THE ROLE OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN PUBLIC AND PRIVATE SECTOR POSSESSION PROCEEDINGS

A J Ramshaw

PhD

2016

THE ROLE OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN PUBLIC AND PRIVATE SECTOR POSSESSION PROCEEDINGS

ADAM JOHN RAMSHAW

A thesis submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy

Research undertaken in the Faculty of Business and Law

September 2016

Abstract

This thesis is concerned with the legal shortcomings flowing from *Manchester City Council v Pinnock*.[1] Following *Pinnock* tenants of local authorities may have the proportionality of a possession order considered by the court in light of art.8 of the European Convention on Human Rights and the Human Rights Act 1998. However, there are questions outstanding from *Pinnock*. Firstly, there has been a failure within the courts to appreciate the importance of the home to the individual, their family, and society in general. Secondly, domestic courts have not provided adequate reasons for limiting art.8 to proceedings involving a local authority. Thirdly, the nature of proportionality within possession proceedings has been poorly conceived thereby marginalising art.8's effects.

This thesis draws support from philosophical and sociological literature to illustrate the deep connection a person feels towards their home. These connections exist irrespective of ownership yet it is these non-legal interests which are often overlooked by the courts. It is argued here that art.8 may protect these non-legal interests.

Further, this thesis questions why art.8's protection ought to be limited to proceedings involving a public sector landlord. The thesis provides an overview of the competing theories concerning horizontal effect and their related shortcomings. The work of Alexy is used to argue that horizontal effect is a singular phenomenon thereby making art.8 applicable in private proceedings. The public/private divide is then critiqued to demonstrate the theoretical viability of horizontal effect where a person's home is at risk.

The final strand of this thesis is concerned with how the competing interests of landlords and tenants may be adjudged. To this end a structured proportionality model is developed to replace the general proportionality exercise utilised by the courts following *Pinnock*. This proportionality model is then applied to existing case law to demonstrate its viability and context sensitivity.

[1] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

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Acknowledgements

I would like to express my thanks to my supervisor, Dr Raymond Arthur, whose sense of humour and encouragement spurred me to the finish line even at those times when nothing seemed further away.

I would also like to thank my second supervisor, Professor Sue Farran, for her wit and feedback which was always insightful and constructive.

Thanks to the staff and research students at Northumbria University who have always been so generous with their time in discussing legal theory, politics, and craft ales.

Special thanks are owed to Kathryn, my family, and my friends who have gracefully withstood my navel-gazing over the past three years (or perhaps longer).

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas, and contributions from the work of others.

I declare that the Word Count of this Thesis is 75,707 words.

Name: Adam John Ramshaw

Signature:

Date:

1 Introduction

1.1 The Need for Increased Security of Tenure in Rented Accommodation

This study explores an alternative approach to assessing the weight to attribute to one's home in legal proceedings. The idea of the home incorporates a person's non-monetary links to a particular place. The nature of the home is particularly relevant for the purposes of art.8 of the European Convention on Human Rights (the Convention) as incorporated into domestic law via the Human Rights Act 1998 (HRA 1998). Article 8 creates a right to respect for one's private and family life, home and correspondence. Any critical analysis of the term 'home' will therefore overlap with ideas of private and family life. The idea of the home is particularly interesting within the context of possession proceedings between a landlord and a tenant as a home may exist independent of any proprietary interest. Moreover, these interests may arise in all instances of rented accommodation and so seem to suggest that one's right to respect for their home should be pervasive in possession proceedings. This thesis places a focus upon possession proceedings as these have become something of a lightning rod for art.8.[1] In light of these general observations this thesis explores the disparate application of art.8 which has arisen following art.8's arduous journey through the courts. This is evident most prominently in the Supreme Court's judgment in *Manchester City Council v Pinnock* [2010].[2]

Following *Pinnock* tenants are now able to invoke art.8 in an effort to resist a landlord's claim for a possession order. In such instances the court must ask whether a possession order would be a 'proportionate means of achieving a legitimate aim'.[3] However, this protection will only arise in proceedings concerning local authorities (or other bodies deemed to be acting in a public fashion). Therefore, such protection will only apply to a limited number of tenants to the exclusion of their private sector counterparts. This immediately raises questions as to why one tenant's home interests are in practice afforded more weight than another's in otherwise analogous circumstances. This is particularly the case as the facts of *Pinnock* are common in possession proceedings. *Pinnock*, which is discussed and referenced throughout this work, concerned Mr Pinnock who was a demoted

[1] See the following cases in particular *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983; *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465; *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[2] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[3] Ibid [52].

tenant due to the anti-social behaviour of his partner and children. Demoted tenants being those tenants who have formerly been secure tenants but due to some misconduct now enjoy lower security of tenure.[4] The local authority pursued a possession order against Mr Pinnock due to the anti-social behaviour of his family some of whom resided with him and some of whom did not. Mr Pinnock was, in the eyes of the court, blameless in this anti-social behaviour. Nevertheless, the Supreme Court found that whilst art.8 was applicable to the proceedings it was proportionate to make an order. This stands in contrast to cases such as *McDonald v McDonald*[5] and *Malik v Fassenfelt*[6] in which the courts have held that art.8 has no bearing upon private sector possession proceedings.

The findings of the Supreme Court in *Pinnock* might seem appropriate on their face due to the historic understanding of human rights existing to protect the individual from the power of the State but upon further reflection, and in light of a burgeoning private rented sector, the position creates an arbitrary distinction between different types of tenant, resulting in variable protection based on the type of tenancy a person enjoys over the severity of the interference with a person's rights. In cases following *Pinnock* the domestic courts have considered the possible application of art.8 to private sector tenancies but thus far the courts have denied art.8 any bearing in such cases. The courts have based their reasoning in such cases upon the legal framework created by the HRA 1998 and the apparent preservation of the public/private divide in human rights adjudication. However, this approach contradicts the findings of the courts in other areas of law which have been receptive to human rights arguments and fails to engage with the arguments in favour of a robust approach to art.8.

This study is necessary in large part due to the comparatively lower security of tenure enjoyed by tenants in both the public and private rented sectors over the course of the past 40 years.[7] At present whilst landlords must broadly speaking acquire a court order before recovering their property,[8] the instances in which an order will be denied are few.[9] Therefore, it is timely and essential to study the effects of art.8. There is a wealth of literature considering the effects of the HRA 1998 upon English law generally together with some appreciation of the effects art.8 may have

[4] For a statutory overview of demoted tenancies see ibid [5]-[13].
[5] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.
[6] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS).
[7] See the following for an assessment of housing law over this period, *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [11]-[28].
[8] Protection from Eviction Act 1977.
[9] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [11]-[28].

upon possession proceedings.[10] However, a study of this depth, taking account of the theoretical underpinnings in the areas related to the core questions raised by art.8 in the context of possession proceedings has not yet emerged. This is in spite of recent efforts by, for example, Shelter in their 'Great Home Debate' which has invited participants to give their views on what makes a place feel like home.[11] The issue of dispossession is all the more pressing as 350,000 tenants were at risk of being removed from their home between April 2015-April 2016.[12] In light of this the questions outstanding from *Pinnock* and related cases as to the application of art.8 are not only legal in nature but have wider practical utility to those tenants (and landlords) who face possession proceedings. The potential role of art.8 in possession proceedings is all the more pressing given that the current rental market is increasingly inhabited by those who are unable to buy their home and so reside in the private rented sector long term.[13] This is reflected in the private housing sector now being larger than the public housing sector with the private rented sector more than doubling in size between 1992 and 2014.[14]

The growth of the private rented sector is due in part to the reduction in the availability of social housing. This reduction may be linked in large part to two central Government policies; the right to buy scheme together with a failure to replace diminishing housing stock. The right to buy scheme allows sitting council tenants to purchase their home at a discount based upon the length of time a tenant has resided at the property. From 1980 to 2015 the total right to buy sales made by

[10] See for example D Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 Legal Studies 165; Lord Irvine of Lairg, 'The Impact of the Human Rights Act: Parliament, the Courts, and the Executive' (2003) PL 308; H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007); S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77; S D Pattinson, 'The Human Rights Act and the Doctrine of Precedent' (2015) 35 Legal Studies 142; I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138.

[11] Shelter, 'The Great Home Debate' (*Shelter,* 2016) <https://www.greathomedebate.org.uk/> accessed 15 June 2016.

[12] Shelter, *Renters Put At Risk* (June, 2016).

[13] P Toynbee, 'Those Who Can't Afford a Home are Being Abandoned' The Guardian <http://www.theguardian.com/commentisfree/2016/apr/18/home-council-social-housing> accessed 20 April 2016; P Sherlock, D Wainwright and P Bradshaw, ''Sky-High' Rental Hotspots Across England Revealed' (*BBC,* 5 August 2016) <http://www.bbc.co.uk/news/uk-england-36794222> accessed 5 August 2016.

[14] D Cowan, *Housing Law and Policy* (Cambridge University Press 2011) 86-87; Department for Communities and Local Government, 'FT1101 (S101): Trends in Tenure' (*Live Tables on Social Housing Sales,* 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/451203/FT1101_Trends_in_tenure.xls> accessed 13 August 2015; D Cowan, *Housing Law and Policy* (Cambridge University Press 2011) 87.

English local authorities was 1,805,282.[15] Sales made under the right to buy have not been spread equally across England nor has there been parity in the quality of housing stock being bought.[16] Homes of the 'best quality … [and the] most spacious, traditionally-built houses with gardens tend to be those which were most popular and in highest demand.'[17] Many of the homes sold under the right to buy scheme have not remained in owner-occupation but have instead become privately rented. These private rented properties are predominantly taken up by low-income renters who might previously have found accommodation in the public sector.[18]

The diminution of public housing has been exacerbated by a failure to replace depleting stock due to the restrictions placed upon local authorities in the use of proceeds from right to buy sales.[19] This failure is evident in the fact that in 1986 local authorities owned 91% of all social housing in Great Britain, as of 2006 local authorities in Great Britain owned 56% of all social housing.[20] In the financial periods 1979-80 to 2015-16 423,400 social housing units were built by English local authorities.[21] In the same period 713,110 housing association units were built.[22] Alongside the sale of council housing the upshot of this for the wider rented sector is a reduced (and reducing) public sector. As a result of this tenants, including those who are unable to become owner-occupiers as well as those who prefer to be in the rented sector, are being pushed into the private sector.[23] Within the private sector

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[15] Department for Communities and Local Government, 'Table 671: Annual Right to Buy Sales for England' (*Social Housing Sales (Including Right to Buy and Transfers),* 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406316/LT_671.xlsx> accessed 13 June 2016.

[16] R Forrest and A Murie, *Selling the Welfare State* (Routledge 1988) 80.

[17] A Murie, 'Linking Housing Changes to Crime' (1997) 31 Social Policy and Administration 22, 28; C Jones, 'The Right to Buy' in Peter Malpass and Rob Rowlands (eds), *Housing, Markets, and Policy* (Routledge 2010) 65; B A Searle, 'Recession, Repossession, and Family Welfare' (2012) 24 Child and Family Law Quarterly 1, 3-4.

[18] C Jones, *Exploitation of the Right to Buy Scheme by Companies* (Office of the Deputy Prime Minister, 2003).

[19] G A Jones, 'Assessing the Success of the Sale of Social Housing in the UK' (2007) 29 Journal of Social Welfare & Family Law 135.

[20] P Malpass and R Rowlands, 'Introduction: Transformation and Change in Housing' in Peter Malpass and Rob Rowlands (eds), *Housing, Markets, and Policy* (Routledge 2010) 9; S Wilcox, *UK Housing Review 2006/7* (Chartered Institute of Housing/Council of Mortgage Lenders, 2006).

[21] Department for Communities and Local Government, 'Table 209: Permanent Dwellings Completed, by Tenure and Country' (*Live Tables on House Building,* 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454681/LiveTable209.xlsx> accessed 13 June 2016.

[22] Ibid.

[23] P Toynbee, 'Those Who Can't Afford a Home are Being Abandoned' The Guardian <http://www.theguardian.com/commentisfree/2016/apr/18/home-council-social-housing> accessed 20 April 2016; S Clarke, 'Home Ownership Struggle Reaches Coronation Street' (*The Resolution Foundation,* 2 August 2016) <http://www.resolutionfoundation.org/media/blog/home-ownership-struggle-reaches-coronation-street/> accessed 5 August 2016.

there is now also a large group of families for whom assured shorthold tenancies offer little advantage given that the assured shorthold framework was implicitly designed for 'young and mobile households'.[24] With such tenants in the low security private sector the research questions of this thesis become all the more prescient.

The problems noted above in relation to right to buy have been exacerbated by the financial crisis of 2007/08 with the private rented sector unexpectedly growing despite the resultant barriers created by the crisis for those who wish to enter owner-occupation (higher unemployment and stricter mortgage requirements).[25] Notwithstanding these barriers those able to invest in property have done so using buy to let mortgages thereby increasing private rented housing stock.[26] Many of these buy to let mortgages were utilised by small-scale landlords, often with only one rental property, attracted to the rental market by its comparatively higher capital growth over other forms of traditional investment such as 'stock markets, bank deposits, and pension annuities'.[27] These landlords saw investments in rented property as a more secure pension fund.[28]

The above changes to the housing sector have given rise to 'generation rent',[29] a group of young people who are in effect locked out of owner-occupation and so instead make their long term home in the rented sector. These individuals have fallen into the 'rent trap'[30] in which they have few legal rights, little security, and no means of escape.[31] This lurch towards the private rented sector for young people

[24] P A Kemp, 'Private Renting After the Global Financial Crisis' (2015) 30 Housing Studies 601, 610.
[25] K McKee, 'Young People, Homeownership, and Future Welfare' (2012) 27 Housing Studies 853, 858-860; J Hoolachan and others, ''Generation Rent' and the Ability to 'Settle Down': Economic and Geographical Variation in Young People's Housing Transitions' (2016) Journal of Youth Studies 1, 2; P A Kemp, 'Private Renting After the Global Financial Crisis' (2015) 30 Housing Studies 601, 614.
[26] P A Kemp, 'Private Renting After the Global Financial Crisis' (2015) 30 Housing Studies 601, 606-611.
[27] Ibid, 608-609.
[28] D Rhodes, 'Buy-to-Let Landlords' in David Hughes and Stuart Lowe (eds), *The Private Rented Housing Market: Regulation or Deregulation?* (Ashgate 2007); P A Kemp, 'Private Renting After the Global Financial Crisis' (2015) 30 Housing Studies 601, 609.
[29] R Ramesh, 'UK Housing Shortage Turning Under-30s into 'Generation Rent'' (*The Guardian,* 2012) <https://www.theguardian.com/society/2012/jun/13/generation-rent-uk-housing-shortage> accessed 11 July 2016; K McKee, 'Young People, Homeownership, and Future Welfare' (2012) 27 Housing Studies 853.
[30] R Walker and S Jeraj, *The Rent Trap: How We Fell Into It and How We Get Out of It* (Pluto Press 2016).
[31] P Sherlock, D Wainwright and P Bradshaw, ''Sky-High' Rental Hotspots Across England Revealed' (*BBC,* 5 August 2016) <http://www.bbc.co.uk/news/uk-england-36794222> accessed 5 August 2016.

creates worrying problems for the future.[32] In a neoliberal landscape housing assets are 'at the heart of a new social contract between the state and its citizens in which individuals are to assume much greater responsibility for securing their own future welfare.'[33] In this sense the home's character as a financial asset comes to the fore and serves as a notional insurance policy with cash available in an emergency or for later in life.[34] However, this is the institution which generation rent are being excluded from with little likelihood that they will be able to benefit from the same 'one-off bonanza' of advantageous socio-economic circumstances that allowed older generations to accumulate housing wealth.[35] Low security of tenure in the private rented sector is therefore becoming the norm for a majority of young people. The ramifications of this are seen in predictions that by 2025 more than half of those under 40 years old will rent their home.[36]

The precarious position of those in (public or private) rented accommodation is made worse again by the broad definition given to anti-social behaviour which is more likely to affect renters on low-incomes than owner-occupiers.[37] Anti-social behaviour legislation is couched in such a way that even those who are not guilty of misconduct may be removed from their home.[38] For instance, *Bryant v Portsmouth City Council*[39] concerned a secure tenant under the Housing Act 1985 who was dispossessed of her home due to the anti-social behaviour of her grandsons despite being at 'no personal fault'.[40] Ground 2 of sch.2 to the Housing Act 1985 allows for a tenancy to be determined where the tenant or a person residing with them is involved in anti-social behaviour. Due to the mandatory nature of the legislation the

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[32] J Hoolachan and others, "Generation Rent' and the Ability to 'Settle Down': Economic and Geographical Variation in Young People's Housing Transitions' (2016) Journal of Youth Studies 1, 8.
[33] K McKee, 'Young People, Homeownership, and Future Welfare' (2012) 27 Housing Studies 853, 856.
[34] See the phenomenon of asset-based welfare, J Doling and R Ronald, 'Home Ownership and Asset-Based Welfare' (2010) 25 Journal of Housing and the Built Environment 165; B A Searle and D McCollum, 'Property-Based Welfare and the Search for Generational Inequality' (2014) 14 International Journal of Housing Policy 325; L Fox O'Mahony and L Overton, 'Asset-Based Welfare, Equity Release and the Meaning of the Owned Home' (2015) 30 Housing Studies 392.
[35] B A Searle and D McCollum, 'Property-Based Welfare and the Search for Generational Inequality' (2014) 14 International Journal of Housing Policy 325, 329.
[36] H Osborne, 'Generation Rent: The Housing Ladder Starts to Collapse for the Under-40s' (*The Guardian,* 22 July 2015) <https://www.theguardian.com/money/2015/jul/22/pwc-report-generation-rent-to-grow-over-next-decade> accessed 5 August 2016.
[37] J McNeill, 'Regulating Social Housing: Expectations for Behaviour of Tenants' in Malcolm Harrison and Teela Sanders (eds), *Social Policies and Social Control: New Perspectives on the 'Not-So-Big Society'* (Policy Press 2016).
[38] Crime and Disorder Act 1998 s.1(1); Anti-Social Behaviour Act 2003 pt 2; Housing Act 1985 ss.82A-85A.
[39] *Bryant v Portsmouth City Council* (2000) 32 HLR 906.
[40] Ibid, 909.

court found that there was no discretion as to whether an order should be made. This approach ignores a wealth of literature which suggests that anti-social behaviour is the product of 'socio-economic disadvantage, marginalisation, and social exclusion'[41] experienced by young people.[42] This legislative approach towards anti-social behaviour and low security in general serves to make the position of those who would benefit from increased security of tenure more precarious by pushing those who are found guilty of anti-social behaviour into the private sector. This begs the question of whether art.8, and the right to respect for one's home, ought to have a more pronounced role in housing proceedings. If art.8 were to offer those who make their home in the private rented sector enhanced security of tenure, in effect making it difficult for a landlord to dispossess without reasoned grounds, this would counter the shortcoming of the current law. A robust approach to art.8 would assist those who have struggled due to the uncertainty of the rented sector to make a home. The desires of tenants in this regard are clear in the following excerpt:

> We do want to have a family, we do want to get married, there are not going to be any of those things unless we have a solid house! If we rented, I could be 8 months pregnant and get a Notice to Quit and be exited out, next month! ... [43]

Those in the private rented sector are often reliant upon the goodwill of their landlords to upkeep their property for fear that they may be evicted if they look to enforce their statutory rights.[44] This results in many private tenants residing in substandard accommodation largely due to their weak security of tenure. Therefore, the outcomes of this work may benefit a great number of tenants (and landlords) in the rented sector. In determining the scope of art.8 it must therefore be asked precisely what it is that the right to respect for the home is seeking to protect. If it is

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[41] R Arthur, 'Recognising Children's Citizenship in the Youth Justice System' (2015) 37 Journal of Social Welfare & Family Law 21, 28. For further discussion of the effects of dispossession on those who are already marginalised in society see M T Fullilove, 'Root Shock: The Consequences of African American Dispossession' (2001) 78 Journal of Urban Health 72.

[42] See in particular, A Millie, M Hough and J Jacobson, 'Finding a Balance for Tackling Anti-Social Behaviour' (2005) 154 Criminal Lawyer 3; J Morgan, 'Family Intervention Tenancies: The De(marginalisation) of Social Tenants?' (2010) 32 Journal of Social Welfare & Family Law 37; J Neary and others, 'Damned if They Do, Damned if They Don't: Negotiating the Tricky Context of Anti-Social Behaviour and Keeping Safe in Disadvantaged Neighbourhoods' (2013) 16 Journal of Youth Studies 118.

[43] J Hoolachan and others, ''Generation Rent' and the Ability to 'Settle Down': Economic and Geographical Variation in Young People's Housing Transitions' (2016) Journal of Youth Studies 1.

[44] See for example Shelter, *Can't Complain: Why Poor Conditions Prevail in Private Rented Homes* (March, 2014); Shelter, 'True Scale of 'Revenge Evictions' Exposed by Shelter Investigation' (*Shelter,* 2014) <http://media.shelter.org.uk/home/press_releases/true_scale_of_revenge_evictions_exposed_by_shelter_investigation> accessed 2 April 2014.

an attachment to a place and the feelings that this place engenders how, if at all, is a public sector tenant's attachment to their home any different to that of a private sector counterpart. If their attachment is akin, then why should one tenant's home be afforded legally enshrined respect and not the other?

1.2 The Objectives and Structure of this Thesis

This study draws together the questions arising from the shortcomings in the current law and asks the following research questions:

1. what is the underlying importance of the home as conceived by art.8(1) and how should this inform art.8's application?

2. what is the theoretical and legal basis for arbitrarily limiting art.8's application to local authority tenants? and

3. what is required by proportionality in possession proceedings?

These questions have been considered to some degree in the literature, however, these analyses have often been limited to general queries such as the nature of horizontal effect or the scope of proportionality.[45] The importance of these issues has been noted by academics writing in housing law.[46] One of this work's original contributions is the depth with which the problems associated with art.8 and possession proceedings are considered. To date the literature has been limited to considering the most recent case law in the area rather than a detailed analysis of the overall body of law, in particular art.8. This work goes further than this in critically engaging with sociological understandings of the home which in turn informs the application to be given to art.8. This study provides a replicable proportionality model for the courts to apply in possession proceedings going forward thereby demonstrating the workability of art.8 in a wide range of proceedings. This study goes beyond the contemporary literature which has at most summarily argued that proportionality, via art.8, ought to have a more robust application than is currently the case. This work's original contribution is strengthened in its exploration and provision of a replicable model of proportionality which as a minimum provides a signpost for landlords and tenants as to the effects of art.8 (and art.1 of the First Protocol) on possession proceedings.

[45] See for example M Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) PL 423; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824; J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409; N Lacey, 'The Metaphor of Proportionality' (2016) 43 Journal of Law and Society 27.
[46] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77.

For the courts this work offers a clear framework through which to balance the disparate rights of all parties involved in possession proceedings.

The case law prior to and following *Pinnock* is considered in detail in Chapter 2 to provide an essential review of the changing judicial approach towards art.8 in possession proceedings. Chapter 2 elaborates on the difficulties faced by those in the rented sector and demonstrates the important contribution that this work makes to academic study in this area, but also to the security of tenure of private sector tenants. Having identified the interests which attach to a person's home in Chapter 3, Chapter 4 will analyse the differential application of art.8 between public and private tenants. This distinction cuts to the core of what has been termed vertical effect and horizontal effect. Vertical effect looks to the relationship between the individual and the State,[47] whereas horizontal effect relates to the relationship between individuals.[48] Chapter 4 considers the legal and theoretical basis for horizontal effect from numerous perspectives including the HRA 1998 and the Convention. Building on the arguments made in Chapters 2 and 3, Chapter 4 comes to the conclusion that a horizontal reading of art.8 is not only possible but required. This addresses the second research question identified above and forms part of the original contribution of this work in its deep consideration of issues which have hitherto only been summarily discussed in the related literature. Chapter 4 develops the arguments made in Chapters 2 and 3 in its analysis of wider matters over and above a pure question of horizontal effect such as the requirements of art.14 of the HRA 1998. This amounts to a novel holistic view of art.8's potential application to possession proceedings.

If a person's attachment to their home exists independent of the institutional character of their landlord then the resultant question is whether there exists a theoretical underpinning which would allow for human rights to have a bearing on proceedings concerning only private individuals. This requires consideration of the traditional role of human rights instruments within the context of the public/private divide. Historically the divide has conceived human rights as part of public law thereby protecting the individual from the actions of the State.[49] If, as argued in Chapter 4, art.8 ought to have a role in all possession proceedings regardless of the institutional character of the parties involved then the ongoing propriety of the

[47] D Friedmann and D Barak-Erez, 'Introduction' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart 2001) 1.
[48] S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan Law Review 387.
[49] D Dyzenhaus, 'The New Positivists' (1989) 39 University of Toronto Law Journal 361.

public/private divide seems uncertain. Therefore, Chapter 5 looks to reconceptualise the public/private divide in light of the findings in Chapters 2-4 and to account for the core submissions of this work. The depth of analysis within Chapter 5 is a welcome addition to the existing literature which has recognised the influence of the public/private divide on the courts' thinking around art.8.[50]

Chapters 2-4 set out the case for art.8's application in all possession proceedings due to the importance of the home to the individual alongside the legal and theoretical framework provided by the relevant human rights instruments. Chapter 6 is concerned with the practical requirements of art.8, that is, what the parties must demonstrate to the court when it is considering a possession order, and what the court must consider in determining the proportionality of an order. The wider jurisprudence around the role of proportionality has been coloured by the disparate objectives of various sources of law. This has resulted in the courts adopting a number of proportionality analyses. Following *Pinnock* the courts' approach to proportionality in possession proceedings might be termed 'flexible unstructured proportionality' which asks generally whether dispossession 'is a proportionate means of achieving a legitimate aim.'[51] Proportionality's form is particularly pressing if art.8 is to have a role in all possession proceedings irrespective of the institutional character of the parties. Possession proceedings will involve competing interests be they interests grounded in proprietary interests or in HRA rights such as art.1 of the First Protocol. Article 1 of the First Protocol protects an individual's right to the peaceful enjoyment of their property in much the same way as the home is protected in art.8. Interferences with art.1 of the First Protocol are permitted only where it is necessary to control the use of property in accordance with the general interest. At present the unstructured approach utilised following *Pinnock* affords almost insurmountable weight to a landlord's proprietary interest. This is true of public sector landlords and, if art.8 was deemed to be applicable in private proceedings as is argued here, private sector landlords. The approach to proportionality demonstrated in *Pinnock* has resulted in a proportionality test calibrated in favour of landlords. In asking the general question of whether an interference is proportionate the courts in effect come to defer to the institutional competence of the party seeking to dispossess a tenant. No doubt in local authority possession proceedings the authority will often benefit from a wealth of experience and knowledge as to how best manage their housing stock.[52] However, efficacy at

[50] S Nield, 'Strasbourg Triggers Another Article 8 Dialogue' (2013) 77 Conv 148, 156.
[51] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [52].
[52] Ibid.

managing housing stock is not synonymous with proportionality. Therefore, the question becomes why in such instances prima facie contraventions of art.8 ought not be exposed to an inquisitive proportionality analysis? These issues are examined in depth in Chapter 6. Chapter 6 therefore makes clear how art.8 may be given effect in practice through a replicable model of proportionality usable in all possession proceedings.

1.3 Methodology

This study argues that art.8 affords the courts the opportunity to give additional weight to a person's home within the existing panoply of housing law. This is a problem of doctrinal making and so a doctrinal approach has been taken to the research questions outlined above. The methodology utilised here takes account of a particular doctrinal method influenced by the work of Unger[53] and Singer.[54] Specifically this research project argues for the:

> expansion of legal protection of certain important interests ... [and] ... established legal doctrines by reinterpreting existing law to demonstrate its principles and counterprinciples ... [thereby] ... arguing for expanded protection of interests already protected to some extent by rules in force.[55]

This naturally necessitates a doctrinal analysis of legislation and case law.[56] This work seeks to strengthen protection for the home through the reinterpretation of existing law to draw out principles and counterprinciples which support a robust application of art.8 with further insight gained from extra-legal understandings of the home. These extra-legal understandings of the home form part of the social world within which the law operates. It is accepted that this approach at a minimum argues for a change in the courts' attitude to the law. The argument draws support from the common law's pervading sensitivity to 'changing social values and social conditions.'[57] This method of considering and applying law is said to be intuitive for common lawyers, a mixture of 'analogy, discrimination, and deduction'[58] couched in

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[53] R M Unger, 'The Critical Legal Studies Movement' (1983) 96 Harvard Law Review 561.
[54] J W Singer, 'Legal Realism Now' (1988) 76 California Law Review 465; J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611; J W Singer, 'The Reliance Interest in Property Revisited' Unbound: Harvard Journal of the Legal Left <http://legalleft.org/wp-content/uploads/2015/09/Singer_Reliance-Interest-Revisited.pdf> accessed 15 December 2015.
[55] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 629.
[56] T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 98.
[57] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 629.
[58] O W Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 466.

rhetoric.[59] However, it does not follow that doctrinal legal research is self-defining and unworthy of further elaboration.[60] Rather doctrinal research 'involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials.'[61] This vigorous analysis and creative synthesis of existing law with disparate doctrinal strands has allowed for a reconsideration of art.8 as it applies to possession proceedings. This approach is particularly beneficial in the sense that art.8 has already been utilised in areas of law where a person's home is not at risk, therefore, the task of extracting general principles from supposed discrete areas of law is key. This method is evident in particular in Chapters 3 and 4 which demonstrate the permeability of law together with the disadvantages of perceiving law as compartmentalised. This in turn strengthens the original contribution of this work in its depth of analysis and application of general legal principles and understandings to the specific field of possession proceedings. This method allows for the conceptualisation of structured proportionality which has taken root in areas outside of housing law and provides a significant improvement over the current Supreme Court guidance in that it affords appropriate weight and some procedural certainty to the competing interests at play.

The advances made in Chapters 3-6 take place through what Unger terms 'internal development'[62] of the law through 'deviationist doctrine'[63] which focuses upon the conflicts within the law and pushes for changes in the law based upon these conflicts.[64] This approach is best described as follows:

> Legal rules and doctrines define the basic institutional arrangements of society. These arrangements determine the limits and shape the content of routine economic or governmental activity. The rules that define these formative practices must be interpreted and elaborated as expressions of a more or less coherent normative order, not just as a disconnected series of trophies with which different factions mark their victories in the effort to the enlist governmental power in the service of private advantage … Deviationist doctrine sees its

[59] See generally, R A Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 University of Toronto Law Journal 333.
[60] T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 100.
[61] Council of Australian Law Deans, *Statement on the Nature of Legal Research* (May and October 2005, 2005); cited at T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 105.
[62] R M Unger, 'The Critical Legal Studies Movement' (1983) 96 Harvard Law Review 561, 580.
[63] Ibid, 582.
[64] Ibid, 580.

> opportunity in the dependence of a social world upon a legally defined formative context that is in turn hostage to a vision of right.[65]

This understanding of legal research underpins this work with an emphasis on what Hutchinson and Duncan call the second stage of doctrinal research, 'deductive logic, inductive reasoning, and analogy'.[66] This approach draws out the disharmonies in the law thereby allowing for development of the system in a narrow sense whilst taking account of the macro body of law.[67] Of course Hutchinson and Duncan's first step, the identification of primary sources of law such as statute and case law, must be completed before moving on to advanced deduction and reasoning and so in Chapter 2 the overarching law and themes of this work are drawn from art.8 case law before being critiqued thereafter. Chapters 3-6 go on and seek to internally develop conceptions of the home, the application of human rights in horizontal proceedings, the public/private divide in law, and the nature of proportionality. This is premised upon the idea that the home has been underappreciated in law generally and especially so in modern housing law. Deductive logic, inductive reasoning, and analogy allow for the development of law within the wider order of the law. The later Chapters of this thesis take the view of Singer in arguing that there is an overarching coherent legal order allowing for ideas and principles to be drawn from one purportedly discrete area of law and utilised in another where the overarching principles of the law require. This method allows for the conclusions reached in Chapters 3-5 which take a holistic view of the law and seek to draw out some coherence within the law. This coherence is informed by the conception of a social world informed by a vision of right in which a person's home is afforded due weight in circumstances where that home is at risk. This vision of right serves to underpin the core arguments of this work, that the home ought to have more protection whilst acknowledging the dependence of society upon a social world which shapes and is shaped by law.

The arguments made in this work are largely a qualitative endeavour drawing upon the 'voice and experience' of the researcher.[68] We each operate within and give meaning to constitutional values and constitutional rights in accordance with our

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[65] Ibid, 582-583.
[66] T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 111.
[67] R M Unger, 'The Critical Legal Studies Movement' (1983) 96 Harvard Law Review 561, 578.
[68] T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 116. See also J Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2011) 54-58.

'own [internal] constitution.'[69] After all, 'there is no such thing as a neutral constitution.'[70] In essence this is a social vision as informed by literature around the home together with property theory.[71] This social vision as informed by the cited literature allows for the rejection of the assumptions which have permeated and allowed for the liberal conception of ownership to subsist.[72] Lastly, a social vision 'may include judgements about how society should be organised and what relationships are good and [ought] to be fostered.'[73] The lens through which to interpret art.8 is not premised solely on internal logic as such but also the emotional coherence of a person's feelings towards their home which are extrapolated in Chapter 3. It may appear that this edges away from the doctrinal approach as traditionally understood. However, this is in keeping with the deviationist doctrine as legal researchers ought to use non-legal ' ... disciplines and knowledge that will help us understand what the effects of ... [legal rules] ... are likely to be ... '[74] In other words understandings of the world external to law may inform understandings of legal rules, the law is not to be understood as hermetically sealed from other disciplines or the outside world.[75] This project does not purport to outline the only possible view upon an assessment of the relevant theory and law in the area of human rights and housing rather this study more modestly suggests that the views taken are but one perspective within a 'constellation of positions',[76] in other words a possible hypothesis. However, what is suggested, on the basis of internal development of the law alongside deviationist doctrine, is that the argument made within this work, that a tenant ought to be able to rely upon art.8 to robustly protect their home irrespective of the prima facie legal right of a landlord to recover possession, is the most powerful and persuasive position yet presented.

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[69] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 33.
[70] K D Ewing, 'The Unbalanced Constitution' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 107.
[71] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 627.
[72] See the endearing influence of the First Aquisitionists together with the work of Robert Nozick discussed in Chapter 3.
[73] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 627.
[74] Ibid, 630.
[75] R M Unger, 'The Critical Legal Studies Movement' (1983) 96 Harvard Law Review 561, 578.
[76] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 628.

2 The Jurisprudence of the European Court of Human Rights and the English Court in Relation to Article 8

> The most controversial issue at the intersection between the law of leases and human rights concerns the role of the residential tenant's article 8 rights in summary proceedings by a landlord seeking possession of the subjects.[1]

This Chapter critically examines the development of art.8 of the European Convention on Human Rights (the Convention) in relation to possession proceedings in both the European Court of Human Rights and the English courts following the enactment of the Human Rights Act 1998 (the HRA 1998). Article 8(1) is concerned with the right to respect for one's home which may only be interfered with in the prescribed circumstances listed in art.8(2). On its face art.8 appears a straightforward and non-contentious provision. However, art.8 has given rise to a litany of cases concerning the continuing probity of mandatory possession proceedings. Mandatory possession proceedings are those proceedings in which the court is afforded no discretion as to whether an order ought to be made thereby allowing a landlord to recover possession of their property, provided a number of prescribed circumstances are fulfilled.[2]

The reasons proffered by the Government in favour of incorporating the Convention into domestic law included the prohibitive cost and burden placed upon British citizens enforcing their rights at the European Court of Human Rights in Strasbourg.[3] However, the most noteworthy argument for consideration of art.8's influence upon domestic law is that:

> rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.[4]

The Government was aware of the significant constitutional change which would be triggered by the HRA 1998 and the subsequent positive obligation placed upon

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[1] F McCarthy, 'Human Rights and the Law of Leases' (2013) 17 Edinburgh Law Review 184, 201. As to the interdisciplinary nature of housing law, public law, and human rights see generally L Whitehouse, 'The Home-Owner: Citizen or Consumer?' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press 1998).
[2] For example see Housing Act 1988 s.21 and Housing Act 1985 s.84A.
[3] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) [1.11].
[4] Ibid [1.11]-[1.14]; E Wicks, 'The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry' (2000) PL 438.

public authorities (including courts) to observe the rights therein.[5] However, there is no apparent recognition in the Government's white paper[6] of the difficulties which might be faced by the courts, as a public authority,[7] when dealing with matters between individuals. This query was raised in the HRA 1998's passage through the House of Commons. The Home Secretary, Jack Straw, opined that the intention of the HRA 1998 was to protect individuals from the State and so the rights therein were not justiciable in actions between private individuals.[8] The clarity of the Home Secretary was not echoed in the House of Lords. The Lord Chancellor foresaw that giving the term 'public authority' a wide definition and including the courts within this may lead to an obligation to enforce the HRA 1998 rights and develop the common law 'in disputes between private individuals'.[9] Clearly in the eyes of the Lord Chancellor the door was open for the development of the common law in light of the HRA.[10] Further, any such developments would be equally applicable in relationships between public authorities and private individuals. To do otherwise would not be, in the eyes of the Government, justifiable.[11] This line of thought from the Lord Chancellor is not unheard of given that bills of rights tend to place the judiciary in a more assertive role than would otherwise be the case.[12]

The above debates over the HRA 1998 during its passage through Parliament provide a starting point for a consideration of the scope of the Act. To give more weight than this to such debates would vest too much weight in the views of the Government of the day rather than the will of Parliament.[13] With this in mind it is accepted that it is:

> ... the language of the Act itself ... [which] ... Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence

[5] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) [2.2].
[6] Ibid.
[7] Human Rights Act 1998 s.6.
[8] HC Deb 17 June 1998, vol 314, col 406.
[9] HL Deb 24 November 1997, vol 583, col 771.
[10] I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 ICLQ 57, 58.
[11] HL Deb 24 November 1997, vol 538, col 783. It is assumed that the Lord Chancellor, due to the nature of his office and his use of the term 'we', was speaking on behalf of the Government rather than an independent member of the House.
[12] P Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press 1999).
[13] J Morgan, 'Questioning the 'True Effect' of the Human Rights Act' (2002) 22 Legal Studies 259, 260.

> trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning … [14]

However, the meaning of the right to respect for the home is ambiguous in the HRA 1998 and so the question of what will amount to a person's home and how this ought to be protected in light of art.8 has been 'left to the courts'.[15] These uncertainties have manifested in possession proceedings with the question becoming whether a tenant can draw upon art.8 'in order to resist an order for possession when domestic law leaves him defenceless.'[16]

2.1 Housing Law and Human Rights

The law concerning the relationship between landlord and tenant is an 'amalgam of statute and common law'[17] which has led to a 'labyrinth and jungle'[18] of legal principles. This labyrinth of legal principles makes housing law a challenging area for landlords and tenants to charter. Before examining the effects of the Convention and the HRA 1998 on housing law it is first necessary to briefly outline some foundations of English property law. There exist two possible estates of land in English law: the 'fee simple absolute in possession' (freehold) and 'a terms of years absolute' (leasehold).[19] It is leasehold estates which are the core concern of this work as it is these situations in which the home of a tenant is carved out of the freehold interest of a landlord. A leaseholder should be distinguished from a licencee who rather than holding an estate in land merely has permission to be on the land and does not benefit from security of tenure. The distinction between leases and licences was explored in the 1980s primarily due to the efforts of landlords to avoid the Rent Act 1977 which sought to redress the strong bargaining position of landlords.[20] However, these efforts were quelled by the Court of Appeal in *Street v Mountford*.[21] Much of the common law rules which grew to protect tenants have been superseded by statute. Such legislation's primary concern is the process by which a tenancy may be determined. On this front, housing legislation may be broadly placed in one of two categories:

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[14] *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279-280.
[15] HC Deb 17 June 1998, vol 314, col 420.
[16] *Patel v Pirabakaran* [2006] EWCA Civ 685, [2006] 1 WLR 3112 [41].
[17] N Madge, 'Time to Clear the Forest' The Times <http://www.nicmadge.co.uk/housing_law_reform.php> accessed 12 October 2015.
[18] *Parry v Harding* [1925] 1 KB 111, 114.
[19] Law of Property Act 1925 s.1(1)
[20] *Horford Investments Ltd v Lambert* [1976] Ch 39, 52.
[21] *Street v Mountford* [1985] AC 809.

1. legislation which requires the court to consider the reasonableness of a possession order and consequently only make a possession order when it is reasonable;[22] or

2. legislation which requires the court to make a mandatory order irrespective of the reasonableness of an order.[23]

The duality of the Rent Act 1977 provides an opportunity to illustrate the two approaches. Section 98(1) of the Rent Act 1977 states that 'a court shall not make an order for possession … unless the court considers it reasonable to make such an order'. Further in addition to the reasonableness of an order it is required that a ground for possession is present.[24] The idea of reasonableness was considered by the Court of Appeal in *Whitehouse v Lee*[25] in which the court confirmed that the assessment of reasonableness was usually best left to the trial judge who will take account of 'all the relevant circumstances'.[26] The court added that in assessing reasonableness courts should ask what the consequences of granting an order would be along with the consequences of refusing an order for each party.[27] In other words, if the tenant would suffer from a possession order whilst the landlord would not suffer from the tenant's continued occupation then the court should not make an order.

The approach to reasonableness under s.98(1) of the Rent Act 1977 should be contrasted with s.98(2) of the Act, which allows a landlord to regain possession notwithstanding the reasonableness of an order provided one of the grounds in pt II of sch 1 of the 1977 Act is made out. Clearly s.98(2) is an example which would fall into the second category above. The courts have shown some judicial creativity to quell the harshness of mandatory possession proceedings.[28] However, the powers available for this end have been reserved for 'extremely rare occasions'.[29] This legislative aversion to a consideration of reasonableness continues in the Housing Act 1988 and the Housing Act 1996. In the contemporary housing market this is most prevalent with the use of introductory tenancies and demoted tenancies. Each

[22] Rent Act 1977 s.98(1); Housing Act 1985 s.84; Housing Act 1988 sch.2 pt.II.
[23] Rent Act 1977 s.98(2); Housing Act 1985 s.84A;Housing Act 1988 sch.2 pt.1; Housing Act 1988 s.21; Housing Act 1996 ss.127-128.
[24] See Rent Act 1977 sch.15 pt.I.
[25] *Whitehouse v Lee* [2009] EWCA Civ 375, [2010] HLR 11.
[26] Ibid [23]. See also *Cumming v Danson* [1942] 2 All ER 653; *Cobstone Investments Ltd v Maxim* [1985] QB 140.
[27] *Whitehouse v Lee* [2009] EWCA Civ 375, [2010] HLR 11 [24]-[26].
[28] See generally D Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 Journal of Law and Society 547.
[29] *Vandermolen v Toma* (1983) 9 HLR 91, 101.

of these tenancies minimises judicial discretion as to whether a possession order should be made. Local authorities may now operate an introductory tenancy scheme in which all new tenants will be introductory tenants as opposed to secure tenants.[30] The political intention of the introductory tenancy scheme was to allow for tenants to demonstrate to the local authority that they are 'responsible'[31] whilst at the same time allowing the local authority to quickly recover possession if the tenant is shown to be irresponsible. After demonstrating a responsible nature the tenant becomes a secure tenant which affords increased security of tenure.[32] During the course of the introductory tenancy the tenant may be dispossessed using a mandatory procedure which precludes any discretion by the court.[33] Demoted tenancies function in much the same way as introductory tenancies but allow for existing secure tenancies to be downgraded to a demoted tenancy. Tenancies will be demoted by a local authority attaining a demotion order which the court may only make where it is reasonable and there has been anti-social behaviour or a threat of such behaviour.[34] A local authority may then recover possession of a demoted tenancy in much the same way as an introductory tenancy.[35]

Against this backdrop is the emergence of a low security private sector predominantly made up of assured shorthold tenancies.[36] Under an assured shorthold tenancy a landlord may recover possession of the property after the fixed term has ended provided that 2 months notice is given.[37] Provided the landlord has complied with the procedural requirements of notice the court has no discretion as to whether to make a possession order. The ease with which a landlord may end an assured shorthold tenancy is reflected in the fact that in England in 2013/14 the termination of an assured shorthold tenancy was the most common cause of homelessness (26%).[38] The private rented sector now eclipses public housing for numerous reasons discussed at 1.1.

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[30] Housing Act 1996 s.124.
[31] *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231, [2014] HLR 23 [12].
[32] Housing Act 1996 ss.124-125.
[33] Ibid ss.127-128.
[34] Housing Act 1985 s.82A.
[35] Housing Act 1996 ss.143D-143F.
[36] As at 1993/94 assured shorthold tenancies accounted for around 40% of the private rented sector this increased to near 70% at 2007/08. See Department for Communities and Local Government, *Fifteen Years of the Survey of English Housing From 1993-94 to 2007-08* (London, 2009) 31.
[37] Housing Act 1988 s.21.
[38] Department for Communities and Local Government, 'Table 774: Reason for Loss of Last Settled Home' (*Statutory Homelessness and Prevention and Relief Live Tables,* 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416902/Table_774.xls> accessed 12 July 2016.

2.2 The Shortcomings of Article 8 Jurisprudence

On its face art.8 of the HRA 1998 offers respite to beleaguered tenants who face mandatory dispossession. Such protection would be welcome in the case of either public or private tenancies due to the difficulties faced by all tenants in the rented sector. In the case of public sector tenancies the courts have accepted that where an order is sought at the behest of a local authority then it is open to the tenant to argue that an order would be disproportionate.[39] However, the courts have rejected the argument that art.8 may have a part to play in proceedings excluding a local authority due to the requirement that only public authorities are bound by the HRA 1998.[40] Therefore, tenants who appear to be in analogous positions but for the institutional character of their landlord do not benefit from the protection afforded by art.8. The remainder of this Chapter analyses the case law surrounding art.8 in possession proceedings and highlights the unprincipled approach of the courts thereby emphasising judicial shortcomings with respect to the research questions identified in Chapter 1:

1. what is the underlying importance of the home as conceived by art.8(1) and how should this inform art.8's application?

2. what is the theoretical and legal basis for arbitrarily limiting art.8's application to local authority tenants? and

3. what is required by proportionality in possession proceedings?

2.2.1 What is the Underlying Importance of the Home as Conceived by Article 8(1) and How Should this Inform Article 8's Application?

Article 8(1) creates a right to respect for a person's private life, home, and correspondence. Therefore, before any consideration of the ramifications of art.8 can be assessed it is first necessary to determine when art.8(1) will be triggered due to the presence of a person's home. The domestic courts first considered the application of art.8(1) in the context of the home in *Harrow London Borough Council v Qazi*.[41] Mr Qazi was a secure joint tenant with his ex-wife and therefore enjoyed significant security.[42] Under the terms of their lease it was possible for either Mr Qazi or Mrs Qazi to terminate the lease by serving four weeks' written notice to quit on Harrow London Borough Council, which Mrs Qazi did therefore determining the secure joint tenancy for both herself and Mr Qazi. Thereafter, Mr

[39] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[40] Human Rights Act 1998 s.6.
[41] *Harrow London Borough Council v Qazi* [2001] EWCA Civ 1834, [2002] HLR 14.
[42] Housing Act 1985 s.82.

Qazi sought permission to remain in occupation. Permission was refused by the council on the grounds that the property was now under-occupied with Mr Qazi being the sole occupant. Soon after this refusal, Mr Qazi remarried with his new wife and her five-year-old son moving into the property and then argued that to dispossess him would breach art.8. Nevertheless, the judge at first instance found that the secure joint tenancy had already come to an end if not only due to the conditions of the lease but also the common law rule in *Hammersmith v Monk*.[43] The rule from *Hammersmith* being that where one joint tenant serves notice to quit the tenancy will be terminated notwithstanding the other tenant's wishes to stay in occupation.

In assessing the application of art.8(1) on appeal, Arden LJ identified the duty placed upon the court under s.2 of the HRA 1998 and highlighted *Buckley v United Kingdom*[44] as representing the view of the European Court on art.8 in such cases. In *Buckley* the European Commission held the term 'home' to be 'an autonomous concept … which … will depend on the factual circumstances, namely, the existence of *sufficient and continuous links* [to the property]'[45] (emphasis added). What is most compelling about this finding is that the lawfulness of an individual's occupation appears not to be relevant as to whether art.8(1) is applicable. It is only when considering art.8(2) that the legality of a person's home will be relevant.

However, since *Buckley* the European Court has reconsidered its stance. In *Chapman v United Kingdom*[46] the European Court held that where an occupier 'in conscious defiance of the prohibitions of the law' establishes a home, the court would be 'slow to grant protection'.[47] Based upon this it would seem that the time at which a person makes their home and the legality of that home may be relevant to art.8's application, in such a case the creation of a legal interest would lend weight to the property being a person's home as this could be described as a 'continuing and sufficient link'.[48] In Mr Qazi's case it is in the least arguable that he established his home in accordance with the law when he rented the property with his first wife. In the same sense it is also arguable that, after Mrs Qazi served notice to quit, the property continued to be Mr Qazi's home. Applying the test from *Buckley*, there is

[43] *Hammersmith v Monk* [1992] 1 AC 478.
[44] *Buckley v United Kingdom* (1995) 19 EHRR CD20 (Commission Decision); *Buckley v United Kingdom* (1997) 23 EHRR 101.
[45] *Buckley v United Kingdom* (1995) 19 EHRR CD20 (Commission Decision) [63].
[46] *Chapman v United Kingdom* (2001) 33 EHRR 18.
[47] Ibid [102].
[48] I Loveland, 'When is a House Not a Home under Article 8 ECHR' (2002) PL 221, 223.

nothing to suggest that Mr Qazi did not have 'sufficient and continuous links' to the property.

In light of the above, the Court of Appeal held that the evolutionary nature of European jurisprudence was 'inexorably moving in one direction'[49] which was to allow for art.8 to have a role in possession proceedings. On that basis art.8(1) was engaged and, as a result of s.6(1) of the HRA 1998, it must be asked whether an interference with art.8(1) was justified by art.8(2). However, the effects of art.8 were to be minimal in *Qazi* as, in the opinion of the House of Lords, contractual and proprietary claims could not be defeated by art.8.

The approach of the Court of Appeal in *Qazi* was met with criticism from Loveland. Loveland argues that the conclusion reached by the Court of Appeal in citing *Buckley* as the leading authority on when a property will be a 'home' for the purposes of art.8 was 'stretching'[50] Convention jurisprudence beyond what had been intended. In support of this proposition Loveland relies upon *Wiggins v United Kingdom*[51] and the European Commission's observation that the property in this case was 'lawfully bought'.[52] The facts of *Wiggins* are similar to that of *Qazi* in that Mr Wiggin's was no longer permitted to reside at the property following a separation from his wife.[53]

However, for the purpose of understanding *Qazi*, *Wiggins* seems an unhelpful authority for Loveland's proposition that a legal interest is required before a 'home' will be present for the purposes of art.8. Firstly, the abstract to the case states:

> [a] dwelling house, legally acquired by a person and occupied for several years does not cease to be his 'home' within the meaning of art.8 (1) merely because due to unforeseen circumstances, this person is no longer authorized to reside therein.[54]

Applying this same proposition to *Qazi*, Mr Qazi acquired a statutory interest to reside there as a tenant and so there seems little scope to argue that the property was not his home despite the lack of legal interest at that time. Therefore, it appears that the property in question could be described as Mr Qazi's home from the point he became a tenant. The property would not cease to be his home due to the unforeseen breakdown of his marriage and resultant determination of his tenancy.

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[49] *Harrow London Borough Council v Qazi* [2001] EWCA Civ 1834, [2002] HLR 14 [47].
[50] I Loveland, 'When is a House Not a Home under Article 8 ECHR' (2002) PL 221, 229.
[51] *Wiggins v United Kingdom* (1978) 13 DR 40.
[52] Ibid, 44.
[53] Ibid, 41-42.
[54] Ibid, 40.

It would be unreasonable to expect Mr Qazi to foresee the dissolution of his marriage 'and thereby also the precariousness of his future housing situation'.[55] The second point to note in relation to *Wiggins* is that, in the same paragraph referred to by Loveland, the European Commission confirmed that the dwelling remained Mr Wiggin's home 'after his separation from his wife … [with her departure giving] … rise to no changes in that respect.'[56]

Loveland contends that the European Commission and the European Court of Human Rights have emphasised the requirement that a legal interest is required before art.8(1) is triggered in a line of decisions.[57] However, it appears that the statements relied upon by Loveland are a result of the way in which the Commission and the Court have drafted their respective reports and judgments rather than an indication as to firm guidance. It is suggested therefore that the Court of Appeal's approach in relation to art.8(1) and its application to *Qazi*, recognises the 'evolutive approach'[58] of the European Court of Human Rights and an emerging line of thought which can be traced to *Wiggins*. After a finding that art.8(1) of the Convention applies, the question ought to become whether the purported interference falls within the derogations allowed in art.8(2).

The relative clarity of the Court of Appeal's judgment in *Qazi* was not to last with the council appealing to the House of Lords.[59] On appeal the question of art.8 and whether the property amounted to Mr Qazi's home was again raised. For the House of Lords this was a straightforward query with the Lords unanimously finding that the property was a home for the purposes of art.8. Lord Steyn's views act as a response to the criticisms proffered by Loveland with strong warnings against colouring the Convention jurisprudence with notions of domestic concepts such as 'title, legal and equitable rights' as this would empty art.8 'of any or virtually any meaningful content.'[60] It is clear from this that for Lord Steyn the importance of the home stretches beyond legal constructs, however, beyond these allusions there is no attempt made by the House of Lords to conceptualise the precise feelings a person may have towards their home beyond the acceptance that ' … few things are more central to the enjoyment of human life than having somewhere to live.'[61] This

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[55] Ibid, 44.
[56] Ibid, 44.
[57] I Loveland, 'When is a House Not a Home under Article 8 ECHR' (2002) PL 221, 222-223; *Buckley v United Kingdom* (1997) 23 EHRR 101; *Chapman v United Kingdom* (2001) 33 EHRR 18.
[58] *Harrow London Borough Council v Qazi* [2001] EWCA Civ 1834, [2002] HLR 14 [55].
[59] *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983.
[60] Ibid [27].
[61] Ibid [8]. See also *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301.

aversion to discussing the importance of the home to an individual's wellbeing is also present in the jurisprudence of the European Court of Human Rights.

In *Buckley v United Kingdom* the Commission for the European Court made clear that 'home' was an 'autonomous concept'.[62] Whilst this is a useful yardstick for determining the existence of a home and as such when a right to respect for the home will arise, it does not explore the importance of the home to the individual and thereby the importance of art.8 itself. The closest the European Court have come to acknowledging the non-legal importance of the home is in *Connors v United Kingdom* in which the court confirmed that the right to respect for the home concerned ' ... rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships and a settled and secure place in the community ... '.[63] But *Connors* seems to offer only a glimpse of what is bound up within a person's home with the majority of case law seemingly concerned with how the court might identify the home as opposed to what it is about the home which makes it worthwhile to protect. The European Court's focus upon the existence of a home over the attachment and links conjured by the home for the individual is explored by Buyse in his overview of the court's case law.[64] Buyse concludes that, in the case law of the European Court, attachment is the key determinative factor in assessing whether the property in question is the applicant's home. The case law following Buyse's study has been bereft of any analysis of the precise interests and feelings that are protected within the right to respect for the home with the European Court repeatedly referring to the *Gillow* test requiring 'sufficient and continuing links' before art.8(1) will be triggered to protect a person's home.[65] These shortcomings are reiterated in the European Court's *Practical Guide on Admissibility Criteria* which confirms the *Gillow* approach.[66]

The failings of the European Court and the English courts in developing a concept of the feelings and interests which arise from the home and attach to its occupants makes application of art.8 all the more unprincipled. In the event that art.8(1) is engaged the follow up enquiry will always be whether such interference is allowed for by the qualification built into art.8(2). This will doubtless involve a balancing of the competing interests through the application of proportionality as explored below

[62] *Buckley v United Kingdom* (1995) 19 EHRR CD20 (Commission Decision) [65].
[63] *Connors v United Kingdom* (2005) 40 EHRR 9 [82].
[64] A Buyse, 'Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) EHRLR 294.
[65] *Gustovarac v Croatia* [2014] HLR 29 [27]; *McCann v United Kingdom* (2008) 47 EHRR 40 [46]; *Prokopovich v Russia* (2006) 43 EHRR 10 [36].
[66] *Practical Guide on Admissibility Criteria* (2015) 60 EHRR SE8 [332]-[334].

in Chapter 6. The focus which has been placed upon determining the bare existence of a home foregoes a wider understanding of the importance of the home to the individual and to wider society. This narrow sightedness is detrimental for both parties as the deeper interests in play in all possession proceedings remain hidden behind the legal rhetoric of title and estates whilst the importance of the home which may exist apart from legal interests is lost in adjudication. However, this misunderstands and ignores the wealth of literature around the home which is discussed in detail in Chapter 3 and frustrates the realisation of Convention rights due to a misunderstanding of the interests protected by those rights. The failings of the courts regarding the nature of the home continue into the recurrent questions as to scope of art.8 in instances not involving a public authority.

2.2.2 What is the Theoretical and Legal Basis for Arbitrarily Limiting Article 8's Application to Local Authority Tenants?

Manchester City Council v Pinnock represents the first acknowledgment by domestic courts that, where a possession order is sought at the behest of a local authority, a tenant must be able to have the proportionality of that order considered by the court. However, whilst this is a welcome change of course from earlier cases[67] there are still outstanding questions as to art.8. In making any argument that art.8 ought to apply in possession proceedings one will soon have to address the question of whether art.8 should have a role in private sector proceedings. This is particularly pertinent given the makeup of the rented sector.[68] The issue of horizontal effect is primarily a concern of the domestic courts in their interpretation of the HRA 1998, however, there is some limited commentary from the European Court of Human Rights as to the horizontal nature of art.8.

The first case to address the question of horizontal effect in detail following *Pinnock* was *Malik v Fassenfelt*.[69] *Malik* involved a group of squatters who had made their home on privately owned land near Heathrow Airport. The owner of the land, Mr Malik, sought to regain possession. In their defence the squatters claimed that under art.8 it would be disproportionate to dispossess them of their home. At first instance the county court judge found that ' … as the court is a public authority … Article 8 is capable of application even though the landowner is a private individual and the

[67] *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983; *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367.
[68] See above at 1.1.
[69] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS).

occupiers are trespassers.'[70] That being the case it will only be in 'a highly exceptional case where the protected rights of a private landowner under art.1 [of the First Protocol] could be interfered with by reason of the Defendant's art.8 rights'.[71]

On appeal the county court judge's assessment of art.8 was not contested as the proceedings turned on another point of law therefore the opinions of the Court of Appeal on art.8 should only be treated as persuasive. Nevertheless in a dissenting opinion Sir Alan Ward agreed with the county court judge that art.8 was engaged between private parties.[72] Sir Alan's reasoning rested upon s.6 of the HRA 1998 which defined the courts as public authorities and therefore bound to observe and give effect to art.8. Sir Alan's opinion is useful for this work in that it shows some desire within the courts to recognise the role that art.8 may have. However, the shortcomings of this dissenting judgment are noted by Lord Toulson in *Malik* who made clear that to give art.8 horizontal effect could lead to a 'considerable expansion of the law' imposing a positive obligation on the State which would need to be carefully thought out.[73] This careful consideration of art.8's horizontal effect is a key aim of this thesis in light of the apparent unwillingness of the domestic judiciary to grapple with the questions raised by art.8 and its disparate application established in *Pinnock* and propagated in cases such as *McDonald v McDonald*.[74]

The property in question in *McDonald* was bought by the tenant's parents to house the tenant who had been evicted from local authority housing, therefore, the property acted as something of a last chance for the tenant. The property was subsequently let by the tenant's parents to the tenant in breach of numerous conditions of the mortgage. Sometime later the tenant's parents fell into mortgage arrears which led to the appointment of receivers who were able to exercise the same powers as a landlord. The receivers sought to recover possession of a property utilising the mandatory procedures of the Housing Act 1988. The receivers opted for this approach over s.36 of the Administration of Justice Act 1970 which would have allowed for the court to consider the reasonableness of a possession order and, if there was a reasonable prospect of the repayment of rent arrears, adjourn the proceedings.[75] In the context of art.8 this is all the more concerning given the tenant's mental health issues which resulted in her being particularly sensitive to

[70] Ibid [29].
[71] Ibid [30].
[72] Ibid [28]-[38].
[73] Ibid [45]-[46].
[74] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.
[75] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 80-81.

changes in her environment and unable to work making it 'very difficult'[76] for the tenant to find alternative accommodation. The judgments of the Court of Appeal and Supreme Court in *McDonald* significantly overlap and so will be considered alongside one another. This approach has the advantage of insight from commentators on the Court of Appeal's judgment as the equivalent commentary has yet to emerge in relation to the Supreme Court's verdict.

