Housing discrimination: the Catalan Right to Housing Act 2007 in the context of the EU anti-discrimination directives.

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Abstract

Purpose - This paper considers from a legal perspective the problem of housing discrimination which has become an issue of increasing importance in Spanish cities, as in other European cities, especially in the light of recent waves of immigration.

Design/Methodology/Approach - This study analyzes the various types of housing discrimination and explains what legal reactions are available under European, Spanish and Catalan Law.

Findings - The Catalan Right to Housing Act 2007 represents one of the first and most complete European legal reactions against housing discrimination. It includes several articles defining direct and indirect discrimination, harassment (which is considered a form of discrimination) and positive action. This Act must be understood as a national and sectorial application of the EU anti-discrimination directives, specifically the Racial Equality Directive (2000/43/EC).

Practical implications – The paper shows how EU anti-discrimination directives can be transposed into the domain of housing using a national example.

Orginality/value – Due to the fact that Catalan Law is one of the first and most complete national legislations using European techniques to fight against housing discrimination, it could be used as an inspiration for future new national legislations.

Keywords – Housing, discrimination, harassment, legislation, United States of America, Europe, Spain, Catalonia

Paper type – Research paper

Introduction: discrimination and segregation

The results of research conducted on the subject of residential discrimination in Europe show a common concern for the existence of diverse forms of discrimination which especially affect ethnic minorities and immigrants in European cities.

We would like to highlight two of these research studies. Firstly, a report published in 2005 by the European Monitoring Center on Racism and Xenophobia (which has now converted into the European Union Agency for Fundamental Rights), which was conducted in 15 European countries (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Holland, Ireland, Italy, Luxemburg, Portugal, Spain, Sweden and the United Kingdom). The introduction of this study states (EMCRX, 2005, pp. 3-4):

“The report shows that in different Member States similar mechanisms of housing disadvantage and discrimination affect migrants and minorities, such as denying access to accommodation on the grounds of the applicant’s skin colour, imposing restrictive conditions limiting access to public housing, or even violent physical attacks aimed at deterring minorities from certain neighbourhoods.(…).

The evidence reveals a paradox. EU interventions in the form of the recent anti-discrimination Directives are having a positive effect, and Member States are strengthening anti-discrimination legislation, with some introducing special programmes to improve the housing conditions of migrants and minorities. However, the report also documents instances of resistance, hostility and failure by public authorities to address the deprivation and discrimination experienced by migrants and minorities in the housing arena.

The report concludes that the area of discrimination and exclusion in housing is still not adequately researched or monitored. Whilst many cases of good practice are reported, much still needs to be done to tackle the discrimination that exists in housing before more inclusive societies in the EU can be attained. As the authors of this report point out, the negative housing outcomes for disadvantaged minorities result from socio-economic and racist exclusion, but at the same time contribute substantially to it.”

The conclusions of this research are the following (ECMRX, 2005, pp. 8-9 and 121 & ff.):

“[1] That similar mechanisms of housing discrimination and disadvantage occur in differing states, and are deeply entrenched in many places.
• [2] That similar negative housing outcomes for disadvantaged minorities are found in differing Member States, resulting from socio-economic and racist exclusion but at the same time contributing substantially to it.
• [3] That the issue of asylum seekers complicates state responses on housing, with inadequate recognition often being given to good practice in housing provision.
• [4] That severe housing disadvantage persists amongst national indigenous minorities.
[5] That law, monitoring and regulation vary widely, and some Member States have only made limited progress towards equality of treatment or recognition of diversity.
• [6] That the concept of integration needs to be approached with care and precision.
• [7] That conflict resolution and counselling are useful, but not enough to resolve local problems, and that accessible legal procedures for challenge are essential.”

The second study we would like to refer to was conducted by the 'European network of *Cities for Local Integration Policies for Migrants*' (CLIP). The CLIP network[2], which was officially launched in Dublin in September 2006, brings together 25 large European cities in a joint learning process over several years; the network seeks to support the social and economic integration of migrants, combat social inequalities and discrimination, and to help migrants to preserve their cultural identity.

Published in 2007, this report draws diverse conclusions, including the following (CLIP, 2007, p. 79, p.):

"The effectiveness of the implementation of the EU Race Directive is under discussion in several Member States. It is suggested that the European Commission monitor whether this directive is being implemented effectively to protect migrants from discrimination on the grounds of their race in terms of access to housing. This may be an appropriate matter to be referred to the FRA by the Commission."

Regarding the anti-segregation policies in order to achieve more balanced neighbourhoods (CLIP, 2007, p. 94 and ff.):

"All city administrations participating in the CLIP project believe that high degrees of concentration of migrants and particularly of one ethnic group of migrants should be avoided, since this situation endangers an effective integration of migrants. However, the city administrations are also aware of the fact that the concentration of migrants in smaller spatial units is to some extent unavoidable. In general, it is advisable to aim for a mix of different types of housing and different ethnic groups. Moreover, the balanced socio-economic and demographic composition of a neighbourhood population is regarded as constituting an important aspect of any anti-segregation policy. Local policy should take into account that a higher birth rate among migrants is one of the
major factors leading to an increasing concentration of migrants in an area, when at the same time middle-class families with small children tend to leave the area. (…)

The following measures are recommended to prevent or reduce segregation:

