

PROHIBITION OF SEGREGATION – A MISSING NORM IN INTERNATIONAL HUMAN RIGHTS LAW?

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Abstract. The aim of this paper is to answer whether and how international human rights law protects from segregationist policies – a still present phenomenon including such practices as prohibition of interfaith marriages, physical separation of men and women in everyday activities or segregation of Roma children in education. I firstly turn to conceptual problems regarding the term “segregation” by proposing its definition and categorizing its diverse displays. I draw a conclusion that segregation and discrimination are separate, although often intertwining, concepts. Subsequent parts of the paper contain an analysis of various international human rights law instruments conducted in search of a norm prohibiting segregation. I conclude that there is no explicit and general prohibition of segregation in international law, however some fragmentary and dispersed norms concerning segregation can be found through analysis of treaties, customary rules as well as doctrinal and judicial interpretations.

Keywords: segregation, international law, human rights, discrimination, equal treatment.

Segregationist practices in the modern world

While researching international human rights law and discrimination law textbooks for this paper, I was struck with how little was written on the topic of segregation. Most of the publications go back to as far as Civil Rights Movement and racial segregation in the United States or apartheid regime in South Africa. Without a doubt, these are the textbook examples of segregationist policies in the modern history anodes that emerge in people’s imagination when someone says “segregation”. All-encompassing character of these examples, as both Americans and South Africans were separated in virtually every aspect of life from education to use of drinking fountains, the tiresome fight of the marginalized in these societies and charismatic leadership of Martin Luther King Jr. and Nelson Mandela is what kept the memory of these regimes so vivid, and as a side effect practically reduced the discourse on segregation to these two policies.

However, segregation did not vanish from the world with Lyndon B. Johnson signing Civil Rights Act of 1964, neither it did with Nelson Mandela becoming

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a president in 1994. Without a question, the world we live in is much more equal than back then, but divisions persist. When there is a difference, there is a temptation to separate based on this difference and people often give in to it. Modern-day segregation exists, but its examples are less ostentatious, but more subtle, less omnipresent, but more selective, less driven by state's action, but more sustained by state's inaction.

Marital law is an example of a widely used instrument of segregation policies. In 25 countries, mostly Muslim-dominated, interfaith marriages are prohibited by state law.² Together with practices of non-recognition of rights of children born in result of interfaith relationships, these policies succeed in segregating religious groups both socially and biologically. Other contemporary attempts of introducing segregation are more traditional in their form, as Israel's recently debated bill that would allow to create Jews-only settlements, a legislation compared in media to South Africa's apartheid laws.³ Conceptual grid of apartheid is also used by some scholars to describe practices of separation of women from men in everyday activities as gender apartheid, one of the harshest examples of it being Saudi Arabia.⁴ Some segregationist policies separate in domains that are not naturally associated with segregation, e.g. social security system in Singapore which is separate for all of the three dominant races in the state.⁵

Modern segregation is not only a problem of non-Western societies as examples of segregation can be found for instance in the United States and in Europe. Although more than 50 years has passed since the abolition of segregationist policies in the USA, the country is still not able to combat residential separation of African-Americans and White Americans, the effect of ghettoization.⁶ Europe's burning issue is segregation of Roma children in education, a problem that is being addressed by both the European Union and the Council of Europe.⁷ The practice concerning regulation of same-sex relationships in Europe can also be labeled as segregation, since it creates "separate but equal" institutions on grounds of sexual orientation by allowing same-sex couples to conclude civil partnerships, but not marriages, although these institutions contain the same rights and obligations in many countries.⁸

² *Freedom of Marriage World Table*, Hiddush – for religious freedom and equality, accessed 13 August 2018, <http://marriage.hiddush.org/table>

³ B. Trew, *Israel law which could create Jewish-only communities protested by thousands over 'apartheid' fears*, The Independent, accessed 13 August 2018, <https://www.independent.co.uk/news/world/israel-draft-law-exclude-arabs-segregation-apartheid-protest-language-communities-a8450976.html>

⁴ A.E. Mayer, *A Benign Apartheid: How Gender Apartheid Has Been Rationalized*, UCLA Journal of International Law & Foreign Affairs, 5, 2000, pp. 237-338.

⁵ Ch.B. Huat, *Political Culturalism, Representation and the People's Action Party of Singapore*, Democratization, 14:5, 2007, pp. 918-921.

⁶ See L.L. Martin, K.J. Varner, *Race, Residential Segregation, and the Death of Democracy Education and Myth of Postracialism*, Democracy & Education, 25:1, 2017, pp. 1-10.

