A ‘Rights-based Approach’ to Security of Tenure Entitlement in Social Housing

Simon Hoffman and Jill Morgan

School of Law, Swansea University, Wales (UK)

European Network for Housing Research, Prague Conference, 28th June-1st July 2009

WORKSHOP 12

A ‘Rights-based Approach’ to Security of Tenure Entitlement in Social Housing

Simon Hoffman and Jill Morgan

School of Law, Swansea University, Wales (UK)

Keywords: Social housing, rights-based approach, anti-social behaviour, conditionality, security of tenure.

Abstract

Housing meets one of the most basic human needs, the need for shelter. Housing is a fundamental human right recognised in international legal instruments an aspect of which is security of tenure. Despite its importance to individual and societal well-being government in the United Kingdom has been gradually disengaging from housing policy which guarantees long-term security of tenure in public sector rented housing. The priorities for social policy have shifted through the erosion of welfarism and its displacement by safety and security as key policy drivers. This paper discusses recent changes in housing in the UK. It argues that despite difficulties inherent in the delivery of enforceable socio-economic rights government is not meeting its responsibility to meet housing expectations set out in international instruments. It will be argued that security concerns dominate the policy agenda, weakening the claim to housing as a right over qualified entitlements. The greatest impact has been for those who lack the means and influence to resist the subversion of housing rights. The author concludes that if housing in the UK is to meet expectations established in international legal instruments more needs to be done to promote housing rights as fundamental and to re-instate the aims of housing policy over other public policy objectives.

Introduction

Article 25(1) of the 1948 Universal Declaration of Human Rights (UDHR) proclaims the right of everyone to a standard of living adequate for themselves and their family, including housing. The importance of housing for shelter, for human physical comfort, and for personal safety can hardly be doubted. A home is a refuge, a place essential for health and well-being, a centre for human activity (Buyse, 2006; REH, 2004). It permits individuals to gain and maintain employment, to provide for their families, to put down roots and develop a sense of belonging to community, and to participate in society (Fox, 2002; DCLG, 2007). These many facets of housing are attributes of ‘a shared humanity’, and are what led the international community to recognize housing as a fundamental human entitlement (GCST, 2002: 1).

There is a tendency to view international housing rights as relevant to the relief of poverty, inequality and disadvantage in developing countries or oppressive regimes where housing is denied and rights violated. Whilst it is certainly true that housing is relatively more advanced (availability, condition, security) in more affluent countries, gritty externalism overlooks problems of inadequacy intra-state. Within the UK there are problems of poor housing, homelessness, discrimination and insecurity affecting disadvantaged and marginalised social groups. This paper is concerned with the relationship between expectations for housing rights derived from international rights instruments, and social housing in the UK. The particular focus is on legal entitlements relevant to security of tenure and the impact of recent anti-social behaviour (ASB) policy for tenants. It will contend that influenced by an obsessional concern with the management of ASB the UK government has disengaged from policies which respect and protect housing rights. It will argue for a stronger 'rights-based approach' to social housing to reverse a trend toward weakened and conditional entitlements.

Analysis of housing rights from a legal point of view has a tendency to focus on interests in land. Accounts of housing and ASB often assume a governance perspective, in particular when discussing social housing. This paper will adopt a rights-based approach to assess the impact of ASB law and policy on security of tenure in social housing. It will first unpack housing rights from the composite of international legal instruments noting relevant aspects of the European Convention on Human Rights and Fundamental Freedoms (the Convention). The paper will then explain what is here meant by a rights-based approach before analyzing recent law and policy in the UK affecting security of tenure in social housing.

The Right to Security of Tenure

Adequate housing is relevant to issues of concern to the international community such as the relief of poverty (Ferraz, 2008). In international law housing entitlements emerge from the complexity of obligations and expectations set out in a number of rights documents. The content of housing rights in this context is elucidated by additional rights instruments, general comments issued by the UN High Commission for Human Rights, UN resolutions, reports and statements, as well as international agendas and accords agreed between member states; for example, the UN Habitat agenda (UN Habitat, 1996). Beyond the UDHR the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains the most

comprehensive assertion of housing entitlements and expectations. Article 11(1) of the ISESCR states:

> *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.*

Article 11(1) is the ‘most significant international legal source of the human right to adequate housing under international human rights law’ (GCST, 2002: 4). The UN Committee on Economic, Social and Cultural Rights (the ‘Committee’) has sought to elaborate on states’ responsibilities under article 11(1). The Committee has identified accessibility, affordability and security of tenure as key entitlements making up the right to adequate housing (CSECR, 1991). It has stressed that the right should not be interpreted in a ‘narrow or restrictive sense’: it is not to be equated with a right to shelter, or a mere ‘roof over one’s head’’ or as a mere ‘commodity’ (CESCR, 1991: para.7). Instead the right should be interpreted as an entitlement to ‘live somewhere in security, peace and dignity’ (CESCR, 1991: para. 6). The entitlement is extended to individuals as well as families, and its enjoyment must not be subject to any form of discrimination on grounds of ‘age, economic status, group or other affiliation or status and other such factors’ (CESCR, 1991). The non-discrimination principle applied to adequate housing is in accord with the International Convention on the Elimination of All Forms of Discrimination (article 5(e)(iii)).

