

## **Introduction: Ethnic Data and Minority Protection**

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### **1. The relevance of ethnic data**

Over the years, a consensus has been established at the international level about the importance of ethnic data for the fight against discrimination, protection of national minorities and integration of diverse societies. As far back as 1973, the UN Committee on the Elimination of Racial Discrimination (UN CERD) called States Parties to provide ‘information on the demographic composition of the population’ regarding race, colour, and national or ethnic origin (UN CERD, 1973). The UN CERD has subsequently specified the need for accurate ethnic data in other, more recent contexts, such as combating racist hate speech (UN CERD, 2013: point 38) or fighting discrimination against the Roma (UN CERD, 2000: point 46). Prominent international organizations at the European level (Council of Europe and OSCE) have also expressed a clear position in favour of processing ethnic data. The European Commission against Racism and Intolerance (ECRI) has already, in its first Recommendation, expressed doubts about the possibility to ‘develop and effectively implement policies (...) without good data’ and called on states to collect ‘data which will assist in assessing and

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evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, antisemitism and intolerance’ (ECRI, 1996: 6). In its *Opinions*, the Advisory Committee (ACFC) on the Framework Convention for the Protection of National Minorities (FCNM) constantly invites States Parties to collect adequate data relevant for the protection of national minorities, also addressing the issue in a more comprehensive manner in the Fourth Thematic Commentary on the scope of application of the FCNM (ACFC, 2016). The ACFC pays special attention to the principle of self-identification in the context of collecting ethnic data (ibid.: 8–9), and points out the need for ethnic data in the context of combating discrimination and equality monitoring. With respect to the latter, the ACFC encourages States Parties to ‘base their equality promotion policy instruments or special measures on comprehensive data related to the situation and access to rights of persons belonging to national minorities’, and to this purpose emphasizes ‘the importance of regularly collecting reliable and disaggregated equality data related to the number and situation of persons belonging to national minorities’ (ACFC, 2016: 25). The OSCE High Commissioner on National Minorities (OSCE HCNM) has also acknowledged the importance of accurate data and identified them as an important segment for development and implementation of an integration policy. As stated in the Ljubljana Guidelines on Integration of Diverse Societies, ‘[p]olicy development should be based on the collection of systematic and comprehensive information and its objective analysis’, whereas ‘[d]ata should be disaggregated according to criteria relevant for integration policy, such as ethnicity or language’ (OSCE HCNM, 2012: 25). Finally, the EU also acknowledges the importance of data (facts) for fighting discrimination and ensuring equality between persons regardless of their racial or ethnic origin, albeit leaving the issue to national law and practice.<sup>1</sup>

The call for states to provide the data necessary for monitoring equality, protection of national minorities or social integration refer to statistical (macro) data disaggregated in a manner that is indicative of the position of (persons belonging to) national minorities in various areas of life. Accordingly, ethnic data can first and foremost serve as quantitative parameters indicating the share and representation of persons belonging to national minorities in various sectors; these could include the share in the total population as well as the ethnic structure of employees, pupils, services users, or perpetrators and victims of hate crimes, to name but a few. The bottom line is that ethnic data collected through the population census are essential for identifying the ethnic structure of the population and can further be used as a benchmark to assess representation of national minorities within specific sectors. Yet, despite the importance

of recording ethnic data in the population census, some studies show that this is not a common practice throughout Europe.<sup>2</sup> The general reluctance of states to collect ethnic data can also be observed with regard to administrative records and targeted surveys, and only a few European states have an established practice in this regard (cp. Farkas, 2017). The UK offers the most prominent example of comprehensive and extensive ethnic data collection (despite regional differences), where ethnic statistics have become standard in a wide range of sectors, as *Willis* shows in his article in this Special Issue. On the other pole are states that strongly oppose the processing of ethnic data (Germany and France, for instance); although they do not fully abstain from collection of relevant data, albeit using proxies (see Farkas, 2017). There are also countries which generally do not oppose ethnic data collection, recording ethnicity in the population census; however, these states only collect ethnic data in a few sectors and have only a rudimentary practice of producing ethnic statistics. Serbia serves as an indicative example of this approach, in which the awareness of the need for ethnic data gradually emerges and ethnic data are being recorded on several occasions, but the practice of producing ethnic statistics and using the data for policy development or monitoring purposes is profoundly missing, as *Djordjević* shows in her article in this Special Issue.

