# Racial and Ethnic Statistics in Sweden: Has the Socialization Process Started Yet?

Yamam Al-Zubaidi*



* Yamam Al-Zubaidi worked at the Swedish Equality Ombudsman for a decade and then worked as the Equality and Diversity Manager at Sweden's National Touring Theatre for several years. He is the author of the first Swedish Equality Data study (2012) and the Swedish handbook on racial equality data for working life (2021). He has contributed to several international comparative reports on equality data, including the 'Analysis and Comparative Review of Equality Data Collection Practices in the European Union', commissioned by the European Commission. He holds a Master of Arts/Science in Decision, Risk and Policy Analysis. He is currently an independent consultant. Email: yamam.alzubaidi@gmail.com.

Statistics related to racial and ethnic minorities have been long debated in Europe. With few exceptions, most Member States prefer not to compile such statistics or use available data for anti-discrimination purposes. Racial and ethnic statistics are undeniably a more complex issue than statistics on sex, which are compiled routinely, but the potential and benefits of such statistics are also difficult to dismiss.

This chapter is an attempt to reflect on and understand the Swedish approach to racial and ethnic statistics for anti-discrimination purposes, an issue that has become unavoidable, at least since the adoption of the Racial Equality Directive in 2000. The lack of racial and ethnic statistics in Sweden has often been justified in terms of a legal prohibition on collecting and processing such data. As data protection is regulated in EU Law, the Swedish approach is here contrasted with the UK approach. Although at this point the UK has left the European Union, it is useful to discuss the UK experience in this field as it was designed and implemented under the EU legal regime. This chapter also poses the question of whether Sweden, despite its deepfelt opposition, is in the midst of a socialization process that will lead to an acceptance and development of racial and ethnic statistics.

## 1 Racial and Ethnic Statistics under the EU Legal Regime

With the adoption of the Racial Equality Directive[1], the European Union established a comprehensive legal framework for protection against discrimination based on racial and ethnic origins. The Directive has a wide material scope covering employment and occupation, social protection including social security and healthcare, social advantages, education, and access to and supply of goods and services available to the public including housing. It is also comprehensive in terms of its concepts, covering direct discrimination, indirect discrimination, harassment and instructions to discriminate. At the time of its adoption, no other EU equality directive had all the above-mentioned concepts and scope combined in one legal instrument.

In contrast, the codification of sex equality, which has had a much longer history under EU law, developed gradually. For instance, Directive 76/207/EEC[2], which is the first directive protecting against sex discrimination in employment, had to be 'modernised' in 2002 through Directive 2002/73/EC[3], 'making the definition of direct and indirect discrimination in the area of gender

1 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive).

2 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

3 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

equality consistent with the definition employed in the Racial Equality Directive'.[4]

Following the same pattern, statistical evidence was not mentioned in Directive 76/207/EEC but was introduced in Directive 2002/73/EC (recital 10) using the formula of the Racial Equality Directive (recital 15) providing that indirect discrimination may 'be established by any means including on the basis of statistical evidence'.

Against this background, it would be reasonable to expect the application of the Racial Equality Directive as well as the forms in which it has been transposed into the national legislation of the Member States to be the leading example when it comes to the use of statistical evidence, at least in relation to indirect discrimination provisions. However, it is the other way around. Statistics on sex were produced and used in litigation long before the adoption of the Racial Equality Directive. Furthermore, in 2006 the existing provisions of the different sex equality directives were brought together and incorporated in Directive 2006/54/EC, commonly known as the Recast Directive.[5] This new directive included a non-optional reference to the use of statistics, maintaining that 'comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels' (recital 37). It is worth noting that this recital is not related to indirect discrimination exclusively; rather, statistics are promoted as a general and necessary tool in the advancement of gender equality.

However, the definition of indirect discrimination in the Racial Equality Directive differs from the one that was previously introduced for gender equality through the Directive 97/80/EC, commonly known as the Burden of Proof Directive.[6] While the Racial Equality Directive speaks of 'a particular disadvantage' in the comparison with other persons, the Burden of Proof Directive speaks of disadvantaging 'a substantially higher proportion of the members of one sex'. According to Tyson (2001)[7] and Howard (2010)[8], this was the result of a compromise in the negotiations concerning the Racial Equality Directive: a number of the Member States opposed collecting statistics on racial or ethnic origins and the Racial Equality Directive wording made it possible to prove indirect discrimination without such statistics.

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4 Susanne Burri and Sacha Prechal, 'EU Gender Equality Law' (2008), Office for Official Publications of the European Communities, Luxembourg.

5 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive).

6 Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (Burden of Proof Directive).

7 Adam Tyson, 'The Negotiation of the European Community Directive on Racial Discrimination' (2001) 3(2) *European Journal of Migration and Law* 199-229.

8 Erica Howard, 'The EU Race Directive. Developing the Protection Against Racial Discrimination within the EU' (2010), Routledge, London.

Furthermore, as Makkonen (2006)[9] and Tobler (2008)[10] point out, this should not pose an obstacle to proving indirect racial discrimination as courts are able to use what sometimes has been called 'a common sense assessment' based on common knowledge or obvious facts. This is partially due to the definition of indirect discrimination in the Racial Equality Directive that speaks of a provision, criterion or practice that 'would' put persons of a racial or ethnic origin at a particular disadvantage.

However, the usefulness of statistics on racial and ethnic minorities goes beyond proving indirect discrimination. It is about understanding and defining the challenges at hand in order to design adequate responses through analysis of disaggregated data at all appropriate levels. Indeed, this is the fundamental idea behind recital 37 of the Recast Directive concerning sex discrimination.

### *1.1 Racial Statistics: The Potential and Challenges*

In a 2004 green paper, the European Commission presented its analysis of the progress that had been made so far in the field of equality and non-discrimination in the enlarged EU.[11] The paper identified the lack of data as a specific area of concern, as this 'makes it difficult to assess the real extent of the challenges that exist and to measure the effectiveness of legislation and policies to tackle discrimination'. The paper also recognised the 'understandable concern to respect personal privacy and data collection rules' as well as the 'the sensitivity of this issue'. Nevertheless, the green paper expressed the need to continue the dialogue on this matter for the 'future development of policy in the field of anti-discrimination'.

The Commission continued its efforts to bring clarity concerning the two main challenges in relation to the collection of racial statistics: respect for the data protection framework and the sensitivity of classification and categorisation of racial and ethnic groups. Several research reports were commissioned. First, in 2006, the Commission launched a report on data collection and EU equality law.[12] In 2007, the *Handbook on Equality Data*[13] was published and in 2017, a revised handbook was issued together with a number of thematic reports including one on racial and ethnic statistics.[14]

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9 Timo Makkonen, 'Measuring Discrimination Data Collection and EU Equality Law' (2006), Office for Official Publications of the European Communities, Luxembourg.

10 Christa Tobler, 'Limits and Potential of the Concept of Indirect Discrimination' (2008), Office for Official Publications of the European Communities, Luxembourg.

11 European Commission, 'Equality and Non-discrimination in an Enlarged European Union, Green Paper' (2004).

12 Timo Makkonen (2006).

13 Timo Makkonen, 'European Handbook on Equality Data' (2007), Office for Official Publications of the European Communities, Luxembourg.

