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Abstract

In August of 2010, the French government began a program of deporting those Roma who lived within the country. Under European Union (EU) law, mass expulsions based on ethnicity are forbidden, as are mass examinations of peoples as opposed to individual assessments in the case of a crime. However, in the spirit of egalitarianism, France does not acknowledge the idea of racial or ethnic minorities. Instead, they have reframed the non-French Roma as a group engaged in criminal activity following Italy's "security package" of 2008, which described 'nomads' as a national security threat and created legislation leading to expulsions of non-Italian Roma. By framing the Roma as a criminal group as opposed to an ethnic minority (that may be engaging in criminal activity), France is able to justify its actions in targeting the Roma people writ large instead of looking at each criminal case on a case-by-case basis. My resulting research question is: if we assume that the Roma are an ethnic minority in France, what obligations does the EU have in enforcing their rights in a member state that does not acknowledge the concept of "ethnic minority"? This paper will look at the French repatriation program and use Critical Race Theory as a framework to critique the situation and examine how EU-level policy could change the position of the Roma in France.

Keywords

immigration, Roma, repatriation, and human rights

"The Gypsy problem is a litmus test not of democracy but of a civil society. The two are certainly two sides of the same coin; one is unthinkable without the other. One means legislation to enable the people to vote and make them the source of power. The civil society is related to human behavior." (Kamm, 1993) - Vaclav Havel

In August of 2010, the French government began a program of deporting people of Roma origin living within the country. As they boarded flights for Romania, each adult received €300 in exchange for leaving. The deportation was incited by two incidents, occurring independently of each other, earlier in the year. In Grenoble, shots were fired at police after a young North African man was killed after trying to rob a casino. Separately, people suspected to be of Roma origins rioted after one of them was killed failing to stop at a checkpoint (Hewitt, 2010).

This action, though not unique in Europe, was the largest mass deportation of Roma from a single state—and the fact that the state was offering money was new as well (Gunther, 2012). Under then-president Nicolas Sarkozy, the Roma repatriation program that began in 2010 not only disrupted the lives of hundreds of the European citizens of the Roma community, but also reframed the group in order to sidestep European Union (EU) regulations concerning the discrimination of minorities. Adding to the problem was France's refusal to recognize the concept of race in their legal system, preferring a color-blind approach. The problem at the EU level was clear: how does one protect the rights of an ethnic minority in a state that does not recognize the concept of ethnicity?

This paper will look at the issue of the Roma in the context of French and EU history concerning the classification of race and ethnicity, and then use Critical Race Theory as a framework to critique the situation and examine how EU-level policy could change the position of the Roma in France.

The French Repatriation Plan

Starting in August of 2010, police officers broke apart illegal Roma camps as well as camps of gens du voyage, or travelers, and offered those living inside a chilling sentence: they were required to leave France, but whether they wanted to do so willingly or not was not up to them. Those who agreed to leave to Romania were given the €300, and those who resisted were forcibly expelled from the country. Almost immediately, this policy was met with resistance and criticism. It was roundly criticized as a political move on President Sarkozy's part in order to drum up support amongst the right wing of the French electorate (Erlanger, 2010).

In early September, a new piece of evidence gave Sarkozy's detractors more fuel. A leaked document from the French Interior Ministry sent to police chiefs around the country told of a "specific objective" of the plan: "300 camps or illegal settlements must be evacuated within three months," it said, adding, "it is down to the [state representative] in each department to begin a systemic dismantling of the illegal camps, particularly those of the Roma" (Willsher, 2010). Under European Union law, mass expulsions based on ethnicity are forbidden in addition to mass examinations of peoples, as opposed to individual assessments in the case of a crime (Erlanger, 2010). Whether or not Sarkozy's policy was breaking EU law, as well as international human rights laws, depended on whether it could be established that French officials were targeting the Roma for expulsion *based* on their ethnicity, rather than their participation in any illegal activity. The leaked document was damning.

Immigration minister Eric Besson insisted that the groups being repatriated were being

treated no differently than other EU migrants who had failed to meet France's residency rules. "France has not taken any measure specifically against the Roma," he stated, "who are not considered as such, but as natives of the country whose nationality they have." Besson insisted that the groups being deported were not necessarily Roma, but simply *Romanians*. Restating the French policy of color-blindness, he added, "the concept of ethnic minorities is a concept that does not exist among the government" (Willsher, 2010).

