UNIVERSITÀ
DI TRENTO
Facoltà di
Giurisprudenza

THE MAKING OF EUROPEAN PRIVATE LAW: CHANGES AND CHALLENGES

edited by
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2024

UNIVERSITÀ
DI TRENTO
Facoltà di
Giurisprudenza

QUADERNI DELLA FACOLTÀ DI GIURISPRUDENZA

75

2024

Al fine di garantire la qualità scientifica della Collana di cui fa parte, il presente volume è stato valutato e approvato da un *Referee* esterno alla Facoltà a seguito di una procedura che ha garantito trasparenza di criteri valutativi, autonomia dei giudizi, anonimato reciproco del *Referee* nei confronti di Autori e Curatori.

ISBN 978-88-5541-053-3
ISSN 2284-2810

Gennaio 2024

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Università degli Studi di Trento 2024

To our students, and to the precious gift of learning together

TABLE OF CONTENTS

THE RIGHT TO HOUSING AND THE RESIDENTIAL TENANCY REGULATION: SHOULD MORE BE DONE AT A EUROPEAN LEVEL?

Ana Afonso[*]

TABLE OF CONTENTS*: 1. What has been done regarding the recognition of a right to housing and tenancy contract regulation? 1.1. Prohibition of discrimination. 1.2. The role of Article 8 of the European Convention on Human Rights and its application by European Court of Human Rights: the right to respect for «home». 1.3. The role of Article 31 of the European Social Charter. 1.4. The relevance of Article 34, para. 3, of the Charter of Fundamental Rights of the European Union. 1.5. The importance of Member States recognition of a constitutional right to housing. 1.6. The «soft law» influence – the DCFR and the «Life Time Contracts» Principles. 1.7. European social policies. 1.8. The relevance of European consumer law. 1.9. The advantages of an «Open Method of Coordination». 2. What more could be done regarding tenancy contract law?*

ABSTRACT: *With a view to «combat social exclusion and poverty», a «right to social and housing assistance» has been included in the Charter of Fundamental Rights of the European Union (Article 34, para. 3). In spite of its vagueness, a right to housing can presently be considered a European Union principle. Protection of tenancies is a facet of an effective right to housing and European Union citizens could benefit from a stable and balanced tenancy contract law regulation. However, tenancy contract law has been left out of European Union «agenda». Creating a set of «model rules» could, nonetheless, be most useful. The absence of legal authority of such texts shall not diminish its importance since they slowly settle a common juridical heritage and influence decisions within the Member States. The drafting of a «default contract» or a set of «model rules» is, notwithstanding, far from being a simple task. Adjusting protection of the tenant's interests to a functioning market is a huge challenge, already at a national level. In fact, wherever average wages are considerably low and rent prices are very high, reconciling landlords and tenants interests seems far from reachable.*

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A non-irrelevant percentage of European citizens depends on rental to meet its housing needs[1]. Although home ownership is still universally considered more appealing and, economically, a more efficient option to cope with that necessity, home renting may well be the only affordable option for some, as well as the preferable solution for others. In fact, both low-income households and migrants are likely to face insurmountable difficulties in having access to credit[2], and middle-income households could advisedly be unwilling to take such a risk and huge financial commitment upon their shoulders. Other than this, house renting is the preferable solution to satisfy a mobility interest: apart from assumedly transitional situations, such as scholarly work or professional training; in fact, jobs and personal commitments are no longer meant to last for a lifetime and a tenancy contract is more adequate to accommodate this flexibility demand.

Despite its existential dimension and economic relevance, tenancy contract regulation has, nonetheless, been essentially left out of the EU institutions agenda. Even if different tenancy contract regulations may constitute an obstacle to the freedom of people, such as capital investment (investors will find it difficult to cope with impenetrable varying laws), the EU has never undertaken any harmonisation effort of this subject. The reasons for this appear to lie not only on a legitimacy issue – the impact of the differences has probably never been considered as sufficiently relevant to affect choices and transactions within the EU and therefore approximation of the Member States legislation was considered unnecessary to ensure the proper functioning of the common market (i.e., the requirements of the proportionality and subsidiarity principles are not met); regulation of property is excluded from EU's

[1] Eurostat (*https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-1a.html*, last accessed on 6 September 2023) indicates that 30% of the European Union population lives in rented housing.

[2] Article 18 of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, establishes an obligation for the creditor to assess the consumer's creditworthiness and to make the credit available only where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.

competence sphere[3] –, but also on the difficulties aroused by the highly politicised nature of the matter, dependent both on national political options and on social and economic circumstances[4].

At least during the last century, national tenancy contract law rules have consistently been of a mandatory nature, aiming to protect tenants, regarded as the weaker party of the contract. Furthermore, social housing policies have been carried out through tenancy contract law and in some countries – as it has been the case in Portugal – to an extent that goes beyond the range of possibilities and efficiency of a «social private law». A strong connection (certainly with various scope and instruments) between the recognition of a right to housing and national regulations of tenancy contract law has thus been established in most Member States. Yet, a right to housing is still but a vague programmatic rule in the European Union. It is true that over the past years, the European Union has become more committed to social policies and has recognised access to decent housing as a pre-requisite to improve the citizens conditions of life and work (which is one of its goals, see Art. 151 TFEU). However, a genuine right to housing has not so far been recognised in any of the European Union texts, let alone any harmonisation of tenancy contract's regulation to promote a European housing policy. Though still barely referred to in European texts, accepting a social right to housing as a means to combat social exclusion may affect tenancy contract law and build a common ground for tenant's protection[5].

[3] Although it has been stated that A. 345 of TFEU does not constitute an obstacle to a European property law (see B. AKKERMANS, E. RAMAEKERS, *Article 345 TFEU (ex article 295 EC) – its meaning and interpretations*, in *European Law Journal*, Vol. 16, No. 3, 2010, pp. 292 ff.). Despite the ambiguity of the phrasing – «the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership» – and its inconsistent use, Art. 345 TFEU seems, nonetheless, to establish some limits to EU regulation of national property law.

