

A recent amendment to France's immigration law would have made it easier for the state to collect ethnic and racial statistics for the French population. The measure met resistance from multiple quarters and was eventually held to be unconstitutional. As Daniel Sabbagh explains, this resistance illustrates the historical and legal differences between the United States and France regarding racial statistics.

In the United States, while some *race-based policies* such as affirmative action have faced often successful political and legal challenges over the last quarter-century, historically, the very principle of *official racial classification* has met with much less resistance. The Equal Protection Clause of the Constitution's Fourteenth Amendment, according to which "no state shall deny to any person within its jurisdiction the equal protection of the laws," was not originally intended to incorporate a general rule of "color-blindness."² And when in California, in 2003, the "Racial Privacy Initiative" led to a referendum on a measure—Proposition 54—demanding that "the state shall not classify any individual by race, ethnicity, color or national origin," this restriction was meant to apply exclusively to the operation of public education, public contracting or public employment. Those were the three sites where affirmative action was once in effect and might be reinstated at some point—or so the proponents of that initiative feared. Anyway, unlike Proposition 209—which had led to the termination of all public affirmative action programs in California in 1996—, Proposition 54 was roundly defeated at the polls. Similarly, when in 1997 the American Anthropological Association issued a statement advocating the withdrawal of the question on race from the federal census,³ this position was squarely rejected.

In France, by contrast, race and ethnicity are absent from the census form, and the analytical distinction between race-based *discrimination* and race-based *classification* is neither understood nor accepted to the same extent as in the United States. Unlike in the United States, the legal issue of whether one ought to infer a *rule of color-blindness* from the constitutionally-grounded *principle of equality* was not left open for the courts to decide. It was settled beforehand, and the answer was incorporated into the text of the Constitution itself. Article 1 of the 1958 Constitution thus provides that "the Republic (...) ensures the equality of all citizens before the law, *without any distinction of origin, race, or religion.*"⁴ As a result, corrective or "remedial" uses of race by state authorities, from a legal point of view, are put on the same plane as "invidious" ones and simply ruled out.

Moreover, this difference of constitutional framework reflects a difference in public culture. In the United States today, the vocabulary of race remains in wide use, although "race" arguably denotes less the formerly predominant pseudoscientific classification of human beings into a set of biologically distinct and hierarchizable groups than the subset of groups having experienced the most severe forms of racist discrimination. In France, in contrast, partly as a result of the participation of the Vichy government in the arrest and deportation of Jews, who were then identified as a distinct race, the delegitimization of racism—through exposure of its genocidal consequences—had long-term effects. It has disqualified race as a descriptive category altogether. As a matter of fact, the word "race" is used in a very limited number of settings: by the most radical fractions of the extreme right, by social scientists looking into the history and the effects of racism, and by lawmakers concerned with prohibiting distinctions based on that disreputable concept.⁵ As far as the collection of statistical data is concerned, as in most other Western European countries, race is a presumptively illegal category.

Obstruction Strategies and Their Success

Recent developments suggest there is currently a window for innovation in French antidiscrimination strategies. The creation in 2005 of a new agency, the High Authority for Antidiscrimination and Equality (*Haute autorité de lutte contre les discriminations et pour l'égalité* – HALDE), may be taken to signal the emergence of a national commitment to promoting greater opportunity for minority and

immigrant populations. Since October 2004, more than 1,600 firms have signed a "Diversity Charter"—whose name testifies to the circulation of American frames and slogans.⁶ Also, the CRAN, created in November 2005, is now advocating the collection of statistical data on the ethnic and racial diversity of the French population, with a view to more accurately measuring the extent of discrimination and assessing the impact of antidiscrimination policies. This is evidence that the public controversy over what has come to be called "*statistiques ethniques*" is spreading beyond the academic sphere.

