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Equality Bodies and Roma Rights Through the Lens of Critical Race Theory

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Abstract

Roma are faced with various levels of marginalization, discrimination, and even hostility throughout Europe. This poses a challenge at all levels of governance and is being remedied through a patchwork of law and policy measures facilitated – among others – by national equality bodies. However, the Roma-related efforts of equality bodies are rather uneven. Throughout their work, equality bodies interpret the law as it applies to the Roma, defining and clarifying grounds for discrimination such as ‘race’. In this context, this article seeks to investigate how equality bodies in a selected number of European states tackle the racialization of and racial discrimination against Roma. From a Critical Race Theory approach, the analysis highlights uneasiness towards discussing race in the context of discrimination faced by Roma. While some equality bodies show discomfort with using race and instead prefer ethnicity or other grounds, others are prevented by national legislation from using race altogether, attesting to a broader context of European colour-blindness. Critical Race Theory provides a lens through which such phenomena become visible. Even if there are no apparent consequences of grounding interpretation in ethnicity and not in race, the language used does perpetuate a feeling of discomfort and the avoidance of an important concern.

Keywords: antidiscrimination law; Critical Race Theory; Roma; Equality Bodies; Europe; race

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Introduction

Similarly to courts, equality bodies (EBs) participate actively in achieving justice through various instruments – monitoring and investigating human rights violations; participating in pending legal cases as *amicus curiae*; litigating; raising awareness of human rights abuses; carrying out research, and giving decisions on discrimination, amongst others. As a natural consequence of their work, EBs not only engage with antidiscrimination legislation, but promote a particular understanding of it as well as its terminology. Equality bodies indeed differ vastly in their mandates, with some having more prominent roles and being more outspoken than others. Limits imposed by the legal frameworks they operate in further differentiate between equality bodies with broad mandates and those which are more specialized on specific issues or grounds for discrimination.

One of the discrimination grounds with which most equality bodies in European countries operate with – either expressly or indirectly – is that of race. As the ground with the fewest probable exceptions – and arguably the most protected (Howard, 2006) – and which presents probably the most egregious and inexcusable of discrimination types, race nevertheless provokes quite a controversy (Witting, 2020; Diallo, 2023) not only in societal debates, but in its application and operationalization as a legal category. The latter point is particularly true for continental Europe, where the double legacy of the Holocaust and colonialism have made race a rather thorny concept that is difficult to accept in many national legal frameworks.

Taking this into account, it becomes apparent that most European equality bodies that deal with issues of race and Roma might be confronted with integrating discrimination against the latter under race or other grounds, such as ethnicity, which is arguably the most popular ‘substitute’ for race, as we shall later see in this paper. However, EBs operate within frameworks that either sometimes do not accept race as a valid legal category or, when antidiscrimination legislation does, race is either avoided, used together with ethnicity (or other similar grounds) or, in very few cases, is used as a standalone legal category. Unfortunately, as we shall see at a later point in this article, in most of these cases, race is an uncomfortable notion and this can be seen from reports, case law, and antidiscrimination legislation, as well as legislative proposals and debates.

This piece also aims to further the work of previous studies and contributions (Grigolo, Hermanin, & Möschel, 2011; Möschel, 2011; Chang & Rucker-Chang, 2020) in the sense that it tries to highlight the need for a serious consideration of discrimination on the basis of race in terms similar to those promoted by Critical Race Theory (CRT) scholars. More specifically, given the prevalence of colour-blindness (Gotanda, 1991) in continental Europe, this contribution seeks to shed a spotlight on the ways in which European equality bodies have tackled racial discrimination (in particular, in the case of Roma) and whether their approaches indicate (or not) the same hesitance towards discussing race.

There are a few reasons why I consider that a race-conscious approach similar to the one advocated for by CRT scholars is needed in continental Europe. Much like in the United

States, maintaining effective rights for marginalized and racialized communities in Europe is a challenge. Moreover, there is no guarantee that these previously-secured formal rights will remain or that they are effective. A vigilant eye is needed to spot possible rollbacks or a corrosion of rights. I believe that one way of doing that is by taking inspiration from the more mature and extensive experience of CRT literature.

A race-focused perspective is also useful in revealing a less visible and more diffuse form of racism that permeates entire systems. This piece also starts from CRT's conceptualization of racism as endemic, permanent (Bell D. , 1993), and as representing the norm, not as episodic, temporary, and deviant. From this perspective, it becomes essential to look at how institutions (such as equality bodies) which are otherwise tasked with assessing and combatting discrimination on the basis of race, can themselves fall prey to the same fallacies surrounding racial discrimination as the societies they are inextricably linked to.

When it comes to continental Europe, I see a particular need for an approach such as that advocated for by CRT scholars because of a broad uneasiness with the concept of race itself. Rather than embracing its validity and usefulness as a tool for examining discrimination and access to rights, amongst others, some European legal systems reject the term altogether and omit it from their antidiscrimination legislation. Other systems fall into the fallacy that giving validity to race as a social construct and tool for analysis would somehow validate biological racism. This fear is already clear from the preamble of the Racial Equality Directive (RED) which heavily inspired European antidiscrimination legislation and which expressly tries to dispel the notion that using the term 'racial origin' in any way validates racial theories on human beings (Council Directive 2000/43/EC, para. 6).

