**'The Private-Public Divide and Horizontality in the English Rental Sector'**

The Supreme Court’s decision in *McDonald,*[[1]](#footnote-1) that those renting in the private housing sector may not challenge their mandatory, no-fault eviction under article 8 of the European Convention on Human Rights (The Convention), at a stroke denied more than half the renting population protection for their home.[[2]](#footnote-2) Disappointingly, the European Court of Human Rights (ECtHR) has supported the Supreme Court, in *FJM v UK*,[[3]](#footnote-3) despite describing home as being “of central importance to an individual’s physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community”,[[4]](#footnote-4) and consistently making it clear that they consider repossession a serious, if not the most serious, interference with respect for the home.[[5]](#footnote-5) The Supreme Court and the ECtHR both acknowledged that article 8 was engaged by a no-fault eviction by a private landlord, but denied that a court needed to demonstrate procedural horizontality should the proportionality of the possession order be disputed.

The Supreme Court has displayed profound reluctance to engage seriously with what respect for the home conferred by article 8 means for individuals. Following a protracted and sometimes testy ‘clash of the Titans’,[[6]](#footnote-6) it has only relatively recently conceded that a public sector tenant should be entitled to invoke the protection of article 8.[[7]](#footnote-7) Thus a clear division has now emerged between the article 8 protection enjoyed by tenants renting from public and private landlords. We draw on *McDonald* to challenge this public-private divide within the rental sector and the associated rejection of procedural horizontality. We question whether the court is a mere forum for the resolution of private disputes or whether, as a public authority, it should take a more pro-active role in balancing human rights norms when they are directly and seriously infringed by private contractual relations. The courts’ constitutional relationship with Parliament under the HRA 1998 is thus under scrutiny.[[8]](#footnote-8) We accept that it is for Parliament to formulate housing policy, and the government has recently acknowledged the inherent contradiction in the current private sector rental model and the needs of tenants.[[9]](#footnote-9) No action has yet been taken and adverse reactions by landlord groups to the government’s recent proposal to extend security of tenure may scupper reform.[[10]](#footnote-10) Equally, the horizontal application of the Convention has long been identified as a particularly controversial subject that lacks coherence.[[11]](#footnote-11) Nevertheless, we argue that human rights protection has been side-lined by adopting a simplistic conception of the private, consensual nature of the rental agreement which ignores the complex reality of housing provision. We criticise the weakness of this approach which reflects excessive deference to the legislature, and represents a missed opportunity to engage in dialogue with the executive and legislature.[[12]](#footnote-12)

We propose that proportionality provides an appropriately flexible framework simultaneously to respect the sovereignty of Parliament, as the arbiter of the private landlord-tenant relationship at the macro level, while giving meaningful effect to the tenant’s article 8 rights at the micro level.[[13]](#footnote-13) Accepting this wider application of the Convention avoids having to draw unprincipled distinctions between the public and private, and shifts attention to compatibility through the application of proportionality.[[14]](#footnote-14) At a conceptual level, our argument builds on a broader trajectory among Western liberal democracies to recognise “property relations as inescapably embedded within a wider social and environmental context”.[[15]](#footnote-15)

The paper outlines both courts’ reasoning, before proceeding to question the characterisation of the tenancy relationship as private and consensual in the context of the current housing market. We then consider the arguments for horizontal application of Convention rights in light of ECtHR jurisprudence, before examining the courts’ aptitude to conduct a proportionality review. Finally, we interrogate how the balancing of private parties’ rights required by a horizontal application of proportionality might be accomplished by considering the parties’ respective vulnerability.

**The denial of proportionality**

The parents of Fiona McDonald, who experienced mental health problems, bought what they hoped would be a permanent home for their adult daughter. It was rented to her on a succession of assured shorthold tenancies (ASTs),[[16]](#footnote-16) with the mortgage interest partly funded by Fiona’s housing benefit. Unfortunately, the McDonalds were unable to keep up their mortgage repayments and the mortgagees appointed receivers[[17]](#footnote-17) who took steps to evict Fiona, as a prelude to sale, by serving a 2 months’ notice to quit under section 21(4) of the Housing Act 1988. This section provides a notice only ground which requires the court to order possession if satisfied that the correct formalities have been observed: there is no statutory discretion to consider proportionality. This no-fault process, which includes a paper-based accelerated procedure,[[18]](#footnote-18) exists alongside other grounds available to the landlord during the term of the tenancy.[[19]](#footnote-19) These are divided into mandatory grounds, where the court must order possession, for example if 8 weeks rent is in arrears,[[20]](#footnote-20) and discretionary grounds, where the court may order possession if it is reasonable to do so; for example, breach of a tenancy obligation.[[21]](#footnote-21) However, it is often simpler for a landlord to use section 21(4) than rely on these alternative proof-based grounds.[[22]](#footnote-22)

The essence of the Supreme Court’s denial of proportionality is expressed as follows:

In the absence of any clear and authoritative guidance from the Strasbourg court to the contrary, we would take the view that although it may well be that article 8 is engaged when a judge makes an order for possession of a tenant’s home at the suit of a private sector landlord, it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here there are legislative provisions which the democratically elected legislature has decided properly balance the competing interest of private sector landlords and residential tenants.[[23]](#footnote-23)

The ECtHR endorsed this approach in *FJM* stating that:

What sets claims for possession by private sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected ….[[24]](#footnote-24)

Thus, the private contractual relationship between the parties, coupled with its legislative regulation, was central to the rejection of proportionality. Both courts emphasised the importance of the voluntary nature of the parties’ relationship. However, as we develop below, the private, consensual nature of the assured shorthold agreement is often illusory and consequently the state’s intervention in determining how the tenancy may be ended is paramount. We argue that the Supreme Court’s deference, in not admitting even the possibility of a proportionality assessment, was misplaced: lack of parliamentary action should not be equated with a proper consideration of the parties’ respective interests in light of the role now played by the AST and the court’s own responsibilities under the HRA 1998.[[25]](#footnote-25) It is noteworthy that parliamentary inaction has been used to justify the courts’ application of Convention rights to resolve private, tortious disputes.[[26]](#footnote-26) The court’s stance in *McDonald* reflects a state limiting concept of proportionality criticised by Rivers,[[27]](#footnote-27) rather than an optimising utilisation of proportionality which, as Young suggests, could assist in a more transparent engagement with the parameters of respect for the home.[[28]](#footnote-28) We argue that a simplistic either/or understanding of the public-private spheres is flawed and should be abandoned to provide “a more complex view of the transformations of each sphere, of their continually negotiated content and contours”[[29]](#footnote-29) which better reflects the reality of the housing market.

The next section locates the AST within the housing market to question the court’s emphasis on freedom of contract and to challenge its dichotomising of the public and private spheres of housing provision.

**The English housing rental market**

The fundamental purpose of the AST, created by the Housing Act 1988, was to deregulate the private sector, with the aim of reversing “the decline of rented housing and [improving] its quality”.[[30]](#footnote-30) The substantial security of tenure afforded under the predecessor scheme[[31]](#footnote-31) was one of many reasons contributing to landlords’ withdrawal from the market.[[32]](#footnote-32) In effectively abolishing security of tenure, the AST was controversial when it was introduced but at a time of growing home ownership, facilitated by the Right to Buy and the deregulation of mortgage finance, it was primarily viewed, at least in England, as a transitory tenure for students and young professionals; the young and (upwardly) mobile who benefit from its flexibility as much as landlords.[[33]](#footnote-33)

The Supreme Court concluded that government reports since 2000 (ie, after the enactment of the HRA 1998) approving the existing provisions, coupled with parliamentary inaction, justified the assessment that “the democratically elected legislature” had properly balanced “the competing interests of private sector landlords and residential tenants.”[[34]](#footnote-34) We argue that the court’s consideration was narrow and historically frozen.[[35]](#footnote-35) It failed to engage fully with either the meaning and significance of respect for the home, or the effect of government policies which have constrained – or eliminated – available housing options and so blurred the court’s neat public-private division and undermined its categorisation of the agreement as voluntary.[[36]](#footnote-36) As we explore below, the private rental sector has doubled in size since 2002. It is now the second largest tenure, accommodating 20 per cent of households[[37]](#footnote-37) with an increasingly heterogeneous tenant profile.[[38]](#footnote-38)

*The AST: A Private Consensual Relationship?*

Autonomy and consent are the basis of contract within which choice is inherent. The objective of the neo-liberal market model is to facilitate choice by promoting a competitive market, offering a range of products, and addressing informational and experiential asymmetries between supplier and consumer by information disclosure, consumer education and product safety standards. The crux of the problem with the market model in the private rental sector, however, is that there is no effective choice in the type of tenure on offer. It is the AST or nothing. The minimum term of an AST is just 6 months and although parties can agree longer terms, in practice it is rare,[[39]](#footnote-39) reflecting the failure of the market for those unable to ‘shop around’ for a better deal. Thereafter a landlord can terminate the tenancy, regardless of the tenant’s default, on a two month notice to quit.[[40]](#footnote-40) Therefore, in sharp contrast with the position in other countries within the UK[[41]](#footnote-41) and Europe,[[42]](#footnote-42) security of tenure is minimal. The court in *McDonald* characterisedthe Housing Act 1988 as offering consumer protection but its extent is minimal. There is a plethora of statutory provisions which acknowledge the vulnerability of private tenants as consumers[[43]](#footnote-43) but they are characterised by their ad hoc and reactive nature; a pervading feature of housing law.[[44]](#footnote-44) Rugg and Rhodes have recently confirmed tenants’ lack of awareness of these rights[[45]](#footnote-45) and, even where tenants have some knowledge of their consumer rights, the Select Committee has identified a “clear power imbalance” in the sector, leading tenants to fear exercising their rights, making them “meaningless”.[[46]](#footnote-46) In any case, the two most contentious features of the agreement – the duration and the rent – cannot be challenged under consumer legislation.[[47]](#footnote-47) The lack of real choice is brought into sharp relief by the role now played by the AST within the broader housing market.

