

Julie Ringelheim*

Minority Protection, Data Collection and the Right to Privacy

The development of minority protection since the adoption of the Framework Convention on the Protection of National Minorities has made one thing clear: the more the state seeks to put in place modalities designed to address minorities' specific situations, the more it needs information about them. This is true of both aspects of minority protection: measures aimed at protecting minority groups' identity, as well as prohibition of discrimination.¹ When public authorities wish to accommodate the traditional lifestyle of a minority—for instance, a nomadic way of life—they must be able to know how many members of this group live according to these traditions. Similarly, when they want to actively combat religious, ethnic or racial discrimination, they need to identify the groups exposed to discrimination, the scale of the problem and the areas of social life where it occurs. In addition, when the states provide the members of a minority with the possibility of benefiting from special rights or programmes designed either to redress past inequalities or to enable them to preserve some religious or cultural traits, there must be a way of identifying the potential beneficiaries of such measures. All these situations suppose the collection by public authorities of data related to ethnic, religious or linguistic affiliations of individuals.

The necessity of collecting data on minorities has become a recurrent theme in opinions issued by the Advisory Committee on the Framework Convention on the Protection of National Minorities.² Some of the Framework Convention's provisions

* Senior Researcher, Centre for Philosophy of Law, University of Louvain (Belgium) and Belgian National Fund for Scientific Research (FNRS).

1 Kristin Henrard, *Devising an Adequate System of Minority Protection – Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff, The Hague, Boston, London, 2000), 8–11.

2 Framework Convention for the Protection of National Minorities, adopted 1 February 1995, entered into force 1 February 1998, CETS No. 157, at <<http://www.conventions.coe.int>> (hereinafter “Framework Convention” or FCNM). The Advisory Committee on the FCNM is in the process of adopting a commentary on the participation of national minorities in cultural, social and economic life and in public affairs, which should deal with the

expressly subordinate the activation of certain rights to a quantitative factor: it is only in areas inhabited by persons belonging to a national minority in substantial numbers or traditionally, and where there is sufficient demand for it, that states parties are under an obligation to endeavour to ensure that persons belonging to this minority can use their language in relations with administrative authorities,³ that they have adequate opportunities to learn the minority language or to receive instruction in it,⁴ and that topographical indications intended for the public are displayed also in the minority language.⁵ More generally, the Advisory Committee insists that obtaining accurate statistics on the ethnic composition of the population is essential to any effective policy for the protection of national minorities.⁶ This echoes the views expressed by other international bodies tasked with monitoring anti-discrimination: the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD),⁷ as well as the European Commission against Racism and Intolerance (ECRI),⁸ regularly

issue of data collection. However, at the time of writing, this commentary has not yet been made public.

3 Art. 10(2), FCNM.

4 Art. 14(2), FCNM.

5 Art. 11(3), FCNM. See Jeroen Schokkenbroek, "What Kind of Information Do We Need for Monitoring the Implementation of Fundamental Rights of Minorities? A Council of Europe Experience", Montreux, ISI, IAOS, at <http://www.portal-stat.admin.ch/iaos2000/schokkenbroek_final_paper.doc>.

6 See, *inter alia*, second opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, para. 30. Moreover, in the guidelines set out by the Advisory Committee on the information to be submitted by states parties in their reports under Art. 25(1), Framework Convention, states are asked to provide factual information, such as statistics and the results of surveys, to enable an evaluation of the effectiveness in practice of the measures taken to implement the Framework Convention. More especially, the Advisory Committee requires that they provide information on the numbers and places of settlement of persons belonging to national minorities as well as on how these data are collected. Advisory Committee on the FCNM, Outline for Reports to be Submitted Pursuant to Article 25 paragraph 1, Framework Convention for the Protection of National Minorities, ACFC/INF(1998)001, adopted 30 September 1998, para. 4 and Appendix, Outline for Part II of the Report.

7 See UN CERD Committee General Recommendation IV Concerning Reporting by States Parties, HRI/GEN/1/Rev.7, adopted 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* (CPS Books, Central European University Press, Budapest, 2001), 62–85.

8 ECRI General Policy Recommendation No. 1, Combating Racism, Xenophobia, Anti-Semitism and Intolerance, CRI (96) 43 rev., adopted 4 October 1996, at <http://www.coe.int/t/e/human_rights/ecri/1%2Decri/3%2Dgeneral_themes/1%2Dpolicy_recommendations/recommendation_n1/Rec01en.pdf>, 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". This recommendation is usually reiterated in country reports, under the heading "Monitoring the Situation". See, for instance,

call upon states to gather and produce information on the situation of racial or ethnic minorities in various areas. Since the adoption in 2000 of the two Equality Directives based on Article 13 of the EC Treaty, the European Union has joined its voice with the latter institutions and encourages EU countries to collect adequate information on the groups exposed to discrimination—in particular, ethnic and religious groups.⁹ The European Commission has identified the lack of accurate data in most member countries as a serious obstacle to policy developments and analysis in the field of anti-discrimination.¹⁰ Accordingly, it has commissioned or supported several studies on the issue of data collection and promotion of equal treatment that demonstrate the importance of data and statistics for anti-discrimination action.¹¹

However, in various European countries, the perspective of public authorities recording information on ethnic or religious affiliation of individuals generates queries, and fears. Isn't there a danger that public authorities could use this information to mistreat minorities? Isn't the processing of such data prohibited anyway by personal data

Third Report on Portugal, CRI (2007) 4, 30 June 2006, para. 101; Third Report on Slovenia, CRI (2007) 5, 30 June 2006, para. 106; Third Report on France, CRI (2005) 3, 25 June 2004, para. 114.

- 9 Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000/43/EC, adopted 29 June 2000 (hereinafter "Race Equality Directive"), prohibits race and ethnic discrimination in a large range of areas, in particular, employment, social protection, education and provision of goods and services. Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000/78/EC, adopted 27 November 2000 (hereinafter "Employment Equality Directive"), precludes discrimination in employment based on religion as well as disability, age and sexual orientation.
- 10 European Commission, DG for Employment, Social Affairs and Equal Opportunities, "Equality and Non-discrimination in an Enlarged European Union", Green Paper (2004), 22, at <http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf>. Note that the Community action programme established to combat discrimination (2001-06) had planned, as part of its initiatives, "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 policies and practices". See Council Decision Establishing a Community Action Programme to Combat Discrimination (2001 to 2006), 2000/750/EC, adopted 27 November 2000, 23, Art. 2 and Appendix.
- 11 See Timo Makkonen, *Measuring Discrimination – Data Collection and EU Equality Law* (European Commission, DG for Employment, Social Affairs and Equal Opportunities, Brussels, 2007); *id.*, *European Handbook on Equality Data* (European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2006); 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* (European Commission, DG for Employment, Social Affairs and Equal Opportunities, Brussels, 2004); 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, Brussels, 2004). These reports are all available online at <http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm>.

protection norms? The mere fact of classifying people in ethnic categories is contested by some as contradicting the notion of respect for individual self-determination. From a legal perspective, all these concerns revolve around the notion of privacy. Personal data protection represents an important facet of individuals' right to respect for privacy. But privacy is also increasingly seen as embodying a principle of personal autonomy or individual self-determination, which would entail a right for individuals to freely determine certain issues essential to their self-understanding.

This article submits that the tension between minority protection, on the one hand, and privacy rights, on the other, does not amount to an insoluble conflict. For sure, the relationship between these notions poses real difficulties. But ways can be found to reconcile these two imperatives. Section I of the article addresses the issue of personal data protection within the framework of European law. It shows that collecting ethnic or religious data for the purpose of protecting minorities is not necessarily incompatible with personal data protection norms, as they are defined at the European level, notably in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter "Convention No. 108") and 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.¹² While processing such data is strictly restricted, it is not prohibited in all circumstances. Part II grapples with the question of how individuals can be classified into ethnic categories in a manner that respects their internationally protected rights. As will be seen, the criterion of self-identification tends to be considered to be the most in line with international human rights law. Article 3 of the Framework Convention, in particular, has been interpreted by the Advisory Committee as entailing a 'principle of self-identification'. Yet, the practice reveals that the use of this criterion does not come without problems. In fact, some states follow other classification methods. Based on a close analysis of the Advisory Committee and other international institutions' work, it will be argued that self-identification is not an absolute rule: under certain conditions and within certain limits, resorting to classification modes other than self-identification may be permissible under human rights law.

In recent years, developments in the field of anti-discrimination have had a notable impact on European states' practice in relation to ethnic, linguistic or religious data collection: several Western European states—where, traditionally, such data were rarely collected—have introduced mechanisms designed to gather information on people belonging to certain ethnic or religious minority groups as part of their anti-discrimination programmes. The emphasis in this article will therefore be on these countries, such as the United Kingdom, Ireland and the Netherlands, which have started to collect ethnic or religious data during the last 15 years for the purposes of their anti-discrimination policies. However, some aspects of the system in place in one Eastern European

12 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted 28 January 1981, entered into force 1 October 1985, CETS No. 108, at <<http://www.conventions.coe.int>>; 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, adopted 24 October 1995, at <http://ec.europa.eu/justice_home/fsj/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf>.

state—namely, Hungary—will also be looked at. The article also takes into account the relevant case law of the European Court of Human Rights and the European Committee on Social Rights.

