Social cohesion and land use law: is there a place for legal regulation in France?

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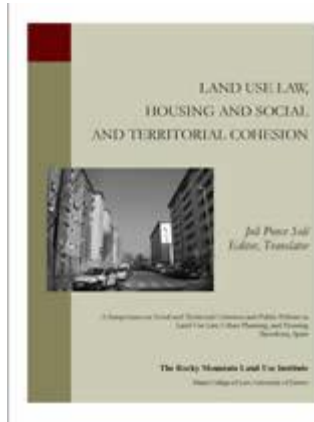

In France, the awareness that the concentration of certain social categories within a district lead to a certain number of risks is not recent. We often quote this exchange dated from 1604 between the King Henri IV and François Miron, head of the municipal administration of Paris. The King expressed the wish to build districts for the exclusive use of workmen, and François Miron answered that this should not be the case "*the thin ones are on one side and the big and fat ones on the other, they will surely better be mixed*". Even if the King complied with this opinion, it is only 400 years later that French land use law is taking into account the objective of fighting against urban segregation.

This paper will deal with two points: after having determined the concept of social mix and its place in the French legal order, we will examine the various legal obligations which can arise from this objective.

1°) The incorporation of the social mix principle into French legal order

The official consideration by the authorities of the emergence of urban ghettos is almost simultaneous with the sixties seventies's policy known as of the "*Grands ensembles*" (high-rise apartment blocks in large estates) created by construction to satisfy needs in quantitative terms. A ministerial circular of 1973, without obligatory effect, entitled "*the fight against social segregation by the housing environment*" invites the prefects, within the framework of the operations of town planning which they carry out, to avoid a too strong concentration of social housing. On this basis, specific actions will be developed for high-rise apartment blocks on the periphery of towns, the source of a downward spiral of social stigma and physical degradation.
It is thus necessary to pause to consider the appearance of the principle of social mix and its legal basis.

A) The emergence of the social mix principle

Seventeen percent of French households are accommodated in the public low rent-housing sector. It is in the context of access to social housing controlled by allocation rules laid down by public authorities, that the first attack on social segregation appeared in 1986 with the reference in the legal texts to the "*necessary diversity of the social composition of each district*". In particular, the prefect must base his deliberations on this objective when he defines the local criteria for priority that the social home ownership sector must adhere to for the allocation of housings.
Thereafter, the "Orientation Statute for the city" (Loi d'Orientation pour la Ville - *LOV*) of 1991, sometimes briefly called the "anti-ghetto statute", will mark an essential stage: even if it does not expressly mention the term of "social mix", the statute will give a definition of this new pivotal concept in urban policies. The 1st Article specifies that all public bodies must, within the framework of their competences, guarantee " *for all inhabitants of the cities, housing and living conditions supporting social cohesion and likely to avoid or to remove the phenomena*

of segregation. This policy must make it possible to socially integrate each district in the city and to ensure in each conurbation the coexistence of the various social categories ".

How consequently can the principle and the legal regulation, contribute to the achievement of this objective? Can regulation go against natural or historic logic which gives rise to socially homogeneous urban spaces?

The French legislator is aware of the limits of the exercise and does not consider himself as a “social alchemist”. Land use law could not create a new housing environment which would ease the “co-lateral damages” of the economic crisis. The essential idea is that the authorities can, by their action in the field of town planning and housing, contribute to the diversity or the diversification of housing; the underlying logic would seem to suggest that the legal status of the residences determines the social category of the people who live there.

It is in 1996 that for the first time the term "social mix" itself appears expressly in normative texts (decree which authorises derogations from income ceilings for access to social housing). In particular the “Pact for the Re-launch of the City” statute specifies that the Local Habitat Programme[1] (Programme Local de l’Habitat - PLH) must "*support social mix by ensuring a balanced and diversified distribution of the supply of housing between the districts of the same commune* ". Thereafter, the statute “for the fight against social exclusions” of 1998 will make this objective an essential principle as regards the allocation of social housing. Finally the urban renewal and solidarity statute (loi Solidarité et Renouvellement Urbains – SRU) of 2000, without bringing in a new definition, refers in a sometimes redundant way to social mix.

