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Rental Housing: the current legal framework in England

Arrendamento para habitação: o actual quadro legal em Inglaterra

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ABSTRACT: Residential tenancies law in England are complex because of an over-lay of (changing) legislation on the top of common law principles, and sometimes different law for private and social tenants. In this article we use a framework of legal determinants of housing precarity to analyse this law. There are five determinants to our analysis: tenure/time; control; cost; conditions (habitability); and immigration status. The difficulties occupiers and landlords face in untangling the patchwork of protections unites these different determinants. Further we demonstrate that the position of tenants has become in some ways more precarious in the last 30 years – in terms of the ease of eviction and, for private tenants, for rents.

KEY WORDS: Residential tenancies; England; precarity.

RESUMO: O regime inglês do arrendamento para habitação é um regime complexo, devido à sua (mutável) legislação, a qual se sobrepõe às regras gerais, bem como à existência de normas diferentes para o setor privado e para o arrendamento social. Neste artigo, analisamos esse regime a partir de certos fatores legais que determinam a precariedade da habitação. São cinco esses fatores: duração do contrato/tempo; controle; custos; condições de habitabilidade e estatuto da imigração. As dificuldades que arrendatários e senhorios enfrentam ao tentarem desvendar o emaranhado legal são um ponto comum a todos estes aspetos. Além disso, demonstra-se que, nos últimos 30 anos, a posição do arrendatário se tem tornado, de diferentes modos, mais precária – em termos de facilidade de despejos e, para os arrendatários do setor privado, também quanto às rendas.

PALAVRAS-CHAVE: Arrendamento habitacional; Inglaterra; precariedade.

CONTENTS:

1. Introduction

We start the article with an apology. As will become apparent in the course of it, residential tenancy law in England is extremely (and unnecessarily) complex. For almost 100 years judges have been bemoaning this problem. In *Parry v Harding*.[1] Lord Hewart CJ observed:

> 'It is deplorable that in dealing with such a matter as this, a Court, and still more a private individual, and most of all a private individual who lives in a small tenement, should have to make some sort of path through the labyrinth and jungle of these sections and schedules. One would have thought that this was a matter above all others which the Legislature would take pains to make abundantly clear.'

Since then, matters have become far worse.

Much of the complexity is because of an over-lay of (changing) legislation on the top of common law principles. For the common law there is little difference legally between a short tenancy and a long tenancy (both may be also known as a 'lease'). Any tenancy, whether for 6 months or 1000 years, is an interest in land.[2] In practice and in terms of legislation there are, however, huge differences. Long tenancies (of at least of 21 years) may be mortgaged and the tenants have rights to enfranchise – to a freehold in the case of a house[3] or collective of the building in the flat.[4] In this article we are only concerned with short leases.

As noted, a tenancy is an interest in land. English landlord and tenant law has always differentiated between tenancies and licences – the latter being purely contractual. This distinction is carried into the relevant legislation for short tenancies: the Housing Act 1985 and 1988.[5] This is important for the position of some occupiers. Two House of Lords decisions in the mid and late 1980s, *Street v Mountford*[6] and *AG Securities v. Vaughan; Antoniades v Villiers*[7] decided the actual documents were subordinate to the legal question, i.e. whether the three elements of a tenancy – exclusive possession, payment and term – were evidenced by the facts on the ground.[8] If these elements are not present an agreement to occupy a home will not be a tenancy. Accordingly, agreements which do not provide these elements, sit outside of the main legal protections outlined below.[9]

For short term tenants there is both a private rented market and a social rented[10] 'market', with different legislation. Private renting in England has nearly doubled from 11% of

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[1] [1925] 1 KB 111 at p.114.
[2] Law of Property Act 1925, s.1.
[3] Leasehold Reform Act 1967.
[4] Leasehold Reform etc Act 1993.
[5] Housing Act 1985, s.79 and Housing Act 1988, 1.
[6] *Street v Mountford* [1985] AC 809, HL.
[7] *AG Securities v. Vaughan; Antoniades v Villiers* [1990] 1 AC 417, HL
[8] ANDREW ARDEN, MARTIN PARTINGTON & CAROLINE HUNTER, *Arden & Partington on Housing Law* (Loose-leaf: Sweet & Maxwell), para. 2-06, 2-07.
[9] For a current example of the use of licences, see CAROLINE HUNTER AND JED MEERS, 'The "Affordable Alternative to Renting:" Property Guardians and Legal Dimensions of Housing Precariousness' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds) *Law and The Precarious Home: Socio-Legal Perspectives on the Home in Insecure Times* (2018, Hart).
[10] Namely, housing provided via either local government or not-for-profit organisations usually with government subsidy. In common with the social rented sector across Europe, there are specific controls on affordability, allocations and (to a lesser extent than before) tenure security. For a comprehensive overview, see: CHRISTINE

households in the 1981[11] to 20% in 2015/2016.[12] Conversely, social renting has contracted in the same period from 32% households in 1981[13] to 17% in 2016.[14] At the same time, there have been two related changes to the social sector. In the 1980s the overwhelming majority of social tenancies were provided by local councils under the Housing Act 1980 'secure' tenancies.[15] There was also a small non-profit sector (generally referred to as 'housing associations'[16]), whose tenants were also covered under the 1980 Act. By the Housing Act 1988, however, housing associations were no longer able create secure tenancies. Instead the new framework for private tenants was applied to them. In the following decades, government policy has been to encourage the transfer of council-owned housing to housing associations and to fund any new building through associations. So while in 1980 local authorities dominated the provision of social housing – accounting for 6.7 million units and 94% of social rented stock[17] – in 2015, this has shrunk to 1.7 million dwellings, comprising 41% of social rented stock.[18]

