

Collecting Data on Race and Ethnicity for Antidiscrimination Policies

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

A U.S.–E.U. Comparison

Julie Ringelheim

At the international level as in several national contexts, statistical studies are recognised as playing an increasingly important role in the struggle against racial and ethnic discrimination in several important respects. First, in order to elaborate policies designed to promote equality, States must be able to identify the nature and extent of discrimination, the groups affected by discrimination, and the fields in which discrimination occurs. To this end, states must have access to sufficiently precise information on the situation of members of vulnerable groups in the diverse fields of social life, such as employment, education or housing. Second, the regular production of new statistical studies is necessary to monitor the implementation of equality policies and assess their impact. The same holds true for private actors such as employers who wish to develop an equality plan in their company and therefore must have the means to assess the extent to which potentially discriminated groups are adequately represented in their workforce. Third, in the framework of judicial proceedings, the law of several States allows the person who claims to be the victim of discrimination to have recourse to statistical studies to prove ‘indirect discrimination’ or discrimination as ‘disparate impact’.

The constitution of statistics in order to measure discrimination presupposes, however, the collection of data relating to ethnic or racial affiliation, which, under European norms on personal data protection, constitutes “sensitive data,” the processing of which is strictly restricted. These restrictions are precisely based on the consideration that those features having normally no relevance in decisions made about an individual, their treatment creates the risk that these data will be used for discriminatory purposes. We are thus confronted with a double bind: effective action against discrimination seems to require the treatment of sensitive data, yet this treatment itself entails a risk of discrimination. Besides, collecting data relating to ethnic or racial affiliation raises another vexing difficulty: the mere possibility of classifying people in ethnic or racial categories is controversial, given the ambiguity of the concepts of “race” and “ethnicity”, and the potential conflict with the principle of individual self-determination.

On the basis of a comparison of the law and practices prevailing in several legal systems, this paper aims to explore these tensions and to determine how and at which conditions the imperative of equality can be reconciled with the requirements of personal data protection on the one hand, the principle of individual self-determination on the other hand, which can be seen as two aspects of the right to privacy. The legal systems studied are those of the United States, the European Union and three of its member states, France, the Netherlands and the United Kingdom. The paper is divided into three parts. Part I explains in more details why racial and ethnic data can be so important for developing and implementing antidiscrimination policies. Part II addresses the issue of personal data protection: it focuses mainly on European Union law, which, compared to the United States, has developed much more far-reaching rules in this area. Part III focuses on the problems raised by the drawing of racial or ethnic categories and the processes through which individuals are classified into these categories.