*The Changing Role of the AST*

An increasingly diverse range of people now live in privately rented housing beyond the young and transient, including a greater proportion of families with children and the retired.[[48]](#footnote-48) The continued increases in house prices, combined with more stringent mortgage lending practices[[49]](#footnote-49) are locking aspirant home-owners out of the market.[[50]](#footnote-50) It is also apparent that these renters anticipate remaining in the sector for longer.[[51]](#footnote-51) At the other end of the spectrum, the scarcity of public or social housing in many areas of the country means that a significant number of people must resort to renting in the private sector,[[52]](#footnote-52) and remain there for the long term.[[53]](#footnote-53) Successive government policies have led to the current paucity of social housing, starkly illustrated by the 60 per cent increase in homeless households living in temporary accommodation since March 2011.[[54]](#footnote-54)

The private sector is used as a social tenancy substitute in even more direct ways. First, it accommodates vulnerable people, like Fiona McDonald, who have been evicted from social housing because of unacceptable behaviour.[[55]](#footnote-55) Secondly, since 2011 local authorities are able to discharge their duty to homeless households by offering a 12 month AST.[[56]](#footnote-56) Given that the ending of an AST has been the principal cause of households being accepted as unintentionally homeless since 2012,[[57]](#footnote-57) this development is highly contentious. Homeless applicants who refuse the offer have no further recourse to the local authority. They must therefore take what is offered or risk rooflessness. These groups are vulnerable and on low incomes and it is untenable to characterise them as consumers entering into a negotiated, consensual private agreement and accepting limited security of tenure as part of that deal. There is also growing evidence that tenants in receipt of housing benefit are automatically rejected by landlords and letting agents, further constraining their already limited options.[[58]](#footnote-58) Thus, whilst successive parliaments have failed to adjust the balance of rights between landlords and tenants, their actions in other areas of housing policy have resulted in ASTs being used as quasi-social tenancies,[[59]](#footnote-59) as well as a longer term housing resource, in a process memorably characterised by Morgan as the “casualization of housing”.[[60]](#footnote-60)

A further factor militating against a clear distinction between public and private provision is the increase in the proportion of private renters receiving financial assistance from the state to help meet rent costs, including Fiona McDonald.[[61]](#footnote-61) Consequently, a growing proportion of private landlords are paid, at least partly – directly or indirectly – by the State. Even where a private landlord lets to a tenant who is not entitled to housing benefit, he or she has enjoyed favourable tax treatment. They have been able to offset the interest element of mortgage repayments, as well as generous wear and tear allowances, against rental income which helped spawned an increase in investors within the private rental sector supported by specific Buy to Let mortgage products. Prompted by fears of unfair competition with first time buyers, the Government has taken steps to limit the attraction of the Buy to Let sector to investors by reducing these financial advantages.[[62]](#footnote-62)

In summary, the Supreme Court’s decision in *McDonald*, endorsed by the ECtHR, shuts off the possibility of an article 8 defence through a simplistic identification of distinct private and public sectors which fails to accord with the reality of housing provision. It ignores the subtlety and complexity of the contexts in which the AST operates and makes the public-private divide critical. Clearly, not all ASTs are being used as quasi-social housing and there are undoubtedly a portion which exemplify the freely negotiated consensual bargain model.[[63]](#footnote-63) The challenge is to recognise and accommodate the spectrum of contexts and to determine “the degree to which public law values should be extended into the sphere of privatised power.”[[64]](#footnote-64)

*A Contextual Spectrum*

As readers of this journal are well aware, the public-private ‘divide’ is hardly a new topic of debate. In 1980, Harlow argued against the creation of general immunities for public authorities against legal action,[[65]](#footnote-65) describing a jurisdictional division between public and private law cases as “old fashioned and undesirable in principle”.[[66]](#footnote-66) The argument has subsequently played out in the susceptibility of various quasi-public bodies to judicial review,[[67]](#footnote-67) and, more recently, to human rights challenges under section 6 of the HRA.[[68]](#footnote-68) The difficulty of establishing clear parameters is illustrated by the divergent judicial opinions that pepper those cases.[[69]](#footnote-69) There is thus ample evidence that a clear and principled dividing line is increasingly elusive, both in practice and conceptually,[[70]](#footnote-70) and we argue that it is time to shift the focus to accommodate the reality of the “hollowed out” state.[[71]](#footnote-71)

Oliver posited common values to support the case for abandoning the distinction between public and private law in favour of an “integrated approach”.[[72]](#footnote-72) Teubner’s influential work on polycontexturality[[73]](#footnote-73) also rejects rigid, binary divides and attempts to capture the multi-dimensional complexity of law in its varied social contexts,[[74]](#footnote-74) while Shamir has emphasised the dynamic and fluid nature of the position.[[75]](#footnote-75) To accommodate the variety of circumstances in which the law operates, Grear builds on Teubner’s work to posit a spectrum, along which “the public and private emerge to differing degrees in different contexts.”[[76]](#footnote-76) As Hedley observes, the incoherence does not make the distinction between public and private meaningless,[[77]](#footnote-77) and in some cases one will “shout louder” than the other.[[78]](#footnote-78) This model thus recognises the lack of binary divide but respects the “archetypal conceptual paradigms” of private and public law, to avoid subsuming private law within a branch of public law.[[79]](#footnote-79) Grear juxtaposes contract law – with its archetypal facilitative, obligation-generating effect, and consensual bargaining of self-regarding individuals[[80]](#footnote-80) – with public law’s ‘other-regarding’ focus on the judicial control of governmental power.[[81]](#footnote-81) It is therefore sufficiently sophisticated to address the concern that imposing public law values on private arrangements disrupts the ways in which private law has sought to balance competing interests.[[82]](#footnote-82) We explain below why we believe that the proportionality assessment is capable of giving effect to this dynamic, contextual approach.

**The Contested Dimensions of Horizontal Effect**

As outlined at the start of this paper, the HRA 1998’s potential to create horizontal effect of Convention rights is a controversial topic which the courts have appeared reluctant to address in a systematic or principled way.[[83]](#footnote-83) Writing in 2007, Phillipson concluded that the courts’ avoidance of resolving the issue decisively has been “at least semi-deliberate”.[[84]](#footnote-84) This view reflects the observation of Mummery LJ that the judiciary prefer a case-by-case development, rather than “the same high level of abstraction on which the debate has been conducted for the most part in the law books and legal periodicals.”[[85]](#footnote-85)

As Young observes, the HRA 1998 does not clarify what type of horizontal effect is envisaged.[[86]](#footnote-86) Most debate has centred on the court’s role under section 6 to develop the common law in a manner which complies with human rights norms, most notably in the area of privacy.[[87]](#footnote-87) Our attention is directed at different horizontality questions which the courts in *McDonald* wererequired to face head on.[[88]](#footnote-88) Fiona’s defence in the lower courts focussed upon the compatibility of section 21(4) with article 8, ie legislative horizontality under the court’s interpretative duty.[[89]](#footnote-89) In the Supreme Court her defence changed tack and argued that the court, as a public authority in pursuance of its duty to act compatibly under section 6, was required (following *McCann v UK* et al[[90]](#footnote-90)) to consider the proportionality of any order for possession of a home, ie procedural horizontality. This latter approach formed the subject matter of Fiona’s appeal to the ECtHR.[[91]](#footnote-91)

*Legislative horizontality*

It has not been seriously questioned that the court’s interpretative duty under section 3 HRA 1998 extends to legislation which governs the relations of private parties.[[92]](#footnote-92) Although the ECtHR was not directly asked to consider the compatibility of the relevant legislation, their judgment raises some concerns. In rejecting Fiona’s appeal the ECtHR stated:

… the balance between the interests of the private individual or enterprise and the residential occupier could be struck by legislation which had the purpose of protecting Convention rights of the individuals concerned.[[93]](#footnote-93)

Taken at face value this statement implies that it is for a State to determine how the relations between private individuals are to be balanced, even where those relations directly and seriously infringe Convention rights. Surely, as a matter of principle, it cannot be right that a State’s assessment of the proper balance between the competing Convention rights of private individuals is beyond scrutiny, while the margin of appreciation concerning possession proceedings by a public landlord has been described as narrow and dependent upon robust procedural safeguards.[[94]](#footnote-94)

*Procedural horizontality*

Procedural horizontality focusses upon the court and its obligation as a public authority to act compatibly – whether domestically under section 6 HRA 1998 or as an organ of the State in Convention jurisprudence. Procedural safeguards constitute a key feature of human rights compatibility. A human rights challenge is victim focussed: it is the proportionate impact of an interference with a qualified human right upon a particular victim that is central. In the context of possession proceedings by a public landlord the seriousness of the infringement coupled with the inherently personal nature of a person’s home demands that “the person concerned must be able to challenge [the eviction] on the ground that it is disproportionate in view of his or her personal circumstances.” It is simply not enough to justify the eviction “under a rule formulated in general and absolute terms.”[[95]](#footnote-95)

As we have explained, an AST landlord is required to obtain a court order to regain possession of their tenant’s home and it is the court’s act in ordering possession which is the focus.[[96]](#footnote-96) The key question in the *McDonald* litigation was whether similar procedural safeguards, in particular a consideration of proportionality, should apply when a home is repossessed by a private party to recognise procedural horizontality.

