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the Landlord and Tenant**

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Out of place, out of time – the foundational relationship between the Landlord and Tenant

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Abstract

The world we inhabit is changing¹ but our, “Abrahamic concept of land”² remains an impediment, with our notions around land ownership based on foundations laid down centuries ago, clearly diminishing the value of home. This paper highlights some of the contrasting issues faced by tenants and owners during the Covid-19 pandemic and argues that they are, at least in part, attributable to these issues that now need to be addressed. Any possible resolution needs to recognise that these foundational perceptions continue to impact the legal framework and, critically, people. In the words of Rahm Emanuel, “You never want a serious crisis to go to waste.”³

Introduction

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property”.⁴

Two centuries later, Blackstone’s observation still resonates. For some, property undoubtedly equates to power. To claim property in land is to declare control over that land;⁵ it is a, “socially approved power-relationship in respect of socially valued assets”.⁶ Our current liberal paradigm is founded on the perception of land being a commodity, detracting from notions of home and inherently ‘dephysicalising’⁷ the land; and the ramifications of this have been clearly seen in the government’s contrasting Covid-19 response to land owners and tenants. Given the increasing trend in

¹ From Climate Change, Biodiversity Loss, Black Lives Matter and Covid-19 to name a few.

² Aldo Leopold, ‘The Land Ethic’ in Aldo Leopold, *A Sand County Almanac; Sketches here and there* (OUP 1968) viii.

³ Barack Obama’s chief of staff 2008.

⁴ William Blackstone, *Commentaries on the Laws of England* Book 2, Ch 1.

⁵ Kevin Gray and Susan Francis Gray, ‘The Idea of Property in Land’ in (eds) Susan Bright and John K Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 1-3.

⁶ Kevin Gray, ‘Equitable Property’ (1994) 47(2) *Current L Problems* 157, 160.

⁷ Nicole Graham, ‘This is not a Thing: Land, Sustainability and Legal Education’ (2014) 26(3) *J Environmental L* 395, 396.

households renting⁸ – and a potential deluge of evictions in the spring – from a practical perspective, legislation could be used to enhance tenants’ protection yet, this paper argues, change is needed on a much more fundamental level. As Hegel points out, people and governments rarely learn lessons from history⁹ so it is time to dust off our textbooks.

This paper is presented in four sections: part 1 outlines the contrasting issues faced by tenants and owners during the Covid-19 pandemic; part 2 discusses the historic reasons these issues exist; part 3 seeks to open discourse and suggests there are a number of ways these foundational issues could be addressed; and part 4 highlights the need for a short-term response.

1. The impact of Covid-19

Covid-19 hit our shores in late January and spread quickly with devastating impact. For many, working from home has presented a myriad of challenges from finding space to work, IT issues, home-schooling, and caring for children and/or other relatives. But for some, the problems have been far worse. Millions are still off work – 9.2 million¹⁰ are on furlough – and with industries announcing job losses almost daily, an ongoing major health crisis has quickly evolved into a simultaneous economic nightmare. For the 63% of households in England¹¹ who own their home,¹² a degree of financial reprieve arrived in the form of potential mortgage payment holidays (originally available until 31 October¹³ but with proposals now pending to extend until 31 January¹⁴), providing a clear path for those homeowners experiencing financial hardship to avoid repossession. Yet, in the case of buy-to-let mortgages, anyone

⁸ Wendy Wilson, 'The end of 'no-fault' section 21 evictions' Briefing Paper no 8658, 9 in 1987-18, 4.1 million households are renting privately.

⁹ Georg Hegel, *Lectures on the Philosophy of History*, vol 1 (first published 1832).

¹⁰ GOV.UK, HMRC coronavirus (COVID-19) statistics, <www.gov.uk/government/collections/hmrc-coronavirus-covid-19-statistics#history> accessed 7 November 2020.

¹¹ GOV.UK, Homeownership www.ethnicity-facts-figures.service.gov.uk/housing/owning-and-renting/home-ownership/latest accessed 16 July 2020, data relates to 2016-18.

¹² Law of Property Act 1925, s1(1)(a)-(b).