I. MINORITY DATA COLLECTION AND PERSONAL DATA PROTECTION

A. The Paradox of Minority Data

The issue of minority data collection confronts us with a paradox: information on the ethnic or religious affiliation of individuals, which is needed today to protect minorities, is similar to that which has been used in the past to discriminate, oppress or exclude some vulnerable communities. Hostility towards the idea of the state processing this information is largely due to memories of tragic moments in history where such data served to harm minorities. Above all, during the time of the Holocaust, data systems played a significant role in the persecution and extermination of Jews and Roma.¹³ These dreadful precedents remain as a warning against the risk of abuse of data related to such sensitive aspects of personality as ethnic and religious belonging. Yet it must be borne in mind that ethnic or religious data, like other types of personal information, have a double-edged nature: depending on the objective of those responsible for their processing, they can be used to the benefit or to the detriment of individuals. According to one expert in the study of abuses of population data systems, “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.”¹⁴ The development of information and communication technologies has made the problem all the more salient: dramatic increases in the capacity to process vast datasets have exacerbated the fear of unwanted collection or abuse of personal information by public or private actors. It is against this background that personal data protection law has emerged in the second half of the twentieth century;¹⁵ one of the main concerns of this body of norms is precisely to ensure that personal data are gathered, stored and used only for legitimate purposes and in a way that respects individuals’ fundamental rights.

In fact, a significant number of European countries do gather data on ethnic origins or religious affiliation in some circumstances. In a recent study on ‘ethnic’ statistics and data protection carried out for ECRI, Patrick Simon highlights that among the 42

13 See William Seltzer, “Population Statistics, the Holocaust, and the Nuremberg Trials”, 24(3) *Population and Development Review* (1998), 511-522; and *id.*, “On the Use of Population Data Systems to Target Vulnerable Population Subgroups for Human Rights Abuses”, 30 *Coyuntura Social* (2005), 31-44, at <<http://www.uwm.edu/%7Emargo/govstat/Coyuntura-Socialpaper2005.pdf>>. See also Patrick Simon, *‘Ethnic’ Statistics and Data Protection in the Council of Europe Countries – Study Report* (ECRI, Council of Europe, Strasbourg, 2007), at 14-16, available at <http://www.coe.int/t/E/human_rights/ecri/>.

14 Seltzer, “On the Use of ...”, *op.cit.* note 13.

15 On the origins and rationale of data protection laws, see Lee A. Bygrave, *Data Protection Law – Approaching its Rationale, Logic and Limits* (Kluwer, The Hague, London, New York, 2002), 92-164.

Council of Europe countries covered by the report, 22 collect data on ethnicity, 24 on religion and 26 on language. Yet the results show a neat discrepancy between Eastern and Western Europe: for historical reasons, the vast majority of Central and Eastern European states include in their national census questions on ethnocultural belonging, usually termed 'nationality'. By contrast, only two Western European countries collect data on self-declared ethnicity—namely, Ireland and the United Kingdom.¹⁶ Significantly, in both cases, the addition of a question on ethnicity in the census has been motivated primarily by the will to obtain data on post-colonial immigrants and their descendants in order to inform anti-discrimination policies.¹⁷ Such a question appeared for the first time on the 1991 census in the UK and in 2006 in Ireland. The Scandinavian countries, as well as the Netherlands, have also developed ways to gather information about people with an immigrant background: their system, however, is not based on a declaration of ethnic affiliation by the persons concerned, but relies on data on individuals' and their parents' birthplace. The other countries—France, Germany and southern European states—do not record people's ethnic origin or affiliation: the only distinction made in public statistics is the one between citizens and foreigners. These countries, therefore, do not look beyond citizenship to track ethnic or cultural differences within their national population.¹⁸ However, even countries that do collect ethnic data do not always use them for minority protection. Moreover, states that include a question on 'nationality' in the census do not necessarily collect similar data at the level of institutions such as companies, schools or health institutions. In consequence, the Advisory Committee on the FCNM and ECRI invite most European states to improve their data collection systems so as to be able to design, implement and monitor effective minority protection and equality promotion policies.

At the same time, these two bodies strongly insist that this information must be collected with full respect for personal data protection norms.¹⁹ These norms are par-

16 Simon, *op.cit.* note 13, 35–38.

17 On census ethnic categories in Ireland, see Rebecca Chiyoko King-O'Riain, "Counting on the 'Celtic Tiger' – Adding Ethnic Census Categories in the Republic of Ireland", 7(4) *Ethnicities* (2007), 516–542. Note that the Irish census also contains the category 'Travellers'. On ethnic data collection in the United Kingdom, see Joan Stavo-Debauge and Sue Scott, *Comparative Study on the Collection of Data to Measure the Extent and Impact of Discrimination – Report on England* (European Commission, DG for Employment, Social Affairs and Equal Opportunities, Brussels, 2004).

18 See Dirk Jacobs *et al.*, "Is Comparative Research in Europe on Ethnic Minorities Possible? The Challenge of Measuring Immigrant Origin and Ethnicity Cross-nationally" (unpublished article on file with the author). In the case of Italy, national censuses do not include any question on affiliation with a minority, with the exception, however, of Bolzano Province, where individuals are asked to declare affiliation with a linguistic group. Statistics on the Ladin, German-speaking and Italian communities are used, in particular, to ensure equitable distribution of political mandates and public sector positions between the three communities. See Advisory Committee on the FCNM, first opinion on Italy, ACFC/INF/OP/I(2002)007, 14 September 2001, para. 19.

19 For the Advisory Committee on the FCNM, see, *inter alia*, second opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, para. 37; second opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, para. 11; first opinion on Italy, ACFC/

ticularly developed in the European legal space. Besides Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which guarantees the right to respect for private life generally,²⁰ the main source of personal data protection rules at the Council of Europe level is Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data.²¹ Opened for signature in 1981, this Convention aimed to strengthen the legal rules protecting personal data, in view of the growth of information technologies.²² In consequence, it is only concerned with the automatic processing of personal data. Moreover, the guarantees it lays down are worded in general and somewhat vague terms. Given these limitations, EU institutions have decided to supplement this Convention with another instrument: 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. This directive further specifies the rules contained in Convention No. 108 and extends the protection to all forms of personal data processing. Like Convention No. 108, it covers both the public and private sectors. However, it does not apply to activities falling outside the scope of Community law, such as public security, defence and the area of criminal law.²³ Lastly, the right to personal data protection has been included in the Charter of Fundamental Rights of the European Union.²⁴

INF/OP/I(2002)007, 14 September 2001, para. 21. For ECRI, see General Policy Recommendation No. 1; and, *inter alia*, Third Report on Bulgaria, CRI (2004) 2, 27 June 2003, para. 73; Third Report on Croatia, CRI (2005) 24, 17 December 2004, para. 99; Third Report on Denmark, CRI (2006) 18, 16 December 2005, para. 102. Reference to privacy and anonymity in CERD's concluding observations is less frequent. But see CERD, Concluding Observations, Seventeenth and Eighteenth Periodic Reports on Norway, CERD/C/NOR/CO/18, 19 October 2006, para. 13; and Concluding Observations on the Tenth and Eleventh Periodic Reports on Portugal, CERD/C/65/CO/6, 10 December 2004, para. 8.

- 20 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953, CETS No. 5, at <<http://www.conventions.coe.int>>. Since 2000, this provision has been interpreted by the European Court of Human Rights (ECtHR) as protecting individuals from the processing of personal data concerning them, whether relating to their private or public activities. See ECtHR, Appl. No. 28341/95, *Rotaru v. Romania*, judgment of 4 May 2000, para. 43. On the evolution of the ECtHR's case law in this regard, see Olivier De Schutter, "Vie privée et protection de l'individu vis-à-vis des traitements de données à caractère personnel", 45 *Revue trimestrielle des droits de l'homme* (2001), 137-183.
- 21 By November 2007, all member states of the Council of Europe had ratified this Convention, with the exception of Andorra, Moldova, Russia, Turkey and Ukraine, which have signed it but not yet ratified it.
- 22 Explanatory Report to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, para. 1.
- 23 Art. 3(2), Directive 95/46/EC. A Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, proposed by the European Commission in October 2005 (COM (2005) 475 of 4 October 2005), is currently under discussion within European institutions.
- 24 Art. 8, Charter of Fundamental Rights of the European Union, adopted 7 December 2000, not yet entered into force, at <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>. The Charter was initially proclaimed on 7 December 2000 at the Nice European Council.

Both the Council of Europe's Convention No. 108 and the EU Directive 95/46/EC make a distinction between two kinds of personal data: they lay down general safeguards applicable to the collection, storage, use and dissemination of any sort of personal data (see Subsection C below). In addition, they set forth more stringent conditions where specific categories of data, considered especially sensitive, are at stake. These 'sensitive data' include, in particular, data revealing ethnic origin and religion (see Subsection D below). Before examining these rules in more detail, the concept of 'personal data' and the reason why minority protection may call for the processing of such data, need to be clarified (see Subsection B below).

