

UNIVERSITY OF SOUTHAMPTON

THE ENDURING APPEAL OF  
'REASONABLE PREFERENCE'

**Public Sector Housing Allocations Within The Context of  
The Central-Local Government Relationship**

Total volumes: 1

Emma Jane Laurie

Thesis submitted for the degree of Doctor of Philosophy

Faculty of Law

September 2002

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF LAW

LAW

Doctor of Philosophy

THE ENDURING APPEAL OF 'REASONABLE PREFERENCE'

Public Sector Housing Allocations Within The Context of The Central-Local Government Relationship

Emma Jane Laurie

The purpose of this thesis is to examine the changing relationship between central government and local authorities within the context of a particular facet of local authorities' housing management functions; the allocation of their housing stock. The thesis has two primary objectives. The first is to establish the nature and extent of the legal and quasi-legal rules imposed on local authorities in the period 1924 to 2002, and the degree of discretion they confer on them. The second objective is to analyse the rationale for adopting those rules and particularly to question whether the prevailing central-local relationship affects central government's decision to confer or limit discretion in this area.

The thesis examines housing allocations within the framework of two models of the central-local relationship; politicisation-juridification and heterogeneity. According to the first model, the processes of politicisation and juridification have led to a restructuring of the relationship between central and local government, and particularly a desire on the part of central government to structure (and limit) local authority discretion through the imposition of detailed statutory procedures on local decision-making. By contrast according to the latter model, a single theory that attempts to explain the entirety of central-local relations is not possible, since central government departments vary in their attitude to local authorities and behave differently in response to varying socio-political circumstances. Under the heterogeneity model, then, the socio-political background becomes the prime focus of attention since the conferment of discretionary authority can only be understood within its context.

While certain housing policies of the period exemplify the inter-related processes of politicisation and juridification, the specific case of housing allocations does not fit squarely within this model. The primary conclusion of this thesis is that the changes and perhaps more importantly, the lack of changes, in housing allocations legislation can only be understood by reference to the broader socio-political background; not simply the changing relationship between central and local government. This finding is closely associated with the heterogeneity model.

# Contents

Table of Cases	i
Table of Statutes	iii
Acknowledgements	x
List of Abbreviations	xi
<b>Introduction</b>	1
<b>Chapter 1 Housing Policy and Allocations</b>	6
Introduction	6
The Origins and Development of Council Housing	8
The Discretion to Manage	14
Legal Controls on Discretion	16
Statutes	16
Circulars and Codes of Guidance	19
Local Selection Policies	22
Case Law	25
General management	28
Allocations	30
Local Government Ombudsman	36
Effect of Discretion	39
Housing Allocations and Human Rights	42
Conclusion	45
<b>Chapter 2 The Exercise of Discretion</b>	48
Introduction	48
Discretionary Decision-Making in Public Administration	49
What is Discretion?	50
The Function of Law in Discretionary Decision-Making	54
The Central-Local Government Relationship	57
The Role of Law in the Central-Local Relationship	58
The Conferment of Discretionary Authority	62
Analyses of the Central-Local Relationship	65
The agency-partnership continuum	65

Politicisation and juridification	70
The heterogeneity of central-local relations	75
Inherent structural conflict	78
Summary	80
The Local Authority Associations	81
Conclusion	83
<b>Chapter 3 Development of Legislation 1920s-1949</b>	<b>85</b>
Introduction	85
Housing Act 1924	86
Background	86
Rent Control	87
Reasonable Preference	89
The Working Class Requirement	91
Central-Local Relations	94
Housing Act 1930	94
Background	94
Allocations	96
Control of Management	98
Central-Local Relations	99
Central-local consensus	103
Housing Act 1935	105
Background	105
Allocations	106
Central-Local Relations	108
Quasi-Legislation	110
Conclusion	114
<b>Chapter 4 Development of Legislation 1950-1991</b>	<b>118</b>
Introduction	118
Housing (Homeless Persons) Act 1977	118
Background	118
Consultation with Local Authorities	121
The local authority associations	124
Local Authority Discretion	127

Code of guidance	129
Summary Housing (Homeless Persons) Act 1977	131
Housing Act 1980 & Tenants' Rights Etc. (Scotland) Act 1980	133
The Right to Buy	134
Management Issues	136
Residential qualifications	136
The Central-Local Relationship	145
Conclusion	150
<b>Chapter 5 Development of Legislation 1992-1999</b>	153
Introduction	153
Background	153
Homelessness and the Moral Debate	155
Allocations and Discretion	158
Consultation	161
Legislative Style	163
Codes of Guidance	170
Implementation of the Housing Act 1996	172
Housing register restrictions	173
Allocations priorities	175
‘Effectiveness’ of the legislation	177
Regulation-Making under the Housing Act 1996	180
Conclusion	181
<b>Chapter 6 Development of Legislation 2000-2002</b>	183
Introduction	183
Background	184
Structure of the Act	186
The Scottish Approach	189
Local Authority Autonomy	193
Cross-Party Consensus	195
‘Alternative’ Allocations Systems	199
Choice-Based ‘Lettings’ Systems	200
Promoting ‘Sustainable’ Communities	202

Top-Down or Bottom-Up?	204
Anti-Social Behaviour	208
Anti-Social Behaviour Orders	210
From Groups to Individuals	211
Local Authority Discretion	213
Indirect Effects	215
Conclusion	220
<b>Chapter 7 Conclusion</b>	<b>222</b>
Introduction	222
The Nature and Extent of the Legal Rules	223
The Central-Local Relationship	227
Juridification	228
Politicisation	230
Rationale for the Rules	231
The Enduring Appeal of Reasonable Preference	237
Concluding Remarks	242
Appendix I	244
<b>Bibliography</b>	<b>245</b>

## Table of Cases

<i>Associated Provincial Picture Houses v Wednesbury Corporation</i> [1948] 1 KB 223	26
<i>Bristol District Council v Clark</i> [1975] 3 All ER 976	21, 29
<i>Cannock Chase District Council v Kelly</i> [1978] 1 All ER 152	27, 29
<i>Chief Constable of the North Wales Police v Evans</i> [1982] 1 WLR 1155	26
<i>Council of Civil Services Unions (CCSU) v Minister for the Civil Service</i> [1985] AC 374	26
<i>De Falco v Crawley Borough Council</i> [1980] 2 WLR 664	22
<i>H E Green and Sons v Minister of Health (No. 2)</i> [1948] 1 KB 34	92, 93
<i>Jenkins v Paddington Borough Council</i> [1954] <i>Journal of Planning and Property Law</i> 510	29
<i>Leeds Corporation v Jenkinson</i> [1935] KB 168	28
<i>Liverpool City Council v Irwin</i> [1976] 2 All ER 39	30
<i>McLellan v Bracknell Forest Borough Council and Reigate and Banstead Borough Council v Benfield and Forrest</i> [2001] EWCA Civ 1510, (2001) 33 HLR 86	27, 45
<i>Pratchett v Leathem</i> (1949) 65 TLR 69	19
<i>R (Daly) v Secretary of State for the Home Department</i> [2001] 2 WLR 1622	27
<i>R (L &amp; D) v Lambeth London Borough Council</i> [2001] EWHC Admin 900; [2001] WL 1251852	32, 34, 35
<i>R v Canterbury City Council, ex parte Gillespie</i> (1987) 19 HLR 7	25, 33
<i>R v Chief Immigration Officer Heathrow Airport, ex parte Bibi</i> [1976] 1 WLR 979	19
<i>R v Criminal Injuries Compensation Board ex parte Alconbury</i> [1999] 2 AC 330	27
<i>R v Gateshead Metropolitan Borough Council, ex parte Lauder</i> (1997) 29 HLR 360	33
<i>R v Islington Borough Council, ex parte Reilly and Mannix</i> (1999) 31 HLR 651	34
<i>R v Lambeth London Borough Council, ex parte Njomo</i> (1996) 28 HLR 737	30
<i>R v Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council</i> [1979] 2 WLR 1	37
<i>R v London Borough of Islington, ex parte Aldabbagh</i> (1994) 27 HLR 271	33
<i>R v London Borough of Lambeth, ex parte Ashley</i> (1997) 29 HLR 385	34

<i>R v London Borough of Newham, ex parte Miah</i> (1995) 28 HLR 279	30
<i>R v London Borough of Newham, ex parte Ojuri</i> (1999) 31 HLR 453 530	21
<i>R v London Borough of Newham, ex parte Watkins</i> (1993) 26 HLR 434	25, 30, 33
<i>R v Port Talbot BC, ex parte Jones</i> (1988) 20 HLR 265	26, 33
<i>R v Secretary of State for Social Services and another, ex parte Stitt</i> (1990) <i>The Times</i> , 5 July	57
<i>R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities</i> [1986] 1 WLR 1	148
<i>R v Tower Hamlets London Borough Council, ex parte Uddin</i> (1999) 32 HLR 391	35
<i>R v Westminster County Council, ex parte Al-Khorsan</i> (2000) Legal Action February	34
<i>R v Westminster County Council, ex parte Nadhum Hussain</i> (1999) Legal Action January	33
<i>R v Wolverhampton Metropolitan Borough Council, ex parte Watters</i> (1997) 29 HLR 931	31
<i>Shelley v LCC</i> [1949] AC 56	28
<i>Southwark LBC v Mills</i> [1999] 3 WLR 939	36
<i>White v St Marylebone Borough Council</i> [1915] 3 KB 249	93

## Table of Statutes

Artisans' and Labourers' Dwellings Improvement Act 1875	91, 93
s.5	95
s.9	95
Artisans' Dwelling Act 1882	95
Audit Commission Act 1998	
s.44	216
s.46	216
Crime and Disorder Act 1998	
s.1(1)(a)	210
s.1(4)	210
Deregulation and Contracting Out Act 1994	
s.72	219
Disability Discrimination Act 1995	
s.19(3)	15
s.20(3)	15
Edinburgh and Glasgow Improvement Acts 1866	92
Finance Act 1999	
s.38	15
Homelessness Act 2002	7, 17, 18, 47, 78, 183 <i>et seq.</i> , 226, 234-5, 239, 241
s.14(1)	187
s.14(2)	44, 187
s.15	187
s.16(2)	187
s.16(3)	17, 32, 187
s.160A(1)(a)	44, 187
s.160A(1)(b)	44
s.160A(1)(c)	45
s.160A(3)	44
s.160A(5)	44, 188
s.160A(7)(a)	45, 187, 211
s.160A(7)(b)	45, 211
s.160A(7)(c)	45
s.160A(8)	187
s.160A(8)(a)	211
s.166	187
s.166(3)	187
s.167(2A)	188, 190
s.167(2A)(a)	188, 191
s.167(2A)(b)	188, 191, 212
s.167(2A)(c)	188, 191, 213
s.167(1A)	187, 207
s.167(2)	17, 32, 187, 188
s.167(2)(a)	17
s.167(2)(b)	17
s.167(2)(c)	18, 187
s.167(2)(d)	18, 187

s.167(2)(e)	18, 187
s.167(2B)	212
s.167(2C)	212
s.167(2E)	188, 207
s.167(4A)	188
Housing (Financial Provisions) Act 1924	10, 16, 18, 28, 30, 31, 86 <i>et seq.</i> , 96-100, 105, 114-6, 223, 231
s.3	96
s.3(1)	86
s.3(1)(a)	87
s.3(1)(b)	87
s.3(1)(c)	87
s.3(1)(d)	87
s.3(1)(e)	87
s.3(1)(f)	17, 87, 95
Housing (Homeless Persons) Act 1977	110, 118 <i>et seq.</i> , 146, 150, 154-5, 159, 170, 172, 197, 227, 229, 232, 235, 242
s.4(3)	119
s.4(5)	119
s.6(2)	17, 118
s.12	21
Housing (Scotland) Act 1935	
s.47(2)	17
Housing (Scotland) Act 1950	
s.73(2)	17
Housing (Scotland) Act 1966	
s.151(1)	17
Housing (Scotland) Act 1969	
s.69(2), Schedule 6, para.19	17
Housing (Scotland) Act 1986	
s.1(1)	191
s.26	189
s.26(1)(b)	189
s.26(1)(c)	189
s.26(1)(e)	189
s.26A	17, 189
Schedule 1, para.13	17, 189
Housing (Scotland) Act 1987	
s.19	189
s.20	189, 190
s.20(1)	17
s.20(1)(a)	190
Housing (Scotland) Act 2001	
s.9	190
s.10	17, 190
s.10(3)	190
s.10(3)(c)(iv)	190
s.10(4)	190
s.19	24, 190

s.19(1)	190
s.20	17, 24
s.20(1)(b)	190
s.20(3)	190
Housing Act 1923	11, 86, 87
s.1(1)(b)	11
Housing Act 1925	28
Housing Act 1930	12, 58, 94 <i>et seq.</i> , 106, 114, 115, 168, 232
s.9	95, 96
s.27	96
s.35	61, 104
s.36	61, 104
Housing Act 1935	18, 95, 98, 104, 105 <i>et seq.</i> , 114, 115, 232
s.2	18
s.24(1)	41
s.51(1)	106
s.51(2)	17, 105, 106, 110
s.51(3)	106
s.51(4)	106
s.51(5)	106
s.51(6)	106
s.51(7)	106
Housing Act 1936	93
s.79	134
s.83(1)	110
s.84(2)	110
Schedule II	92
Housing Act 1949	93, 108
s.1	12
Housing Act 1952	134
s.3(1)	134
s.3(2)	134
Housing Act 1957	110, 118, 133
s.113(2)	110, 118, 123, 128-9, 132, 133 <i>et seq.</i> , 159, 224, 232, 233
Housing Act 1980	13, 78, 118, 123, 128-9, 132, 133 <i>et seq.</i> , 159, 224, 232, 233
Housing Act 1985	17, 155-6, 160, 170, 177, 182, 188, 226, 235, 241
s.7(1)	21
s.22	17, 26, 31, 34, 190
s.22(a)	31
s.22(b)	31
s.22(c)	31
s.32	14
s.33	14
s.34	14

s.43	14
s.84	211
Schedule 2	209, 211
Housing Act 1988	147-8, 165
s.38	14
s.60	14
Housing Act 1996	17, 18, 20, 30, 32, 46-8, 74, 84, 153 <i>et seq.</i> , 183, 187, 188, 190, 193, 194, 195, 198, 205, 207, 209, 210, 211, 212, 213, 214, 215, 219, 220, 225, 226, 227, 229, 230, 231, 234, 235, 238
s.144	213
s.161	187
s.161(1)	18, 158
s.161(3)	18, 158, 163
s.161(4)	190, 210
s.162	187
s.162(4)	164
s.163	187
s.163(7)	164
s.167(1)	18, 158
s.167(2)	17, 22, 32, 160, 187
s.167(2)(a)	17, 160
s.167(2)(b)	17, 156, 160
s.167(2)(c)	17, 160
s.167(2)(d)	17, 160
s.167(2)(e)	17, 160
s.167(2)(f)	17, 160
s.167(3)(a)	164
s.167(3)(b)	164
s.167(4)	164
s.167(5)	164
s.167(8)	18, 39, 158
s.168(1)	39
s.169(1)	21, 164
s.170	219
s.175	155
s.176	155
s.177	155
s.182(1)	21
s.188	155
s.189	155
s.193(3)	155
s.197	155
s.198	155
s.199	155
s.204	25
s.207	155
s.211	155
s.212	155

Housing and Planning Act 1986	
s.3	191
Housing and Town Planning etc. Act 1919	8, 11, 87
s.1	11
Housing of the Working Classes Act 1890	11, 95
s.53	9
Housing of the Working Classes Act 1903	
Schedule I para.12(e)	92
Human Rights Act 1998	42, 45
s.7(1)(a)	43
s.7(1)(b)	43
Labouring Classes Dwelling Houses Acts 1866 and 1867	9
Local Government Act 1929	102
Local Government Act 1972	81
Local Government Act 1974	
s.26(1)	36, 38
s.26(6)	37
s.34(3)	37
Local Government Act 1999	
s.3(1)	215
s.4(1)	216
s.5	215
s.5(2)	215
Local Government Act 2000	58
s.2(1)	7
Local Government and Housing Act 1989	
s.26.	38
Local Government, Planning and Land Act 1980	
s.54(4)	126
s.56(10)	126
Lodging Houses Act 1851	91
National Insurance Act 1911	
s.89	40
Poor Law Act 1930	102
Poor Law Amendment Act 1834	102
Race Relations Act 1976	
s.1	15
s.3	15
s.21(1)	15
Scotland Act 1998	
s.28	184
Sex Discrimination Act 1975	
s.1	15
s.2	15
s.30(1)	15
Social Security Act 1966	64
Social Security Act 1986	56
s.32(1)	56

s.32(2)(b)	57
s.33(10)	57
Social Security Act 1998	57
Social Security Administration Act 1992	
s.176(1)	126
Social Security and Housing Benefit Act 1982	
s.36(1)	126
Social Security Contributions and Benefits Act 1992	56
s.138(1)(b)	57
s.140(2)	57
Tenants' Rights Etc. (Scotland) Act 1980	
s.26	118, 123, 128-9, 132-3, 133 <i>et seq.</i> , 159, 184, 225, 228, 229, 232, 234
s.26(1)	24
s.26(2)	136
s.26(3)	136
Widows', Orphans' and Old Age Contributory Pensions Act 1925	100

## Statutory Instruments

Outdoor Labour Test Order 1842	102
Outdoor Relief Prohibitory Order 1844	102
Outdoor Relief Regulation Orders 1852	102
Public Assistance Order 1930, No.185	102
The Allocation of Housing Regulations 1996 (SI 1996 No. 2753)	177, 175, 180
The Allocation of Housing and Homelessness (Review Procedures and Amendment) Regulations 1996 (SI 1996 No. 3122)	180
The Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996 No. 3205)	219
The Allocation of Housing (Procedure) Regulations 1997 (SI 1997 No. 483)	180
The Allocation of Housing and Homelessness (Amendment) Regulations 1997 (SI 1997 No. 631)	175, 180
The Allocation of Housing (Reasonable and Additional Preference) Regulations 1997 (SI 1997 No. 1902)	17, 160, 181
The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999 No. 71)	181
The Allocation of Housing and Homelessness (Amendment) (England) Regulations 1999 (SI 1999 No. 2135)	175, 181
The Local Government (Best Value) Performance Plans and Reviews Order 1999 (SI 1999 No. 3250)	215

The Allocation of Housing (England) Regulations 2000 (SI 2000 No. 702)	<i>175, 181</i>
The Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002 No. 2051)	<i>186</i>

## International Provisions

Convention on the Elimination of All Forms of Discrimination Against Women art.14(2)	<i>44</i>
Convention on the Elimination of All Forms of Racial Discrimination art.5(e)(iii)	<i>44, 45</i>
Convention on the Rights of Children art.27(3)	<i>44</i>
Convention Relating to the Status of Refugees art.21	<i>44</i>
European Convention for the Protection of Human Rights and Fundamental Freedoms art.3	<i>45</i>
art.8(1)	<i>44, 45</i>
art.14	<i>45</i>
European Social Charter art.16	<i>44</i>
International Covenant on Economic, Social and Cultural Rights art.2(1)	<i>43</i>
art.11(1)	<i>43, 45</i>
Migrant Workers Convention art.43(1)	<i>44</i>
Universal Declaration on Human Rights art.25(1)	<i>44</i>

## Acknowledgements

There are two specific people without whose support this thesis would not have been possible. They are my supervisor, Professor Nick Wikeley and my husband, Ian Laurie. Nick Wikeley has been the ideal supervisor; providing advice and guidance when I needed it but also allowing me to develop intellectually. Ian has provided the bedrock of support that has kept me grounded.

There are a number of other individuals that I would like to thank. Joy Caisley and Anna Hecks of the Hartley Library have been extremely helpful in answering innumerable queries and assisting me to locate many source materials. Ian Sherrard of Hampshire County Council kindly gave me access to the Council's collection of journals. Patrick South of Shelter provided me with invaluable information on aspects of the behind-the-scenes negotiations leading to the Homelessness Act 2002. Nick Georgiou of the Local Government Association Information Service has answered many questions during the course of my research, and has helped me to locate various sources of information. The comments of Dr Paul Meredith and Peter Sparkes of the Law Faculty during my upgrade examination gave me considerable food for thought. Dr Ed Bates, also of the Law Faculty, has been very helpful in relation to the human rights aspects of the thesis. Philippa Bassett of the University of Birmingham's Special Collections Library provided me with historical information on the local authority associations. Marion Bell of Eastleigh Housing Association kindly provided me with material from the Housing Corporation. A number of other people have been very generous in giving me access to, and allowing me to quote from, their unpublished work. They are Caroline Hunter, Sarah Blandy, Pauline Card and Hal Pawson.

On a more personal level, I would also like to thank Jo Wright and Phil Larkin, fellow PhD students, with whom I have shared many of the highs and lows of doctoral research. Last, but by no means least, I would like to thank the Faculty of Law for awarding me a studentship that has enabled me to undertake this research, and for providing a supportive and convivial working environment.

## Abbreviations

AC	Appeal Court Law Reports
ACPI(s)	Audit Commission Performance Indicator(s)
ALG	Association of London Government
All ER	All England Law Reports
ADC	Association of District Councils
AMA	Association of Metropolitan Authorities
AMC	Association of Municipal Corporations
Art.	Article
ASBO	Anti-Social Behaviour Order
BVPI(s)	Best Value Performance Indicator(s)
CBI	Confederation of British Industries
CCA	The County Councils Association
CCSU	Council of Civil Services Unions
CCT	Compulsory competitive tendering
CHAC	Central Housing Advisory Committee
CHR	Common Housing Register
CIH	Chartered Institute of Housing
CJ	Chief Justice
Cmnd.	Command
Col.	Column
CPRS	Central Policy Review Staff
Debs	Debates
DET R	Department of the Environment, Transport and the Regions
DoE	Department of the Environment
DSS	Department of Social Security
DTLR	Department for Transport, Local Government and the Regions
Ed.(s)	Editor(s)
Edn.	Edition
EWCA Civ	Neutral citation: Court of Appeal (Civil Division)
EWHC Admin	Neutral citation: High Court (Administrative Court)
HAT(s)	Housing Action Trust(s)

HC	House of Commons
HL	House of Lords
HLR	Housing Law Reports
HMO(s)	House(s) in Multiple Occupation
HMSO	Her Majesty's Stationery Office
Hon.	Honourable
IPPR	Institute for Public Policy Research
J	Justice
KB	King's Bench Law Reports
LBA	London Boroughs' Association
LCC	London County Council
LGA	Local Government Association
LGO	Local Government Ombudsman
LJ	Lord Justice
LSVT(s)	Large-scale Voluntary Transfer(s)
MP(s)	Member(s) of Parliament
MR	Master of the Rolls
NAPC	National Association of Parish Councils
NHF	National Housing Federation
No.	Number
ODPM	Office of the Deputy Prime Minister
OUP	Oxford University Press
Para.	Paragraph
PAT(s)	Policy Action Team(s)
PRS	Parliamentary Research Service
QC	Queen's Counsel
RDCA	Rural District Councils Association
RSL(s)	Registered Social Landlord(s)
RTB	Right to Buy
s./ss.	Section(s)
SBC	Supplementary Benefits Commission
SEDD	Scottish Executive Development Department
SEU	Social Exclusion Unit
SHAC	Scottish Housing Advisory Committee

SI	Statutory instrument
SLSA	Socio-Legal Studies Association
SSRC	Social Science Research Council
UDCA	Urban District Councils Association
UN	United Nations
Vol.	Volume
WL	Westlaw
WLR	Weekly Law Reports

# INTRODUCTION

The purpose of this thesis is to examine the changing relationship between central government and local authorities within the context of a particular facet of local authorities' housing management functions, viz. the allocation of their housing stock.

The thesis has two primary objectives. The first is to establish the nature and extent of the legal and quasi-legal rules imposed on local authorities and the degree of discretion they confer on them. The second objective is to analyse the rationale for adopting those rules and particularly to question whether the prevailing central-local relationship affects central government's decision to confer or limit discretion in this area.

It is hypothesised that the rules imposed by Parliament relating to housing allocations are not created in a vacuum and that there is a relationship between the status of central-local relations and the extent of discretion conferred on local authorities. If this is correct, the nature of the central-local relationship at the broader level will be reflected in the degree of discretion conferred on local authorities at the level of housing allocations. As such, changes in the prevailing mood between central and local government would be mirrored in the housing allocations legislation. However, it is also possible that the converse is true; that the conferment of discretionary authority on local authorities at the level of housing allocations is unrelated to the wider context of the central-local relationship. If the initial hypothesis is true, then we would anticipate that housing allocations be treated broadly the same as other policy areas, since it is the central-local relationship that is the key determinant of the amount of discretion conferred, rather than the specific policy area. However, if it is untrue housing allocations must, for some reason, be viewed as distinctive in some way.

In order to define the limits of the thesis, it is necessary to distinguish between two levels of discretionary decision-making in the context of housing allocations. At the macro level is the authority granted by central government to local authorities to formulate and implement their own locally determined housing allocations policies. The micro level is concerned with the discretion accorded to individual housing officers, and the way in which that discretion is exercised, in making day-to-day allocations decisions. While the two levels are interconnected, the focus of this thesis is primarily the macro level and

specifically the legal rules that govern local authorities' activities in this sphere. As such, the thesis does not seek to address the exercise of discretionary decision-making at the level of the individual housing officer and the concomitant effect on individual housing applicants. The thesis will, however, examine the implementation of the housing legislation to the extent that it illuminates the role of legal rules within the central-local relationship.

The focus on the macro level does not imply that the micro level is unimportant. On the contrary, decisions taken on a daily basis by individual housing officers have significant and far-reaching consequences for a large number of individuals and their families. However, it is submitted that the macro level is equally important, particularly in view of the changes implemented in the central-local relationship in various policy areas by successive Conservative governments from 1979 to 1997. It is widely accepted that the relationship between central government and local authorities has changed in character, with the period since 1979 witnessing a particularly dramatic shift.<sup>1</sup> This thesis seeks to establish the extent to which this change in the relationship is reflected in housing allocations legislation. The central-local relationship is defined for the purposes of this thesis as the relationship between government/Parliament and the local authorities/local authority associations. It does not consider the relationships between local authorities and other individuals or agencies in the private, voluntary or quasi-public sectors.<sup>2</sup>

No particular stance is taken in this research on the relative value of the institution of local government or the desirability of local autonomy in housing allocations or, indeed, in any other policy area. Further, no view is taken on the role of local authorities as landlords or on the principle of publicly subsidised housing provision. The aim of this thesis is explanatory and analytical, rather than recommendatory. The author does, however, acknowledge that her personal belief in the intrinsic worth of a locally elected tier of

---

<sup>1</sup> M. Loughlin, *Local Government in the Modern State* (London, Sweet & Maxwell, 1986); M. Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford, Clarendon, 1996); D. Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) *Journal of Law and Society*, 22, 4, 506-526; P. John, *Recent Trends in Central-Local Government Relations* (London, Policy Studies Institute, 1990); H. Atkinson and S. Wilks-Heeg, *Local Government from Thatcher to Blair* (Cambridge, Polity, 2000).

<sup>2</sup> See for example D. Mullins, B. Reid and R.M. Walker, 'Modernization and Change in Social Housing: The Case for an Organizational Perspective' (2001) *Public Administration*, 79, 3, 599-623. See also Department of Transport, Local Government and the Regions, *Allocation of Accommodation – Code of Guidance for Local Housing Authorities*. A Consultation Paper (London, DTLR, May 2002) para.3.3.

government and the desirability of providing 'affordable' housing has influenced the decision to study this particular facet of housing law.

## **Structure and Methodology**

Chapter 1 sets the scene of the thesis by providing an historical account of the development of council housing, dating back to the nineteenth century. It then proceeds to examine local authorities' traditional discretion in housing management, including an account of the various legal and quasi-legal constraints imposed in this area. Chapter 2 forms the theoretical framework of the thesis. It establishes, at a theoretical level, what is meant by the concept of 'discretion'. This definition provides the benchmark against which the statutory provisions are measured in subsequent chapters. It also analyses various models of the central-local relationship in order to identify those which, potentially, offer the greatest analytic value for the thesis. The format is then to trace the development of the legislation and quasi-legislation governing housing allocations (and other relevant legislation) from its inception to the present. Consequently chapters 3, 4, 5 and 6 chart the development of housing allocations provisions between 1924 and 2002.

The methodology for chapters 3 to 6 comprises a detailed analysis of the development of the legislation through primary source material. Such material includes parliamentary debates, oral and written parliamentary answers, published and (where available) unpublished departmental papers, circulars and codes of guidance, in addition to the minutes and reports of the various bodies representing local government. The motive for employing this methodology is to discover the rationale for the adoption of particular legislation and legislative formulae, and the socio-political factors influencing the legislators, particularly with regard to the evolution of the central-local relationship.

There are a number of limitations of this methodology, practical and conceptual, that should be acknowledged. The main practical difficulty lies in gaining access to the primary materials. While parliamentary debates are readily available, the same is not true of some of the older departmental papers and circulars. Similarly, the historic records of the local authority associations are not always accessible. The second limitation is the implicit assumption that parliamentary debates and other official documents provide an

accurate and meaningful reflection of the attitudes and intentions of legislators and other interested parties. There are two specific caveats in relation to the parliamentary debates. The first is the system of ‘whipping’ employed in both Houses by the political parties. While MPs are elected to represent the (often conflicting) interests of their constituents, they do so within the discipline of party allegiance.<sup>3</sup> As such, the views expressed by MPs during the debates must be viewed in light of the pressure brought to bear by the Whips not to speak or vote against party policy. Furthermore, the official reports do not give an insight into the unofficial negotiation that takes place ‘through the usual channels’<sup>4</sup> and in extra-parliamentary communications between Ministers, civil servants, MPs and other interested parties.<sup>5</sup>

The second caveat is associated with the purpose of debates in Parliament. Second Reading debates provide an opportunity for front and backbench MPs alike to express views on the principles of a Bill. Any MP may in principle speak, including ‘maverick’ backbenchers.<sup>6</sup> It is therefore to be expected that more extreme opinions will be voiced and it is important that undue weight is not given to any particular speaker’s stance on a subject. However, this is offset by the fact that in practice debates are dominated by the front benches.<sup>7</sup> Furthermore, although the Committee of Selection formally carries out the nomination of MPs to Standing Committees,<sup>8</sup> in practice the Committee accepts the teams nominated by the Whips from each party.<sup>9</sup> As such, Standing Committees are likely to be populated by MPs loyal to their respective parties’ policies and, consequently, the debates will largely reflect the parties’ official views.

---

<sup>3</sup> J.A.G. Griffith and M. Ryle, *Parliament: Functions, Practice and Procedure* (London, Sweet & Maxwell, 1989) p.70.

<sup>4</sup> The expression is used primarily in relation to the arranging of business; D. Wade, *Behind the Speaker’s Chair* (Austick’s Publications, 1978) p.24.

<sup>5</sup> Griffith and Ryle note that “Debates in Parliament should not be regarded as isolated events. They are often only the part that surfaces of a considerable discussion with affected interests bringing pressure to bear on Ministers, civil servants and Parliamentarians”; Griffith and Ryle, 1989, op cit n.3 p.517.

<sup>6</sup> MPs who wish to speak usually notify the Speaker in advance. The Speaker’s Office maintains a list of all those who have registered an interest in this way and a score of the number of times each Member has spoken in previous debates. The Speaker uses this information to arrange the order of Members called to speak in each day’s debates. Personal communication, Peter Barratt, Assistant Secretary to the Speaker, 2 July 2002.

<sup>7</sup> P. Magdwick, *A New Introduction to British Politics* (Cheltenham, Stanley Thorne, 1994) p.194.

<sup>8</sup> Standing Order No. 86.

<sup>9</sup> Griffith and Ryle, 1989, op cit n.3 p.272.

While the effectiveness of Parliament in holding the Executive to account has been doubted,<sup>10</sup> it does provide a forum in which the positions of the political parties on particular policies are aired.<sup>11</sup> As such, the parliamentary debates can provide a valuable insight into the motivations behind support for (or opposition to) certain provisions, more generally expressed attitudes towards the principle of local autonomy and, most importantly, the relationship between the two.

A further point of clarification needs to be made at the outset with regard to references made throughout this thesis to rules imposed by 'central government'. Theoretically, of course, it is Parliament that passes legislation and thus imposes rules on local authorities. However, in practice it is the government of the day that largely controls the legislative functions of Parliament.<sup>12</sup> This is not to imply that the views of the opposition parties are unimportant. On the contrary, note is taken of the relative success of the opposition parties<sup>13</sup> in introducing amendments. Further, attention is paid to the stance of the official Opposition to particular provisions, with the purpose of comparing and contrasting it with the views expressed by that party when in government.

---

<sup>10</sup> See for example, *ibid* p.518; R. Pyper, 'Parliamentary Accountability' in R. Pyper (ed.), *Aspects of Accountability in the British System of Government* (Wirral, Tudor, 1996).

<sup>11</sup> Griffith and Ryle, 1989, *op cit* n.3 p.518.

<sup>12</sup> *ibid* pp.7-13; Madgwick, 1994, *op cit* n.7 p.186; J. Waldron, *The Law* (London, Routledge, 1992) p.19.

<sup>13</sup> This includes both the official Opposition and other opposition parties.

# Chapter 1

## HOUSING POLICY AND ALLOCATIONS

### INTRODUCTION

The primary objective of this chapter is to set the scene for the thesis by providing a general overview of local authorities' involvement in council housing management and examining their traditional discretion in housing allocations. Its secondary aim is to highlight issues and themes that are explored in detail in subsequent chapters. The chapter also provides an historical context in which the theoretical framework of the thesis, which is developed in chapter 2, can be located. The historical bias of this chapter reflects the importance attached to examining the origins of the legislation, in order to understand the reasons for its more recent form and substance and to determine the extent and nature of the changes that have occurred.<sup>1</sup>

The chapter begins by providing an account of the development of council housing as a tenure, dating back to the nineteenth century. The purpose of examining how local authorities became involved in the provision of housing is to relate it to the way in which their management functions were initially established. The chapter outlines how local authorities' involvement in housing construction was largely unstructured; no government has pursued a clear policy towards council housing provision since its inception and local authorities have never been obliged to build housing themselves.

As far as housing management is concerned, the chapter provides an overview of the genesis and evolution of the various legal and quasi-legal constraints that have been imposed in this area. The chapter describes how discretionary power has traditionally been conferred by central government on local authorities not through a positive 'enabling'

---

<sup>1</sup> As Ravetz notes, "There comes a point when [a] body of accumulated knowledge needs reassessment ... [W]ith distance of time, a more balanced overview can begin to be constructed"; A. Ravetz, *Council Housing and Culture: The History of a Social Experiment* (London, Routledge, 2001) pp.1-2.

power<sup>2</sup> but rather through the absence or indeterminacy of rules. The question of what constitutes 'discretion' is considered in more detail in chapter 2. The issue is raised in this chapter in relation to local authorities' involvement generally in public housing. The argument made is that the way in which central government has effectively conferred power on local authorities to allocate their housing stock (essentially through a lack of intervention) reinforces the contention that local authorities' discretion in this area is largely fortuitous and the result of lack of forethought. This observation becomes particularly important in analysing the changes that have occurred in central intervention in the period from 1924 to 2002, which are examined in detail in subsequent chapters.

The introduction to this thesis defined the main area of interest as the macro level, that is the relationship between central government and local authorities. This was contrasted with the micro level – the relationship between local authorities and (potential) tenants. In view of this focus, the chapter does not consider in any detail the origin or development of local authority management policies and practices, or their impact on tenants and applicants; a subject that has been extensively researched.<sup>3</sup> This is not to deny that policies and practices originating at local level can have an impact at national level. Indeed, the ability of local authorities to influence the legislative process is of significant importance in understanding the central-local relationship, and is explored throughout this thesis. Chapter 6 also considers the extent to which certain locally defined issues became incorporated in the current legislation, the Homelessness Act 2002. A further issue explored throughout this thesis is the willingness (or otherwise) of central government to prohibit 'bad' management practices by local authority landlords.

---

<sup>2</sup> For example, a power for local authorities to allocate housing according to locally determined policies. For a modern example see Local Government Act 2000, s.2(1), which provides a power for local authorities to do anything, having regard to the effect on the achievement of sustainable development in the UK, which they consider is likely to promote or improve economic, social or environmental well-being.

<sup>3</sup> See for example, P. Niner, *Local Authority Housing Policy and Practice* (Birmingham, Centre for Urban and Regional Studies, 1975); A. Power, *Property Before People: The Management of Twentieth Century Council Housing* (London, Allen & Unwin, 1987); P. Kemp and P. Williams, 'Housing Management: An Historical Perspective' in S. Lowe and D. Hughes (eds.), *A New Century of Social Housing* (Leicester, Leicester University Press, 1991); M. Pearl, *Social Housing Management: A Critical Appraisal of Housing Practice* (Basingstoke, Macmillan, 1997).

# THE ORIGINS AND DEVELOPMENT OF COUNCIL HOUSING

For much of the nineteenth century, it was widely assumed by both politicians and the public that housing provision should be left to the private market<sup>4</sup> and the vast majority of people were accommodated in privately rented housing.<sup>5</sup> Local authority house building began as early as 1864,<sup>6</sup> although state subsidies were not introduced until 1919.<sup>7</sup> Before local authorities became involved in the provision of housing, housing societies and other charitable and philanthropic individuals and organisations were involved in providing housing for the working classes. However, such charitable provision came relatively late in comparison with other areas, such as education and medicine; there was little philanthropic activity in the housing field before the nineteenth century.<sup>8</sup>

The spur for charitable involvement in housing was the great influx of workers from the countryside into the cities during the Industrial Revolution. This influx caused considerable housing problems, which in turn led to ill-health and the rapid spread of diseases.<sup>9</sup> In 1842, the Poor Law Commission published a report that highlighted the connection between insanitary, overcrowded living conditions and the spread of diseases.<sup>10</sup> While Chadwick's report led to legislative reform in the areas of public health and housing, other individuals and organisations were becoming involved in the provision of sanitary housing for the working classes.<sup>11</sup> The aim of many of the charities was to provide housing for the working classes on a commercial basis. They intended to

<sup>4</sup> C.G. Pooley, *Local Authority Housing: Origins and Development* (London, The Historical Association, 1996) p.7.

<sup>5</sup> M.J. Daunton, *House and Home in the Victorian City: Working-Class Housing 1850-1914* (London, Edward Arnold, 1983) pp.179-80; Pooley, 1996, op cit n.4 p.39, table 1, Appendix.

<sup>6</sup> S. Merrett, *State Housing in Britain* (London, Routledge & Kegan Paul, 1979) p.21.

<sup>7</sup> By the Housing and Town Planning etc. Act 1919; widely referred to as the Addison Act (after its Parliamentary sponsor).

<sup>8</sup> R. Whelan (ed.) *Octavia Hill and the Social Housing Debate* (London, Institute of Economic Affairs, 1998) p.11.

<sup>9</sup> As Wohl has pointed out, the "collective conscience" of the monied classes was "inspired as much by selfinterest [sic] and the desire to maintain the essential fabric of their class and the capitalist system as by humanitarian impulses to seek ways of readjusting the inequalities in the distribution of wealth"; A.S. Wohl, *The Eternal Slum: Housing and Social Policy in Victorian London* (London, Edward Arnold, 1977) p.141.

<sup>10</sup> Written by Edwin Chadwick entitled, *Report on the Sanitary Conditions of the Labouring Population and on the Means of its Improvement* (1842).

<sup>11</sup> "The provision of working-class housing, embodying the latest scientific knowledge of hygiene, became one of the greatest departments in the enterprise of Victorian philanthropy"; Whelan, 1998, op cit n.8 p.12.

demonstrate that a relatively modest return could be generated from such activity. The movement became known as five per cent philanthropy, since five per cent was the return on capital that was thought to be achievable. In 1841, the Metropolitan Association for Improving the Dwellings of the Industrious Classes was formed and, in 1862, the Peabody Donation Fund was established by the American businessman, George Peabody.<sup>12</sup> Despite their claim to operate according to commercial principles, it has been argued that the model dwelling companies were in fact receiving considerable preferential treatment from the state, via reduced interest rates,<sup>13</sup> and “without them it is doubtful if the model dwelling movement could have flourished to the extent which it did.”<sup>14</sup>

While the origin of council house building, dating back to 1864, was in connection with slum clearance, Part III of the Housing of the Working Classes Act 1890 permitted the erection of public housing separately from clearance operations.<sup>15</sup> The 1890 Act has been described as “one of the milestones in the history of social housing,”<sup>16</sup> not only because it marked the moment when the Government finally overcame its doubts about trusting local authorities with the supply of housing but, more importantly for the long term, it marked an acceptance of a need to take some responsibility for the supply of housing.<sup>17</sup> However, “to interpret Part III as indicating warm government support for municipal house building would be incorrect.”<sup>18</sup> Furthermore, it must be emphasised that municipal house building in the quarter century before the First World War broke out was still “pitifully small” in comparison with the house building industry’s total annual output.<sup>19</sup> Moreover, there was no question of local authorities operating on other than “restrained commercial terms”;<sup>20</sup> like the philanthropic organisations, they were expected to achieve a five per cent return. It was not until after World War I that local authorities became major providers of housing and house building by local authorities was subsidised by central government.

---

<sup>12</sup> Peabody became the largest player in the field.

<sup>13</sup> Labouring Classes Dwelling Houses Acts 1866 and 1867.

<sup>14</sup> Wohl, 1977, op cit n.9 p.144.

<sup>15</sup> S.53 gave local authorities a power to erect buildings suitable for lodging houses for the working classes.

<sup>16</sup> J. Morton, “*Cheaper than Peabody*”: *Local Authority Housing from 1890 to 1919* (York, Joseph Rowntree Foundation, 1991) p.1.

<sup>17</sup> ibid p.1.

<sup>18</sup> Wohl, 1977, op cit n.9 p.252.

<sup>19</sup> Merrett, 1979, op cit n.6 pp.26-7. By 1914, there were 24,000 completed housing units, representing well under half of one per cent of the total housing stock.

<sup>20</sup> Morton, 1991, op cit n.16 p.2.

A number of key factors led to the involvement of local authorities in housing provision after World War I. Housing problems had existed before the war, but the virtual standstill in housing production and repair during the war years brought the situation to breaking point.<sup>21</sup> One view is that major social reform by the government came to be seen as the other side of an “unwritten social contract”<sup>22</sup> to the increasing sacrifices demanded of the population by the war. It has also been argued that council housing was an *ad hoc* response to an immediate political crisis; effectively an antidote to revolution.<sup>23</sup> Daunton has observed that there is a conflict between those who see local authority housing as having been achieved by working class pressure from below,<sup>24</sup> and those, such as Swenarton,<sup>25</sup> who see it as being imposed from above, in order to control and contain working class threats to the established order of society.<sup>26</sup> Lloyd George’s wartime coalition government placed particular emphasis on planning post-war housing policy, exemplified by the election slogan, ‘Homes Fit for Heroes’.<sup>27</sup> The crucial change during and after World War I was the “reluctant recognition”<sup>28</sup> that private enterprise would not be able to supply houses of the quantity and quality, and at the rents which many of the working classes could afford. With this realisation, “The idea that central government finance should be used to subsidize local-authority building gradually became acceptable to the wartime planners of reconstruction.”<sup>29</sup>

However, Daunton, adopting an economics approach, argues that there was no inevitability about the demise of the private landlord as the main provider of new working class housing.<sup>30</sup> He argues that the dominance of policy after World War I by council housing

<sup>21</sup> Merrett, 1979, op cit n.6.

<sup>22</sup> J. Burnett, *A Social History of Housing 1815-1970* (London, Methuen, 1978) p.215.

<sup>23</sup> M. Swenarton, *Homes Fit for Heroes: The Politics and Architecture of Early State Housing in Britain* (London, Heinemann, 1981) pp.81-2. “The money we propose to spend on housing is an insurance against Bolshevism and revolution”; HC Debs, Vol. 114, col.1956, 8 April 1919, W. Astor (Parliamentary Secretary, Ministry of Health).

<sup>24</sup> See for example, D. Englander, *Landlord and Tenant in Urban Britain 1838-1918* (Oxford, Clarendon, 1983).

<sup>25</sup> Swenarton, 1981, op cit n.23.

<sup>26</sup> M.J. Daunton, *A Property-Owning Democracy?* (London, Faber & Faber, 1987) p.91. See also chapter 3; John Wheatley’s justifications for the government subsidies contained in the Housing Act 1924.

<sup>27</sup> It has been argued that rather than the pressure for social reform coming from returning soldiers, it was people at home – administrators, government officials and professionals, on the one hand, and the working class on the other – who exerted such pressure; L.F. Orbach, *Homes for Heroes: A Study of the Evolution of British Public Housing, 1915-1921* (London, Seeley, Service & Co., 1977) pp.68-9.

<sup>28</sup> Burnett, 1978, op cit n.22 p.216.

<sup>29</sup> *ibid.*

<sup>30</sup> M.J. Daunton (ed.) ‘Introduction’ in *Councillors and Tenants: Local Authority Housing in English Cities, 1919-1939* (Leicester, Leicester University Press, 1984) p.5.

rested partly upon the political and social isolation of the private landlord,<sup>31</sup> and partly on a different perception of social problems. In the early years of the twentieth century, housing became a political issue. Tensions existed between those seeking an economic return from their investment, on the one hand, and those who viewed housing as a prerequisite for an efficient and stable society, on the other.<sup>32</sup> ‘Criteria of ‘national efficiency’ and social welfare produced controls and regulations which disturbed the market relationship between the effective demand of working-class tenants and the cost of supplying accommodation.’<sup>33</sup> As a consequence, private landlords came to be viewed as a marginal group, and their profit expectations were given a lower priority than raising housing standards and protecting tenants’ rights.<sup>34</sup>

The first major piece of housing legislation following World War I was the Housing and Town Planning etc. Act 1919 (the Addison Act) which introduced for the first time a state building subsidy.<sup>35</sup> The Act has been described as “a brilliant failure”<sup>36</sup> in terms of the number of houses built under its provisions, because “it was never well conceived and rarely well executed.”<sup>37</sup> However, it was important because it marked a departure; a commitment by the state to house the working classes. While the 1890 Act is credited with the same achievement, the 1919 Act recognised, for the first time, the necessity of subsidising housing provision.<sup>38</sup> It has been argued that, without the Addison Act, it is unlikely that the incoming Conservative government would have introduced a building subsidy (albeit limited in the case of local authorities<sup>39</sup>) in its Housing Act 1923 (the Chamberlain Act). It was not simply that people were becoming used to seeing local authorities involved in the provision of working class housing, but they were coming to expect the state to assume obligations that were far wider than those thought reasonable before the war.<sup>40</sup>

---

<sup>31</sup> *ibid* p.6.

<sup>32</sup> Daunton, 1983, *op cit* n.5 pp.179-80.

<sup>33</sup> *ibid* p.180.

<sup>34</sup> *ibid*.

<sup>35</sup> The Addison Act (s.1) imposed a duty on local authorities to survey the needs of their area and make and carry out plans for the provision of housing, after gaining approval from the Ministry of Health.

<sup>36</sup> H. Quigley and I. Goldie, *Housing and Slum Clearance in London* (London, Methuen, 1934) pp.72-3.

<sup>37</sup> Orbach, 1977, *op cit* n.27 p.139.

<sup>38</sup> Under the 1890 Act, local authorities were obliged to achieve a five per cent return on capital.

<sup>39</sup> The Chamberlain Act (s.1(1)(b)) introduced house building subsidies for both private enterprise and local authorities. However, under its provisions, local authorities were only permitted to build if they convinced the Minister of Health “that this was preferable to untrammelled private enterprise”; Merrett, 1979, *op cit* n.6 p.310.

<sup>40</sup> Orbach, 1977, *op cit* n.27 pp.139-40.

During the inter-war years, council housing provision waxed and waned; “[T]here was no smooth progressive growth in council housing and … support from central government for the progress of council housing was unstable and extremely hesitant.”<sup>41</sup> This swing between “extravagance and retrenchment” has been attributed to the ‘political’ character that housing had assumed.<sup>42</sup> During the 1930s, general needs building was replaced by slum clearance, under the provisions of the Housing Act 1930. Although the local authority contribution to the new housing stock that existed by 1939 was substantial,<sup>43</sup> “this achievement is highly qualified … by the prevarications about the role of council building, its financing, its standards and above all by the fact that until well into the 1930s very few poor working class families benefited.”<sup>44</sup>

By 1945, both the Conservative and Labour parties had accepted that the public sector had a significant role to play in addressing the housing needs of large sections of the population.<sup>45</sup> Although local authority house building had become well established between the wars, in 1939 council houses accounted for only one in eight of the housing stock.<sup>46</sup> While public housing was viewed as part of the post-war welfare state, Timmins argues that housing proved to be much less of a policy departure from pre-war days than health, education or social security.<sup>47</sup> Cooper has observed that the lack of fundamental thinking about the role the government should have in housing meant that public housing developed alongside the private market and not as an alternative to it, as was the case with education and health care.<sup>48</sup>

Bevan, as Minister for Health in the Labour government of 1945-51, was in favour of council housing as the primary provider of housing, not just for the poor or working classes.<sup>49</sup> The Conservatives were not committed to Labour’s view of council housing as a vehicle for wealth redistribution and believed, ultimately, that the market could provide for

---

<sup>41</sup> D. Hughes and S. Lowe, *Public Sector Housing Law* (London, Butterworths, 2000) p.22.

<sup>42</sup> Quigley and Goldie, 1934, op cit n.36 p.79.

<sup>43</sup> Since 1919 councils had built 1,112,000 houses and flats, representing one quarter of new construction; Hughes and Lowe, 2000, op cit n.41 p.25.

<sup>44</sup> *ibid.*

<sup>45</sup> I. Loveland, *Housing Homeless Persons* (Oxford, Clarendon, 1995); Burnett, 1978, op cit n.22; P. Bridgen and R. Lowe, *Welfare Policy Under the Conservatives 1951-1964* (Kew, Surrey, PRO Publications, 1998).

<sup>46</sup> N. Timmins, *The Five Giants: A Biography of the Welfare State*. 2<sup>nd</sup> edn. (London, Harper Collins, 2001) p.143.

<sup>47</sup> *ibid* p.142.

<sup>48</sup> S. Cooper, *Public Housing and Private Property 1970-1984* (Aldershot, Gower, 1985) p.12.

<sup>49</sup> Housing Act 1949, s.1 removed the references to working classes from the Housing Acts.

most housing needs. Nevertheless, the Conservative government built more council houses between 1951 and 1956 than any other government during a five year period.<sup>50</sup> During the later part of the 1950s, the Conservative government reduced expenditure on council house building to its lowest level since World War II, and encouraged home ownership. However, in a White Paper published in the early 1960s, the Conservative government accepted that its attempt to limit the state to a residual role in housing provision had been premature.<sup>51</sup>

The Labour party came to power in 1964 with a manifesto commitment to build 500,000 houses.<sup>52</sup> However, in spite of its traditional support for council housing, the Labour party began to distance itself from this stance during the 1960s.<sup>53</sup> By the late 1970s, there was a growing acceptance by the two main political parties that owner-occupation was the 'normal' tenure, and that the function of council housing was to provide a minimal, residual service.<sup>54</sup> Murie links the identification of home-ownership as electorally important to its status as "the national tenure."<sup>55</sup> The 'residualisation'<sup>56</sup> of council housing was realised in a dramatic way by the incoming Conservative government, under the provisions of the Housing Act 1980. The 1980 Act introduced the statutory Right to Buy (RTB), which gave existing local authority tenants the right to buy their council-owned property subject to significant discounts.<sup>57</sup> Since 1980, two further routes of council housing 'privatisation' have been introduced; through large-scale voluntary transfers

<sup>50</sup> Bridgen and Lowe, 1998 op cit n.45.

<sup>51</sup> Department of the Environment, *Housing in England and Wales* (London, HMSO, 1961).

<sup>52</sup> Hughes and Lowe, 2000, op cit n.41.

<sup>53</sup> The Housing Policy Review Green Paper of 1977 is generally regarded as a conservative paper because of its support for owner-occupation; *ibid* p.35.

<sup>54</sup> For the Conservative party, this was based on its ideological attachment to the concept of housing as primarily a private commodity, best provided through the market; M. Loughlin, *Local Government in the Modern State* (London, Sweet & Maxwell, 1986); M. Laffin, *Professionalism and Policy: The Role of the Professions in the Central-Local Government Relationship* (Aldershot, Avebury, 1986).

<sup>55</sup> A. Murie, 'The Nationalization of Housing Policy' in M. Loughlin *et al*, *Half a Century of Municipal Decline 1935-1985* (London, Allen & Unwin, 1985) pp.193-4.

<sup>56</sup> Spicker defines a residualised service as one which acts as a safety net, rather than as a universal or institutional service; P. Spicker, *Social Housing and the Social Services* (London, Longman for the Institute of Housing, 1989) p.12. Forrest and Murie have noted that residualisation rarely refers to a single feature of council housing; "Rather it emphasises process and a direction of policy change which involves a number of dimensions"; R. Forrest and A. Murie, *Selling the Welfare State: The Privatisation of Public Housing* (London, Routledge, 1988) p.74.

<sup>57</sup> See chapter 4.

(LSVTs)<sup>58</sup> and Housing Action Trusts (HATs).<sup>59</sup> All three routes remove ownership of property from the local authority.<sup>60</sup> Under the RTB, ownership transfers to individual tenants, who become owner-occupiers. Under the latter two types of arrangements, ownership is transferred to an alternative landlord, usually a housing association.<sup>61</sup>

## THE DISCRETION TO MANAGE

It has been demonstrated in the preceding section that the policy towards the provision of local authority housing has been neither consistent nor coherent. The sheer quantity of legislation in the period before World War II, amending existing subsidy schemes or instigating new schemes, testifies to this assertion.<sup>62</sup> This point becomes relevant when considering the attention paid by successive governments to housing management issues, and in particular local authorities' discretion to allocate that stock, which is now considered. In order to appreciate fully the implications of the statutory constraints on local authorities' housing allocation decisions, it is useful briefly to compare the nature of the public landlord with that of its private (residential) counterpart in this regard.

English landlord and tenant law<sup>63</sup> is predicated on the common law traditions of 'property rights' (that owners of land should have the right to dispose of interests in that land as they wish) and 'freedom of contract' (that two or more parties negotiate, on equal terms, to a mutually satisfactory conclusion).<sup>64</sup> Its origins are therefore rooted firmly in private law.<sup>65</sup>

<sup>58</sup> Housing Act 1985, ss.32-34 and s.43. Between 1988 and spring 2000 about 450,000 houses were transferred from local authorities to RSLs under the LSVT programme; T. Mullen, 'Stock Transfer' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, Policy Press, 2001) p.48. According to the Liberal Democrat MP Don Foster, speaking in July 2001, 580,000 further houses are to be transferred in the next two years; HC Debs, Standing Committee A, col.9,10 July 2001.

<sup>59</sup> The initiative to establish a housing action trust comes from the Secretary of State who is empowered by Housing Act 1988, s.60 to designate an area as such; J. Morgan, *Textbook on Housing Law* (London, Blackstone, 1998) p.180.

<sup>60</sup> It has been argued that the move towards a market-oriented style reflects successive Conservative governments' deep-seated mistrust of local councils and constitutes part of its desire to wean people off the culture of dependency; Kemp and Williams, 1991, op cit n.3 p.138.

<sup>61</sup> Under a LSVT to a housing association, secure tenants become assured tenants; Housing Act 1988, s.38.

<sup>62</sup> Between the period 1851 (the enactment of the 'Shaftesbury Act') and 1936 there were 24 Acts relating to council housing building; Merrett, 1979, op cit n.6 pp.307-12.

<sup>63</sup> The lease has been in use since the twelfth century; M. Partington, *Landlord and Tenant* (London, Weidenfeld and Nicolson, 1980) p.3.

<sup>64</sup> ibid p.2.

<sup>65</sup> Cooper has argued that public sector tenancies were modelled on the private sector because it was originally thought that the state's involvement in housing provision would be "a short-term expedient while post-war shortages lasted and until such time as the market could re-establish itself"; Cooper, 1985, op cit n.48 p.12.

The numerous statutory interventions in the private rented sector have been blamed by some for its decline.<sup>66</sup> However, such intervention has not taken the form of dictating to landlords their choice of tenant. Private sector landlords are free to 'allocate', i.e. lease, their housing to whomsoever they choose; provided that they do not contravene discrimination law.<sup>67</sup> The same is not true of the public sector. Since 1924, central government has imposed on local authorities certain statutory obligations with respect to the allocation of their housing. The reason for these constraints lies in the special role played by social landlords.

As we have seen, it became accepted that local authority house building was necessary to provide accommodation for the 'working classes' because private enterprise could not achieve either the quantity or quality of housing, at rents that the working classes could afford. As such, local authority housing came to play a 'social' role, in that it would offer housing opportunities to those who were hardest hit by the operation of the free market.<sup>68</sup> Furthermore, as discussed above, since 1919 central government has subsidised, to a greater or lesser extent, house building by local authorities for this social purpose.<sup>69</sup> As part of the social role played by housing, it has come to be acknowledged that factors other than purely commercial ones,<sup>70</sup> should govern to whom housing is allocated.<sup>71</sup> The landlord role in the public sector is therefore different in character, at least to this extent, to that of the private sector; although it has been argued that the social considerations that

---

<sup>66</sup> A. Stewart, *Rethinking Housing Law* (London, Sweet & Maxwell, 1996) p.83. See also Daunton, 1987, op cit n.26.

<sup>67</sup> S. Bright and G. Gilbert, *Landlord and Tenant Law: The Nature of Tenancies* (Oxford, Clarendon, 1995) p.158. Sections 1, 2 and 30(1) of the Sex Discrimination Act 1975 and ss.1, 3 and 21(1) of the Race Relations Act 1976 make it unlawful to discriminate on the grounds of race or sex in both the decision to lease property and the terms on which that property is leased. However, there is an exception in both statutes for resident landlords and small premises; *ibid* p.168. Section 19 of the Disability Discrimination Act 1995 makes it unlawful for the provider of goods or services (including accommodation, s.19(3)) to refuse to provide those goods or services, unless he or she can show that discrimination is justified under s.20(3).

<sup>68</sup> Partington, 1980, op cit n.63 p.22.

<sup>69</sup> Subsidisation is not unique to the public rented sector. The owner-occupied sector has been heavily publicly subsidised through mortgage interest tax relief (MITR) (since abolished by the Finance Act 1999, s.38). Indeed, "the cost of [MITR] has, since the beginning of the 1980s, exceeded the cost of general subsidies to council housing, both globally and per household"; S. Wilcox, *Housing Finance Review 1993* (York, Joseph Rowntree Foundation, 1993) p.162; quoted in Stewart, 1996, op cit n.66 p.20.

<sup>70</sup> One such commercial factor is the ability to pay the rent.

<sup>71</sup> Bright and Gilbert note that although in the private residential sector payment of rent will always be important, other factors might impinge; Bright and Gilbert, 1995, op cit n.67 p.157.

partly motivate local authorities “are rarely defined in any rigorous or adequate way.”<sup>72</sup> Nevertheless, as a consequence of this distinctive character, central government has since the early part of the twentieth century asserted the right to control (to a greater or lesser degree) local authorities’ housing allocations.<sup>73</sup> The extent of central government involvement in housing allocation, and consequently the relative discretion enjoyed by local authorities in this respect, is now discussed.

## LEGAL CONTROLS ON DISCRETION

From the outset public housing has been a very decentralised service, with local authorities enjoying a high degree of autonomy in the management of their housing stock.<sup>74</sup> Chapter 2 describes how, in general, legislation granting local authorities powers to perform their statutory duties was traditionally drafted in such a way as to accord them a large measure of discretion, and housing was no exception. To understand the nature and extent of local authorities’ management discretion, it is necessary to consider the ways in which it has been constrained. Such constraints comprise both direct and indirect legal constraints as well as ‘quasi-legal’ and more informal, non-legal controls. While the focus of this thesis is on the direct legal and quasi-legal constraints, chapter 2 explains that legal rules do not necessarily constitute the whole picture. The purpose of this section is to provide an overview of the legal and quasi-legal controls on discretion, which are then considered in detail in subsequent chapters.

### Statutes

The first legislation to touch on the issue of allocations policies was the Housing (Financial Provisions) Act 1924. It constrained local authorities’ discretion to allocate their housing

---

<sup>72</sup> Kemp and Williams, 1991, op cit n.3 p.123. The authors argue that definitions of housing management in the literature usually amount to little more than an outline of the various activities that comprise management: “all of which are of course also carried out in the private sector”; *ibid*.

<sup>73</sup> Cole and Furbey observe that “the rules and practices surrounding the allocation of the housing stock have always been central to distinctions between market housing and ‘social’ housing”; I. Cole and R. Furbey, *The Eclipse of Council Housing* (London, Routledge, 1994) p.140.

<sup>74</sup> J.B. Cullingworth, *Housing and Local Government* (London, Allen & Unwin, 1966); V. Karn, ‘Housing’ in S. Ranson, G. Jones and K. Walsh (eds.) *Between Centre and Locality: The Politics of Public Policy* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1985).

stock by requiring them to give a reasonable preference to applicants with large families.<sup>75</sup> Fulfilling this condition was a requirement of receiving the government building subsidy. The ‘reasonable preference’ phrase has been maintained in every subsequent Housing Act dealing with allocations, including the current Homelessness Act 2002.<sup>76</sup>

While the ‘reasonable preference’ phrase has remained unchanged, the categories of people to whom that preference must be given have altered, reflecting changing government policy.<sup>77</sup> Initially the requirement on local authorities was to give a reasonable preference to large families.<sup>78</sup> This duty was subsequently expanded to encompass those living in insanitary, overcrowded or unsatisfactory housing conditions.<sup>79</sup> In 1977, local authorities were also required to give a reasonable preference to those people who were accepted as being statutorily homeless.<sup>80</sup> The law was consolidated by the Housing Act 1985.<sup>81</sup> In 1996, the categories were amended and expanded.<sup>82</sup> The 1996 Act contained a new requirement to secure additional preference for households, “who cannot reasonably be expected to find settled accommodation for themselves in the foreseeable future.”<sup>83</sup> In 1997 those found to be statutorily homeless were added to the reasonable preference categories.<sup>84</sup>

---

<sup>75</sup> Housing Act 1924, s.3(1)(f).

<sup>76</sup> S.16(3) substitutes Housing Act 1996, s.167(2).

