

Towards a legal conceptualisation of housing segregation

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Abstract

Housing segregation is one of the major processes threatening the right to adequate housing of individuals and families. Whereas some international human rights instruments contain legal provisions seeking to combat this phenomenon, a lack of concretion as to the notion of segregation itself may ultimately limit their potential and effectiveness. Our proposal explores these conceptual shortcomings through the approach of two human rights instruments and their corresponding monitoring bodies. Firstly, the International Convention on the Elimination of All Forms of Racial Discrimination expressly prohibits segregation. According to the UN Committee on the Elimination of Racial Discrimination, this prohibition encompasses not only de jure but also de facto segregation, arising as a result of the conduct of private actors. Secondly, the European Social Charter contains no explicit mention of segregation, although the European Social Committee has developed it to a certain extent in its case law. Besides them, residential segregation has been widely studied by other social sciences such as sociology and urban studies, which can provide valuable insights to delimit this notion. Building on the above, the proposed contribution will show the profound implications that segregation entails for the right to housing and for housing law, and will delve into the elements, criteria and constraints that a legal conceptualisation of housing segregation demands

Keywords: segregation, conceptualisation, anti-discrimination, housing law

Introduction

Housing segregation is one of the major processes threatening the right to adequate housing of individuals and families. However, the lack of an explicit definition of this concept reveals both conceptual issues at a theoretical level and substantive issues at a practical level. This paper first explores the understanding of segregation contained in two selected international human rights instruments, the International Convention on the Elimination of All Forms of Racial Discrimination and the Revised European Social Charter. It then examines the contribution of urban research, with the aim to extract the relevant points and to extrapolate them to the legal field. After presenting several conceptual issues, the article refers back to those human rights instruments in order to find adequate legal solutions and responses. By means of this process, it will delve into the elements, criteria and constraints that a legal conceptualisation of housing segregation demands.

Segregation in international human rights law: two selected instruments

International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the core instrument in international human rights law targeting discrimination based on 'race,

colour, descent, or national or ethnic origin.¹ The Convention requires States parties to prohibit and eliminate racial discrimination in all its forms, and to guarantee the right of everyone to equality before the law.²

Alarmed by ‘governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,’³ the States parties to the Convention express in Article 3 thereof a ‘particular condemnation’ of racial segregation. They undertake to prevent, prohibit and eradicate all practices of this nature in all territories under their jurisdiction. However, the Convention does not contain any explicit definition of segregation, as it does, for instance, with regard to racial discrimination.⁴ It provides no explanation of what segregation is, nor of which parameters ought to be considered when trying to qualify a particular policy as segregationist. This lack of normative definition poses problems as regards the practical application of the Convention, especially in borderline cases.

The Committee on the Elimination of Racial Discrimination (CERD), the corresponding treaty-monitoring body,⁵ has provided with some guidance in this respect by means of its General Recommendations.⁶ These have the objective to interpret and provide clarity to the application of the ICERD. In particular, General Recommendation XIX on Article 3 of the Convention, adopted 18 August 1995,⁷ clarifies that:

While conditions of complete or partial racial segregation may in some countries have been created by governmental policies, *a condition of partial segregation may also arise as an unintended by-product of the actions of private persons* (emphasis added). In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.

The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities.

In other words, the Committee, whilst acknowledging that the more direct cause of segregation is governmental action, considers that this phenomenon may also arise as a consequence of the actions of individuals or groups of individuals, be they or not intentional. De facto segregation is thus included in the scope of application of the ICERD besides de jure segregation, and on an equal footing.

Some further clarification as to the concept of segregation under the ICERD can be gathered by examining the concluding observations rendered by the Committee in the framework of the periodic reporting obligation of States parties.⁸ In many of its observations, the Committee has raised concerns over a number of policies and practices conducive to segregation. Two of these documents are considered here. First, in its Concluding Observations on Belgium’s fourteenth and fifteenth periodic reports, adopted 11 April 2008, the Committee pointed out that:

¹ International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969. See Article 1.

² See Article 2.

³ See Preamble to the Convention.

⁴ See Article 1.1 of the Convention.

⁵ See Article 8.

⁶ See Article 9.2.

⁷ Committee on the Elimination of Racial Discrimination, General Recommendation XIX on article 3 of the Convention, Forty-seventh session, 18 August 1995.

