

Principles for the collection of equality and participation data in Germany

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The following paper is based on debates carried out in 2013 and 2014 by a loose network of experts specialised in the field of equal treatment and non-discrimination.

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1. Background

Germany has become a diverse country. Over the past 60 years, people from highly diverse backgrounds immigrated to Germany to find employment. Throughout crises and wars Germany provided shelter over short and longer periods of time. Young people now come from all parts of the world to study in Germany. People fall in love and get married, bring their partner to Germany and have children.

This diversity – whether with regard to national origin, religious and cultural practices, language or everyday habits – is well-known and has often been described. However, nobody in Germany is currently able to express the scope of this diversity in concrete numbers. Since the 2011 census, data is gathered not only on the respondent's nationality but also on an eventual migration background and religious affiliation. Yet, even with this data at hand it is difficult to obtain a clear and differentiated picture of the composition of society as a whole and the size and structure of particular groups.

Social processes usually need to be governed by political and administrative bodies. Knowledge of the needs of different population groups with regard to employment, education, cultural activities, housing, leisure opportunities and so forth is a fundamental prerequisite for successful political and administrative governance. When it comes to measures promoting integration and non-discrimination, the responsible Federal Ministries and other actors in the field currently have to do without statistically differentiated background materials which specify the scope of the needs of particular population groups. This is especially problematic for attempts to support the integration of immigrants and the equal treatment of their descendants with targeted measures. For lack of knowledge of these groups' specific needs the adopted measures are often ineffective.

Additional data is especially needed for the protection against discrimination on the basis of ethnic origin. Nationality and migration background are insufficient parameters. Racist discrimination also concerns German citizens, be it because of alleged "non-German" looks, an accent or a "foreign" name. Furthermore, people also face discrimination related to their (ascribed) religious affiliation.

In the days of National Socialism, people were categorized along the lines of race. Based upon an ideology of "racial supremacy" more than six million people died in the Holocaust. To prepare and conduct the annihilation, the Nazi regime relied upon official statistics and data collection. This explains partly why the general population and especially those minorities that were victims of the national socialist annihilation are often skeptical towards the collection of data on ethnic origin and religious affiliation by public authorities. This legitimate skepticism needs to be taken into account. As a reaction to the systematic contribution of administrative bodies, central registers and statistics to the national socialist crimes and the mass murdering, Germany now has highly developed and very progressive laws on informational self-determination and data protection.

In order to ensure an equal treatment of members of minorities and people with a migration background more generally, differentiated qualitative and quantitative data are needed so that efficient, targeted and lasting measures can be adopted. Political representatives need profound data in order to develop policies that are oriented towards the population's needs and in order to evaluate and adapt existing policies. It is in this context that we speak of participation data.

In the context of gender equality and equal opportunities for people with disabilities wide-ranging data has been regularly collected in recent years in order to discern structural problems and target them with adequate measures.¹ However, for the above-mentioned historical reasons data collection is highly contested and subject to controversial debate when it comes to data that is relevant with regard to racist, ethnic, religious or cultural marginalization and discrimination.

Based upon data on the socio-economic situation of the population it is possible to identify disparities between population groups. Discrimination can have effects on a person's socio-economic status and needs to be taken into consideration as one possible factor in the emergence of social inequalities. This being said, it is much easier to identify inequalities than to determine their causes. Systematic surveys would help to uncover in how far discrimination contributes to growing inequalities, to what extent it contributes and how it interacts with other observed factors. This could shed light on why it is that non-citizens have been constantly facing higher unemployment rates than the overall population. Is it due to lower educational levels, marginalizing mechanisms when it comes to access to employment or can discrimination as a source of lower participation chances be excluded? With regard to questions like these it seems sensible to use broad public surveys to collect equality and participation data.

The 2003 PISA survey showed that the collection of equality and participation data is useful as long as certain standards are being observed. It demonstrated that in Germany, children with a migration background have lower chances to obtain a referral to higher secondary schools than children without a migration background and that they reach lower educational levels in average. Only data collection made the cause of the unequal treatment of children with a migration background a problem area that had already vaguely been perceived by experts visible. Following the publication of the study concrete measures were adopted. Their positive effect could be shown thanks to continuous monitoring within the framework of later PISA surveys.

Initially, the need to gather group-related data was believed to be in strong tension with concerns for the privacy rights of members of different minority groups. Under certain circumstances, however, a conflict can be avoided rather easily. Four necessary conditions have emerged in the international discussion under which a collection of participation data seems unobjectionable:

1. The protection of personal data needs to be guaranteed. Data may only be used in an anonymized and aggregated way; this means that the number of observed cases needs to be sufficiently large so as to make it impossible to "recognize" individuals.
2. The categorization regarding ethnic background and/or religion, but also regarding other relevant categories such as sex and gender identity must follow the self-declaration of the participants and may not be questioned by the interrogators under any circumstances.
3. Any declaration must be made voluntarily and no disadvantage may follow from non-declaration.
4. Minority groups must be consulted and get substantive opportunities to actively participate in the development, the conducting and the evaluation of the survey as far as possible.

¹ Cf. for example the preliminary study for a representative survey on the participation of people with disabilities by the Federal Ministry of Labour and Social Affairs (BMAS), <https://www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/Forschungsberichte-Teilhaber/fb-492-repraesentativbefragung-behinderung.html> .

A targeted data collection in accordance with data protection law which rests uniquely upon voluntary participation and self-categorization can help to identify structural problems and to take appropriate measures well beyond matters of education. The effectiveness of the measures taken can be determined by follow-up studies and the measures can then be refined accordingly. In the context of concrete cases of discrimination, statistics can also serve as evidence in a court of law.

As a signatory of several human rights conventions the Federal Republic of Germany is also obliged to deliver regular reports on its observance of the respective human rights standards. The UN requires that these reports contain information on the composition of the population, cases of discrimination and the implementation of equal treatment provisions. Germany has repeatedly been reprimanded by the UN because it did not provide sufficient data.

In the final document of the World Conference against Racism 2001 in Durban the signatories agreed upon a wide range of measures to fight racism. The document dedicates a separate chapter to the collection of data on racist discrimination and on positive measures for promoting diverse societies.²

The collection of data, including data on ethnic origin, has long been practiced and is generally accepted in other countries such as the US and the UK. Their experience can indicate ways of collecting data that the Federal Republic could follow.