¹³ HM Treasury, GOV.UK, <www.gov.uk/government/news/help-with-mortgages-to-continue-for-homeowners-affected-by-coronavirus> accessed 16 July 2020.

¹⁴ Financial Conduct Authority, <www.fca.org.uk/consumers/mortgages-coronavirus-consumers> accessed 6 Nov 2020.

entitled to a mortgage holiday is not required to pass this financial reprieve onto their tenants.¹⁵ Initially, security provided to tenants for non-payment of rent came in the form of a suspension of new evictions (until 23 August¹⁶) and a stay on possession proceedings (until 20 September¹⁷). These were superseded by Practice Direction 55C,¹⁸ in place until 28 March 2021, which broadly requires the claimant to provide information on the direct impact of Covid-19 on the defendant and their dependants, together with rent accounts for the previous two years.¹⁹ However, in light of the more recent lockdowns,²⁰ will this be sufficient to protect tenants? Proposals to change the Housing Act notices and lease terms have been made²¹ but until they are implemented, these short-term measures will only postpone the fallout for tenants from this global pandemic.

2. The Commodification of Property

Private property is a legal, philosophical construct created by humanity;²² one that yields power clearly derived from control of an asset²³ – the land – that is routinely monetised based on its perceived value and that of any buildings standing on it. The commodification of property is not new, it can be traced back to jurists and theorists such as Locke,²⁴ Blackstone²⁵ and Bentham.²⁶ Part of the power-commodity relationship was contextual, proprietary rights in land had important implications –

¹⁵ There are no doubt many sympathetic Landlords who have re-arranged rent payments.

¹⁶ Ministry of Housing, Communities & Local Government, 'Ban on evictions extended by 2 months to further protect renters' <www.gov.uk/government/news/ban-on-evictions-extended-by-2-months-to-further-protect-renters> accessed 16 July 2020.

¹⁷ The Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020r.

¹⁸ Practice Direction 55C – Coronavirus: Temporary Provision in Relation To Possession Proceedings.

¹⁹ PD55C, para 6.1-2, if the claim is based on rent arrears. For fuller detail see Andrew Arden and Justin Bates, 'The Covid Challenge' J Housing Law, [full ref to be added].

²⁰ From 5 November 2020.

²¹ See section 4 below.

²² Peter D Burdon, *Earth Jurisprudence Private Property and the Environment* (Routledge 2015) 13-14; Sarah Blandy, 'Collective Property: Owning and Sharing Residential Space, in Nicholas Hopkins (ed), *Modern Studies in Property Law* (Hart Publishing 2013) 159.

²³ Rosalind Malcolm and Alison Clarke, 'Water: A Common Treasury' in Ting Xu and Alison Clarke (eds) *Legal Strategies for the Development and Protection of Communal Property*, Proceedings of the British Academy (OUP 2018) 202-29.

²⁴ John Locke, *Second Treatise of Government* (first published 1690, ed C B Macpherson Hackett Publishing 1980) Ch5 On Property.

²⁵ Blackstone (n1) Book 2, ch 1.

²⁶ Jeremy Bentham, *Principles of Civil Code* vol 1, pt 8

<www.laits.utexas.edu/poltheory/bentham/pcc/pcc.pa01.c08.html> accessed 20 July 2016.

most notably the right to vote²⁷ – from the seventeenth century to Victorian England.²⁸ This commodification, or economic perspective, has not dissipated over time; land is still viewed as an asset whether through retail space,²⁹ offices or simply the desire to own one's home, as evidenced by the rate of owner-occupation increasing from 10% to 68% of the UK population between 1914 and 1999.³⁰ Essentially, the argument is that control facilitates greater potential for financial gain by giving the landowner the right to determine what does and does not happen in, on, over or under his/her land. Economists see land as a capital good or asset in fixed supply, its value subject to ebbs and flows depending on a range of factors,³¹ but lacking an incentive to care for the land unless there is financial benefit to doing so.

To Burdon, many of the problems facing the planet today are a consequence of humanity's dominion over nature.³² This is undeniably true. Land has been viewed solely for what it can yield for humans, quantified in terms of food, shelter, status and financial security, bought and sold in the marketplace. But this lacks foresight by placing too great an emphasis on enhancing value through what is done to (or placed on) the land which, in turn, impacts the landlord and tenant relationship with the former owning the asset and the latter frequently in the weaker negotiating position.