⁷ See A. Eliason, *With No Deliberate Speed: The Segregation of Roma Children in Europe*, Duke Journal of Comparative & International Law, 27, 2017, pp. 191-241.

⁸ E. Bribosia, I. Rorive, L. Van den Eynde, *Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience*, Berkeley Journal of International Law, 32, 2014, pp. 35-37.

The above confirms that segregation is not only a historical phenomenon, but also an up-to-date problem. Concurrently, examples that can be qualified as cases of segregation differ greatly what poses challenges to defining segregation, classifying its displays and regulating them. Furthermore, it is important to answer whether and how international law prohibits and combats segregation.

Conceptual issues of segregation

As there is no binding legal definition of segregation in international law, it is worth drafting a working definition of this term. I propose to define segregation as separation of people that lacks reasonable justification.

Undoubtedly, an inherent and central element of segregation is separation. It can have as many different types as there are aspects of life. In this respect separation can be, e.g. spatial, biological, social, educational, residential, occupational, in access to citizenship rights and property and in use of public facilities. Another categorization can be conducted by characteristics based on which a separation takes place. Many grounds of division can be named: race, ethnicity, nationality, gender, sex, age, religion, tribe, caste, social status, wealth. Enumerations for both classifications of separation – by domain and by ground – are intrinsically non-exhaustive and include only the most common displays of separation. It should be noted that a particular case can correspond to more than one ground of separation and more than one, or even all, domains of separation.

Not every separation will amount to segregation. In general, separation is not an uncommon practice, and everyone experiences it in day-to-day life. Consider such examples as assigning children to classes in school based on their age or, debatably, providing separate public restrooms for men and women. How are these examples different from segregation practices? Children are separated in school based on their age as it is commonly believed that they develop better among their peers. Ubiquitous practice of separating public restrooms by sex is being customarily defended by arguments of safety and comfort of its users, notably women, although sound criticism of this approach should be recognized.⁹ Contrary, cases of segregation cannot be objectively defended, and therefore “lack of reasonable justification” should constitute an element of the definition of segregation and differentiate it from a mere separation.

Arguably, the definition of segregation could not be phrased in less open-ended manner than “separation that lacks reasonable justification”. Unfortunately, this phrasing will inevitably cause interpretative uncertainty in regard to what justifications can be deemed “reasonable”. Nevertheless, general clauses are not unknown to human rights jurisprudence and scholarship. Recognized doctrine on limitations of human rights, “reasonable justification” clause and test of proportionality should

⁹ See T.S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, Michigan Journal of Gender & Law, 14:1, 2007, pp. 1-56.

also be applicable to scrutinizing segregation practices. Primarily, a justification can be reasonable when a separation is introduced to protect an important value, e.g. “public safety, public order, health, morals, or rights and freedoms of others” to quote justification grounds for limitations of some of individual rights from the European Convention on Human Rights.¹⁰ Moreover, separation policy should pass the proportionality test in order to be deemed “reasonable”, which means that necessity of introducing separation to protect a said value and availability of less intrusive measures must be evaluated and that balancing of costs and benefits of a policy is needed. The questions whether there is room in cases of separation for different standards of scrutiny depending on specific cultural and social context of a state or whether doctrine of margin of appreciation, used by the European Court of Human Rights, should apply, remain open. Regardless of this matter, every separation policy should be seen as suspicious and subject to strict scrutiny. As a result, to better protect victims, the burden of proof should lay on the side of a state which will have to convincingly prove that separation policy was reasonably justified, and therefore does not amount to segregation.

Subsequent issue that needs to be discussed is from whom a segregation policy can originate. According to a definition of segregation proposed by Council of Europe’s European Commission against Racism and Intolerance (ECRI), segregation is “the act by which a (natural or legal) person separates other persons”.¹¹ In light of this definition, not only a state can be a perpetrator of segregation, but also individuals and other entities. This definition may be counterintuitive as segregation is associated mostly with state-imposed policies, also because states are often the only actors capable of introducing such policies, thanks to their legislative and law enforcement competences. However, extending the definition of segregation to encompass actors other than states is in my opinion valuable and reflects general trend in international law that non-state actors are more and more often perpetrators of human rights violations. Whether the case concerns a non-state group participating in an armed conflict that introduces religious segregation in housing on territories controlled by them or a corporate entity that assigns offices to its employees on basis of race, definition of segregation should encompass these situations. Moreover, positive obligations should be imposed on states to prevent and eradicate cases of horizontally imposed segregation.