-spreading social housing around the city seems to be of great importance in avoiding the spatial concentration of low-income earners in general and migrants in particular;
-building smaller social housing units;
-if the social housing units are already built in a concentrated way, single units should be sold and the access to social housing be opened for middle-class income earners;
-the use of formal or informal quotas to avoid a high concentration of migrants seems to be problematic or even unlawful in certain countries.
-*Quota regulations must be carefully checked in terms of fairness, effectiveness and lawfulness with regard to the Directive against racial discrimination. Local authorities may consider that voluntary measures may sometimes prove more effective than involuntary measures such as quota regulations;*
-local policy often puts too much emphasis on measures to control the inflow of migrants into certain areas instead of positively influencing the retention of the middle-class native population in areas with a higher concentration of migrants;
-allocation of public institutions and services, such as childcare services, schools and sports facilities, into segregated areas will enhance the integration of this area into the city as a whole and hence reduce segregation patterns;
-urban renewal programmes and other incentives for (native) middle-class people to move into, or to remain in, areas with a high concentration of low-income or migrant groups can help to achieve socioeconomically mixed neighbourhoods;
- improving the neighbourhood's image in the media and among the general public, by using an effective communication strategy and organising cultural or sports events."

Both of these studies highlight the diversity of situations in Europe, derived from two fundamental aspects. On one hand, related to the fact that institutional settings in the cities concerned are extremely diverse: local housing markets differ in terms of the age of buildings, home ownership, location and quality, but also in accordance with the

degree of scarcity of certain types of housing and the competition for it; the instruments available to local policymakers for building, allocation and improvement of housing also differ markedly, partly due to the given structural characteristics of markets, to national regulations for building, improvement and allocation of housing, as well as to choices made at local level. On the other hand, the second source of diversity is associated with immigrants or minority groups themselves, in terms of demographics, socioeconomic situation, linguistic skills, culture and religion (CLIP, 2007, p. 76).

But both studies also highlight that EU Directives should suppose a factor of cohesion in the struggle against residential discrimination. In this sense, although the solutions will not be found solely through legislation, it is evident that the development of necessary public policies require an adequate judicial framework.

Indeed, such a judicial framework already exists, as represented by the EU anti-discrimination Directives, also applicable to the housing sector. These directives have constructed a series of common concepts and instruments, inspired partly by existing international regulations and the domestic legal system in the USA and they are being developed on a national level in Europe. This study, therefore, will analyze in the first instance, international regulations concerning discrimination and those of the United States with regard to residential discrimination, which is contained in the Fair Housing Act; thereafter, we will take EU anti-discrimination directives into consideration; finally, we will consider one of the most modern and complete transpositions of EU directives introduced by Catalan housing legislation in 2007, which may serve as an inspiration for future national developments on the subject, as FEANTSA has underlined[3].

The right to non-discrimination at the International level

The right to non-discrimination is recognized by several International Human Rights Instruments and should be connected, among others, with housing rights (KENNA, 2008 and FEANTSA, 2009). At the UN level, we have to take into account the Universal Declaration of Human Rights (art. 7 and art. 25), the International Covenant on Civil and Political Rights (art. 2 and art. 26, among others[4]) and the International Covenant on Economic, Social and Cultural Rights (art. 10 and art. 11).

At the European level, the Council of Europe has launched important legal instruments related to this issue: the European Social Charter of 1961 (revised in 1996, art. 31 and article E in Part III) and the European Convention on Human Rights and Fundamental Freedoms of 1950 (art. 14 and art. 14 of the Protocol number 12). The implementation of those legal documents has produced interesting decisions connecting housing and equality, coming from the European Committee of Social Rights[5] and from the European Court of Human Rights[6], respectively.

The US Fair Housing Act

The *Fair Housing Act* integrates title VIII of the *Civil Rights Act* of 1968. This regulation prohibits any behaviour (including zoning) which supposes discrimination in sale or rental of housing and other prohibited practices[7] or any behaviour trying "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or

encouraged any other person in the exercise or enjoyment of, any right granted" by the law[8].

An example of this is the prohibition of what is known as *blockbusting*. This was a practice used by property developers and real estate agents which consisted in selling a property to someone from an ethnic minority (such as African-Americans) to encourage white property owners to sell their homes quickly at below-market prices. This tactic, based on the white community´s fears and prejudices, would create the impression that minority groups were moving into their previously racially-segregated neighbourhood with the supposed effect of causing property values to decline (FRIEDMAN, HARRIS, LINDEMAN, 2000)[9]

If this type of practice occurs, it is possible to lodge a complaint with Local Authorities, who will open an administrative case which can lead to imposing liability for damages caused to the person for discrimination and the imposition of an administrative fine. Any party can request the finalization of the administrative steps in favour of judicial proceedings at any moment.[10]

Kushner (2006), having weighed up the practical application of this legislation, highlights some of its shortcomings, including low levels of reporting and pressing of charges for discrimination by people with limited economic resources, lack of time and knowledge on the issue and due to the lack of expertise in this area among lawyers. Moreover, he points out that public action to enforce the law has been limited, due to budget restrictions and because the United States legal system requires a victim who is willing to come forward and press charges.

EU Directives

The 1997 Amsterdam Treaty included Article 13, which empowers the Community to take action to deal with discrimination based on a whole new range of grounds, including racial or ethnic origin, religion or belief, age, disability and sexual orientation.

