher education and employment.³⁰ These modalities necessarily imply the processing of data on racial or ethnic affiliation or origin in order to identify the potential beneficiaries of the programs. EU countries, however, remain reluctant to adopt comparable schemes, except with regard to professional integration of women.³¹

Finally, statistical data may be crucial to enable victims to prove discrimination in legal proceedings. The famous *Griggs v. Duke Power Co.* case (1971),³² generally considered as the first “disparate impact” decision of the US Supreme Court under the Employment Title (Title VII) of the Civil Rights Act 1964, inevitably comes to mind. At stake was the Duke Power Company’s policy of requiring employees who wanted to work in all but the lowest paying labor department to have a high school education and to register a minimum score on two separate aptitude tests. The Court observed that this policy produced a disproportionate adverse impact (or disparate impact) on African-American employees. Indeed, census data showed that in the state concerned, only 12% of African-American males had completed high school, compared with 34% of white males. In addition, EEOC had found that 58 % of white managed to pass the tests while only 6% of blacks did so. Accordingly, the Court asked whether the measure was justified by “business necessity”. Having found that this was not the case, it held the challenged policy to be in violation of the applicable provision of the Civil Rights Act. Importantly, absent statistical data, the Court would not have been able to detect that the contested rule, although neutral in appearance, had a disproportionate adverse impact on African-Americans. The Court held in *Griggs* that when statistics indicate that a rule or practice produces a disparate impact on the members of a racial group, the burden

²⁹ See Virginie Guiraudon, Karen Phaet, and Jessica ter Wal, Monitoring Ethnic Minorities in the Netherlands, 183 *International Social Sciences Journal* 75 (2005).

³⁰ The literature on affirmative action and its various modalities is huge. See, among many others, Samuel Leiter and William M. Leiter, *Affirmative Action in Antidiscrimination Law and Policy – An Overview and Synthesis* (State University of New York Press, 2002); Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (Yale University Press, 1993).

³¹ The European Court of Justice (ECJ) can specify the conditions under which special measures adopted by member states and involving preferential treatment are compatible with the principle of antidiscrimination under EU law. To this date, this question has only arisen before the ECJ in the context of measures established in favor of women. On this case-law, see Olivier De Schutter, Three Models of Equality and European Anti-discrimination Law, 57 *Northern Ireland Quarterly* 1, 35-46 (2006); Miguel Poiarés Maduro, The European Court of Justice and Anti-discrimination Law, 2 *European Anti-discrimination Law Review* 21 (2005).

³² *Griggs v. Duke Power Co.*, 410 U.S. 424 (1971).

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 the adverse impact doctrine has been considerably restricted by the U.S. Supreme Court in subsequent case law,³³ the notion was embraced in EU law under the name of “indirect discrimination”.³⁴ It emerged in the European Court of Justice (ECJ) case-law related to sex discrimination³⁵ 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 sex.³⁶ 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”.³⁷ 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 concept of indirect discrimination was enshrined in the 2000 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”.³⁸ Unlike the definition contained in the

³³ *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 Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 UCLA Law Review 701 (2006).

³⁴ Mary Finlay, Indirect Discrimination and the Article 13 Directive, in Costello and Barry, supra note 23, at 135-150; Titia Loenen, Indirect Discrimination: Oscillating Between Containment and Revolution, in Titia Loenen and Peter R. Rodrigues (eds), Non-Discrimination Law: Comparative Perspectives 195-211 (Martinus Nijhoff, 1999).

³⁵ See *inter alia* Finlay, supra note 34, at 137-144; Olivier 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 Emmanuelle Bribosia, Emmanuelle Dardenne, Paul Magnette and Anne Weyembergh (eds), Union européenne et nationalités 11-44 (Bruylant, 1999).

³⁶ OJ L 14 of 20 January 1998, p. 6.

³⁷ Article 2(2) of Directive 97/80, my emphasis.

³⁸ Article 2(2)b of Directive 2000/43/EC, my emphasis. See also Article 2(2)b of Directive 2000/78/EC. This new definition has been enshrined, *mutatis mutandis*, in Directive 76/207/EEC as amended in 2002 and as recast in 2006 (see art. 2(2) of Directive 76/207/EEC, as amended by art. 1(2) of Directive 2002/73/EC of 23 September 2002; and, now, art. 2(1)(b) of Directive 2006/54/E 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 (describing 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”). It also is the definition of indirect discrimination mentioned in Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (see art. 2(b)

abovementioned 1997 Burden of Proof Directive, this understanding of indirect discrimination does not necessarily depend upon statistics. It rests on the idea that certain apparently neutral measures are in fact inherently suspect, because they impose a particular disadvantage on certain protected categories of individuals. This is the case, for instance, where a regulation limits the benefit of funeral payment by a public Social Fund to funerals taking place within the national territory: the consideration that foreign residents are much more likely than national citizens to wish to be buried abroad, in their home country, suffices to create a presumption of indirect discrimination against foreign citizens.³⁹ There is no need to produce statistics to establish this fact. This broader approach – inspired by the ECJ case-law in the area of free movement of workers⁴⁰ – was favored to facilitate the task of the victims, by offering them the possibility to prove indirect discrimination by other means than statistics. Indeed, it appeared during the drafting of the Directive that finding statistics broken down by racial or ethnic origin would be problematic in a number of EU member states.⁴¹ Paradoxically, however, while containing an *a priori* wider notion of indirect discrimination, the Directive leaves it to the states to decide whether or not to allow complainants to adduce statistics in courts to establish a presumption of discrimination. Nevertheless, 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*.”⁴²

1.2. The Implications of Statistics for Antidiscrimination

The rise of statistics in the field of antidiscrimination signals an important change in the way discrimination is conceived. 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

of Directive 2004/113/EC). However, Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (supra note 38) remains in force. Besides, the Gender Recast Directive (Directive 2006/54/EC) contains an interesting reference to statistics: “[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).

³⁹ See ECJ, *O’Flynn v. Adjudication Officer* Case C-237/94 [1996] ECR I-2617.

⁴⁰ *O’Flynn v. Adjudication Officer*.

⁴¹ Christopher McCrudden, *Theorising European Equality Law*, in Costello and Barry, supra note 23, 1-38, at 30; Sandra Fredman, *Equality: A New Generation?*, 30(2) *Industrial Law Journal* 162 (June 2001); Catherine Barnard, *The Changing Scope of the Fundamental Principle of Equality?*, 46 *McGill Law Journal* 955, 970 (2001). In addition, the use of statistical data as a means of proof in discrimination litigation may raise controversies in relation to the way the relevant pool of comparison should be measured and the adverse impact assessed: see Dagmar Schiek, *Indirect Discrimination*, in Schiek, Waddington and Bell, supra note 23, 323-475, at 397-423.

⁴² Preamble of Directive 2000/43/EC and Directive 2000/78/EC, § 15, my emphasis. Olivier De Schutter emphasizes that 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. (De Schutter, *Three Models of Equality*, supra note 31, at 14-16).

structural, systemic or institutional character in a society.⁴³ It supposes acknowledging that discrimination may be unconscious⁴⁴, that it can be embedded in certain habits or practices that have never been questioned,⁴⁵ and that putting these phenomena into light requires looking beyond individual cases and comparing the situation of groups.⁴⁶ This conception draws upon social science studies on race relations which, beginning in the 1960s in the U.S., have stressed the “institutional” and “structural” factors in the exclusion of Blacks and other minorities, in addition to prejudiced discrimination. In the 1969 seminal book *Institutional Racism in America*, edited by Louis Knowles and Kenneth Prewitt, “institutional racism” is described as referring to situations where:

the individual generally does not have to exercise a choice to operate in a racist manner. The rules and procedures of the large organizations have already prestructured the choice. The individual only has to conform to the operating norms of the organization and the institution will do the discriminating for him.⁴⁷

In the United Kingdom, the notion of “institutional discrimination” has become widely used after it was given a central place in the report on the official inquiry into the death of Stephen Lawrence, known as the “MacPherson Report”. In it, institutional discrimination is defined as

The collective failure of an organization to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.⁴⁸

⁴³ Simon, *supra* note 8, at 28; Craig, 2007, *supra* note 24, 90-124. Susan Strum talks about “second generation discrimination”: S. Sturm, “Second Generation Employment Discrimination: A Structural Approach”, 101 *Columbia L. Rev.* 458 (2001). On the notion of “institutional discrimination” as developed in U.S. and U.K. legal scholarship, see Christopher McCrudden, *Institutional Discrimination*, 2(3) *Oxford Journal of Legal Studies* 303 (Winter 1982). See also Fredman, *supra* note 26, at 164 (discussing the notion of “positive duty” to promote equality, introduced by the U.K. Race Relations (Amendment) Act 2000).

⁴⁴ See in particular Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 *Stanford L. R.* 317 (1987).

⁴⁵ 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 must come down if equal opportunity and non-discrimination are ever genuinely to become the country’s law and practice.” (*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), here at 274).

⁴⁶ See *inter alia* McCrudden, *Theorising European Equality Law*, *supra* note 43, at 22-28. See also the classic article of Owen M. Fiss: *Groups and the Equal Protection Clause*, 2 *Philosophy and Public Affairs* (Winter 1976), reprinted in Marshall Cohen, Thomas Nagel, and Thomas Scanlon (eds), *Equality and Preferential Treatment* 84-154 (Princeton University Press, 1977).

⁴⁷ Harold Baron, *The Web of Urban Racism*, in Louis Knowles and Kenneth Prewitt (ed.), *Institutional Racism in America* 134-176, at 142-143 (Englewood Cliffs, 1969).

⁴⁸ Report of an inquiry by Sir William MacPherson of Cluny, London, The Stationery Office, CM 4262-I, para. 6.34 (1999). On the notion of “institutional discrimination”, see Christopher McCrudden, *Institutional Discrimination*, 2(3) *Oxford Journal of Legal Studies* 303 (Winter 1982). Other authors, like Craig, use the phrase “systemic discrimination” to refer to basically the same phenomenon. See Craig, 2007, *supra* note 24, 115.

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.⁴⁹

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 weaknesses and limitations. First and foremost, they do not provide explanations for what they measure.⁵⁰ Statistical tools, therefore, must be complemented with other types of information, which can better illuminate the nature and operation of the discrimination phenomenon. These other approaches include victim surveys, attitude surveys and discrimination testing.⁵¹ 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.”⁵²

1.3. The Modalities of Racial or Ethnic Data Collection

Data useful for antidiscrimination policies can thus be collected by different actors, at various levels, and through a variety of methods. These distinctions are important to point out, as they may impact on the assessment of the legal implications entailed by the processing of data revealing racial or ethnic origin.

First, such data may be collected by public authorities. In certain states, for instance the U.S. and the U.K., information on racial or ethnic affiliation or origin is requested in the census, while in other countries, like the Netherlands, 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 (although it can be processed anonymously to produce statistics). In addition, public statistical agencies produce surveys based on population samples, which cover specific issues in more detail than censuses, such as the Labor Force Survey (LFS)

⁴⁹ Alain Desrosières, *La politique des grands nombres – Histoire de la raison statistique*, especially at 22 and 249 (La Découverte, 2000). On the relations between official statistics and modern government, see also Paul Starr, *The Sociology of Official Statistics*, in William Alonso and Paul Starr (eds), *The Politics of Numbers 7-57* (Russel Sage Foundation, 1987).