At last, the purpose of social mix or of diversity or social balance of the habitat is to ensure, in a given territorial space (building, district, city, conurbation) a distribution balanced between the various socio-economic levels of the population.

[1] This programme defines local goals over six year in an attempt to satisfy housing requirements and favours social cohesion. PLH proceedings consist of: establishing a diagnostic process, evaluating the shortcomings and weaknesses in the area, then elaborating upon housing politics of the whole area community.

The social mix principle is based on two elements: balance and diversity. This, from a legal point of view, raises a certain number of questions. On what scale shall the balance be measured? The aim is not to grant freedom of residential choice to groups that are discriminated against, but to create a patchwork by dispersing them throughout the city. Is it the poverty, which raises problem as such, or its excess strong visibility? Also in France, spatial segregation of ethnic groups is seen as a threaten to the republican model. Then the norm of spatial dispersal of immigrants is hidden behind the universal category of social mix or social cohesion. What is also observed is that social mix is use in a single way to avoid concentration in unattractive districts : but it is no more utilize to allow the discriminated groups for housing in the « beautiful districts ». How the principle can be translated into a right to mobility in the city? The intense operations of urban renewal in the most deprived districts are always conducted with rehousing inhabitants on the same place.
These questions stimulated and still stimulate the French sociologists' debates. However, the political authorities having chosen to institute this principle, the jurist too is obliged to wonder.

¶B) The normative position of the principle

The French constitution, contrary to other European constitutions, does not mention any objective of social or territorial cohesion. It also should be recalled that it does not mention the word "housing"; however the Constitutional Council, the body charged with checking that laws are completely in conformity with the Constitution, has pronounced a constitutional objective which weighs on the legislator: to make it possible for any person to be able to obtain access to a decent home. The Council was brought to the point of making a statement by some of the legislative texts mentioning the objective of social mix.
Also it judged on several occasions that this principle corresponded to "*an objective of general interest*" which legitimates infringements of the right to private property - the fact for example that local authorities can impose the construction of social housing on property owners' land (by the mechanism of the land reserve) - or certain

distortions to the equality principle – the fact that the social home ownership sector is not subjected to the "tax on vacant homes" on deliberate vacancy of residences , with a view to this leading to more social diversity in the housing stock.

However, the Constitutional Council took good care not to raise this principle to the rank of the "*objectives of constitutional value*". And it appears clear to us that this principle could tomorrow disappear from the French legal order without the Constitutional Council criticising this. That being so, this assertion must be moderate; indeed, one could consider that the social mix principle, in its various manifestations, contributes to the achievement of the constitutional objective of decent housing. Imposing construction of social housing on the communes which do not have any certainly contributes to the production of housing; and to act in this way, through the regulation of town planning and land action, so that social housing is not concentrated in the same area appears to us to contribute to the "decency" of housing.

But the legal relationship between the "right to housing" and "social mix" is ambiguous. In particular the principle of social mix can justify the refusal of allocation of a social home to an underprivileged person. Under the pretext of avoiding concentration, households are banished to areas with a bad reputation or refused access to social housing altogether. There is furthermore a potential contradiction between these two principles, to the extent that diversity means a dispersal of the disadvantaged in the urban space, whereas the right to housing implies the opening up of the cheapest segments of the social housing stock to the most deprived people.

The Council of State, highest administrative jurisdiction, was moved to make a statement on this question and considered that the legislator wished to put these two principles on the same normative level and that it is not possible, a priori, to treat them on a hierarchical basis; also it judged that the possibility for the prefects to derogate from the income ceilings designed for access to social housing "*responds to the social mix objective the taking into account of which[…] must be required in addition to the objective of satisfaction of the needs of low income groups*[2]".