2. Why collect data on equality and participation?

2.1. Terminology

In the English-speaking world, the term 'ethnic data' is widely used. International anti-discrimination actors who do not focus exclusively on fighting racism, but are committed to fight discrimination more broadly – by challenging, for example, the marginalization of people with disabilities – also commonly speak of 'equality data'. The expression 'ethnic data' is sometimes criticised for constructing a group affiliation by way of external ascription. The working group which elaborated this paper therefore consciously opted for the term 'equality and participation data'. It includes aspects of origin (such as physical appearance, native language or cultural practices), group or religious affiliation and also individual or family migration backgrounds. Gender and sexual identity, disability, (non-)adherence to a religion and residence status are also relevant in this context.

The selected term 'equality and participation data' puts the accent on the goal pursued with the data collection.

It takes the focus off the discriminated subjects and the alleged differences between minorities and the majority and instead draws the attention to the desired results of collecting and using data: tackling obstacles to social participation and achieving equality before the law as well as actual equal treatment in everyday life.

Ultimately, the rather broad terminology also serves as a reminder that we cannot determine identity and group affiliation through a unidimensional lens; they are inherently multidimensional concepts.

Although the examples that are discussed in this paper are mostly taken from the category of 'ethnic origin', other grounds of discrimination such as religion, gender, sexual orientation or disabilities are equally important for equality and participation data.

² Cf. <http://www.un.org/WCAR/durban.pdf>, point 92 – 98, p. 37 ff.

2.2. Interpreting equality and participation data

Where data is available, it can be interpreted quite differently by different social scientists, community representatives, the Government, the larger administration and by politicians. That these different interpretations can affect the respective communities both positively or negatively is something which can ultimately not be prevented or controlled. Statistical correlations can point out connections, but identifying causations is a matter of interpretation. There is no guarantee that the data will be exclusively used in line with the examined groups' goals or that it will be interpreted with sympathy. However, transparent data analysis can ensure that the political demands which different actors derive are open to rational deliberation and criticism.

2.3. Why do we need equality and participation data?

Data on social structures can portray the current state of affairs in a given society. Statistical mass data can illustrate an over- or underrepresentation of different groups in certain social spheres or institutional positions.

They can make visible the distribution of valuable goods, resources and participation opportunities (such as education, health, jobs, housing, etc.) among different social subgroups and point to differences in distribution, as well as to disadvantages, pervasive inequality and potential discrimination.

They allow answering questions such as 'Do immigrants and their descendants generally work in jobs which correspond to their level of qualification and professional experience?' or 'Does the percentage of immigrant children who were raised in Germany and who go to university stagnate or rise?'

The interpretation of such data can indicate in which areas targeted interventions may be necessary.

At a later stage, once data has been collected repeatedly over time, it can be measured whether eventual interventions actually have the desired effect. For law-makers, public authorities and other relevant institutions the data thus provides useful governance-tools. Data can also be an important instrument for other social actors, such as public interest groups, who can use them as evidence in political debates to make convincing and transparent arguments on the basis of statistics.

2.3.1. Proving direct and indirect discrimination

Statistical data can be helpful in legal anti-discrimination work, because it is sometimes difficult to prove a discriminatory act. Statistics can sometimes indicate unequal treatment. In certain cases of direct or indirect discrimination, statistical data can be used as evidence in court, or to supplement evidence. However, until now such data was used in only a few cases in Germany. The collection of the necessary sensitive data (including data on ethnic origin and religious affiliation) is currently highly restricted so that adequate data is rarely accessible. Both direct and indirect discrimination are areas where statistics can be used in court proceedings³.

The term direct discrimination is used when – in a concrete situation – a person is being treated worse than a comparable person. Take as an example the Berlin case of a woman who sued her employer for not giving her a promotion which she had previously been promised in an oral exchange. At the time when the position was actually to be filled she was pregnant and the employer promoted a male colleague. In 2008 the Regional Labor Court

³ Available at <http://heimatkunde.boell.de/2009/11/01/ethnic-monitoring-als-instrument-von-antidiskriminierungspolitik>

(Landesarbeitsgericht) of Berlin-Brandenburg ruled in favour of the plaintiff, because she could prove statistically that while the vast majority of the company's employees were women, the management positions in the company were exclusively held by men. Or consider a complaint which parents of schoolchildren with a Roma background filed in the Czech Republic, because their children were placed in special education classes in school. They could show that these special classes were largely filled with Roma children, without there being adequate testing procedures. The statistical evidence that Roma children were schooled in special education classes at a greatly disproportionate rate persuaded the Grand Chamber of the European Court of Human Rights⁴ that there was indirect ethnic discrimination.

Indirect discrimination occurs where an apparently neutral measure disproportionately disadvantages members of certain groups.

A landmark case from the late 1970's which could not have been won without the use of statistics is the UK case of *Hussein v. Saints Complete House Furniture*. As a matter of principle, a Liverpool-based furniture store refrained from hiring job applicants from certain parts of town. Because of high unemployment rates in these areas, the managers were afraid that unemployed acquaintances of their potential employees might often come to visit their friends in the store, thereby making other customers feel uncomfortable. The fact that 50% of the inhabitants of the concerned parts of town were black – as opposed to 2% of Liverpool's overall population – led the Court to find that the company had indirectly discriminated against its applicants on grounds of race. This finding was only possible because data on the composition of the resident population was available and could be used in court proceedings.

2.3.2. Human rights reporting obligations: UN Human Rights Convention and OSCE membership

Member States of the United Nations and the Council of Europe have committed themselves to comply with the regular reporting mechanisms by signing the respective human rights conventions.

The reports must provide background information on the composition of the population. This includes equality and participation data.

In 2001 the United Nations organised the third 'worldwide conference against racism, xenophobia and intolerance'⁵ in Durban, South Africa. A declaration⁶ was drafted which requires the signatory states to draw up national action plans and implement the recommendations that are contained in the Declaration. Furthermore, data shall be collected to document the implementation process.

Through the signing of the UN Convention Against Racism (ICERD), the Federal Republic has committed itself to submit a comprehensive report on racism in Germany every five years⁷. In addition to these official reports, so-called 'shadow reports' are drafted and submitted by civil society organizations.