14 Timo Makkonen, 'European Handbook on Equality Data 2016 revision' (2017); Lilla Farkas, 'Data Collection in the Field of Ethnicity' (2017). The package is available at: https://www.humanconsultancy.com/projects/equality-data-collection-in-the-eu, accessed 7 October 2021.

In this regard, it is fair to say that the EU has made adequate and high-quality guidance available to the Member States including comprehensive guidelines on how to improve the collection and use of equality data.[15] As a whole, the above-mentioned reports provide a good understanding of the usefulness of racial statistics, tackle the challenges related to data protection rules and cover the sensitivity of classification. The following is a short summary of the main findings of these reports and some other previous research.

### *1.2 Usefulness of Statistics*

In general, racial statistics can be useful concerning the following areas:[16]

- Statistical evidence can play a decisive part in legal proceedings. Individual claimants often find themselves in need of statistical evidence to back up their claim, particularly where indirect discrimination is at issue. This is recognised in the Racial Equality Directive (recital 15).
- Statistical data can play a key role in recognising the need for, and planning of, positive action measures. The Racial Equality Directive permits positive action by allowing the maintenance or adoption of specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin (Article 5).
- Statistical data can be collected by Government agencies, businesses and other organisations for the purposes of monitoring compliance with equal treatment laws.
- Statistics are needed to assess the effectiveness of current anti-discrimination laws and policies, and to guide future policy and legal developments.
- Statistical and other scientific knowledge and evidence can give a major boost to awareness raising and sensitising efforts, and provide a compelling, factual baseline for national discussions on discrimination.
- Key international human rights conventions, to which all EU Member States are parties, directly and indirectly necessitate the collection of data on discrimination. Several conventions require the contracting states to submit periodic country reports on their human rights situation to the international treaty bodies, and full compliance with these requirements necessitate the compilation of statistical data.

### *1.3 Data Protection and Privacy*

When it comes to the legality of data, a common claim is that data protection laws prohibit the collection and processing of 'special categories of data' such

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15 European Commission High Level Group on Non-Discrimination, Equality and Diversity, 'Guidelines on Improving the Collection and Use of Equality Data' (2018), available at: https://ec.europa.eu/info/sites/default/files/en-guidelines-improving-collection-and-use-of-equality-data.pdf, accessed 7 October 2021.

16 Timo Makkonen (2006).

as data revealing racial or ethnic background.[17] However, available legal analyses indicate that this claim is not entirely accurate, at least in relation to international legal instruments.[18]

Makkonen (2006) analysed the data protection framework relevant for all Member States. The analysis covered the EU Data Protection Directive (that was in force at the time),[19] the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[20] as well the International Covenant on Civil and Political Rights to which all Member States are a party. The analysis led to two general conclusions, that:

- the international and European frameworks on data protection do not categorically prohibit the collection of so-called special categories of data for anti-discrimination purposes – instead, the frameworks establish strict safeguards to protect from abuse; and
- the processing of special categories of data is permitted on the basis of the consent of the data subject, except where this option is ruled out by national law in particular circumstances or where the authorisation of the national data protection authority is needed but not obtained.

The first *European Handbook on Equality Data*[21] confirms the same line of reasoning as above. The revised handbook,[22] which analysed the current General Data Protection Regulation (GDPR)[23] draws the same conclusion.

As Simon (2007) points out[24] in an analysis for the European Commission against Racism and Intolerance, the international data protection frameworks impose a prohibition to start with, and then add a relatively long list of conditions under which data may nonetheless be collected. In other words, the ambiguity is due to this prohibition-with-exceptions formula.

The European Union Fundamental Rights Agency (FRA) highlighted the challenges and ambiguity posed by this formula. In its opinion on the then

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17 See for instance Article 9 of the Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

18 Timo Makkonen (2006, 2007, 2017); Patrick Simon, '"Ethnic" Statistics and Data Protection in the Council of Europe Countries' (2007), European Commission against Racism and Intolerance, Strasbourg.

19 Directive 95/46/EC of the European Parliament and of 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 (Data Protection Directive).

20 ETS Convention No. 108.

21 Timo Makkonen (2007).

22 Timo Makkonen (2017).

23 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

24 Patrick Simon (2007).

proposed data protection reform package, FRA suggested[25] that the GDPR could explicitly mention that special categories of data can be collected for the purpose of combating discrimination based on the grounds listed in Article 21 of the Charter of Fundamental Rights.

However, the GDPR was adopted with the same prohibition-with-exceptions formula. It does, however, bring some clarification in comparison with the repealed directive. According to recital 4 GDPR, 'the right to the protection of personal data is not an absolute right' and 'must be considered in relation to its function in society'.

### *1.4 Defining and Categorising*

As Makkonen[26] points out, racial and ethnic origin are socially relevant distinctions that are socially-constructed even though they refer to the real world. They therefore 'do not have a single, self-evident meaning'. In other words, there are no universal solutions when it comes to collecting data on these kinds of socially-constructed distinctions. However, there is a useful methodology on how to approach the issue, as set out in the series of questions below:

- Definitions: what is meant by terms such as 'race' or 'ethnicity'?
- Classifications: how should data be grouped so that the compiled statistics produce a structured and understandable picture of reality?
- Categorisation: by what criteria should a person be assigned to one of the available categories? Should this take place on the basis of self-identification by the person concerned, on the basis of some objective criteria or on the basis of recognition by other members of the group?

The European equality data handbooks, suggest the following guiding principles:[27]

- There are no universally accepted definitions of the concepts 'racial origin' or 'ethnic origin' in international law, EU law or the national law of the EU Member States. Due to international case law and authoritative interpretations of UN human rights bodies, some guiding principles to establish definitions have been provided: definitions should recognize the factual diversity and not depend on political considerations; they should not be narrowly construed – groups must not be excluded without an acceptable justification, as this might lead to unlawful discrimination.
- While there are no universally accepted definitions of these concepts, some standards for classification for grouping data as a structured and understandable picture of reality, have been developed at the international level to enhance comparability of statistics.

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[25] FRA, 'Opinion of the European Union Agency for Fundamental Rights on the Proposed Data Protection Reform Package' (2012). Available at: https://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf, accessed 7 October 2021.

[26] Timo Makkonen (2017).

[27] Timo Makkonen (2007, 2017).

- There are different methods of categorisation (assignment to a category representing a group): self-identification, third-party identification and mutual recognition by members of a group. Self-identification has grown to become the most practised and accepted type of categorisation, in line with human rights principles such as respect for human dignity and respect for private life.

### *1.5 An Example: The United Kingdom*

In the UK, positive action is permitted in national law in respect of racial or ethnic origin. This provides that public authorities must have due regard to the need to eliminate discrimination, harassment, victimisation and to advance equality of opportunity. In Great Britain, there is a general statutory duty on public authorities to eliminate unlawful discrimination and to promote equality of opportunity related to each of the protected characteristics in the law, including race.[28] In Northern Ireland, a duty is imposed on specified public authorities to have 'due regard to the need to promote equality of opportunity' across all the equality grounds.[29]

The positive duties outlined in the national equality legislation require the collection of data and its use to formulate positive action planning. In response, many public sector organisations have put in place processes to try to promote equality in the workplace and in the provision of their services, as part of a process of mainstreaming equality. Private bodies are also increasingly using data to develop positive action on a voluntary basis.[30]

The GDPR is implemented through national legislation. The UK Data Protection Act 2018 allows processing of special categories of data for the purpose of monitoring of equality legislation under certain conditions.[31] This is based on Article 6(1) GDPR, which allows for processing of necessary data for compliance with legal obligations, processing necessary for the performance of a task carried out in the public interest or processing necessary for the purposes of the legitimate interests of the data controller.