Next conceptual challenge for defining segregation is whether the term should include *de facto* segregation, or should it be limited only to segregation policies imposed by law. It might happen that a seemingly “reasonably justified” state policy of separation, produces in its application a non-neutral and non-defendable outcome. A segregationist result of a policy might as well be an envisioned and

¹⁰ Art. 8.2, Art. 9.2, Art. 10.2, Art. 11.2, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950, United Nations Treaty Series vol. 213, No. 2889, p. 221.

¹¹ Par. 6, European Commission Against Racism and Intolerance (ECRI), Council of Europe, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, Strasbourg, 13 December 2002.

easily expected, but hidden and unpronounced goal of policymakers. Consider for example superficially lawful separation in schools of children with intellectual disabilities for a reason of providing them with specialized care and tailored teaching methods. In some European countries this policy resulted in disproportional diagnosis of intellectual deficiencies within Roma children and produced the effect of separating them from other children.¹² A parallel can be drawn between discussed differentiation and direct-indirect discrimination dichotomy. In result, terms such as direct segregation and indirect segregation can be used to capture what has been discussed.

The above analysis raises a question whether an intent to segregate behind a policy or practice is necessary in order to label it as segregation. If we want to follow the logic of international discrimination law, we should conclude that segregationist intent of a perpetrator, just as discriminatory intent in cases of discrimination, does not matter.¹³ This approach has a clear advantage as victim-friendly interpretation since intent of any kind is always difficult to prove.

Another type of *de facto* segregation is the one that occurs spontaneously, without any state-led intervention. One of the examples is residential segregation in America's major cities, where African-Americans and White Americans quite often occupy separate neighborhoods. This situation is not a result of any policy that would envisage racial segregation in the United States, but it is reality. Reasons of residential segregation include disadvantaged economic position of African-Americans ("white neighborhoods" are generally more expensive to live in), unequal treatment in access to mortgage and discrimination by neighbors and landlords. *De facto* segregation of this type asks for positive action of a state to eliminate unjustified separation through preventing discrimination by non-state actors and putting an end to structural disadvantage.

De facto segregation can be involuntary or voluntary.¹⁴ Involuntary segregation happens without intervention of a state, but also without intent of those subjected to it to be separated. For instance, many African-Americans would gladly leave ghetto neighborhoods, but due to poverty and other disadvantages, are not able to do so. Voluntary segregation occurs when *de facto* segregation is a result of free will of those separated to live apart. People quite often intentionally separate themselves from others, e.g. by sending their children to religious schools that can be attended only by practitioners of one faith, by consciously marrying only within one ethnicity group or by choosing, as immigrants, to reside in the same neighborhood with their compatriots. How much this liberty of choice should be respected is a difficult question. The mentioned practices can pose a threat to the well-being of a community as separation, even voluntary, can lead to intolerance, tensions and possibly

¹² A. Eliason, *With No Deliberate Speed* (...).

¹³ D. Moeckli, *Equality and non-discrimination*, International Human Rights Law, Eds. D. Moeckli, S. Shah, S. Sivakumaran, 3rd edition, New York, 2018, pp. 157-158.

¹⁴ *Segregation*, Cases, materials and text on national, supranational and international non-discrimination law, Eds. D. Schiek, L. Waddington, M. Bell, Hart, 2007, p. 258.

a complete disconnection between different parts of society. Nevertheless, freedom allowed to individuals in matters such as marriage or residence is (rightfully) broad and protected by international human rights law,¹⁵ thus ability of a state to intervene in cases of voluntary segregation is most often very limited. Some positive actions like promoting diversity and encouraging contacts between different groups can be in place, however intervention in voluntary segregation practices will always remain a difficult and touchy issue where values such as liberty and diversity will need to be constantly balanced.

The most difficult challenge in conceptualization of segregation is in correctly defining its relation to discrimination. It is clear that segregation and discrimination are not synonymous as cases of discrimination go much beyond practices of separation. The notion of discrimination is also broader from segregation in this manner that it can apply not only to cases of practices against groups, but also against individuals. In my opinion, concept of segregation can be used only when groups are being separated as a certain quantitative weight is assigned to this term and by this I exclude a possibility of individual segregation.