The ICERD Committee takes them into account for its assessments. So far, the Federal Republic has presented only insufficient data on the 'ethnic composition' of the population of Germany. This was criticized by the committee in 2008⁸ and 2015⁹. On the basis of principles

⁴ Available at <http://www.errc.org/cms/upload/media/02/D1/m000002D1.pdf>

⁵ Available at <http://www.un.org/WCAR/e-kit/backgrounder1.htm>

⁶ Available at <http://www.un.org/Depts/german/conf/ac189-12.pdf>

⁷ <http://www.admin.ch/opc/de/classified-compilation/19650268/index.html#a9>

⁸ http://www.bayefsky.com//pdf/germany_t4_cerd_73.pdf

⁹ http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICERD/icerd_state_report_germany_19-22_2013_CoObs_2015_advanced_en.pdf

for the collection of sensitive data, the ICERD Committee recommends the collection of differentiated equality and participation data.

In addition to that, the European Commission against Racism and Intolerance (ECRI) has recommended in its 2009 country report on Germany¹⁰ that Germany improve its data collection on the population composition by clustering the relevant information in categories such as religion, language, nationality and national or ethnic origin.

As a member state of the OSCE, the Federal Republic of Germany has also committed itself to 'collect and maintain reliable information and statistics about hate crimes motivated by racism, xenophobia and related discrimination and intolerance, committed within their territory and to keep a record of such information.'¹¹

2.4. Areas where data collection is of strategic importance

Participation and equality for all people in Germany should in principle be ensured in all areas of social life. The following sections are given as an example to illustrate the need to collect sensitive data.

2.4.1 'Racial Profiling'

The German Border Police (Bundespolizei) has an established practice of controlling individuals without any concrete suspicion. It grounds these measures on a number of legal bases. In principle, the Bundespolizei has the legal power for such spontaneous controls. However, it must not use the (ascribed) ethnic origin of the person in question as a selection criterion.

Increasingly, such controls are being perceived as discriminatory. Personal testimonies as well as the judgments of various administrative courts¹² suggest that factors such as skin colour or ethnic origin are routinely used as selection criteria. What's more, a survey carried out in 2008 by the European Union Agency for Fundamental Rights (FRA) shows that people of Turkish origin and people from the former Yugoslavia were twice as frequently held and controlled by the police as white Germans.¹³ More extensive data could provide certainty and serve as a basis for reflecting upon ways to bring the policing practice into conformity with basic rights

2.4.2. Labour market participation

In order to achieve a society free from discrimination on grounds of origin, ethnic origin or religious affiliation, it is important to know whether, for example, people with a migration background have equal employment rates and are equally represented at all qualification and hierarchy levels. If this is not the case, further research could identify possible causes and countermeasures could be developed. Discrimination which contributes to higher unemployment rates among people with a migration background must be fiercely fought, because the professional sphere is central for the distribution of resources and for participation opportunities in society generally. Furthermore, the collection of equality data in the corporate context enables the employer to analyse the staff composition. Generally, societal diversity will be mirrored in a company's workforce. Adjusting certain practices in

¹⁰ <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-IV-2009-019-ENG.pdf>

¹¹ <http://www.osce.org/de/pc/35612?download=true; PC.DEC/621>

¹² <http://www.bug-ev.org/aktivitaeten/klagen/diskriminierende-polizeikontrollen/aktuelle-faelle.html>

¹³ http://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_DE.pdf

line with the composition of the workforce may allow to keep qualified employees in the company. An obvious example is a workplace canteen that caters to the religious and ideological eating habits of the workforce. In accordance with the results of a survey, the menu could be expanded to include kosher, halal, vegetarian or vegan dishes.

2.4.3. Education

As indicated above, the PISA study had first shown a discrepancy between the performance of children from families which belong to the society's majority and children from immigrant families and then subsequently documented that countermeasures had somewhat alleviated the disadvantages. The collection of equality and participation data can show the specific effects of discrimination. Areas of concern may be the direct assessment of a student's achievements – as it occurs for example in the highly important “transitional recommendations” in which German elementary school teachers express their opinion as to what type of secondary school a child should attend, but also the more informal (non-)including treatment of students. Therefore, equality and participation data should be collected across the education sector in order to minimize the negative effects of ethnic (and probably also social) origin and to offer children optimal chances. To date, the uniform collection of data on an eventual migration background has not been implemented in all school statistics of the German Länder. Since those statistics usually only capture up to a second or third generation migration background the Länder also collect data on ‘native languages other than German’ but do not currently apply a uniform definition of this criterion.

3. Legal basis for data collection

Personal data on ethnic origin, political beliefs or religious affiliation are generally referred to as ‘sensitive data’. They are subject to special data protection regulations. Relevant regulations can be found both at national and EU level. They state that sensitive data can only be collected on a voluntary basis and that the respondent must make a self-categorization. A third-party classification is therefore legally precluded. In addition, sensitive data must be stored and used anonymously.

3.1. Data protection in Germany

The basic right to informational self-determination is derived from the German Basic Law (Grundgesetz =GG)¹⁴.

It is a special expression of the general right to privacy, the general freedom of action (Article 2 (1) GG) and protection of human dignity (Article 1 (1) GG). It has the status of a constitutional right. In Germany, data protection is regulated by the Federal Data Protection Act, the Bundesdatenschutzgesetz (BDSG)¹⁵. Since it entered into force in 1977, it has been amended several times and was continuously adapted to global and European directives.

In 1983, the Federal Constitutional Court (Bundesverfassungsgericht) recognized in a landmark ruling a constitutional ‘right to informational self-determination’¹⁶, which was to guarantee the protection of privacy under circumstances of large-scale data processing. The then newly-recognized right gives individuals the power to determine when and to what extent they share information on personal characteristics. Under the principle of voluntary consent people may refuse to provide information. The Federal Data Protection Act applies to

¹⁴ <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf>

¹⁵ http://www.gesetze-im-internet.de/bundesrecht/bdsg_1990/gesamt.pdf

¹⁶ <https://openjur.de/u/268440.html>

both public authorities and non-public bodies such as private enterprises, trade unions, political parties, self-employed persons and associations. It specifies the conditions¹⁷ under which data may be collected in the spheres of public administration. Under these rules, any survey must be specifically mandated by law and the respondents must have explicitly agreed to the collection of sensitive data such as religious affiliation or ethnic origin. Non-public bodies are also subject to rather strict regulations.¹⁸

In addition to having the consent of the persons concerned, the legislature is obliged to submit a legitimate reason for the survey such as a vital or other important interest. Data may also be collected if the persons themselves have made it public.