It is worth noting here that the position of national minorities can also be assessed using data that are not ‘ethnic’ in the strict sense, as they do not focus on individuals, but which deal with specific ‘phenomena’ such as: minority political parties, minority lists in elections, municipalities in which minority languages can be used in communication with the authorities, schools which provide education in, or of, a minority language, media in minority languages and similar. Because of the depersonalized nature of these data, processing thereof should not be problematic or considered risky, but unfortunately this does not mean that states thoroughly monitor the situation and base their policies on evidence resulting from such data. This can be seen in international monitoring bodies’ repeated calls for states to support their reports with accurate and reliable data. Notwithstanding the importance of various sets of data for national minority protection, the focus in this Special Issue is on ethnic data.

The collection and further processing of ethnic data can be meaningful only if it is part of a systematic and carefully considered process, throughout which there is clarification as to ‘what type of data on ethnicity and/or race are processed, using which definitions and for which purposes are they collected’ (Simon, Piché, Gagnon, 2015: 2). It is essential to keep in mind that the ‘[c]ollection of ethnic data is a tool and not a goal’ (Djordjević, 2019). Collected data cannot substitute for minority policies, but rather contribute to better development, more

efficient implementation and more systematic monitoring of such policies. Accordingly, ‘the more data the better’ approach is not always optimal, as it can lead to ‘data fatigue’ if there are too much data but not enough concrete action is being taken (Chopin, Farkas, Germaine, 2014: 62); it can disguise the lack of genuine policy or be presented as a ‘policy’ per se, or it can ethnicize areas for which ethnicity should be irrelevant (Djordjević, 2019). To various extents, all three articles in this Special Issue advocate for context-dependent and conceptualized collection of ethnic data. *Pap*, in his article on Hungary, calls for differentiation between policies with exclusive and non-exclusive targeting, arguing that ethnic data collection should be limited to policies with exclusive targeting. In cases of non-inclusive targeting, ethnic data collection might constitute an unnecessary infringement on the individual private sphere. *Willis* also raises the issue that the UK focuses on the collection of ethnic data rather than on the analysis of collected data, and calls for stronger scrutiny of ethnic data collection ‘in terms of purpose and what is necessary’. Finally, *Djordjević* identifies the lack of systematic and thoroughly considered ethnic data policy as one of the main weaknesses in the Serbian approach to ethnic data collection, arguing that there is a lack of a clear idea of the purpose and a proper justification for the processing of ethnic data.

Among the many aspects interlinked with the issue of ethnic data processing, two core issues will be briefly addressed here: personal data protection and methodological challenges of ethnic categorization and classification.

## **2. The challenge of personal data protection**

The main justification that countries give for not collecting ethnic data is that this ‘would infringe upon the right to respect for private life’ (Ringelheim and De Schutter, 2009: 6) and contradicts with the data protection rules. Indeed, the European legal framework on personal data protection qualifies ethnic data as one among the ‘special categories of data’, commonly referred to as ‘sensitive data’, for which additional safeguards are prescribed.<sup>3</sup> However, these additional safeguards do not establish an absolute prohibition on collecting and further processing ethnic data, as opponents of ethnic data collection usually claim. The sensitivity of personal ethnic data is indisputable as these data reveal information that could put an individual in a vulnerable position: any form of disadvantage, exclusion from rights or services, exposure to violence or, in the most extreme cases, physical execution. The reluctance towards ethnic data collection in Europe has important historical precedents, chiefly the trauma of WWII and the misuse of population data systems for the annihilation of Jews and Roma (see for instance: Seltzer and Anderson, 2001). On the other hand, in countries with a colonial past, ethnic data

collection evokes memories of the classification of colonized populations (Simon, 2013: 20–21) and the creation of explicit or implicit hierarchies between different groups (Simon and Piché, 2013: 2). More contemporary concerns relate to the misuse of data leading to discrimination against individuals and groups, ethnic profiling, the perpetuation of negative stereotypes, and the stigmatization of specific groups and individuals belonging to them (Djordjević, 2019).

