1

Locating housing law and policy

Contents

It probably seems strange to begin a book about housing law and policy with a chapter which seeks to 'locate' the subject. In one sense, the location of the book is determined by its subject-matter – housing – and its descriptors – law and policy. However, the purpose of this chapter is somewhat deeper than that narrow sense. The purpose of this chapter is to locate the ways in which we think about housing law and policy by uncovering the assumptions and (to a certain extent, hidden) truths of the dual disciplines of law and policy in relation to housing. This is an ambitious way to start a text, but it is important in appreciating both the limits of thought about housing law and policy as well as their current constitution. If you like, the attempt here is to provide a partial genealogy of the subject because the subject was not preordained and, indeed, remains an ongoing project. It is an

ongoing project for at least three reasons – first, the history of housing law and policy is a history to a large extent of cycles of failure and re-invention; second, it is a history in which state sovereignty and individual responsibility have vied for primacy; and, third, housing's uncertain relationship with the welfare state is reflected in the identity of the subject to the extent that we might ask, 'what is social about social housing?' (discussed in Cowan and McDermont 2006). In large part, it is these three ideas that are the underlying themes of this book.

Thus, this chapter concerns what is meant by the study of housing law and policy, locating the law–policy interaction, and how this identity of the subject-matter maps on to the structure adopted in this book. The opening sections identify the disciplines of housing law and policy separately through certain analytical themes which are brought together in these subjects. What this discussion is designed to demonstrate is that both housing law and housing policy are 'destination subjects'. They bring together within their rubric a variety of ideas, theories and perspectives drawn from other sources. To put it another way, they are parasitic on those other sources. In demonstrating this, the task of explaining the evolution of today's housing relations is also begun.

There is a final point to this chapter and this book. Housing law and policy have developed to reflect, perhaps inadequately, what might be termed an evolution in our ways of 'holding' housing. At the turn of the twentieth century, it is said that around 90% of the population lived in privately rented accommodation; most other households were owner-occupiers (see Malpass and Murie 1999: 11). In 2007, in contrast, just under 69.5% of the population were owner-occupiers, around 17.5% rented from social landlords, and just 13% were living in private rented accommodation (www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstatisticsby/stockincludingvacants/livetables/: table 104). Understandings of housing law and housing policy have developed alongside this evolution, driving, supporting and responding to that change as well as raising problems; to an extent, also, the law has facilitated this change without necessary alteration, particularly regarding one aspect of ownership, namely mortgage lending (Whitehouse 2010).

The structure of this chapter is as follows. In the first part, I set out my stall about the interrelationship between housing law and policy and describe the structure of this book. Subsequently, I take the subjects of housing law and housing policy separately, describing the influences on their modern apparel, both historic and current. Separating them out in this way is a convenient, analytical device, which also draws attention to their separate influences. However, the point of this book, as is emphasised in the opening section, is to demonstrate their complex interaction.

Housing law and policy

The separation of housing law and housing policy is a convenient device that reflects both the separate development of the disciplines as well as the way in

which they are often currently presented. But it is a false division. One simply cannot understand, let alone appreciate, the one without the other. Housing policy texts make some reference to housing law, and vice versa. However – and this is no criticism of these works because it is not their purpose – they rarely bring the two together. They offer a partial picture of their subject as a result.

Even the most commonplace application of housing law is infused not just with that law but with housing policy. This is often done silently, with the stamp of a judge and possibly little recognition that they are performing an interdisciplinary act. Most private sector tenancies can generally be terminated by giving the occupier 2 months' written notice that the landlord requires possession of the property. Once that has occurred, the court must grant the possession order. Stripped of its technicality for present purposes (discussed in Chapter 11 below), this is understandable law. However, when a district judge makes such an order, usually without an oral hearing, they are performing a housing policy which has prioritised and produced a private rented sector (PRS) which offers temporary security to tenants. They are the implementers of the law, for sure, but they are also participating in the policy behind it (and there may be little a district judge can do about that). It may also be that the occupier does not go through with the court proceedings, as they are but a mere formality (although, see Chapter 16). In doing so, the occupier is acting out housing policy. Historically, that temporary security represents a major shift in policy.