While these rules apply to the collection, similar provisions apply to the processing and usage of the data. These restrictions may influence or determine whether a given data set may be evaluated at all. If data has been collected in an improper manner, it is forbidden to store or evaluate it.

The data protection laws of the federal Länder apply to the respective state administration, i.e. state authorities and municipal authorities. In particular, they define the competences of the respective state-level data protection official.

Although there is a sound national legal framework for the protection of personal and sensitive data, it cannot be assumed that this framework is always respected. Legal provisions are sometimes disregarded or circumvented by private individuals or public institutions. For example, it became known that in Cologne the police had created a register of Roma families. Affected families were increasingly observed by the police and it was ordered that DNA tests be used to verify whether individuals did indeed belong to larger “Clans”¹⁹. In this case, data on ethnic origin was collected and used without any legal basis. Whether such infractions, which have to be eliminated and sanctioned by all means, should be considered a general obstacle to the collection of data even where it occurs with the goal to fight discrimination is a question which requires careful judgment.

3.2. European and international rules for data protection

At EU level, the Directive on Data Protection 95/46/EC and the Charter of Fundamental Rights of the European Union mainly deal with the handling of personal and sensitive data. At the international level, the Council of Europe *Convention for the protection of individuals with regard to automatic processing of personal data* provides a framework for the collection of sensitive data. In addition, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights adopted by the United Nations (UN) ensure the protection of privacy.

3.2.1. EU Data Protection Directive 95/46/EC

The EU Data Protection Directive was adopted by the EU in 1995. By 2006, all Member States have changed their national laws accordingly, even the latest countries that joined the EU. The directive makes an attempt to clarify a complex field, which includes the collection of census data, scientific investigations, the recording of personal data in state or private institutions as well as the membership lists of associations and police units. For this purpose, specific exceptions and restrictions are necessary in the collection and processing of data.

¹⁷ http://www.gesetze-im-internet.de/bdsg_1990/_13.html

¹⁸ http://www.gesetze-im-internet.de/bdsg_1990/_28.html

¹⁹ <http://www.spiegel.de/spiegel/print/d-29341590.html>

The Directive defines ‘personal data’ as ‘any information relating to an identified or identifiable natural person’. The provisions on scope and usage are to be complied with by the public as well as the private sector. However, some areas are excluded from the scope of the Directive, such as internal security, defense and criminal law.

The basic principles governing the collection of data are their uniqueness and legality. The individual Member States have to specify more precisely under what conditions data may be lawfully processed.

The Directive also defines which categories should be treated as sensitive data. These include ethnic origin, political opinion, religious or philosophical belief; trade union membership, as well as data on health or sexual life. The condition for the legality of processing personal and sensitive data is the direct consent of the person concerned (voluntary nature). In some EU countries, written consent is required; in others an oral consent is sufficient.

The respondent is entitled to be informed of the processing of his data in a comprehensible manner and language, as derived from the principle of good faith. It also stipulates that the survey is intended to serve the fundamental public interest, such as statistics collected by the State, scientific research or the detection of discrimination.

3.2.2. The Charta of Fundamental Rights

The Charter of Fundamental Rights²⁰, which was formally proclaimed in 2000, is of quasi-constitutional rank within the legal architecture of the European Union. and follows the tradition of the European Convention on Human Rights. It secures the right of every person to respect their private and family life.

The protection of personal data²¹ is governed by Article 8. Data may only be collected where there is a legal basis and with the consent of the person concerned. In addition, persons are entitled to access and correct their data.

The European Union has been discussing a strengthening of data protection since 2012. The former directive was revised in December 2015 and the new basic data protection regulation, *the EU-Datenschutz-Grundverordnung (DSGVO)* will enter into force in early 2018²².

3.2.3. UN Guidelines

Article 17 of the International Covenant on Civil and Political Rights states:

‘(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.’

An interference with someone’s private life and hence their privacy by way of collection of private data is therefore not permitted.

Regarding the collection of data on ethnic origin, the General Recommendation No. 8 of the Committee on the Elimination of Racial Discrimination (CERD)²³ states:

²⁰ http://www.europarl.de/resource/static/files/europa_grundrechtecharta/_30.03.2010.pdf

²¹ http://byds.juris.de/byds/019_2.5_EUCharta_Artkel8.html

²² <https://www.datenschutzbeauftragter-info.de/eu-datenschutzgrundverordnung-das-sind-die-neuerungen/>

‘ The Committee (...) is of the opinion that [ethnic] identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. ’

When collecting sensitive data, it is necessary to ensure that the persons concerned assign themselves voluntarily to a group (self-identification).

The recommendations of the UN statistics department for the collection of ethnicity data are not legally binding, but they provide useful guidance and draw from the data collection experience of various countries.

The United Nations Statistical Division’s Principles and Housing Censuses (Revision 2) state the following:

The method and the format of the question used to measure ethnicity can influence the choices of the respondents (...). The subjective nature of the term (not to mention increasing intermarriage among various groups in some countries, for example) requires that information on ethnicity be acquired through self-declaration of a respondent and also that respondents have the option of indicating multiple ethnic affiliations. Data on ethnicity should not be derived from information on country of citizenship or country of birth. The classification of ethnic groups also requires the inclusion of the finest levels of ethnic groups, self-perceived groups, regional and local groups, as well as groups that are not usually considered to be ethnic groups, such as religious groups and those based on nationality. Countries collecting data on ethnicity should note that the pre-coding or the pre-classification of ethnic groups at the time of data capture may have a tendency to lose detailed information on the diversity of a population. Since countries collect data on ethnicity in different ways and for different reasons, and because the ethno-cultural composition of a country could vary widely from country to country, no internationally relevant criteria or classification can be recommended.’

