The Constitutional Dimensions of Tenancy Law in the European Union
Background Paper

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Introduction

This paper attempts to give some further keys to the reading of the "Tenancy Law Reports" by country. It does not intend to give a comparative synthesis of those reports – a point which is dealt with in the general report –, but rather to let the reader understand what is common to most if not all legal systems studied in this research, and even more what remains different from one country to another, as regards the constitutional dimension of private law issues and especially of tenancy issues, how they emerge in court cases mainly, and how they can be treated in the implementation of landlord-tenant relationships. The paper is based upon the author's views in comparative law, his knowledge of the main legal systems of European Union (EU) member states and his reading of the country reports, and will therefore contain only few references.

The phenomenon of constitutionalisation which has very much developed in European countries since about three decades can only be understood with a broad view of what constitutional law means: it is certainly not limited to the presence of relevant provisions in the written constitutions : the United Kingdom is one of the countries which is undergoing one of the most dynamic phenomena of constitutionalisation, although a written constitution is still not on the agenda[1] ; some of the most relevant sources of positive law which contribute to the

[1] See especially Dawn OLIVER, *Constitutional Reform in the UK*, Oxford: Oxford University Press, 2003.

phenomenon are not formally speaking constitutions, but the EU/European Community (EC) treaties[2], and the European Convention of Human Rights (ECHR), and the jurisprudence of the European Courts of Justice in Luxembourg (ECJ) and of Human Rights in Strasbourg (ECtHR), or even non binding instruments, such as the EU Charter of Fundamental Rights of 2000 (EU Charter).

Rather than trying to come up with a definition of the notion of "Constitutional Dimensions", this paper will concentrate on the Constitutionalisation of Private Law as a common phenomenon in present and future member states of the EU, and only address as a matter of conclusion the main features of the constitutionalisation of EU and EC law and its impact on private law in member states, as well as the application of European fundamental rights to tenancy law.

Constitutionalisation of Private Law as a Common Phenomenon in Present and Future Member States of the European Union

Constitutionalisation of Private Law is a phenomenon that can be spotted mainly through three channels: scholarly work, court-cases and written legislation.

Doctrine

In the last quarter of the twentieth century, scholars in public law and especially those authors specialised in constitutional law have more and more been interested in issues which were for a long time considered as belonging only to the sphere of private law – i.e. the legal

[2] See Koen LENAERTS & Piet VAN NUFFEL, *Constitutional Law of the European Union*, (Robert Bray, editor),

relationship between private parties – especially in the field of contracts, liability and property. In most cases this happened as a reaction to developments in case-law, or sometimes legislation (both at the level of constitutional amendments and acts of Parliament).

The impact has been quite different from one country to another, especially due to the fact that in most European legal systems, contracts, liability and property as such are considered as typical instruments or fields of private law, whereas public law instruments are based on unilateral manifestations of state power (or more broadly the powers of public authorities): legislation and regulation, administrative decisions etc. This however is not true of all systems: in the French system of administrative law – which has influenced many countries in general terms, but not on this precise issue (with the exception of Portugal and to a certain extent Bulgaria and Romania) – a quantitatively very important part of administrative law deals with contracts and liability cases involving the state, local government or public agencies, as well as public property. In this type of legal system, practitioners and academics who deal with administrative law are since long accustomed to consider most of the issues relevant to landlord-tenant relationship. It should be noted however, that in these legal systems, the phenomenon of constitutionalisation is rather recent, especially in France, where a number of principles which are nowadays considered as "constitutional" were identified as general principles of (administrative) law until the last quarter of the twentieth century.

Courts and judge-made law

Judge-made law has probably been the main instrument of constitutionalisation. While public law doctrine concentrates its attention on Constitutional courts, especially in comparative

Sweet & Maxwell, London, 1999.

law, the role of ordinary courts is probably far more important in practice, especially when it comes to such issues as those relating to tenancy law.

The Role of Constitutional Courts

Constitutional courts do not exist in all countries, although their presence has been increasingly considered as a typical feature of European constitutions. In a number of national legal systems, the lack of a constitutional court is due to the fact that judicial review by ordinary courts traditionally includes reviewing the constitutional validity of statutes, regulations and other public decisions, like in Denmark since the nineteenth century, in Greece and Ireland since the first decades of the twentieth century, or more recently in Sweden, and Finland. Two countries however continue resisting the trend towards judicial review of the constitutionality of acts of Parliament. In the Netherlands an explicit choice has been made not to allow judges to have this power, during the discussions which took place in the nineteen-seventies and lead to the adoption of the new Constitution of 1983. In the United Kingdom, the lack of a written constitution impedes the establishment of such a power for the courts.