[4] According to E. BARGELLI, *Locazione abitativa e diritto europeo. Armonie e disarmonie di un capitolo del diritto privato sociale*, in *Europa e diritto privato*, No. 4, 2007, pp. 954-957, the reasons why tenancy contract law is ignored by European private law are, first of all, legal.

[5] E. BARGELLI, *Locazione abitativa*, cit., pp. 972 and 992, refers to a «diagonal» effect of European law on national tenancy contracts regulations.

Each Member State has special private law rules to protect the tenant, consisting mainly of limitations to the landlord's right to terminate the contract upon its own will and of capping rent increases. Despite the legislative reforms that took place in the final decade of last century and the beginning of the new millennium, with a market-oriented approach, most countries maintain protective solutions. But there is a very wide range of options between more liberal and more restrictive regulations, that vary over time within each Member State, according to the political majority or the strength of pressure groups[6]. Merely analysing and comparing different national laws is by itself extremely useful, since it allows national institutions to gain perspective and to be less prone to succumb to pressure groups and to adopt unstable urgent responses to specific transitory problems[7]. Nonetheless, the question we want to address in this paper is of a prospective nature: what should or could be done by European institutions to help implementing an effective right to housing through tenancy contract law legislation? Shall tenancy's regulation be entirely left to Member States competence, or should some clear and possibly concrete direction be given at the European level? Firstly, of course, we need to look into what has been done up to this moment.

1. What has been done regarding the recognition of a right to housing and tenancy contract regulation?

1.1. Prohibition of discrimination

An equal access to national housing markets has been prescribed by European law early on, based on the protection of freedom of movement for workers (see Art. 9 of Regulation 1612/68, later included in Regulation No. 492/2011). At the beginning of this millennium, prohibition of discrimination gained a broader scope with Directive

[6] Some Member States have more complex systems, dividing legislative competence on tenancies between central and regional or local entities. This is the case, for example, in Belgium, Italy, and Germany.

[7] See also, E. BARGELLI, *Locazione abitativa*, cit., p. 992.

2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origins. The Directive's scope extends to «all persons, as regards both the public and private sectors» and specifically refers to housing, as Art. 3 h) mentions «access to and supply of goods and services which are available to the public including housing».

Despite its relevance in setting a clear principle and defining sanctions for its violations, European anti-discrimination legislation is only able to scratch the surface. Except if public announcements clearly provide a discriminatory selection, it is very difficult to identify and control personal discriminatory decisions in house renting[8]. Moreover, impenetrable regulations of the host country and poor conditions of the houses when minimum legal standards are lacking, remain unsolved problems.

1.2. The role of Article 8 of the European Convention on Human Rights and its application by European Court of Human Rights: the right to respect for «home»

The European Convention on Human Rights includes the right to respect for private and family life and home and through this door the European Court of Human Rights has already taken some decisions that protect the residential tenant or even other occupants of the house. Although the European Court of Human Rights is not part of the European Union juridical system – neither is the European Union itself legally bound by the Convention –, protection of fundamental rights within the

[8] Although structural discrimination has been identified as a persistent barrier to an effective right to adequate housing and some formal institutionalised mechanisms have been implemented, these cases have hardly ever appeared before a court. Other than this, the Directive is only related with ethnic discriminatory behaviour, but other discriminatory decisions may exist. Defining what is considered discriminatory (would that be the case when refusal is based on an excessive number of children, or upon age), may be far more complex than it appears to. Furthermore: on the basis of freedom of contract, which includes choice of one's party, up to what extent shall a public criterion prevail over the private one, when it comes to renting a private house or a part of it?

European Union is considered equivalent to the protection recognised by the European Court of Human Rights[9].

The right to respect for the home enshrined in Article 8 of the European Convention has grounded some European Court of Human Rights' rulings in which forced evictions were held inadmissible even if they were lawful according to domestic law. Being «the loss of one's home the most extreme form of interference with the respect for the home», any person should be able to have the proportionality of the measure determined by an independent tribunal; thus, a lack of procedural safeguards is a violation of Article 8. The Court has noted that whether a property is to be classified as a «home» is a question of fact and does not depend on the lawfulness of the occupation under domestic law[10]. This criterion has not, however, been applied to private landlords: within private law, the right to housing requires coordination with the protection of other fundamental rights, such as private property and an effective judicial guarantee[11]. Avoiding evictions in wintertime and sus-

[9] There has been a «cross-fertilisation» between the Court of Justice of the European Union and the European Court of Human Rights. An example of this influence, regarding the right to the inviolability of the home, is patent in the modification of the CJEU case law, which did not include business premises under the scope of Article 8 of the Convention (the CJEU held in its Hoechst judgment that it did not apply to business premises: Judgment of 21 September 1989, *Hoechst AG v Commission*, joined cases 46/87 and 227/88, EU:C:1989:337, paras. 17 and 18). After the Niemitz judgment, where ECHR made clear that Article 8 applies to business premises *(Niemietz v Germany*, Application 13710/88, Judgment of 16 December 1992), the CJEU started to bring its case law in line with this interpretation (see Judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, para. 29). Moreover, with the Lisbon Treaty, the EU is bound to accede to the Convention (Art. 6, para. 3 of the TEU, includes in EU law fundamental rights as guaranteed by the European Convention on European Human). On the gaps of EU human rights protection system, see F. VAN DEN BERGHE, *The EU and issues of human rights protection: same solutions to more acute problems?*, in *European Law Journal*, Vol. 16, No. 2, 2010, pp. 112 ff.

[10] In *McCann c. UK*, 13.05.2008, procedural safeguards were considered insufficient, since the tenant was merely given a notice to vacate.

