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CURRENT LEGISLATION

AMENDMENT TO THE CIVIL RIGHTS LAW PROHIBITING DISCRIMINATION IN PUBLICLY AIDED HOUSING ACCOMMODATIONS. —The New York Legislature, in March 1950, enacted a law,¹ to become effective on July 1, 1950, entitled *An Act to amend the civil rights law, in relation to prohibiting discrimination and segregation because of race, color, religion, national origin or ancestry in housing accommodations acquired, constructed, repaired or maintained in whole or in part, with the assistance or support of the State or any of its political subdivisions*. Before proceeding to a discussion of the changes that this statute effects, it would seem profitable to examine the prior law in order that the true significance of these changes may be more clearly understood.

I. *Civil Rights—The Fourteenth Amendment—State Action in Contravention Thereof*

The Fourteenth Amendment to the Constitution provides, among other things, that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."² Those rights secured by this Amendment, the Thirteenth Amendment, and by various acts in pursuance thereof are denominated "civil rights."³ They include, among others, the rights of property, marriage, protection of the laws, freedom of contracts and trial by jury.⁴ Prior to the adoption of the Thirteenth and Fourteenth Amendments the civil, social, and political rights of Negroes were, for the most part limited, and in some jurisdictions were practically non-existent.⁵

The Thirteenth Amendment served only to abolish slavery and involuntary servitude.⁶ The Fourteenth Amendment then proceeded

¹ Laws of N. Y. 1950, c. 287.

² U. S. CONST. AMEND. XIV, § 1, reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

³ *Clyatt v. United States*, 197 U. S. 207 (1905); *Rogers v. Alabama*, 192 U. S. 226 (1904); *Miller v. Texas*, 153 U. S. 535 (1894).

⁴ *Friendly v. Olcott*, 61 Ore. 580, 123 Pac. 53 (1912).

⁵ *Scott v. Sandford*, 19 How. 393 (U. S. 1856).

⁶ U. S. CONST. AMEND. XIII, § 1, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

to declare all persons born or naturalized in the United States and subject to the jurisdiction thereof citizens of the United States and of the state wherein they reside and imposed a series of limitations on the states' power to act in respect to such citizens and other persons. While it is true that the Fourteenth Amendment was intended primarily for the benefit of the Negro race it is clear that its broad language serves to extend its protection to all persons within the jurisdiction of a given state.

Paralleling the "equal protection" clause of the Federal Constitution is a clause found in the Constitution of the State of New York.⁷ In addition to this clause the New York Legislature has enacted a Civil Rights Law which supplements or defines the state's constitutional guaranty as set forth in this and other clauses. It is an amendment to this Civil Rights Law with which this article is primarily concerned.

Soon after the adoption of the Fourteenth Amendment the United States Supreme Court declared that it is state action alone that is prohibited by the Amendment.⁸ The inhibition does not extend to action by the Federal Government nor to the individual invasion of individual rights.⁹ It is to be noted, however, that the "due process" clause of the Fifth Amendment to the Federal Constitution,¹⁰ which does bind the Federal Government, as interpreted by the Supreme Court, includes within its scope the guaranty of equal protection of the laws.¹¹ At this point it is deemed advisable to indicate that the Court has declared that "... the equal protection of the laws is a pledge of the protection of equal laws,"¹² and that a careful consideration of the cases defining equal protection reveals that the rights guaranteed by this provision are more properly described as an equality of rights rather than an identity of rights.¹³

The problem which has resulted from the Court's declaration that the Fourteenth Amendment is designed as a safeguard against state action only is that of determining exactly what constitutes "state action." It is clear that the acts of any agency or instrumentality of the state are to be deemed state action, for the Court in

⁷ N. Y. CONST. Art. I, § 11, provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

⁸ Civil Rights Cases, 109 U. S. 3 (1883).

⁹ *Ibid.*

¹⁰ U. S. CONST. AMEND. V reads: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹¹ *Smyth v. Ames*, 169 U. S. 466 (1898).

¹² *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886).

¹³ *See Johnson v. Board of Education of Wilson County*, 166 N. C. 468, 82 S. E. 832 (1914).