But this book is not just about housing law, it is about housing policy and its uses of housing law. Housing policy interventions may be by way of formal law – by which I mean statute or secondary legislation, and its interpretation by judges – or by informal law – such as guidance which is enforceable by another means (and may be more readily applied by its targets because it is more digestible and is written for them). Housing policy does not necessarily need to use either method of law. There are a variety of other more indirect methods – such as targets and financial penalties or rewards/incentives, bidding criteria (such as a requirement for partnerships before being awarded a grant), performance standards and inspection regimes – which are equally, if not more, important and may also take on the character of 'law' at least between the people involved. These softer regulatory tools are employed by policy-makers and others in sometimes vain attempts to achieve implementation of policy goals. They have become increasingly frequently used in housing policy, as elsewhere.

One important clarification, then, that can be taken from this conjunction between housing law and policy is of the subject-matter of housing law itself. That clarification is one which will be familiar to most, if not all, lawyers, but particularly those with a socio-legal bent. The paradigm of socio-legal studies has opened our eyes to the diverse places and understandings of housing law, whether it be in the courts or in everyday life. The interaction and interrelation between housing law and policy offers the opportunity for a socio-legal analysis of what used to be called the housing system, the agglomeration of tenures,

policy and law (but is perhaps more accurately referred to as the housing systems). The socio-legal question can be framed like this: how does housing law operate in society?

In thinking about this question, we need to be alive to the diverse regulatory techniques of housing policy, as well as the self-governing capacities of individuals. In the course of a study about harassment and unlawful eviction in the PRS in 1999, a private landlord said to us – and I paraphrase – that he considered that placing a bunch of flowers in a property for a new occupier was a much more effective regulatory technique than a contract which nobody read. Albeit slightly extreme, this understanding opens our eyes to the different regulatory techniques which can be used by the different actors in housing relationships. In another guise, Daintith (1994) categorised regulatory techniques by reference to the concepts of imperium – commands backed by force, like the contract – and dominium – incentives to comply, at a stretch the bunch of flowers. Throughout this book, we are just as interested in the contract as the bunch-of-flowers approaches to regulation. When we think about homelessness law, for example, we need to be alive not just to the law itself but also the findings of research project after research project, that, as Loveland (1991a: 22) expressed it,

> Legalism is an intruder into the administrative arena. It does not prescribe decision-making, rather it gets in the way. It is not respected, but ignored. And if it cannot be ignored it is grudgingly accepted as an unrealistic impediment to rational decision-making.

This may be an overly pessimistic assessment and recent research has stressed, more positively, certain criteria through which law might have more significant impact on decision-making practices (for example, Halliday 2004). Nevertheless, we need to be sensitive to the different influences on decision-making beyond the law and what the objects of study – housing officers, tenants, landlords, applicants, lenders, even judges – regard as 'law'. This is what I think Rose and Valverde (1998: 545) had in mind when they argued that there is no such thing as 'the law'. They argue that:

> Law, as a unified phenomenon governed by certain principles, is a fiction. This fiction is the creation of the legal discipline, of legal textbooks, of jurisprudence itself, which is forever seeking for the differentia specifica that will unify and rationalize the empirical diversity of legal sites, legal concepts, legal criteria of judgement, legal personnel, legal discourses, legal objects and objectives.

The task of writing this book, then, is ultimately both ambitious and contradictory. It sets out relevant parts of the law, while simultaneously seeking to pull back from the fiction that this is 'the' law, as opposed to one set of formal rules which may well be ignored, supplemented, interpreted or translated, and only very occasionally invoked. In summary, what people think of, and act out, as law is far more important than my (or your) versions of truth (for *the* classic text on law in society, see Ewick and Silbey, 1999). As a legal practitioner, I

recognise the power of law; as a socio-legal academic, I recognise that is but one version of law competing against other versions which have their own internal logics and power.

Structure of this book

Having outlined the approach taken in this book, I take the opportunity to set out its overall structure. This book has three parts following this introductory chapter.

The three parts of the book discuss the following issues: the *regulation* of the housing systems; *access* to housing; and individual *rights and responsibilities* in housing.

Taking each in turn, the regulation of housing systems is concerned with the ways in which different types of regulation have been used to stifle or stimulate the development of each tenure (a concept discussed in the next sections of this chapter). Although this may be unfamiliar terrain for some lawyers and law students, it provides essential background information which, often, becomes foregrounded in subsequent chapters. It offers some explanation as to why legal values may be less important in decision-making because it offers an appreciation of the regulatory matrix of the housing systems which goes beyond the formal law. Finally, it explains what is possible – that is to say, it explains the constraints within which each tenure operates as well as the constraints (self-imposed and otherwise) within which regulation operates.