In order to apply these measures, three directives have been introduced, along with various documents[11] . Under the current EC legal framework, racial discrimination is prohibited in the areas of employment, training, education, social protection, social benefits and access to goods and services (Directive 2000/43/EC). The scope of protection against discrimination on grounds of religion or belief, age, disability and sexual orientation is limited to employment, work and vocational training (2000/78/EC). Directive 2004/113/EC extends protection against sexual discrimination to the area of goods and services, but not to certain other areas covered by Directive 2000/43/EC.

In each of these three directives we can find some common relevant aspects, but we will focus here on Directive 2000/43/EC:

–The definition of direct and indirect discrimination, as well as harassment, which is considered discrimination. Harassment is defined as the situation in which "an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading,

humiliating or offensive environment”, although “the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”

–The application both in the public sector and the private sector. Directive 2000/43/CE alludes explicitly to housing.

–Approval of positive action to prevent or compensate for disadvantage.

–Specifically, Directive 2000/78/CE incorporates the concept of reasonable adjustments for persons with disabilities by employers.[12]

–The principle of burden of proof in favour of the injured party. An example of this can be found in article 8 of Directive 2000/43/CE.[13]

–The locus standi of associations and other legal entities is also reinforced to guarantee the respect of the Directives. We can find an example of this in article 7 of Directive 2000/43/CE.[14]

–New bodies will be set up to promote equal treatment without discrimination. We can find an example of this in article 13 of Directive 2000/43/CE.[15]

In conclusion, and as it is underlined by the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 June 2005 - "Non-Discrimination and Equal Opportunities for All - A Framework Strategy" [COM(2005)224 - Not published in the Official Journal]:

“Possible measures to complement the current legislative framework

Under the current EC legal framework, racial discrimination is prohibited in the areas of employment, training, education, social protection, social benefits and access to goods and services (Directive 2000/43/EC). The scope of protection against discrimination on grounds of religion or belief, age, disability and sexual orientation is limited to employment, work and vocational training (2000/78/EC). Directive 2004/113/EC extends protection against sexual discrimination to the area of goods and services, but not to certain other areas covered by Directive 2000/43/EC.
The Commission has initiated a feasibility study concerning new initiatives to complement the current legal framework. It will examine the national provisions that go beyond Community requirements and will take stock of the advantages and disadvantages of such measures. The results of the study will be available in autumn 2007.”

Housing discrimination in Spain: the new Catalan legislation

Existing empirical studies show a panoply of constitutional actions and omissions of discrimination and hasassment in the housing sector in Spain. In the case of direct discrimination, the worst and most evident reports on a European level highlight cases accredited in Catalonia and Valencia, referring to rental advertisements placed by ral estate agencies which declared “no foreigners” or “we do not rent to non-EU foreigners”. The intermediaries in some of these cases claimed that they were compromised to exercise the wishes of the owners. Likewise, in Burgos, it was common practice to demand higher rental prices for minority groups and immigrants, along with offering them properties of inferior quality (EMCRX, 2005, p.70).

In the case of indirect discrimination, which is more subtle, existing European reports highlight cases in which length of residence in a municipality has been used as a barrier to prevent access to protected housing EMCRX, 2005, p.71).

In the case of indirect discrimination, it should be noted that there is an express reference to the possibility that a plan, when appropriate town-planning, can be deemed the source. On this point, I would like to refer to the ruling of the Spanish Supreme Court of December 11, 2003.

This decision overturned a previous decision of the Superior Court of Justice of Cantabria (December 15, 2000), concerning the dispute between a City Council and the Government in the Cantabria region, (Northern Spain), with regard to the construction of eight mobile homes on municipal land classified by the local development plan as rural land under special protection. An analysis of the details of the case reveals that the housing was intended for ethnic minority gypsy families, in connection with the municipal plan to eradicate slums. The City Council stated that it is a question of "buildings designed for public use and social interest which should be situated in a rural environment". The legal discussion, which ensued, centered on the following aspects.

The City Council alleged that the specific location was necessary for those concerned, since they needed the space to carry out their scrap metal business, but that it was provisional, until such time as systems and guidelines were established which permitted their full integration into future standardized housing, indicating that their current location was a transitional stage in the process of their integration into the urban nucleus, but without determining what the provisions were for the continuation of their business once integrated into city dwelling.

Both the regional Court and the Supreme Court judged that if the objective was integration into urban life, then it was logical to offer housing in the city rather than in a rural area, where integration would not be possible and that "it is difficult (...) to accept the need to house the group in a rural environment if the aim is to integrate them into urban life", a location which does not "fit constitutionally with their displacement" from the urban environment.

In this case, the Spanish Supreme Court considered unacceptable this kind of discrimination, albeit indirect, since it lead to the spatial segregation of the group. Consequently, the Supreme Court stated null and void the local decision and protected the gypsy families´ right to equality.