The possibility of a public-private divide in the approach to procedural safeguards has drawn comment by individual judges even before *McDonald*. For instance, in his separate opinion in *Buckland v UK[[97]](#footnote-97)* Judge De Gaetano stated:

In my view while it is perfectly reasonable to require that an eviction or repossession issued by the Government or by a local authority … or possibly even an entity in receipt of public funds, should be capable of being challenged on the grounds of proportionality, when the landlord is a private individual the tenant’s right should in principle be limited to challenging whether the occupation … has in fact come to an end according to law. In this latter case the proportionality of the eviction or repossession in the light of the relevant principles under Article 8 should not come into the equation.

It is pertinent to note that Judge De Gaetano, perhaps unwittingly, drew attention to the difficulties of establishing that clear divide where a landlord is in receipt of public funds: for example housing benefit. These difficulties are also evident in *Brezec v Croatia*[[98]](#footnote-98)where apparent procedural horizontality under article 8 was found when a private company, which had been a former state enterprise and remained partly owned by the State, evicted a former employee from her home. In *FJM* the ECtHR rationalised this decision as falling on the public side of the divide.

Procedural horizontality also raises the extent to which States, in pursuance of their obligation to secure Convention rights under Article 1 of the ECHR, owe a positive duty to establish procedural safeguards where private contractual or proprietary relations engage Convention rights. The emergence of positive duties is controversial but growing.[[99]](#footnote-99) To enforce or adjudicate upon a private contract, a party may need the assistance of a court, a public body for whom the State is clearly responsible in articulating its powers and responsibilities. Thus, there is yet another interface between the public and private spheres.

An example of procedural horizontality is found in the case of *Zehentner v Austria[[100]](#footnote-100)* in which Ms Zehentner, who suffered from mental health problems, successfully established a violation of her article 8 and A1 P1 rights when her home was sold through a court administered sale to recover relatively small judgment debts from unpaid repair work to her home. The legislation empowering the court to force the sale set strict time limits to which Ms Zehentner was unable to adhere due to her incapacity. The compatibility of the legislation was not in issue – clearly there is a public interest in the efficient enforcement of judgment debts and certainty of title following a court sale. It was the lack of procedural safeguards which left Ms Zehentner with no voice in the sale of her home that triggered the violations.[[101]](#footnote-101) The ECtHR held that States owe a positive duty to provide “specific protection by the law”[[102]](#footnote-102) to those that lack legal capacity and are particularly vulnerable. In *FJM* the ECtHR suggested that the domestic courts’ general power to delay the execution of a possession order for up to six weeks, in cases of exceptional hardship, satisfactorily addressed the UK’s positive duty to the vulnerable. [[103]](#footnote-103) The deficiency of this provision is that there is no mechanism to allow the landlord’s position to be balanced against that of the tenant, meaning that landlords’ needs could be prejudiced. By contrast, a proportionality assessment would mean that both parties’ needs are transparently considered.

Encouraging statements in support of a positive obligation to ensure procedural horizontality are also found in *Ivanova and Cherkezov v Bulgaria.*[[104]](#footnote-104)The victims had illegally built their home and the authorities sought its demolition under mandatory powers. In upholding a violation of article 8, the ECtHR drew close comparisons both with cases of repossession of public housing and “evictions from properties previously owned by the applicants but lost by them as a result of civil proceedings brought by a private person.”[[105]](#footnote-105) It reiterated in the strongest terms the necessity for procedural safeguards when article 8 is engaged by eviction (whether or not the occupier belongs to a vulnerable group) and made no distinction between evictions by a public body or private person.[[106]](#footnote-106)

It is important to note that *FJM* does not appear to challenge the basic first step that the court’s possession order engages article 8. The ECtHR some 30 years ago in the admissibility decision of *Di Palma v UK[[107]](#footnote-107)* flirted with the idea that the court was merely “a forum for the determination of the civil dispute between the parties”[[108]](#footnote-108) and thus they declared inadmissible a challenge, under both A1 P1 and article 8, to the forfeiture of a valuable long lease for a relatively minor breach of covenant. By contrast in the 2008 decision of *Khursid Mustafa & Tarzibachi v Sweden*,[[109]](#footnote-109) the Strasbourg Court accepted that a court’s ruling in private disputes was not off limits. [[110]](#footnote-110) The case also concerned violations arising from the forfeiture of a long lease for a minor breach of covenant but under articles 10 and 8.[[111]](#footnote-111) The domestic court’s order applying State enacted law was characterised as an interference by a public authority[[112]](#footnote-112) and following *Pal & Puncemau v Andorra* they stated:[[113]](#footnote-113)

 Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.[[114]](#footnote-114)

The domestic court, in balancing the competing Convention rights of the landlord and the lessee, had failed to apply the appropriate standards by paying insufficient attention to the impact on the victim’s Convention rights and personal circumstances. [[115]](#footnote-115)

The Supreme Court was not quite so emphatic in *McDonald*,stating that repossession ‘may well engage’ article 8.[[116]](#footnote-116) Perhaps picking up from this cue the Court of Appeal in *Stewart v Watts*[[117]](#footnote-117) went so far as to say that it “remains unclear” whether repossession engages article 8. The retreat from the unequivocal opinions expressed by the ECtHR may be explained by the realisation that, as night follows day, when article 8 is engaged the correct reasoning is to consider whether the interference can be justified as a proportionate means of achieving a pressing social need, including protecting the rights of others, ie the landlord. Critical to this issue is process: who makes that judgement and how should they do so?

Both the Supreme Court and the ECtHR identify it as an exclusively parliamentary function and that simply by enacting section 21 of the Housing Act 1988 – and not subsequently amending it – Parliament has demonstrated proportionality by effectively balancing the Convention rights of the respective private parties. There is thus no automatic right of a private tenant to challenge the court order as disproportionate in the light of their particular circumstances.[[118]](#footnote-118) This rejection of procedural horizontality was justified on two grounds: first to avoid any unintended interference with privately negotiated rights; and secondly to respect the constitutional separation of power between the legislature and judiciary.[[119]](#footnote-119)

The ECtHR relied heavily on the case of *Vrzic v Croatia*[[120]](#footnote-120)which concerned the judicial sale of the Vrzic’s house to recover mortgage arrears. Having declared the complaint admissible, the court accepted the proportionality of these alleged violations by emphasising the voluntary contractual basis of the mortgage and attendant assumption of risk. The Vrzics knew and accepted that if they did not repay the loan their house could be sold.[[121]](#footnote-121) Nor did the Vrzic’s take advantage of the available means to challenge the sale and accordingly “tacitly agreed to its sale in enforcement proceedings.”[[122]](#footnote-122) Notably, the ECtHR distinguished other repossession cases on the basis that those occupiers, unlike mortgagors, had not voluntarily assumed the risk of the mandatory grounds that triggered their eviction.[[123]](#footnote-123) Crucially, however, the court failed to recognise that for some tenants, including Fiona McDonald, the voluntariness of the AST is illusory.

The constitutional stance of both the Supreme Court and the ECtHR reverts to the position originally taken by the House of Lords (and since abandoned) in relation to public sector tenancies in *Qazi v Harrow LBC*.[[124]](#footnote-124) This decision was subject to robust dissent by Lord Steyn, with whom Lord Bingham agreed, because “it empties article 8(1) of any or virtually any meaningful content …. The decision today does not fit into the new landscape created by the Human Rights Act 1998”.[[125]](#footnote-125) It is unsatisfactory that this argument has been resurrected in respect of private landlords. There is a danger of courts moving beyond deference to abdicate their responsibility to meaningfully assess compliance with Convention norms.[[126]](#footnote-126) The court’s role then does become merely “a forum for the determination of the civil dispute between the parties.”[[127]](#footnote-127)

There seems to be a clear judicial aversion to give substance to what respect for the home entails in the context of repossession proceedings.[[128]](#footnote-128) Home is not defined by legal rights, whether derived from a public or private entity, but is rather constituted by ‘sufficient and continuing links’, of both a physical and psychological nature, that underpin the autonomy and dignity of the individual within the community in which they form part.[[129]](#footnote-129) The necessity for the court to respect its institutional boundaries is uncontentious but resorting to an outdated public-private dichotomy to sustain the argument that repossession is justified because Parliament has said so is simply unacceptable. It leaves those tenants with no choice but to accept an AST with an empty article 8 right.