Perhaps as a result of their structural inability to classify the Roma as an ethnic group, the French government took a different approach toward the community that partially justified this policy to the European Union and partially raised a whole gamut of new questions. They implicated the Roma "as a group in criminal activity," following the precedent set in 2008 by Italy. The Italian "security package" described "nomads"—a conflation of Roma and travelers—as a threat to national security and imposed special security legislation leading to the expulsions of Roma without Italian citizenship (Soros, 2010). The French government stated that Roma camps in particular were "sources of illegal trafficking, profoundly shocking living standards, the exploitation of children for begging, prostitution and crime" (Hewitt, 2010). The Roma were not constructed as an ethnic group whose socioeconomic repression over centuries had put them into a level of society that was perhaps more susceptible to crime. Instead, the Roma were a sort of criminal conglomerate to the French government, defined by their relation to crime as opposed to a shared history or culture.

The policy conflated many different groups—Roma, travelers, North Africans, and delinquent juveniles—under the umbrella of "Roma" and used this group as a proxy for criminal activity. Controversy broke out all over the EU. Justice Commissioner Viviane Reding called the policy "shocking" and said that the European Commission would start a legal procedure against France for refusing to cooperate with both the 2004 Race Directive and the legislation on the free movement of persons. In the European Parliament, the committee for civil liberties called a public hearing on the Roma situation. Opposition came from conservative groups in the assembly to provide a legal interpretation of the free movement directive in regards to the repatriation move (EU to press ahead with Roma case against France, 2010).

In October 2010, the European Commission gave Paris until the 15th of that month to prove that its policies concerning its treatment of the Roma complied with EU laws guaranteeing the free circulation of persons within the Union. If they did not, the Commission would launch legal proceedings against the state. Commissioner Reding, who spearheaded the opposition towards the repatriation program, stated:

> "the Parliament has understood very well that the decision of today to open infringement proceedings…on this very important basic question of values and rights, was a very strong movement…and you have the whole commissioners' college behind this infringement proceeding, just saying "no, we cannot accept that essential procedural safeguards, rights for the European citizens…have not been put into national law" (France handed ultimatum in Roma row, 2010).

There was only one problem: how were they to prove that France had acted to infringe on the rights of European citizens, if they kept claiming that they were targeting a criminal organization, not an ethnic group?

Critical Race Theory and the French History of Color-Blindness

In the spirit of egalitarianism, France does not acknowledge the idea of racial or ethnic minorities. Following the Revolution of 1789, the ideal of the citizen was the primary standard to which all people could be measured. Intending to replace such differentiating groupings like race and religion with the more inclusive "citizen" of France resulted in some noteworthy advances for the state, including the abolition of slavery in 1792 and the incorporation of the Jews into the Republic in 1794. This standard also had far-reaching adverse effects as "citizen" became popularly construed as white and male (Frader 111). While these ideals were intended to diminish racialization of French society, it instead turned the very idea of citizenship—whether one is "French" or not—into a potential proxy for racism. No group has felt the consequences of this more than the Roma. Action against Roma groups in EU countries—expulsion in Denmark and Sweden, monetary incentives to return to Bulgaria or Romania in Germany—are not new, but the French repatriation program that passed in 2010 under the Sarkozy government has been the most controversial.

Instead of justifying their actions along racial lines, the government reframed the non-French Roma as a group engaged in criminal activity. This followed Italy's "security package" of 2008, which described 'nomads' as a national security threat and created legislation leading to expulsions of non-Italian Roma (Soros, 2010). By framing the Roma as a criminal group of outsiders as opposed to an ethnic minority (that may be engaging in criminal activity), France has been able to justify its actions in targeting the Roma people writ large instead of looking at each criminal case on a case-by-case basis. According to BBC, President Sarkozy also wanted those of "foreign origin" who attempted violence against police to be stripped of their French nationality. Sarkozy stated, "French nationality must be merited, and one must be able to show themselves worthy" (Hewitt, 2010).

While the government claimed that they were acting only to deport people on the basis that they were in the country illegally, many European leaders, including Jose Manuel Barroso and EU Justice Commissioner Viviane Reding, pointed out that the French government was specifically targeting Roma camps. Rather than dealing with migrants on a case-by-case basis, this verged uncomfortably close to racial profiling and xenophobia (Traynor, 2010; Lungescu, 2010). However, opposition to the French program waned quickly and the Sarkozy program of repatriation continued to the present day (EU to press ahead with Roma case against France, 2010). The European Union was unable to do anything in part because of the lack of interest in taking on the Roma cause, but also because of the complicated the issue of how to deal with a discriminated ethnic minority in a country that refuses to acknowledge the concept of ethnicity.