B. Personal Data and their Use for Minority Protection

Personal data protection norms only apply to *personal* data—that is, “any information relating to an identified or identifiable individual”.²⁵ Directive 95/46/EC 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”.²⁶ This entails that data collected on an entirely anonymous basis do not constitute 'personal data' and are therefore not the concern of personal data protection laws. 'Anonymous data' within the meaning of Directive 95/46/EC supposes that the natural person to which the information relates (the 'data subject') cannot be identified, whether by the data controller or by any other person, taking account of all the means likely reasonably to be used to identify that individual.²⁷ Accordingly, a survey where inhabitants of a region are asked about their ethnic affiliation under conditions of total anonymity would not involve personal data protection norms, provided that the number of interviewees is high enough to prevent any indirect identification of natural persons. Similarly, when data are made anonymous to be used in statistics in such a way that data subjects are no longer identifiable, they do not constitute personal data any more.²⁸

However, minority protection can hardly rely exclusively on anonymous data: in different circumstances, it requires the handling of information that, at least in an early phase, relates to an identified or identifiable person.²⁹ To begin with, in order to have

It was signed and solemnly proclaimed for the second time, after some adaptations, by the Presidents of the Commission, European Parliament and the Council on 12 December 2007 at the Summit of Lisbon. The Treaty of Lisbon, signed by EU member states on 13 December 2007, provides that Art. 6(1) of the Treaty on European Union is to be replaced by a provision stating that the Charter shall have the same legal value as the Treaties (Art. 1(8), Treaty of Lisbon).

25 Art. 2(a), Convention No. 108. See also Art. 2(a), Directive 95/46/EC.

26 Art. 2(a), Directive 95/46/EC.

27 Art. 29, Data Protection Working Party, Opinion 4/2007 on the Concept of Personal Data, adopted on 20th June 2007, 21.

28 Recital 26, Directive 95/46/EC; *ibid.*, 21.

29 For a more detailed description of the ways in which personal data can contribute to the fight against discrimination and the promotion of equality, see Olivier De Schutter and Julie Ringelheim, *The Processing of Racial and Ethnic Data in Anti-Discrimination Policies:*

data about minorities' demographic importance and geographic distribution in the country, states often rely on census or population registers, which constitute the most comprehensive sources of information on a country's residents. These data are important for several aspects of minority protection: the activation of language rights or the amount of financial support bestowed upon minority associations may depend on the number of persons belonging to the concerned minority at the national or regional level. Insofar as census and population registers' data include socio-economic information about minorities, they can also be extremely useful for designing, implementing and evaluating equality policies. Both census and population registers involve the processing of personal data. To be sure, census results can only be published in the form of aggregated data, which cannot be related to an identified person behind the statistics.³⁰ But the initial collection of information on residents of the country supposes the treatment of personal data. The population register, on the other hand, is a mechanism for the continuous recording of certain information pertaining to a country or a region's residents and the data it contains are kept in a way that allows identification of the individuals concerned.³¹

Furthermore, in order to implement active equality and anti-discrimination policies, public authorities need information about the situation of vulnerable groups in specific areas of social life, such as employment, education or health. This may require collecting data on individual's ethnic or religious affiliation at the level of institutions. Indeed, statistics about the ethnic or religious break-up of companies' workforces, children enrolled in different types of schools, or users of the health system, can be crucial to enabling the detection of disparities between minorities and the majority in access to employment, education or healthcare. Thus, in the UK, under the Race Relations (Amendment) Act 2000, which introduces a positive duty on public sector bodies to promote race equality, the Home Secretary has imposed on a large number of public authorities the obligation to prepare and publish an 'equality scheme': among other measures, the listed public authorities must carry out 'ethnic monitoring' of their policies,³² i.e., collect, store and analyze data about people's ethnic backgrounds in order to "highlight possible inequalities, investigate their underlying causes and remove any unfairness or disadvantages".³³

Reconciling the Promotion of Equality with Privacy Rights (forthcoming, 2008); and Olivier De Schutter, "Three Models of Equality and European Anti-Discrimination Law", 57(1) *Northern Ireland Legal Quarterly* (2006), 1-56.

30 Opinion 4/2007 on the Concept of Personal Data, 21.

31 Each particular person is provided with an identification number to facilitate locating a record concerning him or her. See the United Nations Statistics Division website, at <<http://unstats.un.org/unsd/demographic/sources/popreg/popregmethods.htm#60>>.

32 Art. 71(2), Race Relations (Amendment) Act 2000, signed 30 November 2000. The requirement to prepare and publish a Race Equality Scheme is part of the specific duties imposed by the Home Secretary on specific types of public authorities, which supplement the general duty to promote equality. See Colm O'Cinneide, *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality* (Equality and Diversity Forum, London, 2003), 29-30.

33 Commission for Racial Equality, *Ethnic Monitoring – A Guide for Public Authorities* (CRE, London, 2002), 3. This document is available on the website of the Equality and Human

Similarly, in Northern Ireland, under the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), employers (including private sector employers with more than 10 full-time employees working more than 16 hours a week), are under an obligation to submit annually to the Northern Ireland Equality Commission a 'monitoring return' describing the community background of their workforce and of those applying for positions.³⁴ Given the relatively small size of some of these institutions, anonymous collection of data does not always guarantee that individuals concerned cannot be identified. Besides, non-anonymous data are arguably more adequate for the monitoring of certain issues, such as equality in career development. This is the view of the former UK Race Equality Commission: in its guidelines on ethnic monitoring addressed to public authorities, it recommends that where a person is likely to have a long-standing relationship with the institution, the latter links the ethnic data to the individual through an identifying number, in order to keep track of how its policies and procedures affect this person without having to get monitoring data every time.³⁵

In addition, where special entitlements are reserved for the members of a minority, such as a right to take a day off for a religious holiday or to receive a specific scholarship to access university education, those who wish to benefit from these possibilities must declare to the concerned institution their affiliation with the group protected.

Lastly, ethnic or religious data may be essential to proving discrimination in specific instances. The EU 'Race Equality Directive' (Directive 2000/43/EC) and 'Employment Equality Directive' (Directive 2000/78/EC) both state in their preambles that national rules may provide for direct or indirect discrimination "to be established by any means, including on the basis of statistical evidence".³⁶ Accordingly, several EU member states admit the possibility of using statistics as a means of proof in anti-discrimination proceedings.³⁷ Interestingly, in its decision *European Roma Rights Centre v. Greece*, the European Committee of Social Rights found Greece to be in breach of its obligation to promote the rights of families to adequate housing under Article 16 of the European Social Charter,³⁸ based, *inter alia*, on estimates submitted by the complain-

Rights Commission, at <<http://www.equalityhumanrights.com>>. On 1 October 2007, the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission merged into the new Equality and Human Rights Commission.

34 Fair Employment and Treatment (Northern Ireland) Order 1998, No. 3162 (N.I. 21), signed 16 December 1998. The FETO was amended by the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003, No. 520, signed 9 December 2003, which came into operation on 10 December 2003 and sought to implement the Employment Equality Directive.

35 Commission for Racial Equality, *op.cit.* note 33, 16. The Commission for Racial Equality also observes that this will enable the institution to carry out more detailed analyses that take account of other factors, such as age, sex, qualifications, and socio-economic factors.

36 Preamble, Recital 15, Race Equality Directive; and Employment Equality Directive. On statistics as a means to prove discrimination, see De Schutter and Ringelheim, *op.cit.* note 29.

37 See Makkonen, *Measuring Discrimination ...*, *op.cit.* note 11, 28-38.

38 European Social Charter, adopted 18 October 1961, entered into force 26 February 1965, CETS No. 35, at <<http://conventions.coe.int/>>.

ants according to which around 100,000 Roma were living in sub-standard housing conditions, without the state taking appropriate measures to improve their situation. The Greek government, while contesting this allegation, maintained that it could not provide any estimate of the Roma minority's situation because of legal—and specifically constitutional—impediments to the processing of such data. The European Committee rebutted this argument: “when the collection and storage of personal data is prevented for such reasons, but it is also generally acknowledged that a particular group is or could be discriminated against, the authorities have the responsibility for finding alternative means of assessing the extent of the problem and progress towards resolving it that are not subject to such constitutional restrictions”.³⁹ The European Court of Human Rights took a comparable stance in its judgment *D.H. and Others v. the Czech Republic*, which deals with the issue of Roma segregation in education. To support their claim that their placement in ‘special schools’ for children with learning disabilities amounted to indirect discrimination, the applicants, who were Roma themselves, provided statistical data showing that in the Czech Republic a disproportionate number of Roma children, compared with other children, were placed in such schools, where education was substantially inferior to that offered in ordinary schools. Somewhat similarly to the Greek government in the aforementioned case, the Czech Republic argued that these figures were not sufficiently conclusive and that no official information existed on the ethnic origin of pupils that could prove the existence of discrimination. The European Court rejected this argument on two grounds: first, the Czech government did not produce any alternative statistical evidence; and, second, while the statistics submitted by the applicants might not have been entirely reliable, they were confirmed by independent supervisory bodies’ reports, including the report submitted by the Czech Republic itself under the Framework Convention.⁴⁰

In all these situations, personal data protection norms come into play. As mentioned above, these norms include, on the one hand, general requirements applicable to all sorts of personal data (see Subsection C) and, on the other, additional rules concerning specific categories of data considered sensitive (see Subsection D).

