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## Constitutional Law - Civil Rights - Recent New York City Ordinance Bans Discrimination in Certain Private Housing Facilities

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## RECENT LEGISLATION

CONSTITUTIONAL LAW—CIVIL RIGHTS—RECENT NEW YORK CITY ORDINANCE BANS DISCRIMINATION IN CERTAIN PRIVATE HOUSING FACILITIES—A recent New York City ordinance is the first anti-discrimination legislation affecting the sale and rental of privately-owned housing to minority groups. The ordinance contains three principal provisions: It (1) forbids racial or religious discrimination by private owners in the selection of tenants or buyers for any "housing accommodation which is located in a multiple dwelling,"<sup>1</sup> (2) bans discrimination in the selection of purchasers by a seller of ten or more contiguous housing units, and (3) prohibits the owner or lessor of housing accommodations covered by the ordinance from discriminating because of race or religion in setting the terms of sale or rental, or in furnishing facilities or services to his renters or buyers. The ordinance does not contain any criminal penalties for violations of these provisions, but it does provide for administrative enforcement by "conciliation" and injunction proceedings in the courts when the normal procedure fails.<sup>2</sup> *New York Local Law 80 of 1957*, New York City Administrative Code (1957) c. 41, tit. X.

<sup>1</sup> The term "multiple dwelling" used in the ordinance is defined as any dwelling which is occupied as the residence of three or more families, §5(A) N.Y. Consol. Laws (McKinney, 1946) §4(7). This statutory definition was made part of the ordinance and includes such facilities as rooming houses, hotels, and college dormitories.

<sup>2</sup> The enforcement procedure established by the ordinance starts with the initial complaints of discrimination being taken before a city commission. This commission investigates the complaints, and if it finds that there has been discrimination it attempts to conciliate the matter with the offender. If conciliation fails to stop the discriminatory practice the case is passed to another administrative panel for review. If this panel believes court action necessary to enforce the ordinance it turns the case over to the city attorney who then seeks an injunction against the violator.

New York has for several years had a statute prohibiting discrimination in privately-owned housing projects which have been given public financial assistance.<sup>3</sup> A recent New York decision has upheld the constitutionality of that statute against objections by an owner of publicly-financed housing that it deprived him of the unrestricted use of his property without due process of law under the New York Constitution.<sup>4</sup> The New York City ordinance is similar in design to that statute and would undoubtedly be upheld in New York against any due process objections. Such statutes and ordinances are also specifically authorized under the liberal provisions of the New York Constitution unless they are patently arbitrary.<sup>5</sup>

State statutes have traditionally prohibited the owners of quasi-public businesses, such as theaters, restaurants, and public conveyances, from racial discrimination in serving the public.<sup>6</sup> These statutes have been repeatedly upheld under the Federal Constitution as a valid exercise of the states' police powers to regulate the use of private property, on the theory that these types of businesses are affected with the public interest because the owners hold them out as places of public accommodation.<sup>7</sup> More recent state anti-discrimination statutes have gone beyond regulation of places of public accommodation by prohibiting private discrimination in employment,<sup>8</sup> publicly assisted housing,<sup>9</sup> and other areas.<sup>10</sup> The state courts have apparently assumed that these new anti-discrimination statutes do not violate federal due process,<sup>11</sup> and there is some analogous Supreme Court

<sup>3</sup> 8 N.Y. Consol. Laws (McKinney, Supp. 1957) §18(a).

<sup>4</sup> *New York State Commission Against Discrimination v. Pelham Hall Apartments*, 170 N.Y.S. (2d) 750 (1958). The court upheld the statute on a broad interpretation of the police power, rather than on the particular power of the legislature to regulate individuals who have been given public assistance. The police power theory would apply with equal force to the New York City ordinance.

<sup>5</sup> N.Y. CONST., Art. I, §11, provides that no person shall be subjected to discrimination by another individual or corporation. The New York courts have held this section to be merely declaratory of the state's policy, hence requiring legislative action for implementation. See *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. (2d) 541 (1949). It is clear, however, that this section does give the legislature extremely wide discretion to enact anti-discrimination legislation. See *Kemp v. Rubin*, 188 Misc. 310, 69 N.Y.S. (2d) 680 (1947).

<sup>6</sup> 8 N.Y. Consol. Laws (McKinney, 1948) §40-b; Mich. Comp. Laws (1948) §§750.146, 750.147.

<sup>7</sup> *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Western Turf Assn. v. Greenberg*, 204 U.S. 359 (1907); *People v. King*, 110 N.Y. 418, 18 N.E. 245 (1888). See generally 49 A.L.R. 505 (1927).

<sup>8</sup> 18 N.Y. Consol. Laws (McKinney, 1951) §§290-298; N.J. Stat. Ann. (1940; Supp. 1957) §§18:25-4, 18:25-5, 18:25-12.

<sup>9</sup> 8 N.Y. Consol. Laws (McKinney, Supp. 1957) §18(a); N.J. Stat. Ann. (1940; Supp. 1957) §§18:25-9.1, 55:14E-7.1.

<sup>10</sup> Such as exclusion from labor unions, N.J. Stat. Ann. (1940; Supp. 1957) §18:25-6. For a survey of the federal government's more limited activities in combating private discrimination, see Pasley, "The Nondiscrimination Clause in Government Contracts," 43 VA. L. REV. 837 (1957).