Data is collected on the basis of voluntary self-identification and does not meet the condition mentioned above if it is carried out for the purposes of measures or decisions with respect to a particular data subject or if it is likely to cause substantial damage or substantial distress to an individual.[32]

Racial and ethnic categories are also included in the national census with the main categories being: White, Mixed/Multiple ethnic group, Asian/Asian British, Black/African/Caribbean/Black British, Other ethnic group.[33] This kind

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28 Equality Act 2010, Section 149.

29 Northern Ireland Act 1998, Section 75.

30 Lucy Vickers, 'United Kingdom Country Report 2020 on the Non-discrimination Directives Reporting period: 1 January 2019 – 31 December 2019' (2020).

31 Lucy Vickers (2020).

32 Data Protection Act 2018, Schedule 1, part 2, para 8.

33 Census Analysis: Ethnicity and Religion of the Non-UK Born Population in England and Wales (2011): https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/

of baseline data is useful as benchmark data for public or private bodies that wish to assess the impact of their policies.

One example of the usefulness of such data collection is in the higher education sector. Statistics are collected regarding attainment and are broken down by gender and by ethnicity, which allows for the design of relevant measures to close the attainment gap between different ethnic groups.[34]

Another example of an area in which such data collection is useful is policing. Data on ethnicity is collected at every stop and search performed by the police. Statistics on stop and search are then compiled, which allows for careful analysis and scrutiny regarding the potential disproportionality of the data as regards the ethnicity of those stopped.[35]

### *1.6 The Overall Picture*

The usefulness of statistics on racial or ethnic origin seems to be well-documented in the literature. In a survey conducted by the European Commission in 2004, 93 % of the respondents, who were mostly experts in the area of non-discrimination, recognised the need to improve data for the purpose of developing effective policies to promote equality and tackle discrimination.[36] Furthermore, the need for statistics has been embraced by the EU through the commissioning of several reports covering both research and legal analysis as well as in several explicit statements.[37]

The international and European legal frameworks for the protection of privacy do not seem to impose any absolute prohibition on the collection and processing of data on racial or ethnic origin for the purposes of anti-discrimination. Still, as Makkonen (2017) remarks, the Recital 10 GDPR leaves it to the Member States to determine more precisely under which conditions special categories of data may be collected and processed.

Due to the lack of established, common definitions and categories for the concepts of racial origin and ethnic origin on the European level, it is up to the individual Member State to define what is relevant, based on its demographic and social reality and in line with the principles outlined above. This could be

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2011censusanalysisethnicityandreligionofthenonukbornpopulationinenglandandwales/2015-06-18#ethnicity-of-the-non-uk-born-population, accessed 7 October 2021.

34 Degree Attainment Gaps in the UK. Available at: https://www.advance-he.ac.uk/guidance/equality-diversity-and-inclusion/student-recruitment-retention-and-attainment/degree-attainment-gaps, accessed 7 October 2021.

35 Ethnicity Facts and Figures: Government Data about the UK's Different Ethnic Groups. Stop and Search. Available at: https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest, accessed 7 October 2021.

36 Response Statistics for Green Paper on Anti-discrimination and Equal Treatment. Quoted by Makkonen (2006) 12.

37 See for instance, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Non-discrimination and Equal Opportunities: A Renewed Commitment, COM (2008) 420 final, Brussels, 2 July 2008.

one reason why the European Commission previously made it clear that it is up to the Member States ‘to decide whether or not ethnic data should be collected’.[38]

How different Member States tackle the issue is therefore very much dependent on the state’s national history and traditions as well as its approach to anti-discrimination policies. It does not seem unreasonable to say that the collection and processing of data on racial and ethnic groups are subject to national priorities rather than a question of legality.[39] The reluctance of some Member States to compile and process racial and ethnic statistics that was pertinent to the negotiations on the Racial Equality Directive seems to remain common in most Member States in spite of all the available guidance.[40]

Historically, statistical evidence in the equality field has been strongly associated with the concept of indirect discrimination and the notion of disparate impact that was coined by the United States Supreme Court in its landmark ruling on *Griggs* v. *Duke Power Co*.[41] As Hepple (2009) points out, after it was developed by the US Supreme Court, the concept of indirect discrimination was incorporated in the UK and Irish domestic legislation during the 1970s. It could also be found in the EU case law, starting with the *Defrenne* case.[42] However, the first codification of indirect discrimination in the EU equality framework came as late 1997, with the Burden of Proof Directive.

In other words, the codification of statistical evidence for proving disparate impact came into the EU legal system from countries with a certain tradition of compiling demographic data on racial or ethnic groups, such as the USA and UK. On the other hand, continental Europe had had devastating experiences in relation to the identification of racial or ethnic minorities, of which the Holocaust is the most notorious example.

Twenty years after the adoption of the Racial Equality Directive, it seems that the reluctance of continental Europe to compile data on racial or ethnic origin has resulted in the UK standing out from the majority of the Member States that remained sceptical. In the post-Brexit Union, there is a more urgent need to reflect on national realities to understand how the case for equality data in relation to race and ethnic origin can be advanced.

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[38] Communication from the Commission to the Council and the European Parliament, The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (2006) 643 final, Brussels, 30 October 2006.

[39] Patrick Simon (2007). See also: Angéline Escafré-Dublet and Patrick Simon, ‘Ethnic Statistics in Europe: the Paradox of Colour-blindness’ (2011), in Anna Triandafyllidou et al. (eds), ‘European Multiculturalisms: Cultural, Religious and Ethnic Challenges’ (2011), Edinburgh University Press, Edinburgh.

[40] Lilla Farkas (2017).

[41] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[42] Bob Hepple, ‘Equality at Work’ in Bob Hepple, and Bruno Veneziani (eds). ‘The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945 – 2004’ (2009), Hart Publishing, Oxford. See also: Dagmar Schiek et al. (eds), ‘Cases, Materials and Text on National, Supranational and International Non-Discrimination Law’ (2007), Hart Publishing, Oxford.

## 2 The Swedish Approach

Historically, the official position of the Swedish policymaker has been that data on race or ethnic origin cannot and should not be compiled. The official justification has been that data protection legislation prohibits processing so-called ‘sensitive data’ (the Swedish term for ‘special categories of data’), thus failing to consider the list of exceptions from that prohibition in the relevant legislation.[43]

Available international legal analysis points out that the claim of a strict prohibition to process such data amounts to an exaggeration.[44] Sweden’s obligations under international human rights law, specifically in relation to a number of UN conventions, require disaggregated data in terms of variables such as race or ethnic background or disability.[45] Still, none of these facts and obligations seem to influence the Swedish official position. To the extent official statistics and surveys consider race or ethnic origin at all, it is reflected in terms of country of birth as a proxy. Sometimes, official statistics are disaggregated in terms of two categories – Swedish background and foreign background. The latter is defined as being born outside Sweden or being born in Sweden but both parents having been born outside Sweden. The concepts and the terminology were introduced by Statistics Sweden, the national statistics authority.[46]

### *2.1 The Official Justification*

In 2011 the Swedish Government proposed abolishing the requirement to obtain (written) consent from the data object for processing data that reveals ethnic origin or health-related issues within the scope of the work of the Swedish Public Employment Service.[47] The main purpose was to ease the administrative burden

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43 Yamam Al-Zubaidi, ’Statistikens roll i arbetet mot diskriminering’ (2012), Diskrimineringsombudsmannen, Stockholm. Available in Swedish at: https://www.do.se/kunskap-stod-och-vagledning/publikationer-om-diskriminering/2012/statistikens-roll-i-arbetet-mot-diskriminering, accessed 7 October 2021.