The concept of adequacy is significant as it serves to draw attention to a number of issues which are relevant beyond provision and access. A key condition of adequacy under article 11(1) is security of tenure. The Committee comments that states should ensure that occupiers are provided with ‘legal security of tenure’ to protect against forced eviction, ‘harassment and other threats’, including in the public rented sector (CESCR, 1991: para. 8(a); Kothari, 2001). Article 11(1) is therefore relevant even where the majority of a state population is housed. The notion of security of tenure imports into the right to adequate housing an expectation that individuals and families will be permitted to remain in occupation and will be protected from eviction. It is this expectation that directs attention toward mechanisms in place to guarantee that housing remains available for use and occupation by an individual and their household (UN Habitat, 2006: para.39). The Committee, in considering the nature of states’ obligations under the ICESCR, has made it clear that whilst states may move progressively toward full realization of relevant social and economic rights, progress should not be undermined or eroded through ‘deliberately

retrogressive' measures (CESCR, 1990: para.9; Sachar, 1993). This expectation is confirmed by the Maastricht guidelines published on behalf of the International Commission of Jurists in 1997 to elaborate on the 1986 Limburg Principles (Maastricht, 1997: para.14; Eide, 2001).

The European Convention on Human Rights

Although the Convention is a code of civil and political rights this does not mean that social rights are irrelevant (Hughes and Davis, 2006). The European Court of Human Rights has described the Convention as extending into the sphere of socio-economic rights, commenting in *Airey v Ireland* that 'there is no water-tight division separating that sphere from the field covered by the Convention'[1]. This is not the place for a discussion of the relationship between socio-economic rights, housing rights and the Convention (see: Kenna, 2008; Hughes and Davis, 2006) but it is relevant to note that article 8(1) provides that 'everyone has the right to respect for ... his home', whilst article 1 of the First Protocol states that every person is entitled to 'peaceful enjoyment of his possessions' (including housing: *Mellacher v Austria*[2]). The duty set out in article 8(1) is in substance one of non-interference (*Marzari v Italy*[3]). Article 8(2) provides that interference with the article 8(1) right is only justified where this is in accordance with the law and necessary in the interests of 'national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.'

A Rights-based Approach to Housing

Marshall's often cited account of 'citizenship rights' encompasses civil and political entitlements which include rights to liberty, participation in political life, and the right to own property, as well as social and economic entitlements such as the right to live as a 'civilised being' (Marshall, 1950 [1992]: 8). Social policy has tended to engage with the concept of socio-economic rights as welfare entitlements demanded through the political process and given effect through legal structures, and not so much with the idea of housing as a human right (Dean, 2002 and 2008). In the UK housing rights or housing entitlements are based on moral or political claims put by or on behalf of social groups. Support in the political realm means that these are prioritized and given effect through housing policy or statute which will be used instrumentally to allocate resources and delegate responsibility for service delivery

(Malpass and Murie, 1999), and in some cases legalize entitlements through statutory recognition.

A rights-based approach to housing provides a conceptual framework for thinking about the content and outcomes of housing policy and statute centred on expectations set out in international rights instruments. Under the auspices of the UN the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action. The Declaration gives the duty of all states to 'promote and protect' all human rights and fundamental freedoms' (WCHR, 1993: para. 5). A rights-based approach to housing will reflect this expectation by integrating the norms and principles that emerge from international rights documents into processes of policy decision-making which will be evident in policy outcomes (Sachar, 1993; UN Habitat, 2006). The obligation to *protect* housing rights requires states to take action to prevent infringement or violation of the rights of individuals or social groups (GCST, 2002; see also: UNDP, 2006). Policies or actions which repeal or amend legislation which protects housing entitlements are inconsistent with a rights-based approach except where the intention is to replace it with equally protective laws (Sachar, 1993). A rights-based approach also requires states to *respect* rights. This includes public bodies and other agents of the state, and is an obligation to refrain from any policy or legal measure which undermines, erodes or removes the housing rights of individuals or social groups, or which weakens the legal status of housing rights (GCST, 2002: 22; see also: UNDP, 2006).

Fulfilment of international obligations, such as those set out in article 11(1), does not depend on incorporation into a state legal system (Sengupta, 2007). The realization of rights can be achieved through government prioritization and the allocation of resources; but there are strong arguments for legalization to be part of a rights-based approach in housing. The introduction of rights in law provides protection to vulnerable or disadvantaged groups, and to minorities in society, by giving judges the power to review and guarantee entitlements (Bilchitz, 2007: 105). In political context the legitimate expectations of marginalized social groups are liable to be displaced in favour of claims made by more affluent or more powerful groups. Socially excluded groups, such as those living in relative housing poverty within the UK or homeless persons, lack power and influence in society (Levitas, 1996), and are vulnerable to being overlooked in the political process and for prioritization. This is perhaps reflected in the government's failure to dedicate sufficient resources to bring public sector housing stock up to a decent standard (CHLGR, 2003-04), or to provide enough social housing to meet housing need (Barker, 2004).

