ETHNIC AND RACIAL STUDIES

Fighting Discrimination in Europe

The Case for a Race-Conscious Approach

Edited by
Mathias Möschel, Costanza Hermanin and
Michele Grigolo

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ROUTLEDGE

Fighting Discrimination in Europe

The member states of the EU have only very recently begun to consider race and racism in the framework of equality legislation and policies. As opposed to an established Anglo-Saxon tradition of naming races and using racial categorisation to fight racism, most continental European countries resist this approach. This book investigates the problematic reception and elaboration of race as a socio-legal category in Europe.

Fighting Discrimination in Europe takes a fresh and interdisciplinary look at the normative, theoretical and concrete problems raised by the challenge of devising and enforcing policies to combat race discrimination in Europe. It engages with the juridical and political spheres, from the international level down to concrete cases of state and city policies. As the multifaceted relationship between race, discrimination and immigration is explored, new normative positions and practical approaches are developed, and new questions raised. This collection presents important new research for academics, researchers, and advanced students of Ethnic Studies, Migration Studies, Legal Studies, Sociology, Anthropology, and Policy Studies.

This book was originally published as a special issue of *Ethnic and Racial Studies*.

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Ethnic and Racial Studies

Series editors: Martin Bulmer, *University of Surrey, UK*, and John Solomos, *City University London, UK*

The journal *Ethnic and Racial Studies* was founded in 1978 by John Stone to provide an international forum for high quality research on race, ethnicity, nationalism and ethnic conflict. At the time the study of race and ethnicity was still a relatively marginal sub-field of sociology, anthropology and political science. In the intervening period the journal has provided a space for the discussion of core theoretical issues, key developments and trends, and for the dissemination of the latest empirical research.

It is now the leading journal in its field and has helped to shape the development of scholarly research agendas. *Ethnic and Racial Studies* attracts submissions from scholars in a diverse range of countries, fields of scholarship and crosses disciplinary boundaries. It has moved from being a quarterly to being published monthly and it is now available in both printed and electronic form.

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Introduction: How does race 'count' in fighting racial and ethnic discrimination in Europe?

Costanza Hermanin, Mathias Möschel and Michele Grigolo

Race and Europe: between innovation and resistance

On 8 November 2011, the European Court of Human Rights (ECtHR) held that the practice of sterilizing Roma women without their informed consent constituted inhuman and degrading treatment as well as a violation of their private lives. At the same time, with regard to the non-discrimination claim the judges found that there was not sufficiently strong evidence to prove the applicant's submissions (ECtHR 2011). Eight days later, Italy's highest administrative court struck down the contested 'Nomad Emergency Measures' of 2008, which had included a census and hundreds of forced evictions of Roma's informal settlements, because they were not premised upon a genuine emergency connected to the extraordinary presence of Romani and Sinti people. Regarding race discrimination, also the Italian the court affirmed that:

> "It is certainly a fact of common knowledge that the vast majority of individuals present in the concerned camps concretely has a precise ethnic background, insofar as they have Roma origins. However, in the opinion of this Court, even though these elements are perhaps apt to reveal a discriminatory intent by some of the institutional subjects involved, they do not allow to conclude that the entire administrative action has been uniquely and principally finalized at establishing a racial discrimination of the Roma community…Naturally, this by no means excludes that single measures or provisions have had concrete illegitimate and discriminatory effects ... but this is not sufficient to declare that the acts are illegitimate under this profile (CDS 2011, pp. 19–20)."

These cases are only the latest demonstration of the difficulties that courts – as well as policy makers – have in recognizing, acknowledging and punishing race and ethnic discrimination in mainland Europe. Hence, this book focuses

on the role that race and ethnic origin can and should play when combating racial and ethnic discrimination in Europe by means of public policy and legislation. The question is particularly relevant in a context where ethnic diversification is increasingly common due to migratory inflows and enhanced freedom of movement within the European Union (EU), while any discourse about race in a normative, epistemological or ontological sense is to a large extent a taboo. This is precisely the case of most continental European countries, to which the contributions of this book devote their attention.

In this geographical context, until very recently, only marginal and little used criminal or labour law provisions addressing violence, insults or employment discrimination were passed at the country level, mainly within the framework of the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (Fredman 2001) or in the context of laws prohibiting the reorganization of the Nazi party or of associations inspired by Nazi or Fascist ideals.

Most of these provisions penalized only individual acts of 'violent', 'expressive' or 'overt' racial discrimination and racism, as highlighted by authors who have recently addressed continental Europe's 'race-blindness' from the point of view of explaining policy-making (Bleich 2003; Solanke 2009). These classical forms of racism generally encompass racial injuries and crimes or other acts openly motivated by racial hatred and prejudice.

Only in a very limited number of cases have instances of racial discrimination, also defined as 'access racism' (Bleich) or 'covert racism' (Solanke), been addressed by means other than criminal law. These forms of discrimination, which have the intentional objective (direct discrimination) or intentional and unintentional consequence (indirect discrimination) of establishing a difference of treatment in the enjoyment of rights or access to goods and services, are, instead, those which most commonly affect ethnic minorities or 'people of colour' in Europe.

