

Introduction

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I.

Alongside homeownership and social housing made available and/or funded by the State, private renting, that is housing supplied through private contracts on the market, has always played a significant role in Europe, though its share has differed hugely in different countries at different times.¹ After World War II, communism and socialism in Central and Eastern Europe strongly limited or even abolished private renting in favour of the public provision of housing, albeit niche and black markets have always continued to exist. In Western European countries, the importance of private renting has declined in the post war decades as a result of multiple reasons: the demolition of existing, pre-war poor-quality private rented dwellings; the conversion of private rented dwellings into owner-occupied or social rental units; the preference of large parts of population for homeownership which could be realized more easily in times of prosperity, in many cases combined with the promotion of homeownership by public housing policies through subsidies or tax privileges;² finally, the negative impact of protective regulation in favour of tenants,

¹ See for a description of private renting and its evolution after World War II, P. Boelhouwer and H. Van der Heijden, *Housing Systems in Europe: Part I. A Comparative Study of Housing Policy* (Delft University Press 1992); K. Scanlon, 'Private Renting in Other Countries' in K. Scanlon and B. Kochan (eds), *Towards a Sustainable Private Rented Sector. The Lessons from Other Countries* (LSE 2011) 19; J. Hoekstra, M. Haffner, H. van der Heijden and M. Oxley, 'Private Rental Landlords in Europe' in S.J. Smith, M. Elsinga, L. Fox O'Mahony, O. Seow Eng, S. Wachter and S. Tsenkova (eds), *International Encyclopedia of Housing and Home* (Vol. 5, Oxford: Elsevier 2012) 388–89; C. Whitehead (ed), *The Private Rented Sector in the New Century – A Comparative Approach* (Bologøkonomisk Videncenter 2012); T. Crook and P.A. Kemp (eds), *Private Rental Housing – Comparative Perspectives* (Edward Elgar 2014). For Central and Eastern European Countries, see M. Lux (ed), *Housing Policy: An End or a New Beginning?* (Open Society Institute 2003).

² See for example B. Steven, C. and W.G. Grigsby, 'Income Tax Concessions for Owner-occupied Housing' (2000) 11(3) *Housing Policy Debate* 521–46.

in particular on rent control and security of tenure, which discouraged landlords and investors from offering housing space on the market, as the return on other investments proved to be higher.

Yet, recent decades have shown again a growing interest in private renting in almost all European countries.³ In Central and Eastern Europe, private markets have been re-established after the fall of Communism and promoted through processes of privatization and restitution of formerly State-seized property;⁴ however, the effectiveness of private renting is still hampered by problems of access to justice, unbalanced regulation and informal contracting.⁵ In Western European countries, widespread fiscal constraints have prompted States to reduce the share of publicly owned or funded social housing⁶ as well as the amount of subsidies to promote home ownership. In addition, new policy initiatives such as tenure neutral subsidies for landlords and tenants⁷ as well as more balanced regulation of private contracts have boosted the private rental sector, whose importance for the State as a 'low cost' provider of housing has been rediscovered by left and right wing governments alike.

The Great Financial Crisis since 2007 has but intensified these developments:⁸ rescue measures for banks and households have induced even larger public deficits and extreme austerity policies, which has led to a further decrease of public budgets available for social housing; bank-financed house purchases have failed particularly in Southern European States as loans could no longer be paid back and mortgages were foreclosed; and as a reaction, banks have now become very reticent in the provision of mortgage loans to finance home purchases.⁹ But even

³ See the TENLAW national reports, available 8 August 2017 at <http://www.tenlaw.uni-bremen.de/reports.html>.

⁴ See for example M. Lux and M. Mikeszová, 'Property Restitution and Private Rental Housing in Transition: The Case of the Czech Republic' (2012) 27 *Housing Studies* 77–96.

⁵ See the contribution by J. Hegedüs and V. Horvath in this volume (Chapter 2).

⁶ See the comparison by D. Czischke and A. Pittini, 'Housing Europe 2007: Review of Social, Co-operative and Public Housing in the 27 EU Member States' (CECODHAS European Social Housing Observatory 2007).

⁷ For a discussion, see P.E. Kemp (ed), *Housing Allowances in Comparative Perspective* (University of Chicago Press 2007).

⁸ See H. van der Heijden, K. Dol and M. Oxley, 'Western European Housing Systems and the Impact of the International Financial Crisis' (2011) 26 *Journal of Housing and the Built Environment* 295–313.

⁹ See for example R. Bianchi, TENLAW: Italy (2014) 32–34; D. Correia, N. Santos and M. Olinda Garcia, TENLAW: Portugal (2014) 49–50; E. Molina Roig, TENLAW: Spain (2014) 38–40.

in Northern European States hit less by the crisis, the price of houses and rents in metropolitan areas has increased considerably as a result of very low interest rates.¹⁰ All this has left private renting as the main accessible housing option for many low income households, and the number of tenant households has grown in many European states: Whereas the proportion has already been more than 50 per cent in Switzerland¹¹ and Germany,¹² considerable increases have occurred in England,¹³ Italy¹⁴ and most Eastern European States. Beyond that, the promotion of a variety of housing tenures beyond ownership has been proclaimed as one of the main goals for the next 20 years in the New Urban Agenda adopted by the United Nations at the 2016 Habitat III-conference held in Quito.¹⁵

Against this background, the regulation of private renting has developed into a chief vehicle for the implementation of national housing policies.¹⁶ The ancient Roman law contract of *locatio conductio*, regulating the relationship among two private parties without paying much heed to social goals,¹⁷ has thus become transformed in response to divergent policy objectives which indirectly favour one or the other party.¹⁸ From

¹⁰ M. Jordan, TENLAW: Ireland (2014) 51–52.