Having set the context for the rented sector in England, this article is structured in five parts. The structure is based on Chapter we have recently written on the legal determinants of housing precarity.[19] This focus on precarity is justified by the changes to the legal position of tenants over the last 30 years.[20] Building on the work of Hulse and Milligan,[21] we suggest that there are five legal factors that can exasperate precarity. By focusing on these – tenure/time; control; cost; conditions (habitability) and immigration status – we can illuminate the elements which can exacerbate precarity, rather than comparing precarious arrangements to even more precarious ones.[22] This focus leaves out some elements of landlord and tenant law, for instance, the ways that tenants can end a tenancy. However,

WHITEHEAD, 'Social Housing in England' in Christine Whitehead (ed), *Social Housing in Europe* (Wiley 2014). 105-120.

[11] Private rented continued to fall the 1980s, the surge in private sector renting as largely happened since 2000.

[12] English Housing Survey, 2016 - https://www.gov.uk/government/statistics/english-housing-survey-2015-to-2016-headline-report

[13] All English Housing Survey, 2012/13

[14] English Housing Survey, 2016 - https://www.gov.uk/government/statistics/english-housing-survey-2015-to-2016-headline-report

[15] Consolidated into the Housing Act 1985.

[16] The regulatory terms used have changes over time from 'registered housing associations' to 'registered social landlords' to 'registered providers of social housing housing' the latter two for some purposes also encompassing local councils: see Housing and Regeneration 2008. We have chosen to use the more colloquial 'housing association' throughout this article.

[17] Table 101, https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants

[18] English Housing Survey, 2016 - https://www.gov.uk/government/statistics/english-housing-survey-2015-to-2016-headline-report

[19] HUNTER AND MEERS, op cit. We are using the term 'precarity' as explained in MARA FERRERI, GLORIA DAWSON AND ALEXANDER VASUDEVAN, 'Living precariously: property guardianship and the flexible city' (2016) 42 Transactions of the Institute of British Geographers 246, at 247 as: 'the intersection of new conditions of heightened economic and political insecurity and their normalisation as specific 'structures of feelings' and subjectivities.'

[20] See JILL MORGAN, (1996), "The casualisation of housing" (1996) 18 *Journal of Social Welfare and Family Law* 445; JILL MORGAN, "Housing and security in England and Wales: casualisation revisited" (2009) 1 *International Journal of Law in the Built Environment* 42 and SUZANNE FITZPATRICK AND BETH WATTS (2017) 'Competing visions: security of tenure and the welfarisation of English social housing' *Housing Studies* On-line http://dx.doi.org/10.1080/02673037.2017.1291916

[21] KATH HULSE AND VIVIENNE MILLIGAN, 'Secure Occupancy: A New Framework for Analysing Security in Rental Housing' (2014) 29 *Housing Studies* 638

[22] HUNTER AND MEERS, op cit.

with limited space in this article, it served to provide a framework to understand the current legal position and understand the complexity in the law.

2. Tenure/time

For Hulse and Milligan the length of rental contract and termination arrangements make up the de jure elements of security, namely, "property rights, the legal rules that enable owners to acquire, use and dispose of their property and lease arrangements over land/housing,…".[23] In English law they can been seen to be made up of a number of elements which when aggregated may lead to greater or lesser security for the occupier.

At its simplest and providing least protection, some legal security may simply prevent eviction except in accordance with the contractual (or common law) requirements as to notice and termination of the tenancy. At common law there are two types of tenancy: periodic and fixed term. A period tenancy, as the name implies, runs from period to period, e.g. month to month or week to week.[24] It is ended by a notice to quit by either to the landlord or the tenant, and in common law the length of the notice has to correspond the the period of the tenancy.[25] For a tenancy with a fixed term set at its commencement,[26] the tenancy automatically terminates at the end term through effluxion of time.[27] In practice, the private rented sector relies heavily on fixed-term tenancies of quite short terms – most often, 12 months - while in the social sector the norm until recently as been to use weekly or monthly periodic tenancies.

One step up from the contractual/common law position, the law through statute may impose a minimum period of notice which is longer than would otherwise be contractually imposed. Further, it may impose a requirement that a court order is obtained prior to any eviction.