<sup>77</sup> The reasonable preference formula has a similar lineage in Scotland. It was first introduced in the Housing (Scotland) Act 1935; s.47(2) required local authorities to give a reasonable preference to persons occupying insanitary or overcrowded houses, those with large families or living under unsatisfactory housing conditions. It was subsequently re-enacted in the Housing (Scotland) Act 1950, s.73(2); the Housing (Scotland) Act 1966, s.151(1); the Housing (Scotland) Act 1969, s.69(2), Schedule 6, para.19 (which substituted “houses which do not meet the tolerable standard” for “insanitary houses”); the Housing (Scotland) Act 1986, Schedule 1, para.13 inserted new s.26A; the Housing (Scotland) Act 1987, s.20(1) and, most recently, the Housing (Scotland) Act 2001, s.10 amends s.20 of the 1987 Act. Reasonable preference has a similar meaning in Scotland as in England/Wales; Scottish Executive Development Department, Circular 1/2002 (Edinburgh, SEDD, 2002) para.20.

<sup>78</sup> Housing Act 1924, s.3(1)(f).

<sup>79</sup> Housing Act 1935, s.51(2).

<sup>80</sup> Housing (Homeless Persons) Act 1977, s.6(2).

<sup>81</sup> S.22 contained the reasonable preference categories.

<sup>82</sup> Housing Act 1996, s.167(2); (a) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions; (b) people occupying housing accommodation which is temporary or occupied on insecure terms; (c) families with dependent children; (d) households consisting of or including someone who is expecting a child; (e) households consisting of or including someone with a particular need for settled accommodation on medical or welfare grounds; and (f) households whose social or economic circumstances are such that they have difficulty in securing settled accommodation.

<sup>83</sup> Housing Act 1996, s.167(2) as amended by The Allocation of Housing (Reasonable and Additional Preference) Regulations 1997 (SI 1997 No. 1902).

<sup>84</sup> The Allocation of Housing (Reasonable and Additional Preference) Regulations 1997 (SI 1997 No. 1902), which came into force on 1 November 1997. See now Homelessness Act 2002, s.167(2)(a) and (b).

The Housing Act 1996 marked a departure from the style of previous housing legislation. For the first time, it laid down a comprehensive statutory framework for the allocation of housing by local authorities. It required local authorities to establish a ‘housing register’ and to allocate accommodation only to ‘qualifying persons’.<sup>85</sup> The Secretary of State had broad powers to prescribe by regulations classes of persons who are, or are not, qualifying persons.<sup>86</sup> Authorities were also required to have a scheme for determining priorities between applicants and an allocation procedure,<sup>87</sup> and were prohibited from allocating accommodation except in accordance with their scheme.<sup>88</sup> However, while the framework was new, an element of continuity was provided by the ‘reasonable preference’ phrase.

Under the current Homelessness Act 2002, the local authority also has a duty to frame its scheme so as to secure that reasonable preference is given to certain categories of people. There are five categories, two of which concern people to whom certain homelessness duties are owed by the local authority. The remaining three categories are simplified versions of those contained in the 1996 Act.<sup>89</sup>

Thus, the important recurring phrase in the legislation since the 1924 Act is ‘reasonable preference’. However, it has never been subject to statutory definition, and it does not appear that the term has been used in any other statutory context than the Housing Acts. During the parliamentary debates of the 1924 Act, discussed in chapter 3, the phrase was criticised for its vagueness. Furthermore, with the exception of ‘overcrowding’,<sup>90</sup> none of the reasonable preference categories is defined in statute. The statutory provisions are therefore very imprecise allowing, at least in theory, appreciable room for manoeuvre by local authorities. Yet, statutory rules are not the only source of legal constraints on local authorities’ housing allocations activities. It is necessary also to examine the status and effect of Circulars, Codes of Guidance and case law in this regard.

---

<sup>85</sup> Housing Act 1996, s.161(1).

<sup>86</sup> *ibid* s.161(3).

<sup>87</sup> Housing Act 1996, s.167(1).

<sup>88</sup> *ibid* s.167(8).

<sup>89</sup> Homelessness Act 2002, s.167(2)(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions; (d) people who need to move on medical or welfare grounds; and (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).

<sup>90</sup> The term first appeared in the Housing Act 1935, s.2.

## Circulars and Codes of Guidance

Circulars and Codes of Guidance form part of a body of administrative rules that has become known as quasi-legislation.<sup>91</sup> The term itself is problematic because it is used to cover a wide spectrum of rules. One view is that the only common factor is that such rules are not directly enforceable through criminal or civil proceedings.<sup>92</sup> By contrast, Baldwin and Houghton argue that the courts will give effect to rules where there is a clear indication of parliamentary intention to achieve that effect.<sup>93</sup> In order to ascertain the legal effect of the quasi-legislation in question, it is therefore necessary to examine it in the light of the statutory provision and judicial interpretation.<sup>94</sup>

In relation to public housing, Circulars and Codes of Guidance have been issued by the relevant government department to clarify the meaning of legislation and to provide supplementary guidance in its interpretation. In an attempt to classify the varieties of 'unsanctioned administrative rules', Baldwin and Houghton identify eight models, based on the functions which they perform.<sup>95</sup> Non-statutory guidelines have been the normal channel of communication and control by central government over, amongst other bodies, local authorities.<sup>96</sup> It would appear most appropriate to locate the public housing quasi-legislation in either the 'interpretative guides' or 'instructions to officials' category (the authors concede that the eight models are overlapping). It is a guide to interpretation, particularly as it includes "expressions of criteria to be followed",<sup>97</sup> but since it is aimed primarily at officials within a bureaucracy, rather than at parties outside, it has more in common with the 'instructions to officials' model.<sup>98</sup> It has been argued that a principal

---

<sup>91</sup> G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London, Sweet & Maxwell, 1987); C. Turpin, *British Government and the Constitution*. 3<sup>rd</sup> edn. (London, Butterworths, 1995).

<sup>92</sup> *ibid* Ganz, p.1.

<sup>93</sup> R. Baldwin and J. Houghton, 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) *Public Law*, 239-284, p.247. The authors compare judicial condemnation of a Home Office circular in *Pratchett v Leathem* (1949) 65 TLR 69, with Roskill LJ's acceptance of the legitimacy of the immigration rules in *R v Chief Immigration Officer Heathrow Airport, ex parte Bibi* [1976] 1 WLR 979.

<sup>94</sup> Ganz, 1987, *op cit* n.91 p.6. "A statute may both empower a minister to give guidance to a public body and prescribe the duty of that body with respect to any guidance given"; Turpin, 1995, *op cit* n.91 p.350.

<sup>95</sup> The eight models are: procedural rules, interpretative guides, instructions to officials, prescriptive/evidential rules, commendatory rules, voluntary codes, rules of practice, management or operation, and consultative devices and administrative pronouncements; Baldwin and Houghton, 1986, *op cit* n.93 pp.241-245.

<sup>96</sup> Ganz, 1987, *op cit* n.91 p.75. Ganz identifies the other recipients of non-statutory guidelines as nationalised industries and health authorities.

<sup>97</sup> Baldwin and Houghton, 1986, *op cit* n.93 p.241.

<sup>98</sup> *ibid* pp.241-2.

worry about ‘secret codes’ is that they may conflict with published law.<sup>99</sup> Indeed, this concern was raised during the parliamentary debates on the Housing Act 1996.<sup>100</sup>

Before proceeding to consider the legal effect of circulars and codes of guidance, it is useful to consider the justifications that have been postulated for the use of quasi-legislation. An appreciation of the rationale for such legislation provides a background for the discussions in chapter 2 concerning the role of legal (and quasi-legal) rules within the central-local relationship. One view is that the use of quasi-legislation in the central-local context exemplifies the ‘voluntary approach’; that is, a reliance on cooperation is preferable to the force of law.<sup>101</sup> This may be because it is believed that the local authority should have freedom to use its own discretion; “because it possesses an expertise which the government lacks, or because it is an elected body answerable primarily to its own electors rather than to the government.”<sup>102</sup> This justification of quasi-legislation is resonant with two of the analyses of the central-local relationship which are explored in chapter 2.

On a more cynical note, it has been suggested that quasi-legislation is often used to make law without resort to Parliament, to instruct judges on the meaning of statutes and to insulate bureaucracies from review.<sup>103</sup> Another use of codes of guidance was suggested during the parliamentary debates on the Housing Act 1996;<sup>104</sup> to allow the Minister to put “a more humane gloss” on the primary legislation, with which he did not agree.<sup>105</sup> This interpretation suggests the possibility of conflict occurring between the primary legislation and the guidance. A key question will then be the legal status of quasi-legislation.

It has been argued that judges “in general are happier giving effect to rules that have received some parliamentary or executive sanction.”<sup>106</sup> However, the situation is complicated by the fact that a variety of legal effects may flow from a piece of quasi-legislation, for example whether it is alleged to have direct effect,<sup>107</sup> whether it has

---

<sup>99</sup> *ibid* p.241.

<sup>100</sup> See below and chapter 5.

<sup>101</sup> Ganz, 1987, *op cit* n.91 p.51.

<sup>102</sup> Turpin, 1995, *op cit* n.91 p.349.

<sup>103</sup> Baldwin and Houghton, 1986, *op cit* n.93. See also D. Feldman, ‘The Constitution and the Social Fund: A Novel Form of Legislation’ (1991) *Law Quarterly Review*, 107, 39–45, discussed in chapter 2.

<sup>104</sup> See chapter 5.

<sup>105</sup> HC Deb, Standing Committee G, cols.768-9, 21 March 1996, Nick Raynsford.

<sup>106</sup> Baldwin and Houghton, 1986, *op cit* n.93 pp.246-7.

<sup>107</sup> In the European Community law sense of giving individuals directly enforceable rights before the courts of their own member state.

evidential effect or whether it dictates the procedures to be followed.<sup>108</sup> In *Bristol District Council v Clark*,<sup>109</sup> Scarman LJ referred to circulars issued by the Department of the Environment concerning local authority allocations and homelessness. He did not think it possible:

[T]o rely on those circulars as imposing any direct statutory duty on a housing authority; but I think they are a good indication as to the purposes to be served by the Housing Acts and as to what are relevant matters within the language of Lord Greene MR in the *Wednesbury* case to be taken into account by a local authority serving a notice to quit on a council tenant in arrears of rent.<sup>110</sup>

While imposing no direct duties, Scarman LJ's judgment appears to accord the circular a secondary role in determining whether the local authority had acted reasonably, in the *Wednesbury* sense.<sup>111</sup> The circular referred to in *Clark*<sup>112</sup> later became a code of guidance, to which local authorities were obliged by the primary legislation to "have regard".<sup>113</sup> The formula has been maintained in subsequent legislation.<sup>114</sup> Ganz believes that the transformation of persuasive guidelines into statutory provisions exemplifies the breakdown in the consensus between central and local government, particularly in relation to local government finance.<sup>115</sup> This argument is explored in more detail in chapter 2. However, the mere fact that the method of communication between central and local government has changed does not necessarily indicate a change in the relationship. As Ganz herself notes, embodying the local authorities' duty to have regard to the guidance in statute does not enhance its legal status. This is because the codes have been given

---

<sup>108</sup> Baldwin and Houghton, 1986, op cit n.93 p.246.

<sup>109</sup> [1975] 3 All ER 976.

<sup>110</sup> *ibid* 982.

<sup>111</sup> Baldwin and Houghton, 1986, op cit n.93 p.259.

<sup>112</sup> Department of the Environment, Circular No. 18/74 (London, DoE, 1974).

<sup>113</sup> Housing (Homeless Persons) Act 1977, s.12, which was later consolidated into Housing Act 1985, s.7(1). In *R v Newham London Borough Council, ex parte Ojuri* (*The Times Law Reports*, 29 August 1998, 530) a homelessness case in which a comparable duty to have regard to departmental codes of guidance exists in Housing Act 1996, s.182(1), Collins J held that in failing adequately to take into consideration the code the local authority had failed to go through the correct procedure.

<sup>114</sup> This requirement is contained in Housing Act 1996, s.169(1) and is unaffected by the Homelessness Act 2002.

<sup>115</sup> Ganz, 1987, op cit n.91 pp.75-6.

persuasive, rather than binding, force.<sup>116</sup> In *De Falco v Crawley Borough Council*, Lord Denning, interpreting the homelessness Code of Guidance, was quite clear that:

The code should not be regarded as a binding statute. The council, of course, had to have regard to the code ... but, having done so, they could depart from it if they thought fit.<sup>117</sup>

Circulars and codes of guidance are considered alongside the relevant Acts in chapters 3 to 6. However, at this stage it is relevant to note that the current guidance explains the term 'reasonable preference' as requiring local authorities to:

[G]ive due weight to the factors listed in section 167(2), but it does not restrict authorities to taking only such factors into account. Authorities could add other factors of their own ... However, authorities should not allow their own secondary criteria to dominate their allocations scheme at the expense of factors in the statutory list.<sup>118</sup>

Given the limited legal effect of the code and the language it uses, it does not appear to provide any significant constraint on local authorities in housing allocations. Indeed, the ineffectiveness of governmental circulars in directing local authorities' actions is a recurring theme of this thesis.

## Local Selection Policies and Waiting Lists

Before proceeding to analyse the relevant case law, it is necessary to outline the ways in which local authorities have implemented the statutory housing duties described above. This is because applicants have challenged non-allocation decisions in the courts largely on the grounds that local authorities' schemes do not conform to the statutory requirements, or otherwise offend against public law principles. In deciding to whom housing should be

---

<sup>116</sup> *ibid* p.72.

<sup>117</sup> [1980] 2 WLR 664, 673.

<sup>118</sup> Department of the Environment, *Code of Guidance on Parts VI and VII of the Housing Act 1996* (London, DoE, 1996) para. 5.5; Department of Transport, Local Government and the Regions, *Allocation of Accommodation – Code of Guidance for Local Housing Authorities*. A Consultation Paper (London, DTLR, May 2002) para.5.21.

allocated, local authorities' elected members are responsible for establishing local housing policies. The authority's selection or allocation procedures should reflect both the statutory requirements and the priorities identified by the local policy.

Traditionally, allocation schemes have varied widely between authorities. They have ranged from simple date-order schemes (in which applicants were allocated housing according to how long they had been registered on the waiting list) to so-called 'merit' schemes, in which officers or councillors made decisions based on their local knowledge. However, as the statutory requirements on local authorities to give a reasonable preference to certain groups of people increased, most authorities adopted some variety of points scheme. Such schemes award 'points' according to various indices of housing need; the greater the number of points accrued by an applicant, the greater the likelihood of housing being allocated.

Points schemes have often been criticized for giving too much weight to factors not directly affecting housing need, such as length of residence in the area or length of time on the waiting list. But this is not a criticism of points schemes *per se*: it is a criticism of the policy of the local authority which is reflected in them.<sup>119</sup>

More recently there has been a move away from points-based schemes, in favour of more broadly based banding or grouping schemes. This departure appears to be prompted by a fear that schemes based on the award of points have become overly complex and consequently difficult to apply and incomprehensible to applicants. The Government has supported the adoption by social landlords of more straightforward allocations schemes in furtherance of its aim of giving applicants greater choice during the application process.<sup>120</sup> This issue is considered more fully in chapter 6. However, a question that arises at this juncture is the extent to which such banding schemes are compatible with the statutory requirement to give the reasonable, and possibly additional, preference to certain categories of people. This issue is dealt with in the analysis of the case law below.

---

<sup>119</sup> Cullingworth, 1966, op cit n.74 p.127.

<sup>120</sup> Department of the Environment, Transport and the Regions/Department of Social Security, *Quality and Choice: A Decent Home for All* (London, DETR/DSS, 2000) para.9.18.

Gaining access to the waiting list is the first stage in the two-part selection procedure. The second stage involves determining the applicant's priority on the waiting list and then matching him/her to a vacant property. One of the recurring areas of disagreement between central government and local authorities is the question whether local authorities should be compelled to operate 'open' waiting lists, i.e. not placing eligibility restrictions on applicants. It is a vital issue in practice, since an applicant cannot be considered for housing if he or she is, according to the local authority's rules, ineligible to join the waiting list.

Local authorities have consistently applied such eligibility restrictions; for example that applicants already reside in the local authority area (the residential qualification), are not owner-occupiers or single and are over a certain age. These policies have been disapproved by successive governments, government advisory bodies (such as CHAC, the Central Housing Advisory Committee) and housing charities, but nevertheless they persist. Research studies carried out in the 1960s<sup>121</sup> demonstrated the particularly adverse effect on racial minorities of one of the most commonly imposed waiting list restrictions,<sup>122</sup> the residential qualification. Despite CHAC's condemnation of local authorities' residential requirements as unnecessarily hindering mobility,<sup>123</sup> and "despite the continuing failure of local authorities to implement the necessary changes",<sup>124</sup> central governments of both political persuasions consistently refused to legislate on the matter.<sup>125</sup> It is a matter "on

---

<sup>121</sup> J. Rex and R. Moore, *Race, Community and Conflict* (Oxford, OUP, 1967); W.W. Daniel, *Racial Discrimination in England* (Harmondsworth, Penguin, 1968).

<sup>122</sup> A 1983 study for the housing charity Shelter found that 85 per cent of authorities had residence requirements, based on residence or employment within their area; R. Matthews, *Restrictive Practices: Waiting List Restrictions and Housing Need* (London, Shelter, 1983). More recent research has shown that the highest number of exclusions from the waiting list were because of previous rent arrears (36 per cent of the total). The applicant's personal circumstances (e.g. failing to meet the authority's residence requirements, exceeding the income limit, not being the stipulated minimum age) accounted for 13 per cent of exclusions; S. Butler, *Access Denied* (London, Shelter, 1998) table 3, p.14.

<sup>123</sup> See successive CHAC reports: *Management of Municipal Housing Estates*. Second Report of the Housing Management Sub-Committee (London, HMSO, 1945); *Selection of Tenants and Transfers and Exchanges*. Third Report of the Housing Management Sub-Committee (London, HMSO, 1949); *Residential Qualifications*. Fifth Report of the Housing Management Sub-Committee (London, HMSO, 1955); *Council Housing Purposes, Procedures and Priorities*. Ninth Report of the Housing Management Sub-Committee (London, HMSO, 1969). See also Housing Services Advisory Group, *Allocation of Council Housing* (London, DoE, 1978) chapter 6.

<sup>124</sup> Laffin, 1986, op cit n.54 p.81.

<sup>125</sup> By contrast, the Tenants' Rights Etc. (Scotland) Act 1980, s.26 imposed more rigorous restrictions on councils, forbidding much discrimination on grounds of age, residence or income (see chapter 4). The provisions have been further extended by the Housing (Scotland) Act 2001, ss.19 and 20. Housing register/waiting list qualifications were effectively abolished for England and Wales by the Homelessness Act 2002 (see chapter 6).

which local feeling runs high”,<sup>126</sup> and Cullingworth claimed that pressure was often exerted on councillors by the local electorate.<sup>127</sup> Although Cullingworth does not provide any evidence to substantiate his claim, support for this view can be found as early as 1949.<sup>128</sup> It is for this reason, Cullingworth believed, that the government was reluctant to do anything more than exhort local authorities to take a wider view. Whether this is correct or not, the question of waiting list restrictions does provide a clear example of the generally non-interventionist stance adopted by central government in relation to council housing management issues. The reason for this lack of intervention is explored in this thesis.

As discussed above the statutory provisions, requiring local authorities to give a reasonable preference to certain categories of people, effectively gave local authorities a broad discretion to establish their own allocation criteria, within an overall housing allocation policy. The preceding section has outlined how local authorities have utilised that discretion in establishing their individual allocations schemes. It is now necessary to consider the legal challenges to non-allocation decisions. The purpose of discussing the case law on housing allocations is to determine whether it has provided any further constraint on local authorities’ activities in this sphere. The question of judicial attitudes to council housing applicants is considered only tangentially, in relation to the courts’ willingness to strike down local authorities’ schemes.<sup>129</sup>

## Case Law

Although the scheme of successive Housing Acts has given disappointed applicants no statutory right of appeal against non-allocation decisions,<sup>130</sup> the courts necessarily have the power to intervene by way of judicial review. This is because local authorities must act

---

<sup>126</sup> Cullingworth, 1966, op cit n.74 p.129.

<sup>127</sup> ibid.

<sup>128</sup> “There is at the present time considerable pressure on local authorities in all parts of the country to retain a residential qualification. Resentment is expressed by applicants if they see families coming into the area who, because of their immediate and urgent need, get priority over those who have waited more or less patiently in difficult circumstances for some years”; SHM London Group, ‘The Residential Qualification’ (1949) *The Society of Women Housing Managers, Quarterly Bulletin*, April, II, 13, p.9.

<sup>129</sup> For a thought-provoking discussion of judicial discretion see D. Robertson, *Judicial Discretion in the House of Lords* (Oxford, Clarendon, 1998).

<sup>130</sup> This position has changed in relation to challenges to homelessness decisions under the Housing Act 1996, s.204. The position regarding non-homelessness decisions remains unchanged.

within the general principles of public law in their decision-making. In *R v Canterbury City Council, ex parte Gillespie*,<sup>131</sup> Simon Brown J stated that “It is plain beyond argument that decisions by a local authority in the exercise of their statutory powers are reviewable by the courts on accepted principles of judicial review.”<sup>132</sup> In *R v London Borough of Newham, ex parte Watkins*,<sup>133</sup> Sir Louis Blom-Cooper QC, sitting as a deputy High Court judge, explained that this route of review was possible because local authorities’ responsibilities<sup>134</sup> could not be divorced from their general public law functions “which demand that a local authority takes into account all relevant factors and discards all irrelevant factors.”<sup>135</sup>

Before proceeding to discuss the cases, it is useful to summarise the scope and limitations of judicial review.<sup>136</sup> The first point to note is the distinction between review and appeal, emphasised by Lord Greene in the ‘classic’ judicial review case, *Associated Provincial Picture Houses v Wednesbury Corporation*:

The power of the court to interfere … is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.<sup>137</sup>

Consequently, one important limit to the scope of judicial review is its emphasis on procedure rather than substance, and its inability to review the merits of a case. A further limit to judicial review is the requirement that an application can only be made with

---

<sup>131</sup> (1987) 19 HLR 7.

<sup>132</sup> *ibid* 20.

<sup>133</sup> (1993) 26 HLR 434.

<sup>134</sup> Contained in s.22 of the Housing Act 1985 under which this case was decided.

<sup>135</sup> (1993) 26 HLR 434, 450.

<sup>136</sup> “Judicial review is the exercise of an ancient and inherent supervisory jurisdiction of the Queen’s Bench Division of the High Court, by which excess or abuse of public power may be restrained or remedied”; Turpin, 1995, *op cit* n.91 p.474.

<sup>137</sup> [1948] 1 KB 223, 234. See also Lord Hailsham of St Marylebone in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, 1160; “the purpose of the remedies [in judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

leave.<sup>138</sup> The justification for requiring leave to be sought is to provide a safeguard against unmeritorious challenges.<sup>139</sup> It could be argued that the grounds of review themselves also constitute an effective limit. They have been summarised by Lord Diplock in *Council of Civil Services Unions (CCSU) v Minister for the Civil Service* as follows:

Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.<sup>140</sup>

The heading of illegality can itself be further sub-divided into four; improper purpose, irrelevant considerations, unlawful delegation and fettering discretion. The examination of the case law below shows that this latter ground of review (fettering discretion) has been the most important in challenging housing non-allocation decisions. Irrationality is the modern expression of Lord Greene MR's formulation in *Wednesbury* of what constituted 'unreasonableness' in public law terms; "if a decision ... is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."<sup>141</sup> This definition demonstrates the extremely wide margin of discretion afforded to public authorities by the courts under this head of review, and consequently the difficulty applicants are likely to encounter in establishing a successful challenge on this ground. This point is illustrated by the case of *Cannock Chase District Council v Kelly*,<sup>142</sup> discussed below. More recently, the courts have considered whether a test of proportionality should replace, or co-exist with, the traditional '*Wednesbury unreasonableness*' test. The principle of proportionality is found in both European Community law and the jurisprudence of the European Court of Human Rights. Indeed,

<sup>138</sup> The applicant must show sufficient interest and an arguable case; Turpin, 1995, op cit n.91 p.506. In most cases, a challenge to a non-allocation decision will be made by the applicant. However, in *R v Port Talbot BC, ex parte Jones* (1988) 20 HLR 265, the challenge was made by the leader of the council. It was considered that he had sufficient interest to entitle him to intervene in a case of irregularity by his own local authority; Hughes and Lowe, 2000, op cit n.41 p.114.

<sup>139</sup> Turpin, 1995, op cit n.91 pp.505-6.

<sup>140</sup> [1985] AC 374, 410.

<sup>141</sup> [1948] 1 KB 223, 230. In *CCSU*, Lord Diplock said: "what can now be succinctly referred to as '*Wednesbury unreasonableness*' ... applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"; [1985] AC 374, 410.

<sup>142</sup> [1978] 1 All ER 152

Lord Diplock envisaged the possible adoption of a test of proportionality in the *CCSU* case.<sup>143</sup> Dicta in *R v Criminal Injuries Compensation Board ex parte Alconbury*<sup>144</sup> and *McLellan v Bracknell Forest Borough Council and Reigate and Banstead Borough Council v Benfield and Forrest*<sup>145</sup> have addressed this issue. However, both Lord Slynn in *Alconbury* and Waller LJ in *McLellan* were adamant that the principle does not go as far as to provide for a complete rehearing on the merits of the decision. Similarly, in *R (Daly) v Secretary of State for the Home Department*<sup>146</sup> their Lordships were at pains to emphasise that the proportionality doctrine and the appeal-review distinction can co-exist.<sup>147</sup>

While this thesis is concerned specifically with housing allocations, it is instructive first to recapitulate briefly the challenges to local authorities' general powers of housing management, as these cases have contributed to the courts' public housing jurisprudence. The chapter then proceeds to consider judicial definitions of key legislative terms, as well as to outline the judicial constraints imposed on local authorities' broad discretion under the legislation.

### ***General management***

It is generally acknowledged that during the period from 1945 to 1970 the courts appeared to be reluctant to interfere with the broad discretionary powers granted to local authorities to manage their housing stock. However, the first indication of the courts' approach to the local authorities' landlord role is evident in the earlier case of *Leeds Corporation v Jenkinson*.<sup>148</sup> The Court of Appeal decided that the local authority was entitled to serve a notice to quit on a tenant who refused to pay the amount of rent that the Corporation had determined.<sup>149</sup> The Master of the Rolls believed that the general powers of management vested in the local authority,<sup>150</sup> provided that they were not exercised improperly,<sup>151</sup> gave the local authority "a certain discretion".<sup>152</sup>

---

<sup>143</sup> [1985] AC 374, 410.

<sup>144</sup> [1999] 2 AC 330.

<sup>145</sup> [2001] EWCA Civ 1510, (2001) 33 HLR 86.

<sup>146</sup> [2001] 2 WLR 1622.

<sup>147</sup> M. Elliott, 'Human Rights Review: Raising the Standard' (2001) *Cambridge Law Journal* 455-458, p.457. I am grateful to Dr Ed Bates for drawing this case to my attention.

<sup>148</sup> [1935] KB 168, decided under the Housing Act 1924.

<sup>149</sup> The defendant argued that the Corporation was requiring him to pay a rent in excess of the rent which it was lawfully entitled to charge under the Housing Act 1924.

<sup>150</sup> Under s.67 of the consolidating Housing Act 1925.

<sup>151</sup> "In the sense that they are for a collateral or alien purpose"; [1935] KB 168, 177, Lord Hanworth MR.

<sup>152</sup> [1935] KB 168, 177.

*Jenkinson* was followed more than ten years later by *Shelley v LCC*,<sup>153</sup> the case that is generally thought to lay the foundations for the courts' non-interventionist stance towards local authorities. This case questioned whether the local authority had the power to claim possession of two of its properties. It was found that, for the purposes of the exercise of its statutorily granted powers of general management, regulation and control, the council should have the right to oust the tenants. Lord du Parcq was "willing to concede that Parliament may have intended to give great and almost unique powers as landlords to local authorities performing their statutory duties under the Housing Acts ...". This was because they could be trusted to exercise their powers in a public-spirited and fair way in the general public interest.<sup>154</sup> Partington has observed that the assumption that local authorities will be 'model' landlords has underlain the provision of public housing.<sup>155</sup> In the same case, Lord Porter said that it was "... one of the important duties of management that the local body should be able to pick and choose their tenants at their will."<sup>156</sup>

*Shelley* set the tone for the courts' approach, and was followed five years later in *Jenkins v Paddington Borough Council*.<sup>157</sup> In *Jenkins*, the court upheld on appeal the right of the council to evict a tenant, on the ground that the tenancy was not, according to the council, "in all respects satisfactory", without the council having to justify that claim. This was because the council's decision came within its general powers of management and it was the council's duty to "get rid of an unsuitable tenant."<sup>158</sup> More than twenty years later, the Court of Appeal decision in *Bristol District Council v Clark*<sup>159</sup> demonstrates the same non-interventionist policy towards councils' landlord role. In Lawton LJ's judgment in *Clark*, "... this court should be most reluctant to interfere with the exercise of Housing Act powers by a local authority."<sup>160</sup> Subsequently in *Cannock Chase District Council v Kelly*,<sup>161</sup> Megaw LJ, quoting Lord Greene MR's judgment in the *Wednesbury* case, reiterated the standard that a tenant, or would-be tenant, must achieve before the courts would interfere: "... if a decision ... is so unreasonable that no reasonable authority could

---

<sup>153</sup> [1949] AC 56.

<sup>154</sup> *ibid* 71.

<sup>155</sup> "Behind the notion of 'model' landlordism is the idea that the local authorities will behave towards their tenants in a benevolent, even paternalistic way"; Partington, 1980, *op cit* n.63 p.21.

<sup>156</sup> [1949] AC 56, 66.

<sup>157</sup> [1954] *Journal of Planning and Property Law* 510.

<sup>158</sup> *ibid* 511.

<sup>159</sup> [1975] 3 All ER 976

<sup>160</sup> *ibid* 981.

<sup>161</sup> [1978] 1 All ER 152

ever have come to it, then the courts can interfere.”<sup>162</sup> In *Kelly*, the Court of Appeal held that it could not interfere with a decision by the local authority to evict a mother of five children, who was not in rent arrears and who was described as a ‘good tenant’, and not to give reasons for its decision. The case illustrated that the courts’ interpretation of unreasonableness, in the public law sense, placed an impossibly high burden on tenants seeking to challenge the local authority’s decision.<sup>163</sup>

### *Allocations*

The cases outlined above indicate that the courts have traditionally been willing to accord local authorities a generous degree of discretion in the exercise of their general management powers. It is now necessary to consider the cases dealing specifically with the issue of allocation to determine first how the courts have interpreted the relevant legislative terms and, secondly, to what extent the courts’ application of general public law principles has constrained local authorities’ discretion.

The first issue to consider is the interpretation placed by the courts on the phrase, ‘reasonable preference’. In *Jenkinson*, Lord Hanworth MR pointed out that the legislation provided no indication of how the preference was to be given.<sup>164</sup> In *R v London Borough of Newham, ex parte Watkins*,<sup>165</sup> Sir Louis Blom-Cooper QC concluded that a reasonable preference must entail some form of preferred treatment. “To inflate the unpreferred to a highly preferred status is entirely outwith the statutory function. To deflate the preferred might be ‘reasonable’, so long as there was some degree of preferential treatment.”<sup>166</sup> In *R v London Borough of Lambeth, ex parte Njomo*,<sup>167</sup> Sedley J said that the local authority “must not ... eclipse or distort the priority which section 22 accords.”<sup>168</sup> However, a reasonable preference “implies the power to choose between different applicants on ‘reasonable grounds’.”<sup>169</sup> More controversially, Carnwath J in *R v London Borough of*

<sup>162</sup> *ibid* 157.

<sup>163</sup> *Liverpool City Council v Irwin* [1976] 2 All ER 39 provides an albeit limited constraint on local authorities’ ability to determine the contents of tenancy agreements.

<sup>164</sup> [1935] KB 168, 176. A criticism also made during the Housing Act 1924 parliamentary debates; see above and chapter 3.

<sup>165</sup> (1993) 26 HLR 434.

<sup>166</sup> *ibid* 450.

<sup>167</sup> (1996) 28 HLR 737.

<sup>168</sup> *ibid* 742. This explanation reflects that of the code of guidance on Parts VI and VII of the Housing Act 1996; see above.

<sup>169</sup> *R v London Borough of Newham, ex parte Miah* (1995) 28 HLR 279, 288, Carnwath J.

*Newham, ex parte Miah* believed that it was not unreasonable “to prefer good tenants to bad tenants.”<sup>170</sup> This comment was made in relation to the question of whether there existed any statutory prohibition on including the ability to pay the rent as an allocation factor; this point is discussed in more detail below.

*R v Wolverhampton Metropolitan Borough Council, ex parte Watters*<sup>171</sup> provides an illustration of the flexibility of the term, ‘reasonable preference’. In *Watters*, the Court of Appeal was required to decide whether the local authority could refuse an applicant entry to the waiting list because of outstanding rent arrears from previous council tenancies, despite the fact that the appellant and her family fell within three of the reasonable preference categories.<sup>172</sup> The appellant argued that the local authority’s policy was unlawful because she was in fact accorded no preference at all; since Parliament had required a reasonable preference to be given, it was not reasonable for a local authority to grant no preference at all. The Court of Appeal dismissed the appeal. In its judgment, if section 22 simply required ‘preference’ to be given, then the appellant’s argument would be correct.<sup>173</sup> However, it required ‘reasonable preference’, and that phrase envisaged that other factors might weigh against, and so diminish and even nullify, the preference.<sup>174</sup> The local authority had a duty to have regard to the financial consequences of its action and to the need to balance its housing revenue account.<sup>175</sup>

Section 22 required that positive favour should be shown to applications that satisfy any of the relevant criteria:

---

<sup>170</sup> *ibid.*

<sup>171</sup> (1997) 29 HLR 931.

<sup>172</sup> Then contained in Housing Act 1985, s.22. The categories that applied to the appellant were: (a) persons occupying insanitary or overcrowded houses, (b) persons having large families and (c) persons living under unsatisfactory housing conditions.

<sup>173</sup> During the Housing Act 1924 parliamentary debates, an amendment was proposed which would have omitted the word ‘reasonable’ from the phrase. The argument was that the word ‘reasonable’ gave local authorities too much discretion: “If the word “reasonable” is allowed to pass this Committee, any local authority that does not wish to give preference to large families has a large loophole through which to escape its obligations. If the word “reasonable” is in, I think it will be impossible to interpret it, and it depends on the local committee as to what their interpretation of the word “reasonable” will be. If the word is left out, a preference must be given, and that surely is what we want”; HC Debs, Vol. 176, cols.732-3, 17 July 1924, Lieut. Commander Joseph Kenworthy.

<sup>174</sup> The Court considered that if Sedley J in *Njomo* had meant that the statutory preference cannot be outweighed by other relevant considerations, then he was wrong.

<sup>175</sup> (1997) 29 HLR 931, 936 Leggatt LJ.

To use colloquial language they should be given a reasonable head start. Thereafter all the remaining factors fall to be considered in the balancing exercise inevitably required when each individual application is under consideration. If despite the head start the housing authority eventually decides on reasonable grounds that the application for a tenancy must be rejected this will not constitute a breach of the obligations imposed by section 22.<sup>176</sup>

It should be noted that had the council's policy been to exclude from the waiting list any applicant with previous rent arrears, regardless of their circumstances, then it is likely that the policy would have been found to be unlawful on the ground of fettered discretion. This point is discussed in more detail below.

The term 'additional preference' was first introduced in the 1996 Act and has been re-enacted in the current Homelessness Act 2002.<sup>177</sup> The term is not statutorily defined. However, the accompanying code of guidance advises that the provision does not require authorities to allocate the first available property of any sort in such cases, but it assumed that people meeting this description would have first call on suitable vacancies.<sup>178</sup> Its meaning was considered in *R (L & D) v London Borough of Lambeth*<sup>179</sup> by Sir Christopher Bellamy. Building on the interpretation in *Watters*, he believed that additional preference meant that the applicants in question must be given, at the least, additional weight or an extra head start.<sup>180</sup> This meaning appears to accord with academic opinion that the phrase is meant to ensure that those to whom it applies are prioritised over the other reasonable preference categories.<sup>181</sup>

---

<sup>176</sup> *ibid* Judge LJ. The court was satisfied, on the facts, that the local authority's internal appeals panel had not felt its power, to treat the appellant's circumstances as exceptional, to be so circumscribed by the policy concerning rent arrears that it could not afford her a reasonable preference. Furthermore, the court found that the local authority had conducted the balancing exercise fairly.

<sup>177</sup> Homelessness Act 2002, s.16(3) replaces Housing Act 1996, s.167(2).

<sup>178</sup> Department of the Environment/Department of Health, *Code of Guidance on Parts VI and VII of the Housing Act 1996* (London, DoE, 1996) para.5.10. The current draft code does not provide any clarification as to its meaning; DTLR, May 2002, op cit n.118, para.513.

<sup>179</sup> [2001] EWHC Admin 900; [2001] WL 1251852.

<sup>180</sup> [2001] WL 1251852, para.62.

<sup>181</sup> D. Hughes, M. Davis, V. Matthew and N. Smith, *Cases and Materials on Housing Law* (London, Blackstone, 2000) p.205.

The second issue to consider is judicial interpretation of the categories of applicant to whom a reasonable preference must be given. These categories have been described judicially in *Watkins* as “elastic linguistically, such that any precise definition is not feasible.” Because of this “any interpretation of the provisions … call for an ample margin of variation from some norm of housing in a civilised society and an appreciation of the local conditions. They import also factors which are derivative of social services rather than strictly housing policies.”<sup>182</sup>

It has been noted above that local authorities may lawfully adopt allocations policies provided that they comply with the legislative requirements contained in the Housing Acts and the general principles of public law. Many of the challenges to non-allocation decisions have been brought on the ground that the local authority’s policy is too rigid and effectively constitutes a set of rules that exclude consideration of individual cases. In public law terms this amounts to the fettering of a local authority’s discretion and is consequently illegal.<sup>183</sup> In *R v London Borough of Islington, ex parte Aldabbagh*<sup>184</sup> the council’s policy of not allowing transfers if there were rent arrears was successfully challenged because it was stated in the form of a rule that allowed no exceptions.<sup>185</sup> *Aldabbagh* provides an interesting contrast to *Watters*, and both cases demonstrate the limitations of judicial review from the applicant’s point of view. The question at issue was not the lawfulness of a policy that discriminated against applicants with rent arrears (in both cases it was acknowledged that it is lawful for local authorities to do so), but rather whether the policy was operated as a rule.<sup>186</sup>

In addition to the requirement that local authorities do not fetter their discretion, it has been established through case law that policies must be operated fairly and that councils must

---

<sup>182</sup> *R v London Borough of Newham, ex parte Watkins* (1993) 26 HLR 434, 448, Sir Louis Blom-Cooper QC.

<sup>183</sup> This point is well illustrated by *R v Canterbury City Council, ex parte Gillespie* (1987) 19 HLR 7.

<sup>184</sup> (1994) 27 HLR 271.

<sup>185</sup> In this case the applicant’s overriding medical transfer status.

<sup>186</sup> See also *R v Westminster County Council, ex parte Nadhun Hussain* (Legal Action, January 1999, p.26). The council’s policy excluded applicants from the housing register for a period of two years if they refused an offer of accommodation. The council suspended the applicant from the register, following his refusal of a bedsit, and upheld that decision on internal review. Turner J quashed the decision on the ground that the mandatory suspension for an irreducible two years was an unlawful fetter on its discretion. *R v Gateshead Metropolitan Borough Council, ex parte Lauder* (1997) 29 HLR 360 reached a similar result in regard to the authority’s rule that overcrowding points were withheld for 12 months where a person moved into an overcrowded property.

exclude irrelevant considerations.<sup>187</sup> A number of cases have also succeeded on the basis that the local authority's scheme does not comply with the statutorily imposed obligations. For example in *R v London Borough of Lambeth, ex parte Ashley*,<sup>188</sup> the local authority's published allocation scheme provided that the condition of the tenant's existing property would not be taken into consideration except under the recommendation of the principal medical officer or an environmental health officer. The court held that the legislation clearly envisaged that the condition of the premises should be an important factor in making any allocation decision. Since the local authority's scheme substantially excluded such considerations, it unduly restricted the scope of the authority's power in a way that was inconsistent with the legislative criteria.<sup>189</sup> Similar results were achieved in *R v Islington Borough Council, ex parte Reilly and Mannix*<sup>190</sup> and *R v Westminster City Council, ex parte Al-Khorsan*.<sup>191</sup>

A recent case has provided an initial assessment of the legality of the banding or grouping schemes that were described above. In *R (L & D) v London Borough of Lambeth*, Sir Christopher Bellamy accepted that an allocations scheme based on broad categories was not inherently unlawful. He also accepted that allotting quotas to the various categories might be an appropriate method of securing the statutory reasonable and additional preference. However, he cautioned that a system that is only indirectly related to the statutory categories runs the risk that people in one or other of the categories "will somehow slip through the net and not receive the preference to which the statute entitles them".<sup>192</sup> Lambeth's published allocation scheme was declared unlawful because it failed to make adequate provision for applicants with additional preference.

The notion of 'composite assessments' has provided a further basis for challenge,<sup>193</sup> essentially that local authorities' allocations schemes fail to give sufficient weight to multiple housing needs. In *Reilly and Mannix*, Richards J held that Islington Borough

---

<sup>187</sup> This requirement is illustrated by the case of *R v Port Talbot Borough Council, ex parte Jones* (1988) 20 HLR 265.

<sup>188</sup> (1997) 29 HLR 385. The case was decided under Housing Act 1985, s.22.

<sup>189</sup> The local authority's policy on overcrowding was also found to be illogical and irrational in the *Wednesbury* sense.

<sup>190</sup> (1999) 31 HLR 651.

<sup>191</sup> *Legal Action*, February 2000.

<sup>192</sup> [2001] WL 1251852, para.68.

<sup>193</sup> C. Hunter, 'Allocating Housing – Reasonable Preference and Composite Assessments' (2001) *Journal of Housing Law*, 2, 17-20.

Council's scheme was not capable of producing a fair assessment of applicants' respective needs because it made only a very limited allowance for multiple categories of need, and no allowance at all for the number of persons within the applicant's household who are affected by a particular category of need.<sup>194</sup> The concept of composite assessment was again used successfully in *R v Tower Hamlets London Borough Council, ex parte Uddin*<sup>195</sup> and *R (L & D) v London Borough of Lambeth* to challenge the local authorities' schemes. It has been argued that allocations policies that fail to make proper composite assessments are liable to be struck down on the basis that they are irrational and/or fail to take into account relevant considerations.<sup>196</sup> The current draft guidance stresses the necessity for allocations schemes to provide "a clear mechanism for assessing and giving greater priority to those with a multiplicity of needs."<sup>197</sup>

It has been argued that the courts, in recent years, have been surprisingly active in their willingness to consider and, indeed, strike down local authorities' allocation schemes.<sup>198</sup> However, it is also clear that the courts regard themselves as undertaking a difficult balancing act, between the interests of the applicant and those of the local authority, in deciding whether a local authority's scheme falls foul of its public law duties. In *Watkins*, the judge, Sir Louis Blom-Cooper, went to some length to acknowledge the local authority's efforts at achieving a fair allocation of scarce resources in difficult circumstances.<sup>199</sup> He also explicitly recognised the courts' general reluctance to interfere with the exercise of Housing Acts powers by local authorities, on the grounds that Parliament has entrusted those powers to local authorities and because local authorities have to justify their actions to their local electorate.<sup>200</sup>

While tacitly acknowledging the local authority's failure fully to implement the statutory provisions, he nevertheless declined to rule that the authority's letting policy was unlawful.<sup>201</sup> His reasoning is based on the need to relate the local authority's housing duties to "the wider and multifarious responsibilities imposed on local authorities in areas

---

<sup>194</sup> (1999) 31 HLR 651.

<sup>195</sup> (1999) 32 HLR 391.

<sup>196</sup> Hunter, 2001, op cit n.193 p.19.

<sup>197</sup> DTLR, May 2002, op cit n.118 para.5.18.

<sup>198</sup> Hunter, 2001, op cit n.193 p.20.

<sup>199</sup> (1993) 26 HLR 434, 436.

<sup>200</sup> ibid 447. See also in this context Robertson, 1998, op cit n.129.

<sup>201</sup> ibid 451-2.

of local government.<sup>202</sup> The consequence is that where “non-compliance is heavily mitigated by the infection of other, competing powers and duties, the court may properly relegate the elements of non-compliance to an inferior role.”<sup>203</sup> *Watkins* is the clearest, modern expression of the courts’ protestations that the allocation of scarce resources is a political, rather than judicial, matter.<sup>204</sup>

It could be argued that the courts, through their unwillingness to interfere with the local authorities’ exercise of discretion, were respecting the broadly drafted legislation and effectively supporting the consensual relationship that existed between central government and the local authorities. On the other hand, it has been argued that the courts have consistently cast council house tenants as the recipients of a ‘privilege’, rather than a legal right.<sup>205</sup>

## Local Government Ombudsman

An application for judicial review is the only direct challenge available to disappointed council housing applicants. However, an indirect route of complaint is available via the Commission for Local Administration. Since 1974, members of the public who believe that they have suffered injustice as a consequence of maladministration by, among other bodies, local authorities, can apply to have their case investigated by a Local Government Ombudsman (LGO).<sup>206</sup> A recent LGO report indicates that, as in previous years, housing departments attracted the largest number of complaints.<sup>207</sup> This section briefly outlines the scope and limitations of the LGO, before proceeding to discuss relevant cases.

---

<sup>202</sup> *ibid* 451.

<sup>203</sup> *ibid*.

<sup>204</sup> For a more recent judicial expression of the desirability of resource allocation being decided politically, rather than judicially, see *Southwark London Borough Council v Mills* [1999] 3 WLR 939, 944. Lord Hoffmann and 961, Lord Millett.

<sup>205</sup> However, Loveland argues that while it is tempting to analyse statutory laxity and judicial non-intervention in terms of the ‘right/privilege’ dichotomy, “this analysis is superficially plausible, but it pays insufficient attention to contextual factors”; Loveland, 1995, *op cit* n.45 pp.19-20.

<sup>206</sup> Local Government Act 1974, s.26(1).

<sup>207</sup> There were 5945 complaints in 1998-99, representing 37 per cent of the total number of complaints; M. Seneviratne, ‘The Local Government Ombudsman Annual Report 1998-99’ (2000) *Journal of Social Welfare and Family Law*, 22 (2), 209-217, p.211.

The LGO is not authorised to question the merits of a local authority's decision in the absence of a finding of maladministration.<sup>208</sup> The term maladministration is therefore of central importance, but it is not statutorily defined. It has been described as "an elusive concept",<sup>209</sup> which extends beyond cases of illegality (such as fettering discretion) to encompass procedural aspects of administrative decision-making, as well as more general cases of bad practice.<sup>210</sup>

In the past, the Commission itself has expressed dissatisfaction with the term.<sup>211</sup> The term has also been considered judicially in *R v Local Commissioner for Administration for the North and East Area of England, ex parte Bradford Metropolitan City Council* in which Lord Denning MR emphasised the procedural aspect of decision-making, rather than its substance.<sup>212</sup> The LGO is not permitted to conduct an investigation where the individual has (or had) a right of appeal, either to a tribunal or the courts.<sup>213</sup> However, this limitation is subject to the proviso that the LGO may nevertheless conduct an investigation under such circumstances where it was not reasonable, in the circumstances, for the person to have pursued the other remedies available.<sup>214</sup>

The limitations of the LGO's enforcement powers may be perceived as a weakness of this route of complaint. If a report of maladministration is sent to a local authority by the LGO, the local authority is not obliged to implement its recommendations, although the authority must report to the LGO any action it has taken or will take. If no such report is received, then the LGO may issue a second, or further, report, indicating what would be an appropriate response.<sup>215</sup> This lack of direct enforcement capability has led to the accusation that "the British concept of Ombudsman is one of a 'paper tiger', so that the

---

<sup>208</sup> Local Government Act 1974, s.34(3).

<sup>209</sup> Hughes and Lowe, 2000, op cit n.41 p.190.

<sup>210</sup> *ibid*. The authors give the following examples of maladministration; "instances of excessive delay in dealing with matters, biased or hearsay influenced decision-making, victimisation or oppression of those subject to administrative powers, bad or non-existent procedures, making misleading statements about policy or practice, breaking promises, failing to respond to justifiable complaints, imposing harsh requirements on applicants for housing, and generally behaving in an inappropriate and heavy handed way"; *ibid*.

<sup>211</sup> Commission for Local Administration, *Annual Report of the Commission for Local Administration for the year ended March 31, 1978*, p.24.

<sup>212</sup> [1979] 2 WLR 1, 20.

<sup>213</sup> Local Government Act 1974, s.26(6).

<sup>214</sup> "For example, because the cost of pursuing a remedy in the High Court would be prohibitively high"; Hughes and Lowe, 2000, op cit n.41 p.192.

<sup>215</sup> *ibid* p.193.

institution has little impact.<sup>216</sup> However, this may not accurately reflect the true impact of the LGO. Between 1990/1 and 1996/7, a total of 2,078 reports finding injustice caused by maladministration was issued.<sup>217</sup> Only 131 further reports were issued during this period, suggesting that “most cases where maladministration causing injustice was found were remedied satisfactorily.”<sup>218</sup> The latest report, shows that 459 formal reports were issued and no further reports.<sup>219</sup> Where no satisfactory response to a further report is made, the local authority is obliged to issue public statements concerning the LGO’s recommendations.<sup>220</sup>

The tentative conclusion in the literature is that although the LGO appears to be quite effective in securing redress for some grievances, the procedure that has been adopted acts as a sieve through which only a certain number and type of complaints pass. The procedure for gaining redress for maladministration has been described as, “tortuous, far from certain and places a heavy burden of proof on the complainant, who is, even at the end, not guaranteed that he will receive redress.”<sup>221</sup> Furthermore, public awareness of the LGO and the services it provides remains low, particularly in ‘disadvantaged’ areas.<sup>222</sup>

In common with the judicial review cases, many of the cases on housing allocation investigated by the LGO are founded on the claim that the local authority has fettered its discretion, through the adoption and implementation of rigid rules which exclude certain categories of applicant from even being considered for council housing.<sup>223</sup> One case,<sup>224</sup> however, illustrates the additional requirement that complainants to the LGO must not only demonstrate maladministration, but must also have sustained injustice as a consequence.<sup>225</sup> The local authority imposed a five year residential requirement before an offer of housing

---

<sup>216</sup> C. Chinkin, *Local Authority Response to the Local Ombudsman* (1979) *Journal of Planning and Environment Law*, 441-448, p.441.

<sup>217</sup> This figure includes, but is not limited to, housing cases.

<sup>218</sup> Hughes and Lowe, 2000, op cit n.41 p.193.

<sup>219</sup> Seneviratne, 2000, op cit n.207 p.210.

<sup>220</sup> Local Government and Housing Act 1989, s.26.

<sup>221</sup> D.J. Hughes and S.R. Jones, ‘Bias in the Allocation and Transfer of Local Authority Housing: A Study of the Reports of the Commission for Local Administration in England’ (1979) *Journal of Social Welfare Law*, 273-295, p.293.

<sup>222</sup> Hughes and Lowe, 2000, op cit n.41 p.194. A MORI poll conducted in 1995 found that only 47 per cent of respondents had heard of the LGO service; Seneviratne, 2000, op cit n.207 p.214.

<sup>223</sup> See for example, Commission for Local Administration, *Digest of Cases 1996*. Report 93/B/4060; *Legal Action*, June 1992, Report 91/B/0832 and Report 91/C/0403.

<sup>224</sup> Commission for Local Administration, *Digest of Cases 1997*. Report 95/B/3262.

<sup>225</sup> Local Government Act 1974, s.26(1).

could be made. The LGO found that the five year policy was operated as an iron rule, which consequently fettered the local authority's discretion and amounted to maladministration. However, the LGO concluded that no injustice was caused because lettings of the type of accommodation required by the complainant were rare. The LGO did not believe that the complainant would reasonably have been housed before other applicants who had been housed while her application was precluded from being considered because of the five year residence qualification. Had the case been decided by judicial review, it is likely that the local authority's decision would have been quashed because it amounted to an unlawful fettering of its discretion.

Successful complaints have also been made on the ground that the local authority's policy is not reflected in practice in everyday decision-making,<sup>226</sup> and that a policy not contained in the published rules<sup>227</sup> is applied in practice by the authority.<sup>228</sup> Another important area, until comparatively recently, was the accusation of bias by individual councillors. Until 1997,<sup>229</sup> there was no statutory prohibition on elected council members making allocations decisions, despite recommendations as early as 1969 that individual allocation decisions should be made by council officers, rather than elected members.<sup>230</sup> A study of the reports of the Commission for Local Administration, undertaken in the late 1970s,<sup>231</sup> found that "bias is likely to creep in where Council members are concerned in the application."<sup>232</sup>

## Effect of Discretion

It has been seen that in more recent years the courts have displayed greater willingness to intervene in certain cases and strike down a number of local authorities' housing allocations schemes. Nevertheless, it is submitted that judicial review has only a limited impact on local authorities' discretion in this sphere. The limitations of judicial review

<sup>226</sup> See for example, *Legal Action*, June 1992, Report 90/C/1417; Commission for Local Administration, *Digest of Cases 1996*, Report 94/A/4778.

<sup>227</sup> Housing Act 1996, s.168(1) obliges local authorities to publish summaries of their allocation schemes and supply a copy, free of charge, to any member of the public who requests one. This provision is unaffected by the Homelessness Act 2002.

<sup>228</sup> *Legal Action*, June 1992, Report 90/B/1297.

<sup>229</sup> The Allocation of Housing (Procedure) Regulations 1997 (SI 1997 No. 483), which came into force on 1 April 1997.

<sup>230</sup> CHAC, 1969, op cit n.123 para.122. See also the Maud Committee report; J.P.R. Maud, *Report of the Committee on the Management of Local Government* (London, HMSO, 1967).

<sup>231</sup> Hughes and Jones, 1979, op cit n.221.

<sup>232</sup> ibid p.293.

itself as a route of challenge were outlined above but it should also be borne in mind that the vast majority of non-allocation decisions are not subjected to judicial review. Furthermore, recent research has demonstrated the limited ‘hortatory’ effect of judicial review on local authorities’ decision-making.<sup>233</sup>

The practical effect of the statutory scheme, and its judicial interpretation, is that local authorities have been virtually free from central government control to decide who should become local authority tenants and receive housing subsidised by the Exchequer. The twin questions of whether the almost complete discretion enjoyed by local authorities in this area has changed and the explanations for the change (or lack of it) are examined throughout the subsequent chapters. At this early stage of the thesis, it is useful to posit a number of tentative explanations for the lack of central intervention in local authority autonomy since, as Loveland observes, this might be considered strange in view of its (former) role as a primary housing provider.<sup>234</sup>

It is possible that central government did not want to take direct control over management issues because it did not want to become involved in individual cases. A parallel can be drawn with the creation of the insurance officer under the National Insurance Act 1911.<sup>235</sup> While the central government department, the Board of Trade, assumed overall responsibility for administering the new unemployment insurance scheme, insurance officers were responsible for determining individual claims for benefit.<sup>236</sup> The rationale for such an arrangement was largely to insulate the Minister from day-to-day responsibility for decisions on the allocation of scarce resources.<sup>237</sup> ‘This was achieved by making local insurance officers independent statutory bodies.’<sup>238</sup> However, it could be argued that the insurance officer’s independent statutory status was largely illusory, since s/he remained a civil servant ‘and thus took on a complex dual-role.’<sup>239</sup> The extent of local authorities’ ‘independence’ from central government in respect of housing allocation, and whether this independence is also illusory, is explored throughout this thesis.

---

<sup>233</sup> S. Halliday, ‘The Influence of Judicial Review on Bureaucratic Decision-Making’ (2000) *Public Law* 110-122.

<sup>234</sup> Loveland, 1995, op cit n.45 pp.8-9.

<sup>235</sup> National Insurance Act 1911, s.89.

<sup>236</sup> J. Baldwin, N. Wikeley and R. Young, *Judging Social Security* (Oxford, Clarendon, 1992) p.26.

<sup>237</sup> *ibid* pp.26-7. I am grateful to Professor Nick Wikeley for drawing this comparison to my attention.

<sup>238</sup> *ibid* p.27.

<sup>239</sup> *ibid*.

It is also feasible that the initial lack of attention on housing management can be attributed to the fact that during the 1920s, council housing was oriented towards the better off working class households, who were not perceived to present a management problem. It was not until after 1930 when council housing was directed at slum clearance, and consequently at poorer households, that local authorities were “increasingly forced to confront the problems of reconciling prudent estate management with local social policy.”<sup>240</sup> The new emphasis on housing ‘unsatisfactory families’ led to concern about how management services should be provided. Even then the government preferred to restrict itself to proffering advice largely through advisory bodies; the government housing advisory body, CHAC, was established in 1935.<sup>241</sup> Indeed, the generally non-interventionist stance adopted by central government is demonstrated by the marked reluctance of successive post-World War II governments to give statutory effect to the recommendations made by CHAC in relation to various housing management issues, and specifically those relating to allocation.<sup>242</sup>

It is also entirely possible that no particular thought was given to the allocation of responsibility between central and local government; the emphasis after World War I being heavily on the provision of houses, rather than their management.<sup>243</sup> Thereafter, the relationship between the centre and the localities in housing developed in an unstructured way, and “[t]he initial reluctance of the state to intervene in the housing market or in the day-to-day management of the public housing service was complemented by the desire for autonomy on the part of the local authorities.”<sup>244</sup>

---

<sup>240</sup> Kemp and Williams, 1991, op cit n.3 p.129.

<sup>241</sup> CHAC was established by the Housing Act 1935, s.24(1). Its purpose was to advise the Minister on matters referred to it by him, as well as having a more general remit to raise matters of general concern. Concern was expressed in Parliament that the Committee would be ineffectual and only advice that coincided with the official view would be welcomed; HC Debs, Vol. 297, col.588, 31 January 1935, Sir J. Walker-Smith. It appears that the formation of the Committee was a sop to those calling for a body with much wider powers. A committee chaired by Lord Moyne received evidence from a number of individuals (including Sir Raymond Unwin, supported by Lord Balfour of Burleigh) advocating a national housing body which would replace both local authorities and private enterprise as housing providers; Report of the Departmental Committee on Housing. Cmnd. 4397 (London, HMSO, 1933) para. 107. Lord Balfour was a vocal advocate of a national housing body; see the motion on housing introduced by him: HL Debs, Vol. 93, col.699, 18 July 1934.

<sup>242</sup> CHAC, 1969, op cit n.123.

<sup>243</sup> “Councils became public landlords without commitment, plan or forethought. They intended only to provide housing and put little effort into how they would run it”; Power, 1987, op cit n.3 p.66.

<sup>244</sup> D. Fox, ‘Central Control and Local Capacity in the Housing Field’ in K. Young (ed.) *National Interests and Local Government* (London, Heinemann, 1983) p.97.

A further explanation for the lack of central intervention in housing allocations was the failure to establish a rights-based approach in relation to public sector housing.

The new property thesis of the 1950s and 1960s, of which Reich was a leading exponent,<sup>245</sup> was more influential in the United States than in Britain.<sup>246</sup> However, by the 1950s, the trends towards 'judicialisation' of the government decision-making process was hastened by the Franks Committee report,<sup>247</sup> following the Crichel Down affair.<sup>248</sup> While the influence of the Franks report<sup>249</sup> was evident in many areas of government activity, decisions relating to the management of council housing had been outside the Committee's terms of reference. "And, although the language of substantive rights and procedural due process had an obvious influence on many areas of public administration in the 1960s, central government declined to introduce legislation tightening local councils' loosely defined housing management powers."<sup>250</sup>

## Housing Allocations and Human Rights

The preceding analysis has focused exclusively on domestic law. A further issue that needs to be tackled briefly is the question of whether European and international human rights law imposes an obligation on the state to provide housing, and the implications for housing allocations in this country. It is not possible in this thesis to do justice to the vast literature on human rights law but a brief exploration of whether there exists a 'right to housing' is provided here.

There are a number of European and international instruments that are potentially relevant; the most obvious being the Human Rights Act 1998. The Act provides that anyone can now bring proceedings in a domestic court against a public authority alleged to have acted

<sup>245</sup> See chapter 2.

<sup>246</sup> Loveland, 1995, op cit n.45 p.14.

<sup>247</sup> Report of the Committee on Administrative Tribunals and Enquiries. Cmnd. 218 (London, HMSO, 1957).

<sup>248</sup> Involving compulsory purchase of land from private owners by the Air Ministry in 1937 and subsequent administrative inefficiency, bias and bad faith on the part of some civil servants; E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*. 12<sup>th</sup> edn. (London, Longman, 1997) pp.123-4.

<sup>249</sup> Franks's recommendation was to maximise openness, fairness and impartiality within the government process.

<sup>250</sup> Loveland, 1995, op cit n.45 p.14. During the mid-1960s, pressure groups such as the Child Poverty Action Group had begun their campaigns for a more 'rights' oriented, less discretion-based, model of social assistance; M. Partington, 'The Restructuring of Social Security Appeal Tribunals: A Personal View' in C. Harlow (ed.), *Public Law and Politics* (London, Sweet & Maxwell, 1986) p.165.

in a way that is incompatible with rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).<sup>251</sup> Furthermore, it is possible to rely on Convention rights in legal proceedings brought by others, for example as part of a defence to civil or criminal proceedings.<sup>252</sup> Article 8 offers the greatest protection of substantive housing rights.<sup>253</sup> However, the majority of the case law of the European Court of Human Rights and the Commission currently suggests that article 8 does not establish the right to a home.<sup>254</sup> However, an evolutive and dynamic approach to the interpretation of the Convention has been adopted. This means that the Convention is to be interpreted in the light of 'present day conditions', not those prevailing when it was drafted.<sup>255</sup> Consequently, if the consensus among signatory states changes then it is likely that the Court will modify its interpretation of the Convention accordingly.<sup>256</sup>

The right to housing finds its broadest and clearest recognition in the United Nations treaty, the International Covenant on Economic, Social and Cultural Rights,<sup>257</sup> to which the United Kingdom is a state party. However, the obligation on state parties is recognised to be subject to the availability of resources and the emphasis is on the progressive realisation of the Covenant rights.<sup>258</sup> The Committee on Economic, Social and Cultural Rights (established in 1987) monitors state parties' performance; an initial report is due within two years and subsequent reports are then required at five-yearly intervals.<sup>259</sup> There is no mechanism for groups or individuals to petition the Committee.<sup>260</sup> However, one of the successes of the Committee as a supervisory body is that it takes evidence from non-

---

<sup>251</sup> Human Rights Act 1998, s.7(1)(a).

<sup>252</sup> *ibid* s.7(1)(b).

<sup>253</sup> It provides that everybody has the right to respect for his [sic] private and family life, his home and his correspondence.