Can we therefore conclude that segregation is a subcategory of discrimination given that it is narrower in those two manners? Many believe so. According to some scholars, segregation is a specific manifestation of discrimination.¹⁶ ECRI recommends states to provide expressly in its national laws that segregation is a form of discrimination.¹⁷ European Court of Human Rights also recognizes segregation as a type of discriminatory practice and treats it as a violation of Article 14 ECHR (prohibition of discrimination).¹⁸

If segregation could be classified as a subcategory of discrimination, it should be able to always satisfy the definition of discrimination. Putting aside conceptual issues concerning discrimination that are not relevant for this analysis, it can be stated with sufficient certainty that discrimination equals less favorable treatment of an individual or a group. Is it always that segregation implies less favorable treatment of one of the separated groups? Not necessarily, in my opinion. Theoretically, one can segregate people on the basis of the believe that certain groups should be separated, not intending to disadvantage any group and not resulting in unequal treatment towards anyone. Application of “less favorable treatment” clause in segregation scenarios can be problematic as it requires a comparison of two different groups and there may just not be any group that is treated worse than the other as a result of separation. It can also be a case that all the separated groups are treated worse than they would be treated if the segregation has not taken place.

¹⁵ E.g., Art. 12, Art. 23. 2, International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, United Nations Treaty Series vol. 999, No. 14668, p. 171.

¹⁶ *Segregation* (...), p. 257.

¹⁷ Par. 6, European Commission Against Racism and Intolerance (ECRI), Council of Europe, General Policy Recommendation (...).

¹⁸ J. Gerrards, *Prohibition of Discrimination*, [in:] *Theory and Practice of the European Convention on Human Rights*, Eds. P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, Cambridge, 2018, pp. 1007-1008.

We can think of interfaith marriage prohibition as an example. In this case, rights of all of the religious groups are limited, but limitation is the same for all of them. This policy does not intent to, nor result in less favorable treatment of one group in comparison to other. Arguably, there is also no discrimination in some cases of segregation in Asian countries as they often adhere in its philosophy to a concept of “peaceful coexistence” between different nations which, being a part of Asian values discourse, favors separation over integration, but in the spirit of equality of all nations.¹⁹ Whether one agrees with sincerity and logic of it or not, this explanation is often used to justify non-integrationist policies in Asia.

Even if segregation does not equal discrimination, it does not mean however that it is justifiable. There are other values than equality that are put into question when segregation occurs. Segregation is always a treat to individual freedom as it imposes restrictions on someone’s behavior, e.g. you may not marry a person of a different religion or you may not reside in a city that is not designated for people of your race. Such regulations would respectively limit freedom to marry and freedom to move freely, both protected by international human rights law. Another value that is being put at risk is diversity, since when people are separated, society is divided into “black or white” groups as segregation does not like anything “in-between”, exclusion of mixed-race people in South African apartheid regime being its most evident example.

Moreover, applying “less favorable treatment” prerequisite to segregation cases is redundant and may lead to under-recognition of segregation. Besides causing problems in cases where less favorable treatment just does not occur, additional prerequisite burdens a plaintiff as he or she has to prove that unequal treatment has in fact taken place. Lack of reasonable justification should, in my view, be sufficient to state that a separation policy is segregationist.

One may think that my understanding of segregation in context of discrimination is contrary to a then revolutionary and now well-established case of the U.S. Supreme Court from 1954 – *Brown v. Board of Education of Topeka*.²⁰ The judgement abolished segregated education and reversed former precedence on the segregation issue²¹ by acknowledging that “separate but equal” doctrine should cease to be applied by the Court. My thinking does not contradict *Brown*, which becomes evident after a lecture of this case. First of all, the U.S. Supreme Court discusses segregation in a very specific context – segregation between African-Americans and White Americans in education in early 1950s. In this case, discriminatory character of segregation policy is obvious. On the contrary, my analysis concerns theoretical classification of segregation. Although in most of the cases segregation will be a result of discrimination, it does not necessarily have to be. Second of all,

¹⁹ See F. Dallmayr, ‘Asian Values’ and Global Human Rights, *Philosophy East and West: A Quarterly of Comparative Philosophy*, 52:2, 2002, pp. 173-89.

²⁰ U.S. Supreme Court, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

²¹ U.S. Supreme Court, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

the Court did not state that every separation means inequality and it gave reasons why this particular case amounts to discrimination. What was revolutionary about this judgement was not that it considered every separation policy as inherently unequal, but that it acknowledged that equality should mean something more than tangible equality of facilities provided for both races. *Brown* stated that inequality of school segregation lays in denoting the inferiority to African-Americans and generating the feeling of inferiority in them.²² Similar line of argumentation was followed by the U.S. Supreme Court in *Loving v. Virginia*²³ that abolished prohibition of interracial marriages.