The opinions of the Court of Appeal and the Supreme Court are based upon two planks. The first is the purported lack of a 'clear and constant line of [Strasbourg] decisions'[77] in favour of horizontal effect. The second is the dissenting opinion of De Gaetano J in *Buckland v United Kingdom*[78] which sought to limit the apparently general application of art.8 to those instances in which a public authority was involved. The shortcomings of *McDonald* and the wider trepidation around horizontal effect are discussed by Loveland,[79] Nield,[80] and Lees[81] who offer a variety of views on the 'significant practical consequences'[82] of the case. In the work of each of these writers a theme of judicial wariness emerges further necessitating the need for a comprehensive analysis of the issues identified at 1.2.

There are immediate issues with the courts' understanding of the European Court's 'clear and constant' jurisprudence. Claiming that there is a lack of 'clear and consistent jurisprudence' discounts the institutional limitations placed upon the European Court of Human Rights. Articles 33 and 34 of the Convention make clear that applications to the European Court may only be made against States rather than individuals.[83] Therefore it is little surprise that there is limited analogous Strasbourg case law on the subject of art.8 in private possession proceedings as private sector tenants do not have the necessary locus standi to resort to the European Court. The absence of a 'clear and consistent' line of jurisprudence is not indicative of a latent opinion in the European Court.[84] Furthermore, even if there was a lack of clear and constant case law in the realm of possession proceedings this

[76] *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357 [46].
[77] Ibid [42].
[78] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [55]; *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357 [35]-[45].
[79] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138.
[80] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77.
[81] E Lees, 'Horizontal Effect and Article 8: McDonald v McDonald' (2015) 131 LQR 34.
[82] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 138.
[83] On this point see S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 85.
[84] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 146.

discounts the jurisprudence of the European Court in other areas of law. For example, Loveland argues that the Convention jurisprudence is not hermetically compartmentalised and rather the nature of art.8 in housing law is informed by a range of cases in varying areas of law such as the development of a privacy tort.[85] The ' ... collapsing of cases concerned with different aspects of art.8 of the [the Convention] into a common principle rather suggests that there is no good basis for recognising horizontal effect in privacy cases, but not in possession proceedings.'[86]

Further testing Arden LJ's judgment Loveland goes on to note the curious binding value attributed to *Poplar Housing & Regeneration Community Association Ltd v Donoghue*,[87] following *West Kent Housing Association v Haycraft*.[88] *Donoghue* concerned the interpretation to be given to s.21 of the Housing Act 1988 in light of art.8. Due to the mandatory nature of s.21, which requires a possession order to be made where the procedures within the 1988 Act have been complied with, it was not necessary for the court to reinterpret s.21 as the question of proportionality had been pre-emptively considered by Parliament in enacting the Housing Act 1988. This presumption clearly contrasts with the views of the Supreme Court in *Pinnock* which were subsequently affirmed by the Court of Appeal in *Haycraft*. *Haycraft* concerned the same s.21 procedure as *Donoghue*, however, the Court of Appeal found in *Haycraft* that it was able to assess the proportionality of any order notwithstanding the mandatory nature of s.21. Therefore, as Loveland suggests, it seems the legal basis for *McDonald* is in the least shaky.[89] There was no reliance upon *Donoghue* or *Haycraft* in *McDonald*. Rather the Supreme Court found itself unable to read proportionality into s.21 due to the lack of public law duties placed upon private individuals (both in the sense of judicial review and s.6 HRA 1998) and the intentions of the Housing Act 1988 as opposed to the Housing Act 1996. For the Supreme Court there was:

> not the same flexibility inherent in the language of section 21(4) of the 1988 Act as there is in the language of sections 143D and 127(2) of the 1996 Act such as to enable the court to read into it a

[85] Ibid, 142. See for instance *PJS v News Group Newspapers Ltd* [2016] UKSC 26.
[86] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 142.
[87] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.
[88] *West Kent Housing Association Ltd v Haycraft* [2012] EWCA Civ 276, [2013] PTSR 141; I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 145-146.
[89] These same concerns are echoed by in S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 87.

> requirement that the court consider the proportionality of making an order for possession.[90]

The same criticism can be made here as above. Conceptualising s.21 in this way suggests that areas of the law are hermetically sealed from one another. There is no good basis for allowing art.8 to have a role in relation to one provision and not another when each seeks the same essential outcome – the removal of someone from their home.[91]

Nield is also critical of the Court of Appeal's decision in *McDonald* with the same shortcomings applicable to the Supreme Court's judgment. For Nield the question of whether the European Court of Human Rights applies the proportionality test in horizontal proceedings is 'too generally framed'.[92] Nield submits that the correct question to ask is:

> whether the particular statutory framework of s.21, in interfering with respect for the home, serves a legitimate aim which could fall within the UK's margin of appreciation and be proportionate in balancing the tenant's art.8 rights and the property rights of the landlord.[93]

This reformulation would have allowed the court to consider the facts of the case from all angles and take a view on the 'procedural side-stepping'[94] of s.36 of the Administration of Justice Act 1970 which would have afforded the tenant in *McDonald* a degree of protection. This also appreciates the connected nature of horizontal effect and proportionality, questioning the basis of one necessarily opens up questions about the other. A related weakness in *McDonald* is the failure to take account of the tenant as both 'a legal subject and a human subject'[95] operating in the domestic jurisdiction. A legal subject of course has the benefit of arguing that an order is disproportionate within which there is the human subject which may inform this disproportionality due to the detrimental effects a possession order may have upon the individual.[96] This is compounded by undue assumptions as to the weight of De Gaetano J's opinion in *Buckland* which is open to an alternative view which would see the opinion of the majority disagreeing due to their apparent comfort in the face of De Gaetano J's concerns.

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[90] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [68].
[91] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 142.
[92] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 84.
[93] Ibid.
[94] Ibid.
[95] Ibid, 85.
[96] The detrimental effect of such orders are considered in detail in Chapter 3.

The final criticism made of *McDonald* by Nield is the failure of the Court of Appeal to acknowledge the positive obligations created by art.8. This same shortcoming is present in the Supreme Court's judgment. For instance *Khurshid Mustafa v Sweden*[97] is described as of 'peripheral relevance'[98] by Arden LJ and is not mentioned at all by the Supreme Court. This description undermines the importance the European Court of Human Rights has attributed to the positive obligations of the Convention which 'may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves'.[99] This sentiment is echoed in *Khurshid* with the European Court recognising that it cannot remain inactive where a State acts inconsistently with 'the principles underlying the Convention.'[100]

Lees, discussing the Court of Appeal's judgment in *McDonald*, takes a different view to Loveland and Nield in finding that ' ... [t]he result in [*McDonald*] is correct — there is no opportunity within the statutory scheme for a proportionality assessment.'[101] However, Lees is equally critical of the reasoning of the Court of Appeal due to its failure to distinguish between direct horizontal effect, statutory horizontal effect, and '"common law" horizontal effect'[102] which may give rise 'to the potential for confusion in future cases.'[103] The same failure to take account of the various arguments as to the form of horizontal effect is present in the Supreme Court. Lees suggests that this confusion has clouded the correct question which ought to have been asked which is whether, after finding that art.8(1) was applicable, there has been an interference with those rights by the court itself acting as a public authority.[104] This form of horizontal effect is defined as 'strong indirect horizontal effect' by Hunt[105] and is assessed in detail in Chapter 4. Leading on from this finding Lees suggests that the relevant question becomes whether there is 'clear and consistent' Strasbourg case law to the effect that art.8 has horizontal effect. However, this question suffers from the difficulties noted above in that it discounts the institutional limitations placed upon the European Court by arts.33 and 34

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[97] *Khurshid Mustafa v Sweden* (2011) 52 EHRR 24.
[98] *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357 [32].
[99] *X and Y v Netherlands* (1986) 8 EHRR 235 [23]. See also D Rook, *Property Law and Human Rights* (Blackstone 2001) 48-58.
[100] *Khurshid Mustafa v Sweden* (2011) 52 EHRR 24 [33].
[101] E Lees, 'Horizontal Effect and Article 8: McDonald v McDonald' (2015) 131 LQR 34, 34.
[102] Ibid, 36.
[103] Ibid, 35.
[104] Ibid, 36; Human Rights Act 1998. See also *Re P (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38, [2009] 1 AC 173 for support on this point.
[105] M Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) PL 423.

together with the nascent power of the domestic courts to go beyond the jurisprudence of the European Court.[106]

McDonald is the most overt Supreme Court discussion of the role of art.8 in horizontal possession proceedings. The Supreme Court has followed the same course as the Court of Appeal in finding that the ramifications of art.8 are limited to those instances which involve a public authority. However, as noted by Nield and Loveland there are significant shortcomings in this view which allows for private sector tenants to be excluded from art.8's protection. These shortcomings flow from a recognition of the changes which would be wrought from recognising that art.8 had a role in private sector possession proceedings. This reiterates the overall theme of this Chapter, which is the failure of the courts to recognise and address the questions raised by art.8. In both *Malik* and *McDonald* the courts have not provided an adequate theoretical or legal basis for limiting art.8's application to public sector tenants. This failure to consider the ramifications of a horizontal reading of art.8 for fear that this is a step too far undermines the importance of art.8 and the interests which it protects. Therefore, the arguments given by the domestic courts do not provide a sufficient basis for denying art.8's protection to private sector tenants.

The shortcomings of the art.8 jurisprudence in English courts and at Strasbourg in relation to horizontal effect are stark. The courts ought to grasp the nettle and develop an understanding as to the nature of a person's home and how it ought to be protected for the purposes of art.8:

> There is understandable concern about the possibly horizontal effect of Convention rights, particularly art.8, upon the property rights of private parties. However, the way to allay those concerns is to gain a proper understanding of the different ways in which horizontality can operate and then to appreciate what lies at the heart of the justification for an infringement of respect for the home, including the concept of proportionality ... The answer should remember that under art.8 the home encapsulates values beyond property rights, which prompts the call for some mechanism by which these values can find expression and be accorded appropriate recognition ... [107]

The analysis of the above case law has demonstrated the steadfast resistance of the domestic courts to recognising the horizontal effect of art.8 despite the paucity of theoretical and legal arguments in favour of this position. There are hints of a floodgate argument at work in the judgments of the Court of Appeal and the

[106] N Ferreira, 'The Supreme Court in a Final Push to go Beyond Strasbourg' (2015) PL 367; E Bjorge, 'The Court and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' (2013) 72 Cambridge Law Journal 289; R Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' (2012) PL 639.
[107] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 87-88.

Supreme Court; a fear that extending art.8's protection to private sector tenant would overload county court possession lists thereby undermining the procedural ease with which tenants may be dispossessed. However, this seems a logistical hurdle rather than a reason for denying the protection of a purported fundamental right. The current approach to art.8's horizontal effect creates an arbitrary distinction that the courts have failed to justify. Chapter 4 below looks to deconstruct the various understandings of horizontal effect which have arisen in other areas of the law and cogently outlines the viability of horizontal effect within possession proceedings. The deficiencies in the courts' reasoning in relation to horizontal effect are visible in their discussions of proportionality which has received equally little consideration. However, if it is possible for the courts to give horizontal effect to art.8 thereby allowing for private sector tenants to plead proportionality in possession proceedings, questions remain as to precisely how proportionality might be applied. This is particularly pressing where art.8 interests are at issue given the unique attachment a person has to their home in opposition to the legally defined proprietary interests of an owner or landlord. The remainder of this Chapter will draw out the shortcomings of the case law to date concerning proportionality and art.8.

2.2.3 What is Required by Proportionality in Possession Proceedings?

It is settled that a person who is dispossessed of their home at the behest of a local authority should be able have the proportionality of any possession order determined by the court.[108] In giving effect to this, judicial review was deemed to be inadequate for assessing each case's particular facts due to its inability to take account of a tenant's personal circumstances.[109] However, whilst the personal circumstances of a tenant will be considered within proportionality, the courts have made clear that significant weight will be attached to '[u]nencumbered property rights, even where they are enjoyed by a public body such as a local authority … '.[110] This assertion regarding unencumbered property rights suggests that where a tenant has no proprietary or contractual protection then art.8 will be of limited use.

It is not clear why the Supreme Court in *Pinnock* found it necessary to limit the application of proportionality to a summary assessment. This is particularly so given that proportionality requires similar analysis to those raised by a review of reasonableness in possession proceedings.[111] Therefore, the proposition that

[108] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [45].
[109] Ibid.
[110] Ibid [54].
[111] N Madge, 'The Game of Ping Pong is Over' (2011) 15 Landlord & Tenant Review 3, 5.

proportionality arguments would 'play havoc with possession lists in county courts'[112] seems unfounded.[113] Undoubtedly the summary procedure which permeates through possession lists would require closer judicial scrutiny but it is not a given that this would cause havoc in the county courts as these courts have successfully considered similar arguments under existing housing legislation.[114] This aversion to accepting proportionality continues in *Hounslow LBC v Powell*.[115] *Hounslow* followed soon after *Pinnock* with similar facts, a local authority pursuing a possession order against a tenant. In considering the proportionality of an order the court reiterated the need for exceptionality before the courts will go beyond a summary assessment of proportionality.[116] This line of thought suggests that where an order seeks to vindicate the local authority's property rights and enables the authority to discharge its public duties in managing its housing stock, then 'in the overwhelming majority of cases' there will be no need for the authority to explain or justify its reasons for seeking possession.[117] This fortification of a local authority's property rights indicates that the presumption in favour of a local authority's actions is near 'irrefutable'.[118] Therefore, following *Powell*, any tenant arguing that a possession order would be disproportionate is limited to arguing that an order is disproportionate due to their personal circumstances rather than the lack of necessity attached to a possession order. This is contrary to proportionality as it ought to be understood in light of the case law of the European Court of Human Rights and the English courts as it foregoes key requirements of a proportionality assessment. Therefore the failings of the current law are stark in relation to proportionality's application.

It has been suggested by Loveland that there are advantages for the courts in leaving the nature of proportionality vague to allow the courts flexibility in dealing with the range of circumstances in which art.8 may arise.[119] This advantage is perhaps evident in *Holmes v Westminster City Council*[120] which concerned a local authority

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[112] N Madge, 'Article 8 - La Lutta Continua?' (2009) 12 JHL 43, 46.
[113] By way of context county courts will typically see around 50 – 60 cases in a possession list in any given day, D Cowan and E Hitchings, "Pretty Boring Stuff': District Judges and Housing Possession Proceedings' (2007) 16 Social and Legal Studies 363, 364.
[114] J Luba, 'Is There a "Human Rights Defence" to a Possession Claim Brought by a Private Landlord?' (2011) 15 Landlord & Tenant Review 79, 82.
[115] *Hounslow LBC v Powell* [2010] EWCA Civ 336, [2010] HLR 35.
[116] *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186 [36]-[42].
[117] Ibid [36]-[37].
[118] A Latham, 'Talking Without Speaking, Hearing Without Listening? Evictions, the Law Lords and the European Court of Human Rights' (2011) PL 730, 742.
[119] I Loveland, 'The Holy Grail as an Empty Chalice? Proportionality Review in Possession Proceedings After Pinnock and Powell' (2013) JPL 622, 622.
[120] *Holmes v Westminster City Council* [2011] EWHC 2857 (QB), [2012] BLGR 233.

tenancy held by Mr Holmes, who suffered from various mental illnesses. The possession proceedings arose out of Mr Holmes' alleged assault of two of his landlord's employees. In the county court Mr Holmes argued that a possession order would be disproportionate as he refuted the assault allegation. However, this was summarily dismissed due to the lack of supporting evidence in his favour. On appeal Eady J found that where a local authority wishes to evict a tenant following 'shortcomings in [the tenant's] behaviour … it will have to be shown that there are substantial grounds … if summary imposition of a possession order is to be avoided.'[121]

The vagueness which has been exhibited by the courts in relation to proportionality has resulted in a haphazard application of art.8 at a time when what is most needed from the superior courts is clarity and consistency. This is true not only of the structure and robustness of proportionality but also the factors which should be considered within a proportionality analysis under the nebulous term 'personal circumstances'.[122] This is evident in possession proceedings which have on their face similar facts but nevertheless result in disparate outcomes such as *Birmingham City Council v Lloyd*[123] and *Southend-on-Sea v Armour*.[124]

Birmingham City Council v Lloyd[125] provides an example of the current confusion in the lower courts as to what circumstances ought to be considered within an assessment of proportionality. The facts of *Lloyd* are most unusual. Mr Lloyd and his brother, Mr Gibb, were secure tenants of separate properties let by Birmingham City Council. Following Mr Gibb's death, Mr Lloyd moved into Mr Gibb's flat in spite of warnings from the local authority that he remained liable for the rent of the property let in his name until the tenancy over that property was determined. In addition, the local authority explained to Mr Lloyd that he would not be granted a tenancy of the late Mr Gibb's property. Nevertheless, Mr Lloyd served notice determining his tenancy and remained in Mr Gibb's property thereby forcing the authority to initiate possession proceedings.

The basis of Mr Lloyd's defence in the county court was, that to evict him would be an interference with his rights under art.8 as it would be disproportionate to the legitimate aim pursued. The recorder sitting in the county court agreed with Mr Lloyd for the following reasons:

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[121] Ibid [32].
[122] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [71].
[123] *Birmingham City Council v Lloyd* [2012] EWCA Civ 969, [2012] HLR 44.
[124] *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231, [2014] HLR 23.
[125] *Birmingham City Council v Lloyd* [2012] EWCA Civ 969, [2012] HLR 44.

1. Mr Lloyd had a history of depression which was likely to worsen if he was evicted and made homeless; and

2. there was purported confusion on the part of Mr Lloyd in the circumstances under which he gave up his original tenancy.[126]

The Court of Appeal was not so receptive to these arguments with Lord Neuberger finding that there was no evidence to suggest that, if evicted, Mr Lloyd's depression would worsen. Lord Neuberger's comments on the point are noteworthy; with his Lordship stating that whilst the court was sympathetic to Mr Lloyd's depression the circumstances were not exceptional. This is in itself a reiteration of the principle that the court's sympathy should not colour its consideration of proportionality.[127] This assertion misunderstands the significance of the home to the individual and the nature of the proportionality test to be applied when considering such interests.[128] Moreover, it begs the question that if the deterioration of a tenant's mental health is not weighty enough to make an order disproportionate then precisely what will tip the balance.

Southend-on-Sea v Armour[129] is the only successful pleading of art.8. The proceedings arose out of Mr Armour, an introductory tenant, allegedly being involved in anti-social behaviour including: threatening neighbours, aggression towards housing officers, and abusive behaviour towards local authority electricians working on his property. In the county court the judge found that at the time which the matter reached the court, notwithstanding the fact that it may have been proportionate to make an order at the time of issue, making a possession order at the hearing would be disproportionate. The Court of Appeal agreed with this verdict. Giving the sole judgment Lewison LJ found that the facts of the case had sufficiently changed from the point at which the claim was issued as compared to the facts considered by the county court. Therefore, it would be disproportionate to dispossess Mr Armour of his home. In reaching this decision the Court of Appeal showed significant deference to the 'value judgment'[130] of the county court. The appeal court found that the question was not whether the judgment of the county court was the same as the Court of Appeal but rather whether the decision was open

[126] Ibid [9].
[127] *Corby BC v Scott* [2012] EWCA Civ 276, [2013] PTSR 141 [35]; *Birmingham City Council v Lloyd* [2012] EWCA Civ 969, [2012] HLR 44 [20].
[128] These issues are considered in detail in Chapters 3 and 6.
[129] *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231, [2014] HLR 23.
[130] Ibid [17].

to the county court judge.[131] In assessing this, the Court of Appeal took notice of the aim of the Housing Act 1996 which was to 'test the tenant's behaviour over a one year period in order to see whether he can be a responsible tenant.'[132] In *Armour* the period between issuing the proceedings and the first hearing reportedly demonstrated Mr Armour's good behaviour thereby making the county court judge's decision, that to make a possession order would be disproportionate, viable.

*T*he precedential value of *Armour* is limited as the findings of the county court, High Court, and Court of Appeal seem highly sensitive to the facts of the case. Prior to *Armour* it was expected that a successful art.8 argument would be based upon a well-prepared defence.[133] The judgment in *Armour* was instead a result of the changing facts of the case creating something of a paradox.[134] It is common for a tenant's circumstances to change between the issuing of a proceedings and the county court hearing during which time an already vulnerable tenant is likely to suffer increased distress. Therefore, there is scope for the approach of *Armour* to be common in county courts. For the purposes of this work *Armour* provides little guidance as to the precise application of proportionality in future possession proceedings with proportionality remaining 'incorporeal'.[135] This is all the more confusing in light of comments from a previous Court of Appeal decision in which changed circumstances or a 'last minute redemption'[136] were deemed insufficient to reach the highly exceptional threshold.[137]

The above analysis examined the nature of proportionality in relation to art.8 and has demonstrated the lack of a principled and replicable model which might be applied by county courts when weighing the conflicting rights of a tenant and landlord, be they public or private in nature. This underwhelming development of proportionality following *Pinnock* is disappointing considering the progress the courts have made in human rights adjudication generally.[138] The courts appear to be wary of developing a model of proportionality that would weaken a landlord's proprietary rights and in so doing undercut the advantages granted to landlords by

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[131] Ibid [20].
[132] Ibid [26].
[133] I Loveland, 'The Holy Grail as an Empty Chalice? Proportionality Review in Possession Proceedings After Pinnock and Powell' (2013) JPL 622, 631.
[134] A Ramshaw, 'Southend-on-Sea v Armour: Proportionality Revisited' (2014) 17 JHL 98, 101.
[135] I Loveland, 'Proportionality Review in Possession Proceedings: Corby Borough Council v Nicholle Scott, West Kent Housing Association Ltd v Jack Haycraft [2012] EWCA Civ 276, [2012] HLR 23' (2012) Conv 512, 512.
[136] J Holborn, 'Valuable Possession' (2011) 161 New Law Journal 425, 426.
[137] *Hounslow LBC v Powell* [2010] EWCA Civ 336, [2010] HLR 35 [79].
[138] See for example *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697.

summary possession proceedings. However, this aversion to developing art.8 jurisprudence empties art.8 of its meaning. If art.8 is not to have a meaningful role in proceedings where a person's home is at risk then the value of art.8 becomes questionable. This is not to say that art.8 will always defeat a landlord's claim for possession but stating that it will only be in exceptional circumstances that a possession order will be disproportionate does not assist tenants or landlords in determining whether their own case is sufficiently exceptional and if so how the court will assess proportionality. This is evident in *Southward* in which the circumstances that gave rise to a successful art.8 defence were the product of court delays rather than a particularly virtuous argument.

2.3 Conclusions on Article 8 Jurisprudence

The Supreme Court has come a long way since first deciding in *Qazi* that the enactment of the HRA 1998 had no effect in mandatory possession proceedings due to the recovery of possession being 'in accordance with law' and therefore falling under the qualifications of art.8(2). Following *Pinnock* and *Powell* it is now accepted that a tenant facing dispossession at the suit of a local authority is entitled to argue that a possession order would be disproportionate notwithstanding any lack of discretion afforded to the court by that particular legislative scheme. Nevertheless, there continues to be a lack of appreciation at all levels of the judiciary as to the ramifications of this finding for landlords and tenants in the public and private sectors.

The root of the difficulties faced by the courts in relation to art.8 is the underappreciation for the importance of the home to the individual. Therefore, even in cases where art.8(1) is engaged the interests which rest at its core are not fully conceptualised to the extent that they can be weighed against the considerable interests of a landlord. Any such understanding of the importance of the home to the individual and wider society does not depend upon or relate to the institutional nature of a person's landlord and so may inform the extent to which art.8 has horizontal effect. The arbitrary distinction created by *Pinnock* is all the more difficult to justify in the face of these concerns as to the nature of the home which are explored in full in Chapter 3. A principled and replicable model of proportionality has yet to emerge which exacerbates the underwhelming case law around the importance of the home and the horizontal effect of art.8. In light of the difficulties faced by tenants in the rented sector the courts have given no legitimate reason for a haphazard approach to proportionality. The preceding analysis of art.8

case law in this Chapter has bolstered the necessity of this thesis which will address the following areas:

1. the underlying importance of the home as conceived by art.8(1) and how should this inform art.8's application;

2. the theoretical and legal basis for arbitrarily limiting art.8's application to local authority tenants; and

3. what is required by proportionality in possession proceedings.

In addressing these research questions it will be demonstrated that there is a strong basis for a robust application of art.8 which, in the contemporary housing landscape, would serve to protect those who would otherwise be without a legal remedy.[139] In the absence of a firm understanding of art.8 and its potential requirements tenants, both public and private, are left in a position which is less advantageous than their historical counterparts.[140]

[139] See for example the shortcomings of equity in this area, S Wong, 'Rethinking Rosset from a Human Rights Perspective' in Alastair Hudson (ed), *New Perspectives on Property Law, Human Rights, and the Home* (Cavendish Publishing 2004).
[140] See in particular *Cumming v Danson* [1942] 2 All ER 653; *Vandermolen v Toma* (1983) 9 HLR 91; *Whitehouse v Lee* [2009] EWCA Civ 375, [2010] HLR 11.

3 The Underlying Importance of the Home as Independent From Private Property

3.1 The Nature of Private Property

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[1]

3.1.1 Introduction

The previous Chapter critically analysed the case law of the European Court of Human Rights and the English courts drawing out the tripartite difficulties which have arisen in relation to art.8. Firstly, there has been a failure to fully articulate and account for the importance of the home to the individual beyond determining the presence of a home. Secondly, the courts have created an apparently arbitrary distinction between public and private sector tenants. Thirdly, there has been little engagement with the nature of proportionality and how the proportionality of a possession order will be assessed in art.8 arguments. This Chapter deals with the first of these concerns, the nature of the home. Article 8(1) of the European Convention on Human Rights (the Convention) states everyone ' ... has the right to respect for ... his home ... '. In searching for any meaning to the term home the enquiry inevitably turns to understandings of property and ownership. This Chapter analyses the theoretical underpinnings of competing conceptions and justifications for the ownership of private property. Any protection of the home via the human rights of a tenant will likely result in the deprivation of property in some sense for a third party be they a local authority or a private landlord. This outcome is implicitly recognised in the Convention in art.1 of the First Protocol which secures the right to respect for a person's property. For the purposes of this thesis this will predominantly occur where a landlord is prevented from recovering their property due to it being disproportionate to remove a tenant from their home. In which case a landlord will be unable to enter a new lease with another tenant, live in the property themselves, or sell the property with vacant possession. Therefore, before making any argument for a more robust application of art.8 an understanding of the interests that might suffer as a result is necessary. For these reasons this Chapter, firstly, examines the philosophical idea of and justifications for private ownership and related rights and, secondly, looks to the idea of the home and the unique place of the home in sociological thought. It is argued below that despite a lack of

[1] 2 Bl Comm 2.

appreciation for the home within property theory discourse there is scope for a robust application of human rights within litigation concerning the competing rights of a landowner and a person in their home. This Chapter therefore identifies the theoretical foundations upon which later Chapters build.

3.1.2 What is Property?

The widely accepted understanding of property is based upon 'an ownership model'[2] giving precedence to the rights of owners. This in an important distinction which observes the difference between property as an institution and ownership as an entry point to that institution.[3] The ownership model is taken from Hohfeld's conceptualisation of property rights[4] together with the supplementary work of Honoré.[5] The work of Hohfeld and Honoré will be considered below at 3.1.4. However, at this stage Hohfeld's work may be summarised in the terms for which it has become famous in property theory – namely, that property rights, which arise from ownership, may be described as a 'bundle of sticks'[6] owing to their correlative rights and no-rights or privileges and duties[7] between individuals.[8] Honoré follows Hohfeld's intellectual thread by transposing recognised property rights into Hohfeldian terms. For example, Honoré talks of exclusive control being the most important of the rights attached to land. Honoré describes this as the right for landowners to exclude unwanted guests against the correlative no-right of a guest to enter without the landowner's permission. This leads to a 'self-regarding' understanding of property: 'in that only the owner is legitimately interested and others have no legitimate claims to control what the owner does with her own property'[9] irrespective of who may be making a home on the land. Clearly these approaches presuppose a legal system and a societal acceptance of private ownership but they do not question the justification for ownership of a resource

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[2] J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2001) 3. See also J Waldron, *The Right to Private Property* (Oxford Scholarship Online 1988).
[3] J Harris, 'Is Property a Human Right?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing 1999) 65.
[4] W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale Law Journal 16; W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale Law Journal 710.
[5] A M Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1961).
[6] J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA Law Review 711; L Katz, 'Exclusion and Exclusivety in Property Law' (2008) 58 University of Toronto Law Journal 275; B Ackerman, *Private Property and the Constitution* (Yale University Press 1978) 26-27.
[7] W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale Law Journal 16, 30.
[8] J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2001) 10.
[9] Ibid 4.

which may form the core of a person's relationship with the State.[10] The justification for private ownership becomes all the more noteworthy when considered against the view that private ownership may lead to and exacerbate inequalities among society.[11] The difficulty presented by this absolutist view of property is apparent in conflicts between property rights (necessarily linked to a legal or equitable interest) and personal rights (independent of legal interests) which may often have good reason to take precedence.[12] This is a theme which runs throughout this thesis and is apparent in the case law analysed in Chapter 2 in the ease with which the courts have favoured property interests over art.8 considerations. Therefore, the arguments and justifications for private ownership which are typically advocated in opposition to art.8 claims are critically analysed below.

3.1.3 Justifications for Property and Ownership

Justifications for private property stretch back to Aristotle and Plato. For the purposes of this work their thoughts offer justifications for why private property has been protected to such an extent in English law. This prevailing view is strengthened by the common law view that the State has no business in interfering with a person's property.[13] However, this view does not account for the unique nature of the home, often the primary purpose for which a person acquires land. These shortcomings are recognised by Singer who proposes a proprietary solution to instances where the freedom of an owner to do with their property as they wish ought to be curtailed for the advantage of the wider community. Singer's theory is not directly applicable to instances in which a person's home is at risk as such. Nevertheless, as discussed in detail below, Singer provides an inception point for accepting that property interests may yield to competing interests such as art.8 arguments. However, before looking for gaps which might allow for the stymying of property interests the justifications for property and the interests which attach to ownership must first be established.

3.1.3.1 *Human Perfectionists*[14]

For Aristotle the basis for private ownership rests on the understanding that private property assisted in the realisation of Greek virtues, those virtues being:

1. knowing oneself;

[10] S R Munzer, *A Theory of Property* (Cambridge University Press 1990) 2.
[11] B A Searle and D McCollum, 'Property-Based Welfare and the Search for Generational Inequality' (2014) 14 International Journal of Housing Policy 325; A Walks, 'Homeownership, Asset-Based Welfare, and the Neighbourhood Segregation of Wealth' (2016) Housing Studies 1.
[12] J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2001) 7.
[13] *Semayne's Case* (1604) 5 Coke Rep 91; *Entick v Carrington* 95 ER 807.
[14] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) ch II.

2. moderation or nothing in excess; and
3. each person should do in life what they are best suited to do.[15]

The first of Aristotle's substantive arguments in favour of private ownership rests on the idea that decisions are best made by private actors.[16] This might be seen as an extension of the first Greek virtue as Aristotle believed that the best person to make specialised decisions as to the course of action in a given situation is the person with an interest in the outcome. Grunebaum uses the example of community disagreement over the use of land in support of Aristotle's view.[17] The basis for this view is the specialised knowledge that the individual has in relation to the land in question, for example the terrain and fertility of the land which may be 'very expensive to centrally acquire'.[18] It is not clear from Aristotle or Grunebaum why an individual would be better placed to 'assimilate and comprehend'[19] the matrix of information which will arise in determining how land should be used. However, this is based on the assumption that there exists a common and objective end which a private owner is best placed to implement. Immediately this is problematic as in the modern context it is public bodies (not private individuals), in some cases with democratic accountability in others not, which make decisions as to how to effectively use land for the benefit of the community at large. There does not exist, nor does Aristotle appear to argue there should, an entirely private domain in which individuals are free from the impositions of the community. This realisation therefore allows for instances in which a person's holdings might be rebalanced in favour of some wider benefit to the community or perhaps the benefit of a needier individual.[20] The limitations upon a purely private approach to ownership are recognised within the Convention at art.1 of the First Protocol which allows for the enforcement of 'such laws as [the State] deems necessary to control the use of property in accordance with the general interest'.[21] Aristotle's writings fail to account for the nuances of the modern framework for property ownership in English law[22] and whilst there is some agreement with Aristotle that the virtues deemed worthwhile in pursuit of ownership are concomitant with ideas around the home

[15] Ibid 26.
[16] S R Munzer, *A Theory of Property* (Cambridge University Press 1990) 127.
[17] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 37.
[18] Ibid.
[19] Ibid.
[20] See J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 644-651.
[21] See T Allen, *Property and the Human Rights Act 1998* (Bloomsbury Publishing 2005) ch 1 as to the background and drafting of art.1 of the First Protocol which recognises the limitations that may be placed upon private property in pursuit of general welfare.
[22] S R Munzer, *A Theory of Property* (Cambridge University Press 1990) 127-129.

discussed below at 3.2 there is no acknowledgement from Aristotle that absolute rights over private property may also run counter to these virtues. In addition to this, Aristotle's arguments fail to recognise that these virtues are not necessarily limited to the ownership of private property but rather having a place to call home.

Plato serves as a useful counter to Aristotle. Plato developed a more restrained approach to private ownership which identifies the pursuit of wealth as the ill to be tempered by any system of ownership.[23] To his detriment Plato, like Aristotle, appears to focus on private ownership from the sense of value and scarcity of land as a resource at the expense of overlooking the most fundamental use of land – that is as a home. Both Plato and Aristotle seem fixated on the creation of wealth. It might be that this is the other side of the coin to equality but a complete lack of consideration of this important sociological aspect to property, which may exist independent of ownership, is clearly insufficient for establishing any justification for the absolute domain which traditionally attaches to private property.

Some indirect appreciation for the importance of the home comes from Aquinas. Aquinas's approach to material goods is indicative of an absolute but attractive maxim; 'everything is in common.'[24] There is some virtue in the view that all property is common as this idea leaves open the possibility that it is for society to express its will (through law) as to how competing values ought to be weighed where a person's home is at risk.[25] In the context of housing this conflict will often arise between a tenant and their landlord. It is not proposed that a reading of Aquinas's work allows for the Convention to provide hierarchy of rights which directs the judiciary to the weight to be afforded to certain rights nor is it suggested here that a hierarchical view of rights is correct.[26] Rather Aquinas's view that everything is in common provides an inception point allowing for a reading of art.8 (and art.1 of the First Protocol) which accepts the possibility that hard legal rules supporting the absolute rights of an owner might be softened through the operation of human rights, specifically in this case art.8.

Nozick is most notable for his opposition to the view that resources may be redistributed. Nozick's aversion to this is explained in his entitlement theory which serves as an extension of the core of Nozick's views on the State. If there is to be a

[23] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 33.
[24] T Aquinas, *Summa Theologiae*, vol 38 (Blackfriars McGraw-Hill 1975) 66-67. For recent consideration of the 'common' see generally M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009).
[25] S Shiffrin, 'Remedial Clauses: The Overprivatization of Private Law' (2016) 67 Hastings Law Journal 407, 420.
[26] The idea of a hierarchy of rights is considered in Chapter 6.

process to allow for redistribution of holdings one would expect that this would be in some way an emanation of the State (including the courts), in line with Nozick's favour of the minimal State this would be unacceptable.[27] For Nozick and his entitlement theory property may only be used by the legal owner who will be the legal owner by way of a just acquisition or transfer.[28] Going further if a person's 'holdings are just [that is to say they have been acquired by just acquisition or transfer], then the total set (distribution) of holdings is just'.[29] In other words, redistribution of property or enforced alternative use of property at the behest of the State would be unjust.

In the context of the protection of one's home, Nozick's argument against interference with property is based on a general assumption against State intrusion. However, Aquinas's view, in the equivalent situation, has the potential to create a specific avenue for the staying of property rights in certain instances, due to everything being in common as a starting point.[30] If this thought is carried forward it would appear that there is certainly a case to be made for an individual facing eviction to argue that via the powers granted by the HRA 1998,[31] which like all legislation is the imperfect 'expression of the will of the people in a democracy',[32] a court, as the personification of the community's wishes,[33] is able to and in some cases must curtail a landlord's absolute right to their property.[34] This duty is effectively echoed in law and the interpretation given to art.8. Therefore, in balancing the competing interests of a landlord and of a tenant it may be argued that the tenant's home interests might outweigh the absolute ownership rights of the landlord. This would also necessarily include those instances in which a court is afforded no discretion as to the making of an order due to the powers created by the HRA 1998.[35]

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[27] R Nozick, *Anarachy, State, and Utopia* (Blackwell Publishers 1974) 149-150.
[28] Ibid 151.
[29] Ibid 153.
[30] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 47.
[31] Discussed in detail in Chapter 4.
[32] K D Ewing, 'The Unbalanced Constitution' in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 116.
[33] See discussion of the ancient origins of the courts as part of local communities in F Maitland, *The Constitutional History of England* (Cambridge University Press 1919) 105-115.
[34] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 47-48: 'Those with plenty have a duty to help only when someone in need invokes his right to be *helped*' (emphasis added).
[35] Human Rights Act 1998 s.3.

There is contemporary support for this view from Singer,[36] who argues that in certain instances the court may be under a duty to rebalance property interests from one person to another:

> At crucial points in the development of these [social] relationships [such as landlord and tenant] – often, but not always, when they break up – the legal system requires a sharing or shifting of property interests from the "owner" to the "non-owner" to protect the more vulnerable party to the relationship.[37]

Singer makes this assertion alongside his argument in favour of a 'reliance interest', an interest which will arise where A is to be significantly disadvantaged by the exercise of absolute legal control of property owned by B.[38] Singer utilises various established contract and tortious actions which allow for the courts to stymie the intentions of a legal owner where they have a negative effect on the community.[39] The case study for Singer's article is the 'Steel Valley' community of Youngstown, Ohio, who faced social and economic ruin due to the closure of the local steel plants which employed the majority of people in the area. In this example Singer argues that the relationship between the owner of the plant and the local community ought to be reconceptualised to take account of the power imbalance between the parties giving rise to various options to keep the plants open. The same argument could be made in relation to landlord and tenant relationships which regularly involve landlords who are often economically and institutionally more powerful than their tenants.

The relationship between landlord and tenant could be described as one of 'mutual dependence'.[40] This idea of mutual dependence is akin to Aquinas's thoughts on community and all things being in common therefore providing a basis for the court's ability to rebalance proprietary interests.[41] Due to the premise of Singer's argument being based in the common law, it would seem that this would be limited to instances in which common law rules are under scrutiny and thereby open to

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[36] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611; J W Singer, 'The Reliance Interest in Property Revisited' Unbound: Harvard Journal of the Legal Left <http://legalleft.org/wp-content/uploads/2015/09/Singer_Reliance-Interest-Revisited.pdf> accessed 15 December 2015.

[37] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 623.

[38] J W Singer, 'The Reliance Interest in Property Revisited' Unbound: Harvard Journal of the Legal Left <http://legalleft.org/wp-content/uploads/2015/09/Singer_Reliance-Interest-Revisited.pdf> accessed 15 December 2015; J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611.

[39] See M Fried, 'Continuities and Discontinuities of Place' (2000) 20 Journal of Environmental Psychology 193 for discussion on community attachment.

[40] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 699.

[41] Support for this view also comes from J A G Griffith, 'The Brave New World of Sir John Laws' (2000) 63 The Modern Law Review 159, 172-176.

judicial interpretation and development,[42] such as *Hammersmith v Monk*.[43] However, giving effect to these ideas where statute dictates a particular course of action, such as mandatory dispossession, is more difficult but for those cases which fall under the interpretative powers the HRA 1998. This dichotomy is insightfully highlighted by Fox:

> The line of cases from *Qazi* to *Pinnock* provides a fascinating illustration of the ways in which doctrinal commitments — and the values, explicit or implicit, that underpin these: property values, which are not self-defining but themselves require interpretation — can reach beyond the common law to shape the norms of property law across the 'categories' of our property law system.[44]

3.1.3.2 *First Acquisition of Property*[45]

Plato, Aristotle, and Aquinas provide justifications for ownership from a common belief that ownership contributes to the betterment of society overall. The discussion above at 3.1.3.1 focused upon these writers to demonstrate that whilst they might be described as the 'human perfectionists' the method by which people may be 'perfected' differs between Plato, Aristotle, and Aquinas. The above analysis highlighted Aquinas and Singer's work and an approach which would allow for a softening of ownership rights on the basis of the needs of the community or those individuals in need. An alternative thread of property theory has sought to justify ownership on the basis of 'first appropriation'.[46] Proponents of first acquisition differ somewhat from the human perfectionists in that their starting point is how property comes to be acquired rather than justifying property on the basis of its purported virtue. However, the arguments made in favour of first acquisition lead into justifications for ownership. The idea of first appropriation requires there to be acceptance of state of nature theory predating civil society which hypothetically explains the method by which the opportunity to appropriate resources came about. Like the human perfectionists, these theorists suffer from a general lack of appreciation for the home together with an acceptance of the inequities which flow from the state of nature to modern society.

Locke is the leading first acquisitionist. Locke proposed that in a state of nature, antecedent to civil society, people were able to dispose of their possessions freely without any interference from the law (or society). As to how people are to acquire

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[42] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 746.
[43] *Hammersmith v Monk* [1992] 1 AC 478.
[44] L Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 67 Current Legal Problems 409, 415.
[45] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 52.
[46] Ibid.

property in the first instance Locke proposed a mixed labour theory. Locke's theory rests on the premise that the core of property is a person's labour.[47] It is through labour that Locke believes people are able to first acquire property in both the sense of moral and practical justification, where a person's labour is mixed with the land that land is removed from the state of nature and becomes the property of the labourer.[48] Immediately, Locke's theory is problematic due to the possibility for people to work in groups or some form of cooperation in the state of nature. If a group's labour becomes mixed with the land does that land become jointly owned by the group or is each member of the group entitled to discernible portions of the land which they own individually.[49] The problems with Locke's approach continue where people enter civil society which requires certainty as to title and the precise rights which flow from ownership, therefore, it is unsurprising that Locke advocates a State created legislative system that respects the outcomes of the state of nature.[50] The enduring influence of Locke's work is visible in the contemporary common law approach to property ownership. The emergence of this view in the common law courts is evident in landmark cases such as *Ashby v White*[51] and *Entick v Carrington*[52] which continue to inform the courts' conception of ownership.

Notwithstanding Locke's wish for a system of property which might serve to provide a logically structured system of ownership the problem of Locke's work remains the focus upon labour which looks at property as a store or culmination of wealth rather than as a home. Moreover, there is the question as to how much labour one must expend before ownership arises, is this an aggregative test or de minimis.[53] The problem is best put by Nozick asking if a can of tomato juice is spilt in the ocean would that be sufficient to amount to a mixture of labour thereby making the ocean the property of the careless party.[54] Furthermore, Locke overlooks the importance of the home to the individual. If the state of nature theory is accepted a person's first step would surely be the pursuit of shelter or somewhere which may be called home

[47] J Locke, *The Second Treatise of Civil Government* (Project Gutenberg edn, 1690) 11.
[48] Ibid 11. See also J Day, 'Locke on Property' in Gordon Schochet (ed), *Life, Liberty, and Property* (Wadsworth 1971) 109.
[49] In the modern context this might be compared with English law's approach to joint tenants versus tenants in common, see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.
[50] J Locke, *The Second Treatise of Civil Government* (Project Gutenberg edn, 1690) 38-39.
[51] *Ashby v White* 92 ER 126.
[52] *Entick v Carrington* 95 ER 807.
[53] R Nozick, *Anarachy, State, and Utopia* (Blackwell Publishers 1974) 174.
[54] Ibid 175.

and would act as a base.[55] In spite of these shortcomings, it is Locke's understanding of first acquisition which has gained ground in the common law.[56]

The problems continue in the submissions made by other first appropriationists. Kant's arguments in favour of first appropriation rests on what Kant calls first declaration. Unlike Locke, who requires some expenditure of labour to be expended upon and mixed with the land, Kant merely requires a declaration of a person's intent to claim property: '[w]hen I declare … "I will that an external thing … be mine," I thereby declare it obligatory for everyone else to refrain from the object of my will.'[57] Kant's approach is equally subject to Nozick's criticisms regarding the mixture of labour. If Nozick's criticism is recalibrated in Kantian terms, it seems preposterous to suggest that any person seeking to lay claim to the ocean by virtue of a declaration should be able to enforce such a claim against others. Without the 'limiting condition' of Locke's labour principle Kant's approach is excessive and untenable.[58]

Rousseau might also be termed a first appropriationist due to his work regarding social contract theory.[59] Rousseau approached the question of appropriation from two perspectives. The first is analogous to Locke's view of a state of nature in which people are able to gain ownership of property through 'first occupancy'.[60] The use of the word occupancy is immediately appealing when looking to identify a justification for ownership which recognises the primary purpose for occupying land in the state of nature or in civil society is to make a home. Taking this view would allow for Rousseau's work to be utilised in the context of the home. This implied acknowledgment of the use of land for shelter carries on into Rousseau's framework for determining whether first occupancy has occurred:

1. the land must not be inhabited;
2. the land must not be more than is necessary for subsistence; and
3. there must be signs of 'labour and cultivation' to allow for others to respect first occupancy.[61]

[55] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 1013.
[56] C M Rose, 'Possession as the Origin of Property' (1985) The University of Chicago Law Review 73; R A Epstein, 'Possession as the Root of Title' (1978) 13 Georgia Law Review 1221.
[57] I Kant, *The Metaphysical Elements of Justice* (Bobbs-Merrill 1965) 63.
[58] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 71.
[59] J-J Rousseau, *The Social Contract and the Discourses* (Project Gutenberg 2014).
[60] Ibid 196.
[61] Ibid 197.

Rousseau's view of first occupancy within a state of nature recognises how land is commonly utilised. The first limb of Rousseau's test and specifically the word 'inhabit' demonstrates the importance that may be placed upon the home, with the definition for 'inhabit' being '*live in* or occupy (a place or environment)' (emphasis added).[62] Moreover, words such as inhabit have been found to be synonymous with the home:

> The words 'dwell' and 'dwelling' … are ordinary English words, even if they are perhaps no longer in common use. They mean the same as 'inhabit' and 'habitation' or more precisely 'abide' and 'abode', and refer to the place where one lives and makes one's home. They suggest a greater degree of settled occupation than 'reside' and 'residence' … [63]

Rousseau goes further in his second criterion, and appears to show some overlap with Aquinas, in his requirement that there must be some consideration of what is necessary for survival and impliedly that limited resources must be utilised on the basis of necessity.[64] Coming to the third of Rousseau's requisites for first occupancy, Rousseau appears to soften the mixed labour analogy from Locke and instead requires outward signs of 'labour and cultivation'. This test in itself would appear to be more viable in the context of modern housing law given the courts' willingness to assess a tenant's outward intention to return to their home.[65]

The shortcomings in Rousseau's approach become apparent, however, where the state of nature gives way to civil society. Whilst first occupancy is antecedent to civil society once society is inaugurated then the first occupant will necessarily gain a property right which 'excludes him from everything else [that is not his]'.[66] In this sense, 'individuals who possess little or nothing may lose a great deal or everything'.[67] This creates the potential for civil society to be, using Rousseau's terms, less fair than any state of nature irrespective of the argument that it is the social compact which gives 'full moral and legal status'[68] to an individual's rights. This is in spite of Rousseau's contention that the right ' … each individual has to his own estate is always subordinate to the right which the community has over all …'.[69] However, Rousseau is unclear precisely what is being suggested here, does he mean

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[62] C Sonaes and A Stevenson, *Oxford Dictionary of English* (2nd edn, Oxford University Press 2003).
[63] *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301 [30].
[64] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 75.
[65] *Islington London Borough Council v Boyle* [2011] EWCA Civ 1450, [2012] PTSR 1093; *Brickfield Properties Ltd v Hughes* (1988) 20 HLR 108; *Brown v Brash* [1948] 2 KB 247.
[66] J-J Rousseau, *The Social Contract and the Discourses* (Project Gutenberg 2014) 196.
[67] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 75.
[68] Ibid 78.
[69] J-J Rousseau, *The Social Contract and the Discourses* (Project Gutenberg 2014) 198.

to say that there ought to mechanisms in place to stay property rights where the needs of the community outweigh those of the individual landowner or is Rousseau simply reiterating his view that following the social compact ultimate ownership rests with the sovereign state or people.[70] If it is the former then it is arguable that there is scope within the Rousseau's theory to allow for human rights considerations to overreach conceptions of private ownership where it is deemed necessary in the interests of the community. However, even if the latter position is adopted it is possible to argue that the community, which expresses its will through Parliament, is able to curtail the apparent absolute rights of an owner. This would also in principle allow for human rights considerations to stymie proprietary rights.

Nozick is the final of the first appropriationists considered. Nozick follows in the Lockean tradition on the basis that he believes that justice in private ownership is rooted in history. Nozick differs from Locke, however, in that he rejects the labour principle and instead argues that the acquisition of property is just where the acquisition does not worsen the position of others.[71] Nozick uses the example of a grain of sand on this point to demonstrate that if a grain of sand is removed from the beach there are plentiful other grains for appropriation. However, Nozick oversimplifies his appropriation stance on the assumption that all land, like a grain of sand, is equal to all other pieces of land thereby overlooking inherent competition and trade-offs in land use.[72] Nozick's requirement that acquisition is only just where resources are plentiful and remain available for others does not account for the differing utility of land. For example, if a piece of land is on the meander of a river stocked with fish and well-placed to act as a port then those who have not appropriated this land are immediately disadvantaged when it is claimed.[73] Nozick also fails to appreciate that the 'possession of exclusive rights to something that is scarce and valuable necessarily implies the possession of power over others who also desire the scarce and valuable.'[74] For these shortcomings it is submitted that

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[70] Ibid 197.
[71] R Nozick, *Anarachy, State, and Utopia* (Blackwell Publishers 1974) 175.
[72] This competition is recognised in P King, *Housing Policy Transformed: The Right to Buy and the Desire to Own* (Policy Press 2010) 64-65.
[73] This point is recognised by Locke who limited appropriation to those instances in which there was 'enough and as much left in common for others.', J Locke, *The Second Treatise of Civil Government* (Project Gutenberg edn, 1690) ch 5. See also R A Epstein, 'Possession as the Root of Title' (1978) 13 Georgia Law Review 1221, 1228.
[74] K Davis, *Human Society* (Macmillan Co 1949) 454; D Robertson, 'Cultural Expectations of Homeownership: Explaining Changing Legal Definitions of Flat 'Ownership' within Britain' (2006) 21 Housing Studies 35, 37; S Fitzpatrick and H Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to "Ambulance Service" Social Housing?' (2014) 29 Housing Studies 597, 603.

Nozick's theory does not provide an accurate basis for understanding ownership of property.

3.1.3.3 *Law Gives Rise to Ownership*

Grunebaum identifies the final group of theorists as those who believe that law gives rise to ownership.[75] It might be said that these theorists are more grounded in their approach as they seek to demonstrate that ownership stems from 'political or legal conventions'.[76] Rawls is the most notable of these writers for the purposes of this work. Rawls tables the idea that the rules which define justice, the acquisition of property, and the rights attached to property ought to be the product of a hypothetical original position. This original position is perhaps Rawls's 'single most important departure from traditional social contract theory.'[77] Rawls's original position exists to 'set up a fair procedure so that any principles agreed to will be just' and utilises the 'veil of ignorance' to hypothetically allow for people to make decisions without any prior knowledge of the society in which they exist or of their own place in that society.[78]

In the sense of justification for ownership Rawls's theory flows from the ownership of oneself.[79] This approach has some echoes of Locke's theory of ownership which, as stated above, deems a person's property to be their labour. In Rawls's view there are two related groups of ownership; the first is natural talents which form part of a community's common assets[80] and the second is natural abilities which are also a collective asset.[81] Rawls does not articulate the distinction between these two groups and so they may be considered 'freely interchangeable stylistic variants of one another'.[82] Although Rawls talks of common and collective assets it appears fair to say that Rawls's theory is one based upon private ownership albeit private ownership of one's physical self.[83] Rawls's theory is certainly useful therefore in demonstrating that there may be justifications for the collective use of assets that flow from the actions of the individual however there is perhaps a problem in stretching this to apply to privately owned natural resources such as land.[84] This problem is noted by Grunebaum who gives the example of B finding oil on his land

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[75] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 86.
[76] Ibid 86.
[77] W L McBride, 'Social Theory Sub Specie Aeternitatis: A New Perspective' (1971-1972) Yale Law Journal 980, 993.
[78] J Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 118-119.
[79] Ibid 101.
[80] Ibid 87-88.
[81] Ibid 156.
[82] J O Grunebaum, *Private Ownership* (Routledge & Kegan Paul Ltd 1987) 110-111.
[83] Ibid 111.
[84] Ibid 114.

which increases his wealth. However, imagine that B did nothing to assist in the discovery of this oil but rather rode on the coattails of A, his prospector neighbour, who expended the lion's share of effort in discovering oil. Grunebaum addresses this apparent inequity in the following terms:

> If a person's talents and abilities are a natural endowment which belong to everyone, it is difficult to see why land and resources which are nature's endowment should not also belong to everyone ... [justice involves] the distribution of what is needed for each person to try to achieve the good life as he himself conceives of it.[85]

If justice, in the normative sense tabled by Rawls, involves the distribution of the means to allow a person to achieve a good life it seems consistent to suggest that within any such system of justice there ought to be a robust protection of a person's home where that home is key to the realisation of a good life as she (or the community) conceives it.

3.1.3.4 *Conclusions on the Justifications for Property*

The above analysis of the theoretical justifications for private property demonstrates that whilst there are those theorists who consider it unjust for the courts to interfere with a person's holdings such as Nozick, there are others such as Aquinas, Rawls, and Singer who recognise that there are instances in which a person's property rights may be curtailed for the benefit or protection of others. Aquinas's work is instructive on this point. Aquinas advocates common ownership and therefore recognises instances in which property rights may be rebalanced in favour of a vulnerable party. This approach is amenable to the human rights perspective advanced in this thesis. For example, this accords with the positive obligations which may arise out of art.8.[86] There is weight given to Aquinas's work by Rousseau's ideas around first appropriation notwithstanding the problems identified with state of nature theories above. Rousseau's theory of first appropriation allows for appropriation through a person claiming a piece of property as their home. However, and more interestingly for this work, there is scope within Rousseau's theory to allow for human rights to reach into the property regime where it is necessary and in the interests of the community.

There is also support for this approach from Rawls who believes that a person's natural talents and abilities ought to come under the collective ownership of the community. Looking at the idea of property ownership overall it is possible to take Rawls's theory further. Rawls accepts his theory of justice may involve the

[85] Ibid 115.
[86] *Marckx v Belgium* (1979-80) 2 EHRR 330.

distribution of the means to allow a person to achieve a good life in this sense it seems appropriate to mobilise human rights for the protection of one's home. There are therefore a number of theoretical justifications for a robust utilisation of art.8 where a person's home is at risk that may allow for property rights to be curtailed. To talk of property in absolute terms therefore accounts for only a fraction of the positions one may take in relation to property notwithstanding the confidence with which the courts talk of 'unencumbered property rights'.[87] Any talk of affording a priori weight to a person's property rights seems to be short-sighted. Moreover, it is unclear, beyond the right to recover possession, precisely what the courts are referring to when they use the term property rights and how this might interfere with the protections afford by art.8. The discussion below takes account of the rights which attach to property and the effects these rights may have upon other individuals.

3.1.4 The Rights Attached to Property

The theoretical justifications for private ownership were analysed above. Within this discussion it has been demonstrated that there is no one property theory which engages with and develops the conception of the home as such. However, there are theories which allow for absolute property rights to be stayed leaving room for human rights arguments to have effect. The justifications for private property have focused largely upon philosophical and moralistic considerations in favour of private ownership. However, once private ownership is justified in some sense, allowing for ownership to be softened in certain instances, focus turns to what one can do with the property they own and equally what limitations might be placed upon this. The most pressing question for the purposes of this thesis is when these rights may be stayed or recalibrated to allow for tenants to remain in their home despite the apparent absolute rights of the landlord arising from the ownership model.

Hohfeld and Honoré are most notable for their work in identifying and codifying the precise rights which may be exercised by the owner of property.[88] Hohfeld's work is not solely concerned with property as such[89] rather Hohfeld sought to identify general and basic legal rights which arose across a legal system.[90]

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[87] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [54].
[88] W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale Law Journal 16; W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale Law Journal 710; A M Honoré, 'Ownership' in Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1961).
[89] But for occasional mentions of property rights, W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale Law Journal 710, 719-733;

It is Honoré who directed Hohfeld's work towards property theory, developing the following body of property rights:

1. the right of use;
2. the right of exclusion;
3. the right to compensation;
4. the rights to destroy, waste or modify;
5. rights to income;
6. absence of term;
7. liability to execution; and
8. power of transfer.[91]

This body of rights is the dominant 'understanding of property in what might be called mainstream Anglo-American legal philosophy … [the so-called] "bundle of rights".'[92] The lack of reference to using property as a home within Honoré's calculation is immediately apparent. Moreover, this approach to property theory has in itself been problematic in that it has not quelled outstanding questions as to property rights but rather over time has led to the identification of areas of theory which require further consideration. MacLeod demonstrates this point astutely and highlights four prevalent gaps in the current literature.[93]

The first gap identified by MacLeod relates directly to Honoré's work and is known as 'Wood-Trees Gap'.[94] The core of this criticism is that any kind of Hohfieldian approach to property rights overstates the certainty of property at the expense of realising that 'property is intelligible only as a social construct, as a perfect malleable category wholly at the service of collective goals.'[95] This is akin to Aquinas and Rawls's views discussed above at 3.1.3. In this sense it seems it has been forgotten that the absolutist nature of the ownership model may in certain circumstances yield

W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale Law Journal 16, 21.
[90] W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale Law Journal 710, 710.
[91] A M Honoré, 'Ownership' in Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1961) 107-147.
[92] J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA Law Review 711, 712-730; A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1010.
[93] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009.
[94] Ibid, 1010.
[95] A Brudner, 'Editor's Introduction' (1993) 6 Canadian Journal of Law and Jurisprudence 183, 184-185.

to the well-being of others. Both Munzer and Penner accept to some degree that the core right attached to ownership is the ability to exclude others.[96]

The second gap identified by MacLeod, the justification gap, deals with the issues around the plethora of proposed justifications for private property which have been analysed at 3.1.3. It is not intended to recant the discussion above analysing the justifications for private ownership. However, MacLeod makes similar criticisms of the following; the acquiescence to private ownership on a historical basis,[97] state of nature theories,[98] and a conventionalist approach to justification.[99] It was established above that many of these approaches to private property are flawed as they fail to recognise the importance of the home and fail to account for those instances in which a person's property rights might be amended by law. Rather it is the work of writers such as Aquinas, Rousseau, and Rawls who may be read to allow for community interests to defeat the interests of private property.