More noticeably still, in November 2007, a major French antiracist association, SOS Racisme, circulated a petition demanding two things while basically conflating one with the other.⁷

It first requested the withdrawal of an amendment to a new and particularly restrictive immigration control bill. The amendment allowed for the collection of data on race and ethnicity within the frame of "studies designed to measure diversity (...), integration, and discrimination."⁸ Ironically enough, this amendment—which had become article 63 of the bill—had been introduced by two *députés* who were also members of the national data protection agency—the CNIL—,⁹ with a view to restoring that institution's prerogatives and actually *increasing* the level of control over the collection of "sensitive data" such as race and ethnicity, a fact that many critics of the legislation failed to understand or even notice...¹⁰

Secondly, SOS Racisme requested the removal of questions on respondents' skin color that for the first time had been introduced independently in a major public survey to be conducted in 2008 by the National Institute of Demographic Studies (*Institut national d'études démographiques* – INED) and the National Institute for Statistics and Economic Surveys (*Institut national de la statistique et des études économiques* – INSEE), with financial support from the HALDE and other state subdivisions.¹¹ The survey, "*Trajectoires et origines*," included these questions in order to better understand the connections between perceptions of skin color and of the discriminatory behaviors based on that individual feature, on the one hand, and access to various social goods—such as education, employment, housing, but also health, marriage, and citizenship—on the other.

A few days later, the Constitutional Council, France's constitutional court, did—correctly—strike down the legislative provision challenged by SOS Racisme on procedural grounds, holding that it was basically a rider insufficiently related to the main object of the bill, insofar as both "diversity" and "discrimination" obviously involved not only foreign immigrants but also French citizens. Yet, in an incidental comment (*obiter dictum*)¹²—understood as such within the circles of legal experts though not necessarily by the general public—the Council also intimated that the provision could have been struck down on substantive grounds as well, because of its alleged incompatibility with article 1 of the 1958 Constitution. In this light, race and ethnicity would definitely be off limits for the aforementioned "studies," in contrast with "objective

data" such as the name, birthplace, and (past and present) nationality of the individual under consideration.¹³

This portion of the decision is not immune to criticism. First, data such as those listed above, while obviously relevant for assessing the "integration" of first-generation immigrants, are plainly irrelevant for documenting the discrimination potentially suffered by a significant number of French-born blacks. Additionally, collecting data on ethnoracial features in a statistical study that has no bearing on an individual's rights doesn't *ipso facto* violate the principle of equality before the law. Yet, the presence of that *obiter dictum* can hardly be ignored. Precisely because the article 1-based argument is technically unnecessary and legally worthless, it may also be politically relevant as an indication of what the Constitutional Council might say in the future. Therefore, as far as the specific items on skin color included in the questionnaire of "*Trajectoires et origines*" are concerned, while it is far from certain that the Council's decision has any implication on their legal standing—because of the holding/*dicta* distinction¹⁴ and because color is arguably more "objective" than race—, they may well end up being withdrawn nonetheless. In the absence of an agreement between INED and INSEE on the extent and tolerability of the legal risk involved, the more cautious stance of the latter will likely prevail.¹⁵

Which "*Statistiques Ethniques*" — and for What?

Ultimately, one of the most salient features of current French debates on "*statistiques ethniques*" may well be their degree of confusion—a confusion regarding both the *kind* of statistics that one is talking about and the *purpose* (s) those may reasonably be held to serve. On the one hand, the distinction between the conduct of special surveys of a social-scientific nature on some aspects of the diversity of the French population ensuring the anonymity of respondents and the creation by the state of an *official, standardized, permanent* and *policy-oriented* nomenclature of ethnoracial categories endowed with a legal status is either dimly perceived or openly challenged. On the other hand, while as a general matter the collection of statistical data on race and ethnicity is often defended as a precondition for both measuring and waging the fight against disparate impact discrimination,¹⁶ reaching that goal requires information on the ethnoracial distribution of various "benchmark populations" that can most readily be made available by the establishment of a national nomenclature (*référentiel*) and that a one-time survey on a sample of 24,000 respondents such as "*Trajectoires et origines*" surely cannot—and is not meant to—deliver. Ironically, however, while the survey at least stands a chance of overcoming the obstacles placed in its way, the prospect of a national ethnoracial nomenclature has been rejected explicitly by both the HALDE and the CNIL, and even the most radical antidiscrimination advocates are reluctant to endorse it. As far as it seems, French "color-blindness," as a legal and political frame with practical consequences, will remain with us for some time.