Critical Race Theory (CRT), while most widely used in American legal theory and rarely applied to a European context, places emphasis on race as a variable in discussing law. CRT rests on the assumption that racism is endemic within a society, and as a result plays out not through the actions of deviant individuals but rather through systems. It insists on a historicized, contextualized analysis in understanding how a law effects minorities, and chooses an interdisciplinary approach in analyzing a law, claiming that the intersection between race and law crosses the boundaries of multiple disciplines. As a result of these tenets of theory, CRT is very critical of the idea of "color-blindness" in government, arguing "color-blindness functions as the modern and less explicit version of old-time racism" (Möschel, 2011). In determining how EU and French law handles race—specifically in regards to the Roma—CRT provides a framework upon which to understand the current legal situation

as well as what the EU could potentially do in the future to alleviate any injustices incurred by the Roma as a result of law.

In the spirit of *égalité* described in their constitution, the French state has maintained strict color-blindness in how they classify the inhabitants of their territory. For more than a century and a half, the French census has not distinguished citizens by race. By recording nationality and country of birth for each individual, the census distinguishes between foreigner and citizen rather than by relying on racial lines. They eschewed the use of race as a method to distinguish people in fears that it would result in a racialized or ethnicized society: instead, the census was designed to "serve the special institutional purposes of managing integration" (Simon, 2008).

From 1891 to 1999, the French census classified the inhabitants of the state into three groups: "French," "French by acquisition," and "foreigners." A focus on nationality as opposed to ethnicity led to the creation of these categories, with "French by acquisition" being the most nebulous. In the times of France's colonial empire, this category was used to study the assimilation of peoples in French colonies into the French way of life (as opposed to the indigenous one) and separate them from metropolitan France. The case of Algeria threatened this separation: while citizenship was extended to all Algerians through the Organic Law of 1947, they remained citizens "by acquisition," separate from full citizens. Algeria's distinction of status based on religion and race proved another difficulty for the government in Paris and they decided to compromise the issues of race and citizenship by making new categories. Instead of grouping Algerian natives by nationality (French or Algerian), the degree of difference between individuals was deepened by categorizing those "born in Algeria who have an Arabic or Berber-sounding first and last name" as "Muslim natives of Algeria" and those with a "Christian or Jewish first name" as "French-born natives of Algeria." Following Algeria's independence in 1962, the existing Muslim/Judeo-Christian divide was preserved by categorizing Algerian migrants as "French Muslim natives of Algeria" and "Algerian repatriates," the latter being both non-Muslims and French nationals (Simon, 2008).

These classifications based on nationality, separated France not only by country of origin but by race in general. They permeated the French method of distinguishing groups of people and resulted not in equality, but a French/non-French binary where "non-French" is largely constructed to mean non-white (Möschel, 2011).

European Union Initiatives for the Protection of the Roma

There have also been a number of institutional mechanisms at the EU level set up specifically to address the issue of Roma integration. Following the eastern expansion of the EU to include Bulgaria and Romania in 2007 (as well as the larger eastward expansion in 2004), a significant number of Roma became EU citizens. Part of the membership conditions for these member states assured, "respect for and protection of minorities." So-called PHARE funds were allocated to the candidate states specifically to address the social and economic exclusion of the Roma from the rest of the citizenry. Presumably, this was to help integrate the Roma into these states and ensure their protection, although the argument was made that this strategy was in part to dissuade immigration of the Roma westward (McGarry, 2011).

2007 marked the organization of the Integrated Roma Platform, an institution bringing together government representatives, non-governmental institutions, and other civil society organizations to discuss issues facing the Roma in Europe. European Roma summits

were set up to increase political attention on the plight of the Roma and draw in high-level EU and national policymakers. However, it was not until 2010 and the advancement of the French repatriation scheme that the EU established a Task Force to engage in meaningful action—and not just discussion—concerning the treatment of the Roma in member states. This Task Force examined the impact of EU Structural Funds in helping minorities within a state, and in 2009 and 2010 conducted high-level visits to Hungary and Romania in order to promote a more efficient and conscious use of these funds in order to better human rights. Notably, France was the country that first sparked the need for a Task Force and did not receive a visit (Sobotka, 2012).