⁵⁰ See Reuter, Makkonen and Oosi, *supra* note 8, at 20-21. See also Paul Gordon, *The Racialization of Statistics*, in Richard Skellington with Paulette Morris, ‘Race’ in Britain Today, 20-42, at 40 (Sage Publication, Thousand Oaks, 1996).

⁵¹ See the different data collection methods discussed in Reuter, Makkonen and Oosi, *supra* note 8, at 20-26 and in Olli and Olsen (eds), *Common Measures for Discrimination II*, *supra* note 8, at 34-47.

⁵² Reuter, Makkonen and Oosi, *supra* note 8, at 4-5.

and the Survey on Income and Living Conditions (SILC).⁵³ Furthermore, apart from the population register (which does not exist in every country), there are a number of administrative registers where information required for the administration of areas such as social security, taxation or education, is inserted. Data available in these registers could possibly be used to highlight inequalities and potential discrimination. Moreover, where public authorities are required to carry out ethnic monitoring, data will be collected at the level of public institutions.

Second, private employers may also have reasons to collect information on the racial or ethnic background of their staff. This may be the case where they have adopted an equality plan and wish to monitor the situation of their staff in order to assess the plan's impact or where they want to rebut a legal accusation of indirect discrimination. Researchers then need to gather information on peoples' racial or ethnic affiliation or origin to be able to study discrimination experience, processes and impact. The same can be said of independent equality bodies, like the EEOC in the US and the Equality and Human Rights Commission in the UK. In this regard, Article 13 of the Race Directive creates an obligation for each member state to designate a body tasked with promoting equal treatment of all persons without discrimination on the grounds of racial or ethnic origin; and the competences of these bodies shall include the conducting of independent surveys concerning discrimination.⁵⁴ Accordingly, the Netherlands has designated the Equal Treatment Commission (*Commissie Gelijke Behandeling*)⁵⁵ as its equality body while France created in 2004 the High Authority for the Struggle Against Discrimination and for Equality (*Haute autorité de lutte contre les discriminations et pour l'égalité*).⁵⁶ Finally, racial or ethnic data may attract interest from non governmental organizations who seek to publicly denounce discrimination or help individuals victims establish their allegation of discrimination in Court.

Where public or private institutions practice ethnic monitoring, they usually use surveys, based on questionnaires distributed to the persons concerned, which may or may not be filled in anonymously; these surveys may be comprehensive or sample-based. Researchers, equality bodies and NGO's also largely rely on surveys, through written questionnaires or interviews. In addition, academics, NGO's as well as the British Commission on Racial Equality have resorted to a particular method for collecting information on the existence of discrimination, called "situation testing". It consists in "a form of social

⁵³ Makkonen, Measuring Discrimination, supra note 8, at 14.

⁵⁴ Directive 2000/43/EC, Article 13(2). The competences of these bodies shall also include providing independent assistance to victims of discrimination in pursuing their complaints about racial or ethnic discrimination; publishing independent reports and making recommendations on any issue relating to such discrimination.

⁵⁵ The Equal Treatment Commission was created in 1994 pursuant to section 11 of the 1994 Equal Treatment Act (*Algemene wet gelijke behandeling*). See Virginie Guiraudon, Karen Phalet, and Jessica Ter Wal, Comparative Study on the Collection of data to Measure the Extent and Impact of Discrimination – Report on the Netherlands, European Commission, DG Employment, Social Affairs and Equal Opportunities, at 6-7 (2004), available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (last accessed: August 2008).

⁵⁶ Law No. 2004-1486 of 30 December 2004 creating the High Authority for the struggle against discrimination and for equality (*Loi No. 2004-1486 du 30 décembre 2004 portant creation de la haute autorité de lutte contre les discriminations et pour l'égalité* (JORF No. 304 of 31 December 2004, p. 22567)).

experiment in a real life situation”:⁵⁷ 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 allow for the use of situation testing to prove a breach of the principle of equal treatment. These include France,⁵⁸ despite the traditional hostility in this country to collecting data on racial or ethnic background.

Another relevant distinction is that between “primary” and “secondary” collection. Primary data collection consists in the original collection of data, which are obtained from the persons concerned, from people close to them who reply in their place, or by means of observation. Secondary data collection, on the other hand, refers to the processing of data that is already in the possession of an entity, because it has been collected at an earlier point in time for other purposes.⁵⁹

Finally, 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, such as 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

⁵⁷ Reuter, Makkonen and Oosi, *supra* note 8, at 24 and Makkonen, *Measuring Discrimination*, *supra* note 8, at 30-31. On this technique of proof, see *inter alia* Olivier De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d’emploi*, at 85-88 (P.I.E. Peter Lang ed., 2001). 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, for the results of the comparative study, Roger Zegers de Beijl (ed.), *Documenting Discrimination against Migrants Workers in the Labour Market. A comparative study of four European countries* (ILO ed., 2000). This methodology has also been used to study discrimination against migrant workers in the United States: J. Bendick (Jr.), *Discrimination against Racial/Ethnic Minorities in Access to Employment in the United States: Empirical Findings from Situation Testing*, *International Migration Papers* No. 12, International Labour Office (1996).

⁵⁸ 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). This possibility has then been enshrined in the law: see Article 225-3-1 of the French Penal Code, introduced by article 45 of Law no. 2006-396 of 31 March 2006 on equal opportunities (*Loi No. 2006-396 du 31 mars 2006 pour l’égalité des chances.*)

⁵⁹ Makkonen, *Measuring Discrimination*, *supra* note 8, at 14.

census or population registers, one can identify instances of under-representation, potentially due to discrimination, taking into account, if relevant, diploma's and qualifications.⁶⁰

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.”⁶¹ Anonymous surveys based on population samples or situation testing can also provide useful information for identifying certain forms of discrimination. However, only the combination of data on the entire population and at the level of institutions or companies permits to detect, on a continuous and systematic basis, whether certain groups are under-represented in specific institutions or companies, as well as to evaluate employers' practices and measure progresses.

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.⁶² The most comprehensive legislation is the Privacy Act of 1974,⁶³ 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.⁶⁴ While authorizing the Census Bureau to conduct census and surveys, this law

⁶⁰ See Simon, *supra* note 8, at 38-39.

⁶¹ Ethnic Monitoring – A Guide for Public Authorities, *supra* note 20, at 22.

⁶² For a general account of privacy laws in the U.S., see Privacy International and Electronic Privacy Information Centre, 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 August 2008). For a comparison of U.S. and European approaches to data privacy, see Francesca Bignami, Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network, 26 Mich. J. Int'l. L. 807 (Spring 2005); Joel R. Reidenberg, Resolving Conflicting International Data – Privacy Rules in Cyberspace, 52 Stanford L. R. 1315 (May 2000); Paul M. Schwartz, Privacy and Participation: Personal Information and Public Sector Regulation in the United States, 80 Iowa Law Review 553 (1995).

⁶³ 5 U.S.C. § 552a(2000).

⁶⁴ Public Law 13, 71st Congress, June 18, 1929.

protects the confidentiality of all information collected under the authority of the same Title.⁶⁵ 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.⁶⁶ In fact, certain types of personal data are also considered sensitive under US privacy legislation and benefit accordingly from a higher level of protection; but the information concerned include mainly financial and medical information, not racial or ethnic ones.⁶⁷ 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 origin⁶⁸. 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.⁶⁹ In any case, the initiative was defeated with 64 percent of the vote.⁷⁰

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,⁷¹ 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.⁷² Yet it is essential to

⁶⁵ See the information provided on the U.S. Census Bureau’s website: http://www.census.gov/privacy/files/data_protection/002777.html (last accessed: August 2008). 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 Ann Morning and Daniel 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, at 36 (May 2004), available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (last accessed: August 2008). Sylvester and 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 Douglas J. Sylvester and Sharon Lohr, *The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice*, 83 *Denver University Law Review* 147 (2005).

⁶⁶ Morning and Sabbagh, *supra* note 65, at 37.

⁶⁷ Sylvester and Lohr, *supra* note 65, at 195.

⁶⁸ The text of the Proposition is available at http://www.adversity.net/RPI/rpi_mainframe.htm (last accessed: August 2008).

⁶⁹ See Richa Amar, *Unequal Protection and the Racial Privacy Initiative*, 52 *UCLA Law Review* 1279 (2005).

⁷⁰ Amar, *supra* note 69, at 1281.

⁷¹ Lee A. Bygrave, *Data Protection Law – Approaching its Rationale, Logic and Limits*, at 108-109 (Kluwer, 2002).

⁷² See William Seltzer, *Population Statistics, the Holocaust, and the Nuremberg Trials*, 24(3) *Population and Development Review* 511 (September 1998); and William Seltzer, *On the Use of Population Data Systems to Target Vulnerable Population Subgroups for Human Rights Abuses*, 30 *Coyuntura Social* (2005).

emphasize the double-edged nature of racial or ethnic data.⁷³ Like other types of personal 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.”⁷⁴ 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 denounce such situations and claim equal access to economic, social and political resources.⁷⁵ 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 relating to racial or ethnic origin. Rather, they severely restrict it by laying down stringent conditions that are additional to the general safeguards governing 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. It 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.⁷⁶ The first European legally binding document dealing specifically with personal data protection was 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 (hereinafter the “Personal Data Directive”).⁷⁷ 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

⁷³ Ivan Székely, “Counting or Numbering? Comparative Observations and Conclusions Regarding the Availability of Race and Ethnic Data in Some European Countries”, in Kriszan, *supra* note 8, 267-282, at 279.

⁷⁴ Seltzer, *On the Use of Population Data Systems*, *supra* note 72.

⁷⁵ See Jean-Louis Rallu, Victor Piché and Patrick Simon, *Démographie et ethnicité: une relation ambiguë*, in Graziella Caselli, Jacques Vallin et Guillaume Wunsch (eds), *Démographie: analyse et synthèse*, t. VI Population et société 481-515, 485 (éditions de l’Institut national d’études démographiques, 2004); Melissa Nobles, *Shades of Citizenship – Race and the Census in Modern Politics* (Stanford University Press, 2000).

⁷⁶ See Eur. Ct. H.R. (GC), *Rotaru v. Romania*, Judgment of 4 May 2000 (Appl. No. 28341/95), para. 43.

⁷⁷ OJ L 281 of 23 November 1995, p. 31.

and reproclaimed in December 2007 at the Lisbon Summit,⁷⁸ 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.⁷⁹ Among them, Recommendation No. (97)18E concerns the protection of personal data collected and processed for statistical purposes⁸⁰ and Recommendation No. (91)10E the communication to third parties of personal data held by public bodies.⁸¹ Both the Council of Europe Convention and the Personal Data Directive set out general rules applicable to the processing of all sorts of personal data (2.2.1); and, in addition, defined stricter requirements to be respected when treating special categories of data considered especially sensitive, which include data revealing racial or ethnic origin (2.2.2.).