Ex parte *Virginia*¹⁴ declared, "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way."¹⁵ Thus, in *Buchanan v. Warley*¹⁶ a unanimous Court found that a city, through its legislature, had denied Negroes equal protection of the laws when it enacted an ordinance which denied Negroes the right to occupy houses in blocks in which the greater number of houses were occupied by white persons and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by Negroes;¹⁷ in *Norris v. Alabama*¹⁸ the Court found that two counties, through their administrative agencies, had denied Negroes equal protection of the laws when they excluded Negroes, solely because of their race or color, from serving as grand or petit jurors in the criminal prosecution of a person of the African race; and in *Shelley v. Kraemer*¹⁹ the Court found that a state, through its judiciary, had denied Negroes equal protection of the laws when it employed its processes to enforce a restrictive covenant which had as its purpose the exclusion of persons not of the Caucasian race from the ownership or occupancy of real property. These examples of state interference with civil rights are apparent and admit of little dispute; but other cases have enlarged considerably the idea of state action so as to encompass discrimination by private individuals acting under constraint of state law.²⁰ The expansion of the concept has not terminated here. On the contrary, the courts have evinced a more liberal outlook on the matter. Thus, they have held that private groups which are engaged in activities of a governmental nature in matters of public concern are bound by the restrictions of the Fourteenth Amendment.²¹ They have further declared

¹⁴ 100 U. S. 339 (1879).

¹⁵ *Id.* at 347.

¹⁶ 245 U. S. 60 (1917).

¹⁷ Similar statutes have been declared unconstitutional by the Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas and Virginia. *Glover v. Atlanta*, 148 Ga. 285, 96 S. E. 562 (1918); *Jackson v. State*, 132 Md. 311, 103 Atl. 910 (1918); *Clinard v. Winston-Salem*, 217 N. C. 119, 6 S. E. 2d 867 (1940); *Allen v. Oklahoma City*, 175 Okla. 421, 52 P. 2d 1054 (1936); *Liberty Annex Corp. v. Dallas*, 289 S. W. 1067 (Tex. Civ. App. 1927); *Irvine v. Clifton Forge*, 124 Va. 781, 97 S. E. 310 (1918).

¹⁸ 294 U. S. 587 (1935).

¹⁹ 334 U. S. 1 (1948).

²⁰ *Nixon v. Herndon*, 273 U. S. 536 (1927). Here the Court declared that a state had denied equal protection of the laws to a Negro when ballot clerks at a primary had refused him a ballot because of his race, in accordance with a statute which required them to refuse ballots to Negroes. In *Truax v. Raich*, 239 U. S. 33 (1915), an employer discharged an employee who was an alien because a statute forbade him to employ more than a stated proportion of aliens. This action was deemed to be a denial of equal protection of the laws.

²¹ *Nixon v. Condon*, 286 U. S. 73 (1932). After the statute in *Nixon v. Herndon* had been declared unconstitutional it was repealed and another passed which empowered every political party "through its State Executive Committee" to determine who should be qualified to vote in its primaries. *Nixon* was again denied a ballot and this second statute was declared unconstitutional.

that the act of a corporation, which in and of itself would not constitute an infringement of civil rights, has violated the Constitutional prohibitions against state action when the corporation has been fortified by the state in the commission of the act.²²

These cases seem to indicate that the courts, bound by the declaration in the *Civil Rights Cases*²³ that it is state action alone that the Fourteenth Amendment was designed to prevent, are desirous of finding state action wherever reasonably possible in order to prevent the denial or infringement of civil rights. This being true it might well have been thought that when a state gives tax exemptions to a private housing authority and employs eminent domain proceedings to condemn land to be used by the authority, the refusal of the corporation to rent to Negroes would be state action. In *Dorsey v. Stuyvesant Town Corporation*,²⁴ however, the New York Court of Appeals refused to so declare.

II. "The Stuyvesant Town Case"

The case of *Dorsey v. Stuyvesant Town Corporation*²⁵ involved two appeals. In the first, referred to by the Court as the "Dorsey suit," the plaintiffs, Negroes suing on behalf of themselves and all other persons similarly situated, sought injunctive relief against the defendant, a corporation brought into existence through the Redevelopment Companies Law,²⁶ to prevent it from denying them accommodations and facilities, solely because of their race or color, in Stuyvesant Town, a housing project constructed by the corporation;²⁷ in the second, referred to by the Court as the "Polier suit," the plaintiff taxpayer asked for the same relief as the plaintiffs in the "Dorsey suit" and, in addition, sought to enjoin the City of New York from granting tax exemption to, and further performing a contract with the corporation unless they ceased discriminating against Negroes. The latter appeal was dismissed perfunctorily on

²² *Marsh v. Alabama*, 326 U. S. 501 (1946). Here the managers of a company owned industrial town excluded Jehovah's Witnesses from private streets and the state prosecuted the trespassers on the complaint of the company's officials.