Importantly, I am aware that this contribution might also raise concerns as to the introduction of CRT concepts or perspectives into a European context as yet another 'trojan horse' of American imperialism as other authors have raised this issue (Bourdieu & Wacquant, 1999). Without ignoring the obvious perils of universalizing one country's experience and histories over others, the aim of this piece is rather an exercise in mapping out the ways in which European equality bodies might disregard the otherwise important legal tool that is race. Thus, a race-conscious lens that is perceptive to colour-blind approaches such as that proposed by CRT literature can be (and has been) applied to non-US scenarios (Douzinas & Gearey, 2005) in useful ways. In any case, European specificities are taken into consideration, yet at the same time it is imperative not to essentialize European attitudes towards race as immutable. Instead, while some of the hesitation that exists in continental Europe regarding this concept can be explained through historical context or linguistic predilections, I argue that current ways of relating (or not) to race should not be viewed through a deterministic lens, but as fluctuating.

Moreover, this paper consciously focuses on terminology and discourse analysis, as speech – particularly discursive efforts coming from legal actors such as the equality bodies under scrutiny here – can act in a disciplining fashion, creating or reinforcing hierarchies. In other words, I understand legal discourse as the ultimate legitimizer of all performative

utterances (Bourdieu, 1991). Under this approach, inspired by Speech Act Theory (Austin, 1962; Searle, 1971) and used extensively in CRT literature (Olmsted, 1998; Muñiz, 2023; Williams, 1991), the choice of language for equality bodies is neither neutral, since it is inextricably influenced by local histories of race and power, nor is it without effect, since it enforces a particular understanding of reality.

Race or ethnicity?

Before moving on to subsequent sections of this article, which discuss race in European antidiscrimination law and the practice of equality bodies, respectively, it is important to mention why I believe race is a useful tool to use as a legal category when it comes to tracing discrimination against Roma in Europe. It should be borne in mind that race is not always suppressed in a systematic or organized fashion but, as Mathias Möschel mentions, it is selectively silenced (Möschel, 2011). One of the most widespread practices of silencing of race is realized through its replacement with ethnicity or variations thereof.

Notwithstanding the various societal sensitivities in Europe and the fact that ethnicity can also be a useful legal category, there are a few arguments why it might not be the most appropriate when it comes to discrimination against Roma. Firstly, ethnicity has been described as a cushier (Möschel, 2014) or more benign (Goldberg, 1993) term that does not capture the same elements as race, but is instead meant to avoid the supposedly more rigid and discredited scientific tones of the latter (Gunew, 1997). Ethnicity has been presented an alternative that seems to allow for more choice of self-identification rather than the exonymic logical consequences of race (Gunew, 1997), which has been seen as reducing everything down to physical appearance and other visible differences. Additionally, ethnicity is more closely associated with discourses on culture, while race is linked more with descent (Goldberg, 1993).

However, much of the backlash against race occurred due to the experience of the Holocaust and its subsequent banishment following the Second World War has led to its replacement with ethnicity. Racial groups became ‘cultural’ or ‘ethnic’, especially in Western Europe (Lentin, 2008). Switching the term to ethnicity through this language of self-identification and cultural choice can nonetheless have some perverse repercussions, such as considering otherwise imposed racialized identities as the result of a choice made by the racialized groups (Lentin, 2008; Bell M., 2009).¹

Unlike other groups that are also categorized as ethnicities, Roma are arguably a visible² group in most European societies and, as such, might not be as able to ‘pass’ as the white majority. Beyond this, Roma also tend to be perceived through a ‘cultural lens’, whereby their behaviour is seen as inextricably determined by their culture, as types of ‘cultural robots’, unable to resist the imperatives of tradition (Phillips, 2007). Ascribing immutable characteristics in the same logic and pattern as physical features in the case of a biological understanding of race is one perception which can be better combatted if the latter concept is used, rather than the more euphemistic ‘ethnicity’. Brushing the racial aspects aside only robs Roma of what Du Bois has referred to as the “badge of race” (Du Bois, 1940; Lentin, 2008): the

shared common memory and experience of marginalization, segregation, slavery (in Romania in particular), as well as forced sterilization and physical genocide in the case of the European Roma. These particular patterns of discrimination are all hallmarks of racial thought.

The already-contested (Romsics, 2018) memory of the Roma Holocaust would also be better served through the more subversive concept of race which confronts European narratives more strongly than ethnicity does, especially in the case of the colour-blind Central & Eastern European and Balkan countries. Integrating Roma discrimination under the categories of ethnicity, nationality, or national/ethnic minority, amongst others, avoids remembering the European experiences of racial theories as well as discussing those in the continuum of European history, since many of the elements that lead to racial theories being accepted and the Holocaust being perpetrated are still present in European societies today.