[11] As expressly acknowledged in *Vrzić v. Croatia*, 12.07.2016 (43777/13) and in *F.J.M. v. Uk*, 06.11.2018 (76202/16). Some critical element has arisen in Portugal when an administrative organism – Balcão Nacional de Arrendamento (National Counter for tenancies) – was given the to recognise the right to eviction and the power to execute it.

pending eviction in case of a serious disease (instead of merely counting on a subsequent intervention of social services) have nonetheless been defined as good practices. Article 8 ECHR has also been used as a ground to admit *mortis causa* transmission of tenancy contractual position to family members even where it was denied by national legislation[12].

On the other hand, the Convention has also been invoked against a State for disrespecting landlord's rights, either for failing to evict a tenant when the contract was extinguished, but the landlord was prevented to regain detention of the premises by the tenant's refusal to leave, and for a landlord's inability to derive a decent profit from its property. Limits imposed on property right are also subject to a proportionality test: an excessive burden on landlord's property right and patrimonial interests has thus in many cases been held inadmissible according to the Convention. Restrictions on landlord's rights are acceptable, but must be adequate and necessary to the protection of the community's needs. Rent control regulations are thus admissible, except if the amount is insignificant compared to the market value. The Court has often stated that a fair distribution of the social and financial burdens involved in solving a country's housing problem cannot be placed only on one particular social group, no matter how important the interests of the other group or the community as a whole are[13].

Nonetheless, whenever the defendant offers some argument against the eviction process or invokes some circumstance that may defer execution, the process is sent to a judicial court. See Arts. 15-A ff. of Law No. 6/2006, 17.02.

[12] In *Karner v. Austria*, 24.10.2003, the Court found a violation of Article 14 in conjunction with Article 8 when an occupant was prevented from succeeding to a tenancy after the death of his same-sex partner.

[13] Rent control has, for example, been considered disproportionate and therefore a violation of a landlord's entitlement to derive profit from its property in *Hutten-Czapska v. Poland*, 19.06.2006, where rent levels were set below the cost of maintenance. Violation of the right to property, as enshrined in Article 1 of Protocol No. 1, was not linked in this case exclusively to the rent limits, but rather it was the result of a combination between rent control, impossibility to terminate contract and lack of assistance or subsidies from public authorities to maintain the premises. On the contrary, in *Mellacher and others v. Austria*, 19.12.1989, rent control regulation was not considered as disproportionate. Some cases against Italy found a violation of the Convention for

Although European Court of Human Rights' judges have decided that no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a home[14] or to recognise any right to live in a particular location, it has also been stated that Article 8 does not refer only to a negative defence from public authorities, but also entails the adoption of measures by the State to secure the right to the respect for one's «home» (for example, the adoption of an adequate legal framework), even in the sphere of relations between individuals.

The concept of «home» has been broadly interpreted as including an office or a business shop, being the only requirement a «sufficient and continuous connection to a place»[15]. Secondary residences and holi-

allowing a tenant to occupy a house for too long a period of time. Italy's legal solution of evictions' suspensions was held a violation of landlords rights and patrimonial interests. A judicial decision had to be taken within a reasonable period, as provided by Article 6, para. 1, of the Convention. In *Immobiliare Saffi v. Italy*, a case decided on the 28.07.1999, the tenant occupied the premises without a title for as long as thirteen years; both in *Tanganelli v. Italy*, 11.01.2001, and *Lunari v. Italy*, 11.01.2001, the duration of evictions' suspensions was again considered disproportionate. In *Schirmer v. Poland*, 21.12.2004, the Court highlighted that «an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights» and this balance had not been respected, since the landlord had to bear an individual excessive burden, being denied eviction of the tenant in spite of having found an alternative accommodation in the same town for it. In *Mattheus v. France*, 31.06.2005, although the proprietary had been given some money by the French State to compensate its impossibility to use its property, untitled detention of premises lasted for sixteen years; no social reasons could ever justify such a long-lasting illegal occupation and therefore the Court ruled that there was a violation of Articles 6, para. 1, of the Convention and Article 1 of Protocol 1. The same reasoning was followed in *Edwards v. Malta*, 24.10.2006, where the owner had lost control of its own property for thirty years. On the contrary, in *Almeida Ferreira e Melo Ferreira v. Portugal*, 21.12.2010, the Court considered (with two dissenting votes) restrictions on rent limits and impossibility to regain possession of premises (even upon a housing need for a descendant in first degree) were legitimate and proportionate to protect tenants' interests.

[14] As ruled in *Marzari v. Italy*, 4.05.1999, and *Chapman v. UK*, 18.01.2001. The Court noted that «whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision».

[15] See, namely, case *Winterstein and others v. France*, application No. 27013/07, decision of 17.10.2013.

day's houses are also included in this concept[16]. Moreover, the right to respect for the «home» does not require a specific title and detention of the premises may even be unlawful; any type of premises (including movables, such as caravans) are also recognised.

Article 8 is in fact more directly connected to the idea of inviolability of home, than a real right to housing[17]. Nonetheless, regarding tenancies, it has been proved useful not only to claim that evictions shall be decided by a judicial body and further damages caused by it shall be avoided with regard to the factual circumstances of the occupant whose legitimate interests are protected (suspending evictions during wintertime or in case of a serious disease, for example), but also, conversely, to ensure the landlord's private property rights, considering eternal postponements of evictions inadmissible, and guaranteeing the right to a reasonable and decent profit[18].

There are, however, some obstacles and limits to the relevance that the ECHR may have on a private tenancy contract. Most of ECHR decisions are addressed to the States or public entities, but not to private parties. It has been accepted, nonetheless, that the aggrieved party may invoke the ECHR jurisprudence and argue the disproportionality of an eviction decision and the risk of homelessness[19].

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[16] See case *Fägerskiöld v. Sweden*, application No. 37664/04, decision of 26.02.2008.