⁸ See Article 9.1 of the Convention.

the fact that ethnic minorities are often over-represented in social urban housing—up to 90 per cent in some cases—(...) has resulted in de facto segregation in certain neighbourhoods of large cities. In addition, such phenomenon may lead to the use of ethnic criteria to allocate social housing.⁹

It therefore recommended that Belgium adopt effective measures to prevent de facto segregation and address the underlying factors, especially as this phenomenon has a negative impact on the enjoyment of the economic, social and cultural rights of individuals.¹⁰

For its part, in its Concluding Observations on Sweden's nineteenth to twenty-first periodic reports, adopted 23 September 2013, the Committee similarly notes that:

several metropolitan areas show a stark division in the type and areas of residence along ethnic and socioeconomic lines, which division impacts mostly on foreign-born persons, and in particular Afro-Swedes and Muslims.¹¹

The Committee thus recommended that Sweden assess the effectiveness of its strategies against de facto segregation along ethnic and socioeconomic lines, and highlighted the need for those strategies to be adjusted.¹² It equally made a specific mention to Roma population, recommending that Sweden increase 'access to adequate housing for Roma without discrimination and segregation, including by facilitating access to public and low-cost housing and improving the living conditions of Roma.'¹³

General Recommendation XIX and these two examples all contain important statements on the type of practices and situations that the Committee is prepared to label as segregationist. First of all, it appears that the criterion to qualify a given policy as segregationist will be its nature, rather its intentionality. Secondly, both public and private actors can be involved: the notion of segregation under the Convention includes de jure as well as de facto segregation. Thirdly, the over-representation of ethnic minorities in social housing is taken as a strong indicator of segregation. The fact that housing policies may disproportionately affect certain groups, especially ethnic minorities, should be specifically taken into account when considering public action. Fourthly, the Committee makes an explicit connection between the ethnic and socioeconomic dimensions underpinning segregation. Lastly, the specific mentions to Roma population hint that a particular attention may be afforded to vulnerable minorities when examining whether a particular situation constitutes or not segregation.

To conclude, it should be mentioned that despite the existence of an individual complaint mechanism whereby the Committee can receive and consider communications against alleged violations of the rights set forth in the ICERD by the States Parties to it,¹⁴ none of the opinions delivered thus far has directly addressed segregation. This would be a significant forum for the Committee to examine the issue, as the complaint mechanism allows for a more profound analysis of the questions raised and permits the application of the theoretical framework to a concrete case.

(Revised) European Social Charter

⁹ Committee on the Elimination of Racial Discrimination, Concluding observations on the fourteenth and fifteenth periodic reports of Belgium, Seventy-second session, 11 April 2008 (CERD/C/BEL/CO/15), § 15.

¹⁰ Ibidem.

¹¹ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, Eighty-third session, 23 September 2013 (CERD/C/SWE/CO/19-21), § 14.

¹² Ibidem.

¹³ Ibidem, § 20.

¹⁴ See Article 14 of the Convention.

The European Social Charter (ESC) is the broadest regional human rights instrument protecting economic, social and cultural rights in Europe. Adopted under the auspices of the Council of Europe, it serves as counterpart to the European Convention on Human Rights, which enshrines mostly civil and political rights. A first version of the Charter, eminently labour-oriented, came into force in 1965.¹⁵ An updated version thereof, known as Revised European Social Charter (RESC), expanded the protected rights in 1999.¹⁶ Both instruments coexist today as some States have not ratified the revised version of the Charter.¹⁷

The right to housing, absent from the original Charter, features in Article 31 of the Revised European Social Charter in the following terms:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

The term ‘segregation,’ however, does not appear in the text of the 1961 European Social Charter, nor in the text of the 1999 Revised European Social Charter. In contrast to the ICERD, not only is segregation not defined in the Charter but the instrument lacks any explicit mention to this phenomenon. Some further insight into segregation issues can be found in Recommendation Rec(2005)4 of the Committee of Ministers of the Council of Europe to member states on improving the housing conditions of Roma and Travellers in Europe.¹⁸ Adopted 23 February 2005, the Recommendation states that:

In order to combat the creation of ghettos and segregation of Roma from the majority society, member states should prevent, prohibit and, when needed, revert any nationwide, regional, or local policies or initiatives aimed at ensuring that Roma settle or resettle in inappropriate sites and hazardous areas, or aimed at relegating them to such areas on account of their ethnicity.¹⁹

The Recommendation further contains a specific provision on preventing segregation in environmentally hazardous areas, and mandates that in the case of eviction ‘the alternative housing should not result in further segregation.’²⁰ This particular attention to Roma, Sinti and Travellers is a permanent feature of the European system of human rights protection. In this connection, the European Court of Human Rights famously stated that:

as a result of their history, the Roma have become a specific type of disadvantaged group and vulnerable minority (...). They therefore require special protection. (...) Special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (...) not only for the purpose of safeguarding the interests of the minorities themselves but to preserve cultural diversity of value to the whole community.²¹

¹⁵ European Social Charter, adopted 18 October 1961 by the member States of the Council of Europe, entry into force 26 February 1965 (CETS No.035).

