

**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**

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*Note that this is a very preliminary draft. The arguments are not fully developed and several parts require further research. All comments are very welcome.*

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## **Introduction**

This paper seeks to address the problems posed by the collection of data on racial and ethnic origins for the purposes of antidiscrimination laws and policies. This issue is at present the subject of much attention in the European Union. With the 1997 Treaty of Amsterdam, Article 13 was inserted in the Treaty of Rome, providing the European Community with the competence to take action to combat discrimination based on racial or ethnic origin, as well as on sex, religion or belief, disability, age and sexual orientation.<sup>1</sup> Since then, the fight against discrimination has become a major concern of the European Community. Soon after the entry into force of the Amsterdam Treaty, two directives were adopted on the basis of this new provision: Directive 2000/43/CE (called the “Race Directive”), adopted in June 2000, prohibits racial and ethnic origin discrimination in a large range of areas, in particular, employment, social protection, education, and provision of goods and services, including housing.<sup>2</sup> Directive 2000/78/EC (the “Framework-Directive”), passed in November of the same year, forbids discrimination based on age, disability, religion and sexual orientation, but covers only the field of employment.<sup>3</sup> In addition, the European Council established a vast Community action programme to combat discrimination (2001-2006). One of the programme’s objectives is to foster better understanding of issues related to discrimination through improved knowledge of this phenomenon and through evaluation of the effectiveness of policies and practice.<sup>4</sup> In this context, EU policy-makers found that precise and reliable data documenting the scale and nature of discrimination affecting the groups protected by the directives were often unavailable in member states. This lack of data has been identified by the European Commission as a serious obstacle to policy developments and analysis in the field of antidiscrimination.<sup>5</sup> The Commission has thus undertaken to encourage member countries to develop mechanisms designed to gather information on discrimination.<sup>6</sup>

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<sup>1</sup> “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” (Article 13 EC).

<sup>2</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19 July 2000, p. 22).

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303 of 2 December 2000, p. 16). The Directive prohibits discrimination in access to employment, self-employment and working conditions, including dismissals and pay and membership of organizations.

<sup>4</sup> Council decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ L 303 of 2 December 2000, at 23, Article 2.

<sup>5</sup> European Commission, *Equality and non-discrimination in an enlarged European Union*, Green paper, DG for Employment, Social Affairs and Equal Opportunities, 2004, at 22 [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf/pubst/grpap04\\_en.pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/pubst/grpap04_en.pdf). See also European Commission, *Report on the implementation of the action plan against racism – mainstreaming the fight against racism*, DG for Employment, Social Affairs and Equal Opportunities, January 2000, at 9. [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/pdf](http://europa.eu.int/comm/employment_social/fundamental_rights/pdf)

<sup>6</sup> The aforementioned Community programme indicates that as part of its initiatives, it will support “the development and dissemination of comparable statistical series data on the scale of discrimination” and “the

European States are also under pressure from international bodies tasked with monitoring antidiscrimination. The United Nations Committee on the Elimination of all forms of Racial Discrimination (CERD),<sup>7</sup> the European Commission against Racism and Intolerance (ECRI)<sup>8</sup> as well as the Advisory Committee on the Council of Europe Framework Convention on the Protection of National Minorities<sup>9</sup> are regularly calling upon state to gather and produce information reflecting the situation of vulnerable groups, including ethnic minorities, in a number of areas of social and economic life. Those bodies insist that accurate data is essential to reveal direct or indirect forms of discrimination and to elaborate sound antidiscrimination policies. Likewise, the Durban Declaration and Plan of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (September 2001), urges states to collect, analyse and disseminate reliable statistical data to assess regularly the situation of individuals and groups victims of racial discrimination.<sup>10</sup>

The experience of various countries, like the United States and Canada, but also the United Kingdom, which is part of the European Union, demonstrates the critical role that data and statistics can play in the elaboration, implementation and assessment of policies aimed at combating racial and ethnic discrimination. Yet, many EU countries are deeply reluctant to collect this type of data. Several arguments are raised in this regard. The objection most commonly voiced is that processing data on racial

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development and dissemination of methodologies and indicators to assess the effectiveness of anti-discrimination policy and practice.” (Council decision 2000/750/EC, appendix). The European Commission has commissioned or supported several studies on the question of measurement of discrimination. See P. Simon (coord.), *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands*, Medis Project (Measurement of Discrimination), European Commission, DG for Employment, Social Affairs and Equal Opportunities, August 2004 (study commissioned under the Community action programme) and N. Reuter, T. Makkonen and O. Oosi (eds), *Study on Data Collection to measure the extent and impact of discrimination in Europe*, European Commission, DG for Employment, Social Affairs and Equal Opportunities, December 2004, available at

[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/data\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/data_en.htm). See also E. Olli and B. K. Olsen (ed.), *Towards Common Measures for Discrimination: Exploring Possibilities for combining existing data for measuring ethnic discrimination*, November 2005, published by Centre for Combating Ethnic Discrimination and Danish Institute of Human Rights, with the support of the European Community Action programme to combat discrimination.

<sup>7</sup> See M. Banton, “Ethnic Monitoring in International Law: the Work of CERD,” in A. Krizsan (ed.), *Ethnic Monitoring and Data Protection – The European Context*, CPS Books, Central European University Press, Budapest, 2001, 62-85.

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

<sup>9</sup> See, for instance, the 2d Opinion of the Advisory Committee on Denmark, 9 December 2004, ACFC/INF/OP/II(2004)005, § 60 or its Opinion on Spain, 27 November 2003, ACFC/INF/OP/I(2004)004.

<sup>10</sup> Durban Declaration and Plan of Action, § 92, available at [www.un.org/WCAR/durban.pdf](http://www.un.org/WCAR/durban.pdf).

or ethnic origins would infringe upon the right to privacy. EU countries have all adopted far-reaching legislations on personal data protection, based on the EU Directive on the subject. Under this directive, data revealing racial or ethnic origins, along with data on religion, health or sexual orientation, are defined as sensitive data. And as a matter of principle, the processing of sensitive data is, indeed, prohibited. However, this prohibition is not absolute: the directive allows for exceptions, under certain conditions. It is thus far from clear that European norms makes it illegal to collect racial or ethnic data for the purposes of antidiscrimination.<sup>11</sup> But beyond the issue of personal data protection, the mere possibility of classifying people in ethnic or racial categories is controversial. This concern also relates to the right to privacy, insofar as it is interpreted as embodying a principle of individual autonomy and self-identification. Apart from the vexing question of how “race” and “ethnicity” should be understood, one may wonder to what extent the assignment of individuals to a racial or ethnic category is compatible with respect for individuals’ right to define themselves as they wish. This raises two sub-questions: how are the categories to be delineated? And on the basis of which criteria are individuals to be sorted out in them? The matter of categorisation and classification points towards a third source of concern: some fear that institutionalising racial or ethnic categories and routinely classifying people along this taxonomy, would essentialise differences, reinforce cleavages, and eventually run against the goal of fighting discrimination and promoting a more equal and tolerant society.

This paper aims to explore the two first questions with a view to clarifying the conditions under which the data necessary for the fight against racial and ethnic discrimination can be collected, while fully respecting the rights of individuals. The discussion is based on the examination of the laws and practices of five legal systems: the United States, the European Union, and three of its Member States, the United Kingdom, the Netherlands, and France. The United States has a long experience in the area of measuring racial or ethnic discrimination. Since the adoption of the Civil Rights Act in 1964, it has developed extensive antidiscrimination programs, combined with sophisticated systems of statistical monitoring, which imply the processing of data relating to race or ethnicity. Within the EU, the United Kingdom deserves special attention, since it is, at present, the sole member state that produces statistics broken down by self-declared ethnic affiliation, as part of its antidiscrimination scheme. The Netherlands has also developed statistical monitoring mechanism in the field of antidiscrimination, but its statistics on “ethnic minorities” or so-called “allochtons” are based on indirect criteria, namely the country of birth of the persons concerned or of their parents. France, by contrast, is characterised by a strong opposition,

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<sup>11</sup> Similar questions arise with respect to data on discrimination based on some of the other grounds mentioned in Article 13 EC, namely religion, disability and sexual orientation. Data on these elements are also defined as “sensitive data” by European personal data protection instruments. This paper, however, only deals with the collection of data on ethnic and racial origins for two reasons: first, they raise specific difficulties, due to the ambiguities of the notions of “race” and “ethnicity”; second, they are, among the different types of data defined as sensitive, those which are the most often collected world-wide. According to P. Simon, while statistics on sexual orientation are never collected in EU states, data on religion is recorded in some countries in various ways, often depending on the public financing of religious groups. As for disability, statistics derive from the attribution of social benefits or medication care services. (P. Simon, 2004, at 8).

deeply ingrained in the political culture, to identifying individuals on the basis of their ethnic origins. Nonetheless, the idea of introducing devices aimed at measuring discrimination and monitoring equality programmes, inspired by foreign examples, has emerged in the French public debate.

The first part of the paper explains in more details why racial and ethnic data can be so important for developing and implementing antidiscrimination laws and policies. **(I)**. Part II addresses the issue of personal data protection. It focuses on European norms and seeks to clarify their implications with regard to the processing of data on racial and ethnic origins for the purposes of antidiscrimination action. **(II)**. Part III grapples with the problem of ethnic and racial categories. It first observes the emergence, in international human rights law, of a norm according to which the classification of an individual as member of a racial or ethnic group should be based on self-identification. It then describes the practices of the U.S., the U.K. and the Netherlands in categorising and classifying their population, before looking at recent debates on the subject in France. The examination of states' practice reveals some tensions and dilemmas inherent to the exercise of classifying people by race or ethnicity for antidiscrimination purposes. **(III)**. In a later stage, I intend to develop a fourth part, which would deal with the third objection mentioned above against racial and ethnic data collection, namely that it threatens the goal of promoting equality by entrenching and institutionalising differences. My intention is to discuss this argument in light of the broader debate on the different conceptions of equality. This point, however, is not addressed in the present paper.

The basic position of this paper is that while the collection of data on race and ethnicity raises thorny questions that must be addressed thoroughly, it also represents a crucial tool for the fight against discrimination. Human rights standards, and, more particularly, the requirements of the right to privacy, do not preclude the collection of such data, but rather provide essential indications on the safeguards that must be respected when processing these information.