[17] For example, in the Portuguese Constitution these are two different rights, enshrined in two different articles: Art. 34, on inviolability of home and correspondence; Art. 65, on the right to housing.

[18] On the necessary and difficult conciliation between protection of tenants and guarantee of property owners rights in post-communist countries see *Berger-Krall and others v. Slovenia*, application No. 14717/04, decision date: 12.06.2014. The Court did not find a violation of Article 8 in a reform of the housing sector, following the transition from a socialist regime to a market economy, resulting in a general weakening of legal protection for holders of «specially protected tenancies», since the tenants continued to enjoy special protection to a degree that was higher than that normally afforded to ordinary tenants.

[19] E. BARGELLI, *La costituzionalizzazione del diritto privato attraverso il diritto europeo. Il right to respect for the home ai sensi dell'art. 8 CEDU*, in *Europa e Diritto Privato*, 1, 2019, pp. 75-77, considers that the Convention also applies to private relations.

1.3. The role of Article 31 of the European Social Charter

It was only in 1996, when the European Social Charter (the counterpart of the European Convention on Human Rights in the sphere of economic and social rights) was revised, that the right to housing was introduced in the text of the Treaty. Article 31 now expressly enshrines a «right to housing», stating that the Parties are bound to «take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources». More than the text, it is the «interpretative dynamism» of the European Social Rights Committee, to whom an analysis of the adequacy of a State law or policy in relation to the Social Charter requirements is demanded through a «collective complaint», that gives effectiveness to the Parties' commitments. In its decisions, the Committee has already highlighted that the Charter entails a positive obligation that shall be regarded not merely as an obligation of means, but further as an obligation of gradually achieving some results[20]. Although the Charter is not a juridical instrument of the European Union and not all Member States have ratified Article 31, Article 151, para. 1, TFEU expressly refers to social rights as recognised by the Charter, thus including them within a common juridical heritage[21].

[20] N. BERNARD, *Le droit au logement dans la Charte Sociale revisée: à propos de la condamnation de la France par le Comité européen des droits sociaux*, in *Revue trimestrielle des droits de l'homme*, 80, 2009, p. 1078. Each State is, for instance, obliged to keep statistics to allow it to make a comparison of the results. With respect to evictions, the Committee has often highlighted they must be carried out in a way that respects the dignity of the evicted.

[21] The CJEU has included references to the Charter as a ground of its decisions (see, for example, Judgment of 11 December 2007, *Viking*, C-438/05, EU:C:2007:772; and Judgment of 18 December 2007, *Laval*, C-341/05, EU:C:2007:809). On the interaction of the European Social Charter through the collective complaint procedure with the legal system and the institutions of the EU, see K. LUKAS, *The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?*, in *Legal Issues of Economic Integration*, 41, No. 3, 2014, especially pp. 281 and ff.

1.4. The relevance of Article 34, para. 3, of the Charter of Fundamental Rights of the European Union

With the adoption of an autonomous «Bill of rights» by the European Union (the Charter of Fundamental rights of the European Union was proclaimed in Nice, on 7th December 2000), the protection of fundamental rights has now a direct legal basis in order to be implemented within the European Union. Going beyond the judiciary activism of the ECHR in defining the possibilities of a «right to respect for home», and following the path led by the European Social Charter, the European Union Charter directly recognises «the right to social and housing assistance», with a view to «combat social exclusion and poverty». The problem, however, persists: these texts are an invitation to the States but do not recognise a specific and effective right to individuals; though far from being irrelevant, mere proclamation of a right is not necessarily linked to the adoption of practical measures.

With the entry into force of the Charter, the European Convention has not lost its role in the protection of human rights within the European Union – on the contrary, harmonisation has become mandatory and not only desirable – but it appears to have ceased to be the main source of reference for the CJEU. Relevance of the Convention fundamental rights protection system is guaranteed both through Art. 6, para. 3, TEU, which states that fundamental rights enshrined in the European Convention are part of EU law, and through Article 52, para. 3 of the Charter, which specifies that insofar as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights are to be the same as those laid down by the Convention. According to the explanation of that provision, the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights. With respect to the content of Article 8 of the Convention, its text is reproduced, with the «same meaning and scope», in Article 7 of the Charter.

If legal harmony was optional before the Charter, it has become mandatory with its entry into force. Nonetheless, the CJEU is starting to dispense with Strasbourg case law references, creating the appearance

of an autonomy which has no basis either in the Charter or elsewhere in the Treaty of Lisbon.

1.5. The importance of Member States recognition of a constitutional right to housing

Along with the recognition of fundamental rights as declared in the European Convention of Human Rights, Art. 6, para. 3, TEU includes constitutional principles of the Member States in European Union law. Constitutional law reflects the values and goals of a Member State and these are also (after the Lisbon's Treaty revision) European Union principles. Some Member States, such as Portugal (see Art. 65 in 1976), Spain (Art. 47, in 1978), Belgium (Art. 23, para. 3, in 1994), Greece (Art. 21, in 1975), the Netherlands (Art. 22, para. 2, in 1984), Sweden (Art. 2) and Poland (Art. 75, in 1997) have enshrined in their supreme laws a right to housing[22]. The Portuguese Constitution is quite detailed, mentioning inclusively a rent system adequate to the family income and access to private property. Article 75, para. 2, of the Polish Constitution also refers specifically to the protection of tenants, reading as follows: «protection of the rights of tenants shall be established by statute». Recognition of a right to housing goes beyond a solemn proclamation of a political and symbolic nature; it bounds public authorities to pursue policies conducive to satisfying the housing needs of its citizens (namely combating homelessness and supporting activities aimed at the acquisition of a home). Surely, its implementation is conditioned by politics and dependant on the availability of financial means, but the deployment of special public resources appears to be a direct effect of a constitutional provision of a right to housing. Regarding tenancy contract law, the constitutional recognition of a right to housing implies: a legislative duty to establish a harmonious legal framework for landlords and tenants (one that ensures both the security of tenure and the landlord's right to make a profit from its property) and an interpretation of

[22] A constitutional right to housing is also recognised in some countries where it is not explicitly enshrined in the fundamental text, such as France and Italy, as a result of a connection with other fundamental rights. See R. ROLLI, *Il diritto all'abitazione nell'Unione Europea*, in *Contratto e impresa / Europa*, 2, 2013, pp. 722-727.

the existing tenancy law in a way that better fits constitutional prescriptions[23].