3. Alternative Perspectives

Often to the bewilderment of students, many land law textbooks and lectures begin with the Battle of Hastings. English and Welsh land law begins in 1066 and, put simply, we have never abolished feudalism, we have just adapted over time using the same foundational basis³³ with the Crown as, “the only absolute owner of land in England

²⁷ James Tully, *A Discourse on Property: John Locke and his Adversaries* (CUP 1980) 173 only males over the age of 21 who owned property were entitled to vote.

²⁸ Avner Offer, *Property and Politics 1870-1914* (CUP 1981) 2.

²⁹ Alasdair Barrett, 'Retail in London: Looking Forward' (2015) Greater London Authority <[www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Retail in London - Final Version.pdf](http://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Retail%20in%20London%20-%20Final%20Version.pdf)> accessed 18 November 2017.

³⁰ Joe Hicks and Grahame Allen, 'A Century of Change: Trends in UK statistics since 1900' (1999) Research Paper 99/111. See also Cassie Barton, 'Home ownership & renting: demographics' House of Commons Library Briefing Paper (Number CBP 7706, 2017) home ownership at 65% at the end of 2016.

³¹ David Begg, Stanley Fischer and Rudgier Dornbusch, *Economics* (7th edn, McGraw Hill 2003) 177-79.

³² Burdon (n22) 11.

³³ Alison Clarke, *Principals of Property Law* (CUP 2020) 198.

and Wales”.³⁴ The 1925 property legislation seemingly brought change but, in reality, only shuffled the deck.³⁵ In 2005, the Law Commission proposed to, “examine the case for reform and the implications of statutory intervention ... of feudalism which have continuing technical and practical consequences”³⁶ but this was deferred to the Tenth Programme, and in the Eleventh Programme the decision was made that “public benefit” could be better served with other reform³⁷ leaving England and Wales still working with out-of-date constructs for dealing with land.

When considering ‘ownership’, it is difficult not to reference Honoré’s Incidents of Ownership.³⁸ These provide an effective analytical tool yet the issues associated with the metaphor are symptomatic of the tendency to seek to disaggregate a concept theoretically. The commodification of property has led to the ‘dephysicalisation’³⁹ of the land, and consequently exacerbates the ability to reconnect humanity to the land. The argument for a personal connection between individuals and their location⁴⁰ connects and supports the need, particularly for tenants, for a ‘home’⁴¹ which is becoming increasingly insecure/fragile?⁴²

Some see property as a problem-solving mechanism⁴³ which potentially opens up alternative means of property holding but humanity’s reluctance to accept change challenges whether this can be more than just a basis for discussion. One alternative mode of holding land is Commons, or Common Land, where it is owned by someone,

³⁴ Explanatory Notes to Land Registration Act 2002 n4 Title to Land.

³⁵ Clarke (n33) 200-03.

³⁶ The Law Commission, Ninth Programme of Law Reform, Law Com No 293, HC 353

³⁷ The Law Commission, Eleventh Programme of Law Reform, Law Com No 330, HC 1407, 32-3.3.

³⁸ Tony Honoré, ‘Ownership’ in *Making Laws Bind* (Clarendon Press 1987).

³⁹ Nicole Graham, ‘This is not a Thing: Land, Sustainability and Legal Education’ (2014) 26(3) J Environmental L 395, 396.

⁴⁰ *ibid.* See also Nicole Graham, *Landscape: Property, Environment and Law* (Routledge 2011) 36-50; 160-202; Sarah Blandy, Susan Bright and Sarah Nield, ‘The Dynamics of Enduring Property Relationships in Land’ (2018) 81(1) MLR 85, 89

⁴¹ Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge’ (2002) 29(4) J L and Society 580.