3.2.4. Council of Europe

At the European level there is also the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*²⁴, which sets the framework for the collection of sensitive data. It is the only international agreement dedicated specifically to data protection. The Convention came into force in 1985 and was signed and ratified by all Member States. It controls the processing and storage of data. The collection must be appropriate and lawful. Article 6 prohibits the automatic processing of sensitive data, unless there is a legal basis which provides adequate protection. Article 8 provides that persons can access, rectify and delete their personal data.

In addition, the Europe Convention on Human Rights secures the protection of privacy²⁵. Article 8 (Right to respect for private and family life) states:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.’

This extends to the protection of personal data.

²³ http://www.bayefsky.com//general/cerd_genrecom_8.php

²⁴ <http://conventions.coe.int/Treaty/GER/Treaties/Html/108.htm>

²⁵ <http://conventions.coe.int/Treaty/ger/Treaties/Html/005.htm>

4. Principles for the collection of sensitive data

The collection of sensitive data, in particular on ethnic origin, political beliefs or religious affiliation is extremely complex. Concerns to disclose such data are understandable and justified.

However, if basic principles for the collection and processing of equality and participation data were laid down and generally observed, this would presumably result in a less defensive attitude on behalf of critics and / or minorities and their political representatives.

European and national law provide a strong framework from which the following sensible, effective, pragmatic and generally acceptable standards of data collection can be derived so that equality data can in fact be systematically collected.

4.1. Data protection for anonymous usage and storage without identification

As long as data are personal, they are legally protected against misuse. In order to uncover discriminatory patterns, anonymous mass data are used, which show (un)just distributions or an (in)appropriate representation in certain social sectors.

A survey may only be carried out on the basis of voluntary self-categorization. Once the collection completed, the data must be anonymized, broken down according to certain characteristics (such as nationality, professional activity, family status, etc.) and made publicly available.

The collection of data on ethnic origin, religion or similar sensitive information should only be carried out for statistical purposes. Such data should only be stored and processed in large data sets in which a single person cannot be identified.

In no case should information such as ethnic origin, color, religion or the like be included in personal data records, such as the Resident Register, the Unemployment Register, the Central Foreigners Register or other registers or staff or student records.

In registers, information about people is permanently linked with them; statistics on the other hand represent a 'snapshot' of a larger number of people, about the structure of the whole of society or certain social spheres, not the individual person.

4.2. Who defines whom?

A problematic aspect of the collection of sensitive data is the categorization of ethnic origin. If affiliation is associated with a stigma, most people prefer not to make an eventual affiliation public. As many people belonging to the Roma population do not want to disclose their identification with this group, the census numbers show a considerably lower number than was generally expected. However, if identification is possible without stigma (or is associated with prestige, like for the Sorbs in certain eastern parts of Germany), most people do not have a problem to state an affiliation. Background facts such as this will impact the collection of data.

4.2.1. Self-definition when collecting sensitive data

The UN Committee on the Elimination of Racial Discrimination (CERD) introduced the principle of self-identification in General Recommendation No. 8²⁶ in 1991. This principle is supported by the European Commission Against Racism and Intolerance (ECRI)²⁷.

The right to self-identification is also granted to members of national minorities²⁸ by the Council of Europe's Framework Convention for the Protection of National Minorities. The possibility of self-identification, which is embodied in international conventions, should be incorporated into national legislation and likewise be guaranteed when collecting sensitive data. This is arguably the only way to obtain approval for data collection from the concerned communities.

The diversity of people is a reality. Exclusion and discrimination begin when group membership is externally ascribed to people and depreciated. Therefore, in anticipation of exclusion or discrimination, it is comprehensible that individuals who are attributed to a group are opposed to such a categorization. This rejection is particularly palpable when it comes to the collection of data related to ethnic identification.

The principle of self-identification thus commands the following: The respondent identifies itself with a group (or not) and has complete freedom and control over assigning himself/herself to a category.

Whether this is perceived by others as right or wrong, as appropriate (or not), is irrelevant. No one has the right to question or replace the self-assessment. Even in the case of changing identifications of the same group of people, this principle must remain intact, since otherwise self-identification would be replaced by external attribution.

4.2.2. Voluntariness of the disclosure of sensitive data and informed consent

On the basis of the EU Data Protection Directive 95/46/EC²⁹, the voluntariness of disclosure of sensitive data must be guaranteed at all costs.

This should be clearly signaled in questionnaires. It should be clearly explained to respondents that no disadvantages or sanctions are to be expected if they refuse to disclose sensitive information.

Similarly, the meaning and the purpose of a survey should be explained to the respondent, in order for her/him to be able to identify which purpose the disclosure of the sensitive data serves. Prior to any decision on whether or not to consent, respondents must be aware of the intended use of the collected data and able to assess the consequences of their actions. Only on the basis of clear, transparent and readily available information can respondents reach an autonomous decision.

4.2.3. What are appropriate categories?

Data collection which aims at the documentation of discrimination or the identification of social problems should be able to show overlapping group affiliations and multiple discriminations – the phenomenon commonly referred to as intersectionality. Personality and identity are not monolithic, but combinations of many facets. A person has a gender identity, a country of origin, an outward appearance, and may or may not have philosophical, religious and political attitudes, may have one or more nationalities, one or more mother tongues, and characteristics such as a disability, a specific sexual orientation and so forth. All these

²⁶ <http://www1.umn.edu/humanrts/gencomm/genrviii.htm>

²⁷ http://www.coe.int/t/dlapil/codexter/Source/ECRI_Recommendation_11_2007_EN.pdf

²⁸ <http://conventions.coe.int/Treaty/ger/Treaties/Html/157.htm>

²⁹ <http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:31995L0046&from=DE>

together may be said to form their identity. Different parameters matter to a different degree across a life-span and certain characteristics can change over the course of one's life. Moreover, one's self-perception can differ from how one is perceived by others. This in turn might impact the information which respondents are willing to provide in surveys. It is, therefore, comprehensible and not to be treated as a problem or 'mistake' if people make different statements on different occasions.

Unspecific and large categories such as 'migration background' are inadequate to cope with this diversity. At the same time, one must consider how many categories one can reasonably include, as both financial and time constraints are likely to limit the endeavor. Ultimately, the specific purpose of the investigation is decisive. It provides clues as to which categories are necessary and meaningful.