Kavanagh identifies the courts’ challenge as being “to work out the correct balance between legal certainty, stability and continuity … and equity and justice …”[[130]](#footnote-130) The AST prioritises legal certainty of repossession above all other values and thus it could be argued that conceding to even the possibility of a proportionality assessment undermines its key policy objective. This same justification was made in respect of public sector tenancies until the eventual acknowledgment that sometimes the desirability for certainty of possession must cede to a tenant’s competing rights.[[131]](#footnote-131) Consequently, the court’s bland assertion that “there will of course occasionally be hard cases”[[132]](#footnote-132) does disservice both to the court’s own responsibilities, as well as to AST tenants. It is our contention that, if respect for the home is to mean anything, it should embrace procedural horizontality and, as a minimum, encapsulate procedural safeguards that require a court order and sufficient judicial discretion to consider the proportionality of any eviction.[[133]](#footnote-133) These measures would create a sufficiently flexible tool to accommodate the nuanced spectrum of the public and private within the diverse range of housing supply whilst striking an appropriate constitutional balance[[134]](#footnote-134)

**Proportionality and the Balancing of Rights**

We freely acknowledge that the task of wholescale reform of the private rental agreement can only be undertaken by Parliament, to ensure that those affected are properly consulted. Equally, parties are entitled to rely on agreements they have entered into and around which they may have made investment and other important decisions. Nevertheless, we argue that the Supreme Court’s warning that accepting the possibility of proportionality in a private tenancy case would dilute the rule of law[[135]](#footnote-135) is over-stated and that denying more than half of all renters any benefit of article 8, on a simplistic identification of a clear public-private divide in housing provision, is fundamentally wrong.

Collins identifies that proportionality operates differently in vertical and horizontal challenges.[[136]](#footnote-136) Whereas vertical challenges operate negatively, to protect against naked State power, horizontal claims positively assert the respective human rights of private parties and leads to the need to balance the parties’ rights. However, Fenwick has observed that there is judicial uncertainty as to the proper approach to balancing clashing rights and notes, in particular, judicial reluctance to accept the equal value of competing rights despite Strasbourg’s refusal to accept that any qualified right should have presumptive priority.[[137]](#footnote-137) Thus she calls for a parallel analysis in which there is a dual exercise of proportionality for each right, rather than looking at one right as a qualification of the other: what Collins refers to as “a double proportionality test”[[138]](#footnote-138) and Lord Steyn as “the ultimate balancing test.”[[139]](#footnote-139) However, it is unclear how such a dual test should be undertaken.

We therefore explore a framework within which to exercise proportionality which reflects the statutory status of the AST and recognises that competing human rights are at stake. Rather than drawing a clear line between the vertical and horizontal application of proportionality, we argue for a more nuanced and flexible approach which simultaneously reflects the public-private contextual spectrum evident in the rental market and the parties’ situations within it. As we explain below, we draw on the concept of vulnerability and interrogate its utility in providing guidance to the court when undertaking the final stage of the proportionality assessment; the ‘fair balance’.[[140]](#footnote-140)

*A Presumption of Proportionality?*

Even where there is a public authority landlord, the court has emphasised that proportionality should be presumed and rebuttal only envisaged in exceptional cases.[[141]](#footnote-141) The starting point is that the court will only have to consider the issue when it is raised by the occupier and has crossed the high threshold of being seriously arguable.[[142]](#footnote-142) Moreover, the court rejected a structured approach to proportionality in housing repossession cases because it would involve the landlord in expensive litigation and consequently divert public funds away from its proper purpose. [[143]](#footnote-143) Presumptively, this reasoning would apply equally to private landlords if their tenant were able to raise a proportionality defence. It is therefore unlikely that challenges to the ending of an AST would be numerous or impose an excessive burden either on landlords or county court lists. Furthermore, the emphasis on harm-reduction, rather than the assertion of positive rights in the proportionality assessment, is not merely semantic but would have ramifications for available remedies if the tenant’s argument were to prevail. Consequently, a successful article 8 claim could usually only delay repossession, as envisioned, hypothetically, by the Supreme Court in *McDonald*.[[144]](#footnote-144) These presumptions pay due deference to Parliament, by respecting the principle of certainty of repossession at the macro level, whilst protecting the landlord’s A1P1 rights, at the micro level.

Conducting a proportionality review where eviction is sought by a private landlord is not novel. The Equality Act 2010 requires the court to consider proportionality where an eviction is challenged either because of indirect discrimination[[145]](#footnote-145) or direct discrimination based upon age or disability – other forms of direct discrimination are absolutely prohibited.[[146]](#footnote-146) In contrast to article 8, these assessments of proportionality are structured and the landlord bears the burden of proof.[[147]](#footnote-147) Thus, as Pascoe notes, *McDonald* “creates a binary divide between human rights and disability in private landlord and tenant cases”,[[148]](#footnote-148) making the Equality Act 2010 a significantly more advantageous route of challenge, if a tenant can bring themselves within it. We accept the more rigorous approach under the 2010 Act as justified by its statutory status and, as outlined, suggest that the extent of the proportionality review proposed could soften this divide.

*A Role for Vulnerability?*

Echoing the Strasbourg jurisprudence,[[149]](#footnote-149) the Supreme Court in *Pinnock* accepted suggestions by the Equality and Human Rights Commission that disproportionality is more likely to be found “in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”.[[150]](#footnote-150) No further clarification on how vulnerability should be assessed was provided and subsequent cases have gone no further.[[151]](#footnote-151) Indeed Lord Bingham in the earlier case of *Kay v Lambeth LBC* suggested that “the practical experience of county court judges is likely to prove the surest guide … [t]hey are well used to exercising their judgment … and will recognise a highly exceptional case when they see it.”[[152]](#footnote-152) Nevertheless, this conception of vulnerability suggests a group-based perspective, looking to identifiable characteristics that are deserving of particular consideration;[[153]](#footnote-153) an approach reflected in the Equality Act 2010 ‘protected characteristics’. Homelessness law also gives priority to individuals who are vulnerable because of statutorily specified factors[[154]](#footnote-154) and it is possible that this concurrence with a well-established (if contested)[[155]](#footnote-155) legal test motivated the Commission to suggest its wider application to proportionality. We question the adoption of a solely group-based conception of vulnerability as presenting the danger of both under and over inclusion[[156]](#footnote-156) and consider whether contextual or situational vulnerability may have more to offer. We note, for instance that, despite the apparently group-based approach in homelessness legislation, the Supreme Court has also stated that assessment of vulnerability must be holistic, contextual and practical.[[157]](#footnote-157)

Vulnerability is a concept that has gained momentum in scholarly research on ethics, law and human rights and has arisen to challenge the “myth of the invulnerable, disembodied, and de-contextualised subject of classical liberal law.”[[158]](#footnote-158) Martha Fineman’s innovative work[[159]](#footnote-159) claims that vulnerability is an inherent human characteristic: in other words, we are all vulnerable *because* we are human. This conclusion is important because it denies the validity of the liberal subject model of citizen-state relations which, Fineman argues, allows the state to ignore much systemic and institutionally-based inequality by reference to “individual responsibility”[[160]](#footnote-160) and by focussing on eliminating discrimination against historically disadvantaged groups, rather than eliminating the inequalities to which those groups were subject.[[161]](#footnote-161) Thus Fineman rejects the identification of specific vulnerable groups because it sustains the liberal myth that “normally, people are self-sufficient, independent, and autonomous.”[[162]](#footnote-162) While emphasising the ubiquity of vulnerability, Fineman identifies that individuals occupy different situational relationships to it, based on their resilience through the accumulation of socio-material resources. This conclusion leads her to argue that the state is obliged to put in place institutions which allow all groups to build resilience to inevitable vulnerability[[163]](#footnote-163) and thereby to promote democratic equality.[[164]](#footnote-164)

It is important to acknowledge that the meaning of vulnerability is imprecise and contested.[[165]](#footnote-165) Nevertheless, having surveyed the literature, Graham discerns “widespread agreement that vulnerability may be multi-factorial, multi-dimensional and transitory. To put it another way, it is not a characteristic of specified groups but something which may affect anyone in society.”[[166]](#footnote-166) Currie identifies vulnerability as a state of high exposure to certain risks, combined with reduced ability to protect oneself against them and to cope with their negative consequences.[[167]](#footnote-167) Similarly, the related concept of precariousness is not a marginal phenomenon.[[168]](#footnote-168) It has been recognised as arising from the neo-liberal roll-back which has been further accentuated by the financial crisis of 2008.[[169]](#footnote-169) Its reach is pervasive and inter-related. Precarious employment, typified by zero hours contracts and the so-called gig-economy, with attendant economic instability, combines with the retrenchment of state welfare provision and directly impacts on housing vulnerability[[170]](#footnote-170) which is not limited to the private rental sector.[[171]](#footnote-171) Hunter and Meers identify security of tenure as a key factor “with a lack of security tending to greater precarity.”[[172]](#footnote-172) That precariousness is compounded by dependence; “where an individual lacks the capacity to choose or negotiate their circumstances.”[[173]](#footnote-173) We argue that the AST – as a tenure – is inherently precarious because of its no-fault, mandatory right of repossession. Yet that precariousness will be experienced differently, depending on the person’s ability to withstand the loss of their home. It is likely that the majority of tenants will be sufficiently resilient to render the application of proportionality irrelevant and, consequently, precariousness on its own is insufficient as an analytical framework. However, where housing precarity and dependence on the private rental sector coincide with insecure employment and financial instability, for example, a tenant may be vulnerable in the event of repossession.