Race in European Antidiscrimination Law

Due to the variety of mandates that EBs have, as well as the limitations that national antidiscrimination law places on them, it might seem difficult to establish a common point of comparison as to how they treat discrimination on the basis of race. While a few EBs are aware of the differences between race and other similar grounds, others might have a less clearly established terminology and understanding thereof, or simply be barred by the applicable legislation from using certain grounds altogether, at least formally. On another level, a further distinction operates, namely between EBs with mostly promotion-type functions and EBs that also have judicial or semi-judicial functions. While the former's mandates focus more on promoting human rights, facilitating access to courts or creating reports on discrimination issues, among other tasks, the latter also issue binding or non-binding decisions in individual cases.

There are, of course, other categorizations of equality bodies (Rorive, 2009), yet this distinction between bodies that can decide on individual cases and those that cannot is probably more relevant for the aims of this paper, since I find it to be generally easier to ascertain a body's perception of racial discrimination from its jurisprudence and consistent usage or underusage of race or similar grounds. Arguably, EBs with judicial or semi-judicial functions can more readily engage in norm construction in a way that leads to direct results in individual cases. This does not mean, however, that promotion-type EBs are ineffective, since in many cases their ability to engage with the legislative or judicial branches via opinions or as *amicus curiae* can be just as relevant and revealing of their position on racial discrimination, such as in the case of the French EB, the Defender of Rights (Latraverse, 2022).

Regarding the EBs this paper will focus on, I have chosen to restrict the scope to those EBs that are part of the European Network of Equality Bodies (Equinet)³ and who have racial discrimination or similar grounds under their mandates. This includes bodies from a total of 37 countries⁴ and ensures a fairly extensive field of comparison which would also allow for a more comprehensive argument on how EBs treat racial discrimination and if or how they integrate the Roma under this ground.

In the end, at least functionally, almost all national antidiscrimination frameworks in European countries contain protections against elements of racial discrimination, irrespective of whether the word ‘race’ itself is used expressly as a ground for discrimination or as an understanding of a similar ground instead (Hiltunen, 2022)⁵. Thus, the issue that I wish to highlight has less to do with identifying legal *lacunae* and more with the meaning that EBs ascribe to race or other similar grounds.

From the total of 37 countries within the scope of this paper, 31 have antidiscrimination legislation which mention race expressly under various forms (‘racial discrimination’, ‘race’, ‘racial affiliation’ or others). Out of these, Belgium (Drooghenbroeck, 2022; Unia, 2020)⁶ and Luxembourg (Hoffmann, 2022) have chosen to highlight the social construct nature of race by adding ‘alleged’ or ‘alleged or supposed’ in front of it. In the case of Belgium, this becomes clear from the legislative discussions surrounding the amendment of the 1981 Anti-Racism Law, where Belgian senators wanted to emphasize this aspect:

As the use of the term race may in fact give the impression that the legislature is legitimizing the existence of different races, when in fact it is a concept that does not correspond to any scientific reality, it is preferable to accompany the term race with the adjective “alleged”, in order to make it clear that this distinction exists only in the mind of the racist and that it does not correspond to reality (translation my own) (Belgian Senate, 2001).

As we will see, even with countries which do not expressly make this caveat in their antidiscrimination legislation, there still is a certain degree of uneasiness with the concept of race, and in many cases countries try to stress that they do not believe in a biological notion of race.

Besides race, ethnicity is also quite common in most of these countries, with 28 expressly referring to it;⁷ 14 also use colour or skin colour;⁸ and 13 protect nationality, national affiliation, or origin⁹. A few countries also expressly mention descent or ancestry (3),¹⁰ belonging to a national minority (2),¹¹ genetic heritage (1),¹² and homeland (1)¹³ as protected grounds.

On the other hand, a few countries (namely Austria, Finland, France, Norway, and Sweden) do not expressly protect race under their antidiscrimination legislation. For instance, Austria’s law implementing the RED, the 2004 Federal Equal Treatment Act, eliminated race as a protected ground, replacing it with ethnic belonging (Möschel, 2011) as a means to fight racial thought by eliminating the word ‘race’ itself from legislation. Discussions in the Austrian lower house during the adoption process reveal that ethnic belonging was chosen instead due to the term ‘race’ being “frowned upon in German-language usage”¹⁴ (Austrian National Council, 2004).

Related efforts in Sweden, Norway, Finland, and France have yielded similar effects. In Sweden, race was removed in 2009 (Lappalainen, 2022), a move which was criticized for preferring a symbolic repudiation of race over legal clarity and more substantive changes (Lappalainen, 2022). In the 2009 reform’s preparatory work, the Swedish Government notes that there is “no scientific basis for dividing people into different races”¹⁵ and proposed a careful

excision of race from future antidiscrimination law, replacing it with ‘ethnic belonging’, but not from previous legislation (Swedish Government, 2008). Norway’s 2017 General Equality and Anti-Discrimination Act avoids using race since it starts with the presumption that eliminating the idea of racial categorization of humans is the first step towards combatting racism (Løvdal, 2022). Similarly to Sweden, discussions and reports from earlier Norwegian efforts to build antidiscrimination law also reveal a consistent understanding of race as an undesirable term, with “no scientific basis for dividing humanity into different ‘races’” and as “based on biological, hereditary characteristics ... theories that have no sound scientific basis or content”¹⁶ (Norwegian Government, 2002). On the other hand, Finnish antidiscrimination law never operated with race, but with ethnic or national origin until 2014, when these terms were replaced simply with ‘origin’ as a way of including racial and ethnic origin, as well as skin colour (Hiltunen, 2022). Thus, with the exception of Finland and – as we shall see – France, all the other countries mentioned here prefer to use a variation of ethnicity.