2.2.1. General Principles

Importantly, 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.”⁸² 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.⁸³

⁷⁸ 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.” Initially, the Charter of Fundamental Rights was proclaimed as a non-legally binding instrument. However, the Lisbon Treaty, signed in December 2007, provides for the insertion in the Treaty on the European Union of a new article 6 which confers to the Charter the same legal value as that of the treaties (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, O.J. C 306 of 17.12.2007, p. 1). At the moment of writing, the Lisbon Treaty has not yet been ratified by all EU member states and is thus not yet in force.

⁷⁹ See Joseph A. Cannataci and Jeanne Pia Mifsud-Bonnici, *Data Protection Comes of Age: The Data Protection Clauses in the European Constitutional Treaty*, 14(1) *Information & Communication Technology Law* 5, at 7 (2005).

⁸⁰ Adopted by the Committee of Ministers on 30 September 1997.

⁸¹ Adopted by the Committee of Ministers on 9 September 1991.

⁸² Directive 95/46/EC, article 2(a).

⁸³ Makkonen, *Measuring Discrimination*, supra note 8, at 53.

Considering the data collection methods reviewed in the earlier section, some do involve the treatment of personal data and therefore engage data protection laws, but other do not. 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.⁸⁴ As far as sample surveys are concerned, Timo Makkonen notes that while they "are generally rendered anonymous at an early stage, the conducting of surveys usually requires 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 form, they do not, as a rule, constitute personal data anymore and are therefore not concerned with by the data protection laws."⁸⁵

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,⁸⁶ based on 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 themselves 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."⁸⁷ 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.⁸⁸ "Rather than giving exclusive control or a property interest to the data subject, the right of informational self-determination compels the State to organize data processing so that personal autonomy will be

⁸⁴ Makkonen, *Measuring Discrimination*, supra note 8, at 53.

⁸⁵ Makkonen, *Measuring Discrimination*, supra note 8, at 53.

⁸⁶ 65 BVerfGE 1, decision of 15.12.1983. On the legal and social background to this decision, see Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Rights of Informational Self-Determination*, 37 *American Journal of Comparative Law* 675, at 686-689 (1989); and David H. Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada and the United States*, at 79-83 (The University of North Carolina Press, 1989).

⁸⁷ 65 BVerfGE 1, at 42-43, as quoted by Schwartz, supra note 77, at 690.

⁸⁸ On the notion of informational self-determination, see Bygrave, supra note 71, at 63 and 117-118; Edward J. Eberle, *The Right to Information Self-Determination*, 4 *Utah L. Rev.* 965 (2001); Paul Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 *Iowa L. Rev.* 553 (1995); Schwartz, *The Computer in German and American Constitutional Law*, supra note 86.

respected.”⁸⁹ 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.⁹⁰

These notions are reflected in Council of Europe Convention n°108 as well as in Directive 95/46/EC.⁹¹ 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.⁹² 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.⁹³ Among the general principles applicable to all kind of personal data, a first fundamental requirement is that they must be processed fairly and lawfully.⁹⁴ The principle of fairness entails a requirement of proportionality: the processing must be carried out in a manner that does not interfere unreasonably with the privacy and autonomy of the data subject (i.e. the individual about whom data is held).⁹⁵ 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.⁹⁶ The data collected must be adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed.⁹⁷ Furthermore, the data must be accurate and, where necessary, kept up to date.⁹⁸ 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.⁹⁹ Moreover, the data

⁸⁹ P. Schwartz, *The Computer in German and American Constitutional Law*, supra note 86, at 690.

⁹⁰ Ibid. The German Federal Constitutional Court made application of this doctrine in its 4 April 2006 decision, where it held that the “*Rasterfahndung*” – the massive data mining operation developed in 2001-2003 with a view to uncover dormant terrorist cells on German territory, based on information on the age, religion, national origin or status of residents – was in violation of the individual’s fundamental rights of self-determination over personal information, guaranteed by Article 2(1) and 1 of the German Constitution (1 BvR 518/02). On the relation between ethnic profiling and personal data protection, see Olivier De Schutter and Julie Ringelheim, *Ethnic Profiling: A Rising Challenge for European Human Rights Law*, 71(3) *Modern Law Review* 358 (2008).

⁹¹ See Bignami, supra note 64, at 818.

⁹² For an analysis of Directive 95/46/EC, see Bygrave, supra note 71, 57-69; Bignami, supra note 64, at 819; Spiros Simitis, *From the Market to the Polis: The EU Directive on the Protection of Personal Data*, 80 *Iowa L. Rev.* 445 (1995); and Graham Pearce and Nicholas Platten, *Achieving Personal Data Protection in the European Union*, 36 (4) *Journal of Common Market Studies* 529 (December 1998).

⁹³ 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.

⁹⁴ Directive 95/46/EC, article 6(1)(a). See also Council of Europe Convention, Article 5(a).

⁹⁵ Makkonen, *Measuring Discrimination*, supra note 8, at 55.

⁹⁶ Directive 95/46/EC, article 6(1)(b). See also Council of Europe Convention, Article 5(b).

⁹⁷ Directive 95/46/EC, article 6(1)(c). See also Council of Europe Convention, Article 5(c).

⁹⁸ Directive 95/46/EC, article 6(1)(d). See also Council of Europe Convention, Article 5(d).

⁹⁹ Directive 95/46/EC, article 6(1)(e). See also Council of Europe Convention, Article 5(d).

subject should be informed of the processing and its purpose¹⁰⁰, and must have the right to access to and rectify data concerning him.¹⁰¹ States have to ensure that appropriate security measures are taken to protect personal data against unlawful forms of processing.¹⁰²

The European Union Directive also contains a 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.¹⁰³ Such safeguards must in particular rule out the use of the data to take decisions on data subjects.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

¹⁰⁰ Directive 95/46/EC, articles 10 and 11.

¹⁰¹ Directive 95/46/EC, article 12. See also Council of Europe Convention, article 8(c).

¹⁰² Directive 95/46/EC, article 17(1). See also Council of Europe Convention, article 7.

¹⁰³ 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.

¹⁰⁴ Directive 95/46/EC, Preamble, § 29.

¹⁰⁵ See Makkonen, *Measuring Discrimination*, supra note 8, 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 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).

¹⁰⁶ 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”.

¹⁰⁷ Olivier De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d’emploi*, at 33-52 (P.I.E. Peter Lang ed., 2001).

Under the Council of Europe Convention, sensitive data “may not be processed automatically unless domestic law provides appropriate safeguards”.¹⁰⁸ 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. To begin with, the processing of sensitive data is not prohibited when the data subject has given his explicit consent to the processing of those data.¹⁰⁹ The data subject’s consent is understood as “a freely given specific and informed indication of his wishes by which he signifies his agreement to personal data relating to him being processed”.¹¹⁰ This exception could provide a ground for allowing the processing of sensitive data for the purpose of racial or ethnic monitoring in public or private institutions, insofar as the consent given by employees on which data are collected can be said to be freely given, specific and informed. The laws of the Member State can however provide that the prohibition on sensitive data collection may not be lifted by the data subject’s giving his consent. The question has been raised whether in the context of employment relationship, the worker’s consent to the processing of sensitive data concerning him or her can ever be considered valid given the power imbalance between the processor (the employer) and the data subject (the worker).¹¹¹ For instance, under Belgian law, in employment relationship, the written consent of data subject cannot constitute a justification for processing sensitive data.¹¹² Yet, this does not apply where the data processing is justified by the need to grant an advantage to the concerned worker: in such case, the data subject’s consent can legitimate the collection of sensitive data concerning him or her.¹¹³ This example casts an interesting light on the debate over the validity of consent to sensitive data processing in employment context. The fundamental reason why some doubt the data subject’s consent could be deemed sufficiently “free” in employment relationships to allow such processing is that the employer is able to deny a position or disadvantage a candidate or worker who refuses to provide the information he requests. But where data are collected for ethnic monitoring or implementation of positive action, the risk that the employer would seek to coerce an individual into giving sensitive information about him or her does not seem to arise, as he will proceed to the data collation not out of his or her own interest but rather to promote equality and, in many case, to comply with obligations imposed on him by law. The purpose of the collection being to combat discrimination, workers have *a priori* no reason to fear that the information provided will be used to harm them.

¹⁰⁸ Council of Europe Convention, Article 6.

¹⁰⁹ Directive 95/46/EC, article 8 (2) (a).

¹¹⁰ Directive 95/46/EC, article 2(h).

¹¹¹ On this debate, see Olivier De Schutter, *La protection du travailleur vis-à-vis des nouvelles technologies dans l’emploi*, 54 *Revue trimestrielle des droits de l’homme* 627 (April 2003) and Opinion No. 8/2001 on the processing of personal data in the employment context, WP 48, 5062/01, 13 September 2001.

¹¹² Article 27 of the Executive Decree of 13 February 2001 implementing the Law of 8 December 1992 relating to the protection of private life with respect to the processing of personal data (*Arrêté royal portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l’égard des traitements de données à caractère personnel*, *Moniteur belge*, 13.3.2001).

¹¹³ Art. 27, al. 2 of the Executive Decree of 13 February 2001.

In any case, other exceptions mentioned in Article 8(2) of the Directive permit to process sensitive data even without the consent of the data subject. In particular, the processing of sensitive data can be allowed 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.¹¹⁴ A third relevant exception is where the processing is necessary for the establishment, exercise or defense of legal claims.¹¹⁵ Thus, a person who claims to be the victim of discrimination could in principle avail herself of this provision to be allowed to collect data related to racial or ethnic origin that are necessary to enable her to prove discrimination. Conversely, it can be argued that where a complainant has managed to establish a presumption of discrimination against an employer or another agent, the latter should be allowed to defend himself or herself and rebut this presumption by producing statistical data which tend to demonstrate that no discrimination has occurred.

In sum, Article 8(2) of the Personal Data Directive makes 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.¹¹⁶ 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 of sensitive data where this is required to combat discrimination and promote equality, as these objectives certainly qualify as "substantial public interest". It is precisely on this basis that ethnic monitoring has been justified in the United Kingdom.¹¹⁷ 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.¹¹⁸ The Dutch Data Protection Act transposing the European Directive (*Wet bescherming persoonsgegevens*, 2000) also contains a specific

¹¹⁴ Directive 95/46/EC, article 8 (2) (b).

¹¹⁵ Directive 95/46/EC, Article 8 (2) (e).

¹¹⁶ For an analysis of the relevance of these exceptions for the issue of data collection in equality policies, see De Schutter, *Three Models of Equality*, supra note 31, at 28-32. See also Makkonen, *Measuring Discrimination*, supra note 8, at 58-61.

¹¹⁷ Makkonen, *Measuring Discrimination*, supra note 8, at 61.

¹¹⁸ Paragraph 9, Schedule 3 of the Data Protection Act 1998.

exception to this effect but sets out different conditions.¹¹⁹ 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.¹²⁰

It follows from the above discussion that 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 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.