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

Ethnic and racial data can contribute in several important respects to the fight against discrimination.<sup>12</sup> First of all, in order to elaborate sound antidiscrimination policies, states need to correctly grasp the contours of the problem: they must be able to identify the groups exposed to discrimination, the areas in which discrimination occurs as well as the nature and scale of discrimination. To this end, they need to have access to reliable statistical information on the situation of members of vulnerable groups in the diverse fields of social life. Second, once legislations and policies are in place, the regular production of new statistical studies enables public authorities to monitor their implementation, supervise compliance and assess their effectiveness.<sup>13</sup> Thus, under title VII of the U.S. 1964 Civil Rights Act, “every employer, employment agency, and labor organization subject to this title” is required to “(1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (2) make such reports therefrom, as the Commission shall prescribe by regulation...” Accordingly, since 1966, all companies with more than 50 employees and a contract with the federal government, and all firms with more than 100 employees whether or not they have a contract with the federal government, have been asked to report to the competent federal agency, on a yearly basis, the composition of their workforce broken down by ethno-racial identity, by gender, and by job group.<sup>14</sup>

Furthermore, the processing of personal data is necessary for the implementation of certain types of positive action measures. At the European level, the Race Equality Directive (2000/43/EC), authorises EU member states, “with a view to ensuring full equality in practice”, to maintain or adopt positive action measures – defined as “specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin” -, but do not oblige them to do so.<sup>15</sup> Positive action may take different forms. In particular,

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<sup>12</sup> See *inter alia* O. De Schutter, “Three Models of Equality and European Anti-discrimination Law”, *Northern Ireland Quarterly*, 2006 (forthcoming); E. Olli and B. K. Olsen (ed.), 2005, at 10; ECRI, Seminar with national specialized bodies to combat racism and racial discrimination on the issue of ethnic data collection, Explanatory Note, Strasbourg, 17-18 February 2005 (on file with the author); N. Reuter, T. Makkonen and O. Oosi (eds), 2004, at 14; J. A. Goldston, “Ethnic data as a tool in the fight against discrimination”, European Conference on Data to Promote Equality, Helsinki, Finland, 9 December 2004, p. 12, available at [http://www.europa.eu.int/comm/employment\\_social/fundamental\\_rights/events/helsinki04\\_en.htm](http://www.europa.eu.int/comm/employment_social/fundamental_rights/events/helsinki04_en.htm); K. Negrin, «Collecting Ethnic Data: An Old Dilemma, The New Challenges», April 2003, eumap, <http://www.eumap.org/journal/features/2003/april/olddilemma>; J. A. Goldston, “Race and Ethnic Data: A Missing Resource in the Fight Against Discrimination”, in A. Krizsan (ed.), 2001, 19-41.

<sup>13</sup> Public Law No. 88-352, § 709, 79 Stat. 241, 262.

<sup>14</sup> See A. Morning and D. Sabbagh, *Comparative Study on the Collection of Data to Measure the Extent and Impact of Discrimination – Report on the United States*, Medis Project, European Commission, DG for Employment, Social Affairs and Equal Opportunities, May 2004, at 23.

<sup>15</sup> Article 5 of Council Directive 2000/43/EC. However, the European Court of Justice (ECJ) can specify the conditions under which special measures involving preferential treatment can be deemed compatible with the principle of antidiscrimination under EU law. To this date, this question has only arisen before the ECJ in the

it may consist in the establishment of a “diversity plan” or “equality scheme”, aimed at remedying the under-representation of protected groups in a company’s workforce and involving the setting of quantified objectives (targets and goals), to be achieved through various initiatives, including raising staff awareness and revising practices which hinder minorities’ participation.<sup>16</sup> Employers committed to such a plan must have the means to monitor the ethnic or racial composition of their personnel in order to determine whether disadvantaged groups are fairly represented and to assess whether the plan’s objectives are met.<sup>17</sup> In the U.K., the Race Relations Act, as amended in 2000, imposes on most public authorities an obligation to set up such “equality schemes” in order to fulfil their duty to promote equality between persons of different “racial groups”. For private employers, the introduction of such plan remains voluntary.<sup>18</sup> Besides, in certain countries, positive action measures can also take the form of preferential treatment for members of disadvantaged groups, as is the case in the United States with affirmative action programmes in higher education and employment. These modalities necessarily imply the processing of data on race and ethnicity in order to identify the potential beneficiaries of the programmes.<sup>19</sup>

Finally, statistics may be crucial to enable victims to prove discrimination in legal proceeding. In the famous *Griggs v. Duke Power Co.* case (1971),<sup>20</sup> the U.S. Supreme Court ruled that when statistics indicate that an apparently neutral rule or practice produces a disproportionate adverse impact - or *disparate impact* - on the members of a racial group, the burden of proof shifts and it is for the defendant to demonstrate that the it is justified by “business necessity”. Absent such justification, the rule or practice is deemed discriminatory and there is no need to prove a discriminatory intent. While the reach of this doctrine has been restricted by the U.S. Supreme Court in subsequent case law,<sup>21</sup> the notion of

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

<sup>16</sup> See P. Simon, 2004, at 24-25.

<sup>17</sup> See *The Business Case for Diversity: Good Practices in the Workplace*, September 2005, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (Unit D3). See also O. De Schutter, “Three Models of Equality and European Anti-discrimination Law”, *Northern Ireland Legal Quarterly*, 2006 (forthcoming).

<sup>18</sup> Race Relations Act, as amended, article 71 (1) (b) and 71 (2). See also B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework – Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart Publishing, Oxford, Portland Oregon, 2000, Recommendation 25, at 63.

<sup>19</sup> On the difference between “quotas” and “targets”, see J. Stavo-Debaugé, with the collaboration of S. Scott, *Study on the Collection of data to Measure the Extent and Impact of Discrimination in a selection of countries, Final Report on Great-Britain*, European Commission, DG Employment and Social Affairs, 2004, at 64-65 and P. Simon, 2004, at 24-25.

<sup>20</sup> *Griggs v. Duke Power Co.*, 410 U.S. 424 (1971).

<sup>21</sup> *Griggs* was decided under Title VII of the Civil Rights Act. In *Washington v. Davis* (426 U.S. 229 (1976)), the Court refused to follow the same reasoning when applying the Equal Protection Clause and ruled that it was necessary to prove “a racially discriminatory purpose” in order to establish a violation of this provision. In the context of Title VII, the *Griggs* ruling was largely overturned in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 109 S.Ct. 2115 (1989). This prompted the federal Congress to adopt the Civil Rights Act 1991 (Pub. L. No. 102-66,

disparate impact was resolutely embraced in EU law under the name of “indirect discrimination”.<sup>22</sup> It emerged in the European Court of Justice (ECJ) case-law related to sex discrimination<sup>23</sup> and was codified in the 15 December 1997 Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.<sup>24</sup> Under this Directive, indirect discrimination is described as a situation where “an apparently neutral provision, criterion or practice *disadvantages a substantially higher proportion of the members of one sex* unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex”.<sup>25</sup> However, a different definition of indirect discrimination is enshrined in the Race Directive: “indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin *at a particular disadvantage* compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.<sup>26</sup> It must be noted that unlike the definition contained in the burden of proof directive, this definition does not necessarily depend on statistics. This broader approach – inspired by the ECJ case-law in the area of free movement of workers<sup>27</sup> – was favoured to facilitate the task of the victim, precisely because finding racial or ethnic statistics appeared problematic in several member states.<sup>28</sup> Nevertheless, while leaving for domestic authorities to decide by which means a presumption of direct or indirect discrimination can be established,<sup>29</sup> the directive expressly states that national rules may provide for indirect discrimination “to be established by any means *including on the basis of statistical evidence.*”<sup>30</sup>

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105 Stat. 1071), which limits the implications of the *Wards Cove Packing Co.* case. For a recent account of the evolution of the disparate impact doctrine in U.S. law, see M. Selmi, “Was the Disparate Impact Theory a Mistake?”, *UCLA Law Review*, vol. 53, 2006, 701-782. See also O. De Schutter, 2006.

<sup>22</sup> T. Loenen, “Indirect Discrimination: Oscillating Between Containment and Revolution”, in T. Loenen and P. R. Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives*, Martinus Nijhoff, The Hague, 1999, 195-211.

<sup>23</sup> See *inter alia* O. De Schutter, “Le concept de discrimination indirecte dans la jurisprudence de la Cour de Justice des Communautés européennes (égalité de traitement et liberté de circulation)”, in E. Bribosia, E. Dardenne, P. Magnette and A. Weyembergh (dirs), *Union européenne et nationalités*, Bruxelles, Bruylant, 1999, 11-44.

<sup>24</sup> OJ L 14 of 20 January 1998, p. 6.

<sup>25</sup> Article 2(2) of Directive 97/80.

<sup>26</sup> Article 2(2)b. The same definition of indirect discrimination appears in Directive 2000/78/EC.

<sup>27</sup> See *O’Flynn v. Adjudication Officer* Case C-237/94 [1996] ECR I-2617.

<sup>28</sup> S. Fredman, “Equality: A New Generation?”, *Industrial Law Journal*, vol. 30, No. 2, June 2001, at 162; Ch. McCrudden, “The New Concept of Equality”, Presentation given at the conference Fight Against Discrimination: The Race and Framework Employment Directives in Tier, 31 March-1 April 2003, [www.era.int/web/en/resources/5\\_1990\\_344\\_file.327.pdf](http://www.era.int/web/en/resources/5_1990_344_file.327.pdf), at 16; C. Barnard, “The Changing Scope of the Fundamental Principle of Equality?”, *McGill Law Journal*, vol. 46, 2001, 955-977, at 970.

<sup>29</sup> “The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice.” (Preamble, § 15 of Directive 2000/43/EC and Directive 2000/78/EC). The Race directive, as well as the Framework directive, provides that when the alleged victim of discrimination establishes facts from which it may be presumed that there has been direct or indirect discrimination, “it shall be for the respondent to prove that there has been no breach of the principle of equal treatment” (Article 8(1) of Directive 2000/43/EC; Article 10(1) of Directive 2000/78/EC).

<sup>30</sup> *Ibid.* Member states are thus free to decide whether or not to allow the plaintiff in a discrimination case to rely on statistics to establish a presumption of indirect discrimination. According to Olivier De Schutter, this betrays the original intent of the Commission as expressed in the anti-discrimination package it presented on 25 November 1999. The Commission “intended to allow for victims of discrimination to present statistical data in order to

Generally speaking, the turn to statistics signals an important change in the way discrimination is apprehended. It goes hand in hand with the recognition that discrimination does not reduce to marginal and isolated acts; to the expression of a limited number of prejudiced individuals, but has a structural and systemic character in a society.<sup>31</sup> It supposes acknowledging that discrimination may be unconscious<sup>32</sup>, that it can be embedded in certain habits or practices that have never been questioned,<sup>33</sup> and that putting these phenomena into light requires looking beyond individual cases and comparing the situation of groups.<sup>34</sup>

On a different note, it may be observed that during the 20<sup>th</sup> century, statistics have progressively acquired a major role in guiding governmental action. More particularly, they have become essential in constructing a social phenomenon as an object of political action. By linking together a multiplicity of individual situations, they transform it into a global object, on which political action can bear.<sup>35</sup> Statistics, however, are not the only type of data susceptible to document discrimination. It is important to keep in mind that they have their flaws and limitations. Mainly, they do not provide explanations for what they measure.<sup>36</sup> Statistical tools, therefore, must be complemented with other types of information, which can better illuminate the nature and operation of the discrimination phenomenon. These approaches include victim surveys, attitude surveys and discrimination testing.<sup>37</sup> The authors of a recent study commissioned by the European Commission on the data enabling to measure the extent and impact of discrimination in Europe, concludes that “no particular data collection method is enough in and of itself in order to obtain a satisfactory picture of the extent and nature of discrimination.” They recommend, therefore, the adoption of “a multimethod and multi-disciplinary approach to measuring discrimination.”<sup>38</sup>

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establish a presumption of discrimination, shifting the burden of proof to the defendant. Instead, as a result of the discussions within the Council, the Member States now have the choice whether or not to allow victims to rely on statistics in order to establish a presumption of discrimination”. (O. De Schutter, 2006).

<sup>31</sup> P. Simon, 2004, p. 28. See also S. Fredman, 2001, at 164 (discussing the notion of “positive duty” to promote equality, introduced by the U.K. Race Relations (Amendment) Act 2000).

