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TENANCY LAW AND HOUSING POLICY IN THE EU (TENLAW)

Private tenancy law is existentially affecting the daily lives of European citizens. That notwithstanding, it constitutes a nearly blank space in comparative and European law. At the same time, however, different parts of EU law and policy do affect tenancy law significantly, albeit indirectly. Against this background, this project has set out to provide the first large-scale comparative and European law survey of tenancy law and housing policy in 32 countries.

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INTRODUCTION

Tenancy law regulates contractual and real rights for the use of immovables, and thus directly affects the daily lives of European citizens, as about one third of them depend on rented housing, a proportion which increases in some countries to more than 50%. Residential tenancies are thus likely to impact on consumers more than any other legal branch, even though tenancies are not normally treated as a branch of consumer law. The good functioning of tenancy law and adjudication is therefore of crucial importance for the legitimacy of the legal system in the eyes of citizens. However, just as with most other branches of law, its performance in tenancy law depends increasingly on its multi-level legal, economic and social context

Evidence and Analysis

The *TENLAW* project built on the hypothesis that an adequate treatment of tenures by national legislators and regulators, frequently labeled "tenure neutrality", should also be reflected in private tenancy law. Indeed, private law has a close relationship with housing policy, by which it is influenced and which it itself influences in manifold ways. To start with, a functioning private law infrastructure and court system ("Rule of Law") must be in place; otherwise, as shown in several Eastern European states, no effective private rental market will develop on account of unforeseeable risks for landlords. Furthermore, rent regulation should enable the landlord to make adequate profit. Otherwise, she will not be inclined to rent out her properties but will consider alternative uses or even leave them empty in certain cases, as it is currently happening in Spain and several Eastern European states. As a consequence, the reliance of a growing number of EU States on the private market for the supply of rental dwellings to large parts of the population may be illusory. Instead, the State will need to step in and take care of those tenants who cannot satisfy their housing needs on the market.

On the other hand, if the position of tenants is too weak or instable, e.g., if only short guaranteed periods of tenure are available (as e.g. under the British default tenancy, the so-called assured shorthold, which covers 6 months security of tenure only), rental tenancies do not constitute a reliable alternative to tenants who want to have a stable living base for their families. As a result, tenants may be pushed into homeownership even at the risk of overstretching their financial abilities and ending up in over-indebtedness; as it is well known, such a situation has given rise to the subprime mortgage crisis in the US. Similarly, though less dramatically, the far-reaching prohibition of subletting even without the landlord alleging good reasons, which is common in Southern European countries, provides another unjustified disadvantage of rental tenures as compared to ownership – as an owner could of course rent her house for example during a period of absence for working reasons.

Against this background, the core policy hypothesis of TENLAW is that private law needs to respect a sort of "socio-economic equilibrium" between the legal positions of landlord and tenant – a principle which is thus based not only on private law (commutative) justice but also on legal economic findings. This principle aims at accommodating both the tenant's need to have access to housing at reasonable conditions as well as the landlord's profit-orientation and property rights.

It is under the guidance of this principle that TENLAW has explored and evaluated, by means of a questionnaire, all areas of tenancy law and housing policy in 32 national reports and 11 comparative reports.

Policy Implications and Recommendations

Given the growing importance of tenancy law and housing policy for the Single Market and the free movement of European citizens in times of crisis and migration as well as the significant collateral effects of EU law and policies in other areas, the TENLAW consortium advocates a stronger European coordinative role in this field. As legal harmonization, both maximum and minimum harmonization, is regarded as little realistic and desirable, the open method of coordination (OMC), which has been carried out in other branches of social policy with acceptable results, is regarded as the best institutional tool currently available. In an OMC process, comparative socio-legal analysis may show the existence of bad, good and ambivalent national

practices, with black markets, social rental agencies and energy refurbishment regulation serving as examples. In a positive perspective, an OMC-inspired analysis advocates, as described, neutrality of tenure as "mega principle" for regulation in the field. From this may be derived general principles which national tenancy regulation should respect and balance adequately: profitability and respect of property rights for the landlord, and affordability, stability and flexibility of the tenancy for the tenant. These general principles may in turn guide the development of more detailed European principles and rules of tenancy law, and they could also inspire the draft of European tenancies, i.e., model agreements to be implemented and concretized at national level. General principles in the key areas of duration and termination of tenancy agreements as well as rent control might be defined as follows:

- Minimum security of tenure for a period of 3 years
    - Exception: a legitimate good reason invoked by the landlord for a shorter period (e.g. transitory stay of the tenant for work reasons; contracts with students; owner has foreseeable personal needs for the dwelling after a defined period).
    - After the end of the 3 years period, the tenant has a right to renewal of the contract unless the owner has a legitimate good reason against it.
    - During the 3 years period, termination by the owner is only possible in case of manifest breaches of the contract by the tenant (e.g. delay in rent payment of at least 2 monthly installments; repeated anti-social behavior) or for reasons of force majeure (e.g. dwelling severely damaged).
    - During the 3 years period and in case of renewal, rent increases should be limited to an established price or cost index or the usual rent for comparable dwellings as measured e.g. in the German *Mietspiegel* or the Dutch point system; this may be defined a fair rent system.
- The initial rent (agreed upon by the parties at the conclusion of the contract) should not exceed the fair rent by more than 15%.
- Fixed term contracts concluded without a legitimate good reason are treated as open ended contracts.
- The termination of open ended contracts by the owner is only possible for legitimate good reasons (e.g. personal need of the owner unforeseen at the conclusion of the contract; legitimately changed economic use of the building).
- The tenant should always be allowed to terminate the contract within a delay of not more than 3 months.
- Prohibitions of for the parties to conclude an open-ended contract are not admitted.
- Counteracting black market practices:
    - Oral contracts should have full legal effect under private law and should not entail any disadvantages for the tenant; the tenant only bears the burden of proof for the rent payments.
    - Any violation of public law duties by the landlord (e.g. entry of the contract in a register; tax evasion; inhabitability requirements not fulfilled) should not entail disadvantages for the tenant either.

Even without legal harmonisation at EU level, such soft law European principles on tenancy law could act as effective means of "persuasive guidance" for national regulators in the field.

RESEARCH PARAMETERS

TENLAW set out to systematically research the comparative and European dimensions of tenancy law and housing policy, without embarking on a ready-made European harmonisation agenda or similar but rather by carefully investigating a proper European role in the field.

Objective 1: In a first step, TENLAW analysed national tenancy laws in all EU Member States and their embeddedness in, and effects on, national housing markets and policies in a comparative approach. This part covered the origins and the development of national tenancy law as well as tenancy law's embeddedness in housing policy and housing markets. Moreover, also tenancy law and procedure "in action" was integrated into the comparative analysis. Single fields of tenancy regulation constituted the core part of this analysis. These included: The conclusion of tenancy contracts (in particular the choice of the tenant and discrimination issues) and the use of standard terms; duration and termination of contracts (in particular fixed term contracts and the possibilities of, and restrictions on, the landlord giving notice); rent fixing and rent increases (in particular the conditions and procedure for rent increases); obligations of the parties (in particular guarantees of habitability), breach and termination of tenancy contracts including actions for eviction.
TENLAW's basic parameter of evaluation was the already mentioned hypothesis of a socio-economic balance. This has the following background: As the public sector seems to be increasingly unable and unwilling to provide all citizens in need with housing, private rental markets become more and more important to ensure a sufficient supply of dwellings for rent at affordable price. However, the good functioning of private markets depends on renting remaining attractive for landlords and investors. This, in turn, requires that burdens of social regulation imposed on landlords must not be too onerous and prevent them from making adequate gains and returns. Private tenancy regulation, such as rent control and security of tenure (protection of the tenant against notice) in particular, must therefore strike a socio-economic between the need to provide tenants with housing at affordable and sufficiently stable conditions, and the need to impose only acceptable burdens upon landlords and investors, and which do not act as disincentives. Moreover, only such balanced regulation qualifies as economically efficient.

Objective 2 consisted in a comparative analysis of the effects of EU law and policies in other fields on national tenancy law. As stated, this analysis extends to social policy against poverty and social exclusion; consumer law and policy; competition and state aid law; tax law; energy saving rules; private international law including international procedural law; anti-discrimination legislation; harmonisation and unification of general contract law; constitutional law affecting the EU and the European Convention of Human Rights.