<sup>11</sup> *Holland v. Edwards*, 307 N.Y. 38, 119 N.E. (2d) 581 (1954). See generally 44 A.L.R. (2d) 1138 (1955) for a discussion of the constitutionality of fair employment practices laws.

authority supporting this assumption.<sup>12</sup> Furthermore, these statutes can be justified on the basis that they regulate businesses having such important relationships to the community's life that they are affected with a public interest. The New York ordinance might well be sustained under this theory on the hypothesis that multiple dwellings in New York City have become quasi-public businesses which can be regulated under the police power. On the other hand, the police power may now be broad enough to reach any phase of economic activity.<sup>13</sup> The latter theory might raise a question as to what limitation the courts may place on state anti-discrimination statutes. If state police powers reach all economic transactions, future statutes could constitutionally prohibit discrimination in the sale of a single house by a private owner. A further possibility is that anti-discrimination legislation will expand into the area of purely social regulation, and prohibit private discrimination in such matters as membership in private clubs. This would seem to be an infringement of liberty under the due process clause, and would also seem to be beyond the present scope of the police power. The school desegregation cases were, however, predicated on the theory that segregation by the state denies equal protection because of the psychological impact of segregation on minority groups.<sup>14</sup> Therefore, it could be argued by analogy that the psychological impact of private discrimination is detrimental to the public welfare; hence, social anti-discrimination legislation is within the scope of the police power. Anti-discrimination legislation aimed at purely social relationships, however, would probably violate the due process clause for two reasons. First, while anti-discrimination legislation which deals with economic relationships can be justified by the modern concept of the police power, legislation which deals with purely social relationships is not normally within the scope of the police power. Secondly, social anti-discrimination legislation would tend to infringe individual liberty rather than property rights, and the court has shown a tendency to give liberty greater protection from state regulation than property.

The New York ordinance in its present form clearly appears to be constitutional either by reference to the public business aspects of multiple dwellings, or by analogy to the broad scope of the police power to regulate most phases of economic activity. There is, also, a real possibility that

<sup>12</sup> *Railway Mail Assn. v. Corsi*, 326 U.S. 88 (1945), upheld a New York statute prohibiting membership discrimination by labor unions. The decision makes it clear that the states can ban private discrimination in such vital economic areas as labor unions.

<sup>13</sup> *Nebbia v. New York*, 291 U.S. 502 (1934), is the leading case on the modern concept of the police power as encompassing most facets of the economy. Under this concept it can be argued that anti-discrimination laws which deal with any important aspect of the economy are within the scope of the police power under the Fourteenth Amendment. See *New York State Commission Against Discrimination v. Pelham Hall Apartments*, note 4 *supra*.

<sup>14</sup> *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

this ordinance will serve as a pattern for municipal legislation in the future.<sup>15</sup> Were a state court to strike down such legislation under the state constitution, an interesting "state action" problem would be raised under the Fourteenth Amendment. *Shelley v. Kraemer*<sup>16</sup> merely held that state court enforcement of a racially restrictive covenant involved action by the state in violation of the equal protection clause. In a later case the Court divided four-to-four, however, on the question whether a state court's refusal to grant a plaintiff relief from discrimination by private individuals was "state action,"<sup>17</sup> and the question apparently remains open.<sup>18</sup> The question raised here is similar: whether state court invalidation of an anti-discrimination law forbidding private discrimination involves "state action," since such private discrimination would be legally possible only after the state, through its courts, struck down the statute. One formalistic answer might be that an unconstitutional statute is a nullity, and that the court did not act at all but merely recognized what had always been true—that no statute preventing discrimination was ever in effect.<sup>19</sup> Another might be that judicial withdrawal of rights which the legislature gave only in its discretion simply restores the pre-statute status quo when clearly no constitutional proscriptions applied. On the other hand, however, except for constitutional limitations, legal rights exist only at the sufferance of the state.<sup>20</sup> Therefore, in one sense a state court's constitutional determination that the state cannot prevent private discrimination is as much a state policy determination in support of private discrimination as that found to be "state action" in *Shelley v. Kraemer*. At any rate, if this New York statute is widely copied in less liberal jurisdictions, the question ultimately may have to be faced.

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<sup>15</sup> The National Committee Against Discrimination In Housing, *TRENDS IN HOUSING*, Jan. 1958, p. 2, reports that at least seven cities are already actively considering proposed legislation similar to the New York ordinance.

<sup>16</sup> 334 U.S. 1 (1948).

<sup>17</sup> *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880 (1954). On rehearing, 349 U.S. 70 (1955), the petition for certiorari was dismissed as improvidently granted since a subsequent Iowa statute had mooted the issue as to all except petitioner. In this case a cemetery refused to bury petitioner's deceased husband, solely because he was an Indian. The state court refused to disturb this discriminatory status quo. In *Shelley v. Kraemer* the state court affirmatively carried out the discrimination by enforcing the restrictive covenant.

<sup>18</sup> But cf. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), noted in 55 MICH. L. REV. 871 (1957).

<sup>19</sup> The argument that an unconstitutional statute is a complete nullity is usually made in connection with an attempted amendment. See the discussion of the cases in Crawford, "The Legislative Status of an Unconstitutional Statute," 49 MICH. L. REV. 645 (1951). Whether it could be used in this context is arguable.

<sup>20</sup> But cf. the argument of Justice Harlan which was rejected in the Civil Rights Cases, 109 U.S. 3 at 13, 41 (1883). Natural law arguments contrary to the proposition stated in the text exist, of course.