<sup>32</sup> See in particular Ch. Lawrence III, “The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism”, *Stanford L. R.*, vol. 39, 1987, at 317.

<sup>33</sup> See for instance the observations of Justice Ginsburg in her dissent in the *Adarand* case: “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and non-discrimination are ever genuinely to become the country’s law and practice.” (*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), here at 274).

<sup>34</sup> See in particular O. M. Fiss, “Groups and the Equal Protection Clause”, *Philosophy and Public Affairs*, No. 2, Winter 1976, reprinted in M. Cohen, Th. Nagel, and Th. Scanlon (eds), *Equality and Preferential Treatment*, Princeton, Princeton University Press, 1977, 84-154.

<sup>35</sup> See A. Desrosières, *La politique des grands nombres – Histoire de la raison statistique*, La Découverte/Poche, Paris, 2000 (2<sup>e</sup> éd.), esp. at 249.

<sup>36</sup> See N. Reuter, T. Makkonen and O. Oosi (eds), 2004, at 20-21.

<sup>37</sup> See the different data collection methods discussed in N. Reuter, T. Makkonen and O. Oosi (eds), 2004, at 20-26. See also E. Olli and B. K. Olsen, 2005, at 15-16.

<sup>38</sup> N. Reuter, T. Makkonen and O. Oosi (eds), 2004, at 4-5.

## **II. Privacy as Personal Data Protection**

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

This section considers the problem raised by the processing of racial and ethnic information from the perspective of personal data protection. Interestingly, while this issue is perceived as deeply problematic in Europe, it does not yield much debate on the other side of the Atlantic. To be sure, existing regulations on data processing is much more far-reaching in EU countries than in the U.S..<sup>39</sup> Unlike European Union member states, the U.S. does not have a general legislation at the federal level regulating the processing of personal data by public and private actors. Rather, it has adopted *ad hoc* sectoral laws, targeting specific activities, and focusing mainly on governmental action.<sup>40</sup> The most comprehensive legislation is the Privacy Act of 1974,<sup>41</sup> which concerns the collection and use of personal information by federal agencies. In addition, the U.S. Census Bureau activities are regulated by Title 13 of the United States Code.<sup>42</sup> While authorizing the Census Bureau to conduct census and surveys, this law protects the confidentiality of all information collected under the authority of the same Title.<sup>43</sup> But, apart from the legal framework, it seems that in the eyes of the general public, racial and ethnic data are not viewed as especially sensitive and therefore requiring an enhanced protection.<sup>44</sup> The question of the legitimacy of the state processing data on race has, however, arisen in the public debate with the “Racial Privacy Initiative” – a proposition submitted to referendum in California in 2003 (Proposition 54), which aimed at prohibiting public authorities from classifying by race, ethnicity, colour or national origin<sup>45</sup>. Yet, the driving force behind this initiative appears to be primarily an opposition to affirmative action: the major motivation of the Proposal’s supporters was to make it impossible for the government to implement

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<sup>39</sup> Note, however, that the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (adopted by the OECD Council on 23 September 1980), provides a common source of inspiration for the U.S. and for E.U. countries. See also the United Nations Guidelines Concerning Computerized Personal Data Files, adopted by the UN General Assembly on 14 December 1990 (Doc E/CN.4/1990/72).

<sup>40</sup> For a general account of privacy laws in the U.S., see Privacy International, *Privacy and Human Rights – An international survey of privacy laws and developments – The United States of America*, November 2004, available at [www.privacyinternational.org](http://www.privacyinternational.org). For a comparison of U.S. and European approaches to data privacy, see F. Bignami, “Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network”, *Mich. J. Int’l. L.*, vol. 26, Spring 2005, 807-868; J. R. Reidenberg, “Resolving Conflicting International Data – Privacy Rules in Cyberspace”, *Stanford L. R.*, vol. 52, May 2000, 1315-1376; P. M. Schwartz, “Privacy and Participation: Personal Information and Public Sector Regulation in the United States”, *Iowa Law Review*, vol. 80, 1995, 553-618.

<sup>41</sup> 5 U.S.C. § 552a(2000).

<sup>42</sup> Public Law 13, 71<sup>st</sup> Congress, June 18, 1929. (?)

<sup>43</sup> See the information provided on the Census Bureau’s website:

[http://www.census.gov/privacy/files/data\\_protection/002777.html](http://www.census.gov/privacy/files/data_protection/002777.html). In 1995, the Census Bureau created a Disclosure Review Board (DRB), entrusted with reviewing specifications for all census data products made available to the public or other government agencies, and determining that no product format is approved that contains any degree of disclosure risk. See A. Morning and D. Sabbagh, 2004, at 36.

<sup>44</sup> A. Morning and D. Sabbagh, 2004, at 37.

<sup>45</sup> The text of the Proposition is available at [http://www.adversity.net/RPI/rpi\\_mainframe.htm](http://www.adversity.net/RPI/rpi_mainframe.htm).

preferential treatment based on race.<sup>46</sup> In any case, the initiative was defeated with 64 percent of the vote.<sup>47</sup>

The situation is very different in Europe. In many European states, there is widespread sense that having the state (or private actors) collecting data on racial and ethnic affiliation poses major privacy problems. Doubts about the legality of this practice are combined with fears about the risk of abuses of these data by state authorities. This legitimate anxiety is nourished by traumatic historical experiences,<sup>48</sup> above all, the memory of Holocaust, where data systems, particularly population registers, played a significant role in the persecution and extermination of Jews and Romas.<sup>49</sup> Yet, it is important to highlight the double-edged nature of racial or ethnic data.<sup>50</sup> Like other types of data, they can be used for good or for bad purposes. W. Seltzer stresses that “most population data collection efforts are not associated with such targeting and misuse. Indeed, national population data systems are often the only source of reliable data needed to plan and monitor developments efforts in many fields.”<sup>51</sup> While at certain points in history, they have been used to discriminate or oppress, ethnic data can also serve to put into light persistent disadvantages and discriminatory practices. They can be invoked by minorities themselves to claim equal access to economic, social and political resources.<sup>52</sup> If we admit that having accurate information on the situation of disadvantaged groups is necessary for the development of an appropriate equality policy, we have to wonder whether and how such data can be gathered in a way that protects the population concerned from all risk of abuses. This is precisely the thrust of personal data protection rules. In fact, European norms on this matter do not prohibit in an absolute way the processing of data on racial or ethnic origins. Rather, they severely restrict it by laying down stringent conditions, that are additional to the general safeguards governing the collection, storage, use and disclosure of personal data.

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<sup>46</sup> See R. Amar, “Unequal Protection and the Racial Privacy Initiative”, 52 *UCLA Law Review*, 2005, 1279-1312.

<sup>47</sup> R. Amar, 2005, at 1281.

<sup>48</sup> J. A. Goldston, 2001, at 25; L. A. Bygrave, *Data Protection Law – Approaching its Rationale, Logic and Limits*, The Hague, London, New York, Kluwer, 2002, at 108-109.

<sup>49</sup> See W. Seltzer, “Population Statistics, the Holocaust, and the Nuremberg Trials”, *Population and Development Review*, September 1998, vol. 24, No. 3, 511-552 and W. Seltzer, “On the Use of Population Data Systems to Target Vulnerable Population Subgroups for Human Rights Abuses”, *Coyuntura Social*, No. 30, 2005.

<sup>50</sup> I. Székely, “Counting or Numbering? Comparative Observations and Conclusions Regarding the Availability of Race and Ethnic Data in Some European Countries”, in A. Kriszan, 2001, 267-282, at 279.

<sup>51</sup> W. Seltzer, “On the Use of Population Data Systems to Target Vulnerable Population Subgroups for Human Rights Abuses”, *Coyuntura Social*, No. 30, 2005.

<sup>52</sup> See J.-L. Rallu, V. Piché and P. Simon, « Démographie et ethnicité : une relation ambiguë », in G. Caselli, J. Vallin et G. Wunsch (eds), *Démographie : analyse et synthèse*, t. VI *Population et société*, éditions de l’Institut national d’études démographiques, Paris, 2004, 481-515, at 485.

## 2.2. European Norms on Personal Data Protection

### 2.2.1. General Principles

At the European level, norms governing the processing of personal data are defined in several instruments. Article 8 of the European Convention on Human Rights protects the right to private life generally.<sup>53</sup> Council of Europe Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data formulates important basic principles for the protection of personal data.<sup>54</sup> Within the European Union, these principles have been developed further, and extended to non-automatic means, by Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.<sup>55</sup> Regard must also be had to Recommendation No. 97(18) of the Committee of Ministers of the Council of Europe concerning the protection of personal data collected and processed for statistical purposes<sup>56</sup> and Recommendation No. (91) 10 of the Committee of Ministers on the communication to third parties of personal data held by public bodies.

An important notion informing the European data protection regime is that of “informational self-determination”. This concept was coined by the German Constitutional Court in its landmark 1983 Census case, on the basis of the rights to human dignity and the free development of personality set down in Articles One and Two of the German Constitution. It amounts to the recognition of a “right of control over one’s personal information.”<sup>57</sup> Individuals should be entitled to determine whether their personal data shall be disclosed and utilized. This, in the view of the German Constitutional Court, does not always entail a right to oppose the processing of personal data, but implies that individuals must be given the means to participate in, and have a measure of influence over, the processing of data concerning them.<sup>58</sup>

The Council of Europe Convention and the European Union Directive lay down similar basic principles.<sup>59</sup> In particular, personal data must be processed fairly and lawfully.<sup>60</sup> They must be collected for specified,

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<sup>53</sup> This provision has been interpreted by the European Court of Human Rights as protecting the individual from the processing of data which may be traced back to an identified or identifiable individual. See Eur. Ct. H.R. (GC), *Rotaru v. Romania*, Appl. No. 28341/95, Judgment of 4 May 2000, § 43.

<sup>54</sup> This Convention was opened for signature on 28 January 1981.

<sup>55</sup> OJ L 281, 23.11.1995, p. 31.

<sup>56</sup> Adopted by the Committee of Ministers on 30 September 1997.

<sup>57</sup> F. Bignami, 2005, at 816.

<sup>58</sup> On the notion of informational self-determination, see F. Bignami, 2005, at 816-818; L. A. Bygrave, 2002, at 63 and 117-118; E. J. Eberle, “The Right to Information Self-Determination”, *Utah L. Rev.*, 2001, No. 4, 965-1016; S. Simitis, 1995, 445-469; P. M. Schwartz, “Privacy and Participation: Personal Information and Public Sector Regulation in the United States”, *Iowa L. Rev.*, vol. 80, 1995, 553-618.

<sup>59</sup> See L. A. Bygrave, 2002, 57-69; F. Bignami, 2005, at 819; S. Simitis, “From the Market to the Polis: The EU Directive on the Protection of Personal Data”, *Iowa L. Rev.*, vol. 80, 1994, 445-469.

