

4. Is it discrimination, segregation or both?

An interdisciplinary perspective on societal ('de facto') segregation in education

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SOCIAL AND LEGAL INEQUALITY

The consequences of segregation in education have been extensively researched in social science. Many of these studies point to the existence of detrimental consequences for segregated pupils.² They have established that there is a clear and consistent correlation between the socioeconomic composition of the student body and the individual child's academic success.³ Pupils with a low socioeconomic status (SES) are pupils who face more disadvantage in a combination of social and economic factors, such as their household's income, their parents' education and occupation.⁴ This socioeconomic disadvantage negatively impacts their chances in life, and when additionally these children are segregated into schools with other pupils with an equally low SES, this

¹ Special thanks go to Stijn Smet, Wouter Vandenhoe and Emma Varnágy for sharing their thoughts and useful feedback on an earlier version of this chapter.

² Jennifer van Hook, 'Immigration and African American Educational Opportunity: The Transformation of Minority Schools' (2002) 75(2) *Sociology of Education* 169, 171; Vincent Dupriez, *Methods of Grouping Learners at School* (UNESCO 2010), 58–59; Sean Reardon, 'School Segregation and Racial Academic Achievement Gaps' (2016) 2(5) *RSF: The Russell Sage Foundation Journal of the Social Sciences* 34, 34; Reyn van Ewijk and Peter Sleegers, 'The Effect of Peer Socioeconomic Status on Student Achievement: A Meta-Analysis' (2010) 5(2) *Educational Research Review* 134, 147–48.

³ van Hook (n. 2), 171; Dupriez (n. 2), 58–59; Sjoerd Karsten, 'School Segregation' in *Equal opportunities? The Labour Market integration of the Children of Immigrants* (OECD publishing 2010), 194.

⁴ Van Ewijk and Sleegers (n. 2), 138.

disadvantage is exacerbated.⁵ Individual pupils of a similar (low) SES have less academic success when schooled in a low-SES environment.⁶ At the same time, pupils with a high SES have nothing to fear from a more diverse student body: their level of achievement does not decrease when the student body diversifies⁷ and they may benefit from being exposed to diversity instead of only their homogeneous peer group.⁸

As the legal principle of non-discrimination is based on the idea of equality, and given that educational segregation on the basis of SES⁹ generates unequal opportunities, the question arises as to what extent this social reality of inequality is reflected in legal norms which aim at guaranteeing (legal) equality.

In what follows, the chapter analyses human rights law's response to this social reality. By unpacking the legal concept of segregation, it endeavours to better understand it. The second section examines two human rights instruments in which a legal prohibition of segregation can be found: the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Revised European Social Charter (ESC). The third section proceeds by unpacking the legal concept of segregation and identifying what elements should be present in a certain separation, in order for it to amount to segregation (that is, an unjustified separation). In addition, it analyses the ICERD and the ESC's approach towards each element. The four elements that are taken into account are part of a self-devised interdisciplinary

⁵ Emilie Franck and Ides Nicaise, *Ongelijkheden in het Vlaamse onderwijssysteem: verbetering in zicht? Een vergelijking tussen PISA 2003 en 2015* (SONO 2018), 53.

⁶ Jessica Kenty-Drane, 'Early Isolation: Racial and Economic Segregation in U.S. Public Elementary Schools' (2009) 16(1–2) *Race, Gender & Class* 45, 45; Dirk Jacobs and others, *De sociale lift blijft steken. De prestaties van allochtone leerlingen in de Vlaamse Gemeenschap en de Franse Gemeenschap* (Koning Boudewijnstichting 2009), 77; Karsten (n. 3), 200–1.

⁷ Jacobs and others (n. 6), 79.

⁸ For example in terms of developing critical thinking skills, developing cross-cultural competency or having interracial friendships, see Ann Owens, 'School Segregation by Race/Ethnicity and Economic Status' in Thurston Domina and others (eds), *Education and Society: An Introduction to Key Issues in the Sociology of Education* (University of California Press 2019) 251.