¹⁶ European Social Charter (revised), adopted 3 May 1996 by the member States of the Council of Europe, entry into force 1 July 1999 (CETS No.163).

¹⁷ For instance, Germany, the United Kingdom, Spain and Poland have only ratified the 1961 European Social Charter.

¹⁸ Committee of Ministers, Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, adopted 23 February 2005 at the 916th meeting of the Ministers’ Deputies.

¹⁹ Ibidem, § 5.

²⁰ Ibidem, §§ 21 and 26.

²¹ European Court of Human Rights (GC), *Oršuš and Others v. Croatia*, 16 March 2010 (Application No. 15766/03), §§ 147-148.

The aforementioned focus on Roma, Sinti and Travellers also plays a central role in the collective complaints mechanism which complements the Charter. According to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints,²² social partners and non-governmental organisations may lodge complaints of violations of the Charter by the States parties to the Protocol before the European Committee of Social Rights (ECSR), the competent body to monitor the implementation of the Charter.²³ The Committee will then determine their admissibility and, eventually, take a decision on the merits of the complaint.²⁴ In any case, the determination made by the Committee must be about the general application of the Charter in that State, and not about a violation in a particular case.²⁵

Two of the Committee's decisions on the merits of collective complaints explicitly mention segregation. Firstly, in the case of *COHRE v. Italy*, decision of 25 June 2010,²⁶ the Committee found a violation of Article E (non-discrimination) in conjunction with Article 31§3 of the Charter, due to the situation of segregation of Roma and Sinti in camps. Despite the allocation by Italian authorities of financial resources to combat this phenomenon, the Committee was not persuaded that those resources were narrowly aimed to ensuring access to social housing by Roma and Sinti.²⁷ The decision of the Committee served as condemnation of the Italian government's policy of placing Roma and Sinti population on encampments characterised by substandard conditions on the edges of towns, segregated from the rest of the population and where material conditions were frequently inhuman.²⁸

The second relevant decision can be found in the case of *ERRC v. Portugal*, decision of 30 June 2011,²⁹ where the Committee developed a full examination of whether the situation in hand constituted segregation. The case involved a claim of a violation of, inter alia, the right to housing, taken alone or in conjunction with the right not to be discriminated against as regards the provisions of the Revised Charter. According to the claimant, the rehousing programmes implemented by Portugal failed to integrate Roma, and resulted often in spatial segregation. As a consequence of these programmes, Roma families were living in inadequately sized dwellings, excluded and marginalised in areas with poor infrastructure and with limited or no access at all to public services.³⁰

The Committee thus addressed substantively a claim of segregation for the first time in the framework of the collective complaints mechanism. It started by recalling that States should be vigilant when implementing housing policies, so as to prevent the spatial or social segregation of ethnic minorities or immigrants.³¹ After examining the situation, it concluded that segregated neighbourhoods for Roma had to a large extent been created by the action of municipalities. According to the Committee, 'Roma have been re-housed by municipalities in such

²² Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, adopted 9 November 1995 by the member States signatories to Treaty ETS 35, entry into force 1 July 1998 (CETS No.158).

²³ See Article 1 of the Additional Protocol.

²⁴ See Articles 7 et seq.

²⁵ European Committee of Social Rights, *SAIGI-Syndicat des Hauts Fonctionnaires v. France*, Collective complaint No. 29/2005, decision of 14 June 2005. See further Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford and Portland: Hart Publishing, 2013), p. 50.

²⁶ European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective complaint No. 58/2009, decision of 25 June 2010.

²⁷ *Ibidem*, § 86.

²⁸ *Ibidem*, § 49.

²⁹ European Committee of Social Rights, *European Roma Rights Centre v. Portugal*, Collective complaint No. 61/2010, decision of 30 June 2011.

³⁰ *Ibidem*, § 6.