Where rights are set out in legislation this enables aggrieved parties who claim their express housing rights have been infringed or violated to seek protection or redress through the formal institutions of justice (CSECR, 1991; GCST, 2002). A rights-based approach is therefore both transformative and empowering. It also delivers accountability as government is directed to pay attention to how to safeguard rights, including the rights of marginalized social groups (Leckie, 2000). An insistence on rights in law as part of a rights-based approach to housing contributes toward meeting the two imperatives of respect and protection for entitlements are given effect – it is a bulwark of housing rights. In order to meet with the obligation to protect entitlements a legalizing approach demands laws, procedures and redress mechanisms to prevent or respond to infringements or violations. The legal status of housing rights and access to judicial remedies are indicators that government recognises and respects the importance of housing entitlements, and provides a degree of permanency insulating housing rights from the 'whims of differing political institutions' (Leckie, 2000: 7).

Problematics of a Rights-based Approach?

Realization of socio-economic rights is dependent on choices made by government based on political priorities (Ferraz, 2006: 586) leading some to question whether or not they are capable of delivery (for discussion see: Pogge, 2002; Davis, 2008; McLachlan, 2005; Van Bueren, 2002). A related issue is whether or not socio-economic rights are best determined through 'majoritarianism' and the institutions of democracy or by the courts and the judiciary. This is a question of legitimacy and a suitably constructed rights-based argument serves to support the case in favour of judicial involvement (Bilchitcz, 2007: chp.4). In the UK the allocation of resources is ordinarily a matter of political prioritisation, censure for which is matter for democratic rather than judicial authority[4]. A further problematic affecting social-economic rights is that they are seen as inherently vague and therefore not capable of adjudication (for discussion see: Ferraz, 2008; Jheelan, 2007). These issues are contestable in the UK. However, the courts are involved in matters of prioritization as an aspect of judicial review of public sector implementation agencies involved with the delivery of socio-economic rights (Pillay, 2007). In the field of housing the argument that housing rights are too abstract to be justiciable is something of a fallacy (Sachar, 1995). The right to adequate housing is one of the most developed amongst the ICESCR entitlements in terms of content. The component elements of the right are inherently capable of adjudication, these include: protection against unreasonable or punitive eviction,

and security of tenure (Sachar, 1995). In the UK the relationship between landlord and tenant is regulated by legislation. As a consequence judges are involved in settling disputes concerning housing entitlements and interests in property by reference to rights set out in statute. Housing legislation often uses language capable of multiple interpretations requiring a court to have regard to wide-ranging factors in coming to a decision on the content of rights and how these are to be given effect. For example: disputes over the 'suitability' of housing in homelessness cases[5], the issue of 'reasonableness' in certain claims for possession of land[6], and, what constitutes a 'nuisance or annoyance' to establish a breach of tenancy[7]. In any event, these issues of enforceability, legitimacy and justiciability are only indirectly relevant to the discussion undertaken in this paper as we are here concerned with rights which have already been legally recognized and not aspirant rights.

A Framework for Analysis

One approach to analysis of social policy relevant to housing is to investigate the actions of government and the outcomes of policy decision-making and implementation processes focussing on issues of prioritization, finance, quality, and demography (Ham and Hill, 1993). In this sort of analysis the law is often ignored or regarded as a mere 'passive instrument for policy implementation' (Goodchild, 2001: 75). A rights-based approach of the sort contemplated in this paper requires an analysis of housing which simultaneously recognizes the significance of the policy process but also the importance of statute to deliver rights through enforceable legal entitlements.

To try and make sense of the complicated relationship between rights, social policy and law it is proposed to refer – albeit briefly – to Hohfeld's scheme for describing legal concepts (Hohfeld, 1963). It is not intended to enter into a detailed account of how this might be applied to an analysis of obligations in international law, or how these translate into individual entitlements. The relevance of Hohfeld's scheme to this paper is that it provides a way of thinking about housing entitlements which identifies relationships or 'correlations' between different types of 'rights' referred to in legal and policy discourse. Amongst these is a 'claim-right' the correlate of which is a duty in some other party who is burdened with responsibilities and obligations regarding the right-holder. A right-holder with a claim-right has a legal claim that another person should act, or omit to act, in a certain way. Hohfeld's scheme has been criticised along several lines, and may be inadequate or inaccurate to describe the nature of obligations or the complexity of legal relations that exist (Waldron,

1984: 8; Halpin, 1997). However, for the purposes of this analysis, which is narrowly focused on particular entitlements arising in social housing, reference to Hohfeld's typology helps avoid the sort of loose 'rights-talk' (Bix, 2006: 125) which often pervades discussion of law and policy, and within which 'rights' are often confused with policy (for example when we talk about the 'right' to housing).

Another useful tool for analysis to assess the strength of housing rights within the landlord/tenant relationship is the notion of 'casualization'. Casualization is often used to describe aspects of the relationship between employers and employees in the labour market (Freedland, 1976). It is a notion that has also been used to analyse housing in the UK (Morgan, 1996 and 2009). The utility of casualization in the context of a rights-based approach to housing is that it focuses attention on the outcomes of policy and tells us something about the relative strengths and weakness of rights. When applied to social housing casualization would suggest: (1) weakened security of tenure; (2) a shift in the balance of rights in favour of landlords making it easier to evict tenants; and (3) tenants as a disempowered and vulnerable social group. These sorts of outcomes are precisely what a rights-based approach to housing would seek to avoid by promoting security of tenure which in turn strengthens the position of tenants *viz-á-viz* landlords.