⁹ Other studies have found detrimental consequences to also arise when pupils are segregated on the basis of other grounds, such as race and disability. However, as the focus of the current chapter is on SES, these were not mentioned. See, for instance, Lisa Pfahl and Justin Powell, 'Legitimizing School Segregation. The Special Education Profession and the Discourse of Learning Disability in Germany' (2011) 26(4) *Disability & Society* 449; Owens (n. 8).

framework of analysis and consist of origin, ground, extent and consequences of separation. Lastly, the fourth section explores the relationship between discrimination and segregation, using the four elements of a separation as a guide.

The chapter moreover highlights aspects that are especially relevant for tackling societal segregation on the basis of SES. As was shown in this section, segregation has been found to generate unequal educational opportunities regardless of its origin.

This type of segregation has mostly been termed ‘de facto’ segregation.¹⁰ Although I will be discussing the same phenomenon, I will refrain from terming it de facto segregation, as this term makes it appear that the segregation ‘simply’ exists without any link to a state’s actions and omissions. As I argue further on (infra ‘Origin’), this is not true. Segregation never simply exists; it can always be traced back to seemingly innocent state policies and/or omissions to act. In order to not further feed this confusion, I speak of ‘societal segregation’ when referring to the same type of segregation. Societal segregation is the prevailing (and often not visible) segregation in today’s Western societies, which forms the focus of the current chapter.

HUMAN RIGHTS INSTRUMENTS DEFINING SEGREGATION

The concept of segregation can explicitly or implicitly be found in only a limited number of international and European human rights instruments. For reasons of space, only two instruments will be discussed: the ICERD and the ESC. They were selected because of their capacity to include a prohibition of societal segregation,¹¹ which can be identified by looking at the origin of the

¹⁰ Following the distinction made in the case law of the US Supreme Court between *de facto* and *de jure* segregation, for example in *Keyes v School District No 1, Denver, Colorado* [1973] USSC, 413 US 189. In scholarship, see for instance Erica Frankenberg and Kendra Taylor, ‘De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality’ (2018) 47(2) *Journal of Law and Education* 189.

¹¹ Seven instruments seem to have that capacity, namely the ICERD, the European Convention on Human Rights (ECHR), the ESC, the UN Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Framework Convention for the protection of National Minorities (FCNM) and the UN Convention on the Rights of Persons with Disabilities (CRPD). Objections for using the other instruments are the following: they focus more on inclusion (CRPD), making them less fit to analyze the concept of segregation used; it is not possible to discern a definition of segregation from the instruments or the materials accompanying them (FCNM, CRC and ICESCR).

separation required for a separation to amount to either segregation or discrimination, as explained below (infra ‘Origin’).

The ICERD is the only international convention with an explicit and stand-alone prohibition of segregation.¹² Its Article 3 states: ‘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.’¹³ The General Recommendation clarifies that the provision effectively prohibits all forms of racial segregation in all countries.¹⁴ It moreover explicitly states that ‘a condition of racial segregation can [...] arise without any initiative or direct involvement by the public authorities’.¹⁵

The second instrument that will be analysed is the ESC. While the text of the Charter does not include an explicit prohibition of segregation, this prohibition has been read into Articles 15 and 17 ESC in the case law of the European Committee of Social Rights (ECSR). Cases on segregation in education on the basis of race¹⁶ and disability¹⁷ have been brought before the Committee.

Specifically concerning the ECHR, the developments leading to a clear prohibition of societal segregation are recent and merit a more thorough analysis than the space this chapter can provide (see the developments in *X and Others v Albania* App nos 73548/17 and 45521/19 (ECHR, 31 May 2022); *Elmazova and Others v North Macedonia* App nos 11811/20 and 13550/20 (ECHR, 13 December 2022); *Szolcsán v Hungary* App no 24408/16 (ECHR, 30 March 2023) and their commentary in Merel Vrancken, ‘Segregation in Education and a Duty of Desegregation Under the ECHR’ (2024) 2 European Human Rights Law Review 112.

¹² The CRPD mentions segregation in two of its provisions, but this concept is not central to any of them. Art. 2 of the UNESCO Convention against Discrimination in Education, UNTS 660, 212 (1960) (CADE) effectively prohibits its various instances of segregation but does not call these situations of separation ‘segregation’, thus omitting an important label which highlights the wrongfulness of the separation.

¹³ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1969), art. 3.