²³ See note 9 *supra*.

²⁴ 299 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. denied*, 70 S. Ct. 1019 (1950).

²⁵ *Ibid.*

²⁶ N. Y. UNCONSOLIDATED LAWS §§ 3401-26.

²⁷ Stuyvesant Town is a housing development in an area running from East 14th Street to East 20th Street, and from First Avenue to Avenue C and the East River Drive of the City of New York. It was built pursuant to a contract between the City of New York, Metropolitan Life Insurance Company and its wholly owned subsidiary Stuyvesant Town Corporation. The total cost of the land and the buildings constituting the project was in excess of \$90,000,000, all of which was supplied to Stuyvesant Town Corporation by the Metropolitan Company from funds held for the benefit of its policy holders. The Town consists of 35 buildings, containing 8,755 apartments, housing over 24,000 persons.

the grounds that inasmuch as Polier's status as a taxpayer did not support an action to challenge as unconstitutional the acts of the defendant,²⁸ his appeal did not present the constitutional question essential to the Court's jurisdiction.²⁹

The contention of the plaintiffs in the "Dorsey suit" was that in view of the fact that the corporation was created to perform a public function and was obtaining public benefits under the Redevelopment Companies Law, the acts of discrimination practiced by it were made possible or effectuated by the state. This being so, the acts constituted state action which is subject to the interdictions of the equal protection clauses of the State and Federal Constitutions. The defendant, on the other hand, asserted that it possessed no governmental powers, was privately owned and operated, was engaged in constructing and operating a private project and as a consequence thereof was free to fix its own policies with respect to the selection of tenants.

In arriving at its conclusion the majority stressed the fact that Article XVIII of the State Constitution does not authorize or empower the state or a municipality to engage in any private enterprise other than the building and operation of low rent dwellings for persons of low income. They pointed out that Section I of Article XVIII³⁰ states two purposes which are distinct. In the words of Judge Bromley, writing for the majority: "It may fairly be said that the whole housing article is instinct with the theory, consistent with its two purposes, that low rent housing for persons of low income is to be a function of government and the rehabilitation of substandard areas is to be the function of private enterprise aided by govern-

²⁸ This declaration was made in reliance on *Bull v. Stichman*, 298 N. Y. 516, 80 N. E. 2d 661 (1948). Here a taxpayer sought a judgment declaring unconstitutional an allocation of money by the State Emergency Housing Joint Board for improvements to a denominational institution of education. His complaint was dismissed on the ground that he had no special or peculiar interest in the suit other than that common to all taxpayers and that as a consequence thereof he lacked legal capacity to sue.

²⁹ N. Y. CIV. PRAC. ACT § 538, subd. 1, cl. a, provides: "Appeal to the court of appeals as a right lies only

"1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that

"(a) thereby directly involved the construction of the constitution of the state or of the United States. . . ."

³⁰ N. Y. CONSR. ART. XVIII, § 1, reads: "Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto."

ment.”³¹ It is to be noted that the Court of Appeals had declared previously that the Stuyvesant Town project involved only the clearance and rehabilitation of a substandard and unsanitary area and not low rent housing.³² Fortified with this decision the Court declared that it was unable to find state action and affirmed the judgment on the pleadings rendered by the lower court³³ and affirmed by the Appellate Division in a memorandum opinion.³⁴ It would seem that the fact that the statute declares that the state may not engage in a rehabilitation project should not have been relied upon so heavily in the instant case in order to establish that the state had not, in fact, so engaged. The Court also declared, “The Legislature deliberately and intentionally refrained from imposing any restriction upon a redevelopment company in its choice of tenants. The law contains none. Attempts, repeatedly made in the Legislature since the law was enacted, to alter the policy of the statute in this respect have failed³⁵ On the other hand, the Public Housing Law (§ 223),³⁶ which is applicable to state-constructed, low cost housing projects, expressly prohibits discrimination. There is no claim that the Legislature refused by amendment to make similar provision in the Redevelopment Companies Law because it thought the statute already barred discrimination, and it is undisputed, therefore, that the legislative intent is clear to leave private enterprise free to select tenants of its own choice.”³⁷