Although the first and main obligor of a right to housing is the State, a horizontal effect has been recognised and therefore restrictions to landlords' rights are considered admissible. The conflict between the two fundamental rights at stake – property right of the landlord and the right to housing of the tenant – is not easily solved. Despite the fact that restrictions to private autonomy are necessary and market rules need to be adjusted in the landlord-tenant relationship, the housing problem cannot be solved at the expenses of a particular group of people, the owners, it is an encumbrance on society as a whole. A right to housing entitles, nonetheless, the State to adjust market rules, or to contain its excess, in order to promote socially adequate prices[24].

[23] M. LYS, C. ROMAINVILLE, *Le droit au logement dans la Constitution belge*, in *Le droit au logement: vers la reconnaissance d'un droit fondamental de l'être humain*, in *Droit et Justice*, 83, Brussels, 2009, pp. 25 ff. highlight that, although it may not have an immediate effect, the right to housing has an «effective» effect, referring to three categories of consequences: a direction to the legislator; an irradiation effect, demanding actual measures to pursue the constitutional value and a stabilisation or «standstill» consequence. The authors refer, for example, to the constitutionality of the surtax on unoccupied premises, as has already been decided by Belgian constitutional court (p. 28). On the effects of Article 23 of Belgian Constitution, see also, N. BERNARD, *Le droit au logement comme arrière-plan indissociable du droit au bail*, in G. BENOIT et al., *Le bail de résidence principale*, Brussels, 2006, especially, pp. 13 ff.

[24] N. BERNARD, *ibidem*, p. 26. The Portuguese Constitution (Art. 65, No. 3) refers specifically to a rent system compatible with family income, and recently (Law No. 19/2022) the rent increase has been limited to a 2% above the inflation level. The Portuguese Constitutional Court has traditionally accepted the Parliament options among a wide range of legal solutions, from a very restrictive frame (until the nineties when a «social encumbrance» on property was widely recognised), up to a more recent market-oriented regulation. See A. RIBEIRO MENDES, *O arrendamento na jurisprudência do Tribunal Constitucional*, in L. MENEZES LEITÃO (coord.), *I Congresso do Arrendamento*, Coimbra, 2019, pp. 7 and ff.

1.6. The «soft law» influence – the DCFR and the «Life Time Contracts» Principles

Tenancy contracts were not included in the Draft of Common Frame of Reference (DCFR), published in 2009, resulting from the 2003 Commission's Action Plan on a more coherent European contract law. Nonetheless, the DCFR contains principles and model rules on contracts in general that could be applied to tenancies. It also includes a section on leases of movables (Book IV, Part B, 1:101, ff.) that could serve as a basis for a possible extension of those model rules to the leases of immovables. The obligations of lessor and lessee, and especially the obligation of the former to provide premises in conformity with the contract, not only at the start of the lease period but also during the duration of the lease, the *emptio non tollit locatum* rule (7:101), and the prohibition to subcontract without the lessor's consent (7:103) seem to be easily adapted[25]. The most complex and core issues of the residential tenancies are, however, left unsolved. If general contract law rules and a small set of dispositive provisions were able to deal with the tension between tenant's and landlord's diverse interests, a specific set of mandatory rules would not be necessary. Freedom of market and freedom to contract are not easily reconciled with rent-control solutions and minimum duration; furthermore, some remedies, like «withholding performance» (*exceptio non adimpleti contracti*), do not operate as in other contracts, due to the existential nature of the good provided[26].

Considering that there is a social deficit in European contract law and aiming at making a positive contribution to the development of a body of European social law, the EuSoCo (European Social Contract Group) published the «Principles of Life-Time Contracts», which in-

[25] C. SCHMID, *Residential tenancies in European Union law, comparative law and the DCFR*, in A. AFONSO (coord.), *Um Direito Europeu das Obrigações? A influência do DCFR*, Porto, 2015, p. 200, notes that most of DCFR rules on leases were inspired by national legal provisions enacted and court decisions taken in the field of immovables.

[26] For example, in Portugal, courts have always ruled that the landlord may not suspend access to the premises or interrupt water, gas, electricity, indirectly hindering its use, when the tenant does not comply with payment obligations in the due time.

clude tenancy contracts[27]. Life-time contracts are those long-term contractual relationships having an existential dimension. One of these Principles is that suspending performance would be admissible in «life-time contracts» when supervening, objective difficulties arise; another one regards termination of contract, stating it must be a measure of last resort.

1.7. European social policies

European social policies against poverty and social exclusion, aiming at the improvement of housing conditions, have been affecting national tenancy law, thus promoting some convergence in this domain.

With a wider geographical scope than the European Union borders, the *European Federation of National Organisations working with the Homeless* (FEANTSA)[28] has played a major role regarding evictions, frequently filing complaints before the European Committee of Social Rights, which led to requiring States to make the necessary adjustments of the measures undertaken.

Especially from 2000 on, the EU has launched some ambitious strategies against poverty and exclusion, to be implemented through the structural funds – in particular the European Regional Development Fund (ERDF) and the European Social Fund (ESF) – whose objectives are mainly urban development fighting social exclusion. The European Housing Charter (2006) urges the use of European Union funds to renovate social housing.