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, I examine in this section the various methods used to classify individuals in categories reflecting racial or ethnic affiliation or origin. I first show 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. As will be seen, the U.S., the U.K. and the Netherlands have all developed their own system

¹¹⁹ 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 (last accessed: August 2008).

¹²⁰ Data Protection Act, Article 18.

of categories and classification methods. Additionally, the case of France is 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 form of ethnic discrimination measurement mechanisms. (3.2.). Finally, in light of examination of states' practices, I discuss the tensions and dilemmas entailed by the enterprise of racial or ethnic classifications for antidiscrimination purposes. (3.3).

3.1. Categories and Classifications

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.”¹²¹ As emphasized by Michael Banton, the meaning attributed to the word “race” has shifted throughout history, as new modes of explanation of human variation have arisen.¹²² 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.¹²³ “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 (...).”¹²⁴ This understanding of race served to justify domination, exploitation and even extermination.¹²⁵ These appalling pseudo-scientific theories were refuted throughout the 20th century. There is a 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.¹²⁶ This approach to racial phenomenon is epitomized by the rise of the “racialization” concept in social science, described by Karim Murji and John

¹²¹ John Rex, *Race Relations in Sociological Theory, The Theoretical Problem Stated*, (Routledge, 1970), reprinted in Les Back and John Solomos (eds), *Theories of Race and Racism – A Reader* 119-124, at 119 (Routledge, 2000).

¹²² Michael Banton, *The Idiom of Race – A Critique of Presentism*, in Back and Solomos, *supra* note 121, 51-63, at 51. For a more thorough study of the successive modes of theorizing race, see Michael Banton, *Racial Theories*, (Cambridge University Press, 1998).

¹²³ Robert Miles, *A Propos the Idea of ‘Race’ ... Again*, in Back and Solomos, *supra* note 121, 125-143, at 125.

¹²⁴ *Id.*, at 137.

¹²⁵ Rex, *supra* note 121, at 119. See also Barbara J. Fields, *Slavery, Race and Ideology in the United States of America*, *New Left Review* 95 (1990).

¹²⁶ Karim Murji and John Solomos, *Introduction: Racialization in Theory and Practice*, in Karim Murji and John Solomos (eds), *Racialization – Studies in Theory and Practice* 1-27, at 1 (Oxford University Press, 2005). This view is also endorsed by legal scholars associated with the Critical Race Theory Movement: see Ian F. Haney Lopez, *The Social Construction of Race: Some Observation on Illusion, Fabrication, and Choice*, 29 *Harv. C.R.-C.L. L. Rev.* 1 (1994).

Solomos as “the processes by which ideas about race are constructed, come to be regarded as meaningful, and are acted upon”.¹²⁷ Yet, although socially constructed, “race” continues to have serious impact on social relations, representations and practices.¹²⁸ 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.¹²⁹ It is therefore possible for there to be “racial discrimination” but no separate races in the biological sense of the term.¹³⁰ Besides, in some countries, race, however it is understood, is reclaimed by certain groups as a basis for their collective identity.¹³¹ It needs also be observed that the term “race” in common language has a varying connotation depending on 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 everyday 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.”¹³²

While race is largely grounded on phenotypical differences, typically skin color, “ethnicity” is generally understood as based on cultural ties and commonality of descent. The terms “ethnicity” and “ethnic group” find their origin in the writings of 19th century anthropologists and ethnologists who were studying people living in “exotic”, i.e. non-Western, societies. But in the 1960s, the concept of “ethnicity” has acquired a central place in the U.S. in academic and political debates on the diversity of U.S. society. From then on, it has been used to refer to communities of immigrants and descendants of immigrants who had maintained a specific cultural identity. Adopted by British social scientists, “ethnicity” and “ethnic minorities” have come to designate in the European context immigrants and descendants of immigrants originating from non-Western countries, in particular former colonized countries.¹³³ Nonetheless, there is no consensus among social scientists about how exactly it should be defined.¹³⁴ 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

¹²⁷ Murji and Solomos, *supra* note 126, at 5. In the same vein, Winant proposes the notion of “racial formation processes”. See Howard Winant, *The Theoretical Status of the Concept of Race*, in Back and Solomos, *supra* note 121, 181-190 and Howard Winant, *Race and Racism: Towards a Global Future*, 29(5) *Ethnic and Racial Studies* 986, 987 (2006).

¹²⁸ Martin Bulmer and John Solomos, *Introduction: Re-thinking Ethnic and Racial Studies*, 21(5) *Ethnic and Racial Studies* 819, 823 (September 1998); Winant, *Race and Racism*, *supra* note 127, at 987-989; Howard Winant, *The Theoretical Status of the Concept of Race*, in Back and Solomos, *supra* note 121, at 184.

¹²⁹ Winant, *Race and Racism*, *supra* note 127, at 987.

¹³⁰ Makkonen, *Measuring Discrimination*, *supra* note 8, at 74.

¹³¹ Winant, *Race and Racism*, *supra* note 127, at 987.

¹³² Makkonen, *Measuring Discrimination*, *supra* note 8, at 74.

¹³³ See Marco Martiniello, *L’ethnicité dans les sciences sociales contemporaines* (P.U.F., 1995); Andrea Rea and Maryse Tripier, *Sociologie de l’immigration*, 49-60 (La Découverte, 2003); Albert Bastenier and Felice Dassetto, *Immigration et espace public – La controverse de l’intégration*, 118-128 and 147-155 (CIEMI-L’Harmattan, 1993).

¹³⁴ On the different understandings of ethnicity, see *inter alia* Bastenier and Dassetto, *supra* note 132, 139-147; John L. Comaroff, *Ethnicity, Nationalism, and the Politics of Difference in an Age of Revolution*, in Edwin N. Wilmsen and Patrick McAllister (eds), *The Politics of Difference: Ethnic Premises in a World of Power* 162 (University of Chicago Press, 1996); Rallu, Piché and Simon, *supra* note 75, at 481-482; Andreas Wimmer, *The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory*, 113(4) *American Journal of Sociology* 970 (January 2008).

this differentiation is grounded can vary over time, as a result of changing social, political or economic context.¹³⁵ Also to be stressed, the frontier between the concepts of “race” and “ethnicity” is somewhat hazy. As Kertzer and Arel put it, “[t]he 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”.¹³⁶ 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.”¹³⁷

3.1.2. Classification Criteria

As a matter of policy-making, 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 down. Since race and ethnicity are social constructs, such categories will inevitably depend on the distinctions that have become salient in the society concerned. Relevant categories can thus vary from one country to the other. Second, policy-makers have to define the criteria on which the classification will be based. There are several ways in which individuals can be classified in racial, ethnic or similar categories. Four different approaches can be distinguished:¹³⁸

- 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

¹³⁵ Frederik Barth (ed.), *Ethnic Groups and Boundaries – The Social Organization of Difference*, Oslo, Universitetsforlaget 9-38 (1969).

¹³⁶ David I. Kertzer and Dominique Arel, *Censuses, Identity Formation, and the Struggle for Political Power*, in David I. Kertzer and Dominique Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses 1-42*, 11 (Cambridge University Press, 2002).

¹³⁷ Bulmer and Solomos, *supra* note 128, at 822.

¹³⁸ See Ann Morning, *Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round*, 27(2) *Population Research and Policy Review* 239 (April 2008); Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 *Calif. L. Rev.* 1231, 1239 (1994) and Simon, *supra* note 8, at 35-38.

may not contain a final open category, leaving space for adding a response not included in the list.¹³⁹ 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.¹⁴⁰
- 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. 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.”¹⁴¹ A similar rule has been derived by the Advisory Committee on the Framework-Convention on the Protection of National Minorities¹⁴² from Article 3(1) of this Convention. This provision lays down that every individual belonging to a national (i.e. ethnic, religious, linguistic or cultural) minority shall have the right freely to choose to be treated or not to be treated as such and that no disadvantage shall result from this choice. In the view of the Committee, this right entails that the collection of personal data on

¹³⁹ 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 Morning, *supra* note 138, at 17-18.

¹⁴⁰ 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 Ford, *supra* note 138; Skerry, *supra* note 166, at 8, at 1263.

¹⁴¹ General Recommendation VIII, 38th session, 1990, UN doc. A/45/18 at 79 (1991).

¹⁴² Opened for signature in the framework of the Council of Europe in 1995, it has entered into force on 1st February 1998.

affiliation with a national minority should be based on self-identification.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

This trend is also reflected in national census practices, where self-identification is increasingly used as the criteria for racial or ethnic classification.¹⁴⁶ 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.”¹⁴⁷ 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. Landmark decisions of the U.S. Supreme Court’s case-law provide support for this view. In the 1992 case of *Planned Parenthood v. 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.”¹⁴⁸ 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.¹⁴⁹ Some authors insist more particularly on the

¹⁴³ See for instance Second Opinion of the Advisory Committee on the Framework Convention on Ireland, ACFC/OP/II(2006)007, 6 October 2006, para. 12; Second Opinion on Croatia, ACFC/INF/OP/II(2004)002, 1st October 2004, para. 39; and First Opinion on Italy, ACFC/INF/OP/I(2002)007, 14 September 2001, para. 21. See also Hans-Joachim Heintze, Article 3, in Marc Weller (ed.), *The Rights of Minorities in Europe – A Commentary on the European Framework Convention for the Protection of National Minorities* 107-137, at 119 and 127-128 (Oxford University Press, 2005); and Rainer Hofmann, *The Framework Convention of the Protection of National Minorities: An Introduction*, in Marc Weller, id., 22-23. The Advisory Committee has 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 Heintze, at 130.

¹⁴⁴ See for instance Third report on Finland, CRI(2007) 23, 15 December 2006, para. 102; Third report on Cyprus, CRI(2006) 17, 16 December 2005, para. 99; Third report on Estonia, CRI(2006) 1, 24 June 2005, para. 121 and Third report on the Czech Republic, CRI(2004) 22, 5 December 2003, para. 86.

¹⁴⁵ Durban Declaration and Plan of Action, § 92(a).

¹⁴⁶ See Rallu, Piché and Simon, *supra* note 75, at 500 and 509.

¹⁴⁷ Kertzer and Arel, *supra* note 136, 1-42, at 34.

¹⁴⁸ 505 U.S. 833, 951 (1992).

¹⁴⁹ See in particular Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 Seton Hall Law Review 371, at 381-86 (2003) and references quoted; David A. J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings Law Journal 957, (1979); June A. Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 Harv. C. R.-C.L.L.Rev. 361 (1979); Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410 (1974) (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

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 (...).”¹⁵⁰ Another interesting version of the autonomy-based conception of privacy is that proposed by J. Rubinfeld.¹⁵¹ 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.”¹⁵² In Rubinfeld'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 roles.¹⁵³

Interestingly, since the years 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”.¹⁵⁴ 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.”¹⁵⁵ 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.¹⁵⁶ 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

the right to privacy is based on or amounts to the principle of self-determination include François Rigaux (*La protection de la vie privée et des autres biens de la personnalité* (Bruylant, LGDJ, 1990)); Olivier De Schutter (*La vie privée entre droit de la personnalité et liberté*, *Revue trimestrielle des droits de l'homme* 827 (1999)) and Serge Gutwirth (*Privacy and the Information Age*, transl. by R. Casert (Rowman & Littlefield Publishers, 2002)).