The European regulations on personal data protection indeed recognize the complexity of ethnic data and set a framework for a balanced approach that aims to minimize the risks (through additional, stronger safeguards) and utilize the benefits (through abstaining from the absolute prohibition of processing the ethnic data). The general data protection rules (lawfulness, fairness, transparency, purpose specification, data minimization, data accuracy, storage limitation, data security and accountability) and the rights provided to data subjects (information and access to personal data; rectification and erasure; objection and freedom from a decision based solely on automated processing) also apply to the processing of ethnic data. In addition to these general legal safeguards, several other legal safeguards are usually linked with ethnic data protection. First is the data subject's explicit consent to the processing of ethnic data for one or more specified purposes (see Article 9.2 (a) of the General Data Protection Regulation (GDPR)). Another option for processing ethnic data is linked to the establishment, exercise or defence of legal claims (see Article 9.2 (f) of the GDPR). Substantial public interest can also allow for ethnic data processing (see Article 9.2. (g) of the GDPR). Finally, ethnic data can also be processed if it is necessary for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes (see Article 9.2 (j) of the GDPR). The legal safeguards establish important guarantees for the protection of ethnic data, but their full effectiveness can only be realized if they are underpinned by adequate technical and organizational measures. Such measures aim to 'ensure a level of security appropriate to the risk' and refer to restricted (authorized) access to data, pseudonymization and encryption of personal data, as well as measures ensuring integrity and resilience of the processing system (see Article 32 of the GDPR).

It is important to note here that personal data protection rules apply to ethnic data only if data are processed as *personal* data, i.e. as long it is possible to identify the person who is the data subject (see Article 4.1 of the GDPR). Bearing in mind that ethnic statistics, and statistics in general, are not interested in individuals but in trends, processing ethnic data as personal data is unnecessary in most instances. Against this background, anonymization of

ethnic data, a technique through which the link between data and the individual is entirely broken, can indeed facilitate the processing of ethnic data. Anonymization of data both simplifies data processing and minimizes the risks of harmful misuse of data against individuals. However, such ‘impersonal use of data’ requires that ‘procedures for ensuring anonymity of data are properly followed, and confidentiality is scrupulously respected’ in all phases of data processing (Simon, 2007: 12).

It is indisputable that personal data protection regulations and safeguards are essential for processing of ethnic data. However, two side-aspects are relevant here. First, there is the question of why, given all the legal and political measures for equality, protection of minorities and social integration, ethnicity remains a delicate topic and inquiring about ethnicity is still problematic and sensitive (Bašić and Lutovac, 2020: 5–6). It seems that in the UK, ethnicity as such and ethnic data collection are normalized and not perceived as ‘delicate’, as indicated by the wide areas in which ethnic data are collected (see *Willis* in this Special Issue). But, in the vast majority of European countries, ethnicity is perceived as a delicate issue, not only by the authorities, but also by national minorities themselves. It seems that national minorities are generally aware of the benefits of ethnic data, but they are also cautious about the risks, and unsure about the trade-offs between these two. The second aspect refers to the misuse of the data protection argument to justify the lack of ethnic statistics and to disguise the lack of genuine interest in equality and minority protection. *Pap* reports, in his article on Hungary, that the data protection argument is used as an excuse for obstructing educational desegregation, to avoid prosecuting racially motivated hate crimes and to avoid monitoring ethnic profiling. As *Djordjević* explains in her article a similar trend can be seen in Serbia too; data protection regulations have been wrongly interpreted by authorities as prohibiting the processing of ethnic data and are used to excuse the rudimentary level of monitoring of the quality of national minority protection in practice.

### **3. The challenge of categorization of ethnicity**

Even if there is awareness about the benefits of ethnic data and a general willingness to perform some sort of ethnic monitoring, the processing of ethnic data remains challenging for methodological reasons. The main question is how to collect and further process ethnic data in a manner that creates realistic and reliable information such that the position of different ethnic groups in various sectors can be assessed. There are several methodological challenges to the collection of ethnic data: the very concept of ‘ethnicity’, the scope of diversification of groups

covered and the type of affiliation with the group; standardized and comprehensive ethnic data collection across various sectors versus more targeted and specified ethnic data collection according to specific sectors and circumstances; personalized versus anonymous queries; and the outreach to minority members (questions of trust and adequate reporting), to name but a few.