¹¹ A. Wehrmüller, TENLAW: Switzerland (2014) 8.

¹² J. Cornelius and J. Rzeznik, TENLAW: Germany (2014) 8.

¹³ P. Orji and P. Sparkes, TENLAW: England and Wales (2014) 11: increase in private rentals from 11 per cent (2001) to 18 per cent (2011).

¹⁴ R. Bianchi, TENLAW: Italy (2014), citing increase in rental tenancies from 21 per cent in 2010 to 23 per cent in 2012.

¹⁵ See <http://habitat3.org/the-new-urban-agenda>, at no. 33, accessed 8 August 2017.

¹⁶ Representative accounts on housing policy include P. Boelhouwer and H. Van der Heijden, *Housing Systems in Europe: Part I. A Comparative Study of Housing Policy* (Delft University Press 1992) 201–30; M. Oxley, R. Lishman, T. Brown, M. Haffner and J. Hoekstra, 'Promoting Investment in Private Rented Housing Supply. International Policy Comparison' (London: Department for Communities and Local Government 2010) 17; D. Andrews, A. Caldera Sánchez and Å. Johansson (2011), 'Housing Markets and Structural Policies in OECD Countries' (OECD Economics Department Working Papers No. 836, OECD Publishing), available 8 August 2017 at <http://dx.doi.org/10.1787/5kgk8t2k9vf3-en>. On the link between housing policy and private law, see M. Haffner, M. Elsinga and J. Hoekstra, 'Rent Regulation: The Balance between Private Landlords and Tenants in Six European Countries' (2008) 8(2) *European Journal of Housing Policy* 223; E. O'Sullivan and P. De Decker, 'Regulating the Private Rental Housing Market in Europe' (2007) 1 *European Journal of Homelessness* 95.

¹⁷ See, as *locus classicus*, M. Kaser et al., 'Römisches Privatrecht' (21st edn, Beck 2017) 270 ff.

¹⁸ On the concept of instrumentalisation of private law, see Ch. Schmid, *Die*

a comparative perspective, housing policies transposed into private law display a wide range, from neoliberal to welfarist paternalistic, of solutions, under which the position of the tenant changes from an inferior party nearly without rights to a quasi-owner, who de facto may even have a better position than the owner herself.

On the one side of the scale is the British default tenancy, the assured shorthold, under which the tenant is granted six months of security of tenure only, after which the landlord is free to terminate the tenancy without giving any reason; in particular, the owner may also resort to the retaliatory eviction of a tenant invoking statutory rights. Similar, though less drastic, reforms in Spain and Portugal¹⁹ have reduced security of tenure to periods of no more than a few years, so as to provide incentives to private landlords to rent out more dwellings. At the other end of the scale, one may find paternalistic tenant-protective systems as in Sweden, the Netherlands and Austria where according to a popular saying it is easier to get rid of one's wife through divorce than one's tenant through notice to quit. Indeed, it is sometimes impossible in these countries to evict the tenant even if the house is needed by the owner or her family personally. Such regulatory extremes promote circumvention strategies and black market scenarios characterized by informal agreements which violate public law rules (in particular on taxes, registration and inhabitability) and therefore remain unofficial and hidden. Such arrangements, which also reflect distrust in the legal system, are frequent in Central and Eastern Europe²⁰ but also in Southern European States such as Spain and Italy.²¹

Finally, even though housing law has a strong bearing on the Single Market, in particular the free circulation of persons and capital, the European Union has up until now been inactive in the field and its legislative competence is doubtful; however, policies and legislation from other fields ranging from anti-poverty, energy, tax, environmental and state aid law to consumer law, conflicts of laws, non-discrimination law and human

Instrumentalisierung des Privatrechts in der Europäischen Union (Nomos 2010); for a summary and review in English, see Ch. Joerges and T. Ralli (eds), 'European Constitutionalism without Private Law – Private Law without Democracy' (2011) (Arena Report No. 3, Oslo: Arena).

¹⁹ E. Molina Roig, TENLAW: Spain (2014) 193; D. Correia, N. Santos and M. Olinda Garcia, TENLAW: Portugal (2014) 85–87.

²⁰ See for example J. Hegedüs, V. Horváth, N. Teller and N. Tosics, TENLAW: Hungary (2014) 19–20; A. Mikelénaitė, TENLAW: Lithuania (2014) 16; T. Petrović, TENLAW: Serbia (2014) 27.

²¹ See for example R. Bianchi, TENLAW: Italy (2014) 17–18; E. Molina Roig, TENLAW: Spain (2014) 25–26; O. Bååth, TENLAW: Sweden (2014) 20.

rights, have generated important, though often unintended and unnoticed, collateral effects on housing.²²

II.