In France, both race and ethnic origin (the latter being seen a euphemism for race) are considered prohibited under ordinary legislation; instead, French antidiscrimination law operates with the term ‘nationality of origin’ (Latraverse, 2022). Although France stands out from the previously-mentioned countries as particularly reluctant to give validity to the differentiation and categorization of its citizenry, especially on the basis of race or ethnicity, it too has followed a similar pattern of removing race due to the perception that the word itself perpetuates either an outdated biological notion or a dangerous social construct. When it came to integrating the RED into its national legislation, discussions in the French legislative revolved around these two understandings of race. Among others, one senator even pointed out to the “pernicious and devastating” uses that a social construct notion of “self-reported race” has in the United States and how the only proper usage of race should be when referring to animals¹⁷ (French Senate, 2001).

Attempts to remove the word race have occurred in Germany as well (Möschel, 2011), where the concept of *Rasse* is a particularly sensitive topic. Besides proposals to remove race from the constitution of Berlin included in the local Senate’s policy guidelines for 2021-2026¹⁸ (Berlin Senate, 2023) and successful excisions of race from the state constitutions of Brandenburg in 2013 (Metzner, 2013) and Saxony-Anhalt in 2020 (Henkenberens, 2020), as well as further attempts and proposals in Lower Saxony in 2014 (Hanschke, 2020), Rhineland-Palatinate in 2020 (Landtag Rheinland-Pfalz, 2020), and Bremen in 2020 (Henkenberens, 2020), there are also attempts at a national level to remove the word from the German Constitution (Witting, 2020). In most of the proposals and successful amendments, race is replaced usually with ‘racial grounds’ while the term ‘racism’, like in the case of France (Defender of Rights, 2013), can still be used to refer to the phenomenon itself while avoiding the legal category of race. While the death of George Floyd in the USA and debates surrounding it likely contributed to this wave in 2020, it is mostly an internal phenomenon marked by a post-racial paradigm that excludes *Rasse* as an antiquated legal category at best and dangerous at worst (Barskanmaz, 2018; 2019).

All in all, this mapping of how race is used (or avoided) in European antidiscrimination legislation paints a rather uneven picture, with most countries expressly consecrating this ground for discrimination in their legislation, while a few have chosen different terminology mostly due to public sensitivity towards the word 'race' or to a social perception of it as outdated or reinforcing a racist biological notion. Understandably, in some countries, race is a controversial concept and some have opted to remove it from their legislation, while some have attempted to do so with mixed results. What is clear is that there are movements within certain European societies which object to having this concept operationalized, mostly in Western and Northern Europe, while in the majority of countries, there is little to no indication from antidiscrimination law itself (or its working documents) as to whether there is a particular understanding of race. The question then remains as to how equality bodies operate in such a varied context.

How Equality Bodies in Europe Treat Race and the Racial Discrimination of Roma

Despite their varied mandates and tools at their disposal, European equality bodies have managed to address a variety of issues related to discrimination based on race. In some cases, EBs do not distinguish between 'race' and 'ethnicity' or other similar grounds, while in others, a distinction operates in practice, depending mostly on the identity of the plaintiffs or of the persons concerned.

Both the German Federal Anti-discrimination Agency and the German Institute for Human Rights can still rely on 'race' but tend not to use this term directly, more often utilizing 'racial discrimination'. The former institution actually prefers to use the category 'ethnicity' to refer to the inquiries it makes in its annual reports. In its report for 2020, for example, it mentions that 33% of its inquiries revolved around ethnicity, the second-highest number after disability cases (Federal Anti-discrimination Agency, 2020). As for the German Institute for Human Rights, while it is not an equality body that would fall under the scope set up by this paper, it is nonetheless an important voice on the matter of race and its application as a legal category, and it is frequently cited by the Anti-discrimination Agency. Importantly, the Institute is a strong voice against the presence of the term 'race' in the German Constitution. In one policy paper explaining its stance, it sided with replacing 'race' with 'racial discrimination', as to avoid endorsing a biologizing notion of race and racial thought (Cremer, 2010), similarly to the previously mentioned state- and national-level attempts to remove race from various parts of legislation.¹⁹ The argument here is similar to what we have seen in antidiscrimination law from Belgium and Luxembourg, so we see attempts to distinguish between any indication of the acceptance of human races as biological reality and admitting that racism exists as a social phenomenon. While this was achieved in Belgium and Luxembourg through placing "alleged" in front of race, the German Institute for Human Rights proposes replacing 'race' with racial (or racist) discrimination. While not a full removal of race, the proposal does highlight uneasiness with the term. On the other hand, replacing 'race' with 'ethnicity' or 'ethnic origin'

was also perceived to be insufficient as it could also be construed as endorsing the view that groups can be objectively categorized based on perceived characteristics (Cremer, 2010).