This continental European approach has clear limits: it assumes and legally creates the idea that racism is merely the product of random intentional actions by isolated, lunatic individuals or right-wing groups. At the same time, it fails to address patterns of historical, structural, systemic, institutional and indirect racial discrimination generated by the peculiar European experiences of colonialism, (im)migration, and anti-Roma sentiment.

As opposed to the United States, where despite the 'colour-blind turn' of the federal Supreme Court (cf. below), race has at times played a role in shaping anti-discrimination measures (Lieberman 2005), continental European states started addressing these other, more nuanced patterns of racism only in 2000 with the adoption of the Racial Equality Directive (RED) (EU 2000) by the Council of the European Union. Issues related to discrimination on the ground of race and ethnic origin have been also at the core of the evolution of the text of the European Convention on Human Rights (ECHR; see Protocol 12) and the jurisprudence of the Strasbourg court (European Court of Human Rights) (ECtHR 2007).

Following the Anglo-Dutch approach to racial discrimination (Geddes and Guiraudon 2004), the RED provided the first and over-arching EU framework of protection against racial inequality in addressing forms of 'access racism' and 'covert discrimination' left unheeded by many member states. Conceptually, the RED introduced important notions such as indirect discrimination and positive action in the racial equality field as well as equality bodies with autonomous powers, and detailed provisions for individual and collectively supported judicial redress. Moreover, it granted protection against racial discrimination beyond the sole field of employment typically covered by EU equality law (Bell and Waddington 2003) to the entire sphere of access to goods and services, including all private/horizontal contractual relations (de Witte 2009) as well as relations with public administrations. In spite of wide exceptions regarding immigration law, the RED was initially conceived to apply not only to EU citizens, but also to third country nationals among whom are most of the 'new ethno-racial minorities' who are not citizens of any member state.

Despite, and arguably also because of, its innovative character, so far there is little sign that the RED has taken root in mainland Europe. A sign of this is the single case by the Court of Justice of the European Union (CJEU) interpreting the RED (CJEU 2008) compared to a dozen judgments on other grounds of discrimination.

In particular, the RED has not reversed the paradox of 'racism without races' (Balibar 1991), i.e. that of sanctioning racism and racial discrimination from state and private actors refusing any form of racial categorization. This paradox characterises many European legal systems and is generated by the absolute denial of the existence of races coupled with the absence of deeper reflections on the role that race and ethnicity and their underlying changing and adaptable assumptions still play in contemporary Europe. The absence of this reflection has one important consequence in terms of policy-making: race is more or less consciously rejected as a category at the moment of implementing measures against discrimination. Until such a reflection does not take place one will continue to find legislation or judicial decisions that are openly based on some form of racial prejudice (see the examples provided by Hermanin and Möschel in this book) – not to speak for all those forms of covert racism which are not (yet) subject to legal or social challenge.

In light of this situation, this book provides one opportunity to reflect about race in Europe. Our main argument is clear: race and ethnic origin should *count* and *be counted* when designing and implementing anti-discrimination policies, including in mainland Europe. Our point is that there can be no effective implementation of anti-discrimination measures if a) race cannot be taken fully into the analytical framework of discrimination and b) these practices cannot be measured, for instance by comparing the educational path or the employment career of different ethnic groups.

This point needs to be qualified in at least two related aspects. First, for us 'counting race' does not mean accepting a fixed and/or essentialized vision of

race. We embrace the well-established notion of the social construction of race and suggest that, as far as race exists in the minds of discriminators and the institutional structures, it should be used as a concept and tool to frame and fight discrimination in its different micro- and macro-dynamics and manifestations. The challenge, here, is to acknowledge the existence of different realities of and perspectives on race within European states by embracing race as a valid social, political and legal category in connection with the fight against discrimination. In this respect, and in line with Winant (2000) we suggest that comparative work around the reality of race in different national and continental contexts is much needed and we offer this book as yet another effort in that direction.

Second, we do not imply that race is an all-encompassing, self-sufficient category of discrimination: in fact, a major shortcoming of the RED is that it isolates race from other grounds of potentially concurrent forms of discrimination (and axes of identification) in several crucial policy fields – such as those outside the sphere of employment. Nor do we mean that individuals should not be allowed to choose their own racial identity, without being ascribed to a limited number of predefined categories. At the same time, as racial issues are central but all too often elicited in many instances of discrimination, especially in mainland Europe, we argue in favour of a more accurate consideration of the racist determinants of discrimination and their interrelations with religious and cultural factors, and 'legalised' forms of discrimination based on nationality.

In particular, the separate treatment of discrimination and migration within policy-making has heavily contributed to disconnect race from nationality. EU legislation accordingly fails to acknowledge the reality of race and discrimination in today's Europe as heavily related to migration and, especially in the case of continental Europe, 'new' migration. Human rights may provide the legal and political site for re-connecting race and discrimination with nationality and migration, including the many ways in which race crosses the economic, social and possibly cultural questions and inequalities that characterise the lived experience of migrants in Europe.