Greater levels of security move beyond the notice and a court order and limit the basis on which the landlord can evict the tenant. In these circumstances, notwithstanding that the contractual period of the tenancy may have come to an end or the contract makes a different provision, the landlord can only get permission to evict from the court on limited grounds. These may include fault on the part of the tenant (e.g. rent arrears or damage to the property) or need on the part of the landlord (e.g. to live in the property or to redevelop it). Such security has usually been accompanied by rent control in order to prevent landlords simply pricing tenants out of properties.

This legal framework is the basis for both the private rented sector and the social rented sector and this section first sets-out the minimum protection for all occupiers before

[23] HULSE AND MILLIGAN, op cit, p.641.
[24] See ANDREW ARDEN et al, op cit, para. 2-24.
[25] Ibid, para. 19-80.
[26] Ibid, para. 2-22.
[27] Ibid, para. 19-43.

describing the further different legislative protections for each sector. Finally, we consider the right to succession – the rights that continue after the death of the original tenant.

2.1 Protection from eviction

The Protection from Eviction Act 1977 sits at the core of protection offered for all occupiers of rented housing, providing a minimum of protection regardless of whether a tenancy has been created or not. The Housing Acts 1985 and 1988 which provide the fullest security for private and social tenants have limitations and exemptions – for example, tenancies linked to work contracts and a lack of applicability to licenses. Crucially the Protection from Eviction Act 1977 is not as limited.[28]

The 1977 Act requires a four week notice period to end the agreement,[29] furthermore the occupier cannot be evicted without a court order.[30] In these cases, however, the powers of the courts are very limited. Possession *may* be postponed for a maximum of 14 days, with the possible extension to a total maximum of six weeks.[31]

2.2 Private rented tenancies

Turning to the private rented sector, the current legal settlement was largely established in 1988, when the then Conservative government passed the Housing Act 1988 and effectively deregulated the previous system which had offered a high degree of security to tenants. The pre-1988 position, which had existed from the mid-1960s (and in previous decades in slightly different forms), included rent control and quite severely limited grounds on which possession could be obtained (Rent Act 1977). Indeed in 1982, Honore concluded that the Rent Act 1977 provided 'those who could not afford to buy their homes with a substitute for home ownership, a right to remain in occupation for at least a lifetime and often more.'[32] This can be seen as the high-water mark of rights for private rented tenants.

The Housing Act 1988 was intended to revive and liberalise the rented market. It created two forms of tenancy: the assured tenancy and the assured shorthold tenancy. As originally enacted the assured tenancy was the default tenancy, as landlords had to serve a notice before the start of the tenancy to create a shorthold tenancy. However, this was reversed by

[28] See Protection from Eviction Act 1977, s.3A for the tenancy and licence agreements that are even excluded from the 1977 Act protection.
[29] Protection from Eviction Act 1977, s.5.
[30] Protection from Eviction Act 1977, s.3.
[31] Housing Act 1980, 89(1). This was held to be compatible with article 8 of the European Convention on Human Rights in *Hounslow LBC v Powell* [2011] UKCS 8.
[32] ANTHONY HONORE, *The Quest for Security: Employees, Tenants, Wives* (Stevens, 1982). 37

the Housing Act 1996, so that any tenancy to which the 1988 Act applies is a shorthold, unless the landlord gives notice otherwise.[33]

The security position for shorthold tenants is relatively straight-forward. Whether the tenancy is fixed-term or periodic, for the first six-months of the tenancy the landlord can only seek possession as if it is an assured tenancy (see below).[34] If, as is usually the case, the tenancy is a fixed-term, this limitation will continue through-out the period of the fixed term. However, provided the necessary two written month notice is given, the landlord is entitled to apply for possession as soon as the fixed term ends, and the court *must* give possession.[35] This automatic right to possession provides an incentive for landlords to utilise shorter fixed terms – generally 12 months or 6 months – as discussed above. In practice, private tenants tend to remain in their properties for longer than these fixed terms – within 2015/16, an average of 4.3 years[36] – but this legal regime and the need to continually renew tenancy agreements contributes heavily to a churning private rented sector market,[37] with around a quarter of households having been in their current property for less than a year.[38]

The assured tenancy is more secure and closer to both the security available in the private sector before 1988 and the secure tenancy for social tenants. The starting point is that the tenancy can not be terminated without a court order.[39] The court cannot make an order unless first, a notice has been property served by the landlord on the tenant[40] and second, a ground for eviction has been proven.[41] For some grounds, for example, if the landlord needs the house for his own use, the court *must* give possession; for others, for example rent arrears (if not too great[42]), the court has a *discretion* and may stay or postpone possession.[43]

2.3 Social rented tenancies

As noted in the introduction, the main protection for social tenants arrived with the Housing Act 1980 and is now found in the Housing Act 1985 – the secure tenancy. However, this beguiling simplicity was short-lived. Firstly, as noted above, from 1989 any new housing association tenancy was an assured tenancy under the Housing Act 1988. This has led to