To repeat, segregation is a separation that cannot be reasonably justified. Its different examples can be assigned to different subcategories – according to a domain in which segregation applies or according to a characteristic based on which different groups are being separated. We can distinguish state-led and non-state-led segregation. It can be explicitly imposed by law (direct segregation) or it can occur as a result of a seemingly neutral policy (indirect segregation). Examples of *de facto* segregation, taking place without state intervention, include voluntary and involuntary situations. Since it does not necessarily result in a less favorable treatment of one group, segregation should not be classified as a subcategory of discrimination, but rather as a category of violation of human rights on its own. Nevertheless, notions of segregation and discrimination are closely related and will often appear simultaneously and intertwined. As a result, segregation cannot be *per se* classified, neither as a manifestation of direct discrimination, nor as a type of indirect discrimination – a conceptual issue discussed in literature.²⁴

Direct prohibition of segregation in international law

Answering a question on whether a universal prohibition of segregation exists is, for many reasons, not easy. Firstly, as discussed above, it is not clear what one means when invoking segregation as understandings of this term differ, both in colloquial use and in legal doctrine. Some would claim that only state-imposed segregation will amount to “real” segregation and consequently to prohibition by international law, others would see the issue more broadly and argue that segregation of a larger sense, including *de facto*, not state-controlled segregation should be brought into picture and states should undertake positive obligations to combat it. Secondly, there is no treaty that would directly refer to general and universal prohibition of segregation, therefore the norm must be looked for across different fields and instruments of international law.

²² It is worth noting that US law requires discriminatory intent in discrimination cases, contrary to international human rights law; D. Moeckli, *Equality and non-discrimination* (...), p. 157.

²³ U.S Supreme Court, *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁴ *Segregation* (...), p. 259.

Racial segregation is strictly prohibited by the International Convention on the Suppression and Punishment of the Crime of Apartheid.²⁵ Moreover, according to Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination: “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction”.²⁶ In addition to general prohibition of racial segregation, apartheid is particularly condemned in the field of sports.²⁷ All these international instruments are widely ratified and recognized. Prohibition of racial segregation is reinforced by International Criminal Law since the Rome Statute lists “crime of apartheid” as one of the crimes against humanity.²⁸ Although synonymy of terms “racial segregation” and “apartheid” may be debatable, all the above-mentioned instruments define apartheid as limited to separation based on race.²⁹

Prohibition of racial segregation is a well-established norm of international law already since 1970s. Nevertheless, there are no respective regulations on segregation on grounds of other characteristics, e.g. gender or religion. There is no apparent reason why gender apartheid, religious segregation or unjustified separation on any other ground should not be worthy of the same kind of condemnation from international community. Disparity between racial segregation and other types of segregation seems to create a gap in international human rights law.

Specific recognition in international law is also given to educational segregation. Art. 1.1.c) of the UNESCO Convention against Discrimination in Education³⁰ defines “establishing or maintaining separate educational systems or institutions for persons or groups of persons” as discrimination, subject to enumerated exceptions, and requires states to eliminate and prevent this kind of practice. Interestingly, the Convention allows for sex-separated schools and classes,³¹ even though a reasonable justification for this kind of separation is highly debatable. What is more, according to the Convention, separation in education based on religious or linguistic reasons is only allowed when such kind of schooling is optional and requires a wish of pupil’s parents or legal guardians,³² restrictions that do not apply in case of sex-separated education.

²⁵ International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, “United Nations Treaties Series”, vol. 1015, No. 14861, p. 243.

²⁶ International Convention on the Elimination of All Forms of Racial Discrimination, New York, 20 November 1963, “United Nations Treaties Series”, vol. 660, No. 9464, p. 1.

²⁷ International Convention Against Apartheid in Sports, New York, 10 December 1985, “United Nations Treaties Series”, vol. 1500, No. 25822, p. 161.

²⁸ Art. 7.1. j), Rome Statute of the International Criminal Court, Rome, 17 July 1998, “United Nations Treaties Series”, vol. 2187, No. 38544, p. 3.

²⁹ International Criminal Court, Elements of Crimes, Article 7 (1) (j) of Elements of Crimes, Element 4, The Hague, 2011; Art. 2, International Convention on the Suppression and Punishment of the Crime of Apartheid.

³⁰ Convention against Discrimination in Education, United Nations Educational, Scientific and Cultural Organization, Paris, 14 December 1960, “United Nations Treaties Series”, vol. 429, No. 6193, p. 93.

³¹ Ibidem, Art. 2a).

³² Ibidem, Art. 2b).

Besides education, no other domain of segregation, e.g. residential or occupational, has been restricted by international law – again an example of fragmentary regulation of segregationist practices.

Sporadically, references to segregation can be found in regional human rights instruments. Inter-American Convention Against All Forms of Discrimination and Intolerance states in its preamble that “individual and collective experience of discrimination and intolerance must be taken into account to combat segregation and marginalization”,³³ although the Convention does not make explicit references to segregation in its operative part. Neither instruments of African human rights system, nor of European framework explicitly invoke segregation as a prohibited practice.