⁴² See Helen Carr, Brendan Edgeworth and Caroline Hunter, *Law and the Precarious Home* (Hart 2018)

⁴³ Alison Clarke and Paul Kohler, *Property Law Commentary and Materials* (CUP 2009); William N R Lucy and Catherine Mitchell, ‘Replacing Private Property: The Case for Stewardship’ (1996) CLJ 566; Gregory S Alexander, Eduardo M Peñalver, Joseph William Singer and Laura S Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 Cornell L Rev 743.

but used by others in specific ways;⁴⁴ or where no single person is in a position of privilege over a resource.⁴⁵ In England and Wales, only a legal entity can own an estate in land,⁴⁶ facilitating a layering of rights and interests. To illustrate, the Albury Estate (the Duke of Northumberland's landholding) holds land as private property, but part of the estate (Albury Downs) is also registered as Common Land.⁴⁷ There is a significant body of research advocating Common Land⁴⁸ but, from a pragmatic perspective, it is unlikely to be appealing to current land owners.

Another type of property holding is Anticommons Property where everyone has a right to exclude, but no positive right to use;⁴⁹ think Moscow post-communism, where many shops stood empty while street kiosks thrived. Attempts to decentralise land ownership had seen multiple state and quasi-state organisations with competing interests become stakeholders,⁵⁰ creating layers of rights over the retail space that stifled its use. Not a desirable outcome.

In contrast to private property is Public Property where ownership vests with a 'group', such as a community, city or state.⁵¹ Individuals are granted rights such as a right to use⁵² but the 'group' retains its right to withdraw access to these individuals,⁵³ not dissimilar to a homeowner's right to exclude another from their property. The intention is for the benefit to apply to significant numbers, not just to a particular person or small number of people,⁵⁴ and the 'group' would retain the ability to manage, and receive income and capital, whilst having a duty to prevent harm to those using the land (although this may be closer to occupier's liability). Waldron describes this as

⁴⁴ Edward Cousins and Richard Honey (eds) *Gadsden on Commons and Greens* (2nd edn, Sweet & Maxwell 2012).

⁴⁵ Jeremy Waldron, *The Right to Private Property* (OUP 1988) 41.

⁴⁶ Alison Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property framework' CLP (2006) 59 (1) 319, 348.

⁴⁷ Commons Registration Act 1965. Register held by Surrey County Council for this land.

⁴⁸ Clarke (n46); Cousins and Honey (n38); Lee Ann Fennell, 'Ostrom's Law: Property Rights in the Commons' (2011) 5 *International Journal of the Commons* 1; Elinor Ostrom, *Governing the Commons* (Cambridge University Press 1990).

⁴⁹ Clarke and Kohler (n43) 41-42.

⁵⁰ Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111(3) *Harvard L Rev* 621, 633-37.

⁵¹ Stephen Munzer, *A Theory of Property* (CUP 1990) 25.

⁵² Clarke and Kohler (n43) 40.

⁵³ Blandy (n22) 152-172, 159.

⁵⁴ *ibid* 159.

Collective Property, which he broadly equates to the socialist system,⁵⁵ therefore unlikely to appear on any Conservative government's agenda.

Could ecosystem services provide an alternative mode of land holding? In general terms, ecosystem services incorporate how land supports more than just what is immediately visible;⁵⁶ it is a developing field and potentially one that could provide solutions to some of the issues. Reid suggests it is, "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".⁵⁷ Nsoh and Reid refer to five categories of ecosystem services as encompassing all possible facets pertaining to land: provisioning services (here food, crops, timber, fresh water and plant-derived medicines); regulating services (here those that affect water quality through the filtration of pollutants by wetlands); climate regulation (through carbon storage and water-cycling, and protection from disasters and disease); cultural services (here recreation, spiritual and aesthetic values, and education); and supporting services (here soil formation, photosynthesis and nutrient cycling).⁵⁸ Whilst there has already been some success in implementation – perhaps the most famous being the Catskills Mountains project⁵⁹ – further significant strides would most likely require a restatement of the current property holding paradigm and, given humanity's clear resistance to change (evidenced historically with land ownership), piecemeal change may be a more realistic expectation. Yet it is difficult to envisage how ecosystem services could be adopted gradually. This paper does not propose ecosystem services as the immediate solution, but it supports the argument that the land provides far more than is perhaps immediately recognised.

4. Short term measures

⁵⁵ Waldron (n45) 40-41.