ASB, Policy and Security of Tenure in Social Housing

This section will consider changes in housing in the UK that have taken place in recent decades, including as a direct result of law and policy on ASB. For most of the last century the trend has been for the state to intervene in housing to safeguard occupier interests (Stewart, 1996: 145). For tenants in social housing this meant an increase in security of tenure as statute mitigated the hardship caused by the partiality of the common law in favour of property interests. The Protection from Eviction Act 1977, the Housing Act 1980 and now the Housing Act 1985 (HA 1985) all provide local authority and some housing association 'secure' tenants with extensive rights and protection against dispossession. More recently housing policy has taken place against the backdrop of a transition to a 'risk-society' (Beck, 1986), changes in attitudes to crime, crime prevention (Garland, 2001) and new governance arrangements in late modernism (Rose, 1999). It is beyond the scope of this paper to enter into discussion on these topics but a number of points need to be noted. Risk society is characterized by a fundamental concern for security (Furedi, 2002: 1). In the risk-society government is motivated by a desire to minimise risk through public policy and the

prevention of disorder and ASB (Garland, 2001: 12). Strategies for dealing with the problem of ASB are embedded as part of the 'architecture of governance' (Flint, 2006: 1) and have impacted significantly on social housing. Tenants in social housing are identified as proper recipients of coercive and punitive interventions to put a stop to ASB (Burney, 1995 and 2005). A key strategy for management of ASB is to responsibilize tenants making them liable for their own behaviour and the behaviour of others. In this context government insists on promulgating a transactional discourse of rights and responsibilities (Home Office, 2003). Accordingly policy demands that tenants need to be made aware that keeping their home is dependent on their own behaviour toward neighbours and the community, and the behaviour of those for whom they are responsible (Home Office, 2003). The continuing occupation of social housing is seen as conditional on tenants acting within the bounds of acceptable behaviour which is the antithesis of ASB (see: Carr and Cowan, 2006). Poor behaviour is likely to result in the tenant and their family having their housing rights withdrawn. Conditionality in social housing is part of a wider social turn toward conditionality in welfare (Dwyer, 2004; DSS, 1998: for a discussion of when (if at all) conditionality might be legitimate, see: Deacon, 2004).

One technique used to promote self-discipline and self-regulation as an aspect of governance is contractual governance (Crawford, 2003). The tenancy agreement is a paradigm control contract (Donoghue, 2008); a tool to manipulate the behaviour of tenants in social housing as an aspect of the tenancy management practices of social landlords (Lister, 2006; Hunter, 2006). But also as a vehicle for the extension of conditionality (Flint, 2006: 328). In order to strengthen the arm of social landlords to exercise control tenant rights in existing tenures have been weakened and new forms of less secure tenancy have been introduced. The Housing Act 1996 (HA 1996) amended the HA 1985 and the HA 1988 to widen the 'nuisance or annoyance' ground for possession to make tenants responsible for their own behaviour and that of their household but also their visitors[8]. Tenants are liable to be evicted even where they are unable to control third party behaviour[9]. Although a judge may refuse a social landlord possession on reasonableness grounds statute has structured the court's discretion in this area. The Anti-social Behaviour Act 2003 (ABA 2003) amended the HA 1985 and HA 1988 so that in possession claims based on ASB a court deciding whether to make a possession order has to take into account the effect of the ASB on persons other than the perpetrator[10]. The role of the court in these cases is to balance the risk of future harm to neighbours against the interests of the tenant (Madge *et al*, 2006; para.2.73). The Court of Appeal has demonstrated sensitivity to the government's agenda on ASB,

confirming on numerous occasions the relevance of victim and community interests in possession claims involving ASB[11].

Whereas legislation has weakened the entitlements of tenants already in occupation of social housing the position is worse for some new tenants. Under Part V of the HA 1996 a local authority may elect to adopt an introductory tenancy regime. An introductory tenancy is a tenancy on a probationary basis for up to 18 months which permits the local authority to evict a tenant without reference to substantial grounds. Although a possession order is required the court's role is limited to ensuring that proceedings are regular: it cannot enter into any sort of meaningful assessment of the merits of a landlord's claim. Some protection is given to the tenant as a decision to terminate an introductory tenancy is amenable to judicial review at which time the court will have regard to the Human Rights Act 1998 (HRA 1998) and the Convention. In *R (McLellan) v Bracknell Forest BC*[12] the Court of Appeal held that the introductory tenancy regime is compliant with the Convention. The court deferred to Parliament's objective in legislating for an introductory tenancy regime, namely to protect the interests of tenants, the public and local authorities having regard to the need to deal with the problem of ASB. According to the Court of Appeal this provides justification under article 8(2). The Court also held that the procedure for judicial review provides an adequate redress mechanism for tenants (on deference and the HRA 1998 see: Loveland, 2004).