³¹ *Ibidem*, § 41.

neighbourhoods in a higher proportion than the general population with housing needs.³² It points thereafter to several situations reflecting segregationist practices. For instance, it refers to an municipality where the local authorities walled off the Roma community, effectively segregating them from the rest of the urban fabric.³³ In another case, one Romani community lived on the former rubbish dump on the outskirts of the town.³⁴ It further mentions examples where a Roma settlement had been denied access to water for a week because the municipality cut the water supply,³⁵ and yet another instance where the municipal houses provided to a Roma community lacked electricity, water and sanitation.³⁶

Despite the fact that both decisions avoid an explicit mention of what the the European Committee of Social Rights understands as segregation, the analysis undertaken and the examples provided shed some light on how this concept should be interpreted under the Revised European Social Charter. Indeed, the Committee, as was the case with the CERD, emphasises the criterion of the disproportionate impact on minority groups by comparison to the majority population. Moreover, a special attention should be paid where vulnerable groups such as Roma, Sinti and Travellers are affected. This interpretation of the RESC, along with that of the ICERD examined above, raises some important points that should be taken into account in our attempt to walk towards a legal conceptualisation of housing segregation.

The contribution of urban research: some insights

Other social disciplines, notably urban sociology and urban geography, have profoundly studied the phenomenon of segregation and provided multiple analyses that can help design a legal concept of segregation. Through different approaches and methods, these disciplines have addressed the dynamics of segregation, its causes and effects and the various desegregation policies implemented by policymakers. By confronting the stated policy aims and rationales with their outcomes, they have advanced significant critiques and potential solutions that can help better situate the understanding of segregation in law.

The origin of these disciplines can be found in the 1920s, with the creation of the Chicago School and of human ecology.³⁷ The Chicago School resorted to a methodology of rigorous observation, whereby the spatial patterns drawn by the different social groups in the context of the city were understood through a conceptual lens derived from biology. As such, concepts like invasion, succession, equilibrium or dominance featured in their analyses. These authors observed that cities were divided into residential areas and neighbourhoods, each of which predominantly inhabited by a specific racial or minority group or a specific socioeconomic class, as part of the ‘process of segregation in the sorting and shifting of the different elements of population in the growth of the city.’³⁸

Most of the sociological research considered for this article begins with a note on the obsolescence of the theoretical frameworks to which policymakers have recourse when developing public policies seeking to combat segregation.³⁹ According to this research, many of the desegregation

³² Ibidem, § 48.

³³ Ibidem, § 42.

³⁴ Ibidem, § 45.

³⁵ Ibidem, § 36.

³⁶ Ibidem, § 39.

³⁷ See Gideon Bolt, Ronald Van Kempen, and Maarten Van Ham, ‘Minority Ethnic Groups in the Dutch Housing Market: Spatial Segregation, Relocation Dynamics and Housing Policy,’ *Urban Studies* 45, no. 7 (1 June 2008): 1359–84, doi:10.1177/0042098008090678, p. 1361.

³⁸ Ernest W. Burgess, ‘Residential Segregation in American Cities,’ *The Annals of the American Academy of Political and Social Science* 140, no. The American Negro (Nov., 1928): 105–115, p. 105.

³⁹ See Sonia Arbaci, ‘(Re)Viewing Ethnic Residential Segregation in Southern European Cities: Housing and Urban Regimes as Mechanisms of Marginalisation,’ *Housing Studies* 23, no. 4 (July 2008): 589–613, doi:10.1080/02673030802117050, p. 591.

policies put into place are based on the general assumption that segregation is per se negative and should be reduced or eliminated. These policies lack, however, any prior examination of the causes and effects of segregation, its potential impacts and the policy designs better suited to tackle this phenomenon. The premise is thus that the spatial dispersion of social groups in the city constitutes ethnic segregation; which, given the socioeconomic differences between groups, unchains processes of socioeconomic segregation that have in turn a negative outcome as regards social integration. Segregation is taken to mean the unequal distribution of social groups in the space of the city, without any reference to quantitative or qualitative parameters that may help delimit a permissible or acceptable concentration from an unacceptable one.

Urban sociology has identified in this connection a wide array of circumstances that may contribute to segregation processes. A non-exhaustive list of factors has been compiled here, categorised in four overarching groups as follows:

- *Neoliberalism and the commodification of housing*: globalisation and privatisation trends, rapid urbanisation and entry of financial investors into real estate markets, role of public-private partnerships and entrepreneurialism in urban planning, fostering of owner-occupation and property as predominant tenure systems;
- *Socioeconomic structures and the impact of public policies*: uneven distribution of tenure types, lack of affordability of dwellings, lack of appropriate services and infrastructures, physical isolation from employment opportunities, residualisation of social housing and dualist social housing systems, existence of dualist labour markets, poor social inclusion of migrants and minorities, uneven distribution of local public goods, urban sprawl and urban renewal programmes;
- *Preference externalities*: residential choices marked by ethnic or socioeconomic considerations, preferences as regards local private goods;
- *Role of prejudice and discrimination*: role of ‘gatekeepers’ and institutional discrimination, obscure housing allocation practices, discriminatory practices in the real estate and lending industries, collective action to exclude by neighbours and housing associations, self-segregation of majority population and ‘tipping’ models, weaker position of minorities in the housing market.