This position raises a number of questions which are in some ways addressed by the contributions to this book, such as the legal and practical problems related to the collection of data on race and ethnicity, the use of these and other categories in anti-discrimination and affirmative/positive action/policies, the connection between race and other grounds of discrimination as well as human rights, from the EU down to the state and city levels. More concretely: how to know or *count* people who are affected by racial discrimination if we cannot take their race or ethnic origin *into account*? How to respond to the argument and uneasy feeling that even liberal democracies cannot be trusted once racial or ethnic categorizations are introduced and prevent them from using race and ethnic origin for purposes other than the fight against discrimination? To what extent does race *count* as opposed to – or in conjunction with – other grounds of discrimination? And

finally: how to account of race at different levels in which racial issues emerge? How can the 'glocal' interdependences that construct race and racism be more properly addressed in policy and legislation?

In the following, we provide an overview of how the contributions to this book answer these questions. Before that, however, we elaborate more on what we consider the limited approach to racial discrimination in mainland Europe.

Continental Europe and its narrow approach to racial discrimination

The continental European reluctance to embrace race-conscious measures to combat racism has been placed in relation with the participation of many European states in the Holocaust (Suk 2007). The legacy of racial categorization performed against some ethno-racial groups (Jews, Roma and Blacks) in this context would explain why, as opposed to the UK and the US, continental policy makers have abstained for a long time from reintroducing racial categorization. Four UNESCO declarations condemned the scientific-biological notion of race as a fallacy during the 1950s and 1960s and have also been influential in determining the repudiation of race as a normative concept (Banton 2002).

A second explanation is that regardless of, or rather on top of, the specific historical contingencies on both sides of the Atlantic Ocean and the Channel, race and ethnicity are concepts which are 'essentially contested' (Lorenz 2008), complex and context-dependent. Opposing but equally valuable interpretations of race and ethnicity have led to different racism(s) as well as to different normative approaches on how to deal with them. The continental European one can be defined as 'racial scepticism' and maintains the view that races do not exist at all. Hence, racial scepticists would simply eliminate race from political and normative discourse. The second, 'racial constructionism', holds that races do not naturally exist but are in some ways socially constructed. Racial constructionists subdivide into two groups: either they assume that because race is 'only' a social construct it has no normative value and therefore should be eliminated and not be used normatively; or, as we also hold here, precisely because race is a social construct and therefore part of the real world its use should be continued as a strategy to combat racism (Mallon 2006).

A third explanation lies in the realm of *Realpolitik*. It is difficult to make reference to race in the European context because EU member states have made sure that certain areas where some of the most blatant racial distinctions occur are exempted from the application of racial antidiscrimination legislation. This type of 'legal discrimination' among third country nationals and between them and EU citizens allows European states *inter alia* to introduce selective border controls and internal anti-terrorism and public security measures where the distinguishing criterion *de facto* often runs along

the colour line and leads to racial profiling. Such differences of treatment are still to some extent allowed even in the enjoyment of services and benefits such as healthcare, social provisions and allowances which are otherwise equally granted by EU legislation to EU nationals (Jesse 2009).

In a European Union where migration control has become a top priority over the last twenty years there is, thus, extreme caution about conflating race with nationality in the sense of allowing antidiscrimination legislation to impact on nationality-based distinctions provided for by migration laws and policies. As demonstrated by the exceptions to equal treatment provided in the RED (Article 3.2) and in other pieces of EU immigration law, racial discrimination can be fought in Europe only insofar as it is compatible with leaving the possibility for racial distinction in specific contexts.

Due to these difficulties with openly addressing race and ethnicity in the European context, in recent case law these concepts have frequently emerged in connection with other grounds of discrimination. In Germany, for instance, most of the litigation involving racial discrimination under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) of 2007 has so far arisen in connection with language requirements in employment (BAG 2010). The recent European Court of Justice (ECJ) landmark decision on racial discrimination, *Feryn* (CJEU 2008), involving a Belgian employer who had publicly stated he would not hire any Moroccans/immigrants, (quite rightly) conflates race with nationality without any further discussion. The argument has also been advanced that some of the recent headscarf decisions might qualify as indirect racial discrimination – on top of religious or gender discrimination – since legislation prohibiting the wearing of the veil disproportionately affects people with different racial and ethnic background from white, Christian Europeans (Loenen 2009). Even in the UK, the overlap of race and ethnicity with religion has recently come to public attention (and criticism) in a decision by the new UK Supreme Court. In this case, the matrilineal test of Jewishness on the basis of which a boy was not admitted to a Jewish school was not considered as a religious but as an ethnic test and the admission policy of the school was found *racially* discriminatory (UKSC 2009).

This case law demonstrates that in Europe, rather than recognising such cases as cases of multiple discrimination, other grounds of discrimination frequently stand in as 'proxies for race'.

In spite of the reluctance and the normative obstacles to use race and ethnicity to combat racial discrimination described here above, both concepts are far from being obsolete. Rather, when looking at race and ethnicity in the context of the Old Continent, questions of immigration, colonialism, religion and Orientalism become more relevant than is probably the case in the US.

Whether the twenty-first century's problem will again be that of the colour line as Du Bois (1903) predicted for the twentieth century remains to be seen.