<sup>254</sup> K. Starmer, *European Human Rights Law* (London, Legal Action Group, 1999) para.22.44, p.592; C. Hunter and A. Dymond, 'Housing Law' in C. Baker (ed.), *Human Rights Act 1998: A Practitioner's Guide* (London, Sweet & Maxwell, 1998), para.7-03; S. Leckie, 'The Right to Housing' in A. Eide, C. Krause and A. Rosas (eds.), *Economic Social and Cultural Rights* (London, Kluwer, 1995) p.117.

<sup>255</sup> *ibid* Starmer, 1999, p.160.

<sup>256</sup> Hunter and Dymond, 1998, *op cit* n.254 para.7-03.

<sup>257</sup> Art.11(1) provides that: "The States Parties ... recognize the right of everyone to an adequate standard of living for himself and his family, including adequate ... housing ...". The Covenant was adopted by the UN General Assembly in Resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976; H.J. Steiner and P. Alston, *International Human Rights in Context*. 2<sup>nd</sup> edn. (Oxford, Oxford University Press, 2000) p.245.

<sup>258</sup> Art.2(1); *ibid* p.246.

<sup>259</sup> *ibid* p.248.

<sup>260</sup> M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, Clarendon, 1995) p.98.

governmental organisations, rather than limiting itself to the information provided by states.<sup>261</sup>

Although it regards it as desirable, the Committee does not specifically expect the right to housing to be provided for in parties' Constitutions, or that any specific legislative measures should be enacted.<sup>262</sup> While homelessness is the most obvious manifestation of inadequate housing, the Committee has not limited itself to this issue. In cases where the state plays a central role in the provision of housing, Committee members have been concerned about the conditions for the allocation of such housing and the extent of choice over its location.<sup>263</sup> The Committee has recently published its concluding observations of the report submitted by the UK.<sup>264</sup> While it praised the measures to reduce homelessness,<sup>265</sup> it was nevertheless concerned about "the persistence of *de facto* discrimination in relation to some marginalized and vulnerable groups in society ... in various fields including ... housing".<sup>266</sup>

A number of other European and international agreements are also relevant to the question of housing.<sup>267</sup> However, none of them goes as far as the Covenant. For example, the Council of Europe's European Social Charter does not contain an express right to adequate housing. Housing issues have, however, been considered under the Charter in the context of article 16 (the right of the family to social and legal protection).<sup>268</sup>

In its report on the Homelessness Bill, the Joint Committee on Human Rights<sup>269</sup> identified new section 160A<sup>270</sup> as potentially creating a "significant risk" of incompatibility with

---

<sup>261</sup> *ibid* p.103.

<sup>262</sup> *ibid* p.347.

<sup>263</sup> *ibid* pp.335-6.

<sup>264</sup> Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.79, 17 May 2002; available via the UN human rights website [www.unhchr.ch](http://www.unhchr.ch). I am grateful to Dr Ed Bates for drawing this report to my attention.

<sup>265</sup> *ibid* para.6.

<sup>266</sup> *ibid* para.14.

<sup>267</sup> Universal Declaration on Human Rights, art.25(1); Convention on the Elimination of All Forms of Racial Discrimination, art.5(e)(iii); Convention on the Elimination of All Forms of Discrimination Against Women, art.14(2); Convention on the Rights of Children, art.27(3); Convention Relating to the Status of Refugees, art.21 and Migrant Workers Convention, art.43(1); Craven, 1995, *op cit* n.260 p.330.

<sup>268</sup> Hunter and Dymond, 1998, *op cit* n.254 para.7-05.

<sup>269</sup> The Committee is appointed by both Houses of Parliament to consider matters relating to human rights in the UK (but excluding consideration of individual cases); Joint Committee on Human Rights, *First Report* (London, UK Parliament, 2001); available via the UK Parliament website [www.publications.parliament.uk](http://www.publications.parliament.uk).

<sup>270</sup> Section 160A(1) (inserted by Homelessness Act 2002, s.14(2)) provides that a local authority shall not allocate housing to (a) an ineligible person from abroad (see s.160A(3) and (5)); (b) a person who the

obligations under the Convention,<sup>271</sup> the Covenant<sup>272</sup> and the International Convention on the Elimination of Racial Discrimination.<sup>273</sup> The Committee was nevertheless satisfied that it would in practice be possible to operate the provision in a manner compatible with Convention rights under the Human Rights Act 1998.<sup>274</sup> The Committee's conclusion, taken together with the (albeit) limited evidence presented above, supports the analysis that there currently exists no 'right' to housing in international law that will avail a disappointed applicant for social housing via the waiting list/housing register route, as opposed to via the homelessness legislation.<sup>275</sup>

## CONCLUSION

The purposes of this chapter have been twofold. First, it has provided an historical overview of how local authorities came to be involved in the production and subsequent management of housing and secondly it has established a broad understanding of the nature of central government intervention in local authorities' housing allocations activities, through legislation and quasi-legislation. Case law has been considered to amplify the meaning attributed by the courts to the legislation.

The chapter has argued that local authority involvement in the provision of council housing was largely a function of the disastrous state of housing in this country following World War I. The political imperative was to build as many houses as possible in the shortest possible time. Private enterprise was not considered to be adequate to provide either the quantity or quality of houses required, at a price that the majority could afford. Consequently, local authorities came to be seen as playing a key role in the provision of subsidised housing for the poor and the working class. However, no clear and consistent policy was pursued by governments of any political complexion. Given this lack of

---

authority has decided to treat as ineligible (see s.160A(7)); (c) to two or more persons if either of them falls into (a) or (b) above. Subsections (1)(b) and (7) are discussed in more detail in chapter 6.

<sup>271</sup> Arts.3, 8 and 14.

<sup>272</sup> Art.11(1).

<sup>273</sup> Art.5(e)(iii).

<sup>274</sup> Joint Committee on Human Rights, 2001, op cit n.269 para.12.

<sup>275</sup> The challenges that have been brought under the Human Rights Act 1998 in the field of social housing relate predominantly to the ending of introductory tenancies. See for example *McLellan v Bracknell Forest Borough Council and Reigate and Banstead Borough Council v Benfield and Forrest* [2001] EWCA Civ 1510, (2001) 33 HLR 86.

coherency in housing construction, it is perhaps unsurprising that, at least initially, there was little intervention in local authorities' management of their properties.

Chapter 2 discusses the development of the central-local relationship with regard to the source of local authorities' allocation discretion. However, it is relevant at this juncture to observe the way in which such discretion was granted – by a vaguely worded requirement to give a 'reasonable preference' to certain categories of people, rather than the conferment of a positive power to allocate housing. It might be thought that this is a semantic argument since the result is effectively the same; an area of activity that is highly legally discretionary. However, the way in which the discretion is conferred might indicate, at least to some extent, the state of the relationship between central and local government. This point is developed in chapter 2 which analyses the role played by law within the central-local relationship.

An analysis of the case law suggests that the courts have traditionally adopted a non-interventionist stance in local authorities' dealings with individual applicants. To a certain extent, the courts have been limited by the vague wording of the legislation, and by the fact that no statutory right of appeal exists for challenges to non-allocation. This leaves judicial review and complaints to the Local Government Ombudsman as the only routes of challenge. It could also be argued that the courts were respecting the constitutional arrangement between central and local government, and reflecting the non-interventionist approach that characterised the relationship.<sup>276</sup> While the courts have, arguably, adopted a more proactive approach in recent years, their effect is necessarily limited to the relatively small number of individual cases that come before them.

The housing allocation process has, as a result of all these factors, traditionally been highly discretionary in nature. The legal controls that exist provided only the scantiest constraint on local authorities' discretion. The 1996 Act marked a change in legislative style; it was drafted in much more precise language, imposing quite specific obligations on local authorities. Nevertheless, the vague 'reasonable preference' phrase was maintained. The reasonable preference categories contained in the 1996 Act differ from previous legislation, in that they require local authorities to take into account certain of the

---

<sup>276</sup> Loveland, 1995, op cit n.45.

applicant's social and welfare needs, rather than simply the physical characteristics of the property in which they are living. However, they are couched in broad terms, and arguably oblige local authorities to make highly subjective judgements about applicants' needs. The new Homelessness Act 2002 is the first piece of legislation enacted by a Labour government to deal with housing allocations. A key feature of the Act is that it maintains the 'reasonable preference' formula. The extent to which the Housing Act 1996 and the Homelessness Act 2002 differ from their predecessors is discussed in chapters 5 and 6.

## Chapter 2

# THE EXERCISE OF DISCRETION

## INTRODUCTION

The purpose of this chapter is to provide the theoretical framework for the subsequent detailed analysis of the evolution of the legislation that governs the allocation by local authorities of their housing stock. In establishing the framework for the thesis, the chapter is concerned primarily with two issues. The first is the nature and extent of the legal and quasi-legal rules governing local authorities' housing allocation functions and the second is the rationale for central government imposing those rules.

In relation to the first question, it was described in chapter 1 that local authorities have traditionally been granted (by central government) broad discretion in the management and, specifically, the allocation of their housing stock. This has been achieved through legislation couched in vague language, epitomised by the 'reasonable preference' formula. The claim is further supported by the preceding analysis of the case law. It was also described in the previous chapter how the Housing Act 1996 introduced, in some respects, much greater prescription in housing allocations and employed a different legislative style from previous Acts. Therefore, in order to determine whether local authorities' discretion has been circumscribed by this Act, it is necessary to establish at a theoretical level what is meant by discretion and particularly the relationship between legal rules and discretion. This framework will allow subsequent chapters, charting and analysing legislative developments relating to housing allocations, to measure the degree of discretion accorded to local authorities and, particularly, whether it has changed under different legislation. It will also provide a basis for an assessment of empirical studies on the effect of the Housing Act 1996, considered in chapter 5.

As far as the second point is concerned (the rationale for adopting those rules), this chapter seeks to locate an explanation in the different analyses of the relationship between central and local government. One of the purposes of the thesis is to determine whether any of the

analyses adequately explains the specific case of housing allocation by local authorities. To achieve that objective, the second part of the chapter explores various models of the central-local relationship, with particular regard to their value in explaining the conferment of discretionary authority on local authorities. The models are also examined for their explanation of the function of legal rules within the central-local relationship. This will allow later chapters to assess the significance of the development of the legislation; for example, does a more prescriptive style of legislation signify a deteriorating central-local relationship?

## **DISCRETIONARY DECISION-MAKING IN PUBLIC ADMINISTRATION**

This first section seeks to define discretionary decision-making and to analyse the relationship between legal rules and discretion. The literature drawn upon in this section is concerned with discretionary decision-making in public administration. Consequently, it is necessary to outline briefly the justification for adopting the framework of public administration. For present purposes<sup>1</sup> it is sufficient to classify local authorities as public bodies both because of their direct election and the wide range of services they provide to members of the public.<sup>2</sup> Adopting the definition of administrative law proffered by Wade and Bradley; “the law which determines the organisation, powers and duties of administrative authorities”,<sup>3</sup> public housing provided by local authorities, it is submitted, falls squarely within the auspices of public administration.<sup>4</sup>

---

<sup>1</sup> The constitutional status of local authorities is examined below.

<sup>2</sup> The Redcliffe-Maud Report identified some of the most important local government activities as being “responsibility for the police, for the fire service, for almost all education other than university, for the health and welfare of mothers and infants, the old and the sick, for children in need of care, for public health, for housing, for sport and recreation, for museums, art galleries and libraries, for the physical environment and the use of land, for highways, traffic and transport . . .”; Redcliffe-Maud Report, *Report of the Royal Commission on Local Government in England*. Cmnd. 4040 (London, HMSO, 1969).

<sup>3</sup> E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*. 11<sup>th</sup> edn. (London, Longman, 1993) p.10.

<sup>4</sup> “The [local authority] landlord is the embodiment of the state, a public body, a creature of statute”; A. Stewart, *Rethinking Housing Law* (London, Sweet & Maxwell, 1996) p.119. However, it is argued that in legal terms, tenants’ rights and public housing management “are still basically moulded by the one-to-one contractual relationships derived from the nineteenth century pattern of commercial landlordism”; D. Hughes and S. Lowe, *Social Housing Law and Policy* (London, Butterworths, 1995) p.2.

Much of the literature on discretionary decision-making in public administration reviewed in this chapter explores decision-making within the welfare state. The provision of public housing is widely viewed today as a social service (the special role played by local authority landlords was considered in chapter 1),<sup>5</sup> and consequently comes within the ambit of the welfare state. However, it must be borne in mind that the provision and management of social housing is distinct from other welfare services, for example social security. This is because public housing is managed by local governmental institutions (local authorities), rather than directly by central government through local offices of the Department for Work and Pensions. Therefore, the issues that emerge must be understood in the context of the constitutional and political status of local authorities, and their relationship with central government, which are explored later in the chapter.

## What is 'Discretion'?

The often-quoted definition of discretion<sup>6</sup> is that of the American scholar, Kenneth Culp Davis. He defined it in the following terms:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.<sup>7</sup>

Davis emphasised that the limit must be on effective power, rather than on just what is formally authorised or legal. This means that discretion may be legal (policy makers deciding that officials should have a choice) or illegal (officials being able to exercise choice by, for example, ignoring or bending rules when they are expected to apply them).<sup>8</sup>

<sup>5</sup> P. Spicker, *Social Housing and the Social Services* (London, Longman for the Institute of Housing, 1989) p.1. See also M. Partington, *Landlord and Tenant* (London, Weidenfeld and Nicolson, 1980) p.2.

<sup>6</sup> Jowell defines discretion as "the room for decisional manoeuvre possessed by a decision-maker"; J. Jowell, 'The Legal Control of Administrative Discretion' (1973) *Public Law* 178-220 p.179. Hawkins believes it is "the means by which law ... is translated into action"; K. Hawkins, 'The Exercise of Discretion by Administrators' in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25<sup>th</sup> Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995) p.79. See also J. Bell, 'Discretionary Decision-Making: A Jurisprudential View' in K. Hawkins (ed.), *The Uses of Discretion* (Oxford, Clarendon Press, 1992) p.92.

<sup>7</sup> K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana, Louisiana State University Press, 1969) p.4.

<sup>8</sup> M. Adler, 'Decision-making and Appeals in Social Security: In Need of Reform?' (1997) *Political Quarterly*, 68, 388-405, p.393.

Davis was also clear that discretion can apply to the choice between action and inaction,<sup>9</sup> as well as to alternative courses of action.<sup>10</sup> It can also apply to the finding of facts, and can cover procedural as well as substantive choices, and thus can affect outcomes in a number of ways.<sup>11</sup> In order to ensure that where law ends tyranny does not begin,<sup>12</sup> Davis believed it was necessary to eliminate unnecessary discretionary power and to do more to confine, structure and check necessary discretionary power.<sup>13</sup> By confining, Davis meant deciding how much discretion each official should have; structuring involved developing standards or guidelines to influence and shape the exercise of discretion; and checking ensures officials are held to account for their decisions.<sup>14</sup>

The work of the legal theorist Ronald Dworkin has had considerable influence on modern discourses on the exercise of discretion.<sup>15</sup> Dworkin questioned whether qualitative distinctions could be made between different senses of discretion.<sup>16</sup> “The most obvious and appealing view is that discretion is a matter of degree ranging from the wide assessments that may be involved in creating one’s own standards to the relatively narrow margins open in applying a reasonably clear standard.”<sup>17</sup> Dworkin believed that the meaning of ‘discretion’ is contextual; “The term is always coloured by the background of understanding information against which it is used.”<sup>18</sup> He adopted a doughnut metaphor to illustrate the relationship between rules and discretion.<sup>19</sup> His aim was to point out that discretion is not necessarily uncontrolled or unfettered. “Discretion does imply choice, but the choice is seldom unlimited and must be evaluated in the context in which it arises.”<sup>20</sup>

---

<sup>9</sup> Davis believes that often the most important discretionary decisions are negative ones, i.e. not to do something; Davis, 1969, op cit n.7 p.25.

<sup>10</sup> ibid p.4.

<sup>11</sup> Adler, 1997, op cit n.8 p.393.

<sup>12</sup> Drawing on a quotation from William Pitt, inscribed on the Department of Justice building in Washington. Although attributed to Pitt, the quotation originates with John Locke; M. Loughlin, *Sword and Scales* (Oxford, Hart, 2000) p.13, fn.29.

<sup>13</sup> Davis, 1969, op cit n.7 chapter 1.

<sup>14</sup> ibid chapters 3, 4 and 5.

<sup>15</sup> Dworkin’s particular focus was on discretionary decision-making by judges.

<sup>16</sup> R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977).

<sup>17</sup> D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, Clarendon Press, 1986) p.14.

<sup>18</sup> Dworkin, 1977, op cit n.16 p.31.

<sup>19</sup> “Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, ‘Discretion under which standards?’ or ‘Discretion as to which authority?’”; ibid p.31.

<sup>20</sup> C. Harlow and R. Rawlings, *Law and Administration* (London, Butterworths, 1997) p.102.

The work of both Davis and Dworkin has attracted criticism. Academics have observed that, by confining himself to analysing decision-making by individuals, Davis has ignored the close relationship between discretionary justice and policy-making. A further criticism is that Davis adopts the limited conception of decision-making that, it is argued, is typical of lawyers. One result of this is to see a decision at a particular point in the legal process as an isolated matter and something logically separable from its surroundings. It follows that “[d]ecisions … are seen as simple, discrete and unproblematic as opposed to complex, subtle and woven into a broader process.”<sup>21</sup> Indeed, both Davis and Dworkin have also been criticised for adopting a definition of discretionary decision-making that is too legalistic. Their critics emphasise the need to see discretionary decision-making as part of complex social, organisational and political processes.

Galligan, for example, rejects the idea that discretion is a precise term of art with a settled meaning. Nor is it a concept that, when found to be present, leads to fixed consequences, but rather it is used in different ways, often for different purposes. The sense of discretion (in Dworkin’s terminology) depends on the context in which it occurs and the attitudes of the officials who are involved with it. Writing from a jurisprudential viewpoint, Bell also adopts an analysis of discretionary decision-making as part of a wider sociological process.<sup>22</sup> He contrasts the two dominant themes in Anglo-American legal theory; ‘ruled justice’ in which law is a self-contained, comprehensive and autonomous order of a distinct kind within society, and ‘legal sociology’ in which law is a ‘resource’ for legal actors, providing a background against which they react and negotiate. He argues that “the importance of legal controls must be assessed by setting the institution within the context of broader social controls.”<sup>23</sup> According to the legal theorists’ approach, discretion is either the consequence of conferment of power, or the absence or indeterminacy of legal rules; Dworkin’s hole in the doughnut. However, Bell rejects Dworkin’s metaphor arguing that, far from being the ‘hole’ in legal regulation, discretion is at the centre of the institution, and that legal rules play a subservient role in setting the boundaries. This point will be returned to below when the function of law in discretionary decision-making is considered.

---

<sup>21</sup> R. Baldwin and K. Hawkins, ‘Discretionary Justice: Davis Reconsidered’ (1984) *Public Law* 570, p.580.

<sup>22</sup> Bell, 1992, *op cit* n.6.

<sup>23</sup> *ibid* p.101.

Galligan also criticises Dworkin's doughnut image, arguing that it draws on a specifically legal view of rules and discretion as opposites. Galligan believes that, in order to understand discretion better, it is necessary to move from a narrow legal conception to a broader sociological conception in which "... discretion is as much a product of rules as of their absence."<sup>24</sup> The explanation lies in the nature of rules – they are not complete and self-contained norms to be applied by logical processes isolated from social context. "On the contrary, rules are incomplete and imperfect guides to action because they are only ever partial accounts of a more comprehensive and complex normative system."<sup>25</sup> In a social conception of discretion, legal standards are just one set of norms that may have to compete with others. What looks discretionary from a legal point of view may be highly structured in social reality, and what looks rule-bound from a legal point, may turn out to be heavily discretionary.<sup>26</sup>

In his comparison of North American and British models of welfare benefits schemes, Titmuss was critical of the American, highly rule-based scheme because, he argued, it was based on the assumption that "lawyer's law contains no element of discretion whereas administrative discretion contains no element of law. In other words, law is as different from discretion as day is to night."<sup>27</sup> In reality, "law and discretion are not separated by a sharp line but by overlapping zones."<sup>28</sup> It is possible that this perceived dichotomy between law and discretion can be traced back to early writings on the British constitution by Dicey.

This point is made by Loughlin, who has argued that the history of public law thought in this country is marked by a tension between the ideas of administration and law.<sup>29</sup> On the one hand, administration and law are perceived as separate entities; administration is a

---

<sup>24</sup> D.J. Galligan, 'Discretionary Powers and the Principle of Legality' in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25<sup>th</sup> Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995) p.19.

<sup>25</sup> *ibid* p.19.

<sup>26</sup> Galligan's earlier work (1986) has itself been criticised for failing to give sufficient weight to sociological, specifically political, influences; R. Cranston, 'Discretionary Powers by D.J. Galligan' (1988) *Public Law*, 289-292. This, it is submitted, is not an entirely justified criticism. In his two models of legal authority (private law and public law), Galligan emphasises that in the public law model there is no fundamental and irreducible legal ideal or principle, "but rather that law and legal institutions are part of the political and social composition of a society"; Galligan, 1986, *op cit* n.17 pp.89-90.

<sup>27</sup> R. Titmuss, 'Welfare "Rights", Law and Discretion' (1971) *Political Quarterly*, 42, 113-31, p.118.

<sup>28</sup> *ibid* p.119.

<sup>29</sup> M. Loughlin, 'Administrative Law, Local Government and the Courts', in M. Loughlin, M. D. Gelfand and K. Young (eds.), *Half a Century of Municipal Decline 1935-1985* (London, Allen & Unwin, 1985) p.121.

method of achieving policy objectives, while law is a body of norms that may be applied in order to determine disputes arising in the process of administration.<sup>30</sup> On the other hand, others focus on their similarities, by emphasising the purposive nature of both activities.

Loughlin traces the source of this tension to the early writings of Dicey,<sup>31</sup> and particularly to Dicey's fundamental tenet of the British constitution; the rule of law.<sup>32</sup> According to Loughlin, Dicey's theory was based on a normativist theory of public law; one which highlights the differences between administration and law and subordinates administration to law.<sup>33</sup> Dicey contrasted the rule of law "with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary power."<sup>34</sup> Hence under Dicey's influence, there existed a dichotomy between administration/discretion/policy, on the one hand, and law/rules/rights on the other hand.<sup>35</sup> The dichotomy between law and administration, and consequently rules and discretion, appears to have had continuing influence within legal thought throughout the twentieth century.

## The Function of Law in Discretionary Decision-Making

It has been argued above from a socio-legal stance that (legal) rules should not be viewed as the antithesis of discretion – rather, the two are intertwined. Legislation governing local authorities' housing allocation functions has existed since 1924. In order to account for this state of affairs, it is necessary to consider the function of law within discretionary decision-making generally before proceeding to consider the related question of the role of legal rules in the central-local relationship. This analysis will provide the setting for the detailed exposition in later chapters of the development and significance of those rules.

One depiction of law in discretionary decision-making is not merely as the creator of power-relations but frequently as the legitimator and regulator of existing situations of

---

<sup>30</sup> *ibid* p.122.

<sup>31</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1885).

<sup>32</sup> The rule of law itself is founded on the principles of equality before the law and the supremacy of the ordinary law of the land. From these two principles, Dicey derived a third; that no special legal status was accorded to the state, i.e. that Britain had no special system of administrative law; Loughlin, 1985, *op cit* n.29 p.123.

<sup>33</sup> *ibid* p.140.

<sup>34</sup> Dicey, 1885, *op cit* n.31 p.184.

<sup>35</sup> Loughlin, 1985, *op cit* n.29 p.125.

power.<sup>36</sup> Galligan relates the legitimating role of legal values to the concept of the rule of law.<sup>37</sup> However, the mere act of stipulating legal standards does not guarantee compliance with them. So, while legal rules do perform a positive legitimating role in relation to the rule of law, their effectiveness should not be over-emphasised.

Furthermore, governments can use rules presentationally “so as to give the appearance of taking action or in order to enhance the perceived legitimacy of decisions.”<sup>38</sup> Rules can also be used to ‘routinise’ decisions, rather than raising the quality of those decisions. It should, however, be noted that the absence of rules can also be used in a presentational way. The social fund, discussed in more detail below, provides an example of a scheme purporting to be discretionary, in the sense that there are no legal rules constraining the decision-makers’ discretion, but which is, in fact, tightly constrained by other means.

An issue related to the presentational use of legal rules is the relationship between procedural and substantive fairness. Strengthening individuals’ procedural rights will not necessarily enhance their substantive rights. Indeed, by strengthening procedural rights, there may be less likelihood of achieving substantive reform, since a “symbolic appearance of legality” is placed upon the system.<sup>39</sup> Furthermore, such an “ideological veneer of equality, equity, fairness and justice” may deflect attention away from basic social and structural inequalities.<sup>40</sup> Although committed to the ideal of procedural due process, Jowell acknowledged that this carries the danger of glossing over the lack of substantive due process, in order “to achieve the quiescence of a potentially critical public.”<sup>41</sup> Prosser highlighted the symbolic role of Supplementary Benefit Appeal Tribunals<sup>42</sup> as a means of

<sup>36</sup> Bell argues that the function of law in legitimating control is twofold: “it offers the discretion-holder additional reasons for action in order to secure social legitimisation in the way he exercises power, and, to the subject of discretion and to outsiders, it provides reasons for accepting the power of the discretion-holder as legitimate authority”; Bell, 1992, op cit n.6 p.108.

<sup>37</sup> According to Galligan, the rule of law encompasses the two main values of fairness and non-arbitrariness, and its importance stems from its protection of certain individual interests. First, the citizen should be able to ascertain the rules that govern his activities in relation to the state, and secondly, by requiring officials to act according to the rules, the scope for arbitrariness is reduced; Galligan, 1995, op cit n.24 p.15.

<sup>38</sup> R. Baldwin, ‘Rules and Alternatives’ in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25<sup>th</sup> Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995) p.114.

<sup>39</sup> M. Adler and S. Asquith, ‘Discretion and Power’ in M. Adler and S. Asquith (eds.), *Discretion and Welfare* (London, Heinemann, 1981) p.17. See also Jowell, 1973, op cit n.6; T. Prosser, ‘Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors’ (1977) *British Journal of Law and Society*, 4, 39-60.

<sup>40</sup> Adler and Asquith, 1981, *ibid* p.21.

<sup>41</sup> Jowell, 1973, op cit n.6 p.217.

<sup>42</sup> See below p.64.

defusing opposition to cuts in substantive benefits, by directing opposition into channels where it could be controlled and have minimal effect.<sup>43</sup>

A further depiction of the role of law is as a controlling force. The traditional lawyer's view is that legal rules, embodied in legislation and case law, provide the framework in which public bodies (and more specifically, individual decision-makers) exercise their discretion.<sup>44</sup> This view reflects the normativist approach to public law, discussed above. It suggests that legal rules are the primary means of controlling discretionary decision-making. However, this view has been increasingly challenged, as discussed above, both from within the legal community and by other disciplines, most notably the social sciences.<sup>45</sup> For Galligan there are two basic kinds of constraint on the exercise of discretion in everyday life; the practical kind (including efficiency and effectiveness, political considerations, organisational and economic factors, and the nature of the task) and the value-based kind (including the moral attitudes of officials). Legal standards are just one method of controlling discretion, and that what appears to be discretionary and uncontrolled by legal standards may be tightly regulated by other normative standards.<sup>46</sup>

The social fund provides an illustration of this point. Established by the Social Security Act 1986,<sup>47</sup> the social fund is intended to provide for lump-sum payments to people in receipt of the means-tested, social security benefit, income support.<sup>48</sup> The Green Paper introducing the social fund appeared to envisage a highly discretionary system, based on the exercise of individual social fund officer's discretion.<sup>49</sup> Indeed, the primary legislation does not lay down detailed rules, but merely provides that payments are to be made in

<sup>43</sup> Prosser, 1977, op cit n.39 p.43. Writing specifically in relation to housing allocations, Cranston observes that "... the allocation procedures project an image of order which functions to divert attention away from the fundamental inability of public-housing authorities to meet demand. The procedures also place applicants in competition with each other so that they are less likely to organize collectively to press for more and better housing"; R. Cranston, *Legal Foundations of the Welfare State* (London, Weidenfeld and Nicolson, 1985) p.241.

<sup>44</sup> See M. Partington, 'Landlord and Tenant: The British Experience' in E. Kamenka and A. Erh-Soon Tay (eds.), *Law and Social Control* (London, Edward Arnold, 1980) p.168.

<sup>45</sup> Jowell, 1973, op cit n.6; R.A.W. Rhodes, *Control and Power in Central-Local Government Relations* (Farnborough, Gower (for SSRC), 1981); Galligan, 1986, op cit n.17; Baldwin, 1995, op cit n.38.

<sup>46</sup> Galligan, 1995, op cit n.24 p.31.

<sup>47</sup> Originally Social Security Act 1986, s.32(1). The provisions are now contained in Social Security Contributions and Benefits Act 1992, Part VIII.

<sup>48</sup> Formerly supplementary benefit.

<sup>49</sup> Department for Social Security, *Reform of Social Security*, Vol. 1. Cmnd. 9517 (London, HMSO, 1985).

accordance with directions given or guidance issued by the Secretary of State.<sup>50</sup> However, in practice, decisions are made within a closely circumscribed framework of binding directions and guidance, issued by the Secretary of State.<sup>51</sup>

One view is that the legal system can tolerate a high degree of discretion partly “because limitations on discretion are as inevitable and abundant as the sources of discretion, and because discretionary decisions are rarely as unfettered as they look.”<sup>52</sup> This assessment has important implications for an analysis of housing allocations legislation which, as described in chapter 1, has been noted for its high degree of discretion.

## **THE CENTRAL-LOCAL GOVERNMENT RELATIONSHIP**

The first section has attempted to define discretion and to examine the relationship between legal rules and discretion at a theoretical level. The second part of this chapter attempts to relate the conferment of discretionary authority to the relationship between central and local government. The first issue to explore is the role of law within the central-local relationship and, in order to provide a basis for later analysis, the constitutional status of local authorities is established. The section then considers at a general level the reasons for the conferment of discretionary authority before proceeding to locate that conferment within different analyses of the central-local relationship.

---

<sup>50</sup> Originally Social Security Act 1986, s.32(2)(b) now Social Security Contributions and Benefits Act 1992, s.138(1)(b). The Act also provides that social fund officers shall determine questions in accordance with any general directions issued by the Secretary of State and, in doing so, shall take account of any general guidance issued by him; Social Security Act 1986, s.33(10) now Social Security Contributions and Benefits Act 1992, s.140(2).

<sup>51</sup> R. Drabble and T. Lynes, ‘The Social Fund – Discretion or Control?’ (1989) *Public Law*, 297, p.302. The constitutionality of binding directions, which have been described judicially (in *R v Secretary of State for Social Services and another, ex parte Stitt; The Times*, 5 July 1990, Butler-Sloss LJ) as a “novel” type of subordinate legislation, has been questioned. See D. Feldman, ‘The Constitution and the Social Fund: A Novel Form of Legislation’ (1991) 107 *Law Quarterly Review*, 39. The apparent element of discretion granted by the primary legislation in respect of ‘budgeting loans’ has been further eroded by amendments introduced by the Social Security Act 1998; R. Thompson, ‘A Critique of the New Budgeting Loans Scheme’ (2000) *Journal of Social Security Law* 7, 1, 35-53.

<sup>52</sup> C.E. Schneider, ‘Discretion and Rules: A Lawyer’s View’ in K. Hawkins (ed.), *The Uses of Discretion* (Oxford, Clarendon Press, 1992) p.79.

## The Role of Law in the Central-Local Relationship

In contrast with federal systems of government, UK local authorities derive their formal legal powers and duties from Parliament. There is no doubt that local government has a long history, although its precise origins are a contentious subject.<sup>53</sup> Griffith has claimed that local government “has been a part of the constitutional structure of government and of politics for rather longer perhaps than there has been a recognisable central government.”<sup>54</sup> The nineteenth century reforms of local government established the modern constitutional position of local authorities as bodies constituted by statute, with their supervision vested in central government departments.<sup>55</sup> Furthermore, there is no legal notion of a general residual power (or subsidiarity principle) that gives independent legitimacy to local authority powers; rather their powers are designated in an *ad hoc* way by particular legislation.<sup>56</sup> While local authorities are not directly subordinate to central government,<sup>57</sup> the legislation granting local authorities their powers and duties commonly vests supervisory powers in the relevant central government department.<sup>58</sup> The courts also play a role in supervising the activities of local authorities. Since local authorities derive their powers from statutes, in order to avoid legal challenge, local authorities must act *intra vires*, i.e. within the powers awarded to them. The inadequacies of the courts as supervisory bodies of local authorities has been highlighted on a number of occasions, ranging from the 1930s to the present.<sup>59</sup> Indeed, Loughlin has argued that the courts have

<sup>53</sup> M. Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations*. (Oxford, Clarendon, 1996) chapter 1. Loughlin notes that there is a fundamental antithesis between centralisation and autonomous decentralisation running through the whole history of English government and its organisation; p.11.

<sup>54</sup> J. Griffith, ‘In Defence of Rights’ (1984) *New Society*, January 26, p.139; quoted in G.W. Jones, ‘The Relationship Between Central and Local Government’ in C. Harlow (ed.), *Public Law and Politics* (London, Sweet & Maxwell, 1986) p.63. It is claimed that the earliest origins of local government in Britain can be traced back to medieval times when a number of local boroughs were governed by Royal Charter; H. Atkinson and S. Wilks-Heeg, *Local Government from Thatcher to Blair* (Cambridge, Polity, 2000) p.12.

<sup>55</sup> Loughlin, 1996, op cit n.53 p.31.

<sup>56</sup> J. Alder, ‘Incommensurable Values and Judicial Review: The Case of Local Government’ (2001) *Public Law*, 717-735, p.724. The Local Government Act 2000 represents a departure from this position; see chapter 1, note 2.

<sup>57</sup> J. Stewart, *Local Government: The Conditions of Local Choice* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1983) p.3.

<sup>58</sup> Loughlin, 1985, op cit n.29 p.132.

<sup>59</sup> Jennings published an article in 1936 in which he was highly critical of the courts’ interpretation of housing legislation. He claimed that the courts frustrated the effective implementation of the slum clearance legislation under the Housing Act 1930 because they failed to take a purposive approach to the legislation, i.e. to ask themselves what evil the legislation was intended to overcome; W.I. Jennings, ‘Courts and Administrative Law – The Experience of English Housing Legislation’ (1936) 49 *Harvard Law Review* 429-454.

largely failed to develop a rigorous and realistic administrative law jurisprudence.<sup>60</sup> Writing in relation to judicial attitudes towards challenges under the homelessness legislation, Robertson has accused the Law Lords of “acting as though they were really line managers ...”.<sup>61</sup>

The preceding description of local authorities’ constitutional status emphasises the need for local authorities to act *intra vires*. However, there is another facet to the relationship. Acts of Parliament vest powers directly in government departments and local authorities.

Within the terms on which those powers are bestowed, local authorities are autonomous bodies, and a department which proposes to control the way in which or the extent to which local authorities exercise their powers, must be able to point to statutory provisions authorizing the intervention.<sup>62</sup>

Griffith noted that the legal status of local authorities as the direct recipients of statutory powers is an important element of the framework in which the administrative relationship between the centre and the localities is operated. This latter view stresses the autonomy of local authorities **within** the powers granted to them by Parliament.<sup>63</sup> These contrasting views reflect the complex constitutional and political relationship between the centre and the localities. To a certain extent, the relationship is complicated by the fact that local authorities have a dual purpose, as both a political institution and a provider of services.<sup>64</sup> Stewart contends that it is the combination of direct election, responsibility for a particular local area and the range of functions undertaken by local authorities that justifies the phrase ‘local government’.<sup>65</sup> It should also be noted that local authorities have tax raising powers and expenditure programmes.<sup>66</sup> It is in the capacity for local choice, exercised within limits, that both the value and danger of local government to central government

---

<sup>60</sup> Loughlin, 1985, op cit n.29 p.128. Alder has argued that the dominant perspective of the courts is Benthamite utilitarianism, modified by individualism; Alder, 2001, op cit n.56 p.734.

<sup>61</sup> D. Robertson, *Judicial Discretion in the House of Lords* (Oxford, Clarendon, 1998) p.349.

<sup>62</sup> J.A.G. Griffith, *Central Departments and Local Authorities* (London, Allen & Unwin, 1966) p.49.

<sup>63</sup> Cochrane has observed that “A great deal of the day-to-day activity of councils and their employees exists in the cracks within the system, which allow action to be taken unless it is specifically prohibited”; A. Cochrane, *Whatever Happened to Local Government* (Buckingham, Open University Press, 1993) pp.39-40.

<sup>64</sup> Stewart, 1983, op cit n.57 chapter 1.

<sup>65</sup> *ibid* p.1.

<sup>66</sup> *ibid* p.17.

lie.<sup>67</sup> This ‘inherent structural conflict’ between central and local government is explored in more detail below.

It has been established, then, that local authorities derive their powers and duties from Parliament. Chapter 1 described that, traditionally, legislation has been drafted so as to afford local authorities a wide degree of discretion in the performance of their statutory functions. Thus, the primary role of law in central-local government relations during the post-World War II period was to facilitate the establishment of a constitutive structure within which central departments and local authorities could negotiate and bargain. Stating the basic duties of local authorities “in broad, and often highly subjective terms... maximised the formal legal autonomy of local authorities and nullified the potentially restrictive effect of the *ultra vires* doctrine.”<sup>68</sup> However, even when local authorities are acting *intra vires*, their discretion is limited by factors other than legal rules, including financial, hierarchical, political and informational constraints. Furthermore, the constraints can be self-imposed. For these reasons, it should not be thought that the limits on decision-makers are solely legal in origin; there is a range of constraints.<sup>69</sup> This view supports the earlier point of the limited application of legal rules in confining discretionary decision-making.

In addition to being ‘creatures of statute’, many of the local authorities’ actions depend on approval by a central government department. Cullingworth described some of these controls as ‘quasi-judicial’; “the Minister’s role is to ensure that, within the framework of central government policy, a just and reasonable balance is being struck between the different interests concerned”.<sup>70</sup> However, Cullingworth observed that the process is not simply a judicial one and decisions are not taken on the basis of legal rules. Rather, “they involve the exercise of a wide discretion in the balancing of public and private interest within the framework of a ‘policy’.”<sup>71</sup> Cullingworth’s argument emphasises the constitutional and political relationship between central and local government.

---

<sup>67</sup> *ibid* p.222.

<sup>68</sup> M. Loughlin, *Local Government in the Modern State* (London, Sweet and Maxwell, 1986) p.186.

<sup>69</sup> Rhodes, 1981, *op cit* n.45 p.108. See also Stewart, 1983, *op cit* n.57 chapter 11.

<sup>70</sup> J.B. Cullingworth, *Housing and Local Government* (London, Allen & Unwin, 1966) p.61.

<sup>71</sup> *ibid*.

While it has been traditional practice for legislation to grant local authorities broad discretionary powers, the same legislation has also conferred on Ministers wide powers of review and control. It is not uncommon for legislation to give Ministers the power to intervene in a local authority's affairs where the local authority is deemed to be in default of its duties.<sup>72</sup> Such powers of compulsion have been described as 'draconian' but, in practice, are used only extremely rarely.<sup>73</sup> Writing in 1966, Cullingworth observed:

The British system of government operates in a gentlemanly fashion. Central government departments may complain of the waywardness of individual authorities, just as local authorities may complain of the obtuseness and pedantry of ministries, but the relationships are generally smooth even when they are not cordial.<sup>74</sup>

More recently, it has been argued that

The logic of this legal framework, which both conferred substantial powers of local authority action and extensive powers of central supervision, is revealed only once it is appreciated that its function was to establish a broad framework of interdependent relations within which the centre and the localities would be obliged to negotiate and bargain over the manner in which these various governmental responsibilities were exercised.<sup>75</sup>

It would appear, then, that the legal structure does not reflect the reality of central-local relations; in that conventional administrative practices, rather than legal formalities, determine relations. The sweeping powers given to ministers by Acts of Parliament were more apparent than real, because there was broad political consensus between the centre and localities.<sup>76</sup> Under the traditional system of central-local government relations, the

---

<sup>72</sup> For example, ss.35 and 36 of the Housing Act 1930 contained provisions that gave the Minister authority to assume the powers of the local authority in certain circumstances (see chapter 3).

<sup>73</sup> Cullingworth, 1966, op cit n.70.

<sup>74</sup> *ibid* p.63.

<sup>75</sup> Loughlin, 1996, op cit n.53 p.63.

<sup>76</sup> Loughlin, 1986, op cit n.68; H. Butcher, I.G. Law, R. Leach and M. Mullard, *Local Government and Thatcherism* (London, Routledge, 1990).

role of law was to establish a closed administrative system which achieved legitimisation through its success in delivering good quality services.<sup>77</sup>

The courts supported the consensual relationship, through their unwillingness to acknowledge that if the interests of an individual were detrimentally affected by the exercise of local authority powers, it gave rise to legally enforceable rights.<sup>78</sup> The legal framework was designed to provide administrative, rather than judicial, supervision of the exercise of the local authority's statutory powers and duties, especially where policy factors were involved.<sup>79</sup> The inadequacies of the courts as supervisory bodies between local authorities and (potential) tenants has been outlined earlier. In addition to the criticisms already noted, courts were considered to be too slow, too expensive and overly formal and adversarial in their proceedings to be an appropriate method of settling disputes that required a variety of conflicting interests to be balanced. Judicial proceedings were also considered to be inappropriate because they represented an externally imposed settlement between interdependent bodies that had to continue a relationship with each other.<sup>80</sup>

## The Conferment of Discretionary Authority

Before considering the more specific issue of the conferment of discretionary authority within the central-local relationship, it is useful at this juncture to consider broader explanations for the apparent prominence of discretionary authority within modern government. There are a number of possible reasons for this phenomenon; the range and nature of the tasks performed by the state; a belief that specialists must decide many of the technical or scientific matters; and the role of interest groups in decision-making.<sup>81</sup> It is possible that discretionary power is conferred because the legislature intends to pursue a

---

<sup>77</sup> Loughlin, 1986, op cit n.68.

<sup>78</sup> See chapter 1.

<sup>79</sup> Loughlin, 1996, op cit n.53.

<sup>80</sup> ibid. This has also been identified as one of the weaknesses of the exchange/bargaining model of central-local relations, where law is the resource being traded; see M.J. Elliot, *The Role of Law in Central-local Relations* (London, Social Science Research Council, 1981).

<sup>81</sup> Galligan, 1986, op cit n.17.

given objective or purpose, but the best method of achieving that objective is unclear.<sup>82</sup> A similar formulation is the ‘rule-compromise’ model of discretion.

Sometimes the members of the governmental body responsible for instructing the decision-maker cannot agree on rules or even guidelines, and they will then deliberately choose to pass responsibility to the decision-maker. In other words, according discretion to courts, administrative agencies, or regulatory authorities can be a form of deliberate legislative compromise.<sup>83</sup>

The explanations outlined above share an assumption that discretion is accorded for legitimate and benign purposes. More critical explanations for the increasing use of official grants of discretionary power have been posited. For example, conferring discretionary power enables law-makers to remain silent on controversial or complex areas of public policy.

Discretion ... brings with it other kinds of functional benefits for legal systems: it allows the various tensions, dilemmas, and conflicts of values that frequently arise in the implementation of law to be handled; it helps obscure a lack of consensus about, or any ambiguities in, legislative policy; and it usually forecloses the use of costly formal legal procedures.<sup>84</sup>

It has also been argued that discretionary decision-making is a clandestine way of achieving administrative savings, through the concept of ‘bureaucratic disentitlement’.<sup>85</sup> Bureaucratic disentitlement is used to refer to any practice that frustrates claimants’ attempts to apply for benefits, or that delays actual receipt of the benefits once the claimant’s eligibility is officially confirmed.<sup>86</sup> On a more prosaic level, it has been argued

<sup>82</sup> L. Silveira, ‘Administrative Discretion as Perceived by the Public’ in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25<sup>th</sup> Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995).

<sup>83</sup> Schneider, 1992, op cit n.52 p.65.

<sup>84</sup> Hawkins, 1995, op cit n.6 p.82.

<sup>85</sup> R.E. Goodin, ‘Welfare Rights and Discretion’ (1986) *Oxford Journal of Legal Studies*, 6, p.258. See also M. Lipsky, *Street Level Bureaucracy* (Russell Sage Foundation, 1980).

<sup>86</sup> S.D. Bennett, ‘“No relief but upon the terms of coming into the house” - Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System’ (1995) *The Yale Law Journal*, 104, 2157, p.2159.

that "Parliament's regular approach of discretion-laden formulae was also partly a result of a hurried legislative process."<sup>87</sup>

The inevitability of discretion, particularly within the welfare state, is a common view point.<sup>88</sup> However, it is not necessarily problematic and may be indispensable. It is argued that discretion was introduced into the welfare state in part to overcome bureaucratic inflexibility and insensitivity.<sup>89</sup> While acknowledging that discretion can be used as a smokescreen for fiscal restraint, or can be abused by individuals, it also has the potential to "act as a lubricant for the system, translating ideals into realities."<sup>90</sup> This view reflects the seminal work of Richard Titmuss on the Supplementary Benefits Commission (SBC).<sup>91</sup> Titmuss drew on the American experience of Nixon's Family Assistance Plan, which aimed to remove the exercise of administrative discretion and to transform policies into rules.<sup>92</sup> Titmuss argued that this view was based on the false assumption of a dichotomy between rules and discretion. His conclusions were first, echoing Davis, discussed above, that both the necessity for discretion and its dangers must be recognised,<sup>93</sup> and secondly, that schemes based on a mixture of basic rights and discretionary powers can lead to more innovation and creativity in the broader context of social needs.<sup>94</sup>

---

<sup>87</sup> I. Loveland, *Housing Homeless Persons: Administrative Law and the Administrative Process* (Oxford, Clarendon, 1995) p.73.

<sup>88</sup> S.J. Smith and S. Mallinson, 'The Problem with Social Housing: Discretion, Accountability and the Welfare Ideal' (1996) *Policy and Politics*, 24, 4, 339-357; R. Sainsbury, 'Administrative Justice: Discretion and Procedures in Social Security Decision-Making' in K. Hawkins (ed.), *The Uses of Discretion* (Oxford, Clarendon Press, 1992).

<sup>89</sup> Smith and Mallinson, 1996, *ibid* p.354.

<sup>90</sup> *ibid*. The desirability of being able to respond flexibly to claimants' real needs was advanced in relation to the creation of the social fund; Department for Social Security, 1985, *op cit* n.49. See also Drabble and Lynes, 1989, *op cit* n.51 p.301.

<sup>91</sup> Titmuss, 1971, *op cit* n.27. The Supplementary Benefits Commission was established by the Social Security Act 1966. Its main role was to determine how the discretionary powers contained in the legislation governing the supplementary benefit scheme should be exercised by staff in local offices; Adler, 1997, *op cit* n.8 p.389. Professor Titmuss was Deputy Chair of the Commission when the article was published.

<sup>92</sup> Titmuss argued that the Plan exemplified the values of what he described as 'modern Diceyism', associated with the political right. However, the Plan also attracted support from the social rights movement because, it was argued, the removal of discretion gave welfare benefits the status of 'rights' rather than of 'charity'. See also C. Reich, 'Individual Rights and Social Welfare: The Emerging Legal Issues' (1965) *Yale Law Journal* 1245.

<sup>93</sup> Titmuss, 1971, *op cit* n.27 p.127.

<sup>94</sup> *ibid* p.129. However, Titmuss's work has been criticised on the grounds that he was personally involved in the SBC at a time when the Commission was under attack from welfare rights organisations; Adler, 1997, *op cit* n.8.

Drawing on the concept of ‘embedded discretion’,<sup>95</sup> i.e. discretion embedded within rules, Sainsbury also suggests that discretion is an inevitable feature of the welfare state. He argues that it remains even in schemes based on entitlements and rights because rules containing standards such as ‘necessary’, ‘essential’, ‘exceptional’ or ‘reasonable’ necessarily require the exercise of discretion.<sup>96</sup>

To summarise, there are many possible explanations for the prevalence of discretionary decision-making by officials in modern public administration; some benign, others critical. However, there does appear to be a general acceptance that discretion in decision-making is, at the very least, inevitable and even desirable. This view draws a distinction between discretionary decisions and arbitrary ones. The following section attempts to locate the conferment of discretionary authority by central government on local authorities by examining different analyses of the central-local relationship.

## Analyses of the Central-Local Relationship

### *The agency-partnership continuum*

The prevailing analysis before 1980 was to locate the central-local relationship along an agency-partnership continuum. The concepts of agency and partnership represented the two extremes of the continuum that described the relative independence of local authorities from central government. At one extreme, agency connoted a body that was subservient to a central authority and merely carried out its wishes. At the other extreme, partnership implied two equals, with the same degree of power. In this analysis, the discretion accorded to local authorities is a matter of degree, depending on the view one takes as to the position of the local authority on the continuum.

Employing the agency-partnership analysis, three distinct chronological periods can be identified. The first period, covering the early part of the twentieth century, appears to suggest a restrictive, ‘agency’ role for local government. Jennings, writing in 1935, believed that while local authorities could achieve a great deal within their powers, “they are rigidly restricted to the powers conferred on them by Parliament; their organization and

<sup>95</sup> See C. Harlow and R. Rawlings, *Law and Administration* (London, Weidenfeld and Nicolson, 1984) p.617.

<sup>96</sup> Sainsbury, 1992, op cit n.88.

their proceedings are determined by statutes, and above all they are controlled more or less closely in all their activities by organs of the Central Government.”<sup>97</sup> Loughlin identifies in Jennings’s analysis recurring themes; viz. the restrictiveness of the *ultra vires* doctrine and the need to entrust local authorities with sufficient powers to enable them effectively to provide public services which meet the needs of their constituents.<sup>98</sup>

The second period, spanning the 1930s to the mid-1970s suggests a consensual approach, although there is some disagreement about whether the relationship ever amounted to a ‘partnership’. Two of the influential authors writing in the 1960s, the public lawyer, Griffith and Cullingworth,<sup>99</sup> the housing policy expert, eschewed the comfortable notion of ‘partnership’. Griffith believed that the relationship is based on mutual self-interest; an acknowledgement that neither party can perform its functions without the other. He argued that while the relationship cannot be characterised as one of control by the centre over the locality, neither can it be described as one of partnership. Cullingworth believed that to describe the relationship as one of partnership may imply a greater degree of harmony than actually exists. Cullingworth observed that while local authorities are popularly elected, legally independent bodies, “they are by no means completely autonomous bodies.”<sup>100</sup>

Griffith agreed that local authorities must conform within the limits laid down by governments; both political and financial. He emphasised three conditions that shape the relationship between the centre and the locality; first, that the local authorities are the service providers, but central departments “may forbid, may seek to persuade or may frustrate”;<sup>101</sup> secondly, that to characterise the relationship between the centre and the locality as one of control is a “partial misdescription” because the relationship is two-way;<sup>102</sup> and thirdly, that there is an acceptance, for most services, of the concept of a general minimum standard that should apply to the whole country. “One result … is that the rules and regulations made by the departments are framed with a mind to the weaker local authorities. Frequently, therefore, they are more stringent than is necessary for the

<sup>97</sup> W.I. Jennings, ‘Central Control’ in H.J. Laski, W. I. Jennings and W. A. Robson (eds.), *A Century of Municipal Progress 1835-1935* (London, Allen & Unwin, 1935) p.450.

<sup>98</sup> Loughlin, 1985, op cit n.29 pp.125-6.

<sup>99</sup> Chair of the statutory advisory body on housing, the Central Housing Advisory Committee (CHAC), and author of many reports on public housing. See chapter 1, note 123.

<sup>100</sup> Cullingworth, 1966, op cit n.70 p.60.

<sup>101</sup> Griffith, 1966, op cit n.62 p.18.

<sup>102</sup> ibid.

guidance of the majority.”<sup>103</sup> This tends to suggest an approach that is more consensual in practice than may be suggested by the wording of legislation. This also supports the claim, discussed earlier, that legislation does not necessarily accurately reflect the relationship between the parties.

Looking back on this second period from the vantage point of the 1980s, Loughlin criticises the Maud Committee’s<sup>104</sup> view that legislation governing local authorities’ activities was narrowly drafted.<sup>105</sup> Indeed, Loughlin believes the relationship during this period is better characterised in terms of ‘partnership’, ‘interdependence’ and ‘structured bargaining’.<sup>106</sup> This view is supported by the claim of the 1976-79 Labour government in its Green Paper issued in response to the Layfield Report on local government finance<sup>107</sup> that “the Government see the duties and responsibilities involved in the provision of local public services as being shared on a partnership basis between central and local government.”<sup>108</sup> However, more recently it has been argued that the apparent consensus that existed between central and local government in the post-war period was largely unexplored, and increasingly challenged during the 1980s.<sup>109</sup>

A central theme to the agency-partnership model is the role of professionalism in the central-local relationship. The concept of professionalism provides the model with explanatory value, in that it accounts for the relationship moving along the continuum. Following World War II, professionalism of local government service grew and led to the establishment of national norms and standards that were the true basis of the central-local relationship, rather than the apparently wide supervisory powers given to ministers by legislation.<sup>110</sup> Writing in 1966, Griffith believed that “the professionalism of local

---

<sup>103</sup> *ibid.*

<sup>104</sup> J.P.R. Maud, *Report of the Committee on the Management of Local Government* (London, HMSO, 1967) para. 283.

<sup>105</sup> Loughlin, 1985, *op cit* n.29 p.139.

<sup>106</sup> *ibid.*

<sup>107</sup> Layfield Report, *Local Government Finance*. Report of the Layfield Committee. Cmnd. 6453 (London, HMSO, 1976).

<sup>108</sup> Secretaries of State for the Environment and for Wales, *Local Government Finance*. Cmnd. 6813 (London, HMSO, 1977) pp.4-5.

<sup>109</sup> R. Leach, ‘Local Government Reorganisation RIP?’ (1998) *Political Quarterly*, 69, 31-40, p.37. See also Cochrane, 1993, *op cit* n.63 p.49.

<sup>110</sup> Butcher et al, 1990, *op cit* n.76.

government officers is the greatest single force which enables local authorities to carry out, with much efficiency, the considerable tasks entrusted to them.”<sup>111</sup>

While for some the influence of professionals has largely been ignored or overlooked in the analysis of central-local relations,<sup>112</sup> Stewart identifies managerial professionalism as the dominant tradition in the management structure of local government since the 1930s.<sup>113</sup> Loughlin characterises managerial professionalism (together with administrative politics, in which administrative officers dominate by setting the agenda and providing the source of policy initiatives) as part of the traditional pattern of central-local relations that has broken down under the pressure of the increasing politicisation of local government, and in particular the rise of municipal socialism.<sup>114</sup>

Charting the relative power of managerial professionalism from the half-century 1935 to 1985, Stewart detects three separate challenges to its authority; the administrative efficiency movement, the corporate approach and the new politics. However, the new politics has challenged “the assumptive world of local government in which client need is defined organizationally according to established professional prescriptions.”<sup>115</sup> Stewart’s argument reflects, to a certain extent, Loughlin’s contention, discussed in detail below, that the central-local relationship has become more politicised.

It may, however, be misleading to talk about professionals as a single entity in local government. It has been argued that important differences exist between various disciplines and those differences affect the amount of influence exerted by the professionals on policy decisions. For example, Laffin compares the relative influence of two distinct groups (engineers and housing professionals) on the policy-making process. He found that, in contrast to the professional engineers, the housing professionals never attained the position of being an autonomous source of influence on policy.<sup>116</sup> Cole and

---

<sup>111</sup> Griffith, 1966, *op cit* n.62 p.534.

<sup>112</sup> Rhodes describes professionals as part of the ‘forgotten dimension’ of central-local relations. He contends that professional officers have many opportunities to exert influence on behalf of the local authorities, but are largely absent from the literature on central-local relations; Rhodes, 1981, *op cit* n.45.

<sup>113</sup> J.D. Stewart, ‘The Functioning and Management of Local Authorities’ in M. Loughlin *et al* (eds.), *Half a Century of Municipal Decline 1935-1985* (London, Allen & Unwin, 1985) p.99.

<sup>114</sup> Loughlin, 1986, *op cit* n.68.

<sup>115</sup> Stewart, 1985, *op cit* n.113 p.117.

<sup>116</sup> M. Laffin, *Professionalism and Policy: The Role of Professions in the Central-Local Government Relationship* (Aldershot, Avebury, 1986) p.219.

Furbey too believe that the role of professional housing managers in policy development has been especially peripheral.<sup>117</sup> In Laffin's analysis, one factor is particularly significant; the political controversy that has existed in relation to housing policy.

This controversy has meant that, in housing, unlike many other policy sectors, the professionals have failed to establish boundaries between professional and political jurisdictions. The high degree of interest among politicians in housing reflects partly their perception of it as a field which is dominated by redistributive policies and partly the tendency of local politicians to become involved in the day to day management of the housing stock.<sup>118</sup>

Cole and Furbey posit further explanations for the intervention of local politicians in housing decisions. for example, the early establishment of housing as a local authority service, before the general consolidation of professional power in welfare service delivery after 1945. They also attribute the interference to the relative absence of mandatory requirements in housing legislation, which has left ample opportunity for local political interpretation. Furthermore, compared with less tangible services, for example education, civil engineering or public health, councillors have regarded housing as devoid of mystique and a matter of common sense.<sup>119</sup> Laffin's view is supported by a more contemporary author who argues that in the hierarchy of professions, "housing management has been a relatively recent, minor player."<sup>120</sup>

Within the agency-partnership model, it is widely regarded that the growth of professionalism contributed to a large degree to the relatively high level of discretion accorded to local authorities. Managerial professionalism formed part of the consensual tradition of central-local relations that existed in the post-War period until the middle to

<sup>117</sup> I. Cole and R. Furbey, *The Eclipse of Council Housing* (London, Routledge, 1994) p.131.

<sup>118</sup> Laffin, 1986, op cit n.116 p.221. This is especially true of housing allocation decisions before 1974 when housing authorities were often very small; Cole and Furbey, 1994, *ibid* p.124.

<sup>119</sup> Cole and Furbey, 1994, op cit n.117 p.122. The former Housing Minister, Richard Crossman, supports this view. Expressing his regret at leaving the Department of Housing after only 22 months, he commented that he found that particular Department ideal, "Because Housing isn't a specialist Department; it's full of variety and practical decisions which stretch over the whole life of England"; R. Crossman, *The Diaries of a Cabinet Minister, Vol. One, Minister of Housing 1964-66* (London, Hamish Hamilton and Jonathan Cape, 1975) p.612.

<sup>120</sup> M. Pearl, *Social Housing Management: A Critical Appraisal of Housing Practice* (Basingstoke, Macmillan, 1997) p.209.

late 1970s. However, in the third period of the agency-partnership analysis, which runs from the mid-to-late 1970s until at least 1997,<sup>121</sup> professionalism has become increasingly irrelevant as the central-local relationship has changed, with a commensurate loss of local authorities' discretion to act independently of central government. Indeed, it has been argued that the Conservative Governments of the 1980s and 1990s rode roughshod over professional standards when they found that they conflicted with their political interests,<sup>122</sup> particularly of subjecting local government to the disciplines of the market. This change in the character of the relationship has been explained by the inter-related processes of politicisation and juridification.<sup>123</sup>

### *Politicisation and juridification*

It is possible to trace the growing anxieties about the health of local government from World War II onwards,<sup>124</sup> but it was primarily the economic crisis of the 1970s that caused the strains in the central-local relationship to become apparent.<sup>125</sup> The central concern of the local government reforms of the 1970s was to increase administrative efficiency; "The preoccupation of official reports and academics was with the need to reconcile democracy with efficiency. While the paramount importance of democracy was regularly proclaimed, it was substantially taken for granted."<sup>126</sup>

The retrenchment in local government expenditure was started under a Labour government (1974-76 and 1976-79), but the agenda of the incoming Conservative administration of 1979 was far-reaching reform. The first Thatcher government's aim was not merely to reduce public expenditure but fundamentally to restructure the Welfare State.<sup>127</sup> This has had a profound impact on local government, and the result has been a restructuring of the relationship.<sup>128</sup> This restructuring lead to the breakdown of the largely consensual

---

<sup>121</sup> Whether the relationship has changed since the election of a Labour government in May 1997 is explored in chapter 6.

<sup>122</sup> L. Metcalfe and S. Richards, *Improving Public Management* (London, Sage, 1990) p.130. See also Pearl, 1997, op cit n.120 p.208.

<sup>123</sup> For a broader analysis of juridification within the welfare state see G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G. Teubner (ed.), *Juridification of Social Spheres* (New York, Walter de Gruyter, 1987).

<sup>124</sup> Butcher et al, 1990, op cit n.76.

<sup>125</sup> Cochrane, 1993, op cit n.63 p.29.

<sup>126</sup> Butcher et al, 1990, op cit n.76 p.23.

<sup>127</sup> "If the direction of change was already clear at the end of the 1970s, the *pace* of change accelerated dramatically with the election of the first Thatcher Government"; Cochrane, 1993, op cit n.63 pp.30-1 (original emphasis).

<sup>128</sup> Loughlin, 1986, op cit n.68 p.14.

administrative and professional practices that had characterised the relationship. Following the collapse in traditional administrative practices “the Conservative Government have sought to re-establish a legitimate system by structuring local authority discretion through the imposition of detailed statutory procedures on local authority decision-making.”<sup>129</sup>

The net result is that the relationship has become politicised and juridified. “[P]oliticisation occurs when the idea that central and local government have a basic mutuality of objective is widely questioned. Juridification results from the increased importance of investigating the legal limits of the powers of local authorities.”<sup>130</sup> However, the juridification of the relationship has been entirely one-sided; local authorities have been reconstituted as rule-bound organisations while the same legislation has extended the discretionary powers of central government. Under the traditional central-local relationship, it had not generally been the function of law to define powers and duties with a great deal of precision. Consequently, the “process of juridification is riddled with uncertainties.”<sup>131</sup>

A key premise of the theory of juridification is that a pyramid hierarchy exists (comprising central government, local government and the courts) with central government, by virtue of its constitutional superiority, at the apex. While the relationship is one of complex interaction and tension, “a key feature is that legal rules originate at the apex of the institutional framework”.<sup>132</sup> If this premise is correct, then local authorities’ ability to initiate rules, or even to influence central government’s legislative activities, has been diminished as a result of the juridification of the relationship. The ability of local authorities to influence the legislative process is explored below and throughout this thesis.

It has been argued that discussions of the process of juridification are posed in critical terms; the implication is that the law has proliferated unduly and moved into areas that it cannot or should not cover.<sup>133</sup> However, Zacher contends that such a critical analysis

---

<sup>129</sup> ibid p.195.

<sup>130</sup> ibid p.3.

<sup>131</sup> ibid p.193.

<sup>132</sup> B. Mauthe, ‘The Notion of Rules and Rule-Making in the Central-Local Government Relationship’ (2000) *Anglo-American Law Review*, 29, 3, 315-341, p.320.