¹⁵⁰ Kahn, *supra* note 149, at 373.

¹⁵¹ Jed Rubinfeld, *The Right to Privacy*, 102 *Harvard Law Review* 737 (1989).

¹⁵² *Id.*, at 784.

¹⁵³ *Id.*, at 805.

¹⁵⁴ Eur. Ct. H.R. (3^d section), *Bensaïd v. United Kingdom*, Judgment of 6 February 2001 (Appl. No. 44599/98), § 47.

¹⁵⁵ Eur. Ct. H.R. (1st section), *Mikulic v. Croatia*, Judgment of 7 February 2002 (Appl. No. 53176/99), § 53.

¹⁵⁶ Eur. Ct. H. R. (4th Section), *Pretty v. United Kingdom*, Judgment of 29 April 2002 (Appl. No. 2346/02), *Rep.* 2002-III, § 61.

details of their identity as individual human beings.”¹⁵⁷ And in *Tysac v. Poland*, it finally states that ‘private life’ encompasses “a right to personal autonomy”.¹⁵⁸

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 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.”¹⁵⁹ On the other hand, in *Mikulic*, what the Court posits is the right of individuals to have certain details of a pre-existing and in a sense “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*.”¹⁶⁰ A different approach to the identity issue surfaces in transsexuals cases. Stressing that there are no conclusive findings as to the nature and cause of transsexualism, the Court puts the emphasis on the importance of having regard to how the concerned person feels about his or her gender identity. To be sure, it also considers of major significance that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief.¹⁶¹ Thus, when it states that the numerous and painful interventions involved in a sex-change surgery and the high level of conviction required to achieve a conversion, demonstrates that the decision of a person to undergo gender re-assignment cannot be arbitrary or capricious,¹⁶² it suggests that the wish to change gender corresponds both to a profound feeling and to a medical need. It is not merely a matter of choice. In *Goodwin v United Kingdom*, the fact that the applicant had undergone a sex re-assignment surgery and that her bodily appearance had therefore been transformed to match her psychological gender identity, was determining in leading the Court to rule that her post-operative sex identity had to be recognized in official documents.¹⁶³ The idea that respect is due to the person’s self-perception and feeling of identity is nevertheless present. It is articulated more clearly in *Van Kück v Germany*, where the applicant complained about the German Courts decision to dismiss her action to

¹⁵⁷ Eur. Ct. H. R. (GC), *Christine Goodwin v. United Kingdom*, Judgment of 11 July 2002 (Appl. No. 28957/95), § 90.

¹⁵⁸ Eur Ct HR (4th section), *Tysiac v Poland*, judgment of 20 March 2007, § 107 (our emphasis). Reference to a ‘right to personal autonomy’ is reiterated by the Grand Chamber in Eur Ct HR (GC), *Evans v. United Kingdom*, judgment of 10 April 2007, § 71. On this evolution of the European Court’s case law, see Jill Marshall, A Right to Personal Autonomy at the European Court of Human Rights, 3 *European Human Rights Law Review* 337-356 (2008). See also N. A. Moreham, The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination, 1 *European Human Rights Law Review* 44-79 (2008).

¹⁵⁹ *Bensaïd v. United Kingdom*, *supra* note 146, § 47.

¹⁶⁰ *Mikulic v. Croatia*, *supra* note 147, § 55, my emphasis.

¹⁶¹ *Goodwin v United Kingdom*, § 82.

¹⁶² *Goodwin v United Kingdom*, § 81.

¹⁶³ *Goodwin v United Kingdom*, § 93.

obtain reimbursement from her private health insurance company for medical expenses for sex-assignment surgery, on the ground that she had not proved the “genuine nature” of her transsexuality. Here, the Court declares that domestic court proceedings “touched upon the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination.”¹⁶⁴ In deciding based on its own evaluation of the applicant’s sexual identity that she was not genuinely female orientated, “the Court of Appeal, on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant, and this without any medical competence.”¹⁶⁵

Now, it is clear that race and ethnicity do not correspond to any “biological truth”; they have no biological basis that would make it possible to determine them 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 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 nationality of the parents. But 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.).

¹⁶⁴ Eur Ct HR (Third section), *Van Kück v. Germany* (Appl. No. 35968/97), judgment of 12 June 2003, para. 73.

¹⁶⁵ *Van Kück v Germany*, para. 81. The Court thus found a breach of Article 8. In a later judgment, the Court also found a violation of Article 8 in the case of an applicant who had undergone partial surgery but was precluded from completing his gender reassignment and obtaining full legal recognition of his post-operative gender, as a result of the failure of the state to pass a law regulating full gender-reassignment surgery. In this judgment, the Court observes that “the circumstances of the case reveal a limited legislative gap in gender-reassignment surgery, which leaves the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the *recognition of his true identity*” (Eur. Ct. H.R. (second section), *L. v. Lithuania* (Appl. No. 27527/03), judgment of 11 September 2007, para. 59 (emphasis added)).

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., racial classifications have always been present in laws and institutions. Under the 1790 First Census Act, ‘free persons’ were to be classified by color. The first census, held in 1790, therefore ranged the inhabitants of the country into “Free White Males”, “Free White Females”, “All Other Free Persons” and “Slaves”. The term “race” appeared for the first time on the census form in 1900, where it was coupled with “color”. From 1950 onwards, only “race” was used.¹⁶⁶ However, the purposes and political uses of these classifications have radically changed. In the first part of U.S. history, racial categorizations were used to segregate and oppress. When the civil rights legislations were adopted in the 1960s, the decision was taken 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.¹⁶⁷

Another distinguishing element of the U.S. model is that “race” constitutes the pivotal concept of its categorization system.¹⁶⁸ 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. In its original version, 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.”¹⁶⁹ Initially, this proposal was supported by most Hispanic organizations. But

¹⁶⁶ Morning and Sabbagh, *supra* note 65, at 42. It should be noted that the labels of racial categories have varied greatly over time (*ibid.*) On race and ethnic categories in the US census and administrative practices, see also Peter Skerry, *Counting on the Census? Race, Group Identity, and the Evasion of Politics* (Brookings Institution Press, 2001); Dvora Yanow, *Constructing “Race” and “Ethnicity” in America – Category-Making in Public Policy and Administration* (M.E. Sharpe, 2003); Melissa Nobles, *Shades of Citizenship – Race and the Census in Modern Politics*, 75-79 (Stanford University Press, 2000); Melissa 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* 43-79, at 49-51 (Cambridge University Press, 2002).

¹⁶⁷ Nobles, *Shades of Citizenship*, *supra* note 166; Simon, *supra* note 8, at 49.

¹⁶⁸ Simon, *supra* note 8, at 56.

¹⁶⁹ Skerry, *supra* note 166, at 40.

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.¹⁷⁰ 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 were adopted by state and local governments as well as private actors and academic researchers.¹⁷¹ They have come to form what David Hollinger calls the “ethno-racial pentagon”, among which residents of the United States are routinely asked to identify themselves and their contemporaries.¹⁷² For Melissa 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.”¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ As was the case before, the “Hispanic origin” question appeared on a separate line.

While until 1960, individuals were classified on the census into racial categories by field enumerators visiting households to ask questions, census classification is now firmly based on self-identification.¹⁷⁷ Yet, self-identification is not the only method used in the U.S. system. In other contexts than census, the classification can rest on visual observation by a third party. According to Peter Skerry, racial and ethnic enrolment data relied on by the Office of Civil Rights at the U.S. Department of Education are often

¹⁷⁰ Skerry, *supra* note 166, at 39-40. On the “Hispanic category”, see also *ibid.*, at 62-66.

¹⁷¹ Michael Omi, *Racial Identity and the State: the Dilemmas of Classification*, 15 *Law & Inequality* 7 (1997); Morning and Sabbagh, *supra* note 65, at 44.

¹⁷² David A. Hollinger, *Postethnic America* (Basic Books, 1995).

¹⁷³ Nobles, *Racial Categorization and Census*, *supra* note 166, at 59.

¹⁷⁴ The “mixed race” or “multiracial” movement in the U.S. is discussed further in the next section (3.3.).

¹⁷⁵ Morning and Sabbagh, *supra* note 65, at 57-63.

¹⁷⁶ 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 Simon, *supra* note 8, at 59.

¹⁷⁷ Skerry, *supra* note 166, at 46. In its 1995 “Standards for the Classification of Federal Data on Race and Ethnicity”, the OMB states: “Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible.” (*Federal Registers*, vol. 60 (August 28, 1995), p. 44692, quoted by Skerry, *supra* note 166, at 46).

based on observation by school officials, although parents identification of their children is also used.¹⁷⁸ In the employment field, employers required to file the EEO-1 report (or ‘Employer Information Report’) – the government form requiring certain employers to provide a count of their employees by job category as well as by ethnicity, race and gender and submit it to the EEOC or OFCC for the purpose of monitoring compliance with antidiscrimination legislation – (see the discussion above, section 1.1), have long been encouraged by federal regulators to rely on observer identification, through informal on-site visual surveys’ conducted by supervisors.¹⁷⁹ Inquiries about employees’ racial or ethnic affiliation were indeed considered too sensitive.¹⁸⁰ 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.¹⁸¹ In addition, it may be asked whether this classification method is in line with the now emerging principle of individual autonomy (see above, section 3.1.3). But in a document published in 2003, the EEOC changes its position with regard to the way employers should collect information on their employees’ racial or ethnic affiliation. It now states 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.”¹⁸² The revision of the EEO-1 report in 2005 also reflects the will to better take into account individuals’ feelings of identity:¹⁸³ a new category titled “two or more races” has been included; “Black” has been renamed as “Black or African American”, “Hispanic” as “Hispanic or Latino”, while the category “Asian or Pacific Islander” has been divided into “Asian” on the one side and “Native Hawaiian or other Pacific Islander” on the other. In addition, the strong favour for the self-identification method, as opposed to visual identification by employers, is confirmed.¹⁸⁴

3.2.2. *Ethnic Classifications in the U.K.*

¹⁷⁸ Skerry, *supra* note 166, at 53.

¹⁷⁹ Morning and Sabbagh, *supra* note 65, at 54; Skerry, *supra* note 166, at 53; Ford, *supra* note 138, at 1245-1252.

¹⁸⁰ Ford, *supra* note 138, at 1250; Morning and Sabbagh, *supra* note 65, at 54.

¹⁸¹ This inconsistency is heavily criticized by Ch. A. Ford: see Ford, *supra* note 138.

¹⁸² EEOC (2003), Federal Register, at 34967, quoted by Morning and Sabbagh, *supra* note 65, at 66.

¹⁸³ M. M. Sheahan, New EEOC Form Reflects Racial Identity Trends, *Employment and Immigration Law – A Supplement to the Connecticut Law Tribune* 4-5 (January 2007).