Since we have not found an explicit and universal prohibition of segregation in treaty law, the research can be turned to customary norms. There are some controversies surrounding the issue of custom as a source of international human rights law. Some scholars see this branch of international law as a special one in terms of recognition of a customary rule – ones by claiming that it requires only *opinion iuris* and state practice is not relevant,³⁴ others by stating that as human rights take effect between a state and an individual, contrary to the idea that customary practice in international law should evolve between states, no customary international human rights law can exist.³⁵ I side with the majority opinion that customs can emerge in human rights law just as in any other branch of international law. Nevertheless, it must be admitted that the field in question is a highly codified one and customs did not become as important as treaties for international human rights law.

To put forward a thesis that there is an established customary prohibition of segregation seems risky. I have found no authoritative opinion on this issue. State practice shows that some emanations of segregation are not widely contested, e.g. prohibition of interfaith marriages in numerous countries or forms of gender apartheid in some Muslim states. It makes a hypothesis that there is a universal prohibition of segregation by custom particularly weak.

Once more, the situation might be different with racial segregation. As has been already discussed in this paper, there is a substantial body of universally ratified norms that prohibit and punish racial apartheid. Resolutions of United Nations General Assembly, such as Declaration on Apartheid and its Destructive Consequences in Southern Africa³⁶ and Declaration on the Granting of Independence to Colonial Countries and Peoples³⁷ which in its preamble states that an end

³³ Inter-American Convention Against All Forms of Discrimination and Intolerance, Organization of American States General Assembly, La Antigua Guatemala, 5 June 2013.

³⁴ M. Wood, *Customary International Law and Human Rights*, European University Institute (EUI) Working Paper AEL 2016/03, Fiesole, 2016, Abstract.

³⁵ Ibidem, p. 3.

³⁶ United Nations General Assembly resolution S-16/1, Declaration on Apartheid and its Destructive Consequences in Southern Africa A/RES/S-16/1, 6th plenary meeting, 14 December 1989.

³⁷ United Nations General Assembly resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples A/RES/1514(XV), 15th session, 20 September – 20 December 1960.

must be put to “all practices of segregation and discrimination” associated with colonialism,³⁸ can serve as additional evidences for existence of a customary norm prohibiting racial segregation.

Segregation and international law relating to discrimination

Putting aside for now the issue of theoretical categorization of segregation and its conceptual relation to discrimination which has been discussed above, we must recognize that practice of international law is not always coherent with the theory. As a result, in international law-making and jurisprudence, prohibition of segregation happens to be linked with prohibition of discrimination. Therefore, if we want to find an existing norm of international law that prohibits segregation, we must also take a look at discrimination law.

What makes the analysis of international law relating to discrimination fairly easy, compared to researching norms that explicitly prohibit segregation, is that discrimination law is a well-established discipline of international law and comprises of a large number of treaties complemented by judicial, quasi-judicial and doctrinal interpretations. The most important anti-discrimination norms include Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁹ that universally prohibit discrimination both in terms of enjoyment of rights they protect and generally. Moreover, there exist many specific treaties that prohibit certain types of discrimination, e.g. the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁴⁰ Anti-discrimination norms can also be found in regional human rights systems: Articles 2, 3, 28 of the African Charter on Human and People's Rights,⁴¹ Article 14 and Protocol No 12 of the European Convention on Human Rights, Articles 20, 21(1) and 23 of the Charter of Fundamental Rights in the European Union⁴² and Inter-American Convention Against All Forms of Discrimination and Intolerance. Additionally, prohibition of discrimination is an acknowledged customary international law, at least when it comes to the most common grounds of discrimination, such as race, sex and religion.⁴³

³⁸ In my opinion, taking into account the historical context of the resolution, segregation associated with colonialism should mean and should be limited to racial segregation.

³⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, “United Nations Treaties Series”, vol. 993, No. 14531, p. 3.

⁴⁰ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), New York, 18 December 1979, “United Nations Treaties Series”, vol. 1249, No. 20378, p. 1.

⁴¹ African Charter on Human and People's Rights, Nairobi, 27 June 1981, “United Nations Treaties Series”, vol. 1520, No. 26363, p. 217.

⁴² Charter of Fundamental Rights in the European Union, Official Journal of the European Union, 2012/C 326/02, 26 October 2012, pp. 391-407.

⁴³ D. Moeckli, *Equality and non-discrimination* (...), p. 152.