[33] Housing 1988, s.19A and Sch2A.
[34] Housing 1988, s.21(5).
[35] Housing 1988, s.21(1).
[36] English Housing Survey 2015/16: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627686/Private_rented_sector_report_2015-16.pdf
[37] JULIE RUGG AND DAVID RHODES, *The Private Rented Sector: Its Contribution and Potential* (Centre for Housing Policy 2008). 77-79.
[38] English Housing Survey 2015/16: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627686/Private_rented_sector_report_2015-16.pdf
[39] Housing Act 1988, s.5.
[40] Housing Act 1988, s.8.
[41] Housing Act 1988, s.7.
[42] There is a mandatory ground for rent arrears if the rent is 8 weeks in arrears at the time of the notice and the hearing: Housing Act 1988, Sched. 2, para. 8.
[43] Housing Act 1988, ss. 7 and 9.

housing association using assured tenancies in the same way as secure tenancies. Secondly, over the last 20 years, two intertwined policy agendas have fragmented the protections in the 1985 Act: controlling anti-social behaviour[44] and a 'welfarist' model of social housing.[45] Consequentially to these two points, similar changes listed below (eg demoted and flexible tenancies) have also been made to the Housing Act 1988, but only for housing association tenancies, not for private tenancies.

The secure tenancy operates in a similar way to assured tenancies, namely, the tenancy cannot be terminated without a court order.[46] The court cannot make an order unless first a notice has been property served by the landlord on the tenant[47] and secondly a ground for eviction as been proven.[48] The grounds are split in to those where the court *may* order possession, for rent arrears or anti-behaviour for example, and those it *may only make if suitable alternative accommodation is provided*.[49] There are no mandatory grounds.

Many of the subsequent changes have built on this model, but with a move away from discretion residing in court to mandatory possession orders. Thus Fitzpatrick and Watt conclude:

> 'From the mid-1990s onwards, the introduction of 'probationary' periods for new tenants [introductory tenancies], and then 'demoted' tenancies for those subject to behavioural concerns, began to hedge security of tenure for social tenants. The 2010 UK Coalition Government took this agenda considerably further with the Localism Act 2011, introducing 'flexibilities' enabling social landlords in England to offer fixed-term (renewable) tenancies to all new tenants so that "… this scarce public resource can be focused on those who need it most, for as long as they need it".'[50]

In a number of cases[51] tenants have sought to challenge the enhanced power of social landlords to evict in these new tenancy types, through article 8 of the European Convention on Human Rights and Freedoms.[52] In order to comply with art. 8, the Supreme Court decided that:

> '… where a court is asked to make an order for possession of a person's home at the suit of a local authority the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.'[53]

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[44] See CAROLINE HUNTER, "From landlords to agents of social control" in Flint J., (ed) *Housing and Anti-social behaviour: theory, policy and practice* (2006: Policy Press)
[45] FITZPATRICK AND WATTS, op cit.
[46] Housing Act 1985, s.82.
[47] Housing Act 1985, s.83.
[48] Housing Act 1985, s.84.
[49] Housing Act 1985, Sched. 2.
[50] FITZPATRICK AND WATTS, op cit., p.1022, citing: DCLG. (2010) *Local Decisions: A Fairer Future for Social Housing.* (London: DCLG).
[51] See *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104; *Corby Borough Council v Scott, West Kent Housing Association Ltd v Haycraft* [2012] EWCA Civ 276, [2012] HLR 23; *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231; [2014] H.L.R. 23.
[52] Article 8(1) provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The right is, however, a qualified one, which may not be interfered with by a public authority 'except as in accordance with the law and is necessary in a democratic society 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 for the protection of the rights and freedoms of others.'
[53] *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104, para. 49.

On the face of it, this seems to re-instate discretion for the court. In practice this discretion has been very limited.[54]

With this in mind, in the following table we set-out this this main form of tenancies that have been added, with a description of security and the process to evict.

Type of tenancy	Relevant legislation	Type of security	Eviction process
Introductory	Housing Act 1996	Applies to all new tenants of council if the council have adopted an introductory tenancy scheme.[55] The tenancy lasts to 12 months, at the completion of 12 months without possession the tenant will become secure unless possession proceeding are commenced.[56] Possession must be granted by the court if necessary procedures have been complied with.[57]	Prior to seeking possession the landlord must give a notice to the tenant and offer the tenant the opportunity of an internal review.[58]
Demoted	Housing Act 1996, as amended by Anti-social behaviour Act 2003	Possession must be granted by the court if necessary procedures have been complied with.[59]	A demoted tenancy only arises on the making of an order by the court demoting a secure tenancy to a demoted tenancy because of anti-social behaviour.[60] Prior to seeking possession the landlord must give a notice to the tenant and offer the tenant the opportunity of an internal review.[61]

[54] See David Cowan and Caroline Hunter (2012), 'Yeah but, no but' – Pinnock and Powell in the Supreme Court. *Mod. L. Rev*., 75: 78–91 and David Cowan and Caroline Hunter (2012), "Yeah but, no but", or just "no"? Life after Pinnock and Powell, *Journal of Housing Law*, 15(3), 58-62.
[55] Housing Act 1996, s.124(1).
[56] Housing Act 1996, s.125. The landlord can extend this time for a further six months: s.125A.
[57] Housing Act 1996, s.127.
[58] Housing Act 1996, s.128.
[59] Housing Act 1996, s.143D.
[60] Housing Act 1985, s.82A
[61] Housing Act 1996, ss.143E, 143F.