Introductory tenancies are not available to housing associations which may instead make use of assured shorthold tenancies under the HA 1988 as a form of probationary tenancy. The HA 1988 introduced a new tenure regime for private landlords and housing associations from January 1989. The aim of the legislation was to move housing associations closer to the private sector by giving individual associations greater freedom to set rent levels (DoE, 1987). This change reflected an anti-welfarist approach to social policy which saw the displacement of state welfarism by marketization in the 1980s and 1990s (Le Grand and Bartlett, 1993). The HA 1988 had a number of consequences for security of tenure in the housing association sector. Under the legislation the process of determining an 'assured' tenancy is similar to that for secure tenancies but a number of mandatory grounds for possession are introduced which remove the court's discretion to refuse a possession order on reasonableness grounds[13]. Where there is an assured shorthold tenancy this is terminated by administrative process without reference to substantial grounds or reasonableness[14]. The impact of this weakness in security of tenure affecting shorthold tenancies was at first mitigated as housing associations were encouraged by the statutory regulator to grant fully assured tenancies (Housing Corporation, 2002). However, recent concerns about ASB mean

that the regulator has authorised the use of shorthold tenancies as part of a strategy for the management of ASB (Housing Corporation, 2005 and 2007; WAG, 2006). Assured shorthold or 'starter tenancies' will normally default to an assured tenancy after a minimum of 6 months, although the length of term beyond 6 months is a matter for individual housing associations. As housing associations are not ordinarily subject to judicial review or the HRA 1998 the position of starter tenants is worse than that of local authority introductory tenants. Starter tenants cannot rely on judicial review as a form of redress. This may change following the case of *R (Weaver) v London and Quadrant Housing Trust*[15] in which the Divisional Court held that the management of housing is a function of a public nature. *Weaver* may be of limited assistance however as the Court of Appeal in *Poplar Regeneration and Community Association Ltd v Donghue*[16] held that the assured shorthold tenancy regime under the HA 1988 is compliant with the Convention.

For both local authority and housing association probationary tenants a defence based on public law grounds is more restrictive than a substantive defence. In *Connors v United Kingdom*[17] the ECtHR held that procedural safeguards are necessary to assess the proportionality of any interference with the article 8(1) right which is only justified to the extent that it is in pursuit of a legitimate aim and proportionate. In *McCann v United Kingdom*[18] the ECtHR held that the loss of one's home is the most extreme form of interference with article 8(1) and that any person at risk of losing their home should be entitled to have the issue of proportionality determined by an independent tribunal. In *McCann* and *Connors* the applicants were denied the opportunity to raise a substantial defence in possession proceedings in accordance with domestic law. The ECtHR held that judicial review is not an appropriate forum for resolution of disputed factual matters which might lie at the heart of a tenant's defence. Attempts to introduce legislation to give statutory effect to these decisions in UK law have been rebuffed by government[19].

The ABA 2003 introduced a new tool for use by social landlords to deal with ASB. A court may now make a 'demotion order' in relation to a secure or assured tenancy on application of a social landlord at any time[20]. The court will only grant a demotion order where it is satisfied that there has been ASB or unlawful use of premises, and that it is reasonable to make an order. Having regard to the test for demotion judges are likely to turn to the authorities on ASB and possession claims for guidance. As has been noted, the higher courts have demonstrated sensitivity to policy objectives on ASB and the probability is that this will transfer to demotion claims. Demotion reduces a secure tenancy to a demoted tenancy and an assured tenancy to an assured shorthold tenancy. In effect the demoted

tenancy regime 'removes the time constraints' for the imposition of a probationary period (Sylvester, 2005). The Court of Appeal in *R(on the application of Gilboy) v Liverpool City Council*[21] held that the demotion scheme is similar to the introductory tenancy regime. Therefore following *McLellan* a tenant will only be able to rely on a defence based on public law grounds.

There are some indications that the government is attempting to achieve stability (if not security) for tenants in social housing. The introduction of Choice Based Lettings to create more sustainable communities is an example of government initiative in this area (Morgan, 2009: 53). In addition, recent policy on ASB has included a more moderate discourse which sees perpetrators of ASB as potential 'victims' (Nixon and Parr, 2006: 80; Jones *et al*, 2006). In January 2006 the Home Office published an action plan (Home Office, 2006a) informed by the work of pioneering practitioner led projects which address family support needs and promote social inclusion by targeting 'very disadvantaged families' (Dillane *et al*, 2001: 41; White *et al*, 2008: 4). There is a suggestion of a more measured approach recognizing the value of supportive interventions alongside enforcement as a mode of dealing with ASB: a 'twin track' strategy. This might prevent some families from losing their home because of ASB. In order to formalize support for families the government has introduced the Family Intervention Tenancy (FIT) under the Housing and Regeneration Act 2008. FITs are non-secure tenancies available to local authorities, and whilst a court order is required before eviction the authority will not need to establish a ground for possession. The emphasis remains on public protection and community safety (Home Office, 2006). Enforcement is at the root of the government approach to dealing with ASB as an aspect of crime control (Home Office, 2008). As FITs confirm, tenancy related measures which undermine security of tenure remain a key tool in the government's strategy for dealing with ASB.