Three EU Directives concerning the prevention of poverty and social exclusion linked to housing, are also worth mentioning in this regard: Directive 2003/109/EC, concerning the status of third-country

[27] See L. NOGLER, U. REIFNER (eds.), *Life Time Contracts – Social long-term contracts in labour, tenancy and consumer credit law*, The Hague, 2014. Another «Manifesto» for social justice in contract law is reported in A. SOMMA, *Giustizia Sociale nel diritto europeo dei contratti*, in *Rivista Critica del Diritto Privato*, XXIII, 1, March 2005, pp. 75 ff., and AA.VV., *Giustizia sociale nel diritto contrattuale europeo: un manifesto*, *ibidem*, pp. 99 ff.

[28] See European Federation of National Organisations working with the Homeless, available at *https://www.feantsa.org* (last accessed on 6 September 2023).

nationals who are long-term residents; Directive 2003/86/EC on the right to family reunification, and Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for highly qualified employment.

Moreover, the European Commission has set out concrete initiatives to implement the European Pillar of Social Rights (2017) – which includes a right to housing and social assistance – in a joint effort by the EU institutions, national, regional and local authorities, social partners and civil society[29]. Measures to be implemented are related to housing assistance and protection against eviction and homelessness; tenancy contract law naturally remains out of reach.

1.8. The relevance of European consumer law

European consumer Law has some direct effects in tenancy contracts, since the tenant can qualify as a consumer and thus benefit from consumer law protection[30]. The legal connection between tenants and consumers protection is, however, quite limited. The main legal impact may derive from the Unfair Terms Directive (Directive 93/13/EEC) and the respective national implementation instruments[31]. In *Asbeek Brusse*

[29] On Italy's social housing perspectives, see G. MARCHETTI, *Il diritto all'abitazione tra ordinamento statale ed europeo e prospettive di valorizzazione nel quadro dell'Europa sociale*, in P. BILANCIA, *La dimensione europea dei diritti sociali*, Torino, 2019, pp. 261 ff.

[30] For a reference to a «consumerisation» of tenants, see F. CAFAGGI, *Tenancy Law and European Contract Law*, in *https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawCafaggi.pdf*, p. 10 (last accessed on 6 September 2023). See also C. SCHMID, *General Report*, in *www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawGeneralReport*, 2004, p. 18 (last accessed on 6 September 2023).

[31] In some Member States, such as France and Germany, control of unfair contract terms was explicitly declared applicable to tenants, and exemplification of prohibited terms referred to tenancy contracts. See, in French law, Article 4 of the 1989 Tenancy Act, with a list of nineteen forbidden contractual terms, to which the «ALUR» Act of 2014, added another four; in Germany §§ 305-310 BGB go beyond the Directive's scope, including contracts where the landlord is not an entrepreneur.

and de Man Garabito v. Jahani BV.[32] where analysis of a penalty clause in a tenancy contract was undertaken to decide whether it was an unfair term under Directive 93/13, the CJEU stated that protection for tenants should be increased through consumer law when the landlord is a business and that protection of consumers is particularly important in the case of a residential tenancy agreement.

Another legal connection between tenants and consumers protection may result from Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market, and from Directive 2006/114, concerning misleading and comparative advertising. The Directive concerning contracts for the sale of goods (Directive 1999/44/CE has been revoked by Directive 2019/771/EC) refers neither to immovables («tangible movable items that constitute goods»; «Member States should be free to regulate contracts for the sale of immovable property»), nor to leases. However, Portuguese law, in its national implementation (Law-Decree No. 84/2021, 18th October, Articles 22 to 25, and Art. 3, No. 1) includes immovables (only building for residency) in a separate section (section III of chapter II), and in defining the general scope of the law sets leases contracts beside buy-and-sale and construction contracts. This law's contribution to securing tenant's position is obviously very limited, insofar it focuses mainly on conformity and remedies in case of non-conformity and does not address the most sensitive questions of landlords and tenants contractual relation (such as limits in rent increase; duration of the contract; right to preemption; or assignment of the rental agreement to a new owner).

Using consumer laws to ensure tenants protection fails, as it faces two types of significant limitations: 1) consumer laws can only be applied to a fraction of tenants, as many landlords are not enterprises, but rather individuals operating outside a professional activity, the relationship cannot generally be qualified as a «consumer contract»; 2) consumer law is only partially suited to guarantee all the rights related to housing and tenancy. As it has been pinpointed by Fabrizio Cafaggi, consumerisation of tenancy may not be an appropriate solution if mar-

[32] Judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito v Jahani BV*, C-488/11, EU:C:2013:341.

ket failures relating to housing pose different problems than those relating to consumer protection and therefore require specific intervention[33]. Moreover, protection of the tenant via consumer law would introduce a systemic split, creating a difference between civil and consumer tenancy regulation, adding insecurity when the qualification of the parties (as professional/consumer) is not certain, and creating two legal categories of tenants having common needs and interests, thus requiring application of the same protective provisions.

1.9. The advantages of an «Open Method of Coordination»

Within politically sensitive areas with considerable divergences among Member States, open coordination, as recognised by Art. 151, para. 2 TFEU, can be the best solution[34]. A comparative assessment of national problems and solutions envisaged, the sharing and spreading of best practices, the possibility to learn from one another, was applied in a research project «Tenancy Law and Procedure in the EU», of the Fiesole European University Institute, in 2003[35], and especially in the project «Tenlaw – Tenancy law and housing policy in multi-level Europe», coordinated by Christoph Schmid, from ZERP at the Bremen University, from 2012 to 2015, which is a complete and exhaustive survey of national tenancy laws[36]. This kind of work requires, nonetheless, constant updating, since tenancy contract laws are quite unstable[37].

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[33] *Ibidem*, p. 10.

[34] E. BARGELLI, *La locazione immobiliare nelle ultime tappe del diritto europeo*, in *Nuova Giurisprudenza Civile Commentata*, 2, 2012, p. 276, refers to this method as an effective alternative to vertical harmonisation of tenancy contract law; R. ROLLI, *op. cit.*, p. 730, mentions the advantage of respecting Member States' pluralism.