<sup>60</sup> Directive 95/46/EC, article 6(1)(a) and Preamble, § 28; Council of Europe Convention, Article 5(a).

explicit and legitimate purposes, and cannot be used in a way incompatible with those purposes.<sup>61</sup> The data collected must be adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed.<sup>62</sup> They must be accurate and, where necessary, kept up to date.<sup>63</sup> They must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they were collected or for which they are further processed.<sup>64</sup> The data subject should be informed of the processing and its purpose.<sup>65</sup> He shall have the right to access to and to rectify the data concerning him.<sup>66</sup> States have to ensure that appropriate security measures are taken to protect personal data against accidental or unlawful destruction, alteration, unauthorized disclosure or access, and against all other unlawful forms of processing.<sup>67</sup>

Before turning to the special rules applying to personal data defined as “sensitive”, it must be emphasized that all the instruments mentioned here are only concerned with *personal* data, i.e. “any information relating to an identified or identifiable natural person.”<sup>68</sup> Once the data are made anonymous to be used in statistics, they do not constitute ‘personal data’ anymore. As a matter of fact, the storage and disclosure of aggregate data that cannot be traced to any identifiable individual, cannot threaten anyone’s privacy. In relation to the production of statistics, moreover, the European Union Directive admits that insofar as personal data have been collected lawfully and for legitimate objectives, the further processing of these data for historical, statistical or scientific purposes, should not generally be considered incompatible with the purposes for which the data have originally been collected, provided that Member States ensure suitable safeguards, which must in particular rule out the use of the data in support of measures or decisions regarding any particular individual.<sup>69</sup>

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<sup>61</sup> Directive 95/46/EC, article 6(1)(b) and Preamble, § 28; Council of Europe Convention, Article 5(b).

<sup>62</sup> Directive 95/46/EC, article 6(1)(c) and Preamble, § 28; Council of Europe Convention, Article 5(c).

<sup>63</sup> Directive 95/46/EC, article 6(1)(d); Council of Europe Convention, Article 5(d).

<sup>64</sup> Directive 95/46/EC, article 6(1)(e); Council of Europe Convention, Article 5(d).

<sup>65</sup> Directive 95/46/EC, articles 10 and 11 and Preamble, § 25.

<sup>66</sup> Directive 95/46/EC, article 12; Council of Europe Convention, article 8(c).

<sup>67</sup> Directive 95/46/EC, article 17(1); Council of Europe Convention, article 7.

<sup>68</sup> Directive 95/46/EC, article 2(a). This provision further specifies that “an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”

<sup>69</sup> Directive 95/46/EC, article 6(b) and Preamble, § 29. See also O. De Schutter, 2006. Member states must also comply with the principles spelled out in the Recommendation No. R (97) 18 of the Committee of Ministers of the Council of Europe to the Member States concerning the protection of personal data collected and processed for statistical purposes. In particular, personal data collected and processed for statistical purposes shall be made anonymous as soon as they are no longer necessary in an identifiable form (Principle 3.3.), thus immediately after the end of data collection or of any checking or matching operations which follow the collection, except if identification data remain necessary for statistical purposes and the identification data are separated and conserved separately from other personal data, unless it is manifestly unreasonable or impracticable to do so (Principles 8.1. and 10.1), or if the very nature of statistical processing necessitates the starting of other processing operations before the data have been made anonymous and as long as all the appropriate technical and organisational measures have been taken to ensure the confidentiality of personal data (Principles 8.1 and 15).

### 2.2.2. *The Sensitive Data Regime*

The European Union Directive, like the Council of Europe Convention, establishes a special regime for the data defined as “sensitive.” These include data revealing racial and ethnic origin, as well as data on political opinions, religious or philosophical beliefs, trade-union membership, health and sexual life.<sup>70</sup> This regime is precisely based on the consideration that the treatment of these data creates a particular risk of discrimination. Under the Council of Europe Convention, such data “may not be processed automatically *unless domestic law provides appropriate safeguards*”.<sup>71</sup> The European Union Directive is more restrictive in appearance: under Article 8(1), Member States are required to prohibit the processing of such data. Yet, Article 8(2) enumerates several situations where this prohibition shall not apply. Three of these situations are relevant for our discussion. Thus, the processing of sensitive data will not be prohibited when:

- the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition may not be lifted by the data subject’s giving his consent;
- processing is necessary for the purpose of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards;
- the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.”<sup>72</sup>

These exceptions make it clearly possible for states to authorise the processing of racial and ethnic data either for monitoring potential discrimination through statistical means or for implementing affirmative action measures.<sup>73</sup> Indeed, in the U.K., the 1998 Data Protection Act expressly allows for the processing of data on race or ethnic origin where this is necessary for identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to promote or maintain such equality, and provided that it is carried out with appropriate safeguards for the rights and freedoms of data subjects.<sup>74</sup> In the Netherlands, the 2000 Data

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<sup>70</sup> The list included in Article 8 of the Personal Data Directive slightly differs from that found in Article 6 of the Council of Europe Convention. Data on trade-union membership is mentioned in the Directive but not in the Council of Europe Convention, while data relating to criminal convictions is cited in the latter but not in the former. It can also be noted that the Council of Europe Convention only refers to “racial origin” while the European Union Directive uses the terms “racial and ethnic origin”.

<sup>71</sup> Council of Europe Convention, Article 6.

<sup>72</sup> Article 8 (2), (a), (b), (e). With regard to the first exception, the Personal Data Directive defines consent as the “freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.” (Article 2, (h)).

<sup>73</sup> See O. De Schutter, 2006.

<sup>74</sup> Data Protection Act 1998, Section 4(3) (Schedule 2) Article 9.

Protection Act (*Wet bescherming persoonsgegevens*)<sup>75</sup>, transposing the European Directive, also contains a specific exception to this effect: the prohibition to process personal data concerning a person's race does not apply where the processing is carried out for the purpose of granting a preferential status to persons from a particular ethnic or cultural minority group with a view to eradicating or reducing actual inequalities, provided that three conditions are fulfilled: 1° this is necessary for that purpose; 2° the data only relate to the country of birth of the data subjects, their parents or grandparents, or to other criteria laid down by law, allowing an objective determination whether a person belongs to a minority group; and 3° the data subjects have not indicated any objection in writing. Therefore, individuals may refuse to provide this information, but must express their refusal in writing.<sup>76</sup> Furthermore, the law provides that processing personal data is legal if it is necessary to comply with an obligation of international public law.<sup>77</sup>

### **III. Privacy as individual self-determination**

The discussion in the last section may seem to assume that race and ethnicity are objective attributes of individuals, that can be easily grasped, the only problem being to protect people from unwanted registration or abusive use of this information. Obviously, things are much more complicated. "Race" and "ethnicity" are muddy and contested concepts. The now prevailing view that they are "social constructions" does not clear all the ambiguities and uncertainties surrounding them.<sup>78</sup> The term "race", in many national contexts, continues to convey unsavoury biological connotations. "Ethnicity" is usually understood as based on cultural ties and commonality of descent, but there is no consensus among social scientists about how exactly it should be defined.<sup>79</sup> Moreover, the frontier between the concepts of "race" and "ethnicity" tends to be blurred.<sup>80</sup>

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<sup>75</sup> Law of 6 July 2000, *Staatsblad* 2000, 302. The Law has entered into force in September 2001.

<sup>76</sup> Data Protection Act, Article 18. Interestingly, the Belgian Commission for the protection of private life, asked to give an opinion on a draft Flemish Decree allowing the treatment of data on i.a. the ethnic origin of workers in order to promote "proportional participation on the labour market", lays down exactly the same conditions: "*l'enregistrement [de l'origine ethnique] effectué en vue d'attribuer une position privilégiée à des personnes appartenant à une minorité ethnique ou culturelle déterminée, afin de supprimer ou de réduire des inégalités de fait, est licite pour autant qu'il soit indispensable à la réalisation de cette finalité et que les données n'aient trait qu'au pays natal de l'intéressé, de ses parents ou de ses grands-parents. L'enregistrement n'est pas autorisé si l'intéressé a formulé, par écrit, des objections à son encontre.*" [English translation to be added] (Belgian Commission for the Protection of Private Life, Opinion No.3/2004 of 15 March 2004).

<sup>77</sup> Data Protection Act, Article 23.

<sup>78</sup> See, in particular, I. F. H. Lopez, "The Social Construction of Race: Some Observation on Illusion, Fabrication, and Choice", *Harv. C.R.-C.L. L. Rev.*, vol. 29, 1994, 1-62. See also N. Gotanda, who distinguishes between four different uses of the race notion in the U.S. context: "status-race", "formal-race", "historical-race", and "culture-race": "A Critique of "Our Constitution is Color-Blind", in *Stanford L. R.*, vol. 44, 1991, 1-68.

<sup>79</sup> On the different understandings of ethnicity, see J.-L. Rallu, V. Piché and P. Simon, « Démographie et ethnicité : une relation ambiguë », in G. Caselli, J. Vallin et G. Wunsch (eds), *Démographie : analyse et synthèse*, t. VI *Population et société*, éditions de l'Institut national d'études démographiques, Paris, 2004, 481-515, at 481-482; A.

But regardless of how the concepts “race” and “ethnicity” are defined in the abstract, states who wish to develop mechanisms aimed at measuring the racial or ethnic composition of their population for the purposes of their antidiscrimination policy, face two basic decisions: first, they must delineate the categories in which individuals will be broken down – in other words, they must establish a racial or ethnic taxonomy; second, they must determine the criteria on the basis of which people should be classified in these categories.

Further, the implementation of a full-fledged statistical monitoring system entails that individuals will be classified in the defined categories at two levels:

- On the one hand, information is needed about the racial or ethnic composition of the general population at the national level and in the different regions of the country. These data are obtained either through census or through population registers. They provide the benchmark by reference to which the level of representation of vulnerable groups in specific sectors or entities can be assessed.
- On the other hand, data on racial or ethnic affiliations will be collected at the level of the relevant sectors or entities: companies, public services, schools, higher education institutions, etc. The proportion of the protected groups’ members present in these specific entities can then be compared with their proportion in the overall population, as showed by the census of population registry, in order to identify instances of under-representation, potentially revealing discrimination.<sup>81</sup>

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Bastienier and F. Dassetto, *Immigration et espace public – La controverse de l’intégration*, Paris, CIEMI-L’Harmattan, 1993, at 139-147 ; A. Morning, “Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round”, 2005 (forthcoming), at 3-5 (on file with the author). One very influential theory is that of the anthropologist F. Barth, who argues that the fundamental characteristic of ethnic identities is that they mark a boundary between one group and others, while the criteria on which this differentiation is grounded can vary over time, as a result of changing social, political or economic context. See F. Barth (ed.), *Ethnic Groups and Boundaries – The Social Organization of Difference*, Oslo, Universitetsforlaget, 1969, 9-38. See also J. L. Comaroff, « Ethnicity, Nationalism, and the Politics of Difference in an Age of Revolution », in E.N. Wilmsen and P. McAllister (eds), *The Politics of Difference: Ethnic Premises in a World of Power*, Chicago/London, University of Chicago Press, 1996, 162-183.

<sup>80</sup> See D. I. Kertzer and D. Arel: “The compulsion to divide people into racial categories has never been far from the drive to divide them into ethnic categories. In fact, the two concepts are often blurred, a confusion having largely to do with a belief that identity can be *objectively* determined through ancestry”. (D. I. Kertzer and D. Arel, « Censuses, identity formation, and the struggle for political power », in D. I. Kertzer and D. Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses*, Cambridge, Cambridge University Press, 2002, 1-42, at 11). See also A. Morning, 2005, at 5.

<sup>81</sup> See P. Simon, 2004, at 38-39; M. Banton, 2001, at 64-65. When relevant, the level of qualification of the groups’ members can also be taken into account to identify under-representation in employment. On the methods used to determine cases of “under-representation” or “under-utilisation”, see P. Simon, 2004, at 39-42.