Whilst private renting has already been explored from political, economic, historical and sociologist vantage points,²³ this volume is intended to add in the somewhat neglected perspective of the required legal infrastructure. By this term, we mean a well-functioning legal system and balanced substantive law rules enabling just outcomes among the parties, a principle which is here termed *regulatory equilibrium*.²⁴ A well-functioning legal system presupposes, first and foremost, effective access to fair justice – in other words the existence of a reliable, integer and neutral court or alternative dispute resolution (ADR) system, which resolves disputes in an affordable and swift manner. The second proviso, *regulatory equilibrium*, needs to accommodate both the tenant's need to have access to housing at fair and affordable conditions as well as the landlord's profit-orientation and property rights. It has so far been analysed only little in comparative tenancy law and will form the main theme of this volume.

The concept of justice used here originates from the *Nicomachean Ethics* of Aristotle,²⁵ who distinguished distributive and commutative justice. Only the latter constitutes the core of private law justice.²⁶ In its strong version, it means that the exchange of performances in contract law and

²² See Ch. Schmid and J. Dinse, 'The European Dimension of Residential Tenancy Law' (2013) 8 European Review of Contract Law 201–20; as regards the relationship of tenancy law and energy efficiency policy, see Ch. Schmid et al., 'Mietrecht und energetische Effizienz im europäischen Vergleich', available 8 August 2017 at http://www.bbsr.bund.de/BBSR/DE/Veroeffentlichungen/BBSROnline/2016/bbsr-online-13-2016-dl.pdf?__blob=publicationFile&v=3.

²³ See again the literature quoted in notes 1 and 15.

²⁴ The equilibrium thesis has been developed first in Ch. Schmid, 'Tenancy Law and Procedure, General Report' (EUI Florence 2004), available 8 August 2017 at <http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectTenancyLaw.aspx>; Spanish translation by L. Capote Pérez, 'Los Arrendamientos de Vivienda en Europa' (2006), available 8 August 2017 at <http://housing.urv.cat/wp-content/uploads/2014/07/Working-Paper-4-Prof.-Dr.-Christoph-U.-Schmid1.pdf>.

²⁵ See the translation of Aristotle by J.A.K. Thomson (Penguin Books 2004); on the legal interpretation of the Aristotelian concepts, see C.-W. Canaris, 'Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht' (Verlag der Bayerischen Akademie der Wissenschaften 1997).

²⁶ See Ch. Schmid, 'Private Law Justice in the European Legal System' in

the redress of damages in tort law are to be equivalent. In its weaker and perhaps more important version, it requires that private law relationships are to be governed by criteria originating in the relationship between the parties themselves²⁷ – and not by reference to collective political, social or economic goals, which may either favour one party, such as landlords or tenants,²⁸ or stand completely outside the party relationship, as European market integration concerns.²⁹ In other words, the party relationship must not be instrumentalized by external collective goals. Bydlinski has aptly formulated the minimum requirements of commutative justice as follows: If one were to ignore the collective goal-related, external dimension of a norm or decision hypothetically, the consequence of the norm-applying decision must still qualify as an outcome which is defensible on the grounds of commutative justice among the parties alone – even though alternative decisions might serve commutative justice even better. To give an example in the field: If artificially low rents, which do not cover the costs of the dwelling for the landlord, are prescribed or maintained by statute in order to counteract housing shortage and the lack of social housing, as has happened in Central and Eastern European countries,³⁰ this is no longer defensible on the grounds of commutative justice but rather qualifies as an illegitimate instrumentalization of the parties for public goals. Its outcomes may even be illegal under national constitutional law and the European Convention on Human Rights.³¹ This assessment may be different for a 10 per cent cap on rent increases as recently introduced in Germany,³² which

M. Bussani and F. Werro (eds), *European Private Law, A Handbook* (Vol. II, Staempfli Publishers 2014) 341–62.

²⁷ The eminent Austrian private lawyer Franz Bydlinski (1931–2011) called this the concept of ‘relative or bipolar justification’ (*relative Rechtfertigung*), see his *System und Prinzipien des Privatrechts* (Springer 1996) 92 et seq.

²⁸ The – of course legitimate – protection of typically weak parties such as tenants and workers is characterised as such an external goal here as it does not necessarily reflect the (true of hypothetical) will of the parties to a contract but is motivated by (unilateral) public policy considerations.

²⁹ For examples see Ch. Schmid, ‘The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code’ (2005) 1 *European Review of Contract Law* 211–27.

³⁰ See the contribution by M. Habdas and G. Panek in this volume (Chapter 7).

³¹ Ch. Schmid and J. Dinse, ‘Towards a Common Core of Residential Tenancy Law in Europe?’ in L. Nogler and U. Reifner (eds), *Life Time Contracts – Social Longterm Contracts in Labour, Tenancy and Consumer Credit Law* (eleven publishing 2014) 401–15.

³² See Art. 556 d sec. 1 Bürgerliches Gesetzbuch (BGB) and J. Cornelius and J. Rzeznik, *TENLAW: Germany* (2014) 85.

is still defensible on justice grounds even without considering the housing policy rationales behind it.