39 European Committee of Social Rights, Complaint No. 15/2003, *European Roma Rights Centre v. Greece*, Decision on the Merits of 8 December 2004, para. 27. The Committee further observed that the estimates provided by the complainant organization were corroborated by other international bodies—namely, the UN Committee on Economic, Social and Cultural Rights, the UN Committee Against Torture and ECRI. *Ibid.*, para. 40. Besides, it emphasized that official or semi-official estimates of the number of Roma had been made by Greece in the past. *Ibid.*, para. 28. The Committee has confirmed its stance in European Committee of Social Rights, Complaint No. 27/2004, *European Roma Rights Centre v. Italy*, Decision on the Merits of 7 December 2005, para. 23.

40 ECtHR, Appl. No. 57325/00, *D.H. and Others v. The Czech Republic*, judgment of 13 November 2007, paras. 190–91.

C. General Rules Governing the Processing of Personal Data

Convention No. 108 and Directive 95/46/EC submit the treatment of personal data to similar basic requirements. Personal data must be processed fairly and lawfully.⁴¹ This entails that the processing must be carried out in a manner that does not interfere unreasonably with the privacy of the data subject.⁴² Moreover, data must be gathered and stored for specified and legitimate purposes, and cannot be used in a way incompatible with those purposes.⁴³ They must be adequate, relevant and not excessive in relation to the purposes for which they are processed.⁴⁴ Hence, only those personal data that are necessary to achieve the purposes of the data collection operation may be collected. As stressed by Timo Makkonen, it follows from this that, insofar as doing so does not compromise the objective of the operation, “the controller should opt for secondary rather than primary data collection, anonymous rather than nominal surveys, sampling rather than full-scale surveys, and for voluntary rather than compulsory surveys”.⁴⁵ Furthermore, the data must be accurate and, where necessary, kept up to date.⁴⁶ They shall be preserved in a form that permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.⁴⁷ Besides, states are under an obligation to ensure that appropriate security measures are in place to protect personal data against accidental or unauthorized destruction or loss as well as against unauthorized access, alteration or disclosure.⁴⁸

In addition, Directive 95/46/EC specifically addresses the issue of statistics production. It provides 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 suitable safeguards are in place.⁴⁹ Notably, such safeguards shall preclude the use of these data to take decisions on data subjects.⁵⁰ With regard to the protection of personal data collected and processed for statistical purposes, more detailed rules have been defined by the Committee of Ministers of the Council of Europe in its Recommendation No. R (97) 18.⁵¹ This Recommendation prescribes, in particular, that personal data collected and processed for statistical purposes shall be made anonymous as soon as they are no longer necessary

41 Art. 5(a), Convention No. 108. See also Art. 6(1)(a), Directive 95/46/EC.

42 Makkonen, *Measuring Discrimination* ..., *op.cit.* note 11, 55.

43 Art. 5(b), Convention No. 108. See also Art. 6(1)(b), Directive 95/46/EC.

44 Art. 5(c), Convention No. 108. See also Art. 6(1)(c), Directive 95/46/EC.

45 Makkonen, *Measuring Discrimination* ..., *op.cit.* note 11, 56-57.

46 Art. 5(d), Convention No. 108. See also Art. 6(1)(d), Directive 95/46/EC.

47 Art. 5(e), Convention No. 108. See also Art. 6(1)(e), Directive 95/46/EC.

48 Art. 7, Convention No. 108. See also Art. 17(1), Directive 95/46/EC.

49 Art. 6(b), Directive 95/46/EC.

50 Preamble, Recital 29, Directive 95/46/EC.

51 Committee of Ministers of the Council of Europe, Recommendation No. R (97) 18 on the Protection of Personal Data Collected and Processed for Statistical Purposes, adopted 30 September 1997.

in an identifiable form (Principle 3.3). Where personal data are collected and processed for statistical purposes, they must serve only those purposes, and cannot be used to take a decision or measure in respect of the data subject (para. 4.1). The processing must remain proportionate: only those personal data shall be collected and processed which are necessary for the statistical purposes to be achieved, and identification data shall only be collected and processed where necessary (para. 4.7).

D. Specific Rules Governing the Processing of Sensitive Data

Alongside these general requirements, Convention No. 108 and Directive 95/46/EC provide for additional, stricter, conditions to be met when handling so-called 'special categories of data' or 'sensitive data'. These special categories of data, which have in common that they entail a particular risk of discrimination, are singled out as requiring a heightened level of protection.⁵² In both instruments, they include data revealing religious beliefs and racial or ethnic origins.⁵³ The term 'revealing' is important: it implies that personal data that indirectly indicate affiliation with a religious or ethnic group—for instance, an individual's language—are to be considered sensitive. Yet, contrary to what is sometimes assumed, the sensitive data's special regime does not amount to an absolute prohibition against processing such data. Under Convention No. 108, sensitive data "may not be processed automatically *unless domestic law provides for appropriate safeguards*".⁵⁴ Directive 95/46/EC is more specific: as a general rule, it lays down that member states should prohibit the treatment of sensitive data.⁵⁵ However, it provides for a list of exceptions to this prohibition.⁵⁶ Among them, several are especially relevant to the issue of minority data.

First and foremost, Article 8(2)(a) provides that the prohibition of processing sensitive data does not apply when the data subject has given his or her explicit consent to the treatment of those data. The data subject's consent must be "a freely given specific and informed indication of his wishes by which he signifies his agreement to personal data relating to him being processed".⁵⁷ The consent, therefore, must have been fully and clearly expressed, and no penalty may be imposed if a person refuses to provide the information requested. The data subject must be informed of the purposes for which data are collected.⁵⁸ This first exception can furnish a basis for allowing institutions to collect data on minorities, insofar as this is done with the free, specific and informed

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

53 Convention No. 108 only refers to 'racial origin', while Directive 95/46/EC mentions 'racial and ethnic origin'. For the rest, the list of special categories of data differs slightly from one instrument to the other: both include data on political opinions, health and sexual life but data on trade-union membership is mentioned only in Directive 95/46/EC, while data relating to criminal convictions is referred to only in Convention No. 108.

54 Art. 6, Convention No. 108 (emphasis added).

55 Art. 8(1), Directive 95/46/EC.

56 Arts. 8(2-4), Directive 95/46/EC.

57 Art. 2(h), Directive 96/45/EC.

58 Makkonen, *Measuring Discrimination ...*, *op.cit.* note 11, 59.

consent of those concerned.⁵⁹ Yet, member states are allowed to lay down by law that the prohibition may not be lifted by the data subject's giving his/her consent.

Second, under Article 8(2)(b), the processing of sensitive data may be permitted by national law, even without the data subject's consent, when this is necessary for the purpose of carrying out obligations and specific rights in the field of employment law, provided that adequate safeguards are put in place. Some of the obligations stemming from non-discrimination and equality laws for employers may require the processing of sensitive data, such as, in the UK, the monitoring duty imposed on certain public authorities under the Race Relations (Amendment) Act 2000 (see *supra*). The processing of sensitive data must, however, be *necessary* for the carrying out of the obligations and rights at stake. Timo Makkonen suggests that general diversity monitoring may not meet the necessity test, insofar as employers could use other means to ensure that their practices are not discriminatory, such as anonymous monitoring and beforehand screening of recruitment practices and selection criteria.⁶⁰

Third, also noteworthy is the exception provided for in Article 8(2)(e): the treatment of sensitive data can be authorized when it is necessary for the establishment, exercise or defence of legal claims. On this basis, employers, workers or other data controllers could be allowed to handle sensitive data in order to prove the existence or absence of discrimination in legal proceedings (see *supra*).⁶¹

In addition, Article 8(4) of the Directive permits member states to lay down, for reason of substantial public interest, exemptions other than those mentioned in Article 8(2), either by law or by decision of the privacy supervisory organ, provided that suitable safeguards are ensured. One of the objectives of this provision is to facilitate scientific research and government statistics, making it lawful to process and store sensitive data in central population registers, census registers and similar files.⁶² It can be assumed that the protection of minorities and the fight against discrimination qualify as 'substantial public interests'. This provision thus furnishes an important ground for allowing the processing of sensitive data necessary for these objectives. It is precisely on this basis that ethnic monitoring has been authorized in the UK.⁶³ The 1998 UK Data Protection Act allows for the processing of data revealing race or ethnic origin under two conditions: the processing must be necessary for identifying the existence or absence of equality of opportunities or treatment between persons of different racial or ethnic

59 In the context of employment, however, there are discussions about whether it is appropriate to rely on the worker's consent, given the power imbalance between the processor, i.e., the employer, and the data subject, i.e., the worker. On this debate, see De Schutter and Ringelheim, *op.cit.* note 29; and Olivier De Schutter, "La protection du travailleur vis-à-vis des nouvelles technologies dans l'emploi", 54 *Revue trimestrielle des droits de l'homme* (2003), 627-664.