Flexible tenancy	Localism Act 2011 (amending Housing Act 1985)	Security only for the minimum 2 year fixed term of the tenancy.[62] If the appropriate notices has been served the court must order possession at the end of the fixed term.[63] As a form of secure tenancy during the fixed term the council can only evict on the same basis as for secure tenancies.	To terminate, six months before the end of the tenancy the landlord must give a notice stating that the tenancy will not be renewed and giving reasons. A tenant can seek an internal review of this notice.[64]

2.4 Right to succession

A further element of security is the right of family members to remain in the home after the death of the original tenant. This has been a feature of the rights of tenants since before the Rent Act 1977.[65] Both the Housing Act 1988 for assured tenants and the Housing Act 1985 for secure tenants provide some rights to succession.

Under the Housing Act 1988 the spouse or civil partner living in the home at the time of the death of the tenant is entitled to succeed.[66] For secure tenants this also included, where there no spouse or civil partner, the right to succession of other family members.[67] Since 2012,[68] the law was amended so other family members either of secure tenant or assured tenants of housing associations have also had the right to succeed, but only if the tenancy provided for the right. Namely, the landlord could opt to exclude the right.

3. Control

The starting point for control is the tenancy; the balance between the rights of the tenant and the landlord to use or to limit the occupancy. As summarised by Arden et al:[69]

> 'there can be no tenancy unless the occupier takes possession of the premises in question, and that possession is exclusive… [W]hat is means is that the tenant has the right to exclude all others from the premises, including the landlord.'

62 Housing Act, s.107A.
63 Housing Act 1995, s.107D.
64 ibid.
65 The Rent Act 1977 had generous succession provision to a spouse and then to a further member of the family: see Rent Act 1977, Sched. 1.
66 Housing Act 1988, s.17.
67 Housing Act 1985, s.87.
68 See Localism Act 2011, s.160.
69 ANDREW ARDEN ET AL, op cit, para.2-05.

Indeed, it is implied in to any tenancy that the tenant has the 'quiet enjoyment' of the premises, i.e. the landlord will not interfere with the tenant's law possession of the premises.[70] There does not need to be physical dispossession to breach the covenant. Interference with tenant's comfort or the comfort of the tenant's family is sufficient.[71] There are both civil[72] and criminal[73] remedies for tenants whose quiet enjoyment has been breached.

This is not to say that the landlord can not include reasonable terms in the tenancy, e.g. as to the use of the premises, the behaviour of the tenant and their family. Any terms in the tenancy will the subject to the Consumer Rights Act 2015. This requires contract terms (not including the price, i.e. the rent) to be fair. A term will be unfair if 'contrary to good faith, it causes a significant imbalance in the parties' rights to and obligations to the detriment of the consumer.' The predecessor legislation led to guidance on unfair terms in tenancy agreements from the then Office for Fair Trading.[74] Although no longer in force, the examples provide insight to the sort of controlling covenants used by landlords and whether they might be reasonable. Thus a prohibition against guests overnight would by unreasonable, as having guests is normal use and enjoyment of the property on an occasional basis.[75] On the issue of banning pets the guidance stated:[76]

> 'Our objection is to blanket exclusions of pets without consideration of all the circumstances. Such a term has been considered unfair under comparable legislation in another EU member state because it could prevent a tenant keeping a goldfish. We are unlikely to object to a term prohibiting the keeping of pets that could harm the property, affect subsequent tenants or be a nuisance to other residents.'

While the essence for a tenancy is that the tenant has 'quiet enjoyment' of his or her home, the control necessarily less that for a freehold owner-occupier. The law seeks to police the quiet enjoyment and balance the rights of the tenant against unreasonable covenants.

4. Costs

The main form of cost for a tenant is, of course, the rent. Rent control was a feature of the private rented sector for decades in England. The Rent Act 1977 limited rents to 'fair rents'. The core principal of the Rent Act 1977 was that in setting the rent the rent officer (or tribunal on appeal) had to assume any scarcity did not exist.[77] The system sought to 'deprive

[70] Ibid. para. 16-07.
[71] Ibid, citing *Southwark LBC v Tanner* [2001] 1 AC 1.
[72] In contract proceedings and a statutory tort: see Housing Act 1988, s.27.
[73] Protection Eviction Act 1977, s.1(3) and (3A) creating crimes of harassment by landlords or their agents.
[74] See: https://www.gov.uk/government/publications/unfair-terms-in-tenancy-agreements--2
[75] Office of Fair Trading, *Guidance on unfair terms in tenancy agreements* (September, 2005), 64
[76] Ibid.
[77] Rent Act 1977, s.70(2).

a landlord or a wholly unmeritorious increase in rent which has come about simply because there is a scarcity of houses in the district and thus an excess of demand over supply.' [78]

However, this was swept away by the Housing Act 1988, which essentially moved England to a market based system. There is a residual right for shorthold tenants to challenge the rent. In the initial fixed term, assured shorthold tenants are able to apply to the Tribunal for a determination of the rent that the landlord 'might reasonably be expected to obtain.'[79] The Tribunal can only make a determination if it has evidence of a 'sufficient number' of similar houses let in the locality and if the rent charged by the landlord in 'significantly higher' than payable on those similar tenancies.[80] In practice this procedure is little used.