¹⁸⁴ The Instruction Booklet on the employment information report EEO-1 issued by the EEOC in January 2006 states: “Self-identification is the preferred method of identifying the race and ethnic information necessary for the EEO-1 report. Employers are required to attempt to allow employees to use self-identification to complete the EEO-I report. If an employee declines to self-identify, employment records or observer identification may be used.” This document is available on the EEOC website: <http://www.eeoc.gov/> (last accessed: August 2008).

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.¹⁸⁵ This proposal elicited a vigorous debate about the possibility and legitimacy of asking people 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.¹⁸⁶ The scientific validity of such operation was also contested.¹⁸⁷ 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.¹⁸⁸ 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 noticeably changed: the possibility of having such item on the census was not contested anymore. Instead, the content of the categories and the

¹⁸⁵ See Joan 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, at 81 (2004), available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm (last accessed: August 2008).

¹⁸⁶ Roger Ballard, *Negotiating Race and Ethnicity: Exploring the Implications of the 1991 Census*, 30(3) *Patterns of Prejudice* 3 (1997); Ludi Simpson, “Race” Statistics: Their’s and Our’s, 79-80 *Radical Statistics* (2002), available at www.radstats.org.uk/journal.htm (last accessed: August 2008). On the significance of ethno-racial classifications in Britain, see also Adrian Favell, *Philosophies of Integration – Immigration and the Idea of Citizenship in France and Britain*, at 119-120 (St. Martin Press, 1998).

¹⁸⁷ Simon, *supra* note 8, at 50-51.

¹⁸⁸ For a description of the various formulations experimented, see Ken Sillitoe and Phil White, *Ethnic Group and the British Census: The Search for a Question*, 155(1) *Journal of the Royal Statistical Society. Series A (Statistics in Society)* 114 (1992); and Stavo-Debauge, *supra* note 185, 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.” (Ballard, *supra* note 186, at 11).

formulation of the question was the subject of heated discussions.¹⁸⁹ 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.¹⁹⁰ On the other hand, several groups campaigned to have a category reflecting their own collective identity added to the form.¹⁹¹ 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”).¹⁹²

With the passing of the Race Relations (Amendment) Act 2000, which gives the public sector in Great Britain a “positive duty” to promote equality between different racial or ethnic groups¹⁹³ the collection of ethnic data for antidiscrimination objectives has become increasingly common for public authorities. A large number of institutions are now subject to an obligation to produce an equality scheme and to monitor the ethnicity of their employees or services users (see above, section 1.1). Moreover, private companies may voluntarily adopt an equality plan and carry out monitoring, with a view to eliminating discrimination. The various institutions conducting ethnic monitoring are encouraged to use the same categories as those appearing on the census.¹⁹⁴ The Codes of Practice issued by the former Commission for Racial Equality (CRE) strongly recommends public authorities to use the census categories when monitoring equality in employment and service delivery.¹⁹⁵ With regard to classification criteria, it states 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 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

¹⁸⁹ On the debates surrounding the ethnic question in the census after 1991, see Gordon, *supra* note 50; and Stavo-Debauge, *supra* note 185, at 127-138.

¹⁹⁰ See, e.g., Ballard, *supra* note 186. See also the observations of Banton on the relation between the collection of statistics and “race-making processes”: Michael Banton, *Historical and Contemporary Modes of Racialization*, in Murji and Solomos, *supra* note 126, 51-68, at 63.

¹⁹¹ Stavo-Debauge, *supra* note 185, at 113-114; Simon, *supra* note 8, at 66. See also our discussion in section 3.3.1.

¹⁹² Another change in the 2001 census consisted in the addition of a question on religion, to which people were not obliged to respond.

¹⁹³ Race Relations (Amendment) Act 2000, article 71 (2).

¹⁹⁴ Commission for Racial Equality, *Code of Practice on the Duty to Promote Race Equality* (statutory), available on the website of the Equality and Human Rights Commission: <http://www.equalityhumanrights.com> (last accessed: August 2008).

¹⁹⁵ *Ethnic Monitoring – A Guide for Public Authorities*, *supra* note 20, at 10.

unlawful to use the judgments made on this basis for any purpose other than monitoring equality.¹⁹⁶ In brief, in United Kingdom, 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.¹⁹⁷

3.2.3. “Allochtons” 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 into private life. Fearing a boycott by a significant part of the population which would have rendered its results unreliable, the authorities renounced to organize the planned 1981 census.¹⁹⁸ Second, ethnic classifications are based on indirect and so-called objective 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 Dutch official language in the 1980s. In 1983, the government launched a “minorities policy” aimed at promoting the socio-economic integration of certain disadvantaged immigrants groups (*Minderhedennota*). The phrase “ethnic minorities” (*etnische*

¹⁹⁶ Ethnic Monitoring – A Guide for Public Authorities, *supra* note 20, at 14-15.

¹⁹⁷ Like in Great-Britain, in Northern Ireland census questions on ethnic affiliation as well as on religious background are based on self-identification, and the religious question, moreover, is optional. However, a particular system applies to the determination of the community background (Catholics, Protestants and others) of employees and job applicants by employers for the purpose of carrying out monitoring pursuant to the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO). While the principle method for determining community affiliation is self-declaration by the persons concerned, where an employee or job applicant does not declare affiliation with neither the Catholic nor the Protestant communities, the employer can rely on other factors such as the name and surname, the place of residence, the school attended or organizations the individual is a member of, to classify him or her as either Catholic or Protestant. But before sending the monitoring return to the Northern Ireland Equality Commission, the employer must give each employee a written notice indicating which community he or she is considered to belong for the purposes of the return. Where an employee deems that he or she has been incorrectly classified and draws this to the attention of the employer within seven days, the employer must correct the monitoring return accordingly. (See Christopher McCrudden, *Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities*, in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights Cultures* 315-355 (Oxford University Press, 2006)). Interestingly, the Advisory Committee on the Framework Convention for the protection of national minorities has deemed this system to be in conformity with the Framework Convention. While recalling its position that under Article 3(1) of the Framework Convention, classification of individuals as belonging to a national minority should be based on self-identification, the Committee states that “in the specific context of Northern Ireland, and at this particular moment in time, the determination by employers of the community background of their employees, trainees and applicants may be relevant in order to secure the fair participation of under-represented groups.” It recommends however that the government regularly reviews the authorisation given to employers in Northern Ireland to make a determination of the ‘community background’ of employees, trainees and applicants, when the latter do not provide this information, in order to ensure its continuing relevance to the initial objective. (Advisory Committee, *Opinion on the United Kingdom*, ACFC/OP/II(2007)003, adopted on 6 June 2007 and made public on 26 October 2007, para. 47-48).

¹⁹⁸ Guiraudon, Phalet and Ter Wal, *supra* note 55, at 30.

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 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.¹⁹⁹

While “ethnic minorities” remains the central notion used in public policy, the term “allochtons” (*allochtonen* in Dutch) has appeared in administrative practice following the 1989 report “Allochtons’ policy” (*Allochtonenbeleid*) issued by the academic advisory body for the government.²⁰⁰ In 1995, the category “allochtons” 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 one of the parents was born abroad.” This category, therefore, conflates foreigners and Dutch citizens with foreign origins. People are classified as “allochtons” 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 allochtons” (coming from European countries (except for Turkey), North America, Oceania as well as Japan and Indonesia) and “non-Western allochtons” (those with Turkish, Asian (except for Japan and Indonesia), 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 allochtons in their respect, since 2000, the CBS has started to develop figures on the third-generation of “non-Western allochtons”, i.e. persons with at least one grand-parent born in Morocco, Turkey, Surinam or the Antilles.²⁰¹ Although initially a mere statistical category, the term “allochton” 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 allochton changed in the process in a problematic way: while in official statistics it is meant to designate all persons living in

¹⁹⁹ Dirk Jacobs and Andrea Rea, *Construction et importation des classements ethniques : Allochtones et immigrés aux Pays-Bas et en Belgique*, 21(2) *Revue européenne des migrations internationales* 35, 59 (2005). This article also exists in English: *Construction and Import of Ethnic Categorisations: ‘Allochtones’ in The Netherlands and Belgium*, FEEM Working Paper No. 68 (2006), available at <http://papers.ssrn.com> (last accessed: August 2008). See also Guiraudon, Phaet and Ter Wal, *supra* note 55, at 11.

²⁰⁰ *Wetenschappelijke Raade voor Regeringsbeleid* (WRR) 1989.

²⁰¹ Jacobs and Rea, *supra* note 199. See the criticism of Philomena Essed and Sandra Trienekens on the “allochton” notion: Philomena Essed and Sandra Trienekens, ‘Who wants to feel white?’ *Race, Dutch Culture and Contested Identities*, 31(1) *Ethnic and Racial Studies* 52-75, at 57-63 (January 2008).

the Netherlands with at least one parent born in any foreign country, in popular parlance, it has come to refer exclusively to persons with non-Western origins. It has thus become endowed with a racial-culturalist connotation.²⁰²

In the Netherlands as well, public authorities have for a certain period implemented a monitoring system aimed at remedying discrimination against “ethnic minorities” (see above, section 1.1). Until 2004, the 1998 Act for stimulation of participation of minorities in the labor market²⁰³ 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 2004 – a decision heavily criticized by non-governmental organizations active in the field of non-discrimination.²⁰⁴

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. 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”.²⁰⁵ This attitude is rooted in the interlocking conceptions of equality and national identity prevailing in French political culture.²⁰⁶ 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

²⁰² Jacobs and Rea, *supra* note 199; Essed and Trienekens, *supra* note 201, at 57-60.

²⁰³ *Wet stimuleren arbeidsdeelsname minderheden* (or *Wet SAMEN*), adopted on 23 April 1998 and 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 Labor Market Participation of *Allochtons* (*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 “allochtons” as synonymous.

²⁰⁴ On the 1998 Act for the stimulation of participation of minorities in the labor market, see Guiraudon, Phalet and Ter Wal, *supra* note 55, at 14-16; Marianne 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: August 2008).

²⁰⁵ Didier Fassin, Nommer, interpréter. Le sens commun de la question raciale, in Didier Fassin and Eric Fassin, *De la question sociale à la question raciale ? Représenter la société française* 19, at 20 (La Découverte, 2006).

²⁰⁶ See Patrick Simon, The Choice of Ignorance – The Debate on Ethnic and Racial Statistics in France, 26(1) French Politics, Culture & Society 7-31 (Spring 2008); Gwénaële Calvès, “Il n’y a pas de race ici” – Le modèle français à l’épreuve de l’intégration européenne, 17 Critique internationale 173 (October 2002); and Gwénaële Calvès, “Reflecting the diversity of the French Population”: Birth and Development of a Fuzzy Concept, 183 International Social Science Journal 165 (March 2005).

relates 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. For the French Constitutional Council (*Conseil constitutionnel*), “the Constitution knows only the French people, comprising all French citizens, without distinction on grounds of origin, race or religion”.²⁰⁷ The principles of equality and indivisibility of the French people entail that “no collective rights can be recognized as inhering in any group defined by community of origin, culture, language or belief.”²⁰⁸

Yet, since the 1990s, the question of introducing 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.²⁰⁹ This prompted a wide polemic on whether and how to deal statistically with diversity of national or ethnic origins.²¹⁰

With the increasing awareness of 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.²¹¹ 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 “Visible minorities: Addressing the challenge of access to employment and integration in the workplace” (*Minorités visibles:*

²⁰⁷ Decision 91-290 DC, May 9 1991 (*Statut de la Corse*) (our translation). This decision concerned the draft legislation granting a new status to Corsica.