Some treaties in the field of discrimination law invoke segregation directly, although by doing that, they do not seem to attempt to define its relation to discrimination and do not address segregation consistently. The Inter-American Convention Against All Forms of Discrimination and Intolerance mentions combatting segregation in its preamble, but does not formulate a prohibition of segregation in its operative part. The Convention Against Discrimination in Education prohibits separation but allows for many exception and does not pronounce what is the relation between segregation in education and discrimination. The Convention on the Rights of Persons with Disabilities names segregation as rather an outcome of discrimination that must be defeated than a type of discrimination or an act that must be prohibited on its own.⁴⁴ The International Convention on Elimination of All Forms of Racial Discrimination is an exception as it explicitly prohibits racial segregation in its Article 3. What is common for all these instruments however, is that they put segregation in the context of anti-discrimination norms, implying a link between these two categories.

Other international discrimination law instruments can be connected to segregation through interpretation of its norms. Although neither the ICCPR's general comments, nor the Human Rights Committee jurisprudence addresses the issue of segregation, the Covenant's Articles 2 and 26 may be interpreted as being applicable to cases of segregation. An example of such interpretation was given by Lawyers' Committee for Civil Rights Under Law which submitted that *de facto* racial segregation in schooling in the United States is contrary to Article 2 ICCPR.⁴⁵

The ICESCR has been found to be applicable to segregation by the Committee on Economic, Social and Cultural Rights in its General Comment no. 20 concerning non-discrimination in economic, social and cultural rights.⁴⁶ The General Comment urges states to adopt an active approach to eliminate segregation and puts this phenomenon in the context of systemic discrimination. In terms of right to education (Article 13 ICESCR), the Committee affirms approach taken towards separated schooling by the Convention Against Discrimination in Education.⁴⁷

The prohibition of racial segregation in Article 3 of the CERD is supplemented by a general recommendation of the Committee on the Elimination of Racial Discrimi-

⁴⁴ Art. 23.3, Art. 19 b), Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, United Nations Treaties Series vol. 2515, No. 44910, p. 3.

⁴⁵ Lawyers' Committee for Civil Rights Under Law, *A Critical Assessment of the U.S. Commitment to Civil and Political Rights – Toward Securing Equality and Justice for All in Preparation for the Second/Third Country Review of the United States by the United Nations Human Rights Committee*, New York 2006, p. 5.

⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Forty-second session, Geneva, 4-22 May 2009, Agenda item 3, par. 39.

⁴⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 13, The right to education (article 13 of the Covenant), Twenty-first session, 15 November – 3 December 1999, par. 33.

mination.⁴⁸ The recommendation states that the prohibition includes obligation to eradicate the consequences of segregation and recognizes that it also refers to partial segregation and segregation imposed by private parties. A few individual complaints have been lodged that raise the issue of segregation, however the Committee has never found a violation of Article 3, mostly due to the lack of sufficient substantiation of claims.⁴⁹

The CEDAW uses the term “gender-segregation” in general recommendation no. 13.⁵⁰ It considers it as a phenomenon in the labor market that must be overcome. Except this reference, the CEDAW official interpretations do not use the notion of segregation.

The ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation can be interpreted as applicable to cases of occupational segregation. The ILO’s Committee of Experts has repeatedly found sex segregation in workplace practiced in Saudi Arabia in violation of the Convention since it has the effect of prejudicing equality of opportunity and treatment between men and women in the labor market.⁵¹

In general, regional human rights systems have not dealt much with issues of segregation. The European Court of Human Rights can be considered an exception, although its involvement has been limited to one particular type of segregation – racial segregation in education. The Court judged number of cases relating to separation of Roma children in schools,⁵² a practice that took place in many European countries, and developed a settled case-law on this issue. The ECtHR finds segregation in education in violation of Article 14 that imposes an obligation of equal treatment. The practice is usually identified by the Court as an example of indirect discrimination as schools use *prime facie* neutral criteria to separate Roma children from the others. The ECtHR has not stated that any segregation is *per se* in violation of Article 14, but found that separation had a disproportionately negative impact on Roma children, and therefore was discriminatory.⁵³

⁴⁸ Committee on the Elimination of Racial Discrimination, General recommendation XIX on article 3 of the Convention, Forty-seventh session (1995), Document A/50/18.

⁴⁹ Committee on the Elimination of Racial Discrimination, Opinion adopted by the Committee under article 14 of the Convention concerning communication No. 52/2012, 8 June 2016, CERD/C/89/D/52/2012; Committee on the Elimination of Racial Discrimination, Communication No. 46/2009, Opinion adopted by the Committee at its eightieth session, 2 April 2012, CERD/C/80/D/46/2009.