[35] See European University Institute, available at *www.eui.eu* (last accessed on 6 September 2023).

[36] See *Tenlaw – Tenancy law and housing policy in multi-level Europe*, available at *http://www.tenlaw.uni-bremen.de* (last accessed on 6 September 2023).

[37] For example, in Portugal the law has, meanwhile, been significantly changed: Law No. 13/2019, of 12.02, has, once again, moved from a more liberal perspective to a higher level of protection of the tenant. Something similar happened in Spain, with Law No. 7/2019, 05.03.2019.

2. What more could be done regarding tenancy contract law?

The revision of the EU Treaties and the expansion of social values, related to the goal of combatting social exclusion and poverty, has not been accompanied by a clear redefinition of EU competences to pursue these aims[38]. The idea of a «social Europe» is still far from becoming a clear and concrete project. Though a right to housing can presently be considered a principle of European Union law – even if it is not clearly referred to in the European Charter of Fundamental Rights, it is mentioned both in the European Social Charter and in many of the Member States Constitutions, has been densified by the ECHR jurisprudence; moreover, it can generally be stated that housing supply at affordable conditions is a basic task of a modern democratic welfare state – yet its vagueness has been proved insufficient to lead to concrete solutions for the landlord's/tenant's relationship.

Protection of the tenant within a private law contract is just one of the faces of an effective right to housing, but we can certainly recognise it is an important one, since the housing problem can only be solved either by buying a house or by renting one, and most States do not have enough public property to resolve the entire problem through social lodging. This general idea leaves specific regulation questions unsolved: how far shall a legislator go to attend tenant's contractual stability interest or to ensure that the rent is adequate to families' average income? How protective may a tenancy contract law regulation be without violating the corresponding landlord's property right? Although it is true that housing should not be considered a market asset as any other, it is not less true that this social burden cannot be placed only (or mainly) on the shoulders of a specific category of people – private owners.

Defining the amount of protection while maintaining a functioning market is quite a difficult (not to say impossible) task, already at the national level. Surely difficulties increase when approaching the problem from a wider European perspective, also due to the considerable

[38] See N. RODEAN, *Social rights in our backyard: "Social Europe" between standardization and economic crisis across the continent*, in M. D'AMICO, G. GUIGLIA (eds.), *European Social Charter and the challenges of the XXI century*, Napoli, 2014, p. 31.

differences, both with respect to social and economic circumstances and to political sensibilities. In addition to the doubtful competences of the EU and to the political reluctance to regulate tenancy contracts, we also face a serious efficiency problem. Legal systems are created as a unity and isolated solutions may only add to incoherences and insecurity of judicial decisions. Given the specific national socio-economic context, a legal solution that has proven its merits in one national system may well be inappropriate for another one. It is true, nonetheless, that European social policies, aiming at the improvement of housing conditions, accompanied by comparative work, promote convergence. Moreover, Member States have followed a similar path, from defining restrictive regulations since at least the post-first World War period, to abandoning those highly protective solutions (mainly rent freezing and limitation of landlords right to terminate the contract) from the mid-nineties on, and, more recently, to limiting the liberalisation spirit and readdressing the need for protective solutions, such as the definition of some caps to contain unaffordable rent increases[39]. Thus, even if unintended, some level of convergence in tenancy contract law has made its way.

If a unification of Member States tenancy contract law is neither politically desired nor opportune or attainable (at least for the time being), a European recommendation of best practices, including draft rules and default contracts, implementing a regulatory balance, is certainly most desirable. Although not legally binding, the «informal authority» of these texts – as we know from the undeniable importance of the UNIDROIT principles, PECL or DCFR – should not be underestimated, for it can slowly develop into a form a juridical culture and influence deci-

[39] In general terms, this has been the history of tenancy contract law in most countries such as Italy, France, Spain, Portugal and, to some extent, Germany. Post-communist countries have faced specific problems, having to relodge the high percentage of people occupying previously public premises. On the evolution of Italian legislation, see, for example, S. GIOVA, *Diritto all'abitazione e contratto di locazione tra interessi generali ed equilibri negoziali*, in *Rassegna di Diritto Civile*, 4, 2002, pp. 687 ff., referring the slight reversion to the liberalisation direction introduced in 2002.

sions within each Member State[40]. These Principles stand alongside functioning, possibly coherent, legal systems, and although they are unable to change national legal orders, they may be used as a reference when there is an interpretative doubt or, particularly, when new or reforming codification projects are drafted. Furthermore, the availability of non-binding or default standard contracts alongside a provision of model rules is of the parties most immediate and concrete interest, since on one hand it saves them all the costs of negotiating a contract and, on the other hand, it promotes certainty and reliance in assessing one of the most basic human needs[41].

Defining an adequate balance between landlords' and tenants' interests is quite a difficult and complex goal, as they sometimes appear to be irreconcilable. Tenants interest in contractual stability must not go as far as to deprive landlords of their power to modify their property allocation or use, and an affordable rent can only be made effective either by State subsidies or by limiting the landlords profits, particularly in countries (or cities) where the wages are low and rental market prices are high.

We may, nonetheless, propose some adequate and reasonable solutions to overcome this landlords/tenants tension. To start with, a set of minimum habitability requirements should be defined, prohibiting the conclusion of a rental agreement for premises which do not fulfil these basic requirements[42], possibly alongside a definition of a percentage of market rent defined in accordance with a mandatory standard level. Secondly, pairing a reasonable minimum duration of the residential

[40] As highlighted by N. JANSEN, *Informal authorities in European private law*, in *Maastricht Journal of European and Comparative Law*, 20, 2013, pp. 496 ff., one should not marginalise such phenomena by narrowing the concept of law. On the main developments in European contract law, see L. ANTONIOLLI, *The evolution of European contract law: a brand new code, a handy toolbox or a Jack-in-the-box*, in L. NOGLER, U. REIFNER (eds.), *Life Time Contracts: Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law*, The Hague, 2014, pp. 75 ff.