²⁰⁸ Decision 99-412 DC, June 15 1999, para. 6 (*Charte européenne des langues régionales ou minoritaires*) (official translation, available on the Constitutional Council’s website: <http://www.conseil-constitutionnel.fr/tableau/tab99.htm> (last accessed: August 2008)). This decision concerned the question of the ratification of the European Charter on Regional or Minority Languages.

²⁰⁹ Alain Blum, Resistance to identity categorization in France, in Kertzer and Arel, *supra* note 136, 121-147, at 122-123; Pierre-Yves Cusset, Les statistiques “ethniques”: état des lieux, état des problèmes, in *Statistiques “ethniques”: éléments de cadrage*, Centre d’analyse stratégique, Rapports et documents, 9-50, at 13-22 (La Documentation française, 2006). 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”: Michèle Tribalat, *Faire France* (La Découverte, 1995).

²¹⁰ Blum, *supra* note 209, at 135; Simon, The Choice of Ignorance, *supra* note 206, at 12-13;

²¹¹ Blum, *supra* note 209, at 135; Simon, The Choice of Ignorance, *supra* note 206, at 13-14.

relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise),²¹² deplores the “statistical opacity” which “veils discrimination.”²¹³ It recommends to companies to conduct, on a yearly basis, a statistical study on the composition of their staff so as to identify discriminatory practices or processes. In order to be in conformity with French law, it suggests that this be done through an anonymous questionnaire, asking all employees, on a voluntary basis, to declare whether they consider themselves to belong to a “visible minority.”²¹⁴ The *Fauroux Report* on the fight against ethnic discrimination in employment, submitted to the French Minister of Employment less than a year later, contained a similar suggestion.²¹⁵ 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.”²¹⁶ 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.”²¹⁷ It excludes though making this operation mandatory: 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.²¹⁸

In reaction to these proposals, the French Data protection supervisory authority (the *Commission nationale de l'informatique et des libertés* or CNIL)²¹⁹ 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.²²⁰ 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

²¹² Claude 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 “Bébar Report”].

²¹³ *Id.*, at 17.

²¹⁴ *Id.*, at 19-20. A previous report, conducted by Jean-Michel 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”. (*Lutter contre les discriminations, Rapport à Madame la Ministre de l'Emploi et de la Solidarité*, Jean-Michel Belorgey, at 55 (March 1999).

²¹⁵ *La lutte contre les discriminations ethniques dans le domaine de l'emploi*, Report carried out by a commission presided by Roger Fauroux, submitted to Jean-Louis Borloo, Minister of Employment, social cohesion and housing, July 1995 [hereinafter “Fauroux Report”].

²¹⁶ Fauroux report, *supra* note 215, at 2, 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.*”).

²¹⁷ 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.

²¹⁸ Fauroux Report, *supra* note 215, at 20-24.

²¹⁹ 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*).

²²⁰ *Recommandations 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/index.php?id=2172> (last accessed: August 2008).

employees or job applicants”, in view of 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. But employers who wish to evaluate the diversity of origins of their staff, can use data already available in personnel management files, in particular a person’s name and surname and his or her nationality or 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. This information, moreover, should not be used to classify individuals into “ethno-racial categories”. 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 country of birth or nationality of an individual’s parents have been included in several official sample surveys, such as the employment survey and the familial history survey.²²¹ 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. Yet number of researchers and antidiscrimination activists claim that these sources of information remain dramatically insufficient to develop efficient antidiscrimination policies. But the idea of constructing statistics based on ethnic affiliation or origins remains highly contentious in the French context. Since early 2000, it has become the subject of heated controversies among politicians, academics, and antidiscrimination NGOs²²². 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 inappropriate, and that information currently available are sufficient to assess discrimination and measure progresses.²²³ Advocates of the development of more statistical tools responded with another petition claiming 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”.²²⁴

²²¹ Simon, *The Choice of Ignorance*, supra note 206, at 12 and 21; Dahan, Stavo-Debaugé and Thomas-Hislaire, supra note 8, at 64-65; and Simon, “Ethnic” Statistics and Data Protection in the Council of Europe Countries, supra note 17, at 47-52.

²²² For an illustration of the arguments articulated by both sides in this debate, see Simon, “The Choice of Ignorance”, supra note 206 (in favour of “ethnic” statistics); and Alain Blum and France Guérin-Pace, *From Measuring Integration to Fighting Discrimination – The Illusion of “Ethnic Statistics”*, 26(1) *French Politics, Culture & Society* 45-61 (Spring 2008) (against “ethnic” statistics).

²²³ *Engagement républicain contre les discriminations*, *Libération*, 23 February 2007.

²²⁴ *Statistiques contre discriminations*, *Le Monde*, 12 mars 2007.

The controversy reached an apex when the French legislator adopted an amendment to the French Data Protection Act, designed to facilitate the processing of sensitive data needed to carry out studies “on the measurement of diversity of origins, discrimination and integration”.²²⁵ In fact, this amendment followed a suggestion of the Data Protection Authority (the CNIL) itself. In a report on the possible avenues for measuring diversity while protecting personal data (“Measuring diversity and protection of personal data”),²²⁶ issued on 15 May 2007, the Authority had recommended, among other proposals, to modify the French Data Protection Act for what regards the collection of sensitive data for research purpose: under the present system, either the data are gathered by the researcher with the express (i.e. written) consent of all concerned individuals, or the study is considered by the CNIL to be in the public interest and authorized by it, with the consequence that no consent is required from the individuals. The CNIL suggested to apply to this type of research the regime already in place for the processing of sensitive data in the context of medical research: in all cases, the processing will have to be authorized by the CNIL, and the concerned persons will be entitled to object to the treatment of personal data concerning them. The passing of this provision met with vociferous criticisms from certain antiracism NGOs and opposition MPs, who denounced an attempt to introduce “racial statistics” in France and force individuals into racial or ethnic categories. The fact that this amendment to the Data Protection Act was inserted in a law whose main purpose was to limit immigration heightened the suspicion that the provision was in truth designed to police and control immigrants and descendants of immigrants living in France. A group of MPs seized the Constitutional Council, asking it to rule that the new provision on the collection of data on race and ethnic origin for the purpose of conducting research on discrimination or diversity, was unconstitutional. In its 15 November 2007 decision, the Council held that the amendment was not compatible with the French Constitution. This ruling however was based on procedural grounds: the Council found that the provision was not sufficiently connected with the object of the bill in which it was inserted. Yet, in *obiter dictum*, the Council made a comment on the substance of the provision:

Although the processing of data necessary for carrying out studies regarding the diversity of origin of peoples, discrimination and integration may be done in an objective manner, such processing cannot, without infringing the principle laid down in Article 1 of the Constitution [i.e. the equality of all citizens before the law, without any distinction of origin, race, or religion], be based on ethnicity or race.²²⁷

In an official commentary published by the Council on its website together with the decision, it specified that the “objective” data on which studies regarding the diversity of origin can be based include, for instance, individuals’ name, geographic origin or the nationality they held prior to the French nationality.

²²⁵ Article 63 of the Law on immigration control, integration and asylum, as approved by the National Assembly on October 23, 2007 (*Loi relative à la maîtrise de l’immigration, à l’intégration et à l’asile*).

²²⁶ CNIL, Mesures de la diversité et protection des données personnelles, Madame Anne Debet, Rapporteur, Rapport présenté en séance plénière le 15 mai 2007, available at <http://www.cnil.fr/index.php?id=2172> (last accessed: August 2008).

²²⁷ Decision n° 2007-557 DC November 15th 2007, para. 29 (official translation, available on the website of the Constitutional Council: <http://www.conseil-constitutionnel.fr/decision/2007/2007557/index.htm> (last accessed: August 2008).

Yet this observation did not solve all the queries raised by the Council's decision. Vibrant discussions arose involving legal scholars, social scientists and others, about how this paragraph was to be interpreted. In particular, what did the Council mean when distinguishing studies done "in an objective manner", on the one hand, and "studies based on ethnicity or race", on the other? Did that imply that asking people how they perceived their ethnicity or race had from now on to be precluded as unconstitutional?²²⁸ Unexpectedly, these discussions made an impression on the Constitutional Council: in early 2008, it discretely added one sentence of great significance to the commentary of its decision issued a few months earlier. After the words "objective criteria can be based on name, birthplace or nationality of origin", one now reads that the Council does not however consider that only objective data could be processed. Subjective data can also be treated, for instance, data based on "how one feels one's affiliation" (*le ressenti d'appartenance*). By contrast, defining *a priori* an ethno-racial nomenclature would not be compatible with the French Constitution.²²⁹

3.3. Classifications and Antidiscrimination: Tensions and Dilemmas

The construction of categories on racial or ethnic affiliation or origin is not a neutral and merely technical exercise: choices have to be made and these choices reflect a certain vision of the society. These categories moreover do have an influence on other-perceptions and self-perception of individuals, while social dynamics in turn can prompt revisions to racial and ethnic classifications defined by public authorities.²³⁰ 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.²³¹ Still, the formalization of these categories and their inclusion in public statistics is likely to have a notable impact on social representations.²³² Hence, if EU member states where such data are not collected at the moment decide to develop mechanisms for gathering information and producing statistics on the situation of groups exposed to racial and ethnic discrimination, as the EU invite them to do, 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. But once categories are in place, a continuing reflection on their effects, operation and appropriateness is no less essential. These categories are not fixed once and for all, they are created by political and administrative authorities and can therefore be revised, as the US, the UK and the Netherlands' experiences show.

²²⁸ For a discussion of the Council's decision, see *inter alia* D. Sabbagh, "The Collection of Ethnoracial Statistics: Developments in the French Controversy", American-French Foundation, A Policy Brief from the Equality of Opportunity Program, available at <http://www.frenchamerican.org/cms/policybriefs?pic=5> (last accessed: August 2008).

²²⁹ Cahiers du Conseil constitutionnel No. 23, available at <http://www.conseil-constitutionnel.fr/cahiers/ccc24/jurisp557.htm> (last accessed: August 2008).

²³⁰ See Skerry, *supra* note 166; Nobles, *Shades of Citizenship*, *supra* note 166; Kertzer and Arel, *supra* note 136; Haney Lopez, *supra* note 126.

²³¹ Fassin, *supra* note 186; Jacobs and Rea, *supra* note 199, at 1; Murji and Solomos, *supra* note 126, at 5.