The dissenting judges emphasized the fact that the undertaking was “. . . a governmentally conceived, governmentally aided and governmentally regulated project in urban redevelopment.”³⁸ The majority had asserted that throughout the period that the plan for the project was under consideration by the Board of Estimate the question of exclusion of Negroes was debated; that Stuyvesant Town indicated that it planned to discriminate against Negroes; that despite opposition to the contract on that ground its execution was authorized; and that a local law was thereafter passed by the city forbidding racial discrimination in tax-exempt developments, but expressly excepting from its coverage projects which had already been contracted for, thereby exempting Stuyvesant Town from its provisions.³⁹

³¹ 299 N. Y. 512, 522, 87 N. E. 2d 541, 543 (1949).

³² *Matter of Murray v. La Guardia*, 291 N. Y. 320, 52 N. E. 2d 884 (1943).

³³ 190 Misc. 187, 74 N. Y. S. 2d 220 (Sup. Ct. 1947).

³⁴ 274 App. Div. 992, 85 N. Y. S. 2d 313 (1st Dep't 1948).

³⁵ See, e.g., 1948 Sess., Assem. Int. 127, Pr. No. 127; Assem. Int. 217, Pr. No. 217; Assem. Int. 1270, Pr. No. 1294; 1947 Sess., Assem. Int. 35, Pr. No. 35; Assem. Int. 72, Pr. No. 72.

³⁶ The full text of § 223 is as follows: “For all the purposes of this chapter, no person shall, because of race, color, creed or religion, be subjected to any discrimination.”

³⁷ 299 N. Y. 512, 528, 87 N. E. 2d 541, 547 (1949).

³⁸ *Id.* at 542, 87 N. E. 2d at 555.

³⁹ ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § J41-1.2 reads as follows: “No exemption from taxation, for any project, other than a project

These assertions were seized upon by the dissenters to lend weight to their opinion. "Insofar as respondents rely upon a bargain with the City for discrimination, we have confirmation indisputable that state action was present. If, on the other hand, respondents do not insist that there was such an agreement, they may not complain that they were led by the City to believe that they could practice discrimination."⁴⁰ The dissenting opinion also stressed the fact that the ". . . Fourteenth Amendment is no longer satisfied by a mechanical finding that the discriminatory conduct was not perpetrated by legislative, judicial or executive officials of the State. The concept of 'state' action has been vitalized and expanded; the definition of 'private' conduct in this context has been tightened and restricted."⁴¹

Clearly, the *Stuyvesant Town* case tends to restrict the concept of state action and expand the definition of private conduct. That the Legislature of the State of New York was not satisfied with the outcome of this litigation is evidenced by the fact that it was not long in inserting Article 2-A⁴² in the Civil Rights Law to remedy the situation created by the case.

III. *Article 2-A of the Civil Rights Law*

Article 2-A declares that the practice of discrimination because of race, color, religion, national origin or ancestry in any publicly assisted housing accommodation is against public policy.⁴³

The Act further declares that it shall be unlawful for the owner of any publicly aided housing accommodation to refuse to rent or lease to any person or group of persons⁴⁴ or to discriminate against any person or group of persons in the terms, conditions or privileges of accommodations solely because of their race, color, religion, national origin or ancestry.⁴⁵ It also forbids *any person* to inquire of prospective tenants concerning such facts.⁴⁶ In the event of a violation of any of these provisions Article 2-A provides that the person

hitherto agreed upon or contracted for, shall be granted to a housing company, insurance company, redevelopment company or redevelopment corporation, which shall directly or indirectly, refuse, withhold from, or deny to any person any of the dwelling or business accommodations in such project or property, or the privileges and services incident to occupancy thereof, on account of the race, color or creed of such person.

"Any exemption from taxation hereafter granted shall terminate sixty days after a finding by the supreme court of the state of New York that such discrimination is being or has been practiced in such project or property; if within said sixty days such discrimination shall have been ended, then the exemption shall not terminate."

⁴⁰ 299 N. Y. 512, 545, 87 N. E. 2d 541, 557 (1949).

⁴¹ *Id.* at 540, 541, 87 N. E. 2d at 554.

