Principles of Social Contract Law and Residential Tenancy Law

A Plea for Restrictive Termination and Fair Duration

I.

One of Udo's greatest achievements is the elaboration of general principles for social "lifetime contracts", as they were called impressively - reminding us that in long term contracts in labour, tenancy or credit law, not legal-technical specificities but humans' most valuable asset, irretrievable lifetime, is at stake.[1] Lifetime contractual relationships such as working for a firm for 30 years, taking a house loan from a bank to be paid back in installments for 20 years, or renting a family home for 40 years, are essentially different from one shot transactions such as the purchase of a car. Whereas any layman is likely to agree to this finding, Western codifications, in their pursuit of systematic unity and consistency, have clumsily treated long term and one shot contracts with the same general rules. In contrast, the principles of social contract law constitute an alternative general part of the law of obligations for lifetime contracts. Though no legislator has shown interest to adopt them up to the present day, the principles of social contract law lay done social standards against which the outcomes of traditional rules from codification may be measured. And as critics of our liberalist codifications, we may now invoke a new European scientific standard embodied in the principles. Not at small achievement by their intellectual fathers!

II.

One of the core principles of social contract law is that on termination: *"Termination of life time contracts must be transparent, accountable and socially responsible. Early termination against the will of the consumer, tenant or worker must be a measure of last resort. Disclosure of true and fair grounds for termination must be non-discriminatory and be provided a reasonable period before termination comes into effect. The only grounds for termination are personal behaviour of such significance as to merit termination, or financial circumstances or interests on the part of the provider which materially affect the viability of the subject matter of the contract. Where the reasons for termination are financial in nature, users are entitled to have recourse to mechanisms of collective redress, including the right of the individual to be heard or represented. This procedure must allow sufficient time for users to put forward measures preventing termination and/or its consequences. As far as the termination is in the interest of that party which has developed the contract and organised the service it has to consider the interest of the other party with due diligence."*[2]

III.

Of course, from a perspective of social private law, one cannot but agree to this principle of restrictive termination and the various elements specifying it. Yet, when related to tenancy law and practice, it appears that there are significant gaps which should be filled to render the principle fully effective and to counteract adverse reactions by markets and contract partners.

(1) As legitimate grounds for termination, the principle first mentions adverse personal ("anti-social") behavior, which is indeed very relevant for tenancy relations. The second scenario, financial circumstances or interests on the part of the provider which disrupt the contractual equilibrium to the disadvantage of the landlord, would seem to include

[1] See L. Nogler / U. Reifner (eds), Life time contracts, 2014

[2] Luca Nogler/ Udo Reifner, ibid., p. XIX. All information on tenancy law contained in this contribution may be found at www.tenlaw.uni-bremen.de and Ch. U. Schmid (ed.), Tenancy Law and Housing Policy in Europe, 2018.

payment default situations, which are probably the most frequent reason for termination. Yet, in the event of payment default, many legal orders foresee additional periods of grace and other protective mechanisms which may even go beyond the content of the restrictive termination principle examined here. Beyond default scenarios, *clausula rebus sic stantibus* situations (which are also dealt with in social principle no. 10 on adaptation of lifetime contracts), where the rent has become excessively low and cannot easily be increased, are very rare unless artificially low rents have been imposed by statute. Such interventionist forms of rent regulation have existed in Eastern European countries during the transition period from Communism to Market Economy and may still be found today, albeit in less radical forms, in the Netherlands or Austria. Significantly, such rent regulation may violate the landlord's property rights, as held in important ECHR jurisprudence as the Polish Hutten-Czapska case.[3] But it would be against the spirit of the restrictive termination principle to grant the landlord an additional termination right in this situation, as it is sufficient to allow him to increase the rent in a reasonable way.

