



Indicators according Commitment 2 The Question of Legality of Ethnic Data Collection

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I. Starting point(s)

There is a widespread consensus among ECCaR members for the need of using indicators to measure racism/equality as well as a respective policy impact.

This was shown by a limited survey carried out by UNESCO and ETC among Steering Committee members.

However, it proved a wide range of opinions and approaches on

- what should be measured,
- how this may be done,
- whether this task is feasible for communal administrations in terms of capacity, financial resources etc,
- in what areas this effort should be made,
- on the legality of ethnic data collection,
- on the risks this attempt is exposed to.

II. Survey Results to be considered

1. Consent to the use of indicators

- overall: 100 % say it's useful
and 75 % say it's necessary (25 % not necessary),
but the vast majority (75 %) states that it is difficult to implement.

And there is a strong concern about legality, only 25 % think it's legal, while 37.5 % think that it would be illegal to use indicators on racism or ethnic data in general.

2. There is no clear consent on WHAT should be measured – surprising when considering Commitment 2 of ECCaR.

The answers are a bit confusing and inconsistent: While 100 % think that policy impact should be measured there is a strict objection to measuring racism (25 %) or equality (12.5 %). However, the former is quite impossible without the latter.

3. In order to measure racism/equality and policy impact by using indicators it is necessary to build on a reliable and lawfully implemented collection of “ethnic data”.

According to the ECCaR steering committee members this should be done by quantitative and qualitative data processing, only a minority considers operationalised qualitative data as the appropriate means (25 %).

4. When it comes to concerns and risks 75 % think that legal provisions stand against the efforts and 75 % deem a lack of resources as a major obstacle for the implementation of Commitment 2.

Asked who would probably object to ethnic data collection 62.5 % think that it would be politicians and decision makers. Members of vulnerable groups are not thought to be likely to object, which is an interesting assumption, as it reflects a quite optimistic attitude toward data collection and its purpose.

First conclusions

1. Even though the measuring of racism/equal is useful, as well as policy impact requires “ethnic data” collection and processing there remains strong uncertainty on the legality of such undertaking.
2. A rights-based approach is on several reasons the most promising and appropriate approach.

III. A legal basis for a common reference: UN CERD, Art 1

In the Liège-Seminar in May this year a common reference was found: Art. 1 CERD as we deal with a human rights issue a human rights provision, which applies to all members is the best appropriate reference: It is binding, open to individual approaches, allows for affirmative action, it is concrete, it supports ECCaR’s goals and can be operationalised.

It gives a concrete answer on WHAT should be measured and in what areas:

- Distinction
- Exclusion
- Restriction
- Preference

in political, economical, social or cultural fields of public life – completely compatible with the 10 PPA.

Positively formulated we can measure

- Equality and non-discrimination
- Inclusion and Solidarity
- Participation

in the respective areas (Liège p 3-5).

When it now comes to the question of legality of ethnic indicating CERD provides the overarching legal justification.

IV. Is it legal to work with “ethnic data”?

Is it legal or not? What answer can you expect from academics? – It depends!

Firstly, it depends on what we are talking about: collecting, processing or disseminating.

Secondly, it depends on whether we talk about personal data or statistical data. Thirdly, it depends on the provisions in respective national law.

To take out some tension, for all this we can in principle say YES, it is legal if

- duly justified (ie legitimate goal) and if
- restrictive conditions of
 - data protection (prevention of abuse, adequate methods, lawfully processed),
 - respect for privacy

and

- effective remedies are fulfilled or provided for.

In terms of human rights law the crucial question is the balance of the duty of protecting and fulfilling human rights (for which differentiated data would be needed) on the one hand and the respect for the privacy on the other hand. So, the measures need to be proportionate.

In the following we will take a closer look at opinions of the UN, the Council of Europe and the European Union. In general, all of these international, intergovernmental organizations welcome the collection and processing of *statistical* data to:

- firstly, give an insight on the current situation, i.e. measuring discrimination,

- secondly, to facilitate evidence-planned policy-making and
- thirdly, to measure policy impact.

The different provisions have a tricky relation between each other and however, the role of national, particularly administrative law is uncertain as clear international jurisprudence is missing.

Besides a lot of terminological questions, lacking definitions and so on, we need to very well distinguish between personal data (sensitive data) and statistical data (impersonal data). This leads us to the question where data is gathered from and how it was collected and processed, i.e. public census, registration data, other forms of data collection. The international human rights instruments welcome the production of statistical data, talk about various risks of this undertaking, but are quite silent on concrete recommendations for the collection and the processing of these data. On the conditions we need to consult the legal data protection instruments, as well as the protection of privacy.