60 Makkonen, *Measuring Discrimination ...*, *op.cit.* note 11, 59.

61 See De Schutter and Ringelheim, *op.cit.* note 29; De Schutter, *op.cit.* note 29, 28-29; Makkonen, *Measuring Discrimination ...*, *op.cit.* note 11, 61.

62 See Recital 34, Directive 95/46/EC. See also Makkonen, *Measuring Discrimination ...*, *op.cit.* note 11, 61.

63 Makkonen, *Measuring Discrimination ...*, *op.cit.* note 11, 61.

background with a view to promoting or maintaining equality; and it must be carried out with appropriate safeguards for the rights and freedoms of data subjects.⁶⁴

In sum, European norms on personal data protection, while restricting the circumstances in which sensitive data may be processed, do not prevent states from allowing their treatment where this is necessary for the protection of minorities, provided specific conditions are met. As a matter of fact, several of the exceptions set out in Directive 95/46/EC to the prohibition on processing sensitive data provide a ground for authorizing the collection of such data for the purpose of minority protection or anti-discrimination policies. However, where states make use of this possibility, they must ensure that both the general rules applicable to the treatment of all personal data and the particular requirements pertaining to sensitive data are strictly respected.

II. MINORITY DATA COLLECTION AND ETHNIC CLASSIFICATIONS

The question of how to protect individuals against illegitimate registration, use or dissemination of data related to their religious or ethnic background represents only one facet of the problem raised by minority data collection. Another major source of debate is the issue of how to identify a person's religion or ethnic belonging in the first place. This is more problematic for ethnic affiliations than for religious ones.⁶⁵ This section, therefore, concentrates on the theme of ethnic categorizations.

Ethnicity is a complex and contested concept. It is usually understood to be based on cultural ties and commonality of descent. However, there is no consensus among social scientists as to its exact definition. Most sociologists and anthropologists today reject essentialist concepts of ethnicity and insist that it is a socially constructed concept: ethnic groups are not based on natural and permanent characteristics; they are constructed and negotiated through interactions with other people and groups. Martin Bulmer and John Solomos emphasize that "[p]eople are socially defined as belonging to a particular ethnic or racial group, either in terms of definitions employed by others, or definitions which members of particular ethnic groups develop for themselves".⁶⁶ Identity feelings, moreover, can be multiple, overlapping and fluctuating.⁶⁷ Martin Bulmer proposes the following description of an ethnic group: "a collectivity within a larger population having real or putative common ancestry, memories of a shared past, and a cultural focus upon one or more symbolic elements which define the group's iden-

64 Para. 9, Schedule 3, Data Protection Act 1998, signed 16 July 1998.

65 On the difficulties raised by the concept of 'religion', see Makkonen, *Measuring Discrimination* ..., *op.cit.* note 11, 78-79.

66 Martin Bulmer and John Solomos, "Introduction: Re-thinking Ethnic and Racial Studies", 21(5) *Ethnic and Racial Studies* (1998), 819-837, at 822.

67 Simon, *op.cit.* note 13, 27. On the different understandings of ethnicity, 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* (INED-P.U.F., Paris, 2004), 481-515, at 481-482; John L. Comaroff, "Ethnicity, Nationalism, and the Politics of Difference in an Age of Revolution", in Edwin N. Willmsen and Patrick McAllister (eds.), *The Politics of Difference: Ethnic Premises in a World of Power* (University of Chicago Press, Chicago, London, 1996), 162-183.

tity, such as kinship, religion, language, shared territory, nationality or physical appearance".⁶⁸ This accords to a large extent with the definition found in the Principles and Recommendations for Population and Housing Censuses issued by the United Nations in September 2007: "[b]roadly defined, ethnicity is based on a shared understanding of history and territorial origins (regional and national) of an ethnic group or community as well as on particular cultural characteristics such as language and/or religion [...] Ethnicity is multidimensional and is more a process than a static concept, and so ethnic classification should be treated with moveable boundaries."⁶⁹ This latter document also highlights that the criteria relevant for identifying ethnic groups are dependent upon national context and may thus vary from country to country.⁷⁰

How can individuals' ethnic affiliation or origin be determined for the purpose of minority protection in a way that respects their individual rights? This is the question addressed in the remainder of this article. The right to privacy is again relevant here, insofar as it is increasingly seen as entailing the freedom for individuals to determine issues essential to their life and self-understanding.⁷¹ This trend is especially perceptible in the European Court of Human Rights' jurisprudence: since the year 2000, the Court has recognized that the notion of personal autonomy is an important principle underlying the interpretation of the right to private life enshrined in Article 8 of the European Convention.⁷² Further, it has paid growing attention to the issue of respect for identity in its case law on Article 8.⁷³ Personal autonomy and respect for individual identity thus constitute major principles to be taken into account when assessing the legitimacy of methods used for ethnic categorizations. Accordingly, the approach based on self-identification by the persons concerned has come to be deemed by international

68 Martin Bulmer, "The Ethnic Group Question in the 1991 Census of Population", in David Coleman and John Salt (eds.), *Ethnicity in the 1991 Census*, Vol. 1 (London, OPCS and HMSO, 1996), 33–62, quoted by Simon, *op.cit.* note 13, 27.

69 Principles and Recommendations for Population and Housing Censuses, Revision 2, Statistical Papers, Series M. No. 67/Rev.2, ST/ESA/STAT/SER.M/67/Rev.2, United Nations, New York, 2007, para. 2.161, at 162. See also Conference of European Statisticians, Recommendations for the 2010 Censuses of Population and Housing, Prepared in Cooperation with the Statistical Office of the European Communities (Eurostat), United Nations, New York and Geneva, 2006, para. 419, at 95.

70 UN Principles and Recommendations for Population and Housing Censuses, *ibid.*, para. 2.162, at 162.

71 On this aspect of the right to privacy, see De Schutter and Ringelheim, *op.cit.* note 29.

72 ECtHR, Appl. No. 2346/02, *Pretty v. United Kingdom*, judgment of 29 April 2002, para. 61.

73 See, in particular, ECtHR, Appl. No. 44599/98, *Bensaïd v. United Kingdom*, judgment of 6 February 2001, para. 47; ECtHR, Appl. No. 53176/99, *Mikulic v. Croatia*, judgment of 7 February 2002, para. 53; ECtHR, Appl. No. 28957/95, *Christine Goodwin v. United Kingdom*, judgment of 11 July 2002, para. 90; and ECtHR, Appl. No. 42326/98, *Odièvre v. France*, judgment of 13 February 2003, para. 29. In *Connors v. United Kingdom*, the European Court observed that the rights protected by Art. 8 are "rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community". ECtHR, Appl. No. 66746/01, *Connors v. United Kingdom*, judgment of 27 May 2004, para. 82.

bodies as most in line with international human rights law (see Subsection A). Yet it is also essential that the criterion on which the classification is based enables public authorities to obtain data that are adequate in relation to the purpose for which they are collected. In this regard, it is debatable whether the criterion of self-identification is in all circumstances the most adapted to collect data necessary for implementing minority rights policies, and especially anti-discrimination programmes. The possibility for states to resort to criteria other than self-identification in order to identify people belonging to certain minorities calls, therefore, for careful discussion (see Subsection B).

A. Self-identification and Ethnic Classifications

Various methods are used around the world for determining an individual's ethnic origin or affiliation. Four major approaches can be distinguished:⁷⁴

- Classification based on self-identification: individuals are asked to declare which ethnic group they feel they belong to. Often, they have to choose from a pre-established list of groups, which usually contains a final open category, allowing them to add a group not included in the list.
- Identification by community members: individuals are classified as belonging to a group if they are recognized as such by other members of the group.
- Identification based on 'objective' or indirect criteria: individuals are ranged into pre-defined categories on the basis of indirect indicators, such as their country of birth, the nationality of their parents or grandparents, or their mother tongue. These criteria are deemed 'objective' because they do not rely on self-perception or perception by others, but rather on factual information on places and practices that can be objectively assessed.
- Identification by a third party on the basis of visual observation: individuals are considered members of a group if they are identified as such, on the basis of their physical appearance, by an external observer carrying out the classification.

No international convention expressly regulates the criteria to be used to determine whether an individual belongs to a certain ethnic group. However, since the 1990s, several international bodies have expressed the view that self-identification is the most in line with certain internationally recognized rights. This position is clearly endorsed by the Advisory Committee on the FCNM. Article 3(1) of the Framework Convention lays down that every person belonging to a national 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. The Advisory Committee interprets this provision as entailing that the collection of personal data on affiliation with a national minority should be voluntary and based on self-identification.⁷⁵ The 'principle of self-identification' stemming from Article 3 of the FCNM has been repeatedly asserted in various country

⁷⁴ See Simon, *op.cit.* note 11, at 37-41.