¹⁴ Council of Europe, Framework Convention on the Protection of National Minorities, H (95) 10 (1995), art. 12; UN General Assembly, *Elimination of Racism and Racial Discrimination: Report of the Committee on the Elimination of Racial Discrimination*, A/50/18 (1995), 150; *General Recommendation XIX on article 3* (following: *General Recommendation XIX*), para. 1.

¹⁵ *General Recommendation XIX* (n. 14), para. 4.

¹⁶ *European Roma and Travellers Forum (ERTF) v the Czech Republic* [17 May 2016] ECSR, Complaint No 104/2014.

¹⁷ *Autism-Europe v France* [4 November 2003] ECSR, Complaint No 13/2002; *European Action of the Disabled (AEH) v France* [11 September 2013] ECSR, Complaint No 81/2012; *Mental Disability Advocacy Center (MDAC) v Belgium*

Regarding the education of children with disabilities, the ECSR focuses on the principle of inclusion rather than a prohibition of segregation. According to the Committee, however, both concepts are closely related, as it acknowledges that a lack of inclusion may amount to segregation and that segregation may be remedied through inclusion.¹⁸

THE CONCEPT OF SEGREGATION: A FRAMEWORK

While first intuition may be that segregation is (simply) a form of discrimination, on closer look it becomes clear that not all (forms of) segregation uncontestedly fall under the prohibition of discrimination. For instance in Flanders the term ‘concentration schools’ is used in common language to point to schools that are attended by a majority of pupils with a migration background, discerned by their skin colour, the language they speak or the sound of their names. In a country with free school choice, such as Belgium, this situation of segregation will probably not fall under the prohibition of discrimination. Both the aspect of lack of direct state involvement in creating the unequal situation and the fact that the children(‘s parents) freely chose the school at hand – and are equally free to change schools – add to this probability.¹⁹ This example leads to a number of additional questions, including whether the described situation, if it does not amount to discrimination, can justifiably (legally) be termed ‘segregation’. In what follows, the groundwork is laid that may guide us in attempting to answer this question.

Consider the idea that an unjustified difference in treatment or disparate impact leads to discrimination and an unjustified separation leads to segregation (infra ‘Segregation as discrimination?’). The requirement of a difference in treatment/disparate impact, however, is not entirely analogous to the requirement of a separation. The current section unpacks the legal concept of segregation, focusing on what elements should be present in a certain separation, in order for it to amount to segregation (that is, unjustified separation).

[16 October 2017] ECSR, Complaint No 109/2014; *International Federation for Human Rights (FIDH) and Inclusion Europe v Belgium* [9 September 2020] ECSR, Complaint No 141/2017.

¹⁸ *FIDH and Inclusion Europe v Belgium* (n. 17), para. 173.

¹⁹ Where the schools are part of a catchment area and the lines of the catchment area were unfairly drawn, the school allocation procedure within the catchment area was applied unfairly or there are no acceptable alternative non-segregated schools available for the child within the catchment area, the situation might be different (cf. *Lavida and Others v Greece* App no 7973/10 (ECHR, 30 May 2013); *Szolcsán v Hungary* App no 24408/16 (ECHR, 30 March 2023)).

The clarification of the aspect of separation underlying the concept of segregation that is used in each international instrument is a complex undertaking. By comparing the different definitions to each other and searching for similarities and differences between them, and by concurrently drawing from social science research on segregation in education (briefly mentioned supra under ‘Social and legal inequality’), an interdisciplinary framework of analysis has been drafted that identifies four elements of separation. The definitions differ regarding what situations can be considered to possibly amount to segregation, but at the same time many of them elaborate upon the same four elements that may therefore be considered important for identifying when a separation may amount to segregation, namely origin, ground, extent and consequences.

Origin

The origin of the separation points to the degree of state involvement in creating or maintaining the separation of pupils. A spectrum of state involvement in separating different pupils exists. The state may be very involved in the separation, for instance when separation arises from the law or from legal policies that are devised to establish the separation of certain groups in society. This can be termed *legally mandated separation*. For instance, in the US the Jim Crow laws mandated the separation of coloured people from white people.²⁰ Moreover, separate education of children with disabilities in a parallel system of education is also a form of legally mandated separation. Second, separation may exist as a remnant of past legally mandated separation, which will be named *persisting separation*. An example of this is the separation persisting to date in many US schools, after *Brown v Board of Education*’s abolishment of legally mandated separation.²¹

On the other side of the spectrum of state involvement, the State may only be involved in the separation of pupils in a limited way. Separation may exist without any clear link to past or current mandated separation. Two forms of separation can be identified in this respect: separation as arising from law or policy that is not devised to separate the pupils concerned, but does have that effect (*enabled separation*) and separation as arising from general functioning of society, without any direct link to law or policy (*societal separation*). An example of enabled separation is the overrepresentation of children with a migration background in specialised schools for children with disabilities.