Distributive justice, in turn, is a constitutive feature of public law and aims primarily at an equal distribution of advantages and burdens in the relationship between citizens and the State. Instead of a bipolar logic directed at balancing the interests between two parties, it builds on a monopolar logic directed at determining subjective, person-related criteria such as neediness or worthiness to receive authorizations, subsidies or support payments or the obligation to pay fees or taxes. Such benefits or burdens are subject to the inevitably distortive effect of ‘big money pots’ (Bydliniski). Distributive justice should only be exceptionally relevant for private law, though illegitimate distributive arguments may often be found in private law reasoning, in particular as regards compensation rationales. For example, in the discussion preceding the 2002 reform of German contract law, the leading ministerial official³³ argued that the longer prescription period for defects (two years instead of six months), as laid down by the 1999 European consumer sales directive, should be counterbalanced by ‘compensatory elements’ in favour of sellers, for example the reduction of the prescription period for concurring tort law claims. The same argument could apply to defects of a dwelling such as humidity or mould, which damage the tenant’s personal property. However, such measures would lead to arbitrary results: thus, sellers or landlords confronted with contractual liability claims after nearly two years would not be helped if they, or even their competitors (!), could invoke shorter prescription periods in hypothetical later tort law cases. In reality, such allegedly compensatory solutions render the deficits of justice even worse.³⁴

Mutatis mutandis, the same reasoning applies with stronger force when, as often happens in tenancy law, the legislator tries to compensate unjust private law rules with public law support measures – for example when artificially low rents set by statute are supposed to be compensated by subsidies for the landlord. However, subsidies are not always targeted enough to enable just outcomes in individual cases. It may be, thus, that in the individual case even low rents are fair given the state or location of a particular dwelling, with ‘compensatory subsidies’ enabling undeserved windfall profits for the landlord. In other cases, though, subsidies may be too low or restricted with respect to their material, temporal or personal

³³ See J. Schmidt-Räntsch, ‘Umsetzung der kommenden Kaufrechtsrichtlinie’ (ZEuP 1999) 199 f.

³⁴ Critical in this sense also, H. Eidenmüller, ‘Zur Effizienz der Verjährungsregeln im geplanten Schuldrechtsmodernisierungsgesetz’ (2011) JZ 283 f.

scope of application as to compensate rents which do not cover the landlord's costs.

Moreover, the need for a *regulatory equilibrium* among the parties may be derived not only from commutative justice but also from the 'mischief argument' of economically adverse market outcomes if it is not respected. Thus, if the landlord is prevented from making adequate profit by rent regulation, taxes or factual circumstances, no effective private rental market will develop in the first place. As shown, for example, in several Central and Eastern European countries, landlords will instead prefer alternative uses of the apartment, leaving it empty or renting it out informally, with priority only to family members and friends, with whom informal dispute settlements are possible. On the other hand, if the position of tenants is too weak or instable as under the British assured shorthold, rental tenancies do not constitute a reliable alternative for people who strive for a stable living base for their families. Tenants may as a reaction be pushed into homeownership even at the risk of overstretching their financial abilities and ending up in over-indebtedness; as is well known, such a situation gave rise to the subprime mortgage crisis in the US.³⁵

Similar arguments may be derived from the economic analysis of law, whose protagonists are usually not suspected of propagating leftist social policy ideals. According to this theory, not only an excess of social protection but also the lack of it may be economically inefficient. For example in the absence of guaranteed rental periods and restrictions on giving notice, the landlord might threaten the tenant with an eviction at short notice and could thus benefit from an economically inefficient monopoly rent: For in order to avoid the costs of moving (not only financial costs but also the social costs of changing schools or the workplace), the tenant may often be ready to pay more than the market rent to avoid eviction.³⁶ So regulatory

³⁵ The landlord bias in regulation cannot be justified either by the fact that the English system currently brings a huge volume of housing onto the market so that the lack of security might become less important. First, the high offer currently available is probably caused less by legal regulation than by favourable economic circumstances; therefore, should the offer become smaller in the future, the negative effects of the lack of security would become more incisive again. Second, the bias has probably also contributed to the skyrocketing of prices, the younger generation being increasingly priced out of the market. Third, even when the housing offer is currently good and the market performs well, this does not help individual tenants exposed to the landlord's potential for blackmail resulting from the option of retaliatory eviction.

³⁶ See H.-B. Schäfer and C. Ott, 'Die ökonomische Analyse des Rechts – Irrweg oder Chance wissenschaftlicher Rechtserkenntnis?' (1988) *Juristenzeitung* 213, 222.

limitations on notice and eviction may not only be based on commutative justice and social policy rationales but also on economic theory.