<sup>133</sup> H. Zacher, ‘Juridification in the Field of Social Law’ in G. Teubner (ed.), *Juridification of Social Spheres* (Berlin, New York, Walter de Gruyter, 1987) p.377.

assumes an idea of 'correct law', of its 'proper' evolution and a 'proper' distribution within law and between law and other control mechanisms, as well as between legal norms and other rules.<sup>134</sup> Similarly Partington has observed that, in most areas, law is a reflection of social policy (i.e. it is the means by which social policy is given effect), rather than being a determinant of it.<sup>135</sup> However, it should be noted that these comments were not made in the context of relationships between central and local government. It can be argued that, because of their constitutional status as a directly elected tier of government, local authorities command a status not enjoyed by other decision-makers.

The politicisation-juridification analysis provides a specific means of measuring the change in local authority discretion. According to this model, the processes of politicisation and juridification have led to a restructuring of the relationship between central and local government, and particularly a desire on the part of the government to structure local authority discretion through the imposition of detailed statutory procedures on local authority decision-making.<sup>136</sup> This implies a reduction in local authority discretion. If it is correct that law has now assumed a more prominent position, it would be logical to presume that law has become the dominant factor in controlling the way in which local authorities exercise their discretion. However, a number of research studies appear to demonstrate that law remains a side-issue in this respect.

An empirical study conducted by Ian Loveland focuses on attempts by one 'new urban left' authority to manipulate the provisions of the housing benefit scheme "with the intention of producing concrete social relations between the citizen and the state which are entirely inconsistent with the Thatcher government's political philosophy."<sup>137</sup> This research highlights the willingness of the council's officers to use their administrative discretion to achieve the political will of the ruling group, where the political ideology between the two is congruent. This fact suggests that law plays a weak role in controlling officer discretion. However, there was a difference, in the officers' opinion, between bending the rules, where

---

<sup>134</sup> *ibid* p.378.

<sup>135</sup> M. Partington, 'The Juridification of Social Welfare in Britain' in G. Teubner (ed.), *Juridification of Social Spheres* (Berlin, New York, Walter de Gruyter, 1987) p.435.

<sup>136</sup> It has been argued that some senior civil servants and leading national politicians during the 1980s believed that they could determine what happened at local level by legislating for it; Cochrane, 1993, *op cit* n.63 p.44.

<sup>137</sup> I. Loveland, 'Welfare Benefits, Administrative Discretion, and the Politics of the 'New Urban Left' (1987) *Journal of Law and Society*, 14, 4, 474-494, p.475.

the rules gave them discretion, to effect the political will of the leading group, and knowingly breaking the rules.

This acceptance by officers of the sanctity of legal boundaries contrasted clearly with the stance taken by some councillors against central government over the rate-capping issue... From their comments it was clear that while officers might dislike the regulatory constraints on their political autonomy, nonetheless they reluctantly accepted those constraints as legitimate determinants of administrative activity.<sup>138</sup>

These findings suggest a fragmented, rather than homogenous, status for legal rules in controlling discretionary activity within local authorities.

A more recent study on the role of legal rules in controlling local government activity is that of Cooper.<sup>139</sup> Cooper's study explored the character of legal consciousness within local government in the 1980s and early 1990s, and considered its relationship to juridification. She argues that Loughlin's depiction of juridification in local government in the 1980s revolves around two strands; first, the turn to law as other normative frameworks were undermined, and secondly, the deployment of law by central government to enforce their political agenda. However, these two strands display competing images of law, viz. "law as a game of strategy and skill which all can play [and] second, law as a colonizing force bent on achieving central government's will."<sup>140</sup> Cooper argues that research challenges the notion that people simply absorb a dominant legal ideology. "Instead, law is understood experientially, in ways shaped by class, education, geography, and occupational positioning."<sup>141</sup> The range of responses by those studied makes it difficult to depict municipal actors as part of a single, interpretive legal community. This is surprising since one would expect to find a degree of homogeneity among actors similarly positioned in terms of role and locale.

---

<sup>138</sup> *ibid* p.482.

<sup>139</sup> D. Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) *Journal of Law and Society*, 22, 4, 506-526.

<sup>140</sup> *ibid* p.521.

<sup>141</sup> *ibid* p.510.

Cooper does not dispute that the relationship has become juridified, but she concludes that juridification does not simply lead to an amplified awareness of law; rather it produces contradictory legal images. She cautions against over-estimating the effect of juridification, since many changes remain superficial and local authorities have evaded and resisted central departments' deployment of law. "These forms of avoidance and resistance do not challenge the existence of juridification; indeed, they can be seen as juridificatory effects themselves. What they do contest, however, is the assumption that change occurs in the form law or its 'masters' intends."<sup>142</sup> These conclusions question the effectiveness of law in controlling or determining the central-local relationship, suggesting that more subtle forces combine with the overt process of juridification to affect the outcome. Empirical studies which analyse the implementation of the Housing Act 1996 are examined in chapter 5.

The trend towards the politicisation and juridification of the central-local relationship is associated largely with nearly 18 years of successive Conservative governments. Consequently, in addition to testing whether the analysis provides an adequate explanation of the specific case of housing allocations, it is also necessary to explore whether the trend has continued since the election of a Labour government in May 1997. As Stewart has noted, the relationship between central and local government is not fixed but changes over time "less as a result of any particular measure, but more as the cumulative result of a series of measures."<sup>143</sup> Writing in relation to 'Best Value',<sup>144</sup> in housing management, Vincent-Jones perceives a change of style, rather than substance, in the form of housing regulation adopted by New Labour.<sup>145</sup> Drawing on Daintith's<sup>146</sup> categorisation of governmental powers as *imperium* and *dominium*,<sup>147</sup> Vincent-Jones argues that since the 1997 General Election there has been a significant shift in housing regulation away from

---

<sup>142</sup> *ibid* p.509.

<sup>143</sup> J. Stewart, 'Changing Patterns of Central-Local Relations' (2000) *Journal of Local Government Law* 5, 88-96, p.88.

<sup>144</sup> The successor to the Conservatives' regulatory compulsory competitive tendering framework (CCT).

<sup>145</sup> P. Vincent-Jones, 'From Housing Management to the Management of Housing: The Challenge of Best Value' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001) p.255.

<sup>146</sup> T. Daintith, 'The Techniques of Government' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford, Clarendon, 1994) p.35.

<sup>147</sup> *Imperium* is characterised by commands backed by force, by duties or rules whose breach is accompanied by negative sanctions, while *dominium* refers to the employment of wealth, usually in the form of government grants or contracts, as incentives to comply with central policy. However, Vincent-Jones notes that compliance with *imperium* powers may be rewarded through relaxation of rules, while withdrawal of

command and control towards more subtle forms of *imperium*, combined with increasingly varied *dominium* pressures and incentives.<sup>148</sup> This is contrasted with the classically *imperium* style of the previous government, exemplified by the use of compulsory competitive tendering (CCT). The effect of the 1997 and 2001 Labour governments is examined in chapter 6.

### *The heterogeneity of central-local relations*

The preceding analysis of the central-local relationship treats central and local government as homogenous entities and constructs an overarching theory to explain the change in the relationship between them. This is also true of the agency-partnership analysis. However, according to some academics both models fail to account for differences *between* central departments. The political scientist Rhodes identifies what he describes as the ‘conventional argument’; that local authorities are moving from a partnership towards an agent model.<sup>149</sup> The two reasons that are commonly cited in support of this argument are; first, that central government is exercising increasingly tight control over capital expenditure and local authorities have become increasingly dependent on the central grant awarded by government; secondly, that central departments have acquired more powers of detailed control over local authorities. Rhodes finds evidence to support his contention in both the Maud<sup>150</sup> and Redcliffe-Maud Reports.<sup>151</sup>

However, in Rhodes’s view, just as there is a conventional argument of the central-local relationship, there also exists a ‘conventional critique’ of it. On the subject of the increased financial control of central government over local authorities, it is suggested that a consequence of this would be that central government would seek to limit variations between local authorities’ patterns of expenditure, whereas “In fact … there is enormous variation in the patterns of expenditure.”<sup>152</sup> On the issue of control, although central government has an impressive list of controls at its disposal, “they constitute only a potential for control.”<sup>153</sup> To understand the relationship, according to the conventional

---

benefits may serve a sanctioning purpose under *dominium* powers; Vincent-Jones, 2001, op cit n.145 pp.244-5.

<sup>148</sup> ibid p.255.

<sup>149</sup> Rhodes, 1981, op cit n.45.

<sup>150</sup> Maud, 1967, op cit n.104.

<sup>151</sup> Redcliffe-Maud, 1969, op cit n.2.

<sup>152</sup> Rhodes, 1981, op cit n.45 p.17.

<sup>153</sup> ibid, emphasis in the original.

critique, it is necessary to investigate how the controls work in practice. For example, there are differences between central departments in the amount of control exercised.<sup>154</sup>

Rhodes is critical of both the ‘conventional wisdom’ and the ‘conventional critique’. His argument is that it does not do justice to the literature, in particular the various qualifications by the authors writing on the subject, and that it provides a one-sided description of the relationship through emphasis on local authorities as political systems in their own right. Rhodes’s view is that the relationship is much more complex than is suggested by either the conventional wisdom or its corresponding critique. For example, “Any satisfactory analysis of central-local relations must explain compliance as well as non-compliance with both central advice and statutory based instructions.”<sup>155</sup>

A particularly thorny issue of direct relevance to this thesis is the question of local authorities’ discretion in policy-making. Rhodes believes it is a complex variable, in that there are variations in the degree of discretion at the various stages. Local authorities have considerable discretion in the implementation of some major policies, but the reasons for this discretion are not clear. A possible explanation is that the local authorities have a monopoly of the relevant expertise.

[I]t is possible that central-local relations are composed of a series of discrete policy areas each with its own distinctive characteristics ... the education policy area might have completely different characteristics to those of housing and, as a result, there may be marked differences in the degree of discretion available.”<sup>156</sup>

The author believes it is necessary to look at the differences in policy areas and why such differences occur. Rhodes’s model draws heavily on theories of power-dependence between the centre and localities, and has been criticised for failing to link “the behaviour of individual players in the game of intergovernmental relations to more macro theories of

---

<sup>154</sup> While Rhodes cites the Maud Report as supporting the ‘conventional wisdom’, it should be noted that Maud did also acknowledge the heterogeneity of the central-local relationship; “Local authorities do not deal with a single department of state, and the attitude of central government varies not only with the relevant legislation, but also according to the practices of the department and the nature of the service”; Maud, 1967, op cit n.104 para. 259.

<sup>155</sup> Rhodes, 1981, op cit n.45 p.19.

<sup>156</sup> ibid p.110.

how power and interest are structured in society.”<sup>157</sup> However, there is support for Rhodes’s view; for example, Stewart disputes that central and local government are homogeneous organisations, each with clear policies;

[I]f central government and local authorities were such organizations, restraint would be inexplicable. The reality is ... [that] ... central government both wants local choice and seeks to limit it ... [and] ... local authorities may at times seek central direction and resist it at other times.<sup>158</sup>

According to Stewart, models of central-local relations that assume fragmented organisation, with differing interests, operating with imperfect policy instruments and uncertain knowledge, provide a better explanation than those based on a view of central government as a homogenous decision-maker, with a clear and consistent set of policy aims, pursued in a coherent way for the purposes which they were intended. This view of the central-local relationship stresses its political nature;

The relationship between central government and local authorities is not between abstract institutions that can be relied upon to have clear objectives, perfect knowledge and to use policy instruments geared to those objectives, but they are organisations subject to many and often conflicting pressures.<sup>159</sup>

It follows on this analysis that the degree of discretion available to local authorities to organise their own affairs depends on both the specific policy and its political context.

The heterogeneity analysis may also be applicable to relationships *within* the central government department; between the Minister and civil servants. Evidence for this claim is found in the diaries of Richard Crossman.<sup>160</sup> His account emphasises the key role played by the Permanent Secretary of the day, Dame Evelyn Sharp.<sup>161</sup> He claimed that the department was run as her “personal domain”<sup>162</sup> and that she was resistant to certain

---

<sup>157</sup> Atkinson and Wilks-Heeg, 2000, op cit n.54 p.44.

<sup>158</sup> Stewart, 1985, op cit n.113 p.26.

<sup>159</sup> G. Jones and J. Stewart, *The Case for Local Government* (London, Allen & Unwin, 1983) p.27.

<sup>160</sup> Crossman was Minister of Housing between 1964 and 1966 under Harold Wilson’s premiership.

<sup>161</sup> Crossman, 1975, op cit n.119 pp.23-4 and pp.614-9.

<sup>162</sup> ibid p.617.

changes Crossman wanted to implement.<sup>163</sup> Furthermore, it is possible that the attitude of the Permanent Secretary towards local government will influence the entire department. For example, Crossman described Sharp's attitude towards local authorities as "utterly contemptuous and arrogant, regarding [them] as children which she has to examine and rebuke for their failures."<sup>164</sup> These observations, while based on the experiences of a single minister, tend to support the heterogeneity analysis.<sup>165</sup>

### *Inherent structural conflict*

Both the agency-partnership analysis and that of politicisation and juridification depict conflict as signifying a breakdown in the central-local relationship. By contrast, the inherent structural conflict model depicts conflict as entirely natural, and even desirable, to a thriving democracy. This is because, on the one hand, local authorities are not autonomous bodies since they do not possess any inherent powers or rights,<sup>166</sup> but, on the other hand, local government can legitimately claim authority from the fact that it is a democratically elected institution. Indeed, local authorities are the only other elected authorities within this country.<sup>167</sup> This structure, it has been argued, means that the possibility of conflict is inherent in the central-local relationship, in that both local and central government can claim legitimacy for their actions from their electoral mandate.<sup>168</sup> This argument is highlighted in the parliamentary debates on the Housing Act 1980, in relation to the Right to Buy.<sup>169</sup>

Furthermore, the 'dilemma' in central-local relations, that local authorities can make decisions with which central government does not necessarily agree, is a 'chosen

---

<sup>163</sup> *ibid* p.614.

<sup>164</sup> *ibid* p.24. In a similar vein, Kenneth Baker observed differences between the attitudes of Cabinet members in Margaret Thatcher's government; "... while Mrs Thatcher was herself deeply ambivalent, if not openly hostile, towards local government, it is equally clear that her views were not shared by the Cabinet as a whole"; K. Baker, *The Turbulent Years* (London, Faber, 1993) p.111.

<sup>165</sup> Further contemporary anecdotal evidence to support this contention is found in relation to the Homelessness Act 2002, discussed in chapter 6. The presence within the (then) DETR of a particularly enthusiastic civil servant was believed to have been influential in securing a broad measure of compromise between the main political parties and other interested organisations (including the Local Government Association and Shelter); personal communication, Patrick South, Parliamentary Liaison Officer, Shelter, 24 September 2001.

<sup>166</sup> The constitutional position of local authorities was considered above.

<sup>167</sup> Stewart, 1983, *op cit* n.57 p.222.

<sup>168</sup> J. Stewart, 'Dilemmas' in S. Ranson, G. Jones and K. Walsh (eds.) *Between Centre and Locality: The Politics of Public Policy* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1985).

<sup>169</sup> See chapter 4.

dilemma'. It is a corollary of the creation of elected local authorities with a capacity for local choice in fields of activity that remain the concern of central government departments.<sup>170</sup> This view depicts conflict as inevitable, and indeed, part of the democratic process. It is suggested that a commitment by central government to a healthy local government necessarily entails the acceptance of the right of local authorities to adopt polices and practices with which it does not agree.<sup>171</sup> Alder draws on the concept of 'incommensurable values',<sup>172</sup> arguing that disagreement about such values in a democratic society should be expected, rather than regarded as 'crises'.<sup>173</sup> Alder identifies the competing incommensurables of local government to be local autonomy, instrumental efficiency in achieving substantive outcomes and equity, in the sense of distributive justice between competing claims to resources.<sup>174</sup>

The exercise of discretion by local authorities in this analysis is based on the legitimacy of their electoral mandate. In a parliamentary system in which two democratically elected bodies exist, tension in the degree of discretion accorded to local authorities, and consequently the amount of control retained by central departments, is inevitable. According to this model, it is submitted that the degree of local authority discretion will depend on central government's attitude to the status of local government in general, and the local mandate in particular. While this model does not explain why at particular times conflict becomes more pronounced than at other times, or why governments sometimes seek to impose greater central control over local authorities, its relevance is to provide a

---

<sup>170</sup> Stewart, 1985, op cit n.168.

<sup>171</sup> V. Karn, 'Housing' in S. Ranson, G. Jones and K. Walsh (eds.) *Between Centre and Locality: The Politics of Public Policy* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1985) p.182. John Stuart Mill, writing in the nineteenth century believed: "It is but a small portion of the public business of a country, which can be well done, or safely attempted, by the central authorities; and even in our own government ... the legislative portion at least of the governing body busies itself far too much with local affairs ..."; *Considerations on Representative Government* (1861). Laski, writing in 1926, made the case for local government, arguing that entrusting powers of self-government to local areas was "the surest way to breed responsibility in the population"; H.J. Laski, 'Judicial Review of Social Policy in England' (1926) *Harvard Law Review*, 832-848, p.832. While he concedes that a system of central government may be more efficient than one that leaves room for local variation, "the cost of this efficiency is more than counter-balanced by a loss of interest and responsibility in the electorate involved"; *ibid* p.845. Stewart provides an alternative view of the value of local government to central government; Stewart, 1983, op cit n.57 p.222.

<sup>172</sup> Alder adopts the notion of incommensurability (traceable to Aristotle and propounded by Sir Isiaah Berlin). "Values are incommensurable where, although each has its own rational support, there is no rational basis for choosing between them, for example between privacy and freedom of expression"; Alder, 2001, op cit n.56 p.717.

<sup>173</sup> *ibid* p.734.

<sup>174</sup> *ibid* p.718.

counterbalance to the analyses that depict conflict between central and local government as aberrant rather than natural.

## Summary

The above analyses of the central-local relationship provide different explanations for the conferment of discretionary authority by central government on local authorities.

However, recurring themes are discernible, for example the relative importance of professionals within the relationship. Both the agency-partnership and the politicisation-juridification analyses consider the role of law within the relationship. Under the former analysis, law performed (at least until 1979) a facilitative role and the wording of the legislation did not necessarily reflect the true character of the central-local relationship. According to the latter model, the role of law has changed (from a background to a foreground role) as the relationship between the centre and the localities has become politicised and juridified.

The inherent structural conflict model stresses the inevitability of conflict between two tiers of elected government. As such, attention is focused on the degree to which central government is prepared to accept local variation within particular policy areas or, indeed, the extent to which central government attempts to impose greater direction. Under the heterogeneity model, the socio-political background becomes the prime focus of attention since the conferment of discretionary authority can only be understood within its context. Consequently, it is impossible to generalise about why local authorities are granted considerable discretion in some circumstances or why their actions are more closely defined in others.

The two models that appear to offer the greatest analytic value for this thesis are that of heterogeneity and politicisation-juridification. The latter model, as argued above, provides a very definite view of the change in central-local relations. If it is valid as an overarching theory, then it should provide a meaningful explanatory model for the specific case of housing allocations. The heterogeneity analysis, by contrast, suggests that a single theory that attempts to explain the entirety of central-local relations is not possible, since central government departments vary in their attitude to local authorities and behave differently in response to varying socio-political circumstances. However, it is possible that the

politicisation-juridification analysis and the heterogeneity analysis are not mutually exclusive. Cochrane, for example, has argued that while the Thatcher governments did not generate clear and unequivocal policies for local government (because the government was under competing, rather than consistent, pressure), nevertheless it is possible to identify a general direction to the changes in the central-local relationship that have taken place.<sup>175</sup> The thesis will attempt to assess the utility of each of these two analyses in relation to housing allocations by local authorities.

## The Local Authority Associations

While the constitutionally subordinate status of local authorities was noted above, it is relevant to examine the extent to which local authorities have been able to influence government policy, rather than simply being on the receiving end of central ‘diktats’. This issue is of importance to the state of the central-local relationship and whether it has changed over time.

There are currently some 400 local government units<sup>176</sup> and an examination of their influence as individual entities is beyond the scope of this thesis. However, since the nineteenth century,<sup>177</sup> local authorities have joined together to form associations to represent their collective interests. Prior to the local government reorganisation in 1974,<sup>178</sup> following the Redcliffe-Maud report,<sup>179</sup> there were five associations.<sup>180</sup> After 1974 three associations remained and in 1997 the remaining bodies were replaced by a single organisation, the Local Government Association (LGA).<sup>181</sup> It is therefore possible that an

<sup>175</sup> Cochrane, 1993, op cit n.63 pp.45-8.

<sup>176</sup> Comprising 47 English unitary authorities, 22 Welsh unitary authorities, 36 Metropolitan districts, 33 London boroughs (including the City of London), 34 Shire counties and 238 Shire districts; Local Government Association website [www.lga.gov.uk](http://www.lga.gov.uk). Before the reorganisation of local government in the 1970s, they numbered more than 1,200; Redcliffe-Maud, 1969, op cit n.2 p.21.

<sup>177</sup> Isaac-Henry has described them as “essentially a nineteenth century development, created to protect and promote the interests of the particular type of local authority they represented”; K. Isaac-Henry, ‘The English Local Authority Associations’, in G.W. Jones (ed.), *New Approaches to the Study of Central-Local Government Relationships* (Farnborough, Gower, 1980) p.40.

<sup>178</sup> Local Government Act 1972.

<sup>179</sup> Redcliffe-Maud, 1969, op cit n.2.

<sup>180</sup> The Association of Municipal Corporations (AMC), the County Councils Association (CCA), the Urban District Councils Association (UDCA), the Rural District Councils Association (RDCA), and the National Association of Parish Councils (NAPC). See Appendix I for a graphic representation of the evolution of the associations.

<sup>181</sup> However, in April 2000 the Association of London Government was formed to represent the 32 London boroughs and the Corporation of London; [www.alg.gov.uk](http://www.alg.gov.uk).

impression of the local authorities' ability to influence central government may be gained by studying the activities of their respective associations. Indeed, Griffith has asserted that any description of central and local government in Britain would be incomplete without some mention of the role of local authority associations.<sup>182</sup>

Before attempting to assess the influence of the associations, an important question is raised in relation to their status. Are they, for example, merely a form of 'pressure group', or do they occupy a higher status, given that they are emanations of a tier of government? The first difficulty lies in defining a pressure group. It is clear that such groups are not only numerous but extremely diverse, ranging from the small, issue-specific groups to those which are household names.<sup>183</sup> Despite these variations, it is possible to discern common threads from the various definitions that have been proffered. Broadly speaking, a pressure group is an organisation that attempts to influence the political decision-making process.<sup>184</sup> According to Rhodes, one should not assume that the associations are just another pressure group.<sup>185</sup> He quotes Mackenzie who ascribed to the AMC and CCA an unofficial status of something approaching sub-parliaments.<sup>186</sup> Rhodes prefers the term 'public interest group',<sup>187</sup> and locates them within the 'national community' of local government.<sup>188</sup> Another view is that they are "a unique type of pressure group", their uniqueness deriving from the constitutional status of the members they represent.<sup>189</sup> Given the general aims of the local authority associations,<sup>190</sup> it appears to be reasonable to characterise them as pressure groups. Despite the fact that they represent the interests of a tier of government, they have never enjoyed a formal status above that of an 'interest' group.

---

<sup>182</sup> Griffith, 1966, op cit n.62 p.33.

<sup>183</sup> R. Baggott, *Pressure Groups Today* (Manchester, Manchester University Press, 1995) p.1.

<sup>184</sup> A. Ball and F.A. Millard, *Pressure Politics in Industrial Societies: A Comparative Introduction* (Basingstoke, Macmillan, 1986) pp.33-4; P. Pross, *Group Politics and Public Policy* (Oxford, Oxford University Press, 1986) p.9.

<sup>185</sup> R.A.W. Rhodes, *The National World of Local Government* (London, Allen & Unwin, 1986) p.11.

<sup>186</sup> W.J.M. Mackenzie, 'Pressure Groups in British Government' in R. Rose (ed.), *Studies in British Politics* (London, Macmillan, 1969) pp.258-75; quoted in Rhodes, 1986, *ibid* p.11.

<sup>187</sup> It is argued that the term pressure group is, first, emotive, suggesting aggression rather than negotiation and, secondly, it focuses too much attention on the government as the target of lobbying, and plays down the equally important impact which government has upon groups: Baggott, 1995, op cit n.183 p.9.

<sup>188</sup> Rhodes, 1986, op cit n.185 p.12.

<sup>189</sup> Isaac-Henry, 1980, op cit n.177 p.47.

<sup>190</sup> Namely to protect the interests, rights and privileges of their members; Griffith, 1966, op cit n.62 p.40.

A recurring theme of the literature is the relative weakness of the associations. Such weakness has been consistently attributed, to a significant extent, to their historic inability to provide a united voice in their dealings with central government.<sup>191</sup> However, this situation may be inevitable given the wide variety of interests they represented. In 1967, the Maud Report recognised that just as there was no single attitude or policy of central government towards local authorities, “local government is not itself an identifiable institution; it is a concept”.<sup>192</sup> As such, the heterogeneity analysis, discussed above, applies equally to local government and central government. The associations’ influence is examined at relevant points throughout this thesis.

## CONCLUSION

This chapter has sought to establish the framework for the analysis conducted in later chapters of the origins and development of housing allocations legislation. In doing so, it has performed two primary objectives. The first objective has been to gain an understanding at a theoretical level of the meaning of discretion and particularly its relationship to legal rules. In order to establish whether, and to what extent, local authorities’ discretion in housing allocations has changed, it is important to establish how we will recognise discretion. According to Dworkin’s doughnut metaphor, discretion exists in the absence (or indeterminacy) of rules. On the authority of this definition, then, it is possible to evaluate the housing allocations legislation according to the extent to which the rules are absent or indeterminate.

It was described in chapter 1 that it is generally agreed that local authorities have been conferred considerable discretionary authority in housing allocations, achieved largely by the vague ‘reasonable preference’ requirement. This statutory formula would seem to support the legal theorists’ definition of discretion of an absent or indeterminate rule. However, if the politicisation-juridification analysis is applicable to housing allocations, one would expect to see a change in the nature of the legislation, towards greater prescription through the use of more closely defined obligations. The thesis will explore whether this has occurred.

---

<sup>191</sup> Maud, 1967, op cit n.104 para.309; Isaac-Henry, 1980, op cit n.177 pp.53-4.

<sup>192</sup> Maud, 1967, *ibid*.

However, the existence and nature of the legal rules provides only a partial understanding. Equally important is the effect of those rules. A theme to emerge from the chapter is that legal rules are only one, and not necessarily the most important, method of confining (or promoting) discretion. Indeed, it has been argued from a socio-legal perspective that in order to understand the exercise of discretionary decision-making, it is necessary to relate it to broader social, organisational and political processes. An examination of the implementation of the Housing Act 1996 in chapter 5 considers this point.

A further point to emerge is that the existence, or absence, of legal rules does not necessarily reflect the true state of the central-local relationship; it was argued that, particularly after World War II, professional norms and standards were the true basis of the relationship. If this is true, it then becomes essential to consider the function served by legal rules within the central-local relationship. An analysis of the literature suggests strongly that the traditional lawyers' conception of legal rules, as the primary means of directing actors' actions (i.e. an instrumental function) is, in practice, only one purpose of legal rules.

This observation leads to the second objective of the chapter which has been to examine different analyses of the central-local relationship, with particular emphasis on the value of each model in explaining the conferment of discretionary authority. Two contrasting analyses have been identified which will be tested against the data generated in subsequent chapters; the heterogeneity analysis and that of politicisation and juridification. The rationale for selecting these two analyses is their different view of the conferment of discretionary authority within the central-local relationship. The heterogeneity analysis suggests that such conferment is explicable only in relation to the broader socio-political background and that the central-local relationship is not necessarily the key determinant of the degree of discretion conferred. By contrast, the politicisation-juridification model suggests that the deteriorating central-local relationship has led to the imposition of more detailed and prescriptive rules governing local authorities' activities. This latter analysis therefore provides a definite model against which to test the hypothesis established in the introduction to this thesis.

## Chapter 3

### DEVELOPMENT OF LEGISLATION 1920s-1949

#### INTRODUCTION

Chapter 1 provided a general historical overview of local authorities' involvement in the production and management of council housing. It was observed that the requirement for local authorities to give a 'reasonable preference' to certain categories of people is a long-standing feature of successive Housing Acts. This chapter seeks to explore the origins of the reasonable preference phrase, and in particular to discover the rationale for its initial adoption and subsequent maintenance in the legislation of this period. Establishing the historical basis of local authorities' housing management functions provides an invaluable foundation for the analysis of more recent developments in later chapters.

It was argued in chapter 1 that the inconsistent approach by successive governments of this era to housing production may provide at least a partial explanation for the way in which local authorities' housing management functions were conferred. It was speculated that the adoption of the reasonable preference formula owed as much to lack of forethought and planning, as it did to a positive commitment to the autonomy of local authorities in the sphere of housing management. The chapter therefore seeks to ascertain what can be learned about this formative period, primarily through an analysis of the parliamentary debates, in relation to the motivation for government intervention (or lack of it) in this area.

Chapter 1 also described how, despite the private law roots of local authority housing, it has come to be acknowledged that factors other than purely commercial ones should govern the allocation of such housing. Indeed, the very term 'allocating' sets local authorities' functions apart from private landlords who 'let' their housing. However, the emergence of a social role for housing is largely a post World War II phenomenon. It will be seen that for MPs of this era the question of housing allocation was closely connected with the ability to pay rent and the desirability of providing housing for 'working class'

people. As such, the chapter provides an account of early parliamentary attitudes towards the concept of publicly subsidised housing and, specifically, who should receive it.

The chapter also considers whether any inferences can be drawn from the adoption of the reasonable preference formula on the broader issue of the relationship between central and local government. From the debates an understanding emerges of an early parliamentary and, more specifically, governmental attitude towards local authorities and the autonomy they should have to determine their own housing allocations. The relationship between MPs' perceptions of who should be allocated housing, and the extent to which those views are imposed on local authorities, recurs throughout this thesis.

## HOUSING ACT 1924

### Background

In 1924, the Labour Party took office for the first time and John Wheatley, as the new Minister of Health, introduced another Housing Act with another subsidy.<sup>1</sup> The Housing (Financial Provisions) Act 1924 improved the level of subsidy offered to local authorities, with the intention of establishing long-term investment in high quality council housing. The subsidy was payable over 40 years, compared with over 20 years under the 1923 Act, involving an estimated combined annual expenditure for central and local government of £34 million.<sup>2</sup> Introducing the Money Resolution of the 1924 Act, Wheatley sought to justify such large public expenditure by appealing to the Opposition's self-interest, citing good quality housing as essential to Britain's success in international trade.<sup>3</sup> In the House of Lords, the Lord Chancellor made a similar point, emphasising the ability of housing to pacify militant workers.<sup>4</sup>

Chapter 1 outlined how the reasonable preference phrase first appeared in the 1924 Act. Section 3(1) contained various conditions with which local authorities had to comply in

---

<sup>1</sup> Chapter 1 highlighted the plethora of legislation that has been enacted since 1851; S. Merrett, *State Housing in Britain* (London, Routledge & Kegan Paul, 1979) pp.307-12.

<sup>2</sup> HC Debs, Vol. 174, col.1120, 3 June 1924, John Wheatley.

<sup>3</sup> *ibid* col.1104.

<sup>4</sup> HL Debs, Vol. 59, col.23, 27 July 1924, Lord Haldane.

order to receive central government subsidy. One condition was “that reasonable preference shall be given to large families in letting houses”.<sup>5</sup> This requirement marked a distinct departure from previous legislation. As we saw, the first subsidy from central government to local authorities to build houses was granted by the Housing and Town Planning Act 1919, passed under a coalition government. Subsequently, the Conservatives’ Housing Act 1923 granted a subsidy to local authorities or private enterprise to build houses. Neither Act placed any limitations or restrictions on the use of the houses; they could be let at any rent, or sold.

However, when the 1924 Bill was first introduced, it contained no proposals to limit local authorities’ discretion on their choice of tenant; a point highlighted during both the Money Resolution<sup>6</sup> and Second Reading debates.<sup>7</sup> While Parliament ultimately adopted the reasonable preference criterion as the restriction on local authorities’ discretion in the 1924 Act, alternative bases for housing allocations were discussed. Rent control was a recurring concern and a number of MPs would apparently have preferred local authorities’ allocation decisions to be tied more closely to the rent charged to tenants, rather than requiring them to give a reasonable preference to large families.

## Rent Control

The subsidy paid under the 1924 Act was fixed irrespective of the rent charged for the house. It therefore followed that local authorities could reduce the cost to their own funds by selecting as tenants those who could afford to pay a relatively high rent.<sup>8</sup> During the Committee stage of the debates in the House of Commons an amendment proposed by a Liberal Member, Ernest Simon, would have had the effect of controlling the rent that could be charged by the local authority. Simon explained the purpose of the amendment:

---

<sup>5</sup> Housing Act 1924, s.3(1)(f). The other conditions were (a) that the tenant must reside in the house; (b) a prohibition on assignment and sub-letting without the local authority’s consent; (c) the local authority must seek Ministry approval before selling the house; (d) a fair wages clause in the construction contract; (e) that rents would not exceed pre-World War I rates for working class housing.

<sup>6</sup> HC Debs, Vol. 174, col.1303, 4 June 1924, Neville Chamberlain.

<sup>7</sup> HC Debs, Vol. 175, col.118, 23 June 1924, Lord Eustace Percy.

<sup>8</sup> A. Deacon and J. Bradshaw, *Reserved for the Poor* (Oxford, Blackwell and Robertson, 1983) p.11.

... instead of creating a privileged class of tenant, selected in a way that no one has yet been able to suggest, [the subsidy] would do some real good to the children of the next generation, that is, those of the largest families who particularly need this subsidy.<sup>9</sup>

Simon introduced a further amendment requiring local authorities to charge lower rents to tenants with children.<sup>10</sup> Wheatley declined to accept Simon's amendment but indicated that a later Government amendment, requiring local authorities to give reasonable preference to large families, was proposed.<sup>11</sup> Simon was not entirely mollified by this concession:

It is not only that reasonable preference should be given in the case of large families, but that they should be given some other preference. That is the object of the Amendment – to enable the local authority, if it thinks well, to discriminate in the rent.<sup>12</sup>

Other Members were also unimpressed by the Government's proposed amendment. Francis Blundell, a Conservative, and Lieutenant Commander Joseph Kenworthy, a Liberal, both criticised the vagueness of the reasonable preference formula.<sup>13</sup> Kenworthy expressed his support for the principle, contained in Simon's amendment, that rents should be determined according to ability to pay, pointing out that in a 'Socialist' Bill such a socialist principle was hardly out of place.<sup>14</sup> A contribution by a Unionist Member is interesting because of the light it sheds on the relationship between central government and the local authorities:

If the second Amendment is carried the local authority will be requested by Parliament to give a privilege and a preference to people with large families, but the first Amendment suggested by [Simon] merely says they may be at

---

<sup>9</sup> HC Debs, Vol. 176, col.681, 17 July 1924. The amendment was defeated on division.

<sup>10</sup> *ibid* col.717.

<sup>11</sup> *ibid* col.718.

<sup>12</sup> *ibid* col.719.

<sup>13</sup> "The Amendment the Minister has proposed means nothing whatever, and merely expresses a pious opinion, while the proposal before the Committee not only expresses a pious wish, but lays down some means of carrying it into effect"; *ibid* col.719, Francis Blundell.

<sup>14</sup> *ibid* cols.719-20.

liberty to charge a less rent. Some local authorities may do it and some may not.<sup>15</sup>

This contribution raises a number of points. Joynson-Hicks distinguished between Parliament 'requesting' local authorities to give a preference to certain groups of people, and giving them a power to charge differential rents, according to the tenant's financial status. First, Joynson-Hicks clearly believed that a 'request' by Parliament (expressed in the reasonable preference condition) carried more weight with local authorities than a power to act. This is in contrast with other Members (e.g. Blundell and Kenworthy) who criticised the Government's amendment for its vagueness. Secondly, that Joynson-Hicks described the requirement as a 'request' may indicate a co-operative, consensual relationship with local government. It is, of course, possible to attribute too much weight to a single contribution and consequently more evidence must be garnered from the parliamentary debates before a view can be reached on the status of central-local relations.

## Reasonable Preference

Despite Simon's lack of enthusiasm for the Government's preferred amendment, some kind of agreement was apparently reached, since it was Simon who proposed the second, alternative amendment; that reasonable preference shall be given to large families in letting houses.<sup>16</sup> During the debates on this alternative amendment, a Conservative Member expressed concern that local authorities would be able to circumvent the requirement. She cited the example of Liverpool where 6,000 houses erected under the Addison scheme were to be let to families with three or more children, and that preference was to be given to large families. She claimed that, contrary to these intentions, the majority of the houses were let to married couples with one child.<sup>17</sup>

This contribution is relevant for two reasons. First, it appears that some local authorities were already using allocation criteria prior to the 1924 Act. This may suggest that the Government's preferred reasonable preference amendment was proposed because it was considered to be more acceptable to local authorities than Simon's original differential rent

---

<sup>15</sup> *ibid* col.722, Sir William Joynson-Hicks.

<sup>16</sup> *ibid* col.729.

<sup>17</sup> *ibid* cols.729-30, Viscountess Astor.

amendment. Secondly, as previously outlined, the Addison scheme contained no compulsion on local authorities to let their housing to any particular groups of people. This implies that Liverpool had voluntarily adopted selection criteria. If this is the case, it is unclear why the tenancies had not been granted according to those criteria. It may suggest some kind of disjunction between policy and practice, and consequently between elected members and local government officers.

In the earlier debates on Simon's original amendment, during which the Government's preferred amendment was referred to, Members had expressed concern that reasonable preference was too vague a formulation. This point was returned to in the debates on the second amendment, when a further amendment was proposed, that the word 'reasonable' be omitted from the phrase.

If the word 'reasonable' is allowed to pass this Committee, any local authority that does not wish to give preference to large families has a large loophole through which to escape its obligations. If the word 'reasonable' is in, I think it will be impossible to interpret it, and it depends on the local committee as to what their interpretation of the word 'reasonable' will be. If the word is left out, a preference must be given, and that surely is what we want.<sup>18</sup>

Wheatley's response to the proposed omission of the word 'reasonable' appears to emphasise the importance of local authority autonomy in the sphere of council housing management:

This is a proposal to take from the local authorities the power to select their own tenants... If hon. Members wish to leave the local authority any power – as I hope they do – in the selection of their tenants they should indicate to them that ... wherever it can be reasonably done they shall give preference to large families ...<sup>19</sup>

---

<sup>18</sup> *ibid* cols.732-33, Kenworthy.

<sup>19</sup> *ibid* cols.733-34.

Chamberlain's appeal to the Committee to accept the Government's reasonable preference amendment without further division indicates support for the formulation and may demonstrate inter-party consensus on the issue of local authority discretion.<sup>20</sup>

## The Working Class Requirement

A further basis for the allocation of housing that was discussed during the 1924 Act debates was that tenants were members of the 'working class'. Indeed, the desirability of allocating housing to working class applicants is a recurring theme of the Housing Act debates of this period. This theme is closely connected with the question of rents charged by local authorities and, specifically, whether potential tenants should be subjected to a means test, which is discussed in more detail below. These restrictions on local authorities' allocation discretion often appeared to attract more support from MPs than did the reasonable preference requirement. The origins of the requirement to house the working classes are examined briefly, before proceeding to consider the proposed amendment to the 1924 Act.

The first Act to deal with the housing of the working classes as its main object was the Lodging Houses Act 1851 (the Shaftesbury Act). Since then, the requirement that local authorities provide housing for the working classes has been a consistent feature of housing legislation. The meaning of the term was considered during the debates of the Artisans' and Labourers' Dwellings Improvement Act 1875 (the Cross Act). An amendment was proposed to remove the term from the provision dealing with rehousing displaced people on the ground that:

There were others besides working men, such as clerks and those of small means, who might be displaced, and who were entitled equally with them to the consideration of the Legislature.<sup>21</sup>

---

<sup>20</sup> "I do not think it would be possible that [reasonable preference is given to large families] should be the only consideration in the minds of a local authority in allocating their houses, when putting in the word 'reasonable' you are giving them as much discretion as is necessary"; *ibid* col.739.

<sup>21</sup> HC Debs, Vol. 223, col.126, 19 March 1875, H. Fawcett.

A Liberal Member believed that the defining criterion was that the tenant occupied under a weekly tenancy, and would therefore include “poor clerks and other people of slender means”.<sup>22</sup> Another MP preferred an even wider definition, believing that the term comprehended not only artisans, clerks and translators, but every person who earned his or her income by industry.<sup>23</sup> The Home Secretary declined to provide a definition. He claimed that the term was made use of as far back as 1866 in the Edinburgh and Glasgow Improvement Acts, and was perfectly well understood.<sup>24</sup> ‘Working class’ was subsequently defined in the Housing of the Working Classes Act 1903 as including:

... mechanics, artisans, labourers and others working for wages; hawkers, costermongers, persons not working for wages, but working at some trade or handicraft without employing others, except members of their own family, and persons other than domestic servants whose income in any case does not exceed an average of 30/- a week, and the families of any such persons who may be residing with them.<sup>25</sup>

The definition does not explicitly include the ‘poor clerks’ who concerned the Opposition. However, when the term was considered by Denning LJ in *H E Green and Sons v Minister of Health (No. 2)*<sup>26</sup> he held that, beyond the words in the statute, the term included a large number of other persons; “That large number is left quite indefinite in the Act and is, I suspect, incapable of definition.”<sup>27</sup>

In *White v St Marylebone Borough Council*,<sup>28</sup> Lord Reading CJ had no difficulty in finding a chauffeur to be a member of the working classes, “applying the ordinary test and interpreting the words ‘working classes’ in the ordinary and popular sense”.<sup>29</sup> However, successive governments have been reluctant to define the term with any greater precision. In 1930 Eleanor Rathbone, the Member for English Universities, requested the Minister of Health (Arthur Greenwood) to clarify its interpretation for the purposes of the

<sup>22</sup> *ibid* Sir Sydney Waterlow.

<sup>23</sup> *ibid* cols.127-8, J.S. Hardy.

<sup>24</sup> *ibid* cols.128-9, Sir Richard Assheton Cross.

<sup>25</sup> Housing of the Working Classes Act 1903, Schedule I, para. 12(e). The 30/- limit was altered to £3 by the Housing Act 1936, Schedule II.

<sup>26</sup> [1948] 1 KB 34.

<sup>27</sup> *ibid* 39.

<sup>28</sup> [1915]3 KB 249.

<sup>29</sup> *ibid* 257.

various Housing Acts. Echoing the Home Secretary in the nineteenth century, Greenwood's response was that the term was generally well understood and he was not aware of any practical difficulty in its interpretation by local authorities. Rathbone believed that if the term were undefined local authorities would not know to whom they should let houses.<sup>30</sup>

In *Green*, Denning had no doubt that, “in former times [the term] had a meaning that was reasonably well understood”,<sup>31</sup> a claim that is not borne out by the parliamentary debates of the Cross Act 1875 discussed above. Although he was required to interpret the term in *Green*, Denning believed that the social revolution had made it inappropriate.<sup>32</sup> Parliament apparently agreed as it was removed from certain provisions relating to the Housing Act 1936 by the Housing Act 1949. There appears to have been broad agreement from the Opposition for its abolition. Indeed, the Shadow Minister of Health claimed to have attempted to remove it during the passage of the Housing (Financial and Miscellaneous Provisions) Bill in 1946.<sup>33</sup>

So far as the 1924 Act was concerned, an amendment was proposed by a National Liberal Peer to require local authorities to let their houses to working class tenants, under the special conditions contained in Clause 3.<sup>34</sup> The amendment was accepted by the Lord Chancellor but was rejected by the House of Commons on the grounds that “... the words might be interpreted as excluding classes of persons such as poorly paid clerks and people of that type.”<sup>35</sup> Lord Strachie believed that the Government's rejection of the amendment was owing to Opposition pressure.<sup>36</sup> Since the primary object of the 1924 Act was to provide housing for the working class, adding the requirement that local authorities let houses to working class tenants under the section 3 ‘special conditions’ seems redundant. If this is true, then it is unclear why the Opposition objected to the amendment, since it added no further requirement to the Act.

---

<sup>30</sup> HC Debs, Vol. 237, cols.3079-80, 17 April 1930.

<sup>31</sup> [1948] 1KB 34, 38.

<sup>32</sup> *ibid.*

<sup>33</sup> HC Debs, Vol. 462, col.2137, 16 March 1949, Derek Walker-Smith. A reading of the relevant debate suggests, however, that Walker-Smith advocated the adoption of a more generous definition of the term ‘working class’, rather than its removal; HC Debs, Vol. 421, col.232, 26 March 1946.

<sup>34</sup> HL Debs, Vol. 59, cols. 354-5, 5 August 1924, Lord Edward Strachie.

<sup>35</sup> *ibid* col.471, 6 August 1924, Lord Haldane.

<sup>36</sup> *ibid.*

## Central-Local Relations

There are relatively few direct references in the parliamentary debates to the relationship between central and local government. During the Money Resolution debates, Wheatley acknowledged that without co-operation from the local authorities the proposed building scheme would be unworkable.<sup>37</sup> He also suggested that local authorities were broadly sympathetic to the scheme, despite the fact that many were his political opponents. Lord Strachie in the House of Lords disputed this view, to some extent. He claimed that the local authorities had made the best deal they could with the Government in the circumstances.<sup>38</sup>

The earlier discussion, concerning the reasonable preference condition, also throws some light on the central-local relationship. The original Bill contained no constraints on local authorities' allocation discretion. The reasonable preference requirement was introduced specifically in response to a Liberal amendment (which apparently the Government found even less appealing). Reasonable preference was widely acknowledged, and indeed criticised, as being inherently discretionary; there was no attempt to define the phrase and Members' efforts to reduce its vagueness (by omitting the word 'reasonable') were defeated. These factors seem to indicate that the Government was committed to preserving considerable local authority discretion concerning the allocation of their housing stock.

## HOUSING ACT 1930

### Background

The Labour Party returned to office in the summer of 1929 as a minority government, with Ramsay MacDonald as Prime Minister and Arthur Greenwood as Minister of Health. The Government introduced a new Housing Act in 1930, the 'Greenwood Act', to deal specifically with the problem of the slums. The 1930 Act was intended to encourage local authority activity by simplifying the legal process of slum clearance and giving greater

<sup>37</sup> HC Debs, Vol. 174, col.1117, 3 June 1924.

<sup>38</sup> HL Debs, Vol. 59, col.41, 27 July 1924.

subsidies. Paradoxically, the method of calculating the subsidy was complicated, being based on the numbers of people displaced and rehoused, rather than simply on the number of houses constructed.

Introducing the Second Reading debates, Greenwood attributed great importance to the provision of housing, believing that:

The Englishman's home is the nursery of personal and civic virtues; it is the institution of the whole of us, which, in its intimate day by day life, shapes the destinies of our people. The housing problem, therefore, is not merely a problem of bricks and mortar, it is one of providing proper conditions of life for a community which deserves it.<sup>39</sup>

The requirement to rehouse people displaced by slum clearance was not a new concept. It was introduced by the Cross Act 1875.<sup>40</sup> However, the Cross Act was amended several times, gradually eroding the rehousing requirement.<sup>41</sup> Further, under that Act, it was not envisaged that local authorities would undertake rebuilding activities, although permission could be sought.<sup>42</sup>

While the 1930 Act does not contain the reasonable preference formula that appears in the Acts of 1924 and 1935, the provisions of the 1930 Act obliged local authorities to rehouse tenants displaced by slum clearance.<sup>43</sup> Departmental documents suggest that the two conditions contained in section 3(1)(f) of the Housing Act 1924 and section 9 of the Housing Act 1930 were in effect combined in the Housing Act 1935, discussed below.

---

<sup>39</sup> HC Debs, Vol. 237, col.1801, 7 April 1930.

<sup>40</sup> Section 5 required that "The improvement scheme ... shall provide for the accommodation of at the least as many persons for the working class as may be displaced in the area ... in suitable dwellings, which, unless there are any special reasons to the contrary, shall be situate [sic] within the limits of the same area, or in the vicinity thereof".

<sup>41</sup> See Artisans' Dwelling Act 1882 and Housing of the Working Classes Act 1890.

<sup>42</sup> "... the local authority shall not themselves without the express approval of the confirming authority, undertake the rebuilding of the houses or the execution of any part of the scheme..."; Artisans' and Labourers' Dwellings Improvement Act 1875, s.9.

<sup>43</sup> "A local authority who have [sic] passed a resolution declaring any area to be a clearance area or an improvement area shall, before taking any action under that resolution which will necessitate the displacement of persons of the working-classes, undertake to carry out or to secure the carrying out of such re-housing operations, if any, within such period as the Minister may consider to be reasonably necessary"; Housing Act 1930, s.9.

## Allocations

As already noted, section 9 of the 1930 Act required local authorities to undertake rehousing operations before taking action under a clearance or improvement area resolution. However, the wording of the Bill was unclear on the question of whether displaced people would be allocated the newly built houses. This confusion is highlighted by various Members. For example, one Conservative believed it to be a defect in the Bill that there was no provision to make it compulsory for local authorities to provide suitable alternative accommodation to people displaced by the clearance operation.<sup>44</sup> A Unionist Member attempted to clarify the position:

[T]he explanation given in the Bill was rather complicated and difficult to understand... So far as we understand them [the Minister's intentions] ... they simply mean that if in the clearing of a slum 100 people are removed, it is incumbent upon the local authority to build new housing accommodation for 100 people, but it does not of necessity follow that the 100 people removed from the slum will be the 100 people who will get into the new property. A process of decanting will proceed, and although it is possible that some people from the slum may ... get into the new estate, the probability will be that the large majority of slum people will not.<sup>45</sup>

The Ministry of Health itself appears to have been concerned that the intention of the section was unclear to local authorities. After the 1930 Act received Royal Assent, the Ministry issued a circular stating that it was not necessarily the persons displaced by the slum clearance who would move into the new housing.<sup>46</sup>

The reasonable preference duty in the 1924 Act was contained within the so-called 'special conditions' in section 3. These conditions were largely reproduced in section 27 of the

<sup>44</sup> HC Debs, Vol. 237, col.1874, 7 April 1930, Sir Robert Gower.

<sup>45</sup> HC Debs, Vol. 241, col.326, 8 July 1930, Dr Arthur Davies.

<sup>46</sup> "The actual persons displaced will not necessarily move into the new houses. There will be many cases in which the new houses will be occupied by persons who have vacated other accommodation to which displaced persons will have moved, and there may be many links in this chain of replacement"; Ministry of Health, Circular No. 1138 (London, HMSO, 1930) pp.8-9.

1930 Act, with the exception of the reasonable preference requirement.<sup>47</sup> It was therefore left to local authorities to determine whether displaced people would be given any kind of preference in the allocation of new housing. It is interesting to speculate why the reasonable preference for large families was omitted from the 1930 Act. An attempt was made to amend section 27, discussed below, but it did not seek to re-introduce the reasonable preference condition. Ernest Simon, who had been instrumental in securing the reasonable preference formula in the 1924 Act, turned his attention in the 1930 Act to the question of rent.<sup>48</sup> This is unsurprising since Simon's original amendment in the 1924 Act sought to introduce a differential rent (i.e. based on the tenant's ability to pay). Although he proposed the reasonable preference amendment, it was drafted by the Government,<sup>49</sup> and second best to his preferred option.

The reason there was no attempt to introduce the reasonable preference for large families may be because Members lacked faith in its effectiveness. It was noted above that, during the 1924 Act debates, MPs had expressed disquiet at the vagueness of the term and believed that local authorities would be able, if they chose, to circumvent it. This point was rehearsed in the 1930 Act debates. Malcolm MacDonald (the Prime Minister's son) drew attention to the difficulty faced by parents with young children in obtaining affordable housing.<sup>50</sup> Another Member, went further:

It is not unpopularity; [families with young children] are excluded altogether from houses. It is one of the most intolerable positions that could exist in any civilised country. I wish that the Minister could have put a Clause in the Bill which would have ended the tyranny that prevents parents with young children from having a right to a decent home.<sup>51</sup>

As we have seen, during the 1924 Act debates it was claimed that, contrary to Liverpool City Council's expressed intentions, the majority of their houses were let to married

<sup>47</sup> (a) the tenants must reside in the house; (b) a prohibition against sub-letting or assignment without local authority consent; (c) the local authority was free to determine the level of rent or rebate, within certain aggregate limits set by the Minister; (d) a prohibition against charging a fine or premium in addition to the rent; (e) a fair wages clause to be inserted in the construction contract.

<sup>48</sup> See below pp.100-103 and pp.106-8.

<sup>49</sup> "These are the words suggested by the Minister of Health"; HC Debs, Vol. 176, col.729, 16 July 1924.

<sup>50</sup> HC Debs, Vol. 237, col.1855, 7 April 1930.

<sup>51</sup> *ibid* col.1870, R.S. Young.

couples with one child.<sup>52</sup> In the debates of the 1930 Act, Simon too drew attention to the disjunction between policy and practice within local authorities.<sup>53</sup> According to Simon's own research, the average family size in municipal housing was 4.5 and in Manchester, Simon's own constituency, the figure was even lower at 3.9.<sup>54</sup> Simon attributed the failure of local authorities to house larger families mainly to the inability of such families to afford the rents charged.<sup>55</sup>

As noted above, certain Members appeared to be sceptical about the effectiveness of requiring local authorities to give preference to large families. For many, the key issue was to build housing at rents that large families could afford. Although this was the intention of the 1924 Act, according to some it had failed.<sup>56</sup> It is likely that the lack of concern over the *omission* of the reasonable preference condition is attributable to the *inclusion* of a differential rent provision, discussed below. For many Members, this appears to have been far more important than a provision that had very little practical effect in controlling local authorities' allocation decisions. The ability of tenants to pay local authorities' rents resurfaces once again in the debates on the 1935 Act.

## Control of Management

In common with the 1924 Act, there is little discussion of management issues in the 1930 Act debates. An attempt to introduce greater control of local authorities' housing management functions was made by the Unionist peer, Lord Balfour of Burleigh. His amendment would have added a further sub-section to section 27 (the special conditions), and provided that:

(f) the management of the houses shall be carried on in accordance with rules from time to time approved by the Minister in regard to the selection

---

<sup>52</sup> HC Debs, Vol. 176, cols. 729-30, 17 July 1924, Viscountess Astor.

<sup>53</sup> HC Debs, Vol. 237, col. 2022, 8 April 1930.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid* col. 2023. Simon had been a member of Manchester City Council between 1911 and 1925, Chair of the Housing Committee between 1919 and 1923, and Lord Mayor in 1921. He was therefore speaking with some authority.

<sup>56</sup> HC Debs, Vol. 237, col. 2022, 8 April 1930, Simon.

of tenants, the allotment of suitable accommodation, the settlement of rebates and the termination of tenancies.<sup>57</sup>

The purpose of the amendment was to avoid what Balfour perceived to be the abuses of earlier Housing Acts, under which people who did not need a subsidy had benefited from them.<sup>58</sup> Accordingly, the selection of tenants would involve local authorities rejecting those people who were too well off to justify receiving a subsidy.<sup>59</sup> As such, this amendment demonstrates the close link between allocations and rent levels. The Government professed to be in favour of Balfour's model of housing management, but believed this was best achieved by leaving local authorities complete freedom to adopt such management techniques as they thought appropriate:

[A]s Parliament places the responsibility for the administration of these schemes on the local authorities, we feel that it is wrong to fetter them by laying down conditions under which such management shall be carried on...<sup>60</sup>

Balfour's amendment would have given the Minister powers to lay down rules that the local authorities were obliged to observe. If this amendment had been accepted, it would have profoundly changed the balance of power in housing management, from local to central government. This discussion has relevance to the wider issue of central-local relations.

## Central-Local Relations

One of the points to emerge from an examination of the debates on the 1930 Act is the apparent inter-party consensus that existed over the need to tackle the problem of the slums. Chamberlain complimented Greenwood on his absence of party politics and resolved to adopt the same non-partisan approach.<sup>61</sup> However, there were two main areas

<sup>57</sup> HL Debs, Vol. 78, cols.616-7, 21 July 1930.

<sup>58</sup> "People comparatively well-to-do are occupying houses under the Addison and Wheatley Acts, to the exclusion of the poorer people for whom these houses were really intended..."; *ibid* col.617.

<sup>59</sup> *ibid* col.619.

<sup>60</sup> *ibid* col.622, Lord Marley.

<sup>61</sup> HC Debs, Vol. 237, cols.1825-6, 7 April 1930.

of contention during the debates; the first concerned the compensation to be paid to owners of property in good condition, but which was located within a clearance area; the second concerned the question of differential rents. Discussion of the second point revealed wider disagreements over the extent of freedom that local authorities should be given under the 1930 Act.

The concept of differential rents was new to the 1930 Act, although the question of rents generally was raised frequently during the 1924 Act debates. The principle of the scheme was that it would give local authorities freedom to vary the rent according to the tenant's ability to pay.<sup>62</sup> The interest in rent rebates stemmed from the focus of the 1930 Act on slum clearance. It was noted above that the nature of the central government subsidy paid under the 1924 Act effectively encouraged local authorities to select tenants who could pay relatively high rents.<sup>63</sup> However, many of those rehoused under the 1930 Act could not afford the usual rent.<sup>64</sup> The precise method of calculation was to be determined by the local authorities. Criticism of differential rents centred on the need for local authorities to perform some kind of means test, in order to fix the rent to be charged to the individual tenant. The incongruity of such a requirement in a Labour Bill was highlighted by a number of Members.<sup>65</sup> Another Conservative also believed that differential rents would lead to means testing. Sir Kingsley Wood's objection was based primarily on the unfair burden it would place on local authorities. However, he also drew attention to the apparent inconsistency on the subject:

Are they going to send somebody down every month, some inspector, to ask the very questions which we were told in the discussions on the Widows' Pensions Act<sup>66</sup> it was an insult to put to people in this country?<sup>67</sup>

---

<sup>62</sup> *ibid* col.1821, Greenwood. As such, the differential rent was an early form of rent rebate.

<sup>63</sup> See above p.87.

<sup>64</sup> Deacon and Bradshaw, 1983, *op cit* n.8 p.13.

<sup>65</sup> For example the Conservative Member Countess Gwendolen Iveagh; HC Debs, Vol. 237, col.1851, 7 April 1930.

<sup>66</sup> The Widows', Orphans' and Old Age Contributory Pensions Act 1925, introduced by a Conservative government, was a contributory, non-means tested benefit; A. Ogus, E. Barendt and N. Wikeley, *The Law of Social Security* (London, Butterworths, 1995) p.216.

<sup>67</sup> HC Debs, Vol. 237, col.2008, 7 April 1930. He pointed out that means testing had been successfully resisted in the maintenance scheme of the Education Bill; HC Debs, Vol. 241, cols.366-7, 8 July 1930.

Despite the widespread perception that differential rents would lead to means testing, the concept was broadly supported. In fact, disagreement centred on whether local authorities should be obliged, rather than permitted, to charge differential rents.<sup>68</sup> An amendment introduced by Chamberlain would, according to Simon who spoke in support, have made the adoption by local authorities of differential rents “almost compulsory”.<sup>69</sup> A Conservative Member was more coy, claiming that the amendment merely sought to clarify the Government’s poorly drafted Clause.<sup>70</sup>

Even among its supporters, there seemed to be some dispute over whether the amendment would curtail local authorities’ discretion to set the rent levels. One Conservative believed that the amendment would give the local authority an absolutely free hand to decide how to fix the rebates.<sup>71</sup> The Government disagreed with the Conservatives’ analysis. Asking the House to reject the amendment, it believed that:

You would hamper these authorities and spoil the Bill if you tried to get down too closely to the minutiae of administration. The local authorities wish to have reasonable freedom in distributing the extra money [from the rent pool] among their different classes of tenants.<sup>72</sup>

According to Chamberlain, the only argument made against the amendment was that the local authorities did not approve of it:

I am certainly an advocate of giving wide powers to local authorities, but I consider that when the State is going to step in and give a subsidy to local authorities, the State has a right to say how its bounty shall be used.<sup>73</sup>

Criticism of the wide powers vested in local authorities also came from other Members. Simon supported the principle of leaving local authorities as much freedom as possible, but

---

<sup>68</sup> Deacon and Bradshaw have argued that the idea of rent rebates attracted a surprisingly broad measure of support; “They were advocated by the Conservatives as a means of reducing public spending, and by the Labour and Communist parties as a measure of social justice. The only people to oppose them were the tenants”; Deacon and Bradshaw, 1983, op cit n.8 p.11.

<sup>69</sup> HC Debs, Vol. 241, col.339, 8 July 1930.

<sup>70</sup> *ibid* col.328. Arthur Davies.

<sup>71</sup> *ibid* col. 327. Davies.

<sup>72</sup> *ibid* col. 332, Miss Lawrence.

<sup>73</sup> *ibid* col.332.

drew attention to what he perceived to be the Government's inconsistent approach. He contrasted the reluctance of the Government to curtail the local authorities' discretion in any way in the 1930 Act with the very detailed rules contained in the Public Assistance Order 1930.<sup>74</sup> The order comprised 67 pages<sup>75</sup> of very precise rules on how local authorities should treat people admitted to the poor law institutions.<sup>76</sup> In some respects the level of detail contained in the Order is unsurprising, given the history of central government prescription in the administration of poor relief.<sup>77</sup> Indeed, John has observed that the poor law has been an exception to the general principle that local authorities are left without detailed supervision to administer services.<sup>78</sup> This is despite local authorities' opposition to the creation of the central poor law authority, the powers accorded to it,<sup>79</sup> and sustained criticism of it by the press during its lifetime.<sup>80</sup> The 1930 Order should also be seen in the light of the continuing tension between the government and some poor law Boards of Guardians,<sup>81</sup> most notably those of Poplar Borough Council, which paid a more generous rate of relief.<sup>82</sup> The disparity in central governmental attitudes towards local discretion in poor relief administration, on the one hand, and housing management, on the other hand, provides an early example of a central theme of this thesis; that the conferment of discretionary authority is dependent largely on the specific policy, rather than on a coherent principle of central-local relations.

<sup>74</sup> *ibid* cols.340-1. Public Assistance Order 1930, No.185; the Order was made by the Minister of Health under his powers contained in the Poor Law Act 1930.

<sup>75</sup> The Order ran to 180 sections and three schedules. Schedule 1 alone comprised 17 forms for local authorities to use.

<sup>76</sup> It stipulated, for example, that men and boys over the age of 12 should receive for dinner; 8oz bread,  $\frac{1}{2}$ oz margarine or dripping, 2oz cheese, 4oz potatoes (hot) and 'sufficient' salt; Schedule 2.