⁵⁰ United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 13: Equal remuneration for work of equal value, 8th session, 1989, preamble.

⁵¹ Human Rights Watch, *Perpetual Minors Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia*, New York, 2008, p. 36.

⁵² See European Court of Human Rights (ECtHR), *Case of D.H. and Others v. The Czech Republic*, Grand Chamber, 13 November 2007, Application no. 57325/00; ECtHR, *Case of Sampanis and Others v. Greece*, First Section, 5 June 2008, Application no. 32526/05; ECtHR, *Case of Horvath and Kiss v. Hungary*, Second Section, 29 January 2013, Application no. 11146/11; ECtHR, *Case of Lavida and Others v. Greece*, First Section, 30 May 2013, Application no. 7973/10.

⁵³ *Theory and Practice of the European Convention on Human Rights*, eds. P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, Cambridge 2018, p. 1007.

Conclusions

A few conclusions can be drawn from the analysis. First of all, segregation is still an important and present phenomenon in the practice of human rights violations, although its forms differ greatly. This situation asks for a proper definition and categorization of segregationist practices, tasks that I attempted to fulfill in this paper. Secondly, although segregation and discrimination often occur together, they are conceptually separate notions. Finally, the question posed in the title of this analysis can be answered, although it requires a rather complex response.

It is sure that there is no explicit, general and universal prohibition of segregation in international human rights law. Segregationist practices are regulated in fragmentary and inconsistent manner. There is a well-established prohibition of racial segregation in international law, but it constitutes an exception in comparison to other types of segregation. The term “segregation” is sporadically used in international law instruments, but its usages do not seem to be thought through and lack consistency. Treaties, international judicial and non-judicial organs and scholars sometimes place segregation in the context of non-discrimination norms. This practice is nevertheless yet too scarce to establish that there is a consensus that international discrimination law prohibits and protects from segregation.

In this situation, is there a need for a clearer prohibition of segregation in international human rights law? In my opinion, a treaty-based norm that universally prohibits all forms of segregation would have many advantages. It would clarify the current state of international human rights law on the issue and leave no room for doubt that segregation is a prohibited practice. Being an autonomous norm, it should result in better monitoring and reporting on segregation, and eventually improve the state of human rights worldwide. Moreover, separation of segregation from non-discrimination norms will be conceptually correct and will help to acknowledge possible cases of segregation that do not include less favorable treatment. Segregation as an individual basis of human rights violation can cause a rise in number of complaints to human rights bodies that concern segregationist practices as victims will be more confident that they can succeed in their cases. Additionally, the use of terms in international law discourse such as “gender segregation” or “religious segregation” should result in giving more gravity to the problem of systemic discrimination by calling these practices by name, emphasizing that they are as serious as racial segregation and just like it should be prohibited regardless of cultural justifications.

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ZAKAZ SEGREGACJI – BRAKUJĄCA NORMA W MIĘDZYNARODOWYM PRAWIE PRAW CZŁOWIEKA?

Streszczenie. Celem artykułu jest udzielenie odpowiedzi na pytanie, czy i w jaki sposób międzynarodowe prawo praw człowieka chroni przed praktykami segregacjonistycznymi, zjawiskiem wciąż obecnym i przejawiającym się we współczesnym świecie w takich regulacjach jak zakaz małżeństw międzywyznaniowych, fizyczna separacja mężczyzn i kobiet w życiu codziennym czy segregacja romskich dzieci w szkołach. W pierwszej kolejności zwracam uwagę na problem konceptualizacji pojęcia „segregacja” oraz proponuję jego definicję, a także kategoryzację różnych przejawów segregacji. Wnioskuje również, że segregacja i dyskryminacja są zjawiskami odrębnymi, chociaż często powiązanymi i występującymi jednocześnie. W dalszych częściach artykułu instrumenty międzynarodowego prawa praw człowieka zostają poddane analizie mającej na celu znalezienie i sformułowanie normy zakazującej segregacji. Interpretacja prawa międzynarodowego prowadzi do wniosku, że nie zawiera ono wyraźnego i generalnego zakazu segregacji. Istnieją jednak pewne fragmentaryczne i rozproszone normy, które regulują kwestię praktyk segregacjonistycznych i które można odnaleźć zarówno w traktatach, jak i w prawie zwyczajowym, a także w interpretacjach proponowanych przez doktrynę i orzecznictwo.

Słowa kluczowe: segregacja, prawo międzynarodowe, prawa człowieka, dyskryminacja, równe traktowanie.