Rights-based Assessment

Through changes introduced to existing tenure regimes, and the introduction of new regimes, tenant entitlements to security of tenure in social housing have been progressively weakened or removed. Under the HA 1985 and Housing Act 1988 (HA 1988) there are obligations on social landlords to respect occupier rights arising from their status as tenant. Local authorities and housing associations are under a duty to refrain from evicting a tenant except in prescribed circumstances. The courts are obliged to protect tenant rights through the

application of legal rules and the exercise of discretion in accordance with relevant legal norms. The tenure regimes established by the HA 1985 and HA 1988 *prima facie* demonstrate a respectful approach toward the entitlements of occupiers of social housing. For existing tenants reform has taken place which has made it easier for landlords to remove tenants from their accommodation through reductions in security (Morgan, 2009; Hunter, 2006). For new tenants housing rights are weak from the outset as security of tenure is virtually removed. The obligations on social landlords have been lessened and the protections afforded by the legal process have been weakened. Social landlords remain obliged to have regard to due process in possession claims, and the courts have a role and responsibility to investigate and control the actions of social landlords as an aspect of possession proceedings and of public law accountability. Tenants in social housing have enforceable and identifiable housing rights. A simple Hohfeldian analysis suggests that social landlords and the courts have duties towards rights-holders and cannot omit to act in accordance with rules established by statute. A social landlord commencing a possession action against a tenant does not infringe the legal rights of that tenant where it acts within the statutory framework and the compass of its legal obligations. The lawfulness of possession claims under the various regimes in force in the UK is confirmed by cases such as *McLellan*. For government the position ought to be different as obligations are established by reference to international rights documents and expectations. In the UK the government has failed to meet with its duty to protect existing housing rights and has failed to demonstrate respect for housing rights by introducing legislation which has removed protections from eviction. The changes that have taken place for tenants have been accompanied by a strengthening of the position of landlords. As a group social tenants are more vulnerable to eviction as their rights to security of tenure have been undermined though statute which has made it easier for social landlords to obtain possession or to avoid rigorous scrutiny of the substance or merits of a possession claim. Applying the model of casualization, it is apparent that social housing demonstrates weak tenant rights and correspondingly strong landlord rights affecting a generally weak and vulnerable resident population.

Conclusion

The changes in housing which have been discussed have been introduced largely in order to deal with the problem of ASB. The government is 'almost evangelical' in its commitment to discipline and punish those responsible for ASB (Scratton, 2005: 12). This is

manifest through the introduction of new coercive remedies for ASB in social housing but also in the move toward conditionality. Conditionality in social housing means that a tenant has to prove that they deserve a home and respect for the home (Hawarth and Manzi, 1999: 161). Balancing of rights and responsibilities is at the root of New Labour's political outlook and has been emphasized as a justification for conditionality across several policy areas. However, conditionality is not something that features as an aspect of either article 25(1) of the UDHR or article 11(1) of the ICSECR. When dealing with claims to possession in social housing courts have referred to the Convention and the qualified right under article 8(1). In so doing they have been called upon to decide whether the policy adopted by government is 'justified'. Although it is arguable that the courts have shown undue deference to the will of Parliament (Loveland, 2004), judges act within the framework of relevant statute which allows for the possibility of qualified housing rights. In any culture of fundamental rights the judiciary should play a key role alongside government in fulfilling rights expectations (Van Bueren, 2002: 465). In housing the government has restricted the role of the judiciary by introducing statutory measures which take advantage of deference and which denude the courts of their powers to protect tenants from interference by their landlords. Instead of showing respect for existing rights though non-derogation and non-interference it has instead chosen to act in an anti-progressive manner to undermine established housing rights.

Housing policy should neither ignore nor relegate fundamental rights. One of the objectives of housing policy should be to ensure the provision of adequate accommodation with security of tenure. Another objective should be to ensure that security is not removed or eroded. The rights of tenants in social housing have been progressively removed or weakened by statute as other interests have been elevated and treated as compelling. In recent social policy a concern for public safety has dominated, if not replaced, the welfare objective of housing policy. The role of government should be to ensure that expectations set out in international rights instruments are reflected in housing policy. In housing the entitlements which may be identified from a textual reading of international instruments need to be translated and given effect as enforceable claims to respect and protection from the humiliation of eviction and homelessness. Government therefore needs to re-think the engagement between housing policy, housing rights as legal rights, and fundamental human entitlements.

1 (1979) Series A/32, 2 EHRR 305, para.36.
2 (1989) Series A/169, 12 EHRR 391.
3 (1999) 28 EHRR CD 175.

4 For confirmation in a judicial cinexct see: *Ratcliffe* v *Sandwell Metropolitan BC* (2002) HLR 17; *Southwark LBC v Mills* [2001] 1 AC 1
5 Part VII, Housing Act 1996.
6 Schedule II, Housing Act 1985 and Schedule II, Part II, Housing Act 1988.
7 Ibid, Ground 2 and Ground 14 respectively.
8 Amending Ground 2, Schedule II, Housing Act 1985 and, Ground 14, Schedule II, Housing Act 1988.
9 *Portsmouth CC v Bryant* (2000) 32 HLR 906.
10 Section 85A(2), Housing Act 1998, and, Section 9A, Housing Act 1988.
11 *Bristol City Council v Mousah* (1998) 30 HLR 32; *Newcastle upon Tyne City Council v Morrison* (2000) 32 HLR 891 CA.
12 [2001] EWCA Civ 1510.
13 Schedule II, Part I, Housing Act 1988
14 Chapter II, Housing Act 1988
15 [2008] EWHC 1377 (Admin).
16 [2002] QB 48.
17 [2005] 40 EHRR 9.
18 [2008] 47 EHRR 40.
19 Baroness Andrews, 9th July 2009, Hansard, HL Debates Col. 808-810.
20 Section 82A, Housing Act 1985; and, s6A, Housing Act 1998.
21 [2008] EWCA Civ 751.