⁷⁵ 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* (Oxford University Press, Oxford, 2005), 107-137.

opinions.⁷⁶ The Advisory Committee also infers from this that a question on ethnic or linguistic affiliation on the census cannot be made mandatory.⁷⁷ The UN Committee on the Elimination of Racial Discrimination, for its part, stated in its 1990 General Recommendation VIII, that 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”.⁷⁸ Likewise, ECRI consistently recommends in its country reports that ethnic data be collected with due respect for the principles of informed consent and voluntary self-identification of persons as belonging to a particular group.⁷⁹ The Durban Declaration and Plan of Action follows this trend: it lays down that information documenting racism and racial discrimination shall be collected with the explicit consent of the victims and be based on their self-identification.⁸⁰ In fact, in national census practices around the world, self-identification increasingly appears as the preferred criterion for ethnic classifications.⁸¹ Significantly, Recommendations for the 2010 Censuses of Population and Housing set out by the Conference of European Statisticians, on the basis of UN principles and recommendations, indicate that given the subjective dimension of ethnicity, information on this notion should be based on the free self-declaration of a person.⁸²

The wide support presently enjoyed by self-identification as a criterion for ethnic classification can be attributed partly to the fact that, among the various possible criteria, it is the one that best accords with the notion of personal self-determination: it leaves it

76 See, *inter alia*, Advisory Committee on the FCNM, first opinion on Italy, ACFC/INF/OP/I(2002)007, 14 September 2001, para. 21 (declaring that the current system of individual declaration of linguistic affiliation in the Bolzano province does not adequately safeguard the principle of free affiliation with a minority); second opinion on Italy, ACFC/INF/OP/II(2005)003, 24 February 2005, para. 40 and 43; second opinion on Croatia, ACFC/INF/OP/II(2004)002, 1 October 2004, para. 39; second opinion on Denmark, ACFC/INF/OP/II(2004)005, 9 December 2004, para. 13; and second opinion on Ireland, ACFC/OP/II(2006)007, 6 October 2006, para. 12.

77 See Advisory Committee on the FCNM, first opinion on Estonia, ACFC/INF/OP/I(2002)005, 14 September 2001, para. 19; first opinion on Poland, ACFC/INF/OP/I(2004)005, 27 November 2003, para. 24; and second opinion on the Russian Federation, ACFC/OP/II(2006)004, 11 May 2006, para. 35.

78 General Recommendation VIII, 38th Session, 1990, UN Doc. A/45/19, 79.

79 See, *inter alia*, Third Report on Cyprus, CRI(2006)17, 16 December 2005, para. 99; Third Report on the Czech Republic, CRI(2004)22, 5 December 2003, para. 86; Third Report on Estonia, CRI(2006)1, 24 June 2005, para. 121; Third Report on Finland, CRI(2007)23, 15 December 2006, para. 102.

80 See Durban Declaration and the Programme of Action of the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted 8 September 2001, para. 92(a), at <<http://www.un.org/WCAR/durban.pdf>>.

81 David Kertzer and Dominique Arel, “Censuses, Identity Formation, and the Struggle for Political Power”, in *id.* (eds.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses* (Cambridge University Press, Cambridge, 2002), 1–42, at 34.

82 Conference of European Statisticians, *op.cit.* note 69, paras. 415 and 425, at 95. See also the UN Principles and Recommendations for Population and Housing Censuses, *op.cit.* note 69, para. 2.162, at 162.

to individuals to assess to which group they feel they belong and whether they want to be considered as a member of a given community. Nonetheless, self-identification poses certain difficulties. Significantly, several European countries continue to resort, in some circumstances, to methods other than the one based on self-declared affiliation.

B. Limits of Self-identification and Alternative Criteria

A first major difficulty raised by self-identification lies with the fact that, in some contexts, this criterion leads to significant under-reporting by the members of minorities that are especially stigmatized and discriminated against. There are various reasons why people may choose not to identify with a minority to which, from an external point of view, they seem to belong: they may feel that association with this community does not reflect their identity; or they may fear that declaring affiliation with this group will put them at risk of discrimination. These two factors may be intertwined when people reject affiliation with a group that suffers from stigmatization. This problem is especially acute in the case of Roma. As is well known, census figures about the Roma populations in Central and Eastern European countries are not reliable; these populations are estimated to be much higher than the census results indicate.⁸³ The Advisory Committee has emphasized this problem in several of its country opinions,⁸⁴ highlighting that the lack of reliable data is detrimental to Roma, insofar as it hampers the ability of the state to target, implement and monitor measures aimed at promoting full and effective equality or at protecting their culture.⁸⁵ It has made several suggestions as to measures that could be taken by states in order to address the problem of under-reporting: public authorities should consult and involve representatives of national minorities in the organization of the population census, and in particular in the drafting of the question on ethnic affiliation.⁸⁶ By the same token, they should endeavour to better inform and

83 See Helen O'Nions, *Minority Rights Protection in International Law – The Roma of Europe* (Ashgate, Aldershot, 2007), 2.

84 Advisory Committee on the FCNM, first opinion on Slovakia, ACFC/INF/OP/I(2001)001, 22 September 2000, para. 21; first opinion on Hungary, ACFC/INF/OP/I(2001)004, 22 September 2000, para. 17; first opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, para. 28; first opinion on Romania, ACFC/INF/OP/I(2002)001, 6 April 2001, para. 26; second opinion on Croatia, ACFC/INF/OP/II(2004)002, 1 October 2004, para. 34; second opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, para. 34; second opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, paras. 10 and 30; and second opinion on Romania, ACFC/OP/II(2005)007, 24 November 2005, para. 37.

85 See, *inter alia*, second opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, para. 30; first opinion on Hungary, ACFC/INF/OP/I(2001)004, 22 September 2000, para. 17; first opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, para. 28. On the problems raised by the self-identification criterion from the perspective of equality policies, see Lilla Farkas, "The Monkey that Does not See", 2 *Roma Rights Quarterly* (2004), 19–23.

86 First opinion on Romania, ACFC/INF/OP/I(2002)001, 6 April 2001, para. 21; second opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, para. 33; second opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, para. 32;

raise awareness among minorities of the importance of the census, in order to encourage the persons concerned to use the opportunity of declaring their ethnic affiliation.⁸⁷ In addition, the Committee recommends that governments should seek further ways and means of obtaining reliable statistical data on the actual number of persons belonging to national minorities, rather than relying solely on census results.⁸⁸ For instance, when complete statistics are not available in areas such as access of minorities to employment or health care, states are invited to gather data by other means, such as estimates based on *ad hoc* studies, special surveys or any other scientifically valid methods.⁸⁹

Conversely, in some situations, self-identification may lead to over-reporting: where special programmes are established for particular groups, for example to assist members of minorities in obtaining jobs or accessing university education; individuals who have no real connection with this particular ethnic group can be tempted to self-identify with it in order to benefit from this programme.⁹⁰ A problem of the sort arose in Hungary in relation to minority self-government elections. Under the 1993 Law on the Rights of National and Ethnic Minorities, any of Hungary's 13 recognized minorities are allowed to establish local or national self-government.⁹¹ These bodies manage public funds and are competent in the field of local education, language use, printed and electronic media and the promotion of their traditions and culture. In the initial system, no specific criterion was set for participation in the elections of these institutions: neither candidates nor voters needed to declare affiliation with the minority group represented by a given self-government. This led to some problematic situations: in some cases, people who did not consider themselves to be members of the minority concerned participated in self-government elections either for financial reasons or, worse, with the deliberate

second opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, para. 27. Similarly, the Conference of European Statisticians recommends that "representatives of ethnic, language and religious groups be consulted in the drafting of census questions, the definition of classification procedures and the conduct of censuses among minority populations to assure transparency, the correct understanding of the questions and the full participation of the population. Conference of European Statisticians, *op.cit.* note 69, para. 417, at 95.

87 Second opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, para. 31-32; second opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, para. 37; second opinion on Slovakia, ACFC/OP/II(2005)004, 26 May 2005, para. 27.

88 First opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, para. 28; first opinion on Romania, ACFC/INF/OP/I(2002)001, 6 April 2001, para. 26; second opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, para. 31; second opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, 24 February 2005, para. 37; second opinion on Croatia, ACFC/INF/OP/II(2004)002, 1 October 2004, para. 36.

89 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; second opinion on Slovenia, ACFC/INF/OP/II(2005)005, 25 May 2005, para. 46. See also Outline for Reports to be Submitted Pursuant to Article 25 paragraph 1, FCNM, *op.cit.* note 6, para. 4.

90 UNDP, UN Economic and Social Council, Conference of European Statisticians, Group of Experts on Gender Statistics, "Gender Aspects and Minority Data: An Illustrative Case of Roma Women in Southeast Europe", ECE/CES/GE.30/2006/20, 22 June 2006, para. 32.