With regard to estate agent harassment, or *mobbing* as it is commonly known in Spain, this phenomenon can be explained within the context of specific economic and social circumstances in Spanish cities and in connexion with rental legislation in force for many years in Spain. In the recent past, rental contracts provided one of the main bases of "social" policy with respect to accessible housing since they were heavily regulated in terms of duration and price under the Urban Rental Act of 1964. Since the 1980s, (*Decreto-Ley* 2/1985, April 30, Urban Rental Act of 1994), a new regulation for the rental market was introduced, although serious parallel public policies with regard to accessible housing were not applied and many existing rental contracts were still protected by the Urban Rental Act of 1964, with financial conditions which did not

encourage ownership, certainly when compared with newer contracts which were more likely to be agreed in accordance with real market factors.

This situation helps us to understand the financial motives which are to be found behind many of the alleged cases of estate agent harassment: evict, by one means or another, the tenant, in order to obtain a higher rental income from the property in the future.

Among the practices which can imply real estate harassment, I would like to mention the following for *violation* of existing laws, whether for omission (a typical case of lack of compliance in respect of urbanistic conservation duties on the part of the landlord, for example) or by action (cutting off utilities, disturbances caused by hypothetical “improvement” works, bad odours, lack of hygiene, the introduction of lodgers who cause trouble to the detriment of communal facilities or the peaceful enjoyment of the property etc.). So, if real estate harassment is considered a violation of the right to decent housing, according to article 47 of the Spanish Constitution[16], in reality there is no definition of this ruling to be found in any judicial ruling.

Beyond various sectorial regulations, referring to specific groups such as aliens and the disabled, Act 62/2003, (December 30), incorporating fiscal, administrative and social order measures, which we have already mentioned, has meant the transposition of directives 2000/43/CE and 2000/78/CE in all regions of Spain, (GONZÁLEZ BEILFUSS, 2005, pp. 151 and ff.). This law contains in articles 27 and ff. a range of measures "to apply the principle of equality”. This ruling applies to both the public sector and the private sector (article 27.2) and alludes explicitly to housing as an area of application (article 29.1)

This law provides for the first time in Spain a definition of direct and indirect discrimination and harassment, in art. 28, using the terminology of the EU directives we have alluded to. It also contains previsions on the possibility of positive actions (article 30[17]), locus standi and burden of proof (articles 31 and 32) and creates the Council for the promotion of equal opportunities and deter discrimination of persons due to their racial or ethnic origin.

It needs to be pointed out that this Council has been created as a purely bureaucratic body assigned initially to the Ministry of Employment and Social Affairs, through the Royal decree 237/2005, of March 4, which deals with violence against women and, by the way, includes a brief reference to this Council, which has been regulated by the Royal decree 1262/2007, of September 21. Later the Royal Decree 1135/2008, of July 4, which develops the constitutional structure of the Ministry of Equality, in article 7.3 appoints the Council for the Promotion of Equality and Non-Discrimination of persons due to their racial or ethnic origin to the Ministry of Equality[18].

Finally, we need to take into account that discrimination in the housing sector, whether caused by public or private individuals, can constitute either a petty offence or a serious crime of coercion (in Spanish *coacciones*, articles 172 and 620 of the Penal Code) or a crime of discrimination as typified in articles 511 and 512 of the current Penal Code, punishable with a prison sentence. Beyond the housing sector, such sentences have already been passed in the case of service providers who have been found guilty of discrimination.[19]

Taking this national framework into account, the new Catalan law on the right to housing, respecting the distribution of powers typical of a highly decentralised state like Spain, has introduced a range of anti-discriminatory measures with specific application in the housing sector for the first time in Spain.

The lack of specific regulations before the introduction of the Right to Housing Act which specifically defines discrimination and real estate harassment did not necessarily result in administrative paralysis. Responsibilities such as providing information and advice on these matters (already being offered on a municipal level in the case of Barcelona with the Municipal Consumer Information Offices, for example) or the requirements via appropriate administrative orders for fulfillment of legal obligations on the part of landlords and owners were, and still are in any case, necessary when cases of discrimination and harassment were detected, in accordance with the definition offered in the laws we have already mentioned.

Clearly, there is no doubt that the existence of a specific regulation which endeavours to verify the concept of discrimination and residential harassment, and establish possible administrative sanctions against the guilty parties, should provide a legal safety net. Moreover, independent of possible simultaneous judicial procedures, the new Catalan Act provides a cheaper and quicker administrative reaction to these problems since they are now considered serious administrative violations. This is a good example of how public protection of the right to housing can be achieved without public expenditure but purely through regulation.

Along these lines, we refer to articles 45 to 48 of the Right to Housing Act (PONCE & SIBINA, 2008)[20] (a). Similarly, in the context of adjudication of social housing, the law, in arts. 86 and ff. regulates the possibility of promoting measures for social mixing in order to fight against urban segregation, provided that this does not involve discrimination (b).

a) Arts. 45 and ff. prohibit that *any person* (Spanish nationals or otherwise) suffer discrimination, either direct or indirect, or harassment and should be respected by all persons and all officials, *both in the public and the private sector* (article 45.1 and 2). In order to guarantee that this prohibition be respected, the Law requires public authorities responsible for housing-related issues to adopt “appropriate measures” (article 45.2). These protective measures to avoid direct or indirect discrimination, harassment or any other form of illegal housing (such as sub-standard housing or over-occupancy, for example) can consist “in adopting positive action in favour of vulnerable groups and individuals”, the “prohibition of discriminatory conduct” and the need for “reasonable adjustments to guarantee the right to housing” (article 46).