²⁰ See Jean Van Delinder, ‘Segregation, Desegregation, and Resegregation’ in Thomas Holt and others (eds), *The New Encyclopedia of Southern Culture vol 24: Race* (University of North Carolina Press 2013), 147–48.

²¹ *Brown v Board of Education of Topeka* [1954] USSC, 347 US 483.

While these specialised schools were created for separating pupils with disabilities, the separation of pupils with a migration background was not intended. Nonetheless, as a result of this law or policy, the separation did occur.²²

An example of societal separation is the existence of ‘concentration schools’ in Flanders, in which a great majority of the pupils have a migration background.²³ This separation exists without any direct link to law or policy, but its existence instead stems from the general functioning of society – in this case, the concentration of pupils with a migration background in certain areas, coupled with white flight²⁴ and free school choice. While there is thus no *direct* link to a concrete law or policy in such a situation of societal separation, some (indirect) state involvement always exists.

The two instruments discussed in the current chapter consider all four origins of separation to possibly amount to segregation. In effect, the origin of separation is irrelevant for speaking of segregation under the ICERD.²⁵ All forms of separation, be they a result of law or policy or not, fall under the provision (*supra* ‘Human rights instruments defining segregation’).

Similar to the ICERD, the ESC also adheres to a broad approach. This is reflected in the conclusions made by the ECSR in the reporting procedure, requiring states to establish that Roma children are not subject to segregation in education.²⁶ Particularly in the cases of Greece and Hungary, which have in the past been condemned by the European Court of Human Rights (ECtHR) for the segregation of Roma pupils in education, it asks for confirmation that ‘no de facto segregation takes place’.²⁷ In its conclusions the ECSR moreover asks for information on ‘measures taken to include Roma children in main-

²² See, for instance, *DH and others v the Czech Republic* App no 57325/00 (ECHR, 13 November 2007); *Horváth and Kiss v Hungary* App no 11146/11 (ECHR, 29 January 2013).

²³ Mieke Van Houtte and Peter Stevens, ‘School Ethnic Composition and Students’ Integration outside and inside Schools in Belgium’ (2009) 82(3) *Sociology of Education* 217, 218.

²⁴ *Ibid.* White flight refers to the situation where schools attracting more migrant pupils lose a significant number of native pupils, as parents decide to flee the school.

²⁵ *General Recommendation XIX* (n. 14), paras 3–4.

²⁶ European Committee of Social Rights (ECSR), *Conclusions 2019 – Bulgaria – Article 17-2*, 2019/def/BGR/17/2/EN (5 December 2019), 2.

²⁷ ECSR, *Conclusions 2019 – Greece – Article 17-2*, 2019/def/GRC/17/2/EN (5 December 2019), 3; ECSR, *Conclusions 2019 – Hungary – Article 17-2*, 2019/def/HUN/17/2/EN (5 December 2019), 2.

stream education'.²⁸ Because of the Committee's emphasis on the existence of 'de facto segregation' and the obligation on states to take measures to combat segregation, it seems that all origins of separation are included in the ECSR's concept of segregation.

Ground

As a second element, the specific characteristic that is the basis for the separation (ground) is also a relevant aspect for determining whether a separation amounts to segregation. Two examples may clarify what grounds can be used as a basis for a separation. First, the Flemish education system allows for the separation of pupils on the basis of merit. Pupils who lack the necessary analytical capabilities will not be allowed to stay in the academic track, but may be reoriented to a more technical or vocational track. Second, when young refugees arrive in their country of destination, they may be put in a separate school or class in which the local language is taught to them before they are allowed to enter the general school system. This separation is made on the basis of language.