A similar 'equilibrant' interpretation may, finally, be attributed to the maxim of *neutrality of tenure*,³⁷ which is nowadays propagated by the International Union of Tenants and supported at least on paper by many governments – though in reality, a regulatory bias in favour of homeownership is frequent. According to this principle, tenancies must not be treated less favourably than homeownership in all fields of regulation including subsidies and tax law. Neutrality of tenure also counteracts a privileged status of homeownership in private law and advocates a fair and effective regulation of all forms of tenures. For example, the far-reaching prohibition on subletting even without the landlord alleging good reasons, which is common in Southern European countries, constitutes an unjustified disadvantage in rental tenures as compared to ownership – as an owner could of course rent her house during a period of absence for work or personal reasons. At the same time, this prohibition is at odds with commutative justice: As long as the tenant needs to pay the full rent, it is fair that he may use the apartment in any way which does not violate the owner's property rights. In sum, the principle of regulatory equilibrium may simultaneously be derived from commutative justice, legal economic findings and housing policy rationales.

III.

However, the principle of *regulatory equilibrium* needs to be implemented at the level of national tenancy law in order to become operational. This may be achieved through a set of functionally oriented sub-principles, which effective and legitimate tenancy regulation should accommodate: profitability and respect of property rights for the landlord, and affordability, stability and flexibility of the lease for the tenant.³⁸

The criterion of *respect, de iure and de facto, for the landlord's property rights* is rendered operational by important 'rule of law' features such as the available remedies in cases of default on rent payment and deterioration of the property caused by the tenant, in particular the effectiveness

³⁷ See on this principle, for example, M. Baldini and T. Poggio, 'Housing Policy towards the Rental Sector in Italy: A Distributive Assessment' (2012) 27 *Housing Studies* 563–81.

³⁸ On these criteria, see S. Nasarre Aznar, 'Leases as an Alternative to Homeownership in Europe. Some Key Legal Aspects' (2014) 22 *European Review of Private Law* 6.

of eviction procedures. Also the protection and guarantee mechanisms including deposits, liens and pledges on the tenant's belongings, personal securities (for example sureties of relatives) or insurances need to be scrutinized in this context. Another important emanation of the owner's property right is the possibility to terminate the contract when the house is needed for personal use or close relatives or when it is intended to be used in another, more lucrative way. Finally, the opportunities for construction and rehabilitation are also relevant, in particular the availability of mortgage credit, public subsidies for construction/rehabilitation and sometimes also the admissibility of private arrangements according to which the tenant rehabilitates the dwelling (performance in kind) in lieu of paying rent.

The criterion of the *profitability* for the landlord boils down to the key research question whether rent regulation allows, or impedes, a reasonable profit, especially when profit from renting is compared to alternative investments. In this context, the taxation of rental income, in particular possible tax privileges, also needs to be considered. Likewise, attention should be paid to additional expenses which a landlord might face, such as certain taxes or the costs of repairs and utilities (to the extent these are not capable of being shifted to the tenant). However, the criterion of profitability justifies only reasonable and not excessive profits (the distinction being of course difficult to establish).

As regards the tenant, the key evaluative criteria are *affordability, stability and flexibility* of the tenancy. If not ensured by the market, *affordability* depends on the effective regulation of the rent (limitations on the setting of the initial rent and the control of later increases) and of other fees and expenses the tenant may have to bear, including the deposit, utilities, certain repairs and other fees such as registration fees, taxes or charges which may lawfully be passed on to the tenant. Finally, the availability of public rent subsidies (housing allowances) for poor tenants also needs to be considered.

The *stability* of the position of the tenant first depends on the legal regulation of the 'default tenancy'. In this context, it is initially relevant whether the lack of a written agreement or of registration in a public register, which is mandatory in many European states but frequently denied by landlords for tax evasion purposes, constitutes a risk for the tenant. Yet the key issue related to stability is the duration of the tenancy; that is, the period for which tenants are entitled to stay as long as they respect the contract. In open-ended tenancies, this issue depends on whether there is adequate protection against the unilateral termination of the tenancy by the landlord. In systems following the French tradition of fixed period agreements (for example 3+3 years), it is decisive whether the guaranteed

rental periods are adequately long and whether effective prolongation rights exist (or whether the landlord may make the prolongation dependent on the tenant's consent to potentially abusive rent increases). Other important criteria are the availability of the *emptio non tollit locatum* rule and/or pre-emption rights of tenants in case of sale of the dwelling, and the tenant's legal position in case of a public auction of the house, for example when the landlord's mortgage is enforced. Moreover, the fairness of the eviction procedure, especially the availability of social defences or prolongation rights, also contributes to the stability of the tenant's position. The presence of effective homelessness schemes may also be considered as a last resort.

The last criterion for the tenant, *flexibility*, is crucial for personal and labour mobility. It essentially depends on whether unilateral termination of the contract by the tenant is possible within a reasonable period of time – or whether a tenant may be bound by a long term agreement which would force him to pay two rents if he needs to move. Another frequently underestimated criterion is whether non-abusive subletting is generally allowed or may be prohibited by the owner even without good reasons; again, a possible prohibition strongly decreases the tenant's mobility in case of work assignments in different locations or changes of domicile for private reasons.

Public/social tenures allocated according to need (that is tenancies with public or 'private social' landlords subsidized by public authorities) may, with respect to the position of tenants, also be assessed with the criteria of affordability, stability and flexibility. As these will typically be regulated to the advantage of the tenant, the conditions of access to public/social tenures become crucial; these depend on sufficient supply, the criteria of eligibility for tenants and the selection and allocation procedure, which should be fair, transparent and effective.