[41] Much more than in other domains, not only due to legislative instability, but also, in some countries, to the division between central and regional competences, tenancy contract laws considerably lack legal certainty.

[42] Basic requirements may diverge from State to State, but an administrative licence of habitability is usually mandatory.

lease on behalf of the tenant (three years, for instance seems quite reasonable)[43] with a recognition of the tenant's right to terminate contract before the agreed time duration could be a solution to reconcile the tenant's interest in contractual stability with a conflicting interest in flexibility, without considerably damaging to the landlord's interests[44]. To this end, a minimum duration of the contract should also be defined on behalf of the landlord, for example, as follows: «after a third of the contractual duration is completed, the tenant is entitled to terminate the contract before the agreed time duration upon a thirty days' notice to the landlord».

Price fixation is a very sensitive question. It is well known that high rents exclude a large part of the population from adequate housing or impoverishes it (when burdening the family's income with a percentage that surpasses the 40%); furthermore, failure in payment leads to eviction and creates homelessness problems that States must attend to. Could rent control be a just and efficient solution? It has been done in the past with pitiful consequences to the rental market and to the maintenance of building, but even within a more appropriate framework (such as adjusting to inflation levels and guaranteeing landlords profit up to a reasonable extent) it is very difficult to foresee what would be the impact on the rental market. Possibly, a system based on some rent control measures combined with highly effective guarantees of payment and eviction procedures could be the answer for a function-

[43] C.U. SCHMID, *Epilogue: Towards a European role in tenancy law and housing policy*, in ID. (ed.), *Tenancy Law and Housing policy in Europe – Towards regulatory equilibrium*, Cheltenham (UK)-Northampton (MA, USA), 2018, p. 344, suggests a guaranteed renewable rental period of three years.

[44] Some scholars consider that there should be a European common element recognising the tenant's right to termination of the contract before the agreed duration, because of the mobility provided to tenants and its advantages for the labour market, see C. MARTINEZ-ESCRIBANO, *Tenancy and right to housing: private law and social policies*, in *European Review Private Law*, 5, 2015, pp. 789-791 and C. SCHMID, *ibidem*, p. 344, admitting termination by tenant for «qualified personal and professional reasons». Measures that excessively condition tenants mobility violate the right of free movement, according to S. NASARRE AZNAR, *Leases as an alternative to homeownership in Europe. Some key legal aspects*, in *European Review of Private Law*, 6, 2014, p. 821.

ing and balanced market, insofar the landlords would not have an incentive to terminate the contract, except for tenants failure to perform, because they would not be able to receive more money from new tenants, and, consequently, other protective measures could be avoided[45]. Anyway, the most feasible solution appears to be a fixation of an initial amount, freely agreed according to market rules[46], and link rent increases to a legal parameter (related to inflation rates or a consumer prices index), alongside prohibiting rent increase during a fixed period of the contract duration (for example, allowing rent increase only after a period of one year).

Although the tenant is the weaker party of the contract, as it needs access to premises to satisfy a basic accommodation's need, thus equitable regulation shall guarantee a sufficient level of protection to the tenant, the landlord's interests cannot be disregarded. Within a market economic system, unless landlords have profitability prospects and sufficient guarantees of the tenant's obligations performance (protection against payment default and misuse of property), they would refrain from making their property available for renting. A functioning market requires, therefore, regulation that acknowledges landlord's interest of adequate gains and guarantee of compliance; moreover, one that encompasses legal stability and does not lead to disproportionate limitations of private property. Some incentives for housing rehabilitation would also be welcome.

Other questions, such as who should be entrusted with the drafting of a European Union housing model contract and if it would be better to divide this competence between a «Committee» elected by the European institutions and national representatives, such as tenants and landlords associations, or a political body composed by the Member States Ministries of Justice (ensuring that the EU model contract does not clash with national mandatory tenancy regulation)[47] and by whom

[45] S. NASARRE AZNAR, *ibidem*, p. 832.

[46] There is a shared view that rent shall be established according to market rules. See C. MARTINEZ-ESCRIBANO, *op. cit.*, pp. 791-794.

[47] C. SCHMID, *ibidem*, p. 345, thinks that the national implementation of European tenancies agreements should be made by landlords and tenants associations under the

should disputes be brought (national courts; special Alternative Dispute Resolutions systems; special courts), would also have to be addressed.

Other than selecting the most adequate and meritorious solutions, a practical difficulty that needs to be dealt with when drafting model rules or default contracts is multilingualism. Texts must therefore be drafted in a particularly simple style, avoiding terminology too closely linked to national legal systems[48]. Yet, the use of vague non-technical terms certainly conflicts with the technical nature of legal terminology. Finding functional corresponding terms appears to be even more difficult with regards to tenancy contract than, for example, the supply of services or buy-and-sale contracts, due to the former close connection to property law, where divergence is greater than in law of obligations.

In spite of all the difficulties and obstacles, the definition of a European Union model tenancy contract would have advantages: a stronger and more certain protection for migrant tenants; a reduction of transactional costs for both parties; a market differentiation between landlords and immovable agents or mediators proposing contracts with a European Union guarantee seal.

Starting with this and then gradually making progress, an experiment or test could be firstly made with a limited category of tenants, such as students. It would be easier to build a political interest, since they form a vulnerable category of tenants with high mobility; nowadays students' accommodation seems to be a growing business, one that gained investor's attention; these contracts are typically of a limited duration, therefore avoiding one of the most complex questions of tenancy contract regulation, its duration.

auspices of a European group, such as the International Union of Tenants or, alternatively, designed by a future European Housing Observatory.

[48] As noted by B. POZZO, *Multilingualism and the Harmonization of European Private Law: Problems and Perspectives*, in *ERPL*, 2012, pp. 1185 ff.