(2) Another important situation not explicitly contemplated by the restrictive termination principle[4] arises when the landlord seeks to terminate the contract as he wants to change the economic use of the building; e.g., by converting a residential into a commercial building; by splitting up a big residential building into several units; or by carrying out comprehensive renovation works to conserve and modernize the building and/or to upgrade its energetic performance, which do not allow the tenant to stay. Moreover, the restrictive termination principle fails to address terminations due to personal reasons of the landlord, in particular when the landlord or close relatives need the dwelling for themselves. All these reasons for termination are accepted in almost all European systems, and they seem legitimate from a perspective of social justice as well, as landlords would otherwise be dissuaded from making available, and investing in, residential buildings in the first place. As a result, private rental markets would be seriously affected, and the States would be forced to make available more dwellings, which is little realistic in times of austerity.

(3) Finally and most importantly, the restrictive termination principle fails to address unfair short term contracts. It is true that principle no. 3 on *long-term relationships* aims at protecting somewhat vaguely "*the mutual trust between the parties as to the durability of the long-term relationship"*, but with the only explicit consequence that "*early termination must have only future effect, i.e. having no bearing on the contract prior to that point".* So this principle seems to presuppose the existence of a long-term relationship, rather than setting limits to unfair short term contacts. These are, however, common in tenancy law (and also in labor law) in many, if not most, European countries. To start with, the British default regime for residential tenancies, the so-called assured shorthold, is limited to six months of security of tenure only, after which the landlord is completely free not to renew the contract for whatever reason. Even the retaliatory eviction of a tenant invoking statutory rights is possible under this regime. It is obvious that the restrictions of termination are not very relevant as long as unfair short term contracts are lawful, as the former may simply be circumvented by the latter.
Similarly, though less drastically, Romanic countries drawing inspiration from the French Code Civil do not, as a principle, allow open-ended contracts, as these were considered as an excessive self-limitation by the masterminds of the Code Civil, who were strongly

[3] Application 35041/97, see M. Habdas and G. Panek, in the Tenlaw book above.

[4] It should be noted that there are slight differences between the various language versions: Whereas the German term "Wirtschaftlichkeit" may encompass this situation, the English, French and Italian versions are narrower and come close to the *clausula rebus sic stantibus* scenario (*"financial circumstances or interests … which materially affect the viability of the subject matter of the contract").*

influenced by the ideals of the French revolution. Therefore, tenancy contracts are, in current French law, concluded for a regular period of three years (six years if the landlord is a legal person), which is however compensated by fair renewal rights. This is different in Italy where the contractual default period is of four plus four years. Whereas after the first four years, the contract is automatically renewed for further four years, unless the landlord has legitimate reasons for termination, no such reasons are necessary for the landlord's decision not to prolong the tenancy after eight years. This confers a huge blackmail potential on landlords, as tenants will often be prepared to pay higher than market rents in order to stay in dwellings which have become the centre of their social lives.

IV.

To address these cases, restrictive termination should be supplemented by another principle according to which lifetime contracts shall have a fair duration. According to such a principle, short tenancies should only be possible when legitimate reasons exist at the time of their conclusion; *e.g.*, transitory housing needs in the case of students, posted workers or tourists; in case of close personal relationships among the parties, as with rented rooms in the house of the landlord; and finally when a foreseeable personal need (or another legitimate circumstance) of the owner or close relatives exists. For all other, i.e., all regular tenancies, the minimum duration should be at least of three years, which would render impossible from the outset unfair schemes such as the British assured shorthold. Following the French example, fair prolongation rights should exist, according to which the tenant is entitled to periodic renewals of the contract unless the owner is able to invoke legitimate reasons (for which the law should provide an exhaustive list) not to renew the contract. These specifications apply to tenancy contracts only, but could also be developed for labor law in a similar manner, to counteract bad practices such as "chain contracts" (successive short term contracts). At the level of general principles, applicable to all lifetime contracts, it is sufficient to set forth a further principle of fair duration. Fair duration is therefore a logical complement, a legal Siamse twin, as it were, of restrictive termination: One cannot meaningfully exist without the other.

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