Having established this mandate for public action, the law goes on to *define a sundry of the terminology used* and establishes a specific regulation with regard to the *burden of proof* and *locus standi* (articles 45, 46.2, 3 and 4, 47 and 48, respectively).

With regard to the definition of legal terms used, following European and state guidelines, the Catalan law defines the concepts of direct[21] and indirect[22] discrimination and real estate harassment (article 45.3),[23] in terms which are already familiar to us.

With regard to real estate harassment, we have already highlighted some of the practices, whether through action or inaction, which can give rise to the same.[24] The Law defines what is understood to be harassment and it qualifies it as discrimination [article 45.3.c)]. In addition, it modifies the burden of proof of harassment (article 47). Finally, associations and other organizations representing collective interests have locus standi if authorized by the claimant (article 48), in accordance with the EU directives and national legislation we have analyzed.

With regard to “reasonable adjustments to guarantee the right to housing” as a possible protective measure to be deployed by the administration, another EU concept, article 46, sections 2, 3 and 4, defines these as “the measures directed towards fulfilling the singular needs of certain persons to help them achieve, without imposing a disproportionate burden, social inclusion and enjoyment of the right to housing in equal conditions with the rest of the population”. Without doubt, people with disabilities are an obvious group which could be affected by these adjustments (for example, a landlord can have the right to impose a restriction on pets in the terms of tenancy. This would be discrimination if the potential tenant is blind and relies on a guide dog to compensate for his physical disability).

In the same way, we can highlight the regulation on *positive actions* in article 46.1 of the Law. As we have already shown, article 47 Spanish Constitution (and 26 of the Statute of Autonomy of Catalonia should be interpreted systematically in conjunction with article 9.2 Spanish Constitution (and 4.2 of the Statute), which establishes the mandate to the public authorities to promote conditions so that freedom and equality are real and effective, removing existing obstacles. This ruling therefore opens the door to the unfortunately named "positive discrimination", drawn from various EU directives with the terminology " positive action".

From a general perspective, the possible adoption of specific public measures to guarantee the equality of specific groups had already been endorsed by the Spanish Constitutional Court in various sentences.[25] Likewise, guidelines for town-planning and housing had already explicitly incorporated such measures.[26]

Along these lines, therefore, article 46.1 of the Right to Housing Law indicates that:

> “The protective measures which should be adopted by public authorities may consist in the adoption of positive action in favour of the vulnerable group or person, the prohibition of discriminatory conduct and a demand for the elimination of obstacles and restrictions in exercising the right to housing and reasonable adjustments to guarantee the right to housing.”

Finally, we should emphasize that the Law specifically typifies discrimination and real estate harassment, whether through action or inaction, as a serious administrative violation [article 123.2.a)], with a potential fine of up to 900.000 euros (article 118.1), regardless of possible civil or penal actions which we have already alluded to. In this point, the doubt could be raised as to whether the imposition of an administrative fine and the simultaneous possible reaction in the criminal courts for an assumed coercion could imply a case of *bis in idem*, prohibited by Spanish judicial legislation (this means that it is not possible to punish a conduct both criminally and administratively if the punishment applies to the same person for the same conduct which contravenes the same legal fundamentals). We believe, however, that it can be argued that the grounds for the administrative fine are different from the criminal charges, since in the first case

the legal fundamental is the right to housing whilst in the second it concerns equality. Thus, punishing the same conduct twice is not a case of *bis in idem*, but rather the defence of two different legal fundamentals by two different channels (administrative and criminal).

b) With regard to the Catalan regulation on public activity to prevent urban segregation, this consideration is prevalent throughout the law, from the Preamble in favour of social mixing as the antidote to segregation, through the planning phase for social housing until the moment of adjudication.

At the planning stage, the Spanish regulation, applicable also in Catalonia, State Act number 8 of May 28, 2007, establishes a reserve of land for the construction of housing under public protection. This statute allows for the setting of maximum sale and rental prices, with a minimum requirement of 30% protected housing in all new residential housing projects (art. 10 b). The statute also allows for the increase or reduction of these reserves through regional legislation on land use and urbanization, where the situation if classified as exceptional, while respecting certain limits, including that the distribution of their location respects the principle of social cohesion.

Following this Act, reserves in the Catalan legislation range from 30% to 50% depending on certain circumstances (e.g. the population of the city). With regard to urban areas which are already developed, particular importance is placed on the potential to inject protected housing, for example art. 66.4 of the Catalan regulation of July 18, 2006 which develops Catalan planning law. This establishes reservations for protected housing on consolidated urban land, both for new developments and for major renovations to existing buildings, totally or partially allocated for protected housing. A new statute on housing rights in 2007 reduces this percentage to 20% of the surface area in apartment blocks over 5,000 square meters.

An important aspect connected with the social mix of the region, as an antidote to urban segregation, is the distribution of reserved land in the territory. This is because the reserves of protected housing, in order to provide dignified and adequate living conditions, should avoid spatial concentrations of poor people and be distributed evenly throughout the territory. In this sense, the best approach seems to be, in principle, an even distribution of affordable housing across all sectors. However the decision concerning specific location remains in some regions at the discretion of local planning departments, within the general framework already mentioned. In the Catalan case, art. 57.4 of the 2005 Catalan Land Act establishes that "The reserves for the construction of publicly protected housing should be situated so as to avoid an excessive concentration of housing of this type, in accordance with article 3.2, in order to favor social cohesion and avoid the territorial segregation of citizens based on their level of income".