In the other member states (present and future) the Austrian model of a specialised constitutional court has been followed, although with considerable variations in the institutional setting, and more importantly in the system of constitutional remedies[3]. Without going into any details about the different systems of constitutional remedies, it is worthwhile having in mind that in a number of countries, disputes on constitutionality may be referred – or in some cases have to be referred – by ordinary courts to the constitutional court. In these countries, judges in ordinary courts have been confronted with the issue of constitutionalisation in a direct way, as

[3] See Michel FROMONT, *La justice constitutionnelle dans le monde*, Dalloz, collection : Connaissance du droit, 1996, and Wojciech SADURSKI, *Constitutional Justice, East And West*, Lancaster, Kluwer Academic Publishers, 2002.

happened first in Germany and Italy in the nineteen-fifties. Conversely if the remedies are wide open and allow private parties to bring constitutional issues directly to the constitutional court (a feature that is to be found in Germany again, but also in Spain and in a growing number of other countries), issues of constitutionalisation tend to be looked at almost only by constitutional judges. The French model of the *Conseil constitutionnel* is even more restrictive as the issues about constitutionality of statutes are concentrated with the constitutional court, and before statutes enter into force. Nevertheless, a number of constitutional issues are dealt with by the ordinary courts and especially their supreme courts (*Cour de Cassation* for civil and private law matters as well as criminal matters, *Conseil d'Etat* for administrative law matters), due to the fact that government regulations may be issued in a number of areas without having to be based first on an act of Parliament. The types of remedies which exist in a given legal system have a very important impact on the way constitutional courts see their role and on the type, quality and quantity of cases which are brought to their decision.

But regardless of the type of remedies which are available to bring constitutional issues to them, all constitutional courts have a major role in two aspects of the process of the constitutionalisation of rights. Their first main function is to spell out the constitutional boundaries to the exercise of subjective rights by individuals, through the interpretation of the "catalogue of fundamental rights" which is contained either explicitly or implicitly in the Constitution. This function has led to one of the major aspects of constitutionalisation, i.e. the quantitative growth of principles which have constitutional value and are applicable in private law. The second main function is to arbitrate in cases of "collisions of constitutional rights" (to use a German vocabulary), i.e. to decide cases where two or several constitutional rights would be applicable with different or even opposed consequences, like the right to private property *v.* equal treatment or freedom of expression, or even *v.* a right to housing, when this is considered

as a constitutional right. The constitutional issues which are relevant for the subject mater of tenancy law are being referred to in the national reports. This is the aspect of court decisions where legal interpretation has probably the largest margin of manoeuvre, as the solution is not based on either a hierarchy of norms or on the application of classical principles of interpretation, like the prevalence of the more recent norm over the more ancient norm, or of the more specific norm over the more general norm.

The Issue of Horizontal Effect of Fundamental Rights

German doctrine has developed the theory of "horizontal effect of fundamental rights", which is being referred to more and more by scholars in the fields of legal theory and human rights or in comments on the constitutionalisation of private law. Very often however, there seems to be confusion between the issue of the applicability of constitutional principles to private law litigation on one hand and the collision between constitutional principles applicable to litigation on the other. In the case of Germany, where the doctrine of horizontal effect originates from, the doctrine is enshrined in a constitutional system where the Basic Law is spelling out the rights in detail and, even more importantly, where the constitutional dimension of private law disputes can be submitted to the Constitutional Court, but where the Basic Law does not empower the Constitutional Court in settling the litigation between private parties which is at the origin or the constitutional issue. This determining feature of the German system is usually being overlooked by the scholars who try and generalise the doctrine horizontal effect or transplant it to other legal systems. Furthermore there is some confusion between this doctrinal issue, which is based in national constitutional Law, and the issues of horizontal effect of directives in EU law and of horizontal effect of fundamental rights in the framework of the ECHR. In the two latter cases, the "constitutional instrument" is a treaty between sovereign States, and this is a justification to asking the question of the extent to which the parties intended or agreed to confer

rights upon individuals. In the case of national constitutional law, the issue is somewhat different.