While some grounds for separation may coincide with one of the 'suspect grounds' of discrimination,²⁹ others may not. For instance, language cannot always be found as one of the enumerated non-discrimination grounds in international and European human rights instruments.³⁰ Moreover, 'merit' is never an enumerated or suspect ground. These less or non-suspect grounds may however be linked to the more traditional non-discrimination grounds. For instance, language will usually be indirectly linked to migration status and to race, as pupils with a migration status will more often not have the language of education as their native language and those same pupils will more often be of a different race than the majority population. The prohibition of *racial* segregation that can be found in Article 3 ICERD is clearly limited to the ground of race, interpreted as including colour, descent and national or ethnic origin.³¹ Interestingly, the text of the General Recommendation links race to income,

²⁸ ESCR, *Conclusions 2019 – Slovak Republic – Article 17-2*, 2019/def/SVK/17/2/EN (5 December 2019), 2.

²⁹ Many prohibitions of discrimination include suspect grounds, that is, grounds on the basis of which a differentiation is more suspect and therefore less easily justifiable. The exact grounds which are suspect differ across instruments, but race and sex are often suspect grounds for discrimination (Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law* (OUP 2016), 126).

³⁰ Language is included in for instance, ECHR (1953), art. 14 and ESC, ETS No 163 (1996), art. E.

³¹ ICERD, art. 3; *General Recommendation XIX* (n. 14), paras 3–4.

which points to a possible recognition of intersectionality with socioeconomic status.³² It moreover adds that individuals may ‘suffer a form of discrimination in which racial grounds are mixed with other grounds’.³³

While the ICERD is clearly focused on race, the ESC leaves the question of ground open, mentioning an open-ended list of possible discrimination grounds in Article E, which can be read together with Articles 15 and 17 ESC. The ECSR case law shows that the Committee has adopted decisions concerning segregation on the basis of only two grounds: disability and ethnicity. This does not mean that according to the Committee segregation cannot exist on the basis of other grounds. For instance, in *Mental Disability Advocacy Center (MDAC) v Belgium* and *International Federation for Human Rights (FIDH) and Inclusion Europe v Belgium*, the complainant organisations argued that (disabled) children from families with a lower income are disproportionately represented in segregated schooling, which amounted to discrimination based on economic status.³⁴ The Committee twice rejected this claim because the claims had not been sufficiently substantiated.³⁵ If an organisation provides sufficient proof of the existence of such segregation in the future, the Committee will need to judge whether separation on the basis of this ground may also amount to segregation.

Extent of Separation

A third relevant element is the extent to which the children are separated, that is, how ‘separate’ they actually are. Taking the ground of sex as an example, boys and girls could be educated in different schools, in different classes within the same school or a clear overrepresentation of boys in specific classes (for example, an educational programme for becoming a construction engineer) and girls in others (for example, a training programme for becoming a beauty specialist) could exist. The question arises whether these examples entail separation to a large enough extent so as to possibly call them segregation.

³² As an example of intersectionality regarding segregation in education, the Committee mentions ‘socioeconomic discrimination’ of the Luli/Roma in Uzbekistan with regard to their access to education. Moreover, it emphasises that in putting an end to segregation in education, particular attention should be given to Luli/Roma girls (CERD, *Concluding observations on the combined tenth to twelfth reports of Uzbekistan*, CERD/C/UZB/CO/10-12 (27 January 2020), paras 12–13).

³³ *General Recommendation XIX* (n. 14), paras 3–4.

³⁴ *MDAC v Belgium* (n. 17), para. 90; *FIDH and Inclusion Europe v Belgium* (n. 18), paras 110–114.

³⁵ *MDAC v Belgium* (n. 17), para. 93; *FIDH and Inclusion Europe v Belgium* (n. 18), paras 196, 210.

The ECSR seems to consider a wide range of situations of separation to amount to segregation. For instance, the Committee has held that the teaching of Roma in separate classrooms, putting Roma pupils in a different part of the classroom than the other pupils and giving Roma pupils lunch at different times from other pupils amount to segregation.³⁶ Concerning overrepresentation, it has considered that 11% of Roma children being schooled in Roma-only classes to be ‘substantial segregation’.³⁷ Also the fact that only 10% (in 2003) and 20% (in 2012) of children and adolescents with autism were taught in mainstream schools, with only 1.2% attending upper secondary school, gave rise to a violation of their right to inclusive education.³⁸ It is, however, not possible to point to a minimal extent of overrepresentation required by the ECSR in order for a separation to amount to segregation.