Several theories have been advanced to explain the link between these factors and the emergence of segregated neighbourhoods. First of all, the ‘spatial assimilation’ theory posits that the segregation of groups in space is a consequence of socioeconomic differences,⁴⁰ so that the length of residence, acculturation (understood as the acquisition of the norms and values of the majority community) and socioeconomic mobility are all key factors in bringing about the dispersion of social groups.⁴¹ By contrast, the ‘ethnic stratification’ or ‘place stratification’ theory highlights the role of discrimination in housing markets by various actors, such as mortgage providers, estate agents, (social) landlords and governmental institutions.⁴² Prejudice and discriminatory practices would, according to this theory, shape the residential patterns of minority group members, constraining their residential mobility.⁴³ For its part, the ‘cultural preferences’ theory argues that social groups tend to choose neighbourhoods where their own cultural or ethnic group is strongly represented, even when controlling for socioeconomic differences.⁴⁴

⁴⁰ See Bolt, Van Kempen, and Van Ham, ‘Minority Ethnic Groups in the Dutch Housing Market,’ p. 1361; John Iceland and Rima Wilkes, ‘Does Socioeconomic Status Matter? Race, Class, and Residential Segregation,’ *Social Problems* 53, no. 2 (May 2006): 248–73, doi:10.1525/sp.2006.53.2.248, p. 249.

⁴¹ Bolt, Van Kempen, and Van Ham, ‘Minority Ethnic Groups in the Dutch Housing Market,’ p. 1361.

⁴² Ibidem, p. 1362.

⁴³ Iceland and Wilkes, ‘Does Socioeconomic Status Matter?’, p. 250.

⁴⁴ See Bolt, Van Kempen, and Van Ham, ‘Minority Ethnic Groups in the Dutch Housing Market,’ p. 1362.

A comparative overview of policies seeking to combat segregation implemented in European Union Member States has shown that their most frequent objective is to obtain a balanced population structure or a balanced urban development through the pursuing of a ‘social mix.’⁴⁵ The precise meaning of this concept is obscure, resonating more as an abstract notion than an explicit legal principle. Whereas some countries target specific neighbourhoods in order to achieve this mix, others aim their policies towards all neighbourhoods as an ensemble.⁴⁶ Similarly, the policy rationales cited for these desegregation policies are very diverse: for instance, the fostering of ‘housing careers’ in the district, the promotion of higher resident turnover, the maintaining of stable social relations or the improvement of social contacts within the neighbourhood.⁴⁷

The specific policies implemented to combat segregation highly diverge in their design and outcomes. Adapting one of the proposed classifications,⁴⁸ we can group these policies in three categories:

- *Place-based policies*, which target the neighbourhoods, the dwellings and all related elements. This includes policies such as the improvement of the housing stock and amenities, the creation of affordable housing options, the mixing of housing qualities and prices, social and ethnic mixing, the construction of scattered-site programmes, housing diversification, urban restructuring, allocation quotas or the control of the influx of low-income groups in ‘concentration’ neighbourhoods;
- *People-based policies*, which target specific individuals and families with the aim of facilitating their social mobility. This includes policies such as rental subsidies, housing vouchers or mobility programmes. These policies are typically implemented in the US (i.e. *Gautreaux* and *Moving To Opportunity* programmes),⁴⁹
- *Indirect policies*, which target the root causes of segregation from a broader perspective. These include the enactment of anti-discrimination legislation, the regulation of housing allocation procedures, the promotion of alternative tenure systems, the strengthening of