The assumption underlying the questioning of a possible horizontal effect of fundamental rights is that the Constitution, being the expression of the State, only confers rights as against the State – or broadly speaking as against public authority. This assumption needs to be challenged not only in legal theory, but also in positive law. The theory of social contract, which is at the basis of classical liberal constitutionalism (especially in the United States and in France) deprives the questioning of horizontal effect from its main basis, and this explains why French courts for instance, have not hesitated to apply fundamental rights to private disputes – when no specific statutory instrument spelling out those rights was available. The idea that rights are conferred by the State – an idea which has very much been developed by late nineteenth century German doctrine in order to spell out the "*Rechtstaat"* in a non-democratic context – is conversely at the root of the debate about a possible horizontal effect of fundamental rights, and on the judicial solutions given to this issue in Germany. This debate is totally absent – one could say it is irrelevant – in a number of countries, like Ireland where the fundamental rights spelt out in the Constitution of 1937 have always been considered as applicable in relationships between private parties as well as in litigation against public authorities.

The Role of Ordinary Courts

Ordinary courts – i.e. courts which are not specialised in solving constitutional disputes – also have a very important role in the constitutionalisation of private law, a fact which is however often being overlooked in doctrine. Here again the role of the courts varies according to the degree of specification of fundamental rights in norms which have a constitutional value, and

according to the remedies which are available in order to challenge the constitutionality of legislation or more broadly, public decisions.

In the countries which followed the German and Italian post World War II models (the majority of present and future EU member states), a precise catalogue of fundamental rights with undoubted constitutional values coexists with a set of specific constitutional remedies which necessarily put the question of constitutionality to the ordinary judges : even if these judges do not have the power to quash legislation or decisions that do not respect the constitution, they need to consider the issue of constitutionality, in order to decide whether the case needs to be referred to the constitutional court principles – be it only through a question of preliminary ruling on validity – because there is a possibility that statutory law or public decisions are conflicting with constitutional. In those countries, judges and other members of the legal profession who had been trained under another system, where they only had to apply the law and to use its possible margins of appreciation, took some time to react and to internalise the idea that they had a role to play in assessing constitutionality. The experience undergone in Germany and Italy in the sixties shows that after a time of adaptation, these members of the legal profession tend more and more to examine whether there are relevant issues of constitutional law in a private dispute. This is probably the core of the phenomenon of constitutionalisation in practical terms. In these countries the impact of the ECHR seems less important than in countries which do not have a detailed charter of fundamental rights and/or a fully-fledged system of constitutional remedies, especially if the wording of the national constitution is recent or flexible enough to offer solid ground for argumentation.

In countries which on the contrary do not have a comprehensive catalogue of constitutional rights (like France or Britain) or where remedies for the review of constitutionality

either are only concentrated with the Constitutional courts (like in France again) or are totally missing (as in the Netherlands or in the United Kingdom), the ECHR very often will be the fundamental instrument of reference for the legal profession, which will develop functional equivalents to the instruments used by their colleagues in the first group of countries. The UK is a very special case in that it not only lacks a written Constitution and thus any specific constitutional court or remedy, but also due to the very strict application of the doctrine of duality between international and national law, which made it impossible to refer to the ECHR in a litigation brought before British courts until the entry into force of the 1999 Human Rights Act. Since then, the issues about fundamental right which can be brought to courts and the powers related to settling these issues remain limited by the very specific remedies provided by the 1999 Human Rights Act which incorporates the ECHR into the law of the United Kingdom.

Functional Equivalents to the Constitutionalisation of Private Law

Looking back at a period where constitutional review was the exception (broadly speaking until the nineteen-sixties, with the exception of Germany, Italy and Austria) helps noticing that there have been functional equivalents to the constitutionalisation of private law since a long time, both in allowing for a hierarchy of rights and for limits to the freedom of action of private parties in contract law, the law of liability and property law. Even though the phenomenon of constitutionalisation is underway in Europe since one up to three decades – with differences according to countries –, these functional equivalents remain available for national courts, and sometimes may explain why there is little jurisprudence on constitutional cases.