Once a tenancy has started, any further rent increases are covered by the terms of the tenancy. If the tenancy is periodic and does not have any tenancy terms permitting variation of the rent, then there is a statutory mechanism for the landlord to increase the rent. The process can be used annually.[81] The landlord must serve a notice on the tenant with the proposed rent.[82] The rent takes effect unless the tenant refers it to the Tribunal.[83] The Tribunal has the power to set a market rent.[84]

By design rents for social rented housing are not market-based. In legal terms there is little direct law that limits the rents set by social landlords. Local authorities 'may make such charges as they may determine for the tenancy or occupation of their houses.'[85] There are also provisions for the rents for secure tenancies to be increased annually by notice.[86] The tenants of housing associations are theoretically able to charge market rents. Historically rents have been let on the basis of landlords' pooled costs. However, in recent years the practice of setting of rents for social landlords has been limited by regulatory constraints from the government and the regulator of housing associations,[87] which have limited rent increase and in some years required rent reductions.[88]

The other aspect of costs that is regulated is the taking of deposits by landlords as security for tenant's performance of obligations or liability under the tenancy. After a lengthy campaign by housing charities,[89] the Housing Act 2004 provided for the safeguarding of tenancy deposits in the case of assured shorthold tenancies.[90] All deposits must be dealt with in accordance with an authorised scheme.[91] Schemes may be custodial – where the deposit

[78] Per Lord Widgery CJ in *Metropolitan Property Holding v Finegold* [1975] 1 WLR 349, 352.
[79] Housing Act 1988, s.22.
[80] Ibid.
[81] Housing Act 1988, s.13(2).
[82] Ibid.
[83] Housing Act 1988, s.13(4).
[84] Housing Act 1988, s.14.
[85] Housing Act 1985, s.24(1).
[86] Housing Act 1985, s.102.
[87] The Homes and Communities Agency.
[88] See Welfare Reform and Work Act 2016, s.23, DCLG, *Guidance on Rents for Social Housing* (2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/313355/14-05-07_Guidance_on_Rents_for_Social_Housing__Final_.pdf and HCA, *Rent Standard Guidance* (2015) https://www.gov.uk/government/publications/rent-standard-guidance
[89] See WENDY WILSON, *Tenancy deposit schemes* Briefing Paper, No. 2121 (August 2017, House of Commons Library)
[90] Housing Act 2004, s.212.
[91] Housing Act 2004, s.213.

is transferred in full by the landlord to the scheme.[92] Alternatively, under an insurance scheme the landlord retains the deposit, but any failure by the landlord to repay the deposit is covered by the scheme's insurance that the landlord pays for.[93] The Government has contracted with three schemes to provide tenancy deposit protection.[94] If a deposit is not properly safeguarded in a scheme, a tenant can apply to the court for the return of the deposit and damages.[95] Further a landlord cannot terminate an assured shorthold tenancy by serving a section 21 notice while a deposit is not properly protected.[96]

5. Conditions (habitability)

The fourth element of the legal determinants of precarity is control of property standards or habitability to use the language of the UN.[97] The worst conditions in English homes are found in the private rented sector.[98] More than a quarter (28%) of privately rented homes did not meet the government's Decent Homes Standard[99] in 2015. This compares to 13% in the social rented sector and 18% of owner-occupied homes.[100]

The legal response to the issue of standards takes a number of legal forms in English law. Some are rights given directly to the tenant. The most important example of this is the Landlord and Tenant Act 1985, s.11 of which implies a term in to all short-term tenancy agreements that the landlord is responsible for repairs to the structure, exterior and utilities serving a property. The Act applies to 'short' tenancies, namely periodic tenancies or fixed-term tenancies of less than seven years.[101] It applies to all tenancies, both private rented and social.

Landlords cannot contract-out of the term[102] and a breach of the term can sound in damages.[103] A mandatory injunction can be awarded to require a landlord to effect the repair.[104] However, the implied term is limited to 'repairing' the home and landlords are not required to improve the home, either by providing utilities that were not present in the dwelling when it was let, or to correct an inherent design fault that does not create a