Contrary to the German bodies, in the case of the French equality body, the Defender of Rights, neither race nor ethnicity can be relied on directly as legal categories anymore, but that does not necessarily impede its work or its stance. When asked for an opinion on a 2013 bill aimed at removing race from French legislation (French National Assembly, 2013), it pointed to some of the difficulties such a measure would encounter (Defender of Rights, 2013). Starting with the issue of legal certainty and clarity, the Defender of Rights saw the bill in the context of France's regional and international human rights obligations as part of the various treaties that France is a part of and which list race as a protected ground. In a world where race is used in treaties that French judges have to handle, the equality body saw the bill as a possibly "isolated approach" (Defender of Rights, 2013) by France which could pose problems in antidiscrimination efforts. On the other hand, the Defender did favour replacing the word 'race' with 'racist ideologies' so that expressions like 'discrimination based on race' and 'racial hatred' would become 'discrimination based on racist ideologies' and 'hatred based on racist ideologies' (Defender of Rights, 2013), a move similar to the German Institute for Human Rights' proposal and following the same logic as antidiscrimination law in Belgium and Luxembourg. It considered this move to be the "least destabilizing for the legal order" (Defender of Rights, 2013). With race removed from ordinary French law, the French legislator also tried to remove the term from the Constitution in 2018 (Saget, 2018), thus aiming to complete its formal expulsion from French legislation. Although the amendment received a positive vote, the constitutional reform project was ultimately abandoned (de Villaines, 2018).

In practice, the Defender of Rights uses the term 'origin' to refer to cases involving Roma people and even considered the refusal of school enrolment of Roma children living in camps or hotels by mayors as an emblematic case for this type of discrimination (Defender of Rights, 2020). Moreover, in the context of fighting xenophobia and racism, the Defender of Rights posits that discrimination on the basis of origin can also be understood as actual or assumed membership or non-membership of an ethnic group, nation, or *alleged race*, or physical appearance (Defender of Rights, 2020), among others. Recently, the Defender has been particularly vocal on the treatment and access to education of Roma children living in camps and *bidonvilles* (informal settlements) and considered many of the cases of local authorities' impediments to their enjoyment of certain rights to be discriminatory on the basis of origin (Defender of Rights, 2021).

Thus, at least from the data presented here, although the French equality body is prevented from using race or ethnicity to refer to Roma people, it still manages to engage with cases of systemic racism, which it does recognize expressly as a broader social phenomenon which needs addressing (Defender of Rights, 2020). Moreover, despite the selective silencing of race, the French EB does understand discrimination on the basis of origin as "racism in action" (Defender of Rights, 2020).

In another category of countries, namely those where antidiscrimination legislation operates with race and ethnicity (or ethnic origin) as valid categories, the issue becomes one of distinguishing between the two grounds, if indeed the respective EBs see this as a topic to begin with. Some do not make clear distinctions between race and ethnicity and use them interchangeably. This is mostly the case with EBs in Albania, Bulgaria, Croatia, Czechia, Greece, North Macedonia, Poland, Portugal, Slovakia, and Slovenia.

Although very few in number, some equality bodies expressly categorize Roma cases under the ground of race, albeit not consistently. Interestingly, in Albania, the Commissioner for the Protection from Discrimination (an equality body with quasi-judicial powers) has noted that most of the cases of discrimination are on race and that most of the applicants in these cases are Roma or Egyptian (Baraku, 2022). Importantly, this equality body catalogues these cases under race by itself, even in those cases it does not start *ex officio* (Commissioner for the Protection from Discrimination, 2021). Conversely, the same EB appears to understand ethnicity as falling under the definition of racial discrimination used by the European Commission against Racism and Intolerance (ECRI) in its Recommendation No. 7 (Council of Europe, 2003). In the case of the Greek Ombudsman, while it avoids defining the grounds for discrimination, it reports separately on cases of national or ethnic origin on the one hand, and race or colour on the other (The Greek Ombudsman, 2021). Nevertheless, it includes Roma, together with Asians and Black people as victims of discrimination based on race (Farkas, 2017). One final example is that of Moldova's Council on Preventing and Eliminating Discrimination and Ensuring Equality which, as at the time of writing, has decided on only six cases involving race, while 43 were categorized under ethnicity. Although Roma figure under ethnicity as well, two of the cases on race involved Roma plaintiffs²⁰ and another two had plaintiffs of African descent.²¹ The Council found instances of discrimination in one form or another in all four cases.

In the case of other equality bodies, race and ethnicity are used together and no differentiation is being made between them. In Croatia, the Ombudswoman of the Republic of Croatia makes no distinction between race, ethnicity, skin colour, and national origin or descent, although it mentions that most cases involve Roma and Serbs (Ombudswoman of Croatia, 2018). In this sense, much like in other countries from Central and Eastern Europe, the distinction between Roma and other minorities is blurred and the racial aspect that defines much of the discrimination felt by Roma is brushed aside. A similar approach can be seen in North Macedonia, where the Commission for Prevention and Protection against Discrimination, the national equality body, categorizes cases involving Roma plaintiffs under the grounds of race, skin colour, social background, ethnicity, and affiliation to a marginalized group (Commission for Prevention and Protection against Discrimination, 2022).²²