Justification

In order to justify the use of “ethnic data” with reference to purpose and proportionality we will start with the crucial human rights provision of “privacy”, Article 8 of the ECHR (Council of Europe). The right to respect for the private life is limited in cases of the accordance of an interference with the law, necessity of a democratic society, economic well-being of the country, the protection of health and morals and for the protection of the rights and freedoms of others – just to mention those covered by the legitimate aim provided by Art 1 CERD. Measuring discrimination is a legitimate aim.

As already mentioned, under the conditions of data protection, we need to distinguish personal/sensitive data and anonymous, impersonal data, i.e. statistical data, which does not allow identifying an individual person. The former may be collected, stored and processed under the conditions of the respect for privacy, e.g. with consent of the persons concerned, the latter is not limited to privacy conditions and thus, might be a good option to prevent from excessive examination of legality.

It is not the case that international, European or national laws prohibit categorically the collection of sensitive data. The respective laws only set out the legal framework and the

qualitative conditions that must be respected when using this kind of data. In the majority of European countries (members of the Council of Europe) collection of sensitive data is allowed with the given consent of the data subject. Even without the consent of the data subject these data can be processed in the context of *legal proceedings* and in administrative *efforts to ensure equal treatment* in practice. The use of “ethnic data” – under the condition of lawful collection and processing – is allowed for statistical purposes and research (see Timo Makkonen, *Measuring Discrimination* 2006, p9, pp66-85, EU Network of Legal Experts in the non-discrimination field).

To fulfill the ECCaR Commitment 2 is not prohibited by law. The implementation of the ECCaR policy commitments demand for data collection, research and measuring racism, discrimination and equality, as well as the assessment of the impact and success of the respective policies. This demand is currently not satisfied. Human rights law and equality law require efforts in this respect. Thus, the legitimate aim is obvious, by which data protection as well as privacy is limited.

Further conclusions

1. Data collection and processing for the purpose of measuring racism, discrimination or equality, particularly for the purpose of realizing the principle of equal treatment is not generally prohibited by international or European law. In contrary, under certain conditions it can be interpreted as a legal obligation, particularly in respect to Art 1 CERD.
2. The legal framework for data protection needs to be strictly observed in case of personal/sensitive data. The EU directives on data protection give general guidelines, which are concretely transposed into national law of EU members and may be a guideline of compliance in non-member states. Reference on the Convention ETS 108 of the Council of Europe can be made if the country is a state party to this convention.
3. There is no legal restriction on the use of statistical/impersonal data if lawfully collected.

V. Concerns

However, there remain important concerns on the collection and processing, as well as on the dissemination and use of sensitive data.

1. What is “ethnic data”? We lack a clear definition on how ethnicity can/should be categorized. Furthermore the question of determination remains open: self-identification or legal/administrational determination shall be applied?

A list of possible proxy indicators may illustrate the problem: ethnicity, ethnicity of parents, nationality, immigration background, member of recognized minority, language, language spoken at home, appearance, colour, names, culture, customs, religion, country of origin, traditions, clothing, eating habits,

2. There is a “natural” risk of wrong data.

3. There is always a risk of unlawful or excessive data collection and use. Personal data can be misused even for persecution.

4. No matter whether personal or statistic data is collected and used, it gives always space for discrimination or stigmatization of specific groups.

Safeguards

Strict and effective prevention mechanisms need to be implemented in respect to data protection and respect for privacy. Adequate and effective remedies must be provided.

VI. International and European opinions

United Nations

- The Committee on the Elimination of Racial Discrimination (CERD) points out, that the State Parties of the International Convention on the Elimination of All Forms of Racial Discrimination have certain *responsibilities*: State parties are under an obligation to report upon legislation on non-citizens and its implementation, including *socio-economic data* on the non-citizen population within their jurisdiction. The data should be *disaggregated by gender and national or ethnic origin*. (See CERD General Recommendation No. 30 on Discrimination against Non-citizens, 2004)
- According to the Revised Reporting Guidelines (CERD/C/2007/1), some indication in the CERD-specific document of the number of persons who might be treated less favourably

on the basis of these characteristics, is *needed for monitoring the progress* in eliminating discrimination based on race, colour, descent, or national or ethnic origin.
(See CERD Revised Reporting Guidelines CERD/C/2007/1, B.11.)