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[92] Housing Act 2004, Sched. 10, para. 1.
[93] Housing Act 2004, Sched. 10, para.3.
[94] See https://www.gov.uk/tenancy-deposit-protection
[95] Housing Act 2004, s.214.
[96] Housing Act 2004. s.215.
[97] UN Covenant on Economic, Social Cultural Rights: General Comment 4 (1991) E/1992/23.
[98] See Shelter, *Happier and healthier: improving conditions in the private rented sector* (2017) http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/briefing_happier_and_healthier_improving_conditions_in_the_prs
[99] The Decent Homes Standard was introduced in 2000 to provide a minimum standard of housing conditions in the social rented sector. The Government uses it to measure and compare standards across all housing tenures. It is not a legally binding standard.
[100] DCLG *English Housing Survey Headline Report 2015-16* (2017) https://www.gov.uk/government/statistics/english-housing-survey-2015-to-2016-headline-report
[101] Landlord and Tenant Act 1985, s.13. Meaning that for tenants with longer terms, the legal responsibility will be determined by the terms of the tenancy agreement.
[102] Landlord and Tenant Act 1985, s.12.
[103] On the normal contractual basis: *McGreal v Wake* (1984) 13 HLR 107, CA.
[104] Landlord and Tenant Act 1985, s.17.

disrepair. This was illustrated in the case of *Quick v Taff BC*[105] where condensation caused by design faults (single glazed metal framed windows, no insulating and inadequate heating) was found not to breach section 11.

There is also a structure of public law responses providing local authorities duties and powers to take action to tackle poor standards in housing. The Housing Health and Safety Rating System (HHSRS) in the Housing Act 2004 is a:[106]

> 'risk based assessment tool which is used by environmental health officers [in local authorities] to assess the risk (the likelihood and severity) of a hazard in residential housing to the health and safety of occupants or visitors. The HHSRS is tenure neutral; it can be used to assess hazards in private and social rented housing and also in owner occupied housing.'

The Act provides a number of notices and orders that officers *must* enforce against landlords if there are Category 1 hazards[107] and *may* enforce if the hazard is less serious.[108] Some actions (e.g. a prohibition order closing a dwelling or a demolition order) will lead the the tenant losing their security.[109] However, in order to prevent retaliatory eviction, in cases where the landlord is required to improve the dwelling, section 33 of the Deregulation Act 2015 prevents landlords from issuing a Housing Act 1988 section 21 eviction notice against a shorthold tenant within 6 months of having been issued an improvement notice. Despite the intention of tenure neutrality, in fact local authorities cannot take action against themselves.[110] Accordingly, their tenants cannot use this method to complain about their homes.

Unlike other parts of the UK,[111] England does not have a universal licencing scheme for all private landlords. However, Parts 2 and 3 of the Housing Act 2004 create two different licence regimes. Because of the greater risk in shared dwellings, Part 2 requires licences for all larger houses on multiple occupation (HMOs).[112] Local authorities have power to create licence schemes for other categories of smaller HMOs.[113] Part 3 provides for the introduction of a scheme of selective licensing of private landlords in a local housing authority's area.

> 'The power for authorities to introduce selective licensing was intended to address the impact of poor quality private landlords and anti-social tenants. It was primarily developed with the need to tackle problems in areas of low housing demand in mind – although the Act also allows for selective licensing in some other circumstances.'[114]

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[105] *Quick v Taff BC* [1986] QB 809, CA.
[106] ALEX ADCOCK AND WENDY WILSON, *Housing Health and Safety Rating System (HHSRS)* Briefing Paper, No. 01917 (May 2016, House of Commons Library).
[107] There are 29 hazards covering such matters as damp, excess cold, inadequate provision of facilities for food preparation and personal hygiene.
[108] See Housing Act 2004, Part 1.
[109] See e.g. Housing Act 2004, s.33 in the case of prohibition orders.
[110] *R v Cardiff CC Ex p Cross* (1982) 6 HLR 1, CA.
[111] See the Anti-Social Behaviour etc (Scotland) Act 2004, Part 8 and Housing (Wales) Act 2014, Part 1.
[112] See Housing Act 2004, s.55 and the Licensing of Houses in Multiple Occupation (Prescribed Descriptions) England Order 2006 (SI 2006/371).
[113] Housing Act 2004, s.56.
[114] WENDY WILSON, *Selective licensing of private rented housing in England and Wales* Briefing Paper, No. 4634 (June 2017, House of Commons Library).

Both Parts 2 and 3 of the 2004 Act have similar provisions requiring landlords to be 'fit and proper' persons. Sanctions for failure to register are either criminal prosecution or, since 2017,[115] a civil penalty.

6. Immigration Status

Our final legal determinant is immigration status of the tenant. Kountouris in her work on legal determinants of precariousness in work relations notes that:

> '[i]t is often ignored that one's immigration status plays a crucial role in determining whether she will be in a position to enter a secure and rewarding work contract or relation, or instead will be confined at the margins of the labor market, in an inherently precarious, and often undeclared work, relation.'[116]

The same is true in the housing market. Access to ownership is tied to access to capital, leaving most immigrants to rented housing. In both the social and private rented sectors landlords are limited in offering tenancies to some immigrants.

For over 20 years, access to social housing in England has been limited by immigration status.[117] Despite the popular view, amounting to a moral panic, that immigrants have privileged access to social housing, the reality is the opposite.[118] Rather the evidence is that:

> 'new immigrants and migrants are being revealed to encounter major problems accessing and maintaining accommodation and to be experiencing poor housing conditions, overcrowding and homelessness, as well as exploitation by landlords in the private rented sector.'[119]

For the private rented sector, the Immigration Act 2014 required private landlords to police the immigration status of any new tenant.