1. This brief is a slightly extended version of the introduction to the symposium "French Color-Blindness in Perspective: The Controversy over 'Statistiques Ethniques,'" forthcoming in *French Politics, Culture, and Society*, 26 (1), Spring 2008.

2. See Andrew Kull, *The Color-Blind Constitution*, Cambridge, MA, Harvard University Press, 1992.

3. American Anthropological Association (1997), « Response to OMB Directive 15 », at <http://www.aaanet.org/gvt/ombdraft.htm>

4. Emphasis ours.

5. The rejection of race remains so powerful in contemporary French society that even those advocates asking for the collection of statistical data on phenotypically defined minorities for antidiscrimination purposes are still reluctant to detract from it, as reflected in the following statement by Patrick Lozes, the president of the Representative Council of Black Associations (*Conseil représentatif des associations noires* – CRAN), during a meeting organized by the National Council on Statistical Information (*Conseil national de l'information statistique* – CNIS) on October 12, 2007: "I wish we could definitively expel from our vocabulary this 'ethnoracial categories' phrase that relies on concepts which our history and our morality of science itself reject. Races do not exist, and I don't think ethnicity is a relevant concept in the French context. This is not about measuring races or ethnic groups, but the diversity of French society" (http://www.cnis.fr/ind_actual.htm; « Formation Démographie, Conditions de vie »).

6. See Erin Kelly and Frank Dobbin, "How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996," *American Behavioral Scientist* 41 (7), 1998, p. 960–984.

7. <http://www.fichepasmonpote.com/>. This petition, filled with rhetorical references to the Vichy regime and France's colonial past, was signed by more than 100,000 persons—including the leader of the Socialist Party, François Hollande. It is just one of the last moves in a series of conflicting public interventions of various kinds by researchers and leaders of antiracist associations, excerpts of which are included in this document.

8. <http://www.assemblee-nationale.fr/13/amendements/0057/005700055.asp>

9. *Commission nationale de l'informatique et des libertés*.

10. Under the 1978 *Loi informatique et libertés*—modified in 2004—, the ban on collecting data revealing a person's race or ethnicity admits of several exceptions. One of them applies when that person

has explicitly consented (in writing) to the recording of such information, in which case the CNIL is deprived of the power to authorize—or refuse to authorize—the study *ex ante*. The amendment would have given the agency that power, in a context where an increasing number of private employers interested in getting data on the ethnoracial profile of their workforce might well be able to pressure their employees into "consenting" to deliver such data. For more details, see Christophe Willman, "Statistiques ethniques en entreprise: le Conseil Constitutionnel pose de nouvelles conditions", *Droit social*, February 2008.

11. The first question asks: "When someone meets you, what color do you think you are seen as being?" ("*Quand on vous rencontre, de quelle couleur pensez-vous que l'on vous voit?*"). The following question asks: "And you, what color(s) would you say you are?" ("*Et vous, de quelle(s) couleur(s) vous diriez-vous?*"). The existence of two distinct questions — so as to emphasize the potential disconnection between self-ascribed and other-ascribed "color identities" —, the order in which such questions are to be asked, the somewhat contrived phrasing, and the possibility of checking the "I don't know" and/or the "I refuse to answer" boxes are all evidence of how sensitive the topic is perceived to be. Still, according to one of the INED researchers involved, when the questionnaire was first tested, many respondents, when asked the second question, expressed surprise — if not exasperation — toward what they thought was a redundancy.