Objective 3 included the comparison of national tenancy systems in similar groups of welfare states and at European level. According to the general principles of comparative law, this comparison was carried out in a functional way - i.e., it was not based on legal concepts (which vary widely with one concept having often several meanings in different systems), but on legal and socio-legal mechanisms serving similar regulatory objectives. In detail, the comparison extended to the following features: first, the tenancy law system and its key components, including security of tenure, rent control and guarantees of habitability; second, the different roles tenancy law may play in national housing policies; in this respect, fundamental differences are caused by the different share of private tenancies at market conditions as compared with social tenancies (with public or publicly subsidised landlords) and owner-occupied buildings; third, tenancy laws were compared as integral parts of national housing policies as regards their connection to different

welfare state systems. Technically, the comparison of national tenancy laws and their relationship to housing policies were undertaken at two levels: first at the level of similar, often neighbouring, welfare state systems – for which reason the project consortium was subdivided into 10 groups with each of them analysing three EU Member States; and at the EU+4 level of the overall consortium. In sum, the comparative analysis tried to render foreign systems understandable to national and European regulators and thus provide a basis for mutual learning and the definition of best practices, as envisaged at European level under the open method of co-ordination (OMC).

As key dissemination tool, the TENLAW consortium has designed an information brochure about *"My rights as tenant in the EU"*, made available for free on http://www.TENLAW.uni-bremen.de/brochures.html. For all countries covered in the project, this brochure contains information on the most important tenancy regulation issues including types of tenancies, black contracts, legal requirements and delays for notice by the landlord, rent regulation and liability for maintenance of the apartment. This brochure may be expected to become a useful first and free reference for mobile European citizens wishing to rent homes in another European country, including tourists, students, posted workers or businessmen. For according to the Rome I-Regulation (Art. 4 para. 1 c), tenancy relations are, in the lack of a valid choice of another national law by the parties, always governed by the law of the country of location of the immovable (lex rei sitae), and protective regulation of the tenant's country of residence must not be applied. Therefore, tenants are almost always subject to a foreign law which they will not know in most cases, and which will often not be understandable to them for language reasons. As no such information is currently available on the internet in English, this brochure might fill an obvious information gap and thus contribute to a large-scale diffusion of the project results.

PROJECT IDENTITY

PROJECT NAME

TENANCY LAW AND HOUSING POLICY IN THE EU (TENLAW)

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WEBSITE

www.TENLAW.uni-bremen.de

FOR MORE INFORMATION

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FURTHER READING

1. National reports on all EU countries plus Norway, Switzerland, Serbia, Turkey and Japan, available on: http://www.tenlaw.uni-bremen.de/reports.html
2. Comparative reports, available on: http://www.tenlaw.uni-bremen.de/intrateamcom.html
3. Information brochure: My rights as tenant in the EU, on: http://www.tenlaw.uni-bremen.de/brochures.html
4. Tenancy Law and Housing Policy in the EU - "Best of TENLAW", book publication, forthcoming end 2016
5. Glossary on selected terminology in tenancy law and housing

research: http://www.tenlaw.uni-bremen.de/glossary.pdf

Literatur about Tenlaw and its Method:

1. Ch. Schmid/ J. Dinse, The European Dimension of Residential Tenancy Law, *European Review of Contract Law* 2013, 201-220.
2. Ch. Schmid/ J. Dinse, Towards a Common Core of Residential Tenancy Law in Europe?, in: L. Nogler/ U. Reifner (eds.), *Life Time Contracts - Social Longterm Contracts in Labour, Tenancy and Consumer Credit Law*, eleven publishing, 2014, 401-415.
    - Portuguese version (with M. Dos Santos Silva): Rumo a um Direito Comum do Arrendamento Urbano Europeu? in: *Boletim da Faculdade de Direito da Universidade de Coimbra*, Vol. LXXXIX, 2013, 395-424.
3. S. Nasarre-Aznar - Leases as an alternative to homeownership in Europe. Some key legal aspects, *European Review of Private Law*, December 2014.
4. J. Hegedüs/M. Lux/V. Horváth (eds.): Private Rental Housing in Transition Counties. Palgrave Macmillan, 2016.

Further project publications may be found at:
http://www.tenlaw.uni-bremen.de/literature/projectpublication.html

Further useful literature by other authors may be found at:
http://www.TENLAW.uni-bremen.de/literature/publications.html

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