Our thinking about access to housing has been dominated by two concepts, need and affordability. There is a rough and ready distinction which one might operate here: access to social sector accommodation is based upon a household's housing need, whereas access to private sector accommodation is based upon affordability. In this part, we interrogate these concepts in relation to access to the different housing tenures, although it is most convenient here, for reasons which will become apparent, to link social housing together.

In the third part, we are concerned with rights in housing, including security in housing. The general observation one might make is the shift in concern away from rights towards responsibilities, particularly to one's community. This is, perhaps, paradoxical in light of the incorporation of the European Convention on Human Rights and Freedoms into domestic law in the Human Rights Act 1998 (referred to throughout this book as the HRA). However, the predominant concerns of policy-makers are to ensure that these rights do not trump the interests of neighbours and the local community, bodies which equally have rights of their own, as well as the interests of the housing providers themselves. Sometimes, it must be said, the rights do appear to trump the interests of the providers, but these occasions are infrequent.

In each part, we can observe an appreciation of, and response to, discrete policy issues and approaches. It is also important to appreciate that these parts have intersections and overlaps – it is by no means a perfect structure. Nevertheless,

the structure itself does work because, at the end, you should appreciate that there is a complex interplay between each part. Each chapter can, of course, be read separately, and hopefully there will be valuable material there. But the bigger point, indeed the purpose of this structure, is that the foundational context of each chapter can be found within that structure.

Of the examples of this interplay, the one most uppermost in my mind at present (for reasons with which I won't bore you) is security of tenure, the opening chapter of Part III. It is noted at the outset of that chapter that tenure is the oddest thing and, I might have added, security of tenure is even odder. It just makes no sense – indeed, it is nonsense – on its own. The different ways in which the law provides security of tenure are fundamentally justified by the different modes of funding and regulating each tenure, discussed in Part I. But, when one considers that tenure itself is often an accident and, indeed, unclear at the point of access, that justification is just nonsense.

These introductory points now complete, I move on to discuss the subjects of housing law and housing policy separately.

Housing law

I begin with a story to introduce the identity of housing law. It is a story of the history of the subject in part, and its current identity. The story begins in 2005–06. The Law Commission had been set the task of developing a model of proportionate dispute resolution in the context of housing disputes. Where should it start? It began its work by seeking to classify different types of housing problem to which the law offers some remedy (Law Commission 2006a: paras. 1.18–24). From here, it identified certain core housing disputes, where the occupation of a 'home' is under threat. Next, the Commission identified certain other peripheral areas outside that core concerning issues relating to the peaceful occupation or enjoyment of that home, purely financial matters, and long-term security-related issues. A second set of issues were identified as being concerned with legal relationships. The core here was said to concern 'pure' landlord and tenant matters, because this followed on from their previous work about landlord and tenant. Other legal relationships were at the periphery. The Law Commission was able to present these levels of analysis in the form of an onion so that one could peel back the layers of housing law (Law Commission 2006b: Part 3).

Ultimately, though, it gave up with these approaches (to mix metaphors, the onion hit a brick wall). It did so for a revealing reason. The classification of housing problems approach, it was said, 'risks glossing over the differences in individual perspectives, whether between the two parties to a particular housing dispute, or between different individuals engaged in superficially similar disputes' (Law Commission 2006b: para. 3.18(2)). The legal relationships analysis did 'not bring out the underlying personal relationships, wider social, physical, economic or other problems or the role of, and effects of the dispute on, third parties' (para. 3.18(1)). Instead, the Law Commission developed what

it termed an 'accountability space' analysis which focused on the construction of disputes by reference to dispute resolution processes (paras. 3.13–7).

This story is designed to illustrate a simple point – there is no single, uniform understanding of housing law. The parameters of the subject are shaped not so much by the subject-matter – housing – but by legal processes as well as the authors and practitioners who develop and test their ideas. Of course, this is probably likely to be true of all classifications within the law curriculum; but, underlying the debate about the parameters of housing law lies a rather more complex history.

It should be remembered, first and foremost, that housing law is a relatively new subject within the law curriculum. In their preface to the first major text on the subject, Andrew Arden and Martin Partington (1983: v) noted the diverse locations of their subject and that, conventionally, housing law had meant 'public housing law'. It was the achievement of those authors that they brought together the diverse, apparently unconnected sources of law concerned with housing. Over the subsequent twenty-five or so years, we have developed a better understanding of the terrain of housing law but, as the Law Commission so vividly demonstrated, it remains incomplete and obscure. The analytical approach pioneered by Arden and Partington in that and subsequent work has been to begin with an outline of the different types of legal relationships, or statuses, which occur in housing, followed by a 'function'- or 'problem'-based approach. They were able to develop that structure because, by that time, the sources of housing law were converging, most particularly around the theme of consumerism which had been a particular issue in this area from the 1970s (Loveland 1992).