44 Simon (2007).

45 Requirements to present disaggregated data in terms of several discrimination grounds including race or ethnic origin had been raised in the monitoring of Sweden’s international obligations according to: The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), The International Covenant on Economic, Social and Cultural Rights (ICESCR), The Convention on the Elimination of All Forms of Discrimination against (CEDAW), The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), The Convention on the Rights of Persons with Disabilities (CRPD), The Convention on the Rights of the Child (CRC), The European Charter for Regional or Minority Languages (Council of Europe), and The Framework Convention for the Protection of National Minorities (Council of Europe). Source: Al-Zubaidi (2012).

46 Statistics Sweden, ‘Statistics on Persons with Foreign Background. Guidelines and Recommendations’ (2002). The publication in Swedish with an English summary is available at: https://www.scb.se/contentassets/60768c27d88c434a8036d1fdb595bf65/mis-2002-3.pdf, accessed 7 October 2021.

47 Information on the full legislative process including the proposal, the debate and the final decision by the parliament, see (in Swedish): https://www.riksdagen.se/sv/dokument-

on the Swedish Public Employment Service. The proposal was subject to criticism by the Data Inspection Board.[48] The Board highlighted concerns of poor technical ability to safeguard the sensitive information in question, bringing previous data breaches at the Swedish Public Employment Service to the attention of the Government. However, the Government chose to go on with the proposal and it was adopted by the Parliament with 277 votes for and 35 votes against. In terms of data protection, the Government made use of Section 20 of the Personal Data Act[49], which allows the government to propose exceptions from the general ban on processing so called special categories of data. It is worth mentioning in this respect that the Personal Data Act was the main way in which the Data Protection Directive was transposed into Swedish legislation. Section 20 in the Swedish Act reflected Article 8.4 in the EU Directive.

The same year (2011) the Government commissioned a preliminary study on equality data in relation to all the protected grounds in the Discrimination Act[50] except for sex and age as all official statistics were already disaggregated or possible to disaggregate in accordance with these two variables. According to the terms of reference, the study was asked to cover the five legally-recognized national minorities as well.[51] There are no public records that allow any connections to be made between the decision mentioned above and the commissioning of this study. The task to conduct the study was given to the Equality Ombudsman, which is the national equality body.

The Equality Ombudsman delivered the study in 2012. The final study[52] followed the logic of the first *European Handbook on Equality Data*[53] adapting the legal analysis and the discussion on the definitions of the relevant discrimination grounds to the Swedish legislation and Swedish reality. The report concluded that collecting data on ethnic origin is both doable and needed. The report pointed out that the legal framework on collecting special categories of data in the national data protection legislation at the time, allows the Government to make necessary adjustments to make data collection easier for anti-discrimination purposes. In accordance with international reporting, it was concluded that the relevant international frameworks concerning data protection and the international obligations of Sweden make it possible to design an exception from the general ban on processing special categories of data for

lagar/arende/betankande/borttagande-av-kravet-pa-samtycke-for-behandling_GY01AU4, accessed 7 October 2021.

48 The Data Inspection Board (Datainspektionen) was the Swedish national data protection supervisory authority at the time. It was abolished with the General Data Protection Regulation (GDPR) entering into force and was replaced by a new authority – The Swedish Authority for Privacy Protection (Integritetsskyddsmyndigheten, imy.se).

49 Personuppgiftslagen (1998:204).

50 Diskrimineringslag (2008:567)[Discrimination Act]. According to Swedish Discrimination Act, Chapter 1, Section 1: sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age.

51 According to the Act on National Minorities and Minority Languages (2009:724), the following groups are officially recognized as National minorities: the Jews, the Roma, the Sami, the Swedish Finns and the Tornedalers.

52 Yamam Al-Zubaidi (2012).

53 Timo Makkonen (2006).

legitimate purposes. Section 20 of the Personal Data Act was suggested specifically as a legal ground for such an exception. The study recommended a road map including measures such as: initiating a public debate on the usefulness of ethnic data as well as establishing a task force to map available data and develop useful definitions and categories. The task force was suggested to include equality professionals, statisticians, researchers as well as representatives of ethnic minorities.

The study was endorsed by the UN Committee on the Elimination of Racial Discrimination. In 2013, in its concluding observations on the periodic report of Sweden, the Committee referred to the recommendations of the study as a reasonable way forward.[54] The Committee specifically recommended the State Party to seek guidance from the study 'on methods for determining the composition of the population in terms of relevant discrimination indicators, and living conditions of all components of society, including immigrants, foreign-born citizens and members of indigenous and minority groups, with particular reference to the fields of employment, housing, education and health'. Today in 2021, there are no indications that any steps have been taken to follow up on the conclusions and the recommendations of the study.

A slightly different justification for the lack of data on race or ethnic origin of the population can be found in Sweden's reporting to the Council of Europe on the European Charter for Regional or Minority Languages. In 2013, the Government provided a general estimation of the number of speakers of minority languages. No exact data was provided, with the following justification:[55]

> As mentioned in previous reports, Sweden does not compile official statistics regarding the ethnic origins of individuals, only information with regard to citizenship and country of birth. This is because no methods are available for assessing ethnic origin that are both ethically acceptable and scientifically reliable. There are thus no official statistics with regard to ethnic, linguistic or cultural affiliation.

No reference to a legal prohibition was made. It might be that the study by the Equality Ombudsman made such claims slightly more difficult as the study was endorsed internationally. The same justification, with no references to legal obstacles, was repeated in the following reporting on the Charter (2016).[56]

Nevertheless, the next year (2017) the legal justification was used again in the following reporting to the Committee on the Elimination of Racial Discrimination:[57]

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[54] Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12–30 August 2013), CERD/C/SWE/CO/19-21.

[55] Sweden's report to the Council of Europe on the European Charter for Regional or Minority Languages, presented, in accordance with Article 15 of the Charter, fifth Periodical Report. Available in English: https://rm.coe.int/16806d81e2

[56] Sweden's recurring reporting on the European Charter for Regional or Minority Languages: https://www.regeringen.se/internationella-mr-granskningar-av-sverige/2016/06/sveriges-aterkommande-rapportering-om-europeiska-sprakstadgan/, accessed 7 October 2021.

[57] Twenty-second and twenty-third periodic reports of States parties due in 2016 – Sweden. The report can be found at:

> Sweden compiles no official statistics on people's ethnicity. Under the Personal Data Act (1998:204), it is as a general rule prohibited to process personal data that reveals race, ethnicity or religious conviction. Because Statistics Sweden's processing of sensitive personal data is expressly regulated in the Act (2001:99) and the Ordinance (2001:100) on Official Statistics, it is thus not possible for Sweden to provide complete statistical information on ethnicity, skin colour or other signs of diversity. The only statistics available are those on citizenship and country of birth.

