Proposal for the 2017 Berkeley Conference at Trinity College Dublin

Housing Segregation as Discrimination: A European Law Approach

Dr. Julie Ringelheim
Senior Researcher with the Belgian Fund for Scientific Research (F.R.S-FNRS) and the Centre for Philosophy of Law of the University of Louvain
Professor of Human Rights Law at the University of Louvain.

and

Juan Carlos Benito Sánchez
PhD candidate at the Centre for Philosophy of Law of the University of Louvain

In many countries in Europe, residential segregation affecting Roma and other ethnic minorities is widely considered as a major source of inequality in relation to access to adequate housing. The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) clearly identifies segregation as a form of discrimination: under its Article 3, state parties undertake to condemn racial segregation and 'to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.' European antidiscrimination instruments, by contrast, do not contain any explicit reference to this concept: the term 'segregation' is absent from EU antidiscrimination directives as well as from the European Convention on Human Rights and the European Social Charter. Yet, in practice, this concept has started to be considered in the case-law: some decisions of the European Committee of Social Rights on the merits of collective complaints explicitly discuss segregation issues based on the right to non-discrimination combined with the right to housing.[1] The European Court of Human Rights, while not having examined *residential* segregation problems yet, has famously condemned segregation of Roma children in schools as a form of discrimination.[2] Segregation-related issues have also arisen in some national court cases in European countries, including in the field of housing.[3]

However, as a legal concept, housing segregation still lacks clarity and concretion. The important conceptual and practical issues raised by this notion have been insufficiently addressed in the literature. The UN Committee on the Elimination of Racial Discrimination (CERD) has indicated that not only segregation created by governmental policies falls within the scope of Article 3 ICERD, but also *de facto* segregation arising as 'an unintended by-product of the actions of private persons'.[4] But at what conditions can

[1] See European Committee of Social Rights, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Collective complaint No. 58/2009, decision of 25 June 2010 and European Committee of Social Rights, *European Roma Rights Centre v. Portugal*, Collective complaint No. 61/2010, decision of 30 June 2011.
[2] See i.a. Eur. Ct. H.R. (Grand Chamber), *D.H. and others v. The Czech Republic*, Judgment of 13 November 2007; Eur. Ct. H.R. (1st section), *Sampanis and others v. Greece*, 5 June 2008 and Eur. Ct. H.R. (Grand Chamber), *Orsus and others v. Croatia*, Judgment of 16 March 2010.
[3] See in particular the 'separation wall' case in Romania: Romanian High Court of Cassation and Justice, file 1741/33/2011, decision 640/27.09.2013. See also the 'La Barbuta camp' case in Italy: Tribunal of Rome, decision of 30 May 2015.
[4] Committee on the Elimination of Racial Discrimination, General Recommendation XIX on article 3 of the Convention, Forty-seventh session, 18 August 1995.

a state policy or a *de facto* situation be legally characterized as segregationist? What are the relations between segregation and discrimination? And what concrete measures does the obligation to 'prevent, prohibit and eradicate' segregation practices call for? This paper aims to explore these questions with a focus on European law. The analysis will rely on a diversity of sources. The practice of the UN Committee on the Elimination of Racial Discrimination as well as relevant case law of the European Committee of Social Rights, the European Court of Human Rights, the European Court of Justice and some European national courts will be investigated. Major cases of the United States Supreme Court relating to housing segregation will give an interesting point of comparison. In addition, insights provided by sociology and urban studies will also be taken into account. Residential segregation has indeed been widely studied in these disciplines and this body of research can help better specifying the concept in the legal realm.

It will be argued that a fundamental distinction should be made in the analysis between segregation created by state policies and *de facto* segregation. Each of these situations raises different conceptual questions and point towards different state obligations. The first two parts of the paper will examine each type of segregation in turn, seeking to clarify in each case the defining elements of segregation and the implications of its prohibition for state authorities. The next two sections will discuss two further issues. Residential segregation itself can become a source of discrimination for inhabitants of segregated neighbourhoods. The ECJ decision in the CHEZ case provides a remarkable example of how this phenomenon can be addressed through antidiscrimination law.[5] Finally, some anti-segregationist policies may prove in tension with antidiscrimination norms or with the right to freely choose one's place of residence. The policy implemented in the city of Rotterdam in the Netherlands, which gave rise to the *Garib v. the Netherlands* case before the European Court of Human Rights,[6] illustrates this problem.

[5] CJ, C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015.
[6] Eur. Ct. H.R., *Garib v the Netherlands*, 23 February 2016.