Special attention should be devoted to two instruments which have been used by judges in private law dispute in a number of European countries long before the constitutionalisation of private law developed, and which are still being used either as an alternative or as a complement

to constitutional principles, e.g. the notions of *ordre public* and that of *lois de police*. Both notions (which certainly should not be translated by *public order* or *police regulations*) refer to instruments used by courts in order to limit the freedom of private parties. *Ordre public* is being used in order to quash contractual clauses even when there are no specific statutory prohibitions of such clauses. *Ordre public* is also being used in order to avoid courts from being limited by the arguments that the parties have brought forward in a case: where *ordre public* considerations (*moyens d'ordre public*) are relevant to the solution of a litigation, judges are not only free to consider them even if they have not been mentioned by any party, they are obliged to consider them upon their own initiative. *Ordre public* may also be used in order to limit the application of foreign law in disputes which are brought to the decision of a court due to the conflict rules of private international law. In the latter case, *lois de police* are also used for the same purpose.

Ordre public and *lois de police* are functional equivalent of constitutional rights for several reasons: they allow for a limitation of the freedom of private parties in the absence of specific statutory provisions and they are subject to far more interpretative activism by the courts than the mere application of statutory provisions would be. The equivalence is even more obvious in systems which do not have a catalogue of fundamental rights embedded in their constitution: like human rights in the latter case, *ordre public* and *lois de police* are principles of judge made law, in the same way as *principes généraux du droit*, a concept common amongst others to EC/EU law and to French administrative and constitutional law. These general principles go far beyond the English concept of *principles of natural justice*, because they include not only procedural but also substantive rights. The use of *ordre public, lois de police* and *principes généraux du droit* does not only open the possibility of judicial activism in a much broader way than the mere interpretation of positive law, they also generate a broad debate amongst scholars, and between courts and scholars. The relevance of all these instruments to the

topic of tenancy law is obvious in the case of the "right to housing" (*droit au logement*) which may or may not be included in a written catalogue of fundamental rights, and which tends to be considered as included in *lois de police* by a number of scholars, as well as by the principle of non-discrimination which is to a large extent included in the notion of *ordre public*.

Legislation

A third instrument of constitutionalisation is written law typically by way of constitutional amendments, but also in some cases by the use of Acts of Parliament. I think it is only worthwhile to be mentioned in third position, after doctrine and judge-made law whereas a narrow view of constitutionalism would lead to consider only constitutional amendments to be a vehicle for constitutionalisation.

A number of formal differences have to be made when trying to compare different legal systems as far as constitutional amendments are concerned. These formal differences often are not taken into account by those – be they politicians or scholars – who try and compare the constitutional wordings of emergent rights in different European countries. A first formal difference between countries is obviously due to amendment procedures, which vary greatly from one country to another as far as technical requirements are concerned, but which are more largely influenced by the party-system at a given place and time. A second difference is due to the possible existence of different levels of statutory law. In a number of countries statutory law is being limited to acts of parliament and delegated legislation, which is adopted by the executive on the basis of a parliamentary delegation in order to set up detailed procedures and possibly criteria for the implementation of basic statutory law. But there are countries like France, where the Constitution provides for a broad scope for governmental regulation which derives directly from a constitutional authorisation and does not need a specific mention in an act of parliament.

This is particularly important when it comes to the implementation of EC directives and it is explaining why the same directive may be transposed by a Law adopted by the *Bundestag* (federal parliament) and the *Bundesrat* (federal council) in Germany and by government decree in France, for instance. Furthermore, the possibility to regulate a matter by governmental statutory law submitted to ex-post ratification (implicit or explicit) by parliament (delegated legislation in the United Kingdom, decreti legge in Italy) has an influence. The more possibilities are available for governmental statutory law, the more acts of parliament do acquire a symbolic character ; this may lead to the fact that an Act of Parliament appears to be sufficient in order to mark the importance of a certain set of principles and makes it unnecessary to resort to constitutional amendments. Conversely if there is little leeway for important normative activity through acts of governmental statutory law, and if the procedure for constitutional amendment is not too difficult to be applied, a number of these principles will rather appear in the form of constitutional amendments. Forgetting those aspects might induce wrong conclusions when comparing the type of constitutional principles applicable in different countries to the landlord-tenant relationship.

Furthermore important differences are due to the form of the relevant state. In a unitary state, the only statutory instruments to be taken into account are acts of parliament and governmental delegated legislation. But only eleven out of twenty five of the present and future EU member states are purely unitary states. In Austria, Belgium, Germany, Italy and Spain the power of making statutory law may be exercised centrally or at regional level throughout the entire country, whereas In the case of Finland, France, Portugal, and the United Kingdom – one might even add Denmark for the Faeroe Islands and Greenland, as well as the Netherlands for Aruba and the Dutch West Indies – there are parts of the territory where two level are available for statutory law making. With an issue like tenancy law, it is highly improbable that the entire

competence for regulating all the relevant aspects of the landlord-tenant relationship can be given to one single level of regulation; this in turn may push towards the use of constitutional amendments in order to ensure that the general principles applicable be the same throughout the country, regardless of the form of the state.