<sup>77</sup> A central authority (the Poor Law Commission) was first created in 1834 (by the Poor Law Amendment Act 1834), following the recommendations of the Royal Commission of 1832-4; M. Rose, *The English Poor Law 1780-1930* (Newton Abbot, David & Charles, 1971) p.76. The Poor Law Commission and its successor, the Poor Law Board, issued a number of detailed orders on the operation of poor relief. For example; Outdoor Labour Test Order 1842, Outdoor Relief Prohibitory Order 1844 and Outdoor Relief Regulation Orders 1852.

<sup>78</sup> P. John, *Recent Trends in Central-Local Government Relations* (London, Policy Studies Institute, 1990) footnote no.7.

<sup>79</sup> The powers reserved for the Poor Law Commission were considerably whittled down from those recommended by the Royal Commission; Rose, 1971, *op cit* n.77 p.76.

<sup>80</sup> "Many of these attacks concentrated on the issue of centralisation: the Poor Law Commission was alleged to be attempting to extend its authority into every sphere of local government, and thus to be undermining one of the most sacred principles of the English Constitution"; *ibid* p.121.

<sup>81</sup> Their successors were the public assistance committees, following the Local Government Act 1929 which transferred the functions of the guardians to the local authorities.

<sup>82</sup> R. Postgate, *The Life of George Lansbury* (London, Longmans, 1951) p.217. See also B. Keith-Lucas and P.G. Richards, *A History of Local Government in the Twentieth Century* (London, George Allen & Unwin, 1978) p.44.

Simon's support for differential rents is unsurprising, since he had attempted to introduce the concept into the 1924 Act. His approval of the Conservatives' amendment can be explained by his scepticism that local authorities would exercise their wide discretion for the benefit of the poorest people. Rejecting the amendment, Greenwood justified giving such wide powers to local authorities on the basis of the responsibility that was placed on them:

I do not pretend that all local authorities are equally enlightened, but in this matter of housing we have handed over to them heavy responsibility and we must trust them... We cannot approach local authorities these days after their enormous experience and lay down in detail the precise method by which they have to deal with the problem of rent.<sup>83</sup>

It is possible to speculate that the Government's reluctance to entertain any fettering of the local authorities' discretion may have been based more on an agreement reached with the local authority associations, than real confidence in their housing management experience. It was suggested in chapter 1 that during this period central government was heavily reliant on local authorities to produce the volume of housing required. It is therefore possible that the lack of interference in local authorities' allocations was the *quid pro quo* for co-operation on housing production.

### ***Central-local consensus***

During the 1930 Act debates, the Government was anxious to stress the extensive consultation that had occurred between central government and local authorities. Opening the Second Reading Greenwood hoped that:

... the local authorities, with whom I have endeavoured to work during recent months in the closest harmony and co-operation, will receive this Bill ... with both hands and extract from it 100 per cent. of what value it contains.<sup>84</sup>

---

<sup>83</sup> HC Debs, Vol. 241, cols.335-6, 8 July 1930.

<sup>84</sup> HC Debs, Vol. 237, col.1825, 7 April 1930.

Again, during the Third Reading, Greenwood claimed that the Bill had been welcomed by the large local authorities and their organisations.<sup>85</sup> The enthusiasm of the local authorities' associations was confirmed by the Lord President of the Council in the House of Lords.<sup>86</sup> Such apparent central-local harmony prompted Eleanor Rathbone to remark rather acidly that:

The Minister and the local authorities appear to have formed a kind of mutual admiration society, for we have observed that whenever we have made a criticism of any provision of the Bill, the reply has been, "We must trust the local authorities".<sup>87</sup>

Rathbone's remark does seem to have some justification. While it is impossible to be certain from the parliamentary debates alone, it does appear that the Bill was drawn up in close consultation with the local authorities and their representative associations. It will be seen below that central-local consultation was also a feature of the 1935 Act, pointing towards an era of central-local relations that was based on consent and co-operation, at least in the sphere of public housing.

One feature of the 1930 Act that appears, at least superficially, to militate against the co-operative mood described above is the existence of potentially draconian powers, giving the Minister authority to assume the functions of the local authority in certain circumstances.<sup>88</sup> However, the references made to these provisions in the debates, while relatively infrequent, share a common theme. Chamberlain, for example, expressed the view that the default powers might just as well have been left out. He suggested that "[Greenwood] knows very well that, however good an appearance they make in the Bill, he will find it extraordinarily difficult to put them into operation if the case should ever arise. That is the experience of all Ministers of Health."<sup>89</sup>

---

<sup>85</sup> *ibid* cols.372-3.

<sup>86</sup> HL Debs, Vol. 78, col.458, 15 July 1930, Lord Parmoor.

<sup>87</sup> HC Debs, Vol. 241, col.379, 8 July 1930.

<sup>88</sup> Housing Act 1930, ss.35 and 36; the county council and, ultimately, the Minister can assume the powers of rural district councils which fail to exercise their powers under the Act.

<sup>89</sup> HC Debs, Vol. 237, col.1842, 7 April 1930.

A Conservative Member also believed that the powers were more apparent than real, describing them as “just so much waste paper”.<sup>90</sup> The Leader of the Liberal Party in the Lords similarly doubted whether the default powers would be effective in compelling recalcitrant local authorities:

[A]lthough the Minister of Health takes power to compel them, I feel very doubtful whether ... he will take more drastic steps than he has taken in the past. He has had these powers, but has never used them in days gone by, and it seems doubtful if he will use them in the future.<sup>91</sup>

These contributions are relevant because they suggest that the presence of these powers in the 1930 Act was more a question of form than reality. It is possible that their inclusion was intended to emphasise the Government’s supremacy. Whether this message was intended for the local authorities or for Parliament is unclear. Whatever the real purpose of such provisions, these contributions point to governmental reluctance to use them, reinforcing the impression of a consensual central-local government relationship.

## **HOUSING ACT 1935**

### **Background**

The second statutory appearance of the reasonable preference formula was in the Housing Act 1935, introduced by the Conservative dominated National government under the leadership of Stanley Baldwin. The continuing concern about overcrowding and slums was reflected in the new wording of the relevant section; “the authority shall secure that in the selection of their tenants a reasonable preference is given to persons who are occupying insanitary or overcrowded houses, have large families or are living under unsatisfactory housing conditions”.<sup>92</sup> In the 1924 Act, the reasonable preference requirement was contained in the ‘special conditions’ with which local authorities had to comply in order to receive government subsidy. In the 1935 Act, section 51(2) is contained within Part IV of

---

<sup>90</sup> *ibid* col.2011, Sir Kingsley Wood.

<sup>91</sup> HL Debs, Vol. 78, col.478, 15 July 1930, the Earl of Beauchamp.

<sup>92</sup> Housing Act 1935, s.51(2).

the Act, which laid down the unified conditions affecting local authority housing.<sup>93</sup> The other requirements are similar to those contained in the 1924 and 1930 Acts 'special conditions'.<sup>94</sup> Departmental documents suggest that section 51(2) of the 1935 Act is an amalgam of the allocations requirements contained in the 1924 and 1930 Acts.<sup>95</sup>

## Allocations

The 1935 Act debates were dominated by the problem of overcrowding. In common with the 1924 Act, the main focus of attention was housing production. Eleanor Rathbone was one of a small number of Members apparently concerned with issues of housing management generally and allocations in particular. Rathbone drew attention to the lack of consideration given to the question of housing allocation:

... I am convinced that a large part of the difficulty in the housing problem arises not merely from the shortage of houses but from the careless, unscientific method of allocating houses, so that the wrong people get into the houses and the right people do not ... I feel that this is a side of the house problem that is persistently and consistently ignored. We hear extraordinarily little about it in the discussions on housing in this House. Discussion always relates to the putting up of houses rather than to whom exactly you should give the houses when you have put them up.<sup>96</sup>

As well as requiring local authorities to give reasonable preference to certain types of people, the 1935 Act allowed local authorities to grant rent rebates to any tenant, subject to any terms and conditions they thought fit.<sup>97</sup> Rathbone believed that the two provisions

<sup>93</sup> S.51(1) directed local authorities to "observe the requirements specified in the following provisions of this section".

<sup>94</sup> Housing Act 1935, ss.51(3) and (4) the requirement to reserve a certain number of houses for agricultural workers; (5) the local authority has the power to grant rent rebates; (6) the local authority is obliged regularly to review rents; (7) a prohibition against sub-letting or assignment without the local authority's consent.

<sup>95</sup> Housing Bill (24 & 25 Geo. 5), Drafts of notes on clauses. Public Record Office, HLG 29/208.

<sup>96</sup> HC Debts, Vol. 302, cols.108-9, 20 May 1935.

<sup>97</sup> "In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates from rent, subject to terms and conditions, as they think fit"; Housing Act 1935, s.51(5). The scheme of differential rents introduced by the Housing Act 1930 was directed at tenants displaced by slum clearance. The 1935 Act extended the scheme to all tenants.

were closely related and that, in effect, the granting of a council tenancy should be based upon an applicant's needs. While acknowledging that some MPs were opposed to the principle, because of its connection with means testing, Rathbone believed that if housing was allocated irrespective of tenants' means the inevitable effect was that poor tenants with families would fail to get good housing.<sup>98</sup> Rathbone proposed an amendment to require local authorities, in fixing rent, granting rebates and selecting tenants, to ensure that only those tenants who needed it would receive the benefit of the central government subsidy.<sup>99</sup> The Government resisted the amendment on the grounds that it was unnecessary:

This amendment merely sets out obvious considerations which a local authority must have in mind in arranging for rebates to particular tenants... Local authorities must be trusted to see that a rebate is only granted to a tenant where his circumstances warrant it...<sup>100</sup>

It should be noted that the Government's response dealt only with the issue of rebates, whereas Rathbone's proposal dealt also with the selection of tenants. The Government's assertion that local authorities "must be trusted" concerning rebates is relevant to the broader discussion on central-local relations. Despite its rejection of Rathbone's 'means test' amendment, the Government issued a circular following the 1935 Act's Royal Assent that appeared to encourage local authorities to take the tenant's means into account in making their allocations decisions.<sup>101</sup>

Her proposed amendment to the 1935 Act was not the first occasion on which Rathbone had linked access to local authority accommodation with ability to pay. In 1930, she had asked Arthur Greenwood to clarify the interpretation of the term 'working classes' for the purposes of the various Housing Acts.<sup>102</sup> Her true intention was to draw attention to the fact that large numbers of people, who did not warrant it, were taking advantage of subsidised housing. Her claim was based on the number of council tenants who were

---

<sup>98</sup> HC Debs, Vol.302, col.139, 20 May 1935.

<sup>99</sup> Commons Report 43/34/1. Public Record Office, HLG 29/210.

<sup>100</sup> *ibid.*

<sup>101</sup> "The power [for local authorities to grant rebates from their standard rents] will be of special service as a means of dealing with a person whose housing conditions are such as to require the provision of alternative accommodation but whose means are insufficient to enable him to meet the standard rent of any available house"; Ministry of Health, *Housing Act, 1935, Memorandum E. Consolidation of Housing Contributions and Accounts* (London, HMSO, 1935).

<sup>102</sup> HC Debs, Vol. 237, cols.3079-80, 17 April 1930.

seeking permission to build a “motor garage”.<sup>103</sup> Rathbone returned to her theme in 1934, bemoaning the fact that since World War I houses built with taxpayers’ money had been allocated largely without regard to tenants’ ability to pay an economic rent. Further, that the Government had never attempted to prevent the practice.<sup>104</sup>

Once again demonstrating the close connection between council housing and ability to pay, the recurrent theme of means testing was also raised in the Housing Act 1949 debates. Indeed, it was seen by some Opposition Members as providing an alternative to the requirement that local authorities allocate their housing to members of the working classes. Although the 1949 Act did not deal directly with housing allocations, an amendment was proposed that would have effectively required local authorities to undertake a means test before making an allocation. The justification was that such a test would help “to concentrate the helping hand where it is most needed”.<sup>105</sup> Perhaps unsurprisingly the Government was unimpressed by such an argument. A Labour Member claimed that it would fetter the local authorities’ discretion just as “we are trying to remove all those kinds of restrictions with which the local authorities are faced”.<sup>106</sup> For its part, the Opposition claimed that it would, in fact, give local authorities more rather than less discretion.<sup>107</sup> Certainly, the way in which the amendment was worded appeared to give local authorities greater discretion; it was expressed as not obliging local authorities to provide accommodation for those who were “financially capable of obtaining suitable housing accommodation by other means”.<sup>108</sup> However, its intention was clearly to require local authorities to submit applicants to some type of financial test.<sup>109</sup>

## Central-Local Relations

In contrast with the 1924 Act, but in common with the 1930 Act, there are far more direct references in the debates on the 1935 Act to the central-local relationship. Introducing the Second Reading debates, the Minister of Health claimed that there had been prolonged and

---

<sup>103</sup> *ibid.*

<sup>104</sup> In the Supply (Civil Estimates) Supply Committee debates; HC Debs, Vol. 291, col.447, 20 June 1934.

<sup>105</sup> HC Debs, Standing Committee C, col.1822, 5 April 1949, Elliot.

<sup>106</sup> *ibid* col.1847, V.F. Yates.

<sup>107</sup> *ibid* col.1848, Marlowe.

<sup>108</sup> *ibid* col.1822, Elliot.

<sup>109</sup> The criterion of “economic strength” was proposed to determine on whom the “helping hand” should be concentrated; *ibid.*

close discussions with the local authorities, which had resulted in a substantial measure of agreement on the general outlines of the Bill.<sup>110</sup> This claim was corroborated by a Labour MP who was a member of the national executive of one of the local authority associations, the Urban District Councils' Association.<sup>111</sup> A Liberal National MP provided one of the most explicit references to the central-local relationship, and suggested that local authorities retained an important degree of autonomy from the centre:

... when you deal with standardisation and mass production it is not the same as the head of a great store dealing with 300 branches all over the country... [W]e cannot ring up the housing directors of Manchester and Birmingham and Liverpool and sack them. We are dealing with 1,600 local authorities with a strong measure of independence, and we work in close partnership with them.<sup>112</sup>

Much of the debate around the relative autonomy of local authorities in the 1935 Act centred on the Government's proposal to allow them to establish housing commissions. The commission would assume all the local authorities' management functions, including housing allocation. The draft proposal concerning the duties of the commission required them:

... to let the houses ... to members of the working-classes. In selecting tenants to give a preference to tenants who by reason of economic circumstances are unable to obtain accommodation elsewhere either by purchasing or leasing a house.<sup>113</sup>

This proposal raises a number of points. First, it is difficult to ascertain whether the omission of the word 'reasonable' in the reasonable preference phrase is significant or whether it is merely a drafting oversight in what appears essentially to be a preliminary

---

<sup>110</sup> HC Debs, Vol. 297, col.363, 30 January 1935, Sir Hitton Young.

<sup>111</sup> *ibid* col.616, 31 January 1935, George Griffiths.

<sup>112</sup> *ibid* col.657, G. H. Shakespeare. In a circular issued to local authorities after the 1935 Act received Royal Assent, the Government's commitment to consultation and consent was again evident. "The Minister is already engaged in discussing with the Associations of the local authorities the most convenient methods of executing the new duties of local authorities under the Act"; Ministry of Health, Circular No. 1493 (London, HMSO, 1935).

<sup>113</sup> Local Management Commissions Proposals, 4 December 1933, Public Record Office, HLG 29/213.

document. If it were a deliberate omission, it might indicate that the Government was considering curtailing, to some extent, local discretion in housing allocation. Secondly, the reasonable preference condition is substantially different to those conditions that subsequently appeared in the Bill, taking only economic factors into account and not housing conditions (i.e. insanitary or overcrowded houses, large families or otherwise unsatisfactory housing conditions).

As well as affecting local authorities' allocations, the proposal is also relevant to the wider issue of central-local relations. The original Government proposal imposed a duty on local authorities to appoint a local management commission.<sup>114</sup> Since the commission would assume all management functions, this would have severely curtailed local authority discretion. It would also have compelled local authorities to contract-out (to use the modern terminology) part of their housing function. Such compulsion would have been out of step with the generally permissive nature of the provision of local authority services prevailing at the time. However, by the time the Bill came before Parliament, the duty had been transformed to a power to set up such a commission, and the proposals had been considerably amended.<sup>115</sup>

## QUASI-LEGISLATION

Chapter 1 described departmental circulars (and more recently codes of guidance) as 'quasi-legislation' and explained their limited legal effect. Nevertheless, an examination of such measures is relevant since their chief aim has traditionally been to clarify the meaning of legislation and to provide supplementary guidance in its interpretation. This role is particularly important in view of the vagueness of the early legislation.

Furthermore, while the 1935 Act was the final piece of legislation<sup>116</sup> directly to affect allocations until the Housing (Homeless Persons) Act 1977, which is considered in chapter 4, a relatively large number of reports and circulars were issued during this period.

---

<sup>114</sup> *ibid* Clause 1.

<sup>115</sup> Indeed, the Government claimed that the guiding principle had been to maintain the greatest possible degree of freedom for local authorities; HC Debs, Vol. 302, col.118, 20 May 1935, Sir H. Young.

<sup>116</sup> The Housing Acts of 1936 and 1957 were consolidating measures and both reproduced s.51(2) of the 1935 Act, i.e. the reasonable preference requirement. Section 83(1) of the 1936 Act vested the general

The Housing Management Sub-Committee of the CHAC, established by the 1935 Act, was particularly active during the period 1937 to 1949. It published two reports in fairly rapid succession, dealing with the selection of tenants.<sup>117</sup> CHAC's 1945 report was intended to provide advice to local authorities "in the light of special conditions likely to arise in the immediate post-war period".<sup>118</sup> It highlighted Parliament's intention,<sup>119</sup> that need should be the primary selection criterion.<sup>120</sup> On the issue of selection method, the report concluded that a wide variety of practices was inevitable since local conditions were of prime importance.<sup>121</sup> Furthermore, the local authority alone was in the best position to determine the most appropriate method of selection.<sup>122</sup> However, local authorities were criticised for their imposition of residential qualifications, which were discussed in chapter 1. Both the Society of Women Housing Managers and the Institute of Housing (the two professional bodies), in their evidence to the Sub-Committee, deprecated the use of such qualifications.<sup>123</sup> The report believed that a long qualification period was out of keeping "with the extensive movement of the civil population which have [sic] occurred during the war and with the need for increased mobility of labour which may prove to be nationally desirable".<sup>124</sup> However, despite identifying such deleterious effects, the report merely recommended local authorities to review current practice "with a view to its adaptation to present circumstances".<sup>125</sup>

The Sub-Committee's 1949 report dealt with many of the same issues as those raised in the 1945 report.<sup>126</sup> It reaffirmed the earlier recommendations that need should be the primary criterion for selecting tenants<sup>127</sup> and that local authorities should retain the responsibility for determining their own priorities, based on local conditions.<sup>128</sup> The Sub-Committee

---

management, regulation and control of houses provided by the local authority in the local authority, while s.84(2) reproduced s.51(2) of the 1935 Act. In the 1957 Act, the relevant section was s.113(2).

<sup>117</sup> Central Housing Advisory Committee, *Management of Municipal Housing Estates*. Second Report of the Housing Management Sub-Committee (London, HMSO, 1945); Central Housing Advisory Committee, *Selection of Tenants and Transfer and Exchanges*. Third Report of the Housing Management Sub-Committee (London, HMSO, 1949).

<sup>118</sup> CHAC, 1945, *ibid* Terms of Reference.

<sup>119</sup> Expressed in the consolidating 1936 Act, which incorporated the 1935 Act reasonable preference requirement.

<sup>120</sup> CHAC, 1945, *op cit* n.117 para. 10.

<sup>121</sup> *ibid* para. 12.

<sup>122</sup> *ibid* para. 13.

<sup>123</sup> *ibid* para. 27.

<sup>124</sup> *ibid* para. 29.

<sup>125</sup> *ibid* para. 29.

<sup>126</sup> CHAC, 1949, *op cit* n.117.

<sup>127</sup> *ibid* para. 7.

<sup>128</sup> *ibid* para. 15.



nevertheless rehearsed its objections to the imposition by local authorities of residential qualifications. It recommended that, as a first step towards complete abolition, all local authorities should immediately reduce their restrictions on admission to the waiting list to a uniform level by accepting applicants who had lived in the district for one year or were employed, or to be employed, there.<sup>129</sup> The Minister of Health in the accompanying circular commended the report to local authorities.<sup>130</sup> In particular, the practice of imposing residential qualifications was deprecated and hope expressed that local authorities would give serious consideration to the Sub-Committee's recommendations.<sup>131</sup>

It will be seen that the condemnation of residence qualifications is a feature of both the 1945 and 1949 CHAC reports.<sup>132</sup> However, it was not until 1980 that the Government prohibited the imposition of such qualifications; even then the prohibition applied only to Scottish local authorities.<sup>133</sup> This issue raises a number of points relevant to a discussion of the central-local relationship. First, it should be noted that the Sub-Committee clearly supported the general principle that local authorities should determine both their allocation policies and the method of carrying out those policies, in the light of local circumstances. This position reflects both the broadly worded provisions of the Housing Acts of the period, and the general proposition that local authorities should be given considerable latitude to perform their statutory duties. Despite such support for local autonomy, the Sub-Committee expressed repeated criticism of the imposition of residence qualifications. While the language used to express its disapproval remained somewhat muted, there is no doubt that it deprecated the practice and believed it to have deleterious effects on the country's post-war economic recovery. Indeed, it will be seen in chapter 4 that the Government cited the national economic interest as the primary reason for prohibiting the use of residence qualifications in Scotland.

---

<sup>129</sup> *ibid* para. 13. The Sub-Committee noted, however, that many witnesses who gave evidence expressed the view that public opinion supported the requirement of a residential qualification; *ibid*, Appendix II.

<sup>130</sup> Ministry of Health, Circular No. 31/49 (London, HMSO, 1949).

<sup>131</sup> *ibid*.

<sup>132</sup> Condemnation of these qualifications was once again expressed by CHAC in subsequent reports (considered in chapter 4); Central Housing Advisory Committee, *Residential Qualifications*. Fifth Report of the Housing Management Sub-Committee (London, HMSO, 1955) and its best known report, the Cullingworth Report; Central Housing Advisory Committee, *Council Housing Purposes, Procedures and Priorities*. Ninth Report of the Sub-Committee (London, HMSO, 1969).

<sup>133</sup> The Tenants' Rights Etc. (Scotland) Act 1980; see chapter 4.

The second point to note is that while successive governments endorsed the findings of the CHAC reports on the issue of residence qualifications,<sup>134</sup> and local authorities continued largely to ignore the exhortations of both CHAC and government to modify their practices,<sup>135</sup> no government took legislative action until 1980; 35 years after the publication of the first CHAC report to identify the problem. One interpretation (but not necessarily the only one) of this lack of legislative action is that it supports the principle of local authority autonomy in the sphere of housing management.

In addition to the distribution of the CHAC reports, central government issued a number of circulars during the period 1945 to 1947, requesting that local authorities give special consideration to certain classes of applicant.<sup>136</sup> By selecting the medium of departmental circular the government was requesting, rather than instructing, local authorities to give preference to these groups. This is because such circulars have no direct legal effect, as was observed in chapter 1. Indeed, there is evidence in the parliamentary debates of this period to suggest that MPs were highly sceptical regarding the ability of circulars to influence local authority activity.<sup>137</sup>

Taken together, the lack of legislative action on the issue of residence qualifications and the use of departmental circulars substantiate the received wisdom that the 1920-1949 period was marked by a high degree of consensus between central government and local authorities. This suggests a respect on the part of central government of local authorities' autonomy in the sphere of housing management in general, and allocations in particular.

---

<sup>134</sup> Ministry of Health, Circular No. 1740 (London, HMSO, 1938); Ministry of Health, Circular No. 176/45 (London, HMSO, 1945).

<sup>135</sup> A 1983 study for the housing charity Shelter found that 85 per cent of authorities had residence requirements, based on residence or employment within their area; R. Matthews, *Restrictive Practices: Waiting List Restrictions and Housing Need* (London, Shelter, 1983).

<sup>136</sup> Ministry of Health Circular Nos.; 109/45 (serving and ex-service men); 109/45 (exchanges and transfers); 184/45 (merchant seamen); 176/45 (policemen); 98/46 (district nurses and health visitors); 98/46 & 15/48 (midwives); 74/47 (miners); 155/47 (agricultural workers); 160/47 (key workers); quoted in CHAC, 1949, op cit n.115 para.4.

<sup>137</sup> "... it is not enough to issue circulars if no trouble is taken to see that they are carried out. We all know what happens to circulars. I feel that in most cases they never reach anybody except the official in charge ... and when a circular advocates an unpopular policy it is not likely that that advice will be followed unless something more is done"; HC Debs, Col 448, 20 June 1934, Eleanor Rathbone. See also, HC Debs, Vol. 176, col.446, 16 July 1924, Sir Francis Fremantle.

## CONCLUSION

The period 1920 to 1949 witnessed the introduction of restrictions on local authorities' previous complete freedom to allocate their housing stock. However, the most striking feature of the parliamentary debates of this time is the *lack* of discussion surrounding housing management. This is true of all three Acts considered in this chapter. The vast majority of the debates concerned housing production, with management issues being considered only tangentially.

Despite the focus being on the production of housing, there was no consistent approach; each Act introduced a different regime and subsidy scheme, and was aimed at tackling a different housing problem. This finding tends to support the initial assessment made in chapter 1 that, in light of the erratic approach to housing production during this period, it is unsurprising that housing management commanded relatively little attention.

On the more specific question of the nature of the restrictions imposed on local authorities, the reasonable preference formula was introduced by the 1924 Act and subsequently re-enacted in the 1935 Act. Given that the 1924 Act was the first occasion on which central government had imposed any restriction on local authorities' autonomy in this area, the rationale for the inclusion of the provision is of some importance. However, no clear motivation for the restriction emerges from the debates. Indeed, as originally drafted, the Bill contained no such restrictions. The 'large family' condition was introduced only as an amendment and apparently to stave off a Liberal revolt. The choice of wording appears to have been intentionally vague. Nowhere in the debates is the intended meaning of the phrase defined, and efforts to reduce its discretionary nature were rejected. This tends to suggest that the Government's amendment was an attempt to appease both those Members who wanted greater restrictions placed on local authorities, and those who wanted to preserve as much autonomy for the local authorities as possible including, presumably, the authorities themselves. This assertion is supported by the Government's rejection of proposals for alternative bases for local authorities' allocations, such as the facility for local authorities to charge differential rents, or the requirement that local authorities let their housing to members of the working classes (and the concomitant requirement for some kind of means test). Although rent rebates were introduced by the 1930 Act for

tenants displaced by slum clearance, and extended by the 1935 Act to all tenants, they have existed alongside the requirement for local authorities to give a reasonable preference to certain groups. Furthermore, the rent schemes were permissive rather than mandatory, and organised locally rather than nationally.

The wording of the reasonable preference condition may be relatively unsurprising, given the prevailing legislative style in matters concerning local service provision that was discussed in chapter 1. Another possible reason that a definition for reasonable preference was considered unnecessary is because Parliament did not envisage the term giving rise to legal disputes between disappointed applicants and local authorities.

Once the reasonable preference formula was adopted in 1924, there appears to have been no challenge to its inclusion in the 1935 Act (although the requirement is absent from the slum clearance provisions of the 1930 Act). There are a number of possible explanations for the lack of subsequent debate surrounding the reasonable preference formula. The first is that MPs believed it to have little practical significance. As mentioned above, a frequently expressed concern during the Housing Act debates of this period is the question of rent, and the inability of the poorest tenants to pay the rents charged by the local authorities. This issue provoked more debate than the question whether local authorities should be obliged to give a reasonable preference to certain groups of people. Although the subsidies paid under the 1924 Act were considerably higher than under previous Acts, the rents were nevertheless out of reach of the poorest.<sup>138</sup> It is possible that, after its inclusion in the 1924 Act, Members were relatively uninterested in the reasonable preference conditions because they considered them to be largely irrelevant. If potential tenants could not afford the rents charged, then it was immaterial that local authorities were obliged to give them a reasonable preference in allocation. There appeared to be more enthusiasm for requiring local authorities to allocate subsidised housing according to ability to pay, rather than vaguer conditions such as 'large families' or 'insanitary conditions'. The necessity of ensuring that only those who needed subsidised housing received it is a repeated parliamentary concern.

---

<sup>138</sup> M. Bowley, *Housing and the State 1919-1944* (London, Allen and Unwin, 1945) p.129.

An alternative explanation for the lack of debate on housing allocations is a prevailing central-local relationship that was based on consent and a respect for local authority autonomy. Chapter 2 explored a number of analyses of the central-local relationship and its status at different periods during the twentieth century. The period considered in this chapter spans both a more restrictive view of the role of local authorities (in the early twentieth century) and the emergence of a more consensual approach from the 1930s onwards. The analysis of the Housing Acts in this chapter does not support entirely this proposition. While there are relatively few direct references to central-local relations in the 1924 Act debates, it was argued above that the rationale for the reasonable preference formula was apparently simultaneously to preserve as much local authority discretion as possible while applying some restriction on local authorities' allocations activities. The debates of the 1930 and 1935 Acts do contain far more references to the desirability of co-operating with the local authorities, as well as evidence that the authorities and their associations were consulted prior to the publication of the Bills, supporting a consensual governmental approach. Whether such consultation extended to the management provisions (such as they were) or was limited to the main issue of housing production is unclear. What is apparent is that from 1924 onwards attempts to restrict local authorities' allocation freedom were consistently resisted.

The question raised by this observation is why such attempts were resisted. Were they based on support for the principle of local autonomy? Or, did it have more to do with the mutual self-interest that Griffith wrote about in the 1960s; an acknowledgement that neither party can perform its functions without the other?<sup>139</sup> A supplementary issue is whether the lack of debate on allocations signals cross-party consensus on the issue. It was suggested in chapter 1 that during this period central government was heavily reliant on local authorities to produce the volume of housing required. It is therefore possible that the lack of interference in local authorities' allocations was the *quid pro quo* for co-operation on housing production. It is difficult to determine whether granting local authorities a wide measure of discretion in housing management was a conscious policy decision, or whether it came about fortuitously because Parliament's attention was focused on the construction of housing. This 'chance' theory is supported by the way in which local authorities' freedom was conferred; through a *lack* of central government intervention,

---

<sup>139</sup> J.A.G. Griffith, *Central Departments and Local Authorities* (London, Allen & Unwin, 1966).

rather than through the positive conferment of discretionary power. As far as the question of cross-party consensus is concerned, the argument that the lack of debate signalled a degree of consensus is borne out by the fact that while the reasonable preference formula was passed under a Labour government, it was subsequently re-adopted in a Conservative measure. Further, the need for co-operation with local authorities is a feature of both Labour and Conservative Acts.

## Chapter 4

# DEVELOPMENT OF LEGISLATION 1950-1991

## INTRODUCTION

Following from the previous chapter, this chapter examines the development of relevant legislation and quasi-legislation during the period 1950 to 1991. The material analysed in this chapter does not affect directly the 'reasonable preference' requirement. It does, however, make important contributions to a more general understanding of the central-local relationship with regard to housing management generally, and specifically the question of local authority discretion in this sphere. The main Acts covered in this period are the Housing (Homeless Persons) Act 1977, the Housing Act 1980 and the Tenants' Rights Etc. (Scotland) Act 1980. While there are no relevant Acts during the period 1950 to 1976,<sup>1</sup> the chapter considers a number of reports issued by government's advisory bodies, the Central Housing Advisory Committee (CHAC) and its Scottish counterpart, the Scottish Housing Advisory Committee (SHAC), as well as pertinent departmental circulars and codes of guidance. These reports are discussed thematically rather than chronologically throughout the chapter.

## HOUSING (HOMELESS PERSONS) ACT 1977

### Background

It is not the object of this thesis to examine the allocation of housing to people found to be statutorily homeless. This is because, traditionally, a separate route of housing allocation has applied to this group. However, as well as adding a further group to the reasonable preference categories,<sup>2</sup> the Housing (Homeless Persons) Act 1977 imposed on local authorities, for the first time, an obligation to house permanently a statutorily defined

<sup>1</sup> The Housing Act 1957 was a further consolidation Act which left intact the reasonable preference phrase; s.113(2).

<sup>2</sup> Housing (Homeless Persons) Act 1977, s.6(2).

group.<sup>3</sup> It consequently curtailed local authorities' almost complete discretion to allocate housing and, as such, is relevant to this thesis.<sup>4</sup>

The Act was controversial because, as it was originally drafted, it imposed an absolute obligation on local authorities to house certain categories of people in 'priority need', regardless of how their homelessness had arisen.<sup>5</sup> The final Act contained considerably fewer unequivocal obligations on local authorities. It is the process by which this dilution occurred that is of particular interest, since it has direct relevance to the influence exerted by local authorities (and their associations) on the content of legislation during this period.

It is necessary first briefly to outline the Act's conception and parentage, since it will be argued that the political background to its birth had a direct effect on its provisions. The Act was introduced as a Private Member's Bill by the Liberal MP, Stephen Ross, during a minority Labour administration. However, Ross received considerable assistance from the Government throughout the Bill's parliamentary passage. At the outset, Ross shelved his own draft in favour of one that had already been prepared by the Department of the Environment.<sup>6</sup> The Government's high degree of involvement has prompted Loveland to assert that "the bill was a government measure, with Ross the *de facto* sponsoring minister".<sup>7</sup>

The motivation behind the Bill was Circular 18/74, issued jointly by the Departments of Health and Social Security and the Environment under the previous Conservative administration.<sup>8</sup> The circular requested housing authorities, rather than social service departments, to accept the prime responsibility for housing homeless people.<sup>9</sup> A government review showed that, 18 months after the circular had been issued, 40 per cent of housing authorities had still not accepted that responsibility. In his opening speech

<sup>3</sup> The Act also imposed on local authorities an obligation to house temporarily certain groups of people; *ibid*, s.4(3).

<sup>4</sup> The Act required local authorities to house permanently those found to be unintentionally homeless, in priority need and with the requisite local connection; *ibid*, s.4(5). Although the Act merely required local authorities to "secure that accommodation becomes available" (*ibid*), a survey conducted by the Department of the Environment in 1988 suggested that most entitled applicants were granted secure tenancies; S. Duncan and A. Evans/Department of the Environment, *Responding to Homelessness: Local Authority Policy and Practice* (London, DoE, 1988).

<sup>5</sup> I. Loveland, *Housing Homeless Persons* (Oxford, Clarendon Press, 1995) p.70.

<sup>6</sup> HC Debs, Vol. 926, col.896, 18 February 1977, Ross.

<sup>7</sup> Loveland, 1995, *op cit* n.5 p.69.

<sup>8</sup> Department of the Environment, Circular No. 18/74 (London, HMSO, 1974).

<sup>9</sup> HC Debs, Vol. 926, col.899, 18 February 1977, Ross.

during the Second Reading debates, Ross claimed that what emerged from the Government's review was:

[A] unanimous call by the local authority associations and the voluntary movement for a new legislative framework to change the outdated concept that homelessness was a social work problem and to place it clearly in the sphere of housing.<sup>10</sup>

The view commonly expressed by Labour Members was that the Act was aimed primarily at the recalcitrant 40 per cent of authorities that had not implemented the circular.<sup>11</sup> The lack of effectiveness of governmental circulars in directing local authority activity recurs throughout this chapter. Despite their ineffectiveness, successive governments largely resisted taking stronger, for example legislative, action in most spheres of housing allocation;<sup>12</sup> in this respect the 1977 Act marks a distinct departure.

Claims were made in both the Commons and the Lords that the Bill enjoyed all-party support.<sup>13</sup> Nevertheless, divisions along party-political lines were evident during the Second Reading debates. Homeless people were described by some MPs in such pejorative terms as 'queue-jumpers',<sup>14</sup> and 'scroungers' and 'scrimshankers'.<sup>15</sup> By contrast, the Committee stage was apparently characterised by a non-partisan, consensual approach.<sup>16</sup> This view is supported by the fact that, in Committee, the Opposition spokesperson on the environment (including housing), Hugh Rossi, introduced amendments advocated not only by the local authority associations, but also by voluntary bodies representing the interests of homeless people.<sup>17</sup> However, the extent to which the voluntary bodies' wishes

---

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid* cols.941-2, Julius Silverman.

<sup>12</sup> This point is aptly illustrated by the case of residence qualifications, discussed below in relation to the Housing Act 1980 and the Tenants' Rights Etc. (Scotland) Act 1980.

<sup>13</sup> Ross claimed to have sponsors to the Bill from five political parties; HC Debs, Vol. 926, col.897, 18 February 1977.

<sup>14</sup> *ibid* cols.914-5, Paul Channon.

<sup>15</sup> *ibid* col.905, col.921 and col.972, W.R. Rees-Davies.

<sup>16</sup> This point was made by the Conservative MP, Peter Morrison; "It seems that this Committee is turning into a very amicable affair. Every time we put forward an amendment from the Opposition side, [Ross] sees our point of view and promises that at a later stage he will come back and accommodate us"; HC Debs, Standing Committee A, col.135, 16 June 1977. See also *ibid* col.281 21 June 1977, Bruce Douglas-Mann and *ibid* col.341, 23 June 1977. Robin Cook.

<sup>17</sup> Rossi claimed that "in the Committee we are responsive and receptive to good suggestions from whichever quarter they may come and ... we are not briefed on behalf of one interest or another"; HC Debs, Standing Committee A, col.306, 21 June 1977.

prevailed over those of the local authorities and their associations is open to doubt, and is discussed in more detail below. Furthermore, while the Bill may have enjoyed cross-party support in theory, there was nevertheless room for considerable disagreement over the extent of the obligation that was to be placed on local authorities, and the degree of discretion they should retain in deciding whom to house under the Act.

## Consultation with Local Authorities

There is abundant evidence to support the view that local authorities were extremely effective in making their concerns heard at the highest levels. An analysis of the parliamentary proceedings suggests that local authorities were instrumental in bringing about the considerable concessions achieved during Committee and Report stages. Indeed, it appears to be the local authorities, and particularly their associations, that set the agenda, rather than the Bill's sponsor, the Government or the charities representing the interests of homeless people. There are two possible explanations for this phenomenon. On the one hand, it is possible that it reflects a respect for local government and a co-operative approach to the legislation. On the other hand, it is possible to attribute the importance attached to local authorities' representations to the fact that they happened to reflect the political ideology of the Opposition.<sup>18</sup> Had this not been the case, it is open to question whether their concerns would have been accorded such weight.<sup>19</sup> It is clear that the Labour Government's minority status made it vulnerable to concerted challenge from any opposing force.

Introducing the Second Reading debates, Ross acknowledged that the Bill owed its origins not only to the Government but also to the local authority associations.<sup>20</sup> This point was

<sup>18</sup> In chapter 2, it was doubted whether it was possible to speak of 'local government interests' as a single entity, given the differences between the associations representing the various types of local authority. The debates do highlight differences of opinion between the ADC and the AMA. However, there are a number of claims by Rossi that the associations shared concerns over certain of the homelessness duties to be imposed by the 1977 Act; Standing Committee A, col.124, 16 June 1977.

<sup>19</sup> A similar phenomenon has been observed in relation to the reorganisation of local government in the 1970s. Leach argues that the success of the ACC in modifying the initial drive towards unitary authorities was attributable, at least in part, to the fact that its objections coincided with influential Conservative backbench and grass-roots feeling; R. Leach, 'Local Government Reorganisation RIP?' (1998) *Political Quarterly*, 69, 31-40, pp.36-7.

<sup>20</sup> "I am sure that the Under-Secretary of State ... will join me in expressing appreciation for the helpful and cooperative spirit which has been shown by the local authority associations in their approach to the preparation of the legislation. They have participated fully in the lengthy process of consultation which has

also emphasised by the Minister most closely associated with the Bill, the Under-Secretary of State for the Environment, Ernest Armstrong. He conceded that not all the Bill's provisions "will receive an unqualified welcome", but nevertheless claimed that on the point of principle (that homelessness was primarily a housing, rather than a social service, problem), there was general consensus.<sup>21</sup>

The potency of the local authorities' lobbying was most evident in Committee. It is clear that the Association of District Councils (ADC) lobbied vociferously on behalf of its members, and mobilised housing authorities to put pressure on their MPs.<sup>22</sup> It was claimed that the opposition from local authorities was not based on party political lines,<sup>23</sup> but Ross believed it was the 40 per cent of local authorities that had not implemented the advice contained in the joint Circular 18/74 which had "shouted the loudest".<sup>24</sup> Ross also asserted that the majority of representations from individual authorities had been made at the behest of the ADC, arguing that their fears had been deliberately exaggerated.<sup>25</sup>

There is evidence throughout the Committee debates to demonstrate the extent of local authority influence on the Bill. A few examples illustrate the point. An amendment was introduced to prevent itinerant owners of caravans (or houseboats) from moving to a particular location, claiming that there was no available caravan site (or mooring) and then applying to the local authority as homeless.<sup>26</sup> Rossi claimed that both the ADC and Association of Metropolitan Authorities (AMA) strongly supported the amendment.<sup>27</sup> The ADC was also instrumental in tabling an amendment in relation to the co-operative

---

gone on over the last 12 months or more, and I welcome their constructive attitude at a time of acknowledged difficulty for them"; HC Debs, Vol. 926, cols.899-900, 18 February 1977.

<sup>21</sup> *ibid* col.962.

<sup>22</sup> For example see the interchange between Rossi and Ross; HC Debs, Standing Committee A, col.11, 14 June 1977.

<sup>23</sup> *ibid*, Morrison.

<sup>24</sup> *ibid* col.13.

<sup>25</sup> This view is refuted by one Conservative MP. "My housing department contacted me immediately this Bill appeared ... and said that it was desperately anxious about it. Mine is a local authority which acted on the circular and accepted its responsibility, but it is concerned about the wide terms of the Bill"; *ibid* col.7, 16 June 1977. Tony Durant. Tim Sainsbury, another vocal Conservative opponent to the original Bill, claimed that Ross's housing authority (the Isle of Wight) was alone among south coast authorities in being in favour of the Bill; *ibid* col.20, 14 June 1977.

<sup>26</sup> *ibid* col.119, 16 June 1977, Morrison.

<sup>27</sup> "I have received some 60 letters on this point from individual local authorities, all emphasising the importance to them of this aspect of the Bill. There is considerable disquiet among local authorities about the nature of the burden that the Bill proposes to place on them"; *ibid* col.124.

arrangements between housing authorities and social service departments proposed under the Bill.<sup>28</sup> It is also apparent that the ADC inspired the ‘local connection’ amendment.<sup>29</sup>

It would be misleading to give the impression that it was Conservative MPs alone who championed the local authorities’ position. Although Ross suspected that many representations received by MPs from individual local authorities were the result of the ADC’s ‘round robin’ briefing to its members, nevertheless he too was involved in consultations and negotiations with them.<sup>30</sup> The Under-Secretary of State also made it clear that he was personally involved in on-going negotiations with local authorities.<sup>31</sup> When challenged on the contentious provisions of the Bill, and the local authorities’ disquiet, the Government’s standard response was generally sympathetic towards the local authorities. Armstrong believed it was necessary to achieve a balance between the legitimate concerns and difficulties of local authorities faced with implementing the provisions of the 1977 Act, and the desperate plight of homeless families.<sup>32</sup> Armstrong’s conciliatory tone contrasts with the very much stronger stance taken on the issue of the Right to Buy (RTB) by the Government during the debates on the Housing Act 1980 and the Tenants’ Rights Etc. (Scotland) Act 1980, which are discussed below.

Thus it is clear that considerable consultation with local authorities and their representative associations took place, not only prior to the publication of the Bill, but also during its parliamentary passage. Furthermore, it has been argued that local authorities were effective in achieving substantial concessions.<sup>33</sup> The reproachful voices of certain peers who believed that too many concessions had been wrung by local authorities testify to this fact. For example, one Labour peer believed that the duties contained too many loopholes and vaguely defined criteria.<sup>34</sup> He attributed the flexibility of the resultant wording to the

<sup>28</sup> *ibid* col.230, 21 June 1977, Rossi.

<sup>29</sup> “This is a serious and important problem. The [ADC] has made it clear that it is a priority matter to be dealt with, namely, to limit the duty to re-house only to those applicants who have a substantial connection with the area”; *ibid* col.245, Sainsbury.

<sup>30</sup> “At the same time as this Bill is going through we are consulting the local authority associations on a draft circular designed to secure the better use of available accommodation”; *ibid* cols.219-20.

<sup>31</sup> “Homelessness has been the subject of helpful consultation and dialogue between local authority associations, the Government and the voluntary bodies and that will go on”; *ibid* cols.426-7, 23 June 1977.

<sup>32</sup> *ibid* col.47, 14 June 1977. See also HC Debs, Vol. 926, col.962, 18 February 1977.

<sup>33</sup> “I cannot believe that the local authorities are not reasonably satisfied with the amendments that are before us today. Those amendments meet most of the points, if not all the points, that the authorities have been making to us”; HC Debs, Vol. 934, col.1631, 8 July 1977, Ross.

<sup>34</sup> HL Debs, Vol. 385, cols.1168-9, 15 July 1977, Lord Gifford.

need to achieve consensus between competing interests.<sup>35</sup> Hence the final wording of the Act was very much the product of compromise.<sup>36</sup>

### *The Local Authority Associations*

Given the conclusion reached about the lobbying effectiveness of the local authority associations, it is curious to note that a report published in 1977 on central-local relations characterised the associations as valuable “post-offices midway between their members and central government”.<sup>37</sup> This is in stark contrast with remarks made by the Minister of Housing and Local Government twenty years earlier, attributing to the associations a status of being “virtually ... part of the constitution of the country.”<sup>38</sup> The Minister’s remarks should perhaps be treated with some caution in light of their context (an address to one of the major associations). Nevertheless, it is possible that the changing fortunes of the associations mirrored the general evolution of the central-local relationship that was outlined in chapter 2, and the Minister’s claim was a true reflection of the relationship that existed at the time.

Support for this analysis can be gained from a number of authors. Rhodes, for example, identified three distinct trends in intergovernmental relations; bargaining, incorporation and direction. The ‘bargaining’ era, characterised by consultation, spanned the post-war period until the mid-1970s, while incorporation was the style adopted by the Labour governments of 1974-79. Rhodes intentionally avoided the term ‘corporatist’ to describe this period because the associations “did not and could not regulate their members; they never held a monopoly of representation; membership of an association was never compulsory; and there was competition between the constituent organizations of the national community.”<sup>39</sup> Nevertheless, the Labour governments did make a sustained effort

<sup>35</sup> “I and other noble Lords, and people outside Parliament, have expressed grave concern because the Bill as it has been amended has become very flexible ... We fear that the effect of the consensus will produce a very woolly Bill”; HL Debs, Vol. 386, col.1025, 27 July 1977.

<sup>36</sup> “It has been rightly said that we have tried to achieve a consensus on the Bill ... that we have had discussions and have come up with an amended Bill which seems to go a long way to meeting the fears of local authorities and the voluntary bodies is an achievement, in spite of all the rude remarks made in the House”; HC Debs, Vol. 936, col.882, 27 July 1977, Ross.

<sup>37</sup> The Central Policy Review Staff, *Relations Between Central Government and Local Authorities* (London, HMSO, 1977) p.37.

<sup>38</sup> Speech at the official opening of the new County Councils Associations offices, reported in the *County Councils Gazette*, September 1956; quoted in J.A.G. Griffith, *Central Departments and Local Authorities* (London, Allen & Unwin, 1966) p.33.

<sup>39</sup> R.A.W. Rhodes, *The National World of Local Government* (London, Allen & Unwin, 1986) p.375.

to introduce a kind of top-level integration in its dealings with local authorities.<sup>40</sup> The trend towards direction originated with the Thatcher Government of 1979,<sup>41</sup> and is discussed later in this chapter.

Rhodes is supported in his view of broadly harmonious relationships during the post-war period. Stewart, for example, claimed that pre-legislative consultation was part of the established order.<sup>42</sup> Baggott explains the relationship between various pressure groups and government during this period in terms of a mutual dependence. Governments' assumption of the responsibility for managing the economy meant that they were dependent on the co-operation of various groups, for example trade unions and employers, while the creation of the welfare state created a dependence on the professions who delivered the services and local authorities who administered many of them.<sup>43</sup>

It is also possible to find evidence to support this view in the associations' official publications. For example, in his address to the 1952 annual meeting of the County Councils' Association (CCA), the Minister of Housing and Local Government emphasised the interdependence of central and local government.<sup>44</sup> In 1958, the CCA concluded that it continued "to enjoy a close relationship with the Ministries concerned with our affairs" and despite "an inevitable divergence of views on certain matters" had no doubt that "this relationship constitutes a source of strength and advantage to local government."<sup>45</sup> Clearly, this is a limited collection of anecdotal evidence in 'partisan' publications and should not be given undue weight. However, when this evidence is taken together with the references throughout the parliamentary debates of the period, a consistent picture begins to emerge.

The broadly consensual approach adopted towards pressure groups does not deny the existence of conflict and criticism but such breaches were the exception and conflict was

---

<sup>40</sup> *ibid.*

<sup>41</sup> "The Conservative government of 1979-83 abandoned incorporation for direction, with retrenchment as the dominant theme of its economic policy"; *ibid* p.379.

<sup>42</sup> J.D. Stewart, *British Pressure Groups* (Oxford, Clarendon, 1958) p.17.

<sup>43</sup> R. Baggott, R., *Pressure Groups Today* (Manchester, Manchester University Press, 1995) pp.107-8. See also Griffith, 1966, *op cit* n.38 p.43-44.

<sup>44</sup> "On the housing side of my work I have to operate through the fifteen hundred housing authorities up and down the country, and I depend entirely upon them and their efficiency for my failure or success"; County Councils Association, *Official Gazette*, June 1952, p.104.

<sup>45</sup> *ibid* May 1958, p.144.

generally well-managed.<sup>46</sup> The 1970s witnessed a greater degree of conflict as a result of economic crises and a decline in the post-war consensus politics. In his address to the ADC's 1974 annual meeting, the Chair acknowledged the existence of an unstable political scene that was unsettling to local government. Despite this, he claimed "the Association had had full and friendly relations with Government Ministers and the Department of the Environment."<sup>47</sup> By 1976, local government appeared to be feeling the strain of sustained criticism. According to the ADC, "there had been an insidious shift from criticising local government as a kind of historic national pastime to an almost contrived town hall bashing."<sup>48</sup> However, it was clear that he blamed such criticism on the media rather than on central government. Indeed, he claimed that government "recognised the part local government was playing and Ministers had openly paid their tribute" and that "there was the closest co-operation between Government and local government."<sup>49</sup>

As far as consultation is concerned, Loughlin notes that it became standard practice during the twentieth century for government to consult affected local authorities before initiating new legislation.<sup>50</sup> Writing in 1958, Stewart observed that although the right to consult was never formally conceded by government, "[it] has been conceded to such an extent in practice that any failure in the formal procedure is treated as an injustice ...".<sup>51</sup> Griffith, too, asserted that consultations were frequent<sup>52</sup> and benefited both parties.<sup>53</sup>

However, doubt has been cast on both the extent and effectiveness of consultation. The Redcliffe-Maud report identified that one of the unsatisfactory features of the central-local relationship was that the two parties "sometimes seem to be at arm's length."<sup>54</sup> The Commission recommended that continuous consultation should be the normal practice.<sup>55</sup>

<sup>46</sup> Baggott, 1995, op cit n.43 p.108.

<sup>47</sup> Association of District Councils, *Report of Annual Meeting and Conference* (London, ADC, 1974) p.15.

<sup>48</sup> Association of District Councils, *Report of Annual Meeting and Conference* (London, ADC, 1976) p.11.

<sup>49</sup> *ibid* pp.12-3.

<sup>50</sup> M. Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford, Clarendon, 1996) p.384. In secondary legislation, the requirement to consult is often incorporated in statute; for example, Local Government, Planning and Land Act 1980, ss.54(4) and 56(10); Social Security and Housing Benefit Act 1982, s.36(1), now Social Security Administration Act 1992, s.176(1).

<sup>51</sup> Stewart, 1958, op cit n.42 p.31.

<sup>52</sup> Griffith, 1966, op cit n.38 p.43.

<sup>53</sup> "The information from and comments of the associations are of considerable assistance in the drafting of circulars, Statutory Instruments and Bills, making it less likely that wholly impracticable policy changes will be made"; *ibid* p.44.

<sup>54</sup> Redcliffe-Maud, *Report of the Royal Commission on Local Government in England*. Cmnd. 4040 (London, HMSO, 1969) para.105.

<sup>55</sup> *ibid*.

Furthermore, even where consultation does take place, its effectiveness has been questioned.<sup>56</sup> One view is that the value to the associations is negligible because the government's mind is usually made up prior to the discussions. On this analysis, consultations are of greater use to the department concerned, whose Minister can then claim that the local government interest has been consulted.<sup>57</sup> This effectively reduces consultation to a symbolic exercise.

## Local Authority Discretion

At the heart of the debates on the 1977 Act was the degree of discretion that local authorities should retain in deciding who was homeless and would therefore qualify for housing. Stephen Ross claimed that the original Bill did leave local authorities discretion in important areas. The importance he attached to this discretion was apparently based on practical, rather than principled, considerations.<sup>58</sup> However, Hugh Rossi disputed that the Bill would achieve the result that Ross claimed he wanted. Rossi acknowledged that the Committee's task (one that, with hindsight, was largely to elude them) was to find the right wording. Their goal was simultaneously to leave local authorities the discretion to identify the "non-genuine homeless person", while preventing them from avoiding and shuffling off their responsibility for people who were genuinely homeless.<sup>59</sup>

The cross-party support claimed by Ross for his Bill was particularly elusive in relation to the question of local authority discretion. Conservative Members appeared to be generally in favour of giving local authorities greater discretion than, they asserted, did the Bill. However, Rossi was alone in making the issue one of principle.<sup>60</sup> He claimed that the previous Conservative Government (which had issued circular 18/74) was prepared to deal with the question of homelessness more flexibly. The choice of a circular, rather than legislation, was to guide local authorities rather than imposing an absolute duty on them.

<sup>56</sup> K. Isaac-Henry, 'The English Local Authority Associations' in G.W. Jones (ed.), *New Approaches to the Study of Central-Local Government Relationships* (Farnborough, Gower, 1980) p.47.

<sup>57</sup> *ibid.*

<sup>58</sup> "I am sure that it is right to leave the action in individual cases within the discretion of individual local authorities in the light of the needs of the families concerned and of other claims on their resources"; HC Debs, Vol. 926, col.905, 18 February 1977.

<sup>59</sup> HC Debs, Standing Committee A, cols.67-8, 16 June 1977.

<sup>60</sup> The Conservative MP, Reginald Eyre, was concerned about the potentially demoralising effect on local authorities of the imposition on them of statutory obligations that they were not physically able to fulfil; *ibid* col.21, 14 June 1977.

This was because the Conservative Government “had a certain amount of regard for the autonomy of local authorities in this question.”<sup>61</sup>

This is why, when we were in government, we gave local authorities a certain amount of flexibility and relied upon their good faith and humanitarianism to make their resources available as justly as they could between the competing demands that were inevitably made upon them.<sup>62</sup>

Rossi’s assertion that a question of principle was involved is important to an examination of the central-local relationship. As mentioned above, Rossi was the only contributor to regard the issue as a matter of principle. Further, Rossi was a front bench Member and his views presumably therefore reflected the Opposition’s official standpoint. This point becomes particularly relevant when considering the debates leading to the Housing Act 1980 and the Tenants Rights Etc. (Scotland) Act 1980.

It has been suggested that the desire for local authority discretion was predominantly a Conservative view. However, the Minister was also in favour of a more loosely drafted Bill, on the grounds that local authority housing committees needed flexibility to deal with the variety of cases coming before them.<sup>63</sup> Another Labour MP believed that most housing managers and departments “would prefer not to have mandatory duties imposed upon them because … they interfere with flexibility in handling housing cases.”<sup>64</sup>

During the parliamentary debates all three political parties espoused the principle of allowing local authorities considerable autonomy over housing allocations. It is therefore relevant to question whether one party can legitimately claim to be the champion of local authority discretion, or whether the desirability for such autonomy changes according to the subject matter and whether the party is in government or opposition. It was observed above that Rossi advocated the principle of local authority autonomy while in Opposition.

---

<sup>61</sup> HC Debs, Vol. 926, col.957, 18 February 1977.

<sup>62</sup> *ibid* col.958, Rossi.

<sup>63</sup> “To suggest that we can sit in this Committee room and give to every authority in the country … precise and similar rules and regulations is absolute nonsense”; HC Debs, Standing Committee A, col.47, 14 June 1977, Ernest Armstrong.

<sup>64</sup> HC Debs, Vol. 926, cols.941-2, 18 February 1977, Silverman. Silverman was a member of the Housing Management Sub-Committee of CHAC when it produced its ninth report on council housing, published in 1969; Central Housing Advisory Committee, *Council Housing Purpose, Procedures and Priorities*. Ninth Report of the Housing Management Sub-Committee (London, HMSO, 1969).

Support for local authority autonomy is also voiced by the Opposition during the debates of the Housing Act 1980 and Tenants' Rights Etc. (Scotland) Act 1980, considered below. By then it was the Labour Party in Opposition. It is therefore possible to speculate that the desirability of local authority autonomy is regarded as the 'moral high ground', and inhabited largely by members of opposition parties.

### *Code of Guidance*

Great emphasis was placed throughout the debates on the accompanying code of guidance. Ross's intention from the outset was that the Act was simply a skeleton and the detail would be contained in guidance, on which local authorities had been extensively consulted.<sup>65</sup> The Act required local authorities to 'have regard to' the code; an obligation that is discussed in more detail below.

A recurring concern was the extent to which detailed obligations should be defined in primary legislation or left to guidance, but attitudes were not always consistent. For example, one Conservative MP advocated stipulating in the primary legislation the circumstances in which local authorities were entitled to reject applicants as not genuinely homeless, but warned against the danger of writing too much detail into the Bill when discussing an amendment to define statutorily the priority groups.<sup>66</sup>

The code of guidance appeared to be the means of expressing Government policy more explicitly, given the need to achieve consensus on the primary legislation for the reasons adduced above. Given the centrality of the code in 'fleshing out' the Act, an important question was raised in relation to its legal effect.<sup>67</sup> One view was that the code of guidance would have the same legal effect as if the provisions were contained in the primary legislation.<sup>68</sup> By contrast, it was argued that if a potential litigant to a homelessness decision could show that the local authority had not bothered to look at the guidance, then it could be faulted at law. However:

---

<sup>65</sup> *ibid* col.904.

<sup>66</sup> HC Debs. Standing Committee A, col.197, 21 June 1977, George Younger.

<sup>67</sup> This point is discussed in relation to 'quasi-legislation' in chapter 1.

<sup>68</sup> HC Debs, Standing Committee A, col.198, 21 June 1977, Younger.

No court, surely, will take account of the guidance, specifically stated to be guidance, to which local authorities are only to have regard in discharging their functions ... simply because the local authority had not adhered to the guidance issued by the Secretary of State.<sup>69</sup>

This exposition is supported by the judicial interpretation of quasi-legislation discussed in chapter 1.

The obligation on local authorities to have regard to the guidance itself caused a certain amount of controversy. Rossi claimed that the 1977 Act was the first to impose such an obligation on authorities, and he believed that it raised a constitutional issue.<sup>70</sup> Local authorities had apparently taken great exception to the statutory nature of this provision. This was because they regarded it as "the means by which Whitehall will remove from them what they consider to be their legitimate responsibility and discretion in exercising functions given to them by Parliament."<sup>71</sup>

This discussion is relevant to the broader issue of central-local relations, as local authorities had apparently taken umbrage because the Government<sup>72</sup> felt it necessary to impose a statutory obligation to 'have regard to' the guidance. It is interesting to question why the Government had taken such a step and whether it reflected a deterioration in central-local relations. The decision to enshrine such an obligation in statute may be related to the fact that 40 per cent of local authorities had failed to give effect to the Conservatives' circular. Indeed, the effectiveness of previous circulars in directing local authority action is doubted on a number of occasions during the debates.<sup>73</sup> The lack of effectiveness of circulars, particularly in relation to the imposition of residence qualifications, is returned to later.

---

<sup>69</sup> *ibid* col.199, George Cunningham.

<sup>70</sup> *ibid* cols.424-5, 23 June 1977.

<sup>71</sup> *ibid*, Rossi.

<sup>72</sup> This is described as a government measure despite the fact that the 1977 Act was officially a Private Member's Bill. The justification for this claim is that Ross adopted the DoE's draft Bill.

<sup>73</sup> The Labour MP, George Rodgers, was of the opinion that the joint circular "made many useful and helpful recommendations, each of which was widely ignored or totally rejected by local authorities"; *HC Debts*, Vol. 926, col.950, 18 February 1977.

A further challenge to the constitutional status of the provision was mounted in the Lords. An amendment was introduced to allow local authorities to take into account local factors, in addition to the guidance issued by the Secretary of State. The aim was to ensure that:

The local authorities which are democratically controlled and especially set up in order that regard should be given to local circumstances, should be left free to take those into account. It is also important not to give the Secretary of State such extensive powers as to enable him to give specific direction to individual authorities.<sup>74</sup>

Although Lord Wade, the Bill's sponsor in the Lords, apparently accepted the amendment the Government sought to re-introduce the previous wording on Report.<sup>75</sup> The Minister was keen to stress, however, that an authority would not lose its discretion to determine the facts of a particular case, or to decide how to handle a case in the light of local circumstances.<sup>76</sup>

## Summary Housing (Homeless Persons) Act 1977

The 1977 Act debates illustrate that parliamentary support for a Bill depends on a number of complex and inter-related factors, including the government's majority and the effectiveness of lobbying by pressure groups.<sup>77</sup> The claim made by the Bill's sponsor of cross-party support appears to have been predicated (as far as the Opposition was concerned) on achieving a significant retreat from the original obligations. It must have become apparent to both Ross and the Labour Government, as the Bill progressed through Parliament, that it would be lost without quite drastic retrenchment. Baroness Birk provided the most explicit acknowledgement of this assumption.<sup>78</sup> There is no doubt that the resultant Act differed in significant respects from the original Bill. Furthermore, the

<sup>74</sup> HL Debs, Vol. 386, col.714, 22 July 1977, Lord Sandford.

<sup>75</sup> "An authority could effectively disregard the Secretary of State's guidance if it decides that the local circumstances, or the facts of individual cases, warrant it"; *ibid* col.1000, 27 July 1977, Baroness Birk.

<sup>76</sup> "But to suggest that an authority should be entitled to disregard the Secretary of State's guidance, or to have regard to it just to the extent that it suited it, is to misconstrue the purpose and nature of the guidance"; *ibid*.

<sup>77</sup> The local authority associations are included within this broad term.