When the micro-census first included a set of questions on migration backgrounds it did so by relying on rough (and sometimes rather unhelpful) categories. Generally, one should examine whether broad categories such as "migration background/no migration background" could be replaced by more sophisticated alternatives. While a survey on 'Racial Profiling' might mainly include categories that cover visible features of potential minority-affiliation, categories such as mother tongue/ family language/ first language would be relevant for a survey on school success.

One should take into account that descriptions for categories are not static, but are subject to social change. While it seemed appropriate in the 1970s to refer to immigrants as "foreigners" (*Ausländer*), this term is now perceived as inappropriate. Here, social change has occurred. Therefore, categories that today appear to be appropriate may have become obsolete ten years from now. In order to reflect such social changes, it is important to be in continuous communication with relevant communities and experts during the planning, development, and evaluation phase of surveys on sensitive data, and, where necessary, to adapt category-labels.

4.3. Involvement with civil society

When collecting sensitive data on ethnic origin, religion and group membership one must seek to cooperate with affected communities and their representatives and closely involve them in the development of the studies as well as in working out definitions and selecting categories. Thus far, such dialogues are the exception rather than the rule.

In the respective research design the methods of data collection should then be adapted to the target group, questions should be formulated in a sensitive and effective way and phrased in adequate terminology. This would increase both the acceptance of the survey among respondents and their co-operation. The Council of Europe's Commission Against Racism and Intolerance (ECRI) also recommends the consultation and integration of relevant interest groups. Similarly, transparency in the collection and analysis of sensitive data should be guaranteed.

5. Participation Data in Germany and Elsewhere: The Status Quo

5.1. Procedures for gathering statistical information on discrimination

Different approaches are available for using quantitative data to adequately capture the pervasive phenomenon of discrimination.

For one, attitudes of the population towards minorities and other groups can be examined. Although this does not say much about actual discrimination practices, it is a good indicator for the societal climate.

Another option is to ask members of affected groups to share their experiences. Such interviews give the researcher an idea of the general mood, allow to identify social participation opportunities and can show specific dissatisfactions among members of particular groups. One can also resort to testing, in order to examine concrete distribution mechanisms at neuralgic points of societal resource distribution. By filing, for example, a certain number of applications for jobs or apartments which essentially differ only with regard to the tested feature, one can check whether the tested characteristic impacts the distribution decision in question.

While many methods allow primarily uncovering certain social effects of discrimination – such as higher unemployment rates among immigrants in Germany – testing allows to inquire directly how and where unequal treatment influences distribution procedures. Collecting and evaluating complaints filed with counseling centers is another way to obtain discrimination statistics. The cases filed there, however, will only show the tip of the iceberg.

Counting complaints or judgments which are made based on the General Equal Treatment Act (AGG), can also help to indicate the extent of discrimination in certain areas.

All of these procedures are well-established means to investigate inequality but they are limited in scope. The collection of equality and participation data in larger population- and other administrative statistics would offer more comprehensive insights into discrimination as a social phenomenon.

When considering population and administrative statistics, it becomes obvious how much variation there is regarding whether or not information on characteristics which are protected by equality-laws is being collected.

Age, for example, is accurately captured in most statistics up to the exact year of birth. Gender, too, is almost always included, although usually only with the binary categories female and male. A person's sexual orientation, on the other hand, is never traced by official bodies.

In the next section it will become evident that hitherto there is no participation and equal treatment data on ethnic origin available in Germany but that considerable efforts are being made to register an eventual migration background.

5.2. The micro-census: Migration background instead of participation data

In 2011, for the first time in many years, a general population census was carried out in Germany. Because general census data is collected so rarely, the micro-census is the more important data source when it comes to official statistics. For the micro-census, data on the population is collected annually among one percent of residents. The micro-census is considered so crucial for Government planning that residents are under a legal obligation to provide information. It serves as the basis for the planning of numerous legislative projects which require statistical data. The surveys cover information on the housing and labor market as well as the education and health system. Data on social problems relating to spheres such as health care are gathered and used to assess the urgency of the respective problem.

It is only since the amendment of the Micro-census Act in 2005 that data concerning the migration background is being collected³⁰. The legislative materials state: ‘Immigration from abroad and the integration of migrants are increasingly important political topics, for which basic information has so far been lacking. The data on naturalization is important for integration reporting, since naturalization is a way of formal integration, which allows to draw conclusions about the general willingness to integrate of such migrants’³¹. Here it should be added that the data does not only capture a willingness to integrate on the part of migrants, but also uncovers areas which the Government has neglected. With the (extended) collection of such data in the micro-census, the various dimensions of discrimination could be made visible, necessary areas of action could be identified and policies could be tailored more adequately to meet the specific circumstances of different migrant groups.

For the micro-census questionnaires of approx. 80 pages are used. Three and a half of these deal with nationality and the duration of stay³².

The respondents indicate whether they were born in Germany, when they came to the country, when they obtained German citizenship, where their parents were born, if family members still live abroad, and if so, where³³. The ‘migration background’ is then obtained by combining several of these individual variables. The (parents’) country of birth is often equated with ethnic origin, but this is an increasingly error-prone proxy variable.

Under the definition used there a person has a migration background’ if that person has immigrated after 1949, was born in Germany without a German passport or with a migrant parent (who either came to Germany or was born in Germany but did not have a German passport). The category of ‘migration background’ is not necessarily strictly congruent with equality and participation data on ethnic origin.

Discrimination does not only occur based on invisible features such as nationality or migration background, but is often based on visible features and an actual or attributed ethnic origin. One can be entirely free from or subject to recurring discrimination depending on certain physical characteristics, a particular phenotype, visible cultural practices or symbols which may be taken to suggest a religious or other affiliation (wearing certain garments or hairstyles, for example). The ethnic diversity in Germany cannot be attributed entirely to migration since 1949 or a citizenship. For example, black people or Sinti and Roma have been living in Germany for several hundred years. It is wrong to describe them as migrants, but at the same time many of them are exposed to types of exclusion which ‘strangers’ must typically endure. In addition, not all immigrant groups report the same degree or types of discrimination.

If discrimination in the education and health system as well as the labor market is only measured with regard to a migration background, the data will not show an eventual unequal treatment of people of color without a migration background, since the statistics count them as a part of the non-discriminated social majority.