For the system to be fully consistent, identical categories and classification methodology should normally be used in all different contexts where racial or ethnic data are collected, so as to ensure their comparability. Thus, when statistical registration by certain public or private actors is made mandatory or strongly recommended, public authorities have to set up a standardised taxonomy and provide the different entities concerned with instructions about how to perform their task.<sup>82</sup>

In the following of this section, I will first review the different methods that can be used to classify individuals in racial or ethnic categories. I will show that the approach based on self-identification benefits from an increasing legitimacy at the international level. The principle according to which individuals should be classified on the basis of their own self-understanding can, indeed, be grounded on the concept of privacy, insofar as the latter is understood as embodying a principle of individual self-determination. (3.1.). I will then turn to states' practices in categorising and classifying their population. The U.S., the U.K. and the Netherlands have all developed their own system of categories and classification methods. The case of France is also interesting to look at, since this country is notoriously opposed to racial or ethnic classifications. Yet, the issue has surfaced in the public debate and certain proposals have been made with a view to introduce some form of ethnic discrimination measurement mechanisms. (3.2.). Lastly, I will discuss the tensions and dilemmas inherent to the enterprise of ethnic and data collection for antidiscrimination purposes. (3.3).

### **3.1. The Methods of Classification - Emergence of a norm of self-identification**

#### ***3.1.1. The Methods of Classification***

There are several ways in which individuals can be classified in racial or ethnic categories. Four different approaches can be distinguished:<sup>83</sup>

- Self-reported identity or self-identification: individuals are asked to declare which group they feel they are part of. They often have to choose from a pre-established list of groups, which may or may not contain a final open category, leaving space for adding a response not included in the list.<sup>84</sup> Self-identification is the method used nowadays for census.

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<sup>82</sup> P. Simon, 2004, at 31.

<sup>83</sup> See Ch. A. Ford, « Administering Identity: The Determination of « Race » in Race-Conscious Law », *Calif. L. Rev.*, vol. 82, 1994, 1231-1285, at 1239 and P. Simon, 2004, at 35-38.

<sup>84</sup> In certain countries other than those studied in this paper, the “ethnicity question” on the census takes the form of an open-ended question. On the different answer formats to “ethnicity questions” in national census, see A. Morning, 2005, at 17-18.

- Identification by community members: individuals are considered as part of a group if they are recognised as such by the members of this group. In other words, an individual's affiliation to a group depends on whether or not the other group's members perceive him or her as a fellow member.<sup>85</sup>
- Identification by a third party (other than community members) based on visual observation: an individual is considered as member of a particular group if he or she is perceived as such, on the basis of his or her physical appearance, by an external observer who is carrying out the classification.
- Classification by a third party based on "objective" or indirect criteria: individuals are classified into ethnic categories on the basis of indirect indicators, such as the country of birth, the nationality of their parents, or language spoken. These criteria are said to be objective in the sense that they are not based on feelings of affiliation or perception by others, but on factual information on places and practices that can objectively be assessed.

### ***3.1.2. The Emergence of a Norm of Self-Identification***

There are various indications that, at the international level, self-identification comes to be viewed as the only appropriate method to classify individuals into racial or ethnic categories. In 1990, the UN Committee on the Elimination of Racial Discrimination issued a recommendation stating that the identification of individuals as being members of a particular racial or ethnic group "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned."<sup>86</sup> A similar rule can be derived from the Council of Europe Framework-Convention on National Minorities (1995),<sup>87</sup> which lays down that every individual shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and that no disadvantage shall result from this choice.<sup>88</sup> Accordingly, states cannot treat individuals against their will as members of a national minority group.<sup>89</sup> In the view of the Advisory Committee for the Framework Convention – the body entrusted with supervising compliance with this Convention –, the right not to be treated as a person belonging to a national minority extends to census situations and entails that questions on one's ethnicity cannot be made

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<sup>85</sup> This method is used in the United States to classify American Indians in "federally recognised tribes" for purposes of U.S. law and tribal court jurisdiction. See Ch. A. Ford, 1994, at 1263.

<sup>86</sup> General Recommendation VIII, 38<sup>th</sup> session, 1990, UN doc. A/45/18 at 79 (1991).

<sup>87</sup> Opened for signature in the framework of the Council of Europe in 1995, it has entered into force on 1<sup>st</sup> February 1998.

<sup>88</sup> Article 3(1).

<sup>89</sup> H.-J. Heinze, "Article 3", in M. Weller (ed.), *The Rights of Minorities in Europe – A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford, Oxford University Press, 2005, 107-137, at 119.

mandatory.<sup>90</sup> The European Commission against Racism and Intolerance has, for its part, consistently recommended, in its General Policy Recommendations and country reports, that ethnic data be collected in accordance with three principles: confidentiality, informed consent and voluntary self-identification.<sup>91</sup> Likewise, the Durban Declaration and Plan of Action states that information documenting racism, racial discrimination, xenophobia and related intolerance shall be collected with the explicit consent of the victims and be based on their self-identification.<sup>92</sup>

This trend is also reflected in national census practices, where self-identification is increasingly used as the criteria for racial or ethnic classification.<sup>93</sup> Thus, “[t]he notion that only the individual has the right to decide which identity category he or she should be placed in is a powerful force in the world today.”<sup>94</sup> As a matter of fact, the self-identification criteria is the most in accordance with the general principle of individual self-determination or autonomy, which implies that individuals should have the right to freely decide on issues of essential importance to their life or self-understanding, without external interference. This principle is regarded by a large number of authors to be at the core of the right to privacy. This approach, which emerged in analyses of the U.S. Supreme Court’s case-law,<sup>95</sup> was to a large extent endorsed by the European Court of Human Rights. The latter stated in a 2002 Judgment that the “notion of personal autonomy is an important principle underlying the interpretation” of the guarantees of Article 8 of the European Convention on Human Rights, which protects the right to respect for private life.<sup>96</sup> In a subsequent case, dealing with claims of transsexuals to have their post-operation sexual identity recognised in official documents, the European Court asserts that “[u]nder Article 8 of the Convention

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<sup>90</sup> See e.g. Opinion of the Advisory Committee of the Framework Convention on Estonia, 14 September 2001, ACFC/INF/OP/I(2002)005, § 19 and Opinion on Poland, 27 November 2003, ACFC/INF/OP/I(2004)005, § 24. See also H.-J. Heinze, 2005, at 127-128 and R. Hofmann, “The Framework Convention of the Protection of National Minorities: An Introduction”, in M. Weller (ed.), 2005, at 22-23. The Advisory Committee also expressed the view that the collection of personal data on an individual’s affiliation with a particular national minority without his or her consent and without adequate legal safeguards does not comply with Article 3 FCNM. See H.-J. Heinze, 2005, at 130.

<sup>91</sup> ECRI, *Seminar with national specialised bodies to combat racism and racial discrimination on the issue of ethnic data collection (Strasbourg, 17-18 February 2005)*, Report, CRI(2005)14, at 4.

<sup>92</sup> These information shall be collected “with the explicit consent of the victims, based on their self-identification and in accordance with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees” (§ 92 (a)).

<sup>93</sup> See J.-L. Rallu, V. Piché and P. Simon, 2004, at 500 and 509.

<sup>94</sup> D. I. Kertzer and D. Arel, « Censuses, identity formation, and the struggle for political power », in D. I. Kertzer and D. Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses*, Cambridge, Cambridge University Press, 2002, 1-42, at 34.

<sup>95</sup> See in particular D.A.J. Richards, “Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution”, *Hastings Law Journal*, vol. 30, 1979, 957-1018; J. A. Eichbaum, “Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy”, *Harv. C. R.-C.L.L.Rev.*, vol. 14, 1979, 361-384 ; and, on a different note, J. Rubinfeld, “The Right to Privacy”, *Harvard Law Review*, vol. 102, 1989, 737-807. European authors who endorse the view that the right to privacy is based on or amount to the principle of self-determination include F. Rigaux (*La protection de la vie privée et des autres biens de la personnalité*, Bruylant, LGDJ, Bruxelles, Paris, 1990); O. De Schutter (“La vie privée entre droit de la personnalité et liberté”, *Rev. trim. dr. h.*, 1999, 827-863) and S. Gutwirth (*Privacy and the Information Age*, transl. by R. Casert, Rowman & Littlefield Publishers, Lanham, Boulder, New York, Oxford, 2002).

<sup>96</sup> Eur. Ct H. R. (4<sup>th</sup> Section), *Pretty v. United Kingdom* (Appl. No. 2346/02), 29 April 2002, Rep. 2002-III, § 61.

(...), where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.”<sup>97</sup>

Yet, the examination of states’ classification practices shows that, while the self-reported identity approach is increasingly favoured, it is not universally applied. (3.2.) Furthermore, the application of the self-identification criteria does not go without some difficulties. (see 3.3.).

### **3.2. The Practice of Classification (or non-Classification): the U.S., the U.K., the Netherlands and France**

#### **3.2.1. Racial Classifications in the U.S.**

In the U.S., contrary to the other countries under study in this paper, racial classifications have always been present in laws and institutions. A question on race has appeared on the census since the first census in 1790.<sup>98</sup> However, the purpose and political use of these classifications have radically changed. In the first part of U.S. history, racial categorisations were used to segregate and oppress. When the civil rights legislations were adopted in the 1960s, the decision was taken, after some discussions, to maintain racial categories and statistics in order to help implementing antidiscrimination laws and policies. The goals of racial classifications were thus completely reversed: they now served to remedy the effects of past discrimination and promote equality.<sup>99</sup>

Another distinguishing element of the U.S. is that “race” constitutes the pivotal concept of its categorisation system.<sup>100</sup> The categories used by all federal agencies, including the U.S. Census Bureau, in their statistical activities, have been defined in the Statistical Policy Directive No. 15, issued in 1977 by the Office of Management and Budget (OMB). This document establishes a uniform list of racial and ethnic categories applicable throughout the U.S. Federal statistical system. It distinguishes between five groups: American Indian or Alaskan Native; Asian or Pacific Islander; Black; White and Hispanic. While the first four groups are considered as “races”, the “Hispanic” option is defined as being an “ethnic

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<sup>97</sup> Eur. Ct. H. R. (GC), *Christine Goodwin v. United Kingdom* (Appl. No. 28957/95), 11 July 2002, § 90. See also Eur. Ct. H. R. (1<sup>st</sup> Section), *Connors v. United Kingdom* (Appl. No. 66746/01), 27 May 2004, § 82 (the rights protected by Article 8 of the Convention are “rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.”)

<sup>98</sup> P Skerry, *Counting on the Census? Race, Group Identity, and the Evasion of Politics*, Brookings Institution Press, Washington D.C., 2001; M. Nobles, « Racial Categorization and Census », in D. I. Kertzer and D. Arel (eds), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses*, Cambridge University Press, Cambridge, 2002, 43-70, at 49-51.

<sup>99</sup> M. Nobles, 2002, at 57; P. Simon, 2004, at 49.

<sup>100</sup> P. Simon, 2004, at 56.

category”. It appears on a different line than the race question on the census and can be combined with any race. Its definition is based on cultural elements: Hispanics are “people of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin.” Interestingly, in the beginning of the 1990s, the proposal was made to integrate the “Hispanic-origin” option among the racial categories. This would apparently have made census categories “consistent with emergent usage in law and politics, where Hispanics have come to be treated as a distinct racial groups with a history of discrimination.”<sup>101</sup> Initially, this proposal was supported by most Hispanic organisations. But after some tests revealed that the number of individuals who identified as Hispanic was significantly higher when “Hispanic origin” was presented as a separate *ethnic category* than when it was included among the *racial categories*, Hispanics organizations expressed strong opposition to it and the idea was abandoned.<sup>102</sup> This episode illustrates tellingly how slippery the distinction between “race” and “ethnicity” is in the U.S. context.