Another category of EBs, while using or having legislation allowing for the usage of both race and ethnicity, has opted for the latter. Thus, the Czech Public Defender of Rights, while reporting on race and ethnicity together (Public Defender of Rights, 2021), has a preference for using 'ethnicity' (Farkas, 2017) and uses this term consistently to refer to Roma. The approach

of Poland's equality body, the Commissioner for Human Rights, follows a similar pattern, as it usually considers the Roma as an ethnic minority and does not apply the race ground (The Commissioner for Human Rights, 2021). The same can be said of the Slovak National Centre for Human Rights, which did engage in an effort to define race and ethnicity in an expert opinion (Slovak National Centre for Human Rights, 2019), and while it adopted a nuanced take on both terms and acknowledged them as complex and intertwined social constructs, in the end it agreed with identifying the Roma as an example of an ethnic minority without going into more detail. Slovenia's Advocate of the Principle of Equality uses the two interchangeably when referring to cases involving Roma (Advocate of the Principle of Equality, 2021).

Finally, in a handful of countries, equality bodies have made a rather clear distinction between cases on ethnicity or other similar grounds and those on race. In Hungary, Serbia, and Romania, the respective equality bodies have built up a case law that consistently categorizes discrimination against Roma as based on ethnicity, ethnic origin, or on belonging to a national minority.

In Hungary, the now-defunct Equal Treatment Authority (ETA) has been split between using skin colour or belonging to a national minority as grounds for discrimination cases involving Roma (Kádár, 2022). Nevertheless, in the eight years leading up to its dissolution in 2021, it catalogued these cases solely under belonging to a national minority. The successor to the ETA, the Office of the Commissioner for Fundamental Rights, has continued in a similar vein, referring to Roma as a national minority²³ and avoiding using the category of race. Interestingly, however, the Commissioner for Fundamental Rights does use instead skin colour (*bőrszín* or *színes bőr*) as an equivalent legal category in a few cases involving American citizens of colour (Commissioner for Fundamental Rights, 2000) or people of African descent (Parliamentary Commissioner for Citizens' Rights, 2002) and has even expressly mentioned in one report that "[I]n our country there is one ethnic minority, many of whose members are different in skin color from the majority population: the Gypsies"²⁴ (Commissioner for Fundamental Rights, 2007). Notwithstanding the unfortunate use of the term 'Gypsies' (*cigányok*), seeing Roma as a visible minority is a progressive approach in the region, although both Hungarian equality bodies more often than not have tended to place Roma under the 'national minority' ground, without any other qualification like the one just mentioned. Thus, in most cases, the visibility aspect is probably lost. Using skin colour instead of race (and mostly in the case of non-Hungarian people of colour or of African descent) further denotes hesitancy to using this latter legal category, instead preferring the former as the less ideologically uncomfortable part of race and brushing aside other aspects of racial discrimination which go beyond physical appearance.

The situation is quite similar with the Serbian Commissioner for the Protection of Equality, which, like its Hungarian counterpart, is a semi-judicial body capable of issuing binding decisions on individual cases of discrimination. However, unlike the Equal Treatment Authority, which makes a functional distinction between race and other grounds it uses for Roma cases, the Commissioner for the Protection of Equality expressly associated race

with cases of discrimination against African Americans (Ivana Krstic, 2022) as an example, while national affiliation and ethnic origin are consistently used for cases of discrimination against Roma people (Commissioner for Protection of Equality, 2022). As a matter of fact, almost all cases involving Roma are catalogued under national affiliation or ethnic origin and, while singled out as the most vulnerable of minorities (Commissioner for Protection of Equality, 2021), they are still considered in the same category as other groups such as Romanians, Hungarians, Croats and others.

On the other hand, in one of the few cases on race, the Commissioner dealt with an assault on football players of African origin in the city of Kruševac in 2019 (Commissioner for Protection of Equality, 2020). Coupled with the small number of cases it catalogued under race, it can be seen as a reluctance to use race as a valid legal category. Moreover, the association with African Americans (or people of African descent), a population which is generally perceived as not autochthonous to Serbia, further relegates race to a distant context that is foreign to the local one. Indeed, even the fact that the Commissioner used the term African American (instead of people of colour or similar terms to allow for their inclusion into the Serbian context) seems to point to an understanding that race is a category mostly fit for a Western and/or American legal framework, where it is used more often.

Lastly, Romania's National Council for Combatting Discrimination (NCCD) is probably the best example of an equality body making a clear functional distinction between race and ethnicity, and it also one of the few examples where not only the explanation for this choice can be found in its case law, but also some very strong hints as to its logic. Much like the Hungarian and Serbian EBs, the NCCD also has a strong preference for ethnicity over race which is most clearly exemplified by its case law. From the published case law, it decided on 807 cases on 'ethnicity' from 2007 up until the time of writing, while race has been used in only 29 cases during the same time period.²⁵ However, the word 'race' (and variations thereof: 'racism'; 'remarks referring to race'; 'incitation to racial hatred'; 'racist environment') can be found in only 20 of the cases listed under discrimination on the basis of race. In most cases, the NCCD is the one framing the cases under race, notwithstanding the few examples where the applicants themselves use the term. Moreover, even though in some of these cases race is accompanied by xenophobia or even ethnicity, it is clear that the equality body sees these handful of cases as those where the racial element is most pronounced.