The third area of scholarship highlighted by MacLeod is the agency gap which recognises the core dichotomy of private property that is the conflict between the rights of the individual and wider community interests:[100]

> In a simplified version of this dichotomy, property is either an absolute, pre-political right enjoyed by an individual to disregard the public good or simply whatever privileges are left over after the state has finished regulating (for now). Property ownership is thus placed in conflict with political powers.[101]

This highlights a key line of thought in property theory and wider legal thinking that might be termed the public/private divide[102] or 'the core relations ... between the

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[96] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1013; J E Penner and H Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 294-295; A Ripstein, 'Possession and Use' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013).

[97] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1014; J Waldron, 'To Bestow Stability upon Possession: Hume's Alternative to Locke' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013).

[98] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1015; J E Penner and H Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 12.

[99] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1015-1016; J E Penner and H Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 196.

[100] See for example A Brudner, 'Private Property and Public Welfare' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013).

[101] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1025.

[102] C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241; G Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 MLR 558.

state and the citizens concerning the general interest'.[103] The full ramifications of the public/private divide will be addressed in Chapter 5. However, at this stage the gap identified by MacLeod is noteworthy due to the focus placed on 'the emotional sources of successful institutions'.[104] The agency gap therefore cuts across three areas of this work, namely, the nature of the public/private divide (that is the application of public law in the form of human rights to housing law), the necessary balance to be accorded to competing interests in the context of property, and the lack of consideration for the 'emotional' aspects of property, specifically in the context of the home detailed at 3.2.

The final gap for MacLeod is the rights gap which focuses upon the legal nature of the rights which attach to property. As opposed to the popular bundle approach to rights which provides a convenient shorthand within philosophical circles, lawyers rather focus upon legal constructs.[105] It is this style of legal argumentation which has narrowed literature around the absolute nature of rights which attach to ownership of property. The law favours certainty and in so doing opts for absolutes where possible, this is no more evident than in such foundational common law concepts like stare decisis. From a rule of law standpoint this is sensible in that it makes the law 'accessible and so far as possible intelligible, clear, and predictable.'[106] However, this drive for predictability betrays an equally valid observation: 'in law, "context is everything."'[107] Therefore, attributing greater weight to the interests of a landlord over the personal circumstances of a tenant on the basis of the landlord's property rights seems overzealous. This is particularly so in light of the range of personal circumstances which might arise in possession proceedings.[108] This same observation might be levelled at the literature considering the role of human rights as applicable to housing law and so opens the door for a wider view of the justifications for human rights to play a role within housing law beyond legalistic arguments.

This self-contained approach within legal literature exacerbates the problem which forms the basis of this thesis, that is the lack of a unified approach to the role of

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[103] J Bell, 'Public Law in Europe: Caught between the National, the Sub-National and the European' in Marc Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 259, 259.
[104] C M Rose, 'Psychologies of Property (and Why Property is not a Hawk/Dove Game)' in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 288.
[105] A J MacLeod, 'Bridging the Gaps in Property Theory' (2014) 77 MLR 1009, 1024-1025.
[106] T Bingham, *Rule of Law* (Penguin Books 2011) 37.
[107] *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 [69].
[108] See for example Chapter 2 for discussions of some of this case law.

human rights where a person's home is at risk and the precise application of human rights law in an area essentially concerned with resource allocation. This issue in itself feeds into the overarching gap found by MacLeod, the theory-doctrine gap. This problem is visible in the phenomenon of 'property outsiders'.[109] Property outsiders are those who 'have less or no property'[110] due to the current focus within property literature upon 'certainty, autonomy, and efficiency'.[111] It is these property outsiders who often make their homes in the rented sector which, as highlighted in Chapter 1, is increasingly made up of poor housing stock and marginalised people. It is these same individuals who would be protected by the argument at the core of this thesis, that art.8 ought to have a pervasive influence in all instances where a person's home is at risk at the behest of a landlord.

The gaps identified in the literature around property rights broadly demonstrate the paradox at the core of property:

> Property, understood as absolute control over one's own, is self-defeating. If there were no limits on one's ability to use one's property, one could use it to destroy the property of others. Because others have property rights too, protection of property requires limits on property rights to ensure that one's legal rights are compatible with the rights of others. Property – the paragon of absoluteness, the quintessential example of complete control – is inherently limited ... Property, then, is a paradox ... Entitlement initially appears to abhor obligation, yet on reflection we can see that it requires it. Indeed, it is the tension between ownership and obligation that is the essence of property.[112]

This understanding of property rights has much in common with the view that property may be justified on the premise that it is allowed for by law.[113] This finding demonstrates the patchwork nature of property theory and highlights the futility of seeking to explain property in one monolithic theory. This paradoxical understanding of property allows us to conceive something which is collectively constructed in a social and legal sense.[114] This social collective construction is no more present than in the sociological understandings of the home discussed below at 3.2. Entitlements and obligations are bound up in property. The question is in what circumstances these may out shadow one another.[115] In this work the question

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[109] L Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 67 Current Legal Problems 409.
[110] Ibid, 411.
[111] Ibid.
[112] J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2001) 203-204.
[113] See 3.1.3.3.
[114] J W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2001) 215.
[115] Ibid 216.

might be reformulated to ask when it is correct for the right to respect for a person's home under art.8 to supersede a landlord's entitlement to a mandatory order for possession. The legal argument in favour of this began in Chapter 2 and continues in Chapter 4. The remainder of this Chapter engages with sociological literature in favour of this view and bolsters the argument that art.8 ought to be readily applicable in all possession proceedings.

3.2 The Inherent Non-Legal Importance of the Home to the Individual and Society

> I mean [possession proceedings are] pretty boring stuff. It's not intellectually demanding, as you've seen. And my response is largely instinctive rather than intellectual but it's important, and what could be more important than, well, what could be more important? Life and death, I suppose. But otherwise taking you out of your, of your home, Article 8, and all the rest of it. So that's what sort of keeps me [a district judge] going doing this stuff.[116]

> At the end of the day you're talking about somebody's home. There is nothing more fundamental, it seems to me, apart from taking someone's children away but somebody's home is actually one of the most fundamental things.[117]

3.2.1 Introduction

The following makes use of sociological understandings of the home as opposed to the philosophical and legal understandings of ownership which have been primarily concerned with the identifiable monetary nature of the home as a legal construct.[118] The home is more than a physical space and attaches to a person's identity and wellbeing by providing a secure private place for an individual or group of people to retreat.[119] In the context of a landlord and tenant the home is a product of the unique and interdependent relationship between the two parties.[120] This analysis serves as the basis for arguing that art.8 ought to be robustly applied in possession proceedings as these 'ethical considerations cannot be excluded from the administration of justice.'[121]

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[116] D Cowan and E Hitchings, "Pretty Boring Stuff': District Judges and Housing Possession Proceedings' (2007) 16 Social and Legal Studies 363, 363-364.
[117] D Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 Journal of Law and Society 547, 564.
[118] L Fox O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 67 Current Legal Problems 409, 420.
[119] R Hiscock and others, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18 Housing, Theory and Society 50, 50.
[120] J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 682-684.
[121] W A Robson, *Justice and Administrative Law: A Study of the British Constitution* (Macmillan and Co 1928) 238.

3.2.2 More than Simply Ownership

The importance of the home whilst underrepresented in traditional legal discourse is 'widely accepted as a universal human experience by Western philosophers and writers'.[122] This is in spite of the fact that one's legal relationship with their home acts as the foundation that gives rise to a plethora of complicated contextual feelings.[123] This phenomenon has been noted by socio-legal scholars who have recognised that an 'analysis of emotions may develop further an understanding of ideological processes in legal regulation which have so far focused on macro aspects, such as grand-scale political ideologies'[124] which are visible in housing law. Searching for the meaning of the protections afforded by art.8 is made difficult by use of the word 'home' over, for example, residence, dwelling, or even house.[125] The travaux préparatoires of the Convention makes no mention of how the term home is to be interpreted.[126] The travaux préparatoires instead shows that the wording of art.8 was transposed from art.12 of the Universal Declaration of Human Rights (UDHR).[127] Many of the articles to the UDHR are inspired by a multitude of national constitutions and bills of rights.[128] Article 12 is no different in this regard in being partially based upon the suggestions of the Chinese delegation to the December 1947 Committee tasked with drafting the UDHR.[129] The sentiments of art.12 are also similar to the requests of Latin American nations at the time of the UDHR's drafting and the idea of the 'inviolability of the home'.[130] For the drafters of the UDHR the inviolability of the home flowed from a person's inherent right to have their privacy protected.[131] However, due to protestations from the UK delegation the idea of

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[122] S Smith, 'The Essential Qualities of a Home' (1994) 14 Journal of Environmental Psychology 31, 31.
[123] S Fitzpatrick and H Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to "Ambulance Service" Social Housing?' (2014) 29 Housing Studies 597, 602.
[124] B Lange, 'The Emotional Dimension in Legal Regulation' (2002) 29 Journal of Law and Society 197, 221.
[125] A Buyse, 'Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) EHRLR 294, 296.
[126] J Velu, 'The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications' in Arthur Henry Robertson (ed), *Privacy and Human Rights* (Manchester University Press 1973).
[127] Ibid 15; A Mowbray, 'The European Convention on Human Rights' in Mashood A Baderin and Manisuli Sessenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010).
[128] J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 6-8.
[129] Ibid 6-8.
[130] Ibid 131-133.
[131] Ibid 134. At p.134 see in particular the views of the following delegates '"The domicile is inviolable, as also epistolary correspondence and private papers" (Argentina); "every house is an inviolable asylum"/"epistolary correspondence and private papers are inviolable" (Bolivia); "the dwelling is inviolable" and "the privacy of letters and other means of communication is inviolable" (Yugoslavia).

inviolability was dropped in recognition of instances in which a person's home will be interfered with in some way, for example, by a landlord recovering possession.[132] The use of the word 'arbitrary' over 'unreasonable' or 'illegitimate' within art.12 is noteworthy in the composition of the UDHR with the delegates favouring arbitrary for two reasons. The first is a matter of consistency with other articles of the UDHR, specifically arts.9 and 15. The second is more substantive, in that 'arbitrary interference' suggested that a breach of art.12 would arise where 'everything was not in accordance with well-established legal principles'.[133] The debate around the precise wording of art.12 is indicative of the emotive nature of the home and its unique place in the minds of its drafters. What is clear from the debates around what became art.12 is that the interests protected by art.12 exist apart from property which is the subject of art.17 of the UDHR. Based upon these findings it is difficult to say precisely what is meant by the term home and how it ought to be interpreted by individuals or nations looking to cite the UDHR and, relatedly, art.8 of the Convention. The difficulty of determining the extent of art.8 is made more difficult by the use of 'domicile' in the French version of the Convention which the European Court of Human Rights has found to have a wide definition.[134] Nevertheless, the protection of the home tallies with the protection of the individual at the core of human rights instruments[135] and transcends easily quantifiable physical assets such as land and the ownership thereof which the law has come to efficiently recognise and protect.[136]

This idea of the home and private life transcending ownership has been alluded to by the European Court of Human Rights in *Niemietz v Germany*.[137] In *Niemietz* the European Court held the right to respect for one's private life must 'comprise to a certain degree the right to establish and develop relationships with human beings'.[138] This necessarily requires that an individual is able to develop their personality and relationships with others. The notion of 'family life' cited in art.8 is interpreted widely and goes beyond legal understandings and instead focuses on the facts of a given case such as whether there 'exists [a] *de facto* family life where

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[132] Ibid 136.
[133] Ibid 138.
[134] A Buyse, 'Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) EHRLR 294, 296; *Chappell v United Kingdom* (1989) 12 EHRR 1 [30].
[135] A Buyse, 'Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) EHRLR 294, 307.
[136] K Hollingsworth, 'Assuming Responsibility for Incarcerated Children: A Rights Case for Care-Based Homes' (2014) 67 Current Legal Problems 99, 127.
[137] *Niemietz v Germany* (1993) 16 EHRR 97.
[138] Ibid [29].

persons live together on a permanent basis and share a home so as to constitute themselves as a family.'[139]

Radin seeks to explain this phenomenon of the home through her theory of property and personhood[140] in which she argues that a person's attachment to property may be placed on a spectrum of two diametric forms of property; personal property and fungible property.[141] This approach rests upon the proposition that 'most people possess certain objects they feel are almost part of themselves'.[142] Within this scale Radin uses the example of a wedding ring to demonstrate the differing personal attachments a person may exhibit:

> One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement ... For instance, if a wedding ring is stolen from a jeweller, insurance proceeds can reimburse the jeweller [fungible property], but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo – perhaps no amount of money can do so [personal property].[143]

Radin makes the same claim in relation to a person's home by using the example of a commercial landlord who will undoubtedly have a different attachment and feeling towards his property than the tenant who calls that property their home.[144] In the case of a landlord the property in question is fungible whereas for a tenant the same property would be personal due to the way in which they are invested in their home. It may be that the landlord is resident on the property so the property may be the home of the landlord and the tenant.[145] However, this does not undermine the feelings a tenant may have towards their home, rather, this simply allows for a conceptualisation of these interests which may be understood in the same way as a landlord's. The key is determining whether the property is personal or fungible for the relevant party.[146]

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[139] P Van Dijk and G Van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn, Kluwer Law International 1990) 378.
[140] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957; M J Radin, *Reinterpreting Property* (University of Chicago Press 2009). For a recent reconsideration of Radin's work see also J D Jones, 'Property and Personhood Revisited' (2011) Wake Forest Journal of Law and Policy 93.
[141] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 959.
[142] Ibid, 960.
[143] Ibid, 959.
[144] Ibid, 960.
[145] This is recognised in the resident landlord exception in housing legislation, Housing Act 1988 sch.1 pt.1 para.10.
[146] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 300-301.

Radin's theory is inspired in part by the work of Hegel who, in the tradition of Kant, saw the person as 'an abstract autonomous entity capable of holding rights, a device for abstracting universal principles and hence by definition devoid of individuating characteristics.'[147] From this proposition it may seem contradictory to argue that a person may be bound up with an external object, however, viewed in another fashion it becomes clear that the only manner in which a person may express their personhood is to take action in the actual world over and above their abstract selves. This idea is apparent in the steps tenants may take to modify their home to 'appropriate what they themselves have not created … [but which are] … constructive of social relations'.[148] In this sense the home is recognised as 'a moral nexus between liberty, privacy, and freedom of association'[149] where a person can 'embody and constitute' themselves.[150] Additionally, whether a place is a person's home is independent of ownership.[151] The home acts as a private sanctuary which assists in the development of a personhood.[152] The higher status given to personal property, and specifically the home, in such instances flows from a person's reliance upon continuity and self which requires 'an ongoing relationship with the external environment'.[153] The forfeiture of such connections via dispossession leads to a great sense of loss.[154] Radin's approach to personhood presents a basis upon which art.8 may be anchored to recognise a person's intimate connection to their home. Moreover, the personhood theory does not concern itself with the institutional character of actors in a given case. Instead Radin demonstrates that some attachments, such as those concerned with the home,[155] are so strong that they ought to be given precedence. The concept of personhood is not unique to Radin with Griffin arguing that human rights exist to protect one's personhood.[156] In

[147] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 971.
[148] D Miller, 'Appropriating the State on the Council Estate' (1988) 23 Man 353, 370.
[149] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 991.
[150] Ibid, 992.
[151] Ibid. See also H Easthope, 'Making a Rental Property Home' (2014) 29 Housing Studies 579.
[152] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 995; J W Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611; J W Singer, 'The Reliance Interest in Property Revisited' Unbound: Harvard Journal of the Legal Left <http://legalleft.org/wp-content/uploads/2015/09/Singer_Reliance-Interest-Revisited.pdf> accessed 15 December 2015.
[153] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 1004.
[154] L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 599; L Fox O'Mahony and J A Sweeney, 'The Idea of Home in Law: Displacement and Dispossession' in James A Sweeney and Lorna Fox O'Mahony (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate Publishing 2013).
[155] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 1013.
[156] J Griffin, *On Human Rights* (Oxford University Press 2008) pt II.

Griffin's work personhood may be distilled to autonomy and liberty.[157] In this sense art.8 may directly link with the development of one's personhood in that the home may allow for one to enjoy autonomy from the outside world alongside the liberty to act as one wishes within their home (or in the least a part of their home). This linking of personhood, autonomy, and liberty is evident in the empirical evidence discussed below in which tenants cite a lack of liberty and autonomy as undermining their attachment to the home.

The strongest criticism of Radin is offered by Blumenthal who suggests that there is little empirical evidence to support Radin's theory, particularly in the sense of affording increased protection to the home.[158] Blumenthal also contends that one's feelings towards their home are contextual.[159] For instance, in some studies women have been shown to develop stronger ties to their homes than men.[160] Blumenthal therefore asks whether a woman's home should be afforded more protection than a man's. The same point could be made in relation to children who might often have a stronger connection to the home (and particularly their own space) than adults due to the refuge provided by the home in an otherwise adult world. However, whilst Blumenthal's point is an interesting observation it is suggested that rather than focusing on a monolithic approach that would apply to a given gender, age, or other grouping of people, focus should be placed upon the individual at risk of losing their home in a given case. A context sensitive approach recognises the common thread running through literature on the home which makes clear that the home is a ' ... private and personal place that is highly idiosyncratic, whose shape changes fairly frequently, and whose image can be both multifaceted and also highly ephemeral.'[161]

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[157] J Tasioulas, 'Human Rights, Universality, and the Values of Personhood: Retracing Griffin's Steps' (2002) 10 European Journal of Philosophy 79, 83.
[158] J A Blumenthal, 'To Be Human: A Psychological Perspective on Property Law' (2008-2009) 83 Tulane Law Review 609, 617.
[159] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 165; L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 106-107.
[160] J A Blumenthal, 'To Be Human: A Psychological Perspective on Property Law' (2008-2009) 83 Tulane Law Review 609, 632. This difference in feelings towards the home between men and women appears as early as childhood, see B Whiting and C P Edwards, 'A Cross-Cultural Analysis of Sex Differences in the Behaviour of Children Aged Three through 11' (1973) 91 Journal of Social Psychology 171, 182-183; J Tognoli, 'Residential Environments' in Daniel Stokols and Irwin Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 658.
[161] J Tognoli, 'Residential Environments' in Stokols and Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 655.

This dynamism towards the home is echoed in a person's differential feelings towards individual areas or rooms of the home.[162]

Taking the first point of a lack of empirical evidence for a close connection between a person and their home it should be noted that Blumenthal begins from a misunderstanding of Radin's work by saying Radin's theory is presumed on the submission ' ... that control over private property is paramount in developing a healthy self-identity ... '.[163] This is not the case. Radin's discussion of landlord and tenant relationships makes clear that personhood is not limited to ownership of private property but can attach to objects which may be owned by another. This is evident in the positive characteristics of the home not being 'inherently enhanced by home ownership, particularly where the occupier's status becomes unsustainable.'[164] Moreover, there is empirical support for Radin's work offered by Smith[165] and Sixsmith.[166] In Smith's study, 23 subjects[167] participated in interviews which sought to draw out their feelings towards their homes.[168] In these interviews the participants noted the following qualities which attached to the home: 'continuity, privacy, self-expression and personal identity, social relationships, warmth, and a suitable physical structure'.[169] During interviews the subjects also identified ownership and the security that this provides as a desirable, but not essential, feature of a home. This point is supported by Hiscock:

> [B]ecoming a home owner does not in itself guarantee feeling more protected in or by the home ... [although] owner-occupation can provide financial backup in times of trouble, interviewees who considered what this would mean in reality were less convinced of its advantages as housing wealth is likely to be realised at a great

[162] P Korosec-Serfaty, 'The Home from Attic to Cellar' (1984) 4 Journal of Environmental Psychology 303.
[163] J A Blumenthal, 'To Be Human: A Psychological Perspective on Property Law' (2008-2009) 83 Tulane Law Review 609, 614.
[164] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 162.
[165] S Smith, 'The Essential Qualities of a Home' (1994) 14 Journal of Environmental Psychology 31.
[166] J Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6 Journal of Environmental Psychology 281.
[167] The participants of Smith's study were 23 heterosexual adult volunteers (11 of which were cohabiting with a partner). Of these 23 participants 12 were females with a mean age of 34.4 years old whilst the remainder of the participants were male with a mean age of 35.75 years old.
[168] S Smith, 'The Essential Qualities of a Home' (1994) 14 Journal of Environmental Psychology 31, 31.
[169] Ibid.

> emotional cost: the loss of the home … owner occupation could [therefore] actually provide less security than social renting … '[170]

The remainder of the descriptors used by the subjects in Smith's study are equally applicable to rented accommodation such as the 'atmosphere of the home' and 'internal social relationships'.[171] Of these themes a 'significant proportion' of the participants noted the ability for self-expression allowed them to develop a self-identity.[172] Further, restrictions on self-expression due to short-term tenure led to a feeling that the place was not a home.[173] In view of the commonality of the responses from the interviewees Smith concluded that there was empirical support for 'continuity, privacy, self-expression, social relationships, warmth, and … physical structure'[174] being essential characteristics of a home. Applying this finding to art.8 would appear to suggest that anyone claiming an interference with art.8 and their right to respect for their home is necessarily holding themselves out as having these feelings towards the property in question.

Additional empirical support for the unique position of the home in the minds of individuals is offered by Sixsmith.[175] Sixsmith begins by asking a simple question: 'what does "home" mean?'[176] In answering this question Sixsmith's study in contrast to Smith looked at the experiences of postgraduate students living in university accommodation.[177] This group of participants has the potential to undercut the proposition that the essential characteristics of the home which have been identified within the work of Radin and Smith are focused upon a middle class nuclear family.[178] It might seem that postgraduate students do nothing to assuage this middle class image given that many postgraduate students will come from an advantaged background.[179] However, this misses the point of Sixsmith's work. In

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[170] R Hiscock and others, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18 Housing, Theory and Society 50, 55-57.
[171] S Smith, 'The Essential Qualities of a Home' (1994) 14 Journal of Environmental Psychology 31, 36.
[172] Ibid, 44.
[173] Ibid.
[174] Ibid, 45.
[175] J Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6 Journal of Environmental Psychology 281.
[176] Ibid, 281.
[177] As to the similarities between university dormitories and other forms of accommodation see C Deasy and T E Lasswell, *Designing Places for People: A Handbook on Human Behaviour for Architects, Designers, and Facility Managers* (Watson-Guptill Publications 1985) 56-63.
[178] C Després, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8 Journal of Architectural and Planning Research 96, 103.
[179] The 1994 Group, *The Postgraduate Crisis: Policy Report* (The 1994 Group, 2012) 11-17; The Sutton Trust, *The Social Composition and Future Earnings of Postgraduates: Interim*

selecting postgraduate students as subjects Sixsmith's strengthens the proposition that one's feelings towards their home arise independent of the location being a family or cohabited home. Postgraduate students 'have often lived in a range of different residential arrangements'.[180] Therefore, any common ground between Sixsmith and Smith's work suggests some universality as to the phenomenon of the home. The participants' answers to the 'meaning of the home' were grouped into 20 categories by Sixsmith, of these categories the three most common feelings were; belonging, happiness, and self-expression.[181] Although these characteristics were not seen as essential for the existence of a home they are indicative of a person's general feelings towards the place which they call their home which Sixsmith categorises in three broad groupings; personal, physical, and social.[182] In a personal sense '[t]he home can be seen as an extension of oneself, perhaps in two senses … between the subjective self (the "I") and the objective self (the "Me")'.[183] This echoes the observations made by Radin in relation to the abstract self and the expression of that self in the physical space such as a home. Leading from this the home becomes a physical and emotional centre point essential to a sense of being.[184] On the basis of her findings Sixsmith determines:

> Home is a multidimensional phenomenon, neither unidimensional nor created from a set of standard qualities pertaining either to the person or the place. Rather, each home features a unique and dynamic combination of personal, social and physical properties and meanings.[185]

The home is more than merely a physical structure and encompasses a range of social and emotional ties.[186] It is the loss of these multidimensional ties that Radin is seeking to conceptualise and prevent.

Blumenthal's second criticism of Radin, the contextual nature of the home, is supported by the empirical work of Smith and Sixsmith. However, this is not a reason to disregard the idea that the home ought to be respected by the law rather Blumenthal's concern simply reminds us that the home holds different meanings for

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Results from the Centre for Economic Performance at the London School of Economics (The Sutton Trust, 2010).

[180] J Sixsmith, 'The Meaning of Home: An Exploratory Study of Environmental Experience' (1986) 6 Journal of Environmental Psychology 281, 284.

[181] Ibid, 287.

[182] Ibid, 289.

[183] Ibid, 290.

[184] Ibid.

[185] Ibid, 294.

[186] S M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 Michigan Law Review 1093, 1110; J Horwitz and J Tognoli, 'Role of Home in Adult Development: Women and Men Living Alone Describe Their Residential Histories' (1982) 31 Family Relations 335.

different people.[187] For example, in homes where social relationships have soured or where a person has been the victim of domestic violence then the home may understandably conjure negative feelings.[188] Equally, negative (or positive) feelings may arise following tragedy or loss, for example, where a friend or family member passes away.[189] The negative feelings an individual may feel towards a certain place have been explored by Manzo,[190] who notes '[much] critique [which highlights the negatives experiences of the home] stands in sharp contrast with the metaphorical meaning of the home ... by describing the residence as a haven.'[191] However, negative feelings towards the home may be better described as the 'shadow side' of home life.[192] In effect what these negative feelings show is the 'dynamic' nature of an individual's feelings towards a given place.[193] In this sense what is required from the perspective of the courts looking to give protection to a person's home through art.8 is a context-sensitive approach which takes account of this dynamism. Taking a view of the whole circumstances of the case where a person's home is at stake would allow the court to assess a person's attachment to that home and the ramifications of

[187] J Horwitz and J Tognoli, 'Role of Home in Adult Development: Women and Men Living Alone Describe Their Residential Histories' (1982) 31 Family Relations 335.

[188] J Tognoli, 'Residential Environments' in Stokols and Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 657; D N Benjamin (ed), *The Home: Words, Interpretations, Meanings and Environments* (Avebury 1995) 134-135; L C Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 Journal of Environmental Psychology 47.

[189] L C Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 Journal of Environmental Psychology 47, 51. Negative feelings towards the home may also be more pervasive and relate to the local area in which a person's home is located, see M Fried, 'Continuities and Discontinuities of Place' (2000) 20 Journal of Environmental Psychology 193, 201-203. Consider also the potential for fetishism towards the home (and other objects), see M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 969.

[190] L C Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 Journal of Environmental Psychology 47; L C Manzo, 'For Better or Worse: Exploring Multiple Dimensions of Place Meaning' (2005) 25 Journal of Environmental Psychology 67.

[191] L C Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 Journal of Environmental Psychology 47, 50.

[192] L Chawla, 'Childhood Place Attachments' in I Altman and SM Low (eds), *Human Behaviour and Environments: Advances in Theory and Research*, vol 12 (Plenum Press 1992); L C Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 Journal of Environmental Psychology 47, 51.

[193] L C Manzo, 'Beyond House and Haven: Toward a Revisioning of Emotional Relationships with Places' (2003) 23 Journal of Environmental Psychology 47, 51-53; D Case, 'Contributions of Journeys Away to the Definition of Home: An Empirical Study of a Dialectical Process' (1996) 16 Journal of Environmental Psychology 1. There are elements of 'perspectivalism' here with the home's features being dependant upon the perceiver and their projections on that place, see L Alexander, 'The Public/Private Distinction and Constitutional Limits on Private Power' (1993) 10 Constitutional Commentary 361, 369-371; M M Childers, '"The Parrot or the Pit Bull": Trying to Explain Working-Class Life' (2002) 28 Signs 201, 217-218.

a person being dispossessed of their home.[194] To be clear this is not to say that a place with negative feelings for a person is any less their home in a de facto sense but rather seeks to highlight a person's connection based upon individual experience. These potential negative feelings are open for consideration by the courts under the current approach of the European Court of Human Rights and the domestic courts.[195] Concomitantly the court may consider the 'significant negative psychological impacts from [involuntary] moving'.[196]

Criticism of Radin is also offered by Stone who suggests that it is the law of property itself which leads to a person becoming attached to their home:

> In other words, one can draw … a reversal in the chain of logic, from the idea of the subject grounding the law of property to the law of property producing some of the constitutive elements of our political and legal embodiment.[197]

Stone argues that this understanding results in Radin's theory being 'pervasively conservative'.[198] It is true that some of the examples used by Radin fall within what might be termed conservative institutions such as a wedding ring[199] or the ownership of a suburban family home.[200] However, the arguments used by Radin in favour of property and personhood are not restricted to instances of ownership but transcend to instances where a person does not necessarily own the property which they are attached to. In the case of rented homes a tenant will not own the property they consider home and yet they may have much the same feelings towards their home as an owner-occupier.[201] This view is best put by Radin saying that a tenancy ought to carry the same 'moral weight … [as an owner-occupier's home] … because … it is the tenant's home in the same sense.'[202] In those instances where tenants are

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[194] This is much the same approach the domestic courts have taken in relation to historic dispossession legislation: '[The judge must] look at the question from all angles, in particular by considering the effect on the parties if the order was made, but also if it was not … It may be said that for a judge to consider the parties' respective positions both if an order is made and if it is not is merely for him to look at both sides of the same coin; and there is perhaps something in that', see *Whitehouse v Lee* [2009] EWCA Civ 375, [2010] HLR 11 [30]-[31].
[195] *Connors v United Kingdom* (2005) 40 EHRR 9; *Blecic v Croatia* (2005) 41 EHRR 13; *Cosic v Croatia* (2011) 52 EHRR 39.
[196] D B Barros, 'Home as a Legal Concept' (2006) 46 Santa Clara Law Review 255, 281.
[197] M Stone, 'Robert Esposito and the Biopolitics of Property' (2015) 24 Social and Legal Studies 381, 387.
[198] Ibid.
[199] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 959-961.
[200] M J Radin, 'Residential Rent Control' (1986) 15 Philosophy and Public Affairs 350, 364; S Schnably, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45 Stanford Law Review 347, 365.
[201] H Easthope, 'Making a Rental Property Home' (2014) 29 Housing Studies 579; Q Bradley, 'New Nomads: The Dispossession of the Consumer in Social Housing' (Housing Studies Association Conference 2011: Housing in Hard Times).
[202] M J Radin, 'Residential Rent Control' (1986) 15 Philosophy and Public Affairs 350, 364.

dissatisfied with their lack of ownership it seems their dissatisfaction flows from limitations enforced by their landlord.[203] This observation is confirmed by the work of Saunders who when interviewing owner-occupiers found that his subjects often draw a line between renting and owning one's home to the effect that when a home is owned the occupier is free to do to the property as they choose.[204] Again, these observations do not suggest that a tenant's feelings towards their home are any greater or lesser than those of an owner-occupier, rather their attachment is simply contextual. This is evident in the fact that renters often see home as a place closely linked with family and neighbours whereas owner-occupiers see home as a place of relaxation and personal possessions.[205] In each case the consequences flowing from dispossession are likely to be negative for the occupant irrespective of the form of tenure. If any argument was to be made as to the detrimental effects of dispossession upon an individual there is scope to make the case that renters who place an emphasis on the family and neighbours around them are likely to suffer more distress than an owner attached to their chattels which are easily transferable to a new home. Therefore, the criticisms of Radin's property and personhood theory being conservative,[206] favouring the nuclear family,[207] and concerned with the aspirational idea of the suburban family home[208] seem to misunderstand Radin's approach which does not require ownership of property.[209] This is supported by the empirical research referred to above. Particular support is drawn from Sixsmith's work. The fact that Sixsmith's students exhibited much the same feeling towards their home as their more typical rented sector counterparts strengthens this argument. The criticisms levied at property and personhood are understandable as Radin at times makes the claim that ownership is central to her theory[210] which conjures up ideas of owning property rather making clear that ownership of a legal interest, such as under a lease or a licence, is equally able to contribute to

[203] This negative feeling conjured by one's inability to modify their home is borne out in empirical research, see S Smith, 'The Essential Qualities of a Home' (1994) 14 Journal of Environmental Psychology 31, 39; B Tanner, C Tilse and D De Jonge, 'The Impact of Home Modifications on the Meaning of Home for Older People' (2008) 22 Journal of Housing for the Elderly 195; D Miller, 'Appropriating the State on the Council Estate' (1988) 23 Man 353.
[204] P Saunders, *A Nation of Home Owners* (Unwin Hyman 1990) 271-274.
[205] Ibid 272.
[206] M Stone, 'Robert Esposito and the Biopolitics of Property' (2015) 24 Social and Legal Studies 381; S Schnably, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45 Stanford Law Review 347.
[207] C Després, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8 Journal of Architectural and Planning Research 96, 103.
[208] S Schnably, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45 Stanford Law Review 347, 364-366.
[209] M J Radin, *Reinterpreting Property* (University of Chicago Press 2009) 57-63.
[210] Ibid 1.

personhood.[211] Furthermore, Radin does not acknowledge the potential for a person, for example children and other vulnerable people, to be bound up in their home in lieu of a proprietary interest.[212] The contention made here due to the empirical evidence identified above is that the personhood approach is equally applicable in instances where there is no legal interest as such. In those occasions where art.8(1) ought to be engaged it is suggested that there should be a 'robust justification'[213] for the removal of someone from their home. In light of the interpretative powers created by the HRA 1998 the same robust justification ought to be required for limiting the ramifications of art.8 to public sector tenants as was done in *Pinnock* and *McDonald*.

3.2.3 The X Factors of the Home

The above discussion of Radin's property and personhood theory has alluded to the connections which arise in relation to a person's home. These intangible qualities have been explored in a more overt legal context by Fox who has termed these qualities the 'x factors' which transform the home from bricks and mortar into something which is bound up with the occupier, in other words 'home = house + x'.[214] The framework provided by Fox allows for the interests a person may feel to be conceptualised in an overt sense beyond simply accepting that a person is bounding up in their home. This is particularly beneficial when a person's connection to their home is to be assessed by a court. Fox identifies five potential categories for these x factors:

1. home as a financial investment;
2. home as a physical structure;
3. home as a territory;
4. home as a centre for self identity; and
5. home as social and cultural unit.[215]

3.2.3.1 *Financial Investment*

The first of these x factors accounts for those instances in which the home is owned by the occupier. Legal discourse concerning the home is adept at identifying the

[211] Ibid 58.
[212] See for example S M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 Michigan Law Review 1093.
[213] S Fitzpatrick and H Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to "Ambulance Service" Social Housing?' (2014) 29 Housing Studies 597, 604-605.
[214] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 162.
[215] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) ch 4.

financial investment an owner-occupier makes in their home.[216] However, this adeptness has led to the non-monetary interests which arise from a person's relationship with their home being underappreciated.[217] Where owner-occupation is seen as the primary form of tenure the rented sector will be 'viewed as a second-class housing tenure'.[218] This perpetuation of the financial elements of one's home threatens to further marginalise those who rent their home. In this sense Fox accepts that overly focussing upon a financial investment skews matters in favour of owner-occupiers. This view also fails to appreciate that most owner-occupiers must buy their home with the help of a mortgage and so whilst an owner-occupier may have an exclusive right to possession this is subject to significant contractual obligations to the mortgagee.[219] This thesis is concerned with the effect of art.8 upon landlord and tenant relationships, in which a tenant will not typically have a financial investment in their home. In light of the foregoing analysis as to the diversionary nature of the financial investment x factor and the research objectives of this work, focus will instead be placed upon the other x factors of the home as identified by Fox. These factors are not only more relevant to this study but exist independent of any ownership one may or may not have in their home.

3.2.3.2 *Physical Space*

The abstract advantages of the home must flow from some physical space which is more than simply a shelter or territory.[220] The physicality of the home provides the locus for a 'place of safety, privacy, continuity, and permanence.'[221] These benefits are succinctly expressed by Porteus who notes that the benefits of a physical space to call one's home are essential for psychological health.[222] Due to the law's comfortableness in dealing with physical spaces it is unsurprising to see that art.8 is seen to protect 'the notion of a private space into which no-one is entitled to

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[216] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 160-161.
[217] Ibid, 161; B A Searle, 'Recession, Repossession, and Family Welfare' (2012) 24 Child and Family Law Quarterly 1.
[218] M B Jacoby, 'The Value(s) of Foreclosure Law Reform' (2010) 37 Pepperdine Law Review 511, 526.
[219] *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, 320; Law of Property Act 1925 ss.88, 98.
[220] L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580 591-592; J Malpas, *Place and Experience: A Philosopical Topography* (Cambridge University Press 1999) 155-157.
[221] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 161.
[222] J Porteus, 'Home: The Territorial Core' (1976) 66 Geographical Review 383; L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 593.

enter'.[223] The absence of a physical space which is 'basic to the sustenance of life itself'[224] is not simply detrimental to a person's physical health but their very future as it is the home where 'opportunities to grow physically, mentally, intellectually, and spiritually'[225] which will hopefully prepare an individual to enter society.[226] The importance of the home in this regard is evident in the romantic manifestations of the home in literature and poetry.[227]

There is also an alternative view put forward by Waldron arising out of the lack of a physical space to call home, that is that any liberal society which values an individual's freedom requires a place to exercise that freedom:

> Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we [must] always have a location.[228]

In this sense one's home is a precondition to the realisation of the other rights contained within the HRA 1998. This is an important point when considered alongside the work of Barak. For Barak where such facilitative rights are at issue there exists a duty upon the courts to consider and give effect to the idea of an implicit right to 'human dignity'.[229] The content of this right protects a person's humanity; that is their self-respect, self-worth, and the freedom to direct one's life as they choose.[230] This overlaps with Waldron's view and is supported by Miller's work on the transition a physical space goes through from structure to household via the expression of one's own tastes and modifications to their home.[231] For Miller,

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[223] D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 151.
[224] J Waldron, 'Homelessness and the Issue of Freedom' (1991-1992) 39 UCLA Law Review 295, 320.
[225] *Chameli Singh v State of Uttar Pradesh* (1996) 2 SCC 549, 555.
[226] J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 151-152.
[227] C Cooper, 'The House as a Symbol of the Self' in Jon T Lang (ed), *Designing for Human Behaviour: Arcitecture and the Behavioral Sciences*, vol 6 (5th edn, Dowden, Hutchinson & Ross 1974) 137.
[228] J Waldron, 'Homelessness and the Issue of Freedom' (1991-1992) 39 UCLA Law Review 295, 297; B R Little, 'Personality and the Environment' in Daniel Stokols and Irwin Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 221-222.
[229] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 142-144. Barak's work downplays the ability of common law courts to fill any 'lacunas' in constitutional texts due to the common law preference for statute. However, this overlooks the interpretative creativity demonstrated by the English courts in HRA 1998 cases, see for example, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457.
[230] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 124-127.
[231] D Miller, 'Appropriating the State on the Council Estate' (1988) 23 Man 353.

the wilful construction of a household identity is crucial in the formation of the home.[232]

This same view is reflected in Fox's approach to the home as a physical space, in that the structure of the home acts as an undoubtedly important aspect of the home yet it is not fully representative of the range of feelings which are attributed to the home.[233] Rather, for Fox, the structure of the home is the starting point for the x factors which create the phenomenon of the home, as a place of privacy, safety and continuity.[234] This idea of safety and continuity demonstrates the territorial character of the home where a person or group will exhibit control over the area which in itself allows for self expression, security and family life.[235] These observations overlap with the insights above in relation to the negative feelings tenant's have towards their home where they are prevented from making customisations to the property. The advantages of the home as a physical space or a territory might be encapsulated in the following, '[the physical space of the home] represents a complex cluster of values … ' for the occupier such as family, privacy, security, control, belonging, rootedness, personal orientation, and continuity.[236] These same attributes contribute to the occupier's feelings of identity and self-determination.[237] However, the physical features of the home 'account for only a small portion of the definition of home'[238] and so act as a jumping off point for the other x factors.

Before moving on to the additional x factors of the home detailed by Fox it is worthwhile exploring the concept of spatial identity which may act as a bridge between the advantages of a physical space and identity. The importance of a spatial identity is best put by Fried, 'a sense of spatial identity is fundamental to human functioning.'[239] The idea of a spatial identity is based upon the memories, images, and ideals that are triggered and developed by a physical space, whether this is the home itself or the local area.[240] Whilst Fried is concerned with this phenomenon in relation to the forced relocation of whole communities (specifically the West End of

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[232] Ibid, 369.
[233] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 156.
[234] Ibid 157.
[235] Ibid 158.
[236] Ibid 167; J Tognoli, 'Residential Environments' in Stokols and Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 657.
[237] *Connors v United Kingdom* (2005) 40 EHRR 9 [82].
[238] J Tognoli, 'Residential Environments' in Stokols and Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 655.
[239] M Fried, 'Grieving for a Lost Home' in Leonard J Duhl (ed), *The Urban Condition: People and Policy in the Metropolis* (Basic Books 1963) 156.
[240] Ibid 156.

Boston during the 20th century) the same observations made in relation to spatial identity in those instances are equally applicable in the case of individuals, families, or friends facing a possession order. It is arguable that the negative feelings which would arise in the case of an individual being dispossessed would be more pronounced as they are being removed from the community in which they may have developed their spatial identity.[241] This contention is all the more pertinent in relation to those who are less affluent and who tend to be 'integrally tied to a *specific* place'[242] (emphasis in original). It will be recalled from Chapter 1 that those in low security tenancies are often those in disadvantaged socio-economic circumstances, in such cases 'effective relationships with others are dependent upon a continuing sense of common group identity, the experience of loss and disruption of these affiliations is intense and frequently irrevocable.'[243] These identity connections exemplify the connections that a person may have to the physical space and surrounding area in which they make their home. These ideas of identity are further explored in the following section.

3.2.3.3 *Identity*

The importance of identity is often presented as an outcome flowing from private ownership,[244] perhaps the most extreme form of this is Locke's labour theory which allows for a person's identity to essentially be stamped upon the land through mixing one's labour with the land.[245] However, if the emergence of identity is analysed further it becomes clear that identity flows not from ownership of private property but rather from one's presence in their home or a specific place.[246] This idea is perhaps most visible in the development of children and young adults as ' ... it is inevitable that any place a child lives will shape him in some way in terms of his memories, his identity, his self-worth, and his self-esteem.'[247] A child is unlikely to own the home in which they live, at most they may have an equitable interest through the operation of a trust, and yet it is in the home that a child's identity is

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[241] This is supported by the fears associated by 'short-life housing' arising from the introduction of flexible tenancies, Q Bradley, 'New Nomads: The Dispossession of the Consumer in Social Housing' (Housing Studies Association Conference 2011: Housing in Hard Times).

[242] M Fried, 'Grieving for a Lost Home' in Duhl (ed), *The Urban Condition: People and Policy in the Metropolis* (Basic Books 1963) 156-157.

[243] Ibid.

[244] C M Rose, 'Psychologies of Property (and Why Property is not a Hawk/Dove Game)' in Penner and Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 275-276.

[245] See above at 3.1.3.2.

[246] H Easthope, 'Making a Rental Property Home' (2014) 29 Housing Studies 579, 581.

[247] K Hollingsworth, 'Assuming Responsibility for Incarcerated Children: A Rights Case for Care-Based Homes' (2014) 67 Current Legal Problems 99, 128-129; P Korosec-Serfaty, 'The Home from Attic to Cellar' (1984) 4 Journal of Environmental Psychology 303, 315-316.

formed. Therefore, it is the home and its intangible nature that gives rise to the development of the self and one's identity rather than ownership.[248]

The home as an aspect of a person's identity may be subdivided into two categories: 1) 'the home as a symbol of one's self' or the pscyho-analytical perspective which sees the home as 'the most powerful extension of the phyche'[249] and 2) the socio-psychological aspect which sees the home as an integral aspect of a person's social identity.[250]

3.2.3.3.1 The Home as a Symbol of One's Self[251]

The home acts as an 'identity shell' which provides the physical and metaphorical space for autonomy allowing for incubation of the self.[252] Therefore, the home is symbiotic with the occupier who is allowed to express themselves fully within their home and the home concurrently becoming the canvas for that expression.[253] Again, this supports the view that it is not ownership which gives rise to the complex feelings a person has towards their home but rather the freedom to express themselves as noted in the empirical studies above. For the purposes of art.8, in any balancing exercise involving the home it should be expected that the damage to a person's self-identity be considered before making a possession order. This is especially the case given that the loss of the home 'may often trigger an identity crisis'.[254]

The connection between the home and one's self might be better expressed in the non-legalese language that there is a 'deep connection' between the home and the

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[248] L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 598-599.
[249] Ibid, 598; C Després, 'The Meaning of the Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8 Journal of Architectural and Planning Research 96, 100.
[250] L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 599.
[251] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 170.
[252] H Dittmar, *The Social Psychology of Material Possessions: To Have is to Be* (Harvester Wheatsheaf 1992) 113; L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 598; C Cooper, 'The House as a Symbol of the Self' in Lang (ed), *Designing for Human Behaviour: Arcitecture and the Behavioral Sciences*, vol 6 (5th edn, Dowden, Hutchinson & Ross 1974) 144.
[253] K Dovey, 'Home and Homelessness' in I Altman and CM Werner (eds), *Home Environments* (Plenum Press 1985) 14; J Tognoli, 'Residential Environments' in Stokols and Altman (eds), *Handbook of Environmental Psychology*, vol 1 (Wiley 1987) 661; P Saunders, *A Nation of Home Owners* (Unwin Hyman 1990) 270-271.
[254] A Buttimer, 'Home, Reach, and the Sense of Place' in A Buttimer and D Seamon (eds), *The Human Experience of Space and Place* (St Martin's Press 1980) 167; L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 599.

human spirit.[255] In balancing competing interests the evocative reference to the human spirit made by Dovey and referenced by Fox is indicative of the aspirational strength of the rights sought to be respected under art.8 of the Convention. This view also has some empirical support from psychoanalytical psychology which has identified a 'fusion between "self" and "home" as symbolic of the home "as a centre, a place in which possessions and display represent identity; home and the self become merged"'.[256] It is the merging of home and self that leads to memories being intimately linked to a physical space.[257] In addition to memories being linked to a physical space there are also memories linked to objects contained in the home, for example furniture and photographs, which are often treasured.[258] Upon realisation of this intimate connection between home and memory it is seems only reasonable that the law ought to act when the home comes under threat:[259]

> If there is some validity to the notion of the house-as-self, it goes part of the way to explain why for most people their house is so sacred and why they so strongly resist a change in the basic form which they ... [live] ... For most people the self is a fragile and vulnerable entity; we wish therefore to envelop ourselves in a symbol-for-self which is familiar, solid, inviolate, [and] unchanging ... [260]

3.2.3.3.2 The Home as an Integral Aspect of a Person's Social Identity[261]

The second plank of the identity x factor comes from socio-psychological theory which supposes that a person's home is integral to their outward social identity.[262] Under this lens, it is the social stigma or the social esteem created by a person's home and their tenure within that home which suggests that the home is 'a

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[255] K Dovey, 'Home and Homelessness' in Altman and Werner (eds), *Home Environments* (Plenum Press 1985) 40; L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 170.

[256] H Perkins and D Thorns, 'House and Home and their Interaction with Changes in New Zealand's Urban System, Households and Family Structures' (1999) 16 Housing, Theory and Society 124, 125.

[257] See the pain and social paralysis experienced by those who are dispossessed in M T Fullilove, 'Root Shock: The Consequences of African American Dispossession' (2001) 78 Journal of Urban Health 72, 77.

[258] P Korosec-Serfaty, 'The Home from Attic to Cellar' (1984) 4 Journal of Environmental Psychology 303; M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957; M J Radin, *Reinterpreting Property* (University of Chicago Press 2009).

[259] As to the long term place of the home in a person's mind and the negative effects of dispossession see M T Fullilove, 'Root Shock: The Consequences of African American Dispossession' (2001) 78 Journal of Urban Health 72.

[260] C Cooper, 'The House as a Symbol of the Self' in Lang (ed), *Designing for Human Behaviour: Arcitecture and the Behavioral Sciences*, vol 6 (5th edn, Dowden, Hutchinson & Ross 1974) 144.

[261] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 171.

[262] L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge' (2002) 29 Journal of Law and Society 580, 599; K Dovey, 'Home and Homelessness' in Altman and Werner (eds), *Home Environments* (Plenum Press 1985) 40; J Ford, R Burrows and S Nettleton, *Home Ownership in a Risk Society: A Social Analysis of Mortgage Arrears and Possessions* (Policy Press 2001).

statement and a mirror'.[263] This is evident in the case studies referenced by Cooper and the styles that people pursue in decorating their homes.[264] The concurrent inward and outward nature of the home continues the idea that the home acts as an 'identity shell'[265] or garment:

> Beings surround themselves with the places where they find themselves, the way one wraps oneself up in a garment that is at one and the same time a disguise and a characterisation. Without places, beings would be only abstractions.[266]

When a person loses their home they are 'de-robed' thereby losing their ability to project onto the outside world.[267] On that basis the home could be said to be essential to a person's individual inward and outward self-identity allowing for individuals to fully interact with the world outside of their home.[268] This identity is the product of human beings being 'thinking, remembering, experiencing' creatures.[269] Whilst a person's identity might be seen as two sides of the same coin being developed in the home and then honed and fashioned in the outside world, the geographical location of the home is dual layered in the sense that our identities will be formed by our association with that place but also by others' conception (be they positive or negative in the eyes of the beholder) of that place.[270] Where such strong connections are engendered by the home, which have a continuing formative effect on the self, it would appear logical to afford the home strong legal protection. It is not only these internal elements of the home but also the social connections which attach to this space. Those who are dispossessed of their home often lose contact with friends and family not simply because of their relocation but because of the social stigma attached to the loss of the home, particularly among children.[271] In

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[263] K Dovey, 'Home and Homelessness' in Altman and Werner (eds), *Home Environments* (Plenum Press 1985) 40.
[264] C Cooper, 'The House as a Symbol of the Self' in Lang (ed), *Designing for Human Behaviour: Arcitecture and the Behavioral Sciences*, vol 6 (5th edn, Dowden, Hutchinson & Ross 1974) 136.
[265] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 136.
[266] J Malpas, *Place and Experience: A Philosopical Topography* (Cambridge University Press 1999) 176.
[267] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 136.
[268] Support for this view comes from K D Ewing, 'Social Rights and Constitutional Law' (1999) PL 104, 116-118. This work is not concerned with socio-economic rights as such but Ewing makes the argument that such rights as the right to a home are antecedent to the concept of citizenship and community. The same argument is applicable to those who are at risk of losing their home and is recognised in L Whitehouse, 'The Home-Owner: Citizen or Consumer?' in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press 1998).
[269] J Malpas, *Place and Experience: A Philosopical Topography* (Cambridge University Press 1999) 177.
[270] Ibid.
[271] J Ford, R Burrows and S Nettleton, *Home Ownership in a Risk Society: A Social Analysis of Mortgage Arrears and Possessions* (Policy Press 2001).

cases of such personal trauma it would appear logical to utilise art.8 to assist those whose home interest has been overlooked by the relevant statutory or common law rule.[272]

3.2.3.4 *Privacy*

It has been said that the kernel of art.8 is protection from arbitrary interference on the part of the State and therefore a substantial body of art.8 case law has focused upon the privacy perspective of art.8.[273] However, the home and privacy are not mutually exclusive legal domains. The home in itself contributes towards the value of privacy in allowing a person to go about their life away from the prying eyes of others in the community.[274] This aspect of property has been explored by Radin.[275] Admittedly, Radin approaches privacy from the perspective of its advantages to the individual without specifically referencing the home. However, it is clear that the advantages which attribute to Radin's property and personhood theory arise equally from a person's home.

Radin relies upon the US Supreme Court case of *Stanley v Georgia*[276] to demonstrate the link between privacy and the home. *Stanley* concerned the possession of so-called obscene material, specifically three reels of pornography, which were discovered by police at the home of the appellant. Notwithstanding the alleged obscenity of the material, the US Supreme Court found that the possession of pornography in the home was part of the appellant's freedom of expression under the First Amendment to the US Constitution and therefore any laws which forbade this were invalid. Although this work is concerned with English law it is nevertheless significant to see the US Supreme Court acknowledging that the home is linked with a person's privacy. Such interference with the sanctuary of the home is itself an invasion into 'one's history and future [and] one's life and growth'.[277]

Given the common lineage of the English common law and the US common law, and the prevailing influence of *Entick v Carrington*,[278] it is unsurprising to see such reverence paid to the privacy of the home. However, there is more to privacy in the

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[272] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 173.
[273] *Belgian Linguistic Case* (1979-80) 1 EHRR 252 [7]; *Marckx v Belgium* (1979-80) 2 EHRR 330, 342; *Moreno Gomez v Spain* (2005) 41 EHRR 40; *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983 [46]-[49].
[274] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 997.
[275] Ibid.
[276] *Stanley v Georgia* 394 US 557.
[277] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 992.
[278] *Entick v Carrington* 95 ER 807. See the following cases for the continued influence of *Entick*, *Malone v Commissioner of Police of the Metropolis* [1979] Ch 344; *Chic Fashions (West Wales) v Jones* [1968] 2 QB 299; *Ghani v Jones* [1970] 1 QB 693.

home than that detailed by Radin. It is this view that demonstrates the non-physical advantages of the home and how these tie in with the physical characteristics of property.[279] The 'headquarters of private life'[280] therefore serves to protect the individual from arbitrary interference and allows for the development of the self, which goes to the heart of what human rights protect.[281] It is this latter aspect of development within the home which might be accorded with 'identity'[282] and demonstrates the overlap across all of the categories discussed above and the holistic nature of an individual's feelings towards our homes. It is easy to compartmentalise the interests protected by art.8, the home, privacy, and correspondence, into discrete areas. However, this betrays the interrelated nature of these interests, the observance of one protects the other. This further puts in doubt the disparate approach to the courts have taken towards art.8 with respect to possession proceedings and privacy cases.[283]

3.2.3.5 *A Social and Cultural Phenomenon*

The above observations of the x factors of the home might be grouped under the heading of 'psychological or sociological'[284] conditions. However, there are significant threads of literature which identify the social and cultural character of the home as equally prevalent in a person's feelings towards their homes.[285] It is in this sense that the x factors of the home might be identified as contemporary culturally specific conceptions rather than uniform ideas that travel across borders.[286] Given the regular recital of an Englishman's home being his castle it is unsurprising to find Anglophone perceptions of the home are very much informed by the social context in which we interpret institutions. Therefore, the home as a

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[279] C M Rose, 'Psychologies of Property (and Why Property is not a Hawk/Dove Game)' in Penner and Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 275.
[280] G Cohen-Jonathan, 'Respect for Private and Family Life' in Ronald Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 427.
[281] J Howell, 'The Protection of Rights of Property in Land under the Human Rights Act' in L Betten (ed), *The Human Rights Act 1998 - What it Means* (Martinus Nijhoff Publishers 1999) 90.
[282] C M Rose, 'Psychologies of Property (and Why Property is not a Hawk/Dove Game)' in Penner and Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013).
[283] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [46].
[284] J Moore, 'Placing the Home in Context' (2000) 20 Journal of Environmental Psychology 207; L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 173.
[285] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 174; J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 166; R Hiscock and others, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18 Housing, Theory and Society 50, 61-62.
[286] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 175.

refuge remains the core of the Anglo-American understanding of the home.[287] Whilst it is implied by Fox that the increased level of owner-occupation has bolstered the feeling of the home being the core of a person or family's for their exclusive use, taking advantage of the x factors detailed above, there is no reason to suggest that these feelings are not equally present in those who choose to, or who have no choice but to, rent their home. Those who rent their home benefit equally from the physical space of the home, privacy, identity and security and so any distinctions between these two forms of tenure in this area is undue. Moreover, it may be that there is a stronger case for those who rent their home to receive such protection as they are not the beneficiaries of the policy objectives of the late 20th century which have sought to increase home ownership rather it may be said they are the victims.[288]

3.3 Conclusions

> A focus on home meanings enables us to examine questions which are not always deemed to be 'relevant' to legal proceedings, for example, the human, social and personal costs of displacement and dispossession ... The concept of home provides the vocabulary ... for articulating the human claims of vulnerable people.[289]

The above analysis of philosophical and legal theory in relation to property at 3.1 and sociological understandings of the home at 3.2 demonstrates the failings of the courts and the law generally to account for the importance of the home. This importance must be accounted for in art.8 in spite of the heavy judicial preference for the certainty of an owner's legal interest. Therefore, it is encouraging that within property theory there are gaps which allow for hard-edged understandings of property to be curtailed in certain instances thereby allowing for a middle ground in which the courts are afforded the opportunity to assess the weight of conflicting rights in a given case. In the context of possession proceedings (be they public or private) such conflicts are visible in the art.8 rights held by a tenant and the property rights held by a landlord. To give effect to these disparate interests there must be an acceptance on the part of the courts that these home interests are in the abstract at least as importance as the well-defined property interests held by a landlord. The literature concerning the non-legal nature of the home explored above highlights the urgency with which the courts ought to act where a person's home is

[287] Ibid.
[288] Ibid ch 2; J Morgan, 'Family Intervention Tenancies: The De(marginalisation) of Social Tenants?' (2010) 32 Journal of Social Welfare & Family Law 37; S Fitzpatrick and H Pawson, 'Welfare Safety Net or Tenure of Choice? The Dilemma Facing Social Housing Policy in England' (2007) 22 Housing Studies 163.
[289] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 167.

at risk. However, this is not to say that there are not instances in which an owner's proprietary rights ought to take precedence over another's home interests. Therefore what is required is an understanding which allows for the court to appreciate that neither of these interests have a priori importance.

It is in assessing such an understanding that Aquinas's and Rawls's work is particularly instructive in that it recognises an initial position which accounts for instances where property interests may be recalibrated due to common ownership. This approach is supported to some extent by Rousseau's theory of property allowing for property interests to be curtailed where it is in the interests of the community. There are therefore theoretical justifications for protecting the home beyond what has so far been allowed for by the Supreme Court in relation to art.8. These home interests are 'a complex and multi-dimensional amalgam of financial, practical, social, psychological, cultural, politico-economic and emotional interests to its occupiers'.[290] The difficulty of giving weight to the home is exacerbated by its experiential nature which will differ from one case to the next.[291] This might explain the limp advice of the Supreme Court in largely leaving the effect of art.8 on possession proceedings to the 'good sense and experience' of county court judges.[292] However, this approach starves the lower courts of any constructive dialogue with the Supreme Court as to developing a conception of the home. After all, before asking what art.8 offers tenants in particular proceedings it must firstly be determined what art.8 might protect generally. Fox argues that such considerations ought to be made at the policy level.[293] It is agreed that a more sophisticated understanding at the policy level would be welcome, especially considering the international obligations placed upon the UK by the UDHR and negative commentary from the UN with respect to the UK's housing policy.[294] However, upon accepting that art.8 is in the least triggered by possession proceedings the courts are now well placed to adjudicate those instances where a person's home is at risk. Moreover, it is the courts that are best able to consider the contextualised nature of

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[290] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 178.
[291] K Dovey, 'Home and Homelessness' in Altman and Werner (eds), *Home Environments* (Plenum Press 1985) 52; L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 178-179.
[292] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [57].
[293] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 180.
[294] Committee on Economic Social and Cultural Rights, *General Comment No.4: The Right to Adequate Housing (Art.11(1) of the Covenant)* (E/1992/23, 1991); Committee on Economic Social and Cultural Rights, *General Comment No.7: The Right to Adequate Housing (Art.11(1) of the Covenant): Forced Eviction* (E/1998/22, 1997); United Nations, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context* (A/HRC/25/54/Add1, 2013).

art.8 rights in a given case. For example, the negative effects a tenant may face upon dispossession vary widely and can only be fully accounted for by a court. Such an exercise would have to bear in mind the links an individual has to their home including an understanding of the home as an identity forming physical space which allows for an individual (or group) to live their life as they wish. Of course this will not be the experience of every person such as vulnerable people who face violence or abuse within the home. However, it seems unlikely that these people would be arguing against a possession order based upon the protections of art.8.