⁴² See note 1 *supra*.

⁴³ N. Y. CIV. RIGHTS LAW Art. 2-A, § 18-a(2).

⁴⁴ *Id.* § 18-c(1).

⁴⁵ *Id.* § 18-c(2).

⁴⁶ *Id.* § 18-c(3).

aggrieved shall be entitled to bring an action to restrain the continuance thereof and to obtain such other equitable relief as may be necessary to undo the effects of the violation.⁴⁷ Such person may also bring an action for damages.⁴⁸ The statute also authorizes a taxpayer to seek injunctive relief and any other necessary equitable relief to prevent the continuance of a violation of the Article provided that his assessment has amounted to more than one thousand dollars or that he has paid taxes upon an assessment of more than one thousand dollars.⁴⁹

In order to make certain that the essential terms of the Act are not misconstrued the Legislature has defined them.⁵⁰

It is to be noted that this Article is to be deemed an exercise of the police power of the state necessary for the protection of the welfare, health and peace of the people of New York.⁵¹

If the Court of Appeals in the *Stuyvesant Town* case had declared that state action existed, the defendant would not have been in a position to assert that there had been an impairment of the obli-

⁴⁷ *Id.* § 18-d(1).

⁴⁸ *Id.* § 18-d(2).

⁴⁹ *Id.* § 18-d(1).

⁵⁰ N. Y. CIV. RIGHTS LAW Art. 2-A, § 18-b, reads: "When used in this article:

"1. The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy and receivers or other fiduciaries.

"2. The term 'housing accommodation' includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings, but shall not include any accommodations operated by a religious or denominational organization as part of its religious or denominational activities.

"3. The term 'publicly assisted housing accommodation' includes any housing accommodation to be constructed within the state of New York

"(a) which is to be exempt in whole or in part from taxes levied by the state or any of its political subdivisions;

"(b) which is to be constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine;

"(c) which is to be constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; or

"(d) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance.

"4. The term 'owner' includes the lessee, sub-lessee, assignee, managing agent, or other person having the right of ownership or possession or the right to rent or lease housing accommodations and includes the state and any of its political subdivisions and any agency thereof.

"5. The term 'discriminate' includes to segregate or separate."

⁵¹ N. Y. CIV. RIGHTS LAW Art. 2-A, § 18-a(1).

gations of the contract entered into between itself and the City of New York. This is so because Article I, Section 10 of the Federal Constitution,⁵² which prohibits a state from passing a law impairing the obligations of a contract, has no application to the decisions of a state's courts.⁵³ However, Article I, Section 10 by its very terms applies to state legislation. Consequently, if Article 2-A had been made applicable to publicly aided housing accommodations, for the building of which contracts had been entered into prior to the enactment of the statute, it may well be that it would have been open to an attack on constitutional grounds.⁵⁴ It would seem that the Legislature recognized the possibility of such an attack for the statute specifically declares that it is applicable to ". . . any housing accommodation to be"⁵⁵ constructed within the state of New York."⁵⁶ However, even if such a provision were missing from the statute it is doubtful that the Article would be construed in such a manner as to make it retroactive. "It must be admitted that by construction, if it can be avoided, no statute should have a retrospect anterior to the time of its commencement. . . ." ⁵⁷ Clearly the Article will apply to all such housing projects for the building of which contracts are entered into after July 1, 1950. "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms" and that ". . . principle embraces alike those which affect its validity, construction, discharge and enforcement."⁵⁸

Conclusion

The primary purpose of the legislation under discussion is to prevent a recurrence of the result reached in the *Stuyvesant Town* case. It is submitted that the statute is a noteworthy step toward the abolition of discrimination and the establishment of the equality of all men. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."⁵⁹

⁵² U. S. CONST. Art. 1, § 10, reads: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

⁵³ *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18 (1888).

⁵⁴ For an excellent discussion of the law dealing with impairment of the obligations of contracts, see Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 621, 852 (1944).

⁵⁵ Italics added.

⁵⁶ N. Y. CIV. RIGHTS LAW Art. 2-A, § 18-b(3).

⁵⁷ *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121, 124 (1822).

⁵⁸ *Van Hoffman v. Quincy*, 4 Wall. 535, 550 (U. S. 1866).

⁵⁹ *Hirabayashi v. United States*, 320 U. S. 81, 100 (1942).