⁴⁵ See Gideon Bolt, ‘Combating Residential Segregation of Ethnic Minorities in European Cities,’ *Journal of Housing and the Built Environment* 24, no. 4 (December 2009): 397–405, doi:10.1007/s10901-009-9163-z; Roger Andersson, Åsa Bråmås, and Emma Holmqvist, ‘Counteracting Segregation: Swedish Policies and Experiences,’ *Housing Studies* 25, no. 2 (March 2010): 237–56, doi:10.1080/02673030903561859; Hanna Dhalmann and Katja Vilkkumaa, ‘Housing Policy and the Ethnic Mix in Helsinki, Finland: Perceptions of City Officials and Somali Immigrants,’ *Journal of Housing and the Built Environment* 24, no. 4 (December 2009): 423–39, doi:10.1007/s10901-009-9159-8; Gideon Bolt, Deborah Phillips, and Ronald Van Kempen, ‘Housing Policy, (De)segregation and Social Mixing: An International Perspective,’ *Housing Studies* 25, no. 2 (March 2010): 129–35, doi:10.1080/02673030903564838; Sybille Münch, ‘“It’s All in the Mix”: Constructing Ethnic Segregation as a Social Problem in Germany,’ *Journal of Housing and the Built Environment* 24, no. 4 (December 2009): 441–55, doi:10.1007/s10901-009-9160-2; Maarten Van Ham and David Manley, ‘Social Housing Allocation, Choice and Neighbourhood Ethnic Mix in England,’ *Journal of Housing and the Built Environment* 24, no. 4 (December 2009): 407–22, doi:10.1007/s10901-009-9158-9; Emma Holmqvist and Zara Bergsten, ‘Swedish Social Mix Policy: A General Policy without an Explicit Ethnic Focus,’ *Journal of Housing and the Built Environment* 24, no. 4 (December 2009): 477–90, doi:10.1007/s10901-009-9162-0.

⁴⁶ See the difference, for instance, between the German and the Swedish desegregation policies. Münch, ‘“It’s All in the Mix”’; Andersson, Bråmås, and Holmqvist, ‘Counteracting Segregation.’

⁴⁷ See Bolt, Phillips, and Van Kempen, ‘Housing Policy, (De)segregation and Social Mixing,’ p. 130–132.

⁴⁸ Leah Platt Boustan, ‘Racial Residential Segregation in American Cities,’ in *The Oxford Handbook of Urban Economics and Planning*, ed. Nancy Brooks, Kieran Donaghy, and Gerrit-Jan Knaap (Oxford: Oxford University Press, 2012), p. 319.

⁴⁹ Marco Oberti and Edmond Préteceille, *La ségrégation urbaine*, Repères 666 (Paris: La Découverte, 2016), p. 103.

the individuals and families' position in the housing market or the improvement of minorities' integration in the host society.

Finally, the critical remarks and potential solutions advanced by urban researchers in light of these policies are also manifold. First, they mostly criticise the fact that desegregation and mixing policies deflect attention from the structural causes of segregation—namely, prejudice, inequality and discrimination—,⁵⁰ and conceal housing hardship and marginalisation.⁵¹ They are often based on oversimplifications, overlooking the fact that the causes of segregation are rather multifaceted and contextually bounded.⁵² Secondly, many of these policies have not significantly reduced the levels of segregation in the areas where they have been implemented;⁵³ on the contrary, as some authors point out, they might have even displayed negative effects.⁵⁴ In fact, some degree of spatial segregation might help minorities adjust to the host society and the host country at an initial but crucial stage of their integration.⁵⁵ Thirdly, the role of so-called 'neighbourhood effects' or 'peer effects,' that is, the limited chances of escaping poverty due to poor social networks and limited resources and opportunities, appears to have been overestimated.⁵⁶ Lastly, desegregation policies often disregard the impact of the self-segregation trends of the majority population,⁵⁷ as well as the risks of gentrification and of displacement of sociocultural concentrations towards other areas.⁵⁸

Towards a legal conceptualisation of housing segregation

The insights provided by urban research are significant in the task to conceptualise segregation from a legal perspective. An exercise to extract the relevant points from these analyses and to extrapolate them to the legal field is attempted in this section. Once each of these conceptual issues is presented, the article refers back to the legal interpretation of segregation advanced in the framework of the International Convention on the Elimination of All Forms of Racial Discrimination and the Revised European Social Charter, in order to find adequate legal solutions and responses. By means of this process, this section delves into the elements, criteria and constraints that a legal conceptualisation of housing segregation demands.

The sociological research presented above shows, first of all, that a certain concentration of social groups in space—be it ethnic or cultural minorities, be it low-income groups—need not be automatically prejudicial. It has been argued that such concentrations may even be beneficial, unless linked with material conditions of deprivation.⁵⁹ In turn, some authors have denounced how public policies often identify automatically concentration with segregation, without any prior examination of the situation in hand.