<sup>78</sup> "... there have been intensive consultations and discussions between those of us here and in another place who are concerned to try to get the best compromise we can. I must say quite frankly that this is the result of those consultations. We must accept it with a good grace"; HL Debs, Vol. 386, col.693, 22 July 1977.

changes that were introduced overwhelmingly reflected the interests of local authorities, rather than those of groups representing homeless people.

There are few direct references to central-local relations within the debates. This is in complete contrast, just three years later, with the debates leading to the Housing Act 1980 and the Tenants' Rights Etc. (Scotland) Act 1980. Hugh Rossi was alone in suggesting that the previous Conservative administration had deliberately chosen to implement its policy on housing homeless people by circular, because it valued the principle of local authority autonomy. The only other occasion during the debates on which central-local relations were expressly discussed is in regard to the obligation for local authorities to have regard to the code of guidance. Again, it was Rossi who raised the issue as one of principle.<sup>79</sup>

The apparent success of local authorities in achieving considerable concessions is not attributable unequivocally to a genuine regard for the preservation of good central-local relations. It is likely that other factors were influential; for example, the fact that local authorities' wishes coincided with those of the Opposition; the effective lobbying by their associations, and the Government's minority status. While explicit discussions on the state of central-local relations are rare, there are frequent references to consultation with local authorities. That extensive local consultation was carried out before the Bill was introduced in Parliament would seem to indicate, at least superficially, a healthy central-local relationship. Furthermore, throughout the debates the Government made positive statements about the role played by local authorities in shaping the legislation. This may, as outlined earlier, have more to do with political necessity (the fact that the Government was in a minority) than a genuine desire to respect the wishes of local authorities.

The generally positive attitude towards local authority discretion evidenced by the debates is also supported by CHAC and SHAC reports of the period. These reports are considered in more detail below in relation to the issue of residence qualifications. However, it is worth citing at this juncture the view of the influential Cullingworth Report, which

---

<sup>79</sup> Rossi, a barrister, had spent nearly ten years in local government (Hornsey Borough Council 1956-65, Chairman of the Housing and Redevelopment Committees; Middlesex CC 1961-65, Chairman of the Building Committee) before becoming secretary of the Conservative Parliamentary Housing Land and Local Government Committee between 1968 and 1970. Before becoming the Opposition Spokesperson on

endorsed strong local discretion and the inadvisability of greater central control.<sup>80</sup> The Committee was certain that the need was for “a clearer lead from central government, not greater control”.<sup>81</sup>

Despite the caveats entered concerning the vulnerability of the minority Government, it is argued that there is sufficient evidence to substantiate a tentative conclusion that, towards the end of 1977, central-local relations within the context of local authority housing appeared to be relatively amicable and consensual. The mood underwent a fairly dramatic shift by the time of the debates on the Housing Act 1980 and the Tenants’ Rights Etc. (Scotland) Act 1980, which are now examined.

## **HOUSING ACT 1980 & TENANTS’ RIGHTS ETC. (SCOTLAND) ACT 1980**

At first sight the Housing Act 1980 does not appear to have any relevance to the issue of housing allocation. The Act does not deal directly with allocations, leaving the provisions of the Housing Act 1957 intact.<sup>82</sup> However, it did introduce such important and far-reaching concepts as the RTB and statutory security of tenure for council tenants. It is particularly in the context of discussions on the RTB that relevant issues are raised in relation to the central-local relationship. Moreover, the Government’s response to a number of management-related amendments that were proposed illuminates further the changing relationship between central government and local authorities in relation to housing management.

The Tenants’ Rights Etc. (Scotland) Act 1980 and the Housing Act 1980 proceeded through Parliament virtually simultaneously. The provisions of the Scottish Act are similar to those of its English/Welsh counterpart and many of the arguments, particularly with regard to the RTB, are rehearsed. However, it merits separate consideration because it contains provisions relating to allocations that are not included in the English/Welsh Act.

---

<sup>80</sup> the Environment in 1974, he had previously held the post of Parliamentary Under Secretary of State for the Environment in 1974.

<sup>81</sup> “Our view is that more central control could prove less effective than the present system”; CHAC, 1969, op cit n.64 para.54.

<sup>82</sup> ibid.

<sup>82</sup> S.113(2).

The main issues concerning the RTB will first briefly be considered, before proceeding to an examination of the management provisions contained in both Acts.

## The Right to Buy

In brief, the RTB gave existing local authority tenants the right to buy their council-owned property at a substantial discount from the market value. Previously local authorities had the power to sell their properties but had never been compelled to do so.<sup>83</sup> It is this characteristic of compulsion that raised important issues of local democracy for many Members from all sides and in both Houses.

Those expressing concern about the element of compulsion feared the erosion of the local mandate that it would necessarily entail. Roy Hattersley spoke for many when he claimed that the RTB was a direct attack on local autonomy.<sup>84</sup> While acknowledging the legitimacy of the local mandate, the Minister clearly saw it as being subordinate to the national mandate.<sup>85</sup> Jack Straw accepted the Government's mandate to pursue the RTB and that it overrode local authorities' mandates.<sup>86</sup> His point was that the Conservative's position on the RTB was inconsistent, since the Party had traditionally opposed increasing central powers.<sup>87</sup>

A variation on the local mandate theme was the 'local difference' issue, i.e. that housing circumstances vary throughout the country and it is therefore inappropriate to adopt an

---

<sup>83</sup> The Housing Act 1936 allowed local authorities to sell their housing stock to sitting tenants with the consent of the Minister. S.79 which required local authorities to obtain the best price for the property, was abolished by the Housing Act 1952, s.3(1). S.3(2) of the Housing Act 1952 provided that the Minister's consent could be given generally to all local authorities. By circular 64/52 the Minister gave general consent to local authorities to sell to sitting tenants; Ministry of Housing and Local Government, Circular No. 64/52 (London, HMSO, 1952).

<sup>84</sup> HC Debs, Vol. 976, cols.1472-3, 15 January 1980. His views were echoed by his Scottish colleagues during the Scottish 1980 Act debates. For example; *ibid* cols.1261-2, 14 January 1980, Bruce Millan; *ibid* cols.1288, 14 January, Gordon Wilson; *ibid* col.1333, 14 January 1980, George Robertson.

<sup>85</sup> "I do not regard a local election result as trivia ... but there is a question of balance of priorities between a national decision and a local decision. It is commonplace that a national Government under the constitutional arrangements of this country has the right to put a national policy to the electorate as a whole and to seek their views on it. That was done in the clearest terms in the last election"; HC Debs, Standing Committee F, cols.85-6, 31 January 1980, John Stanley.

<sup>86</sup> *ibid* col.70.

<sup>87</sup> Straw quoted from the Conservative Party's 1970 manifesto in which it was claimed that the Labour Party had deliberately overridden the views of elected councillors, and that the Conservatives would "redress the balance and increase the independence of local authorities"; *ibid*.

approach that gives no room for local variation to be taken into account.<sup>88</sup> Local variation has traditionally been a key reason for allowing local authorities to pursue their own housing policies, with little or no central government control.<sup>89</sup> In fact, the Government cited the desirability of maintaining local discretion and flexibility as the main reason for rejecting many of the management-based amendments that were proposed in the Housing Act 1980 which are discussed below.<sup>90</sup>

The opposition to compulsory sales did not come from the Labour ranks alone. Some Conservative MPs were also uneasy about the trespass on local authority autonomy.<sup>91</sup> The measure was also apparently opposed by both Labour- and Conservative-controlled local authorities, as well as a number of the local authority associations.<sup>92</sup> Research conducted by the housing charity Shelter showed that only 98 of 371 councils supported the Government's policy. Even among Conservative-controlled councils only 82 out of 176 supported compulsion.<sup>93</sup>

At the heart of the debates on the RTB was the effect on local authority autonomy. The Labour Opposition was clear that the RTB represented a huge incursion into local authorities' territory. However, Members from both sides of the House were keen to point out that the other party's stance on the issue of local autonomy changed according to whether they were in government or opposition. For example, one Labour MP contrasted the Conservatives' stance on education when in opposition with its current position on the

---

<sup>88</sup> The Labour Member, Frederick Mulley, believed that housing, more than any other service depended on the local circumstances. He believed it to be "unprecedented for the Secretary of State to take power to override all manner of local discretion. HC Debs, Vol. 976, cols.1484-5, 15 January 1980.

<sup>89</sup> CHAC, 1969, op cit n.64 para.169.

<sup>90</sup> However, 30 years earlier SHAC had cast doubt on the veracity of the local variation argument. It believed that the conventional wisdom (that the circumstances of each local authority's area were so varied that no general advice could be given on methods of selecting tenants) had its origins in the fear that recommendations by governments or advisory bodies may be made obligatory, rather than being borne out by the facts; Scottish Housing Advisory Committee, *Choosing Council Tenants*. Department of Health for Scotland (Edinburgh, HMSO, 1950) para.14.

<sup>91</sup> For example, the Conservative, William Benyon, could not support the Bill "because it removes from a democratically elected body the right to take a decision on policy"; HC Debs, Vol. 976, col.1505, 15 January 1980.

<sup>92</sup> "The Secretary of State and the Minister would do well to listen to the exhortations of the Association of County Councils – which is controlled by Conservatives – and of the Association of Metropolitan Authorities, which have both condemned the Bill because it seeks to control local authorities"; *ibid* col.1501, David Alton.

<sup>93</sup> HC Debs, Standing Committee F, col.55, 31 January 1980, Frank Allaun. However, John Major questioned the authority of the research, claiming that the results were based on the views of council officers, rather than those of elected members; *ibid* col.76.

RTB.<sup>94</sup> He was also keen to highlight the disjunction between the RTB and “the specific Conservative election pledge in 1970 of real autonomy for local councils.”<sup>95</sup> The relative value attached to the principle of local authority autonomy by governments and opposition parties is a recurring theme of this chapter.

## Management Issues

A number of management-related amendments were introduced in both Acts. Not all these amendments directly related to the question of allocations. However, they merit attention, first because of the Government’s differential treatment of the same issue in the two Acts and, secondly, because of the reasons given by the Government for rejecting the amendments.

### *Residential qualifications*

In chapter 1 we saw that local authorities have commonly imposed qualifications on people applying to join the housing waiting list. Such qualifications have included, for example, the requirement that the applicant resides in the local authority’s area; that s/he is above a certain age, and is not an owner-occupier. The Scottish Act, for the first time, prohibited local authorities from imposing a residence and other qualifications on applicants.<sup>96</sup> However, the English/Welsh Act did not contain a similar provision and the Government resisted attempts to include one. Residence qualifications have long been a contentious subject. It was observed in chapter 3 that CHAC had deprecated the use of such qualifications but had merely recommended local authorities review current practice.<sup>97</sup> In the light of the disparity between the two Acts it is worth considering the succession of reports by the two government advisory bodies, together with relevant departmental circulars, in order to assess the effect of this ‘quasi-legislation’.

<sup>94</sup> He pointed out that the Conservatives had “continually made much of the principle that local government should be able to reflect local decision-making”; HC Debs, First Scottish Standing Committee, col.95, 31 January 1980, Robertson. The same point is also made by Russell Johnston; HC Debs, Vol. 976, col.1273, 14 January 1980.

<sup>95</sup> HC Debs, Vol. 976, cols.1333-4, 14 January 1980.

<sup>96</sup> S.26(2) residence; s.26(1) applicant’s age and s.26(3) local connection.

<sup>97</sup> Central Housing Advisory Committee, *Management of Municipal Housing Estates*. Second Report of the Housing Management Sub-Committee (London, HMSO, 1945) para.29.

Between 1950 and 1988 five reports on the subject were published; two by CHAC and three by SHAC. In its 1955 report, CHAC believed that the result of not admitting applicants to the waiting list, “particularly when the refusal is based on lack of residential qualification, a consideration which is completely irrelevant to the test of housing need – may be extremely harsh.”<sup>98</sup> The Sub-Committee reiterated its previous recommendation that local authorities should accept employment in the area as a qualification for admission. It was “equally desirable in the national interest as in the individual’s own interest that there should be no impediment to people changing their place of employment.”<sup>99</sup> In its 1950 report, SHAC admitted ambivalence in deciding what restrictions local authorities could legitimately place on waiting list admission.<sup>100</sup> Although the Committee was convinced that a long residential qualification “has most undesirable results”,<sup>101</sup> its recommendation was more timid than was CHAC’s. It concluded that one year’s residence or employment was sufficient to demonstrate a genuine need for housing in a particular area.<sup>102</sup> By the time of its second report in 1967, SHAC was “convinced that conditions of residence impose a hindrance to mobility of labour which Scotland cannot now afford.”<sup>103</sup> Nevertheless, the statutory imposition of a national allocation scheme would be “neither appropriate nor practicable: the discretion of local authorities should not be completely eradicated...”<sup>104</sup>.

A number of groups of people were identified for whom the imposition of residence qualifications caused particular problems; these included members of the armed forces about to be discharged and immigrants. A White Paper,<sup>105</sup> departmental circulars<sup>106</sup> and reports by both advisory bodies consistently exhorted local authorities to take particular

<sup>98</sup> Central Housing Advisory Committee, *Residential Qualifications*. Fifth Report of the Housing Management Sub-Committee (London, HMSO, 1955) para.14.

<sup>99</sup> *ibid* para.32.

<sup>100</sup> SHAC, 1950, *op cit* n.90 para.37.

<sup>101</sup> *ibid* para.39.

<sup>102</sup> *ibid*.

<sup>103</sup> Scottish Housing Advisory Committee, *Allocating Council Houses*. Department of Health for Scotland (Edinburgh, HMSO, 1967) para.55.

<sup>104</sup> It believed the central approval of allocation schemes to be the only feasible solution. It also advocated that the Secretary of State draw up a model allocation scheme. Local authorities were to be allowed to depart from the central model to meet local conditions, but only if such variations were reasonable in the circumstances and did not conflict with the general principles established by central government; *ibid* para.88.

<sup>105</sup> Ministry of Housing and Local Government, *The Housing Programme 1965 to 1970*. Cmnd. 2838 (London, HMSO, 1965) para.40.

<sup>106</sup> For example, Ministry of Health and Local Government Circular No. 8/52 (armed forces); Ministry of Housing and Local Government Circular No. 2/67 (Welsh Office Circular 6/67) and Ministry of Housing and Local Government Circular No. 63/68 (immigrants).

account of the special circumstances of these groups.<sup>107</sup> In its 1955 report CHAC claimed that the response from local authorities to governmental exhortation had been good.<sup>108</sup> However, this assessment is belied by both an adjournment debate in the House of Commons, considered below, and the necessity for CHAC to publish yet another report dealing with this issue.

In its best known and most influential report, published in 1969, CHAC claimed that insufficient attention had previously been paid to the politics of residence qualifications. While there was broad professional agreement that housing need should be the primary criterion in allocating housing, it was “generally held that local opinion … would qualify this by upholding the greater claim of ‘local’ people”.<sup>109</sup> However, the report nevertheless judged that there was no consensus of opinion on residential qualifications and, moreover, a considerable proportion of the population regarded them as irrelevant.<sup>110</sup> In conclusion, the Committee acknowledged that conditions differed so greatly between areas that “absolute uniformity is not possible.”<sup>111</sup> The Committee went further than its previous reports, in holding it to be fundamental that no one should be precluded from applying, or being considered, for a local authority tenancy “on any grounds whatsoever”. Furthermore, this rule should be made a statutory obligation.<sup>112</sup> This was a quite dramatic recommendation, given CHAC’s previous stance on the desirability of maintaining generous local authority discretion. It is ironic that it was CHAC that ultimately recommended statutory intervention, since it was **only** in Scotland that the Government legislated to abolish certain waiting list qualifications and opposed such provisions in England and Wales.

The issue of residence qualifications did not end with the Cullingworth Report. Two further departmental circulars were issued; in 1975 the plight of former members of the armed forces was once again highlighted<sup>113</sup> and in 1977 a circular was issued following the

<sup>107</sup> In its report on housing in London, the Milner Holland Committee also accepted the undesirability of residence qualifications for new-comers to an area and their restriction on industrial mobility; Committee on Housing in Greater London, *Report of the Committee on Housing in Greater London*. Cmnd. 2605 (London, HMSO, 1965).

<sup>108</sup> CHAC, 1955, op cit n.98 para.44.

<sup>109</sup> CHAC, 1969, op cit n.64 para.150.

<sup>110</sup> *ibid* para.152.

<sup>111</sup> *ibid* para.169.

<sup>112</sup> *ibid*.

<sup>113</sup> Department of the Environment, Circular No. 54/75 ‘Housing for Ex-Servicemen and Ex-Servicewomen’ (London, HMSO, 1975).

publication of the Finer Committee's<sup>114</sup> recommendations on the housing needs of one-parent families.<sup>115</sup> The latter circular referred to the Government's announcement of its intention to consider legislating against the imposition of residence qualifications.<sup>116</sup> In the meantime, the circular urged local authorities to ensure that one-parent families were "accorded ready admission to the waiting list".<sup>117</sup>

It is noteworthy that despite deprecating, in increasingly strong terms, the imposition by local authorities of residence qualifications, neither advisory body was willing to recommend the imposition of such a statutory prohibition on local authorities, until CHAC's final report in 1969. This is despite recognising that their various exhortations had fallen largely on deaf ears.<sup>118</sup> Research conducted in the early 1970s found that none of the case study authorities completely satisfied the Cullingworth recommendation that no one should be precluded from applying for, or being considered for, a council tenancy, and all required some form of residence qualification.<sup>119</sup>

Despite the evidence from various sources that exhortation was ineffectual, successive governments until 1980 demonstrated a marked unwillingness to legislate in this sphere.<sup>120</sup> An adjournment debate in 1954 provides a good illustration of the essential dilemma for government; "that the local authorities should have autonomy and that housing should be a

---

<sup>114</sup> Department of Health and Social Security, *Report of the Committee on One-Parent Families*. Cmnd. 5629 (London, HMSO, 1974). Finer followed Cullingworth's recommendation that residential qualifications be abolished; para.6.76. The Report also recognised that simply requiring the admission of one-parent families to the waiting list was insufficient to eradicate discrimination in allocation. The Report therefore recommended that, except in areas of acute housing shortage, all families whether one- or two-parent should have their claim considered purely on the basis of need; para.6.78.

<sup>115</sup> Department of the Environment, Circular No. 78/77 'Housing for One-Parent Families' (London, HMSO, 1977).

<sup>116</sup> The Labour Government did subsequently introduce limited restrictions on residential qualifications in its 1979 Housing Bill.

<sup>117</sup> DoE, 1977, op cit n.115 para.18.

<sup>118</sup> For example, in its 1967 report, SHAC was disappointed to find that the recommendations of the 1950 report (that one year's residence or employment was sufficient) had largely been disregarded by local authorities. SHAC, 1967, op cit n.103 para.55.

<sup>119</sup> P. Niner, *Local Authority Housing Policy and Practice* (Birmingham, Centre for Urban and Regional Studies, 1975) p.23. Niner found that the more restrictive eligibility requirements were set by authorities under housing pressure, usually the 'conurbation authorities'; *ibid* pp.23-4. This finding is echoed more than 20 years later in research conducted on behalf of the Department of the Environment, Transport and the Regions, which is discussed in chapter 5.

<sup>120</sup> A consultative document, published in 1977, rejected a centrally-imposed statutory framework for allocations schemes, although it supported the Cullingworth report's recommendation for legislative action against residence and other waiting list qualifications; Department of the Environment, *Housing Policy*. Cmnd. 6851 (London, HMSO, 1977), paras.9.20-21.

local government responsibility.”<sup>121</sup> The subject of the debate was a departmental circular exhorting local authorities not to apply residence qualifications to recently discharged members of the armed forces. The mover of the adjournment described the document as “a well-worded and diplomatic circular, but it has not had any effect...”.<sup>122</sup>

The Minister was more positive about the success of the circular in achieving the Government’s policy, believing that “a large number of local authorities have amended their points schemes as a result of this circular.”<sup>123</sup> However, the Minister urged Members to send his department details of “difficult individual cases”. The departmental officials would then contact the relevant local authorities “on a friendly basis to see whether we can ask them to right the wrong ...”<sup>124</sup> He had “never yet ... known of one case in which the local authority has not gone some way towards meeting the wishes of the Ministry, even though the local authority is autonomous.”<sup>125</sup>

At the time of the debate, CHAC’s Housing Management Sub-Committee was undertaking its investigation on the subject. Scepticism was expressed that the investigation represented real action on the Government’s part. The Minister, however, believed that “A unanimous report from the Sub-Committee would carry great weight.”<sup>126</sup> As discussed earlier, the Sub-Committee duly published its report in 1955, roundly condemning the use of residence qualifications. The Minister’s prediction that the report would be influential is to be doubted, given that the Government subsequently felt it necessary to issue further departmental circulars,<sup>127</sup> and CHAC was obliged to return to the issue once again in its 1969 report.

This adjournment debate highlights a number of interesting points. First, the relative ineffectiveness of circulars in affecting local authority policy is again rehearsed. Secondly, there is an acknowledgement that the issue of residence qualifications poses a dilemma, because intervention by central government contravenes the principle of local authority autonomy in housing allocations. Thirdly, the subject was one on which cross-party

---

<sup>121</sup> HC Debs. Vol. 531, col.909, 30 July 1954, Ian Harvey.

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid* col.920, Ernest Maples.

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid* col.921.

<sup>127</sup> Ministry of Health and Local Government Circular Nos. 60/65 and 2/67 (London, HMSO).

consensus existed.<sup>128</sup> It is noted below, in relation to the Scottish Act, that similar cross-party consensus existed concerning the desirability of the abolition of residence qualifications. Fourthly, and perhaps most tellingly, the Government's response to the limited success of the circular was not to act on a national basis – either with legislation or another circular – but rather to intervene in individual cases. It was observed in chapter 1 that the willingness of central government to grant local authorities considerable autonomy in housing management may, at least partially, be accounted for by government's reluctance to become involved in individual cases. Doubt is cast on this supposition by the Minister's response.

This review of the various advisory body reports and governmental circulars demonstrates a marked reluctance to interfere statutorily with local authorities' discretion on the subject of residence qualifications. This is despite widespread recognition of the detrimental effect that such qualifications had both on particular groups of applicants and on the economy, in terms of labour mobility. Having considered the policy debates surrounding the issue of residence qualifications, it is now necessary to consider the parliamentary debates of the two Acts to determine the influence this discourse had on the legislation.

It was observed above that both CHAC and SHAC had noted the undesirable effect of residence qualifications on the movement of people in search of employment. Giving the Government's primary reason for prohibiting such qualifications in Scotland, it was claimed that there was the existence of:

[A] considerable volume of evidence to suggest that the practice of many authorities of refusing applications from, or discriminating against, applicants from outside their area has a depressing effect on the Scottish economy by inhibiting labour mobility.<sup>129</sup>

Younger prefaced his remarks by acknowledging that, in general, housing allocation was a matter for local authorities.<sup>130</sup> However, the size of the public sector in Scotland made it a

---

<sup>128</sup> Such consensus was referred to by both Harvey (*ibid* col.908) and the Parliamentary Secretary (*ibid* col.917).

<sup>129</sup> HC Debs, Vol. 976, col.1245, 14 January 1980, Younger.

<sup>130</sup> *ibid*. In Committee, Malcolm Rifkind claimed support for the provision from both the CBI in Scotland and Shelter; HC Debs, First Scottish Standing Committee, col.1192, 13 March 1980.

serious national problem “which justifies the exceptional step of overriding local discretion and prohibiting residential qualifications and certain other aspects of allocations policies which act against people needing to move for employment reasons.”<sup>131</sup> This remark is interesting because it expressly acknowledges that in prohibiting the imposition of such qualifications central government was overriding local authorities’ discretion and that such an act was ‘exceptional’.

It is also noteworthy that Younger felt obliged to justify quite rigorously this incursion into local authority autonomy, which is consistent with the mood of the various CHAC/SHAC reports discussed above. This attitude is however in complete contrast with the stance taken on the RTB. There, as discussed above, the Government was wholly unapologetic about the attack on local authorities’ discretion; indeed, it clearly subjugated local authorities’ ‘rights’ (to decide whether to sell or to retain their housing) to the ‘rights’ of tenants to buy their council home.<sup>132</sup>

During the Second Reading debates one Labour MP appeared to cast doubt on the necessity for, or utility of, the allocation provisions in the Scottish Act. He claimed that the benefits of the provisions were “grossly exaggerated” and doubted that many of the problems could be dealt with by central legislation.<sup>133</sup> However, Millan’s was a lonely voice in an otherwise almost universal welcome for the provisions. Indeed, Millan himself appears to have warmed to the provisions by the time of the Standing Committee debates.<sup>134</sup>

Given the Government’s stance on residential qualifications in the Scottish Act, its attitude towards the same issue in the English/Welsh Act might be thought paradoxical. A Labour amendment to abolish residential qualifications in the Housing Act 1980<sup>135</sup> was rejected by the Government because it would:

---

<sup>131</sup> HC Debs, Vol. 976, col.1245, 14 January 1980, Younger.

<sup>132</sup> In an interview for *The Scotsman*, Younger had apparently claimed that he would not “put the convenience of local government higher than the rights of the tenant”; HC Debs, First Scottish Standing Committee, col.95, 31 January 1980, Robertson.

<sup>133</sup> “It is a mistake to believe that we can legislate to solve a number of local problems”; HC Debs, Vol. 976, cols.1261-2, 14 January 1980, Millan.

<sup>134</sup> HC Debs, First Scottish Standing Committee, col.1191, 13 March 1980.

<sup>135</sup> Baroness David cited the greater need for mobility as the primary reason for introducing the amendment – the very reason advanced by the Government for the inclusion of a similar provision in the Scottish 1980 Act; HL Debs, Vol. 410, col.200, 30 June 1980.

[R]emove a great deal of freedom which local authorities enjoy at the moment to give a reasonable degree of preference to local people in the allocation of their housing. It would oblige them to take on their lists people from outside their area who meet criteria which would cause a great deal of debate if they were to be put into statute.<sup>136</sup>

Even taking into account the more muted language of the Lords, this response is exceptionally weak. The Government's RTB policy had caused a 'great deal of debate', but this was pursued in the legislation. On the question of the disparity between the two Acts, the Minister explained that it was not a like-with-like comparison, because there was a much higher proportion of public housing stock in Scotland.<sup>137</sup> The Government's reasoning is, it is submitted, illogical. Since the explanation given for not including the provision in the English/Welsh Act was the diminution in local authority discretion, then the effect on Scottish authorities would be more pronounced, given the greater proportion of council tenants in that country.<sup>138</sup> The amendment was subsequently reintroduced on Third Reading, where it was defeated on division. The usual Government response of removing the freedom of local authorities was given as the reason for opposing it. Baroness Birk drew attention to the supreme irony of the Government's rationale:

[I] found it not only rather sad and frustrating, but highly amusing that the Minister, in rejecting this amendment, used phrases such as "It would remove much of the freedom which local authorities enjoy" and "The heavy-handed intervention in local affairs". One of the themes that is running through the whole of this Bill is exactly that – removing much of the freedom which local authorities enjoy, and heavy-handed intervention in local affairs.<sup>139</sup>

---

<sup>136</sup> *ibid* col.202, Lord Belstead.

<sup>137</sup> *ibid.*

<sup>138</sup> At December 1979 council homes in England accounted for 29 per cent of the total housing stock. In Scotland the figure was 54 per cent; Department of the Environment, Scottish Development Department, Welsh Office, *Housing and Construction Statistics 1978-1988* (London, HMSO, 1989) table 9.3.

<sup>139</sup> HL Debs, Vol. 410, col.908, 30 July 1980.

It should be noted that, despite the deprecating comments of various Labour Members concerning the Government's refusal to prohibit the imposition of residence qualifications, the Labour party was a relatively recent convert to the desirability for such legislative action. It was not until Labour's 1979 Housing Bill<sup>140</sup> (which fell with the Labour Government in May 1979) that measures were proposed to limit this widespread practice.<sup>141</sup> Indeed, in the consultation paper that preceded the Bill the former Labour Government recognised that complete abolition of residence qualifications "could produce significant increases in housing lists and also impose an unacceptable burden on some local authorities".<sup>142</sup> It therefore proposed easing, rather than abolishing, residence qualifications.<sup>143</sup>

It is possible to speculate that the true motive behind the Government's abolition of residence qualifications in Scotland was an attempt to weaken Labour's local government stronghold. Support for this assertion can be found in the Government's argument that it was the proportion of tenants in council housing, rather than the absolute numbers, that was important in the Scottish context. However, an examination of the distribution of power in Scottish district councils at the time of the Scottish debates does not support such a contention; Labour held only six councils while the Conservatives held eight.<sup>144</sup> Indeed, if this had been the Government's intention it backfired in a dramatic way. Far from crushing Labour support, the Scottish Act may have been partly responsible for the significant increase in Labour-controlled local authorities.<sup>145</sup>

---

<sup>140</sup> Housing Bill, Bill no. 117, clause 27.

<sup>141</sup> Baroness David highlighted the fact that, despite successive reports (by governments and advisory bodies) recommending the abolition of residence requirements, a report by Shelter found that "exactly the same proportion of councils ... still had restrictive residence requirements in 1978 as they had in 1968"; HL Debs, Vol. 410, col.200, 30 June 1980.

<sup>142</sup> Department of the Environment, *Housing Management: Eligibility* (London, DoE, 1979).

<sup>143</sup> It is reported that the local authorities and their associations were opposed to the abolition of waiting list restrictions, which resulted in the Government making a number of minor changes to its Housing Bill; A. Kay, C. Legg and J. Foot, *The 1980 Tenants' Rights in Practice* (London, The Housing Research Group, City University, 1986) para.1.3.

<sup>144</sup> In the majority of councils (18) no party was in overall control or the council was Independent (16); Parliamentary Research Service, *The Local Government Companion* (Chichester, PRS, 1977/78).

<sup>145</sup> Following the May 1980 district council elections Labour increased its share of councils by 18 to a total of 24. While the Conservatives lost three councils, most of Labour's gains came from councils that had previously had no party in overall control; *ibid* 1980/81.

The issue of residence qualifications was returned to once again in England and Wales in 1987 when a Labour MP<sup>146</sup> introduced the Housing (Waiting List Restrictions) Bill.<sup>147</sup> The Bill required local authorities to discount a wide range of factors in deciding whether to admit the applicant to the waiting list.<sup>148</sup> It also changed subtly one of the reasonable preference categories, but it left the reasonable preference formula itself unchanged. The Bill did not receive a second reading.<sup>149</sup>

## The Central-Local Relationship

Both Acts profoundly affected the central-local relationship; first, through the RTB, secondly, through the imposition of statutory security of tenure for existing and new tenants and, thirdly, in the case of the Scottish Act, through the abolition of residential and other waiting list qualifications. The RTB resulted in 1.4 million council homes being sold,<sup>150</sup> with a resultant diminution in the available council housing stock. It dramatically affected the role of local authorities in housing; “while giving certain rights to existing council tenants, [it] has significantly reduced [local authorities’] ability to meet the growing number of claims on their limited housing resources.”<sup>151</sup> Given the huge reduction in council housing stock, it has been argued that while local authorities retained the notional discretion to allocate their housing, that discretion was severely circumscribed by the practical issue of lack of available housing.<sup>152</sup> Loveland’s argument is that, on the one hand, central government indicated its acceptance of local diversity in housing by acceding local authorities significant discretionary powers. However, on the other hand, knowing that “implementing agencies have no meaningful room for manoeuvre in [the legislation’s] implementation [the government] might plausibly be accused of engaging in

<sup>146</sup> At the time, Donald Anderson was the Opposition Front Bench Spokesperson on Foreign Affairs. He was also the Chair of the Parliamentary Campaign for the Homeless and Roofless (CHAR) from 1984 to 1990.

<sup>147</sup> Bill number 37. It received its First Reading on 28 October 1987.

<sup>148</sup> In addition to the restrictions contained in the Tenants’ Rights Etc. (Scotland) Act 1980, the Bill also prohibited local authorities from taking account of debt arrears or a person’s marital status.

<sup>149</sup> HC Debs, Vol. 126, col.623, 26 February 1988, Madam Deputy Speaker.

<sup>150</sup> S. Wilcox, *Housing Finance Review 2000/2001* (York, Joseph Rowntree Foundation, 2000) p.113. At December 1979, the local authority housing stock stood at 6.5 million in Great Britain (31.4 per cent of the total housing stock); Department of the Environment, Scottish Development Department and Welsh Office, *Housing and Construction Statistics 1978-1988* (London, HMSO, 1989) table 9.3. By March 1995, the figure was 4.6 million (19.5 per cent of the total); Department of the Environment, Scottish Development Department and Welsh Office, *Housing and Construction Statistics March Quarter 1995 Part 2* (London, HMSO, 1995) table 2.23.

<sup>151</sup> M. Loughlin, *Local Government in the Modern State* (London, Sweet and Maxwell, 1986) p.118.

<sup>152</sup> Loveland, 1995, op cit n.5 p.330-1.

‘mendacious’ rather than aspirational symbolism.”<sup>153</sup> The effect and significance of these indirect incursions into local authorities’ allocations discretion are considered further in the remaining chapters.

The parliamentary debates of both Acts evidence a marked contrast with pre-war housing legislation in the attitude towards local authorities on the issue of the RTB. We saw in chapter 3, and above in regard to the 1977 Act, that governments were keen to stress that extensive consultation had taken place with local authorities prior to the publication of the relevant Bill. In contrast, there is very little evidence of consultation with local authorities in the 1980 Act debates; a point highlighted by a number of Members.<sup>154</sup> Where such consultation is mentioned, it is cited as a reason for rejecting many of the management-related amendments that were introduced, demonstrating an inconsistent approach that is analysed below. The apparent lack of consultation supports the view that the Thatcher Government of 1979 marked a radical change in relations between government and pressure groups (including the local authority associations) generally. Baggott comments that the Thatcher Government “appeared to adopt a hostile stance towards pressure groups as a matter of policy.”<sup>155</sup> This attitude was reflected by a shift in emphasis within the consultation process.<sup>156</sup> For example, between 1980 and 1990 the number of advisory committees fell by a third.<sup>157</sup> The Hansard Society found that nearly all representatives of ‘outside’ organisations criticised the way in which consultations were conducted.<sup>158</sup> In its joint evidence, the AMA, ACC and ADC reported a “serious decline in the extent and nature of consultation”.<sup>159</sup>

---

<sup>153</sup> *ibid.*

<sup>154</sup> “We have scarcely had a Housing Act without a White Paper ... But there is none this time. There has been no consultation ...”; HL Debs, Vol. 410, col.1489, 24 June 1980, Lord Ross of Marnock. See also HC Debs, Vol. 976, cols.1287-8, 14 January 1980, Gordon Wilson; HC Debs, First Scottish Standing Committee, col.7, 29 January 1980, John Maxton. Lack of consultation was apparently not confined to local authorities. Cook also highlighted the lack of consultation on the provisions of the Bill relating to the private rented sector; HC Debs, Vol. 976, col.1293, 14 January 1980.

<sup>155</sup> Baggott, 1995, *op cit* n.43 p.109. However, it would be misleading to create the impression that all pressure groups fared equally badly under the successive Conservative administrations from 1979. Not all pressure groups were affected in the same way, and some remained unaffected; *ibid* p.115.

<sup>156</sup> *ibid* p.109.

<sup>157</sup> *ibid* pp.109-10.

<sup>158</sup> Hansard Society, *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London, The Hansard Society, 1992) p.14.

<sup>159</sup> *ibid* p.293.

The associations' catalogue of complaints concerning the consultation process is aptly illustrated by the Housing Act 1988. Although the Government had announced in the Queen's speech in June 1987 that there was to be major reform of housing legislation, no White Paper was published until the end of September, after the legislation had been drafted and only seven weeks before the Bill itself was published.<sup>160</sup> Furthermore, the Second Reading in the Commons took place **before** the end of the consultation period.<sup>161</sup> Adopting the judicial definition of the 'essence of consultation' as "a genuine invitation to give advice and a genuine consideration of that advice" which necessarily involves sufficient time being given for consultation,<sup>162</sup> then "the Government's recent consultative practices concerning proposals affecting local government have fallen far short of the norm."<sup>163</sup>

The impression to emerge, then, is that the relationship between the associations and central government deteriorated rapidly under the Thatcher administrations. For example, in 1981 the Chair of the ADC referred to the criticism and abuse that had been directed at local government by central government. He was particularly concerned about the dilution of local government autonomy.<sup>164</sup> By 1984, the ADC felt it necessary to point out that the hallmarks of local government (of local choice, initiative and diversity) must be preserved.<sup>165</sup> The ADC was also adamant that central government "should consult the practitioners in the field before decisions are taken."<sup>166</sup>

However, a number of caveats should be noted. First, doubt is cast on whether the associations have ever enjoyed the status of being "virtually part of the constitution".<sup>167</sup> Secondly, it was observed in chapter 2 that analyses of the central-local relationship that are based on a model of central government as an homogenous organisation, following clear and consistent policies, fail to account for the differences both between departments and within departments over time. It was also observed that differences exist between

<sup>160</sup> Cmnd. 214 was published on 29 September 1987 and the Bill was given its first reading on 19 November 1987; Loughlin, 1996, op cit n.50 pp.385-6.

<sup>161</sup> Hansard Society, 1992, op cit n.158 p.295.

<sup>162</sup> *R. v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1, 4, Webster J. The court held that the Government had been in breach of its statutory requirement to consult the local authority associations over drafting of new social security regulations.

<sup>163</sup> Loughlin, 1996, op cit n.50 p.384.

<sup>164</sup> Association of District Councils, *Report of Annual Meeting and Conference* (London, ADC, 1981) p.6.

<sup>165</sup> Association of District Councils, *Report of Annual Meeting and Conference* (London, ADC, 1984) p.5.

<sup>166</sup> *ibid.*

<sup>167</sup> Above p.124.

policy areas. For example, Griffith adopted a typology to describe the attitudes of central government departments towards local authorities; *laissez-faire*, regulatory and promotional. He observed that the Ministry of Housing and Local Government exhibited all three kinds of attitudes in regard to different policies.<sup>168</sup>

A further explanation for the relative powerlessness of the local authority associations lies in the fact that they have historically been unable to present a unified voice to central government. As far back as 1967, the Redcliffe-Maud Report identified that a weakness of local authorities' ability to influence government lay in the fact that a number of different associations existed, and it recommended a single representative body.<sup>169</sup> Griffith has acknowledged that in their endeavour to protect the interests of their members, the associations have sometimes found themselves in conflict with one another. However, Griffith denied that these conflicts have meant that the associations have been "in a constant state of internecine warfare."<sup>170</sup>

The Government's apparent shift in attitude towards local authorities in general, and their management of council housing in Scotland in particular, is illustrated by the speeches of some Conservative MPs during the Scottish Act debates. For example, Michael Ancram believed that the Bill would put an end to "the paternalistic control of Scottish council housing that has existed for so long".<sup>171</sup> He welcomed the fact that the Bill redressed the balance of power between landlord and tenant.<sup>172</sup> Ian Lang also believed that the Bill was in favour of the individuals and families who occupied the houses "and against the bureaucracies that run housing schemes."<sup>173</sup> Another Conservative went so far as to suggest that the provision and allocation of council housing in Scotland was akin to a form of gerrymandering.<sup>174</sup>

---

<sup>168</sup> Griffith, 1966, op cit n.38 p.515.

<sup>169</sup> J.P.R. Maud, *Report of the Committee on the Management of Local Government* (London, HMSO, 1967) para.309, Vol.1. This view was echoed two years later by the Redcliffe-Maud Report; Redcliffe-Maud, 1969, op cit n.54 para.106.

<sup>170</sup> Griffith, 1966, op cit n.38 p.42.

<sup>171</sup> HC Debs, Vol. 976, col.1276, 14 January 1980.

<sup>172</sup> ibid col.1280.

<sup>173</sup> ibid col.1283.

<sup>174</sup> "The building and allocation of council houses in Scotland since the war has often been engineered to provide large numbers of captive voters whose loyalty can be bought by the manipulation of council house rents"; ibid col.1324, Bill Walker.

There may be a relatively straightforward explanation for this attitudinal shift. It was suggested in chapter 1 that prior to and immediately after World War II, governments were reliant on local authority co-operation to build new housing. Without it governments could not deliver the quantity of houses they had promised the electorate. This reliance meant that a consensual approach was imperative. By contrast, the RTB was about removing control of housing stock from local authorities, for which authorities' co-operation was not needed; particularly with the broad powers accorded to the Secretary of State effectively to force sales through.

This 'straightforward' explanation breaks down, however, when considering the Government's response to the various management amendments that were proposed. Here, the Government was keen to stress the preservation of local authority discretion as the primary reason for rejecting the amendments. Indeed, the Government seemed to be completely impervious to local authorities' views on the RTB, but excessively chary of curtailing local authority discretion in management-related issues. There are two possible explanations for these divergent stances. The first is that non-interference in local authorities' housing management discretion was a sop for the huge incursions made into their discretion by the RTB. It is possible that the Government felt that to interfere further would be to antagonise local authorities excessively. It appears that the local authorities were hostile to many of the management-related provisions of both Acts.<sup>175</sup> Despite some differences between the associations, it is claimed that all were concerned with the implications of the Acts for their future role, stemming from the "basic threat that these [provisions] posed to authorities' hitherto largely unchecked local discretion in allocating and managing their housing".<sup>176</sup>

The second explanation is more cynical. The RTB was the manifestation of the Government's desire simultaneously to expand the owner-occupier market and to reduce the public rented sector. Although the Housing Act 1980 did introduce the Tenants' Charter which gave remaining local authority tenants improved rights and protection

---

<sup>175</sup> It may be possible to distinguish between the virtually outright opposition to the notion of legal rights for tenants from the Conservative-controlled ADC, and the more pragmatic arguments against certain of the rights by the Labour-controlled AMA and the London Boroughs' Association (LBA); Kay et al, 1986, op cit n.143 para.1.3.

<sup>176</sup> *ibid.*

against the landlord authority,<sup>177</sup> the main focus of the Act was to encourage the maximum number of people to exit the public sector. As such, those remaining in the public sector, or even hoping to join it, were not, to use a slight euphemism, the Government's highest priority.<sup>178</sup> This point is reinforced by the very different enforcement mechanisms contained in the Act. In contrast with the arguably draconian enforcement provision of the RTB, extensive discretion was left to local authorities in the implementation of the 'collective rights'.<sup>179</sup>

Even this explanation does not adequately account for the Government's contradictory approaches in the two Acts concerning the housing management issues discussed above. In the Scottish Act there was a general welcome for the provision prohibiting residential requirements.<sup>180</sup> Since the Opposition was broadly in favour of these restrictions, there was no discussion around local authority autonomy and the incursions made into it by the provisions. This is noteworthy in itself. The Opposition appeared to draw a distinction between, on one hand, local authorities' discretion to decide whether to sell their housing (which should not be curtailed by Parliament) and, on the other hand, their discretion to decide how to allocate that housing (which could legitimately be curtailed by legislation). This analysis supports the theory propounded earlier that parties' support for the principle of local authority autonomy is not constant but shifts according to the subject matter in question.

## CONCLUSION

The beginning of the period covered by this chapter reflected the mood of the previous chapter; namely one of exhortatory government circulars but no direct intervention. This is borne out by the succession of circulars and advisory body reports dealing with the issue of

---

<sup>177</sup> It should also be borne in mind that the Conservative government of 1979 was not the original author of the Tenants' Charter.

<sup>178</sup> At an Institute of Housing conference in June 1979, the Secretary of State for the Environment, Michael Heseltine, "expounded at length the benefits of owner-occupation. Whilst Heseltine went on to say that the tenants' charter was an opportunity to give tenants a feeling of pride in their homes, he clearly saw this as a consolation prize. He stated that council tenants have no comparable benefits to that of home ownership in increasing personal wealth and that the control of council housing hampers people's ability to move", P. Gallagher, 'Ideology and Housing Management', in J. English (ed.), *The Future of Council Housing* (London, Croom Helm, 1982) p.149.

<sup>179</sup> Kay et al, 1986, op cit n.143 para.10.1.

<sup>180</sup> HC Debs, First Scottish Standing Committee, col.1187, 13 March 1980, Millan.

residence qualifications.<sup>181</sup> The 1977 Act was highly controversial because of the duty it placed on local authorities to house those people who could bring themselves within the statutory definition of homelessness. By imposing on local authorities a specific duty to provide permanent accommodation for statutorily homeless people, the 1977 Act represented a reduction in local authorities' previously almost complete autonomy to allocate their housing.<sup>182</sup> Nevertheless, an examination of the parliamentary debates shows that the general mood of respect for local authority autonomy, and the desire to achieve consensus, was still present.

The two 1980 Acts represent a fundamental shift in attitude. The debates of both Acts exhibit a much more hardened attitude towards local authorities generally, and local authority autonomy in particular. As such it evidences a contrast with the apparent consensus on housing policy described in chapter 3. The controversial RTB provisions represented a huge reduction in local authority autonomy. The provisions have been characterised as including "a statutory procedure ... laid down to limit local variation over implementation ... and very strong powers for the Secretary of State to intervene in local administration."<sup>183</sup> As such, the RTB exhibits many of the tendencies towards 'juridification'<sup>184</sup> that were discussed in chapter 2.

The preceding analysis fits quite neatly with Loughlin's depiction of the central-local relationship becoming politicised and juridified following the 1979 election. However, this is too simplistic a conclusion. A further important conclusion of this chapter is the Government's paradoxical attitude towards local authority discretion, i.e. its willingness significantly to curtail local authorities' discretion in certain areas while maintaining substantial autonomy in others. Further, while the debates concerning the RTB are heated and MPs are split largely along party lines, the same is not true of the housing management provisions contained in the two Acts. For example, there was cross-party support in the Scottish Act for the abolition of residence and other waiting list qualifications. The

<sup>181</sup> The 1969 Cullingworth Report noted that central government played a "relatively tiny and peripheral role" in local authority housing management. It was observed that 150 professional staff were employed in housing construction matters in the Ministry of Housing and Local Government, whereas only a single member of staff was employed in housing management: CHAC, 1969, op cit n.64 para.67.

<sup>182</sup> In practice, most entitled applicants were granted secure tenancies: Loveland, 1995, op cit n.5 pp.254-5.

<sup>183</sup> R. Forrest and A. Murie, *Selling the Welfare State: The Privatisation of Public Housing* (London, Routledge, 1988).

<sup>184</sup> C. Hunter and S. Blandy, 'Housing Policy and Central-Local Relations: Resistance to and Subversion of Central Government Intent'; Unpublished paper to SLSA, Manchester Metropolitan University, 1999.

exclusion of comparable provisions from its English/Welsh counterpart caused political ill-will and it is unclear why the Government resisted the Opposition's proposals. Both Acts appear to demonstrate the willingness of the Government to override local authority autonomy when it suited its policies while, simultaneously, citing the desirability of local discretion when opposing Opposition amendments. Similarly, the Opposition was swift to cry foul concerning incursions into local authority autonomy when it opposed the policy in question (namely, the RTB), while supporting the limitation to local discretion on certain management issues (for example, the abolition of residence qualifications). A complex picture, then, emerges that does not fit neatly into the juridification and politicisation analysis. Rather, this period appears to suggest that the desirability for local authority discretion in relation to housing allocation depended on the policy areas in question; fitting more closely with the heterogeneity model analysed in chapter 2.

Support for this theory is found in other areas of housing policy. Hunter and Blandy argue that the juridificatory nature of the RTB can be contrasted with other methods of council housing privatisation introduced subsequently. The authors conclude that Housing Action Trusts (HATs), introduced by the Housing Act 1988, far from ending council involvement, "have very much been a creature of local authorities. They have used them for their own ends."<sup>185</sup> Similarly, Large Scale Voluntary Transfers (LSVTs) do not conform to the theory of juridification, in that the statutory framework is very loose and proposals for transfer were frequently instigated by housing officers, whose aim of a transfer was to preserve the housing stock for social renting.<sup>186</sup>

---

<sup>185</sup> Hunter and Blandy, 1999, *op cit* n.184.

<sup>186</sup> *ibid.* See also T. Mullen, 'Stock Transfer' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, Policy Press, 2001).

## Chapter 5

# DEVELOPMENT OF LEGISLATION 1992-1999

## INTRODUCTION

The primary purpose of this chapter is to examine the Housing Act 1996 and its implementation. This Act is of key importance because it marked a radical departure from the style of previous legislation, in that it imposed quite specific obligations on local authorities in regard to their housing allocation functions; an area hitherto largely unregulated. The chapter considers the parliamentary passage of the 1996 Act, to chart the differences between it and previous legislation and to attempt to discern what can be inferred about the central-local relationship. The chapter also considers the implementation of the Act. Given its departure from conventional housing allocations legislation, particularly its apparently juridificatory style,<sup>1</sup> the Act provides an ideal way of assessing one of the themes explored in chapter 2, the role of law within the central-local relationship.

## Background

Before describing and analysing the provisions of the 1996 Act relevant to housing allocations, it is worth outlining briefly its scope. It was not simply concerned with social housing but is “an amalgam of different provisions affecting different sectors of the housing world.”<sup>2</sup> Its scope is reflected in its length; an already substantial Bill was expanded by 52 sections and seven Schedules during its parliamentary passage.<sup>3</sup> It was passed during the latter part of John Major’s troubled 1992-97 term of office.<sup>4</sup>

<sup>1</sup> In its apparent attempt to circumscribe local authorities’ discretion, through the imposition of detailed rules.

<sup>2</sup> D. Cowan (ed.), *The Housing Act 1996: A Practical Guide* (Bristol, Jordans, 1996) preface.

<sup>3</sup> *ibid.*

<sup>4</sup> At the 1992 general election, the Conservatives were returned to power with a slender majority of 21 seats; B. Coxall and L. Robins, *Contemporary British Politics*. 3<sup>rd</sup> edn. (Basingstoke, Macmillan, 1998) table 7.1, p.107. By the time of the 1996 Act’s parliamentary passage that majority had been further reduced to 7.

As Cowan states, while parts of the Act were uncontroversial other parts were highly political,<sup>5</sup> not least the provisions governing housing allocations by local authorities.<sup>6</sup> The Government's objective for Part VI of the Act was to ensure a "fair" way of allocating social housing, and the most appropriate way of achieving this objective was to require local authorities to maintain a single waiting list for long-term housing.<sup>7</sup> Pre-legislative consultation documents spelt out the Government's policy. For example, the Government believed that allocation schemes should reflect the underlying values of our society. "They should balance specific housing needs against the need to support married couples who take a responsible approach to family life...".<sup>8</sup> Similarly, local authorities should give priority to ensuring that families, particularly married couples with dependent children or who are expecting a child, have access to settled accommodation.<sup>9</sup> Central to the Government's policy was a belief that a valid distinction could be drawn between those in long-term and those in short-term need of social housing.<sup>10</sup> The 1996 Act was intended to ensure that local authorities made that distinction. What is interesting, for the purposes of this thesis, is the way in which the Government sought to achieve its objectives and the impact on local authorities.

The 1996 Act is important for a number of reasons. For organisations representing the interests of homeless people, its key feature was the dismantling of some of the main provisions of the Housing (Homeless Persons) Act 1977. While the changes to the homelessness provisions are outlined briefly in this section, the focus is on the way in which the 1996 Act both affected the central-local relationship and may be seen as a reflection of the state of that relationship. This is not to deny the importance of the changes to homeless people, which have been well documented elsewhere.<sup>11</sup> It will be argued that the apparent consensus concerning the new allocations criteria and the maintenance of the 'reasonable preference' formula are as important as the intense

---

<sup>5</sup> Cowan, 1996, op cit n.2 preface.

<sup>6</sup> Contained in Part VI.

<sup>7</sup> HC Debs, Vol. 270, col.650, 29 January 1996; John Gummer, Secretary of State for the Environment.

<sup>8</sup> Department of the Environment, *Our Future Homes: Opportunity, Choice, Responsibility*. Cmnd. 2901 (London, DoE, 1995) p.36.

<sup>9</sup> Department of the Environment, *Allocation of Housing Accommodation by Local Authorities* (London, DoE, 1996).

<sup>10</sup> HC Debs, Vol. 270, cols. 650-3, 29 January 1996, Gummer.

<sup>11</sup> D. Cowan and J. Fionda, 'Back to Basics: The Government's Homelessness Consultation Paper' (1994) *Modern Law Review*, 57, 610-619; D. Cowan, *Homelessness: The (In-)Appropriate Applicant* (Aldershot, Dartmouth, 1997).

disagreements concerning the homelessness provisions and the radically different structure of the 1996 Act.

## Homelessness and the Moral Debate

The greatest (potential)<sup>12</sup> impact of the Act was on the homelessness provisions, established in the 1977 Act and consolidated in the Housing Act 1985. The 1996 Act repealed the homelessness provisions contained in Part III of the 1985 Act and replaced them with Part VII of the Housing Act 1996. Some of the old provisions were replicated<sup>13</sup> or re-enacted with only minor amendments.<sup>14</sup> However, there were three major changes to the homelessness provisions. The first was an exemption from providing accommodation for unintentionally homeless applicants in priority need if the authority was satisfied that other suitable accommodation was available in its area.<sup>15</sup> The second was that the authority's duty to provide assistance was initially limited to a minimum period of two years.<sup>16</sup> The third, and perhaps most significant change, was that the authority was prohibited from providing its own accommodation in discharging its functions under Part VII for more than two years out of any three.<sup>17</sup> To these general rules there were a number of exceptions and qualifications that are beyond the scope of the thesis.

In addition to the changes to the main homelessness duties contained in Part VII, the 1996 Act also removed the category of statutorily homeless people from the reasonable preference categories, which had been a feature of housing allocations legislation since the enactment of the 1977 Act. The general thrust of these combined changes was effectively "to minimise the priority call of the homeless on local authority stock".<sup>18</sup> However, academic commentary on the 1996 Act, published shortly after its enactment, suggests that while the omission of the statutorily homeless from the reasonable preference categories represented a major substantive change in the primary legislation, "it may well be that it

---

<sup>12</sup> The extent to which local authorities changed their allocations practices as a result of the 1996 Act is considered below.

<sup>13</sup> For example s.189, priority need.

<sup>14</sup> For example ss.175-177, definition of homelessness; s.188 interim duty to accommodate; ss.198-199, local connection and ss.211-212, protection of property.

<sup>15</sup> Housing Act 1996, s.197.

<sup>16</sup> *ibid* s.193(3).

<sup>17</sup> *ibid* s.207.

<sup>18</sup> A. Arden and C. Hunter, *Homelessness and Allocations: A Guide to the Housing Act 1996 Parts VI and VII* (London, Legal Action Group, 1997) para.1.60.

represents little change in practice.”<sup>19</sup> There were two ways in which the provisions could be interpreted by local authorities to achieve effectively the same result as under the 1985 Act. First, it would usually be possible to fit homeless applicants into one of the other reasonable preference categories.<sup>20</sup> Secondly, since authorities were only obliged to give a reasonable preference to the categories, and authorities had considerable discretion in relation to the operation of the scheme, it would seem that local authorities had appreciable room for manoeuvre in treating some cases as ‘exceptional’.<sup>21</sup>

The purpose of outlining these changes is not to provide a comprehensive review of the amendments to the homelessness provisions but rather to set the context of the debates on allocations. It will be argued that the debates of the 1996 Act must be judged against the apparent desire of the Government to scapegoat a section of those applying for social housing.<sup>22</sup> As such, the focus of the debates was on the potential behavioural effect of the legislative changes on individuals. Although there is some discussion of local authorities and their historic discretion to allocate housing, this is a secondary theme to emerge from a study of the debates. This fact in itself may illuminate the state of central-local relations existing at the time, and is returned to below.

Despite Government claims to the contrary, the irresistible conclusion is that the motivation behind the Act was the desire to ensure that homeless applicants did not ‘jump the queue’ into long-term subsidised housing. The Conservative Party Conference of 1993 set the tone for the Government’s housing policy for its 1992-97 term. Sir George Young, then Housing Minister, made a speech in which particular groups were singled out as ‘queue-jumpers’; specifically young, single (never-been-married) mothers.

The scourge of queue-jumpers was also evident in the Bill’s Second Reading in the Commons. For example, one MP questioned why “a married couple ... who have been waiting patiently for years for a council house ... go to the back of the housing queue

---

<sup>19</sup> Cowan, 1996, op cit n.2 p.149.

<sup>20</sup> For example s.167(2)(b); people occupying accommodation which is temporary or occupied on insecure terms; see *ibid* p.151.

<sup>21</sup> This situation was referred to in the parliamentary debates as the ‘nearly enough’ points syndrome or the ‘layered protocol’; HC Debs, Vol. 270, col.652, 29 January 1996, Gummer and HL Debs, Vol. 573, cols.329-30, 19 June 1996, Lord Mackay. See also Cowan, 1996, op cit n.2 pp.149-50.

<sup>22</sup> Cowan, 1997, op cit n.11.

because of some teenage priority waltzing into town?"<sup>23</sup> Similarly, it caused "enormous offence" to people "who have been on a housing list for years but who find some flibbertigibbet of a girl jumping the queue ... because she has been regarded as homeless."<sup>24</sup> Both these comments were made during Second Reading debates in which, as has previously been argued, a more strident tone might be expected.<sup>25</sup> However, during the Committee stage the Minister in the Lords referred to people "waiting patiently on the housing list" six times in six columns; contrasting them with homeless applicants who jump the housing queue.<sup>26</sup> Despite such evidence to the contrary, the Minister for Local Government, Housing and Urban Regeneration, David Curry, specifically rejected the claim that the Act had a moral agenda:

I am not in the business of doing down the homeless or of persecuting or rescuing fallen women or anyone else. My concern is to meet need and not to pass judgment on people's life styles.<sup>27</sup>

An extensive literature exists on the way in which applicants' moral 'worth' affects the allocation of housing.<sup>28</sup> While it is not the purpose of this thesis to explore this facet of housing allocations, it is nevertheless important to understand the context in which the debates took place. As Cowan observes, the moral debate "forms the undercurrent of the legislation concerned with access to council housing as well as its implementation."<sup>29</sup> Despite Curry's protestations, there is little doubt that the backdrop to the debates was an increase in those accepted as being statutorily homeless<sup>30</sup> (and consequently the practical necessity to restrict access to a limited resource<sup>31</sup>) and, in particular, claims that waiting list

---

<sup>23</sup> HC Debs, Vol. 270, col.697, 29 January 1996, John Sykes. See also *ibid* col.720, Jacqui Lait.

<sup>24</sup> HL Debs, Vol. 572, col.592, 16 May 1996, Lord Jenkin of Roding.

<sup>25</sup> See the Introduction to this thesis.

<sup>26</sup> HL Debs, Vol. 573, cols. 379-384, 19 June 1996, Lord Mackay.

<sup>27</sup> HC Debs, Vol. 270, col.742, 29 January 1996.

<sup>28</sup> For example; S. Fitzpatrick and M. Stephens, 'Homelessness, Need and Desert in the Allocation of Council Housing' (1999) *Housing Studies*, 14, 413-431; D. Cowan, R. Gilroy and C. Pantazis, 'Risking Housing Need', (1999) *Journal of Law and Society*, 26, 4, 403; Cowan, 1997, *op cit* n.11.

<sup>29</sup> D. Cowan, 'From Allocations to Lettings: Sea Change or More of the Same?' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001) p.134.

<sup>30</sup> Between 1978 and 1993 the number of households accepted for rehousing by local authorities in Great Britain increased from 63,003 to 159,974; J. Morgan, *Textbook on Housing Law* (London, Blackstone, 1998) p.249, table 17.c.

<sup>31</sup> P. Cloke, P. Milbourne and R. Widdowfield, 'Change but no Change: Dealing with Homelessness under the 1996 Housing Act' (2000) *Housing Studies*, 15, 5, p.741.

applicants were disadvantaged compared with homeless applicants.<sup>32</sup> This was despite the fact that research<sup>33</sup> showed that people rehoused from the waiting list are similar to those gaining housing as statutorily homeless, as far as income, employment and previous tenure are concerned.<sup>34</sup>

Needless to say, the Government's perception of the state of homelessness and its affect on housing allocations was not universally supported. In an article published shortly before the 1993 Conservative Party Conference, it was reported that the consensus among professionals was that the Government was making a scapegoat of a small number of teenage mothers in its approach to dealing with the increasing numbers of applicants accepted by local authorities as homeless.<sup>35</sup> During the Bill's Second Reading, a number of MPs accused the Government of attempting to pin the blame of the housing shortage (caused by the Government's underfunding of housing) on homeless families.<sup>36</sup>

## Allocations and Discretion

The 1996 Act not only amended the homelessness provisions, it also marked a distinct departure from the style of previous housing legislation. For the first time it laid down a comprehensive statutory framework for the allocation of housing by local authorities. It required local authorities to establish a 'housing register' and to allocate accommodation only to 'qualifying persons'.<sup>37</sup> The Secretary of State had broad powers to prescribe by regulations classes of persons who were, or were not, qualifying persons.<sup>38</sup> Section 167 of the 1996 Act also required authorities to have both a scheme for determining priorities between applicants and an allocation procedure.<sup>39</sup> Authorities were prohibited from allocating accommodation except in accordance with their scheme.<sup>40</sup>

<sup>32</sup> Department of the Environment, *Access to Local Authority and Housing Association Tenancies: A Consultation Paper* (London, DoE, 1994) para.2.6.

<sup>33</sup> P. Prescott-Clarke, S. Clemens and A. Park, *Routes into Local Authority Housing* (London, HMSO, 1994).

<sup>34</sup> DoE, 1994, op cit n.32 para.2.6.

<sup>35</sup> Simmons, 'Teenage Scapegoats' (1993) *The Guardian*, 7 October. See also; The Institute of Housing, *One Parent Families – Are They Jumping the Housing Queue?* (Coventry, IoH, 1993) p.4; S. Speak, S. Cameron, R. Woods and R. Gilroy, *Young Single Mothers: Barriers to Independent Living* (London, Family Policy Studies Centre, 1995).

<sup>36</sup> HC Debs, Vol. 270, col.686, 29 January 1996, Diana Maddock; ibid col.704, Clive Soley.

<sup>37</sup> Housing Act 1996, s.161(1).

<sup>38</sup> ibid s.161(3).

<sup>39</sup> ibid s.167(1).

<sup>40</sup> ibid s.167(8).