The understanding of the home analysed above may be anchored to legal arguments regarding the home 'within a framework that recognises the authenticity and importance of home meanings for occupiers.'[295] This therefore allows one's feelings towards the home in an individual case to be unpacked and fully considered by the court. These feelings are not restricted to public or private sector tenants and are pervasive across all forms of tenure. Therefore, this Chapter undermines any argument in favour of maintaining the restriction on art.8's application to public sector proceedings. In the following Chapter the doctrinal difficulties created by the HRA 1998 and the current case law around art.8 are assessed in relation to private landlords and tenants. The outcomes of this may then be factored into a principled form of proportionality which takes account of the complex features of the home as identified above but which allows for a reasonable balance to be struck between competing interests. The courts adjudicative nature and tradition of balancing interests across all adversarial litigation suggests that they are capable of giving weight to the importance of the home to the individual and wider society.

[295] L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 165.

4 The Argument for Horizontal Effect of Article 8

4.1 Introduction

> Human rights were originally conceived as rights and freedoms owed by the State and other public authorities. Their very fundamental purpose was to protect the individual against the omnipotent State with its vast powers ... The major function of human rights thus was to mitigate the imbalance between two unequal parties ... [1]

The potential for human rights to reach beyond the traditional position described above is of fundamental importance to this thesis which is concerned with the theoretical and legal basis for arbitrarily limiting art.8's application to local authority tenants. The scope for human rights to apply between private individuals, rather than between private individuals and the State, has been termed horizontal effect in opposition to vertical effect as between the State and individuals.[2] The question of horizontal effect pervades the incorporation of the European Convention on Human Rights (the Convention) via the Human Rights Act 1998 (HRA 1998). The Convention itself appears to be drafted in terms seeking to limit the actions of States. However, it is equally the case that the Convention's plain wording does not preclude a horizontal reading of the Convention rights.

In housing law, the courts have recognised the ability of a tenant to draw upon art.8 to resist a possession order notwithstanding any statutory requirements for a mandatory possession order. However, the Supreme Court in *Pinnock* made clear that their judgment was to have no bearing on proceedings involving a private landlord.[3] The outstanding question of horizontal effect was considered by the Court of Appeal in *Malik v Fassenfelt*[4] and the Supreme Court in *McDonald v McDonald*[5] with the finding that art.8 has no bearing in private sector possession proceedings. *Malik* and *McDonald* were analysed in detail at 2.2. This aversion to art.8's horizontal effect is in spite of the dissenting opinion of Sir Alan Ward who held that:

> the court must approach the claim made by a private landowner against a trespasser [or tenant] in a similar way to that adopted to

[1] D Friedmann and D Barak-Erez, 'Introduction' in Friedmann and Barak-Erez (eds), *Human Rights in Private Law* (Hart 2001) 1.
[2] S Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Michigan Law Review 387, 388; A L Young, 'Mapping Horiztonal Effect' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 29; M Hunt, 'The Effect of the Convention on the Law of Obligations' in Basil S Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (Oxford University Press, USA 1998).
[3] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [4], [50].
[4] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS).
[5] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.

> claims of various sorts made by a local authority ... Thus the test is whether the eviction is a proportionate means of achieving a legitimate aim.[6]

Sir Alan proceeded on the same basis as the trial judge in finding simply that the courts, as a public authority,[7] are bound to apply art.8 in all cases. This suggestion cuts to the core of this Chapter and suggests that human rights protection ought to extend beyond vertical relationships. However, despite a 'good steer'[8] from Sir Alan, the horizontal effect of art.8 has been rejected by the Supreme Court. These findings are all the more concerning given that 'the private rented sector is [now] larger than the local authority and social rented sectors combined.'[9] Therefore, the potential beneficiaries of a horizontal reading of art.8 are legion. Barring private sector tenants from the protection of art.8 in effect provides 'a shield for the bearers of private power who [ought to be] the targets of social regulation.'[10]

Even near two decades after the HRA 1998 was enacted, whilst it is largely accepted that there is at least some form of horizontal effect in areas other than housing law,[11] there continues to be considerable debate as to its precise model and scope.[12] However, acknowledging that there will likely be some form of horizontal effect is not sufficient,[13] instead it must be asked precisely what is meant by horizontal effect and, for the purposes of this work, what this means for possession proceedings, an area made up of various common law rules and statutory interventions. Considering the competing theories of horizontal effect generally will highlight the means by which the courts might reassess housing law in light of the HRA 1998. In addition,

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[6] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS) [28].
[7] Human Rights Act 1998 s.6(3)(a).
[8] J Luba, 'The Role of Article 8 in Residential Possession Claims Made by Individuals and Companies' (2013) 17 Landlord & Tenant Review 170, 172.
[9] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 139.
[10] K D Ewing, 'The Unbalanced Constitution' in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001) 111.
[11] A L Young, 'Human Rights, Horizontality and the Public/Private Divide: Towards a Holistic Approach' (2009) 2 UCL Hum Rts Rev 159, 159; I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 141-142.
[12] M Hunt, *Using Human Rights Law in English Courts* (Hart 1997); B S Markesinis, *The Impact of the Human Rights Bill on English Law* (Oxford University Press, USA 1998); M Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) PL 423; I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 ICLQ 57; B S Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824; G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726; G Phillipson, 'Clarity Postponed: Horizontal Effect After Campbell' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the Human Rights Act* (Cambridge University Press 2007).
[13] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 354.

this will inform the discussions emerging later in this thesis in relation to the public/private divide and proportionality.

4.2 Defining Horizontal Effect

Before assessing the possible scope of horizontal effect it is worthwhile reiterating what is meant by the term itself. Simply put, horizontal effect occurs where 'an individual is subject to an obligation to respect the human rights of another',[14] as opposed to the more traditional view that human rights exist to 'safeguard the individual against the excessive power of the state'[15] (vertical effect). Whilst this provides a good starting point to further explore horizontal effect, its precise form is far from definitive.[16] Therefore, the following will analyse the literature around horizontal effect with the viability of various models questioned and evaluated alongside instances in which a person's home is at risk and therefore art.8 is in play.

4.3 Forms of Horizontal Effect

4.3.1 Direct Horizontal Effect

Proponents of direct horizontal effect effectively argue that the Convention rights, and therefore their HRA 1998 counterparts, are a freestanding cause of action which may be relied upon by one individual against another.[17] The force of direct horizontal effect is dependent on the text of the Convention rights themselves and whether these rights are applicable to private parties.[18] This is particularly the case in relation to art.8 and housing law given the potency of s.3 of the HRA 1998. For instance, in *Ghaidan v Godin-Mendoza*[19] the House of Lords held that s.3 allowed for a departure from previous precedent thereby allowing a same sex couple to benefit from the succession provisions of the Rent Act 1977.

The first question in considering horizontal effect therefore must be whether the plain wording of art.8 is in itself 'applicable' to private individuals. The most enduring and sophisticated consideration of horizontal applicability comes from

[14] A L Young, 'Mapping Horiztonal Effect' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 18.
[15] B S Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47, 47.
[16] A L Young, 'Human Rights, Horizontality and the Public/Private Divide: Towards a Holistic Approach' (2009) 2 UCL Hum Rts Rev 159.
[17] S Gardbaum, 'Where the (State) Action Is' (2006) 4 Int'l J Const L 760, 764; H Wade, 'Horizons of Horizontality' (2000) 116 LQR 217.
[18] H Wade, 'Horizons of Horizontality' (2000) 116 LQR 217, 218-219.
[19] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

Beyleveld and Pattinson.[20] Beyleveld and Pattinson argue that the Convention rights themselves have 'unqualified' horizontal effect and, therefore, unless limited to vertical effect by Parliament, must be given full horizontal effect.[21] In analysing the submissions of Beyleveld and Pattinson below it is demonstrated that the content of art.8 is triggered by proceedings involving individuals are independent of the State, notwithstanding the adjudicative function of the court dealt with by s.6 of the HRA 1998.

4.3.2 Horizontal Applicability

Before any Convention right may have horizontal effect it must first be horizontally applicable.[22] This submission rests upon the language of Convention rights rather than the legal machinery of those rights' incorporation into the domestic legal framework. Article 8(2) is illustrative of the horizontal applicability of Convention rights. Article 8(2) reads:

> There shall be no interference by a public authority with the exercise of this right except such as is 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*. (emphasis added)

Beyleveld and Pattinson contend that the inclusion of the italicised passage in art.8(2) presupposes that art.8, along with the other Convention rights, is prima facie horizontally applicable.[23] Beyleveld and Pattinson's reading of the Convention might overly focus on the catch-all aspects of the qualified rights like art.8 rather than the apparently absolute Convention rights such as art.3 or 5 which are aimed at limiting the powers of the State rather than private individuals.[24] However, these rights are in any event secured against private individuals by operation of the domestic law.[25]

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[20] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623.

[21] Support for Beyleveld and Pattinson's approach comes from N Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) Cambridge Law Journal 159, 166-169.

[22] A L Young, 'Mapping Horiztonal Effect' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 29.

[23] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623, 627.

[24] N Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) Cambridge Law Journal 159, 159.

[25] See for example the Offences Against the Person Act 1861 and the torts of trespass to the person, *Collins v Wilcock* [1984] 1 WLR 1172; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58.

Support for the horizontal applicability proposition is drawn from the work of Christoffersen.[26] Christoffersen considers horizontal effect alongside the positive obligations of the Convention and makes the argument that the text of the Convention is in itself horizontally applicable, although Christoffersen does not employ the distinction between applicability and effect described by Beyleveld and Pattinson.[27] Christoffersen's argument proceeds on two fronts. The first is the lineage of the Convention rights which were drawn from the Universal Declaration of Human Rights which looks to protect rights from contravention by any source.[28] The second, more forceful, argument made by Christoffersen regards the self-fulfilling nature of the arguments made against horizontal effect. For Christoffersen arguing against horizontal effect presupposes horizontal effect. It is the State's obligation under the Convention to protect the human rights of all its citizens. The effect of this is in a sense a positive obligation to ensure that the exercise of one individual's rights does not infringe the rights of another. This therefore in itself creates horizontal effect.[29]

On such a reading the Convention rights and therefore the HRA 1998 rights are inherently horizontally applicable. In light of this the question becomes how those same rights might have horizontal effect through the legal machinery of the HRA 1998.

4.3.3 Beyleveld and Pattinson's Substantive Argument for Full Horizontal Effect

Following their argument that the Convention rights are in themselves horizontally applicable, Beyleveld and Pattinson are left with identifying the legal framework which allows for full horizontal effect. Beyleveld and Pattinson rest their argument upon s.3(1) of the HRA 1998 which 'requires all legislation … to be interpreted as compatible with the Convention rights if it is possible to do so'.[30] On this basis Beyleveld and Pattinson argue that s.3(1) taken together with:

1. s.1 of the HRA 1998, which incorporates the Convention rights, but for arts.1 and 13, and requires those rights to have effect for the purposes of the HRA 1998; and

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[26] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009).
[27] Ibid 98-99.
[28] Ibid 98.
[29] Ibid 99.
[30] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623, 633.

2. the long title of the Act, 'an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights', require the courts to give effect to those rights that are horizontally applicable.

For Beyleveld and Pattinson this duty to apply Convention rights horizontally will be required in all cases with the exception of those in which primary legislation makes it impossible to give a Convention compliant interpretation.[31]

4.3.4 Section 3(1) of the Human Rights Act 1998

The interpretative powers created by s.3(1) are significant, however, s.6(2) of the HRA 1998 appears to limit the power of s.3(1) to those instances in which legislation is not mandatory to a particular course of action. For example if a local authority is required to perform some act that is non-compliant with the HRA 1998 then s.6(2) will protect that local authority from any liability. In *Pinnock*, s.143D(2) of the Housing Act 1996 required the court to make an order for possession in favour of the landlord. However, the court found that art.8 required that the proportionality of a possession order must be considered by the court. At the same time art.8 required the court to consider the proportionality of the measure before making a possession order.[32] Upon this basis, applying the reasoning of Beyleveld and Pattinson with regard to s.6(2), it might be thought that the Supreme Court would be unable to give a Convention compliant reading to s.143D(2) given its clear terms which appear to exclude any consideration of proportionality. The Supreme Court's brief discussion of s.6(2) gives the impression that engagement of s.6(2) will depend upon the interpretative powers granted by s.3 of the HRA 1998 in a given case.[33] Where a provision can be read in a Convention compliant fashion then the defence provided by s.6(2) will not arise.[34] This therefore casts doubt on the extent to which the court will utilise s.6(2) of the HRA 1998 and suggests that s.3 will be the primary judicial remedy. In the context of possession proceedings a landlord will rarely be under a statutory duty to seek possession and so the ability of a public sector landlord to rely upon s.6(2) to avoid liability under s.6(1) seems limited when considered against the obligations of s.6(1).

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[31] Human Rights Act 1998 s.6(2).
[32] *Paulic v Croatia* App no 3572/06 (European Court of Human Rights, 22 October 2009); *McCann v United Kingdom* (2008) 47 EHRR 40; *Connors v United Kingdom* (2005) 40 EHRR 9.
[33] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [93]-[104].
[34] Ibid.

Further support for the limited role of s.6(2) is provided by *Poplar Housing & Regeneration Community Association Ltd v Donoghue*.[35] *Poplar* dealt with a possession order made under s.21 of the Housing Act 1988, which requires that the court make a possession order where the procedural elements of s.21 are met. Speaking obiter dicta in *Poplar* Lord Woolf stated that '[i]t is difficult to overestimate the importance of section 3 ... [which applies] ... to legislation passed both before and after the Human Rights Act 1998 came into force.'[36] In giving effect to s.3 Lord Woolf held that 'legislation which predates the Human Rights Act 1998 and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of s.3.'[37] The wide ambit of s.3 may therefore go further and extend 'deep in[to] the private sphere ... [regardless of] ... whether [the Act is] regulating the acts of public authorities or private individuals ... '.[38] Clearly, s.3 of the HRA 1998 imposes a heavy burden upon the courts to interpret all legislation in keeping with the HRA 1998 rights.

Whilst the preceding comments from Lord Woolf support the view that s.3 will have a wide-ranging effect upon legislation, the Court of Appeal in *Poplar* came to the conclusion that s.3 did not allow for an interpretative reassessment of the Housing Act 1988. The defendant in *Poplar* contended that the consequence of the claimant being a public authority was to make mandatory possession incompatible with art.8. Therefore counsel on behalf of the defendant argued that the words 'if it is reasonable to do so' be read into s.21(4) of the Housing Act 1988.[39] Despite the force of s.3 recognised by Lord Woolf, his Lordship found that reinterpreting s.21(4) in such a way would 'defeat Parliament's original objective of providing certainty ... [and this] ... would involve [the judiciary] legislating.'[40] Notwithstanding these comments, the Supreme Court in *Pinnock* came to precisely the opposite conclusion, finding that s.3(1) of the HRA 1998 taken together with art.8 required that the court be able to consider the proportionality of a possession order sought by a local authority.

The above analysis of s.3 suggests that the court's interpretative obligations under the HRA 1998 will not be limited due to s.6(2) as suggested by Beyleveld and

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[35] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.
[36] Ibid, 72.
[37] Ibid, 72.
[38] F Klug and K Starmer, 'Standing Back from the Human Rights Act: How Effective is it Five Years On?' (2005) PL 716, 725.
[39] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, 73.
[40] Ibid.

Pattinson. In other words, the duty to interpret legislation in a rights-compliant manner imposed by s.3 is stronger than the defence created by s.6(2). Some support for the strength of s.3 comes from the relatively small number of occasions in which the courts have made declarations of incompatibility, as at 4 March 2015 the UK courts had made only 29 declarations of incompatibility since the HRA 1998 came into force.[41] The usage of s.3 as opposed to s.4 of the HRA 1998 is perhaps to be expected given that the obligation created by s.3 is 'the prime remedial remedy'[42] in cases dealing with HRA rights.

The arguments of Beyleveld and Pattinson in relation to s.3(1) of the HRA 1998 and the resultant judgments of the courts in light of the HRA 1998 show that the effect of s.3(1), despite the robust approach of Beyleveld and Pattinson, may have been underestimated. Beyleveld and Pattinson suggest that s.6(2) of the HRA 1998 would act as a bar to the judiciary utilising an adventurous interpretation of legislation in pursuit of s.3 of the HRA 1998. However, upon assessing the case law around ss.4 and 6(2) it appears that the courts have instead opted to rely upon s.3 in the first instance and attempted to reach a Convention compliant reading of legislation which is not possible on a literal reading of legislation. In the field of housing law this has resulted in the, albeit limited, introduction of proportionality in the case of public sector tenancies. However, the courts have resisted utilising the same arguments in cases concerning private sector tenancies despite the doctrinal viability of the same approach demonstrated above in relation to the use of s.3 and the interpretative obligations contained therein.

4.3.5 Full Horizontal Effect

In addition to the argument for direct horizontal effect 'full horizontal effect' has been advocated by Raphael.[43] Full horizontal effect rests upon similar theoretical foundations as direct horizontal effect. However, it differs in the position the courts should take in approaching existing precedents. In discussing full horizontal effect Raphael does not appear to contend that the HRA 1998 will have at least some effect upon the application of legislation but he focuses upon the Act's role in developing and applying the common law.[44] Despite legislative intervention from Parliament there are areas of housing law which are governed by the common law, such as the

[41] Joint Committe on Human Rights, *Human Rights Judgments: Seventh Report of Session 2014-2015* (HC 1088, 2015) 17.
[42] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [50].
[43] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493.
[44] Ibid, 493.

rule from *Hammersmith v Monk*.[45] Therefore, consideration of full horizontal effect is equally as important as those models which deal with the law generally.

Raphael differs from Wade, Beyleveld, and Pattinson in claiming that the restriction of the HRA 1998 to public authorities prevents any direct horizontal effect via s.6, notwithstanding the requirements of ss.2 and 3. However, Raphael does foresee a developmental obligation arising from s.6 for two reasons. Firstly, there is no mechanism for issuing a declaration of incompatibility for shortcomings in the common law. Secondly, if the courts are obliged to construe legislation in light of the Convention then in 'an area where case law and statute are interwoven [such as housing], [this] could create highly odd practical results.'[46] To quell this uncertainty Raphael proposes:

> full horizontal effect … [meaning] that judicial decisions which do not give effect to rights are incompatible wherever there are no statutory restrictions on jurisdiction. [In such cases the] … court would be obliged to develop the common law in the face of contrary precedent and common law rules of jurisdiction.[47]

Raphael argues that there are limitations placed upon the court in their duty to interpret legislation from other statutes and within the HRA 1998 itself at s.6(2).[48] In response to this Raphael suggests that judicial decisions which do not give effect to Convention rights will be incompatible where there is no statutory justification for those decisions, echoing the sentiments of s.6(2) of the HRA 1998. Therefore s.6 exists to place an obligation upon the courts to develop the common law in line with the Convention. This duty arises out of primary legislation and so the courts ought to attach primacy to the will of Parliament in developing the common law in a Convention compliant manner rather than exercise a preference for the settled common law. However, Raphael stops short of fully endorsing this view for fears of an unconstrained judicial ability to develop the common law beyond what has hitherto been accepted by English law.[49] Rather the courts should adopt a constrained approach to developing the common law by respecting the existing jurisdictional limits of the respective court and any negative precedent.[50] The problem with this approach continues to be the nature of s.6 of the HRA 1998 in that it *requires* the courts to act compatibly with the Convention rights irrespective

[45] *Hammersmith v Monk* [1992] 1 AC 478.
[46] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493, 497.
[47] Ibid, 501.
[48] Ibid, 501-502.
[49] Ibid, 503-506. See also Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR 534; G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 MLR 878.
[50] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493, 505-506.

of existing common law precedent. It is not a matter of established common law being determined as 'irrelevant or obsolete'[51] by the courts, but rather giving effect to the HRA 1998 which requires the courts to respect the Convention rights.

Raphael's theory is closer to direct horizontal effect than it appears on its face. Raphael accepts that legislation is to be interpreted in accordance with the Convention due to ss.2 and 3 of the HRA 1998. Furthermore, Raphael accepts that the Convention will have an effect upon the common law. The main differentiator between direct horizontal effect and full horizontal effect is the nature of the obligation placed upon the courts to develop the common law and new causes of action. In Beyleveld and Pattinson's view the ability of the courts to develop the common law exists apart from the HRA 1998,[52] moreover, the obligation to give effect to the Convention rights, including the creation of new causes of action, is absolute and negative precedents have no bearing upon this.[53] This is opposed to Raphael's argument that there ought to be limitations upon the development of the common law so as to respect the 'existing boundaries' of judicial development.[54]

There is some support for Raphael's view in the realm of housing law. In *Pinnock* the Supreme Court found that the interpretative power created by s.3 of the HRA 1998 allowed the court to read proportionality into s.143D of the Housing Act 1996. This was the case despite contrary precedent.[55] Comparing this approach to that of the court in *Hammersmith v Monk*[56] it is clear that the court have been less confident in developing the common law. The approach of *Monk* has been affirmed in spite of art.8 with Mummery LJ stating in *Sims v Dacorum BC* that there 'is nothing in the legal rule [in *Monk*] per se or in its exercise by [a tenant] that was an interference … with respect for the home.'[57] In considering art.8 and the rule from *Monk* the Supreme Court adopted a remarkably concise style with the court handing down a joint judgment with the conclusion that whilst a tenant was entitled to raise art.8 'that point gets [him] nowhere.'[58] Rather than assessing the continued application of the rule from *Monk* the court instead found the terms of the lease to

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[51] Ibid, 506.
[52] There is support for this view in the development of the law around construct trusts in equity, see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.
[53] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623, 642-643.
[54] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493, 505-506.
[55] *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983; *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367.
[56] *Hammersmith v Monk* [1992] 1 AC 478.
[57] *Sims v Dacorum BC* [2013] EWCA Civ 12, [2013] CP Rep 19 [35].
[58] *Sims v Dacorum BC* [2014] UKSC 63, [2014] 3 WLR 1600 [21].

be determinative of the legality of the notice to quit,[59] in spite of the acceptance that such provisions on their face engage art.8.[60] However, the Supreme Court never directly engaged with the question of whether *Monk* is itself compliant with art.8. Therefore, it would appear following *Sims* that despite a tenant being able to argue a proportionality defence, the rule from *Monk* remains good law. The situation is complicated by the court's reliance upon the terms of the lease making the judgment highly contextual with the rule from *Monk* being undercut by the facts of the case but yet still being binding precedent. The only advantage to this approach appears to be that the door remains 'open to allow a litigant in the future to argue that the position would be different where the tenancy agreement was silent on the point [and the common law stepped in].'[61] These conflicting approaches to statute and common law demonstrate the 'highly odd practical results'[62] which Raphael warned of in the event that the common law was not reassessed alongside statute. The current situation is odd indeed with local authority possession proceedings being subject to art.8 whilst the private sector goes on unchanged.

Both Raphael's and Beyleveld and Pattinson's theories of horizontal effect provide a solution to the problem created by *Monk*. The differences are found in the force and confidence with which the courts should act in developing the common law. There is no reason why such developments must be in keeping with the 'existing limits of judicial power'[63] which the courts have exercised prior to the HRA 1998. For the purposes of this study the question becomes why the courts have not trodden the same course in reassessing *Monk* to ensure compatibility with art.8. This is especially the case given the viability of Raphael, Beyleveld, and Pattinson's arguments. The uncertainty within the courts as to the method by which the HRA 1998 may have a more robust application is exacerbated by the further models of horizontality explored below.

4.3.6 Remedial Horizontality

Another conception of horizontal effect is remedial horizontality which is s.6(1) when read alongside s.6(3)(a) of the HRA 1998 together with the 'discretionary powers of the court to issue court orders and remedies in private law actions.'[64] Admittedly, the traditional discretionary common law powers of the court are

[59] Ibid [17].
[60] Ibid [20]-[21].
[61] P Williams, 'Monks Working to Rule' (2015) 19 Landlord & Tenant Review 7, 11.
[62] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493, 497.
[63] Ibid, 502.
[64] A L Young, 'Mapping Horiztonal Effect' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 19.

limited in housing law with the majority of tenants falling under one of the statutory regimes.[65] However, there are those tenants who are excepted from substantive statutory protection,[66] and are therefore common law tenants with minimal statutory protection.[67] Most notable of these exceptions are tenancies with a high rateable value,[68] tenancies at a low rent,[69] and tenancies with a resident landlord.[70] It is these common law tenancies which may feel the reach of the HRA 1998 based upon remedial horizontality.

The discretionary powers of the court have arisen most often in relation to art.8 and privacy in which areas of the common law have been fused with the principles underpinning the Convention.[71] The classic position in English law with regard to privacy was that there existed no freestanding tort amounting to a right to privacy.[72] However, following the HRA 1998 the position is now more nuanced as demonstrated by *Murray v Express Newspapers*.[73] The case concerned pictures taken of JK Rowling's son, David, in public but without the permission of his parents. In considering the legal background to privacy Sir Anthony Clarke took time to point out that the rights contained in art.8 of the Convention, relating to, among other things, privacy, and art.10 of the Convention, relating to freedom of expression, now lie at the heart of liberty in a modern state.[74] The reverence Sir Anthony speaks with lends further weight to the proposition that the HRA 1998, and by proxy the Convention, now sits in a unique position in the constitutional framework of English law.[75]

The development of the common law in this area has taken a marked lead from the principles of the Convention. Moreover, the courts have shown no hesitation in applying this new tort to horizontal relationships (often between individuals and press organisations) notwithstanding the principles of the modern tort arising from

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[65] Department for Communities and Local Government, *English Housing Survey* (Headline Report 2013-14, 2015) 8-15.
[66] Housing Act 1988 sch 1.
[67] Protection from Eviction Act 1977; *Secretary of State for Transport v Blake* [2013] EWHC 2945 (Ch); *McGlynn v Welwyn Hatfield DC* [2009] EWCA Civ 285, [2010] HLR 10.
[68] Housing Act 1988 sch 1 pt 1 para 2.
[69] Ibid, para 3.
[70] Ibid, para 10.
[71] G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726, 726.
[72] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 [18]-[20].
[73] *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481.
[74] Ibid [24].
[75] See also *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151; D Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) LQR 343; S Lakin, 'How to Make Sense of the HRA 1998: the Ises and Oughts of the British Constitution' (2010) 30 Oxford Journal of Legal Studies 399.

the Convention and the HRA 1998.[76] The remedy often sought in cases involving privacy is an injunction preventing publication of the relevant images or information. Injunctions are a discretionary remedy flowing from the courts' equitable jurisdiction.[77] Therefore, if the courts are willing to employ remedial horizontal effect in these circumstances, the follow up question must be why the same motion cannot be applied to housing situations governed by the common law, where the court are afforded more discretion than in cases involving housing legislation. A response to this may be that it is the high value attached to a landlord's property which may dissuade the court from interfering. However, in privacy cases the courts have been willing to block the publication of sensitive images notwithstanding the financial advantage that would no doubt flow from this for the newspaper or magazine in question. Moreover, looking at privacy cases and possession cases as discrete areas of law each concerning different aspects of art.8 seems counter-productive and arbitrary given the conflation of these areas in the jurisprudence of the European Court of Human Rights.[78] These areas of law may deal with disparate interests but these interests are equally important in the scheme of the Convention and HRA 1998.[79]

4.3.7 Indirect Horizontal Effect

In addition to the above arguments in favour of horizontal effect there are also those who have called for 'indirect horizontal effect'.[80] Indirect effect rests on the proposition that the HRA 1998 may require the law to be developed in light of Convention principles thereby the Convention will organically seep through into apparently unrelated areas of law.[81] In such a case the law itself is subject to human rights arguments with subsequent compliant interpretations being applicable to private persons.[82] Therefore, indirect horizontal effect will only arise where an individual pleads an independent legal provision which is then in turn interpreted

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[76] See for example *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554; *PNM v Times Newspapers Ltd* [2013] EWHC 3177 (QB).
[77] *Goodeson v Gallatin* (1771) 2 Dick 455; *Doherty v Allman* (1878) 3 App Cas 709; *UL v BK (Freezing Orders: Safeguards: Standard Examples)* [2013] EWHC 1735 (Fam), [2013] Fam Law 1379 [14].
[78] I Loveland, 'Horizontality of Article 8 in the Context of Possession Proceedings' (2015) EHRLR 138, 142.
[79] This point is developed further in Chapter 6.
[80] G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824.
[81] *Du Plessis v De Klerk* [1996] ZACC 10.
[82] S Gardbaum, 'Where the (State) Action Is' (2006) 4 Int'l J Const L 760; G Taylor, 'The Horizontal Effect of Human Rights Provisions, The German Model and its Applicability to Common-Law Jurisdictions' (2002) 13 King's College Law Journal 187; G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 MLR 878.

under s.3 of the HRA 1998 to reflect HRA rights.[83] However, the literature around indirect horizontal effect gives rise to the following models which ought to be considered:

1. strong indirect horizontal effect;
2. strong/weak indirect horizontal effect; and
3. weak indirect horizontal effect.

4.3.7.1 *Strong Indirect Horizontal Effect*

In Hunt's view the strong indirect position lies somewhere between vertical and direct horizontal effect and is based upon ss.3(1) and 6(1) of the HRA 1998, which, he suggests, make the law itself subject to the Convention and place a duty upon the courts to achieve HRA 1998 compatibility.[84] For the purposes of housing law this conception of horizontal effect would be applicable to housing legislation and also those tenants who fall outside of statutory protection and are subject to the common law. Therefore, it is an attractive vehicle for a more robust reflection of human rights,[85] and supports the argument that the HRA 1998 ought to be applicable to all tenants regardless of the institutional character of their landlord, the legislative scheme, or the common law rules in play. For example, if assured shorthold tenancies are viewed alongside Hunt's arguments relating to s.3 of the HRA 1998 this would allow for the court to read proportionality into provisions requiring a mandatory possession order. Equally in the case of those tenancies governed by the common law s.6 of the HRA 1998 imposes a duty upon the courts to uphold the HRA 1998 rights and so this would encompass the common law.

Buxton is however critical of Hunt's contentions.[86] Buxton critiques Hunt's view of s.6 on the basis that whilst there is now an obligation on the courts to act compatibly with the HRA 1998 when developing the common law it is equally the case that the courts are bound by their traditional duty to apply English law. Buxton goes on to question the view that Convention rights themselves require horizontal effect due to:

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[83] D Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011) 35.
[84] M Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) PL 423, 439-440.
[85] N Bamforth, 'The True "Horizontal Effect" of the Human Rights Act 1998' (2001) LQR 34.
[86] R Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48, 59-60.

1. the wording of the Convention rights being directed towards the limitation of State interference rather than individuals;[87] and

2. the European Court's resistance to imposing requirements on signatories to the Convention and domestic courts.[88]

However, looking more closely at these points the strength of Buxton's argument falls away. On Buxton's first point and as detailed at 4.3.2, Beyleveld and Pattinson's work has demonstrated that the issues of horizontal applicability and horizontal effect must be separated from one another and following this exercise it is clear that the Convention rights may be read so as to apply to individuals.[89] On Buxton's second point, whilst the European Court may have resisted imposing requirements upon the domestic courts, notwithstanding the positive obligations arising from the Convention,[90] Buxton confuses the distinction between the HRA 1998 and the Convention. Prior to the HRA 1998, the Convention had no standing within the domestic legal order and, although some of the principles of the Convention permeated the common law, there was no obligation on the English courts to utilise the Convention rights or the jurisprudence of the European Court. Following the enactment of HRA 1998, there is an obligation placed upon the courts to take account of the jurisprudence of the European Court,[91] thereby encouraging a dialogue between the domestic and the European Court, providing a direct route for the domestic courts to give effect to European Court's jurisprudence. This obligation reflects the will of Parliament and is now one and the same as the duty to give effect to domestic law. However, there is a barrier presented by the jurisprudence of the European Court of Human Rights in relation to horizontal effect and the ability of the court to offer guidance on the same. The European Court is limited to hearing applications concerning a Member State.[92] These limitations of jurisprudence explicitly supporting horizontal effect are reflected in the approach of the domestic courts towards *Buckland v United Kingdom* in which De Gaetano J held in a

[87] Ibid, 61.
[88] Ibid, 61-62; Cossey v United Kingdom (1990) 13 EHRR 622.
[89] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623.
[90] B Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) Northern Ireland Legal Quarterly 203; R S Kay, 'The European Convention on Human Rights and the Control of Private Law' (2005) EHRLR 466; J-F Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Directorate General of Human Rights, Council of Europe 2007).
[91] Human Rights Act 1998 s.3.
[92] European Convention on Human Rights arts.33-34.

separate opinion that art.8's application was limited to public landlords.[93] Therefore relying upon the European Court to provide a steer as to horizontal effect seems unwise.

There are also deeper concerns with strong indirect horizontal effect where it is conceptualised as an independent form of horizontal effect. This problem is best put by Wade stating:

> [I]s there any significance in distinguishing between direct and indirect effect, or in speaking of new private causes of action? A claimant pleads the facts of his case, and he may claim any relief to which the facts, if proved, entitle him … Whether this is called direct or indirect effect or a new cause of action seems to be a matter of words and to make no intelligible difference.[94]

Hunt's goal of a model for horizontal effect which would apply to statute and common law equally is commendable. However, his theory suffers from a reliance upon the jurisprudence of the European Court regardless of the domestic standing of the HRA rights and terminological difficulties noted by Wade. These shortcomings make it difficult to wholeheartedly recommend strong indirect horizontal effect on its own.

4.3.7.2 *Strong/Weak Indirect Horizontal Effect*

Noting the potential shortcomings of the strong indirect horizontal effect model, Young suggests that there is a weaker form of strong indirect horizontal effect in which the court are under an obligation to develop the common law but must stop short of creating new causes of action.[95] This is something of a hybrid between the strong indirect horizontal effect analysed above at 4.3.7.1 and the weak indirect horizontal effect assessed below at 4.3.7.3. Support for this particular view is provided by Baroness Hale stating:

> The [HRA 1998] does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights.[96]

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[93] See above at 2.2.2.

[94] H Wade, 'Horizons of Horizontality' (2000) 116 LQR 217, 221-222. There are echoes in this passage of the criticisms made with regard to the public/private divide, see in particular G Cornu, *Etude Comparee de la Responsabilite Delictuelle en Droit Prive et en Droit Public* (Reims, Moto-Braine 1951) 74. These arguments are considered in full in Chapter 5.

[95] A L Young, 'Mapping Horiztonal Effect' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 43; A L Young, 'Horizontality and the Human Rights Act 1998' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007) 35.

[96] *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481 [132].

This view has the advantage of allowing the courts to develop and apply Convention rights in a fairly robust fashion via what may be called 'developmental influence'.[97] The limitations placed upon new causes of action are perhaps not all that problematic in the field of possession proceedings as the pleading of art.8 would not amount to a cause of action. However, development or reinterpretation of statute is not included within strong/weak indirect horizontal effect thereby creating a gap as to the potential for art.8 to protect tenants who are subject to statute. In addition the problems with strong/weak indirect horizontal effect continue into the theoretical basis of the position.

Phillipson and Williams term Young's theory of strong/weak indirect horizontal effect the 'radical distortion model',[98] saying that it is equally too limiting and too unconstrained.[99] Phillipson and Williams's claims rest on the fact that there is nothing within the HRA 1998 which would prevent the development of new causes of actions as such, rather the only limitation placed upon the courts in this sense is to develop the common law in keeping with its evolutionary tradition. It is accepted that the HRA 1998 does not on its face prevent the creation of new causes of action. However, it is unfair to say that in developing, for example, the tort of misuse of private information via arts.8 and 10 that the original tort has been 'over-written'[100] with the original tort discarded and arts.8 and 10 standing in its place. Instead, the tort has incrementally progressed in precisely the fashion afforded by the HRA 1998.[101] Moreover, it is submitted that the courts have sought to develop arts.8 and 10 using the vehicle of breach of confidence because the spirit of the common law and the Convention were sufficiently analogous to make it unnecessary for the creation of a new tort.[102] Therefore, whilst it is accepted that the strong/weak indirect horizontal effect model might impose unjustified limits upon the flexibility of the court, it would seem that the courts' approach to existing torts has been in keeping with the spirit of the common law which calls into doubt the soundness of this form of strong/weak indirect horizontal effect. If the courts opted for the

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[97] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493, 495-496; A L Young, 'Mapping Horiztonal Effect' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 39.
[98] G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 MLR 878.
[99] Ibid, 884.
[100] Ibid, 885; J Morgan, 'Questioning the 'True Effect' of the Human Rights Act' (2002) 22 Legal Studies 259, 271.
[101] *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 WLR 992, 1002-1005.
[102] F Klug and K Starmer, 'Standing Back from the Human Rights Act: How Effective is it Five Years On?' (2005) PL 716, 726. The view that the common law and Convention overlap to some degree is not novel, see *Birdi v Secretary of State for Home Affairs* (1975) 119 SJ 322; *R v Miah* [1974] 1 WLR 683; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751.

creation of a new cause of action separate from breach of confidence it seems unlikely that the judiciary and counsel would have jettisoned case law concerning breach of confidence. In which case the permeating influence of the common law would still have been felt. This further weakens the arguments made by those in favour of strong/weak indirect horizontal effect.

In conclusion, the foremost shortcoming of strong/weak indirect horizontal is the focus placed upon development of the common law and resultant lack of development of statute. Housing law has been moulded by successive statutory interventions in addition to development of the common law. Therefore, strong/weak indirect horizontal effect seems to address only part of the law at issue. Strong/weak indirect horizontal effect alone does not provide any guidance for courts which are faced with interpreting legislation in light of the judgments of the European Court of Human Rights or the precise nature and strength of the obligation created by s.3 of the HRA 1998.

4.3.7.3 *Weak Indirect Horizontal Effect*

Foremost of the proponents for weak indirect horizontal effect is Phillipson who suggests that claimants 'seeking to invoke Convention rights in private common law cases will not be able to rely solely on the right in question, but will have to anchor their claim in an existing common law cause of action.'[103] Phillipson rests his proposition on the idea that there is no duty upon the courts to interpret the common law in tandem with the jurisprudence of the European Court.[104] However, Phillipson does concede that the courts may unilaterally develop the common law beyond that required by the Convention and s.3 of the HRA 1998.[105]

Phillipson points specifically to the potential development of the common law protection of privacy in support of the idea of weak indirect horizontal effect. However, as discussed above it appears that in the realm of privacy the court have incorporated arts.8 and 10 under the guise of breach of confidence and more recently misuse of private information. These articles are 'now not merely of persuasive or parallel effect but ... are the very content of the domestic tort that the English court has to enforce'.[106] On this basis, it seems that the courts have taken the obligations placed upon them by the HRA 1998 beyond simply a power to develop

[103] G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824, 847.
[104] Ibid, 848.
[105] Ibid, fn 140.
[106] *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [11].

the common law and instead have seen it as a duty to develop the common law. Moreover, Phillipson has himself reneged from the weak indirect horizontal effect model in his more recent work.[107] Therefore, in light of this and the above it would appear that whilst the indirect horizontal effect model may have been a viable theory early in the life of the HRA 1998 it is not the course which has been followed.

There are also further difficulties with Phillipson's initial conception of weak indirect horizontal effect as noted by Klug and Starmer.[108] Weak indirect horizontal effect allows for gaps in the protection offered by the common law if the courts are unable to deal with incompatible legislation through s.3 of the HRA 1998 and instead read s.6 as preventing the creation of freestanding torts.[109] It would appear that adopting such a reading of the HRA 1998 would not be in the spirit of the Act to 'bring rights home'[110] and instead would offer protection weaker than that provided in the European Court,[111] which would in turn fall below the minimum protection the courts have found the HRA 1998 requires.[112]

4.4 Missing the Point?

It is clear from the above that there is significant disagreement around the application of the HRA 1998. However, it appears that commentators concerned with common law jurisdictions have, perhaps due to the volume of literature on the subject, been unable to see that it is not a matter of developing a single theory or single explanation of horizontal effect; rather it may be that each theory is an aspect of an all-encompassing phenomenon which is sensitive to the 'complicated legal relations typical in horizontal effect cases'.[113]

The legal theory of Alexy offers a solution to this problem. Alexy's work is concerned with the German legal system. The differences between the German human rights regime and the HRA 1998 are many.[114] However, Alexy's observations regarding

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[107] G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 MLR 878.
[108] F Klug and K Starmer, 'Standing Back from the Human Rights Act: How Effective is it Five Years On?' (2005) PL 716.
[109] Ibid, 726.
[110] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997).
[111] F Klug and K Starmer, 'Standing Back from the Human Rights Act: How Effective is it Five Years On?' (2005) PL 716, 726.
[112] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.
[113] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 358. This builds upon the cursory view of Wade in H Wade, 'Horizons of Horizontality' (2000) 116 LQR 217.
[114] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xxxvi-xxxvii.

horizontal effect are equally applicable to the HRA 1998.[115] This is particularly the case for art.8 which is inherently horizontally applicable and protects individuals from private parties as well as the State.[116] In this sense the interpretation of statute and common law are consequences of horizontal applicability and the positive imposition placed upon the State to observe human rights.[117] In such a case there is no basis for the distinction between direct (or full) horizontal and indirect horizontal effect as the only limitations placed on the court are those relating to statutory interpretation or development of the common law.[118] Therefore, for Alexy there is only horizontal effect.[119] The above consideration of horizontal effect in relation to the HRA 1998 has demonstrated that the effects of the HRA rights between individuals are more nuanced than any single model can account for. Rather these theories are part of an overarching approach to horizontal effect. These instances of horizontal effect are better understood within the context of three levels of relations:

1. the level of state duties;
2. the level of rights against the state; and
3. the level of legal relations between private individuals.[120]

Within each of these levels is an appreciation of the literature explored above but with an understanding that these approaches coexist in HRA 1998 jurisprudence.

4.4.1 The Level of State Duties

The first head of Alexy's conception of horizontal effect rests in the traditional vertical relationship between State and individual. It is in this relationship that the State is obliged to ensure that legislation and private law adjudication is compatible with constitutional rights.[121] In terms of the HRA 1998 these obligations are already visible. For example in the case of legislation presented before Parliament the relevant Minister must make a declaration that the bill is either compatible or

[115] Ibid, xxxvii. See also the reliance placed upon Alexy in the UK context in G Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 LQR 399; B Malkani, 'A Rights-Specific Approach to Section 2 of the Human Rights Act' (2012) EHRLR 516; J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174.
[116] See above at 4.3.2-4.3.3.
[117] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xl.
[118] Ibid xli.
[119] Ibid 358.
[120] Ibid.
[121] Ibid.

incompatible with the Convention rights.[122] In either case the bill will continue through Parliament, however, if there is a statement that the bill is incompatible the Minister must give reasons for the incompatibility.[123] Equally in the case of adjudication involving public authorities, even when dealing with private law, regard must be had to the HRA 1998.[124] This level of state duties is similar in that sense to public liability horizontality which recognises the force of s.6 in giving effect to the HRA 1998 in proceedings involving a public authority. As noted above the shortcoming of public liability horizontality is the necessity for a public authority or a private body performing a public act to be involved in the proceedings. This is problematic for the large body of private sector tenants who, under the present law, are barred from the protections of art.8. However, the level of State duties explains those instances such as *Pinnock* and *Lawal v Circle 33 Housing Trust*[125] in which the courts have found art.8 to be applicable with regard to local authorities and housing associations respectively.

4.4.2 The Level of Rights Against the State

The second head of Alexy's model refers to the relationship between the individual and the State.[126] For example, Alexy uses the example of a judge, acting on behalf of the State, who contravenes rights which a litigant is entitled to.[127] This example again finds support in the HRA 1998 from s.6(3)(a) which defines the courts as public authorities who are therefore bound to respect the Convention rights of those seeking the assistance of the court. After all, a right can 'only be infringed by those against whom it is held.'[128] Equally this is evidenced by the courts willingness to develop the common law in line with the Convention, especially in the area of misuse of private information.[129] This approach therefore similar in scope to intermediate horizontality discussed above.

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[122] Human Rights Act 1998 s.19.
[123] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) [3.2]-[3.3].
[124] Human Rights Act 1998 s.6(1); *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936; *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546.
[125] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9.
[126] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 359.
[127] Ibid.
[128] Ibid.
[129] N Moreham, 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 LQR 373; A L Young, 'Human Rights, Horizontality and the Public/Private Divide: Towards a Holistic Approach' (2009) 2 UCL Hum Rts Rev 159.

There are two advantages to this aspect of Alexy's approach. Firstly, all parties have the benefit of their individual rights in litigation 'to [an] appropriate extent'.[130] Secondly, as this is based at the adjudication level the court is able to take account of the defensive and protective nature of rights,[131] for example in the realm of housing law this would allow for consideration of arts.8(1) and 8(2) and art.1 of the First Protocol to the Convention when assessing the proportionality of a possession order.

4.4.3 The Level of Legal Relations Between Private Individuals

Finally in Alexy's tripartite reconceptualisation of horizontal effect, Alexy contends that the concept of direct horizontal effect should not be thought of in the sense that rights themselves are equally applicable to private parties but instead that rights create 'certain rights and no-rights, liberties and no-liberties, powers and disabilities in the relations between citizens on the basis of constitutional reasons' which would not exist but for the rights themselves.[132] In the context of art.8 within domestic jurisprudence this would manifest itself in the right of a tenant to plead art.8 to the court and to have the proportionality of any possession order considered and the no-right of a landlord to reattain possession of the property without the court first considering proportionality and determining that it would be proportionate to make a possession order. Each of these levels of horizontal effect are in play in domestic law, however, the shortcoming in the literature to date has been to see each model of horizontal effect as exclusive rather than a position within a wider framework through which human rights may take effect;[133] through State duties, through rights against the State, and through the legal relations between private individuals. The shortcomings of one model of horizontal effect might be filled by another. This would place the offending law itself under the scrutiny of the HRA 1998. On this basis it seems that there is no reason for the courts to remain passive when asked by a private sector tenant to consider art.8. Alexy's tripartite approach dispatches the terminological difficulties created by the plethora of suggestions for the scope of horizontal effect. The question becomes not whether something is direct/indirect or strong/weak it is matter of the level at which the litigation takes place, which allows for courts to take account of the facts as pleaded by the claimant. This argument is bolstered from the additional pressure placed upon the courts by the non-

[130] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 361.
[131] Ibid.
[132] Ibid 362. On the idea of correlative rights see also W N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-1914) 23 Yale Law Journal 16; W N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale Law Journal 710 and the discussion of Hohfeld's work at 3.1.4.
[133] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 358.

discrimination provisions of the Convention and the HRA 1998 which are critically analysed below.

4.5 Further Support for Horizontal Effect

Article 14 of the Convention reads:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

On its face art.14 seems of little relevance to housing proceedings and the horizontal effect of art.8. However, when art.14 is read in conjunction with the preamble to the Convention, which seeks to secure the realisation of the Convention rights, it must be asked whether art.14 might raise questions over the disparate application of art.8 the domestic courts have thus far favoured.[134] This is particularly so in light of the level of state duties discussed above as the State (including the courts) is bound to have regard for art.14 in adjudication. The engagement of art.14 in relation to housing proceedings is not novel with the House of Lords in *Kay v Lambeth LBC* being of the opinion that any art.8 defence must be predicated on art.14.[135] However, art.14 arguments have not been common. The closest analogous argument advanced in relation to the differential application of art.8 following *Pinnock* comes from *Southward Housing Co-Operative Limited v Walker*,[136] detailed below at 4.6. This discussion suggests that the current approach of the courts towards the exclusive application of art.8 in possession proceedings is flawed, not least for the reasons expounded above in relation to the lack of appreciation for the theoretical nature of horizontal effect, but also due to the requirements placed upon the courts by art.14. A correct reading and application of art.14 requires the same procedural safeguards afforded to public sector tenants by art.8, this argument finds additional weight from the framework of the HRA 1998 itself. This section therefore adopts a legalistic argument against the current differential application of art.8. This will be demonstrated:

1. through an assessment of art.14 jurisprudence;

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[134] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 39 HC 382, 2004) 26; D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623, 632.
[135] *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 [158]-[200].
[136] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 (Ch), [2015] 2 P & CR 13.

2. by establishing the 'ambit' of art.8 which includes possession proceedings which in turn will trigger art.14; and

3. by establishing that the status of private sector tenants falls under the protection of art.14 via the 'other status' provision.

4.6 Article 14 Jurisprudence

The prevailing guidance on the effects of art.14 from the European Court of Human Rights remains the *Belgian Linguistic Case*.[137] The case concerned the language used in schools in certain areas of Belgium which had been termed unilingual. In assessing whether these measures discriminated against the French speaking minority in these regions, in that they were not able to study in their preferred language, the European Court determined that there will be a breach of art.14 where a 'distinction has no objective and reasonable justification'.[138] In assessing whether such a justification is reasonable and objective the court will pay attention to the aim and effects of the measure and assess these through the lens of proportionality.[139] This approach has since been adopted in *Larkos v Cyprus*[140] with the European Court of Human Rights accepting that the differential treatment of public and private sector tenants amounted to a breach of art.14 as there was 'no objective and reasonable relationship between the means employed and the aim sought to be realised'.[141] Given this rather straightforward guidance from the European Court it might be wondered why the domestic courts have not, due to their duties under s.3 of the HRA 1998, enquired into whether the current judicial approach which allows for the differential treatment of public and private tenants is objective, reasonable, and proportionate. However, the English courts have instead sought to distinguish domestic proceedings from their European counterparts.

Southward Housing Co-Operative Ltd v Walker[142] serves as the most recent example of the domestic courts' failure to grapple with the substantive requirements of art.14. *Walker* is not directly analogous to situations in which a private sector tenant is seeking to resist the possession order of a tenant, however, in the absence of direct judicial commentary on the issue *Walker* serves as a good example of the lacklustre approach of the domestic courts. *Walker* concerned a tenancy granted by

[137] *Belgian Linguistic Case* (1979-80) 1 EHRR 252.
[138] Ibid [10].
[139] Ibid.
[140] *Larkos v Cyprus* (2000) 30 EHRR 597.
[141] Ibid [29].
[142] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 (Ch), [2015] 2 P & CR 13.

a housing association which the association claimed was excluded from the security of tenure provisions of the Housing Acts. A range of arguments contrary to this submission were raised by the tenants including reliance upon arts.8 and 14. In addressing these submissions Hildyard J held that the argument of the defendants stretched what was possible under arts.8 and 14. On the art.8 argument Hildyard J reiterated that consideration of proportionality will only be required where the order is sought at the behest of a public authority. The tenant's art.14 argument was based upon the residual protection afforded to those in housing association accommodation[143] versus private sector and local authority tenants.[144] This argument failed as, for Hildyard J, a tenant is not a form of 'other status' due to the lack of 'innate and immutable'[145] characteristics required before an individual's attributes will amount to a status for the purposes of art.14. A further problem identified by Hildyard J was the institutional character of the housing association. Therefore, taking *Walker* as the most recent and applicable authority on the effects of art.14 in possession proceedings would appear to suggest that:

1. art.14 is only relevant in cases where the landlord is a public authority (the ambit);[146]

2. differentiation of tenants on the basis of their landlord (and therefore the statutory framework which applies to them) does not amount to a 'status' for the purposes of art.14 (the status);[147] and

3. even if art.14 was engaged the difference in treatment would be justified given the margin of appreciation which has been left to Member States (the justification).[148]

This conception of art.14's role in possession proceedings is flawed as it propagates discrimination between tenants. This disparate application of art.8 is the very outcome which art.14 looks to avert. It is demonstrated below that each of these three heads has been misconstrued by Hildyard J.

[143] Protection from Eviction Act 1977.
[144] Rent Act 1977; Housing Act 1985; Housing Act 1988; Housing Act 1996.
[145] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 (Ch), [2015] 2 P & CR 13 [186]-[190].
[146] Ibid [168]-[169].
[147] Ibid [189]-[190].
[148] Ibid [205].

4.6.1 The Ambit of Article 14

The finding of the High Court in *Walker* suggests that art.14 will only be relevant in possession proceedings where an order is sought by a public authority. This misunderstands the ambit of arts.8 and 14. At 4.3.2 it was demonstrated that art.8 is applicable to all possession proceedings upon its plain reading. The same observations are true of art.14 due to its horizontal applicability and the positive duties it creates on the part of the State. However, the arguments as to horizontal effect will not be repeated here. The focus will instead be the uniquely 'parasitic'[149] or 'symbiotic'[150] nature of art.14 when pleaded alongside art.8 of the Convention. With regard to art.8 it should be recalled that:

> … the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under art.8 of the Convention … [151]

Clearly on this reading art.8 is engaged where a person's home is at risk independent of art.14. This might be called the ambit of art.8 for the purposes of this thesis. It is this ambit which is being limited to public sector tenants.

The difficulty the courts have faced in identifying the purpose and effects of art.14 of the Convention is perhaps surprising given that there is a tradition within the common law to identify and prevent discrimination where possible.[152] Nevertheless the courts have struggled to provide a principled approach that avoids arbitrary distinctions among different groups of people due to legalistic wrangling with s.6 of the HRA 1998 and concerns over whether a litigant is a public authority.[153] It is suggested that limiting attention to s.6 of the HRA 1998 has caused the courts to overlook the purpose of art.14 which is simply the equal enjoyment of Convention

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[149] D Oliver, 'England and Wales: The Human Rights Act and the Private Sphere' in Dawn Oliver and J Fedtke (eds), *Human Rights and the Private Sphere*, vol 1 (Routledge-Cavendish 2007) 76; J Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights' (2003) 6 International Journal of Discrimination and the Law 45, 47.

[150] *R (Clift) v Secretary of State for the Home Department* [2004] EWCA Civ 514, [2004] 1 WLR 2223 [10]; *Belgian Linguistic Case* (1979-80) 1 EHRR 252 [9].

[151] *Buckland v United Kingdom* (2013) 56 EHRR 16 [65].

[152] *Kruse v Johnson* [1898] 2 QB 91, 99; *Short v Poole Corp* [1926] Ch 66, 91; *Blathwayt v Baron Cawley* [1976] AC 397 [2].

[153] Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 39 HC 382, 2004); Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 77 HC 410, 2007).

rights.[154] Article 8 is, inter alia, concerned with the right to respect for a person's home this has manifested in the requirement that any order ought to be subject to proportionality. Therefore art.14 is prima facie triggered in the case of private sector possession proceedings where this protection being denied. In such cases it is for the State to demonstrate that discrimination is not disproportionate.[155] The typical position in which this might occur may be in relation to discriminatory legislation or government measures. However, in the case of possession proceedings it is the judicially developed approach to art.8 which has led to the discriminatory application of Convention rights,[156] despite the allowance within the statutory framework to give effect to the requirements of arts.8 and 14.[157] Therefore, it falls upon the courts to adjust their course in relation to arts.8 and 14. Following this line of argument, the relevance of art.14 will turn on whether a tenant fulfils the status requirements of art.14 due to not falling into the non-exhaustive list of other potential grounds of discrimination.[158]

4.6.2 The Statuses of Article 14

Article 14 of the Convention explicitly prohibits discrimination based upon a range of factors including birth, sex, or race. However, the words 'other status' indicate that this is a non-exhaustive list.[159] Moreover, the nature of the 'other status' included within art.14 provision is not limited to those characteristics which are inherently or innately personal as suggested in *Walker*.[160] It is arguable on that basis that private sector tenants have recourse to art.14 due to their exclusion from art.8 protection.[161] However, whilst the European Court has been open to an encompassing approach confusion has arisen due to two diverging schools of

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[154] A Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the Ambit under Article 14 ECHR' (2006) 69 MLR 714, 716-718.
[155] *Belgian Linguistic Case* (1979-80) 1 EHRR 252; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.
[156] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [50].
[157] Human Rights Act 1998 ss.2-6.
[158] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 103-104; R O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211, 222.
[159] *Kjeldsen v Denmark* (1979-80) 1 EHRR 711; *Rasmussen v Denmark* (1985) 7 EHRR 371; *Carson v United Kingdom* (2010) 51 EHRR 13.
[160] *Clift v United Kingdom* App no 7205/07 (European Court of Human Rights, 13 July 2010) [59].
[161] O M Arnardottir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 Human Rights Law Review 647, 648.

thought as to the scope of art.14.[162] The first approach is exemplified by the cases of *Engel v Netherlands*[163] and *Rasmussen v Denmark*;[164] in the former differential treatment based upon military rank was found to be a breach of art.14 as the holders of said ranks were caught by the other status provision of art.14, in the latter the European Court found that there was a difference in treatment between husband and wife with the Court simply stating there was 'no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive.'[165] The second approach may be seen in *Grande Oriente d'Italia di Palazzo Giustiniani v Italy*[166] in which the European Court appeared to focus upon the arbitrary nature of the distinction rather than the reason for the distinction occurring on the basis of any status. For the purposes of this study it would appear that regardless of which approach the European Court chooses to adopt the current situation for private sector tenants falls foul of art.14 if it may be demonstrated that the current situation is either: (1) discriminatory on the basis of the tenant's personal status; or (2) the distinction is arbitrary. The most suitable approach to art.14's application is dependent upon what one sees as the purpose of art.14. On this front, it was established above that the essential rationale of art.14 is to ensure the equal enjoyment of the Convention rights. However, as the work of Gerards demonstrates, this may manifest in two ways: (1) non-discrimination or (2) equal treatment.[167]

4.6.2.1 *Non-Discrimination*

The non-discrimination perspective is based on the idea that art.14 prohibits discrimination rather than guarantees equality.[168] In view of this an individual's personal status (race, sex, or religion) is informative as to whether there has been discrimination. These characteristics often evoke moral discomfort given the historical discrimination such groups have faced.[169] These characteristics are also often seen to be the product of a person's innate being such as race (non-choice grounds) or within the realm of their personal autonomy such as religion (choice

[162] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 104-105.
[163] *Engel v Netherlands* (1979-80) 1 EHRR 647.
[164] *Rasmussen v Denmark* (1985) 7 EHRR 371.
[165] Ibid [34].
[166] *Grande Oriente d'Italia di Palazzo Giustiniani v Italy* (2002) 34 EHRR 22
[167] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99.
[168] Ibid, 113.
[169] Ibid, 113-114.

grounds).[170] The difficulty with this approach for the purposes of this study is that this may exclude the argument that the discriminatory application of art.8 on the basis of a landlord's institutional character does not involve a sufficiently innate characteristic. It is likely that the court would approach this in the same manner as place of residence cases which have been of mixed success.[171] It is perhaps for this reason that Gerards foresees this view as the one which would be most agreeable between the European Court and the domestic courts, not least because this approach is analogous to existing legislation,[172] as this sets a low bar which the Member States are free to build upon should they chose.[173]

The difficulty here is that the location a person makes their home and the status of that person's landlord may be prima facie seen as a choice ground of discrimination. However, upon an assessment of the rented sector this suggestion loses weight. The number of tenants in the private rented sector is growing for a number of reasons.[174] Among these reasons is the reduced local authority housing stock resulting from right to buy schemes,[175] which are about to be reinvigorated and introduced for housing associations.[176] Therefore there is a housing market in which a tenant's ability to rely upon a human rights defence is narrow not because of their choice as such but due to the lack of opportunity for them to find a local authority tenancy. This is not a choice but rather a fact of the housing market. To exclude private sector tenants from the protection of art.8 on the basis of it not being part of their status is misconceived. The status of tenant is legal in nature rather than personal as the form of a person's tenancy is dictated by statute. In such cases, the UK government

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[170] R Wintemute, '"Within the Ambit": How Big is the "Gap" in Article 14 European Convention on Human Rights? Part 1' (2004) 4 EHRLR 366; R Wintemute, 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No. 12 ECHR: Part 2' (2004) 5 EHRLR 484.