To conclude, it is not unfair to say that the Swedish official position is that statistical data on the racial or ethnic composition of the population should not be collected, not even for anti-discrimination purposes. The justifications given may vary between being legal and technical in nature, but the opposition to collecting data seems to be robust in substance.

### *2.2 The Discrimination Act*

The EU Equality Directives are transposed into the Swedish national legislation mainly though the Discrimination Act.[58] The law not only bans discrimination; it also imposes a duty on employers and education providers to commit to goal-oriented proactive measures for promoting equality. The legal term for these duties is 'active measures' and they are defined as: 'prevention and promotion measures aimed at preventing discrimination and serving in other ways to promote equal rights and opportunities'. This duty covers all the seven discrimination grounds including ethnic origin.[59]

In relation to ethnic origin, these provisions on active measures 'are within the realm of positive action in a more general sense' as understood under Article 5 of the Racial Equality Directive.[60] The provisions do not allow preferential treatment in employment in relation to ethnic origin. But an employer is expected to take measures of a collective character to prevent ethnic discrimination and promote equal rights and opportunities. The collective character of the provisions is clearly stated in the legislative preparatory materials. The national inquiry that preceded the latest amendment of the provisions on active measures pinpointed that the purpose of the provisions is 'to even out differences in conditions between different groups'.[61] The Government bill proposing that same amendment clearly stated that these provisions are not 'intended to be

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fSWE%2f22-23&Lang=en, accessed 7 October 2021.

[58] Diskrimineringslagen (2008:567). Full text is available in English at the website of the Equality Ombudsman: https://www.do.se/choose-language/english/discrimination-act, accessed 7 October 2021.

[59] Discrimination Act (2008:567), Chapter 3, Section 1.

[60] Paul Lappalainen, 'Country Report: Non-discrimination. Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78 – Sweden', (2020). Available at: https://www.equalitylaw.eu/downloads/5279-sweden-country-report-non-discrimination-2020-2-08-mb, accessed 7 October 2021.

[61] Legislative Inquiry SOU 2014:41 Förslag till nya regler om aktiva åtgärder i diskrimineringslagen. Available at: https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2014/06/sou-201441/, accessed 7 October 2021.

applied in individual cases but are forward-looking and of a general or collective nature'[62] essentially adhering to the proposal of the national inquiry[63]:

> A promotional work for equal rights and opportunities aims at a work to even out differences in conditions between different groups.

Active measures were introduced for the first time in relation to gender equality as early as 1979. Since then, all legislative materials unanimously outline the term 'active measures' as relating to measures of a collective character, not intended for targeting individuals, even though individuals are expected to benefit from them indirectly or in the long term.[64] In other words, the term 'active measures' is well established in Swedish discrimination law and there is little ambiguity, if any, in terms of the nature and aims of the relevant legal provisions. The current provisions are formulated as follows (emphasis added)[65]:

> Work on active measures means pursuing prevention and promotion work by:
>
> 1) investigating the existence of any risks of discrimination or reprisals or any other obstacles to *individuals'* equal rights and opportunities in the establishment in question,
>
> 2) analysing the causes of any risks and obstacles discovered,
>
> 3) taking the prevention and promotion measures that can reasonably be demanded, and
>
> 4) monitoring and evaluating measures under points 1–3.

It makes sense to describe the four-step methodology above as an attempt to simulate the equality mainstreaming approach to some extent, aiming at handling systemic discrimination in relation to groups of employees. Thus, provisions of a collective character constitute an adequate tool. It is therefore a paradox that the legal text refers to individual rights.

According to older legislative preparatory materials that accompany the law, collection of data on ethnic origin is not required.[66] In fact, it is specifically discouraged stating that collecting data on ethnic origin would amount to an invasion of privacy.[67] The national inquiry for the latest amendment of the active

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[62] Regeringens proposition 2015/16:135. Available at: https://www.regeringen.se/rattsliga-dokument/proposition/2016/03/prop.-201516135/, accessed 7 October 2021.

[63] Regeringens proposition 2015/16:135

[64] Paul Lappalainen, Yamam Al-Zubaidi and Paula Lejonkula (Jonsson), 'Active Measures in Sweden – In Theory and in Practice', (2010). Heinrich-Böll-Stiftung – Schriften zur demokratie, Band 24. Available at: https://heimatkunde.boell.de/de/2010/09/01/active-measures-sweden-theory-and-practice, accessed 7 October 2021. See also: Legislative Inquiry SOU 2014:41 *Nya regler om aktiva åtgärder mot diskriminering* [New Rules on Active Measures Against Discrimination].

[65] Discrimination Act, Chapter 3, Section 2.

[66] Regeringens proposition 2007/08:95.

[67] Ibid.

measures provisions does not mention statistics and data collection.[68] The Government bill that passed in the Parliament mentioned data collection in one instance, clarifying that employers' obligation to examine the workplace for discrimination risks does not imply collection of special categories of data.[69] The provisions, according to the Government bill, are not intended to involve data collection[70]:

> The intention is not for the measures to be implemented at the individual level or involve any extended registration of personal data that can be linked to any individual. The work must be carried out on a general level through, for instance, review of guidelines and routines as well as attitudes and norms in one's own business.

On the other hand, there are several active measures provisions that are designed exclusively for the discrimination ground of sex, outlining measures that require data collection: promoting gender balance in different types of work (Section 7), conducting annual survey and analysis to remedy and prevent unfair gender differences in pay and other terms of employment (Section 8) and conducting gender pay gap analyses (Section 9).

Data collection is limited to promoting gender equality, whereas equality in relation to ethnic origin (as well as other discrimination grounds) is expected to be promoted though a "review of guidelines and routines as well as attitudes and norms in one's own business" (Section 2). This provides a plausible explanation for the fact that some provisions in the law have been formulated exclusively in relation to sex as a discrimination ground. This might also explain the reference to individual's rights in the legal text.

Nevertheless, in relation to ethnic origin, it is another paradox that employers are expected to take measures that would promote racial equality on the group level by defining 'obstacles to individuals' equal rights and opportunities' which is to be achieved by reviewing their own guidelines, routines, attitudes and norms. There is no further guidance in the legislative materials or in the publications of the Equality Ombudsman on how that can be achieved effectively.

The Government bill speaks of an 'intention' not to implement the provisions with data collection but does not include any ban on using data collection for promoting equality in relations to other discrimination grounds than sex. The law does not mention data collection explicitly, thus – strictly speaking – there is no prohibition on data collection, but only a political intention not to require data collection specifically.

Nevertheless, in its guidelines to the implementation of active measures provisions, the Equality Ombudsman states the following (emphasis added)[71]:

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68 Legislative Inquiry SOU 2014:41.

69 Regeringens proposition 2015/16:135.

70 Regeringens proposition 2015/16:135.

71 Guidelines 'Arbetsgivarens aktiva åtgärder' ('An Employer's Active Measures'), are available in Swedish only at: https://www.do.se/download/18.277ff225178022473141e4f/1618941288981/stod-aktiva-atgarder-arbetsgivare-faktablad.pdf, accessed 13 October 2021. Translated by the author.

> Keep in mind that any sensitive personal data that still emerges should not be linked to any employee in a way that is contrary to the GDPR. Employers are thus *not allowed* to register and collect sensitive information about individuals in the work with active measures.