[2] CE 27 juill. 2001, Association Droit au logement, AJDI 2002, p. 54, obs. J.-Ph. Brouant

2°) The legal obligations which arise from the social mix principle

Because of its place in the substantive law, the social mix principle cannot be analysed like a simple declaration of intent without legal effects. It imposes an obligation both of action by of the proper authorities and of prohibition of some practices.

A) Social mix, a norm for action

The legal standard cannot thus be satisfied by a prohibition but can on the contrary institute an obligation of action, an obligation which can have more or less force.

- Incentivising action :

The mechanisms of subsidy and of tax deduction, were generally developed with a view to helping disadvantaged districts. A statute of August 2003, continuing the conduct of urban policy since the end of the Eighties, sets up a "National Programme of Urban Restoration" for diversifying housing tenure within the regeneration area to break up concentrations of poverty and create social mix. A private form of actor equipped with significant financial means[3], an "*association foncière logement*" (Association for Housing Land), intervenes in these districts to buy land and buildings and to create unsubsidised housing.

- Obligation of means :

The *LOV* statute of 1991 innovated whilst forcing public bodies to provide for the diversification of the housing environment in their town planning documents. The *SRU* statute December 2000 maintains this requirement since it expressly refers to the objective of "*social mix in the urban housing environment and the rural settlement*" which forces plans of great size for territorial planning (Directive territoriale

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[3] Part from the « participation des employeurs à l'effort de construction (PEEC – Employer contribution to the construction effort).

d'aménagement – territorial development directive) and the local authority documentation : the "Schémas de cohérence territoriale" (plans for territorial coherence) for conurbation areas and the "Plans locaux d'urbanisme" (PLU- local urban plans) or "Cartes communales" (municipal plans) for the municipality level.

As it is expressed in the Code of Town Planning like a general principle while the urban renewal principle, the social mix principle is not sufficiently precise to impose on the competent local authorities an obligation of result. The Constitutional Council, in its decision of December 7, 2000, interpreted these provisions "*as forcing only the authors of the documents of town planning to oblige the appearance of measures tending to achieve the objectives which they state*". It deduces from this that it remains for the administrative judge "*to exert the simple control of imposing an account of the rules fixed by these documents and of the provisions of the Article L 121-1*". The authorities cannot thus accept opposition to change and a town planning document which would not include "measures" could be regarded as unlawful.
To satisfy this obligation, local authorities have a certain number of means.
- the commune can authorise derogations from the limits fixed by the local urban plan (PLU) for urban development as regards the volume of construction (going beyond the limit of 20% of the plot ratio[4] to support the social housing construction)
- the communes can, through their Local Urban Plan (PLU) and only in the urban zones, reserve a certain number of plots with the aim of realising programmes of residences "*having respect for the objectives of social mix*"; this faculty can both be used to build social housing in a residential district and to provide available housing in a social housing district. The owners of the plots can put the commune on notice to buy their ground at a fixed price, a price fixed by mutual agreement, or determined by a judge.

In addition, apart from the city planning, the communes can intervene in favour of social rental construction using three categories of tools:

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[4] *Ratio between the floor area and the area of the site.*

- direct land intervention: the local authorities can use expropriation or pre-emption rights with a view carrying out social housing;
- projects or operations of site development (the judge legitimated the possibility of requiring a different contribution from the developer according to the type of housing carried out)
- land subsidies, in the form of the granting of subsidies to social home ownership sector or for transfers of land at prices lower than the free market

As the State is responsible for social cohesion, by its supervision and in its various capacities, it will encourage the local authorities; as the State representative, the Prefect will be able to oppose the entry into force of a document of town planning which insufficiently discusses the question or the means for attaining social mix; it also can, under the heading of the procedure for "projects of general interest" (PIG – projet d'intérêt general) impose the taking into account by the local town planning documents of projects intended "*for the reception and the housing of underprivileged people or people of modest resources*".