[171] *Magee v United Kingdom* (2001) 31 EHRR 35; *Clift v United Kingdom* App no 7205/07 (European Court of Human Rights, 13 July 2010); *Carson v United Kingdom* (2010) 51 EHRR 13.

[172] Equality Act 2010.

[173] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 116-117; J Lewis, 'The European Ceiling on Human Rights' (2007) PL 720.

[174] Department for Communities and Local Government, *English Housing Survey* (Headline Report 2013-14, 2015); R Mason, 'Council Tenants Lost Lifetime Right to Live in Property' (*The Guardian,* 2015) <http://www.theguardian.com/society/2015/dec/09/council-tenants-lose-lifetime-right-to-live-in-property> accessed 10 December 2015.

[175] D Cowan, *Housing Law and Policy* (Cambridge University Press 2011) 86-87.

[176] Cabinet Office and Her Majesty The Queen, 'Queen's Speech 2015' <https://www.gov.uk/government/speeches/queens-speech-2015> accessed 14 October 2015; F Perraudin, 'Housing Bill to Include Right-to-Buy Extension in Queen's Speech' The Guardian <http://www.theguardian.com/politics/2015/may/26/housing-bill-right-to-buy-queens-speech-housing-association-tenants-conservatives> accessed 14 October 2015.

has argued that art.14 is not applicable. However, in *Bah v United Kingdom*[177] the European Court found that legal statuses may amount to an 'other status' for the purposes of art.14. Therefore, a tenant's legal status ought to be able to form the basis of an art.14 claim.

4.6.2.2 *Equal Treatment*

Taking an alternative view to the rationale for art.14 of the Convention, Gerards discusses the equal treatment rationale. The equal treatment rationale seeks to empty art.14 of moral considerations and rather imposes a strict legal rule applicable where 'one group or person is allowed to exercise a certain right or receive a certain benefit, whilst this is not permitted for another person or group'.[178] The primary advantage of this approach is that it would allow for flexibility on the part of the European Court to develop art.14 to a fuller extent by scrutinising 'all differences in treatment with an open eye to underlying systematic problems of societal or economic discrimination.'[179] The Court's commentary on social and economic issues is controversial due to its supra-national status.[180] In the domestic sphere the same conservative approach is found due to deference from the courts to Parliament and local authorities.[181] Nevertheless, if a court chose to adopt this course and ask whether the Convention rights had been applied equally in the case of art.8 and possession proceedings the answer would clearly be no. This would then allow the court to assess the justification for the apparent discrimination.

In assessing the virtues of either the non-discrimination rationale or the equality rationale Gerards shows a preference for the equal treatment approach due to its robustness in the face of arbitrary discrimination.[182] However, it is apparent that the use of either model would allow for the European Court and the domestic courts to expose discriminatory application of art.8 to justification. For the purposes of this work it is recognised that the non-discrimination approach is more likely to succeed in the European Court of Human Rights and the domestic courts due to the

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[177] *Bah v United Kingdom* (2012) 54 EHRR 21.
[178] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 117.
[179] Ibid, 118-119.
[180] M Bossuyt, 'Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations' (2007) 28 Human Rights Law Journal 321.
[181] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 (Ch), [2015] 2 P & CR 13 [164].
[182] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 123-124.

doctrines of subsidiarity and the margin of appreciation respectively.[183] On this finding the justification for discrimination comes to the fore.[184] Focussing on the non-discrimination approach should not be taken as a disregard for the equal treatment view. Rather it is suggested that the two may coexist,[185] but that for the purposes of this thesis the non-discrimination perspective should be favoured due to its higher likelihood of adoption.

4.6.3 Justifications for Interference with Article 14

A finding of prima facie discrimination under art.14 of the Convention is not sufficient to amount to a breach. Rather the question is whether the measure is justified by it serving a legitimate purpose in a proportionate manner.[186] In answering this question the domestic courts have adopted a multi-tiered approach in which suspect classifications, such as race or gender, will require a weighty justification to avoid a breach of art.14 whereas less suspect classifications will not be subject to strict scrutiny. This approach is most visible in *Carson v Secretary of State for Work and Pensions*.[187] The case concerned the payment of pension contributions to retirees who had left the UK to live in South Africa (among other countries). The UK was party to a bilateral international agreement which allowed for the uprating of pension payments to account for increases to the cost of living. Unfortunately, South Africa was not a signatory to this agreement and so the claimant received her pension at the same level as when it was awarded to her (excluding increments for inflation). The claimant argued that this breached art.14. The House of Lords held that the appellant failed to show a breach of art.14 due to the lack of an 'analogous situation' to those living in the UK or a country with a reciprocal agreement. In assessing the presence of discrimination the House of Lords relied upon a lack of Strasbourg jurisprudence on the question of the grounds for discrimination being of equal 'potency'.[188] In finding that the appellant's case to be unsuccessful utilised the jurisprudence of the United States Supreme Court which

[183] Ibid, 122-124.
[184] The European Court of Human Rights have on occasion used the idea of comparators alongside justification. However, this approach is part of the justification analysis rather than a separate head of review, see *Rasmussen v Denmark* (1985) 7 EHRR 371 [37]; *Carson v United Kingdom* (2010) 51 EHRR 13; *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 [7]-[9].
[185] O M Arnardottir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 Human Rights Law Review 647, 669-670.
[186] *Religionsgemeinschaft der Zeugen Jehovas v Austria* (2009) 48 EHRR 17 [87]; R O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211, 224.
[187] *Carson v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173.
[188] Ibid [55].

has recognised the existence of 'suspect classifications' that ought to be subjected to 'particularly severe scrutiny' due to historical discrimination.[189] It was this view which allowed for the House of Lords to find that the appellant was not in an analogous situation. It is submitted that this approach is ill-founded. The argument against the *Carson* approach is advanced on two fronts in line with the jurisprudence of the European Court: (1) art.14 does not advocate a tiered approach to scrutiny on the basis of 'suspect' classifications; and (2) the justification for any prima facie breach of art.8 should be assessed by gauging whether the measure is proportionate to the legitimate aim pursued rather than grasping for a tiered approach to scrutiny.[190]

4.6.3.1 *European Court Approach*

The work of Baker is instructive on the scrutiny to apply to justifications tabled for interferences with art.14.[191] The first contention of Baker is that the plain wording of art.14 does not indicate or require any hierarchy of discrimination which might make one form of discrimination more insidious than the other. Article 14 is therefore drafted to take account of a wide-ranging number of classifications. The motivation of anti-discrimination provisions is the realisation of equal dignity and respect.[192] In such a case it is not the ground for discrimination which is significant but rather it is 'proportionality itself that tells us whether a classification is suspect'.[193] In spite of the lack of support for a tiered approach at the European Court of Human Rights there are commentators who consider the suspect and non-suspect grounds to be part of the European Court's jurisprudence. By way of example, Joory states the European Court of Human Rights 'has gradually cultivated different approaches to discrimination involving "suspect grounds" and "non-suspect grounds"'.[194] However, an analysis of the European Court's jurisprudence does not support this, those who have identified the suspect and non-suspect grounds have instead highlighted the differing rationales for art.14 assessed above at

[189] Ibid [55]-[57].
[190] A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847.
[191] Ibid.
[192] *Carson v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173 [15]-[17], [55]-[60]; J Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights' (2003) 6 International Journal of Discrimination and the Law 45; A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847.
[193] A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847, 884.
[194] I Joory, 'Arguments Against the Politicised Role of Comparators in Article 14 Discrimination Cases' (2009) 5 Cambridge Student Law Review 40, 43.

4.6.2.1-4.6.2.2, non-discrimination versus equality. For instance, Joory relies upon *Petrovic v Austria*[195] in support of the suspect/non-suspect distinction. *Petrovic* concerned alleged discrimination which arose out of gender, a historic form of discrimination which has been a target of art.14 since the Convention's inception.[196] Rather than creating a tiered approach to scrutiny the case demonstrates that the form of discrimination serves to attune the eventual proportionality analysis which any prima facie breach of art.14 must endure.[197] This subverts the tiered approach by exposing any discriminatory measure to proportionality in the first instance rather than asking whether a measure encroached on a prescribed suspect or non-suspect ground. This approach is in keeping with a plain reading of art.14 which gives no indication that some forms of discrimination are more suspect than others.[198]

Following a dispensation of the multi-tiered approach and endorsement of a wide reading of art.14 the question becomes whether the justification was 'objective and reasonable'[199] not whether it involves suspect or non-suspect grounds.[200] In the context of possession proceedings, differential application of art.8 would require an objective and reasonable justification tested via proportionality which:

> contemplates a situation where the harm of a measure, in terms of the extent of invasion of an individual's rights, or in terms of the damage to common interests in equal dignity and social inclusion for example, could outweigh the benefits of even a narrowly tailored measure aimed at a compelling interest.[201]

Therefore on the basis of the above it is suggested that the compelling interest in stimulating the private rented sector that lies at the heart of contemporary housing legislation,[202] taken together with the obligations created by the HRA 1998, ought to be scrutinised by the courts during their assessment of whether a person may be dispossessed of their home. This is argued due to the requirements of arts.8 and 14 taken together. Given the importance of the home to the individual recognised above at 3.2 and protected via art.8 it is difficult to foresee circumstances in which the differential treatment of public sector and private sector tenants might survive.

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[195] *Petrovic v Austria* (2001) 33 EHRR 14.
[196] A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847, 883.
[197] Ibid, 882.
[198] Ibid.
[199] *Paulik v Slovakia* (2008) 46 EHRR 10 [54].
[200] A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847.
[201] Ibid, 887.
[202] Department for the Environment, *Housing: The Government's Proposals* (Cm 214, 1987); D Hughes and others (eds), *Text and Materials on Housing Law* (Oxford University Press 2005) 101.

This is appreciated in the discussion below which looks to give effect to the European Court's approach to art.14 in spite of *Carson*.

4.6.3.2 *Giving Effect to the European Court Approach in Light of* Carson

The judgment of the House of Lords in *Carson* has subsequently been affirmed leaving the suspect grounds approach in play in domestic law.[203] Notwithstanding the questionable turn taken by the House of Lords in *Carson* the Supreme Court should reconsider this issue when afforded the opportunity, especially given the omission of suspect grounds jurisprudence in the European Court.[204] In doing this the Supreme Court should not shy away from their duties under the HRA 1998 and should draw upon the constitutional underpinnings of domestic law.[205] The dissenting judgment of Ward LJ in *Fitzpatrick v Sterling Housing Association Ltd*[206] is particularly persuasive on this point. Briefly summarised *Fitzpatrick* concerned the interpretation to be given to sch.1 of the Rent Act 1977 which on its face discriminated against same sex couples to the effect that the couple's fundamental right to human dignity was 'severely and palpably affected'.[207] This same point could be made in relation to the *Carson* approach which would bar private sector tenants from arguing that there has been a breach of art.14. Private sector tenants' human dignity is doubtlessly being 'severely and palpably affected' where they are barred from the same fundamental rights available to their public sector counterparts.

Ward LJ's concise and methodical approach highlights the legalistic ease with which the Supreme Court could affect a change in position. Ward draws a distinction between matters of form and function, on the facts of *Fitzpatrick* the nature of the relationship between members of the same sex is the same as a heterosexual relationship in function if not in form.[208] Applying this same straightforward functionalistic approach to the distinction between public sector and private sector

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[203] *Langford v Secretary of State for Defence* [2015] EWHC 875 (Ch). See, however, the comments of Baroness Hale concerning the addition of grounds to the suspect and non-suspect categories in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545 [19].

[204] See for following for examples of the suspect grounds argument being raised with the European Court but not featuring in its findings *Hode v United Kingdom* (2013) 56 EHRR 27; *JM v United Kingdom* (2011) 53 EHRR 6.

[205] J Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights' (2003) 6 International Journal of Discrimination and the Law 45, 58.

[206] *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304.

[207] Ibid, 337.

[208] Ibid, 338.

tenants finds that each group have the same goals in mind when taking up a residential lease – to make a home. Therefore the formalistic identity of their landlord ought to be ignored.[209] Such an approach would allow for the Supreme Court to adopt a progressive approach in keeping with the ideals of the Convention and domestic law.

4.6.3.3 *Comparators*

In assessing the justification for discrimination the European Court and domestic courts have often resorted to comparing the situation of the complainant with that of another analogous individual. The use of comparators is demonstrated by *Nicholas v Secretary of State for Defence*.[210] The appellant in *Nicholas* was a RAF serviceman who occupied his home under a licence granted by the Ministry of Defence until the licence was determined upon the breakdown of his marriage. The appellant argued that this amounted to discrimination under art.14 taken together with art.8 due to the denial of security of tenure that attaches to the majority of other tenancies.[211] The Court of Appeal identified two potential comparators to the appellant in *Nicholas* the first was a private sector licencee and the second was a public sector licencee. On the first comparator the court found that if the appellant had been a licencee he would not have benefitted from security of tenure as licencees are excluded from protection. This seems a misguided finding in light of the lease/licence distinction and the position of the courts following *Street v Mountford*.[212] In *Street* the court found the attempts of a landlord to avoid the effects of the Rent Act 1977 by terming the rental agreement a licence to be unsuccessful as the characteristics of a lease were present. The use of the second comparator is also flawed in that the court seems to flip from a private context in the first comparator to a public context in the second. The difficulty with this second comparator is that, notwithstanding the effect of sch.1 of the Housing Act 1985 which excludes employment accommodation from being a secure tenancy, the Ministry of Defence is arguably acting in a private law capacity in their employment of the appellant. Therefore, both comparators used in *Nicholas* to find no violation of art.14 are flawed. *Nicholas* demonstrates the possible 'light touch' distinction

[209] Ibid 338.
[210] *Nicholas v Secretary of State for Defence* [2015] EWCA Civ 53, [2015] 1 WLR 2116.
[211] See for example Housing Act 1988 sch.1; Housing Act 1985 sch.1.
[212] *Street v Mountford* [1985] AC 809.

which arises out of a conflation of justification and comparators thereby excluding a more intensive enquiry.[213]

The European Court and domestic courts do frequently look for analogous situations in assessing whether there has been discrimination.[214] However, this is not a method of determining justification only that there has been a difference in treatment. In the case of possession proceedings the relevant comparator would be a public sector tenant benefiting from the procedural protections afforded by art.8 as opposed to a private sector tenant who does not. In comparing these analogous situations it is difficult to see the European Court finding these parties to be sufficiently different to allow for the difference in treatment. Therefore, attention ought to instead be focused on the justification for the measure in question. For example, in *Paulik v Slovakia*[215] the European Court found that despite numerous differences between two individuals there may still be a comparable position in which any differential treatment must be reasonable and justified.[216] This approach is best expressed by the European Court stating:

> in any event, the Court does not consider it necessary to determine conclusively whether the applicant[s] ... were in an analogous situation to either of the comparators suggested ... [due to] ... the differential treatment to which the applicant was subjected ... [217]

Therefore for the European Court it appears that although there remains a nominal attachment to seeking a comparator against which to compare the complainant the determinative factor in assessing art.14 breaches is whether the difference in treatment is 'reasonably and objectively justified'.

In the domestic courts Baroness Hale has offered comments in support of the above view. In the opinion of Baroness Hale, when considering art.14 ' ... unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.'[218] Article 14's 'non-technical drafting'

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[213] A Baker, 'Comparison Tainted by Justification: Against a "Compendious Question" in Art.14 Discrimination' (2006) PL 476, 477.
[214] R O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211, 219.
[215] *Paulik v Slovakia* (2008) 46 EHRR 10.
[216] See also the following cases in which the European Court of Human Rights has focused upon the justification for the alleged discrimination *Burden v United Kingdom* (2008) 47 EHRR 38; *Ismailova v Russia* [2008] 1 FLR 533; *Stec v United Kingdom* (2006) 43 EHRR 47.
[217] *Bah v United Kingdom* (2012) 54 EHRR 21 [52].
[218] *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, 1444-1445.

thereby simply allows the court to subject discriminatory measures to justification.[219] Due to the approach of the European Court in relation to art.14 and the apparent acceptance of this by the domestic courts, the framework is in place for a private sector tenant to argue that the decision in *Pinnock* is discrimination without reasonable or objective justification.

4.7 Conclusion

The extent to which the Convention may have an effect in relationships between individuals continues to inspire lengthy debates. In view of the contributions of Beyleveld and Pattinson[220] it is clear that the rights contained in the Convention are, on their literal reading, applicable to horizontal litigation. However, there is less agreement around the precise model and extent of horizontal effect. There are those such as Wade and Raphael who advocate a robust approach to the HRA 1998 and horizontal litigation whereas there are those such as Phillipson who argues for a weaker form of horizontal effect without any obligation on the courts to develop the law in line with the Convention. The situation is made the more difficult given the courts aversion to aligning themselves to any one view despite several judgments demonstrating the characteristics of mutually exclusive approaches. Therefore, rather than seeking to find the one true model the debate may be better framed as highlighting a range of possible coexistent applications of the same principle.

In view of these findings, it is not submitted that any of the headings of Alexy's work at 4.4 become the sole method for determining the horizontal effect of human rights but rather that the courts utilise all of the above powers depending upon the circumstances and the parties appearing before the court. This approach sidesteps the issues which have plagued the courts to date and instead opts for a holistic approach which allows individuals to fully plead HRA 1998 rights. Moreover, it would allow the courts to develop domestic jurisprudence more freely and in keeping with the particular nuances of the common law and the UK Constitution. The true question therefore becomes not whether HRA 1998 rights will have horizontal effect but rather the 'balancing of [competing] interests'[221] which is exemplified in the requirements of art.8(2).[222]

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[219] *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117 [13].
[220] D Beyleveld and S D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) LQR 623.
[221] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 363.
[222] This question is considered in depth in Chapter 6.

In the sphere of housing law Alexy's theory allows the courts to approach statute and the common law with a view to reaching a Convention compliant interpretation. For example if the courts were dealing with s.7(3) of the Housing Act 1988 involving a local authority the court may resort to the level of state duties, alternatively if a private sector landlord sought to rely upon s.21 of the Housing Act 1988 the court may refer to the level of legal relations between private individuals. In either case the question will become whether any subsequent order would be proportionate and how proportionality may represent the competing interests of a range of parties which range from purely public bodies such as local authorities to tenants subject to private sector leases. The pressure to adopt this course of action is all the stronger due to art.14 which prohibits any unjustified discrimination in the application of Convention rights.

The difficulties of the current human rights approach within housing law necessitate a reconceptualization of the application of human rights. In light of the foregoing arguments the legal framework is in place for the domestic courts to grasp the human rights instruments available to the judiciary to ensure all people's homes are given the respect required and deserved. A concern flowing from this may be the curtailment of certainty in possession proceedings which are largely dealt with on a summary basis at present. However, it is demonstrated in Chapter 6 that the introduction of proportionality does not afford the courts blanket discretion nor in such circumstances is a landlord barred from recovering their property in all instances. Before dealing with possible conceptions of proportionality the nature of the public/private divide must be considered. The public/private divide is the theoretical backdrop which has informed s.6 of the HRA 1998's limitations. Therefore, whilst the legal framework critically analysed above might allow for these limitations to be softened there remain theoretical questions as to the basis for public law creations to reach into the private sphere.

5 The Public/Private Divide and its Effects in the Application of Article 8 to Housing Law

5.1 Introduction

The previous Chapters of this thesis have made the case that the courts' current approach to art.8 is unduly limited in two key ways. The first is assessed in Chapter 3 where the deep physical and mental connections a person feels towards their home were demonstrated. Chapter 3 concluded by arguing that these interests may be encompassed within art.8 and afforded weight within an assessment of the proportionality of a possession order. The connection which one feels towards their home exists regardless of the institutional character of their landlord. This leads to the analysis of horizontal effect in Chapter 4 which determined that art.8 is inherently horizontally applicable and, in various fashions, may have horizontal effect. However, the question which emerges from this practical assessment of art.8's scope and effect is how a creation of public law, which at the time of its drafting was understood to be addressed to the State and impliedly not interfere with matters outside the State's purview, might be utilised by private sector tenants. This question therefore requires a critical analysis of the public/private divide as maintained by the HRA 1998 in s.6 which limits the application of HRA rights to those instances involving public authorities, including the courts. This Chapter will therefore assess the basis of the public/private divide with a particular focus on the divide's effects in the application of art.8. The key concern of this Chapter is to determine the monolithic nature attributed to the divide by many writers and judgments.

The public/private divide and its position within common law jurisdictions has engaged commentators since the recognition of a discrete body of public law.[1] The role, if any, of the public/private divide is all the more noteworthy following the passage of the Human Rights Act 1998 (HRA 1998) which makes the provisions of the European Convention on Human Rights (the Convention) binding upon 'public

[1] See for example J Mitchell, 'The Cause and Effects of the Absence of a System of Public Law in the United Kingdom' (1963) PL 95; C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241; D Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1349; G Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 MLR 558; D Oliver, *Common Values and the Public/Private Divide* (Butterworths 1999); J Allison, 'Variation of View on English Legal Distinctions Between Public and Private' (2007) 66 Cambridge Law Journal 698.

authorities'.[2] The role of divide comes to the fore when arguing that art.8 of the Convention and the HRA 1998 ought to have horizontal effect, discussed in detail in Chapter 4. If it is accepted that art.8 of the Convention ought have both vertical and horizontal effect this doubts the idea that human rights exist to 'trace a fault-line between public and private spheres'[3] by imposing human rights duties upon only the public actors and not their private counterparts. This is in spite of the fact that private actors are often lawfully able to exercise their power against individuals to much the same effect as the State.[4] In view of these issues this Chapter identifies the precise nature of the public/private divide within English law and questions the continued appropriateness of this apparent binary legal construct in view of the arguments made in Chapter 4 as to the horizontal effect of art.8.

Understood as a bipolarity the public/private divide acts as a constraint on one of the core submissions of this work, that is that human rights considerations ought to be applicable in all instances where person's home is at risk, irrespective of the institutional nature of the parties. Human rights are commonly considered to be public law creations as they manage the relationship between the State and the individual.[5] The objectives of public law might be summarised as ensuring public bodies act fairly within their powers.[6] In the development of public law the courts have sought to delineate the occasions and the bodies which will be subject to judicial scrutiny thereby drawing a rudimentary divide between those instances calling for public law remedies as opposed to private law.[7] The lineage of public law is visible in the HRA 1998 which on its face applies only to those bodies amenable to judicial review.[8] In this sense human rights might be thought to exist autonomously from private law in an effort to regulate the relationship between State and individual.[9] Whereas private law is concerned with the legal relationships of

[2] Human Rights Act 1998 s.6.
[3] S Nield, 'Article 8 Respect for the Home: a Human Property Right?' (2013) 24 King's Law Journal 147, 150.
[4] R L Hale, 'Force and the State: A Comparison of "Political" and "Economic" Compulsion' (1935) 35 Columbia Law Review 149.
[5] M Rosenfeld, 'Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 International Journal of Constitutional Law 125, 126.
[6] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 WLR 1174.
[7] *O'Reilly v Mackman* [1983] 2 AC 237; *R v Panel on Takeover and Mergers ex p Datafin Plc* [1987] QB 815; *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207.
[8] Human Rights Act 1998 s.6.
[9] C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 241; G Vedel, *Droit Administratif* (5th edn, Presses Universitaires de France 1973) 46-47; J Bell, 'Public Law in Europe: Caught between the National, the Sub-National and the

individuals.[10] This view of private law lies at the heart of private property which may be reduced to the owner's ability to exclude others from one's land with a view to protect their autonomy.[11] However, even this apparent absolute is not as strong as it first appears when the wealth of interferences with private property are noted such as planning restrictions and environmental laws.[12] The idea of autonomy is noteworthy here as it has been understood by the courts as essentially a right to quiet enjoyment of one's property[13] rather than autonomy in the sense highlighted in Chapter 3. Moreover, if a public/private divide was drawn to include ideas beyond law then it would be non-contentious to consider the home private.[14] Therefore, to argue that human rights should play a role in instances where a person's home is at risk is to argue at the very least that the public/private divide is not to be conceived as a monolithic compartmentalisation of two discrete areas of law. This Chapter argues that rather than being a hard 'fault-line'[15] the divide ought to be conceived as a spectrum which would in turn allow for the courts to factor the characteristics of a particular case into any analysis of whether it may be proportionate to dispossess someone of their home.

5.2 Emergence of the Public/Private Divide

> 'What is public, and what is private, and who cares?'[16]

5.2.1 Historical Roots

The roots of the public/private divide are older than the English legal system with the distinction between public and private activities being recognised in Greek and Roman law.[17] Equally, calls for the elimination of the divide have existed for just as

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European' in Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 262-264.

[10] E J Weinrib, 'Private Law and Public Right' (2011) 61 University of Toronto Law Journal 191, 191.

[11] E J Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 74-75.

[12] Town and Country Planning Act 1990; Environmental Protection Act 1990.

[13] See generally the law around private nuisance, *Southport Corporation v Esso Petroleum* [1954] 2 QB 182, 195-203; *Hunter v Canary Wharf Ltd* [1996] AC 655; *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, 851-857.

[14] C M Rose, 'Psychologies of Property (and Why Property is not a Hawk/Dove Game)' in Penner and Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 275.

[15] S Nield, 'Article 8 Respect for the Home: a Human Property Right?' (2013) 24 King's Law Journal 147, 150.

[16] C D Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter' (1981-1982) 130 University of Pennsylvania Law Review 1441, 1506.

[17] R Kemp and A D Moore, 'Privacy' (2007) 25 Library Hi Tech 58, 59; D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2001) 1; N Rose, 'Beyond the Public/Private Division: Law, Power, and the Family' (1987) 14 Journal of Law and Society 61, 64.

long.[18] The idea of public and private spheres first received attention from English speaking writers with Locke.[19] It is upon the acquisition of private property that the nuances of Locke's ideas of the private sphere become clear in that Locke sees private property as allowing for the development of the self alongside the enjoyment of a person's land.[20] Locke's approach to the property rights which arose from civil society allows ' ... individuals the moral space to order their lives as they [see] fit ... [securing] a domain of private action free from public pressures.'[21] Encroaching upon this private domain with public power therefore would require 'weighty justification'.[22] Admittedly here Locke is concerned with acquisition of private property and the liberties attached to this rather than ideas of the home which were critically analysed in Chapter 3. However, as was established, the core principles remain the same in relation to the home, regardless of the specific form of legal tenure (or lack thereof), with the home forming the centre of one's existence which allows for a physical and metaphorical shelter away from the 'prying eyes'[23] of the public forum.[24] The home therefore exists as a private sphere, an enclave within the wider public sphere.[25] Even in Locke's writings which do not address human rights concerns, the lines of the public/private divide are visible and serve to enforce the principle that private law exists for the protection and proliferation of private property.[26] Moreover, in modern Western liberal societies public law has been blocked from gaining ground in any way which might weaken the 'most important' right, the right to property,[27] creating a 'republic of property'.[28] Private property therefore facilitates a private sphere in which an individual is usually free from the interference of the State and able to exercise autonomy.[29] However, the extent of

[18] Plato, *The Laws* bk V; R Kemp and A D Moore, 'Privacy' (2007) 25 Library Hi Tech 58, 60. See Chapter 3 for discussion of Greek virtue.
[19] J Locke, *The Second Treatise of Civil Government* (Project Gutenberg edn, 1690).
[20] Ibid ch 5.
[21] R Kemp and A D Moore, 'Privacy' (2007) 25 Library Hi Tech 58, 61.
[22] Ibid, 61.
[23] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 997.
[24] P Korosec-Serfaty, 'The Home from Attic to Cellar' (1984) 4 Journal of Environmental Psychology 303, 304; C M Rose, 'Psychologies of Property (and Why Property is not a Hawk/Dove Game)' in Penner and Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 275; L Fox O'Mahony, 'Eviction and the Public Interest: The Right to Respect for the Home in English Law' in Robin Paul Malloy and Michael Diamond (eds), *The Public Nature of Private Property* (Ashgate 2011).
[25] There is some support for this view from the work of Jürgen Habermas, see in particular J Habermas, *The Structural Transformation of the Public Sphere* (MIT Press 1962).
[26] See generally M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009) 9-15.
[27] Ibid 10.
[28] Ibid 15.
[29] The divide remains clear in the minds of the judiciary who have understood the core of art.8 of the European Convention on Human Rights to be concerned primarily with privacy, J A Sweeney and L Fox O'Mahony, 'The Displacement and Dispossession of Asylum Seekers:

this autonomy is perhaps overwrought when considered in light of contemporary limitations placed upon the owner of a property.[30] Montesquieu is more overt in his assessment of the distinction between public and private law. For Montesquieu, public law (or political law) affords liberty whilst private law (or civil law) secures private property.[31] For Montesquieu these two branches ought not intertwine. Montesquieu's view is based on the belief that the holding of private property is inherently virtuous and as such no public good may defeat this.[32] Montesquieu's approach does not provide any grounds by which the public/private divide might be altered to allow for art.8 to have a role in possession proceedings.

The recognition of a divide between public and private is also visible in the work of Mill in his conceptualisation of public and private spheres:[33]

> ... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection ... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[34]

For Mill there is a space around the individual and the individual's conduct which is private in nature and shall not be pierced but for instances in which another individual will be harmed.[35] In contrast to private conduct Mill refers to public power being exercised via public authorities at the behest of the majority of society.[36] These public and private activities each belong to their own sphere independently of one another.[37] Solely relying upon *On Liberty* it would appear that the only instance in which a person's liberty, that is for Mill the freedom to do as one wishes, may be infringed by a public authority is where harm will befall another.[38] Extrapolating this idea into landlord and tenant law, a tenant may only be

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Recalibrating the Legal Perspective' in James A Sweeney and Lorna Fox O'Mahony (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate Publishing 2013) 125-126.

[30] Town and Country Planning Act 1990; Environmental Protection Act 1990.

[31] M Cohen, 'Property and Sovereignty' (1927-1928) 13 Cornell Law Quarterly 8, 8.

[32] Ibid.

[33] J S Mill, *On Liberty* (Project Gutenberg edn, 1859).

[34] Ibid 17-18.

[35] Ibid 17.

[36] Ibid 7. See also J-J Rousseau, *The Social Contract and the Discourses* (Project Gutenberg 2014) ch VI.

[37] J S Mill, *On Liberty* (Project Gutenberg edn, 1859) 16-21; R Kemp and A D Moore, 'Privacy' (2007) 25 Library Hi Tech 58, 61.

[38] This view echoes the Lockean belief that an individual has ownership of themselves and their labour/property and the reason for entering society is the protection of oneself and one's belongings. For Locke entering society and the protection of one's property involves a cessation of some autonomy, see Chapter 3.

dispossessed of their home where there is no harm caused to the tenant. In the same example, however, an inability to dispossess might cause harm to a landlord. The harm principle is therefore flawed due to it not accounting for law or actions which do not fall tidily into either sphere. For the contemporary legal issues of this thesis Locke and Mill offer little guidance as they fail to see a middle ground where public and private law may intersect with one another. The same is true for socialist thinkers such as Marx who 'recognised the public status of private capital'.[39] This in turn leads to collective ownership in which the private is made to be public.[40] In this there is no middle ground between public and private. Marx's co-writer Engels is similarly accepting of a public/private divide, although like Marx Engels saw the divide as beneficial only for the bourgeoisie.[41] The Marxist solution to this is the deletion of the divide by essentially making all which is private public. However, this suffers from the same difficulties as classical liberal thinkers such as Locke in failing to appreciate the symbiotic nature of each realm. This nuance is clear in art.8 of the Convention and art.1 of the First Protocol. These provisions deal with ideas of the home and private property which would fall within the so-called private sphere yet these provisions are the product of public discourse in the form of human rights and so any bright line division is questionable.[42] The difficulties continue in the ability of public bodies, such as local authorities, that are able to exercise private functions such as entering contracts or acquiring property.[43] The line between the public and private is blurred further by the 'common rights' which may be acquired by individuals such as those relating to the environment.[44]

5.2.2 Early Common Law Application

The public/private divide in a legal context began to occupy political theorists into the 20th century,[45] however, this did not readily lead to English law following, facilitating, or recognising such a distinction.[46] Whilst civil jurisdictions recognised a divide between public and private law from their inception those jurisdictions

[39] D Slater, 'Public/Private' in Chris Jenks (ed), *Core Sociological Dichotomies* (Sage 1998) 142.
[40] Ibid 142.
[41] R D Lipschutz, 'Power, Politics and Global Civil Society' (2005) 33 Millenium: Journal of International Studies 747, 755.
[42] C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 256-257.
[43] Local Government Act 1972 s.111.
[44] K Woods, 'The Rights of (Future) Humans Qua Humans' (2016) 15 Journal of Human Rights 291.
[45] D Kennedy, 'Three Globalisations of Law and Legal Thought: 1850-2000' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development* (Cambridge University Press 2006) 22-26.
[46] M Shapiro, 'From Public Law to Public Policy, or the "Public" in "Public Law"' (1972) 5 PS 410.

using the common law have looked to develop the divide much later.[47] American law was the first common law jurisdiction to develop an overt public/private divide in a drive to:

> create a legal science that would sharply separate law from politics … [an] apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem "tyranny of the majority".[48]

There are hints of historical American scepticism of government and fears of majority rule rooted in revolutionary politics in this view.[49] Conceptualising law in this apolitical form serves to strengthen private rights at the expense of the public generally.[50] In the context of landlord and tenant law this might be seen as evident in the exceptional circumstances required by the courts before a landlord's right to recover their property will be defeated by human rights considerations, thereby giving preference to ascertainable property rights.[51] However, any pursuit of a 'sharp line' between public law and private law or public acts and private acts presents inherent impracticalities.[52] This is particularly evident in context-sensitive approaches adopted by the courts.[53] In the United States these issues may be seen in the difficulties the courts faced in the regulation of railways[54] or the realisation of racial equality.[55] In this sense it is perhaps unsurprising that the United States Supreme Court were required to comment on the legitimacy of a strict public/private divide in *Shelley v Kraemer*.[56] The case concerned the inclusion of a

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[47] See the following for discussion of the public/private divide in civil law systems, J H Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1968) 7 Jounal of Public Law 3; J Allison, *A Continental Distinction in the Common Law: a Historical and Comparative Perspective on English Public Law* (Clarendon Press 1996).

[48] M J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1423, 1425.

[49] For an account of this sentiment see generally D MCCullough, *John Adams* (Simon & Schuster Paperbacks 2001) 119-122, 370-376; R Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* (Oxford University Press 2005) 622-641, 669-685.

[50] R Pound, 'Liberty of Contract' (1908-1909) 18 Yale Law Journal 454, 461.

[51] *Re Citro (Domenico) (A Bankrupt)* [1991] Ch 142; *Re Holliday (A Bankrupt)* [1981] Ch 405; *Barca v Mears* [2004] EWHC 2170 (Ch), [2005] 2 FLR 1.

[52] M Cohen, 'The Basis of Contract' (1932-1933) 46 Harvard Law Review 553, 562.

[53] *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546; *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95; *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363..

[54] W Herrin, 'Government Regulation of Railways' (1913-1914) 2 California Law Review 87; A T Hadley, 'Private Monopolies and Public Rights' (1886) 1 The Quarterly Journal of Economics 28; R L Hale, 'Force and the State: A Comparison of "Political" and "Economic" Compulsion' (1935) 35 Columbia Law Review 149.

[55] *Civil Rights Cases* 109 US 3; *Brown v Board of Education* 347 US 483; *Shelley v Kraemer* 334 US 1; R S Kay, 'The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law' (1993) 10 Constitutional Commentary 329.

[56] *Shelley v Kraemer* 334 US 1.

restrictive covenant which sought to preclude the purchase of property by people of the 'Negro or Mongolian Race'.[57] The legality of the covenant turned on the interpretation given to the Fourteenth Amendment to the US Constitution which might be summarised as prohibiting the denial of constitutional rights to US citizens. This same argument is one aspect of the overall submission of Chapter 4 of this thesis, that HRA rights are inherently applicable and effective in all cases regardless of the character of the parties before the court.[58]

In determining the scope of the Fourteenth Amendment upon a covenant which had been agreed between individuals the court drew attention to the fact that the enforcement of such covenants was dependent upon State action through a court order.[59] The cases in which the courts have enforced these agreements are not cases where the courts have 'merely abstained from action, leaving private individuals free to impose such discriminations as they see fit.'[60] In light of this view the court adjudged the restrictive covenant to be unconstitutional and therefore unenforceable notwithstanding the private law underpinnings to the enforcement of restrictive covenants.[61] Herein the court appears to have recognised that where the State is called upon to enforce a promise or right effectively all law becomes public and subject to considerations over the constitutionality of the requested action.[62] There are echoes of this approach in the development of various areas of English law following the view that the court, as a public authority, is required to give effect to the HRA rights where possible.[63] Given the apparent ease with which the US Supreme Court reached its decision in *Shelley* it may be asked why the nature of the public/private divide has continued to enliven legal debate.[64] In the context of the US the continued referral to the public/private divide is attributed to the changing political attitudes which emerged in the latter half of the 20th century following World War 2. Prior to the War progressives in the US saw the State as the promoter

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[57] Ibid, 5.
[58] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS) [1]-[40].
[59] *Shelley v Kraemer* 334 US 1, 19.
[60] Ibid.
[61] Ibid, 17-18.
[62] This view is a tenet of the legal realist school of thought. See in particular E J Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 7; J H Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1968) 7 Jounal of Public Law 3, 13; H Shamir, 'The Public/Private Distinction Now: The Challenges of Privatisation and of the Regulatory State' (2014) 15 Theoretical Inquiries in Law 1, 7.
[63] See in particular the development of the law of privacy *Malone v Commissioner of Police of the Metropolis* [1979] Ch 344; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457; *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481.
[64] C D Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter' (1981-1982) 130 University of Pennsylvania Law Review 1441; M J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1423.

of the public interest. However, upon witnessing the emergence of totalitarian governments of Europe the function of the State was 'redefined as simply a reflection of a sum of the vectors of private conflict. Private self-interest … once again became the only legitimate political reality … '. [65] The same political attitudes were not contemporaneous within the UK, particularly after the War and the nationalisation that followed, nevertheless a discrete body of public did emerge.[66] On that basis it would appear that the divide is reactionary to historical and societal conditions rather than inherent in common law jurisdictions leaving open the potential for flexibility within any conception of the divide.[67]

5.2.3 Coming to England

Given the theoretical difficulties which arise from the public/private divide and the historic peculiarities of the common law it is unsurprising that English law took some time to recognise the existence of public law.[68] The most famous proclamation of the historical absence of public law in England comes from Dicey.[69] Calls from within the judiciary for the development of a discrete body of law to govern the action of the State increased in the 1960s and 1970s.[70] Prior to this period it was felt that administrative law was not necessary in England.[71] However, the development of public law came to be seen as necessary in curtailing 'the enormous post-war state apparatus'.[72] Prior to this an individual's ability to hold the State to account was limited to ancient historical instruments, such as Magna Carta, the Bill of Rights 1689, and habeas corpus, but these instruments could not be described as part of a discrete system of public law. The procedural aspects of the public/private divide took shape with the Rules of the Supreme Court (RSC) and later the Supreme Court Act 1981 (now the Senior Courts Act 1981)[73] which, unlike the RSC, 'can affect both procedure and substance alike'.[74] Therefore, with the enactment of s.31 of the Senior Courts Act 1981 the courts were afforded the power, in the form of judicial review, to make orders in favour of an individual where they were 'challenging the conduct of a

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[65] M J Horwitz, 'The History of the Public/Private Distinction' (1982) 130 University of Pennsylvania Law Review 1423, 1426-1427.
[66] J Hollowell (ed), *Britain Since 1945* (Blackwell Publishers 2003).
[67] J H Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1968) 7 Jounal of Public Law 3, 14; R S Kay, 'The State Action Doctrine, The Public-Private Distinction, and the Independence of Constitutional Law' (1993) 10 Constitutional Commentary 329, 358.
[68] Law Commission, *Remedies in Administrative Law* (Working Paper No 40, 1971) 29.
[69] A Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148, 152.
[70] *Ridge v Baldwin* [1964] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Gouriet v Union of Post Office Workers* [1978] AC 435.
[71] *Ridge v Baldwin* [1964] AC 40, 72.
[72] T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 13.
[73] Constitutional Reform Act 2005 sch 11 para 26.
[74] *O'Reilly v Mackman* [1983] 2 AC 237, 255.

public authority or a public body, or of anyone acting in the exercise of a public duty.'[75] On this definition the purpose of public law clearly overlaps with the intentions of human rights instruments which regulate the relationship between the individual and the State.[76] For example art.1 of the Convention makes plain that the signatories to the Convention are to secure the rights and freedoms of the Convention to all those in their jurisdiction. Moreover, the HRA 1998 itself seeks to secure these same rights and freedoms for individuals as against public authorities.[77] The public/private divide might therefore be seen as core to the constitutional angle of public law which aims to regulate relations between the State and individuals[78] this is as opposed to the relations between individuals which, if they are not part of public law, may be deduced to be part of private law.[79]

Whilst the burgeoning public law of the 20th century saw the relationship between State and individual as its primary concern, the protection of fundamental rights and freedoms did not feature within this newly developed framework as such. The idea that human rights ought to be protected through public law did not immediately receive credence as the common law was seen to already recognise and protect a number of such rights.[80] It is in this approach that we see the sanctity of an individual's property achieving a higher status through the operation of common law rights.[81] Specifically the principles of the common law recognised in *Entick v Carrington*[82] and *Semayne's Case*[83] are significant.[84] Notwithstanding this lineage the protection of fundamental rights is now often adjudged through the lens of

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[75] Ibid, 256.
[76] A Byrnes, 'Women, Feminism, and International Human Rights Law - Mythological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some Current Issues' (1988-1989) 12 Australian Year Book of International Law 205, 226-227; D Oliver, *Common Values and the Public/Private Divide* (Butterworths 1999) 84; A Barak, 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart 2001) 17.
[77] Human Rights Act 1998 s.6; S Nield, 'Article 8 Respect for the Home: a Human Property Right?' (2013) 24 King's Law Journal 147, 150; G Jurgens and F V Van Ommeren, 'The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide' (2012) 71 Cambridge Law Journal 172, 194.
[78] A Tomkins, *Public Law* (Oxford University Press 2003) 3; J Bell, 'Public Law in Europe: Caught between the National, the Sub-National and the European' in Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 262-264.
[79] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 182.
[80] T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 18; Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' (1992) PL 397; J A G Griffith, 'The Brave New World of Sir John Laws' (2000) 63 The Modern Law Review 159, 160-162.
[81] Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' (1992) PL 397, 404-405.
[82] *Entick v Carrington* 95 ER 807.
[83] *Semayne's Case* (1604) 5 Coke Rep 91.
[84] See also the speech of Lord Scarman in *Morris v Beardmore* [1981] AC 446, 463-466 recognising the common law's respect for the home.

judicial review.[85] For the purposes of housing law and possession proceedings in particular this is evident in *Kay v Lambeth*.[86] It is in instances such as this that rights-based public law is visible. There are elements of this within other areas of law such as family law[87] and employment law.[88] The passage of the HRA 1998 crystalizes this and reaches beyond the comparatively limited scope of judicial review with the Supreme Court now more than willing to tackle public law issues (particularly human rights applications).[89] However, the paradox within this is that the HRA 1998 explicitly retains a distinction between public law and private law with only public authorities being bound by the HRA rights.[90]

This distinction is visible in ss.6(1) and 6(3)(b) of the HRA 1998 which require any body performing a public function to act compatibly with HRA rights.[91] Despite this apparent retention of the public/private divide in s.6 there have been some instances of private actors being bound by rights contained in the HRA 1998. This is visible in public liability horizontality. The most illuminating examples of public liability horizontality are *Poplar Housing and Regeneration Community Association v Donoghue*,[92] *R (Heather) v The Leonard Cheshire Foundation*[93] and *Aston Cantlow v Wallbank*[94] Each of these cases involved art.8 of the Convention and so are particularly instructive as to the potential role of art.8 within housing law.

Poplar is an early consideration of s.6.[95] In assessing the correct approach to s.6 Lord Woolf found that in applying the HRA 1998 the courts should adopt a generous interpretation of s.6,[96] which would presumably extend beyond the traditional

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[85] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665.
[86] *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465.
[87] *F v Wirral Metropolitan Borough Council* [1991] Fam 69; *Re Angela Roddy (A Minor)* [2003] EWHC 2927 (Fam), [2004] EMLR 8 [29]-[33]; *Re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670.
[88] G S Morris and S S Fredman, 'Is There a Public/Private Labour Law Divide?' (1993) 14 Comparative Labour Law Journal 115; S Sedley, 'Public Law and Contractual Employment' (1994) 23 Industrial Law Journal 201; J Laws, 'Public Law and Employment Law: Abuse of Power' (1997) PL 455.
[89] S Shah and T Poole, 'The Impact of the Human Rights Act on the House of Lords' (2009) PL 347.
[90] Human Rights Act 1998 s.6.
[91] A L Young, 'Mapping Horiztonal Effect' in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press 2011) 21.
[92] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.
[93] *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936.
[94] *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546.
[95] *Poplar* was discussed in detail above at 4.3.4.
[96] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 67.

definition of a public authority as understood in judicial review and the requirement for there to be some public function.[97] However, his Lordship stopped short of finding that any private organisation carrying out functions on behalf of a public authority would be bound by the HRA 1998 instead noting the existence of hybrid bodies which may carry out both public and private functions. Nevertheless, where a seemingly private body performs public acts that body may be bound by the HRA 1998. This approach exacerbates the situation created by the courts following *Pinnock* with public sector tenants able to rely upon art.8 whilst private sector tenants are not. This differential approach 'is hard to justify in principle'[98] and highlights the importance of the second research question set out in Chapter 1 of this thesis as to the theoretical and legal basis for arbitrarily limiting art.8's application to local authority tenants.

The rights contained in the Convention are intended be 'practical and effective' rather than 'theoretical or illusory'.[99] On this basis it is difficult to envisage how the courts can continue to justify such an arbitrary distinction where dealing with a private landlord and tenant relationship. Arbitrary distinctions between public and private bodies are all the more concerning following *R (Heather) v Leonard Cheshire*[100] and *Aston Cantlow v Wallbank*.[101] *Leonard Cheshire* concerned a care home run by a charity. Those cared for by the charity were placed there by the local authority fulfilling a statutory duty to provide care. The residents were later moved to another residence following redevelopment of the original care home. The residents argued that the charity was a public authority for the purposes of s.6 and that the dispossession amounted to a breach of art.8.

In giving judgment in *Leonard Cheshire*, Lord Woolf phrased the question simply as being whether, by providing accommodation, the charity was: 'performing a public function?'[102] Surprisingly, given the generous interpretation which was detailed in *Poplar*, the court found that the charity was not a public authority as the local authority's statutory obligations were met by the authority arranging for and providing funding for the residents' care. However, the local authority's obligations

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[97] *R v Panel on Takeover and Mergers ex p Datafin Plc* [1987] QB 815; *R (West) v Lloyd's of London (Permission to Apply for Judicial Review)* [2003] EWHC 1189 (Admin); N Madge and C Sephton, *Housing Law Casebook* (4th edn, Legal Action Group 2008).
[98] I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 ICLQ 57, 77.
[99] *Airey v Ireland* (1979-80) 2 EHRR 305 [24]; *Belgian Linguistic Case* (1979-80) 1 EHRR 252.
[100] *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936.
[101] *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546.
[102] *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936 [17].

under the HRA 1998 were neither extinguished nor transferred to the charity upon entering a contract to provide care. The court held that the charity was not a public authority on the basis that there was no material difference in the treatment given to residents who were privately funded and those who were funded by the authority. The practical effects of art.8 were therefore limited.[103] This 'questionable'[104] approach does not prevent there being some public liability horizontal effect, but the scope for this form of horizontal effect appears limited on a reading of *Leonard Cheshire*.

Following the Court of Appeal's views in *Poplar* and *Leonard Cheshire*, the House of Lords again considered the concept of a public authority in *Aston Cantlow*. *Aston Cantlow* concerned a church council that chose to enforce their powers under the Chancel Repairs Act 1932 thereby requiring local residents to pay for repairs to the parish church. Bearing in mind *Poplar* and *Leonard Cheshire* Lord Nicholls found a distinction between public authorities and the Church of England, which is a purely religious organisation.[105] Therefore, the parish council was not bound by the HRA 1998. Furthermore, if the church council was a hybrid public authority, a private body able to commit public acts,[106] it would not be bound by the HRA 1998 in this case as the powers it was seeking to use were private in nature and were permitted by primary legislation thereby protecting the church council from liability.[107]

The remainder of the court came to similar conclusions as Lord Nicholls in determining that the church council was not a core public authority but via different avenues. Lord Hope focused particularly on the consequences of the Church of England being recognised as the established church, drawing attention to the fact that whilst the Church has no legal personality and although recognised by the State, it acted independently of government.[108] Lord Hobhouse took the view that the church council was neither a core or hybrid public authority and so the council was not bound to uphold HRA 1998 rights.[109] Lord Scott followed the same line as the other Law Lords concluding that the church council was not a core public authority.[110] However, Lord Scott found that the acts of the church council, at least in this case, were public acts but did not amount to a breach of the Convention

[103] Ibid [35].
[104] R Clayton, 'Developing Principles for Human Rights' (2002) 2 EHRLR 175, 182.
[105] *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546 [13].
[106] Human Rights Act 1998 ss.6(3)-6(5).
[107] Ibid s.6(2)(b); *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546 [19].
[108] *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546 [59]-[64].
[109] Ibid [86]-[88].
[110] Ibid [129].

rights.[111] Delivering the final speech Lord Rodger found that the church council was not a core public authority[112] and was not carrying out a public act.[113] The House of Lord's reluctance to adopt a comprehensive unified approach as to what will amount to a public authority further muddies the waters as to the effect the HRA 1998 and the public/private divide. This differential opinion moves judicial consideration away from the content and import of the rights at issue towards a procedural and institutional query.

Public liability horizontal effect may be attractive in principle but for the courts' narrow approach to public authorities thereby limiting the scope for horizontal effect. However, the core shortcoming of public liability horizontality remains. Only those instances involving some form of public authority will engage horizontal effect thereby undermining the public/private divide. This is a matter outside the control of the claimant. This approach is particularly problematic for housing law. Under a public liability horizontality model a great number of private tenants would not benefit from the protection of the HRA 1998 whilst their public sector counterparts would. Chapter 3 demonstrated that these tenants have much the same feelings towards their home as public sector tenants and so are no less deserving of protection. Public liability horizontality is at best only part of a broader framework which would allow for art.8 to have a role in private possession proceedings.

Based upon the above analysis, the retention and demarcation of public law and private law inherent in the HRA 1998 is problematic for the following reasons:

1. the judicial tools at hand to measure interferences with human rights may be mired in the limitations of judicial review which have influenced the recognition and role of proportionality in possession proceedings;[114]

2. the divide serves as an arbitrary limitation upon the HRA 1998 and its potential effect in horizontal proceedings;[115] and

3. if the courts are able to apply human rights principles between individuals, how can the divide between public law and private law continue to exist as a

[111] Ibid [131].
[112] Ibid [166].
[113] Ibid [171].
[114] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186; A Ramshaw, 'Southend-on-Sea v Armour: Proportionality Revisited' (2014) 17 JHL 98.
[115] P Craig, 'Public Law and Control Over Private Power' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 206.

hard 'fault-line'.[116] Thinking of the divide in this fashion suggests that there is no scope for the law to permeate and crossover where it is necessary thereby blocking the aspirational nature of human rights.[117]

5.3 What is Private Law and What is it For?

> Private law operates between parties who exist in the same plane, and are thus equal. Rights are in issue. In public law properly conceived there is an inequality; private right is in conflict with public interest in a quite different way.[118]

The primary concerns of this Chapter have been outlined above alongside the emergence of the public/private divide and recognition of a discrete body of public law within England and Wales. The topic of private law has only been alluded to in passing and so some attention will be paid to the idea of private law, as distinct from public law, before asking why it is seen as advantageous to have an area of law which is independent of public law concerns. It might be deduced private law is that which is not public. However, this seems to oversimplify the public/private distinction as it exists in the law today.

As established above public law has developed to regulate the relationship of the State and the individual. Therefore relationships between individuals fall outside of public law, in such relationships private law: ' ... exists to provide frameworks within which individuals can act voluntarily, and to provide remedies when they exceed the bounds of the acceptable use of private power.'[119] In some sense the aim therefore appears to be the 'just distribution of power'.[120] The question which arises following such a finding is what role the State, specifically the courts, ought to play in this space. Jansen and Michaels are instructive on this stating that the role of the State in private law ' ... could be regarded as a neutral authority to balance conflicting interests of two parties to find solutions for conflicts that are regarded as purely private.'[121] The aim of this pursuit would appear to cut to the core of Locke's reasons

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[116] S Nield, 'Article 8 Respect for the Home: a Human Property Right?' (2013) 24 King's Law Journal 147, 150.
[117] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151; A Tomkins, *Public Law* (Oxford University Press 2003) 1-18; Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1, 2012) [7.17].
[118] J Mitchell, 'The Cause and Effects of the Absence of a System of Public Law in the United Kingdom' (1963) PL 95, 102.
[119] J Bell, 'Public Law in Europe: Caught between the National, the Sub-National and the European' in Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) 262.
[120] J Laws, 'Public Law and Employment Law: Abuse of Power' (1997) PL 455, 455.
[121] N Jansen and R Michaels, 'Private Law and the State: Comparative Perceptions and Historical Observations' (2007) 2 Rabels Zeitschrift Für Ausländisches und Internationales Privatrecht 345, 348.

for entering civil society, that is to avoid a state of conflict which is within the interests of any sovereign to avoid and, moreover, supports the view that an individual's benefit of joining society is the protection of their private property.[122] Having established that private law aims to provide frameworks for areas regarded as purely private any follow up enquiry should ask what areas of law can be called *purely* private. A natural answer to this question may be that those bodies of law which seek to protect private property. This is problematic for it underestimates the multifarious aims law may have. For example, criminal damage is clearly concerned with the protection of property,[123] property being anything of 'a tangible nature, whether real or personal, including money'.[124] However, to argue that criminal damage is a form of private law would make the most earnest defender of private law recoil.[125] This is equally apparent in the case of housing legislation which seeks to recalibrate the common law relationship between landlord and tenant. Nevertheless, following the recognition of art.8's place within possession proceedings it is increasingly difficult to exclusively term the relationship between landlord and tenant private. Asking whether the law in question is solely concerned with the protection of private property therefore seems to be a difficult endeavour.

An alternative conception of private law suggests that common law (that is the common law that has been developed by the courts not that which describes the nature of English law in opposition to civil law) and private law are essentially synonymous.[126] However, this is equally problematic due to the development of fundamental rights in the common law which, prior to the emergence of public law in England and Wales, were seen as the primary protection available for the individual against the State.[127] Samuel determines that private law is dependent upon a range of factors including: the status and the nature of the relationship between the parties, the damage suffered, and the remedy which should be awarded.[128] Within these factors it is the status of the defendant which is of 'central

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[122] J Locke, *The Second Treatise of Civil Government* (Project Gutenberg edn, 1690) ch 3.
[123] Criminal Damage Act 1971 s.1.
[124] Ibid s.10(1). See Chapter 2 generally for discussion of private property and ownership.
[125] ' … [T]heorists have never been happy with treating criminal law as falling unambiguously in either camp [of public or private law].' A Erh-Soon Tay and E Kamenka, 'Public Law - Private Law' in Stanley I Benn and Gerald Gaus (eds), *Public and Private in Social Life* (Croom Helm 1983) 78.
[126] R Pound, 'Public Law and Private Law' (1939) XXIV Cornell Law Quarterly 469, 470. See also A Dicey, *Law of the Constitution* (3rd edn, Macmillan and Co 1889); A Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148; G Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 MLR 558, 562.
[127] A Dicey, *Law of the Constitution* (3rd edn, Macmillan and Co 1889).
[128] G Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 MLR 558, 566-567.

importance' to deciding the level of duty to impose upon a party.[129] In other words the State ought to be under a more onerous obligation than an individual.[130] On this view the relationship between a landlord and tenant becomes particularly interesting. Public landlords (including local authorities and, in some cases, housing associations) are under statutory duties to provide housing to those who are deemed to be in need due to prescribed vulnerabilities or homelessness.[131] Whilst private landlords are under no such duty to house those in need.[132] These disparate duties (or lack thereof) are echoed in anti-social behaviour legislation which allows for local authorities to apply to the court directly for an injunction against anti-social behaviour[133] or seek a reduction in the security of tenure afforded to tenants.[134] Private landlords on the other hand must rely upon the assent of the police before any actions may be taken under anti-social behaviour legislation.[135] Moreover, private landlords are not be under a duty to alleviate nuisances caused by their other tenants but for those instances in which there has been a breach of covenant.[136] There is a clear difference in the expectations placed upon public and private landlords. For Samuel these differential duties might suggest a more onerous obligation resting on a local authority over a private landlord. However, this would contradict the horizontal applicability of art.8 as established in Chapter 4. Samuel's suggestion that private law is linked with the status and relationship of the parties seems something which ought to be considered by the court under art.8(2) rather than as a boundary for the application of fundamental rights. It would be at this same stage that a private landlord's own rights under art.1 of the First Protocol would be considered.