In sum, the general principle of *regulatory equilibrium* and its concrete applications – respect for property rights and profitability for the landlord vs. affordability, stability and flexibility for the tenant – constitute the analytical framework of this book to assess national housing policies, their tools and mechanisms in general, and their private law implications in particular.

IV.

The main part of the work is opened by two general surveys of housing policy related to private renting, which sketch out a representative picture of the social, economic and legal embeddedness of this sector in Western

as well as Central and Eastern Europe: Marietta Haffner's comparison of private renting in France and the Netherlands and József Hegedüs' and Vera Horváth's overview on Central and Eastern European countries.

Marietta shows that the decline of private renting from the 1980s onwards was mainly caused by the retreat of institutional landlords/investors in France and private person landlords in the Netherlands. This was triggered in Holland *inter alia* by a relatively strict rent control system. Private person landlords stayed more active in France where tenancy legislation is more balanced. Currently, both countries promote rental markets, in particular by developing an intermediate price segment to bridge the gap between social and private market housing. For this reason, France has introduced subsidies for institutional investors (not only private person investors/landlords), whilst the existing contract regulation guaranteeing a high degree of security of tenure has been largely left in place. The Netherlands introduced restrictive measures which limit the options for potential candidates in social housing and owner-occupation, thus indirectly favouring private market rentals. In addition, a new landlord tax was introduced for the cheaper rental stock. However, strict rent control is increasingly limited to social rental dwellings and households with a lower income in the expectation that investments in private renting will become more attractive in the future. Whereas in both countries tenancy regulation is thus only one element of housing policy alongside (more) tenure-neutral policies, at the same time key elements of tenancy contracts such as affordability of rent in social and private market rentals constitute chief policy goals.

The account of József and Vera on the private rented sector in Central and Eastern European (CEE) countries after the fall of Communism presents some scenarios from the Wild-West. Following massive privatization and restitution measures undertaken by municipalities unable to bear the costs of formerly state-owned dwellings transferred to them, the share of owner occupancy increased to more than 70 per cent, whereas that of public housing shrank drastically to below 5 per cent in most countries, thus being completely unable to cover the existing need. The private rented sector is therefore important in particular for low income households unable to buy a dwelling even at the low end of the market. However, the rental market is instable and performing badly in most CEE states: Except in the Czech Republic, it typically operates in the informal economy as small private landlords prefer to avoid taxes and do not, therefore, register rental contracts; as a result, the overall rental market is much bigger than statistics suggest; institutional investors are largely absent, in particular since the tax and subsidy systems favour ownership at the expense of private renting, rendering the latter unattractive; the

legal infrastructure is not effective, the protection of tenants is often insufficient, legislation being based on liberal principles; and litigation is too expensive, complicated and time-consuming, with ADR structures being largely nonexistent. Yet in many cases, there are risks for landlords as well, for example when measures protecting tenants have been left in place after privatization, which prevent landlords from evicting tenants unable to pay the rent and leave them with debts for utility payments. In sum, the residual character of private renting in CEE countries and the social disruptions resulting from uncovered housing needs are closely linked to dysfunctions of the rule of law and the unbalanced or partly absent regulation of tenancy contracts.

After these two surveys, the other contributions deal more narrowly with the legal regulation of tenancy contracts and its deficiencies in achieving a *regulatory equilibrium*. After a comparative restatement of the equilibrium thesis with reference to South West and West European tenant countries and an analysis of black market constellations in Southern Europe, the book turns first to the regulatory panorama in Central and Eastern Europe and then in Western Europe. The order in which the countries are presented reflects a growing significance of private renting and its regulation.

The comparative account by Sergio Nasarre et al. on Spain, Portugal and Malta sets the scene by examining to what extent the regulation of tenancies contributes to the policy goal of providing effective alternatives to homeownership in the wake of the 2007 mortgage crisis, which hit the Iberian Peninsula particularly strongly. Though legislators in all three countries have in recent years liberalized tenancies to enhance landlords' incentives for renting out additional dwellings, the analysis of the Spanish situation in particular shows that the new regulation is not equilibrated. Whilst eviction proceedings have been speeded up, important shortcomings on the tenants' side persist: there is a shorter guaranteed rental period of three years only; *emptio non tollit locatum* does not apply if the parties fail to register the contract; the market rent is not regulated, which means that rents are often higher than credit instalments for financing the purchase of equivalent dwellings; and tenants need to compensate the landlord if they want to leave before the agreed term. Moreover, tax advantages for tenants have been repealed, and subsidies are available in case of individual need only. All these legal shortcomings have contributed to the persisting public perception of rental contracts as an inferior tenure – a kind of spill-over effect of imperfect regulation.