91 Law on the Rights of National and Ethnic Minorities, No. LXXVII, signed 7 July 1993.

purpose of limiting the powers of the minority. Such abuses affected the Roma community especially: in the village of Jázladány, in particular, a group of non-Roma, led by the wife of the mayor, were elected to the Roma minority self-government thanks to non-Roma votes, with the specific objective of overruling the previous self-government's decision to veto the creation of a new private school, which in its view would have increased Roma segregation in education.⁹² In order to address this problem, the law was amended in 2005: participation in minority self-government elections is now restricted to persons belonging to the minority concerned. Interestingly, however, the system remains based on self-identification: voters in a given minority self-government election are now required to register with the local election office prior to each election and to explicitly state that they are members of the minority. This declaration cannot be challenged. Besides, in order to guarantee personal data protection, access to the register is limited and the voters' lists are destroyed after each election. As for candidates, they must be presented by a minority civil society organization that has been in existence for at least three years and is identified in its statutes as an organization representing the minority concerned.⁹³

At this point, it is important to emphasize that Article 3 of the Framework Convention does not provide individuals with a right to arbitrarily choose to belong to a national minority. As stated in the Explanatory Report, the choice guaranteed in Article 3 of the Framework Convention presupposes that the person concerned displays objective characteristics that permit him or her to be considered a member of a determinate national minority.⁹⁴ Thus, given the difficulties entailed by self-identification, the question arises whether states can resort to criteria other than self-declared identity for determining a person's ethnic affiliation or origin.

The Advisory Committee has been confronted with this issue when reviewing the United Kingdom's second report. The problem concerned the positive action schemes introduced in Northern Ireland by the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) (see *supra*). As mentioned above, under this legislation, employers are under a duty to submit annually to the Northern Ireland Equality

92 National Democratic Institute, *The Hungarian Minority Self-Government System as a Means of Increasing Romani Political Participation*, National Democratic Institute Assessment Report, funded by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR), October 2006, 11, at <http://www.osce.org/documents/odihr/2007/07/25447_en.pdf>. See also Anita Danka and Nicole Pallai, "Legal but Illegitimate: The Gypsy Minority Self-Government in Jázladány", available on the European Roma Rights Centre website, at <<http://www.errc.org/cikk.php?cikk=1302>>; Advisory Committee on the FCNM, first opinion on Hungary, ACFC/INF/OP/I(2001)004, 22 September 2000, para. 52; and second opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, paras. 28-29.

93 National Democratic Institute, *op.cit.* note 91, 11-12. In its second opinion on Hungary, adopted before the vote of the 2005 law amending the minority self-government election system, the Advisory Committee already welcomed the amendment of Art. 70 of the Hungarian Constitution, which restricts to persons belonging to minorities the right to vote and run as a candidate in minority self-government elections. Second opinion on Hungary, ACFC/INF/OP/II(2004)003, 9 December 2004, paras. 25-27.

94 Explanatory Report to the FCNM, para. 35.

Commission a 'monitoring return' reporting the community background of their workforce and job applicants. The rules laid down to determine the community to which an employee is treated as belonging in this context has retained the attention of the Advisory Committee. In principle, the determination must be based on the person's self-identification. But where an employee or job applicant does not declare affiliation with either of the two communities, the employer is strongly recommended to use the residuary method in order to check his or her community affiliation. This residuary method consists of relying on other relevant information provided by the persons concerned, such as their name and surname, address, schools attended, sporting or leisure pursuits or interests, clubs, societies or organizations they belong to or occupation as a clergyman of a particular religious denomination. On this basis, the employer is allowed, for the purposes of the monitoring return, to treat the employee as belonging to the community to which the information tends to show he or she is related. Yet, before sending in the monitoring return, the employer must inform each employee about the community to which he or she is regarded as belonging in this document. Where the employee believes that the employer has incorrectly designated him or her and draws this to the employer's attention within seven days, the employer is obliged to correct the monitoring return to reflect this response.⁹⁵

Interestingly, when assessing the compatibility of this system with Article 3 of the Framework Convention, the Advisory Committee took a very nuanced position: while restating that restrictions on the right to free self-identification by persons belonging to national minorities are not consistent with the latter provision, it admits 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".⁹⁶ It recommends that the government should regularly review the authorization given to employers to determine the community background of their employees in order to ensure its continuing relevance to the objective of securing equality in the field of employment.⁹⁷ The Advisory Committee, however, did not elaborate on the reasons why it deems the system in place in Northern Ireland as relevant and acceptable under the Framework Convention. It is suggested that three factors can explain the Advisory Committee's position. First, for an equality programme such as the one in place in Northern Ireland to be efficient, it is essential that the authorities obtain accurate data on the number of employees belonging to each community, both the traditionally disadvantaged one and the traditionally privileged one. Indeed, this monitoring obligation is part of a general policy aimed at redressing inequalities between Catholics and Protestants in the labour market. Data are needed to determine whether members of both communities enjoy fair participation in employment, detect instances of potential discrimination and identify additional measures to be adopted to remedy the situation

95 Christopher McCrudden, "Consociationalism, Equality and Minorities in Northern Ireland Bill of Rights Debate: The Role of the OSCE Higher Commissioner for National Minorities", in John Morison, Kieran McEvoy and Gordon Anthony (eds.), *Judges, Transition and Human Rights Cultures* (Oxford University Press, Oxford, 2006), 315-353.

96 Second opinion on the United Kingdom, ACFC/OP/II(2007)001, 6 June 2007, para. 48.

97 *Ibid.*, para. 49.

where necessary. If a number of individuals choose not to declare association with a community, although they are in fact connected to it and perceived as such by the surrounding society, the figures will be distorted and this can jeopardize the implementation of the whole equality scheme.⁹⁸ Second, it must be pointed out that the residuary method employers are allowed to use to determine a person's background despite him or her not declaring affiliation with any of the two communities, does not permit them to rely merely on their subjective perception of which community a person belongs to: rather, it is based on specific criteria listed in the relevant regulations and which, in the social context of Northern Ireland, characterized by a profound cleavage between Catholics and Protestants, are deemed revealing of a person's community.⁹⁹ Third—and importantly—the derogation to the rule of self-identification is attenuated by the fact that the persons concerned have the option of requiring that the monitoring return be corrected if they deem that they have been incorrectly classified as belonging to one community. They are, therefore, not deprived of all control over the manner in which they are categorized for the purposes of the monitoring obligation.

While the Northern Ireland system is still principally based on self-determination, other countries have chosen a different criterion as the main basis for determining ethnic affiliation or origin when collecting data necessary for their anti-discrimination policies. This is the case in the Netherlands. Here, categorization as a member of an 'ethnic minority' does not depend on self-identification by individuals but rather on their birthplace or that of their parents. However, the notion of 'ethnic minority' has a particular meaning in the Dutch official language. In 1983, the Dutch government adopted a 'minority policy' aimed at enhancing the socio-economic integration of certain disadvantaged immigrant groups (*Minderhedennota*). Since then, the term 'ethnic minorities' has designated a limited list of groups, specifically named in governmental documents, and characterized by two elements: first, they are groups of immigrants and descendants of immigrants for the presence of which the authorities feel a special responsibility, either because they come from former colonies (Surinamese, Antillans, Arubans and Moluquans) or because they have been recruited by the government to work in the Netherlands (in particular Moroccans and Turks); and, second, they are in a structurally disadvantaged socio-economic situation.¹⁰⁰ Under the 1998 Act for

98 See De Schutter and Ringelheim, *op.cit.* note 29.

99 McCrudden, *op.cit.* note 94.

100 In addition, in 1995, the national statistics agency (*Centraal Bureau voor de Statistiek*, CBS) introduced the category '*allochtonen*' (i.e., 'non-autochthonous') in official statistics to single out individuals with a foreign background living in the Netherlands, whether or not they are Dutch citizens. It is sufficient to have at least one parent born abroad to be classified as '*allochtone*'. See 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* (2005), 35-59; Virginie Guiraudon, Karen Phalet and Jessica Ter Wal, *Comparative Study on the Collection of Data to Measure the Extent and Impact of Discrimination in a Selection of Countries – Final Report on the Netherlands* (European Commission, DG Employment and Social Affairs, Brussels, 2004), 11.