Samuel's relational angle to private law is also key to Weinrib's study of private law. For Weinrib identifying the character of private law through its supposed aims is

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[129] Ibid, 567.
[130] A Williams, 'Strasbourg's Public-Private Divide and the British Bill of Rights' (2015) EHRLR 617; A Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998: Private Contractors, Rights-Stripping, and "Chameleonic" Horizontal Effect' (2011) PL 136.
[131] See for example Housing Act 1996 pt VII.
[132] The nearest a private landlord comes to such obligations are arrangements in which a local authority complies with their duty by utilising the assistance of a private landlord's property, Housing Act 1996 ss.188-189, s.209.
[133] Anti-Social Behaviour, Crime, and Policing Act 2014 s.5(1).
[134] Housing Act 1985 s.82A. This is in addition to the inverse situation in which a public landlord may opt for an introductory tenancy scheme requiring a tenant to demonstrate their good behaviour ahead of gaining security of tenure, see Housing Act 1996 ss.124-143.
[135] Anti-Social Behaviour, Crime, and Policing Act 2014 s.5. Private landlords themselves are omitted from the bodies who may apply directly to the court, see Anti-Social Behaviour, Crime, and Policing Act 2014 s.20.
[136] *Smith v Scott* [1973] Ch 314; *Hussain v Lancaster City Council* [2000] QB 1; *Mowan v Wandsworth LBC* (2001) 33 HLR 56.

counterintuitive. Private law may only be understood from an internal perspective with an acceptance of the interrelated nature of a parties' relationship at the exclusion of any question of the effect a court's judgment may have upon those not party to the litigation.[137] This understanding of private law separates adjudication from legislation putting the arguments of the litigants centre stage making the internal coherence of the law equally as important as the outcome in a given case. The outcome of this for Weinrib is a repository of 'collective wisdom'[138] that is self-correcting and able to 'work itself pure'.[139] Weinrib's views carry an air of romanticism reminiscent of the old judicial view of the common law as a self defining phenomenon which has since lost support.[140]

Beyond the romanticism of Weinrib's views his approach is its inherently insular making the common law averse to considering the wider ramifications that it may have. Although the private relationship at hand might seem narrow the precedent set in the common law doubtlessly has a wider effect upon the public.[141] Related to this criticism is the role of corrective justice in Weinrib's theory, corrective justice being 'the idea that liability rectifies the injustice inflicted by one person on another'.[142] For Weinrib corrective justice is 'the unifying structure that renders private law relationships immanently intelligible.'[143] This conception of justice is broadly contrary to distributive justice which 'deals with the distribution of whatever is divisible … among the participants in a political community … [dividing] a benefit or burden in accordance with some criterion that compares the relative merits of the participants'.[144] Conceiving private law within the terms of corrective justice is problematic for the following reasons; it makes the assumption that the parties are equal (either in their bargaining position or their holdings) prior to whatever circumstances have led to the matter reaching the courts and it does not accord with the approach the common law has taken in relation to those relations in which there is an imbalance of power. Such imbalances of power exist in landlord and tenant relationships. This is the case for both public and private sector relationships in which it is straightforward to conceive a landlord being in a stronger

[137] E J Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 12.
[138] Ibid 12-13.
[139] Ibid 13.
[140] J Reid, 'The Judge as Law Maker' (1972) 12 JSPTL 22.
[141] See for example the contractual interpretation given to mortgage agreements by the courts, L Whitehouse, 'The Home-Owner: Citizen or Consumer?' in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press 1998).
[142] E J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 349.
[143] E J Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 19.
[144] E J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 349.

bargaining position to their tenants. A further shortcoming in Weinrib's approach stems from a focus upon damages as a pervasive remedy in private law. Clearly such a focus does not accord with instances in which a person's home is at risk, in such cases a court may grant an order for possession or not. Moreover, Weinrib's approach does not accord with the approach of the court in the development of the foundations of landlord and tenant law which seek to ensure that tenants, who are typically the weaker party in tenancy agreements, enjoy protection from the law.[145]

The shortcomings of Weinrib's theory of private law become more pronounced upon a further analysis of the landlord and tenant relationship. A landlord and tenant each have broadly overlapping interests in the property that links them together. For a landlord most often this will take the form of rent received from the tenant.[146] For a tenant their interest is occupation which will be secured through the payment of rent and keeping the property in a tenant-like manner so that they may remain in occupation. However, this is an over-simplification of the current housing landscape with tenants renting from a local authority, a registered social landlord, or another individual. It is here that Samuel and Weinrib's relationship based approach to the public/private divide becomes strained, this is in spite of the fact that the rules around the creation of a lease are largely based in the common law and so following Samuel and Weinrib within private law.[147] A rigid application of the public/private divide based upon the relationship of the parties has given rise to an absurd application of art.8 of the Convention with tenants of local authorities able to rely upon the protections afforded by art.8 whilst non-local authority tenants are excluded. This seems to be an affront to the aspirations of the Convention and the further realisation of human rights to everyone within the signatories' jurisdiction.[148] From another more practical view, as discussed in Chapter 1, this approach is difficult to justify in the sense that tenants are often not in a position to choose their landlord as such rather they will choose their home based upon means, location, and social connections.[149] In such situations it will be these factors that dictate the ability for someone to retain their home in the face of a landlord who

[145] *Street v Mountford* [1985] AC 809.
[146] Law of Property Act 1925 s.205(xxiii); *Arden v Pullen* 152 ER 492; *Henley v Bloom* [2010] EWCA Civ 202, [2010] 1 WLR 1770.
[147] *Street v Mountford* [1985] AC 809.
[148] European Convention on Human Rights art.1.
[149] See generally A Buttimer, 'Home, Reach, and the Sense of Place' in Buttimer and Seamon (eds), *The Human Experience of Space and Place* (St Martin's Press 1980); J Malpas, *Place and Experience: A Philosopical Topography* (Cambridge University Press 1999); L Fox O'Mahony and J A Sweeney, 'The Idea of Home in Law: Displacement and Dispossession' in Sweeney and Fox O'Mahony (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate Publishing 2013).

wishes to recover possession. It seems ill-judged to leave the application of human rights to chance and as a result the above private law theories in support of a hard divide must be rejected as they would allow for the contravention of an individual's art.8 rights whilst their neighbour may be protected by the same.[150]

The public/private divide is tenuously present in the Convention at art.34 which states that only States may be the respondents in applications made by those who allege human rights infringements.[151] Article 34 impliedly requires the European Court to adjudge the distinction between a State and an individual.[152] However, the question as to the distinction between public and private law for the European Court is less nuanced than that experienced in English courts. If it is determined that an application is validly made against a State then the matter will be heard, if not then the Convention will have no bearing on the case (in the eyes of the European Court). Therefore, there has not been an opportunity for the European Court to consider the nature of the public/private divide due to private actors not being within the remit of the court due to its institutional limitations discussed at 2.2.2 above. The closest the court has come to recognising the role of private actors in breaching the human rights of other individuals is within the scope of positive obligations.[153] The consequence of this for this study is a dearth of overt guidance from the European Court of Human Rights on the nature of the public/private divide. In elucidating the public/private divide the domestic courts are more vocal and provide grounds for arguing that there may be a reconceptualisation of what we understand to be public or private.

5.4 Finding an Alternative Divide

> ... [S]ome may wish to press the search for some general essence of public/private. But I doubt that the prospective rewards would warrant the effort. For what we need is not merely a line (if we could produce it) that clearly and intelligibly satisfies our intuitive notions about public and private in general. We need definitions that suit specific legal purposes, yielding whatever division is appropriate to the legal consequences that currently are, or should be, attached.[154]

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[150] This is the converse to the idea that public law will shelter public authorities from liability, see C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 246.
[151] T Allen, *Property and the Human Rights Act 1998* (Bloomsbury Publishing 2005) ch 8.
[152] A Williams, 'Strasbourg's Public-Private Divide and the British Bill of Rights' (2015) EHRLR 617, 618.
[153] See for example *A v United Kingdom* (1988) 10 EHRR CD149; *Moreno Gomez v Spain* (2005) 41 EHRR 40.
[154] C D Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter' (1981-1982) 130 University of Pennsylvania Law Review 1441, 1448.

Rather than grappling with the difficulties presented by the divide it may instead be the case that 'the "public/private" classification is today irrelevant and devoid of intrinsic merit'.[155] The difficulties with the current approach for the individual are set out by Cornu:

> A traffic accident, in public as in private law, possesses the same characteristics. What does it matter whether the state or a private individual owns the vehicle? It is the victim who is in each case the focal point and his interests are the same throughout. At this level, the frontiers between public and private law necessarily disappear.[156]

Cornu writes from a civil law perspective. However, in the brief scenario outlined above there is nothing unique to take away from the fact that, in either a civil law or common law jurisdiction, the victim's interests are the same regardless of the character of her oppressor. Applying this same view to a lease, leases with either a local authority or a private individual feature largely the same characteristics. In each case the interest of the tenant in staying in their home permeates throughout proceedings. Therefore, on this view the distinction between public and private ought to disappear, allowing any tenant to rely upon art.8 of the Convention in protecting their home.

Arguments in favour of differential treatment of tenants are threefold. The first rests on the legal machinations of the HRA 1998 which seeks to provide guidance on those bodies which will be bound by the Act. This first argument has much in common with the debate around horizontal effect. Those arguments are not repeated here but for reiteration that there is scope within the framework of the HRA 1998 for the rights contained therein to have a robust application in all proceedings where a person's home is at risk. The second rests on the aims of the legislation which governs private sector tenancies. For example the Housing Act 1988 sought to reduce the security enjoyed by those that make their home in the private rented sector.[157] The Housing Act 1988 aimed to 'put new life into the independent rented sector'[158] by striking a balance between the interests of landlord and tenant, allowing a 'reasonable return' on a landlord's investment and 'reasonable' security of tenure respectively.[159] On the face of these aims there seems to be little conflict with art.8 and art.1 of the First Protocol and the inherent fair

[155] C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 250.
[156] G Cornu, *Etude Comparee de la Responsabilite Delictuelle en Droit Prive et en Droit Public* (Reims, Moto-Braine 1951) 74.
[157] See also Housing Act 1996.
[158] Department for the Environment, *Housing: The Government's Proposals* (Cm 214, 1987) 2.
[159] Ibid 10.

balance the Convention aims to strike.[160] This pursuit for balance would fairly protect the landlord's economic interests in their property.[161] However, the case law has demonstrated that, due to the mandatory nature of certain grounds for possession,[162] there is a stark preference for the interests of the landlord. This preference for the landlord is in spite of the non-legal interests that attach to a person's home which have largely been underplayed by the courts in their assessment of art.8. Related to these shortcomings is a lack of appreciation from the courts that consideration of art.8 in private possession proceedings would concern art.1 of the First Protocol thereby calibrating any proportionality analysis to the facts at hand.

Thirdly, if the law is sensitive to the institutional nature of the parties there are extra-legal characteristics of those in each sector which necessitate those in the public sector having increased protection. The lion's share (58%) of those in the private rented sector are aged 25-44[163] whereas those in the public sector tend 'to be more evenly spread across the age groups.'[164] In addition to this 85% of private renters are in employment or full-time education.[165] Based upon this it could be argued that those within the private rented sector are more resilient, and therefore more able to find a new home, than their public counterparts. However, this overlooks the economic pressures placed upon those making their home in the private sector who must pay comparatively higher rents.[166] Therefore, the economic flexibility of those in private sector is perhaps overestimated.[167] Moreover, there are

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[160] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (Application No 44302/02, Merits and Just Satisfaction, 30 August 2007) [53]; *Goodwin v United Kingdom* (2002) 35 EHRR 18 (Application No 28957/95, Merits and Just Satisfaction, 11 July 2002) [72]; *Cossey v United Kingdom* (1990) 13 EHRR 622 [37].

[161] The application of proportionality will be discussed in detail Chapter 6. At this stage the public/private divide in the jurisprudence of the European Court of Human Rights is noteworthy, particularly the '…"selflessness" principle; that is, the idea that the State differs fundamentally from the individual in institutional terms because it is under a duty to act "selflessly", in the public interest rather than for its own ends.' A Williams, 'Strasbourg's Public-Private Divide and the British Bill of Rights' (2015) EHRLR 617.

[162] Housing Act 1988 sch 2 pt I.

[163] Department for Communities and Local Government, *English Housing Survey: Households* (Annual Report on England's Households 2013-14, 2015) 12.

[164] Ibid 29-30.

[165] Department for Communities and Local Government, *English Housing Survey* (Private Rented Sector Report, 2014-15, 2016).

[166] Those in the private sector spend 43% of their income on rent whereas public renters spend 31% of their income on rent, Department for Communities and Local Government, *English Housing Survey: Households* (Annual Report on England's Households 2013-14, 2015) 35.

[167] L Elliott and H Osborne, 'Under-35s in the UK Face Becoming Permanent Renters, Warns Thinktank' (*The Guardian*, 13 February 2016) <http://www.theguardian.com/society/2016/feb/13/under-35s-in-the-uk-face-becoming-permanent-renters-warns-thinktank> accessed 15 February 2016.

increasing numbers of dependent children in the private sector whilst the number of children in other tenures (owner-occupied properties and public sector tenancies) remains steady.[168] The feelings children may have towards their home were explored in Chapter 3, it was particularly noted that children often experience the home as a place of identity formation and sanctuary. These feelings are likely to be particularly prevalent in the private sector in which the majority of dependent children are under 5 years old.[169] In denying art.8's protection for private sector tenants the home interests held by dependent children go unheard. This is particularly concerning as those with dependents are often most at risk of losing their home due to difficulties with paying rent.[170]

Those in the private sector are typically more economically active than those in the public sector. This is evident in the common desire to move into owner-occupation among affluent tenants in the private sector in spite of the circumstantial unlikelihood of owning a home.[171] However, it must be remembered that there is a rump of tenants in the private rented sector who expect to make their long term home in a sector which offers little statutory protection.[172] Of those tenants who do not expect to be able to move to owner-occupation, 55% plan to stay in the private rented sector long term.[173] Those in such circumstances have subsequently been barred from the protection offered by art.8. Exacerbating this problem is the limited availability of public sector housing,[174] leaving private renters to make the best of their trying circumstances. The product of these problems taken together is the dominance of the private rented sector over both owner-occupation public sector housing, with a generation of people 'permanent renters'[175] unable to save for owner-occupation due to high rents.[176] These high rents are not only locking people into the private rented sector but they are also depriving renters of other basic

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168 Department for Communities and Local Government, *English Housing Survey: Households* (Annual Report on England's Households 2013-14, 2015) 32.
169 Ibid 70.
170 Ibid 75.
171 Ibid 79.
172 Housing Act 1988; Housing Act 1996.
173 Department for Communities and Local Government, *English Housing Survey: Households* (Annual Report on England's Households 2013-14, 2015) 79.
174 Department for Communities and Local Government, 'Table 671: Annual Right to Buy Sales for England' (*Social Housing Sales (Including Right to Buy and Transfers),* 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406316/LT_671.xlsx> accessed 13 June 2016.
175 L Elliott and H Osborne, 'Under-35s in the UK Face Becoming Permanent Renters, Warns Thinktank' (*The Guardian,* 13 February 2016) <http://www.theguardian.com/society/2016/feb/13/under-35s-in-the-uk-face-becoming-permanent-renters-warns-thinktank> accessed 15 February 2016.
176 R Walker and S Jeraj, *The Rent Trap: How We Fell Into It and How We Get Out of It* (Pluto Press 2016) 32.

necessities due to the money spent on housing. Despite housing charities, Shelter and the Joseph Rowntree Foundation, advising that individuals should spend no more than a third of their income on housing the price of renting in many places in England exceeds this benchmark.[177]

Fortunately for the growing number of people in the private rented sector, Harlow's work recognises the difficulties which have arisen in applying a rigid division between public and private authorities under the HRA 1998.[178] As referenced above, s.6(1) of the HRA 1998 makes it unlawful for a public authority to act in contravention of the Convention rights. It is s.6 of the HRA 1998 which has led the Supreme Court to find that art.8 allows a public sector tenant to have the proportionality of any possession order considered and, if it would be disproportionate to make an order, the landlord cannot recover possession.[179] The courts have also concluded that registered social landlords ought to pay attention to the HRA 1998 which presents further theoretical difficulties.[180] This is notable in the recognition of 'hybrid public authorities'.[181]

The recognition of such bodies draws question marks over the rigid approach of Samuel explained above and strengthens the view that the divide appears to be fact specific[182] and a judicial tool to make or rather mask value judgments.[183] This is increasingly the case in modern life where public and private institutions, such as local authorities, registered social landlords, and private landlords, 'carry on identical functions which are allocated in a haphazard fashion.'[184] On that basis there seems little sense in maintaining a strict divide given its poor structural integrity. This sharing or parity of functions in the modern legal landscape doubts the probity of any strict divide between so-called public and private actors. If the basis for a discrete body of public law is to account for power held by the State in opposition to the individual this reasoning falls away where private actors possess

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[177] P Sherlock, D Wainwright and P Bradshaw, "Sky-High' Rental Hotspots Across England Revealed' (*BBC,* 5 August 2016) <http://www.bbc.co.uk/news/uk-england-36794222> accessed 5 August 2016.
[178] C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 256.
[179] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186.
[180] *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363.
[181] *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 [30]; *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363 [27].
[182] *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.
[183] M Weaver, 'Herbert, Hercules and the Plural Society' (1978) 41 MLR 660; C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 265.
[184] C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241, 257.

the same ability to negatively affect another's life, after all 'not all wrecked lives are caused by governments.'[185] However, given that the divide seems trenchant in the minds of the judiciary dissolution of the divide is unrealistic at this time and sacrifices the jurisprudence which has developed to date.[186]

Complete destruction of the public/private divide might seem attractive on the basis of the above difficulties, but abolition fails to account for the differing competencies of the actors which may have to consider human rights.[187] The difficulties presented by a deletion of the public/private are explored by Chinkin[188] and Schoenhard.[189] Chinkin accepts that drawing lines between public and private spheres in legal and non-legal disciplines is fraught with difficulty.[190] Despite this the divide is pervasive in 'Western liberal thought' making any attempts to separate the legal understanding of the divide from the philosophical conception fruitless.[191] Notwithstanding the difficulties in drawing a bright-line between public and private there is no doubt utility in retaining these archetypal understandings in a 'nuanced and contextual'[192] approach. This approach is succinctly put by Schoenhard:

> the public/private distinction remains … necessary to adjudication of fundamental constitutional issues as well as issues in, among other areas, corporations and securities law. Unfortunately, the traditional, two-dimensional approaches to public and private result in inconsistencies …[193]

With this in mind it would appear that a context sensitive approach to the public/private divide would take account of the criticisms towards the current framework but account for the differing competencies of those who might defend

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[185] Peter Archer MP, HC Deb 2 April 1971, vol 814, cols 1861-1862.
[186] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 170-171.
[187] D Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *Administrative Law* (Hart 1997); D Oliver, *Common Values and the Public/Private Divide* (Butterworths 1999); C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241.
[188] C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387.
[189] P M Schoenhard, 'A Three-Dimensional Approach to the Public-Private Distinction' (2008) Utah Law Review 635.
[190] The difficulties drawing a hard line between public and private spheres, and the responsibilities which flow from each, are visible in non-legal areas such as the feelings a person may have to the most visible part of the home, the garden, N Blomley, 'The Borrowed View: Privacy, Propriety, and the Entanglements of Property' (2005) 30 Law and Social Inquiry 617.
[191] C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 389.
[192] Ibid, 395. See also P M Schoenhard, 'A Three-Dimensional Approach to the Public-Private Distinction' (2008) Utah Law Review 635, 635-636.
[193] P M Schoenhard, 'A Three-Dimensional Approach to the Public-Private Distinction' (2008) Utah Law Review 635, 663.

human rights claims. Whatever conception of the public/private divide replaces the status quo must account for the spectrum of circumstances which come before the county court in possession lists. This is particularly pressing in possession proceedings with local authorities, registered social landlords, and private landlords all vying for supremacy against the interests of tenants suggesting that the courts ought to have some latitude to account for the context of a given case. This is evident in the statutory duties owed by local authorities and housing associations to house those who are homeless or deemed vulnerable.[194] Conversely private landlords are not subject to these duties and instead reasonably look to rent their stock to produce profits. Therefore, in dispossessing a tenant a local authority will often be looking to achieve vacant possession so that their statutory duties may be more effectively fulfilled such as where property is under-occupied.[195] A landlord's objective in such cases is in the least 'arguably sufficiently important to justify'[196] limiting art.8. In the case of a private landlord the method by which dispossession is achieved will be based in statute[197] or common law[198] however the objective of dispossession is encapsulated by art.1 of the First Protocol to the Convention – the peaceful enjoyment of one's possessions. These objectives are discrete and so to have an alternative public/private divide which does not take account of these disparate institutional objectives would be ill-suited to the wide range of possession claims which come before the courts. The key for any new model is therefore context sensitivity.

5.5 Diluting the Divide

> [A strict separation of the public/private divide] … proceeds from the shared assumption that the flow of values through public and private law is essentially uni-directional. That is, either public law or private law is the critical locus of value but not both … In fact the relationship between public and private law is better understood as deeply integrated and mutually constitutive.[199]

The foregoing discussion above has demonstrated two opposing views as to the future of the public/private divide with Samuel advocating the retention of the divide due to it allowing the courts to hold the State to a higher standard than individuals whilst Harlow doubts the utility of the divide due to its theoretical instability and its apparent arbitrary nature. Each approach has its strengths and

[194] Housing Act 1996 pt VII.
[195] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9.
[196] This concept is discussed in detail at 6.3.1.
[197] Housing Act 1988 s.21.
[198] *Hammersmith v Monk* [1992] 1 AC 478.
[199] M Moran, 'The Mutually Constitutive Nature of Public and Private Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart 2009) 17.

weaknesses for the following reasons. Samuel's approach would allow the courts to hold State bodies to account and ensure they act within their powers in a robust fashion. However, this would be at the expense of human rights principles playing a role in private proceedings where they are often most needed. For example in the realm of housing law private tenants typically enjoy low security of tenure yet are the demographic excluded from art.8 protection. Harlow's approach to the divide would allow for the blanket application of human rights to all cases. The trouble with this approach is that the courts would be unable to implement a nuanced approach dependent upon the circumstances of the case. Each approach is clearly problematic. Instead a third way should be sought which appreciates the 'profound connection'[200] between public and private, is sensitive to the difficulty in separating public and private,[201] and advocates the fusion of the divide allowing courts to utilise the remedies of either branch where necessary. In other words, the court must ask what the context of the case requires. An assessment of proportionality, discussed in detail in Chapter 6, goes some way in achieving this, however, before one can consider proportionality the theoretical justification for proportionality playing any role in private sector possession proceedings must be made out. This is particularly so given that the courts' aversion to allowing for proportionality to play a part in possession proceedings to date has been based upon a strict understanding of the public/private divide in which those actors which are purely private are free from any art.8 considerations.[202]

Diluting the public/private divide begins with recognising that there are 'underlying common values' throughout the law.[203] These common values are not legal in character but rather have an aspirational tone akin to the underlying values of the Convention and the HRA 1998.[204] Oliver cites the values of 'dignity, autonomy, respect, status, and security' which in turn link into three paramount values: 'democracy, citizenship, and participation'.[205] Each of these five common values are present in cases where the courts are asked to dispossess someone of their home. Firstly, there is the dignity which flows from a person having a home to call their

[200] N Blomley, 'The Borrowed View: Privacy, Propriety, and the Entanglements of Property' (2005) 30 Law and Social Inquiry 617, 621.
[201] On this point see in particular P Craig, 'Public Law and Control Over Private Power' in Taggart (ed), *The Province of Administrative Law* (Hart 1997); M Aronson, 'A Public Lawyer's Response to Privitisation and Outsourcing' in Michael Taggart (ed), *Administrative Law* (Hart 1997).
[202] See for example *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS).
[203] D Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' (1997) PL 630, 630.
[204] European Convention on Human Rights preamble; Human Rights Act 1998 preamble.
[205] D Oliver, 'The Underlying Values of Public and Private Law' in Taggart (ed), *Administrative Law* (Hart 1997) 225.

own. Secondly, there is the autonomy a person achieves by having a home. That is the autonomy to exclude others and develop a conception of oneself,[206] this autonomy in itself is a key part of the concept of human dignity conceptualised by Barak.[207] Thirdly, respect is given to a person's home and the homes of others through operation of the law.[208] Fourthly, a person's status together with that of their family may be tied up in the home.[209] Lastly, security is at play where a person's home is at risk in two senses. There is the financial investment that people make in their home which may be lost and also a wider sense of security in that a person's home is a shelter from the outside world which may be lost.[210] This approach to common values turns the focus from the decision itself and to 'the significance of the action or decision for the individuals affected by it'.[211] The significance of any action can then be fed into the court's proportionality assessment.

In possession proceedings a person now has the opportunity to argue that it would be disproportionate for a local authority to remove them from their home in light of art.8. Herein the common values of domestic judicial review and the application of proportionality in human rights are visible. However, the problem of crossing the divide at this stage remains clear with both judicial review and human rights acting in areas preoccupied with the exercise of so-called public power.[212] Oliver's common values are nonetheless heartening in that they recognise the conflicting values which are to be balanced with competing interests.[213] This is particularly pertinent where there is an imbalance of power between the parties in which one party may infringe

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[206] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957; M J Radin, *Reinterpreting Property* (University of Chicago Press 2009); L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 345; *Bensaid v United Kingdom* (2001) 33 EHRR 10.

[207] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 1-8.

[208] European Convention on Human Rights art.8 and art.1 of the First Protocol. See also the law of trespass *Entick v Carrington* (1765) 19 Howell's State Trials 1029; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384; *Drane v Evangelou* [1978] 1 WLR 455.

[209] S Bright, 'Dispossession for Arrears: The Weight of Home in English Law' in James A Sweeney and Lorna Fox O'Mahony (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate Publishing 2013).

[210] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 146-167; K Hollingsworth, 'Assuming Responsibility for Incarcerated Children: A Rights Case for Care-Based Homes' (2014) 67 Current Legal Problems 99, 127; A Buyse, 'Strings Attached: the Concept of "Home" in the Case Law of the European Court of Human Rights' (2006) EHRLR 294, 306.

[211] D Oliver, 'The Underlying Values of Public and Private Law' in Taggart (ed), *Administrative Law* (Hart 1997) 220.

[212] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 WLR 1174; Human Rights Act 1998 s.6.

[213] D Oliver, 'The Underlying Values of Public and Private Law' in Taggart (ed), *Administrative Law* (Hart 1997) 224.

upon the dignity, autonomy, respect, security, or status of the weaker party.[214] The trouble with these findings is that they remain restricted in the public realm of the public/private divide. However, there are instances in the private realm which reflect Oliver's common values which are particularly pertinent to the housing space.

The common values cited by Oliver and identified above in relation to public law are present in private law. These are evident in common law rules which seek to address the imbalance of power between individuals.[215] For example this is the case in housing law which has for the majority of the 20th century seen statutory intervention in an effort to provide some security of tenure to tenants who are often in an imbalanced relationship with their landlord. Within this approach is the weighing up of the positive and negative implications for the parties involved[216] which shows a parallel backdrop to common values which has been present in public law following the emergence of contemporary judicial review.[217] Given the statutory basis for the mandatory termination of tenancies in the majority of cases,[218] there is also an argument to be made that the power exercised by landlords in these cases is in itself public in nature and therefore should be subject to public law oversight.[219] This links back to the idea that statutes act as an expression of the will of Parliament in its position as a legislature whose mandate flows from the majority of the public and is given effect by the courts.[220] These ideas are not limited to overt housing legislation or case law. The tort of trespass has been stretched to allow for the protection of a person's home notwithstanding the absence of property ownership in limited circumstances.[221] The protection of a vulnerable person from the stronger position of another individual or group is also present in the development of the tort of misuse of private information.[222] Clearly these common values on each side of the public/private divide seek to protect all aspects of an individual's life from arbitrary

[214] Ibid 233.
[215] P Craig, 'Public Law and Control Over Private Power' in Taggart (ed), *The Province of Administrative Law* (Hart 1997) 197.
[216] *Vandermolen v Toma* (1983) 9 HLR 91.
[217] D Oliver, 'The Underlying Values of Public and Private Law' in Taggart (ed), *Administrative Law* (Hart 1997) 237.
[218] Housing Act 1996 s.101; Housing Act 1988 s.21; Housing Act 1985 ss.84-84A.
[219] P Craig, 'Public Law and Control Over Private Power' in Taggart (ed), *The Province of Administrative Law* (Hart 1997) 198.
[220] See above at 3.1.3.1. See also M Amos, 'The Second Division in Human Rights Adjudication: Social Rights Claims under the Human Rights Act 1998' (2015) 15 Human Rights Law Review 549.
[221] *Hunter v Canary Wharf Ltd* [1996] AC 655, 675.
[222] For an account of this development see T Aplin, 'The Development of the Action for Breach of Confidence in a Post-HRA Era' (2007) Intellectual Property Quarterly 19; T Aplin, 'The Relationship Between Breach of Confidence and the "Tort of Misuse of Private Information"' (2007) 18 King's Law Journal 329.

interference including their livelihood, their privacy, and their freedom of association.[223] The above examples do not concern the same conflicting interests of a tenant pleading art.8 and a landlord relying upon their property rights. Nevertheless, the commonality of the values within public and private law overlaps with the idea of 'the common' argued by Hardt and Negri.[224] For Hardt and Negri there exists a third perspective for considering what would otherwise be termed public or private. This in turn links with the discussion in Chapter 3 around Aquinas's view that 'everything is in common'[225] with property serving both 'private and public ends.'[226] This recognition of property as serving both public and private ends appreciates the dialectic at work whenever one talks of property. Property is commonly spoken of as being strictly private, 'an Englishman's home is his castle',[227] and free from interference from other individuals and the State. Yet restrictions and interferences with one's property are commonplace thereby taking account of the mixture of public and private interests which coalesce around property.[228] This realisation underlines the impracticality of making private property immune to human rights considerations due to the mirage of a strict public/private divide.

The permeability of public/private divide is explored by Moran.[229] In recognising that values cross the divide Moran's work concerns the mutually beneficial nature of public and private law over the idea of public law serving as hierarchically superior to private law.[230] In this sense Moran's view overlaps with Oliver's in finding that each area of law offers lessons for the other. With this idea in mind it is clear to see the importance of private law in the relationship between landlord and tenant. This is demonstrated in the development of the legal characteristics of this relationship which have been developed by the courts opting to ensure protection for the typically weaker party, the tenant.[231] Therefore, what is required from the law is an analytical method by which the permeability of the divide is appreciated allowing principles to flow back and forth dependent upon the context of the proceedings at hand.

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[223] D Oliver, 'The Underlying Values of Public and Private Law' in Taggart (ed), *Administrative Law* (Hart 1997) 240.
[224] M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009) viii.
[225] T Aquinas, *Summa Theologiae*, vol 38 (Blackfriars McGraw-Hill 1975) 66-67.
[226] N Blomley, 'The Borrowed View: Privacy, Propriety, and the Entanglements of Property' (2005) 30 Law and Social Inquiry 617, 646.
[227] See *Semayne's Case* (1604) 5 Coke Rep 91 for the origins of this maxim.
[228] See above at 5.1.
[229] M Moran, 'The Mutually Constitutive Nature of Public and Private Law' in Robertson and Wu (eds), *The Goals of Private Law* (Hart 2009).
[230] Ibid 19-26.
[231] *Street v Mountford* [1985] AC 809.

5.6 Dilution but by How Much?

The extent to which the public/private divide should be diluted to allow for principles to flow back and forth remains a live question. It is Grear's work that is most helpful in accounting for the context sensitivity needed for the application of human rights principles to public and private actors.[232] Grear opposes the full fusion proposed by Oliver and instead suggests a public/private spectrum based upon the idea of polycontextuality.[233] Grear argues that the difficulties in operating the public/private divide 'strongly suggest the inadequacy of any rigid division between public and private law, [however, these difficulties] do not support the abandonment of a distinction between them at a conceptual level ... '.[234] Instead the law should turn its attention to the 'complexity of relationships and interpenetrations'.[235] It is this appreciation which makes the theory attractive for possession proceedings which encompass a variety of relationships and allows for human rights to apply to both public and private proceedings.[236] In most relationships which come to be considered by the courts ' ... public and private interests appear on both sides, [therefore] there is little sense in seeing the balance in terms of individual versus governmental [or community] interests.'[237] These cases fall on the spectrum which Grear details as existing between public law and private law which is imagined as a gradient rather than a binary distinction.[238] Interests traditionally understood as existing within the public or private find themselves 'on the same plane'.[239] The sensitivity of Grear's work is particularly advantageous when dealing with property as it recognises the co-operative and facilitative nature of law, alongside the control of power, that is inherent in land law and law more generally.[240]

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[232] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169.
[233] Ibid, 169. See D Oliver, 'The Underlying Values of Public and Private Law' in Taggart (ed), *Administrative Law* (Hart 1997) for Oliver's opposing view.
[234] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 170.
[235] Ibid, 171. See also L Alexander, 'The Public/Private Distinction and Constitutional Limits on Private Power' (1993) 10 Constitutional Commentary 361.
[236] See generally T Allen, *Property and the Human Rights Act 1998* (Bloomsbury Publishing 2005) ch 8.
[237] T A Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 The Yale Law Journal 943, 981.
[238] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 176.
[239] R Pound, 'A Survey of Social Interests' (1943) 57 Harvard Law Review 1, 2.
[240] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 177-178.

The idea of a spectrum within the public/private divide is not unique to Grear with support coming from Wolfe.[241] Wolfe contends that what is needed is 'a way of recognising the importance of both the public and the private without absolutising either.'[242] This may be achieved by accepting a range of distinct publics which might include families, communities, and collectives with shared norms. In these groups there are public characteristics in their shared norms and yet the groups themselves are partially private in that they exist apart from the wider public. Therefore, there are multiple publics (and privates) in operation at any one time. These diverse states allow for the development of personal identities which in turn are then exercised in the wider public forum.[243] These advantages are reminiscent of the characteristics associated with the home in Chapter 3. There is an argument to be made on this basis that the home is a unique institution which is simultaneously public and private. Public to tenants who share collective norms which tie households together, private in the sense that the home is expected to be protected from outside interference. This recognition does not give priority to either conception but rather serves to appropriately calibrate the approach to be taken in instances where a person's home is at risk.

When Grear and Wolfe's work is applied to the home the advantages of any dissolution of the public/private divide become questionable. For Oliver the commonality across public and private law is based upon the law existing to control the use of power. In controlling the use of power the law has a facilitative character.[244] In the realm of housing law this is exemplified in the relationship between landlord and tenant with the law seeking to find a balance between the interests of the landlord and the interests of the tenant. This facilitation occurs against the backdrop of attempts to regulate both the public and private rented sector.

When controlling the use of human rights, principles ought to apply to 'all bodies, public or private, that wield significant power to affect important public, individual, or social interests.'[245] In developing a spectrum for the operation of public law and private law it is necessary to paint what will be the 'archetype' of private law and

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[241] A Wolfe, 'Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary' in Ernest J Weinrib and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (The University of Chicago Press 1997).
[242] Ibid 201.
[243] Ibid 196-197.
[244] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 177-178.
[245] Ibid, fn 38; A Supiot, 'The Public-Private Relation in the Context of Today's Refeudalization' (2013) 11 International Journal of Constitutional Law 129, 129.

public law.[246] Grear's archetypal relationships look to the power at the core of each type of relationship. For public law this would rest on the control of power thereby avoiding the imposition of unfair restrictions or obligations on the weaker party, whereas, private law emphasises the autonomy of individuals and their ability to enter agreements with others.[247]

Sensitivity to these issues allows for an 'organic and dynamic' interplay between the common values identified above.[248] It is in considering these archetypes that the argument in favour of human rights playing a role in all possession proceedings gains strength. As noted above in Chapter 1, tenants in the public and private rented sector do not benefit from institutional parity with their landlords and so this relationship cannot be described as one of bilateral liberty and choice.[249] The law's response to this must be to allow for human rights to have horizontal effect. This is only possible through a reconceptualisation of the public/private divide which takes account of this. It is here that a polycontextural approach is recommended.

Polycontextuality foregoes blanket definitions by accepting a contextually sensitive approach to public law and private law. This goes beyond the de facto idea of private law protecting a de facto economic autonomy and recognises the benefits a range of autonomies related to the range of social circumstances in which the individual exists.[250] Within these autonomies is the importance of the home to the individual which goes beyond economic constraints and has wider societal significance. This in turn allows for the penetration of private law by public law principles where the autonomy afforded to private law leads to a skewing of interests. For example, in cases of unregulated markets a market centric approach may lead to a marketplace in which the individual is disadvantaged in bargains which ought to be equal.[251] Teubner cites industries such as health, telecoms, and social services as being examples of this phenomenon. However, this skewing of interests is equally applicable to the housing market in view of the disadvantaged position of tenants in public and private accommodation.[252] It is clear that the current makeup of the housing space which has seen a reduction in State intervention and security for the

[246] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 182.
[247] Ibid.
[248] Ibid, 187.
[249] This power imbalance is noted by landlords as well as tenants H Rifkind, 'If Buying a Home is Bad, Renting is Far Worse' *The Times* (London 22 October 2013) 19.
[250] G Teubner, 'After Privatization? The Many Autonomies of Private Law' (1998) 51 Current Legal Problems 393, 398.
[251] Ibid, 412.
[252] See above at 1.1.

tenant in favour of a reallocation of power towards the landlord is akin to the problems noted by Teubner above. Therefore, there is ample opportunity for Teubner's polycontextuality to play a role in determining the extent to which human rights considerations ought to penetrate all possession proceedings. A simple dualism between public law and private law, however defined or erased, cannot take account of the plurality of factual situations which come before the courts in possession proceedings.[253]

If polycontextuality was utilised in possession proceedings the ideas of the home expressed in Chapter 3; shelter, security, and self-development, come to the fore. Tenants are not simply seen as independent consumers able to autonomously choose where they make their home thereby immune from the externalities of property.[254] Instead context is given to the situation by its own unique circumstances.[255] For Teubner these contexts might include 'intimate life, health care, education, research, religion, art, [and] the media'.[256] Taking this view, there is no bar preventing home interests being considered. However, unlike Teubner who advocates for self-regulation it is suggested that given the importance that the home has for the individual and the lack of consideration that has been given to these non-legal interests it is for the courts to utilise the powers granted to them by the HRA 1998.[257] There are instances in which the expediencies of the facts at hand frustrate a hard divide between public and private and require paramountcy to be given to recognised rights in 'a special legal space … carved out for the existence of a fertile interpenetration between a set of real, multi-faceted human social orderings … '[258] This approach lets 'those aspects of being human which are not reducible to politics or economics' but which are central to the human experience to be considered.[259] A person's connection to their home is of exactly the same nature, it is irreducible to politics or economics. The great advantage of the polycontextuality approach is that it is conciliatory rather than destructive and allows the space between uncontentious public or private bodies to continue while allowing latitude for more difficult decisions.

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[253] G Teubner, 'After Privatization? The Many Autonomies of Private Law' (1998) 51 Current Legal Problems 393, 396-397; A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 193.
[254] M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009) 153-155.
[255] C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 European Journal of International Law 387, 395.
[256] G Teubner, 'After Privatization? The Many Autonomies of Private Law' (1998) 51 Current Legal Problems 393, 398-399.
[257] Human Rights Act 1998 ss. 2, 3, and 6.
[258] A Grear, 'Theorising the Rainbow? The Puzzle of the Public/Private Divide' (2003) 9 Res Publica 169, 193.
[259] Ibid.

5.7 Conclusion

The key aim of this Chapter has been to question the continuing relevance of the public/private divide which seeks to compartmentalise law based upon the standing of the parties rather than the interests at stake. This question is particularly pertinent within the scope of this thesis as an acceptance of the public/private divide as traditionally conceived restricts consideration of art.8 to possession proceedings involving a public authority. This is unsatisfactory for the reasons argued in Chapters 3 and 4, the importance of the home to the individual and the possibility for art.8 to be given horizontal effect. Judicial review in public law has developed into a useful device for ensuring public bodies act fairly and within their powers. It is within the confines of judicial review that ideas as to what bodies are public and therefore subject to public law have been developed. The HRA 1998 appears to support this compartmentalisation by limiting HRA rights to those instances concerning a pure public authority or private bodies which perform public acts. This has in turn restricted art.8 arguments to those proceedings involving public authorities. This has led to arbitrary distinctions with public sector tenants having more protection than others due to mere chance.

The public/private divide has been deconstructed above to allow for art.8 to be further considered in all proceedings where a person's home is at risk. Whilst judicial review has proven to be receptive to proportionality such focus upon procedure and whether a body is public blocks consideration of the rights protected within art.8. Reconfiguring the public/private divide allows for art.8 to be considered in private possession proceedings. Utilising polycontextuality recognises the flexibility within the public/private divide which is demonstrably not inherent to legal systems. The emergence of the public/private divide in English law has occurred in response to the changing nature of the State and so is responsive to other changes in society such as the need for a robust application of art.8 established in Chapters 1 and 2. Polycontextuality assists in this by allowing for the courts to recognise that whilst there may be archetypal actors which typify a hard line between public and private there are also instances where private actions may be just as traumatic as any action taken by the State. This is no more evident than in the relationship between landlord and tenant. In possession proceedings there are doubtless public and private interests in play and therefore disavowing one for the other is unwise. For example, Parliament, speaking on behalf of the community, enacted art.8 in domestic law the observance of which creates a public interest in ensuring a person's right to respect for their home is satisfied. Equally there is a

public and private interest in ensuring that a person's property interests are respected. This is evident in art.1 of the First Protocol and in the general acceptance of private property established in Chapter 3 above. Yet if one was to identify the nature of the power at the core of landlord and tenant relationships such as is recommended by Grear then it is clear to see that the relationship is not one of equal power or autonomy as one might be expected from private law. Rather what is found is the imposition of unfair obligations on the weaker party, the tenant. This is archetypal of public law and yet it would be unfair to define a landlord and tenant relationship as either strictly public or private.

What becomes clear upon these realisations is that context is key to possession proceedings. Such sensitivity to context allows for the considerations explored in Chapter 2 to filter through into possession proceedings alongside ideas of the home under art.8. To deny this to some proceedings because they are termed private misunderstands the complexity of the landlord and tenant relationship and the law which governs it. Accepting the permeability of the public/private divide and the advantages of such an approach for possession proceedings gives rise to the question as to how resultant conflicts of rights might be reconciled. Any solution to this problem must be able to account for interests that may be sourced from either public or private law and yet gives no a priori weight to one or the other but instead allows for the facts of the cases to determine how conflicting rights might be assessed. Chapter 6 identifies proportionality as the best answer to this question as proportionality allows for the simultaneous identification and balancing of competing interests within the confines of a neutral adjudicative structure explored in detail below.

6 Developing a Principled and Replicable Model of Proportionality for Possession Proceedings

6.1 Introduction

Questions around proportionality and the balancing of conflicting interests have been alluded to throughout this work and therefore the nature and application of proportionality deserve the full attention of this Chapter. Thus far it has been established that there has been an underappreciation of the importance of art.8 interests has resulted in the discriminatory treatment of private sector tenants. Chapter 3 argued that the interests which attach to a person's home have been underplayed in the landlord and tenant relationship and are such that they ought at the very least to be given equal weight to monetary legal interests which have arisen out of the law's understanding of ownership. The non-legal interests which attach to the home have thus been omitted from any proportionality analysis concerning art.8 and possession proceedings. Chapter 4 highlighted the legal opening created by the HRA 1998 allowing for art.8 to play a robust role in all possession proceedings, regardless of the institutional nature of a tenant's landlord. This Chapter builds upon the analysis undertaken in Chapter 5 regarding polycontextuality. In accepting a polycontextual approach to balancing rights the courts may consider the vying interests of those parties involved in possession proceedings regardless of the institutional character of the parties. The advantages of a polycontextual approach are evident at 6.4 below where a replicable proportionality model is tested against case law to demonstrate the advantages of art.8 for tenants alongside the force of an owner's right to possession.

The proportionality model explored here goes beyond that utilised by the courts in possession proceedings to date. Prior to and following the HRA 1998 it is Parliament that is deemed to be best placed to strike a fair balance between the competing rights of landlords and tenants.[1] However, this deferential approach does not sit comfortably with the idea that the courts are the protectors of fundamental rights.[2] The 'most difficult and important' issue facing English courts is therefore the development of 'a coherent and defensible' doctrine of proportionality which is

[1] T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 157-162.

[2] C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1; Baroness Hale, 'Who Guards the Guardians' (2014) 3 Cambridge Journal of International and Comparative Law 100.

clear, principled, and respectful of fundamental rights.[3] This is no more evident than in possession proceedings. It has been demonstrated above that art.8 may have horizontal effect between private individuals due to the fundamental nature of the rights protected by art.8. This is of course in addition to vertical effect which was recognised in *Pinnock*. However, in each instance the courts have struggled to annunciate the precise exercise that should be followed when assessing the proportionality of a possession order. This Chapter provides guidance on a proportionality model which accounts for the plethora of circumstances which may arise where a landlord looks to dispossess a tenant. These rights are given no hierarchical value by the Convention or the HRA 1998 and so the conflict facing the courts is in effect right versus right. [4] This realisation defeats much of the criticism laid upon proportionality and makes the case stronger for structured proportionality. This is particularly so in areas where there is a 'clash of rights'[5] such as would be the case in private possession proceedings concerning art.8 and art.1 of the First Protocol. This Chapter paints the framework through which the courts may consider the fundamental rights of landlords and tenants.

Part 1 of this Chapter examines the nature of proportionality in English law and critiques the disparate approaches to proportionality which are present in the courts. These disparate approaches have given rise to a number of doctrinal problems including the judicial creation of a hierarchy of rights which in turn dictates the intensity with which rights infringements will be tested. To address these concerns Part 1 introduces a principled proportionality model, known as full proportionality analysis, and argues that the burden of proof for proving (dis)proportionality must be split between the parties holding conflicting rights. This approach insulates the court from overstepping its institutional role and overcomes concerns around judicial deference which have occupied commentators in debates around proportionality.

Part 2 details the nature of full proportionality analysis and its specific contours. Following a discussion of full proportionality analysis it becomes clear that the doctrine is already at work in the European Court of Human Rights and the domestic courts. The theoretical work of Alexy is called upon to give structure to full

[3] R Clayton, 'Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle' (2001) EHRLR 504, 504.
[4] The idea of a hierarchy of rights is explored at 6.2.2.
[5] J E Fleming, 'Securing Deliberative Democracy' (2004) 72 Fordham Law Review 1435, 1446.

proportionality analysis and demonstrate how the courts may balance competing interests in an open and principled framework.

Part 3 applies full proportionality analysis as detailed in Parts 1 and 2 to three cases which have concerned art.8 in possession proceedings, *Manchester City Council v Pinnock*,[6] *Lawal v Circle 33*,[7] and *McDonald v McDonald*.[8] These cases represent a cross section of the institutional nature (public, hybrid, or private bodies) of landlords involved in possession proceedings. Notwithstanding the institutional differences between these parties and their disparate objectives, the principled and context-sensitive nature of full proportionality analysis is straightforwardly applicable to all cases where a person's home is at risk and as a result of the polycontextual approach advocated in Chapter 5.

6.2 Proportionality in English Law

> We are at a crossroads, and there is a choice: proportionality can either become the fig leaf for unstructured judicial decision-making or it can become a powerful normative and predictive tool ... [9]

The roots of the 'indeterminate concept'[10] of proportionality run to antiquity and cross 'time, space, and subject matter'.[11] Proportionality took hold in modern legal systems in the Prussian[12] and later German legal order and spread to kindred civil legal systems in Continental Europe, the common law traditions of the Commonwealth, and into the international orders of the European Union,[13] the European Court of Human Rights and the World Trade Organisation.[14] Proportionality is therefore now seen as 'a central feature of rights adjudication in liberal democracies worldwide.'[15] In the case of the European Court of Human Rights this is in spite of the Convention itself making no mention of the doctrine of

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[6] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[7] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9.
[8] *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357.
[9] T Hickman, 'The Substance and Structure of Proportionality' (2008) PL 694, 716.
[10] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002) ix.
[11] N Lacey, 'The Metaphor of Proportionality' (2016) 43 Journal of Law and Society 27, 33.
[12] The Right Honourable Lady Justice Arden, 'Proportionality: The Way Ahead?' (2013) PL 498, 499.
[13] This in turn makes proportionality relevant in English courts applying EU law. See P Craig, *Administrative Law* (Sweet & Maxwell 2012) 622-630.
[14] A S Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-2009) 47 Columbia Journal of Transnational Law 72, 96; M Cohen-Eliya and I Porat, 'Proportionality and the Culture of Justification' (2011) 59 American Journal of Criminal Law 463; P Popelier and C Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 European Constitutional Law Review 230, 230.
[15] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law and Ethics of Human Rights 141, 142.

proportionality.[16] Nevertheless, it is now accepted that proportionality sits at the core of the Convention in the eyes of the European Court of Human Rights[17] and is the best tool for analysing 'the intricate collision ... [of] ... competing principles'.[18] In addition to proportionality is the idea of 'fair balance' between the rights of the individual and the community at large, which is said to guide the application of the Convention in the European Court.[19] This idea of fair balance is relevant here due to the overt reference to such principles in art.8(2) which allows for interference with the rights protected in art.8(1) where the interests of the community outweigh those of the individual. However, fair balance should not be considered separately from proportionality but rather as the overall goal of proportionality.[20] Fair balance implicitly requires a 'purposive interpretation' of the Convention rights as a whole in which the overall structure of the Convention will influence its application.[21] It is for the courts to pay attention to the structure of the Convention and the HRA 1998 and draw out both the express and implied holistic meanings of the instrument's preamble, articles, and paragraphs.[22]

Following the enactment of the HRA 1998 proportionality now has a role to play in determining whether human rights have been infringed. This is particularly the case for a tenant who is to be dispossessed of their home where art.8 is to be considered. However, in assessing this the courts have failed to articulate precisely what task the court ought to carry out when assessing the proportionality of a given measure.[23]

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[16] The Right Honourable Lady Justice Arden, 'Proportionality: The Way Ahead?' (2013) PL 498, 500.

[17] T J Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465, 469; P Van Dijk and G Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 80.

[18] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 167.

[19] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [70]-[72]; *JA Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3 [53].

[20] T J Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465, 470.

[21] A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012).

[22] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 81.

[23] Calls for a principled approach to proportionality are as old as the HRA 1998, R Gordon, 'Structures or Mantras? Some New Puzzles in HRA Decision-Making' (2006) 11 Judicial Review 136; D Mead, 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions Under the Human Rights Act' (2012) PL 61; R Clayton, 'Regaining a Sense of Proportion: the Human Rights Act and the Proportionality Principle' (2001) EHRLR 504; I Leigh, 'Taking Rights Proportionately: Judicial Review, The Human Rights Act, and Strasbourg' (2002) PL 265; M Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 Cambridge Law Journal 301; M Fordham and T De La Mare, 'Identifying the Principles of Proportionality' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart 2001); S Atrill, 'Keeping the

The only successful pleading of proportionality in possession proceedings is *Southend-on-Sea v Armour*,[24] discussed in Chapter 1 above.

In English law generally, the closest 'that domestic courts have come to establishing a structured approach to proportionality is … *de Freitas v Permanent Secretary of Ministry for Agriculture*'.[25] The case concerned the Constitution of Antigua and Barbuda, an independent state within the Commonwealth, and the right to freedom of speech that was constitutionally protected. In deciding the case the Privy Council developed, based upon Canadian jurisprudence,[26] the following test to identify whether interference with the claimant's freedom of speech had been proportionate:

> the legislative objective [must be] sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective [must be] rationally connected to it; and the means used to impair the right or freedom [must be] no more than is necessary to accomplish the objective.[27]

This test has subsequently coalesced into a four-prong approach with the courts recognising that in matters concerning breaches of Convention rights the following analysis ought to be conducted:

1. the legislative objective must be sufficiently important to justify limiting a fundamental right;

2. the measures designed to meet the legislative objective must be rationally connected to it;

3. the means used to impair the right or freedom must be no more than is necessary to accomplish the objective; and

4. the measure must strike a fair balance between the rights of the individual and the interests of the community.[28]

This conception of proportionality will be termed 'full proportionality analysis'[29] for the remainder of this work. Full proportionality analysis has found some support

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Executive in the Picture: A Reply to Professor Leigh' (2003) PL 41; C Knight, 'Proportionality, the Decision-Maker, and the House of Lords' (2007) 12 Judicial Review 221.

[24] *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231, [2014] HLR 23.

[25] T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 179.

[26] *R v Oakes* [1986] 1 SCR 103.

[27] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.

[28] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [19]; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [68]-[76]; *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697.

from the courts[30] but where a person's home is at risk the courts continue to show a heavy preference for a landlord's 'unencumbered property rights'.[31] This has organically led to their being multiple approaches to proportionality in English courts.[32]

6.2.1 Multiple Approaches to Proportionality

It has been noted above that the domestic courts have developed numerous approaches to proportionality.[33] These include; 1) flexible unstructured proportionality,[34] 2) structured proportionality in cases concerning EU law,[35] and 3) structured proportionality where HRA 1998 rights are at issue and flexible unstructured proportionality where EU rights are at issue.[36] The aim of this Chapter is to demonstrate the suitability of full proportionality analysis in those instances where a person's home is at risk. However, in making this argument it is first necessary to highlight the problems which arise from multiple approaches to proportionality. The argument against multiple conceptions of proportionality is threefold, first, disparate applications of proportionality give rise to a hierarchy of rights that is not present in the Convention or the HRA 1998. Second, and related to a hierarchy of rights, multiple approaches to proportionality create situations in which the intensity of review applied by the courts is determined by the source of rights rather than the severity by which they have been infringed.[37] Third, and perhaps most pressing for public sector tenants, differential proportionality tests may prejudicially calibrate proceedings in the State's favour.[38]

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[29] This term is inspired by the work of Chan, see C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1. However, it is appreciated that Chan uses this term in a slightly different context.

[30] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700; *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697.

[31] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; A Goymour, 'Possession Proceedings and Human Rights - the Final Word?' (2011) 70 Cambridge Law Journal 9.

[32] This is discussed in depth in relation to various HRA rights in B Goold, L Lazarus and G Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice Research Series 10/07, 2007).

[33] A L Young, 'Will You, Won't You, Will You Join the Deference Dance' (2014) 34 Oxford Journal of Legal Studies 375.

[34] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

[35] *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15, [2015] AC 1399.

[36] *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697.

[37] There is support for the view that review ought to be accorded to the severity of the infringement in pre-HRA 1998 case law, see J Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) PL 59, 68-69; J A G Griffith, 'The Brave New World of Sir John Laws' (2000) 63 The Modern Law Review 159, 160-162.

[38] These shortcomings of disparate proportionality approaches are latent in the work of Gunn, particularly the three hypothetical approaches towards proportionality explored at T J

6.2.2 Hierarchies and Intensity of Review

Hierarchies of rights and intensity of review are inherently linked. This is astutely demonstrated by Craig who argues that a hierarchy of rights and variable intensity of review are built into the HRA 1998. For Craig the level of scrutiny to be attributed to a particular right will depend upon the views of the decision-maker, the a priori importance of the right, and the institutional nature of the defendant.[39] However, this is counter to the jurisprudence of the European Court where it has been made clear that there is no hierarchy of rights which allows for certain rights to trump others.[40] This is particularly the case for qualified rights such as art.8 which recognise that rights ought to be balanced against one another indicating that these rights carry equal weight. This idea of a hierarchy is counter to the fair balance that is said to run through the Convention[41] which ought to be viewed as a whole indivisible 'single package'.[42] The idea is also doubtful in light of the case law surrounding the balance to be struck between apparently conflicting rights and goals indicating that there is no one Convention right which is a silver bullet.[43] It is suggested here that the domestic courts ought to appropriate the principles of the common law and administrative law and reiterate that there is no a priori weighting of rights,[44] rather the balancing and weight to be attributed to rights in a given instance are a matter for the bench in that case.[45] Another issue flowing from the current confusion around the precise contours of proportionality is the intensity of review placed upon a measure becomes dependent upon the right's legislative character. The potential for variable intensity on the basis of a right's source has been dismissed by the European Court of Human Rights.[46]

Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465, 472-477.

[39] P Craig, 'Proportionality, Rationality and Review' (2010) New Zealand Law Review 265, 288-289.

[40] A Tahvanainen, 'Hierarchy of Norms in International and Human Rights Law' (2006) 24 Nordic Journal of Human Rights 191.

[41] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [70]-[72]; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (Application No 44302/02, Merits and Just Satisfaction, 30 August 2007) [53]; *Goodwin v United Kingdom* (2002) 35 EHRR 18 (Application No 28957/95, Merits and Just Satisfaction, 11 July 2002) [72].

[42] A Tahvanainen, 'Hierarchy of Norms in International and Human Rights Law' (2006) 24 Nordic Journal of Human Rights 191, 204-205.

[43] See for example *Axel Springer AG v Germany* (2012) 55 EHRR 6, [2012] EMLR 15; *SAS v France* (2015) 60 EHRR 11; *O (A Child) v Rhodes* [2015] UKSC 32, [2015] 2 WLR 1373.

[44] On these traditions see generally J Laws, 'The Good Constitution' (2012) 71 Cambridge Law Journal 567.

[45] A Stone-Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008-09) 47 Columbia Journal of Transnational Law 72, 88.

[46] 'As has already been adverted, there can be no double standards of human rights protection on grounds of the "origin" of the interference. It is immaterial for a fundamental human right, and for that reason for the court, whether an interference with that right

It is in cases such as *Pinnock* that proportionality is calibrated in the State's favour by merging 'all four stages of the [proportionality] enquiry into one general question of … whether the measure is reasonable or permissible.'[47] In so doing the courts are failing in their duty to 'guard against slippage "into unstructured balancing tests" in all contexts.'[48] Following this it is incredibly difficult for a tenant to demonstrate a possession order would be disproportionate due to the heavy presumption placed upon a landlord's 'unencumbered property rights'.[49] The question flowing from this conception is what does proportionality offer over traditional Wednesbury unreasonableness and why is proportionality not utilised as a penetrating analysis of the allegedly infringing conduct.[50] These questions will be considered below in the context of variable intensity of review and judicial deference.

The emergence of a variable intensity of review can be traced to the development of judicial review following *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,[51] which focused upon the pure administrative aspect of decision to the complete exclusion of value judgments,[52] and stated that a court may only interfere with the decision of a public authority where it is so unreasonable that no public authority could have come to it. Following the emergence of Wednesbury review, Wednesbury remained rather static and acted predominantly as a 'safety net' for a domestic judiciary alongside other heads of judicial review, those being 'error of law, fairness, and legitimate expectation'.[53] These avenues of judicial review crystalised in *Council of Civil Service Unions v Minister for the Civil Service*.[54] In which Lord Diplock found that the nature of judicial review which had developed following *Wednesbury* may be assembled under the following heads: illegality, irrationality (Wednesbury unreasonableness), and procedural impropriety (taking account of

originates in legislation or in a judicial or administrative act or omission.' *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, 658.

[47] C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1, 9.

[48] J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 116. Quoted from J E Fleming, 'Securing Deliberative Democracy' (2004) 72 Fordham Law Review 1435, 1450.

[49] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [54]; *Thurrock v West* [2012] EWCA Civ 1435, [2013] HLR 5 [25]; *Southend-on-Sea BC v Armour* [2012] EWHC 3361 (QB) [16].

[50] *Connors v United Kingdom* (2005) 40 EHRR 9.

[51] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *O'Reilly v Mackman* [1983] 2 AC 237.

[52] M Taggart, 'Proportionality, Deference, Wednesbury' (2008) New Zealand Law Review 423, 428.

[53] Ibid, 429.

[54] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 WLR 1174.

natural justice).[55] In taking these ideas forward the judiciary paid a particular reverence towards what may be termed fundamental rights[56] or constitutional rights.[57] This has been termed the 'righting' of administrative law,[58] which has in turn led to the development of variable intensity of review.[59] The question therefore becomes whether variable intensity of review has any bearing on a proportionality enquiry where a person's home is at risk.

On its face variable intensity of review is appealing given the lack of judicial consideration for the non-legal interests which attach to a person's home as it would allow for the range of interests in play to be considered within the framework of polycontextuality. However, a heightened standard of judicial review still remains judicial review at its heart which is rather different to proportionality. Therefore, the development of traditional judicial review allowing for variable intensity of review would be better described as a hangover from the judicial awakening of the 20th century.[60] This hangover and the shortcomings of the same can be seen in the House of Lords' early approach to art.8 in possession proceedings.[61] It is clear that traditional judicial review (of any intensity) falls woefully short of the more piercing review required by the Convention in the eyes of the European Court of Human Rights.[62] Moreover, for the purposes of this study traditional judicial review is mired in procedural difficulties which exclude actions against individuals.[63] Therefore, judicial review at any intensity does not provide a suitable method for the balancing of competing interests, such as art.8 and art.1 of the First Protocol, as its application is denied to a large swathe of potential beneficiaries.

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[55] Ibid, 410-411.
[56] Lord Steyn, 'Democracy Through Law' (2002) 6 EHRLR 723, 729; M Taggart, 'Proportionality, Deference, Wednesbury' (2008) New Zealand Law Review 423, 431.
[57] R Clayton, 'Principles for Judicial Deference' (2006) 11 Judicial Review 109, 117.
[58] M Loughlin, 'Rights Discourse and Public Law Thought in the United Kingdom' in Gavin W Anderson (ed), *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press 1999).
[59] M Taggart, 'Proportionality, Deference, Wednesbury' (2008) New Zealand Law Review 423, 423.
[60] This approach can be seen in the following cases: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 WLR 1174. Contrast this with the approach in *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696; *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940; *R v Ministry of Defence ex p Smith* [1996] QB 517.
[61] *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465; *McCann v United Kingdom* (2008) 47 EHRR 40; *Kay v United Kingdom* (2012) 54 EHRR 30.
[62] *Connors v United Kingdom* (2005) 40 EHRR 9; *McCann v United Kingdom* (2008) 47 EHRR 40; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367.
[63] S Nield, 'Clash of the Titans: Article 8, Occupiers and their Home' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart Publishing 2011) 122.