When it comes to the origin of the applicants, it becomes clear that the NCCD makes a functional difference regarding who can be considered as being discriminated because of their race and who cannot. From the cases where the applicant's origin or physical or other traits are expressly mentioned, a disproportionate amount (19) concern people of colour, people of African descent or "mulattos" (in Romanian, "*mulatru*"²⁶), as the NCCD cases referred to them. Three further cases concerned persons of Iraqi, Syrian, and Jewish origin (one each) and finally, four involved Roma applicants. Ethnicity, on the other hand, is consistently used for Romania's traditional minorities, such as the Hungarians and also the Roma. Importantly, the NCCD did not find any instances of discrimination in the cases involving Roma and race. This,

on its own might not indicate a bias, as many of the race cases involving the other applicants (12) were also dismissed on various grounds.

However, when looking at the content of the cases on race, it becomes apparent that the NCCD associates this ground undeniably more with people of colour or of African descent (or other groups generally not considered to be traditional to the Romanian context) than with the Roma. A sizeable amount of these cases involves racial slurs, usually during sports matches (such as calling someone a “monkey” or making monkey sounds).²⁷ In one case involving a Romanian mayor using the racist slur “bar of blacks”²⁸ to refer to a rival politician who was not a person of colour, the NCCD mentioned that it “cannot retain a racist connotation or an incitement to hatred such as in a society like the United States of America or the United Kingdom”.²⁹ The reasoning in this latter case is quite clear: the Romanian equality body does not see race as a category as ‘valid’ there as in other societies (such as the USA or the UK) where racialization clearly exists, unlike in Romania.

Despite clearly using race as a legal category, the NCCD tries to externalize racial elements by either only choosing cases involving groups not generally considered to be autochthonous to Romania (similar to the Serbian EB), thus decoupling Romanian society from this “irritant” legal category, or by shutting down cases involving autochthonous groups that are racialized (such as the Roma). To give an example of the latter, in one of the four cases of discrimination on the basis of race involving Roma,³⁰ a local newspaper printed a story where several racial slurs were used to describe Roma, such as deploring the “gypsyization of Romania”,³¹ describing how some politicians have been “gypsysized” and thus are “stupid, uneducated, aggressive, vulgar”³². As for the Roma themselves, they were described as the “blackish ethnicity/ethnic group” (in Romanian “*etnia tuciurie*”).³³ Normally, such a case would prompt a clear finding of discrimination and a heavy fine for the newspaper’s publishers, and yet the NCCD only found that the authors were merely deploring the state of Romanian society and were simply concerned for its wellbeing.

Conclusion

What becomes apparent from the previous mapping of race is that among the equality bodies discussed, there is no clear uniform understanding of the concept, nor of the relationship between it and other grounds such as ethnicity, skin colour, or origin etc. The uncertainty present in antidiscrimination legislation is mirrored in the practice of equality bodies. Of course, particularly in the case of EBs with decisional powers and case law, it is important to bear in mind that in an unclear number of cases, the applicants themselves might have described the discrimination they have endured as being on the basis of race. This would mean that to a slight extent, the EB that would accept such a case (and not change the ground itself) would not make a very strong statement as to the preference it had for that term. In other words, even in the cases lodged by applicants explicitly under race, the fact the EB retained this ground would not necessarily indicate a conscious choice for race over other grounds. However, even in these cases, the said equality body still operates within a terminological

context that is biased towards certain concepts and is either irritated by or indifferent to others. Choosing to preserve and subsequently include in reports a case under race (or under ethnicity), among others, still signals that one term is given more legal validity and operability than the other.

Equality bodies in some Western European countries, notably France and Germany, tend to be sceptical to using race even though they are not necessarily indifferent to racism as a societal phenomenon that causes harm. France has its own history with rejecting divisions within its citizenry, refusing to ratify minority rights treaties (Decision 99-412 DC, 1999)³⁴ and considering itself as one indivisible people “without distinction of origin, race or religion” (Decision 91-290 DC, 1991, para. 13). Also, due to its experience in the Second World War, race and other categories are viewed with suspicion when taking censuses or when using it more broadly as a legal category. German society is also firmly apprehensive towards race due to its colonial and Nazi past.

On the other hand, in some countries (mostly in Central and Eastern Europe), there appears to be less interest in distinguishing between race and ethnicity to the extent that they are used together and thus confusion or equation between the two operates. Presumably, this can be explained by the perception that race is a rather sterile legalistic term that does not really convey social realities, but was merely adopted as part of many of these countries’ road towards EU integration, one of the requirements of which is adopting the European *acquis communautaire*. This is also clear through the lack of any meaningful debates within most national legislative bodies when antidiscrimination frameworks were adopted or amended. It is most likely not an accident that many of these countries have very extensive lists of grounds for discrimination, thereby trying to cover possible gaps in their new antidiscrimination legislation. Bar a few exceptions, this latter category of countries has created equality bodies that tend to either dismiss or externalize race and the phenomenon of racialization, seeing it as incompatible with the perception of their societies as non-colonial and non-colonizing. Thus, Roma are more often than not incorporated into other legal categories, such as ethnicity, nationality, or national/ethnic minority, together with other groups which have an easier time passing as members of the majority. Most perceived racialization is lost in this colour-blind approach.