Clear examples such as these do not exist for the ICERD. Looking at the element of extent under the prohibition of segregation laid down in Article 3, it is clear that several ‘forms’ of separation are accepted to possibly amount to segregation. Concluding observations under the periodic reporting procedure make mention of the situations of ‘two separate systems of education’,³⁹ separated schools,⁴⁰ and overrepresentation⁴¹ as amounting to segregation. From these reports it is not clear which degrees of overrepresentation would be problematic.

Detrimental Consequences

A fourth element is the consequence of a separation. As segregation is a negative concept that indicates the existence of unjust treatment, detrimental consequences are a requirement in order to speak of ‘segregation’ instead of

³⁶ ECSR, *Conclusions 2011 – Slovak Republic – Article 17-2*, 2011/def/SVK/17/2/EN (9 December 2011), 1.

³⁷ ECSR, *Conclusions 2019 – Portugal – Article 17-2*, 2019/def/PRT/17/2/EN (5 December 2019), 3.

³⁸ *AEH v France* (n. 17), paras 83–4, 94 and 106.

³⁹ CERD, *Concluding observations on the combined seventeenth to nineteenth reports of Israel*, CERD/C/ISR/CO/17-19 (27 January 2020), para. 21.

⁴⁰ CERD, *Concluding observations on the combined tenth to twelfth reports of Uzbekistan*, CERD/C/UZB/CO/10-12 (27 January 2020), para. 16.

⁴¹ CERD, *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, CERD/C/POL/CO/22-24 (24 September 2019), paras 21–22; CERD, *Concluding observations on the combined twelfth and thirteenth periodic reports of Czechia*, CERD/C/CZE/CO/12-13 (19 September 2019), paras 17–18.

‘separation’. Negative consequences always need to be present and are thus a necessary – but not sufficient – element to be able to speak of segregation.⁴²

The General Recommendation on Article 3 of the ICERD ‘invites States parties [...] to work for the eradication of any negative consequences that ensue [from racial segregation]’,⁴³ thus clearly pointing to the detrimental consequences of segregation. The Convention seems to already presume that negative consequences ensue from (racial) segregation, not requiring them to be explicitly identified. For lack of case law on this matter, however, this assertion cannot be verified.

Regarding both the separation of children with disabilities and Roma children in education, the Committee of Social Rights does not require proof of any negative consequences that arise from this separation for it to amount to segregation. More specifically, concerning the education of children with disabilities, the ECSR puts the emphasis on the right to inclusive education when it finds a breach of the Charter.⁴⁴ Inclusion thus needs to be advanced, regardless of any proof of the harmful consequences of a lack of inclusion.⁴⁵ the detrimental effect is presumed. The same is true for the segregation of Roma children in education.⁴⁶

Social science literature has made evident that the separation of pupils, in and of itself, has detrimental effects on their achievement. This is the case even where there is no full separation and there are no state policies actively mandating or enabling this separation, in the present or in the past.⁴⁷ These pupils are not only set back by the disadvantages they carry with them as (mostly)

⁴² In the various definitions of segregation, differences exist concerning whether these negative consequences are presumed or need to be proven. This depends on who carries the burden of proof and the assumptions underlying the different prohibitions. For instance, the CADE also includes a presumption of negative consequences when the separation is made on the ground of belonging to a national minority, but does not when it is made on the ground of language (CADE, arts 1(c), 2(b)).

⁴³ *General Recommendation XIX* (n. 14), para. 4.

⁴⁴ *Autism-Europe v France* (n. 17), paras 48–49; *AEH v France* (n. 18), paras 75–100; *MDAC v Belgium* (n. 17), paras 61–7; *FIDH and Inclusion Europe v Belgium* (n. 17), paras 164–86.

⁴⁵ *ECSR, Conclusions 2007 – Statement of interpretation – Article 15-1, 2007*, Ob. 2/Ob/EN (30 June 2007); *FIDH and Inclusion Europe v Belgium* (n. 17), para. 173.

⁴⁶ This can be corroborated by the wording used in its 2015 conclusions on Hungary (CERD, *Conclusions 2015 – Hungary – Article 17-2, 2015/def/HUN/17/2/EN* (4 December 2015), 4).