When it comes to the stage of adjudication of social housing, the Catalan Right to Housing Act provides for positive action, through the technique of the so-called *special quotas*, reserved for vulnerable groups, among whom immigrants may be included (article 99). Moreover, it establishes the following in article 100.3:

"In order to guarantee an effective social mix in official protected housing developments, the specific conditions of adjudication in each development should establish systems which ensure that the final composition of the occupancy reflects the social makeup of the town, district or area, both in terms of

income level as well as place of birth, and to avoid excessive concentrations of groups who can put the development at risk of social isolation."

Finally, it seems that it leaves the door open for the possible implementation of quotas and other measures against segregation in the adjudication process for social housing by means of a lottery as mentioned in art. 101.5:

"The lottery may be divided into blocks made up of applicants within various income brackets or various interest groups, to ensure the social mix established in article 100.3, or even the length of time the applicant has been registered on the waiting list in the Official Register of Applicants for Protected Housing."

In the absence thus far of known conflicts in relation to this regulation, it will be necessary to remain alert in its administrative application and judicial control. Without doubt, this is a delicate aspect which can shift the balance between the achievement of social mixing and possible discrimination when it comes to access to housing. FEANTSA (FEANTSA, 2005) believes that the role of social housing relates primarily to the creation of equality of opportunity and the reduction of poverty and marginality. In that sense, it considers that "the issue of social mixing is very complex and is often used in an unnuanced way. I believe that social mix is important. The way to achieve social mix, however, is an issue of concern". It believes that social mix is primarily a (urban) planning issue and that mechanism for the allocation of individual dwelling should only be a secondary means to ensure social mix. FEANTSA also believes that there is still a lack of empirical evidence that socially unmixed communities are necessarily unsustainable and that "mixing people in buildings (allocation mechanism) is maybe not as important as mixing people in other areas of daily life (planning) where mixing happens more naturally (school, culture, sport, shopping, etc)".

This "concern" about allocation as a means to ensure social mixing, and especially about the specific use of this mechanism in a concrete situation, is reasonable, as a recent decision of the European Committee of Social Rights[27] applying the European Social Charter and RESC[28] has shown. But I would like to highlight that the European Committee of Social Rights affirms that it is the fault of policy development of the concept of social mix as well as its concrete administrative application which has led the committee to declare a contravention of the Charter (paragraph 144):

"The Committee considers that the allocation procedure does not ensure sufficient fairness and transparency, since social housing is not reserved for the poorest households. The application of the concept of "social mix" in the 1998 Act, which is often used as the basis for refusing social housing, often leads to discretionary results excluding the poor from access to social housing. The major problem stems from the unclear definition of this concept in the law and, in particular, from the lack of any guidelines on how to implement it in practice. Therefore, the Committee considers that the inadequate availability of social housing for the most disadvantaged persons amounts to a breach of the Revised Charter (see also Conclusions 2005, Article 31§3, France).[29]"

As far as Catalonia is concerned, the Right to Housing Act associates the concept of social mixing with social cohesion in art. 3, a key legal guideline in the allocation of housing, as we have seen. However, the specific application of these guidelines will warrant closer scrutiny in the future; as indicated by CLIP, following an analysis of the use of quotas in various European cities, including Frankfurt (CLIP, 2005, pp. 16 and ff. and p. 95):

"Quota regulations must be carefully checked in terms of fairness, effectiveness and lawfulness with regard to the Directive against racial discrimination"

In our opinion, this essential analysis should take into account various aspects with regard to possible anti-segregation measures in the allocation of social housing, in accordance with the legal principles of Spanish and Catalan Law, which also used occasionally with a different terminology on a European level.

Thus, those measures must be analyzed according to the principles of rationality (art. 9.3 Spanish Constitution), proportionality (implicit in art. 1 Spanish Constitution) and equality (art. 14 Spanish Constitution). The UE and Spanish legal tests will be passed if the anti-segregation measures (including quotas):

a) Try to achieve a public interest (such as social mixing)
b) Do not impede access to social housing for those who need it most (although the control of the decisions should use a broad view considering possible future allocations within the framework of a local housing plan: one allocation can be denied if there is a viable and real alternative in the immediate future that guarantees the individual right to housing and protects the social mix)
c) Maintain a similar percentage of immigrants in the specific allocation similar to the averages in the area as a whole (including areas that are not segregated).

If the three conditions are met these kind of measures could be considered legal and even a type of positive action since they try to guarantee an immigrant presence in all new municipal social housing offers thereby avoiding concentration. It could be especially true in the Spanish case because the normal allocation system is based on lottery and it is debatable whether this method can achieve the same goal effectively.

Some final considerations

The EU Directives against discrimination should provide a crucial reference point in the struggle against residential discrimination and they should be incorporated into national legislation. In the case of Spain, the Catalan Right to Housing Act of 2007 is a good example of how national legislation take seriously the right to be treated equally within the built environment.