- *CERD requests states to collect information* on mother tongues, languages commonly spoken, or other indicators of ethnic diversity, together with any information about race, colour, descent, or national or ethnic origins derived from social surveys. States are advised and encouraged to develop appropriate methodologies for the collection of relevant information. (See CERD Revised Reporting Guidelines CERD/C/2007/1, B.11.)

As a result of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the UN is recalling the need to develop legislative, juridical, regulatory, administrative and other measures to prevent and protect against racism on a *national level*. Therefore the Member States are asked to *establish working groups* consisting of, among others, local community leaders and national as well as local law enforcement officials, to *improve and enhance data collection* regarding violence motivated by racism, racial discrimination, xenophobia and related intolerance.
(See Durban Declaration, 08.09.2001, 74 b iii, v).

- The UN point out, that statistical data should 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. (See Durban Declaration, 08.09.2001, 92 a).

Conditions

- The following minimum guarantees should be provided in national legislation:
 - not collect or process information in unfair or unlawful ways, nor use it for ends contrary to the purpose of the Charter of the UN
 - regular checks on the accuracy and relevance of the data recorded
 - specify, legitimate and publicize the purpose of serving a file
 - ensure access of persons about whether information concerning him/herself is being processed
 - appropriate security measures to protect files against dangers
 - designate an authority for supervision and sanctions(See Guidelines for the regulation of computerized personal data files 45/95, adopted by the General Assembly on 14 December 1990).

Concerns

- The United Nations are concerned about the fact, that *data is likely to give rise to unlawful or arbitrary discrimination*, because it includes information on racial or ethnic origin, colour, sex life, political opinions, religious, philosophical and other beliefs as well as membership of an association or trade union.
(See Guidelines for the regulation of computerized personal data files 45/95, adopted by the General Assembly on 14 December 1990, Principle 5).

- Furthermore, there is a possibility that the information about persons will be *collected or processed in unfair or unlawful ways*, or the information will be used for ends *contrary to the purposes and principles of the Charter of the United Nations*. (See Guidelines 45/95, Principle 1).
- The UN are also concerned that *states are likely to use their power to make exceptions excessively*, which would lead to a departure from the principles of lawfulness and non-discrimination, even when it is not necessary for the protection of the national security, public order, public health or money, and the freedom of others. (See Guidelines 45/95, Principle 6).
- The UN recognize a certain natural danger to the data files, such as accidental loss or destruction, but also the danger of unauthorized access, fraudulent misuse of data or contamination by computer viruses. (See Guidelines 45/95, Principle 7).
- The UN point out that it is necessary to establish an authority in the law system of every country, which is responsible for supervising observance of the principles concerning “ethnic” data collection. It is also necessary to have certain sanctions against their violation. (See Guidelines 45/95, Principle 8).

Council of Europe

- The Council of Europe acknowledges that collecting *data will assist in assessing and evaluating the situation and experiences* of groups which are particularly vulnerable to racism, xenophobia, anti-Semitism and intolerance. Without good data it will be difficult to *develop and effectively implement policies*. (See ECRI General Policy Recommendation 1 (1996) on combating Racism, Xenophobia, Anti-Semitism and Intolerance).
- According to the “Ethnic Statistics” Study Report of Patrick Simon, the dissemination of data concerning named persons is strictly *regulated*, to ensure that individuals who have supplied personal information are fairly treated. The fact, that only those for whom this information is intended are authorised to see it (they have to be specified when the file is declared), is a *useful prevention tool* against misuse of personal data. (See Study Report: “Ethnic statistics and data protection in the Council of Europe Countries, Patrick Simon, Institut National d’Etudes Démographiques, Strasbourg 2007, Page 11).

Conditions

- The collection of “ethnic” data must satisfy three main conditions:
 - there must be explicit consent and
 - collection must be in the public interest or
 - collection must be a legal obligation

These conditions give the data protection authority the main role in deciding whether the proposed processing operation is legitimate, and they offer a key to set up a monitoring system.