Strands of housing law were apparent before that time, although they had not been interwoven. A number of themes arose at different times and for different reasons, and (perhaps counter-intuitively) despite prevailing political orthodoxies (cf. Englander 1983; Wohl 1977: 19). In the remaining part of this section, these strands of housing law are introduced.

Poor Laws

One strand of housing law can be derived from the Poor Laws. This should neither be over- nor underestimated. It should not be overestimated because the Poor Laws were abolished by the National Assistance Act 1948, s. 1. Therefore, they have no formal existence; although certain concepts are reminiscent of those laws (such as the equation of settlement under the Poor Law with local connection under the homelessness legislation – discussed in Chapter 6 below) and the local administration of public sector housing. Equally, their influence should not be underestimated because, as Cranston noted (in the broader context of the welfare state, but which is equally applicable to housing):

> When modern social rights are examined … many of the themes identified in the discussion of the poor law … recur – notably the character of social rights, the

> incorporation of morality in social welfare law and administration, and the centrality of work in social welfare policy. (Cranston 1985: 44; see also Harris 1999)

Relevant themes of the Poor Laws include the principle of less eligibility, the importance of locality, and the distinctions between those deserving of assistance and those undeserving of it. This is not the place for a full examination of the Poor Laws (as to which see, for example, Cranston 1985).

The principle of less eligibility was most clearly framed in what is known as the New Poor Law, which came into being in 1834, and was a product in part of the Royal Commission report of 1832. It incorporated a particular understanding of a broad division between those deserving of assistance and those undeserving of assistance. The principle was that relief should not be given so as to produce a better situation for the recipient than the lowest-paid worker:

> The first and most essential of all conditions, a principle which we find universally admitted, even by those whose practice is at variance with it, is that [the recipient of Poor Law relief's] situation on the whole shall not be made really or apparently so eligible as the situation of the independent labourer of the lowest class … Every penny bestowed that tends to render the condition of the pauper more eligible than that of the independent labourer, is a bounty on indolence and vice. (Poor Law Report, in Checkland and Checkland 1974: 335)

The principle was produced from concerns that 'outdoor relief' – commonly, some form of payment in money or in lieu – actually caused both the breakdown of family ties as well as claims for relief: 'In abolishing punishment, we equally abolish reward … idleness, improvidence, or extravagance occasion no loss, and consequently diligence and economy can afford no gain' (Checkland and Checkland 1974: 156). The concern was to identify the pauper from the pauperised. The pauperised was a category of poor person who was made idle by the system – those who won't labour – as opposed to those who, despite the system, tried to find work or remained in work – the industrious poor (see Dean 1992: 220; Procacci 1991: 158, who refers to pauperism as 'poverty intensified to the level of *social danger*' (original emphasis)). The construction of workhouses in this period was specifically designed to demonstrate this principle both to the inmates as well as those on the outside. They became a powerful means of disciplining populations both inside and outside their walls (Foucault 1991).

At the risk of accusations of historicity – an overly linear understanding of history – one can say that these debates remain prevalent in housing law and its administration today. Law reformers at the heart of government, for example, had a rallying cry in the early 1990s that rehousing assistance should be targeted on married couples, or those who are holding off marriage until they find suitable accommodation. In 2008, a new housing minister, Caroline Flint, fresh from the Department for Work and Pensions (DWP), argued that housing allocation should be linked by a 'commitment contract' to job-seeking (Wintour 2008), a point reinforced by the Coalition government in its programme for welfare reform (DWP 2010c, with the sub-title 'welfare that works').

Sanitation

For some, housing law itself was born during the nineteenth century. It was during this time that the first legislative interventions in the relationship between landlord and tenant – fragments of which remain extant today – occurred (and are touched on again in Chapter 13 as they remain relevant). These interventions concerned the state and condition of rented properties. They resulted, in part, from problematic limitations on the responsibility of landlords through the usual principles of contract law. However, to see such judicial limitations as the cause would in itself be insufficient.