The legislative materials outline an 'intention' that promotion of racial equality is to be done without data collection. That hardly amounts to a ban on data collection. A ban on collecting data is nowhere to be found in any legal text or in the legislative preparatory materials. Legal bans are normally stated more explicitly and in a clearer manner.

### *2.3 Access to Justice and Power Relationships*

Legally speaking, data protection has been regulated in EU law through directives and then transposed into national legislation, or directly into national legislation through EU regulations. The UK experience proves that collection and processing of special categories of data for promoting equality can be done under the EU legal regime.

In fact, the previous Swedish Personal Data Act reflected the same prohibition-with-exceptions formula that was outlined in the Data Protection Directive. Section 20 of the Act reflected Article 8.4 in the Directive allowing a Member State to further regulate the issue. This opportunity was effectively used in the decision to allow the Swedish Public Employment Service to process data on ethnic origin and disability without consent. It is not controversial to claim that ethnic minorities and persons with disabilities are normally considered to be vulnerable groups. The decision to not require consent is therefore, instead, a step towards weakening their position in relation to a public authority in terms of data protection. The legislative preparatory materials that preceded that decision give the impression that concern for the data protection of the vulnerable groups is an issue, but is secondary to the effectiveness of the public authority in question. The criticism by the Data Protection Board was mainly due to technical reasons rather than concerns for the personal integrity of the data subjects.

It is not unfair to say that the Swedish policymaker exhibits a willingness to allow processing of data on ethnic origin even without a consent of the data subject for purposes that are perceived as normatively legitimate. The norm in this case is sound public administration with less administrative burden. In contrast, it can be argued, that the Swedish legislator does not seem to perceive the purpose of anti-discrimination as legitimate enough or as normative enough.

The same formula of prohibition-with-exceptions is still in force with the GDPR. The main difference is that the GDPR has a direct effect on national legislation rendering any member state justifications of a legal character even less convincing than previously.

Furthermore, the GDPR clearly states that proportionality in relation to legitimate purposes should be one of the guiding principles when privacy is at stake (emphasis added)[72]:

[72] Recital 4 GDPR.

> The processing of personal data should be designed to serve mankind. *The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.* This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, *the right to an effective remedy* and to a fair trial, *and cultural, religious and linguistic diversity.*

After all, the purpose of data protection legislation is to protect from abuse and misuse rather than to deprive people of the right to an effective remedy.

Broadly speaking, access to data on a group level for anti-discrimination purposes provides for, among other things, the power to remedy discrimination. At the end of the day it is about power relationships. This is clearly understood by Statistics Sweden. When launching a tool that makes national statistics available for the general public, the authority tweeted: 'The power is yours. We are now launching "Sweden in Figures". Discover an easier and more fun way to understand society, examine what others say and build your own arguments. Statistics and knowledge are power. Now it's yours.'[73]

This is understood by equality groups as well. After the launch of the study by the Equality Ombudsman, a number of activists intensified a public debate on the need to disaggregate public statistics in terms of race and ethnic origin. It is not an exaggeration to describe the national debate as fragmented, confused and heated.[74] On the other hand, the debate is dominated by activists and journalists. The continuous silence of the policymaker and the relevant public authorities, such as the Equality Ombudsman and the Swedish Authority for Privacy Protection, has most probably contributed to sustaining an already heated and fragmented public debate.[75]

In meantime, a growing number of employers are looking for ways to effectively design and evaluate their anti-discrimination work – understanding that data collection has the potential to make their internal work more relevant rather than engaging in what sometimes been called 'paper work that does not diminish discrimination'.[76] Some employers are taking their own initiatives and being prevented from further development by a rather formalistic approach of

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[73] Translated by the author. The tweet in Swedish can be found here: https://twitter.com/sverigeisiffror/status/6563483

[74] Peter Wikström and Tobias Hübinette, 'Equality Data as Immoral Race Politics: A Case Study of Liberal, Colour-blind, and Antiracialist Opposition to Equality Data in Sweden' (2021) 60(4) British Journal of Social Psychology.

[75] Yamam Al-Zubaidi, 'Jämlikhetsdata på arbetsplatsen med fokus på etnisk tillhörighet' (2021), Länsstyrelsen Stockholm, Stockholm.

[76] Yamam Al-Zubaidi and Paula Lejonkula, 'Mer pappersarbete minskar inte diskrimineringen' (2016), Lag & Avtal 2016:2.

the judiciary[77] relying on claims made by the Equality Ombudsman that employers 'are not allowed' to collect data.[78]

### *2.4 The Public Debate*

It is not unreasonable to say that the UK and Sweden seem to have adopted two diametrically different approaches to the notion of race and ethnicity. The UK approach embraces the significance of the notions of race and ethnicity and recognises the need to mirror them in official statistics for monitoring purposes. The Swedish approach on the other hand seems to consider race and ethnicity as a private issue that should be kept away from public consideration.

In fact, Sweden has invested in a national legislative inquiry to ensure that the word 'race' is eliminated from any national legislative texts.[79] From an EU legal perspective this does not pose any significant problems for proving discrimination[80] as the discrimination ground 'ethnic origin' is defined as 'national or ethnic origin, skin colour or other similar circumstance'. The open-ended definition allows for enough flexibility for the legal definition to cover even those individual characteristics that would fall under the notion of 'race', as long as this more expansive definition is invoked. Technically speaking, if so, the official insistence on eradicating the word 'race' has a rather normative than legal implication.

The insistence on what could be labeled as 'normative color-blindness' may sometimes lead to some bizarre conclusions in the Swedish public debate. One such example is the debate following a 2012 statement by then Prime Minister Fredrik Reinfeldt when he said:[81]

> It is not correct to describe Sweden as in a situation of mass unemployment. If you look at ethnic Swedes in the middle of life, we have very low unemployment.

The statement was examined in Faktakoll ('Fact check'), a column in the major Swedish newspaper Svenska Dagbladet that reviews the correctness of statements made by policymakers. Reviewed statements are assigned a green, yellow or red color based on their investigated correctness. The final assessment of the Prime Minister's statement was as follows (emphasis added):[82]

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77 Administrative Court in Stockholm, Section 32, Judgment 2018-06-25, Issued in Stockholm. Case number 13371-17.

78 Yamam Al-Zubaidi (2021).

79 Legislative Inquiry Dir. 2014:115. Available at: https://www.regeringen.se/rattsliga-dokument/kommittedirektiv/2014/07/dir.-2014115/, accessed 7 October 2021.

80 Paul Lappalainen (2020).

81 Channel TV4, 'Debatt om statsministerns uttalande om "etniska svenskar"' (16 May 2012). Available at: https://www.tv4.se/artikel/4fc33cda04bf72228b000c81/debatt-om-statsministerns-uttalande-om-etniska-svenskar, accessed 7 October 2021. Translated by the author.

82 Svenska Dagbladet, 'Faktakoll: Rött ljus för Reinfeldt' (15 May 2012). Available at: https://www.svd.se/faktakoll-rott-ljus-for-reinfeldt, accessed 7 October 2021. Translated by the author.