The taxonomy set by Directive No. 15 has been enormously influential. The five standards categories have come to be adopted by state and local governments as well as private actors and academic researchers.<sup>103</sup> They now form what D. A. Hollinger calls the “ethno-racial pentagon”, among which residents of the United States are routinely asked to identify themselves and their contemporaries.<sup>104</sup> For M. Nobles, the directive “acts as a “gatekeeper” to an official statistical existence. Invested with this power and visibility, the directive has become a referent for groups seeking official recognition.”<sup>105</sup>

Directive No. 15 was revised in 1997. The major innovation was the introduction of the possibility to classify individuals in more than one racial group, in response to claims of organisations of “mixed race” or “multiracial” Americans, who demanded to have their multiple racial affiliations reflected in the classification. Another modification – based on socio-economic reasons - consisted in the division of the “Asian or Pacific Islander” category into two racial groups: the “Native Hawaiian or other Pacific Islander” on the one hand, and “Asians” on the other hand.<sup>106</sup> Accordingly, the 2000 census distinguished between the five following racial groups: Blacks, Whites, Native Americans, Asians, Native Hawaiians and Other Pacific Islander. For the first time, people were allowed to check more than one box.<sup>107</sup> As was the case before, the “Hispanic origin” question appeared on a separate line.

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<sup>101</sup> P. Skerry, 2000, at 40.

<sup>102</sup> P. Skerry, 2000, at 39-40. See also the discussion on the misunderstanding problems of the “Hispanic category” by some respondents, P. Skerry, 2000, at 62-66.

<sup>103</sup> M. Omi, “Racial Identity and the State: the Dilemmas of Classification”, *Law & Ineq.*, vol. 15, 7-23; A. Morning and D. Sabbagh, 2004, at 44.

<sup>104</sup> D. A. Hollinger, *Postethnic America*, Basic Books, New York, 1995.

<sup>105</sup> M. Nobles, 2002, at 59.

<sup>106</sup> A. Morning and D. Sabbagh, 2004, at 57-63.

<sup>107</sup> In fact, very few did so: only 2.8% of the population declared affiliation with more than one race. As was already the case before, people could also tick the “some other race” box and write it in the space provided. See P. Simon, 2004, at 59.

While the census classification is based on individuals' self-identification, this is not the only method used in the U.S. system. In many other contexts, in fact, the classification is based instead on the observer identification's criteria. According to P. Skerry, racial and ethnic enrolment data relied on by the Office of Civil Rights at the U.S. Department of Education are often based on observation by school officials.<sup>108</sup> This is also largely the case in the employment field: employers who are required to report, on a yearly basis, on the ethno-racial distribution of their workforce to the Equal Employment Opportunity Commission (EEOC) for the purpose of monitoring compliance with antidiscrimination legislation, usually rely on observer identification, through informal, on-site "visual surveys" conducted by supervisors.<sup>109</sup> This practice has long been encouraged by federal regulators, on the ground that inquiries about employees' racial or ethnic affiliation were too sensitive.<sup>110</sup> Regardless of whether observer's identification is in line with the principle of individual autonomy, some have pointed out that this creates a major inconsistency in the U.S. monitoring system: it implies that the two main sources of information used to track discrimination in the employment context – the Census on the one hand, information provided by employers on the other hand – are collected through two different classification modes, namely self-identification and observation identification. And these different procedures can yield different results.<sup>111</sup> A document published in 2003 by the EEOC indicates, however, a change of position of the federal agency with regard to the way employers should collect information on their employees' racial or ethnic affiliation. It is now stated that self-identification should be "the preferred method of identifying the race and ethnic information necessary for the EEO-1 report." Employers are strongly encouraged to rely on this method. Yet, "[i]f self-identification is not feasible, (...) observer identification may be used to obtain this information."<sup>112</sup>

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

In the United Kingdom, the insertion of a question on ethnicity in the census is a recent phenomenon, dating back to 1991. This innovation is directly related to the development of the antidiscrimination legislation. Following the adoption of the Race Relations Act in 1976, public authorities found themselves in need of statistical data in order to carry out the requirements and objectives of the fight against discrimination. As soon as 1978, the government demanded that a question on ethnicity be inserted in the 1981 census with a view to obtaining authoritative and reliable information about ethnic minorities.<sup>113</sup> This proposal elicited a vigorous debate about the possibility and legitimacy of asking people to identify by racial or ethnic origin. Some argued that such question was morally and politically

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<sup>108</sup> P. Skerry, 2000, at 53. See also A. Morning and D. Sabbagh, 2004.

<sup>109</sup> A. Morning and D. Sabbagh, 2004, at 54; P. Skerry, 2000, at 53; Ch. A. Ford, 1994, at 1245-1252.

<sup>110</sup> Ch. A. Ford, 1994, at 1250; A. Morning and D. Sabbagh, 2004, at 54.

<sup>111</sup> This inconsistency is heavily criticised by Ch. A. Ford, 1994. See also A. Morning and D. Sabbagh, 2004.

<sup>112</sup> EEOC (2003), Federal Register, at 34967, quoted by A. Morning and D. Sabbagh, 2004, at 66.

<sup>113</sup> See J. Stavo-Debaugue, 2004, at 81.

objectionable, that it would reify the concept of “race”, and that the results could be used to put minorities at a further disadvantage.<sup>114</sup> The scientific validity of such operation was also contested.<sup>115</sup> Eventually, the proposal was dropped.

The lack of information continued to cause difficulties to the Commission for Racial Equality, the body entrusted with implementing the objectives of the Race Relations Act, and the government asked the OPCS (*Office for Population Censuses and Surveys*) to resume work on the issue. New tests were conducted to find an appropriate formulation. The ethnic question was finally introduced in the 1991 census. Interestingly, the various tests carried out by the OPCS between 1975 and 1989 revealed that there was little opposition among minority members themselves to being questioned on their ethnic origins. Rather, objections pertained to the way the question was formulated.<sup>116</sup>

In the 1991 census, people were asked to choose between the following categories: White, Black-Caribbean, Black African, Black other (“please describe”), Indian, Pakistani, Bangladeshi, or Chinese. They could also opt for the “any other ethnic group” box and write in their affiliation. Lastly, it was specified that persons descended from more than one ethnic or racial group, could either tick the group to which they considered they belonged, or opt for the “any other group” box and describe their ancestry in the space provided.

While debates around the ethnic question continued after 1991, the focus noticeably changed: the possibility of having such item on the census was not contested anymore.<sup>117</sup> Instead, the content of the categories and the formulation of the question was the subject of heated discussions. Some criticised the scheme on the ground that the categories were based on a mix of racial and ethnic elements, arguing that it contributed to a “racialisation” of ethnic groups.<sup>118</sup> Besides, several groups campaigned to have a category reflecting their specific affiliation added to the form. The ethnic question – originally aimed at facilitating the measurement of discrimination - was increasingly seen as an occasion to assert one’s collective identity and get official recognition for it.<sup>119</sup> In consequence of these discussions, several

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<sup>114</sup> R. Ballard, « Negotiating Race and Ethnicity: Exploring the Implications of the 1991 Census », in *Patterns of Prejudice*, vol. 30, No. 3, 1997, 3-33. On ethno-racial classifications in Britain, see also A. Favell, *Philosophies of Integration – Immigration and the Idea of Citizenship in France and Britain*, Macmillan Press, St. Martin Press, New York, 1998, at 119-120.

<sup>115</sup> P. Simon, 2004, at 50-51.

<sup>116</sup> R. Ballard, 1997, 10. For a description of the various formulations experimented, see J. Stavo-Debaugue, 2004, at 87-99. The strongest opposition to the proposed classifications came from people of Afro-Caribbean descent: They “proved to be far more sensitive than their Asian and African counterparts about the possibility that their association with ethno-national labels such as “West Indian” or “Afro-Caribbean” might seem to imply that they were in some way not-British.” (R. Ballard, 1997, at 11).

<sup>117</sup> On the debates surrounding the introduction of an ethnic question in the census after 1991, see J. Stavo-Debaugue, 2004, at 127-138.

<sup>118</sup> See, in particular, R. Ballard, 1997. In the view of J.-L. Rallu, V. Piché and P. Simon, in Great-Britain, even more than in the United States, the frontier between race and ethnicity appear extremely hazy. (2004, at 498).

<sup>119</sup> J. Stavo-Debaugue, 2004, at 113-114; P. Simon, 2004, at 66.

changes were made in the 2001 census form. One major modification was the breakdown of the “White” category in several sub-groups to reflect internal diversity: “British”, “Irish”, and “Any other white background” (with a blank box). Further, people were now offered the possibility to report a “mixed race” background, by choosing between: “White and Black Caribbean”; “White and Black African”; “White and Asian” or “any other Mixed background” (“please write in”).<sup>120</sup>

The various institutions conducting ethnic monitoring use the same categories as those contained in the census. Indeed, the Commission for Racial Equality, in the Codes of Practice it has issued to provide the entities concerned with instructions about how to monitor equality, strongly recommends integrating the census categories.<sup>121</sup>

### ***3.2.3. “Allochtons” and Ethnic Minorities in the Netherlands***

Two features characterise the Dutch approach to ethnic statistics. First, these statistics rest on information provided by municipal population registers and not by census. In fact, no census has been carried out in the Netherlands since 1971. This practice has been vigorously contested during the 1970s, as constituting an intrusion in private life, contrary to the right to privacy. Fearing a boycott by a significant part of the population, which would have rendered its results unreliable, the authorities renounced to organise the planned 1981 census.<sup>122</sup> Second, ethnic classifications are based on indirect criteria, namely the country of birth of the person concerned or the country of birth of his or her parents. Contrary to the U.S. and the U.K. systems, the Dutch model, therefore, does not rely on self-identification.

The term “ethnic minorities” appeared in the official language in the 1980s. In 1983, the Dutch government adopted a “Minority policy” aimed at promoting the insertion of certain disadvantaged immigrants groups (*Minderhedennota*). The phrase “ethnic minorities” (*etnische minderheden*) covers a list of groups specifically enumerated in the governmental document. They are defined on the basis of two elements: their country of origin and their socio-economic situation. The ethnic minority policy only applies to immigrants for the presence of which the authorities feel a special responsibility, either because they come from former colonies (Surinamese, Antillans, and Moluqans), or because they have been recruited by the government to work in the Netherlands (Moroccans, Turks and Southern Europe immigrants workers (Italians, Spaniards, Portuguese, Greeks and Yugoslavians)). Additionally, a group is considered a minority only if its members are structurally in a disadvantaged socio-economic situation.

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<sup>120</sup> Note also the addition in the census of a question on religion, to which people were not obliged to respond.

<sup>121</sup> P. Simon, 2004, at 34.

<sup>122</sup> V. Guiraudon, K. Phalet and J. Ter Wal, 2004, at 30.