 Therefore, could this wider conception of vulnerability assist in constructing a framework within which to articulate and balance the competing rights at stake in repossession of a person’s home? First, Fineman’s thesis explicitly recognises that either party may be vulnerable and therefore our starting point is that neither side’s rights automatically trump the other’s, a proposition supported by the ECtHR and the Council of Europe in relation to the Convention.[[174]](#footnote-174) Thus, in our context, a landlord may be vulnerable, despite an ostensibly more powerful position in terms of their superior property rights and ability to invoke no-fault repossession. For example, in *Akerman-Livingston* the fact that the landlord’s own lease had been terminated as a result of the freehold owner’s desire to sell the whole building, helped to demonstrate the proportionality of the eviction.[[175]](#footnote-175) Secondly, it is inherently a relational concept which places the individual in his or her social context;[[176]](#footnote-176) a facet of which may be their relative precariousness. Focusing on situational or contextual vulnerability appropriately demarcates the court’s role by avoiding pre-defining vulnerable groups in need of protection. Unlike the statutory mechanism which permits the court to delay repossession where the tenant faces ‘exceptional hardship’,[[177]](#footnote-177) discussed above, a vulnerability framework gives equal weight to the landlord’s position.

We have argued that the Supreme Court’s characterisation of the AST draws heavily on the image of classical rational legal subjects making consensual, freely negotiated contractual bargains. Vulnerability offers the potential to disrupt that construction by recognising that the decision to enter an AST agreement is rooted in the social and economic circumstances of the transaction.[[178]](#footnote-178) Our primary criticism of the Supreme Court’s opinion is the failure to appreciate that many assured shorthold tenants lack any other options; a position which can cause or exacerbate vulnerability. This argument has resonance in other areas typified by lack of real choice. Fox O’Mahony has employed situational vulnerability to highlight the risks for some older homeowners of entering equity release agreements, in a socio-political environment which gives them little or no choice whether to do so.[[179]](#footnote-179) In the context of the energy market, Ofgem defines vulnerability as:

[W]hen a consumer’s personal circumstances and characteristics combine with aspects of the market to create situations where he or she is: significantly less able than a typical consumer to protect or represent his or her interests …; and/or significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial.[[180]](#footnote-180)

This definition is apposite because it explicitly recognises the significance of the conjunction of personal and market characteristics. It also corresponds with the contextual aspects of the vulnerability test under homelessness law which compares the applicant with an ordinary person if made homeless and also provides an appropriately high threshold of harm.[[181]](#footnote-181) Fineman has sought to dissociate vulnerability from the negative connotations of risk of harm, dependence and helplessness which, impliedly, only apply to certain groups. Our version – focussed on harm reduction – thus distances us from Fineman’s normative argument for the creation by the state of positive rights (for example to housing) and aligns it with the approach adopted in the privacy case law.[[182]](#footnote-182) The comparison with privacy is pertinent since, as the Supreme Court in *McDonald* recognised, the courts have been willing to intervene, despite its private law status.[[183]](#footnote-183) Privacy also requires the court to weigh competing rights. As Lord Hope explained, the question in the privacy context is:

 [W]hether the benefits that will be achieved by … publication [of the confidential information] are proportionate to the harm that may be done by the interference with the right to privacy.[[184]](#footnote-184)

The question could be similarly posed in the repossession situation. The point of departure would be the landlord’s legitimate aim of vindicating their property rights and this ‘benefit’ could be supplemented by specific contextual factors, such as the motivation for seeking possession. For example, where the landlord wishes to sell the property with vacant possession[[185]](#footnote-185) it would require the tenant to provide strong evidence of their vulnerability to justify delaying possession. By contrast, a landlord who merely wants to replace a tenant, perhaps with one who pays higher rent, may be required to wait longer where, for example, the tenant suffers health problems falling short of those protected under the Equality Act 2010,[[186]](#footnote-186) or requires more than two months’ notice because of specific childcare needs, or because their receipt of housing benefit limits their access to rented housing. A proportionality argument could also potentially be raised where there has been discrimination outside the protection of the Equality Act 2010, or a retaliatory eviction not effectively covered by the statutory regime relating to repair.[[187]](#footnote-187) For example, the phenomenon of ‘sex for rent’ has been reported in the media as a growing concern in situations where demand for rental properties is high, or expensive, or both.[[188]](#footnote-188) To be clear, there are no trump cards, simply factors or indicators to be taken into account. Equally, we are not suggesting that proportionality is routinely assessed. As outlined above, the tenant would need to surmount the initial, high threshold of having a “seriously arguable” case and the strong presumption would be the vindication of the landlord’s rights, as it is in the public sector.[[189]](#footnote-189)

As we have explained, identifying housing-related vulnerability is a task with which the courts are already familiar under the homelessness legislation.[[190]](#footnote-190) The comparison with homelessness is also appropriate since the likely outcome of a vulnerable tenant being evicted from an AST is an application to the local housing authority under the homelessness provisions, so demonstrating a further interface between public and private housing spheres and militating against the validity of the Supreme Court’s dichotomous approach. For these reasons, we conclude that a contextual or situational concept of vulnerability – in the terms we have identified – provides a useful framework within which to assess a ‘fair balance’ between the parties.

*Community Orientated Property?*

The absolute nature of property rights has long been qualified from their zenith of self-interest in the 19th century.[[191]](#footnote-191) Freedom of contract is also acknowledged as largely illusory in the consumer context. There is an ever-growing raft of legislation and regulatory measures limiting a landowner’s ability to act in their own interests and seeking to protect consumers from the superior strength of suppliers of goods and services. The private landlord and tenant relationship is no exception with regulation in such areas as repair,[[192]](#footnote-192) the protection of tenants’ deposits[[193]](#footnote-193)and the control of unfair terms.[[194]](#footnote-194) Parliament has even imposed additional burdens on private landlords to achieve broader social objectives, such as the detection of illegal immigration, by requiring landlords to ascertain potential tenants’ ‘right to rent’.[[195]](#footnote-195) Gray poses the question which lies at the heart of balancing the landlord’s and tenant’s human rights in the following terms:[[196]](#footnote-196)

Consideration of the impact of regulation requires some assessment of the degree to which the idea of 'property' comprises not merely notions of private right, but also elements of public duty. Of critical importance here is the exact scope of the community directed obligations which define or delimit any landowner's 'bundle of rights'.

Grear too promotes tempering the traditional exclusionary rhetoric associated with property ownership by shifting to a discourse of social inclusion in which human rights has a part to play.[[197]](#footnote-197) Across the Atlantic within American jurisprudence there is also a vigorous debate as to the extent to which property should acknowledge and promote community directed values.[[198]](#footnote-198) Meanwhile in Europe there is an emerging jurisprudence around the concept of Life Time contracts; those which are necessary for individual self-realisation and participation in society and which encompass housing-related contracts . [[199]](#footnote-199) In a challenge to a classic contractual approach, sixteen essential principles are promoted to govern Life Time contracts, including a principle of transparent and socially responsible termination.