The prosecution of discrimination (whether direct or indirect) and harassment and the deployment of positive actions, in the fields of planning and allocation of social housing are far from being incompatible with efforts to avoid urban segregation. According to available empirical data and social and political perceptions is not always seen in a positive light (PONCE, 2009, CLIP, 2005, p. 10 and ff) [30]. However, the pursuit of social mixing cannot entail, under any circumstances, either direct or indirect discrimination against immigrants, nor should it be based exclusively on allocation. Additionally, we believe that planning measures and the inclusion de social housing which is evenly distributed throughout the urban area (including zones which are not segregated) should be pursued simultaneously. Unquestionably, "there is much talk of maximum quotas for " minority groups " in specific areas, but there is little consideration of minimum quotas or nomination rights for these groups elsewhere", Volker Busch-Geertsema, 2007).

As CHARMES points out (CHARMES, 2009), the aims of achieving accessible housing and avoiding segregation cannot and should not be contradictory public policies, but should rather combine to avoid or, at least, improve ghettoes with public help to lift people out of poverty. All this must be achieved without discrimination while fighting against the discrimination that can arise in the housing market. Or to use his own words:

« la bonne voie pour l'action publique se situe probablement dans un mélange de redistribution des populations et de développement local »

Evidently, this is not an easy task. But it seems to be an essential one and the Law should provide the appropriate means to achieve it.

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[1] jponce@ub.edu ; www.urcosos.net
[2] http://www.eurofound.europa.eu/areas/populationandsociety/clip.htm (accessed May 14, 2008)
[3] See FEANTSA (2009), FEANTSA (2009), *Access to Housing: antidiscrimination toolkit. Using International Instruments to ensure the right to housing for everyone*, pp. 6 and ff. (http://www.feantsa.org/files/freshstart/Working_Groups/Housing_rights/2009/Policy_docs/Toolkit_Housing_Antidiscrimination_FINAL.pdf) (accessed May 14, 2008)
[4] General Observation 18 adopted by the Human Rights Committee states the following: "the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" (http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument)
[5] E.g. FEANTSA Collective Complaint vs France in 2006, concerning the violation of Article 31 of Revised European Social Charter on the right to housing have one point directly related with discrimination. The European Committee of Social Rights unanimously concludes that there is a violation of Article 31.3, taken in conjunction with article E (Non-discrimination) on the grounds of deficient implementation of legislation on stopping places for Travellers. At the same time the Committee already considers it could be presumed that there is a problem of indirect discrimination against migrants in respect of access to social housing.
[6] E.g. Moldovan and Others v. Romania (No. 2) (Applications nos. 41138/98 and 64320/01), Court´s decision of July 12, 2005. the applicants complained that, following the destruction of their houses, they could not live in their homes and had to live in very poor, cramped conditions. They also complained that the authorities failed to carry out an adequate criminal investigation, which prevented them from bringing a civil action in damages against the State regarding the misconduct of the police officers concerned. Several applicants also complained about the length of the criminal proceedings. They further submitted that they had suffered discrimination. The Court held: unanimously, that there had been and was a continuing violation of Article 8 (right to respect for private and family life and home) of the European Convention on Human Rights;unanimously, that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention; by five votes to two, that there had been no violation

of Article 6 § 1 (access to court); unanimously, that there had been a violation of Article 6 § 1 (right to a fair hearing) on account of the length of the proceedings;unanimously, that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Articles 6 § 1 and 8.

[7] Sec. 804. [42 U.S.C. 3604]

[8] Sec. 818. [42 U.S.C. 3617]

[10] Consult: http://www.hud.gov/offices/fheo/FHLaws/yourrights.cfm?&lang=en (accessed May 14, 2008), the website of the United States Department of Housing and Urban Development, which contains information on the *Fair Housing Act*. Here we can find a specific case of administrative action for violation of the law in a judgement of July 1994, in which charges pressed resulted in the imposition of a fine of US$300,000 in compensation in favour of the individuals deemed discriminated against and an administrative fine of US$10,000 (please refer to http://www.hud.gov/offices/oalj/cases/fha/pdf/johnsn-e.pdf). (accessed May 14, 2008)

[11] See: http://europa.eu/scadplus/leg/en/cha/c10313.htm (accessed May 14, 2008)

[12] Article 5: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned"

[13] Art.8: "Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case."

[14] Art.7: "Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment."

[15] Art.13:

"1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

[16] "All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town-planning policies of public bodies."

[17] Developing EU Directives and art. 9.2 of Spanish Constitution, which establishes that: "It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life."

[18] The modest and discrete mechanisms of the Spanish Council are in contrast, for example, to the transcendence which has been achieved in France via a body with similar functions, the "*Haute Autorité de Lutte Contre las Discriminations et pour la Egalit"é*, created by French Law no. 2004-1486, December 30, 2004, introduced by Bernard Stasi (former Minister) in a report for the Prime Minister (See: http://www.halde.fr:80/). (accessed May 14, 2008)

With specific regard to discrimination in the housing sector, consider deliberation no. 2007-190, July 2, 2007, by the same French body, regarding the intervention of this French authority in the case of a refusal to rent a property to an individual on the basis of not being a French national. In its intervention, the claimant was informed of his rights and the landlord of the fact that his behaviour was in breach of French penal law. This document can be consulted on the following link:
http://www.halde.fr/Deliberation-relative-a-un-refus.html?page=article_domaine&id_mot=2. (accessed May 14, 2008) (Last accessed: April 2008.)