Also important for the Roma is the EU guarantee of "freedom of movement" for its citizens in the Treaty of Lisbon, although the legislation "expressly allows for restrictions on the right to move freely for reasons of public order, public security and public health" (Hewitt, 2010). On 29 September of 2010, the European Commission told France that the repatriation scheme was a violation of a 2004 directive on the freedom of movement and if they did not remedy the situation, they would face an official infringement procedure (Q&A: France Roma expulsions, 2010). Directive 2004/38/EC gives all European citizens the freedom to "move and reside freely within the territory of the Member States," subject to certain limitations (European Council, 2004).

Unfortunately, the legal basis for ethnic and racial protection provides no real answers for the plight of the Roma in France. In Commission document COM(2010)133, "The Social and Economic Integration of the Roma in Europe," the European Commission explicitly refers to the Roma as "the largest ethnic minority in the EU." By doing to, they explicitly state another definition of this population than that espoused in France—the Roma are not a criminal organization, but rather an ethnicity (European Commission, 2010). However, after this definition, the Commission does not mention ethnicity again[1]. Instead, they focus on the Roma's socioeconomic position and propose initiatives for better integration into the rest of European societies through increased participation in both public and political life. While the document mentions Member States frequently, it also proposes numerous policy measures directly between the Roma communities and the EU, including the use of EU structural funds to develop desegregation policies in areas like housing and education. It is clear from this document that there is a precedent at the EU level to directly engage with the Roma population, in some cases by passing or ignoring the Member State a Roma community is situated in. The rights of the Roma are thus a Union issue and not a state issue. While this establishes the EU's ability to interfere in the case of the exclusion of an ethnic minority in a member state, what good does this do in a case like France, where ethnicity is not a recognized concept? To answer this question, two things must be kept in mind: how the EU defines ethnicity and discrimination and whether this definition has jurisdiction over any differing definitions held by the Member States.

The "Race Directive" of 2000, or Directive 2000/43/EC, implemented the principle of equal treatment regardless of racial or ethnic origin. This piece of legislature can be understood to be grounded in the EU's commitment to fundamental rights and human dignity for EU citizens (Sobotka, 2012). It gives victims of discrimination the right of redress, which includes access to EU-level bodies set up for the promotion of equality. However, this document has been criticized for its inefficiency and reliance on Member States to imple-

1 The word "ethnic" is used five times in the document—three times in the introduction, one in the conclusion, and one in a footnote—and "racism" once. "Ethnicity" and "race" were never used.

ment nondiscriminatory policies. Luke Mason, PhD researcher at the European University Institute, notes the Race Directive's "failure to put in place appropriate structures that would ensure a forum for negotiation" and notes that it does not go far enough to address ethnic or racial discrimination, merely condemning its existence instead (Mason, 2010). The Race Directive is instead a "hollow shell" within which the member states retain agency in regards to fighting discrimination within their territory.

This document relies on the United Nations' Universal Declaration of Human Rights and other United Nations (UN) precedents as a framework for their stance on discrimination. They define discrimination as a two-part concept: direct discrimination, "where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin," and indirect discrimination, "where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage" (European Council, 2000). The phrase "racial or ethnic origin" pervades the document, although the Commission does not outright define what these phrases encapsulate: would it include a community like the Roma in France, who came from elsewhere (European Council, 2000)? Is nationality—the closest concept to ethnicity recognized in France—included? Section 13 of the introduction reads as so:

> "…any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation" (European Council, 2000).

While the Roma are defined as an "ethnic minority" by the EU, the lack of coverage in this commission for those of different nationalities makes it very difficult to address the Roma population residing in France. As long as the French stance continues to stress that the Roma are Romanians (as well as a criminal group), they would receive no coverage under this directive.

The Race Directive is an example of how the European Union can be powerless to stop a Member State from engaging in discriminatory actions against peoples living within them. While the Roma are recognized as an ethnicity on the EU level, the Race Directive provides little legal basis for EU-level actors to step in and remedy a discriminatory policy. The French government, by framing the Roma as a group explicitly not protected by this directive, managed to sidestep EU policies in order to continue their repatriation plan.

Analysis: The Options of the EU in Confronting the French Repatriation Program

In accordance with these different constructions of the Roma in EU- and nation-level discourse, the different institutions of the European Union are limited in their abilities to handle a case like this. According to the current rules, the French policy of color-blindness essentially gives them *carte blanche* to deal with issues of race and ethnicity since EU regula-

tions are so nebulous[2].