The list of “ethnic minorities” targeted by the policy has been adapted and changed over time: in particular, groups from EU countries have been removed from the list.<sup>123</sup>

While public policy refers to “ethnic minorities”, the administrative practice has introduced the term “allochtons”. This notion was coined by the national statistics agency (the *Centraal Bureau voor de Statistiek* or CBS) to designate in official statistics all individuals living in the Netherlands who are born abroad or with at least one parent born abroad, regardless of their nationality. This category, therefore, conflates foreigners and Dutch citizens with foreign origins. Since 1999, a further distinction is made between “Western allochtons” (coming from European countries, North America, South Sea Islands, Japan and Indonesia) and “non-Western allochtons” (those with Turkish, Asian, African or Latin American origins). The third generation is automatically included among the “autochtons”. However, since 2000, the CBS started to develop figures on the third-generation of non-Western allochtons, i.e. persons with at least one grand-parent born in Morocco, Turkey, Surinam or the Antilles.<sup>124</sup>

Although initially a mere statistical category, the term “allochtons” has permeated the political and legislative language. Since the 1990s, political authorities tend to use it as synonymous with “ethnic minorities”, while in popular parlance, it has come to designate all persons with non-Western origins.<sup>125</sup> Significantly, in 1994, a law was passed which aimed at promoting “proportional labour market participation of *allochtons*”.<sup>126</sup> This law was replaced by a new act in 1998, which now used the phrase “ethnic minorities”: the “Act for stimulation of participation of minorities in the labour market”.<sup>127</sup> This act called upon companies with more than 35 employees to monitor their workforce composition and publish a yearly report on the number of “ethnic minorities” members among their personnel with a view to achieving a multicultural workplace in the Netherlands. This programme, however, was terminated in 2003.<sup>128</sup>

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<sup>123</sup> See D. Jacobs et A. Rea, « Construction et importation des classements ethniques : Allochtones et immigrés aux Pays-Bas et en Belgique », *Revue européenne des Migrations internationales*, vol. 21, No. 2, 2005; V. Guiraudon, K. Phalet and J. Ter Wal, 2004, at 11.

<sup>124</sup> D. Jacobs and A. Rea, 2005.

<sup>125</sup> D. Jacobs and A. Rea, 2005.

<sup>126</sup> *Wet bevordering evenredigearbeidskansen voor allochtonen* (Act on the Promotion of Proportional Labour Market Participation of Allochtons) or Wet BEAA.

<sup>127</sup> *Wet stimulering arbeidsdeelsname minderheden* (Act for the Stimulation of Participation of Minorities in Employment), adopted on 23 April 1998, entered into force on 1<sup>st</sup> January 1998.

<sup>128</sup> According to V. Guiraudon, K. Phalet and J. Ter Wal, the decision to terminate this programme was taken in spite of many NGO’s insisting on its usefulness. (2004, at 14-16).

### 3.2.4. Debates over Classifications in France

France, like many other EU member states, does not classify its population by ethnicity in public statistics. It only distinguishes on the basis of nationality. As it is well-known, there is in France a profound opposition to officially identifying individuals through ethnic or racial categories. This attitude is rooted in the interlocking conceptions of equality and national identity prevailing in French political culture.<sup>129</sup> The dominant view on equality is that it requires the state to treat all citizens alike, and abstain from looking beyond the citizen to consider his or her ethnic origin or cultural affiliation. Any differentiation based on ethnic origins tends to be seen as stigmatizing and opening the door to discrimination. This conception is related to a vision of the nation as a united whole, constituted by an association of individuals, who emancipate themselves from particular communities by acceding to the status of citizen. According to the French Constitutional Council, “the Constitution knows only the French people, comprising all French citizens, without distinction on grounds of origin, race or religion”.<sup>130</sup> The principle of the indivisibility of the French people precludes “recognition of collective rights to any group whatsoever defined by community of origin, culture, language or belief.”<sup>131</sup>

Yet, since the 1990s, the question of introducing ethnic categories in public statistics has emerged in the public debate. Initially, the interest in ethnic classifications arose from a concern in getting a better knowledge of immigration, more especially of the number of immigrants in France and how they (and their offspring) integrate into the French society. From the mid-1980s, the issue of immigration has been the subject of a growing debate. The far right spread imaginary figures aimed at demonstrating that the population of North African descent would become preponderant in France in a few generations. In this context, the central statistical agencies sought to develop criteria enabling it to identify French citizens with a foreign background, in order to produce accurate figures and to study how they behave in French society.<sup>132</sup> This prompted a wide polemic on whether and how to deal statistically with ethnic diversity.<sup>133</sup>

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<sup>129</sup> See, *inter alia*, A. Favell, 1998, esp. at 71-72; G. Calvès, “‘Il n’y a pas de race ici’ – Le modèle français à l’épreuve de l’intégration européenne”, in *Critique internationale*, n°17, Oct. 2002, 173-186 and G. Calvès, « ‘Reflecting the diversity of the French Population’: Birth and Development of a Fuzzy Concept », in *International Social Science Journal*, No. 183, March 2005, 165-174.

<sup>130</sup> Decision 91-290 DC, May 9 1991 (*Statut de la Corse*). This decision concerned the draft legislation granting a new status to Corsica.

<sup>131</sup> Decision 99-412 DC, June 15 1999 (*Charte européenne des langues régionales ou minoritaires*). This decision concerned the European Charter on Regional or Minority Languages.

<sup>132</sup> A. Blum, « Resistance to identity categorization in France », in D. I. Kertzer and D. Arel (eds), 2002, 121-147, at 122-123. See the important survey conducted in 1992 by INED (National Institute of Demographic Studies) and INSEE (National Institute of Economic Statistics), entitled « Geographic Mobility and Social Integration ». M. Tribalat, *Faire France*, La Découverte, Paris, 1995.

<sup>133</sup> A. Blum, 2002, at 135.

With the increasing awareness of and reflection on the problem of discrimination, especially in the field of employment, the discussion on ethnic categories has evolved towards the issue of their potential usefulness to the struggle against discriminatory practices.<sup>134</sup> Some now argue that introducing such categories in official statistics is necessary to get a clear picture of the problem and design appropriate antidiscrimination policies, citing the British or the Canadian experiences in example. To be sure, this view remains very contentious in the French context.<sup>135</sup> Yet, several recent reports on the issue, commissioned by the French government, do recommend, among other measures, the development of some forms of monitoring of workers' ethnic origins in companies. The 2004 report directed by Claude Bébéar, entitled "*Minorités visibles: relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise*" (*Visible minorities: Addressing the challenge of the access to employment and integration in the workplace*),<sup>136</sup> deplores the "statistical opacity" which "veils discrimination."<sup>137</sup> It further observes that French law does not preclude companies from inquiring about the ethnic origins of its workers, provided that this is done anonymously and that no nominative data are gathered. In order to evaluate their policy of recruitment and promotion, so as to identify discriminatory practices or processes, the report recommends to companies to conduct, on a yearly basis, a statistical study on the composition of their staff. This, it suggests, should be done through an anonymous questionnaire, asking all employees, on a voluntary basis, to declare whether they consider themselves to be part of a "visible minority". The question could be further refined by inviting people to specify a geographical zone of origin.<sup>138</sup>

The "Fauroux Report" on the fight against ethnic discrimination in employment, submitted less than a year later to the French Minister of Employment, contains a similar suggestion.<sup>139</sup> The report states that "one of the main weaknesses of the French integration model is the blindness it imposes to itself with regard to the ethnic and even geographic origin of individuals of whom it only wants to know the nationality."<sup>140</sup> Among its main recommendations, the report advocates, therefore, the collection of data on "ethnic minorities" in companies and, more generally, in all organizations, in order to measure the

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<sup>134</sup> A. Blum, 2002, at 135.

<sup>135</sup> See Calvès, "Il n'y a pas de race ici" – Le modèle français à l'épreuve de l'intégration européenne", *Critique internationale*, n° 17, Oct. 2002, 173-186 and A. Blum, 2002, at 135-140.

<sup>136</sup> Cl. Bébar, *Rapport au Premier Ministre – Minorités visibles : relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise – Des entreprises aux couleurs de la France*, Novembre 2004 (hereinafter "Bébéar Report").

<sup>137</sup> Bébéar Report, 2004, at 17.

<sup>138</sup> Bébéar Report, 2004, at 19-20. A previous report, conducted by J.-M Belorgey in 1999 and commissioned by the Minister for Employment and Solidarity, already proposed "*de prévoir que le bilan social transmis aux institutions représentatives du personnel comportera désormais non seulement, comme c'est déjà le cas, des données relatives à l'emploi des étrangers, mais aussi à l'emploi des Français d'origine étrangère*" (*Lutter contre les discriminations*, Rapport à Madame la Ministre de l'Emploi et de la Solidarité, Jean-Micher Belorgey, Mars 1999, at 55, my emphasis). [English translation to be added].

<sup>139</sup> *La lutte contre les discriminations ethniques dans le domaine de l'emploi*, Report carried out by a commission presided by R. Fauroux, submitted to J.-L. Borloo, Minister of Employment, social cohesion and housing, July 1995.

<sup>140</sup> "L'une des principales faiblesses du modèle français d'intégration est la cécité qu'il s'impose vis-à-vis de l'origine ethnique et même géographique des individus dont il ne veut connaître que la nationalité." (Fauroux report, 2005, at 2).

progress of “diversity”.<sup>141</sup> It excludes though making this measure mandatory: measuring diversity should be deemed as one possible instrument available to companies in their efforts to combat discrimination. It also stresses that the French legislation on personal data protection<sup>142</sup> allows for exceptions to the prohibition to process data revealing racial or ethnic origins. Finally, the report recommends that the liberty of individuals to freely choose to be identified or not through such diversity measurement mechanism be respected.<sup>143</sup>

In reaction to these proposals, the French Data protection supervisory authority (the *Commission nationale de l’informatique et des libertés* or CNIL) issued in July 2005 a set of recommendations aimed at clarifying the conditions under which employers can measure the “diversity of origins” of their employees.<sup>144</sup> While acknowledging that the fight against discrimination in employment is a legitimate objective which serves the public interest, the Commission lists the data that can be collected to this end. These consist of the name and first name, the nationality, the nationality of origin, the place of birth, the nationality or place of birth of the parents, and the address. With regard to data on “racial or ethnic origins”, the Commission stresses the absence of any “ethno-racial” typology defined at the national level, and used in public statistics, which could serve as a benchmark. Such standardised typology should be approved by the legislator. The Commission, therefore, recommends to employers not to gather data on “real or supposed racial or ethnic origins of their employees or job applicants”. The analysis of the name and first name, the nationality, or the address provides no adequate criteria on the basis of which people could be classified in ethno-racial categories. The Commission also insists on “the risk of offence against human identity that would result, for the employees who do not want to benefit from advantages based on their “racial” characteristics, from being registered in a file by skin colour or “ethno-racial” origin.”<sup>145</sup> This last observation raises some doubts as to whether the Commission correctly understood the mechanism at stake, since the measurement of the composition of a company’s staff aims primarily at identifying discrimination but does not imply *per se* the granting of a preferential treatment.

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<sup>141</sup> The report, however, notes the existence of disagreements, including among the commission members, with regard to the way data on ethnic minorities can be collected.

<sup>142</sup> *Loi relative à l’informatique, aux fichiers et aux libertés du 6 janvier 1978 (modifiée par la loi du 6 août 2004)*.

<sup>143</sup> Fauroux Report, 2005, at 20-24.

<sup>144</sup> *Recommandations de la Commission nationale de l’informatique et des libertés pour mesurer la diversité des origines*, 9 July 2005, available at <http://www.cnil.fr>.