The difficulties of a variable intensity of review within the mould of judicial review are visible in proportionality and echo the concerns above in relation to hierarchies of rights. Variable intensity of review within proportionality exists independently of judicial review and in a housing context would serve to calibrate the level of scrutiny inflicted upon the justification for interference with art.8. As noted above, the current level of scrutiny features a heavy preference for the interests of the landlord.[64] This presents a clear misunderstanding of the proportionality analysis which the courts ought to carry out. Baker has written extensively on the nature of art.14 of the Convention.[65] Baker notes that there is nothing in the text of art.14 which makes some infringements more serious than others.[66] This same argument is applied to art.8 here, in cases where there has been a prima facie breach of art.8 then it is proportionality which determines the severity of the breach.[67] This demonstrates the mistaken approach taken by the courts thus far by affording a priori weight to certain rights as has been done in possession proceedings involving public sector landlords. It is within this approach that the margin of appreciation and the idea of judicial deference regularly appears to cloud the process by which the court balances interests. Below the margin of appreciation and deference are considered in detail.

6.2.3 Margin of Appreciation and Deference

The margin of appreciation exists to recognise the sovereignty of States within the Council of Europe.[68] It is the 'lubricant between international and national authorities'.[69] The margin of appreciation is seen to be the 'other side' of proportionality in the European Court.[70] Despite the margin of appreciation's

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[64] Such shortcomings are inherent in horizontal conceptions of proportionality which call for an intuitive assessment of proportionality in lieu of structure, E Brems and L Lavrysen, "Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 146.

[65] A Baker, 'Comparison Tainted by Justification: Against a "Compendious Question" in Art.14 Discrimination' (2006) PL 476; A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847; A Baker, 'The Judicial Approach to "Exceptional Circumstances" in Bankruptcy: the Impact of the Human Rights Act 1998' (2010) 5 Conv 352.

[66] See above at 4.6.3 for discussion of Baker.

[67] A Baker, 'Proportional, Not Strict, Scrutiny: Against a US Suspect Classificiations Model under Article 14 ECHR in the UK' (2008) 56 American Journal of Comparative Law 847, 884.

[68] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002) 17.

[69] D Feldman, 'Proportionality and the Human Rights Act 1998' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 126.

[70] Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002) 14; G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 711; F Matscher,

origins in the European Court of Human Rights the doctrine's role within English law repeatedly arises in domestic courts. In the case of politically sensitive areas such as housing this is particularly prevalent with the European Court of Human Rights holding that it will respect the wishes of the legislature in sensitive areas 'unless that judgment is manifestly without reasonable foundation'.[71]

It is easy to see echoes of the margin of appreciation at the European Court in judicial deference in domestic courts in domestic courts.[72] Therefore, an understanding of one will inform conceptions of the other together with understandings of proportionality.[73] The most pressing question for the purposes of this work is whether it is correct for the domestic courts to give any consideration to the margin of appreciation in English law given its origins in a supranational court. If so, to what extent should the margin of appreciation exist independent of judicial deference. It is surprising to note that prior to the enactment of the HRA 1998 the English judiciary paid mind to the margin of appreciation.[74] In *R v Ministry of Defence ex p Smith*[75] the Court of Appeal held the margin of appreciation to be akin to 'constitutional bounds' and 'constitutional balance' suggesting that there is some institutional deference created or, in the least, altered by the margin of appreciation. Going further Simon Brown LJ observed that if the Convention were to be incorporated into domestic law then, subject to the margin of appreciation, it would be for the courts to ask whether a human rights infringing action was proportionate.[76] From *Smith* it is clear that in 1995 the Court of Appeal were of the opinion that the margin of appreciation ought to have a role in domestic adjudication in the event the Convention was incorporated. In which case the margin of appreciation would be synonymous with judicial deference. This approach raises questions as to the discreteness of these two areas.

'Methods of Intepretation of the Convention' in Ronald Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 79.

[71] *Connors v United Kingdom* (2005) 40 EHRR 9 [82].

[72] P Sales and B Hooper, 'Proportionality and the Form of Law' (2003) 119 LQR 426, 451-452; T H Jones, 'The Devaluation of Human Rights under the European Convention' (1995) PL 430.

[73] A L Young, 'Will You, Won't You, Will You Join the Deference Dance' (2014) 34 Oxford Journal of Legal Studies 375, 376.

[74] *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696, 751; *R v Secretary of State for the Environment ex p National and Local Government Officers' Association* (1992) 5 AdminLR 785; *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 690.

[75] *R v Ministry of Defence ex p Smith* [1996] QB 517.

[76] Ibid, 481.

Following the incorporation of the HRA 1998 the warmth shown towards the margin of appreciation has waned with the acceptance that the English courts are not as such bound by the doctrine.[77] It is now clear that the European Court and the domestic courts may reach different verdicts due to the subsidiary nature of the former[78] and the 'meaningless' of the margin of appreciation in domestic courts.[79] It is nevertheless unquestionable that domestic deference has retained a role in proceedings where the courts have recognised an area of judgment where deference will be shown to the 'considered opinion of [an] elected body'.[80]

Taking this view forward the question becomes in what circumstances will it be appropriate for the courts to defer to another body given the importance placed upon the right to respect for one's home by the European Court with regard to the margin of appreciation.[81] The dissenting judgment of Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*[82] is helpful in providing principles which may assist in the approach to be taken in cases calling for deference. Laws's discussion of deference touches on some of the issues that have arisen from the recognition of the role of proportionality within housing law, including:

1. the tension between parliamentary supremacy and fundamental constitutional rights;[83]

2. the deference (or latitude) to be afforded to the elected institutions of the State;[84] and

3. the balance to be accorded between the rights of the individual and the wider community.[85]

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[77] *Brown v Stott* [2003] 1 AC 681, [2001] 2 WLR 817, 703; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [81]; *R v DPP ex p Kebilene* [2000] 2 AC 326.
[78] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 236.
[79] T Raphael, 'The Problem of Horizontal Effect' (2000) EHRLR 493, 510.
[80] *R v DPP ex p Kebilene* [2000] 2 AC 326, 381.
[81] *Gillow v United Kingdom* (1986) 11 EHRR 335 [55].
[82] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [69]-[116]. Some support for the comprehensive nature of Laws LJ's approach also comes from Clayton, see R Clayton, 'Principles for Judicial Deference' (2006) 11 Judicial Review 109, 114.
[83] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [72].
[84] Ibid [76]-[79].
[85] Ibid [72].

Laws goes on to detail his principles in the following terms, firstly there should be greater deference accorded to an Act of Parliament over other forms of executive or public authority actions.[86] This principle on its face is similar to the traditional view of the supremacy of Parliament but recognises the diminishing reverence to be paid to the actions of ministers and other public authorities exercising power conferred by Parliament. While this may seem a sensible course of action on its face upon further inspection turning this approach to the complicated legal landscape of landlord and tenant legislation highlights certain problems. For example, if the root of all potentially Convention offending actions within a particular area of law is primary legislation[87] then Laws's approach be may sensible as it would allow for the fundamental rights of individuals to be consistently and predictably gauged. However, housing law is far more complex stemming from numerous Acts of Parliament (each with disparate policy aims) and the common law. For a tenant facing dispossession the source of whichever law allowing a landlord to recover possession is irrelevant, much like in the example provided by Cornu.[88] Also, the statutes governing housing do not mandate actions but rather set in place the specific procedures and outcomes of voluntary actions. For instance, ss.83 and 85A of the Housing Act 1985 set out the procedure through which a housing authority may recover possession of a secure tenant's home, however, the decision to initiate proceedings rests with the authority. Under Laws's approach to deference this would necessitate a lower standard of deference as the Housing Act 1985 does not mandate a local authority initiating possession proceedings. However, this is then complicated by his second principle – requiring increased deference where the Convention right in question recognises a balancing exercise,[89] such as art.8. The shortcoming that runs throughout Laws's theory is the failure to appreciate the two conflicting approaches of the courts in this area. The first approach involves the court assuming that there has been appreciation of the conflicting interests in play by Parliament. The second approach is one of assuming that Parliament has legislated to incorporate the balancing of rights through proportionality into

[86] Ibid [83]. This approach of greater deference to Acts of Parliament is based on the idea that Parliament exercises 'full control' and therefore 'full scrutiny' of legislation. However, this historical ideal is in itself a fiction in the modern British constitution due to the strains placed upon Parliament's time and the burgeoning scope and complexity of legislation. On this point see J Mitchell, 'The Cause and Effects of the Absence of a System of Public Law in the United Kingdom' (1963) PL 95, 101.
[87] For an statutory definition of 'primary legislation' see Human Rights Act 1998 s.21.
[88] Discussed above at 5.4.
[89] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 [84].

domestic law via the HRA 1998.[90] This latter approach is particularly concerning in respect of housing legislation which has predominantly been enacted prior to the HRA 1998 with no evidence of Parliament giving any consideration to art.8.[91]

This view undermines the importance of the HRA rights which the HRA 1998 seeks to protect. This blanket presumption for antecedent balance therefore runs counter to the aspirations of the HRA 1998 and should be doubted as an argument against robust proportionality analysis. If the law already balanced the conflicting rights and interests protected in the HRA 1998 then what would the point be in bringing rights home in the first place. Moreover, an antecedent judgment regarding the balance to be struck will always be detrimental to those groups who stand to lose out due to their rights being deemed less weighty.[92] The argument made here is that this assumption is misplaced due to lack of evidence that Parliament has 'addressed the human rights issue ... and subjected it to extensive discussion ... in the context of an inclusive debate.[93]

Reasons given for deference to Parliament by Laws include 'constitutional competence and institutional competence',[94] that is areas in which the legislature or executive are institutionally better placed to make decisions. In uncontroversial areas such as national defence, the example used by Laws LJ, it is not contentious to suggest that the executive may be better placed than the courts to determine the merits of actions conducted in the course of national defence.[95] However, this is not true of cases which involve the balancing of qualified fundamental rights[96] rather it is submitted that it is the courts which are best placed to analyse the correct balance to be struck due to their inherent experience in adversarial adjudication.[97] On that basis there is no reason for the court to defer to decisions made by public authorities

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[90] P Sales, 'Rationality, Proportionality, and the Development of the Law' (2013) 129 LQR 223, 234.
[91] I Loveland, 'The Impact of the Human Rights Act on Security of Tenure in Public Housing' (2004) PL 594, 608.
[92] L B Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 International Journal of Constitutional Law 864, 881.
[93] A Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34 Oxford Journal of Legal Studies 443, 472.
[94] J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592; J Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe, Essays in Honour of Carol Harlow* (Oxford University Press 2003).
[95] See generally Lord Steyn, 'Deference: A Tangled Story' (2005) PL 346.
[96] European Convention on Human Rights arts.8-11.
[97] See generally C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1; D Feldman, 'Human Rights, Terrorism and Risk: the Roles of Politicians and Judges' (2006) PL 364; T Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' (2005) PL 306.

simply on the basis of their democratic accountability.[98] The judiciary 'must be, and must be seen to be'[99] independent of the other arms of the State. Disagreement among the judiciary, the executive, and Parliament should not be worrisome but rather the indication of one branch protecting the individual from the power of the other.[100] The HRA 1998 provides the judicial tools for such protection.

The terms 'constitutional competence' and 'institutional competence' run to the core of the issue of judicial deference.[101] Jowell approaches deference with a general belief that the level of deference afforded is a legal matter to be decided by the courts in their role as the arbiters of moral rights enforceable against the State.[102] The problem with constitutional competence, or deferring to an elected arm of the State, in Jowell's view is the abrogation of the duties created by the HRA 1998. The HRA 1998 altered the framework through which the judiciary are asked to perform their constitutional duties. This thereby creates an assumption that the judiciary will prefer rights considerations over other interests such as the wider public interest or convenience by virtue of s.3 of the HRA 1998. However, if it is the case that the consequences of the HRA 1998 are less drastic and do not require the court to presume that rights ought to win out over other concerns the courts remain able to delineate and shape the nature of rights while Parliament retains its ultimate sovereignty.[103] Therefore, there is no reason for the courts to shirk away from their HRA 1998 duties for fear of overstepping their judicial competence.[104] For this thesis this allows for the court to ensure the comprehensive use of proportionality where a person's home is at risk without being overly concerned with deference to Parliament as it is Parliament who enacted the HRA 1998. Therefore the court may go beyond the base level of protection provided for by the European Court of Human Rights and the Convention, due to the European Court's institutional limitations.[105]

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[98] R Clayton, 'Principles for Judicial Deference' (2006) 11 Judicial Review 109, 115.
[99] *Millar v Dickson* [2001] UKPC D 4, [2002] 1 WLR 1615 [41].
[100] Lord Steyn, 'Deference: A Tangled Story' (2005) PL 346, 358-359.
[101] J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592; J Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Craig and Rawlings (eds), *Law and Administration in Europe, Essays in Honour of Carol Harlow* (Oxford University Press 2003).
[102] J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592, 593.
[103] Ibid, 597.
[104] Human Rights Act 1998 ss.2-3.
[105] European Convention on Human Rights arts.33-34 which limit the ability to make an application to the European Court of Human Rights to individuals (who must be victims) and only against Member States of the Council of Europe.

Clearly the powers allowed for by constitutional competence are substantial, therefore, Jowell proposes some curtailment of this power through the recognition of 'institutional capacity'.[106] Jowell suggests that the extent to which institutional capacity will play a role is dependent 'upon context and the right and interest involved.'[107] It is submitted that this 'context' looks to the unique characteristics of each branch of the State and concedes that there will be occasions where, simply due to their makeup and experience, the courts are better placed to decide certain matters. The courts are, after all, 'properly equipped with procedural tools and safeguards for a thorough and adversarial examination of complex legal issues'.[108] That is not to say that the opinion of the executive and legislative do not carry weight, however, these must be considered alongside the contents of the Convention rights and the jurisprudence of the European Court of Human Rights.[109]

Of course there are those who agree with Jowell,[110] however, there are also those who disagree with the very concept of deference.[111] Allan is the foremost of these critics. In Allan's opinion the very need for deference is unnecessary due to the institutional and constitutional sensitivity open to the court through the existing judicial tools which allow for the balancing interests, such as proportionality. For Allan, the level of deference to be afforded to a decision-maker is a matter for the court in its residual discretion which must be determined in the face of the complexity of a case's given facts.[112] Allan's approach is commendable in the sense that it aims for doctrinal clarity within the confines of settled law. A shortcoming of Allan's work may be that there is a lack of a defined and replicable model of proportionality that would allow for the institutional position of the decision maker to be accounted for. As identified above, it is clear that there is confusion within the courts as to the precise contours of proportionality, nevertheless, a replicable model of proportionality is available in full proportionality analysis. The trouble with a discrete deference doctrine, in Allan's view, is that the court is only able to approach rights adjudication on the basis of the stated cases of the parties to the litigation.[113]

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[106] J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592, 598.
[107] Ibid.
[108] S Nield, 'Article 8 Respect for the Home: a Human Property Right?' (2013) 24 King's Law Journal 147, 166.
[109] Human Rights Act 1998 s.2; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592, 598-599.
[110] P Craig, *Administrative Law* (Sweet & Maxwell 2012) 630-631.
[111] See *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 [75] for judicial disapproval of the concept of deference.
[112] T Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 LQR 97.
[113] Ibid, 110-111.

In other words these matters are internal to the courts obligation to consider the 'genuine moral and legal rights' which are created by the HRA 1998.[114] If the courts were able to disregard the HRA rights then there would be a case to be made for the development of an independent deference doctrine, however, this is not the case.[115] Therefore, any consideration of deference ought to take place within an analysis of proportionality.

For the purposes of this study, Allan's approach is certainly attractive in the sense that it reduces the number of doctrines in play thereby simplifying litigation for both litigants and the courts. This would thereby reduce uncertainty faced by landlords and tenants under the current law. In the context of housing law this is particularly appealing given that the lion's share of decisions will be made in the county court as part of a busy possession list.[116]

Any consideration of Allan's submissions must be accompanied with the work of Kavanagh.[117] Kavanagh sketches the scope of judicial deference in the following terms:

> [J]udicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy ... [therefore deference is] *variable*[118] (emphasis in original)

This conception is similar to the approach advocated by Jowell in that Kavanagh alludes to the institutional competence and constitutional competence. Kavanagh's favour for deference stems from the idea that deference is not absolute and, as emphasised above, is variable. In this vein it remains open to the court to impose a high level of scrutiny on administrative decisions or those which stem from bodies which might be termed public authorities. For the purposes of this enquiry this appears to be a worrying prospect. In the realm of housing law this is particularly concerning. The courts have noted that local authorities are best placed to make decisions as to how their housing stock should be used.[119] Applying Kavanagh's conception of deference to such housing cases creates two problems. Firstly, it is

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[114] T Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 Cambridge Law Journal 671, 695.
[115] Human Rights Act 1998 ss.2-3.
[116] D Cowan, C Hunter and H Pawson, 'Jurisdiction and Scale: Rent Arrears, Social Housing, and Human Rights' (2012) 39 Journal of Law and Society 269.
[117] A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222; A Kavanagh, 'Judging the Judges under the Human Rights Act: Deference, Disillusionment and the "War on Terror"' (2009) PL 287.
[118] A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222, 223.
[119] See above at 2.2.

doubtful that, in cases dealing with the most extreme form of interference with art.8,[120] such an approach would satisfy the procedural requirements of art.8 which have led to the recognition of the role of proportionality in English law. Secondly, as detailed in Chapters 3-4, there is no reason why the full ambit of art.8 should not apply to public authorities providing housing together with their private sector counterparts. In Kavanagh's view deference arises where the courts are dealing with elected branches of the State, presumably local authorities would fall under this head given the democratic credentials of councillors. On this basis deference would presumably have no role in those matters involving private landlords. If this came to pass public authorities might be under a less onerous human rights obligation than private individuals, running counter to the intentions of the HRA 1998.[121] Moreover, there is nothing within the HRA 1998 which supports this view of deference towards (un)elected State institutions.[122]

In Kavanagh's work the terms 'weight'[123] and 'balance'[124] often arise as part of the exercise to be completed by the courts when assessing the level of deference to be afforded to a decision-maker. The use of such terminology in itself lends support to Allan's view that the idea of deference may already be accommodated within the existing doctrines which are open to a reviewing court. In the context of proportionality and the qualified rights (such as arts.8-11), the balancing of rights and weight are perennial considerations of the court. Kavanagh talks of balancing in terms of balancing substantive and institutional reasons; substantive reasons being the merits of the legal issues before the court and the institutional reasons being an assessment of the institutional merits of the case. However, it may be argued that these considerations are themselves accounted for within the HRA 1998. For example, ss.2 and 3 of the HRA 1998 require courts to take account of the jurisprudence of the European Court of Human Rights while s.4 recognises the institutional limitations within the UK constitution and seeks to retain the supremacy of Parliament. Therefore, it is unnecessary to have an independent test for determining deference given that this has already been achieved by the HRA 1998. The question following this realisation becomes how the court may apply a

[120] *McCann v United Kingdom* (2008) 47 EHRR 40 [50]; *Kay v United Kingdom* (2012) 54 EHRR 30.
[121] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997); Human Rights Act 1998 s.6.
[122] I Leigh, 'Taking Rights Proportionately: Judicial Review, The Human Rights Act, and Strasbourg' (2002) PL 265, 287.
[123] A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222, 227-229.
[124] Ibid, 229.

neutral model of proportionality which allows for the interests of the parties to come to the fore of litigation but without a priori weight being attached to either ownership of private property or alternatively to an individual's home.

Concerns around any impracticalities or cumbersome requirements of proportionality within possession lists at the level of the county court seem ill-founded and an underestimation of district judges' ability to develop routines and procedures to streamline legal processes. Furthermore, full proportionality analysis limits the differences flowing from personal judicial styles of individual judges.[125] The missing piece of Allan's theory is structured and replicable proportionality. The application of full proportionality analysis would sit alongside the idea that judicial action must be exercised according to 'the rules of reason and justice, not according to private opinion.'[126] Full proportionality analysis focuses the judicial mind and draws out the pertinent aspects of the case relevant to proportionality.[127] A further advantage of full proportionality analysis is its straightforward application to circumstances pre-issue. This would allow for the interests protected by art.8 to be more easily considered by landlords who, at present, may see art.8 as having little relevance upon their managerialised operations.[128] In the discussion below the argumentative structure of full proportionality analysis is outlined to demonstrate its practical advantages.

6.2.4 Bearing the Burden

The above analysis of disparate models of proportionality, hierarchies of rights, and deference demonstrate trepidation from the courts to grasp the problems at hand and model a solution to the underappreciation of non-legal interests which attach to the home, the horizontal applicability of Convention rights, and the scope for art.8. In such cases the courts have not only struggled to formulate a principled approach to proportionality but have also failed to state where the presumptions as to proportionality will rest. Should the court adopt a 'presumption of

[125] As to the various judicial approaches emerging from possession lists see D Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 Journal of Law and Society 547.
[126] *Sharp v Wakefield* [1891] AC 173, 179.
[127] V C Jackson, 'Being Proportional About Proportionality' (2004) 3 Constitutional Commentary 803.
[128] For example as to the organisational structure of housing associations see D Cowan, C Hunter and H Pawson, 'Jurisdiction and Scale: Rent Arrears, Social Housing, and Human Rights' (2012) 39 Journal of Law and Society 269.

proportionality'[129] or should it be for the State to demonstrate the proportionality of a measure?

The approach taken by the Supreme Court in *Pinnock* places a heavy preference on a landlord's right to recover their property. In the case of a local authority this preference is strengthened due to the statutory duties owed to those in need of housing. The result of this is that the local authority's aim in recovering possession should be seen as a '"given", which does not have to be explained or justified … so that the court will only be concerned with the occupiers' personal circumstances.'[130] This demonstrates the incredibly high bar a tenant must reach before a possession order will be disproportionate thereby essentially creating a presumption of proportionality in favour of a local authority landlord.[131] This hurdle is more pronounced in the case of private sector tenants who have been blocked from utilising art.8 defences by the courts.[132] The work of Rivers is useful in working through this impasse. Before detailing Rivers's commentary, it is worthwhile reiterating what is meant by full proportionality analysis, which requires the court to ask whether:

1. the legislative objective is sufficiently important to justify limiting a fundamental right;

2. the measures designed to meet the legislative objective are rationally connected to it;

3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective; and

4. the measure strikes a fair balance between the rights of the individual and the interests of the community.

Full proportionality analysis provides an 'argumentative structure'[133] for courts and litigants to work through when faced with human rights concerns. It is in this argumentative structure that the courts are able to assign the burden of proof

[129] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409.
[130] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [52]-[53].
[131] A D P Brady, *Proportionality and Deference under the UK Human Rights Act* (Cambridge University Press 2012) 240-249.
[132] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS); *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357.
[133] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 409. See also M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 International Journal of Constitutional Law 574, 579; A Stone-Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008-09) 47 Columbia Journal of Transnational Law 72, 75-90.

created by proportionality in a fair and reasoned fashion. Rivers's work provides the following argumentative structure for assigning the burden of proving (dis)proportionality on both parties to the litigation:

> ... [O]nce a state measure has crossed the rational threshold by being shown, by the state, to pursue a legitimate aim (stage 1) by means which are rationally connected to that aim (stage 2), the burden of proof shifts to the claimant to demonstrate on the balance of probabilities either that an alternative measure is equally effective and less intrusive (stage 3), or that the measure is unbalanced in imposing an excessive cost to rights (stage 4).[134]

Rivers talks of 'state measures' in the above excerpt showing his primary concern being proportionality as applied between the State and an individual. However, there is nothing in this passage which makes such an approach inapplicable to horizontal proceedings. This is evident in the two examples offered by Rivers as to when proportionality might be applied in this fashion. For the purposes of this work the most relevant example is 'cases in which rights conflict' and 'decisions made under proportional sets of legal rules'.[135] Conflicting rights is precisely the situation which may occur between private landlords and their tenants, art.1 of the First Protocol and art.8 respectively.[136] For Rivers such situations call for a 'presumption of proportionality' for whatever outcome positive law prescribes. For the landlord seeking recovery of possession this would likely be via s.7(3) or s.21 of the Housing Act 1988 which allow for mandatory possession irrespective of the reasonableness of the order, in other words a 'fact insensitive'[137] approach, and therefore likely to raise questions of proportionality. Prior to *Pinnock* s.7 did not allow for any exceptions (but for procedural safeguards around notice procedures).[138] Following the Anti-Social Behaviour, Crime, and Policing Act 2014 when assessing the probity of a possession order under s.7(3) the court must now consider the defences available due to the Human Rights Act 1998. This protection has not been included in the mandatory possession possible under s.21 of the Housing Act 1988. Therefore, whilst a general presumption of proportionality in certain cases may be attractive for Rivers such an approach does not make logical sense in the context of landlord

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[134] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 427.
[135] Ibid, 428.
[136] State authorities do not benefit from Convention rights. See for example, A Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998: Private Contractors, Rights-Stripping, and "Chameleonic" Horizontal Effect' (2011) PL 136; A Williams, 'Strasbourg's Public-Private Divide and the British Bill of Rights' (2015) EHRLR 617.
[137] P Sales and B Hooper, 'Proportionality and the Form of Law' (2003) 119 LQR 426, 428-429.
[138] Housing Act 1988 s.8. Similar notice requirements can be found in relation to s.21 at ss.21A-21B.

and tenant relationships, which are most likely to be assured shorthold tenancies with low security. Presuming the proportionality of a landlord's actions fails to take account of the non-legal interests a person has in their home (irrespective of the institutional character of their landlord) and frustrates the arguments made in Chapter 3 and 4 as to the ability for human rights considerations to have a robust application to possession proceedings. Therefore, any presumption of proportionality must be rejected. This assertion draws weight from Gunn who accepts that the burden of proof in proportionality proceedings may shift from party to party.[139] For Gunn, it is the circumstances of the case which dictate the assignment of the burden of proof apart from any presumption of proportionality for any party. The flaws with a shifting burden of proof attuned to the facts of the case are considered below however the strongest argument against any presumptions of proportionality is provided by Gunn stating that, in all instances: 'the party carrying the burden should be clearly articulated and should be put to its burden to prove the case.'[140] Where there are such procedural safeguards in place the virtue of any presumption of proportionality seems misguided.

Proportionality may 'function as a defence, requiring the individual claimant to show some exceptional feature of his or her own case which makes the application of the rules unnecessary or unbalanced.'[141] Adding this gloss to the assignment of burdens of proof unnecessarily tilts matters in favour of the State and damages Rivers's assertion that the court ought to be neutral in its assessment of proportionality with the parties offering the court information to assist.[142] The landlord is more often than not already in an advantageous position being able to state that she wishes to recover the property and use the most expedient legal means to do so. In this there is a legitimate aim, vindication of their property rights,[143] which the dispossession is rationally connected to. It will then be for the tenant to demonstrate that this is not necessary or that the measure would be unbalanced due to the cost imposed upon the tenant's art.8 rights. This is already a significant threshold to cross without the further imposition of a presumption of proportionality in favour of the landlord. Rivers's bare placement of the burdens of proof outlined above reasonably balance the competing interests of parties engaged in rights adjudication, whether those parties are public or private in archetypal

[139] T J Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465, 481-482.
[140] Ibid, 480.
[141] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 430.
[142] As to the neutrality of proportionality analysis itself see D M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 158-161.
[143] Article 1 of the First Protocol to the Convention.

nature. These burdens can be accommodated within full proportionality analysis and allow the court to retain its independent character and engage 'with the substance [of the prima facie infringement] without substituting the judge for the administrator.'[144] Rivers's initial apportionment of burden places the onus on the parties to (dis)prove the elements of full proportionality analysis and insulates the judiciary, as much as it is possible to do so, from reading their own views into the proportionality assessment. The shifting of the burden of proof from rights-infringer to claimant when assessing the third stage of full proportionality analysis is latent in the recent jurisprudence of the European Court.[145] This is particularly the case when the complaint involves 'interference with the private sphere'.[146] Therefore, a revised approach to Rivers's burdens of proof provides a structure through which judicial concerns regarding deference and horizontality fall away. These concerns have caused the courts to opt for passivity when dealing with art.8 for fears of overstepping their constitutional and institutional boundaries.

Moreover, this approach to the argumentative structure of proportionality fits to some extent with the Supreme Court's art.8 jurisprudence. The Supreme Court has, following *Pinnock*, reiterated the importance of considering personal circumstances when assessing the proportionality of a possession order.[147] This same examination of personal circumstances is possible within Rivers's argumentative structure. However, in assigning burdens of proof to limbs of full proportionality analysis the structure of arguments for and against a possession order take on a reasoned character making it more readily apparent to the court how the parties' conflicting interests counteract one another. This is clear when the argumentative structure is applied to the component parts of full proportionality analysis as is done below.

6.3 The Structure of Full Proportionality Analysis

> An advantage of ... [structured] ... proportionality analysis is ... that it unburdens the balancing exercise by introducing separate tests to assess the suitability and necessity [of a measure]. Asking three questions rather than merely an overall one, allows a better, but also

[144] T Hickman, 'The Substance and Structure of Proportionality' (2008) PL 694, 696.
[145] *Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland* App no 34124/06 (European Court of Human Rights, 21 June 2012); E Brems and L Lavrysen, "Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 154-156.
[146] E Brems and L Lavrysen, "Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 158-159.
[147] *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186; *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.

> more intensive, assessment of the proportionality of a restrictive measure.[148]

The discussions above have made the case that multiple approaches to proportionality are unwelcome due to the emergence of hierarchies of rights, variable intensity of review, and undue deference. However, the argument has not been made as to why full proportionality analysis is favoured over flexible unstructured proportionality such as that used in *Pinnock*, which asks simply whether 'the eviction is a proportionate means of achieving a legitimate aim.'[149] This section argues that full proportionality analysis is ideally suited to assessing the proportionality of a possession order due to its 'intuitive requirement of reason'.[150] Full proportionality analysis allows for the courts to identify the nature of the conflict before them and to determine the optimal outcome where it is impossible to reconcile conflicting interests.[151] Full proportionality analysis is therefore an 'optimising' conception of proportionality seeing proportionality as 'a structured approach to balancing fundamental rights with other rights and interests in the best possible way'.[152]

There is an inborn structure in assessing the balance to be struck between an individual's rights and those of the community. The innate nature of this exercise in adjudication is demonstrated in the emergence of proportionality across jurisdictions; 'where there is interpretation, there is proportionality.'[153] Moreover, this pursuit of an optimal outcome is vital in ensuring that rights may exist in a single reactive legal scheme 'as adapted to certain social conditions necessary for their enduring exercise.'[154] However, this basic four stage structure is not explicit in the jurisprudence of the European Court of Human Rights with the court struggling to annunciate the particularities of the proportionality test.[155] The court have instead

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[148] E Brems and L Lavrysen, "Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139, 145-146.

[149] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [52]; *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS) [28]; *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15, [2015] AC 1399 [18].

[150] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 413.

[151] Ibid, 413. See also D M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 162; A Stone-Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008-09) 47 Columbia Journal of Transnational Law 72, 75.

[152] J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 176.

[153] S Van Drooghenbroeck, 'La Proportionnalité dans le Droit de la Convention Européenne des Droits de l'homme: Prendre l'idée Simple au Sérieux' (2001) 90 Publications Fac St Louis 145, 145.

[154] J Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2011) 295.

[155] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xxxii; A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and

ostensibly cultivated a three limbed approach to proportionality nominally omitting the first stage of full proportionality analysis.[156] It is suggested here that the reason for this omission is the pre-emptory broad legitimate aims provided for within the qualified rights to the Convention. In the majority of cases a State may point to a legitimate aim contained in the Convention and at least prima facie demonstrate that its objective is sufficiently important to justify limiting the right in question thereby bypassing the first stage of full proportionality analysis.

Furthermore, although proportionality is said to permeate the whole fabric of the Convention,[157] there is no overt reference to proportionality in the text of the Convention and so the European Court has been left to develop proportionality on a case by case basis making a concrete structure difficult to discern.[158] The European Court is not typically bound by precedent making the development of replicable tests less important than they perhaps would be to common law courts.[159] In addition to this is the court's approach to the margin of appreciation which seeks to afford Member States latitude to respect Convention rights within the confines of their own historical and constitutional traditions.[160] These institutional peculiarities of the European Court give the judgments of the court a 'broad-brush'[161] character that is more in keeping with civil law traditions over the common law.[162] Notwithstanding these difficulties it is submitted that the European Court of Human Rights is applying full proportionality analysis in all but name.[163]

Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671.

[156] A Stone-Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008-09) 47 Columbia Journal of Transnational Law 72, 75.

[157] J J Cremona, 'The Proportionality Principle in the Jurisprudence of the European Court of Human Rights' in U Beyerlin and others (eds), *Recht zwischen Umbrauch und Bewahrung - Festschrift fur Rudolf Bernhardt* (Springer 1995) 323.

[158] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 31.

[159] P Van Dijk and G Van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd edn, Kluwer Law International 1990) 604; A Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-Law' (2009) 9 Human Rights Law Review 179; S D Pattinson, 'The Human Rights Act and the Doctrine of Precedent' (2015) 35 Legal Studies 142.

[160] *Handyside v United Kingdom* (1979-80) 1 EHRR 737; *Connors v United Kingdom* (2005) 40 EHRR 9.

[161] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [70]-[72]; S Greer, 'Constitutionalising Adjudication under the European Convention on Human Rights' (2003) 23 Oxford Journal of Legal Studies 405, 407-408; C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1, 8.

[162] As to the stylistic differences of judicial opinions in common law, civil law, and the European Court of Human Rights see M Andenas and D Fairgrieve, 'Simply a Matter of Style? Comparing Judicial Decisions' (2014) European Business Law Review 361.

[163] The precise wording of four stage proportionality is taken to be largely 'interchangeable' as it has been applied in the same way by the courts who have accepted proportionality in

For instance, in cases concerning art.14 of the Convention the European Court has followed the same analytical path as full proportionality analysis in determining the proportionality of acts which have prima facie infringed Convention rights.[164] This is visible in the *Belgian Linguistic Case*[165] with the European Court stating that instances of unequal treatment must be assessed in light of the measure's legitimate aim and its justification alongside with the proportionality of the means used in relation to the aim sought.[166] All four steps of full proportionality analysis are present in this approach. Moreover, the European Court often states a measure must have an 'objective and reasonable justification'[167] this encompasses discerning the legitimate aim of the infringing measure[168] together with the 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.'[169] This reading in of structured proportionality is common in the literature around the European Court of Human Rights.[170]

Full proportionality analysis is visible and accepted in the case law of the European Court of Human Rights notwithstanding the limited instances in which the court has overtly referenced the four-stage test.[171] However, even in the absence of full proportionality analysis in the jurisprudence in the European Court of Human Rights it would remain open to domestic courts to develop and apply proportionality as understood within the common law. The effects of this will be recalled from Chapter 4 and critique of the 'mirror principle' which views the job of the domestic courts as being to keep pace with the jurisprudence of the European Court of Human Rights, 'no more, but certainly no less'.[172] The contemporary precedence of this view is now weakened in light of recent opinions suggesting that domestic courts may go beyond the bare protections of the Convention and the European

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this basic form, see J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 178.

[164] *Belgian Linguistic Case* (1979-80) 1 EHRR 252; *DH v Czech Republic* (2008) 47 EHRR 3; *Bah v United Kingdom* (2012) 54 EHRR 21.

[165] *Belgian Linguistic Case* (1979-80) 1 EHRR 252.

[166] Ibid [10].

[167] *Pla v Andorra* (2006) 42 EHRR 25; *Stec v United Kingdom* (2006) 43 EHRR 47; *SAS v France* (2015) 60 EHRR 11.

[168] *Pla v Andorra* (2006) 42 EHRR 25 [61].

[169] *Larkos v Cyprus* (2000) 30 EHRR 597 [29]; *DH v Czech Republic* (2008) 47 EHRR 3 [196]; *Vistins v Latvia* (2014) 58 EHRR 4 [108].

[170] J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 177-178; Lord Justice Stanley Burnton, 'Proportionality' (2011) 16 Judicial Review 179, 179; A Lester, D Pannick and J Herberg, *Human Rights Law & Practice* (3rd edn, LexisNexis 2009) [3.10].

[171] See for example, *Winterstein v France* App no 27013/07 (European Court of Human Rights, 17 October 2013).

[172] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20]; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [105].

Court.[173] This view is particularly pressing for proportionality, as not only may the domestic courts go beyond but it is arguable that they must: 'the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.'[174] This view allows the domestic courts to develop an alternative conception of proportionality to that utilised in the European Court of Human Rights provided of course it did not fall below the standards required by the jurisprudence of the European Court.[175] The viability of this position is reflected in the development of proportionality both before and after the enactment of the HRA 1998.[176]

The 'structured and stringent'[177] nature of full proportionality analysis is in keeping with the aims of human rights adjudication and the traditions of the common law.[178] Unstructured proportionality such as that advocated in *Pinnock* frustrates the intentions of the HRA 1998 and the Convention by skewing the principle of fair balance in favour of the landlord. The pitfalls of unstructured proportionality are demonstrated by Hickman.[179] For Hickman structured proportionality acknowledges the institutional particularities of courts and decision makers and recognises that what is in the public interest is not always necessarily proportionate. It is in determining proportionality that the courts will apply the fourth head of full proportionality analysis and ask whether there is a proportionate balance struck between the competing interests at work in the case.[180] In the context of possession proceedings it is this stage which is sorely omitted from the analysis applied by English courts. For instance in *Malik* the word 'balance' features only twice in the judgment of Court of Appeal, each instance of which is contained in an excerpt from another case.[181] Balance in such cases is assumed on the basis of the framework created by the various statutory interventions into security of tenure. In following a conflated view of proportionality in housing law the courts have only concerned

[173] *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435 [126]-[130]; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700.
[174] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [71]; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200 [168].
[175] Human Rights Act 1998 ss.2-3.
[176] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 WLR 1174, 410; *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700; *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697.
[177] C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1, 6.
[178] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [72].
[179] T Hickman, 'The Substance and Structure of Proportionality' (2008) PL 694, 716.
[180] Ibid, 698-700.
[181] *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS) [12], [14].

themselves with the 'overall proportionality'[182] of a possession order. That is to say the costs and the benefits of the prima facie infringement have been crudely assessed in a utilitarian fashion.[183] In dispossession, the injury to a person's art.8 rights may be great, taking account of those interests recognised in Chapter 3, but the certainty of a landlord's property rights together with the ability to then offer that property to another tenant might be considered to be within the wider interests of the community at large. However, the courts have failed to assess the 'relative proportionality'[184] of possession orders. In questioning relative proportionality the court should ask whether it is fair for the individual to withstand an interference with their rights notwithstanding the fact that there may be an alternative more onerous course of action for the infringing party.[185]

In possession proceedings this query would focus the mind of the court on the significant pain and distress caused by eviction and force the court to ask whether an alternative course would achieve the landlord's objective. These conceptions of proportionality, overall and relative, are incorporated in the third and fourth heads of full proportionality analysis respectively.[186] It is only overall proportionality that is visible in the jurisprudence around possession proceedings. Hickman's discussion of these perspectives of proportionality recognises the shortcomings in selectively applying certain limbs of full proportionality analysis and demonstrates the neutrality of proportionality itself.[187] The value of full proportionality analysis will be visible when applied to decided possession cases in Part 3 below. The arguments made here in favour of full proportionality analysis should not be understood as suggesting that all courts and all judges would reach the same verdict in sight of full proportionality analysis. Even the most established and clear legal tests may lead to disagreement among individual judges.[188] Progression of the common law and legal developments generally rely heavily upon this disagreement.[189] What is in fact

[182] T Hickman, 'The Substance and Structure of Proportionality' (2008) PL 694, 711-712.
[183] Ibid.
[184] Ibid, 712.
[185] Ibid.
[186] Ibid, 713.
[187] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 413; D Kyritsis, 'Proportionality as a Constitutional Doctrine' (2014) 34 Oxford Journal of Legal Studies 395, 397. The neutrality of proportionality's structure has been recognised by those that are generally critical of proportionality as an adjudicative framework, see for example, G Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law & Jurisprudence 179, 193.
[188] T J Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465, 475-476.
[189] See for example, P Bozzo, S Edwards and A A Christine, 'Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court' (2011) 36 Journal of Supreme Court History 193; M Tushnet (ed), *I Dissent: Great Opposing Opinions in Landmark Supreme*

suggested is that a replicable model for proportionality focuses the mind of the judiciary and the parties to proceedings to the pertinent contours of the case.[190] These assertions become clearer in the following paragraphs analysing the specifics of each head of full proportionality analysis. However, a brief comment ought to be made at the outset of this argument in favour of full proportionality analysis which, at stage 4, asks whether there has been a fair balance struck between the conflicting rights in play. Tsakyrakis argues that the balancing exercise is a doctrinal dead end due to the inviolable core of certain human rights.[191] In such cases, 'sledgehammers and nutcrackers are irrelevant; the court's concern is to keep the nut intact.'[192] In which case there is no proportionality exercise to be conducted. However, Tsakyrakis's argument in these terms suggests that the full realisation of a right's minimum core might co-exist with the minimum core of other rights. In the context of a landlord and tenant relationship this is difficult to conceive. It might be said that, for the purposes of this study, the minimum core of art.8 is the protection of a person's home. Correspondingly the core of art.1 of the First Protocol to the Convention is that no one may be deprived of their possessions but for where the deprivation is in accordance with law.[193] For (public and private) landlords pursuing a possession order via the mandatory grounds for possession there is no apparent reason in positive law for the court to deny a landlord's request. However, due to the interpretation given to art.8 by the European Court the proportionality of any possession order must be considered in order to recognise the importance of the home as protected by art.8. Therefore, the two minimum cores are mutually exclusive. In such proceedings the court is in essence being asked by each party to determine which right ought to prevail. In which case Tsakyrakis's criticism of the balancing exercise misunderstands the nature of those rights that may come into conflict. Furthermore, seeking to distil rights to their minimum core is in itself a fraught exercise.[194]

Court Cases (Beacon Press 2008); J Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 Oxford Journal of Legal Studies 221.

[190] A Stone-Sweet and J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008-09) 47 Columbia Journal of Transnational Law 72, 77.

[191] See for example K Lehmann, 'In Defense of the Constitutional Court' (2007) 22 American University International Law Review 163, 182-193.

[192] S Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2009) 7 International Journal of Constitutional Law 468, 493.

[193] This is much in line with the protections afforded by the common law, see *Entick v Carrington* 95 ER 807; *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534.

[194] X Contiades and A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 International Journal of Constitutional Law 660.

6.3.1 The Objective is Sufficiently Important to Justify Limiting a Fundamental Right

Stage one of full proportionality analysis expressed above refers to a 'legislative objective' this assumes that proportionality will be applied only in those instances involving a public authority (other than the court).[195] In Chapters 3 and 4 it has been shown that human rights considerations may be equally salient in proceedings between individuals. In light of this any application of full proportionality analysis must account for the fact that measures leading to a prima facie infringement of human rights may not always concern a legislative objective as such. For instance, cases following the rule from *Monk*[196] do not concern a legislative objective but rather the operation of a common law rule. In such cases the courts have been afforded the jurisdiction by s.6(3) of the HRA 1998 to develop the common law and therein apply full proportionality analysis.[197] Moreover, asking whether the legislative objective is sufficiently important suggests that it is the proportionality of the legislation itself which is being tested rather than the act which has led to questions over proportionality. This is particularly the case in possession proceedings as the courts have confirmed that legislation allowing for mandatory repossession may be read to allow for an analysis of proportionality. Where this is done it is the proportionality of making a possession order that will be tested, the objective of which will be recovery of possession for the landlord. Therefore, in assessing whether an objective amounts to a legitimate aim reference to legislative objectives ought to be omitted.

Instances in which there is no legitimate aim are rare.[198] *Nolan v Russia*[199] offers an example as to when there may be no legitimate aim for interfering with Convention rights. *Nolan* concerned art.9 of the Convention which protects a person's 'freedom of thought, conscious, and religion'. Much like art.8, art.9 is qualified and may be limited in certain instances detailed in art.9(2). The State in *Nolan* sought to rely upon art.9(2) to demonstrate that it was in the interests of national security to deport the applicant due to his religious beliefs. In assessing this the court found that national security was not listed in art.9(2) and so could not be a legitimate aim for the curtailment of someone's religious freedom.[200]

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[195] Human Rights Act 1998 s.6(3).
[196] *Hammersmith v Monk* [1992] 1 AC 478.
[197] This ability is demonstrated in the development of misuse of private information.
[198] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 421.
[199] *Nolan v Russia* (2011) 53 EHRR 29. See also J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 421.
[200] *Nolan v Russia* (2011) 53 EHRR 29 [73].

Otto-Preminger Institute v Austria[201] offers further discussion of legitimate aims within the context of art.9. *Otto* concerned the seizure and destruction of a film, Das Liebeskonzil. The satirical film depicted God, Jesus, and the Virgin Mary in a derogative light. The applicant alleged that the seizure and destruction of the film amounted to a breach of their freedom of expression under art.10 of the Convention. The State argued that the film was 'disparaging and insulting' to Christians and so censorship protected their rights and any disorder that might flow from protests against the release of the film.[202] In assessing the presence of a legitimate aim in *Otto* the European Court noted the State's positive obligation to ' ... ensure the peaceful enjoyment of the right guaranteed under art.9.'[203] Therefore, this lended support for the proposition that censorship pursued a legitimate aim.

For the purposes of landlord and tenant relationships *Mago v Bosnia and Herzegovina*[204] offers some guidance on the circumstances in which it will be legitimate to deprive a person of their property notwithstanding art.1 of the First Protocol. In *Mago* the deprivation of property was carried out for the sole reason of awarding a benefit to another individual rather than in the public interest. The European Court found that only where such redistribution contributed to social justice would the public interest be served thereby creating a legitimate aim.[205]

A legitimate aim in such circumstances was found in *JA Pye v United Kingdom*[206] in which the European Court found that the limitation period for recovering land from squatters was 'a legitimate aim in the general interest.'[207] It is clear from this case law that the courts ought to firstly look to the qualifications within the relevant right itself in determining whether an infringement has pursued a legitimate aim. This is particularly pressing for the relationship between art.8 and art.1 of the First Protocol as each of these rights are qualified to account for the general interests of society. This will be relevant for any court considering the balance to be struck between these rights in a given case. However, demonstrating a legitimate aim in such cases is unlikely to present difficulties for a landlord seeking a possession order. This is particularly the case for private landlords who may rely upon art.1 of

[201] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34.
[202] Ibid [46].
[203] Ibid [47]. The same positive obligation is applicable to art.8 and art.1 of the First Protocol, see for example, *Marckx v Belgium* (1979-80) 2 EHRR 330; *X and Y v Netherlands* (1986) 8 EHRR 235; *Oneryildiz v Turkey* (2005) 41 EHRR 20.
[204] *Mago v Bosnia and Herzegovina* App no 12959/05 (European Court of Human Rights, 3 May 2012).
[205] Ibid [99].
[206] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (Application No 44302/02, Merits and Just Satisfaction, 30 August 2007).
[207] Ibid [70].

the First Protocol to vindicate their property rights alongside their natural justice rights to be heard before being dispossessed of their property. Whereas a local authority will not be able to rely upon art.1 of the First Protocol perhaps indicating that a local authority must ensure that the legitimate aims within art.8(2) are clearly articulated to the court.[208] In the case of a hybrid housing association or housing trust[209] the extent to which art.1 of the First Protocol is applicable will depend upon the nature of the act being performed, be it public or private. Given each body's not-for-profit status and charitable nature[210] it may be that an association or trust will be unable to rely upon art.1 of the First Protocol and so must instead fulfil their burden within the proportionality analysis by identifying a legitimate aim listed within art.8(2). These considerations are, however, likely to be more pertinent under stages 3 and 4 of full proportionality analysis.

6.3.2 The Measures Designed to Meet the Legislative Objective are Rationally Connected to It

It has been common for courts to consider the legitimate aim of a measure alongside the measure's connection with that aim. In doing this the courts are essentially asking whether the measure is suitable for the aim pursued.[211] The conflation of the legitimate aim and suitability assessments is evident in *Al-Fayed v United Kingdom*.[212] In *Al-Fayed* the European Court of Human Rights considered the investigative and reporting requirements of the Companies Act 1985 which had led to the applicants being investigated by the UK Government. The Government's report alleged that the applicants had been dishonest with regard to their national origins and wealth. The report was later published with the applicants contending that, under art.6, this had damaged their honour and reputation without the opportunity to have the matter determined by a court. The European Court found that the UK Government's actions in 'ensuring the overall soundness and credibility'[213] of company law in general and the associated investigation and publication pursued a legitimate aim in that the freedom of investigators was

[208] See for example A Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998: Private Contractors, Rights-Stripping, and "Chameleonic" Horizontal Effect' (2011) PL 136; A Williams, 'Strasbourg's Public-Private Divide and the British Bill of Rights' (2015) EHRLR 617.
[209] *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95; *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] AC 546; *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936.
[210] Housing Act 1985 ss.5-6.
[211] The Right Honourable Lady Justice Arden, 'Proportionality: The Way Ahead?' (2013) PL 498, 499-500.
[212] *Al-Fayed v United Kingdom* (1994) 18 EHRR 393.
[213] Ibid [69].

essential to the furtherance of the social goal of maintaining confidence in the regime of company law.

There is a duality at work in the approach used in *Al-Fayed*. Despite the court not overtly mentioning suitability in their judgment it is clear that in approaching the facts of the case the court has, firstly, established that the UK pursued a legitimate aim in seeking to maintain confidence in the regime of company law. Secondly, the European Court of Human Rights has then turned its attention to the means used in pursuance of that aim and asked whether the report in this case went some way to achieve that aim in other words whether it was suitable. On this point it ought to be borne in mind that suitability does not require that the measure in question is absolutely effective in achieving the legitimate aim, it need only go some way to realisation of its goal.[214]

Taking another example, *Paulic v Croatia*[215] demonstrates the role of suitability in possession proceedings. The applicant had been the tenant in a property owned by the Yugoslavian army with an option to buy the property. Following the fall of Yugoslavia the property was subsumed by the Republic of Croatia at which time the applicant applied to buy his home under Croatian law. This was rejected by the Croatian authorities who moved to recover possession of the property. The applicant submitted that this breached art.8 as the property was their home. The European Court's preliminary questions expectedly centred on the applicability of art.8 to the circumstances of the case. The State argued that refusing the purchase was based upon the economic well-being of the country, a legitimate aim cited in art.8(2). However, at this point the court leapt ahead and asked whether 'the interference was proportionate to the aim pursued'.[216] This approach foregoes one of the two stages of full proportionality analysis which requires the State to defend its actions. Omitting either of these stages significantly tilts matters in the State's favour.

The prima facie infringing measure must have a 'causal relationship to the aims pursued'[217] by the State. In cases involving clear policy objectives with this causal link it is not difficult for an observer or the court to find that a measure is suitable in the pursuance of a legitimate aim. For example, in the above cases the investigation

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[214] N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluxer Law International 1996) 26; J Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 International Journal of Constitutional Law 466, 473.
[215] *Paulic v Croatia* App no 3572/06 (European Court of Human Rights, 22 October 2009).
[216] Ibid [39].
[217] J Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 International Journal of Constitutional Law 466, 473.

of directors to ensure the propriety of companies operating in the jurisdiction and the recovery of housing stock for the economic well-being of the country as a whole were found to suitable for the aims pursued. Therefore, despite the European Court's lack of overt commentary upon a structured proportionality test it would appear that the court is nonetheless requiring both a legitimate aim and suitability when applying proportionality.[218] A similar approach to suitability is already visible in English law with Lord Hoffmann commenting as early as 1999 that any assessment of proportionality required that any measure which infringed fundamental rights must be suitable to achieve the purpose intended.[219]

Therefore, a measure need not entirely succeed in achieving its legitimate aim but need only 'contribute' towards that aim. It is within this stage that the domestic courts have allowed for some institutional deference to decision-makers. However, this is unnecessary given the low bar that suitability creates for those arguing that a measure is rationally connected to a legitimate aim. In this it is suggested that the courts should bear in mind the placement of the burden of proof detailed above at 6.2.4. In doing this the courts ought to observe the institutional balance built into full proportionality analysis, as conceptualised in this Chapter, and ensure that it is the parties at each stage of the analysis who provide detailed reasons and justifications of the arguments being made regarding (dis)proportionality.

The causal link and the contribution necessary to satisfy suitability are considered by Alexy commenting that suitability precludes the adoption of any measure (*M*) which does not further a right (*P1*) as intended but has a negative effect on the realisation of another right (*P2*).[220] Such an outcome is visible in *Al-Fayed*. In *Al-Fayed* the aim of the Government was to maintain the credibility and openness of company law (*P1*). The investigation, production, and publication of the Government's report (*M*) promoted *P1*, however, it may be argued *M* obstructs the realisation of the applicant's right to a fair trial under art.6 (*P2*). The mere fact that *M* promotes *P1* and is suitable for this purpose, and in *M*'s absence *P1* would suffer,

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[218] The lack of consistency in the European Court of Human Rights has been noted by commentators, J Christoffersen, 'Invididual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011); A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671.

[219] The Right Honourable Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999).

[220] R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131, 135.

is sufficient to demonstrate suitability under full proportionality analysis, notwithstanding the detriment to *P2*.

6.3.3 The Means Used to Impair the Right or Freedom are No More than is Necessary to Accomplish the Objective

Necessity is commonly referred to by the European Court of Human Rights and is the 'textual peg'[221] upon which the court hangs its general proportionality assessment.[222] Therefore, necessity is the most overtly discussed aspect of proportionality in the European Court.[223] Rivers conceives necessity in the following way:

> The test of necessity asks whether the decision, rule or policy limits the relevant right in the least intrusive way compatible with achieving the given level of realisation of the legitimate aim. This implies a comparison with alternative hypothetical acts (decisions, rules, policies, etc.) which may achieve the same aim to the same degree but with less cost to rights.[224]

This approach to necessity accords with the European Court of Human Rights, with the court using different definitions amounting to some doctrinal uncertainty but following the same practical course. The problem with this is that the court has often allowed the necessity test to bleed into the balancing exercise which ought to be distinct. For example, *Silver v United Kingdom*[225] demonstrates the court's willingness to assume that a measure is necessary and jumps straight to the balancing exercise. *Silver* concerned the control of prisoners' correspondence which had not been sent to their intended recipients for various reasons. The applicants contended that this amounted to a breach of their rights under arts.8 and 10 together with art.6 due to the prison's refusal to grant access to legal advice on the matter.

In considering the issue of art.8 the European Court asked whether the interference was in accordance with law, pursued a legitimate aim under art.8(2) of the Convention and was 'necessary in a democratic society'.[226] On the first two points the court found that the UK legislation and the actions of the prison conformed with

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[221] J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 177.
[222] *Handyside v United Kingdom* (1979-80) 1 EHRR 737.
[223] E Brems and L Lavrysen, "Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139.
[224] J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 198; R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131, 135-136.
[225] *Silver v United Kingdom* (1983) 5 EHRR 347.
[226] Ibid [84].

the requirements of the Convention.[227] On the meaning to attribute to 'necessary in a democratic society' the court held that the measure in question must align with a pressing social need and be proportionate to the purported legitimate aim.[228] Based upon this, Rivers's conception of necessity clearly does play a role within the European Court of Human Rights' consideration. In pursuing full proportionality analysis, it is encouraging that the court has been clear as early as its judgment in *Silver* that any interference with a Convention right ought to be proportionate to the aim pursued. In this sense it would appear that what is meant by this in the eyes of the court is that the interference must not encroach upon an individual's rights anymore than is necessary or in other words the court will ask whether there are less restrictive means to achieve the legitimate aim.[229] This approach is demonstrated in *Otto-Preminger Institute v Austria*[230] which shows the European Court of Human Rights' distillation of the necessity principle.

In assessing the necessity of the censorship undertaken in *Otto* the court drew attention to the central role of freedom of speech in the Convention, however, there is considerable disparity across Europe as to the significance of religion in modern European societies and for that reason the States would be given a certain latitude. Whilst this does not give the States a blank cheque when dealing with rights under art.10 the necessity of the interference must be 'convincingly established'.[231] Based upon this it is clear that, even in the absence of a common consensus, where the right in question is seen as central to the spirit of the Convention the bar for States to demonstrate that an action is necessary and not overly interfering with a Convention right is rather high.[232] In *Otto*, '[t]he decisive point was whether the precautions taken by the cinema to prevent people from unwillingly being offended in their religious feelings were sufficient and thus represented *the least restrictive measure* to pursue the legitimate aim' (emphasis added).[233] In the case of *Otto* it was asked what other action the authorities could have taken in order to protect the

[227] Ibid [85]-[96].
[228] Ibid [97]-[98].
[229] E Brems and L Lavrysen, "Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139.
[230] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34.
[231] Ibid [50].
[232] For an example of a higher bar in the case of art.2 and the right to life see *McCann v United Kingdom* (1996) 21 EHRR 97 in which the European Court of Human Rights implemented a 'strictly necessary' test, requiring a more stringent test than that used in cases concerning arts.8-11.
[233] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 156.

religious sensibilities of the majority of the population.[234] In that sense it is unsurprising that the court found the interference to be necessary as there is no clear measure which would have been less injurious to the applicant's art.10 rights. This approach to necessity is noteworthy in the context of possession proceedings as it would require the court to ask, and the tenant to argue, whether a possession order was the least injurious method of achieving their legitimate aim. This is discussed in further detail below at 6.4 alongside art.8 case law.

The European Court has been criticised for not always applying the strictest test for necessity choosing to invoke the margin of appreciation, affording domestic authorities latitude for demonstrating the necessity of their measures.[235] However, as discussed above at 6.2.3 the margin of appreciation has no application in domestic law rather it is deference towards other State institutions which has exercised the court in human rights adjudication. Applying full proportionality analysis in the method influenced by Rivers foregoes the need for deference and in such cases allows for the domestic courts to apply necessity in a manner which accords with the facts of the case at hand. If an individual can demonstrate to the court that another measure would have achieved the same result but with less injury to rights then the complained of measure must be disproportionate.[236]

This approach to 'least injurious method'[237] is already visible in English law. In *R (Daly) v Secretary of State for the Home Department*[238] the House of Lords found that the blanket policy of the Home Secretary which required all correspondence between a prisoner and his counsel to be examined by prison staff was disproportionate. The aim of these measures was to maintain prison security and order. The importance and suitability of the measure were accepted by the House of Lords, however, the measure infringed upon the applicant's rights to 'an extent greater than necessity requires'.[239] Therefore, there was an alternative approach which would have achieved the same end but with no interference or in the least less interference with fundamental rights.[240] This same conclusion was reached in *De*

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[234] Ibid.
[235] P Popelier and C Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 European Constitutional Law Review 230.
[236] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.
[237] T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 179-180.
[238] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.
[239] Ibid [23].
[240] *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150 [19].