It is easy to forget that no fault evictions, exemplified by ASTs, have only been a feature of the private rental sector for three decades. For much of the twentieth century varying degrees of security of tenure of the home was the norm. ASTs were introduced at a time when home ownership was burgeoning to provide a housing solution to tenants not necessarily seeking long term accommodation. As already noted, times have changed. Scotland has already abandoned no fault evictions[[200]](#footnote-200)and we have referred to the range of alternative evidenced- based grounds upon which a landlord can seek eviction and appropriately vindicate his or her property right. Given the narrow formulation of proportionality outlined above, we do not believe that procedural horizontality poses a disproportionate control of landlords’ property rights but provides some minimal, yet necessary, substance to respect for the tenant’s home. One is thus left wondering what the Supreme Court, as well as landlords, are afraid of in admitting a proportionality defence in possession proceedings between private parties.[[201]](#footnote-201)

**Conclusion**

We have utilised *McDonald* to highlight the fallacy of the courts’ adoption of a clear divide between the public and private sectors when human rights are in issue. *McDonald* illustrateshow such a divide fails to reflect the reality of the public-private interface, specifically in housing provision, to deny the article 8 rights of all private tenants, irrespective of context. We argue that the courts should not shrink from procedural horizontality in home repossession proceedings where article 8 is so clearly and seriously infringed but should adopt a more nuanced approach which acknowledges the spectrum of contexts in which human rights are engaged within the public-private continuum and should embrace proportionality as an appropriate mechanism to reflect that spectrum. Accordingly, we illustrate how a proportionality review could be undertaken by the domestic courts in private rental relationships, to give effect to private renters’ article 8 rights, while respecting the landlord’s competing A1 P1 rights, as well as the State’s authority as legislator. Landlords and mortgage lenders may initially react negatively but we contend that the argument advanced here would minimally disrupt the existing balance of rights in the landlord-tenant relationship. Maintaining absolute certainty of repossession, in all cases, could only be achieved by denying the applicability of human rights: a position we have argued is untenable.

1. \* We are extremely grateful to Professor Ian Loveland and to our colleagues Dr Alun Gibbs, Professor David Gurnham and Mark Jordan and the anonymous reviewers for their insightful comments. We would also like to thank the Editor of the journal for his encouragement to persevere with this piece. All errors remain our own.

 *McDonald v McDonald* [2016] UKSC 28; [2016] H.L.R. 28. [↑](#footnote-ref-1)
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3. Application no. 76202/16 decided 29/11/18. [↑](#footnote-ref-3)
4. *Ivanova and Cherkezov v Bulgaria*, Application no. 4677/15 [54]. [↑](#footnote-ref-4)
5. *Connors v UK* (2005) 40 E.H.R.R. 9, *McCann v UK* (2008) 47 E.H.R.R. 40; *Kay v UK* [2011] H.L.R. 2; *Cosic v Croatia* [2011] 52 E.H.R.R. 39; *Paulic v Croatia* App No. 3572/06 and *Bedjov v Croatia* App No. 42150/09. [↑](#footnote-ref-5)
6. S. Nield, “Clash of the Titans: Article 8, Occupiers and Their Home” in S. Bright (ed.) *Modern Studies in Property Law* Volume 6 (Hart, 2011). [↑](#footnote-ref-6)
7. *Manchester CC v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 10, *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 A.C. 186 and sometimes for social tenants *London & Quadrant Housing Trust v The Queen on the Application of Weaver* [2009]EWCA Civ; [2010] 1 W.L.R. 363. [↑](#footnote-ref-7)
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9. MHCLG, *Overcoming the Barriers to Longer Tenancies in the Private Rental Sector*, July 2018, para. 5. [↑](#footnote-ref-9)
10. National Landlords Association, ‘Longer-term tenancies: NLA reacts to 3-year proposals’ NLA Network 1 July 2018 <https://landlords.org.uk/news-campaigns/news/longer-term-tenancies-nla-reacts-three-year-proposals> [accessed 4/10/18]; N. Barker, ‘Morning Briefing: three-year tenancies “could be killed off by Number 10”’ *Inside Housing* 5/9/18. [↑](#footnote-ref-10)
11. See G. Phillipson, “Horizontal effect after *Campbell*’” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007); A. L. Young, “Mapping horizontal effect” in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (CUP, 2011); J. Wright, “A damp squib? The impact of section 6 HRA on the common law: horizontal effect and beyond” [2014] P.L. 289. [↑](#footnote-ref-11)
12. A. L. Young, *Democratic Dialogue and the Constitution* (OUP, 2017); cf P. Sales, “Partnership and challenge: the courts' role in managing the integration of rights and democracy” (2016) P.L. 456. [↑](#footnote-ref-12)
13. A. Brady, *Proportionality under the UK Human Rights Act* (Cambridge, CUP, 2012), p.21; J. Rivers, “Proportionality and the Variable Intensity of Review” [2006] C.L.J. 174. [↑](#footnote-ref-13)
14. A. Goymour “Property and Housing” in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (CUP, 2011), p.273. [↑](#footnote-ref-14)
15. A. Grear, “A tale of the land, the insider, the outsider and human rights (an exploration of some problems and possibilities in the relationship between the English common law property concept, human rights law and discourses of exclusion and inclusion” (2003) L.S. 33, 35. [↑](#footnote-ref-15)
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18. Civil Procedure Rules, Part 55, Rules 55.11-55.19. [↑](#footnote-ref-18)
19. Housing Act 1988 s.7 and Schedule 2, [↑](#footnote-ref-19)
20. Ibid Ground 8. [↑](#footnote-ref-20)
21. Ibid Ground 12. [↑](#footnote-ref-21)
22. J. Rugg and D. Rhodes, *The Evolving Private Rented Sector: Its Contribution and Potential* (University of York, Centre for Housing Policy, 2018), p.113. [↑](#footnote-ref-22)
23. *McDonald* at [40]. [↑](#footnote-ref-23)
24. *FJM*  at [42]. [↑](#footnote-ref-24)
25. P. Sales, “Partnership and challenge: the courts' role in managing the integration of rights and democracy” (2016) P.L. 456, 458. [↑](#footnote-ref-25)
26. *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. [↑](#footnote-ref-26)
27. J. Rivers, “Proportionality and the Variable Intensity of Review” [2006] C.L.J 174. [↑](#footnote-ref-27)
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34. *McDonald* at [40]. [↑](#footnote-ref-34)
35. *McDonald* at [11]-[19]. [↑](#footnote-ref-35)
36. J. Morgan, “The casualization of housing” (1996) J.S.W.F.L. 18(4) 445. [↑](#footnote-ref-36)
37. DCLG, *English Housing Survey Headline Report 2016-17* para. 1.8. In London it is 30%. [↑](#footnote-ref-37)
38. Housing, Communities and Local Government Committee, *Private rented sector Fourth Report of Session 2017–19* HC 440 (19 April 2018), paras 3-4. [↑](#footnote-ref-38)
39. In 2015/16 81 per cent of tenancies were granted for an initial fixed term of 6 or 12 months: MHCLG, *Overcoming the Barriers to Longer Tenancies in the Private Rental Sector*, July 2018, para. 6. [↑](#footnote-ref-39)