Given the new legislative framework, it is unsurprising that questions were raised during the parliamentary debates concerning the extent to which the Bill constrained local authorities' discretion in housing allocations.<sup>41</sup> The opposition parties argued that the Government was proposing "a single, monolithic, bureaucratic mechanism", rather than "a pluralistic framework that offers diversity and choice and recognises a range of different needs".<sup>42</sup> However, the Government consistently claimed that the Bill did give local authorities discretion in the allocation of housing.<sup>43</sup> Indeed, an amendment was resisted in the Lords which would have prevented local authorities from taking into account certain factors, precisely because the Government believed that a degree of flexibility was required.<sup>44</sup>

It was alluded to above that the focus of the 1996 Act was on applicants rather than on local authorities. In this regard, it is worth noting the basis on which the perceived lack of flexibility in the provisions was deprecated. In the House of Commons arguments for greater flexibility were not made on the constitutional principle that local authorities are an independently elected tier of government, but rather on the ground that the provisions would simply not work.<sup>45</sup> This is in direct contrast with the debates of the 1977 and 1980 Acts, which were discussed in chapter 4. The situation was different, however, in the House of Lords where a number of peers referred, rather sadly, to the diminution of local democracy that had occurred, exemplified most recently by the 1996 Act. For example, one Conservative peer<sup>46</sup> who had been a district councillor for 15 years observed that during that time the management powers of the council had been gradually eroded.<sup>47</sup> A Liberal Democrat peer accused the Government of "turning local authorities into departments of Whitehall" when they should be "a necessary part of the political variety which makes this a free country."<sup>48</sup>

<sup>41</sup> See for example the contrasting positions expressed by Roy Thomason and Clive Betts; HC Debs, Vol. 270, col.679, 29 January 1996.

<sup>42</sup> HC Debs, Standing Committee G, col.577, 13 March 1996, Nick Raynsford.

<sup>43</sup> *ibid* cols. 600, 617, 625, David Curry.

<sup>44</sup> HL Debs, Vol. 573, col.344, 19 June 1996, Lord Mackay.

<sup>45</sup> HC Debs, Standing Committee G, col.577, 13 March 1996, Raynsford

<sup>46</sup> Baroness Flather who resigned the Conservative Whip in December 1998.

<sup>47</sup> HL Debs, Vol. 573, col.774, 25 June 1996, Baroness Flather.

<sup>48</sup> *ibid* cols. 43 and 45-6, 8 July 1996, Earl Russell.

While the framework of the 1996 Act was new, a consistent feature was the maintenance of the reasonable preference phrase. Under section 167, local authorities were obliged to give reasonable preference to six categories.<sup>49</sup> Two of the old categories were maintained from the 1985 Act; the remaining ones were new.<sup>50</sup> At the time of the 1996 Act's parliamentary passage, the most controversial feature of section 167 was the omission of statutorily homeless people.<sup>51</sup> By contrast, there appeared to be support for the proposed categories, which were intended to deal with "some of the more social characteristics"<sup>52</sup> in contrast with the previous criteria which focused on the physical conditions of the applicants' existing housing. The categories proposed by the Government corresponded closely to a Labour amendment (with the exception of the omission of the statutorily homeless).<sup>53</sup> This supports Cowan's observation that:

Despite incessant and occasionally intense political debate about the allocation of council housing, there has been a remarkable degree of consensus between the political parties about the basic principles which should underlie it.<sup>54</sup>

A further novel feature of section 167 was the requirement to give 'additional preference' to applicants falling within one of the reasonable preference categories<sup>55</sup> who could not reasonably be expected to find settled accommodation for themselves in the foreseeable future.<sup>56</sup> 'Additional preference' was not statutorily defined, however the accompanying code of guidance explained that the provision did not require authorities to allocate the first

<sup>49</sup> S.167(2)(a) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory conditions; (b) people occupying housing accommodation which is temporary or occupied on insecure terms; (c) families with dependent children; (d) households consisting of or including someone who is expecting a child; (e) households consisting of or including someone with a particular need for settled accommodation on medical or welfare grounds and (f) households whose social or economic circumstances are such that they have difficulty in securing accommodation.

<sup>50</sup> The reasonable preference categories were defined in the primary legislation at Report stage as a Government concession; HC Debs, Vol. 276, col.1013, 30 April 1996, Maddock.

<sup>51</sup> However, this group was reinstated as a preferred category when the Labour government came to power in May 1997: The Allocation of Housing (Reasonable and Additional Preference) Regulations 1997 (SI 1997 No. 1902) reg. 2.

<sup>52</sup> HC Debs, Standing Committee G, col.656, 14 March 1996, Curry.

<sup>53</sup> ibid cols. 648-9, Raynsford. The amendment also included the reasonable preference formula.

<sup>54</sup> Cowan, 2001, op cit n.29 p.133. For an earlier account see P. Niner, *Local Authority Housing Policy and Practice* (Birmingham, Centre for Urban and Regional Studies, 1975).

<sup>55</sup> Housing Act 1996, s.167(2)(e).

<sup>56</sup> ibid s.167(2).

available property of any sort in such cases, but it assumed that people meeting this description would have first call on suitable vacancies.<sup>57</sup>

Despite the claims and counter-claims concerning local authority discretion, there appeared to be general agreement that the reasonable preference term gave local authorities a certain amount of flexibility. Lord Mackay, responding to an amendment to allow local authorities to house in permanent accommodation homeless applicants who were within six months of receiving permanent accommodation,<sup>58</sup> stressed that the phrase necessarily gave local authorities the discretion they needed in these cases.<sup>59</sup> Later, when pressed on its meaning, Mackay was more coy; “It is self-evident that ‘reasonable preference’ ... cannot be defined in the abstract from this Dispatch Box ...”<sup>60</sup> He appeared to suggest that the term allowed local authorities to take into account such factors as other demands on the housing list and the number of points accumulated by the individual.<sup>61</sup> Support for the Government’s assertion is found in both the case law, discussed in chapter 1, and the accompanying codes of guidance, discussed below. Furthermore, it may be argued that the amended and expanded reasonable preference categories themselves imported a great deal of discretion. There is considerable scope for interpretation in such phrases as: “a particular need for settled accommodation on medical or welfare grounds” and “social or economic circumstances ... such that they have difficulty in securing accommodation”. Indeed, in this respect, it could be argued that the 1996 Act conferred greater rather than less discretion on local authorities.

### **Consultation**

Throughout this thesis attention has been drawn to the extent to which local authorities (or their associations) have been consulted on the content of proposed legislation. It is clear that consultation was carried out both in 1994<sup>62</sup> and again early in 1996.<sup>63</sup> Indeed, one MP questioned why the Government had carried out further consultation when the 1994 exercise had yielded responses from “the local authority associations, authorities of every

<sup>57</sup> Department of the Environment/Department of Health, *Code of Guidance on Parts VI and VII of the Housing Act 1996* (London, DoE, 1996) para.5.10.

<sup>58</sup> The so-called ‘nearly enough points’ applicants.

<sup>59</sup> HL Debs, Vol. 573, col.329, 19 June 1996. See also HL Debs, Vol. 574, col.32, 8 July 1996, Earl Ferrers.

<sup>60</sup> *ibid* col.816, 25 June 1996.

<sup>61</sup> *ibid* col.816.

<sup>62</sup> DoE, 1994, *op cit* n.32.

<sup>63</sup> DoE, 1996, *op cit* n.9.

political persuasion and other interested bodies such as Shelter, the Chartered Institute of Housing and many tenants organisations" who gave their views "on the problems that they envisaged if the Government continued with the proposals that we are considering."<sup>64</sup>

Ministers did make several references to consultation with local authorities.<sup>65</sup> Indeed, Lord Mackay claimed that a number of changes had been implemented in the legislation as a result of responses to the 1996 consultation exercise.<sup>66</sup> However, references to consultation are dominated by claims from the Act's detractors that the result of such consultation was broad opposition from local authorities, their associations and those representing the interests of homeless people.<sup>67</sup> In fact, it was claimed that there had been 10,000 responses, and virtually all of them were hostile to the provisions.<sup>68</sup> It is possible that such hostility was a facet of Labour and Liberal dominance in local government.<sup>69</sup>

One view is that there were clear signs of a re-emphasis on the philosophy of consultation under John Major's premiership. Indeed, "the Major government offered an olive branch to many groups which had been excluded in the previous decade [including] ... the local authority associations."<sup>70</sup> However, Baggott stresses that this apparent softening of attitude should be located within the context of a forthcoming general election.<sup>71</sup> Nevertheless, after 1992 the chairs of the various associations met formally with the Secretary of State for the Environment on two or three occasions a year.<sup>72</sup> Despite these apparent improvements in the relationship, Baggott claims that the pre-Thatcher era had not yet returned and, in particular, there has been a great deal of conflict on issues including expenditure restrictions and changes to housing policies.<sup>73</sup> Indeed, the timing of

<sup>64</sup> HC Debs, Standing Committee G, col.665, 14 March 1996, William O'Brien.

<sup>65</sup> For example, HC Debs, Vol. 270, col.660, 29 January 1996, Gummer; HC Debs, Standing Committee G, col.625, 12 March 1996, Curry.

<sup>66</sup> HL Debs, Vol. 573, col.333, 19 June 1996.

<sup>67</sup> For example, HC Debs, Vol. 270, col.679, 29 January 1996, Maddock; *ibid*, Betts; Standing Committee G, col.666, 14 March 1996, William O'Brien.

<sup>68</sup> HC Debs, Vol. 270, col.728, 29 January 1996, Gerry Sutcliffe; HL Debs, Vol. 572, col.615, 16 May 1995, Baroness Hollis.

<sup>69</sup> Councils became increasingly Labour and Liberal-dominated from 1979 to 1997. In 1979 the Conservatives had overall control of 231 English councils. By 1995 that figure had been reduced to 13. In the same period, Labour increased its control in England from 83 to 167 and the Liberals/Liberal Democrats increased their control from 1 to 51; Local Government Chronicle Election Centre [www.politics.plymouth.ac.uk/politics/lgecentre](http://www.politics.plymouth.ac.uk/politics/lgecentre).

<sup>70</sup> R. Baggott, *Pressure Groups Today* (Manchester, Manchester University Press, 1995) p.124.

<sup>71</sup> "In this politically sensitive period, the government went out of its way to appear open to concerns raised by groups"; *ibid* pp.124-5.

<sup>72</sup> *ibid* p.129.

<sup>73</sup> *ibid* p.130.

the 1996 consultation casts doubt on the Government's sincerity. It was pointed out by one MP that the results of the consultation would be received **after** the Standing Committee had concluded its consideration of the Bill,<sup>74</sup> suggesting that the process was largely a symbolic exercise. A similar phenomenon was observed in chapter 4 in relation to consultation on the Housing Act 1988.<sup>75</sup>

## Legislative Style

Despite the maintenance of the reasonable preference formula, the 1996 Act was very different in style to previous housing allocations legislation. In certain respects it exemplifies the analysis of the central-local relationship, explored in chapter 2, which argues that the central-local relationship has become politicised and juridified. As we saw, one particular facet of this process is the attempt by the government to structure local authority discretion through the imposition of detailed statutory procedures on local authority decision-making.<sup>76</sup>

In addition to the more structured style of the Act, a further novel feature (for housing legislation) lay in the extensive regulation-making powers reserved to the Government. As Cowan observes, such 'enabling' Acts are now "an accepted facet of our system of Parliamentary democracy and [derive] from the increasing regulation, down to the minutiae, of local democracy".<sup>77</sup> The breadth of these powers has important ramifications for local authorities and will be explored in some detail.

In contrast with previous housing allocations legislation, regulation-making powers were contained in virtually every section of Part VI of the 1996 Act. For example, for the purposes of allocating housing to 'qualifying persons', the Secretary of State was empowered to prescribe other classes who are, or are not, qualifying persons.<sup>78</sup> He<sup>79</sup> also had the power to prescribe the information an authority was obliged to hold about an

<sup>74</sup> HC Debs, Vol. 270, col.728, 29 January 1996, John Gunnell.

<sup>75</sup> See above pp.146-7.

<sup>76</sup> M. Loughlin, *Local Government in the Modern State* (London, Sweet and Maxwell, 1986) p.195.

<sup>77</sup> Cowan, 1996, op cit n.2 preface.

<sup>78</sup> Housing Act 1996, s.161(3).

<sup>79</sup> The male pronoun is used here to reflect the sex of the Secretary of State during this period.

applicant on the housing register.<sup>80</sup> Before removing a person from the housing register, a local authority was obliged to comply with such requirements as the Secretary of State prescribed.<sup>81</sup> Perhaps most importantly, he could specify other people to whom a reasonable preference must be given<sup>82</sup> or amend/repeal any parts of the reasonable preference categories;<sup>83</sup> a so-called ‘Henry VIII’ provision. Furthermore, the Secretary of State was empowered to specify factors that a local authority could not take into account in allocating housing,<sup>84</sup> and also to prescribe the principles upon which the allocations procedure is based.<sup>85</sup> In addition to these extensive powers, he could also issue guidance, to which local authorities were obliged to have regard.<sup>86</sup> The subject of guidance is discussed below.

The introduction to this section argued that the main thrust of the 1996 Act was to restrict the eligibility of homeless people to permanent local authority housing. However, it is important to bear in mind that the regulation-making powers contained in Part VI could equally be used to broaden access to social housing. For example, local authorities could effectively be prohibited from imposing residence qualifications, discussed in chapter 4, by giving everyone who wanted to do so the right to be included on the local authority’s housing register. In the Lords, the Minister believed that the regulation-making power would allow the Government to deal with various scenarios in some detail:

If authorities believe that they have found a new way to limit access to the list, the power of regulation gives us the opportunity to address these problems without trying to find time to come back to both Houses of Parliament with primary legislation.<sup>87</sup>

---

<sup>80</sup> Housing Act 1996, s.162(4).

<sup>81</sup> *ibid* s.163(7).

<sup>82</sup> *ibid* s.167(3)(a).

<sup>83</sup> *ibid* s.167(3)(b).

<sup>84</sup> *ibid* s.167(4).

<sup>85</sup> *ibid* s.167(5).

<sup>86</sup> *ibid* s.169(1).

<sup>87</sup> HL Debs, Vol. 573, col.334, 19 June 1996, Lord Mackay.

However, the Government also intended to use its powers “as a vehicle for our clearly stated policy of limiting entitlement to long-term social housing to people with a long-term need.”<sup>88</sup>

Regardless of whether the regulation-making powers were used to liberalise or to restrict access to social housing, they had a potentially dramatic effect on the ability of local authorities to decide how to allocate their housing stock. This point was explicitly recognised by Lord Mackay:

... the regulations made under the clause can work in two ways. In either case, they would limit local authorities' discretion as to who may appear on the housing register. They can either give prescribed groups the right to go on a housing register or they can ensure that other prescribed groups cannot appear on the register.<sup>89</sup>

In Committee, the Government professed its intention only to use the power to establish the framework for the categories of persons who were or were not entitled to appear on the housing register.<sup>90</sup> It appeared to accept the principle that, within the ‘broad framework’, “it seems reasonable that a local authority should be entitled to set its own rules, and its entitlements for consideration for social housing, in the light of local circumstances.”<sup>91</sup>

Given the breadth of the regulation-making powers, there was relatively little criticism on a point of principle. Indeed, support for or opposition to the powers appeared to depend on the subject matter under discussion.<sup>92</sup> For example, Baroness Hamwee advocated granting additional regulation-making powers to the Secretary of State. Her desire was to impose on local authorities a formal procedure for notifying applicants who were unsuccessful in being accepted onto the housing register. In his response, Lord Mackay noted that:

---

<sup>88</sup> HC Debs, Standing Committee G, col.625, 12 March 1996, Curry. Included within its policy was the removal of entitlement to social housing “from certain classes of people from abroad”; HL Debs, Vol. 574, col.44, 8 July 1996, Earl Ferrers.

<sup>89</sup> HL Debs, Vol. 573, col.348, 19 June 1996.

<sup>90</sup> HC Debs, Standing Committee G, col.625, 12 March 1996.

<sup>91</sup> *ibid.*

<sup>92</sup> A similar phenomenon was observed in chapter 4.

[I]n this case [Baroness Hamwee] is quite keen to give me regulation-making powers. I understand the principle. One is happy for the Government to make regulation-making powers when one agrees with what they may do; one is not so happy if one is suspicious of what the Government may do and does not want them to have such powers.<sup>93</sup>

Earl Russell was virtually alone in attacking the powers on constitutional grounds. He questioned why, if local authorities were to have a housing function, the Secretary of State was to perform all the allocation functions.<sup>94</sup> The Earl wondered whether the Secretary of State thought he knew what was best for every local authority in the country, or whether the “Secretary of State has an agenda and intends to impose that agenda on local authorities, whether they like it or not?”<sup>95</sup> The Earl also believed that the desire to control in detail housing allocations would lead to a spiral of regulation-making powers.<sup>96</sup> In response Lord Mackay denied that the Secretary of State would become involved in day-to-day allocation decisions, or even that allocation schemes would be required to be uniform throughout the country.<sup>97</sup> However on Report, another Minister appeared to suggest that uniformity in allocations policies was desirable:

[The amendments] would leave Part VI open to a kaleidoscope of interpretation and application by local authorities. They could well do things quite differently. If authorities were to be left entirely to their own devices in the field of allocations, I fear that an intolerable situation would develop with inconsistencies and unfairness creeping in all over the place.<sup>98</sup>

The Government’s primary defence of the extensive regulation-making powers ostensibly lay with the desire to give future Governments the tools with which to keep the legislation up-to-date.<sup>99</sup> Mackay acknowledged that the power to amend the reasonable preference categories was wide-ranging but believed that protection against abuse was provided by

<sup>93</sup> HL Debs, Vol. 573, col.362, 19 June 1996.

<sup>94</sup> “If you have housing powers in local authorities it really does seem a little superfluous for the Secretary of State to take such complete control of them himself”; HL Debs, Vol. 573, col.390, 19 June 1996.

<sup>95</sup> *ibid* col.391.

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid* col.392.

<sup>98</sup> HL Debs, Vol. 574, col.44, 8 July 1996, Earl Ferrers.

<sup>99</sup> HL Debs, Vol. 573, col.393, 19 June 1996, Lord Mackay.

making the regulations subject to an affirmative resolution<sup>100</sup> in both Houses.<sup>101</sup> The Minister also claimed that giving the Secretary of State the power to specify by regulations the factors that a local authority was not entitled to take into account when allocating housing, would prevent authorities from discriminating unfairly against particular groups of applicant.<sup>102</sup>

The foregoing explanations of the regulation-making powers are largely uncontroversial, within the context of ‘umbrella’ legislation. However, when pressed to justify these extensive powers, Lord Mackay’s subsequent response was more illuminating. He claimed that it was by virtue of the Government’s extensive subsidy of public housing that gave it (and Parliament) the right to “take a close interest in how that housing is allocated.”<sup>103</sup> Further, he claimed that there was “a good argument for saying that central government has a role to play in both the detail and the principles.”<sup>104</sup> Earl Russell highlighted the danger of the Minister’s argument about funding; “Public money goes to all sorts of bodies. It does not follow that the Secretary of State is the best person to decide how that money should be used.”<sup>105</sup>

The view that public funding gave central government the right to intervene at this level of detail was not confined to Lord Mackay. Another Minister also believed that regulations were not only inevitable but desirable:

There cannot be a completely different panoply of housing rules throughout the country ... There has to be some kind of regulation running all the way through, particularly as the Government provide a very great part of the funding.<sup>106</sup>

---

<sup>100</sup> “The affirmative procedure obliges the government to move for approval of the instrument and allow a debate ... and is generally reserved for instruments that raise issues of principle or are of some special importance”; C. Turpin, *British Government and the Constitution*. 3<sup>rd</sup> edn. (London, Butterworths, 1995) p.333.

<sup>101</sup> HL Debs, Vol. 573, col.393, 19 June 1996.

<sup>102</sup> *ibid*, Lord Mackay. See also the comparison with Scottish housing allocations provisions, discussed in chapter 6.

<sup>103</sup> HL Debs, Vol. 573, col.397, 19 June 1996.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid*.

<sup>106</sup> HL Debs, Vol. 574, col.56, 8 July 1996, Earl Ferrers.

A number of relevant points emerge from the preceding discussion. The first lies in the Government's trespassing on territory previously considered to belong almost exclusively to local authorities. The claim that central government had a role to play in the detail of housing allocations marked a distinct departure from previous policy and legislation. Indeed, it was observed in earlier chapters that central government consistently refused to intervene in the allocation of housing, even when it appeared that parliamentary support existed over the issue. The 1977 Act was controversial, not least because it constrained local authorities' long-standing discretion to allocate housing. Supporters of the 1977 Act justified it on the basis of the extreme position in which homeless people found themselves. In the 1996 Act debates, however, the Government appeared to claim the right to intervene in matters of detail by virtue of its subsidy. During the debates of the Housing Act 1930, Neville Chamberlain (then in Opposition) while claiming to support granting local authorities wide powers, nevertheless believed that when a State subsidy was involved, it gave the State the right "to say how its bounty shall be used".<sup>107</sup> However, Chamberlain was speaking in the context of obliging (rather than permitting) local authorities to charge differential rents and was not claiming that Parliament should prescribe local authorities' individual allocation decisions.

A further point to emerge is the lack of discussion around the constitutional principle raised by the Secretary of State's regulation-making powers. The Lords was the only forum in which such concerns were expressed. An interesting question is raised concerning the role of the Lords as the 'defenders of local government'.<sup>108</sup> Damien Welfare claims that during the period 1979 to 1990 the Lords appeared to take on this role,<sup>109</sup> motivated by a number of factors: the existence of a Government elected by only a minority of the population<sup>110</sup> but which was pursuing an unprecedentedly ideological programme; by unease at the quality of legislative scrutiny in the Commons through the use of the guillotine; and the break with consensus government and the practice of widespread consultation.<sup>111</sup>

<sup>107</sup> HC Debs, Col 332, 8 July 1930.

<sup>108</sup> D. Welfare, 'An Anachronism with Relevance: The Revival of the House of Lords in the 1980s and Its Defence of Local Government' (1992) *Parliamentary Affairs*, 45, 205-219.

<sup>109</sup> Fifty-one of 156 government defeats in the Lords during 1979-90 were on local government bills; *ibid* p.206.

<sup>110</sup> As have been all post-war governments.

<sup>111</sup> "Discussions with peers themselves suggest that their first concern was not in fact local democracy, or the rundown of local services as a whole, but the threat which spending cuts posed to funding by local authorities of voluntary organisations"; Welfare, 1992, *op cit* n.108 pp.216-7.

While peers did perceive local government to be the ‘whipping boy’ of Thatcherism, he cautions against an idealised view of the basis of the Lords’ intervention.<sup>112</sup> Indeed, the House of Lords Select Committee charged with scrutinising delegated powers found nothing in Part VI of the Bill to which it needed to draw the House’s particular attention;<sup>113</sup> this was despite its matter-of-fact observation that ‘Henry VIII’ provisions were contained in six of the Bill’s clauses.<sup>114</sup> As Loveland observes, until recently the dubious moral basis of Henry VIII clauses seems to have led Parliament to enact them sparingly.<sup>115</sup> However, “more recently … governments have seemingly regarded Henry VIII clauses as an acceptable means to implement sweeping policy programmes.”<sup>116</sup>

In the Commons, MPs’ concerns appeared to lie at the level of the individual applicant, and the potential injustices that would be caused by the Act. Notwithstanding the obvious importance of housing allocation decisions to individuals, it could be argued that by confining themselves to objections at this level, the Opposition largely overlooked the huge incursions being made into local authority autonomy. The impression one gains from the Commons debates is that the erosion of local autonomy and, concomitantly, local democracy, was no longer of great significance to MPs. It is possible that, after 17 years of successive Conservative administrations apparently committed to emasculating local government, opposition parties had come largely to accept the Government’s ideological boundaries. A possible connection could be drawn with the so-called ‘Thatcherisation’ of New Labour: in its quest for ‘electability’ the Labour Party has, according to some commentators, adopted many of the policy agendas of the Conservatives.<sup>117</sup> The impact of the new Labour Government is discussed in chapter 6.

---

<sup>112</sup> *ibid* p.218.

<sup>113</sup> Select Committee on the Scrutiny of Delegated Powers, HL Paper 80, 23<sup>rd</sup> report, Session 1995-96 (London, HMSO, 1996) para.26.

<sup>114</sup> *ibid* para.15.

<sup>115</sup> I. Loveland, *Constitutional Law: A Critical Introduction*. 2<sup>nd</sup> edn. (London, Butterworths, 2000) p.127.

<sup>116</sup> *ibid*.

<sup>117</sup> For example, M. Barratt Brown and K. Coates, *The Blair Revelation: Deliverance for Whom?* (Nottingham, Spokesman, 1996); M. Kenny and M.J. Smith, ‘Interpreting New Labour: Constraints, Dilemmas and Political Agency’ in S. Ludlam and M.J. Smith (eds.), *New Labour in Government* (Basingstoke, Macmillan, 2001). However, it has been argued that while such arguments possess an empirical and political force, “they do not adequately capture the totality of this political phenomenon”; Kenny and Smith, 2001, p.238.

## Codes of Guidance

It was noted in chapter 4 that since the enactment of the 1977 Act, the code of guidance has become an important feature of housing legislation. In chapter 1 the legal status of guidance was considered and it was argued that the statutory duty to "have regard to" the code does not give it direct legal effect. Nevertheless, an interpretation of the relevant case law lead to the conclusion that local authorities would need to show good reasons for departing from its contents to withstand a legal challenge.<sup>118</sup> Perhaps as important as its legal effect is its persuasive quality within the central-local relationship. It was argued in relation to the 1977 Act that guidance could be used as a way of expressing government policy more clearly than was possible in the primary legislation, because of the necessity to achieve compromise between opposing parliamentary forces. However, it should be recalled that the efficacy of central government circulars in directing local authority action has been doubted.<sup>119</sup>

It may be thought that greater need to provide clarification and amplification of the legislation existed when the legislation was stated in such broad terms as the 1985 Act. Whether the same is true of such relatively detailed legislation as the 1996 Act is open to more doubt. Nevertheless, it appears that guidance is now an accepted fact of central-local relations in this sphere. Indeed, the Local Government Association (LGA) calls for "more detailed guidance on implementation",<sup>120</sup> although this was expressed to be in preference to increased primary or secondary legislation, on the basis that it allows greater scope for authorities to develop allocations schemes which best meet local needs.<sup>121</sup>

It was argued above that the background to the 1996 Act was a concern that the 'wrong' people were gaining priority in the housing queue. Given that the legislation was value-neutral, in the sense that it gave local authorities the discretion to prescribe or proscribe groups of people who were eligible to join the housing register, it might be expected that

---

<sup>118</sup> This view is apparently shared by the Local Government Association; "... authorities must take the guidance into account and, if they fail to do so, must be able to demonstrate they have valid reasons"; Local Government Association, *No Place Like Home*. Report of the Allocations and Homelessness Task Group: Influencing the Green Paper (London, LGA, 1999) p.5.

<sup>119</sup> See chapter 3.

<sup>120</sup> LGA, 1999, op cit n.118 p.5.

<sup>121</sup> *ibid.*

the Government would use the medium of guidance to clarify its position on who should receive housing priority. However, although the first edition did contain reference to the types of preference articulated in pre-legislative documents, by the second edition the relevant paragraph had been removed.<sup>122</sup>

The guidance was revised by the incoming Labour Government and provided an early indication of the new Government's housing allocations policy and, more specifically, local authority discretion in this sphere. The most striking feature of the revised guidance is its similarity to its predecessors. It is not useful within the limits of this thesis to compare in detail the two versions. However, a number of points serve to illustrate this claim. For example, both codes exhorted local authorities to adopt a 'needs-based' approach.<sup>123</sup> There was also broad agreement on the meaning of 'reasonable preference'. While the codes each gave a different example of factors to which authorities might wish to give their own preference,<sup>124</sup> there was consensus that the authorities were not restricted to the factors contained in section 167(2). Nevertheless, both versions advised that local authorities should not let their own secondary criteria dominate their allocations scheme at the expense of the statutory factors.<sup>125</sup> There was also conformity in the meaning attributed to 'additional preference'.<sup>126</sup>

From what has been claimed concerning the background of the 1996 Act, it is perhaps surprising that, at least in one respect, the revised code sanctioned a more explicitly restrictive attitude towards certain categories of applicant than its predecessor. Both codes agreed that it was permissible for local authorities to take into account the characteristics of the people they selected as tenants, both individually and collectively. While the 1996 version advised that this could extend to selecting tenants for housing to ensure "a viable social mix" on an estate,<sup>127</sup> the 1999 code advised that it may be legitimate for local authorities "to give less priority to an applicant with a history of rent arrears, or anti-social

<sup>122</sup> Cowan, 2001, op cit n.29 p.150 fn.4.

<sup>123</sup> "Generally, authorities will wish to ensure that their allocation schemes give preference to the more severe cases of need, whether manifested singly or through a spread of indicators"; DoE, 1996, op cit n.57 para.5.7. The corresponding paragraph is; Department of the Environment, Transport and the Regions, *Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness* (London, DETR, 1999) para.5.12.

<sup>124</sup> The 1996 code gives the example of housing key workers, while the 1999 version suggests that authorities may wish to give consideration to housing elderly people near their relatives.

<sup>125</sup> DoE, 1996, op cit n.57 para.5.5; DETR, 1999, op cit n.123 para.5.13.

<sup>126</sup> DoE, 1996, op cit n.57 para.5.10; DETR, 1999, op cit n.123 para.5.14.

<sup>127</sup> DoE, 1996, op cit n.57 para.5.6.

behaviour...”.<sup>128</sup> This emphasis may reflect a growing consensus over the issue of anti-social behaviour, discussed in more detail in chapter 6. Notwithstanding this subtle distinction, the point that is of greater relevance is that both versions advised that authorities “may” wish to take such factors into account, rather than requiring them to do so. As such, the codes shared a common permissive tone.

## Implementation of the Housing Act 1996

It has been argued above that the 1996 Act marked a departure in style from previous housing allocations legislation, although doubt was cast on whether it constrained local authorities’ discretion to any greater extent in housing allocations. The basis for such doubt was the maintenance of the inherently discretionary reasonable preference formula and the broad and vaguely worded reasonable preference categories. However, in order to assess whether the change in style resulted in a change in local authorities’ policies and practices, it is necessary to consider the implementation of the Act.

The key questions to be asked are to what extent local authorities retained discretion in practice over housing allocations and, concomitantly, whether the 1996 Act was effective in achieving the objectives established for it by the previous Conservative Government. The answer to these questions will indicate how far the Act marked a radical departure from previous housing allocations legislation. It may also say something about the role of law within the central-local relationship. Secondly, the application of the regulation-making powers contained in the Act must be investigated. This will demonstrate whether the previous Government was serious in its apparent intent to interfere in day-to-day decision-making. Regulations made under the new Labour Government will also provide early evidence of any shift in central-local relations.

A number of research studies have been conducted into the implementation of the 1996 Act, the primary findings of which are now considered. It was observed in chapter 1 that the allocation of housing involves a two-stage process; the first stage is gaining access to the housing register and the second stage is being allocated housing. The first stage focuses on the ‘eligibility’ of the applicant, while the second stage raises issues of

---

<sup>128</sup> DETR, 1999, op cit n.123 para.5.17.

allocations systems (e.g. systems based on points, groups, date order etc.) and the factors to which priority is attached. The 1996 Act formalised this two-stage process and, accordingly, the research is considered under these two broad headings.

### ***Housing register restrictions***

Research commissioned by the previous Conservative Government provides an early assessment of the implementation of the 1996 Act.<sup>129</sup> Unfortunately, the research does not attempt to compare local authority policies and practices before and after the Act came into force, but rather provides a description of the 'current' state of affairs. From this description it can be gleaned that there has been relatively little modification of local authorities' practices. For example, the study found that most local authorities continued to operate policies restricting access to the housing register.<sup>130</sup> The main barriers to access included applicants living outside the area (i.e. residential qualifications), those aged under 18 years and owner-occupiers.<sup>131</sup> Such restrictions have been identified earlier in this thesis as being the most commonly practised by local authorities.<sup>132</sup> A number of studies conducted on behalf of Shelter have highlighted housing debt (usually rent arrears) as the restriction most usually imposed by local authorities.<sup>133</sup> Shelter does not distinguish between the two-stages of the allocation process; its definition of exclusion encompasses "a variety of mechanisms that deny applicants access to the housing register."<sup>134</sup> Shelter's initial report on the implementation of the 1996 Act demonstrates wide-scale use of exclusion and suspension policies by local authorities.<sup>135</sup> The organisation's subsequent survey highlights a four-fold increase in exclusions or suspensions from social housing between 1996/97 and 1997/98.<sup>136</sup>

---

<sup>129</sup> M. Griffiths, J. Parker, R. Smith and T. Stirling, *Local Authority Allocations: Systems, Policies and Procedures* (London, DETR, 1997). See also the research summary: DETR, *Local Authority Housing Allocations: Systems, Policies and Procedures. Housing Research Summary No. 74* (London, DETR, 1997).

<sup>130</sup> *ibid* p.35.

<sup>131</sup> *ibid* p.76.

<sup>132</sup> See chapter 4.

<sup>133</sup> P. Niner with V. White and D. Levison, *The Early Impact of the Housing Act 1996 and Housing Benefit Changes* (London, Shelter, 1997); S. Butler, *Access Denied* (London, Shelter, 1998); R. Smith, T. Stirling, P. Papps, A. Evans and R. Rowlands, *The Lettings Lottery: The Range and Impact of Homelessness and Lettings Policies* (London, Shelter, 2001).

<sup>134</sup> For example, refusing people access to the register; suspending or deferring a person's application once s/he has been accepted on the register; giving low or zero priority to an application under an allocations policy; Butler, 1998, *op cit* n.133 p.6.

<sup>135</sup> Niner et al, 1997, *op cit* n.133.

<sup>136</sup> Butler, 1998, *op cit* n.133 p.8.

In a more recent analysis of the empirical evidence,<sup>137</sup> Pawson observes that the operation of restrictions against former tenants with rent arrears became very widespread during the 1990s and the number of English local authorities adopting restrictive eligibility policies towards those accused of 'anti-social behaviour' was substantial.<sup>138</sup> However, Pawson argues that the figures do not clearly support the contention that local authorities have adopted a generally more 'restrictive' stance on housing eligibility during the 1990s. Indeed, the proportion of authorities requiring a 'local connection' has fallen substantially.<sup>139</sup> He argues that "a distinction needs to be made between restrictions which relate to 'offences' (e.g. rent arrears or anti-social behaviour) and those which are more intimately related to the rationing of supply in the context of the 'needs based' allocations model."<sup>140</sup> His contention is that, in order truly to understand the changing incidence of restrictions, it is necessary to "get behind the national figures and look at the regional picture."<sup>141</sup> The data show that 'rationing restrictions' are now more commonly applied in areas of high demand, such as London and the South. Simultaneously, the local connection or residence requirement, once almost universal, has tended to be discarded in the North.<sup>142</sup> Indeed, the proportion of authorities introducing more restrictive approaches during the 1997-2000 period was closely paralleled by the number relaxing their rules in this area.<sup>143</sup>

Shelter's research, however, reveals a different regional pattern; it shows that the highest number of exclusions was made in the North West and North East.<sup>144</sup> It is possible that the two findings can be reconciled. Shelter's study focuses on 'offence-based' restrictions (North West and North East showing the highest incidence), whereas Pawson's data highlight 'rationing' restrictions (London and the South showing the highest incidence). In other words, while the North West and North East regions of the country have tended to abandon rationing restrictions (such as the residence qualification), these regions have

---

<sup>137</sup> Pawson draws on three national surveys of English local authorities undertaken in 1986, 1991 and 2000.

<sup>138</sup> H. Pawson, 'Top-down or Bottom-up? Influences on Changing Approaches to Social Housing Allocations'. Paper presented at SLSA Conference (Bristol, University of Bristol, 2001) p.4. Pawson notes, however, that such restrictions affect relatively few people (approximately three per cent), while suspensions (people who have been accepted onto the housing register but whose application has been suspended) affect much larger numbers of applicants.

<sup>139</sup> *ibid* p.5.

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid* pp.5-6.

<sup>144</sup> Butler, 1998, *op cit* n. 133 p.11.

simultaneously adopted more offence-based restrictions (such as exclusions for rent arrears or anti-social behaviour). A further possibility is that, as Shelter observes, the level of monitoring of exclusions and suspensions is “worryingly low”,<sup>145</sup> effectively casting doubt on much of the empirical data.

It was noted earlier that the regulation-making powers contained in the 1996 Act enabled the Government effectively to prohibit local authorities from imposing such restrictions on applicants. However, the power has not been exercised to achieve this objective.<sup>146</sup> Indeed, the Code of Guidance accompanying the 1996 Act made it clear that local authorities were free to impose such qualifications, although the most recent edition cautioned against adopting a too broad brush approach.<sup>147</sup>

At this stage, a clear theme to emerge from the empirical research is that differences exist between local authority landlords concerning both the type of exclusions used and their extent.<sup>148</sup> The existence of such differences reinforces the argument that discretion at the first stage of the allocation process has been retained following the enactment of the 1996 Act. It is now necessary to consider whether the same is true of the second stage of the process.

### *Allocations priorities*

The findings of a DETR study suggest that, in practice, local authorities experienced “considerable flexibility in operating their allocation policies and setting rehousing priorities.”<sup>149</sup> Indeed, local authorities often built in flexibility in order to cater for exceptional circumstances that may not have been defined in the allocations scheme criteria.<sup>150</sup> The study highlights “wide variations in policy and practice between different social landlords”.<sup>151</sup> Although the mechanisms for prioritising need varied considerably,

---

<sup>145</sup> *ibid.*

<sup>146</sup> Regulations have been made mainly dealing with the eligibility, or otherwise, of people from abroad; see The Allocation of Housing Regulations 1996 (SI 1996 No. 2753), as amended by The Allocation of Housing and Homelessness (Amendment) Regulations 1997 (SI 1997 No. 631), The Allocation of Housing and Homelessness (Amendment) (England) Regulations 1999 (SI 1999 No. 2135) and The Allocation of Housing (England) Regulations 2000 (SI 2000 No. 702).

<sup>147</sup> DETR, 1999, *op cit* n.123 paras.3.6-3.19.

<sup>148</sup> Smith et al, 2001, *op cit* n.133 p.40.

<sup>149</sup> Griffiths et al, 1997, *op cit* n.129 para.5.6, p.38.

<sup>150</sup> *ibid* para.5.44.

<sup>151</sup> *ibid* para.1.10.

nevertheless the factors considered in measuring housing need were broadly similar.<sup>152</sup> This accords with the view, expressed earlier, that there has been remarkable consensus about the basic principles that should underlie an assessment of housing need.<sup>153</sup> The research by the DETR, Pawson and Shelter agree that local authorities' allocations policies are primarily 'needs based'. However, all three studies demonstrate that many systems incorporate mechanisms that prioritise housing management objectives.<sup>154</sup>

Pawson argues that local authorities' policies have changed since the 1996 Act and identifies the change as being "a continuing drift towards increasingly formalised systems under which the role of elected members in operational decisions is eliminated and the scope for officer discretion is minimised."<sup>155</sup> He believes that this shift "probably results from both an aspiration to accommodate every possible eventuality, and a desire to enhance equity among applicants."<sup>156</sup> Nevertheless, he observes considerable flexibility in practice in the factors taken into account by local authorities in establishing housing priority, notwithstanding the requirement for authorities to devise their schemes within the legal framework.<sup>157</sup>

Further support for the view that the 1996 Act allowed considerable local variation lies in the incidence of 'exceptional policies' (also known as 'local lettings policies') for specific neighbourhoods or stock types. Research conducted in 2000 indicates that 39 per cent of authorities and other registered social landlords (RSLs) in England and Wales adopted policies that deviate from their standard allocations policies.<sup>158</sup> Such policies are often inspired by the need to respond to low demand.<sup>159</sup> More recently, Shelter reports that local lettings policies are now more widespread than in 1995.<sup>160</sup> However, the organisation notes that it is possible that social landlords are now simply more willing to admit to the use of modified lettings policies "in a climate where issues of changing demand are being

<sup>152</sup> *ibid* para.11.19.

<sup>153</sup> Cowan, 2001, *op cit* n.29 p.133.

<sup>154</sup> For example, criteria may include giving extra weight to management transfers, to achieve a better use of the available housing stock; Griffiths et al, 1997, *op cit* n.129 para.5.46. See also; Pawson, 2001, *op cit* n.138 p.8; Smith et al, 2001, *op cit* n.133 p.22.

<sup>155</sup> Pawson, 2001, *op cit* n.138 p.12.

<sup>156</sup> *ibid* p.7.

<sup>157</sup> *ibid* p.8.

<sup>158</sup> T. Brown, R. Hunt and N. Yates, *Lettings: A Question of Choice* (Coventry, Chartered Institute of Housing, 2000).

<sup>159</sup> Pawson, *op cit* n.138 p.11.

<sup>160</sup> Smith et al, 2001, *op cit* n.133 p.49.

discussed openly and where there is evidence of a culture shift in central Government's thinking ...".<sup>161</sup> This raises an important question about the efficacy of law in regulating behaviour, indicating that policy discourse may exert as much influence as the legislative background. The influences on change are discussed below but, once again, the existence of local lettings policies suggests that the 1996 Act did allow local authorities appreciable autonomy within the broad framework.

### *'Effectiveness' of the legislation*

The research does appear to indicate that local authorities have modified their allocations policies since the implementation of the Act.<sup>162</sup> This raises two issues; first, whether the changes reflect the objectives established by the Government for the Act and, secondly, whether local authorities' actions can be attributed to the legislation or to other factors. The answers to these questions will give some indication of the role of legislation in affecting local authorities' activities.

As we have seen, the weight of the research indicates the existence of a high degree of local discretion under the 1996 Act. It will be recalled that during the parliamentary debates the Government professed itself to be in favour of local authorities retaining discretion to take such decisions.<sup>163</sup> However, it was argued above that the debates also betrayed the Government's wish to standardise allocations policies. Furthermore, the 1996 Act established a detailed legislative framework, requiring local authorities to have a single housing register, comprising 'qualifying' people and to allocate housing only from that register. How, then, does the implementation of the Act match those objectives? The DETR study, cited above, appears to cast doubt on the existence of the single housing register. The report recognises that in reality a local authority's "single comprehensive register" consists of a multiplicity of queues for different sizes and types of property and different areas, and that the queues may move at different speeds.<sup>164</sup> It would also appear

---

<sup>161</sup> *ibid.*

<sup>162</sup> At the time of its survey, Shelter found that a significant number of the 65 organisations it questioned were planning review or changes to one or more elements of their allocations policies; *ibid* p.29.

<sup>163</sup> "This is not a prescriptive set of proposals from the bureaucrats of Whitehall or from me. ... We intend local authorities ... to have a more coherent approach to allocations, ...to have the discretion to design their own framework – as they have under the Housing Act 1985"; HC Debs, Standing Committee G, col.588, 12 March 1996, Curry.

<sup>164</sup> Griffiths et al, 1997, *op cit* n.129 para.1.16.

that the Act has failed to standardise allocations policies, since the research, including the Government's own research, points to considerable variation between local authorities.

The next question to consider is the factors that have influenced local authorities' modification of their allocations policies. Shelter's initial report identifies two main factors: the impact of the 1996 Act and related guidance which has "increased local authorities' use of discretion in deciding who should and who should not qualify for social housing"; and "a changing focus within social landlords' allocations policies, with a decreasing stress on the housing need of individuals, and increased concern about other factors, particularly anti-social behaviour and housing management."<sup>165</sup> While Shelter partly attributes the rise in exclusions from the register to the legislation, it also acknowledges that the Act may simply have permitted the formalisation of previously covert exclusions policies operated by some local authorities.<sup>166</sup> Nevertheless, Shelter believes that the Act has also led to the introduction of new qualifying conditions and concludes that its implementation has had "a significant effect" on the increase in exclusions.<sup>167</sup>

However, it has been argued that to see the 1996 Act as the sole cause of the 'get tough' policies implemented by local authorities is to ignore the wider context of the last five years.<sup>168</sup> Goodwin argues that the rise in exclusions from the register must be viewed against the backdrop of the increased public and media concern over so-called 'neighbours from hell', sex offenders and drugs and crime on housing estates. "Within this context, the 1996 Act can be seen as simply a push for authorities to join a steadily accelerating bandwagon."<sup>169</sup> It was observed above that the 'moral debate' was a strong theme of the 1996 parliamentary debates. It is consequently unsurprising that the debate should influence the implementation of the Act.<sup>170</sup> The subject of anti-social behaviour in the context of social housing allocations is explored in more detail in chapter 6.

---

<sup>165</sup> Butler, 1998, *op cit* n.133 p.8.

<sup>166</sup> "There is evidence from Shelter's housing aid centres that exclusion policies were becoming increasingly common before the 1996 Act was introduced. Some of these were formalised but many were covert"; *ibid*.

<sup>167</sup> *ibid* p.9.

<sup>168</sup> J. Goodwin, 'Locked Out' (1998) *ROOF*, July/August, p.26.

<sup>169</sup> *ibid*.

<sup>170</sup> However, as Shelter points out, the justification commonly given by local authorities for tough exclusions policies (to deal with anti-social behaviour) does not match the recorded reasons for exclusions (rent arrears); in other words, "[r]hetoric and reality are at odds"; Butler, 1998, *op cit* n.133 p.26.

Pawson also cautions against attributing too much efficacy to the legislation, believing that it has in many cases “simply codified existing practices.”<sup>171</sup> In support of this argument, Pawson notes that increases in restrictions have been witnessed in Scotland – a jurisdiction not subject to the 1996 Act.<sup>172</sup> Similarly, he argues that whereas ‘top-down’ influences (e.g. through legislation) might be expected to have a similar impact across the country, a number of policy changes are specific to particular parts of the country. He concludes that incidence of regional variations in housing trends “strongly suggests the relevance of market factors as an underlying driver of policy change.”<sup>173</sup> A further factor militating against the 1996 Act being the sole or main cause of changing allocations policies is the enduring consensus that housing should be allocated to those in greatest need, reflected in the reasonable preference categories.<sup>174</sup>

Shelter’s more recent research also indicates that the Act has had a variable impact; half of the organisations that made modifications to their exclusions policies reported that the changes were in response to the legislation.<sup>175</sup> However, the report shows differences in the motivations to change between local authorities and other RSLs. Local authorities were primarily motivated by the legislation, while RSLs were motivated more by internal organisational change.<sup>176</sup> This finding lends credence to the politicisation-juridification theory of central-local relations; in that local authorities are arguably more susceptible to the influence of legislation because they have been subjected to increasing control by central government through this medium. However, it will be recalled that research (discussed in chapter 2) aimed at exploring the character of legal consciousness within local government in the 1980s and early 1990s, and its relationship to juridification, suggests a more complex picture.<sup>177</sup>

---

<sup>171</sup> Pawson, 2001, op cit n.138 p.13.

<sup>172</sup> ibid.

<sup>173</sup> ibid p.14.

<sup>174</sup> Pawson argues that the political accord among the main political parties has largely been shared with local authority members and officers; ibid p.17.

<sup>175</sup> Smith et al, 2001, op cit n.133 p.30.

<sup>176</sup> ibid pp.30-1.

<sup>177</sup> D. Cooper, ‘Local Government Legal Consciousness in the Shadow of Juridification’ (1995) *Journal of Law and Society*, 22, 4, 506-526.

## Regulation-making under the Housing Act 1996

We have seen that the 1996 Act contained numerous and broad regulation-making powers; for example, to allow the Secretary of State to amend the reasonable preference categories; to prescribe or proscribe people who were ‘qualifying persons’ for the purposes of the housing register and to stipulate the factors that local authorities may not take into account in formulating their allocations schemes. It could legitimately be argued that these regulation-making powers gave the Government enormous potential for control. It is therefore relevant, when examining the implementation of the Act, to consider how these powers have been used. This analysis is not intended to provide a comprehensive list of regulations made under the legislation, but rather to highlight the main changes to the important sections of the Act.

Regulations have been made under both Conservative and Labour Governments. The Conservative Government extended both the list of qualifying persons and those who do not qualify for the purposes of the housing register.<sup>178</sup> It also prescribed the information that must be contained on local authorities’ housing registers,<sup>179</sup> as well as the review procedure to be followed by local authorities of decisions under both Parts VI and VII.<sup>180</sup> In addition, it acted to prevent elected members from taking part in allocations decisions under the local authority’s allocation procedure.<sup>181</sup>

It was argued above that broad political agreement has traditionally existed concerning the recipients of social housing. Given that regulations allow changes to be implemented without the need for primary legislation, the modifications made by the incoming Labour Government may provide an early indication of whether the consensus over social housing has been maintained. Furthermore, they may also signal the new Labour Government’s attitude towards local authority autonomy in this sphere. Since 1997, the Labour Government has extended the categories of people to whom a reasonable preference must

---

<sup>178</sup> The Allocation of Housing Regulations 1996 (SI 1996 No. 2753), regs.4-6, as amended by The Allocation of Housing and Homelessness (Amendment) Regulations 1997 (SI 1997 No. 631).

<sup>179</sup> The Allocation of Housing Regulations 1996 (SI 1996 No. 2753) reg. 7.

<sup>180</sup> The Allocation of Housing and Homelessness (Review Procedures and Amendment) Regulations 1996 (SI 1996 No. 3122), as amended by The Allocation of Housing and Homelessness (Amendment) Regulations 1997 (SI 1997 No. 631).

<sup>181</sup> The Allocation of Housing (Procedure) Regulations 1997 (SI 1997 No. 483).

be given,<sup>182</sup> amended the review procedures that local authorities must observe,<sup>183</sup> and amended the categories of people (mainly those from abroad) who are, or are not, qualifying persons.<sup>184</sup>

On the evidence presented above, it could hardly be argued that the Conservative Government used its regulation-making powers substantially to reduce local authorities' allocation discretion. It is possible that this lack of action is attributable to the relatively short period between the 1996 Act coming into force and the 1997 general election.<sup>185</sup> It is open to speculation whether the Conservative Government would have made more use of its powers, had it been returned to power once again. As far as the new Labour Government is concerned, it could be argued that it has restricted local authorities' discretion more than the previous Conservative Government, by extending the reasonable preference categories. However, it was observed above that since homeless applicants would invariably fall into one of the other reasonable preference categories, their omission and subsequent re-instatement was more of symbolic than substantive importance; a point that is returned to in the concluding chapter.

## CONCLUSION

During its parliamentary passage the Housing Act 1996 caused considerable consternation to Opposition Members and those representing the interests of homeless people. This is unsurprising given the encroachment it made into the obligations owed by local authorities towards homeless people. Notwithstanding the general veracity of this statement, what is perhaps more interesting for the purposes of this thesis is the **lack** of change it engendered from its predecessor legislation and the **lack** of debate around issues of principle, such as local authority autonomy.

An interesting feature of the legislation is that it combined prescription and discretion. On the one hand, the Act laid down a prescriptive framework for the allocation of housing. On

---

<sup>182</sup> The Allocation of Housing (Reasonable and Additional Preference) Regulations 1997 (SI 1997 No. 1902).

<sup>183</sup> The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999 No. 71).

<sup>184</sup> The Allocation of Housing and Homelessness (Amendment) (England) Regulations 1999 (SI 1999 No. 2135); The Allocation of Housing (England) Regulations 2000 (SI 2000 No. 702).

<sup>185</sup> Part VI of the Housing Act 1996 came into force on 1 April 1997; the General Election was held on 1 May 1997.

the other hand, it could be argued that the broadly worded reasonable preference categories, importing imprecise concepts of 'need', in fact gave local authorities more rather than less discretion, compared with the 1985 Act. The Government itself acknowledged that the reasonable preference phrase gave local authorities a broad degree of discretion in determining allocations. The assertion of greater discretion sits uncomfortably with an analysis of the parliamentary debates, which point towards an apparent desire by the Government to impose fairly rigid control on local authorities and particularly the desire to 'nationalise' housing allocations standards. Also, it does not fit neatly with the politicisation-juridification theory of the central-local relationship.

Research conducted into the implementation of the Act suggests that local authorities' discretion has not been significantly curtailed in practice. Furthermore, while the regulation-making powers represented the potential for greater prescription and control, the powers have not been used extensively; although it is possible that this is attributable to lack of time, rather than inclination.

The second point to note is that, when the posturing and rhetoric are swept away, a good deal of parliamentary consensus existed over many of the allocations provisions. It has been noted that the Labour opposition was broadly in favour of the new reasonable preference categories. Furthermore, there was no challenge to the inclusion, once again, of the reasonable preference formula itself. It is important to state, however, that such agreement is not expressed openly, but is rather inferred from the lack of opposition. Indeed, an initial reading of the debates gives the impression of hostility and conflict between the main political parties. A further caveat should be entered; the agreement extended only as far as the allocations provisions. The debates on Part VII evidence the bitter disagreement that existed. It could also be argued that there was apparent agreement on the lack of importance of local authority autonomy as an issue of principle, in that MPs largely confined themselves to highlighting the injustices that would be caused to individuals, rather than to local authorities.

## Chapter 6

### DEVELOPMENT OF LEGISLATION 2000-2002

#### INTRODUCTION

The primary focus of this chapter is the development of the Homelessness Act 2002.<sup>1</sup>

Since it represents the first piece of housing legislation from the new Labour Government, the Act is of central importance. The style and content of the new legislation are examined to determine what can be gleaned about the way in which central-local relations are developing under a government of a different political complexion. Throughout the chapter comparisons are drawn between the 2002 Act and its predecessor, the Housing Act 1996.<sup>2</sup> Later sections of this chapter explore in more detail two specific strands of current interest within housing policy; the adoption of 'alternative' allocations systems and the relevance of anti-social behaviour in social housing allocations. Through an analysis of these two areas, the Government's translation of its policies into practice, via the medium of legislation, and the concomitant impact on the exercise of discretion by local authorities is considered.

The 2002 Act extends only to England and Wales. The Housing (Scotland) Act 2001 governs allocations by both local authorities and Registered Social Landlords (RSLs) north of the border. An in-depth examination of central-local relations in Scotland is beyond the scope of this thesis. This is because first, central-local relations in Scotland have historically been different in many respects to those in England and Wales.<sup>3</sup> Secondly, since the creation of a Scottish Parliament in 1998 Scotland has been given general

---

<sup>1</sup> The Homelessness Act 2002 received Royal Assent on 26 February 2002. The allocation provisions will be brought into force in January 2003; HC Debs, col.373W, 10 May 2002, Sally Keeble.

<sup>2</sup> The 2002 Act amends rather than replaces the 1996 Act; consequently the two must be read together.

<sup>3</sup> John observes that in the period 1945 to 1970 there was greater contact between central and local government in Scotland, and that relations were more harmonious "because of the role of a single local government association ... and the relatively small scale of local government." Nevertheless, the Scottish Office has traditionally possessed more legal and discretionary control over local authorities than central government departments in England and Wales have had; P. John, *Recent Trends in Central-Local Government Relations*. Local and Central Government Relations Research Programme Report 3 (London, Policy Studies Institute, 1990) p.4.

legislative powers, independent of Westminster.<sup>4</sup> However, since 1980 Scottish legislation has imposed a number of restrictions on local authorities that were not mirrored in England and Wales.<sup>5</sup> This chapter considers the development of housing allocations legislation in Scotland from 1980 onwards. It will be seen that the different approach taken in 1980 has persisted until the present. As such, Scotland demonstrates a contrasting attitude to central intervention in housing allocations and provides a further basis against which the Homelessness Act 2002 can be judged.

## Background

The Homes Bill was introduced in the latter stages of the 1997-2001 Labour Government's first term but failed to complete its parliamentary passage before Parliament was dissolved prior to the June 2001 general election. It was not included in the Queen's Speech for the second term of the Blair government. However, during the very early stages of the 2001-02 term, the Government introduced the Homelessness Bill, which largely replicates Part II (affecting housing allocations) of the previous Homes Bill. Before Parliament was dissolved, the Homes Bill had completed its passage in the House of Commons and had been read for the second time in the House of Lords. The chapter draws on the parliamentary debates of both Bills.

Since the Homes Bill came relatively late in the Labour Government's first term (a point noted by a number of MPs and peers),<sup>6</sup> it is useful to consider the state of the central-local relationship generally, and specifically in the context of housing allocations, during the preceding four years. This review provides a background to the Homelessness Act 2002. There were a number of early indications that the central-local relationship would undergo something of a revival under the first Labour Government to be in power since 1979. Indeed, Labour's 1997 election manifesto "offered several abstract statements which might be thought to herald the restoration of much of local government's former autonomy."<sup>7</sup> As

---

<sup>4</sup> Scotland Act 1998, s.28.

<sup>5</sup> Chapter 4 explained that the Tenants' Rights Etc. (Scotland) Act 1980 differed from its English/Welsh counterpart, to the extent that it prevented local authorities from imposing some of the common waiting list qualifications, such as residency.

<sup>6</sup> For example, HC Debs, Vol. 360, col.725, 8 January 2001, Nigel Waterson; *ibid* col.797, Tim Loughton; HL Debs, Vol. 624, col.353, 28 March 2001, Baroness Maddock.

<sup>7</sup> I. Loveland, *Constitutional Law: A Critical Introduction*. 2<sup>nd</sup> edn. (London, Butterworths, 2000) p.334.

Lowndes observes, "... the biggest change evident in the first months following the election was in the style and mood of central/local relations."<sup>8</sup> In more concrete terms, the Labour Government signed the Council of Europe European Charter of Local Self-Government, which was advocated by the House of Lords Select Committee on central-local relations<sup>9</sup> but not carried out by the previous Conservative administration.<sup>10</sup> It also signed a new 'partnership' framework for central-local relations with the Local Government Association (LGA).<sup>11</sup> The LGA itself appears to have adopted a more proactive lobbying role. For example, its allocations and homelessness task group report attempted to influence the content of the forthcoming Green Paper.<sup>12</sup> This action in itself tends to indicate that the LGA believed that it was worth re-engaging with central government. By contrast, consultation during the Thatcher and (to a lesser extent) Major eras was often thought by organisations largely to be a symbolic exercise.<sup>13</sup> A number of commentators have, however, cautioned against a too simplistic analysis of the new '*entente cordiale*' between central and local government;<sup>14</sup> a subject which is discussed in more detail below and in the concluding chapter.

On the specific issue of housing, the 2002 Act was preceded by a Green Paper which signalled the Government's intentions towards the allocation (or 'letting', to adopt the Government's nomenclature) of social housing. The Green Paper emphasised the importance of giving tenants and applicants greater 'choice' in deciding the area and property in which they live.<sup>15</sup> However, while the Government advocated more choice for individuals, this was not to be achieved at the expense of local authority discretion.<sup>16</sup>

<sup>8</sup> V. Lowndes, 'Rebuilding Trust in Central/Local Relations: Policy or Passion?' (1999) *Local Government Studies*, 24, 5, 116-136, p.121.

<sup>9</sup> Select Committee on Relations Between Central and Local Government, *Rebuilding Trust*, HL Paper 97 (London, HMSO,1996).

<sup>10</sup> However, it should be noted that "signature of the Charter has little or no domestic legal impact. Treaties are not self-executing in UK law, and in the absence of some act of legislative incorporation the sole domestic legal effect of the Charter would be as a marginal influence on the interpretation of statutory provisions"; I. Leigh, *Law, Politics and Local Democracy* (Oxford, Oxford University Press, 2000) p.30.

<sup>11</sup> Local Government Association/Department of the Environment, Transport and the Regions, *A Framework for Partnership* (London, LGA 1997). The 'Framework for Partnership' contains an explicit recognition that "central and local government are mutually dependent".

<sup>12</sup> Local Government Association, *No Place Like Home: Report of the Allocations and Homelessness Task Group* (London, LGA, 1999) p.2.

<sup>13</sup> See discussion in chapters 4 and 5.

<sup>14</sup> Loveland, 2000, op cit n.7 pp.334-5; Lowndes, 1999, op cit n.8.

<sup>15</sup> Department of the Environment, Transport and the Regions, *Quality and Choice: A Decent Home for All* (London, DETR, 2000) para.9.5. and para.9.17.

<sup>16</sup> It should be recalled that for previous Conservative Governments, the 'choice' to be offered to tenants was confined largely to leaving the public sector, through such 'exit' mechanisms as the Right to Buy, Large-Scale Voluntary Transfers and Housing Action Trusts.

Indeed, the Government did not favour the statutory imposition of any particular allocation scheme, believing that it was “up to local authorities to determine what works within their locality after consultation with local people.”<sup>17</sup>

It was discussed in chapter 5 that a strongly moral rhetoric provided the backdrop to the 1996 Act debates, although it did not ultimately find significant expression in the legislation. The 2002 Act was not immune from similar moral discourse. While the ‘folk devils’<sup>18</sup> of the 1996 Act were (teenage) single mothers, the fear expressed by the media<sup>19</sup> and some Conservative MPs during the 2002 Act debates was that ex-offenders would be given priority and would be allowed to ‘jump the housing queue’.<sup>20</sup> For example, Nigel Waterson, the Conservative frontbench spokesperson claimed that the Government’s proposals to give priority to applicants with an institutionalised background meant that it wanted “convicted criminals to jump the housing queue when they are released”. He wanted to know what sort of message that sent “to law-abiding people who wait patiently to be rehoused, often for years?”<sup>21</sup> Waterson was particularly vexed that the Bill did not differentiate between a family with dependent children and a convicted offender being released from prison.<sup>22</sup> It is of particular relevance, in view of later discussion, that his primary concern was that it would be left to local authorities’ discretion to prioritise between such applicants.

## Structure of the Act

Chapter 5 argued that the 1996 Act marked a departure from previous housing allocations legislation, at least in style (notwithstanding the inclusion of the reasonable preference formula), if not in substance. In order to begin to analyse the way in which the central-local relationship has changed since the election of the new Labour Government in 1997, it is necessary first to outline the structure of the Homelessness Act 2002 and then to

<sup>17</sup> DETR, 2000, *op cit* n.15 para.9.36.

<sup>18</sup> The term has been coined by Stan Cohen; *Folk Devils and Moral Panics* (MacGibbon and Kee, 1972).

<sup>19</sup> See for example, D. Hickley, ‘Prescott Pushes Convicts to Front of Housing Queue’ (2000) *Daily Mail*, 3 April; D. Cracknell, ‘Prisioners Will Jump Housing Queues’ (2000) *Sunday Telegraph*, 2 April.

<sup>20</sup> The 2002 Act gives no particular preference to ex-offenders in housing allocations. However, the Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002 No. 2051) extends the priority need categories for the purposes of Part 7 of the 1996 Act to include (amongst others) those who are vulnerable as a result having served a custodial sentence (article 5(3)(a)).

<sup>21</sup> HC Debs, Vol. 360, col.726, 8 January 2001.

<sup>22</sup> HC Debs, Standing Committee D, col.390, 1 February 2001.

compare it with the provisions of the 1996 Act.