The following contribution by Elena Bargelli and Ranieri Bianchi explores the black rental market in Southern European legal systems, with a particular focus on Italy. The black market is a real world phenomenon

often neglected by housing policy, lawmakers and scientific studies alike. It is constituted by unofficial, informal contracts which violate binding legal rules, in particular public law rules on tax, registration and inhabitation requirements, and are therefore mostly kept secret by the parties. Such secretive illegal arrangements, which render the resort to courts and other public institutions prohibitive or more difficult, tend to disfavour the weaker party, which is typically the tenant. Against this background, the Italian legislator has introduced sanction mechanisms under private law, which are supposed to give the tenant incentives to report black market practices without endangering her own position – whereas no such incentives exist in relation to public law sanctions such as money fines which benefit only the State. However, the most severe of these private law sanctions – a mandatory change of the contractual terms prescribing a very low rent and entitling the tenant to claim back the difference with the higher rent actually paid – was declared unconstitutional by the Italian Constitutional Court in 2013. Yet, other sanctions continue to exist: Landlords may only enforce written and registered contracts whereas tenants may ask for registration even at a later stage to invoke their rights. Thus, a rent which is charged in excess of the written and registered rent must not be judicially enforced by landlords but may still be claimed back by tenants. Under a recent Portuguese provision, the landlord is prevented from using a faster, extrajudicial eviction procedure when she has not complied with her fiscal duties. Yet most of these measures presuppose an effective, swift and affordable judicial system trusted by the tenant, which cannot always be taken for granted in Southern Europe.

The following contribution by Špelca Mežnar and Maša Drofenik on Slovenia, Croatia and Serbia raises the pertinent question whether housing law is part of the problem or the solution. Following privatization and restitution of housing stocks after the quasi-communist period, these countries have become nations with a very high proportion of homeownership, which is available even to people who would not have become owners under normal economic circumstances; rental tenures and their regulation have, however, been neglected. A comprehensive housing policy is non-existent in Croatia and Serbia whereas in Slovenia it is largely ineffective and flawed by a bias towards homeownership, which is reflected in a tax privilege for owner occupation. Generally, rental tenancies are regarded as measures of last resort by the population, and long-term contracts are very rare, the usual duration of a contract being of one year. The residual character of private renting may be explained by a bundle of reasons which include a wide dominance of black market contracts (normally invalid as not in writing and not registered), obsolete legislation, incomplete and disproportional rules (for example an over-

complex termination procedure under Slovenian law, which is little used in practice), a lack of reliable quality standards of rental dwellings, ineffective inspection authorities and, most importantly, inadequate – too slow and expensive – legal procedures. Reforms capable of changing the whole system are badly needed but not in sight.

A similar, though less dramatic overall situation may be found in the Baltic States – Lithuania, Latvia and Estonia – described in the contribution by Irene Kull and Ave Hussar. These countries were within the Soviet Union until 1991 and are still struggling with the legacies of Communism. Privatization and restitution measures have produced the highest rate of homeownership in the EU here, ranging between 80 and 90 per cent. The privatized housing stock is often in very bad condition, being composed of many small flats without basic amenities. This contributes to the constant need for new dwellings. However, more recent reforms have realized, at least at the level of the ‘law in the books’, a certain degree of interest balancing and stability of rental tenancies. Yet tenants seem more protected in Lithuania and Latvia than in Estonia. Constitutive regulatory features such as the requirements on form and registration, duration and termination of rental agreements, *emptio non tollit locatum* as well as social defences in the eviction procedure have been dealt with in the new legislation. That notwithstanding, the low number of tenancy relationships and court cases will certainly delay the development of a more effective system.

Unbalanced tenancy regulation is also at the core of the contribution on private housing in Poland, the Czech Republic and Slovakia by Magdalena Habdas and Grzegorz Panek. They show that, after privatization and the ensuing lack of public housing, an unbalanced housing policy characterized by a pro-ownership bias induced governments to place the social and financial burden of housing low income groups on landlords, claiming that it is a necessary measure in the transition period of the 1990s, but in reality long into the 2000s. However, the jurisprudence of the European Court of Human Rights, in particular the *Hutten-Czapska* case of 2006,³⁹ stopped the government approach by finding a violation of the owner’s freedom of property through an instrumental rent regulation which did not allow the landlord to recover her own costs. This judgment also had repercussions in the neighbouring countries where landlords were exposed to similar problems. It impressively shows the supranational constitutional dimension of commutative justice limiting national legislators. As a reaction, tenancy legislation was deregulated in all three countries; and the long-standing

³⁹ Application 35014/97, Grand Chamber judgment of 19 June 2006, 2006-VIII GC.

fragmentation of the market into privileged and non-privileged rentals as well as the communist legacy of the so-called tenant quasi-ownership were abolished. The new Polish law sets forth detailed provisions on rent setting and rent increase; in particular, the annual rent must not, as a rule, exceed 3 per cent of the dwelling's reconstruction value. Moreover, shorter time-limited tenancies have been introduced to provide incentives for landlords to rent out additional dwellings. Despite these reforms, the housing situation, particularly in Poland, is tense due to a lack of rental dwellings in general and housing for low income groups in particular.