> In Reinfeldt's original statement about 'ethnic Swedes', there is nothing that explains what he really meant. 'Ethnic Swedes' are also not the same as being *born in Sweden*.
>
> The term 'ethnic Swedes' is not something used in statistics or official contexts. On the contrary, it is an uncertain term to use, according to the experts spoken to by Svenska Dagbladet.
>
> *There are no statistics* on the unemployment that the Prime Minister spoke about - simply because *the group 'ethnic Swedes' does not exist in the formal sense*. Nevertheless, Reinfeldt commented on that specifically.
>
> The fact check gives Fredrik Reinfeldt therefore a red light for his statement.

The statement generated a 'storm' of reactions[83] discussing what the Prime Minister really meant. Essentially, the debate was about the phrase 'ethnic Swedes' and the predominantly most common argument seems to have been that 'ethnic groups' do not exist in reality, such as in Faktakoll's assessment above. This example demonstrates how contentious the idea of racial or ethnic identities is in Sweden.

The term 'race' was abolished in all legislative materials as it was deemed to be unscientific. The justification as to not having any statistics on ethnic origin is most often of a legal character, claiming that data privacy bans collecting such data. If there is any merit to this argument, it can only be discussed if ethnic origin actually exists. The Swedish public debate seems to have endorsed the idea that ethnic origin does not exist.

On the other hand, the official position has also implied that statistics may be possible to collect provided that 'methods are available for assessing ethnic origin that are both ethically acceptable and scientifically reliable'. Bearing in mind the devastating history of racial biology politics in Sweden[84], the reoccurring reference to science by policymakers is disturbing the debate.

### *2.5 Country of Birth and Self-perception*

Public discourse and public policy in Sweden continue to focus on the country of birth, it is the main and only variable used for disaggregating statistics in terms of origin. The country of birth approach is not unique to Sweden. For instance, both France and Germany have adopted the same idea of 'colour blindness', looking only at the country of birth or citizenship. This seems to be the dominant approach in Europe with some few exceptions.[85] Country of birth can be useful in some specific contexts, for instance when studying the living conditions of newly-arrived immigrants with the aim of advancing their equal rights and opportunities. This is recognised in the UK as well, as the census includes the

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83 SVT Nyheter, 'Storm på nätet om Reinfeldts uttalande'. Available at: : https://www.svt.se/nyheter/inrikes/storm-pa-natet-om-reinfeldts-uttalande, accessed 7 October 2021.

84 See for instance: Ulrika Kjellman, 'A Whiter Shade of Pale. Visuality and Race in the Work of the Swedish State Institute for Race Biology' (2013) 38(2) Scandinavian Journal of History.

85 Patrick Simon (2007); and Lilla Farkas (2017).

categories UK-born and foreign-born. However, both categories are further broken down by ethnicity in the UK.

Sweden's modern period of immigration dates back to the 1950s and 1960s. Thus, country of birth is not relevant for a considerable part of the population that has some immigrant background. For instance, country of birth as an identification does not cover or reflect physical characteristics such as colour of skin. Additionally, some immigrants belong to persecuted ethnic minorities in their original countries, which makes the country of birth a contentious issue from their point of view.

Another shortcoming that comes with the country of birth as a proxy is that it does not cover the domestic racial and ethnic minorities that historically have existed in Sweden over longer periods of time. In this respect, Finland provides an interesting example as data on language instead provides information.[86] Finland is bilingual with Finnish and Swedish as official languages. The Language Act (423/2003), allows every person to use their language (Finnish or Swedish) when receiving public information or interacting with authorities, except for unilingual authorities and municipalities. The Sámi Language Act (1086/2003) allows the Sámi minority to use their language when interacting with the municipalities, the state's regional and local authorities to whose area of jurisdiction those municipalities belong as well as with courts in those municipalities. These legal requirements are met through collecting data on the first language of every resident in Finland. Data on language is collected through public statistics: every person indicates their native language and the information is listed in the Population Information System. Authorities are obliged to determine on their own initiative a person's registered native language.

The Finnish language rights' system is not designed for anti-discrimination purposes specifically, although it does provide two advantages from an anti-discrimination perspective. First, it contributes to diminishing the risks of discrimination by providing information in the relevant language and secondly, it recognises the ethnic composition of the population, including domestic minorities. However, the Finnish language rights' system is limited to the Finnish, Swedish and Sámi languages.

In contrast, Sweden has five legally-recognised national minorities. There are no figures on the number of persons that belong to those minorities. According to official accounts there are only estimations with no explanations on how these estimations were made.[87]

In terms of public policy, country of birth, even combined with the country of birth of the parents, is too narrow a category and does not reflect the real world and the diversity of the population in contemporary Sweden. It perhaps only reflects the self-perception by a country in terms of multiculturalism.[88] In that sense, the use of country of birth as a proxy for racial or ethnic origin is a social

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86 See information from the Finnish Ministry of Justice: https://oikeusministerio.fi/en/linguistic-rights, accessed 7 October 2021.

87 Except for the Finnish Finns: the estimation was based on the country of birth as a proxy. For the other four recognized minorities, country of birth does not make any difference as they are born in Sweden (for more than two generations back) with some few exceptions.

88 Patrick Simon and Victor Piché, 'Accounting for Ethnic and Racial Diversity: The Challenge of Enumeration' (2012) 35(8) Ethnic and Racial Studies.

construct that mainly reflects the current political and ideological self-perception.

With the current changes in the Swedish demographics, the issue deserves more attention than the colour-blind approach might offer. As Escafré-Dublet and Simon (2011) remark, the idea that colour-blindness is a way to blur ethnic and racial boundaries in order to achieve equality is challenged by a reality where those boundaries are becoming even more visible.

### *2.6 Adherence to an International Norm*

None of the Swedish decisions or justifications for the lack of data on racial ethnic origin as discussed here, have been developed or discussed with relevant equality groups. Neither were they openly and publicly-debated for the sake of scrutiny by public opinion. The legitimacy of those decisions and justifications is thus limited to the extent to which they reflect the worldview of the Swedish policymaker. Normally this should not pose a problem in a representative democracy, unless such a world-perception is incompatible with an international norm or the reality. One sign of such an undesirable development is a tendency to not listen to those affected by the subject matter. The issue of equality data in relation to racial and ethnic origin is a case in point.[89]

A number of civil society organizations presented their parallel shadow reports to the UN Committee on the Elimination of Racial Discrimination. In the last two reporting cycles (2013 and 2018), the need to disaggregate data on population in terms of racial or ethnic origin was supported in the parallel reports of the following organizations: The Swedish Muslims in Cooperation Network, The Afro-Swedish National Association, The English International Association of Lund, The United Nations Association of Sweden, The Swedish Youth Federation and the Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights, the International Organization for Self-Determination and Equality and The Sami Parliament.[90]

Furthermore, several parallel reports by civil society organizations expressed scepticism towards the eradication of the term ‘race’ in public documents pinpointing, among other things, that the term ‘racism’ is strongly interrelated with the term ‘race’. The issue has been highlighted in the domestic debate as well.[91]

A better understanding of the Swedish official position deserves an in-depth analysis beyond the limits of this preliminary attempt to straighten out a number of facts. However, it is not unreasonable to say that the official Swedish position on racial and ethnic statistics for anti-discrimination purposes, to a certain extent, exhibits signs of an opposition to conforming with an international norm.

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89 Paul Lappalainen (2020).

90 All reports are available at UN Treaty Body Database: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=SWE&Lang=EN, accessed 13 October 2021.