Bibliography

- Abbott, K.W., and Snidal, D., (2000), 'Hard and Soft Law in International Governance', *International Organization* 54, 3, 421-456.
- Barker, K., (2004), *Delivering Stability: Securing our Future Housing Needs* (London: ODPM).
- Beck, U., (1986), *Risk Society: Towards a New Modernity* (London: SAGE).
- Bix, B., (2006) *Jurisprudence: Theory and Context* (London: Sweet and Maxwell).
- Bilchitz, D., (2007), *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford: Oxford University Press).
- Burney, E., (1999), *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Winchester: Waterside Press).
- Burney, E. (2005), *Making People Behave: Anti-Social Behaviour, Politics and Policy* (Cullompton: Willan Publishing).
- Buyse, A.,(2006), 'Strings attached: the concept of "home" in the case law of the European Court of Human Rights', 3 *European Human Rights Law Review*: 294-307.
- Carr, H. and Cowan, D., (2006) 'Labelling: constructing definitions of anti-social behaviour?', in J.Flint (ed.).
- CHLGR, (2003-04), *Decent Homes*, Committee on Housing, Planning Local Government and the Regions, Fifth Report of Session 2003-04 (London: TSO).
- Crawford, A., (2003), 'Contractual Governance of Deviant Behaviour', *Journal of Law and Society*, Vol.30(4), 479-505.
- CSECR, (1990), Committee on Social Economic and Cultural Rights, *The nature of States parties obligations*, General Comment 3 (New York: Office of the High Commission for Human Rights).

- CSECR, (1991), Committee on Social Economic and Cultural Rights, *The Right to Adequate Housing*, General Comment 4 (New York: Office of the High Commission for Human Rights).
- DCLG, (2007), Department for Communities and Local Government, (2007), *Homes for the future: More Affordable, More Sustainable* Cm.7191 (London: TSO).
- Davis, D.M., (2008), 'Socioeconomic rights: do they deliver the goods?', *International Journal of Constitutional Law*, 6(3/4), 687-711.
- Deacon, A. (2004), 'Justifying conditionality: the case of anti-social tenants', *Housing Studies*, 19, 6, 911–26.
- Dean, H., (2002), *Welfare Rights and Social Policy* (Harlow: Prentice Hall).
- Dean, H., (2008), 'Social Policy and Human Rights: Re-thinking the Engagement', *Social Policy and Society*, Vol.7(1), 1-12.
- Dillane, J., *et al* (2001), *Evaluation of the Dundee Families Project* (Glasgow: University of Glasgow).
- DoE, (19870, Department of the Environment, *Housing: The Government's Proposals* Cm.214 (London: HMSO).
- Donoghue, J., 'Antisocial Behaviour Orders (ASBOs) in Britain: Contextualizing Risk and Reflexive Modernization', *Sociology*, 42, 337-355.
- DSS, (1998), Department of Social Security *A New Contract for Welfare* Cm 3805 HMSO, London
- Dwyer, P., (2004), 'Creeping conditionality in the UK', *Canadian Journal of Sociology,* 25, 2, 261-283.
- Eide, A., (2001), 'Economic, social and cultural rights as human rights' in A.Eide, C.Krause and A.Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, (Dordrecht: Martinus Nijhoff).
- Ferraz, O.L.M., (2008) 'Poverty and Human Rights', *Oxford Journal of Legal Studies,* Vol. 28, No.3, 585-603.
- Flint, J., (ed.), (2006), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, policy and practice* (Bristol: Policy Press).
- Flint.J., (2006), 'Introduction', in J.Flint (ed.).
- Fox, L., (2002), 'The meaning of a home: a chimerical concept or a legal challenge', 29(4) *Journal of Law and Society*, 580-610.
- Freedland, M., (1976), *The Contract of Employment* (Oxford: Clarendon Press).
- Furedi, F., (2002), *Culture of Fear: Risk-Taking and the Morality of Low Expectation* (London: Continuum).
- Garland, D., (2001), *The Culture of Crime Control* (Oxford: Oxford University Press).
- GCST, (2002), Global Campaign for Secure Tenure, *Housing Rights Legislation, Review of international and national legal instruments* (Nairobi, OHCHR).
- Goodchild, B., (2001), 'Applying theories of social communication to housing law: towards a workable framework', 16(1), Housing Studies, 75-96.
- Halpin, A.K.W., (1997), *Rights and Law Analysis and Theory* (Oxford: Hart Publishing).
- Ham, C. and Hill, M., (1993), *The Policy Process in the Modern Capitalist State* (London: Harvester Wheatsheaf).
- Haworth, A. and Manzi, T., (1999), 'Managing the "Underclass": Interpreting the Moral Discourse of Housing Management', *Urban Studies*, Vol.36(1), 153-66.
- Hohfeld, W.N., (1963), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven CT: Yale University Press).