³⁰ https://mediendienst-integration.de/fileadmin/Dateien/Informationspapier_Mediendienst_Integration_Migrationshintergrund_im_Mikrozensus.pdf

³¹ Deutscher Bundestag – 15. Wahlperiode Drucksache 15/2543

³² An example can be found under <https://www.statistik-berlin-brandenburg.de/datenerheb/dateien/MZ.pdf>

³³ See footnote 29, p.56-59

5.3. Are participation data included in other surveys in Germany?

In the following, we will give an overview of major German scientific and demographic surveys and explain how they handle participation data. To summarize, the surveys listed below have all come to include the migration background as a criterion in their questionnaires over the last two decades, but no genuine equal treatment and participation data are currently being collected.

For instance, the German Federal Institute for Population Research conducted the *Gender and Generations Survey* among 4000 German-Turkish migrants³⁴.

The institute aimed at collecting data on the household, children, parents and partnerships and the attitudes, values and opinions associated with these topics. The migration background was captured by asking questions about place of birth, nationality, mother tongue and most commonly used language.

The German Federal Ministry of Education and Research regularly carries out the social survey of the German Student Union. A look at the survey conducted in 2012³⁵ shows that characteristics relevant to discrimination were indeed included in the questionnaire. Age, educational background, health impairments and children to be cared for were inquired in detail. An entire chapter was dedicated to students with a migration background. Captured were only students who had just enrolled in their first university degree program. Along with the other information, their educational background and their way to finance their studies were broken down according to five different migratory statuses.

The German Youth Institute carries out a series of surveys, such as the *Youth Survey*, the *Family Survey* and a study on *Growing up in Germany*. These surveys focus less on participation in socially relevant subsystems, and more on family structures. However, the third and last Youth Survey also focused on social and political participation of the 12-15 and 16-29-year-olds³⁶. In the 2003 to 2004 survey period, the family, school and migration background were included as new survey topics for the first time.

The *German General Social Survey* (ALLBUS) collects data on attitudes, behavior and the social structure of the population. Since the 1980s this survey has been carried out every two years as a way of social monitoring. The questionnaire for the year 2014 contains questions about citizenship, place of birth, place of childhood residence and the country of origin of the parents³⁷.

The *Socio-Economic Panel SOEP* is a representative iterative survey of private households in Germany, which has been conducted among the same set of respondents annually since 1984. Since the beginning the survey included non-German residents, with a disproportionate sample including households with Turkish, Spanish, Italian, Greek or formerly Yugoslavian heads of household. The new so-called SOEP Migration Sample is a survey among people

³⁴ https://www.bib-demografie.de/SharedDocs/Publikationen/DE/Materialien/121b.pdf?__blob=publicationFile&v=6

³⁵ The publication of the 21st survey is announced for 2017; the predecessor is available at http://www.studentenwerke.de/sites/default/files/01_20-SE-Hauptbericht.pdf

³⁶ A summary can be found here: <http://www.dji.de/index.php?id=39286&L=0>

³⁷ [http://www.gesis.org/allbus/datenzugang/fragebogen/;](http://www.gesis.org/allbus/datenzugang/fragebogen/)

In the 2014 version, the relevant questions are listed under points 119-126.

with a migration background conducted for the first time in 2013. It is intended to ensure that issues of migration can be adequately included in the long-term study³⁸.

As the examples show, the migration background is a category that is commonly included in German population surveys. But what do surveys look like which also collect genuine participation data and what sort of results do they deliver? A look at Great Britain and at the EU-level illustrates the possibilities for collecting such data.

5.4. Examples of participation data surveys

5.4.1. The EU-MIDIS survey of the European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights (FRA) has published a survey on European minorities and discrimination in 2009 (EU-MIDIS). The survey included 23,500 people with an ethnic minority or immigrant background across the EU's then 27 Member States³⁹. For the survey, up to three native minorities and/or largest immigrant groups were selected per country and within these groups 500 persons were interviewed periodically over a period of 16 years. Only groups which are often targeted by ethnic and religious discrimination and who are especially vulnerable to xenophobic violence were taken into account. This meant, for example, that 500 Roma were personally interviewed in Hungary, whereas in Germany Turkish people and people from Yugoslavia were chosen.

On the basis of residence statistics, the interviewers personally explored the residential areas of these groups and asked people on the street whether they identified with the selected target group and were willing to be interviewed. Accordingly, data on discrimination experiences of different groups were collected across a large variety of countries. On the national level, different scopes of discrimination became visible with regard to different groups.

In Belgium, for example, 20% of Turkish people reported that they had been discriminated against within the past 12 months, while among North Africans it was more than a third (34%). In Austria, 9% of Turkish people reported discrimination experiences, while in Germany they were three times as many (30%).

The EU-MIDIS survey asked for the types of discrimination, such as ethnic or religious discrimination, as well as for the social context in which the discrimination had occurred, whether during job search, during work, at school, in the health care system or at cafes and restaurants. Across Europe, Roma are overall the most heavily discriminated group in all these areas, with particularly bad situations in eastern and southern-European countries. While in the European average 8% of North African children were discriminated against at school, the Italian average was 21%.

These figures make it possible to fight discrimination in a targeted manner as they allow to identify specific problem areas as well as regions and groups with rather little need for action. For political decision-makers and social organizations it is important to know, for example, that the health care system in Germany appears to be rather free of discrimination against Turkish people and that therefore no urgent changes are warranted, whereas in the labor market Turkish applicants are often being denied participation. With regard to the latter problem it is worth taking a look at Germany's neighbors, some of which already have found solutions for the problem of employment discrimination on grounds of ethnic origin.

³⁸ <http://www.tns-infratest.com/SoFo/Expertise/SOEP.asp>

³⁹ A summary of the main findings can be found at http://fra.europa.eu/sites/default/files/fra_uploads/664-eumidis_mainreport_conference-edition_en_.pdf

Collecting data of this kind can therefore provide more detailed information than the micro-census and other surveys which rely on the proxy of migration background. It appears that those affected by discrimination do not have many reservations vis-à-vis the collection of participation data. According to EU-MIDIS, on a voluntary and anonymous basis 70% of the interviewees would provide information on their ethnic origin and 69% would also indicate their religion in a census survey if they could thereby help to fight discrimination. A second phase of the survey has been in progress since 2015, and the first figures have been available in autumn 2016.