[19] There are several regional judicial decisions. But, in particular, the decisión of the Spanish Supreme Court of September 29, 1998 (RJ\1998\6467), in which a verdict was annulled after a second-hand car salesman had been sentenced to one year in prison for refusing to sell a vehicle to an individual on the basis of his ethnic origin.

[20] In fact, according to the analysis in the report of the *European Social Housing Observatory* by CECODHAS entitled "*Integración de los inmigrantes en la Unión Europea y la Vivienda Social: Herramientas para los promotores de vivienda social" which can be accessed in the Boletín Informativo* núm. 88, July 2007, of the Asociación Española de Promotores Públicos de Vivienda y Suelo (http://www.a-v-s.org/boletines.php?SID=) (accessed May 14, 2008), the Catalan Act would be pioneer in the transposition of EU directives with regard to housing, since many countries have not adopted anti-discrimination measures in the housing sector (p. 23).

[21] "a) Direct discrimination occurs when a person receives, in a housing related issue, a different treatment than others in a similar situation, as long as the difference in treatment does not have a legitimate justification that is objective and reasonable and the and means to reach that objective are adequate and necessary"

[22] "b) Indirect discrimination, occurs when a norm, a plan, a conventional or contractual clause, an individual pact, a unilateral decision, a criterion or a practice that is apparently neutral causes a particular disadvantage for someone in respect to others while exercising their right to housing. Indirect discrimination does not exist if the act has a legitimate end that is objective and reasonably justified and is used to reach an adequate and necessary motive"

[23] "c) Real estate harassment is understood as any act or omission of an act which causes one's rights to be abused and has the objective of disturbing one's housing needs through harassment and a hostile environment. This can be expressed in a material, personal, or social manner, with the ultimate motive of forcing someone to adopt a decision that they do not want in regards to their right which protects them from occupying their home. The unjustified denial of accepting rent by a homeowner is an indication of real estate harassment"

[24] See the referente to the corresponding action in 2005 of the Oficina Municipal d'Informació al Consumidor (OMIC), a department of Barcelona City Council, which since 2004 has been offering advine on possible cases of real estate harassment. The OMIC has established the following in its classification of cases liable to be considered harassment: presumed neglect of the property (33.61% of cases), personal harassment (7.56%), problems with utilities (0.84%), lack of hygiene (15.5%), refusal by the landlord to receive rent (6.72%) and other factors (34.45%). Consult: http://www.omic.bcn.es/catala/memoriaomic_2005.pdf. (accessed May 14, 2008)

[25] E.g. Decisions 216/1991 and 269/1994, accepting positive actions in relation to gender or disability, quoting art. 9.2 of Spanish Constitution.

[26] The Catalan land use Act of 2005 created a specific type of public housing (*viviendas dotacionales*, art. 34) addressed exclusively to young people, the elderly and the homeless.

[27] Collective Complaint of *FEANTSA v. France.* Complaint No. 39/2006. Report of the European

Committee of Social Rights to the Committee of Ministers - 5 June 2008, Paragrahp 144

[28] *European Social Charter. (Revised)* Council of Europe, Strasbourg 3/5/1996. The binding nature at national level of the Charters depends on whether a dualist of monist legal systems pertains, but many States have incorporated the Charter (or parts of it) into national law. See website: http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (accessed May 14, 2008)

[29]Actually, there are French judicial decisions emphasizing that public consideration of ethnic origin when allocating social housing is a discrimination punished by the French Penal Code (*Tribunal correctionnel de Saint Etienne*, February 3, 2009, office *HLM* of Saint Etienne, quoted by the *Haute Autorité de Lutte Contre les Discriminations et pour L´Égalité*, *Délibération* 2009, March 16, 2009).

[30] According to the CLIP´s research:

"Most CLIP cities perceive a segregation challenge and try to address the issue. Segregation exists as spatial segregation, such as physical distance and social structure in space, and as social segregation which reflects social distance in society. Both forms of segregation can be further differentiated into three relevant basic dimensions: demographic segregation, social (class) segregation and ethnic segregation. When reflecting the cities' policies, it should be
remembered that these three dimensions exist in parallel and that it is difficult to describe or analyse them independently from each other. Many similarities exist between 'ethnic' and 'social' segregation since migrant or ethnic minority groups are usually not homogeneous communities in terms of social or economical aspects. Thus, it is difficult to distinguish between mere class segregation and ethnic segregation and its effects.(…)

-segregation negatively affects cultural and social integration, particularly language competence and the formation of social networks with the receiving society; in brief, segregation has a negative influence on the
formation of cultural and social capital in terms of competing successfully in central institutions in society;
- through its negative effects on the formation of cultural and social capital, segregation hinders structural integration. For instance, segregation is also an invitation to fall into the 'ethnic mobility trap' which is associated with seeking a limited 'career' within the ethnic colony only;
-segregation negatively affects identificatory integration, particularly with the country of choice for migrants, but not so much with the city.
These challenges exist, no matter how municipalities, politicians or researchers judge the feasibility of avoiding segregation or of decreasing existing segregation. Researchers like those of the German 'Schader foundation' project, who believe that the segregation of migrants in cities cannot be changed and are willing to accept it, do not have different opinions regarding the negative effects of segregation as those stated above; they believe, however, that the negative effects are to some degree balanced out by positive effects and can be further counterbalanced by improving living conditions and institutions in the segregated housing areas."