⁴⁷ van Hook (n. 2), 171; Dupriez (n. 2), 58–9; Karsten (n. 3), 194.

members of minority groups, but also by the additional disadvantage that separation from the majority group and the ‘concentration of disadvantage’ in their school or class brings them⁴⁸ (supra ‘Social and legal inequality’). Taking this into account, separation could (and should) be presumed to have detrimental consequences.⁴⁹ The instruments discussed, in effect, already do this: no proof of additional negative consequences, aside from the fact of separation, seems necessary.

In conclusion, the four elements of origin, ground, extent and consequences are relevant for assessing whether a separation that is not justified may amount to segregation. The question of whether and when a separation can be justified will in part depend on the degree of severity of the elements of the separation in question. For instance, a legally mandated full separation on the basis of race may be very difficult to justify, but a societal partial separation on the basis of socioeconomic status may be more easily justified.⁵⁰

SEGREGATION AS DISCRIMINATION?

Suppose the following parallel between the concepts of discrimination and segregation: an unjustified difference in treatment (direct discrimination) or disparate impact (indirect discrimination) leads to discrimination and an unjustified separation leads to segregation. This hypothesis is largely based on an intuitive grasp of the concepts of discrimination and segregation and their relation to each other. A number of instruments prohibiting segregation effectively do so through their prohibition of discrimination,⁵¹ indicating a close relationship between both concepts. Segregation is often seen as ‘a form of’ discrimination.

The current section explores this idea of a symmetry between the concepts of segregation and discrimination. It looks into the different elements of segregation and links them to aspects of discrimination. The relation between both concepts is of particular relevance for establishing what obligations regarding segregation stem from general prohibitions of discrimination that do not

⁴⁸ Franck and Nicaise (n. 5), 53.

⁴⁹ With the important caveat that the negative consequences may vary depending on elements such as the ground and extent of separation, or even its origin.

⁵⁰ Apart from this general observation, the question of justification is not further discussed in the current chapter as there is insufficient space to give it the nuanced examination it deserves. On this topic, see Janneke Gerards, *Judicial Review in Equal Treatment Cases* (Brill 2005); Fellmeth (n. 29).

⁵¹ The ECHR, the CADE and the European Committee against Racism and Intolerance (ECRI), *General Policy Recommendation No. 7*, CRI(2003)8 REV (2002) do so.

include a reference to segregation. Can it be presumed that a prohibition of discrimination includes a prohibition of (all forms of) segregation? If segregation as a concept is not simply a 'form' or a specific manifestation of discrimination, but instead a specific type of violation of the principle of equality that does not follow the same 'rules' as discrimination, it will not be possible to presume that all general prohibitions of discrimination include a prohibition of (all forms of) segregation. By examining similarities between both concepts, this section lays the groundwork to answer these questions.

Origin and Consequences

Differential treatment, the often used requirement for direct discrimination to be established,⁵² implies the existence of an act that differentiates, differential *treatment*. Viewed from the perspective of the state as a perpetrator, this differential treatment may for instance be treatment in the form of unequal legislation, or an individual administrative act by a government official. When compared to the elements of separation, this points to a legally mandated origin: separation that arises from the law or from legal policies that are devised to establish the separation of certain groups in society.⁵³

In contrast, disparate impact,⁵⁴ the requirement often used for indirect discrimination,⁵⁵ does not directly point to an action by the state. Indirect discrimination generally requires that seemingly neutral treatment has disproportionate consequences on a group or person. This puts special emphasis on the consequences of a separation rather than on its origin. By putting less emphasis on the origin, this form of discrimination potentially accepts origins with less state involvement. However, indirect discrimination still seeks a culprit responsible for the discrimination. This may mean that a parallel can be drawn between disparate impact and both persisting and enabled separation: these two forms can be traced back to the state as the (indirect) culprit.

The above explanation omits a reference to the fourth possible origin of a separation, namely societal separation. This form of separation seems to have

⁵² Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd ed, CUP 2019) 689–90, 714–15, 722–3; Sandra Fredman, *Discrimination Law* (OUP 2011), 153.

⁵³ One could argue that differential treatment can also point to persisting separation as intent seems to be a part of legally mandated separation but is not a requirement for direct discrimination. This argument will not be developed here.