⁵⁶ Brendan Fisher, R Kerry Turner and Paul Morling, 'Defining and classifying ecosystem services for decision making' (2009) *Ecological Economics* 643, 645 the definition is contested.

⁵⁷ Colin T Reid, 'The Privatisation of Biodiversity?' (n306) 219 with reference to Convention on Biological Diversity, COP 5 (2000) Decision V/6 para 1.

⁵⁸ Walters Nsoh and Colin T Reid, 'Privatisation of biodiversity: who can sell ecosystem services?' (2013) 25(1) *Environmental Law and Management* 12, 5
<<https://research.birmingham.ac.uk/portal/files/26308472/SLSAarticleFINAL.pdf>> accessed 1 December 2019.

⁵⁹ James Salzman, 'Creating markets for ecosystem services: notes from the field' (2005) 80(600) *New York U L Rev* 101.

Whilst the perception of ownership needs re-evaluating to support fundamental change, more immediate consideration must be given to the current problem. Discourse has begun as to likely long-term changes to a wide range of issues in response to the pandemic, yet when we reflect on housing we will question if enough was done to keep people in their homes. As the editors point out, much of the legislation is to prevent the courts from being overwhelmed,⁶⁰ rather than address the issues. There are two key proposals which could provide greater security for tenants. First, the repeal of s21 notices⁶¹ with resultant beneficial impacts on insecurity fears, the cost of frequent moves, retaliatory evictions, and challenging rent increases.⁶² Second, consideration of a 3-year minimum term, standard in France⁶³ where, notably, feudalism was abolished in the 1780s.

Two proposals have been tabled in the last couple of years.⁶⁴ First, a minimum 6-month term, cessation of no-fault evictions with the government seemingly committing to removing no-fault evictions⁶⁵ and a clear intention to repeal s21 notices, combined with the creation of more robust s8 notices.⁶⁶ In response, the government has yielded in one aspect and provided a general extension of the notice period to six months for most residential occupiers until 31 March 2021.⁶⁷ However, there is with little indication of any imminent legislation;⁶⁸ the notice timings were subsequently linked to a further consultation process,⁶⁹ addressing the second key issue of the length of term. A three-year minimum term was floated in 2018⁷⁰ but, a year later, this was reduced to two. Despite a commitment to abolishing section 21,⁷¹ there have been no further

⁶⁰ Arden and Bates (n19).

⁶¹ Housing Act 1988.

⁶² Wilson (n8) 13-16.

⁶³ Law n° 89-462 of July 6 1989, art 10 (Loi Mermaz).

⁶⁴ Wilson (n8); Ministry of Housing, Communities & Local Government, 'Overcoming the Barriers to Longer Tenancies in the Private Rented Sector' July 2018.

⁶⁵ Ministry of Housing, Communities & Local Government, 'Overcoming the Barriers to Longer Tenancies in the Private Rented Sector' Government Response, April 2019.

⁶⁶ Wilson (n8).

⁶⁷ The Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020, SI 2020/889. See also Arden and Bates (n19) 3.

⁶⁸ See [www.parliament.uk](https://services.parliament.uk/bills/), Bills before Parliament 2019-21 <<https://services.parliament.uk/bills/>> accessed 1 July 2020.

⁶⁹ Ministry of Housing, Communities and Local Government, 'A New Deal for Renting Resetting the balance of rights and responsibilities between landlords and tenants: A consultation'.

⁷⁰ *ibid.*

⁷¹ HC Oral Answers to Questions 20 July 2020, vol 678, col 1816.

developments and at the time of writing, data from A New Deal for Renting⁷² are currently being analysed. The issue is still the balancing of the landlord's land as the asset with the tenant's more personal needs of a home, which looks to be more critical than ever.

5. Conclusions

This paper has sought to open discussion around the flaws in the foundational nature of ownership that continues to impact land adversely on a practical basis, poignantly evident during Covid-19. Whilst the old phrase, qualified by Gray, 'an Englishman's home is still, by and large, his castle'⁷³ is usually taken to extoll exclusion and possession, surely the priority should be to keep people in their homes;⁷⁴ it is time to recognise the big picture.

⁷² *ibid.*

⁷³ Gray (n6) 173.

⁷⁴ Arden and Bates (n19) 9.