(See Study Report: “Ethnic statistics and data protection in the Council of Europe Countries, Patrick Simon, Institut National d’Etudes Démographiques, Strasbourg 2007,

Concerns

- There is a possibility that data will be obtained and processed in an *unfair and unlawful way* and stored for *illegitimate purposes*.
(See Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28.01.1981, Art. 5).
- The Council of Europe is concerned about the danger of inadequate, irrelevant and *excessive data collection* in relation to the purpose for which they are stored.
(See Convention 1981, Art. 5).
- According to a study concerning “ethnic” statistics in the Council of Europe countries, there is a certain **danger of abuse and misuse of data**:
 - “Ethnic” data are likely to be used for the *identification of individuals* with reference to characteristics which may expose them to discrimination, exclusion or persecution.
 - Data statistics are likely to be used to *stigmatise a vulnerable group*, in case of confirming stereotypes by using findings reductively, or publishing tables without explaining them, or analysing the factors without account for discrepancies.
 - Xenophobic and populist movements *use the potential for stigmatisation* and use the “ethnic” data to demand, that immigration has to be stopped and jobless persons of immigrant origin have to be expelled.

(See Study Report: “Ethnic statistics and data protection in the Council of Europe Countries, Patrick Simon, Institut National d’Etudes Démographiques, Strasbourg 2007, Page 15).

European Union

- The European Union points out, that *free flow of personal data between Member States* and the Community institutions and bodies is an important factor for the exercise of activities within the scope of Community law, especially Title V and VI of the Treaty on European Union.
(See Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Preamble 13-15).
- The European Union acknowledges the significant growth in the possibilities afforded by electronic communications. Their use to collect data is a *valuable tool in the prevention, investigation, detection and prosecution of criminal offences*, in particular organised crime. Therefore it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period.
(See Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communication networks, Preamble 7, 9)

- According to the European Handbook on equality of data, *data is needed to guide and support policy development and implementation*, and also to evaluate and access the impact of these policies.
(See European Handbook on equality of data, European Commission, November 2006, Page 7)
- Data is also needed in *juridical processes*, to prove direct and indirect discrimination with empirical evidence.
(See European Handbook, Page 7)
- National specialised bodies, the UN treaty bodies, the government agencies and for certain organisations would *benefit from international monitoring*. Comparing quantitative and qualitative data would improve their monitoring functions.
(See European Handbook, Page 7)
- Qualitative data can serve a *sensitising and awareness-raising purpose*, especially in national discussions on equality and discrimination.
(See European Handbook, Page 7)
- Any set of data can be useful for researchers seeking to improve our understanding of discrimination. *Research* is a prerequisite for developing and implementing more effective policies to fight discrimination.
(See European Handbook, Page 23)
- The European Union intends to adapt the policy development in the context of action against discrimination to the developments in the markets and technologies for electronic communications services in order to *provide an equal level of protection* of personal data.
(See Directive 2002/58/EC on privacy and electronic communications, Preamble 4).

Conditions

- Personal data must be:
 - processed fairly and lawfully
 - collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes
 - adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed
 - accurate and, where necessary, kept up to date
 - kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed
 (See Directive 95/46/EC, Art.4).

Concerns

- The European Union is concerned about the possibility, that *data is likely to be collected in an unlawful way* and that the collection is *based on illegitimate aims* (other than the security or the control of the processing systems or operations, and the prevention, investigation, detection and prosecution of serious criminal offences).

(See Directive 95/46/EC, Art.5, 6).

- There is a certain *danger of processing data in an unlawful form* because of inappropriate security levels.
(See Directive 95/46/EC, Art. 21, 22).
- The European Union recognizes the *possibility of misuse by keeping personal data* in a form which allows the identification of data subjects for longer than necessary for the purposes for which the data were collected or processed.
(See Directive 95/46/EC, Art. 4).
- Furthermore, the European Union is concerned about the *safety of data transmission*, especially personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life.
(see Directive 95/46/EC, Art. 7-10).
- The European Union acknowledges the *danger of violation of the fundamental rights and freedoms of natural persons*, in particular their right to privacy, by processing personal data.
(See Directive 95/46/EC, Preamble 9).
- According to the measures, which were taken by EU Member states so far, the European Union points out the **main problems of the present data collection activities**:
 - Data collections are *not systematically planned or carried out*
 - They tend to be *conducted on an ad hoc basis*, not on a regular basis
 - They tend to *focus only on some grounds of discrimination*
 - They are often *based on the use of proxy indicators* (which exception of age) which lead to results that are not fully representative of the target groups
 - They tend to be *limited in terms of the areas of life covered*
 - They tend to be *limited in terms of the type of information gathered*

(See European Handbook on equality data, European Commission, November 2006, Page 12)