91 See for instance: Samson Beshir och Tobias Hübinette ‘Avskaffa inte rasbegreppet i svensk lagstiftning’ (7 August 2014). Available at: https://www.svd.se/avskaffa-inte-rasbegreppet-i-svensk-lagstiftning, accessed 13 October 2021.

The remaining question is: how is the Swedish policymaker going to handle a growing demand for a compliance with an international norm in times when the pressure to comply is not limited to diplomatic requests from UN Treaty Bodies, but also coming from a soft but consistent EU pressure as well growing domestic advocacy efforts?

As Rise (1999) put it, 'ideas do not flow freely' and adherence to international human rights norms is not an easy process to study.[92] However Risse & Sikkink (1999) suggest an interesting model that might be useful in understanding the Swedish official position discussed here (emphasis of the original):[93]

> This process by which international norms are internalized and implemented domestically can be understood as a process of *socialization*. We distinguish between three types of causal mechanisms which are necessary for the enduring internalization of norms:
>
> - processes of instrumental adaptation and strategic bargaining;
> - processes of moral consciousness-raising, argumentation, dialogue, and persuasion; and
> - processes of institutionalization and habitualization.

They argue that such a socialization process happens under the pressure from several relevant parties – internationally and domestically. This is how they describe the process:[94]

> Actors incrementally adapt to norms in response to external pressures, initially for purely instrumental reasons. National governments might then change their rhetoric, gradually accept the validity of international human rights norms, and start engaging in an argumentative process with their opponents, both domestically and abroad. The more they accept the validity of the norms and the more they engage in a dialogue about norm implementation, the more they are likely to institutionalize human rights in domestic practices. Human rights norms are then incorporated in the "standard operating procedures" of domestic institutions. This type of internalization process can be conceptualized as independent from changes in individual belief systems. Actors follow the norm, because "it is the normal thing to do." Whether they are convinced of its moral validity and appropriateness or not is largely irrelevant for habitualization processes.

According to Brodie (2011), this model is useful for understanding the Swedish policymaker's attempts to renegotiate the so-called Paris Principles which define the independence of a National Human Rights Institution.[95] Sweden did not

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[92] Thomas Risse, 'Domestic Politics and Norm Diffusion in International Relations' (2017), Routledge, London.

[93] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices. Introduction' (1999) in Thomas Risse (2017).

[94] Thomas Risse and Kathryn Sikkink (1999).

[95] Meg Brodie, 'Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights' (2011) Nordic Journal of International Law 80.

comply with the Paris Principles[96] in several ways, one of which is the independence of an NHRI from the Government. The accreditation of the Swedish Equality Ombudsman was not successful as it is a Government agency and did not comply with the condition of independence. What might be called the process of socialization in this case started with the attempts to present the Equality Ombudsman as fully independent body already in 2010. Only in 2021 was a decision taken to establish a Swedish NHRI that potentially is in full compliance with the Paris Principles.[97] The proposed institution will still have to apply for a peer-based accreditation with the Global Alliance of National Human Rights Institutions after its formal establishment on 1 January 2022. It is worth noting that the Paris Principles were adopted in 1993.

Similarly, it can be argued that the process of socialization in relation to racial and ethnic data may have already started with the (temporary) shift in the justification of lack of data from the legal to the technical. The reference to science in relation to methodology of racial and ethnic categorization may also be understood as a form of tactical renegotiation of an international norm. The paradoxes in the Discrimination Act and the approach to not require data collection without strictly forbidding it, may be understood as a form of an instrumental adaptation and bargaining.

As mentioned previously, it is a difficult task to understand how, when and why policymakers may shift their position after such longstanding resistance. If the model presented by Risse & Sikkink (1999) provides for an adequate explanatory model, there is still a long way to go. It might help though, if the new Swedish National Human Rights Institution would join the UN Treaty Bodies, the EU and the civil society in reminding policymakers of their international obligations. After all, as Risse & Sikkink (1999) point out, it is about a country's international image:

> Countries most sensitive to pressure are not those that are economically weakest, but those that care about their international image.

## 3 Concluding Reflections

Racial and ethnic classification is a contentious issue: it is rooted in a history made up of 'slavery, colonisation, xenophobia, exploitation and domination, and they have the power to reveal historically crystallised relationships of power'.[98] Ironically, it is also data as to such that gives power to the victims of discrimination to claim equal rights.

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[96] Principles relating to the Status of National Institutions (The Paris Principles). Adopted by General Assembly resolution 48/134 of 20 December 1993.

[97] Legislative Inquiry Kommittédirektiv 2021:22 Inrättande av ett Institut för mänskliga rättigheter. Available at: https://www.riksdagen.se/sv/dokument-lagar/dokument/kommittedirektiv/inrattande-av-ett-institut-for-manskliga_H9B122, accessed 13 October 2021.

[98] Angéline Escafré-Dublet and Patrick Simon (2011), 'Ethnic Statistics in Europe: the Paradox of Colour-blindness', in Anna Triandafyllidou et al. (eds) *European Multiculturalisms: Cultural, Religious and Ethnic Challenges*.

However, considering all the available guidance, it seems that Sweden, as many other Member States, is 'locked in self-inflicted taboos' when it comes to racial and ethnic data collection.[99]

The optional formula for statistical evidence provided by the Racial Equality Directive (recital 15) leaves the choice to collect data on racial and ethnic origin to the Member States. Furthermore, recital 10 GDPR leaves it to the Member States to set out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful. It is the Member State that has the power to decide what evidence of discrimination is available for the potential victims of discrimination as well as the power to frame awareness about equal rights and ensure that effective remedies are in place. On the other hand, despite the reluctance of many Member States to collect data on racial or ethnic origin, a majority of Europeans seem to be willing to share their data for the purpose of advancing equal rights.[100]

As Solanke (2009)[101] points out, the debate on racial and ethnic classification in the UK started in the 1960s. A fierce public debate continued for several decades, with racial and ethnic categories only included in the public statistics from 1990 – compromise takes time.

From an EU perspective, the European Commission can be said to be the main player on the ground. In its newly adopted anti-racism action plan for 2020-2025, the Commission has expressed a renewed commitment to a continuous dialogue with the Member States.[102] This dialogue would benefit from including not only those who have the power to make the decision, but also those who aspire to equal rights and opportunities. From a Swedish perspective, such a dialogue has the potential to reinforce the process of socialization that hopefully has already started.

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[99] Isabelle Chopin, Lilla Farkas and Catharina Germaine-Sahl, 'Ethnic Origin and Disability Data Collection in Europe: Measuring Inequality – Combating Discrimination', (2014), Open Society Foundations: Brussels. Available at: https://www.opensocietyfoundations.org/uploads/d28c9226-bed7-4b1b-ac8b-4455f3c3451a/ethnic-origin-and-disability-data-collection-europe-20141126.pdf, accessed 7 October 2021.

[100] Special Eurobarometer 263.

[101] Iyiola Solanke, *Making Anti-racial Discrimination Law* (2009), Routledge, London.

[102] European Commission (2020), *A Union of Equality: EU Anti-racism Action Plan 2020-2025*, COM (2020) 565 final, available at: https://ec.europa.eu/info/sites/info/files/a_union_of_equality_eu_action_plan_against_racism_2020_-2025_en.pdf.