The central methodological challenge is related to the vagueness of the concept of ethnicity: what exactly is to be (statistically) measured and how? As it is well known, there is no universal definition of ‘ethnicity’<sup>4</sup> and the concept is subject to different interpretations. In the Principles and Recommendations for Population and Housing Censuses, UN DESA explains ethnicity as being ‘based on a shared understanding of history and territorial origins (regional and national) of an ethnic group or community, as well as on particular cultural characteristics such as language or religion’ (UN DESA, 2017: 204). However, it also recognizes that ‘[e]thnicity is multidimensional and is more a process than a static concept’, and therefore ‘ethnic classification should be treated with movable boundaries’ (ibid.). Because there are no universal criteria or classifications for ethnicity (cp. ibid., 140), there is a possibility for social negotiations and agreements on what is to be understood under ‘ethnicity’ in the specific context, and which groups are enumerated and thus ‘statistically recognized’. The UK, as explained by *Willis* in this Special Issue, offers an interesting example of the development and gradual updating (expanding) of census categories of ethnicity since 1991. The UK’s categorizations also wrestle with the blurred lines between race and ethnicity, as the categories ‘White’, ‘Black’ and ‘Mixed’ have racial rather than ethnic connotations, notwithstanding the very problem of the concept of ‘race’. While the categorization of ethnicity in the census has been a subject of political debates in the UK, *Pap* explains, in his contribution to this Special Issue, that no such public or doctrinal debate has occurred with regard to census categories in Hungary, where the law recognizes 13 national minorities but census also covers five more categories. Collecting ethnic data based on the pre-set group categories, as in the UK or Hungary, makes statistical processing easier, but raises important conceptual questions: which groups are listed and in which order, and is it possible to record multiple affiliations; if so, is this facilitated by pre-set mixed categories or is it possible to mark several (up to what maximum) options? These are not simply technical questions, but important issues of diversity management and the chosen approaches reflect specific contexts, relations between different groups, claims of various stakeholders, power relations and similar. The method of using pre-set categories also bears two important risks: first, it ‘may have a tendency to lose detailed

information on the diversity of a population’ (ibid.) and, second, it can ‘influence the choices that respondents make regarding their ethnic identity’ (UNECE, 2015: 149). Thus, instead of capturing statistical reality, this approach can indeed contribute to the construction of reality itself (cp. Simon and Piché, 2013: 2–3). To mitigate the pitfalls associated with the pre-set categories, the ethnicity question should also provide for write-in responses (UNECE, 2015: 150). This would be in line with the understanding that ‘respondents [should] have the option of describing their identity in their own words’ (ibid.: 149). An alternative method for setting categories is to collect ethnic data based on a fully open question, so that the respondent is entirely free to define their own ethnic affiliation. This approach makes statistical processing more complicated as it theoretically leaves space for an infinite number of categories; in reality, though, it calls for the categorization of responses after the ethnic data have been collected. The question of the ‘statistical recognition’ of groups is relevant with this method too: categorization should be sufficiently sophisticated so as not to mask the reporting of some groups, either by setting the release thresholds too high (ibid.: 150) or by ignoring the responses listing multiple affiliations. As *Djordjević* explains in her paper in the Special Issue, Serbia opted for the open-question approach which gives respondents full freedom of ethnic identification. Yet, the question of release thresholds remains open for sectors other than the population census, as does the question of recognition of multiple identities (which were recorded for the first time in the 2011 census, but are generally an underdeveloped concept in Serbia).

Another important methodological and conceptual question relates to individual ethnic identification. There are various methods through which a person can be linked with a specific ethnic identity: self-identification, identification by community members, identification by a third party, and classification by a third party based on objective or indirect criteria (Ringelheim and De Schutter, 2009: 91–92; see also *Pap* in this Special Issue), but the principle of self-identification is now considered to be the guiding principle.<sup>5</sup> This presupposes that it is up to every individual to identify themselves as belonging to a particular ethnic group or not; individuals cannot be limited in their freedom to identify with a specific group, nor can they be ascribed an ethnic identity against their will. The freedom of self-identification is, however, not absolute and cannot be perverted to the point of arbitrariness. As *Pap* argues in his contribution on Hungary, the misuse of the principle of self-identification can lead to ethno-fraud, such as deliberate ‘false’ identification with the aim of accessing positive action measures. *Djordjević*, in her contribution on Serbia, also reports that some authors and minority

representatives are critical of the too-liberal understanding of the principle of self-identification that would allow for spurious access to minority autonomy (the national minority councils), political representation, and unfair access to some positive action measures. Against this background, individual self-identification needs to rest on some sort of affiliation with the core ('objective') identity features of the group (culture, language, tradition, religion, ancestry, or similar).<sup>6</sup> Yet, there should not be an attempt to *ex ante* codify abstract objective criteria for group membership; it is instead more appropriate to *ex post* examine objective criteria 'in light of the person's subjective choice and against the parameters of reasonability and no unjustified discrimination' (Marsal and Palermo, 2018: 98). In sum, the misuse of the freedom of self-identification is an issue, but not a pitfall for which it should be abandoned as the guiding principle of individual identification. The focus should be rather on the creation of an environment in which ethnic fraud is simply socially unacceptable. In a similar vein, a positive environment is also crucial for free self-identification without fear of stigmatization or negative repercussions, which appears to be one of the core reasons for significant underreporting of Roma identity (an issue that *Carstocea* tackles in her book review in this Special Issue).