⁵⁴ Also called 'prejudicial effects' or any other term pointing to the same idea, namely that a seemingly neutral treatment has (a) disproportionate consequence(s) for a group or person.

⁵⁵ De Schutter (n 52) 707, 722–23, 729–30; Fredman (n 52) 154.

a parallel in the concept of structural discrimination. However, this is only an emerging concept in human rights and discrimination law, without clear and generally applicable features other than its societal (structural) origin. No general agreement exists on whether this form of discrimination is prohibited by human rights law.⁵⁶

Ground and Extent

As for the exploration of a symmetry between the concepts of segregation and discrimination, it seems that the requirement of a ground functions in the same way for both concepts. For discrimination, the ground may have an impact on whether the discrimination will be considered direct or indirect: while a differential treatment on the ground of ethnicity will usually point to a possible direct discrimination, that same differential treatment on the ground of language may be considered a neutral policy with a possible disparate impact, turning it into an indirect discrimination.

To compare this to segregation, think of the example that was given above, under ‘Ground’, of the (direct) separation of newcomers into separate classes on the basis of language, where the ground could also be migration background or race. Each of these grounds can be chosen as the basis of the segregation: when language is chosen, this means that an actively pursued (legally mandated origin) full separation (extent) on the basis of language exists. When migration background is chosen, this means that a non-directly pursued (enabled origin) full separation (extent) on the basis of migration status exists. When race is chosen, a non-directly pursued (enabled origin) partial separation (extent) exists. Although no similar concepts of direct/indirect segregation exist, this last example could be seen as indirect segregation on the basis of race, similar to the example of discrimination.

In any case, when it is viewed like this, the element of extent also plays an important role: only when the (indirect) separation on the basis of race is of a sufficient extent, may it amount to segregation on that basis. When applying it to the concept of discrimination, the requirement of extent points to the degree of ‘difference’ in the differential treatment and the amount of ‘disparateness’ in disparate impact. It lies at the heart of the concept of separation and as segregation is precisely about separation, it is very specific to that concept.

The exploration above shows that a clear link between the concepts of discrimination and segregation exists, and depending on the origin of the sep-

⁵⁶ On structural discrimination, see De Schutter (n. 52), 721–3; Elisabeth Henn, *International Human Rights Law and Structural Discrimination: The Example of Violence against Women* (Springer 2019).

aration and ground chosen, segregation will find its parallel in direct, indirect or structural discrimination. Although *some* relation between the concepts does exist, this section has not succeeded in clarifying exactly *what* this relation is. The question whether segregation is simply a form of discrimination or a closely related concept with individual existence remains unanswered. Although it cannot give a definite answer to this question, this section makes an important contribution to it by identifying the symmetries between both concepts when it comes to different origins, grounds, extents and consequences of segregation/discrimination. This contribution lays the groundwork for further investigation into the relation between both concepts and the exact place of the concept of segregation within discrimination law.

CONCLUSION

Through an analysis of the legal concept of segregation and an examination of the relation between segregation in education and discrimination, this chapter brings more clarity to the legal status of segregation in education. It proposes a different and interdisciplinary way of looking at the concept, to enable highlighting certain issues that seem unique to it, and to better understand it. Four elements play a role in determining whether a certain separation may amount to segregation: its origin, ground, extent and consequences. When viewed through the lens of these four elements, certain aspects of the relationship between segregation and discrimination can be clarified. These aspects lay the groundwork for answering the question what the relation between segregation and discrimination is, without yet providing a definite answer.

As was stated at the beginning of this chapter, segregation in education is widespread and generates unequal opportunities. The current chapter shows that this ‘societal problem’ could have a (partly) legal solution, as the two human rights instruments discussed already largely prohibit the instances of segregation with a societal origin. Research in social science points to socio-economic segregation as the segregation that generates the most inequalities. Both the concepts of segregation discussed, under the ICERD and under the ESC, provide a wide-encompassing prohibition of segregation that includes societal segregation. For the ICERD, the biggest limitation is that it only prohibits segregation on the basis of race (while recognising some degree of intersectionality). The prohibition of segregation under the ESC seems even more promising for prohibiting societal segregation, as it includes a potentially very wide array of possible prohibited or suspect grounds for such segregation. Both instruments seem fit to address segregation in education and to further the equality of all pupils’ educational opportunities and may thus prove essential tools for structural societal change.

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