12. See note 14.

13. Decision n°2007-557 DC, November 15 2007: see <http://www.conseil-constitutionnel.fr/decision/2007/2007557/2007557dc.htm>

14. The holding is a court's determination of a matter of law based on the issue presented in the particular case. Dicta are remarks or observations that, although included in the body of the court's opinion, do not form a necessary part of the decision.

15. To be more specific, one of the differences between the views of these two institutions is that INSEE, unlike INED, apparently does not consider what the CNIL's interpretation of the Constitutional Council's decision might be as relevant to its own assessment.

16. Disparate impact discrimination—more commonly called "indirect discrimination" in the European context — applies whenever a specific practice, rule or procedure has a disproportionately negative effect on members of a group defined on the basis of a forbidden ground for discrimination (race, for instance), regardless of whether a discriminatory intent is involved.

Categorical Refusal – SOS Racisme's Petition Against Ethnic Statistics – "Fiche pas mon pote"

By adopting the law on immigration, integration and asylum, the parliament modified the law of information technology and civil liberties, allowing the collection of "ethnic statistics" pursuant to "studies on the measurement of the diversity of people's origins, of discrimination and of integration." Starting in 2008, a public study on incomes, the level of schooling, etc. will ask 24,000 people to answer questions such as "What would you say is your origin?" "What would you say is your skin color?" and "Do you have a religion? If yes, what is it?" etc.

It is urgent to take action against this abandonment of the founding principles of our Republic. Today, we are issuing an appeal:

I refuse "ethnic statistics" (...)

I refuse to be asked about the color of my skin, my origin or my religion. (...) I refuse to have my identity reduced to criteria from bygone eras, eras like the French colonial period or Vichy. (...) I refuse that the attention and investigation be focused on the victims rather than the perpetrators of discrimination. The required knowledge of the reality of discrimination should be gathered by other means, for example, through individual *in situ* investigations of racist conduct.

“There are no Sorcerer’s Apprentices at INED” Le Monde, November 15, 2007

By François Héran, Director of INED

Our mission is to produce knowledge, of which to date there is precious little. People claim the relevance of *testing*, that is, specific *in situ* investigations into discriminatory practices. No one disputes the usefulness of this type of investigation on a local scale. But as they deal with fictional cases, they produce at best significant results where we lack representative findings drawn from real life. These specific investigations don’t make nationwide investigations superfluous any more than clinical trials take the place of nationwide surveys on health. . . There are two ways to defend the Republican model. The first is to restrict oneself to an ideal by refusing to measure what separates it from the reality. The second respects the principle of equality, but enhances it by emancipation through knowledge. Lucidity is better than blindness. The INSEE and the INED experience this every day through the feedback their publications receive: French society has a profound need for self-knowledge.

“A Republican Pledge Against Discrimination,” Libération, February 1, 2007

To assess the extent of discrimination based on origin and to measure the progress made in this field, we need to have statistical data. (...) From firms and national surveys, we have information such as nationality or country of birth of the respondents (sometimes, of their parents). First names are also available and they are sufficiently correlated with ethnic origin. It is therefore entirely possible in our current situation to measure discriminatory phenomena (...) Ethnic statistics are not only unnecessary; they are dangerous. Far from documenting diversity, they would (...) oversimplify it. They would invent groups that do not exist, create divisions where there is proximity, erect boundaries where there is continuity. Ethnic statistics would (...) fuel intercommunity conflicts.

“Statistics Against Discrimination,” Le Monde, March 12, 2007

We certainly do not want to insist that ethnic or racial statistics should become commonplace, or be included in the national census; we do believe, however, that in order to enhance our understanding of discrimination no research tool (...) should be prohibited on the ground that it would conflict with the (...) French republican model of integration. The prevalence of discrimination indeed demonstrates that this model has not fulfilled its promises. (...) How can it be decreed that it is “dangerous” to know who is affected by discrimination? Today, “ethnic statistics” are not a threat to social cohesion -- discrimination is.

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