Freitas in which the court found that a blanket infringement of rights went beyond what was necessary with the legitimate aim achievable through less onerous restrictions. Hickman suggests that asking whether a measure is the least injurious solution collapses:

> …. the fundamental distinction between the roles of judges and public officials. By specifying that public authorities must adopt the least intrusive course of action, the test appears to remove any element of choice or discretion from public authorities and legislatures as to what measure will best accomplish the public interest objective sought to be achieved.[241]

Hickman may be correct if one assumes that it is the public authority itself that must prove that a measure is no more than necessary thereby giving rise to a potential conflict between the opinion of the court and the authority. However, under full proportionality analysis this concern is ill-founded as it is the rights-holder who must demonstrate that a measure goes further than necessary. In this context the court maintains its institutional and adjudicative independence on the question of necessity with the court making a decision based upon the arguments put forth. A further criticism of the least injurious method from Hickman is its binary nature and the lack of a spectrum in which one can determine the least injurious action alongside the least effective way of achieving the aim. From the perspective of a rights-holder arguing that a measure is more than necessary the lack of a spectrum is irrelevant. If one can articulate a course of action which would have had a less injurious effect upon fundamental rights and yet still achieve the same objective, then it ought to be clear in the mind of the court that the measure goes further than necessary. In the absence of such submissions then the court may accept the submissions of the defendant as to the least injurious nature of the complained act. On this basis there is no reason why the least injurious method cannot play a part in domestic proceeding concerning proportionality when using full proportionality analysis.

Christoffersen is also critical of the least injurious approach due to the principle's purported omission in the jurisprudence of the European Court.[242] This point will not be directly refuted here as to do so would reiterate the same comments made above in relation to the case law of the European Court. The same shortcomings noted with respect to Hickman's work are applicable to Christoffersen with the importance of the argumentative structure of full proportionality analysis

[241] T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 180.
[242] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 129-135.

unappreciated by Christoffersen. The primary argument made by Christoffersen against the use of the least injurious method or 'strict necessity' is based upon the aim of the Convention to provide a 'minimum level of protection'.[243] The first weakness in this argument is that it provides little guidance for domestic courts who, through domestic legislation in the case of the UK, have been tasked with upholding the HRA 1998 rights. In such cases it is open to the domestic courts and the domestic legislature to go beyond the protection afforded by the Convention in their own jurisdictions. Second, the minimum level of protection in all cases is the observance and respect for the rights in question within this is an expectation that in complying with Convention the States will seek to achieve the greatest realisation of those rights.[244] If the State may have achieved the same legitimate aim via a suitable means in a way that was less injurious to rights then it seems counter to the spirit of the Convention to take the more injurious route. In doing this the court is not prescribing a particular course of action it is simply requiring that an individual's rights are not excessively and unnecessarily infringed. In applying full proportionality analysis the task of the court in this regard is made easier by the burden placed upon the victim to demonstrate that a less injurious means would have achieved the same end. Therefore, it is not for the court to cast around the facts of the case to determine this it is for the victim to prove that a less injurious means was available. On this basis Christoffersen's criticisms fall away. The least injurious method does not undermine the 'implementation freedom'[245] of Contracting States rather it serves to require States observe and realise rights to their fullest extent. For example, if there are three courses of action which lead to the same end and result in the equivalent level of interference, the State is free to follow any of these.

6.3.4 The Measure Strikes a Fair Balance Between the Rights of the Individual and the Interests of the Community

The final stage of full proportionality analysis requires the overall balance of the competing interests of the case to be considered.[246] This final step is detailed by Klatt and Meister who, following Alexy's work, find balancing to be the act of determining 'whether the [offending] act represents a net gain, when the reduction

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[243] Ibid, 132.
[244] European Convention on Human Rights art.1; Human Rights Act 1998 preamble.
[245] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009), 135.
[246] K S Ziegler, 'Introduction' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007).

on enjoyment of rights is weighed against the level of realization of the aim'.[247] In the context of the European Court of Human Rights it is 'the balancing of divergent individual interests within the confines of what are considered the fundamental interests and values of the society at large'[248] which occupies the court's mind. The balancing of these interests strikes to the very core of constitutional law across the Council of Europe.[249] Therefore, it is disappointing that the application of the balancing exercise within the European Court of Human Rights is doctrinally thin.[250]

The lack of a consistent and discernible approach to the balancing of competing interests is demonstrated by *Kay v United Kingdom*.[251] The case concerned the actions of a local authority which had granted licences to a housing trust who in turn would grant licences to residents. The authority later instructed the housing trust to replace its licences with assured shorthold tenancies, thereby giving residents additional security. Some years passed and the local authority sought to evict the tenants and recover possession of the property. In the domestic courts the county court made an order in favour of the local authority with appeals to the Court of Appeal and Supreme Court being dismissed. The applicants alleged in the European Court of Human Rights that this amounted to a breach of their art.8 rights and respect for their homes.

In assessing the effect of art.8 the European Court stopped short of any general pronouncements regarding proportionality in the abstract instead turning to its application in *Kay*, thereby contributing to the theoretical void cited by commentators.[252] The European Court's application of proportionality in *Kay* is equally bereft of precedential value.

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[247] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 9; J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 177.
[248] A Z Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties' (1979) 26 Netherlands International Law Review 163, 165.
[249] P Popelier and C Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9 European Constitutional Law Review 230, 230-231; A Arden, 'Whose Rights? Whose Reasons?' (2011) 14 JHL 47.
[250] G De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105, 114.
[251] *Kay v United Kingdom* (2012) 54 EHRR 30. The appeal from *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465.
[252] G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 723-724; A Arden, 'Whose Rights? Whose Reasons?' (2011) 14 JHL 47, 48-51; S Kentridge, 'The Incorporation of the European Convention on Human Rights' in John Beatson, Christopher Forsyth and Ivan Hare (eds), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998) 189.

The lack of a unified approach to the balancing of competing rights and interests is visible in other areas touching upon art.8. For example, in the area of privacy the European Court of Human Rights has been clear in the requirements of art.8 and art.10, however, as to how the interests ought to be balanced, the court has been silent. *Ringier Axel Springer Slovakia AS v Slovakia*[253] demonstrates the difficulty of balancing these interests. The applicant in the case was a company who had been found liable for the publication of a story calling an individual dishonest. In the domestic courts the applicant was ordered to publish an apology and pay damages to the individual due to the falsity of the claims. The matter in the European Court of Human Rights centred around the domestic courts' exclusive consideration of the individual's art.8 rights without resort to art.10. In assessing the role of art.10 the court followed the same course as that in *Kay*. Namely, the court asked whether the interference with art.10 had been 'necessary in a democratic society' in accordance with a 'pressing social need' bearing in mind the margin of appreciation left to national authorities.[254] However, as to the actual method which must be used where there are competing Convention rights the court's focus will be upon the overall 'fair balance' struck.[255] In light of this doctrinal gap English courts have taken it upon themselves to develop a tortious doctrine built atop the competing interests of arts.8 and 10 which goes beyond the jurisprudence of the European Court of Human Rights.

Given the lack of firm guidance from the European Court of Human Rights it is perhaps therefore not surprising that national courts have looked to other common law jurisdictions for clues as to how to apply proportionality when dealing with Convention rights.[256] For the relationship between a landlord and tenant the jurisprudence of both the European Court and the domestic courts fails to provide guidance on how conflicting rights might be reconciled. In domestic possession proceedings the lack of a principled approach towards proportionality and then to balancing within that analysis is rooted in policy rather than in theoretical limitations.[257] The next section of this Chapter will build a theoretical basis for the application of the final stage of full proportionality analysis in line with the legal theory of Alexy.

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[253] *Ringier Axel Springer Slovakia AS v Slovakia* (2012) 54 EHRR SE4.
[254] Ibid [107].
[255] Ibid [109].
[256] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xxxii; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [73]-[74]; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200 [164].
[257] A Arden, 'Whose Rights? Whose Reasons?' (2011) 14 JHL 47, 48-49.

6.3.4.1 *Balancing*

> To force [judicial] analysis into a procrustean bed of proportionality review can leave one feeling that there is a certain arbitrariness in the weighing exercise. It is not obvious that adoption of a proportionality standard ... would make judicial reasoning more transparent, or subject it to more determinate legal constraints. In reality, in many contexts, what it would involve would be a mere transfer of the simple power to make a decision where a decision is required from democratically accountable executive organs to the courts.[258]

The above passage summarises much of the criticism of proportionality in that proportionality purports to be a value-free judicial tool and yet it provides another veil through which the judiciary may hide their moral judgments.[259] The idea of courts balancing conflicting rights has often been tabled as a step too far in human rights adjudication with the court stepping in to the territory of merits review, going beyond 'the proper boundaries of judicial intervention'[260] and into the realm of politics. However, it is not clear how the balancing of human rights differs from any other judicial exercise that the courts undertake.[261] This is a necessary outcome of the various principles which are at play creating a legal landscape which is 'in a state of constant conflict and must be balanced.'[262] This 'search for a fair balance between conflicting interests may be universally inherent in adjudication'.[263] Therefore, lending an antecedent weight to a landlord's rights, under art.1 of the First Protocol or the mandatory grounds for possession contained in legislation, falls short of the balancing exercise required by art.8 and full proportionality analysis as it foregoes the enquiry required by rights adjudication. Giving antecedent weight to interests frustrates a key advantage of balancing – the continual reappraisal of the content of rights.[264]

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[258] P Sales, 'Rationality, Proportionality, and the Development of the Law' (2013) 129 LQR 223, 236.

[259] See also T Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere' (2004) 63 Cambridge Law Journal 166, 171-172; M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 56.

[260] P Craig, 'Unreasonablenss and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 104.

[261] ' ... [B]alancing, in the form of proportionality, is nothing but a manifestation of the perennial quest to invest adjudication with precision and objectivity.' See generally S Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2009) 7 International Journal of Constitutional Law 468, 469.

[262] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 119.

[263] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 198.

[264] X Contiades and A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 International Journal of Constitutional Law 660, 670. This understanding of proportionality giving a permeable scope to rights is akin to that of polycontextuality in relation to the public/private divide as explained in Chapter 5.

This organic 'structuring' of rights is common within the legal traditions of common law adjudication.[265] What is needed in possession proceedings is 'less obscure proportionality analysis … if art.8 is not to be emptied of all practical impact in this context.'[266] Alexy's theory of constitutional rights[267] is helpful in securing this particularly when the question turns to the balance of rights.[268] Alexy's theory rests upon the idea of constitutional rules and principles which may be distinguished from one another in rights adjudication.[269] Rules and principles are the 'key to the resolution of central problems of constitutional rights.'[270] For Alexy rules and principles are discrete norms which guide the application of constitutional rights. It is beyond the scope of this work to engage the volume of literature around the idea of jurisprudential norms.[271] However, here the term norm will be used to refer to the idea of a 'constitutional rights norm':

> constitutional rights norms are those norms which are expressed by provisions relating to constitutional rights [such as art.8], and constitutional rights provisions are those statements, and only those statements, contained in the text of the … [HRA 1998].[272]

On this definition it is clear that art.8 and art.1 of the First Protocol are constitutional rights norms. The follow up to this is the structure of constitutional rights norms, which encompass the idea of rules and principles which are in themselves norms as they each 'say what ought to be the case'.[273] A principle requires an end to be realised to the greatest possible extent legally and factually possible, an 'optimisation requirement',[274] whilst a rule is binary, either fulfilled or

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[265] In a theoretical sense this tallies with Dworkin's Hercules who is tasked with finding consistency in the body of law generally, see R Dworkin, *Law's Empire* (Hart Publishing 1998).
[266] R Walsh, 'Stability and Predictability in English Property Law - the Impact of Article 8 of the European Convention on Human Rights Reassessed' (2015) 131 LQR 585.
[267] The rights contained in the HRA 1998 are widely considered to be constitutional rights, Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 77 HC 410, 2007) 5; R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) xvii; D Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) LQR 343.
[268] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002).
[269] The idea of rules and principles is not novel, see R Dworkin, 'Judicial Discretion' (1963) 60 The Journal of Philosophy 624; R Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14.
[270] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), 44.
[271] See for example, J Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011); H Kelsen, *Pure Theory of Law* (1967) 5; H L A Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012).
[272] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 30.
[273] Ibid 45.
[274] Ibid 47. It is the optimisation requirement of Alexy's theory that stands apart from Dworkin, see J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 209.

not.[275] Therefore, this section is concerned with the optimisation or reconciliation of values in conflict.[276] This optimisation 'makes each constitution the best it can possibly be.'[277]

The rights contained in the Convention and the HRA 1998 may be broadly grouped into those rights that are absolute such as the right to a fair trial under art.6 or those that may be qualified in certain circumstances under art.8. These broad groupings should not be taken to mean that absolute rights are rules whilst qualified rights are principles. The jurisprudence of the European Court of Human Rights demonstrates that even those rights which on their face appear to be rules and therefore may be 'fulfilled or not',[278] such as the absolute rights, are actually principles. For example, art.6's terms are largely absolute but for reservations regarding private hearings. However, in considering art.6 the European Court have utilised balancing to determine whether there has been a contravention of art.6.[279] The same observations may be made regarding art.5.[280] This supports Alexy's approach to rules and principles and allows the Convention rights to be conceptualised as optimisation requirements. Conceiving art.8 in this way is supported by the qualifications built in to art.8(2) which allow for limitations to art.8(1) in certain prescribed circumstances therefore allowing the right to be realised to varying degrees.[281] Similarly, art.1 of the First Protocol and the protections created for private property are qualified and allow for limitations upon art.1 in certain cases.[282] Therefore, art.1 of the First Protocol might also be described as a principle. Alexy's

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[275] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 48. See also the work of Dworkin concerning the nature of rules and principles, for Dworkin 'The difference between rules and principles is a logical distinction … Rules are applicable in an all-or-nothing fashion … All that is meant, when we say that a principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.' R Dworkin, *Taking Rights Seriously* (1977) 22-26. On this reading Alexy clearly attributes more weight to principles in that they are *requirements* in his theory of constitutional rights.

[276] This is in contrast to those theories which look to afford priority to rights. In cases where rights are in conflict models giving priority to rights give little guidance, see for example L B Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 International Journal of Constitutional Law 864, 868-869.

[277] D M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 163.

[278] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 47-48.

[279] T Hickman, 'Negotiable Rights, What Rights?' (2012) 75 MLR 437, 446; T Hickman, *Public Law after the Human Rights Act* (Oxford University Press 2010) 109-123.

[280] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 214-215.

[281] See also the security of tenure created by, for example, the Protection from Eviction Act 1977.

[282] See the following for examples of cases in which the right to property has been limited, but not extinguished completely, *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch), [2009] 1 FLR 873; *Barca v Mears* [2004] EWHC 2170 (Ch), [2005] 2 FLR 1; *Re Citro (Domenico) (A Bankrupt)* [1991] Ch 142.

conception of rules may be equated to art.3 of the Convention which prohibits torture and 'inhuman or degrading treatment or punishment'. There are no qualifications to this right[283] and in cases where treatment amounts to torture or inhuman treatment, degrading treatment, or punishment there will be a breach of art.3.[284]

Once it is established that art.8 and art.1 of the First Protocol are principles in the context of Alexy's theory the question becomes how competing principles might be reconciled. Any method which allows for consideration of competing principles must account for the fact that giving precedence to one principle does not render the counter principle invalid, rather it must recognise 'the outweighed principle may itself outweigh the other principle in certain circumstances.'[285] This view recognises that the rights contained in the Convention and the HRA 1998 are not accorded a priori weight and so do not create a hierarchy of rights.[286] The weight accorded to such rights is dependent upon the facts of the case not the right's inherent value within the framework of the Convention or the HRA 1998:

> This is what is meant when it is said that principles have different weights in different cases and that the more important principles on the facts take precedence.[287]

Accepting this begs the question as to how the courts might conduct a balancing exercise in a replicable fashion within full proportionality analysis that is applicable by the county courts who stand at the coalface of possession proceedings.[288] Alexy's Law of Competing Principles offers insight on this.

6.3.4.2 *The Law of Competing Principles*

Courts must give effect to the maximum possible realisation of each principle within the confines of what is factually and legally possible. This aim is inherent in full

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[283] Member States of the Council of Europe may not derogate from art.3 in any circumstances, European Convention on Human Rights art.15(2).
[284] *Saadi v Italy* (2009) 49 EHRR 30.
[285] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 50.
[286] See discussion of hierarchies of rights at 6.2.2.
[287] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 50. This view is influenced by the work of Dworkin who considered that conflicting principles must be resolved by taking account of the relative weight of each principle within the context of the case, R Dworkin, *Taking Rights Seriously* (1977) 26, 39-45.
[288] *Corby BC v Scott* [2012] EWCA Civ 276, [2013] PTSR 141 [36]; K Lees, 'Article 8 Defences - Separating the Wheat from the Chaff: Corby BC v Scott; West Kent Housing Association Ltd v Haycraft' (2012) 16 Landlord & Tenant Review 148, 150; D Cowan and C Hunter, '"Yeah But, No But", or Just "No"? Life after Pinnock and Powell' (2012) 15 JHL 58, 60.

proportionality analysis which seeks to ensure the greatest realisation of rights.[289] In so doing this Alexy proposes the Law of Competing Principles.

The first step in the Law of Competing Principles is recognising the competing principles at play. The second involves determining where the general precedence rests in a given case. At this stage the court should bear in mind the values of society overall and the inherent fair balance in the Convention.[290] In the third and final stage of the Law of Competing Principles the court will decide the actual weight to give to the principles in play thereby determining which principle will win out. For the purposes of this work these principles are visible in cases concerning both private and public landlords. In the case of a local authority landlord the competing principles are represented by a tenant's art.8 rights and the rights and interests of a local authority and community at large in recovering possession of their property,[291] principle 1 (*P*1) and principle 2 (*P*2) respectively. Giving precedence to one of these principles requires the court to consider the conditions (*C*) under which would allow for *P*1 to outweigh *P*2.[292] In instances where *P*1 takes precedence over *P*2 due to *C* then this legal consequence (*Q*) will amount to a legal rule which must be satisfied.[293] Following such a finding, where similar circumstances arise, for example in future cases concerning mandatory possession proceedings, such instances 'will be "subsumed" within the conditional relation of precedence'[294] and provide a particularly useful starting point for lower courts. In other words a precedential principle will be 'concretised'.[295]

Applying this to possession proceedings involving a local authority would require the court to recognise the competing principles in play, a tenant's art.8 rights (*P*1) and a local authority's proprietary rights (*P*2). At stage 2 the court must decide where the general precedence lies for the conflicting principles. In determining this the court ought to determine whether the interests of the tenant in a typical case weigh heavier than the interests of the State in recovering possession. It is

[289] The Law of Competing Principles and proportionality are intimately linked, R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 66-69.
[290] A Z Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties' (1979) 26 Netherlands International Law Review 163, 165.
[291] These rights are reflected in art.8(2): 'There shall be no interference by a public authority with the exercise of this right except … for the protection of the rights and freedoms of others.'
[292] This nomenclature is borrowed from Alexy's work, R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 52.
[293] Ibid 53-54.
[294] G Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law & Jurisprudence 179, 184.
[295] J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 220-221.

submitted here that that general precedence should take account of the non-legal home interests identified in Chapter 3. This contrasts the position the courts have taken towards art.8 so far with a heavy preference for the interests of the landlord.[296] However, this general precedence does not necessarily 'determine the outcome of balancing.'[297] Instead this is simply one of many variables which must be considered by the court when conducting the balancing exercise. In other words this gives the protection of a person's home a character of rebuttable 'prima facie trumping.'[298] Finally, at stage 3 the nuances of the case will be felt via *C*, the conditions which would allow for one principle to take precedence over another. For instance in a case where a tenant is particularly vulnerable and unable to secure alternative accommodation then *P*1 might well take the status of a rule and be realised as such making it unlawful to dispossess the tenant of their home. Alternatively, in circumstances where a tenant has been particularly anti-social or violent towards neighbours, the court may find that *P*2 must supersede *P*1 due to the harm and distress which would be prevented by the vindication of the local authority's property rights, and statutory right to recover possession.[299] These examples recognise that 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[300]

Critics of the balancing exercise within full proportionality analysis fear that judicial balancing of conflicting interests will introduce merits review into rights adjudication.[301] It is conceded that balancing does not lead to a 'precise and unavoidable outcome', however, this does not equate to the balancing exercise being an 'irrational procedure'.[302] Therefore, what full proportionality analysis seeks to achieve is not broad-brush certainty as to the outcome of a case but certainty as to the method by which that outcome will be reached. Dispossessing someone of their

[296] *Fareham BC v Miller* [2013] EWCA Civ 159, [2013] HLR 22; *Birmingham City Council v Lloyd* [2012] EWCA Civ 969, [2012] HLR 44; *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[297] M Klatt and M Meister, 'Proportionality: A Benefit to Human Rights? Remarks on the I·CON Controversy' (2012) 10 International Journal of Constitutional Law 687, 690.
[298] Ibid.
[299] See for example the actions which led to the possession proceedings in *Southend-on-Sea BC v Armour* [2014] EWCA Civ 231, [2014] HLR 23.
[300] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 102; J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 426; M Jestaedt, 'The Doctrine of Balancing - its Strengths and Weakensses' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012) 155-156.
[301] See above at 6.3.4.
[302] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 100.

home is a grave interference with art.8[303] and so the reasons tabled for curtailing this right ought to be clear and well thought out.[304] The courts are adept at such balancing exercises in various other areas of law, for example, tort,[305] contract,[306] and equity,[307] and so to suggest that the same exercise cannot be conducted in possession proceedings is baseless.

A criticism made of proportionality generally is that it simultaneously invites and hides moral considerations in a legal method which purports to be morally neutral.[308] This view misunderstands the nature of proportionality which is 'as neutral as far as ... [a formal legal] structure ... '[309] may be.[310] However, to give effect to any legal structure requires external judicial will encompasses ' ... moral arguments and considerations of weight and value that vary according to different perspectives ... '.[311] Therefore, the outcome of any review cannot 'preclude a certain degree of infusion of the personality of the judge into his judgements.'[312] The advantage of proportionality is that it edges judges towards the pertinent issues of a case upon which an unavoidable moral judgment will be made.[313] These moral judgments do not arise out of proportionality but are rather an inherent result of any adjudication.

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[303] *McCann v United Kingdom* (2008) 47 EHRR 40 [50]; *Wandsworth LBC v Dixon* [2009] EWHC 27 (Admin), [2009] L & TR 28 [22]; *Malik v Fassenfelt* [2013] EWCA Civ 798, [2013] 28 EG 84 (CS) [9].

[304] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) preface; R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 105-107.

[305] *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732; *Hunter v Canary Wharf Ltd* [1996] AC 655; *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

[306] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, [1998] 1 All ER 98; *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] 1 AC 1101.

[307] See *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 (Australian High Court), 413: 'A central element of ... [equitable] ... doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.'

[308] See generally S Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2009) 7 International Journal of Constitutional Law 468.

[309] M Klatt and M Meister, 'Proportionality: A Benefit to Human Rights? Remarks on the I·CON Controversy' (2012) 10 International Journal of Constitutional Law 687, 695.

[310] See generally L B Tremblay, 'An Egalitarian Defense of Proportionality-Based Balancing' (2014) 12 International Journal of Constitutional Law 864.

[311] M Klatt and M Meister, 'Proportionality: A Benefit to Human Rights? Remarks on the I·CON Controversy' (2012) 10 International Journal of Constitutional Law 687, 695.

[312] X Contiades and A Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 International Journal of Constitutional Law 660, 672.

[313] K Möller, 'Proportionality: Challenging the Critics' (2012) 10 International Journal of Constitutional Law 709, 726.

This same exercise in assessing competing principles is replicable in proceedings concerning private landlords.[314] In the context of possession proceedings initiated by a private landlord the competing principles become the tenant's art.8 rights (*P*1) in opposition to the landlord's property rights under art.1 of the First Protocol (*P*2).[315] Recognition of *P*1 and *P*2 allows for the attribution of general precedence. In this example it is again suggested that general precedence takes account of the importance of the home for tenants as detailed in Chapter 3 and which may weigh 'significantly more heavily'[316] than the landlord's interest in private property. This is all the clearer considering the intensity of the infringement with *P*1, giving precedence to *P*1 will temporarily prevent a landlord from recovering possession of their property but will allow them to continue receiving rent and, should the conditions change, re-enter the property at a later date. Whereas giving precedence to *P*2 would irrevocably remove a tenant from their home. At the third stage of the Law of Competing Principles the particular circumstances of the case will be considered. It is here that the general precedence might be defeated. For instance, it is foreseeable that in some cases a tenant may be unable to continue paying rent and so for the court to refuse a possession order would be too great an interference with the landlord's art.1 rights.[317] It is here that the court will carry out an analysis akin to that used prior to the HRA 1998 in possession proceedings taking 'into account all relevant circumstances as they exists at the date of the hearing … [in a] broad common-sense way … '.[318]

This principle has since been regularly echoed in the courts with the accepted guidance being that the court should bear the above in mind in considering the consequences which will flow from the making of a possession order or refusing an order.[319] This consideration may, therefore, prove beneficial for the tenant or the landlord. Much like earlier possession proceedings what is being asked of the court in the Law of Competing Principles for the judiciary to look at 'both sides of the same coin'.[320]

The above analysis around the Law of Competing Principles within the fourth stage of full proportionality analysis might appear to contradict the allocation of the

[314] For a detailed discussion of horizontal effect see Chapter 4.
[315] This is in addition to a landlord's statutory rights to recover possession.
[316] R Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 52.
[317] Article 1 of the First Protocol includes rights attached to and income from legal interests, see generally, *Mellacher v Austria* (1989) 12 EHRR 391; *Hutten-Czapska v Poland* (2007) 45 EHRR 4.
[318] *Cumming v Danson* [1942] 2 All ER 653, 655.
[319] *Cresswell v Hodgson* [1951] 2 KB 92; *Battlespring Ltd v Gates* (1984) 11 HLR 6.
[320] *Whitehouse v Lee* [2009] EWCA Civ 375, [2010] HLR 11 [31].

burdens of proof outlined at 6.2.4, however, this is not the case. The argumentation structure advocated at 6.2.4 is an exercise which takes place during the hearing of a matter concerning proportionality and so therefore serves to provide a structure to litigation.[321] Therefore, in possession proceedings it will be for the tenant to argue that a possession order would be disproportionate as the measure imposed too great an interference of their art.8 rights over and above the interests of the community. It will of course be open to the landlord to respond to these submissions but the burden will remain with the tenant within the third and fourth stages of the argumentative structure outlined above. Applying the Law of Competing Principles and arguing for a general precedence for art.8 does not alter this argumentation structure. Rather the balancing of competing principles takes place post-argumentation and will be a matter for the judiciary. These considerations are therefore complimentary in their efforts to ensure a principled and rational structure to proceedings and judicial decision-making in matters concerning proportionality. Having established the nuances of the fourth stage of full proportionality analysis and the experience of the courts in conducting this test in all but name the next section of this Chapter will look to apply full proportionality analysis to three cases which have concerned art.8 in possession proceedings.

6.4 Full Proportionality Analysis Applied

The contours and propriety of full proportionality analysis in reconciling conflicting rights have been outlined above. The purpose of this section is to apply full proportionality analysis to three cases which have concerned the application of art.8. These cases have been chosen to demonstrate a cross-section of the parties and interests which may be in conflict during possession proceedings. The cases below also serve to illustrate that a principled application of full proportionality analysis does not bar landlords from recovering possession of their property should the facts of the case make a possession order proportionate.

6.4.1 *Manchester City Council v Pinnock*

The facts of *Pinnock* are well-known at this stage and might be recalled from Chapter 2. For the purposes of the case study the facts may be summarised as follows; Mr Pinnock was the demoted tenant of a local authority. Following continued anti-social behaviour on the part of Mr Pinnock's family, some of whom lived with Mr Pinnock and some of whom did not, the local authority sought a possession order.

[321] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 409.

Full proportionality analysis applied to *Pinnock* directs the court's attention to the substantive interests in play. First, is the local authority's objective sufficiently important to justify limiting a fundamental right? The local authority's objective in *Pinnock* was recovery of property in pursuit of its statutory duties including 'the fair allocation of its housing … [and] *the need to remove a source of nuisance to neighbours* … '[322] (emphasis added). It appears in *Pinnock* that the Supreme Court accepted these aims given the statutory framework in the authority's favour. Furthermore, these objectives match the qualifications in art.8(2) of the Convention thereby satisfying the first stage of full proportionality analysis.

Second, 'is the measure rationally connected to the objective?' Like the first stage it is straightforward for the local authority to argue that the means used are rationally connected to their aim. It is difficult to think of other means which might be used to recover possession of the property in this case. This clearly 'makes some contribution to the aim'[323] pursued by the authority.

Third, it would be for Mr Pinnock to show that dispossession is 'more than necessary to accomplish the objective'.[324] It is here that the courts are likely to face the most difficulty in assessing the proportionality of a possession order. In *Pinnock* the local authority's objective was the recovery of possession in pursuit of the removal of Mr Pinnock's family who had been the source of anti-social behaviour. On this basis it seems in the least arguable that removing Mr Pinnock from his home in order to remove his family and quell their anti-social behaviour is more than necessary to accomplish the council's objective. Moreover, there is a counterpoint to this in that there is no evidence this would actually end the anti-social behaviour it is possible such behaviour would simply be exported elsewhere. In light of this it must be asked what other powers a local authority possessed to achieve their aim. In 2010 when *Pinnock* reached the Supreme Court Anti-Social Behaviour Orders (ASBOs) were extant, therefore, Mr Pinnock logically argued that the correct course for the Supreme Court would be ASBOs or similar orders[325] excluding Mr Pinnock's children from the area thereby eliminating the opportunity for further anti-social behaviour.[326] The court did consider this but reached the view that such an order would not prevent the anti-social behaviour.[327] Bearing in mind the criminal liability which flows from the breach of an ASBO or similar order it is difficult to follow the

[322] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [52].
[323] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 421.
[324] Ibid, 422.
[325] Crime and Disorder Act 1998 s.1; Housing Act 1996 s.153C.
[326] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [124].
[327] Ibid [125]-[130].

court's reasoning when the problem is reassessed through the lens of whether the measure was 'no more than necessary to accomplish the objective' sought. If the possibility of criminal liability was not able to dissuade Mr Pinnock's children from anti-social behaviour why should the responsibility for their actions rest with the innocent party, Mr Pinnock.

Fourth, the balancing exercise, it is uncontentious that making a possession order amounts to a prima facie breach of art.8(1). However, in *Pinnock* the council might argue that an order would serve to protect the interests of the local community, including the art.8 rights of third parties living nearby. Balancing rights requires gains to community interests to be 'at least as great as the cost to rights.'[328] Proving this will turn on claimant's ability to demonstrate that the measure is 'out of line with the order of values expressed more widely in the law and public culture'.[329] In this case it seems difficult for Mr Pinnock to argue that his art.8 rights ought to outweigh the art.8 rights of neighbouring tenants who have suffered due to his family's anti-social behaviour and so there does not seem to be 'an excessive cost to rights'.[330] This is in accordance with the Law of Competing Principles as it would be for the court to firstly identify the competing principles at issue. Then turn to the general precedence of art.8 where a person's home is at risk given the severity of interference instigated by dispossession. This general precedence will then, however, be assessed in light of the particular facts of the case. Due to the excessive cost of rights which would flow from Mr Pinnock's continued residence (and likely continued actions of his family) any general precedence for art.8 would likely be defeated.

Stages 1, 2, and 4 of full proportionality analysis have been demonstrably satisfied on the facts of *Pinnock*. However, the necessity of dispossession to quell the anti-social behaviour is questionable. It is correct that Mr Pinnock's family had been subject to ASBOs in the past and went on to breach the orders but to have Mr Pinnock lose his home for this seems disproportionate at stage 3 of full proportionality analysis. This is particularly so given that breach of an ASBO may attract a prison sentence of at least 6 months and up to 5 years.[331] Mr Pinnock is in essence being dispossessed due to the wrongdoings of his family. Therefore, a possession order could in all likelihood be disproportionate in *Pinnock*.

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[328] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 426.
[329] Ibid, 427. See also 'There is ... an in-built sensitivity to the adjudicative context within the substantive theory of proportionality.', C Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1, 17.
[330] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 427.
[331] Crime and Disorder Act 1998 s.10.

6.4.2 *Lawal v Circle 33 Housing Trust*

Lawal v Circle 33 Housing Trust[332] concerned a housing association which assisted the local authority in housing those who were owed a duty to be housed under the Housing Act 1996.[333] It is settled that in cases involving a hybrid authority, that is an authority which is not inherently public but may perform public functions, HRA 1998 obligations may arise. There were numerous legal issues which arose in *Lawal*, however, for the purposes of this work the application of art.8 is most relevant.[334] The housing authority moved to recover possession of the property on the basis that it was under-occupied, with only Mr Lawal and his daughter residing at the property. This was in spite of the Mr Lawal being in ill-health, requiring assistance in day to day activities, and potentially being made homeless if dispossessed. In addition, if evicted, Mr Lawal's daughter was unlikely to be able to afford accommodation in the private rented sector.

In looking at the issues in *Lawal*, and applying the same unstructured test from *Pinnock*, the court found that it was proportionate to make a possession order. However, applying full proportionality analysis to *Lawal* leads to a different outcome. In applying full proportionality analysis it must first be asked whether the objective of the housing authority is sufficiently important to justify limiting a fundamental right. The burden for proving this will rest with the housing authority.[335] The housing authority sought repossession on numerous grounds but the overarching objective of the housing authority was the recovery of an under-occupied property which could be used by other people in need of social housing.[336] Given the qualifications built into art.8(2) it would be straightforward for a court to accept that stage 1 of full proportionality analysis has been satisfied.

The second stage of full proportionality analysis is equally straightforward for the housing authority to demonstrate. The aim of the measure is to recover possession of the property so that it may be rented to those in need of social housing and who

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[332] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9.
[333] Ibid [23].
[334] The proceedings arose out of the property no longer being the tenant's 'only or principal' home per s.81 of the Housing Act 1988. Section 81 requires that there is an outward intention to return to the property, see for example, *Brickfield Properties Ltd v Hughes* (1988) 20 HLR 108; *Crawley BC v Sawyer* (1988) 20 HLR 98. This test stands apart from the 'continuing and sufficient links' test used by the European Court of Human Rights to determine the application of art.8 but there are some similarities, see for example, *Buckley v United Kingdom* (1995) 19 EHRR CD20 (Commission Decision); *Khatun v United Kingdom* App no 38389/97 (European Commission of Human Rights, 1 July 1998); *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 AC 186.
[335] See 6.2.4 above.
[336] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9 [23].

would be able to fill the property to capacity. A possession order would clearly make some contribution to this aim. Turning to the third stage, it would be for the tenant to demonstrate that the measure is more than necessary to achieve the cited legitimate aim. The housing authority's aim is vacant possession of the property this could not be achieved in any way other than seeking a possession order.

By satisfying stages 1-3 of full proportionality analysis the final avenue for challenging the proportionality of a possession order is the overall balance between the rights of the individual and the interests of the community. The burden of proof for arguing this will rest with the tenant.[337] There is no doubt force in the argument made by the housing authority as to the property being under-occupied. However, finding in favour of the local authority would require the gains to community interests to be 'at least as great as the cost to rights.'[338] Alongside this the court ought to consider the particular characteristics and vulnerabilities of the rights-holder.[339] These considerations can be assessed by the court using the Law of Competing Principles which would recognise the interests of the tenant and the interests of the community in having access to sufficient social housing. It appears that the facts of the case support a general precedence for art.8. It is submitted that this is due to the particular vulnerabilities endured by Mr Lawal who required the assistance of his daughter in day-to-day activities. It is this aspect of the case which potentially tips the balance in favour of Mr Lawal. This is all the more weighty given the lack of suitable alternative accommodation offered to Mr Lawal at the time of the hearing.[340] In assessing the weight to attach to these competing interests required by stage 3 of the Law of Competing Principles the manner in which Mr Lawal and his daughter came to reside at the property must be considered. It will be recalled from above that Mr Lawal moved into the property into the property with his wife and, notwithstanding regular absences due to employment overseas, resided there with his family since 1974. Mr Lawal's wife died in 2002 and in 2010 he appears to have retired and ceased regular business travel. Under-occupancy of the property has occurred out of circumstance. Notwithstanding the unquestionable benefits for the local community which would flow from vacant possession of the property, evicting Mr Lawal would cause severe physical and mental distress and so would have a disproportionate effect upon him. In other words, the costs of

[337] This is in opposition to the submission of the tenant's counsel who suggested that the burden of proving proportionality ought to rest with the housing authority, ibid [60].
[338] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 426; M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 9.
[339] *Winterstein v France* App no 27013/07 (European Court of Human Rights, 17 October 2013); *Chapman v United Kingdom* (2001) 33 EHRR 18.
[340] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9 [61].

dispossession significantly outweigh the gains. A failure at the balancing stage makes any possession order disproportionate.

6.4.3 *McDonald v McDonald*

> If private power can, in effect, enable or constrain public rights, then the same legitimation needs which … underpin the appeal to proportionality in public law [ought to] resonate in private law.[341]

McDonald v McDonald[342] concerned parents who mortgaged a property for their daughter to live in as a tenant. The grant of the tenancy was in breach of various mortgage conditions. The tenant had a particular disorder which made changes in her environment acutely distressing. Sometime later the tenant's parents (effectively her landlords) fell into mortgage arrears. The mortgagee subsequently appointed receivers who exercised the same powers as a landlord allowing the mortgagee to serve notice to quit and recover possession of the property. The aim of the mortgagee was to sell the property with vacant possession and secure a greater profit than with a property with a sitting tenant. The particular powers used by the mortgagee afforded the court no discretion as to the making of the order.[343] In Chapters 3-4 it was demonstrated that art.8 is horizontally applicable and may apply to private landlords. The aim of this section is to demonstrate the versatility of full proportionality analysis outside those instances dealing with (core or hybrid) public authorities. This is particularly the case due to art.1 of the First Protocol which requires respect for private property.[344]

Applying the first stage of full proportionality analysis to *McDonald* is straightforward. The objective of the mortgagee was the recovery of possession, thereby vindicating art.1 of the First Protocol, so that the property could be sold with vacant possession. It is difficult to argue that this is not a legitimate aim as the Convention seeks to protect this right in art.8(2) and art.1 of the First Protocol. It is equally straightforward to argue that the means used to achieve vacant possession are rationally connected to the legitimate aim. The ease with which stages 1 and 2 can be fulfilled by the mortgagee ought to demonstrate the unnecessary consternation shown by the courts towards art.8's application in possession proceedings. This uncomplicated application of stages 1 and 2 of full proportionality analysis doubts the a priori weight given to the interests of landlords and the assumption that Parliament has already struck the balance required by art.8 and

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[341] N Lacey, 'The Metaphor of Proportionality' (2016) 43 Journal of Law and Society 27, 38.
[342] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.
[343] Housing Act 1988 s.21.
[344] This includes both natural and legal persons such as the mortgagee in *McDonald*, see European Convention on Human Rights art.1 of the First Protocol.

proportionality.[345] It is correct that the burden of proving proportionality at stages 1 and 2 rests with the party seeking to recover possession but this is far from an onerous task.

It is at stages 3 and 4 which full proportionality analysis may begin to bite. Stage 3 requires the tenant to demonstrate that the means used to impair art.8 (and vindicate art.1 of the First Protocol) go beyond what is necessary to accomplish a landlord's legitimate aim. It is here that the actions of the mortgagee in *McDonald* become questionable. The aim of the mortgagee was the recovery of the debt (£200,000) secured against the property and owed by the tenant's parents who had fallen behind with mortgage payments.[346] Arden LJ in the Court of Appeal found that the mortgagee would be unable to recover this debt without the sale of the property.[347] However, it is not clear how this is the case. Prior to the arrears arising the mortgagee was content to receive repayment of the mortgage debt in the usual fashion, monthly payments. These monthly payments were made using the tenant's housing benefit.[348] The financial difficulties which led to the mortgage arrears were a product of the tenant's parents not the tenant. Therefore, there is nothing on the facts to suggest that the mortgagee could not have sought repayment of the debt in the same way which it was content to do prior to arrears arising as the tenant's housing benefit payments could cover monthly mortgage payments. Further weight is given to this argument by the way in which the mortgagee sought to recover the property by excluding the discretion of the court as to whether a possession order be granted.[349] If the mortgagee had pursued mortgage repossession proceedings the court would have been able to stay execution of any possession order to allow for the continued payment of the mortgage.[350] With these issues in mind it seems self-evident that the tenant would be able to argue that the measure sought by the mortgagee was more than necessary for the realisation of art.1 of the First Protocol.

In assessing the final stage of full proportionality analysis applied in *McDonald* the following passage from Nield is notable:

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[345] *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, [2015] HLR 9 [58]; *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357 [50], [70].
[346] Enforceable debts are considered to be possessions for the purposes of art.1 of the First Protocol, see for example, *Agneessens v Belgium* App no 12164/86 (Commission Decision, 12 October 1988).
[347] *McDonald v McDonald* [2014] EWCA Civ 1049, [2015] Ch 357 [52].
[348] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [3].
[349] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 80-81.
[350] Administration of Justice Act 1970 s.36; S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 80-81.

> There is no doubt that in striking a proportionate balance property rights will weigh very heavily [against home interests]. The question is whether, in the light of the particularly strong policy reasons of a given context, they should be the only weight on the scales. The answer should remember that under art.8 the home encapsulates values beyond property rights, which prompts the call for some mechanism by which these values can find expression and be accorded appropriate recognition.[351]

The balancing exercise to be undertaken in *McDonald* differs from *Pinnock* and *Lawal* in that two individual rightsholders are competing for precedence, art.8 in the case of the tenant and art.1 of the First Protocol in the case of the mortgagee. This situation is nevertheless still open to the three stages of the Law of Competing Principles the first stage being the recognition of competing principles, *P*1 and *P*2 respectively. Here, in the second stage of the Law of Competing Principles, it is suggested that general precedence must rest with sitting tenants where a mortgagor falls behind on arrears if as in this case the tenant continued to pay their rent therefore making the tenant innocent of any wrongdoing. The final stage of the Law of Competing Principles requires the particular facts of the case to be considered with the court asking whether the gain from the interference with rights is 'at least as great as the cost to rights.'[352] The tenant in *McDonald* suffered from a mental disorder making changes in her environment particularly distressing. Due to this disorder the tenant had been evicted from social housing and was unable to work.[353] The property in question served as something of a last chance saloon for the tenant who was unlikely to be able to find alternative suitable accommodation. Vindication of the mortgagee's property rights therefore would amount to a great cost to rights with very little benefit, making eviction disproportionate at stage 4 of full proportionality analysis. The initial agreement between the tenant's parents and the mortgagee is able to continue for as long as the tenant receives housing benefit. This agreement ought to subsist in light of the disproportionality visible at stages 3 and 4 of full proportionality analysis.

6.5 Conclusion

This Chapter demonstrates the shortcomings of the English courts' conceptions of proportionality thus far. The Supreme Court's approach to proportionality in *Pinnock* fails to account for the fair balance inherent in the HRA 1998 and the Convention. Moreover, *Pinnock* tilts the balance in favour of landlords and essentially empties art.8 of any meaningful application. This misunderstands the

[351] S Nield, 'Thumbs Down to the Horizontal Effect of Article 8' (2015) Conv 77, 87.
[352] J Rivers, 'The Presumption of Proportionality' (2014) 77 MLR 409, 426.
[353] *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45 [1].

importance of the interests protected within art.8, explored in Chapter 3, for it is assumed that housing legislation itself strikes the correct balance between art.8 and competing rights. Full proportionality analysis shows the error in this and demonstrates that any concerns around the ability of the county court to expediently deal with possession lists are misplaced.

Policy considerations are legion in the legislation and common law which govern landlord and tenant relationships. However, this is not a reason for the courts to evade questions as to whether fundamental human rights have been interfered with. Full proportionality analysis allows the parties to argue in favour of their respective interests whilst the court has the same task it does in most litigation as the arbiter of where balance ought to be struck. This endeavour is inherent in the courts' jurisdiction. The implementation of full proportionality analysis should not deter landlords from entering new tenancies rather it requires that landlords are clear in their arguments in favour of dispossession that must be followed to demonstrate an order is proportionate. For tenants a robust application of art.8 and proportionality ensures that the principles of art.8 are borne out. Mandatory possession proceedings make up the majority of possession lists, full proportionality analysis protects those tenants who are particularly vulnerable or blameless and gives effect to non-legal home interests which would otherwise go unheard in determining whether a person should be evicted from their home. Full proportionality analysis therefore offers the framework through which the proportionality of any possession order can be tested.

7 Overall Conclusion

7.1 Objectives of the Thesis

The thesis has critically analysed the complex issues flowing from the following research questions:

1. what is the underlying importance of the home as conceived by art.8(1) and how should this inform the application of art.8 generally;

2. what is the legal and theoretical basis for arbitrarily limiting art.8's application to local authority tenants; and

3. what are the requirements of proportionality in possession proceedings.

The prescience of these questions was demonstrated in the face of the case law explored in Chapter 2. Following *Manchester City Council v Pinnock*[1] and resultant cases the domestic courts have accepted that it is open to a local authority tenant to rely upon art.8 to contest the proportionality of a possession order. However, it continues to be the case that:

> The most controversial issue at the intersection between the law of leases and human rights … [continues to be] … the role of the residential tenant's article 8 rights in summary proceedings by a [public or private] landlord seeking possession of the subjects.[2]

This controversy flows from a failure to engage with the substance of the protection guaranteed by art.8. This shortcoming is visible in the law reports of English courts and also in the literature surrounding art.8 and possession proceedings which has not engaged with the substance of art.8's application. Therefore, in Chapter 3 the concept of the home was critically analysed alongside property theory. It was argued that the home 'represents a complex and multi-dimensional amalgam of financial, practical, social, psychological, cultural, politico-economic and emotional interests to its occupiers'.[3] In spite of the apparent focus upon strict legal interests within literature exploring ownership there are gaps within property theory which allow for these non-legal interests to be considered within the framework which has been developed by Fox, Radin, and others. For example, the work of Aquinas and the idea of common ownership allows for property rights to be reassessed by the courts in

[1] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[2] F McCarthy, 'Human Rights and the Law of Leases' (2013) 17 Edinburgh Law Review 184, 201.
[3] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 178.

light of an individual's non-proprietary interests. These non-proprietary interests are recognised by Rousseau whose work leaves scope for human rights to temper property interests where it is necessary and within the interests of the wider community. If it is accepted that the rights contained in the Convention and reflected in the HRA 1998 amount to a body of interests which the wider community has deemed as worthy of protection then the argument can be made art.8 ought to have a robust application in possession proceedings.

In exploring what non-legal interests and feelings attach to a person's home the work of Radin develops the idea that the home is more than simply ownership and links personhood with the home. The home presents a prototypical example of personal property due to a person's emotional investment in their home. This manifests in the great sense of loss a person is likely to feel when dispossessed. The primary critique of the property and personhood approach relies upon the lack of empirical evidence to support the theory. However, in Chapter 3 it was demonstrated that there is an empirical basis for Radin's property and personhood perspective.

For Radin the home serves as 'a moral nexus between liberty, privacy, and freedom of association'.[4] Therefore, the home is not only linked with the individual but is facilitative in the realisation of human rights more widely.[5] This creates a cyclical argument in which the home is deserving of protection via human rights and in service of the attainment of other rights. The x factors identified by Fox assist in categorising the non-legal interests alluded to by Radin. For Fox the home is more than a physical structure and encompasses a territory in which an individual's self identity is anchored and developed within a social and cultural unit. However, Fox contends that it would not be possible to 'conduct a case-by-case analysis on any fair grounds'[6] and argues for policy changes that would take account of these non-legal interests.[7] Policies which take account of these interests would of course be welcome but it is the contention of this work that it is open to the courts to consider these interests within the existing legal framework. Such judicial contemplation would assist the courts in assessing the proportionality of any possession order which they are already bound to consider. Therefore, the shortcomings in this area are not simply an omission or misunderstanding of the non-legal interests in play but also a

[4] M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957, 991.
[5] J Waldron, 'Homelessness and the Issue of Freedom' (1991-1992) 39 UCLA Law Review 295.
[6] L Fox, *Conceptualising Home: Theories, Law, and Policies* (Hart 2006) 180.
[7] Ibid.

lack of judicial tools in which these interests are accorded weight. These interests exist independent of a landlord's institutional character, therefore, Chapter 3 considered the means by which home interests might be protected in horizontal proceedings given that these interests will arise irrespective of the institutional character of a tenant's landlord.

The domestic courts have for the most part been unreceptive to the idea that art.8 may have a role to play in possession proceedings beyond those involving a local authority. Furthermore, the courts have on occasion speculated that if art.8 was to have horizontal effect then it would in any event be defeated by art.1 of the First Protocol due to the scope of proportionality.[8] These findings are in spite of the courts accepting at least some form of the horizontal effect in other areas of law. There are also hints of horizontal effect within housing law in cases such as *Poplar Housing & Regeneration Community Association Ltd v Donoghue*[9] which reinterpreted legislation applicable to horizontal relationships to find a HRA 1998 compatible reading.

In addition to the inconsistencies of the courts there are also great differences of opinion within the literature as to the nature of horizontal effect. There are those who advocate limited horizontal effect such as Buxton who claims the HRA 1998 is strictly concerned with limitation of State power[10] as opposed to Wade who proposes direct horizontal effect allowing human rights to infiltrate all proceedings.[11] There is of course a spectrum of positions between these two poles explored in detail in Chapter 4. However, utilising the work of Alexy it was demonstrated that the arguments proffered by the literature to date have been flawed in their mutually exclusive perspectives. Alexy's contribution shows that the horizontal phenomena visible within the case law of the domestic courts exist within a single tripartite conception of horizontal effect encompassing:

1. the level of state duties;
2. the level of rights against the state; and
3. the level of legal relations between private individuals.

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[8] *Dutton v Persons Unknown* [2015] EWHC 3988 (Ch); *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45.
[9] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.
[10] R Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48.
[11] H Wade, 'Horizons of Horizontality' (2000) 116 LQR 217.

This understanding obviates the arguments as to the precise form horizontal effect should take and allows for a pragmatic approach to applying art.8 depending upon the context of the case at hand. This is particularly advantageous in the realm of housing law which is made up of an amalgam of various statutory and common law rules. In such instances the question becomes not whether art.8 has any application in horizontal proceedings but rather how art.8 may have effect against competing interests such as art.1 of the First Protocol. This argument gains strength from the effects of art.14 of the HRA 1998 which prohibits unjustified discrimination in the application of HRA rights.

If upon accepting that art.8 has some form of horizontal effect within the confines of the tripartite model advocated by Alexy there remains a theoretical hurdle to art.8's application in all possession proceedings, the public/private divide. The public/private divide is a late development in English law after emerging alongside judicial review which has in turn demarcated an area of administrative law broadly aimed at ensuring the fair and legal use of State power. Judicial review has latterly been called upon in proceedings concerned with human rights. For example in *Kay v Lambeth LBC*[12] judicial review was tabled as the method by which to test the proportionality of a possession order. However, judicial review has since been rejected in possession proceedings following *Pinnock*'s recognition of proportionality which provides a fact sensitive approach to acts which might contravene art.8. In order for this higher standard to reach into horizontal relationships the public/private divide must be reconceptualised.

Chapter 5 argued that the public/private divide must be calibrated in terms of polycontextuality which sees the public/private divide as a spectrum rather than a binary construct. This approach acknowledges the work of Samuel and Harlow in particular in identifying the strengths and weaknesses of a public/private divide or the wholesale deletion of the same. The difficulty identified with the absolute nature of these perspectives was that they fail to account for the range of relationships which may arise in legal proceedings. Often these relationships do not easily fall into either public or private due to the distribution of power which rests at their core. Polycontextuality allows the courts to make this distribution of power determinative of the rules which might govern a particular case. This necessarily requires a context sensitive approach. However, given the common values which pervade the public/private divide outside of those archetypal cases mind must be paid to the spectrum of positions between public and private spheres of law. Thinking of the

[12] *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465.

divide in this fashion allows for ideas from each realm to cross over into the other where the context of the case requires. For the purposes of this work, the home holds a special place in the life of the individual, the protection of which is increasingly necessary due to the lack of security given by statute and the common law. The reconceptualisation of public and private law detailed in Chapter 5 allows for public law considerations in the form of human rights to protect a defendant in a disadvantaged position. The position allowed for by polycontextuality is sensitive to the multitude of factual matrixes which might arise in possession proceedings. Most importantly polycontextuality allows courts to consider the proportionality of a possession order in all proceedings where a person's home is at risk regardless of the institutional character of the litigants. However, understood through this prism art.8 rights do not become invulnerable to the competing interests of landlords whether they are a local authority or a private landlord. The question therefore becomes how these interests might be fairly and equally considered by the courts. Chapter 6 addressed these questions by providing a replicable model for proportionality in 'full proportionality analysis'.

Full proportionality analysis requires the court to ask whether the legislative objective is sufficiently important to justify limiting a fundamental right, whether the legislative objective is rationally connected to it, the means used to impair the right or freedom are no more than is necessary to accomplish the objective, and whether there has been a fair balance struck between the rights of the individual and the interests of the community. Full proportionality analysis stands apart from the general query utilised in *Pinnock* which asked 'whether the eviction is a proportionate means of achieving a legitimate aim.'[13] Full proportionality analysis not only provides an improvement over the current approach but also addresses general concerns as to proportionality such as variable intensity of review and the role of the margin of appreciation in domestic proceedings. Full proportionality analysis provides an argumentative structure through which the court may assess the competing interests at play in possession proceedings. This jettisons the idea that housing legislation and common law rules pre-emptively achieve the appropriate balance of rights thereby leaving the courts to assess the balance of rights in a given case. Full proportionality analysis undermines the worries the Supreme Court has around the ability of the county court to expediently deal with proportionality in a busy possession list. There is no reason why full proportionality

[13] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 [52].

analysis cannot be used by a county court judge to assess the proportionality of an order given the argumentative structure and method provided.

Full proportionality analysis allows both tenants and landlords to plead the particularities of their case and places the court in an inquisitorial role. This potential is evident in the case studies explored in Chapter 6. These case studies offer a cross section of the instances in which art.8 considerations might arise; in proceedings involving a local authority landlord, proceedings involving a housing association landlord, and proceedings involving a private landlord. These case studies illustrate the unnecessary trepidation over the effects of proportionality and show that consideration of art.8 does not prevent landlords (of any institutional character) from recovering their property provided an order would be proportionate. For instance applying full proportionality analysis to *Pinnock*, *Lawal*, and *McDonald* brings to light the shortcomings which might defeat a claim for a possession order. However, the argumentation structure provided by full proportionality analysis directs the minds of all parties to the pertinent hurdles which must be surmounted before a court will find it (dis)proportionate to make a possession order. These hurdles are interdependent upon the statutory or common law framework which provides a port of first call in possession proceedings but equally the protection given by art.8 provides a curtailment of the procedural marginalisation of those making their home in the rented sector. Therefore, this thesis has presented:

1. a framework through which the underlying importance of the home may be appreciated and conceptualised within the context of an art.8 argument;

2. a legal and theoretical basis for art.8's application to all possession proceedings irrespective of the institutional character of the parties; and

3. a replicable structured model of proportionality in full proportionality analysis that may be used in possession proceedings to take account of the disparate interests in play where human rights arguments are utilised.

These findings contribute to the original contribution of this thesis in that the shortcomings of art.8 jurisprudence have been dealt with in a holistic fashion which has contributed to a practicable approach which might be readily applied by the courts. This is the first time such a detailed analysis of the relevant law and theory has been taken with regard to the intersection of housing law and human rights and such a conceptual framework has been developed. Therefore, the findings herein

provide an original contribution to the debate around the effects of art.8 on all possession proceedings involving a landlord and tenant.

7.2 Conclusions

The strengthening of art.8 and its associated requirements are not the conclusive change needed to produce a fairer rented sector in which tenants will be more secure in their home and protected from arbitrary or capricious evictions. The findings from Chapter 2 as to the burgeoning private sector raise wider questions as to the state of the country's housing stock across all tenures. As at 2013-14 48% of young people (aged 25-34) privately rented their homes up from 21% in 2003-04. In the same period owner-occupation within this age group dropped from 59% to 39%.[14] The decrease in owner-occupation in this group might be attributed to a number of phenomena. The first is so-called 'generation pause'[15] in which young adults are planning to delay milestones (such as career progression or beginning a family) due to the expense and instability of rented accommodation. This grouping is visible in the deferral made by 18-34 year olds. For 18-24 year olds home ownership dropped from 36% in 1991 to 10% in 2011/12.[16] Similarly, home ownership among 25-34 year olds dropped from 67% to 43% in the same period.[17] Alongside generation pause are the 'boomerang'[18] phenomenon which sees young people returning to their family home for a number of reasons including unaffordable rents and to save to eventually enter owner-occupation. These two groups might be encompassed alongside 'generation rent' which describes those young adults who make their home in the private rented sector for longer periods than previous generations due to the inaccessibility of homeownership and the public rented sector. The incorporation of proportionality into possession proceedings assists those who make their home in the rented sector and wish to enjoy some minimum level of security. This work does not make any assertions as to the virtue or otherwise of making one's home in the rented sector as opposed to owner-occupation, after all, as was established in Chapter 3 the feelings an individual has towards their home exist largely independent of the legal tenure they

[14] Department for Communities and Local Government, *English Housing Survey* (Headline Report 2013-14, 2015) 8.
[15] Shelter, 'The Great Home Debate' (*Shelter,* 2016) <https://www.greathomedebate.org.uk/> accessed 15 June 2016.
[16] P A Kemp, 'Private Renting After the Global Financial Crisis' (2015) 30 Housing Studies 601, 610-611.
[17] Ibid.
[18] For consideration of the boomerang effect within the UK see J Sage, M Evandrou and J Falkingham, 'Onwards or Homewards? Complex Graduate Migration Pathways, Well-being, and the "Parental Safety Net"' (2013) 19 Population, Space, and Place 738.

enjoy (or endure). However, the aforementioned statistics show that there has been a reduction in the number of young people entering owner-occupation. Therefore, the reconceptualisation of art.8 within possession proceedings advocated in this work presents a solution to the underappreciation of the home in landlord and tenant relationships. This solution directs the minds of the judiciary to the pertinent queries when assessing whether it is proportionate to remove someone from their home and allows for the courts to draw on other areas of law in which 'strong-form review' has developed.[19]

7.3 Future Work

This thesis has made an important and original contribution to the fields of housing law and human rights. However, there are threads of this work which may be taken further. As alluded to above one of these avenues is the potential for the arguments made here to have some application in mortgage repossession proceedings. The feelings which arise between an individual and their home are as prescient for owner-occupiers as they are for tenants. For instance, full proportionality analysis could equally be used where a person's home was at risk at the behest of a mortgagee. Of course the specifics of how the arguments made in this thesis would play out in mortgage repossession cases are something which would have to be tested against case studies similar to those in Chapter 6. However, there is no immediately apparent reason why the findings made here could not go on to have a wider application than landlord and tenant relationships.

The public/private divide has been ever present in consideration of human rights and the role they ought to play where a person's home is at risk. Chapter 5 argued for a modern reformulation of this legal construct to account for the common values that flow through much of the law. The focus of Chapter 5 was the standing of the home and art.8 within the divide. However, there is scope to explore the arguments made in Chapter 5 and ask whether the public/private divide is appropriately understood in other areas of law. For instance, there is potential to assess the role of the public/private divide in relation to contract law which might be considered a purely private area of law. Such a finding suggests human rights have no bearing upon contractual agreements in which the courts generally seek to give effect to the wishes of the parties. However, this is something worthy of further exploration given the common legal values identified in Chapter 5 and the similarities between a lease and contract.

[19] M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare in Comparative Constitutional Law* (Princeton University Press 2009) 75.

Finally, the utility of full proportionality analysis as explored in Chapter 6 is worthy of further examination due to the potential for such a model to be used in all matters where human rights claims clash either with one another or with other legal rights. This might provide the starting point for a unification of the disparate proportionality tests which are currently used by the courts.

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