²³² See Nobles, *Shades of Citizenship*, *supra* note 166, at 181; Jacobs and Rea, *supra* note 199, at 2 and 22.

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, the overview of states' practice reveals that its application to the collection of data for antidiscrimination purposes is not devoid of difficulties. (3.3.1.). The second major classification criterion used, namely the place of birth of individuals or that of their parents, presents significant advantages but also has its limits and shortcomings. (3.3.2).

3.3.1. Questioning Self-Identification

Relying on self-identification for ethnic or racial classification appears *a priori* to be the method most in line with respect for individual autonomy. Yet from the perspective of antidiscrimination, collecting data on the basis of self-declared racial or ethnic affiliation does not go without problem. A first difficulty relates to the fact 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 match with the way she sees herself or to her feelings of affiliation.²³³ As one author puts it, the “effects of racism all too frequently operate on the level of appearance, not identity.”²³⁴ In consequence, some authors argue that the criterion of self-identification may not always be the most appropriate to delineate the members of a disadvantaged group.²³⁵ Moreover, in some contexts self-identification may lead to under-reporting by members of disadvantaged groups, because they are reluctant to declare affiliation with a group that is stigmatized in the society.²³⁶ This is an acute problem in the case of Roma in Central and Eastern Europe: census data about Roma population are generally considered poorly reliable, as many Roma prefer not to identify as Roma, either because they fear this will put them at risk of discrimination or because they do not want to be considered as belonging to this minority.²³⁷

²³³ Morning and Sabbagh, *supra* note 65, at 49-50; Ballard, *supra* note 186, at 16.

²³⁴ Nancy A. Denton, Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?, 15 *Law & Ineq.* 83, at 92 (1997).

²³⁵ For Ford, “[t]he ability of self-reported classification to act as a proxy for “real” patterns of social disadvantage is (...) highly questionable.” (Ford, *supra* note 138, at 1281). See also Morning and Sabbagh, *supra* note 65, at 50.

²³⁶ Rallu, Piché and Simon, *supra* note 75, at 505.

²³⁷ See L. Farkas, The monkey that does not see, 2 *Roma Rights Quarterly* 19-23 (2004); Simon, “Ethnic” statistics and data protection in the Council of Europe countries, *supra* note 17, at 40; Julie Ringelheim, Minority Protection, Data Collection and the Right to Privacy, in *European Yearbook on Minority Issues*, vol. 6 (forthcoming 2008). The lack of reliable data on Roma population in Central and Eastern country has been acknowledged by the Advisory Committee on the Framework Convention on the Protection of National Minorities in several of its country opinions. The Committee emphasises that this situation is detrimental to Roma, since it hinders the state’s ability to implement and monitor measures aimed at promoting effective equality for Roma. (See, for instance, Second Opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, para. 10 and 30; First Opinion on Hungary, ACFC/INF/OP/I(2001)004, 22 September 2000, para. 17; and First Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, para. 28). In order to address this problem, the Committee invites public authorities to consult and involve representatives of national minorities in the organization of population census, and in particular in the drafting of the question on ethnic affiliation. (See, for instance, Second Opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, para. 33; First Opinion on Romania, ACFC/INF/OP/I(2002)001, 6 April 2001, para. 21). In addition, it recommends governments not to rely only on census-results and seek further

A further complexity results from 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.²³⁸ 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.²³⁹ 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.”²⁴⁰ 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. Thus, people who previously considered themselves White or would not acknowledge Indian ancestry have rediscovered their American Indian background.²⁴¹ 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”.²⁴² 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 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

ways of obtaining reliable statistical data on the actual number of persons belonging to the Roma minority. Similarly, where complete statistics on issues such as Roma access to employment or healthcare are not available, it suggests that states gather data by other means, such as estimates based on *ad hoc* studies, special surveys or any other scientifically valid methods. (See, *inter alia*, Second Opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, para. 32; Second Opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, para. 35 and 53). See also the projects based on targeted surveys conducted in the Czech Republic in order to gather more reliable data on the Roma population, described in Olli and Olsen (eds), *Common Measures for Discrimination II*, supra note 8, at 26-27.

²³⁸ See Omi, supra note 171, at 13; Rallu, Piché and Simon, supra note 75, at 504-506; Skerry, supra note 166, at 49-54.

²³⁹ See Kertzer and Arel, supra note 136, at 19.

²⁴⁰ Simon, supra note 8, 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 Simpson, supra note 186. But individuals generally have the possibility to opt for the “any other ethnic (racial) group” box and write in their affiliation.

²⁴¹ Omi, supra note 171, at 15; Skerry, supra note 166, at 52 and Tseming Yang, Choice and Fraud in Racial Identification: the Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society, 11 Michigan Journal of Race and Law 367-417, 404 (2006).

²⁴² Skerry, supra note 166, at 52.

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.²⁴³ 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.²⁴⁴ 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.²⁴⁵ 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.”²⁴⁶ 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.²⁴⁷ The results showed that only 2.8% of the population did so.²⁴⁸ 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 who marked “white” and a nonwhite race should be counted as members of the nonwhite group. As for the mixed-race individuals without white ancestry, they were to be treated as having whichever racial affiliation they claimed was the basis for discrimination”.²⁴⁹ However, as noted above, in the revised version of the EEO-1 form, adopted in 2005, a new ‘two or more races’ category has been inserted.

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

²⁴³ Nobles, *Shades of Citizenship*, supra note 166, at 131.

²⁴⁴ *Id.*, at 82.

²⁴⁵ 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 Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 Michigan L. R. 1161 (March 1997); Tanya Kateri Hernandez, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Maryland L. R. 97 (1998); and Tanya Kateri Hernandez, *Multiracial Matrix: the Role of Race Ideology in the Enforcement of Antidiscrimination Laws – A United States-Latin America Comparison*, 87 Cornell L. R. 1093 (2002).

²⁴⁶ Nobles, *Shades of Citizenship*, supra note 166, 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 smaller 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.” (*Ibid.*, at 137-138).

²⁴⁷ On the “multiracial” movement, see Nobles, *Shades of Citizenship*, supra note 166, at 139-145; Skerry, supra note 166, at 52-54; Morning and Sabbagh, supra note 65, at 57-63.

²⁴⁸ Simon, supra note 8, at 59.

²⁴⁹ Morning and Sabbagh, supra note 65, at 60. 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.” (Simon, supra note 8, at 59).

public recognition for it.²⁵⁰ 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.²⁵¹ Indeed, the more the state refines categories and extends 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.²⁵² In addition, categorizations aimed at identifying discrimination inevitably 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 discomfoting consequence of fueling the idea that these categorizations do reflect the authentic and primary identity of individuals concerned.

3.3.2. *Questioning the Place of Birth Criterion*

What emerges from the above observations is that in order to determine an appropriate method for racial or ethnic classification, one must have regard to the context and function of this operation.²⁵³ A question aimed at capturing how people perceive their ethnic identity may not always be suitable for the purpose of identifying individuals who are at risk of being discriminated against on racial or ethnic grounds. One could be tempted to defend resorting in the latter case to visual observation by a third party. This method, however, 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 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. More promising seems the suggestion made by some authors that in surveys designed to collect data to measure ethnic or racial discrimination, people be asked not only which group they consider themselves belonging to, but also how *they think they are perceived by others*.²⁵⁴ Nancy Denton maintains that “by having both questions together, people would get the satisfaction of personal identification as well as providing the data to allow monitoring for discrimination.”²⁵⁵ Significantly, while still being based on self-identification, this second question would make clear that what is searched for is not the way people feel, but how they are perceived by others. Additionally, it would put the emphasis on the experience of racial or ethnic

²⁵⁰ Stavo-Debaugé, supra note 185, at 113-114; Simon, supra note 8, at 66; Nobles, *Shades of Citizenship*, supra note 166, at 21-22.

²⁵¹ See Hollinger, supra note 172, at 49; Simon, supra note 8, at 53; Hickman, supra note 245, at 1254-1255.

²⁵² See Morning and Sabbagh, supra note 65, at 61.

²⁵³ In this sense, Tseming Yang, *Choice and Fraud in Racial Identification: the Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 *Michigan Journal of Race and Law* 367-417, at 406-417 (2006).

²⁵⁴ Yang, supra note 253, at 412-414; Denton, supra note 248, at 93. This has also been suggested by Patrick Simon in France during the hearings of the CNIL on the question of measuring diversity: CNIL, *Mesures de la diversité et protection des données personnelles*, supra note 226, at 30.

²⁵⁵ Denton, supra note 248, at 93.

stereotyping and discrimination, and underline the fact that racial or ethnic categorizations are not static and objective.²⁵⁶

The option retained by the Netherlands, where categorization is based on an objective rather than subjective criterion, namely the country of birth, also deserves attention.²⁵⁷ 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 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 and appropriate 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 revealed by the stance taken by the French Data Protection Authority and the Constitutional Council's commentary on its November 2007 decision, 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.²⁵⁸

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 calls for caution in

²⁵⁶ Yang, *supra* note 253, at 407-416.

²⁵⁷ See also the system in place in Northern Ireland for the determination of employees' community background for the purpose of equality monitoring in companies pursuant to the Fair Employment and Treatment (Northern Ireland) Order 1998 and subsidiary legislation. While the principle method for classification is self-identification, where an employee declares no affiliation with either the Catholic or the Protestant communities, the employer is allowed to revise this classification, based on a set of "objective" criteria. See *supra* note 197; and McCrudden, *supra* note 197.

²⁵⁸ 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 Patrick Simon and Martin Clément, *Comment décrire la diversité des origines en France? Une enquête exploratoire sur les perceptions des salariés et des étudiants*, 425 *Population & Société* (July-August 2006), available at http://www.ined.fr/fr/ressources_documentation/publications/pop_soc/ (last accessed : August 2008).

this regard: a new term forged by an administration originally as a mere descriptive statistical category, i.e. “allochton”, was transformed when adopted in ordinary language and infused with a racial-cultural connotation.²⁵⁹ Besides, this classification method is affected by a critical weakness: 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.²⁶⁰ Nonetheless, at this particular moment in time, in a number of EU countries, for what regards post-colonial migration, information on the persons’ birthplace or nationality of origin or that of their parents still permit to identify to a large extent the populations concerned, who are generally affected by pervasive discrimination.²⁶¹ However, some authors predict that if discrimination continues over more than two generations, these countries will have no other choice than moving to a system based on self-identification, as the UK did, if they want to remain able to obtain reliable and suitable data to build effective antidiscrimination policies.²⁶²

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-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

²⁵⁹ Jacobs and Rea, *supra* note 199, at 20-21.

²⁶⁰ See the observations of ECRI, Third report on the Netherlands, CRI(2008)3, adopted on 29 June 2007, para. 14.

²⁶¹ In this sense, Olli and Olsen (eds), *Common Measures for Discrimination II*, *supra* note 8, 24 (on Scandinavian countries); Simon, *The Choice of Ignorance*, *supra* note 206, 21 (on France).

²⁶² Simon, *supra* note 8, at 68.

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. 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 respectively by the U.S., the U.K. and the Netherlands 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.