> 'Given the additional burdens this it was expected to place on landlords, the policy has proved controversial within the private rented sector, with a number of concerns raised by landlord associations at the consultation stage and during the 2014 Act's progress through Parliament. These concerns centred on the potential burden placed on landlords and the possible incentives for discrimination.'[120]

Accordingly government first piloted it in limited areas[121] but in 2016 the law was rolled-out across England.[122]

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[115] When the Housing and Planning 2017 came in to effect.

[116] Nicola Kountouris, 'Legal Determinants of Precariousness in Personal Work Relations: A European Perspective' (2013) 34 *Comparative Labor Law & Policy Journal* 21, 27.

[117] Housing Act 1996, s.160ZA and the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294.

[118] David Robinson "New immigrants and migrants in social housing in Britain: discursive themes and lived realities" (2010) 38 *Policy & Politics* 57

[119] Ibid, 64.

[120] Alex Bate and Alexander Bellis, *Right to Rent: private landlords' duty to carry out immigration status checks* Briefing Paper, No. 7025 (August 2017, House of Commons Library), 2.

[121] Although see: Claire Brickell, Tom Bucke, Jonathan Burchell, Miriam Davidson, Ewan Kennedy, Rebecca Linley, Andrew Zurawan, 'Evaluation of the Right to Rent scheme. Full evaluation report of phase one' (Research Report

To have the 'right to rent' a person must have the requisite qualifying status.[123] Landlords are require to check the tenant's (and any other adults members of the household) immigration documents before they enter into a tenancy. If the check is failed, the landlord must not allow the tenant to occupy the dwelling. Further if the tenant has a time-limited right to remain in the UK, the landlord may be required to carry out follow-up checks.[124] A landlord may receive a civil or criminal sanction for failing to carry out the checks.[125] Further, an amendment of the 2014 Act in 2016, permits landlords to terminate an agreement if the occupiers are disqualified.[126]

7. Conclusion

We started this article with an apology. Readers may now appreciate why. The legal framework surrounding rental housing in England is a complex and messy beast, with its limitations described here across five legal determinants of precariousness: tenure/time, control, cost, conditions, and immigration status. The difficulties occupiers and landlords face in untangling this patchwork of protections is an overarching element which unites these different strands. But does it need to be this way? Surely there is a better way forward?

In 2006 the Law Commission of England and Wales offered a potential route, recommending a major simplification to the law of rented homes.

> 'First, we recommend the creation of a single social tenure. At present, local authorities can only let on secure tenancies; [housing associations] only on assured tenancies. Our recommendations are "landlord-neutral". They enable social housing providers,… and those private sector landlords who so wish to rent on identical terms…
>
> Secondly, we recommend a new "consumer protection" approach which focuses on the contract between the landlord and the occupier (the contract-holder), incorporating consumer protection principles of fairness and transparency. Thus our recommended scheme does not depend on technical legal issues of whether or not there is a tenancy as opposed to a licence (as has usually been the case in the past). This ensures that both landlords and occupiers have a much clearer understanding of their rights and obligations.'[127]

While the proposals are being enacted in Wales,[128] there is no evidence of an appetite in government in England for updating the law. We would suggest that this is a mistake. For

83, Migration and Border Analysis, Home Office Science, October 2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf
[122] ALEX BATE AND ALEXANDER BELLIS, op cit.
[123] Immigration Act 2014, s.22.
[124] Ibid.
[125] Immigration Act 2014, ss. 23 and 33A.
[126] Immigration Act 2014, s.33D.
[127] Law Commission, *Renting Homes: The Final Report Volume 1: Report* (Law Com No 297, 2006), paras 1.4 and 1.5.
[128] Renting Homes (Wales) Act 2016 and MARTIN PARTINGTON, 'Wales' Housing Law (R)evolution: An Overview Part 2 (2016) *Journal of Housing Law* 19(3), 45.

both landlords and tenants (and their advisors) the simplicity it would bring would be welcome.

The recommendations of the Law Commission would leave the balance between the position of landlords and tenants largely untouched. It suggested two types of occupation contract:

> '(1) the secure contract, modelled on the present secure tenancy, giving substantial security of tenure protected by statute; and (2) the standard contract, modelled on the present assured shorthold tenancy, where the duration of the occupation is determined by the contract. [Social landlords] will be required to enter into secure contracts, except where the Bill allows them to enter into standard contracts (for example as probationary contracts, or following a court order after the anti-social behaviour term has been breached).'[129]

As we have demonstrated the position of tenants has become in some ways more precarious in the last 30 years – in terms of the ease of eviction and, for private tenants, for rents. Whether the current settlement has hit the right balance is not the focus of this article. Our role here has instead been limited to an overview of the key legal framework. We would comment, however, that the law is a creature of housing policy; the law is not neutral and the current position – with all the problems it carries with it - is a political choice.

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