Stimulation of Participation of Minorities in the Labour Market,¹⁰¹ all companies with more than 35 employees were required to define an action plan aimed at promoting equality for ethnic minorities. Moreover, they had 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 in the Netherlands. This obligation was terminated by Dutch authorities in 2004, but companies can still carry out ethnic monitoring on a voluntary basis. To this end, employers are allowed to ask their employees to provide information on their place of birth or that of their parents. It is on this basis that members of 'ethnic minorities' are identified. A specific provision has been inserted in the Dutch Personal Data Protection Act to allow the processing of personal data for this purpose. The Act subordinates the authorization to the following conditions: the treatment of personal data concerning a person's 'race' (*sic*) is permitted when this is carried out for the purpose of assigning a preferential status to persons from a particular ethnic or cultural minority group with a view to eradicating or reducing actual inequalities affecting persons from a particular ethnic or cultural minority group, provided that: (1) this is necessary for this objective; (2) the data processed relate only to the country of birth of the data subjects, their parents or grandparents, or 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 to the processing of this information in writing.¹⁰²

The criterion chosen for ethnic classification, namely the country of origin of the person or of his or her parents, is related to the type of groups concerned by anti-discrimination policies in the Netherlands—that is, immigrants and their descendants. Of course, one could argue that, according to the traditional international law stance, communities of immigrants are not considered to constitute 'national minorities'. However, this approach is increasingly contested in the minority rights literature.¹⁰³ The Advisory Committee itself encourages states to envisage including certain immigrant groups in applying the Framework Convention on an article-by-article basis.¹⁰⁴ The question must therefore be raised whether the Dutch system of ethnic data collection is compatible with Article 3 of the Framework Convention, which, according to the Advisory Committee, entails a norm of self-identification. In this respect, as with the Northern Ireland mechanism, it is essential to have regard to the purpose for which the data are collected. Importantly, a difference emerges here between the two facets of minority

101 Act for Stimulation of Participation of Minorities in the Labour Market, signed 23 April 1998.

102 Art. 18, Personal Data Protection Act, signed 6 July 2000. Note that the Act also provides that the prohibition on processing sensitive data does not apply where this is carried out with the express consent of the data subject (Art. 23(1)(a)).

103 According to Kristin Henrard: "[n]otwithstanding some ongoing resistance, an international trend can be identified away from a nationality requirement". Kristin Henrard, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination* (European Commission, DG Employment, Social Affairs and Equal Opportunities, Brussels, 2007), 12.

104 See, for instance, second opinion on Germany, ACFC/OP/II(2006)001, 1 March 2006, para. 26; second opinion on Norway, ACFC/OP/II(2006)006, 5 October 2006, para. 31.

protection: preservation and promotion of minorities' specific cultural identity, on the one hand, and anti-discrimination, on the other. While measures aimed at the first objective presuppose that individuals to which they apply identify with the minority and its culture, the protection against discrimination, by contrast, does not depend on whether the persons concerned have a feeling of belonging to the discriminated group they are associated with by others. When data are processed with a view to detecting discrimination and promoting equality, what is searched for is not how people perceive their ethnic identity, but whether they are part of a group exposed to discrimination. As a matter of fact, discriminatory attitudes do not necessarily result from individuals' feelings of belonging, but rather from the way they are perceived by others.¹⁰⁵ Self-perception and perception by others may coincide in a large number of cases, but this is not always true. Hence, insofar as reliable information attests that people with certain national origins are the victims of discrimination or structural disadvantages, the birth-place of individuals or that of their parents can be deemed to provide an objective and relevant criterion to identify the groups on which anti-discrimination policies should focus.

Besides, the rule laid down in Article 3 of the Framework Convention is related to the notion that the existence of a 'minority' within the meaning of international law on minority protection supposes both 'objective' elements—namely, ethnic, religious or linguistic features differing from those of the rest of the population—and a subjective component, i.e., the wish of the group's members to preserve their specific identity.¹⁰⁶ However, the prohibition of ethnic discrimination is not only based on the Framework Convention but is also enshrined in international instruments whose scope is not restricted to national minorities, such as the UN Convention on the Elimination of All Forms of Racial Discrimination and the EU Race Equality Directive. And the groups to which these latter instruments apply are not defined by reference to any subjective condition: all persons presenting a characteristic likely to entail a form of discrimination prohibited by the instrument at stake—be it skin colour, national origins, ethnic or racial origins—are covered by the protection it provides. How this person relates to this characteristic, whether he/she deems it important for his or her self-understanding, is irrelevant.

On a different note, it may be observed that in certain European countries where strong opposition to the institution of ethnic categories is ingrained in the political culture, the population—and especially people with an immigrant background—may more readily accept being questioned about their national origins than being asked to classify themselves in a list of pre-defined 'ethnic' or 'racial' groups.¹⁰⁷

105 See, for instance, Nancy A. Denton, "Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?", 15 *Law & Inequality* (1997), 83-97, at 92.

106 Henrard, *op.cit.* note 103, 44-45.

107 France provides an interesting example in this regard. A survey carried out in 2006 among a sample of employees and students to assess their reaction when asked to classify themselves along various criteria, showed that categorizations based on geographic origin were well received by the vast majority of respondents (96%). Ethno-racial categories, by contrast, yielded more reluctance, especially from immigrants and people of immigrant origin. See Patrick Simon and Martin Clément, "Comment décrire la diversité des origines en France?"

These considerations permit the conclusion that the use of criteria other than self-identification to collect data needed to inform, implement and monitor anti-discrimination laws and policies does not necessarily conflict with international human rights law. Self-identification should therefore not be considered as the sole and only admissible basis for gathering data on people's ethnic affiliation or origin for the purposes of combating discrimination and promoting equality. Rather, as the CERD has stated, identification of people as members of a certain ethnic group should in principle be based on self-identification, *if no justification exists to the contrary*.¹⁰⁸ It is submitted that the necessity of obtaining appropriate data for implementing efficient anti-discrimination and equality policies, in view of serious discrimination or disadvantage suffered by certain groups, does provide justification for relying on another criterion, in place of or in addition to self-identification. However, to be admissible, such an alternative method must be reliable and adequate for the purpose of identifying the groups at stake, taking into account the social context in which the policies are implemented. Arguably, the notion of personal self-determination would require that, even when they use a criterion other than self-declared ethnic affiliation, states should, as far as possible, ensure that individuals have a say in the categorization process. In this respect, it is noteworthy that in Northern Ireland, employees whose community background is determined on the basis of the residuary method are allowed to ask the employer's determination to be corrected. Similarly, in the Netherlands employees have the option of indicating, in writing, objections to the processing of data on their birthplace. But whatever criterion is used, it is essential that all people should be clearly informed about the reasons why they are asked to provide such sensitive information about themselves and why it is important that public authorities obtain accurate and comprehensive data. Minority protection and eradication of discrimination cannot be achieved without the involvement of the whole society, majority and minority alike.

III. CONCLUSION

The question as to how to obtain adequate data on ethnic, religious or linguistic minorities is an inescapable aspect of contemporary minority protection. Various facets of international law on minorities call for the gathering of such data: the design of appropriate measures to enable minority members to preserve their cultural traits as well as the implementation of policies aimed at combating ethnic or religious discrimination.

Une enquête exploratoire sur les perceptions des salariés et des étudiants", 425 *Population & Société* (July-August 2006), at <http://www.ined.fr/fr/ressources_documentation/publications/pop_soc/>. On the one hand, the system in place in The Netherlands also has its limits and disadvantages. In particular, the practice of singling out people on the basis of their parents' origins, regardless of whether they are citizens or not, may itself come to be resented as a form of stigmatization. Furthermore, from a practical point of view, after three generations, the criterion of country of birth becomes poorly reliable at identifying those at risk of discrimination: it is, indeed, difficult to record information on grandparents' birthplace on the census or in population registers; moreover, there is no satisfying way to classify people with multiple origins. See Jacobs and Rea, *op.cit.* note 99; Simon, *op.cit.* note 11, 67-68; and De Schutter and Ringelheim, *op.cit.* note 29.

108 CERD, General Recommendation VIII, *op.cit.* note 78.

Yet, the scope for public and private bodies to handle information on personal characteristics of individuals such as their ethnic or religious affiliation is restricted by the norms stemming from the right to respect for privacy. These norms, however, should not be regarded as an obstacle to the processing of data needed for minority protection. Rather, they define fundamental safeguards and limitations that make it possible to obtain information necessary for these purposes in a manner that respects individuals' rights and interests. To be sure, personal data protection rules, as defined in Council of Europe Convention No. 108 and EU Directive 95/46/EC, subordinate the processing of sensitive data, which include data on religion and ethnic origin, to particularly stringent conditions that supplement the general requirement applicable to the treatment of any sort of personal data. But this heightened protection does not amount to an absolute prohibition: even Directive 95/46/EC, which, as a matter of principle, precludes the processing of sensitive data, provides for exceptions to this rule. Several of these exceptions furnish a basis for allowing, under certain conditions, the treatment of data related to ethnic or religious belonging where this is necessary for minority protection and anti-discrimination. Besides, insofar as privacy is viewed as embodying a principle of personal self-determination, it also has implications for the manner in which individuals' ethnic affiliation or origin can be determined. At the international level, there is a clear trend towards considering that identification of people as members of an ethnic group should, in principle, be based on self-identification. This position, supported by the Advisory Committee on the FCNM, ECRI and the CERD, resonates with the notion of personal self-determination. Yet the constraints of anti-discrimination policies may justify derogations from the norm of self-identification: in certain contexts, the data needed to put in place effective equality programmes are best obtained when resorting to a criterion other than self-declared ethnic identity. Nonetheless, even when an alternative method is used, states should ensure that due regard is paid to the principle of respect for individuals' autonomy.