According to CRT, the system of color-blindness that France has in place only serves to delegitimize complaints of discrimination based on race or ethnicity within the country, since it refuses to acknowledge the existence of these concepts. This creates a culture in which the marginalized continue to be marginalized. In the case of the Roma, their positions as outcasts of society are attributed to their inherent criminality, ineptness, and asocial nature as opposed to any racism present in the system. The issue of nationality also creates problems here, since many Roma do not identify as coming from Romania or Hungary—or any other country in particular. Their transitory nature makes it difficult to apply French law concerning nationality to their case. Moreover, since nationality is not covered in the Race Directive of 2000, they cannot use their foreigner status in order to gain rights and challenge their treatment in France.

The Roma population subject to the repatriation program that began in 2010 were not French citizens, nor could they really be classified as Romanians or Hungarians. Instead, these people were *Europeans*—a category that does not fit nicely into the system of nation-states that makes up the European Union. As such, it is the obligation of the EU to protect these citizens. However, in a case like the French repatriation program, the legal base for their protection is uncertain.

Commissioner Reding's introduction of Directive 2004/38/EC concerning the freedom of movement of EU citizens was a temporary roadblock for the French government. While they were able to eventually satisfy the Commission that they were in compliance with the Directive, the argument could have been made that they were not entirely fulfilling the obligations of a Member State concerning foreign citizens residing within their borders. Section 20 of the Directive reads:

> "In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law" (European Council, 2004).

The use of *nationality* here has potential to be used against the French repatriation plan: since the French government recognizes nationality as a fundamental concept and part of personal identity, this directly accuses them of behaving in a discriminatory manner by framing the Roma as Romanian immigrants. While this argument has its limits (the French insistence that the Roma were also a criminal group, in keeping with the Italian "security package" of 2008), an argument can be made that the French policy was in fact discriminatory without bringing notions of race or ethnicity into play.

In order to fully protect the rights of the Roma, the EU would either need to work within the framework that France has set up, divorced from notions of ethnicity or race, and reframe the Roma community as something else entirely, or force the French government

2 It is worth noting that these regulations are nebulous by design, since they would have been agreed to and in part fashioned by France, a powerful voice in the European Union. French influence in dictating the language of a document like the Race Directive would have been quite strong as a result of France's massive vote on the Council as well as their unique views on race.

to recognize the Roma as a group with the protections afforded other minorities discriminated against on an ethnic or racial basis. The first option seems nearly impossible, while the second threatens an infringement on state sovereignty, and both are dramatic motions that would have an extraordinarily difficult time getting traction and support on the EU level. It is clear that the actors on the supranational level, like Commissioner Viviane Reding, are aware of this, since no dramatic action has been taken to reconstruct the legal position of the Roma community.

What the EU has chosen to do instead is best exemplified by documents like COM(2010)133, which focuses on the socioeconomic integration of the Roma into the member states. By limiting their scope to the major issues facing Roma communities (primarily housing, education, and poverty) and allocation EU structural funds to alleviate these problems, the governing structure of the EU limits itself in order to not infringe on the rights of Member States and, in doing so, provides only temporary fixes for the Roma population. While integration of the Roma of Europe is without a doubt important, it does not get to the root of the cause behind their systematic discrimination and ill treatment: the governments of the Member States themselves. In France, the different constructions of the Roma community have allowed the French government to get away with a blatantly discriminatory program without fear of significant repercussions from the overarching governance structure of the European Union.

Conclusion

The French repatriation controversy of 2010 threw light on a situation difficult to address at an institutional level: the discrimination of an ethnic group justified by their involvement with—or at least proximity to—criminal activity. As EU citizens, the Roma have the rights granted to the citizens of each member state according to the Treaties of Lisbon and Maastricht and it is the EU's job to protect their well-being. When a member state, especially one whose history is so fraught with concerns over race and ethnicity as France's, threatens these fundamental liberties, the EU has an obligation to act. However, the current EU writings on race, including but not limited to the Race Directive of 2010, are not concrete enough to provide meaningful support for those citizens facing institutionalized discrimination on the basis of their identity as a certain ethnicity. The question of the Roma is not just one of policy discrete member states, but rather the overarching structure to which they all belong: the European Union. Even if the French reject them, Italy shuns them, and Bulgaria and Romania accept them only begrudgingly, the Roma are still Europeans—and due to their transient nature, perhaps the most "European" of all EU citizens.

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