At the same time, effective protection of the aspects normally covered by race is ultimately most essential in the work of any body, institution, or authority dealing with discrimination. Pragmatic approaches are welcome and this paper does not suggest a forced external identification of Roma under racial terms, merely advancing that in order to have accurate solutions to the already existing phenomenon of racialization of Roma in Europe, we need to be aware of the existence of institutional racism even under less overt or extreme forms. This is why I think the paradigm that CRT represents would prove valuable, as it focuses on forms of ‘quiet’ racism (such as institutional silence on racial issues or avoidance of the term ‘race’), all of which can signal systemic forms of racism and colour-blindness, as well as conscious or unconscious discursive efforts that ultimately fail in tackling them

Endnotes

- 1 Mark Bell calls ‘ethnicity’ in this sense as a “politically correct code word for ‘race’”.
- 2 Roma are often singled out or identified socially by outward appearance or perceived behaviour. See, for example, Csepeli & Simon (2004), Weychert (2020), and Plájás, M’charek, & van Baar (2019).
- 3 See <https://equineteurope.org/european-directory-of-equality-bodies/>.
- 4 The countries in question are: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.
- 5 In Finland, for example, the Government’s proposal on the Non-Discrimination Act considers ‘origin’ to cover race as well (Hiltunen, 2022).
- 6 According to the Racial Equality Federal Act (Drooghenbroeck, 2022). Also, the Belgian EB that has race under its mandate (Unia) mentions in its report that its competencies cover the five ‘racial criteria’: alleged race, skin colour, nationality, origin (l’ascendance), and national or ethnic origin (Unia, 2020).
- 7 All of the countries mentioned above at note 4, except for Cyprus, Malta and the Netherlands.
- 8 These are: Belgium, Croatia, Czechia, Denmark, Greece, Hungary, Ireland, Luxembourg, Moldova, Montenegro, North Macedonia, Serbia, Slovakia, and Slovenia.
- 9 These are: Bulgaria, Czechia, Hungary, Ireland, Latvia, Lithuania, Montenegro, The Netherlands, North Macedonia, Poland, Romania, Serbia, and Slovakia.
- 10 As in the case of Belgium, Greece, and Serbia.
- 11 As with Hungary and Montenegro.
- 12 Portugal is the only country that uses genetic heritage as a protected ground.
- 13 Germany also uses homeland as a protected ground.
- 14 Translation my own.
- 15 Translation my own.
- 16 Translations my own.
- 17 Debate in the French Senate regarding an amendment to the Labor Code. See in particular the reactions of Guy Fischer, member of the Groupe Communiste, Républicain, Citoyen et Écologiste (CRCE) (French Senate, 2001).
- 18 Among others, the Berlin Senate aims to work “with communities affected by racism to develop proposals for replacing the term ‘race’ from Article 10 of the Berlin Constitution and other state law provisions in favour of a wording that encompasses the scope of protection of racially motivated discrimination” (Berlin Senate, 2023).
- 19 See part 2.
- 20 Cases 187/14 and 239/15.
- 21 Cases 139/2014 and 180/14.
- 22 See cases 3 and 6 (Commission for Prevention and Protection against Discrimination, 2022).
- 23 See, for example in cases AJB-1134/2022 concerning the legality of the restriction of personal liberty in the context of criminal proceedings against a person of Roma nationality and the right of defence, AJB-18/2020 on the EMMI Special Children’s Home Centre, General School and Vocational School.
- 24 Translation my own.
- 25 The cases are those published on its website: <https://www.cncd.ro/>.
- 26 As in English, “mulatru” is considered old-fashioned and offensive, albeit still sometimes used to refer to people perceived as having “mixed” White and African heritage. In two NCCD cases (44/2014 and 634/2014), the applicants were referred to as “mulatto” and the NCCD retained the term in its description of the facts.
- 27 Such as in NCCD Decisions nos. 395/2016, 563/2019 and 93/2020.

- 28** NCCD Decision 159/2020. The expression “bar of blacks” (in Romanian, “bar de negri”) is a quite common slur in Romania and is mostly used to refer to a place of disorder and chaos. Most likely, it is a nod to segregation in the United States, where facilities and places of leisure or commerce assigned to Black people were generally in worse condition than the ones reserved for whites. Notwithstanding its point of reference, it is commonly used in Romanian society without much thought given to its probable origin.
- 29** NCCD Decision 159/2020, para. 13.
- 30** NCCD Decision 275/2010.
- 31** NCCD Decision 275/2010, para. 5.1.2.
- 32** NCCD Decision 275/2010, para. 5.1.2. Translations my own.
- 33** NCCD Decision 275/2010, para. 5.1.2.
- 34** See the Constitutional Council’s Decision 99-412 DC of June 1999, where it postulated that ratifying the European Charter for Regional or Minority Languages would require amending the Constitution. See also the State Council’s more recent Opinion on the draft constitutional law authorizing the ratification of the European Charter for Regional or Minority Languages from 2015, which also found incompatibilities between accepting the existence of minority groups and France’s Constitution (Decision 99-412 DC, 1999).

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