This raises a first conceptual issue: is segregation to be conflated with any significant concentration of social groups in space, regardless of whether such concentration has a harmful character? In other words, if certain concentrations of social groups in space were to be justified, would these 'acceptable' concentrations come under the concept of segregation? This discussion is not merely terminological: the manner in which we frame segregation has an impact on the types of policies, practices and situations that we consider included in that notion, with the legal consequences that ensue. Moreover, the answer given to this question will predetermine the set

⁵⁰ Bolt, Phillips, and Van Kempen, 'Housing Policy, (De)segregation and Social Mixing,' p. 133.

⁵¹ Arbaci, '(Re)Viewing Ethnic Residential Segregation in Southern European Cities,' p. 604.

⁵² Ibidem, p. 590.

⁵³ See Andersson, Bråmă, and Holmqvist, 'Counteracting Segregation'; Van Ham and Manley, 'Social Housing Allocation, Choice and Neighbourhood Ethnic Mix in England.'

⁵⁴ Bolt, Phillips, and Van Kempen, 'Housing Policy, (De)segregation and Social Mixing,' p. 130.

⁵⁵ Dhalmann and Vilka, 'Housing Policy and the Ethnic Mix in Helsinki, Finland,' p. 437.

⁵⁶ Münch, "'It's All in the Mix'," p. 446.

⁵⁷ Ibidem, p. 445.

⁵⁸ Bolt, Van Kempen, and Van Ham, 'Minority Ethnic Groups in the Dutch Housing Market,' p. 1369.

⁵⁹ See further Dhalmann and Vilka, 'Housing Policy and the Ethnic Mix in Helsinki, Finland,' p. 430.

of methods required in order to qualify any given situation as segregation, as well as the legal tools available to address it.

Two possible responses emerge to this first question. It can be understood, on the one hand, that segregation encompasses all those situations where a concentration of social groups in space becomes sociologically relevant, because it shows behavioural patterns that differ from those in areas where social groups are dispersed. Following this response, segregation would be qualified by an empirical finding (level of concentration), along with a sociological one (relevance of the concentration). The judgment whether segregation is in any given instance ‘permissible’ or ‘acceptable’ according to legal standards would be an extraneous one; irrelevant from a conceptual standpoint to define segregation.

By contrast, it can be also understood that the concept of segregation already internalises this judgment. In this case, the notion of segregation would refer exclusively to impermissible or unacceptable concentrations of social groups *from a legal standpoint* (i.e. because they run counter to the right to housing or the right not to be discriminated against). This stance assumes that: (a) every finding of segregation is a legal finding; and (b) this legal finding has to be made from the outset in order to qualify a policy, practice or situation as segregationist. Turning our attention to the concept of segregation as interpreted in the ICERD and the RESC systems, it can be concluded that these instruments support the latter conception of segregation. Indeed, from the moment that States parties condemn segregation and undertake to eradicate it, they imply in that concept a contradiction of the fundamental rights and values they seek to protect. Segregation should therefore be understood as a *legal* concept; that is, as a concept whose materialisation ultimately depends on a legal judgment, and not merely an empirical or sociological one.

A second conceptual note revolves around the necessity to connect the legal concept of segregation with the actual material conditions under which segregation manifests itself. As urban research highlights, a wide array of factors (neoliberalism and the commodification of housing, socioeconomic structures and the impact of public policies, preference externalities, prejudice and discrimination) contribute to segregation, and different theories (spatial assimilation, ethnic or place stratification, cultural preferences) can be formulated to explain this link. The legal concept of segregation cannot exist in a vacuum, but all these structural factors should be taken into account holistically when qualifying a particular situation as segregationist. The degree of housing deprivation, the impact of inequality, prejudice and discrimination or the avoidance strategies of majority groups—amongst others—cannot be detached from the core content of segregation. This intuition would necessarily contradict those policy discourses which frame segregation as a direct consequence of the decisions of minority groups to withdraw.⁶⁰ Segregation should be conceptually (re)connected with the factual scenario in which it emerges.

Thirdly, a glance at the identified causes of segregation shows that many of these causes are structural, and do not always stem from deliberate or targeted actions. As already seen when examining the two selected international human rights instruments, segregation should be defined by reference to the nature of the situation, policy or practice in hand; rather the intentionality. Measures of a nature such to create or aggravate a situation of factual segregation should be in principle prohibited, regardless of whether the authors actually intend to do so.