40. Housing Act 1988 s.21. [↑](#footnote-ref-40)
41. The Private Housing (Tenancies) (Scotland) Act 2016. [↑](#footnote-ref-41)
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45. J. Rugg and D. Rhodes, *The Evolving Private Rented Sector: Its Contribution and Potential* (University of York, Centre for Housing Policy, 2018), p.106. [↑](#footnote-ref-45)
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55. *McDonald* at [2]. [↑](#footnote-ref-55)
56. Housing Act 1996 s.193(7AA) and (7AC)(c). [↑](#footnote-ref-56)
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58. Shelter and National Housing Federation, *Stop DSS Discrimination* (2018). [↑](#footnote-ref-58)
59. R. Coulter, “Social Disparities in Private Renting Amongst Young Families in England and Wales, 2001-2011” (2017) 34 *Housing, Theory and Society* 297. [↑](#footnote-ref-59)
60. J. Morgan, “The casualization of housing” (1996) J. Soc. Wel. & Fam. L. 18(4), 445. [↑](#footnote-ref-60)
61. Between 2008-09 and 2014-15 the proportion of private renters receiving housing benefit increased from 19 to 27 per cent: DCLG, *English Housing Survey Headline Report 2015-16*, para. 1.51. [↑](#footnote-ref-61)
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67. *R. v Panel on Takeovers and Mergers Ex p Datafin Plc* [1987] Q.B. 815. [↑](#footnote-ref-67)
68. For example D. Oliver, “Functions of a public nature under the Human Rights Act” (2004) P.L. 329. [↑](#footnote-ref-68)
69. *Aston Cantlow v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546; *YL v Birmingham City Council* [2007] UKHL 27; [2008] A.C. 95; *R. (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 W.L.R. 363. [↑](#footnote-ref-69)
70. D. Oliver, *Common Values and the Public-Private Divide* (Butterworths, 1999), p.14. [↑](#footnote-ref-70)
71. R. A. W. Rhodes, “The Hollowing out of the State: The changing nature of the public service in Britain” (1994) 2 *The Political Quarterly* 138. [↑](#footnote-ref-71)
72. D. Oliver, *Common Values and the Public-Private Divide* (Butterworths, 1999), p.248. [↑](#footnote-ref-72)
73. G. Teubner, “After Privatisation: The Many Autonomies of Private Law” (1998) 51 *Current Legal Problems* 393. [↑](#footnote-ref-73)
74. A. Grear, “Theorising the Rainbow? The Puzzle of the Public-Private Divide” (2003) 9 *Res Publica* 169, 170. See also G. Jurgens and F. Van Ommeren, “The public-private divide in English and Dutch law: a multifunctional and context-dependant divide” (2012) C.L.J. 172. [↑](#footnote-ref-74)
75. H. Shamir, “The Public/Private Distinction Now: the challenges of privatization and of the regulatory state” (2014) 15(1) *Theoretical Inquiries in Law* 1, 11. [↑](#footnote-ref-75)
76. A. Grear, “Theorising the Rainbow? The Puzzle of the Public-Private Divide” (2003) 9 *Res Publica* 169, 171. [↑](#footnote-ref-76)
77. S. Hedley, “Courts as public authorities, private law as instrument of government” in K. Barker and D. Jensen (eds), *Private Law: Key Encounters with Public Law* (CUP, 2013), p.95. [↑](#footnote-ref-77)
78. Ibid p.90. [↑](#footnote-ref-78)
79. A. Grear, “Theorising the Rainbow? The Puzzle of the Public-Private Divide” (2003) 9 *Res Publica* 169, 171. [↑](#footnote-ref-79)
80. M. Taggart, “The Province of Administrative Law Determined?” in M. Taggart (ed), *The Province of Administrative Law* (Oxford, Hart, 1997), p.4. [↑](#footnote-ref-80)
81. A. Grear, “Theorising the Rainbow? The Puzzle of the Public-Private Divide” (2003) 9 *Res Publica* 169, 182. [↑](#footnote-ref-81)
82. H. Collins, “On the (In)compatibility of Human Rights Discourse and Private Law” LSE Working Papers 7/2012, 22. [↑](#footnote-ref-82)
83. A. L. Young, “Mapping horizontal effect” in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (CUP, 2011), p.17. [↑](#footnote-ref-83)
84. G. Phillipson, “Horizontal effect after *Campbell*’” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007), p.146. [↑](#footnote-ref-84)
85. *X v Y* [2004] EWCA Civ 662; [2004] I.C.R. 1634 at [45]. [↑](#footnote-ref-85)
86. A. L. Young, “Mapping horizontal effect” in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (CUP, 2011), p.17. [↑](#footnote-ref-86)
87. See *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. A role acknowledged in *McDonald* at [46]. [↑](#footnote-ref-87)
88. We adopt the different definitions of horizontality provided by I. Leigh see “Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth” (1999) 48 *International and Comparative Law Quarterly* 57. [↑](#footnote-ref-88)
89. Human Rights Act 1998 s.3(1). [↑](#footnote-ref-89)
90. See cases at Fn 5. [↑](#footnote-ref-90)
91. *FJM* at [46]. [↑](#footnote-ref-91)
92. *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557. More controversial is whether the court can interpret the legislation compatibly or must make a declaration of incompatibility under the HRA 1998 ss 3 or 4 – see J. van Zyl Smit, “Statute Law” in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (CUP, 2011), p.68 and A. Kavanagh, “Choosing between sections 3 and 4 of the Human Rights Act 1998: judicial reasoning after *Ghaidan v Mendoza*” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007), p.114. In obiter comments in *McDonald* at [61]-[70] the court indicated that they would have issued a declaration of incompatibility rather than tried to interpret s.21(4) compatibly. [↑](#footnote-ref-92)
93. *FJM* at [41]. See also [43]. [↑](#footnote-ref-93)
94. *Connors v UK* (005) EHRR 9 at [82]-[83]. [↑](#footnote-ref-94)
95. *Ivanova* *and Cherkezov v Bulgaria* Application No 4677/15at [53] which provides the latest statement on procedural safeguards. [↑](#footnote-ref-95)
96. Housing Act 1988 s.5. See also Protection from Eviction Act 1977 ss 2 and 3 unless the tenant voluntarily, and in the absence of harassment, relinquishes possession. [↑](#footnote-ref-96)
97. (2013) 56 EHRR 16 at [01-1]. [↑](#footnote-ref-97)
98. Application no. 71771/10. [↑](#footnote-ref-98)
99. See generally L. Peroni and A. Timmer, “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law” (2013) 11 Int. J. of Constitutional Law 1056. [↑](#footnote-ref-99)
100. [2011] 52 EHRR 22. [↑](#footnote-ref-100)
101. *Zehentner* at [65]. [↑](#footnote-ref-101)
102. *Zehentner* at [63]. [↑](#footnote-ref-102)
103. Housing Act 1980 s.89. [↑](#footnote-ref-103)
104. Application no. 4677/15. [↑](#footnote-ref-104)
105. *Ivanova* at [52] referring (inter alia) to *Zehentner* and *Brezec*. [↑](#footnote-ref-105)
106. *Ivanova* at [53]-[55]. [↑](#footnote-ref-106)
107. (1996) 10 E.H.R.R 149. [↑](#footnote-ref-107)
108. (1986) 10 E.H.R.R 149, 210. [↑](#footnote-ref-108)
109. Application no. 23883/06. [↑](#footnote-ref-109)
110. The alleged violation of Article 8 was not considered given the finding of a violation of article 10. [↑](#footnote-ref-110)
111. In accordance with the ECtHR’s common practice once a violation of article 10 was established they did not go onto consider the alleged article 8 violation. [↑](#footnote-ref-111)
112. At [34]. [↑](#footnote-ref-112)
113. (2006) 42 E.H.R.R. 25. [↑](#footnote-ref-113)
114. Application no. 23883/06 at [33]. [↑](#footnote-ref-114)
115. Ibid at [48]-[50]. [↑](#footnote-ref-115)
116. *McDonald* at [40]. [↑](#footnote-ref-116)
117. *Stewart and others v Watts (Secretary of State for Communities and Local Government intervening)*