In the context of the intensive diversification of societies, there is a call to approach ethnic identity beyond the binary/exclusive understanding of 'either/or' and to open it to multiple affiliations. This reading of the principle of self-identification presupposes that respondents have the option to indicate more than one ethnic affiliation or a combination of ethnic affiliations (ACFC, 2016: 9 and UNECE, 2015: 150). An important implication of the principle of self-identification is also the possibility for individuals to declare different ethnic identities across time or according to the situation: as the ACFC has observed, 'persons (...) must not be required always to self-identify in the same manner' (ACFC, 2016: 9). This indeed poses some challenges for the processing of ethnic data, identifying trends and making comparisons, but it is in line with the dynamic understanding of identity as a multi-layered phenomenon.

#### **4. Conclusion**

Processing ethnic data is a complex endeavour which rests on at least three sets of issues: what is to be assessed and what information is needed to fulfil this aim, and consequently which data are needed to provide such information (1); how to collect and further process ethnic data so that they meet the purpose and provide reliable and accurate information on which to base sound analysis and conclusions (2); and how to secure all legal and technical safeguards and

protect individuals from an intrusive interference with their privacy and individual freedom (3). It has also to be borne in mind that processing of ethnic data is only one of the tools supporting effective laws and policies – it is not a substitute. It is also important to note that data can be interpreted in various ways (for better or for worse), just as the outcomes of statistics can vary depending on the methodology used (see Simon and Piché, 2013: 5). Against this background, processing ethnic data by no means establishes some ‘absolute truth’ about the status of various ethnic groups and their members, but is one valuable source that needs to be interlinked with other sources of information and carefully assessed within both quantitative and qualitative parameters (cp. Ringelheim and De Schutter, 2009: 41–43).

This Special Issue presents a contribution to the academic discussion of ethnic data processing and its relevance for national minority protection. It addresses the issue through the lenses of three case studies: Hungary, the UK and Serbia, as well as one book review with a focus on the Roma people of Europe. It attempts to deal with the complexity of ethnic data from multiple perspectives and, as such, *Pap*’s article on Hungary focuses on the challenges of defining groups and memberships (with a special focus on the Roma), *Willis* directs his discussion toward the collection of ethnic data in the UK in the context of ACFC monitoring, and *Djordjević* deals with various aspects of ethnic data processing from the perspective of legal regulations in Serbia. Finally, the book ‘Legal Aspects of Ethnic Data Collection and Positive Action. The Roma Minority in Europe’ by Jozefien Van Caeneghem provided a good opportunity for *Carstocea* to reflect on some important challenges of data collection related to this community. The book offers a valuable comprehensive analysis of the complexity of the ethnic data collection and its importance for the Roma protection, in the context of positive action: as an important precondition for targeted and effective measures. The book comprehensively addresses some core issues of ethnic data collection, such as: key rules and principles; benefits, risks and methods, and challenges to collecting ethnic data on Roma, and is ‘a valuable addition to the body of knowledge on the subject of data collection’ (*Carstocea* in this Special Issue).

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### Notes

<sup>1</sup> See Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, p. 22–26.

<sup>2</sup> Simon (2013) shows that out of 41 countries covered, only 22 (or 54%) collect data on ethnicity. The results of Morning's (2015) study are even lower, indicating that among 36 covered countries, only 16 (or 44%) recorded ethnicity in the census.

<sup>3</sup> See Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108 of the Council of Europe, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>) and Article 9 of the General Data Protection Regulation (GDPR) of the EU (<https://gdpr-info.eu/art-9-gdpr/>).

<sup>4</sup> Indicative can be the famous minority definition provided by Francesco Capotorti, which rests on 'ethnic, religious or linguistic characteristics' as well as on 'a sense of solidarity, directed towards preserving their *culture, traditions, religion or language*' (emphasis added).

<https://www.ohchr.org/en/issues/minorities/pages/internationallaw.aspx>. The definition, however, never became legally binding.

<sup>5</sup> See General Recommendation VIII of the UN CERD as well as Article 3 of the FCNM.

<sup>6</sup> See Para. 35 of the Explanatory Report to the FCNM.

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