<sup>145</sup> “[La Commission] tient à souligner les risques d’atteinte à l’identité humaine qui résulteraient, pour les employés qui ne souhaiteraient pas bénéficier d’avantages en fonction de leurs caractéristiques “raciales”, de leur catégorisation dans un fichier par la couleur de leur peau ou leur origine “ethno-raciale”.”

### 3.3. Classifications, Antidiscrimination and Self-Identification: Tensions and Dilemmas

Much can be said about the manner in which different countries construct and revise racial or ethnic categories, the vision of the society that these categorisations convey, how they impact on society and how, in turn, social dynamics can prompt modifications to them.<sup>146</sup> But I would like to concentrate here on a specific issue, namely the tension that may arise between the constraints of a categorisation scheme aimed at identifying discrimination on the one hand, and respect for personal feelings of identity on the other hand. To be sure, as stated above, a classification based on self-identification is the most in accordance with the principle of individual autonomy. Yet, it is important to be aware of the difficulties that the application of this criteria may entail.

The first difficulty is that discrimination results from the way a person is perceived by others, the potential agents of discriminatory practices, and this does not necessarily correspond to the way she sees herself or to her feelings of affiliation.<sup>147</sup> As one author writes, the “effects of racism all too frequently operate on the level of appearance, not identity.”<sup>148</sup> In consequence, some authors argue that the criteria of self-identification may not always be the most appropriate to delineate the members of a disadvantaged group.<sup>149</sup> A further complexity lies in the contrast between the technocratic rationality that requires clear-cut, consistent, and stable categories in order to produce workable statistics, and the reality of personal identity feelings, which can be multiple, overlapping, hazy, and fluctuating.<sup>150</sup> Indeed, social scientists emphasise that identities are fluid and context-dependent; that they are socially constructed and can vary over time and space, depending on the social or political conditions.<sup>151</sup> Statistical template, on the other hand, “seeks to construct relevant, sound, coherent and stable categories over time to feed the lengthy series of data required for comparisons and for analyzing trends. Statistics only moderately appreciate subjective definitions and favour “objectivistic” estimations of origin through genealogy. ... Administrative and legal registries require categories that are well defined and exclusive, as do statistics.”<sup>152</sup>

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<sup>146</sup> See, in particular, P. Skerry, 2000; D. I. Kertzer and D. Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Census*, Cambridge University Press, Cambridge, 2002; M. Nobles, *Shades of Citizenship – Race and the Census in Modern Politics*, Stanford University Press, 2000.

<sup>147</sup> A. Morning and D. Sabbagh, 2004, at 49-50; R. Ballard, 1997, at 16.

<sup>148</sup> N. A. Denton, “Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?”, *Law & Ineq.*, vol. 15, 1997, 83-97, at 92.

<sup>149</sup> For Ch. A. Ford, “[t]he ability of self-reported classification to act as a proxy for “real” patterns of social disadvantage is ... highly questionable.” (Ch. A. Ford, 1994, at 1281). See also A. Morning and D. Sabbagh, 2004, at 50.

<sup>150</sup> See P. Skerry, 2000, at 49-54; M. Omi, “Racial Identity and the State: the Dilemmas of Classification”, *Law & Ineq.*, vol. 15, 7-23, at 13.

<sup>151</sup> See D. I. Kertzer and D. Arel, 2002, at 19 and references cited at note 79.

<sup>152</sup> P. Simon, 2004, at 53.

The evolution of American Indian population figures in the U.S. is a dramatic example of the potential volatility of identifications feelings. Between 1960 and 1990, this population increased by 255 %. According to analysts, this increase is largely due to changes in self-identification, driven by shifts in attitudes toward American Indians and a romanticization of the past.<sup>153</sup> Since 1990, the Census Bureau has abandoned pure self-identification for Indians and requires those identifying as American Indian to name their “enrolled or principal tribe”.<sup>154</sup>

The debate sparked by the “mixed race” or “multiracial” movement in the U.S. is also a case in point. This movement, which arose in the 1990s, comprised mainly parents in mixed couples, who vigorously contested the obligation to classify their children in a single-race category. They claimed that this requirement to choose an exclusive affiliation forced their children to deny the racial heritage of one of their parents. Their suggestion to add a new “mixed-race” category to the official racial classification was, however, sturdily opposed by Black leaders who feared that such multiracial option would lead to a reduction of the numbers of those who identified as “Black” and produce major disturbances in the civil rights laws monitoring and enforcement system.<sup>155</sup> Finally, the solution retained by public authorities was to keep the racial categories unchanged but to give individuals the opportunity to declare multiple racial affiliations.<sup>156</sup> The results showed that only 2.8% of the population did so.<sup>157</sup> Yet, in order to integrate them into the civil rights laws monitoring scheme, multiple-race responses had to be reallocated to single race categories. The authorities decided that people “people who marked “white” and a nonwhite race should be counted as members of the nonwhite group. As for the mixed-race individuals without white ancestry, they were to be treated as having whichever racial affiliation they claimed was the basis for discrimination”.<sup>158</sup>

This illustrates a broader phenomenon observable both in the U.S. and in the U.K.: while racial and ethnic categories were introduced or maintained to serve the antidiscrimination policies, they have been re-appropriated by the public and came to be seen as an opportunity to express one’s identity and obtain

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<sup>153</sup> M. Omi, 1997, at 15 ; P. Skerry, 2000, at 52 ; A. Morning and D. Sabbagh, 2004, at 48.

<sup>154</sup> P. Skerry, 2000, at 52.

<sup>155</sup> This opposition was echoed by some legal scholars who argued that the modification of the current racial classifications, demanded by the multiracial movement, would jeopardize the fight against discrimination. See Ch. B. Hickman, “The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census”, *Michigan L. R.*, vol. 95, March 1997, 1161-1265; T. K. Hernandez, ““Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence”, *Maryland L. R.*, vol. 57, 1998, 97-173; and T. K. Hernandez, “Multiracial Matrix: the Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison”, *Cornell L. R.*, vol. 87, 2002, 1093-1176.

<sup>156</sup> On the “multiracial” movement, see P. Skerry, 2000, at 52-54; A. Morning and D. Sabbagh, 2004, at 57-63.

<sup>157</sup> P. Simon, 2004, at 59.

<sup>158</sup> A. Morning and D. Sabbagh, 2004, at 60. P. Simon criticises this solution: “One of the weaknesses of this option is that the reallocation procedure uses a reasoning reminiscent of the *one drop rule*, which prevailed during the time of segregation and according to which any person with one drop of black blood was considered black. Here, the reclassification of “mixed race” into a single race replicates the same “minority preference” option by systematically assigning the non-white “race” to mixed white persons.” (P. Simon, 2004, at 59).

public recognition for it.<sup>159</sup> But the two logics at play here – that of antidiscrimination and that of identity recognition – may come at odds with each other.<sup>160</sup> Indeed, the more the state refines categories and extends the range of possible responses and combinations, so as to enable individuals to express their sense of identity, the more difficult to use the data become for the antidiscrimination programs.<sup>161</sup>

Given these difficulties, the option retained by the Netherlands – a categorization based on the country of birth – may appear to present some advantages. It is based on a stable criteria, that can be objectively assessed. It may even appear less intrusive insofar as individuals are not questioned about their subjective feeling of identity or group affiliation, but are asked to state a fact: their place of birth or that of their parents. Yet, inquiring routinely on the individuals' parents' origins, and classifying them on this basis, regardless of whether they are Dutch citizens, may be resented as a form of stigmatization; as conveying the message that they remain perpetual foreigners. This method is also criticised for technical reasons: the extent to which the factors taken into account are appropriate to identify the members of disadvantaged groups is contentious. But maybe the major problem is that after three generations, the country of birth criteria becomes very unreliable: not only the information on ascendants' countries of birth may be unavailable but, moreover, there is no satisfying way of classifying individuals with multiple origins.<sup>162</sup>

## **Tentative Conclusions**

I can, at this stage, only provide for some sketchy and tentative conclusions.

Compelling arguments support the view that, given the magnitude of the racial and ethnic discrimination problem in many countries in Europe, a robust antidiscrimination policy is called for. This requires that states have access to accurate data on the situation of potentially discriminated minorities. Such data are necessary to help designing appropriate policies and monitor discrimination in different sectors or entities, especially in the field of employment. They are also needed to implement positive action programmes that involve preferential treatment, in countries where this type of measures is applied. However, the collection and processing of racial and ethnic data that this approach presupposes, raises delicate privacy questions that must be addressed seriously. Two aspects of the right to privacy are at

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<sup>159</sup> J. Stavo-Debaugue, 2004, at 113-114; P. Simon, 2004, at 66.

<sup>160</sup> See D. Hollinger, 1995, at 49; A. Morning and D. Sabbagh, 2004, at 65; P. Simon, 2004, at 53; and Ch. B. Hickman, 1997, at 1254-1255.

<sup>161</sup> See A. Morning and D. Sabbagh: "...the proliferation of racial categories does introduce some uncertainty and complexity in the process of establishing the baseline against which to judge discriminatory impact by producing a new set of arguments as to "who counts as what""'. (2004, at 61).

<sup>162</sup> P. Simon predicts that within a few years, self-identification will be necessary in the Netherlands, as it is in the United States and in the United Kingdom. (2004, at 68).

stake here: the protection of personal data on the one hand, respect for individual self-determination, on the other.

Personal data protection norms are often thought in Europe to preclude the collection of racial and ethnic origins data, while this issue does not seem to yield much debate in the U.S.. In fact, European-level instruments regulating the processing of personal data do not constitute an insuperable obstacle. They allow for exceptions to the prohibition of processing “sensitive data”, which include data revealing racial or ethnic origin. These exceptions make it possible for EU states to authorise the collection of racial or ethnic data needed for the implementation of antidiscrimination laws and policies, in particular, if this is done with the explicit and informed consent of the persons concerned. At the same time, personal data protection norms define fundamental safeguards aimed at protecting the rights and interests of individuals on whom data are processed. Notably, the purpose of the collection should be clearly stated and legitimate; and no more data than is strictly necessary for this purpose should be collected.

The second problem pertains to the way ethnic or racial categories are drawn and people classified in them. Here, the fundamental issue from the perspective of privacy is how to respect individuals’ right to self-determination, which, arguably, implies the right to self-identify and not to be imposed an identity by others. I do not have a definitive answer to this question but will make some observations, based on the analysis of states’ practice. First, there is no universally valid model. Every scheme will have its limitations and downside. A categorisation system designed to serve the antidiscrimination policy must obviously be developed in accordance with the specificities of the country: it must take into account the specific structure of the population, the nature of the disadvantaged groups, the origin of groups cleavages, as well as the prevalent political culture that shapes the way these categories will be received in the society. Second, this also implies that the drawing of categories and the choice of classification criteria cannot be dealt with as a merely technical issue, to be solved by neutral scientific methods. It is an inherently political exercise, which involves issues that may be perceived as very sensitive and personal by individuals. It is of primary importance that categories and classification criteria pay due regard to the perspective and sensitivities of the members of the groups who are the victim of discrimination, and do not only reflect the vision of the dominant majority. Minorities should therefore be associated to this process. Lastly, I want to make a claim for diversity and creativity. Countries where these mechanisms do not exist at present may learn from foreign experiences and develop, in association with the minorities concerned, creative ways of measuring discrimination in order to better combat it.