5.4.2. The British census

In the UK, census data are collected every ten years. Since 1841 respondents provide data on their country of birth and nationality. In the 1970s, however, in the context of the enactment of new specific anti-discrimination laws, it became clear that the questions regarding country of birth and nationality were not sufficient to record ethno-cultural diversity.

It was therefore considered to include questions about the ethnic origin in the 1981 census, but that innovation was postponed because of strong public opposition. Concerns were expressed that such categories would make the classification and racialization of people legitimate. Some argued that this would be politically and morally reprehensible, since the concept of 'race' would be revived and the survey could lead to further disadvantages for minorities. The data collection was meant to facilitate the work of the Commission for Racial Equality (CRE), established in 1976. Without the necessary census data, it was unable to adequately accompany and test the newly implemented anti-discrimination laws.

In the 1991 census, the question on ethnic origin was finally included. Since then, the available categories have evolved. In the 1991 census, respondents were able to choose between the following categories: White, Black Caribbean, Black African, Black Other: please describe, Indian, Pakistani, Bangladeshi, Chinese or 'other ethnic group' – each with the possibility to further specify. While the charge of racialization had still not faded, some groups launched campaigns for the inclusion of categories reflecting their collective identity. For the 2001 census, some amendments were implemented. The 'White' category was further divided into 'British', 'Irish', and 'Other White Background' to make existing variety within the 'White' category visible. The category 'Asian or Asian-British' now contained the specifications 'Indian', 'Pakistani', 'Bangladeshi' and 'other Asian background'. The category 'black or black-British' included 'Caribbean', 'African' or 'other black background'. Another option was 'Chinese' and other ethnic groups. The category 'mixed race' was further broken up in: 'White and Black Caribbean', 'White and Black African', 'White and Asian, or 'any other mixed/multiple ethnic background: please describe'. With the 2011 census, the categories 'Irish Traveler/Pavee or Gypsy' and 'Arab' were introduced⁴⁰.

In addition to ethnic origin, the parameters of spoken language, religion, nationality and physical impairments were also covered.

5.4.3. Positive labor market measures and census in South Africa

In 1948, apartheid was established in South Africa and in 1950 the population was divided into three categories through the Population Registration Act: White, Black or Colored (the latter including South African minorities such as 'Cape Malay' and 'Griqua', but also 'Indian', 'Chinese' and 'Cape Colored', people of mixed descent). The structural discrimination during

⁴⁰ The UK questionnaire is available at webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/guide-method/census/2011/the-2011-census/2011-census-questionnaire-content/2011-census-questionnaire-for-england.pdf

the apartheid (and beyond) was essentially based on this category system. For example, the residential districts of the different population groups were separated and marriages between differently classified partners were forbidden.

In order to compensate for the unequal distribution of resources caused by racism and to create equal opportunities, different measures are now being taken on the labor market in South Africa.

They are thus part of the so-called 'positive measures' or 'affirmative action'. People are classified as 'historically disadvantaged individuals', if they have been categorized as 'African' and 'Colored' under the apartheid system and if they were South African citizens before 1993. According to the provisions on employment equity, employers are obligated to hire members of historically disadvantaged groups, especially in higher positions. Companies with more than 50 employees or a turnover of more than 5 million Rand (about EUR 300,000) must submit staff statistics, broken down into the census categories. In addition to private companies, NGOs, trade unions, foundations, cooperatives and churches are also obliged to take such measures.

A related concept is *Black Economic Empowerment* (BEE). Depending on the turnover and the business partners, the participants agree to be measured against a scorecard which lists five criteria. Small companies can voluntarily participate in the program. Larger companies must disclose some of the information and for companies with a turnover of approx. 3 million Euro participation it is mandatory to participate in the whole program.

The BEE's seven pillars include ownership structure, management and positive human resource measures, training, supplier structure and supply companies, as well as the development of other small firms (mainly those owned by Black people) and support to socio-economic (charitable) projects.

In each category, a company can collect 5 to 25 points. Companies with high scores enjoy certain advantages. Companies with a majority of black workers can only earn points if some work in management positions. In the public sector, the participation in BEE is compulsory. In addition to general criteria such as price, time and quality, the scoring is also relevant in the context of public procurement.

On this basis, suppliers are selected, licenses are granted, bidders are selected to whom state ownership is sold and partners are selected for public-private partnerships. Since the BEE score also affects business partners and their BEE score, many smaller companies who are not obligated to participate decide nonetheless to take part on a voluntary basis.

6. Conclusion and outlook

People affected by discrimination constantly report unacceptable experiences, but scientific studies and experts in the field of anti-discrimination also conclude that discrimination will remain a continuous phenomenon even in key areas of social life.

While there are detailed figures on age, gender and disability, the extent and degree of unequal treatment of people because of their ethnic origin, sexual orientation, or religion remains hidden. Conceiving and implementing effective measures for fighting such discrimination is therefore difficult.

At the level of public international law, the Federal Republic of Germany has already undertaken to collect equality and participation data. This is motivated by the insight that such data could allow antidiscrimination work to make great progress in strategic areas such as the labor market, the education system and police work.

Collecting Equality and participation data would allow one to implement more targeted measures to organize participation opportunities in the education and labor market according to people's professional abilities and not as a function of skin color, sexual orientation, religion or other characteristics which are unrelated to job-performance.

Worries about this kind of data collection are understandable. The history of national socialism, with its unspeakably dehumanizing crimes and its horrifying ideology do command a very prudent approach. Only the collection of equality and participation data according to firmly anchored ethical principles can take the legitimate concerns adequately into account. Data protection, voluntary information-disclosure, anonymity of the respondents, self-identification and flexibility in the design of the relevant identity-ascribing categories are the basic prerequisites for any survey.

For an effective anti-discrimination work, the collection of data is only one aspect among others. But when embedded in a broader context of measures, it can effectively contribute to fighting discrimination. Interlinked measures which include data collection and are tailored to the needs which arise in and the circumstances of certain areas would add another important element to the struggle for substantial equal treatment across different social spheres..