- obligation of result:

Whereas the *LOV* statute instituted an obligation of realisation of social housing, *SRU* statute amplified these obligations considerably: the objective of realisation of 20% of social housing in the urban communes was validated by the Constitutional Council as a component of a sufficiently precise obligation weighing on the local authorities. The communes with a deficit are subjected to an annual levy on their tax resources at least equal to a hundred and fifty euros per missing home - and more for the richest - for as long as they fail to achieve the goal laid down by the law. These sums are transferred in the conurbation to the profit of social housing construction.

The communes' obligation cannot be satisfied by paying; they must put into effect a triennial correction programme. If at the end of the programme the commitments were not maintained, the Prefect can take financial sanctions by raising the tax penalty and at the same time enter an agreement with a low rent-housing builder for

the realisation of the necessary residences; the commune must then obligatorily contribute to the financing of the operation.

It is also necessary to indicate that a law passed in 1990 and updated again in 2000 places an obligation on every commune with more than five thousand inhabitants to construct a site for travellers living in caravans. Also ignorance of their legal obligations after a reasonable time constitutes a fault likely to engage their responsibility[5]. One could, by extension, wonder whether homeless people have the right to engage the responsibility for a commune which knowingly ignores its obligations concerning quotas for production of social housing imposed by the statute on urban renewal and solidarity.

B) Social mix, a norm for abstention:

For a long time, local land use law, as it appeared in the town planning documents, was an addition to the mechanisms of urban segregation: with the aim to protect a superior residential area, building rules were very hard to satisfy (for example, by forbidding blocks of flats, imposing a big size of building plot, two parking areas or more pernickety rules on building materials). In theory, these practices should be stopped by legal supervision in name of the social mix principle. However, you should not expect a revolution. Before even the legal consecration of social mix principle, judges could declare such local rules unlawful with regard to the principle of balance. And there is no decision on this point. This can very certainly be explained by the fact that citizens or associations (NGOs) do not mobilise in favour of this principle. Also it will be difficult for the judge to appreciate if a given territorial space is well-balanced between the various socio-economic levels of the population. On what scale shall the balance be measured? : building? district, city or conurbation? With which criteria? Nationality, socio-economic level?

Only one existing example illustrates these difficulties. A commune named Puteaux decided to buy a building in the neighbouring commune Gennevilliers intending to create a hostel to accommodate municipal employees of foreign origin. This is a

[5] CAA Nancy, 4 déc. 2003, Commune de Verdun, req. n°98NC02526

symbol of what we call in France “la politique du coucou” (cuckoo politics), bird which lays his eggs in other bird's nests. The commune of Gennevilliers decided then to refer to the judge. The Council of State judge that Gennevilliers has *locus standi*[6] to take legal action against the decision of Puteaux on the basis of the risks of aggravation of urban and social imbalances which it suffers. It amounts to saying that the nationality whatever else is the socio-economic situation, constitutes a danger for social cohesion…
The Council had regard to the specific character of the operation, the low number of people concerned and the respective localisation their places of dwelling and work - Such a decision is not sullied with an obvious error of law and does not ignore either the principle of "social cohesion" stated in the 1st Article of the statute of July 1991, nor the statutory or regulatory provisions intended to implement it[7].

There’s no doubt that the social mix principle will be used as argument to crystallise social situations considered as well-balanced.

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When deputies referred the SRU statute to the Constitutional Council, they argued that the social mix principle would be about a "*declaration of political or ideological principle, arising from a sociological observation of the social classes, based on a non-legal construction and subject to very diverse interpretations and to very subjective analyses*". Thus they asked for the Council to declare that this principle was not normative. The Council hasn’t come over to these opinions but it is clear that the social mix principle can only be analysed as a “legal standard”, an indeterminate concept to which judges will give both content and scope with their statements[8].

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[6] In french « intérêt à agir » : the right to be heard in court.

[7] CE Nov. 22.2002, *Commune* de *Gennevilliers*, *AJDI* 2003, *n°4*, p. 298, *obs*. J-p.*Brouant*

[8] S. Rials, Le juge administratif et la technique du standard ; essai sur le traitement juridictionnel de l’idée de normalité, L.G.D.J., 1980.