Moving now to Western Europe, the least regulated and most liberal system is the British one, which, in the words of Mark Jordan, constitutes an extremity of tenancy law on the fringes of Europe. Since the liberalization of private residential tenancy law initiated by legendary Prime Minister Margaret Thatcher in the late 1980s, the British system has been premised upon market rents and extremely limited security of tenure under the already mentioned assured shorthold as the statutory default tenancy. Yet admittedly, the liberalization has entailed a strong growth in private renting during this period. Therefore, European policy makers, eager to develop private renting, have increasingly turned to the British model. Yet it is obvious that the weak security and unregulated rents under the assured shorthold regime tend to undermine the stability of home life of households who are settling in for the medium to long term; as mentioned, it may also drive families into homeownership who cannot really afford it as rental tenancies do not constitute a viable alternative. Moreover, the lack of any rent regulation is increasingly perceived as problematic given the recent explosion of rents particularly in London and South-East England. For all these reasons, the British model has lately come under growing pressure, which is reflected in amendment proposals from the devolved governments of Scotland and Wales and the Irish concept of rolling security of tenure subject to relative notice periods. In sum, the English solution indeed represents an extreme which will become socially less acceptable as the share of social and municipal housing, which still acts as an important compensation mechanism, is declining.

The Nordic countries – Sweden, Finland and Denmark – which are covered by the contribution of Per Norberg and Jakob Juul-Sandberg, possess exemplary social tenancy regimes. These focus on rent control and other subtle interest balancing mechanisms: Denmark has as its principal form the cost-based rent, which is fixed at below market level on the basis of the running costs, a surcharge for improvements and a small profit margin; other rent regulation forms are more liberal but less frequent. Finland liberalized rents in the 1990s in order to bring more apartments onto the market, though courts exercise an intense control of reason-

ableness, and the link to a cost index is usual for rent increases. Sweden has the most interesting system under which most rents are negotiated collectively between tenant unions and municipal and private landlords, often assisted by the Swedish Property Federation; for all controversies, parties may turn to a special rent tribunal. If the individual contract contains a bargaining clause (as 90 per cent do), the rent will automatically follow the rent set in collective agreements, which apply to both social and private rentals. Therefore, negotiated rents are typically below market rents. Swedish and Danish rent regulation is complemented by a protective regulation of duration and termination of contracts, which normally enable the tenant to opt for barely limited prorogations; also, the tenant has the right to transfer the tenancy to family members. As a result, it is in many cases impossible for the landlord to terminate the tenancy contract even for reasons of personal or family need. Against this background, the authors propose to assimilate the doctrinal concept of tenancies to that of ownership, so as to fully implement the principle of tenure neutrality. Yet the downside of this strict regulatory system is that a shortage of rental housing exists particularly in metropolitan areas; and unlawful practices such as illegal subletting of rent controlled dwellings at market prices or illegal compensation payments for the transfer of a 'cheap' rent-controlled dwelling are frequently reported.

The last report by Annika Klopp and myself on the 'tenant countries' Switzerland, Austria and Germany, which have the highest shares of tenants in Europe, has an economic starting point: Rental tenancies constitute an economically efficient debt financing of housing needs; and if preceded by bank financing of property acquisition by the landlord, even a third level of economic value creation is generated. Economically, renting is thus more efficient than owner occupation. This finding gives rise to a basic thesis: To the extent that balanced regulation contributes to a high share of rental tenancies, it also accounts for macroeconomic benefits. For Austria, this thesis may be confirmed only partially with respect to the well-regulated and organised social rental sector funded by the State. However, private rentals are covered by various complicated regimes with different scopes of application, most of which stipulate forms of statutory rent control for social reasons. That notwithstanding, the average cost for private renting is higher than in Germany where there is no comparable direct rent control. The case of Switzerland, with a tenant share of nearly 60 per cent, is more in point. Tenancy law is regulated in a relatively balanced way, although there is a certain pro landlord-tendency. However, the resort to tenancies may also be explained by the lack of viable alternatives. Thus, social housing is scarcely available and only indirectly funded by the State; and owner occupancy is affected not only

by very high market prices but also by a negative tax treatment, according to which the fictitious rental value of owner-occupied dwellings is subject to income tax. The final case of Germany with a tenant ratio of about 50 per cent might provide the most convincing example. Regulation is relatively equilibrated, though with slight advantages for tenants; the '*Mietspiegel*', a statistical compilation issued by municipalities on local neighbourhood average rents which must not be exceeded by the parties, constitutes a viable compromise solution between free market rents and rents controlled by statute. Alternative tenures are more easily accessible than in Switzerland: Whereas social housing has also been limited in favour of subject-based subsidies of tenants in need, the subsidisation of private rental buildings is possible on the condition that they observe a social rent below the market for a period of 15 years. Home ownership enjoys a high public reputation and is promoted by legislation as well as by stable financing conditions. Nevertheless, the current housing situation is vulnerable: Market rents in attractive areas have skyrocketed in recent years, and the profitability of housing investments might be reduced by the recent 'rent break' regulation introducing rent caps, although these have not, up until now, managed to limit the massive rent increases of the last years; and the shrinking supply of social housing is increasingly unable to meet the growing demand caused by internal migration and the afflux of refugees.

What are the lessons which could be drawn for a possible role of the European Union in tenancy regulation, given this extremely diverse and complex panorama of housing policies, markets and their legal regulation? As expounded in the epilogue, whereas unification is neither politically desired nor opportune, a European recommendation of best practices including draft rules and default contracts implementing a regulatory equilibrium would be a rewarding step forward.