Fourthly, it has also been highlighted that many of the contributing factors originate from the conduct of private, non-governmental actors. In many cases, such as collective action to exclude or self-segregation, these actions can bear a considerable impact on the overall levels of segregation. According to this recognition, the idea that segregation ‘may also arise as an unintended by-product of the actions of private persons’⁶¹ should form an integral part of any

⁶⁰ See Münch, “‘It’s All in the Mix’,” p. 442 et seq.

⁶¹ See Committee on the Elimination of Racial Discrimination, General Recommendation XIX.

legal conceptualisation of segregation. Both de jure and de facto segregation must come under this concept on an equal footing.

As a fifth conceptual issue, an overview of the various policies seeking to combat segregation reveals that one of the most frequent stated aims is the achievement of a ‘social mix,’ through which to obtain a balanced population structure or a balanced urban development. Similarly, different policy designs have been put in place with the rationale to maintain stable social relations, such as allocation quotas. Urban research has raised concerns about the disproportionate impact these policies may have on ethnic and cultural minorities and on low-income groups, which can see core elements of their right to housing restricted as a result. Therefore, the disproportionate impact that certain policies and practices may have on ethnic and cultural minorities and on low-income groups should be taken into account when trying to qualify them as segregationist.

In the sixth place, and in a parallel manner to the previous issue, the over-representation of minorities among the beneficiaries of some policies can bear a considerable weight in qualifying them as segregationist. Obscure allocation practices, mediocre quality dwellings, lack of access to public services and infrastructures, etc., are all relevant factors pointing to segregation, especially when it is a particular social group that is systematically put under inadequate housing conditions. Some extreme practices, such as those evoked in the framework of the collective complaint mechanism of the RESC (walling off entire communities, placement of communities in environmentally hazardous areas, cutting the water supply, etc.)⁶² unambiguously reveal intentional segregation on the part of the State. In this respect, an aggravated notion of ‘direct’ or ‘deliberate’ segregation could perhaps be envisaged to qualify those State practices that clearly threaten the core elements of the right to housing of individuals and which are especially objectionable from a human rights law standpoint.

A seventh point would refer to the link between the ethnic and socioeconomic dimensions within segregation phenomena. An explicit recognition of this link, which has been acknowledged by the CERD and the ECSR as well as by urban research, would serve to emphasise the relevance of this interconnection at a conceptual stage, making those situations of multiple segregation more visible. It would equally highlight from the outset the conceptual relationship between segregation and discrimination.

Finally, and as an eighth element, a specific attention should be afforded to particularly disadvantaged groups and vulnerable minorities, such as Roma, Sinti and Travellers in Europe. Internalising the specific needs and lifestyle of these groups, along with the special protection they require, is essential to fully conceptualise segregation from a legal perspective; and this, as the ECSR has advanced, ‘not only for the purpose of safeguarding the interests of the minorities themselves but to preserve cultural diversity of value to the whole community.’⁶³

Conclusions

This paper has attempted a first exercise to move towards a legal conceptualisation of housing segregation through the examination of this notion under two selected human rights instruments—the ICERD and the RESC—as well as the contributions of urban research. By extrapolating the relevant points to the field of law, it has raised several conceptual issues that may be answered by means of the guidance provided in the framework of those two instruments. This comparative exercise has notably highlighted eight elements that may serve as reference to conceptualise housing segregation.

⁶² See European Committee of Social Rights, *European Roma Rights Centre v. Portugal*.

⁶³ See European Court of Human Rights (GC), *Oršuš and Others v. Croatia*.

The eight conceptual notes may be summarised as follows: (1) segregation should be understood as a legal concept, that is, as a concept whose materialisation ultimately depends on a legal judgment and not merely an empirical or sociological one; (2) segregation should be connected with the material conditions under which the phenomenon manifests itself, and all structural factors conducive to segregation should be taken into account holistically when qualifying particular situations; (3) segregation should be defined by reference to the nature of the situation, policy or practice in hand, rather its intentionality; (4) this concept should include both *de jure* and *de facto* segregation, that is, segregation arising as an unintended by-product of the actions of private persons; (5) the disproportionate impact that certain policies and practices may have on ethnic and cultural minorities and on low-income groups should be taken into account when trying to qualify them as segregationist; (6) regard should be had to the over-representation of minorities amongst the beneficiaries of some policies, along with extreme practices which unambiguously reveal intentional segregation on the part of the State; (7) the link between the ethnic and socioeconomic dimensions within segregation phenomena should be explicitly recognised, thus making the situations of multiple segregation more visible; and (8) specific attention should be afforded to particularly disadvantaged groups and vulnerable minorities, such as Roma, Sinti and Travellers in Europe.

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