During the nineteenth century, it has been said that there was an 'avalanche of statistics', the science of the state (Hacking 1991; Foucault 1991). Many of these interventions were to focus on the housing conditions of the poor and, most particularly, stamping out the production of disease, such as cholera, which affected all classes. Hence, the poor are often written out of the accounts of investigators in the early to mid-nineteenth century (Poovey 1995: 82; Hamlin 1998: 211). Perhaps the classic text of this early period is Edwin Chadwick's *Report on the Sanitary Condition of the Labouring Population of Great Britain*, published in 1842. In this publication, Chadwick summarised the local reports of his investigators. As Hamlin (1998) explains, Chadwick's reading of the local reports and his summary were designed in part to bolster the New Poor Law, which Chadwick himself had devised, and to create a limited public health in which certain explanations of disease, such as destitution and poverty, were written out. This necessitated buying into certain theories of disease, notably the miasmatic version (through which disease was airborne), and discrediting others. Sanitation fulfilled a number of ends, and was used to explain and solve all; principally though, it bolstered the New Poor Law project (Hamlin 1998; Dean 1991).

In this report and subsequently, the primary target of intervention became the poor themselves and, more specifically, the moral condition of the poor (Gauldie 1974). Principal concerns were overcrowding and certain types of housing – 'common lodging houses' – which were regarded as unhygienic and ethically problematic. Overcrowding produced incest and sexual promiscuity, referred to by Chadwick euphemistically as 'promiscuous sleeping' (see Flinn 1965: 194). Lodging houses were regarded in the 1842 report as inherently contagionist, but this was not necessarily the focus of the accounts: they stressed the 'moral depravation' encountered in these transient locations. By their transient nature, the occupiers lent themselves to such depravation (see, further, Gauldie 1974: 245). There was a 'long succession of works whose literary merit and statistical accuracy may have varied, but whose cumulative influence was considerable' (Gauldie 1974: 147). One particularly influential work was Reverend Andrew Mearns' one penny pamphlet, *The Bitter Cry of Outcast London* (1883). This pamphlet provided shocking examples of apparent degradation and vice, from which the poor were said to be in need of evangelical rescue.

The Royal Commission on the Housing of the Working Classes (1885a: 14) was particularly engaged with the question: 'Is it the pig that makes the stye or the stye that makes the pig?' To put this slightly differently, the question which animated the inquiry was whether, if the quality of the housing were improved, would that also impact on the moral delinquency of the inhabitants? In one form or another, it was this question which dominated Victorian inquiry and became understood as public health.

Public health was a legitimate organising metaphor for intervention in the free market but it was combined with a sense of concern for the morals of the occupiers. The legislation during this period (according to Wohl (1977: 73), there were forty major Acts dealing with public health) has been categorised as follows:

i) the Public Health Act powers over new building, and (less comprehensive and more difficult to exercise) to prevent the unhealthy use of existing houses and to remedy conditions that were dangerous to health;
ii) powers to close or demolish individual houses that were unfit for human habitation;
iii) powers to demolish and clear areas of insanitary housing. (Holmans 1985: 27)

Such neutral presentation of the laws, however, does little justice to the role they had in making visible not only the conditions of such housing but also the types of occupier. In particular, attention was focused on not just the criminal classes but what Octavia Hill (a pioneer housing manager and member of the 'five per cent' philanthropists) referred to in her evidence to the 1885 Royal Commission as the 'destructive classes' for whom a 'paternal supervision' was necessary (1885a: paras. 9122–4). The principal reason for slum clearance and housing improvement powers was understood to be dealing with deviance:

> The first and most sweeping improvement schemes were deliberately driven through the most criminal areas, with the dispersal of criminals from their haunts, and the suppression of crime as the first motive. The fact that these haunts were in most cases also the most insanitary parts of the cities was a secondary consideration. The frequency with which the emotive phrase 'dens of vice' crops up is some indication of attitude. (Gauldie 1974: 267)

It was not until the Housing of the Working Classes Act 1885 that Parliament introduced an implied condition of fitness for human habitation into the contract between landlord and tenant (against the furious protests of the judiciary – see Reynolds 1974: 381). The provision was, perhaps unsurprisingly, narrowly interpreted and (as demonstrated in Chapter 13) practically useless, but it remains an important provision in that it interfered, for practically the first time, in an important matter: the landlord–tenant contractual relation. It brought into effect, in slightly different form, a recommendation of the 1885 Royal Commission (1885a: p. 56) that 'there should be a simple power by civil