- Home Office, (2003), *Respect and Responsibility – Taking a Stand Against Antisocial Behaviour* (London: Home Office).
- Home Office, (2006), *Respect Action Plan* (London: Home Office).
- Home Office, (2008), *Cutting Crime – A New Partnership 2008-2011* (London: Home Office).
- Housing Corporation, (2002), *The Regulatory Code and Guidance* (London: Housing Corporation).
- Housing Corporation (2007), 'Tenancy Management; Eligibility and Evictions' Circular (Housing Corporation: London),
- Housing Corporation, (2005), *The Regulatory Code and Guidance* (London: Housing Corporation).
- Hughes, D., and Davis, M., (2006) 'Human Rights and the triumph of property: the marginalisation of the European Convention on Human Rights in Housing law' *Conveyancer and Property Lawyer*, Nov/Dec, 526-552.
- Hunter, C., (2006), 'The changing legal framework: from landlords to agents of social control', in J.Flint (ed).
- Jheelan, N., (2007), 'The enforceability of socio-economic rights', *European Human Rights Law Review*, 2, 146-157.
- Jones, A., Pleace, N., Quilgars, D., (2006), 'Evaluating the Shelter Inclusion project: A floating support service for households accused of anti-social behaviour', in J.Flint, (ed.).
- Kenna, P., (2008), 'Housing rights: positive duties and enforceable rights at the European Court of Human Rights', *European Human Rights Review,* 2, 193-208.
- Kothari, M., (2001), *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, UN Doc. E/CN.4/2001/51
- Langstaff, M., (1992), 'Housing associations: a move to centre stage', J.Birchall (ed.), *Housing policy in the 1990s* (London: Routledge).
- Leather, P., and Morrison, T., (1997), *The State of UK Housing*, (York: Joseph Rowntree Foundation).
- Leckie, S., (2000), *UN Human Development Report: Housing Rights,* available at: http://hdr.undp.org/en/reports/global/hdr2000/papers/leckie.pdf
- Le Grand, J. and Bartlett, W., (eds), (1993), *Quasi-markets and Social Policy,* (Basingstoke: Macmillan).
- Levitas, R., (2006), 'The concept and measurement of social exclusion', in Pantazis *et al* (eds.) *Poverty and social exclusion in Britain: the millennium survey* (Bristol: Policy Press).
- Lister, D., (2006), 'Tenancy agreements: a mechanism for governing anti-social behaviour?', in J.Flint (ed.).
- Loveland, I., (2004) 'The impact of the Human Rights Act on security of tenure in public housing', *Public Law,* Autumn, 594-611.
- Maastricht, (1997), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (Maastricht: International Commission of Jurists).
- Madge, N., McConnell, D., Gallagher, J. and Luba, J., (2006) *Defending Possession Proceedings* (London: LAG).
- Malpass, P., and Murie, A., (1999) *Housing Policy and Practice* (Macmillan: Basingstoke).
- Marshall, T.H., (1950 [1992]), *Citizenship and social class* (London: Pluto).

- McLachlan, H., (2005), *Social Justice, Human Rights and Public Policy* (Humming Earth: Glasgow).
- Morgan, J., (1996), 'The casualization of housing', *Journal of Social Welfare and Family Law*, 18(4), 445-460.
- Morgan, J., (2009), 'Housing and security in England and Wales: casualization revisited', *International Journal of Law in the Built Environment*, Vol.1(1), 1756-1450.
- Nixon, J. and Parr, S., (2006),'Antisocial behaviour: voices from the front line', in J.Flint (ed.).
- Pillay, A., (2007), 'Courts, variable standards of review and resource allocation: developing a model for the enforcement of social and economic rights', *European Human Rights Law Review*, 6, 616-36.
- Pogge, T., (2002), *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity).
- REH, (2004), Reviews on Environmental Health, 'Special Issue: Housing, Health and Well-Being', Vol.19, Nos.3-4.
- Rose, N., (1999), *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press).
- Sachar, R., (1993), *The Right to Adequate Housing*, UN Doc. E/CN.4/Sub.2/1993/15.
- Sachar, R., (1995), *The Right to Adequate Housing, Final Report*, UN Doc. E/CN.4/Sub.2/1995/12.
- Scratton, P. (2005), 'Essays for civil liberties and democracy in Europe', European Civil Liberties Network, Essay No.9.
- Sengupta, A., (2007), 'Poverty Eradication and Human Rights', in, T.Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press).
- Stewart, A., (1996) *Rethinking Housing Law* (London: Sweet and Maxwell).
- Sylvester, C., (2005), 'Demotion or suspension? Tackling anti-social behaviour through the possession process', *Landlord and Tenant Review*, Vol.9(1), 2-6.
- UN Habitat, (2006), United Nations Habitat, *Habitat Agenda*, available at: http://www.unhabitat.org/categories.asp?catid=9
- UNDP, (2006), United Nations Development Programme, *Indicators for Human Rights Based Approaches to Development in the UNDP Programme* (New York: UNDP).
- Van Bueren, G., (2002) 'Including the excluded: the case for an economic, social and cultural Human Rights Act', *Public Law* 456.
- WAG, (2006), Welsh Assembly Government, *Regulatory Code for Housing Associations in Wales*, (Cardiff: WAG).
- Waldon, J., (1984), *Theories of Rights* (Oxford: Oxgord University Press).
- WCHR, (1993) World Conference on Human Rights, *Vienna Declaration and Programme of Action*, available at: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument
- White, C. *et al*, (2008), *Family Intervention projects: An Evaluation of their Design, Set-up and Early Outcomes* (London: DCSF).