More generally speaking these formal and procedural aspects also have to be taken into account when trying to assess the issue of horizontal effects of fundamental rights. In the debate about horizontal effect, there seems to be little reflection upon the fact that statutory law may in principle affect the relationship between private persons; if constitutional amendments are to be preferred to acts of parliament in order to establish new principles – like the right to housing – in one country, it might be due mainly to a combination of formal requirements and to the more ore less important feasibility of majority decision making in parliament due to the system of political parties. Why then should one deny horizontal effect to a principle on the mere basis of its formal (constitutional) status?

Only once all these elements have been taken into account will it be useful to try and analyse in a comparative way which kind of principles of constitutional or statutory law have been adopted as a reflection of societal evolution, which ones are to be analysed as a reaction to jurisprudence – either in order to consolidate and develop principles which courts have put forward in a piecemeal way in order to solve the cases which have been brought to their decision, or in order to redress a judge-made regulation that does not correspond to the feelings of the parliamentary majority or a bigger number of actors.

As the EU and EC treaties do not establish the grounds for a supranational competence to regulate the landlord-tenant relationship it is only through indirect or diagonal ways that EU Law impacts upon this field, as noted in the national reports, i.e. mainly through provisions of EC delegated legislation and jurisprudence relating to consumer protection, through treaty principles and case law relating to the free movement of persons and through the provisions on non-discrimination. The impact of the ECHR has a broader scope as it is not limited by the functional character of EC/EU competences, but in most cases ECHR principles do not add very much to the national constitutional principles applicable to tenancy relationships. In the case of the ECHR however, this impact varies far more from one country to another than in the case of EC law. This is due to the differences in the systems of constitutional review: in those countries which have a very wide and deep ranging system of constitutional review, the ECHR has rather a complementary function, whereas in the countries where constitutional review of legislation is either very restricted or absent, the ECHR tends to have a major impact as the most important source of human right principle to which courts can resort.

Constitutionalisation of EU law is not a new phenomenon. Doctrine has to a large extent considered the EC and then EU treaties as having a constitutional content, and it has been followed by the ECJ. As far as its impact upon the private law of member States is concerned, the constitutionalisation of EU law has little relevance as such, because the principle of primacy of Community law is applicable to the entire EC law: treaties, secondary legislation and case law of the ECJ. However, with the work of the Convention on Human Rights (2000) and of the

European Convention (2002-2003) which has led to the adoption of a Draft Treaty establishing a Constitution for Europe, the issue of constitutionalisation of European law acquires a new prospective dimension.

First, one will have to consider that, while the legal bases linked to market integration have not been altered by the work of the European Convention, the new Articles 2 and 3 on values and objectives of the Union, as well as the change in the order in which legal bases will appear in the third part of the Constitutional treaty might affect the interpretation given by European and national Courts to already existing relevant law. This might also influence the European legislator in shifting towards a more social (and less economic) approach on the whole (also depending on the results of the elections at the European Parliament). More importantly maybe, the suppression of the pillar structure and the inclusion of the Area of Freedom and Justice in the ordinary system of legal bases might have consequences in the future as far as the issues that impact upon tenancy law are concerned. A special attention should be devoted to the new formulation of the clause on judicial cooperation in civil matters, which aims at a high level of judicial protection: this might lead to some degree of harmonisation in procedural matters.

Second, the codification and consolidation of fundamental rights which has been undertaken by the two Conventions (for content as far the first Convention is concerned, for the legally binding effect of the Charter in the case of the second Convention) will probably have an impact upon the European legislator, and they have already had an impact upon the way the ECJ interprets EC and EU law. It will probably also impact upon the attitude of national courts in the implementation of EC law. No right to housing (droit au logement) is granted by the Charter, as there are no promises of this kind of right in existing Community law, and as it still is a right which is not formulated in all national constitutions. However, the Charter's insistence upon

dignity, which is also embedded in Article 2 of the draft constitutional treaty, might trigger interesting developments in those fields of law which have an impact upon tenancy issues.