 [2017] 2 W.L.R. 1107 at [75] per Sir Terence Etherington MR. [↑](#footnote-ref-117)
118. *FJM* at [41]. [↑](#footnote-ref-118)
119. *FJM* at [42]. [↑](#footnote-ref-119)
120. Application no. [43777/13](http://hudoc.echr.coe.int/eng#{"appno":["43777/13"]}). [↑](#footnote-ref-120)
121. Ibid at [71] and [68]-[69] echoing the approach taken in the older mortgage enforcement admissibility case of *Woods v UK* Application No. 32540/96. [↑](#footnote-ref-121)
122. *Vrzic* at [70]. [↑](#footnote-ref-122)
123. *Vrzic* at [66]. [↑](#footnote-ref-123)
124. [2003] UKHL 43; [2004] 1 A.C. 983. [↑](#footnote-ref-124)
125. *Qazi* [27]. [↑](#footnote-ref-125)
126. See E. Lees, “Article 8, proportionality and horizontal effect” (2017) L.Q.R. 31, 32. [↑](#footnote-ref-126)
127. *Qazi* at [108]. [↑](#footnote-ref-127)
128. HRA 1998 s.3; J. King, “Three Wrong Turns in Lord Sumption’s Conception of Law and Democracy” in N. W. Barber, R. Ekins and P. Yowell (eds.), *Lord Sumption and the Limits of the Law* (Hart, 2016). [↑](#footnote-ref-128)
129. *Ivanova and Cherkezov v Bulgaria*, Application no. 4677/15. [↑](#footnote-ref-129)
130. A. Kavanagh, “The Role of Courts in the Joint Enterprise of Governing” in N. W. Barber, R. Ekins and P. Yowell (eds.), *Lord Sumption and the Limits of the Law* (Hart, 2016), pp 133-134. [↑](#footnote-ref-130)
131. *Pinnock* at [49], [54] and [62]. [↑](#footnote-ref-131)
132. *McDonald* at [45]. [↑](#footnote-ref-132)
133. Repossession of an AST already requires a court order; see Housing Act 1988 s.5. The Supreme Court in *McDonald* at [42] made the extraordinary suggestion that proportionality would encourage landlords to evict without a court order but such action is illegal and could trigger redress for illegal eviction see Protection from Eviction Act 1977 s.1 and Housing Act 1988 ss27 and 28. [↑](#footnote-ref-133)
134. In the longer-term, we would advocate a more extensive and nuanced understanding of respect to give prominence to the values that home represents. [↑](#footnote-ref-134)
135. *McDonald* at [43]. [↑](#footnote-ref-135)
136. H. Collins, “On the (In)compatibility of Human Rights Discourse and Private Law” LSE Working Papers 7/2012, p.4. [↑](#footnote-ref-136)
137. H. Fenwick, “Judicial Reasoning in Clashing Rights Cases” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, 2007). [↑](#footnote-ref-137)
138. H. Collins, “On the (In)compatibility of Human Rights Discourse and Private Law” LSE Working Papers 7/2012, p.31. [↑](#footnote-ref-138)
139. *Re: S (Identity: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 A.C. 593 [17]. [↑](#footnote-ref-139)
140. *Bank Mellat v HM Treasury* [2013] UKSC 39; [2013] H.R.L.R. 30 at [20]. [↑](#footnote-ref-140)
141. *Pinnock* at [61]. [↑](#footnote-ref-141)
142. *Powell* at [33]. [↑](#footnote-ref-142)
143. *Powell* at [41]. Commentators are divided in their views of this approach see J. Rivers, “The Presumption of Proportionality” (2014) 77 M.L.R. 409 and A. Latham, “Talking Without Speaking, Hearing Without Listening? Evictions, the Law Lords and the European Court of Human Rights” [2011] P.L. 730. [↑](#footnote-ref-143)
144. *McDonald* at [73]. [↑](#footnote-ref-144)
145. Equality Act 2010 s.19(2)(d). [↑](#footnote-ref-145)
146. Equality Act 2010 ss 13(1)-13(2) and s15. [↑](#footnote-ref-146)
147. *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15; [2015] A.C. 1399 at [34]. [↑](#footnote-ref-147)
148. S. Pascoe, “The end of the road for human rights in private landowners’ disputes?” (2017) Conv*.* 269, 273. [↑](#footnote-ref-148)
149. For instance acknowledgement of the import of vulnerability is evident in *Zhentner* (mental fragility), *Bjedov v Croatia* App No 42150/09 (age and ill health), *Yordanova v Bulgaria* App No 2544/06 (Roma) and *Winterstein v France* App No 27013/07 (Roma and travellers). [↑](#footnote-ref-149)
150. *Pinnock* at [64]. [↑](#footnote-ref-150)
151. *Akerman-Livingstone* [2015] UKSC 15; [2015] A.C. 1399 at [56] per Lord Neuberger; *Jones v Canal and River Trust* [2017] EWCA Civ 135; [2018] Q.B. 305 at [48] per McCombe LJ. Walsh bemoans this lack of guidance see R. Walsh, “Stability and predictability in English property law – the impact of article 8 of the European Convention on Human Rights reassessed” (2015) 131 L.Q.R. 585. [↑](#footnote-ref-151)
152. [2006] 2 A.C. 465 at [38]. [↑](#footnote-ref-152)
153. In respect of the Strasbourg jurisprudence see L. Peroni and A. Timmer, “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law” (2013) 11 Int. J. of Constitutional Law 1056. [↑](#footnote-ref-153)
154. Housing Act 1996 s.189(c) and *Hotak v Southwark London Borough Council* [2015] UKSC 30; [2016] A.C. 811. The groups are: old age, mental illness or handicap or physical disability or other special reason. [↑](#footnote-ref-154)
155. I. Loveland, “Changing the meaning of ‘vulnerable’ under the homelessness legislation?” (2017) 39(3) J. Soc. Wel. & Fam. L. 298. [↑](#footnote-ref-155)
156. See C. Graham, “Tackling consumer vulnerability in energy and banking: towards a new approach” (2018) 40 J. Soc. Wel. & Fam. L. 241, 244. [↑](#footnote-ref-156)
157. *Hotak* at [38] and [62]. [↑](#footnote-ref-157)
158. C. Yoko Furusho, “Uncovering the human rights of the vulnerable subject and correlated state duties under liberalism” (2016) *UCL Journal of Law and Jurisprudence* 175, 175. [↑](#footnote-ref-158)
159. M. Fineman, “The Vulnerable Subject” (2008) 20 *Yale Journal of Law and Feminism* 1; “The Vulnerable Subject and the Responsive State” (2010) 60 *Emory Law Journal* 251; “Beyond Identities: The Limits of an Anti-discrimination approach to Equality” (2012) 92 *Boston University Law Review* 1713. [↑](#footnote-ref-159)
160. M. Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics” in M. Fineman and A. Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013), p.14. [↑](#footnote-ref-160)
161. N. Kohn, “Vulnerability Theory and the Role of Government” (2014) 26 *Yale Journal of Law and Feminism* 2, 6. [↑](#footnote-ref-161)
162. M. Fineman, “The Vulnerable Subject” (2008) 20 *Yale Journal of Law and Feminism* 1 at 1. [↑](#footnote-ref-162)
163. M. Fineman, “Equality, Autonomy, and the Vulnerable Subject in Law and Politics” in M. Fineman and A. Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013), p.19. [↑](#footnote-ref-163)
164. C. Mackenzie, “The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability” in C. Mackenzie, W. Rogers and S. Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2014), p.34. [↑](#footnote-ref-164)
165. L. Peroni and A. Timmer, “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law” (2013) 11 Int. J. of Constitutional Law 1056, 1058. [↑](#footnote-ref-165)
166. C. Graham, “Tackling consumer vulnerability in energy and banking: towards a new approach” (2018) 40 J. Soc. Wel. & Fam. L. 241, 243. [↑](#footnote-ref-166)
167. S. Currie, ‘Compounding vulnerability and concealing unfairness: decision-making processes in the UK’s anti-trafficking framework’ (2019) P.L. xxx, xxx. [↑](#footnote-ref-167)
168. I. Lorey, *State of Insecurity: Government of the Precarious* (Verso, 2015), p.1 quoted in H. Carr, B. Edgeworth and C. Hunter (eds) *Law and the Precarious Home* (Hart, 2018), p.8. [↑](#footnote-ref-168)
169. H. Carr, B. Edgeworth and C. Hunter, “Introducing Precarisation: Contemporary Understandings of Law and the Insecure Home” in H. Carr, B. Edgeworth and C. Hunter (eds) *Law and the Precarious Home* (Hart, 2018), pp 10-11 and M. McKee, A. Reeves, A. Clair and D. Stuckler, “Living on the edge: precariousness and why it matters for health” (2017) 75 *Archives of Public Health* 1, 2. [↑](#footnote-ref-169)
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173. Hunter and Meers, p.71. [↑](#footnote-ref-173)
174. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, para.11. [↑](#footnote-ref-174)
175. *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15; [2015] A.C. 1399. [↑](#footnote-ref-175)
176. L. Peroni and A. Timmer, “Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law” (2013) 11 Int. J. of Constitutional Law 1056, 1060. [↑](#footnote-ref-176)
177. Housing Act 1980 s.89. [↑](#footnote-ref-177)
178. L. Fox O’Mahony, *Home Equity and Ageing Owners* (Hart, 2012), p.158. [↑](#footnote-ref-178)
179. L. Fox O’Mahony, *Home Equity and Ageing Owners* (Hart, 2012), p.192. [↑](#footnote-ref-179)
180. Ofgem, *Consumer Vulnerability Strategy* 102/13, 4 July 2013, p.12. See also National Audit Office, *Vulnerable Consumers in Regulated Industries* HC 1061 Session 2016-17, 31 March 2017. [↑](#footnote-ref-180)
181. *Hotak* at [53]. [↑](#footnote-ref-181)
182. *Campbell v MGN Ltd* [2004] 2 A.C. 457. [↑](#footnote-ref-182)
183. *McDonald* at [46]. [↑](#footnote-ref-183)
184. *Campbell* at [113]. [↑](#footnote-ref-184)
185. A situation considered in *McDonald* at [41]. [↑](#footnote-ref-185)
186. Equality Act 2010 s.4. [↑](#footnote-ref-186)
187. Deregulation Act 2015 s.33. [↑](#footnote-ref-187)
188. P. Anderson, “Sex-for-rent is the hidden danger faced by more and more female tenants” *The Guardian* 11 January 2017 available at <https://www.theguardian.com/commentisfree/2017/jan/11/sex-for-rent-female-tenants-predatory-landlords> [accessed 14/6/18]. See also J. Bibby and P. Terry, “The vile exploitation of ‘free rent for sex’ ads” Shelter blog 12 August 2016 available at <http://blog.shelter.org.uk/2016/08/7172/> [accessed 14/6/18]. [↑](#footnote-ref-188)
189. *Manchester CC v Pinnock*; [2011] 2 A.C. 10, *Hounslow LBC v Powell* [2011] 2 A.C. 186. [↑](#footnote-ref-189)
190. Through the homelessness legislation: Housing Act 1996 s.189(1)(c) and Homelessness (Priority Need for Accommodation) (England) Order 2000 (S.I. 2002/2051) arts 5 and 6 and the Equality Act 2010. See in respect of the latter, the comments of Baroness Hale at [31] in *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15; [2015] A.C. 1399. [↑](#footnote-ref-190)
191. *Bradford Corporation v Pickles* [1895] A.C. 587 in which a landlord owner was able to maliciously interrupt the water supply to the growing city of Bradford. [↑](#footnote-ref-191)
192. Landlord and Tenant Act 1985 ss 11 and 13. [↑](#footnote-ref-192)
193. Introduced by the Housing Act 2004. [↑](#footnote-ref-193)
194. See Unfair Terms in Consumer Contract Regulations 1999 now found in updated form in the Consumer Rights Act 2015 and *Newham LBC v Khatun & Ors* [2004] EWCA Civ 55. [↑](#footnote-ref-194)
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196. K. Gray, “Land Law and Human Rights” in L.Tee (ed) *Land Law: Issues, Debates, Policy* (Willan Publishing, 2002), p.236. [↑](#footnote-ref-196)
197. A. Grear, “A tale of the land, the insider, the outsider and human rights (an exploration of some problems and possibilities in the relationship between the English common law property concept, human rights law, and discourses of exclusion and inclusion)” (2003) L.S. 2003, 33. See also R. Walsh, “Stability and predictability in English property law – the impact of article 8 of the European Convention on Human Rights reassessed” (2015) 131 L.Q.R. 585. [↑](#footnote-ref-197)
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