In common with the 1996 Act, the 2002 Act contains a combination of powers and duties. For example, a local authority **shall not** allocate housing accommodation to certain persons from abroad.<sup>23</sup> However, a local authority **may** treat an applicant as ineligible if s/he has been guilty of unacceptable behaviour.<sup>24</sup> The 2002 Act abolishes the duty imposed on local authorities by the 1996 Act to maintain a housing register,<sup>25</sup> but imposes on local authorities a duty to secure the provision of certain advice and information concerning housing.<sup>26</sup> It also effectively abolishes the imposition of housing register qualifications, such as residence qualifications, by requiring local authorities to consider every application for housing.<sup>27</sup>

As far as the allocation scheme is concerned, the authority has a duty to include a statement of its policy for offering choice to people who are to be allocated housing accommodation.<sup>28</sup> It also has a duty to frame its scheme so as to secure that reasonable preference is given to certain categories of people.<sup>29</sup> There are five categories, two of which concern people to whom certain homelessness duties are owed by the local authority. The remaining three categories are simplified versions of those contained in the 1996 Act.<sup>30</sup> In the Green Paper, one of the constraints on choice identified by the Government was the requirement for local authorities to give a reasonable preference to certain categories of people.<sup>31</sup> Although this could be interpreted as a criticism of the reasonable preference categories themselves, it is more likely that the Government was criticising the way in which some local authorities have responded to their statutory obligation, through the adoption of “complex points systems” for prioritising needs.<sup>32</sup> This

---

<sup>23</sup> Homelessness Act 2002, s.14(2) inserts new s.160A(1)(a).

<sup>24</sup> *ibid* s.160A(7)(a). ‘Unacceptable behaviour’ is defined in s.160A(8).

<sup>25</sup> *ibid* s.14(1) repeals Housing Act 1996, ss.161-165.

<sup>26</sup> *ibid* s.15 substitutes s.166.

<sup>27</sup> *ibid* s.166(3).

<sup>28</sup> *ibid* s.16(2) inserts s.167(1A).

<sup>29</sup> *ibid* s.16(3) substitutes s.167(2).

<sup>30</sup> *ibid* s.167(2)(c) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions; (d) people who need to move on medical or welfare grounds; and (e) people who need to move to a particular locality in the district of the authority, where failure to meet that need would cause hardship (to themselves or to others).

<sup>31</sup> DETR, 2000, *op cit* n.15 para.9.8.

<sup>32</sup> *ibid*.

interpretation is supported by the fact that the reasonable preference formula is maintained in the 2002 Act.

Local authorities have the power to give additional preference to particular descriptions of people within these groups if they have urgent housing needs.<sup>33</sup> They also have the power to include provisions within their schemes for determining priorities between applicants within the reasonable preference categories;<sup>34</sup> if they do so, the Act specifies the factors that may be taken into account.<sup>35</sup> Subject to fulfilling the duty concerning the reasonable preference categories, the local authority's scheme may also make provision for allocating particular housing accommodation to other persons.<sup>36</sup> The Act also imposes on local authorities the duty to frame their scheme in order to enable an applicant to be provided with information that will enable him/her to assess how his/her application is likely to be treated, and whether accommodation is likely to be made available and, if so, how long it is likely to be before it is available.<sup>37</sup>

The purpose here is not to analyse in detail the obligations imposed by the Act but, rather, to assess the nature of local authorities' discretion under the legislation. The Act does appear to justify the claims made during the parliamentary debates, which are discussed below, of offering local authorities considerable discretion in allocating their housing stock.<sup>38</sup> The maintenance of the reasonable preference phrase alone supports this argument. Also notable by their absence are the numerous and broad regulation-making powers that were such a prominent feature of the 1996 Act.<sup>39</sup> It could not be argued that the 2002 Act represents a return to the legislatively unstructured pre-1996 era; the Homelessness Act 2002 contains far greater detail than the Housing Act 1985. However, the tenor of the legislation is significantly less oppressive than the 1996 Act. Although

---

<sup>33</sup> Homelessness Act 2002, s.167(2). This was previously a power under the 1996 Act.

<sup>34</sup> *ibid* s.167(2A).

<sup>35</sup> *ibid* s.167(2A)(a) the financial resources available to a person to meet his housing costs; (b) any behaviour of a person (or member of his household) which affects his suitability to be a tenant; (c) any local connection ... which exists between a person and the authority's district.

<sup>36</sup> *ibid* s.167(2E).

<sup>37</sup> *ibid* s.167(4A).

<sup>38</sup> Shelter believes that the 2002 Act confers greater discretion on local authorities in allocations decisions and removes "much of the rigidity contained in the original [1996 Act] scheme"; R. Campbell, 'Homelessness Act 2002 – Strengthening the Safety Net and Restoring Discretion' (2002) *Legal Action* July 28-30, p.29.

<sup>39</sup> Under the 2002 Act, the Secretary of State has the power to make regulations to prescribe other classes of people from abroad who are ineligible for housing accommodation; s.160A(5).

both contain a combination of powers and duties, the emphasis in the 1996 version was on duties, whereas the balance in the 2002 Act is with powers.

Later sections of this chapter examine in greater detail two areas that have received particular attention; ‘alternative’ allocations systems and anti-social behaviour. Given the assertion that the 2002 Act accords local authorities a large amount of discretion, the objective is to analyse the way in which the Government’s policies (as expounded by the Green Paper and other policy documents) in these two areas have been translated into legislation, and the effect on the exercise of discretion by local authorities.

## **The Scottish Approach**

It was explained in chapter 4 and in the introduction to this chapter that since 1980 Scottish local authority landlords have been subject to different rules governing the allocation of housing. This section briefly charts the development of such legislation, with the intention of comparing the approaches taken in England/Wales and Scotland.

The Housing (Scotland) Act 1986 amended the provisions of the Tenants’ Rights Etc. (Scotland) Act 1980 relating to both admission to the waiting list and the allocation of housing.<sup>40</sup> The main effect was to separate the rules of admission from the rules of allocation.<sup>41</sup> However, new restrictions on local authorities’ discretion were also introduced. Under the 1986 Act, for example, local authorities were not entitled to take into account the applicant’s income,<sup>42</sup> the value of any property owned by the applicant,<sup>43</sup> or the applicant’s marital status<sup>44</sup> in deciding whether to admit a person to the housing list. The provisions relating to housing allocation in Scotland were consolidated in the Housing (Scotland) Act 1987.<sup>45</sup>

The law has been further amended by the current legislation, the Housing (Scotland) Act 2001. Section 9 substitutes a new version of section 19 of the 1987 Act. Section 19(1)

---

<sup>40</sup> Schedule 1, para.13.

<sup>41</sup> Ss.26 and 26A respectively.

<sup>42</sup> S.26(1)(b).

<sup>43</sup> S.26(1)(c).

<sup>44</sup> S.26(1)(e).

<sup>45</sup> Ss.19 and 20 dealt with admission and allocation respectively.

now extends a right to register on a housing list for accommodation held by local authorities or RSLs to anyone aged 16 or over.<sup>46</sup> This is a new approach for Scotland, replacing the numerous factors that local authorities were **not** entitled to take into account with a general positive duty to admit an applicant to a housing list. It was noted above that the Homelessness Act 2002 follows the same approach.<sup>47</sup> Section 20 of the 1987 Act is amended to provide additional criteria governing the operation of the housing list by a local authority or RSL.<sup>48</sup> The requirement to give certain categories of applicant a reasonable preference is maintained,<sup>49</sup> but subsection (3) amends the factors that cannot be taken into account by a local authority or RSL in making allocations decisions. The primary change to the 1987 Act is the inclusion of more detailed restrictions on local authorities' ability to take into account any outstanding liability (such as rent arrears) in making allocations decisions.<sup>50</sup>

As already outlined, the English/Welsh and Scottish Acts now share a common approach to the subject of 'open' waiting lists and the requirement to give a reasonable preference to certain groups of applicants.<sup>51</sup> However, there is an important point of divergence between the two Acts. Since 1980, Scottish legislation has detailed factors that local authorities (and, since 2001, RSLs) **may not** take into account in their allocations decisions. By contrast, there is no such history in England and Wales. Indeed the Housing Act 1996 allowed local authorities in their allocations policies to determine who were or were not qualifying persons for the purposes of appearing on the housing register.<sup>52</sup> The Homelessness Act 2002 specifies factors that local authorities **may** take into account in determining priorities between applicants within the reasonable preference categories;<sup>53</sup>

---

<sup>46</sup> The provision gives effect to a commitment by the Scottish Executive; Scottish Executive, *Better Homes for Scotland's Communities: The Executive's Proposals for the Housing Bill* (Edinburgh, The Scottish Executive, July 2000) section 5, para.13.

<sup>47</sup> Homelessness Act 2002, s.166(3).

<sup>48</sup> Housing (Scotland) Act 2001, s.10.

<sup>49</sup> S.20(1)(b) is amended to reflect the new homelessness provisions contained in Part II.

<sup>50</sup> S.10(3)(c)(iv) and s.10(4), inserting new subsection (2A).

<sup>51</sup> The Scottish reasonable preference categories reflect more closely those contained in the Housing Act 1985, s.22. Housing (Scotland) Act 1987, s.20(1)(a) (as amended by the Housing (Scotland) Act 2001, s.10(3)) requires a reasonable preference to be given to persons who (i) are occupying houses which do not meet the tolerable standard; or (ii) are occupying overcrowded houses; or (iii) have large families; or (iv) are living under unsatisfactory housing conditions; and s.20(1)(b) homeless persons and persons threatened with homelessness. 'Unsatisfactory housing conditions' refers both to the physical condition of the house as well as more subjective aspects of an applicant's circumstances, such as unsatisfactory living arrangements or problems with neighbours; Scottish Executive Development Department, Circular 1/2002 (Edinburgh, SEDD, 2002) para.19.

<sup>52</sup> Housing Act 1996, s.161(4).

<sup>53</sup> Homelessness Act 2002, s.167(2A).

such as the applicant's financial resources, behaviour that affects the applicant's suitability to be a tenant, and any local connection.<sup>54</sup> As such, since 1980 Scottish local authorities have been subject to tighter restrictions on their discretion to allocate their stock.

It is not possible within the scope of this thesis to explore specifically Scottish central-local relations. Nevertheless it is useful to consider briefly the reasons for the disparity in the legislation. The Conservative Government's explanation for the difference between the English/Welsh and Scottish Acts in 1980 was the relatively high proportion of council housing north of the border, and the adverse impact of waiting list qualifications on employment-related mobility. It was noted in chapter 4 that despite the implications for local authorities' autonomy there was little discussion at the time surrounding the issue of central-local relations. This was attributed to the fact that the Labour Opposition supported the restrictions on local authorities. The parliamentary debates of the 1986 Act reflect the same inter-party consensus. The Labour Opposition was responsible for successfully introducing amendments that imposed further limits on local authorities' discretion,<sup>55</sup> and tried unsuccessfully to persuade the Government to require local authorities to operate completely open waiting lists. While the Minister believed that there should be as few barriers as possible placed in the way of admission to waiting lists, he was anxious that such a move would increase administrative burdens on local authorities.<sup>56</sup>

We see, then, the same inconsistent attitudes towards the principle of local autonomy that have been noted in earlier chapters. Where the Opposition agreed with the provisions in question, the issue of local discretion was not raised, notwithstanding the fact that the measures diminished that discretion.<sup>57</sup> By the same token, the Government resisted certain amendments on the ground that they would inconvenience local authorities while, in other policy areas, imposed increased burdens and reduced local authority discretion.<sup>58</sup>

---

<sup>54</sup> *ibid* s.167(2A)(a), (b) and (c) respectively. It appears that local authorities are not limited to taking account of these factors, since the subsection states that the factors "include" those mentioned above.

<sup>55</sup> For example, that local authorities are not permitted to take into account the fact that an applicant owns or has owned property, and the value of that property, in determining whether the person may be admitted to the housing list; HC Debs, First Scottish Standing Committee, col.384, 30 January 1986, Maxton.

<sup>56</sup> *ibid* col.382, Michael Ancram.

<sup>57</sup> The Labour MP, Robert Brown, did caution against too much prescription, preferring "to use diplomatic means to find out who [the problematic authorities] are and exercise a wee bit of influence on them"; *ibid* col.386.

<sup>58</sup> For example, the Housing (Scotland) Act 1986 extended the right to purchase to virtually all categories of public sector secure tenants (s.1(1)). In the same year, the Housing and Planning Act 1986, s.3 inserted into the Tenants' Rights Etc. (Scotland) Act 1980 new subsections (5B) and (5C) which enabled the

The parliamentary debates of the 2001 Act do not provide many insights into the state of central-local relations in housing management since devolution. The Deputy Minister for Social Justice, Margaret Curran,<sup>59</sup> stated that it was “right that there should be a limit on what factors landlords can or cannot take into account in decisions about allocations;”<sup>60</sup> a proposition that is now apparently uncontroversial in Scotland. However, the Scottish Executive supports the principle of local discretion, to allow landlords to develop policies in line with local priorities.<sup>61</sup> Although the debates contain few references to local authorities, the Deputy Minister did claim that the allocations provisions were about “striking the right balance” between the interests of applicants and landlords.<sup>62</sup> The Scottish local government association, the Convention of Scottish Local Authorities (CoSLA), made a submission to the Social Justice Committee in which it generally welcomed the Bill.<sup>63</sup> On the specific question of the changes to the housing admissions and allocations criteria, CoSLA believed they were “unlikely to cause major problems for local authorities”.<sup>64</sup>

A number of amendments appear to have been prompted by organisations other than CoSLA with interests in housing issues; such as Shelter,<sup>65</sup> the Chartered Institute of Housing in Scotland,<sup>66</sup> the Disability Rights Commission,<sup>67</sup> the Scottish Federation of Housing Associations and the Scottish Council for Single Homeless,<sup>68</sup> as well as the Scottish Churches Housing Agency.<sup>69</sup> With one exception, the amendments proposed sought to increase the restrictions on local authorities’ discretion.<sup>70</sup>

---

Secretary of State to prescribe by order different percentage discounts on the purchase of houses by tenants.

<sup>59</sup> Curran has since been promoted to Minister for Social Justice.

<sup>60</sup> Scottish Parliament, Social Justice Committee Official Report, col.2079, 1 May 2001.

<sup>61</sup> SEDD, 2002, op cit n.51 para.6.

<sup>62</sup> Scottish Parliament, Official Report, cols.1362-3, 13 June 2001.

<sup>63</sup> COSLA, *Submission to Social Justice Committee on Housing (Scotland) Bill*; available via COSLA’s website [www.cosla.gov.uk](http://www.cosla.gov.uk).

<sup>64</sup> *ibid* p.3.

<sup>65</sup> Scottish Parliament, Social Justice Committee Official Report, cols.2081 and 2087, 1 May 2001, Tommy Sheridan.

<sup>66</sup> *ibid* col.2080, Curran.

<sup>67</sup> *ibid* col.2082, Karen Whitefield.

<sup>68</sup> *ibid* col.2087, Sheridan.

<sup>69</sup> *ibid* col.2089, Robert Brown.

<sup>70</sup> The Liberal Democrat, Robert Brown, advocated allowing local authorities to take some (albeit limited) account of whether an applicant was an owner-occupier in determining the person’s priority on the waiting list; *ibid* col.2081.

## Local Authority Autonomy

To return to the English/Welsh case, one of the most striking features to emerge from an analysis of the parliamentary debates of the Homelessness Act 2002 is the frequent reference to local authority autonomy. This is in direct contrast with the 1996 Act, in which the issue of local autonomy was hardly raised. However, not only was the issue back on the agenda, it was also considered to be highly desirable by all the main political parties, as well as by organisations representing both applicants (such as Shelter) and the local authorities (such as the LGA).

The Government claimed that the 2002 Act established an all-embracing, transparent and objective framework within which local authorities could come to balanced and fair judgements.<sup>71</sup> While conceding that no system was foolproof, the Housing Minister believed that “given a sound framework and discretion, local authorities have a better chance of getting it right than if the Government try to dictate every detail of every scheme.”<sup>72</sup> Indeed, the Government rejected a number of amendments on the ground that they would remove too much discretion from local authorities.<sup>73</sup> The Conservatives also broadly welcomed the 2002 Act,<sup>74</sup> and stressed that the Opposition would be “at some pains to ensure that local authorities are genuinely to be given the freedoms for which they ask ...”<sup>75</sup> The Liberal Democrats joined the general approbation for the increased flexibility for local authorities to determine their lettings policies to suit local circumstances.<sup>76</sup>

Previous chapters have observed that the desirability, or otherwise, of allowing local authorities appreciable discretion in allocation decisions cannot be unequivocally associated with either of the main political parties. Indeed, we have seen that the attitude

---

<sup>71</sup> HC Debs, Standing Committee D, col.410, 1 February 2001, Nick Raynsford, Minister of State for Housing and Local Government.

<sup>72</sup> *ibid.*

<sup>73</sup> “There is such wide variation in the circumstances of different local authorities in different parts of the country that it is simply not sensible to specify nationally how authorities should respond in the light of local circumstances ... We do not wish to be unduly prescriptive, and we recognise the concerns that have been expressed in some quarters of local government about an excessively dirigiste approach if this part of the amendment were to be accepted”; *ibid* col.343, 30 January 2001, Raynsford. See also *ibid* col.382, Raynsford.

<sup>74</sup> HC Debs, Vol. 371, col.44, 2 July 2001, Waterson.

<sup>75</sup> HC Debs, Vol. 360, cols.727-8, 8 January 2001, Waterson.

<sup>76</sup> *ibid* cols.740-1, Don Foster.

towards prescription versus discretion often changed according to the subject matter at issue. It should be recalled that the Housing (Homeless Persons) Act 1977, which removed considerable allocation discretion from local authorities, was passed under a Labour government.<sup>77</sup> Furthermore, it was argued in chapter 5 that the lack of debate during the 1996 Act concerning the issue of local autonomy could be interpreted as agreement between the Government and the Opposition. Nevertheless, the enthusiasm expressed in the 2002 Act by the Government for local discretion is less surprising, given the sentiments declared in the Green Paper. More unexpected is that the enthusiasm was shared by the Conservatives. During the 1996 Act debates the previous Conservative Government consistently claimed that it supported the principle of local authority discretion. However, the prescriptive facets of that Act, together with a number of comments made by Government ministers, cumulatively tend to belie these assertions.

Conservative support for local autonomy may be thought unexpected enough. However, it appeared at times that the Government and the Opposition were competing to be the true 'friend' of local government autonomy and the enemy of central prescription.<sup>78</sup> Although all sides professed support for the principle of local discretion, in common with previous legislation, views on local discretion varied according to the subject matter. For example, the Conservatives proposed an amendment to prohibit local authorities from giving reasonable preference to ex-prisoners.<sup>79</sup> A further amendment re-instated the specific requirement for local authorities to give a reasonable preference to families with dependent children.<sup>80</sup> The effect of both these amendments would be to constrain local discretion. Waterson took on board "all the points made about being over-prescriptive". Nevertheless, he could not agree that the inclusion of reasonable preference for families with dependent children "should cease to be an explicit criterion and [become] simply a matter for local interpretation."<sup>81</sup>

---

<sup>77</sup> Although the 1977 Act was technically the result of a Private Member's Bill, it was argued in chapter 4 that the level of Government support transformed it into a *de facto* Government measure.

<sup>78</sup> See for example the interchange between the Government Under-Secretary, Robert Ainsworth, and the Opposition frontbench spokesperson, Loughton, concerning the Conservatives' proposal to specify that local authorities should not give priority to ex-offenders leaving prison; HC Debs, Standing Committee D, col.392, 1 February 2001.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid* col.397, Waterson.

<sup>81</sup> *ibid* col.397.

Each side accused the other of adopting an inconsistent position in relation to local discretion,<sup>82</sup> and Liberal Democrat MPs were not immune from this proclivity. For example, a Liberal Democrat amendment proposed giving existing tenants priority over new tenants in the allocation of ‘new-build’ accommodation.<sup>83</sup> The Minister found it “extraordinary” that the Liberal Democrats considered such detail appropriate,<sup>84</sup> and highlighted the apparent inconsistency of the Liberal Democrats’ position on local autonomy.<sup>85</sup>

## Cross-Party Consensus

Surprise has been expressed above at the level of consensus on the majority of the Act’s provisions. This position needs to be clarified, since it should not be overlooked that the general point made in relation to the 1996 Act was the existence of broad, if unarticulated, agreement concerning the allocations provisions. To that extent, it might be argued that the 2002 Act debates do not signal any change – the consensus has been maintained. However, the 1996 Act and the 2002 Act are different in their focus. The emphasis during the 1996 debates was on the effect of the provisions on individual applicants, rather than on the ability of local authority landlords to manage their housing stock. It will be recalled that the subject of local authority discretion was hardly mentioned in the Commons. By contrast in the 2002 debates the issue is raised so frequently, the effect is quite giddyng. A further point is that the consensus that was observed in relation to the 1996 Act was confined to the allocations provisions. The Labour Opposition expressed bitter disagreement with the amended (and reduced) homelessness provisions.

We have seen, then, that broad agreement existed among the main political parties, not only in relation to the degree of discretion that local authorities should enjoy in their housing allocation functions, but also with regard to the desirability of (re-)imposing more

---

<sup>82</sup> For example, see the interchange between Karen Buck and Waterson; *ibid* cols.430-2.

<sup>83</sup> HC Debs, Vol. 363, col.946, 7 February 2001, Simon Hughes.

<sup>84</sup> *ibid* Raynsford.

<sup>85</sup> “Indeed, the Liberal Democrats’ suggestion is curious because considerable discretion would be removed from local authorities by [their amendment] yet [Foster] speaks frequently about diktats from Whitehall and the Government’s centralising tendency”; *ibid*. See also Raynsford’s response to a further Liberal Democrat amendment to provide the Secretary of State with the power to give directions to local authorities on the exercise of their homelessness functions; *ibid* col. 991.

extensive homelessness duties on local authorities.<sup>86</sup> Pawson claims that, in the past, the political consensus was shared by social landlords and their professional staff.<sup>87</sup> In order to establish whether this holds true, it is necessary to consider the response of local authorities to the 2002 Act.

It appears not only from the parliamentary debates, but also from the organisations' own publications, that both the LGA and Shelter supported many of the Act's provisions.<sup>88</sup> This is noteworthy because, in the past, the interests of applicants (including homeless people) and those of local authorities did not always coincide.<sup>89</sup> This point is particularly evident in relation to the 1977 Act. However, the LGA broadly welcomed many of the Government's proposals, including those relating to homelessness.<sup>90</sup> Indeed, many of the Green Paper proposals had been suggested by the LGA in its allocations and homelessness task group report.<sup>91</sup> While the LGA welcomed the more extensive homelessness provisions, research conducted by Shelter has supported the principle of "continued flexibility and autonomy at local level."<sup>92</sup> A measure of agreement between the LGA and Shelter was also evident in a number of opposition amendments.<sup>93</sup> However, one important area of dissent is in relation to the treatment of applicants accused of anti-social behaviour. This issue is discussed in more detail in a later section of the chapter.

The general accord shared by the LGA and Shelter is also reflected in the approval

---

<sup>86</sup> "I am grateful for the widespread support from hon. Members on both sides of the House for our proposals on homelessness"; HC Debs, Vol. 360, col.800, 8 January 2001, Chris Mullin, Parliamentary Under-Secretary of State for the Environment.

<sup>87</sup> H. Pawson, 'Top-down or Bottom-up? Influences on Changing Approaches to Social Housing Allocations'. Paper presented at SLSA Conference (Bristol, University of Bristol, 2001) p.17.

<sup>88</sup> Such support extended to the Chartered Institute of Housing and the National Housing Federation. In a joint letter, dated 22 March 2001, the Chartered Institute of Housing, Shelter, the Local Government Association and the National Housing Federation fully supported the reforms of Part II of the Homes Bill 2001.

<sup>89</sup> It should be noted that there were differences in the stances of the various local government associations existing at the time: see chapter 4.

<sup>90</sup> Local Government Association, *Response to the Housing Green Paper 'Quality and Choice: A Decent Home for All'* (London, LGA, 2000) available via the LGA website [www.lga.gov.uk](http://www.lga.gov.uk).

<sup>91</sup> LGA, 1999, op cit n.12. It is possible that the election of Paul Bettison to the chair of the LGA Housing Executive may have contributed towards its shift in attitude. Although Bettison is a Conservative and replaced a Labour incumbent, he was sympathetic towards Shelter's position. His influence may have added greater weight to Shelter's case with Conservative-controlled local authorities. Bettison also provided a link between Shelter and Conservative spokespeople in the House of Commons; personal communication, Patrick South, Parliamentary Liaison Officer, Shelter, 24 September 2001.

<sup>92</sup> R. Smith, T. Stirling, P. Papps, A. Evans and R. Rowlands, *The Lettings Lottery: The Range and Impact of Homelessness and Lettings Policies* (London, Shelter, 2001) p.10.

<sup>93</sup> HC Debs, Standing Committee D, cols.256-7, 25 January 2001, Foster and Waterson.

expressed by both the Government and Opposition for the two organisations.<sup>94</sup> Waterson cited with approbation the LGA's welcome for many of the greater "flexibilities" contained in the Bill.<sup>95</sup> In Committee, he quoted freely and with approval from the LGA's report.<sup>96</sup> He also appeared to take on the role of spokesperson for the LGA, articulating its concerns.<sup>97</sup> For example, he associated the Conservatives' concern about the omission of families with dependent children from the reasonable preference categories<sup>98</sup> with a passage in the LGA's report, in which the association identified:

[R]eal problems for local authorities in reconciling the housing needs of an individual with the legitimate concerns of a community, when considering certain types of applicant, such as sex offenders, ex-offenders and those with a history of anti-social behaviour.<sup>99</sup>

However, it is suggested that in this instance Waterson is quoting selectively from the report to give credence to the Conservatives' position. The passage from the report in fact relates to the LGA's proposals on exclusion policies and qualifying criteria.<sup>100</sup> With regard to the reasonable preference categories, the LGA believes that the inclusion of homeless households effectively renders section 167(2)(c) and (d)<sup>101</sup> obsolete, since "such households who are in real housing need would inevitably be included in one or other of the priority categories."<sup>102</sup>

The Conservatives' support was not limited to the LGA. Frontbench MPs also associated themselves closely with many of the concerns raised by Shelter;<sup>103</sup> for example the possibility that some local authorities might use the framework of the new legislation to deny people accused of anti-social behaviour access to social housing in unjustifiable

<sup>94</sup> *ibid* col.342, 30 January 2001, Raynsford; *ibid*, Waterson.

<sup>95</sup> HC Debs, Vol. 360, cols.727-8, 8 January 2001, Waterson.

<sup>96</sup> For example, HC Debs, Standing Committee D, col.378, 30 January 2001, *ibid* col.390, 1 February 2001 and *ibid* col.425.

<sup>97</sup> For example, he expressed concern at the limited number of committee sittings that had been scheduled, on the ground that it would give interested bodies, such as the LGA, insufficient opportunity to voice their views; HC Debs, Vol. 360, col.814, 8 January 2001.

<sup>98</sup> Discussed above p.186.

<sup>99</sup> HC Debs, Standing Committee D, col.390, 1 February 2001.

<sup>100</sup> LGA, 1999, *op cit* n.12 paras.14-17.

<sup>101</sup> Requiring a reasonable preference to be given to families with children and pregnant mothers.

<sup>102</sup> LGA, 1999, *op cit* n.12 para.13.

<sup>103</sup> Shelter sought consensus with both the main political parties and the LGA; personal communication, Patrick South, *op cit* n.91.

circumstances.<sup>104</sup> They also expressed the intention of introducing an amendment inspired by Shelter to oblige local authorities to give homeless applicants a minimum period in which to consider an offer of housing.<sup>105</sup> For its part, the Government claimed to have worked “closely and harmoniously” with the LGA.<sup>106</sup> The overall impression is that outside organisations (such as the LGA and Shelter) were consulted extensively at all stages of the parliamentary process.<sup>107</sup> This is in direct contrast with the 1996 Act in which there are relatively few references in the debates to consultation. When consultation is mentioned, it is usually citing opposition to it.<sup>108</sup>

It was noted in chapter 2 that the local authority associations’ relative ineffectiveness in influencing government policy is generally thought to be attributable, at least in part, to the existence of multiple representative bodies.<sup>109</sup> It is possible, therefore, that the LGA’s apparently central role during the 2002 debates is a result of its status as the sole representative body of local government.<sup>110</sup> It should, however, be borne in mind that associations are “essentially voluntary bodies neither mandated by their members nor able to guarantee their members’ support for the line they take.”<sup>111</sup> Belonging to an association has never precluded an individual authority from lobbying for its own position. Indeed, it has been argued that, notwithstanding the deficiencies of multiple associations, the existence of a single association would not necessarily ensure that local government spoke with one voice; “one Association could result in local authorities not speaking at all on vital issues where interests clash and no common viewpoint emerges.”<sup>112</sup> This point was acknowledged by the Central Policy Review Staff, which conceded that “trying to develop

---

<sup>104</sup> HC Debs, Vol. 371, col.46, 2 July 2001, Waterson.

<sup>105</sup> *ibid.*

<sup>106</sup> HC Debs, Standing Committee D, cols.344-5, 30 January 2001, Raynsford.

<sup>107</sup> Prior to the Bill’s publication, the Government called meetings with Shelter, the LGA and the Housing Corporation in order to get the various groups behind the Bill; personal communication, Patrick South, *op cit* n.91.

<sup>108</sup> It was claimed, for example, that the Government had received 10,000 objections to the earlier Bill; HC Debs, Vol. 270, col.728, 29 January 1996, Gerry Sutcliffe.

<sup>109</sup> See above p.83.

<sup>110</sup> A qualification needs to be made to this statement. The Association of London Government was established in April 2000 to represent the 32 London Boroughs and the Corporation of London; [www.alg.gov.uk](http://www.alg.gov.uk).

<sup>111</sup> Central Policy Review Staff, *The, Relations Between Central Government and Local Authorities* (London, HMSO, 1977) p.38.

<sup>112</sup> To illustrate the danger, he cites the example of the AMC between 1945-72 when no clear policy on reform of local government emerged because of the differences of interest between the county and non-boroughs; K. Isaac-Henry, ‘The English Local Authority Associations’ in G.W. Jones (ed.), *New Approaches to the Study of Central-Local Government Relationships* (Farnborough, Gower, 1980) p.56.

*national* thinking about policy on behalf of *local* authorities is often impossible.”<sup>113</sup> The debates do not, however, display any evidence of conflict within the LGA. On the contrary, as mentioned above, the LGA was proactive in issuing its report on allocations *prior to* the publication of the Government’s Green Paper.<sup>114</sup>

Very broadly, then, the 2002 Act appears to demonstrate a commitment by Parliament to the autonomy of local authorities, at least within the sphere of social housing allocations. To test this assertion further, two themes of current interest, which have received exhaustive Government attention, are considered in the following sections. The purpose is to analyse the way in which the Government’s policies in specific areas have been translated into legislation and the consequence for local authority discretion.

## ‘ALTERNATIVE’ ALLOCATIONS SYSTEMS

This section considers the issue of what might be termed ‘alternative’ allocations systems. The systems are alternative in the sense that they depart from the traditional model, with its focus on allocating social housing according to measured need, which has come to be exemplified by points-based systems. There are two distinct variants within the alternative model; choice-based allocations systems and the use of allocations schemes to create or maintain ‘sustainable’ communities. Both concepts are supported by current Government policy,<sup>115</sup> although arguably the emphasis is on the former.<sup>116</sup> They share in common the fact that they depart from traditional needs-based allocations systems and are currently associated predominantly with hard-to-let housing. This section first describes the two alternatives before proceeding to explore their origins, how they are dealt with in the 2002 Act and the impact on local autonomy.

---

<sup>113</sup> CPRS, 1977, op cit n.111 p.37; original emphasis.

<sup>114</sup> The LGA is also working in co-operation with other housing organisations to present a unified front to the Government; Local Government Association/Chartered Institute of Housing, *Modernising the Legal Basis for Local Authorities’ Strategic Housing Role* (London and Coventry, LGA/CIH, 2001).

<sup>115</sup> DETR, 2000, op cit n.15 paras.6.15, 6.16 and 8.30. A pilot scheme, funded by the DTLR, is currently underway in 27 local authorities to test a variety of ‘alternative’ allocations schemes; J. Agnew, ‘Allocations: But Not As We Know It’ (2001) *Adviser*, September/October, p.6.

<sup>116</sup> P. Somerville, ‘Allocating Housing – Or ‘Letting’ People Choose’ in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001) p.119.

## Choice-Based ‘Lettings’ Systems<sup>117</sup>

The current Government’s enthusiasm for choice-based systems is evident. The Green Paper makes extravagant claims for the principle of choice; including longer term commitment to the locality, leading to more sustainable communities, increased personal well-being, as well as reduced anti-social behaviour, crime, stress and educational under-achievement.<sup>118</sup> To some extent, this contention is supported by research. There is now an increasing awareness that “traditional needs-based systems may, in part, have contributed to social exclusion and the creation of problem estates by concentrating households with the greatest priority needs in the least popular areas.”<sup>119</sup>

However, while choice may make positive contributions in its own right, it is also clear that the adoption of choice-based systems has been prompted, at least in part, by changing patterns of demand for social housing and, particularly, difficult-to-let housing. The demand for social housing is often portrayed as a regional pattern; continued high demand in the South, falling demand and sometimes oversupply in the North. However, this is too simplistic an analysis, since there can be areas of high and low demand within a particular area, and between different types of property, for example sheltered housing or one-bedroomed properties versus family-sized accommodation.<sup>120</sup>

Choice-based approaches can be viewed on a continuum between small-scale incremental modifications to existing systems, through to more radical approaches, such as those based on the so-called Delft model.<sup>121</sup> The concept of choice within social housing is, at one level, uncontroversial. Research conducted in 2000 found that two-thirds of housing organisations operate policies that allow a limited number of reasonable offers, while 85

---

<sup>117</sup> This section aims purely to deal with the concept of ‘choice’ within the social housing tenure, rather than the broader concept of choice, in which individuals choose among different tenures.

<sup>118</sup> DETR, 2000, op cit n.15 para.9.7. The use of the term ‘choice’-based has been criticised as misleading, since the systems are in reality application-driven. Further, it is argued that the discussion in Britain surrounding application-driven allocations confuses the currency used under the Dutch model and the method of application; “The method of allocation of necessity changes when waiting lists are dropped in favour of the application-driven model. But the outcome is still likely to depend on whether the currency is also changed, that is, whether it is time-based or needs-based; M. Stephens, N. Burns and L. MacKay, *Social Market or Safety Net?* (Bristol, The Policy Press, 2002) p.6 (original emphasis).

<sup>119</sup> T. Brown, R. Hunt and N. Yates, *Lettings: A Question of Choice* (Coventry, Chartered Institute of Housing, 2000) p.20.

<sup>120</sup> *ibid* p.26.

<sup>121</sup> *ibid* p.37.

per cent allow households to express a preference for geographical areas.<sup>122</sup> In its Green Paper the Government promotes the use of broad-brush ‘banding’ or ‘streaming’ systems, in which everyone in a particular band or stream is considered to be in broadly similar need. The bands could be as simple as differentiating between those in urgent need, those in non-urgent need, and those with no particular need of social housing.<sup>123</sup> The priority between applicants within the same band would then be determined by waiting time.<sup>124</sup> According to the Government, this type of scheme would enhance applicants’ choice by enabling them “to balance their own ‘felt’ need, as measured by the time they felt able to wait, against the availability of the properties they might be able to secure.”<sup>125</sup>

A more radical approach to lettings is the system that has become known as the Delft model.<sup>126</sup> More than ten years ago in the Netherlands, a fundamental review of the allocations process was undertaken, which resulted in a highly customer-focused lettings system. Under this model, Dutch municipalities work in partnership with housing associations on allocations policies and procedures.<sup>127</sup> The main features of the Delft model are that all available properties are advertised, but with a ‘label’ aimed at a particular ‘customer’ group. In order to be considered, potential customers must express an interest in the specific property by completing and returning a special coupon. A further important feature of the system is that lettings decisions are based on simple and straightforward criteria (for example length of time on the housing register), if more than one household expresses an interest in the property. Lettings decisions are then publicised to provide future customers with relevant information to enable them to modify their search activities. At this level, there is a fundamental departure from the traditional approach to allocations, which is essentially an administrative process unlike that found in the private housing market.<sup>128</sup>

---

<sup>122</sup> ibid p.38.

<sup>123</sup> DETR, 2000, op cit n.15 para.9.18.

<sup>124</sup> ibid para.9.20. In 1978, the Housing Services Advisory Group believed that group schemes were not appropriate in areas of high stress, where a points scheme was needed; Housing Services Advisory Group, *Allocation of Council Housing* (London, DoE, 1978) para.7.7.

<sup>125</sup> DETR, 2000, op cit n.15 para.9.21.

<sup>126</sup> Named after the city in which it was piloted.

<sup>127</sup> Out of some 600 housing corporations, all but 79 operate the Delft model; N. Bacon, ‘Model Choice?’ (2001) ROOF, January/February, p.21.

<sup>128</sup> H. Pawson, D. Levison, H. Third, G. Lawton and J. Parker, *Local Authority Policy and Practice on Allocations, Transfers and Homelessness* (London, DETR, 2001) para.2.125.

## Promoting ‘Sustainable’ Communities

The desirability of promoting ‘sustainable’ communities, through the use of allocations policies, is another of the alternative allocations schemes currently gaining credence. It should be noted that achieving ‘sustainable’ communities is broader than the issue of allocations within social housing. Indeed, there may be limited scope for social landlords to manipulate social balance, since it is the most socially and economically deprived 20 per cent of the population who are on housing registers or who become homeless.<sup>129</sup> The Government makes this point in its Green Paper, extolling the virtues of integrating more closely social housing with other forms of tenure, i.e. to achieve a social mix of tenures, not simply of different social housing tenants.<sup>130</sup> It nevertheless advocates the use of allocations policies to achieve a mix of households within the social rented sector.<sup>131</sup>

Various terms exist for these policies, such as community or local lettings. They are also commonly referred to as ‘sensitive’ lettings. At their heart is the idea that they operate alongside or in place of a consideration of housing need and take account of the potential tenant’s contribution to the particular community.<sup>132</sup> However, it has been acknowledged that community lettings have also been used negatively, to exclude households perceived as likely to be disruptive;<sup>133</sup> this point is highlighted by Shelter in its response to the Green Paper.<sup>134</sup> Local lettings policies are associated closely with difficult-to-let estates or areas. Early research demonstrated that most local lettings schemes were introduced as ‘exceptional’ policies in very restricted circumstances and were usually envisaged as being temporary in nature and affecting only a small proportion of the stock.<sup>135</sup> More recent

<sup>129</sup> M. Griffiths, J. Parker, R. Smith, T. Stirling, and T. Trott, *Community Lettings: Local Allocations Policies in Practice* (York, Joseph Rowntree Foundation, 1996) p.22.

<sup>130</sup> DETR, 2000, op cit n.15 para.6.16. However, a recent study which explored the impact of publicly sponsored owner-occupation on three Scottish housing estates has cast doubt on whether a tenurial mix can achieve the objective of reconnecting excluded people to the mainstream; R. Atkinson and K. Kintrea, ‘Owner-occupation, Social Mix and Neighbourhood Impacts’ (2000) *Policy & Politics*, 28, 1, 93-108.

<sup>131</sup> DETR, 2000, op cit n.15 para.8.30.

<sup>132</sup> The tenant’s contribution to the community is defined widely, to include facilitating socio-economic balance in particular areas or on specific estates, achieving appropriate child densities or allowing households to move nearer to other relatives to provide or receive care, or to move closer to employment; Griffiths et al 1996, op cit n.129 p.1.

<sup>133</sup> ibid.

<sup>134</sup> Shelter’s response to the Green Paper; quoted in House of Commons, *The Homelessness Bill: Research Paper 01/58* (London, House of Commons Library, 2001) p.54.

<sup>135</sup> Griffiths et al, 1996, op cit n.129 p.19. See also National Housing Federation, *Flexible Allocations and Local Lettings Schemes* (London, NHF, 2000) pp.24-5 in the context of RSLs.

research has highlighted the fact that while many landlords subscribe to the principle of sensitive lettings, in practice there is considerable variation in the extent to which such policies are used.<sup>136</sup> However, the National Housing Federation claims that RSLs are beginning to apply the principles and aims of local lettings schemes to general allocations policies.<sup>137</sup>

Local lettings policies can work in a variety of ways. Research undertaken in 1996 identified that, typically, the waiting list (housing register) remained the primary source of applicants, but 'by-passing' was allowed.<sup>138</sup> By-passing refers to the process whereby "the refinement of a shortlist leads to the selection of a 'lower priority applicant'."<sup>139</sup> In the case of hard-to-let property, the main method found by Griffiths et al was for officers to go down the list to find applicants who would be prepared to accept an offer. Such applicants were likely to be those with a low priority and little chance of securing a better offer.<sup>140</sup> In their most extreme form, local lettings policies are devised following the 'profiling' of an estate or area. This involves assembling a picture of the demographic character of particular neighbourhoods and analysing the outcomes of current allocations policies in these areas (i.e. the extent to which allocations outcomes appear to be contributing to existing imbalances). "The logical outcome of this process could be 'community lettings' policies for some areas, under which targets for allocations to certain groups would be adopted."<sup>141</sup> Such profiles include information about child densities, household ages and types. Local lettings policies based on profiling have already been implemented in France,<sup>142</sup> and in some UK local authorities, such as Bristol.<sup>143</sup>

Research published in 1996 by the Joseph Rowntree Foundation identified only a relatively small number of social landlords operating a formal local lettings policy. However, the authors contend that traditional allocations policies often allow at least a limited degree of

---

<sup>136</sup> Pawson et al, 2001, op cit n.128 para.2.146.

<sup>137</sup> The example is given of North British Housing Association which has broadened the aim of its allocations policy from meeting housing needs to include the creation of balanced and sustainable communities; National Housing Federation, 2000, op cit n.135 p.25.

<sup>138</sup> Griffiths et al, 1996, op cit n.129 p.20.

<sup>139</sup> Pawson et al, 2001, op cit n.128 para. 2.133.

<sup>140</sup> Griffiths et al, 1996, op cit n.129 p.20. On another view, by-passing is simply a value-neutral term for 'queue-jumping'. I am grateful to Professor Nick Wikeley for this observation.

<sup>141</sup> Pawson et al, 2001, op cit n.128 para.2.16.

<sup>142</sup> I. Cole, *Estate Profiling and Community Balance* (Sheffield Hallam Centre for Regional Economic and Social Research, 1998).

<sup>143</sup> Pawson et al, 2001, op cit n.128 para.2.16.

flexibility (and discretion) in making individual offers and allocations.<sup>144</sup> This claim is supported by research for the Chartered Institute of Housing, which found that nearly 40 per cent of respondents deviated from their standard policies to reflect local circumstances.<sup>145</sup> This clearly raises the question of the degree of discretion available within the housing allocations legislation.

## Top-down or Bottom-up?

Throughout the thesis the extent to which local authorities have been at the mercy of centrally imposed policies has been questioned. In this respect, it is relevant to consider why allocations policies and processes have come under increasing scrutiny over recent years. This will help to determine whether the 'alternatives' are inspired by local practice or imposed by central government and, as such, illuminate the state of central-local relations.

Research commissioned by the Chartered Institute of Housing identifies a number of influential reports that have informed the current discourse.<sup>146</sup> It is contended that the increased scrutiny can be attributed largely to three factors; changing patterns of demand for social housing; an increasing polarisation between more and less popular areas; and a growing focus on treating those who use the services of social landlords as consumers.<sup>147</sup> The authors believe that "reform of the allocations policies of housing organisations is seen as crucial in delivering the Government's objective of providing choice to those seeking social housing and creating sustainable neighbourhoods."<sup>148</sup>

---

<sup>144</sup> Griffiths et al, 1996, op cit n.129 p.6.

<sup>145</sup> Brown et al, 2000, op cit n.119 p.31.

<sup>146</sup> DETR, 2000, op cit n.15; Social Exclusion Unit, *National Strategy for Neighbourhood Renewal* (London, SEU, 2000); Urban Task Force, *Towards An Urban Renaissance* (London, E & FN Spon, 1999); Institute for Public Policy Research, *Housing United* (London, IPPR, 2000).

<sup>147</sup> Brown et al, 2000, op cit n.119 p.7. The Law Commission's recent consultation paper has advocated the adoption of a more consumer-oriented approach to housing law; The Law Commission, *Renting Homes 1: Status and Security* Consultation Paper No. 162 (London, The Stationery Office, 2002) part VI.

<sup>148</sup> Brown et al, 2000, op cit n.119 p.12.

Nevertheless, the interest in alternative allocations systems is not new<sup>149</sup> and not the exclusive province of central government. Indeed, it is argued that current research has built on the work of housing practitioners “who have been developing alternative approaches to the lettings of social housing at least since the early 1990s”.<sup>150</sup> Furthermore, the current Government was not the first to recognise that factors other than need may legitimately influence the allocations system.<sup>151</sup> While social housing allocations have usually been underpinned by the principal objective of meeting the most urgent housing needs, systems have often allowed a degree of flexibility to allow landlords to develop overall rehousing strategies that respond to a range of needs.<sup>152</sup> The consultation paper issued by the previous Conservative Government, prior to the enactment of the Housing Act 1996, explicitly acknowledged that local authorities should be free to take into account factors other than need, including ensuring a social mix.<sup>153</sup>

The growing tide towards alternative systems has apparently developed through an increasing disenchantment with the traditional approach to housing allocations systems. The attraction of points-based systems has lain in their ability to take into account a wide range of circumstances in an ostensibly objective way.<sup>154</sup> However, in practice, such systems are largely subjective since each local authority uses its own definitions of need devised by ‘experts’ such as housing professionals and councillors. “This means that ‘need’ is defined in different ways in different areas.”<sup>155</sup> It is also argued that traditional points-based systems have given priority to normative need<sup>156</sup> and comparative need,<sup>157</sup> at the expense of felt and expressed need.<sup>158</sup> The Government has criticised the adoption of

<sup>149</sup> As long ago as 1978 the Greater London Council was experimenting with a ‘Ready Access’ scheme for lettings outside the normal waiting list procedure; Housing Services Advisory Group, 1978, op cit n.124 paras.12.11-12.15. In 1980, SHAC published a report that appeared to anticipate (by some 20 years) policies that have now been adopted by New Labour. Scottish Housing Advisory Committee, *Allocation and Transfer of Council Houses*. Report by a Sub-committee of SHAC (Scottish Development Department, Edinburgh, HMSO, 1980).

<sup>150</sup> Brown et al, 2000, op cit n.119 p.15.

<sup>151</sup> It has been argued that the concept of achieving a ‘social mix’ goes at least as far back as Octavia Hill; R. Atkinson and K. Kintrea, ‘Owner-occupation, Social Mix and Neighbourhood Impacts’ (2000) *Policy & Politics*, 28, 1, 93-108, p.96.

<sup>152</sup> Smith et al, 2001, op cit n.92 p.22.

<sup>153</sup> Department of the Environment, *The Allocation of Housing Accommodation by Local Authorities* (London, DoE, 1996) para.23.

<sup>154</sup> See above p.23.

<sup>155</sup> Brown et al, 2000, op cit n.119 pp.17-8.

<sup>156</sup> Based on expert judgements and standardised definitions.

<sup>157</sup> Typified by the housing ‘queue’.

<sup>158</sup> Brown et al, 2000, op cit n.119 p.19.

“complex points systems” as difficult to explain to applicants.<sup>159</sup> It does not believe that “points-based assessments are an ideal way of ensuring that social housing lettings meet need in a sustainable way.”<sup>160</sup>

Furthermore, it has been observed that the traditional emphasis on ‘allocation’ envisages a shortage of supply compared to demand and assumes the need to ration a scarce resource. It was described above that the resource-rationing model is no longer appropriate in many areas of the country. A further modification has occurred in the focus on meeting *individual* need in housing. This has been overtaken by “a broader debate centred around the needs of the community”.<sup>161</sup> This change has been attributed to the new social exclusion agenda “which emphasises the role of housing allocation in meeting objectives that are wider than that of individual housing need.”<sup>162</sup> According to Papps et al, as the social, economic and demographic context for the provision of social housing has altered, so the preferences and aspirations of tenants (or prospective tenants) have gained prominence, and as a consequence increased the pressures on, and expectations of, allocations policies.<sup>163</sup>

What, then, can be inferred from the above discussion about the central-local relationship? The discussion earlier in this chapter demonstrated that the Green Paper clearly favours the adoption by local authorities of both choice-based systems and local lettings policies. However, it was noted the Government did not intend to prescribe by statute any particular format. This promise has largely been fulfilled in the 2002 Act. The Act appears to achieve its aim of striking a balance between the traditional position of ‘allocating’ housing according to need (it was noted earlier that the reasonable preference categories have been maintained), while giving local authorities greater flexibility to depart from

---

<sup>159</sup> DETR, 2000, op cit n.15 para.9.8. This view was aired as long ago as 1978 by the Housing Services Advisory Group. The Group supported the principle of points schemes, but cautioned against the adoption by local authorities of highly complex systems; Housing Services Advisory Group, 1978, op cit n.124 para.7.9.

<sup>160</sup> DETR, 2000, op cit n.15 para.9.17. Criticism of points-based schemes is not new. As far back as 1969, Cullingworth highlighted that points schemes are essentially a reflection of local authorities’ policies. J.B. Cullingworth, *Housing and Local Government* (London, Allen & Unwin, 1966) p.127.

<sup>161</sup> LGA, 2000, op cit n.90 p.38.

<sup>162</sup> Somerville, 2001, op cit n.116 p.118.

<sup>163</sup> P. Papps, R. Rowlands and R. Smith, ‘Shifting the Balance in Social Housing Allocations: Changing Access, Meeting Needs, Encouraging Choice and Promoting Sustainable Communities’, Paper presented at the Housing in the 21<sup>st</sup> Century Conference (2000) Sweden, Gavle, 26-30 June, p.6.

needs-based allocations, where this is appropriate.<sup>164</sup> The abolition of the requirement to maintain a housing register is intended to allow local authorities greater flexibility to depart from traditional allocations schemes. The Act also provides that, subject to fulfilling the duty concerning the reasonable preference categories, the local authority's scheme may make provision for allocating particular housing accommodation to other persons.<sup>165</sup> This provision is intended to allow local authorities to adopt local lettings schemes, which could include key worker schemes, or schemes to lower the child to adult ratio on an estate, or to provide housing for those who do not usually receive high priority on an authority's register, such as young single people.<sup>166</sup>

To this extent, authorities are to retain a considerable degree of discretion concerning their allocations/lettings policies and practices. It was observed earlier that the 2002 Act represents a more permissive framework than its predecessor, the 1996 Act. It should, however, be recalled that chapter 5 described how some local authority landlords were already operating allocations/lettings policies that deviate from the 'normal' system before the enactment of the 2002 Act. This indicates that in practice a wide degree of discretion already existed under the 1996 Act allocations regime. There are two further caveats to the generally discretionary nature of the 2002 Act. First, the Act imposes on local authorities, for the first time, a duty to include a statement of its policy for offering choice to people who are to be allocated housing accommodation.<sup>167</sup> The provision does not explicitly require local authorities to offer choice and, as Hunter notes, such a statement "may amount to very little indeed".<sup>168</sup> Nevertheless, it appears the intention of the provision is to have a motivating or hortatory effect.<sup>169</sup> Secondly, the lack of prescription within the legislation should not obscure the indirect ways in which central government directs local authority action; a theme to emerge from chapter 2. Two issues are of significance in this respect; the 'Best Value' regime and the continued use of Large Scale Voluntary Transfers (LSVTs), both of which are discussed below.

---

<sup>164</sup> HL Debs, col.CWH64, 10 December 2001, Lord Falconer.

<sup>165</sup> Homelessness Act 2002, s.167(2E).

<sup>166</sup> HL Debs, col.CWH63, 10 December 2001, Lord Falconer. See also Department for Transport, Local Government and the Regions, *Allocation of Accommodation – Code of Guidance for Local Housing Authorities*. A Consultation Paper (London, DTLR, May 2002) para.5.22.

<sup>167</sup> Homelessness Act 2002, s.167(1A).

<sup>168</sup> C. Hunter, "'The Good, The Bad and The ...': Reasonable Preference, Exclusion and Choice in Housing Allocation' (2001) *Journal of Housing Law* 77.

<sup>169</sup> The draft code of guidance advises that the requirement means that "the housing authority must address the matter and take a policy decision"; DTLR, May 2002, op cit n.166 para.5.2

As to the question of whether the measures are centrally or locally inspired, it appears that the reality is not a dichotomy but a combination of the two. It was noted above that current thinking builds on housing practice dating back to the 1990s. However, the research indicates that such practice is largely the response of individual local authority landlords experiencing low demand in certain areas or for particular types of housing. The LGA supports the principle of greater tenant choice but remains concerned at how vulnerable applicants will fare in a choice-based system, with its emphasis on proactive participation by the applicant<sup>170</sup> (a concern echoed by Shelter<sup>171</sup> and the Association of London Government<sup>172</sup>).<sup>173</sup> On the question of local lettings schemes, the LGA has advocated the creation of an additional reasonable preference category, to enable authorities to address broader strategic issues (e.g. regeneration, employment, mobility and sustainability) “as an alternative to allocating properties purely on the basis of an individual’s housing need.”<sup>174</sup> As far as the Government is concerned, attention has been drawn to the fact that it supports both approaches. Indeed, the Policy Action Teams (PATs) of the Social Exclusion Unit dealing with housing management (PAT 5) and unpopular housing (PAT 7) advocate the use of community sensitive lettings<sup>175</sup> and the promotion of market-orientated culture in housing allocations respectively.<sup>176</sup>

## ANTI-SOCIAL BEHAVIOUR

The phenomenon of anti-social behaviour provides a further opportunity to explore the Government’s translation of policy into legislative practice. In common with the issue of alternative allocations systems, anti-social behaviour has received considerable Government and academic attention. However, unlike allocations, it has also excited

<sup>170</sup> LGA, 1999, op cit n.12 p.38.

<sup>171</sup> Shelter’s response to the Green Paper; quoted in House of Commons, 2001, op cit n.134 p.50.

<sup>172</sup> See chapter 2 note 181.

<sup>173</sup> ALG’s response to the Green Paper; quoted in House of Commons, 2001, op cit n.134 p.51.

<sup>174</sup> LGA, 1999, op cit n.12 p.18.

<sup>175</sup> Social Exclusion Unit, *National Strategy for Neighbourhood Renewal – PAT 5: Housing Management* (London, SEU, 2000) recommendation 5iii.

<sup>176</sup> Social Exclusion Unit, *National Strategy for Neighbourhood Renewal – PAT 7: Unpopular Housing* (London, SEU, 2000) recommendation 35. According to Somerville, the two approaches reflect different strands of thought within New Labour discourse. Choice-based systems reflect the neo-liberal, customer-centred perspective on social problems, while local lettings polices evoke “New Labour’s new corporatist managerialism”; Somerville, 2001, op cit n.116 pp.118-20.

considerable media interest.<sup>177</sup> It is not intended to explore in depth the extensive literature<sup>178</sup> spawned by this important subject but rather to provide a brief overview of its relevance to housing allocations and specifically to the issue of local authority discretion within that sphere. Anti-social behaviour is an emotive issue that has arguably been inflamed by media reporting.<sup>179</sup> As Hunter acknowledges, “there is always a tension in dealing with (and indeed writing on) anti-social behaviour.”<sup>180</sup> While the profound and damaging effects on victims is undisputed, concerns have been expressed on a number of grounds; for example, the lack of an agreed definition,<sup>181</sup> whether legal responses to such behaviour are appropriate and effective and the relationship between anti-social behaviour and social exclusion.<sup>182</sup>

The early focus on dealing with anti-social behaviour was directed at the eviction of local authority tenants from council housing.<sup>183</sup> The 1996 Act contained new provisions aimed at allowing social landlords to evict more easily tenants guilty of anti-social behaviour.<sup>184</sup> Such provisions include the use of introductory tenancies, extended grounds for possession and new forms of injunction.<sup>185</sup> It is not intended to examine these provisions here, since this thesis is concerned primarily with the allocation of council housing, rather than the subsequent management of tenants.

---

<sup>177</sup> Feuding neighbours apparently make good television. The BBC’s television series *Neighbours at War* and Carlton TV’s *Neighbours From Hell* were both broadcast in 1998.

<sup>178</sup> For example, C. Hunter, T. Mullen, and S. Scott, *Legal Remedies for Neighbour Nuisance: Comparing Scottish and English Approaches* (York, Joseph Rowntree Foundation, 1998).

<sup>179</sup> D. Cowan, ‘From Allocations to Lettings: Sea Change or More of the Same?’ in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001).

<sup>180</sup> C. Hunter, ‘Anti-social Behaviour and Housing – Can Law be the Answer?’ in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press 2001) p.233.

<sup>181</sup> The PAT 8 report of the SEU admits that there can be no single definition of anti-social behaviour: “it covers a wide range of behaviour from litter to serious harassment”; Social Exclusion Unit, *National Strategy for Neighbourhood Renewal. PAT 8 Anti-Social Behaviour* (London, SEU, 2000) p.14. The Law Commission has proposed the adoption of a “single, coherent concept of what amounts to serious housing related anti social behaviour”; Law Commission, 2002, op cit n.147 para.13.38.

<sup>182</sup> For example, Hunter, 2001, op cit n.180; P. Card, ‘Managing Anti-social Behaviour – Inclusion or Exclusion?’ in D. Cowan and A. Marsh (eds) *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001); E. Burney, *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Winchester, Waterside Press, 1999); Social Exclusion Unit, 2000, op cit n.181.

<sup>183</sup> For example, N. Malik, ‘Nowhere to Run’, (1998) *ROOF*, September/October p.16.

<sup>184</sup> Housing Act 1985, Schedule 2, as amended by Housing Act 1996, s.144.

<sup>185</sup> See also two recent consultation papers; Department for Transport, Local Government and the Regions, *Tackling Anti-Social Tenants* (London, DTLR, April 2002) and The Law Commission, 2002, op cit n.147 part XIII.

The anti-social behaviour discourse is not confined to the eviction of social housing tenants. Attention has also been focused on the potential to exclude ‘undesirable’ applicants. Chapter 5 described how the 1996 Act allowed local authorities, in their allocations policies, to determine who were or were not qualifying persons for the purposes of appearing on the housing register.<sup>186</sup> The question of an applicant’s behaviour was not explicitly addressed in the Act, although the 1996 version of the accompanying code of guidance cited people with a history of anti-social behaviour as among the groups that could be determined by local authorities to be ineligible for the housing register.<sup>187</sup> The later guidance, issued under the incoming Labour Government, cautions against drawing too broadly the ineligible classes of people but nevertheless accepts that local authorities may exclude from housing allocation people with a history of anti-social behaviour.<sup>188</sup> An initial assessment of the impact of the 1996 Act, described in chapter 5, indicates that the Act resulted in the wide-scale use by local authorities of exclusion or suspension policies.<sup>189</sup> In a more recent analysis of the empirical evidence,<sup>190</sup> Pawson observes that during the 1990s the number of English local authorities adopting restrictive eligibility policies towards those accused of anti-social behaviour was substantial.<sup>191</sup> It also appears that local authorities and RSLs have used the medium of local lettings policies as a way of excluding potentially disruptive tenants.<sup>192</sup>

## Anti-Social Behaviour Orders

There has been more recent recognition that anti-social behaviour is not confined to social housing tenants and that cross-tenurial responses are required. A further ‘weapon’ in local authorities’ armoury against anti-social behaviour is provided by the Crime and Disorder Act 1998. The Act introduced a new type of sanction, the Anti-Social Behaviour Order (ASBO). Local authorities and/or the police can apply to the courts for an ASBO if it

---

<sup>186</sup> Housing Act 1996, s.161(4).

<sup>187</sup> Department of the Environment/Department of Health, *Code of Guidance on Parts VI and VII of the Housing Act 1996* (London, DoE, 1996) para.4.27.

<sup>188</sup> Department of the Environment, Transport and the Regions, *Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness* (London, DETR, 1999) para.3.13.

<sup>189</sup> P. Niner with V. White and D. Levison, *The Early Impact of the Housing Act 1996 and Housing Benefit Changes* (London, Shelter, 1997).

<sup>190</sup> Pawson draws on three national surveys of English local authorities undertaken in 1986, 1991 and 2000.

<sup>191</sup> Pawson, 2001, op cit n.87 p.4.

<sup>192</sup> National Housing Federation, 2000, op cit n.135 pp.24-5.

appears to them that the person has acted in an anti-social manner.<sup>193</sup> The courts' powers under the ASBO are potentially wide: the order may prohibit the defendant from doing anything described in the order.<sup>194</sup> Unlike the provisions of the 1996 Act, the ASBO does not link directly the problem of anti-social behaviour to housing (social or otherwise).<sup>195</sup> Nevertheless ASBOs may be relevant to the issue of determining a person's eligibility for social housing. The 1996 Act allowed local authorities to determine to a large degree their own local eligibility criteria. It was therefore possible for local authorities to decide that those with an ASBO against them were 'ineligible' for the purpose of admittance to the housing register.<sup>196</sup> In the first 14 months of their existence,<sup>197</sup> 80 ASBOs had been imposed in England and Wales; however they do not appear to have been used primarily as a tool against tenants of social landlords.<sup>198</sup>

## From Groups to Individuals

The current preoccupation with anti-social behaviour is apparent in the 2002 Act. While the 1996 Act allowed local authorities to specify *groups* of people ineligible for housing, the 2002 Act permits local authorities to take into account the behaviour of the *individual* applicant in deciding whether to allocate housing. Contained in the Act are no fewer than three stages during the allocation process at which the applicant's behaviour is relevant.<sup>199</sup> The first stage is in determining the eligibility of an applicant for housing. A local authority has the power to decide that an applicant is to be treated as ineligible for housing if

[H]e, or a member of his household, has been guilty of unacceptable behaviour serious enough to make him unsuitable to be a tenant of the authority and in the circumstances at the time his application is considered, he is unsuitable to be a tenant of the authority by reason of that behaviour.<sup>200</sup>

---

<sup>193</sup> Defined in section 1(1)(a) as "a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself...".

<sup>194</sup> Crime and Disorder Act 1998, s.1(4).

<sup>195</sup> Hunter, 2001, op cit n.180 p.223.

<sup>196</sup> N. Bacon, *Access Denied* (London, Shelter, 1998) p.8.

<sup>197</sup> The relevant provisions of the Crime and Disorder Act 1998 came into force in April 1999.

<sup>198</sup> Hunter, 2001, op cit n.180 p.229.

<sup>199</sup> HC Debs, Standing Committee A, col.87, 12 July 2001, Foster.

The section defines unacceptable behaviour as that which, if the person were a secure tenant, would entitle the local authority to a possession order.<sup>201</sup>

The second stage at which an applicant's behaviour is germane is in determining priorities between applicants who fall within the reasonable and additional preference categories. Section 16 amends section 167 of the 1996 Act, inserting a new subsection to allow the authority's scheme to take into account factors including "any behaviour of a person (or a member of his household) which affects his suitability to be a tenant."<sup>202</sup> Unlike at the first (and third) stage, there is no statutory test for such behaviour. The third stage is found in a new subsection which obviates the requirement to give any preference to people whom the authority has decided have been guilty of unacceptable behaviour.<sup>203</sup> For the purposes of this subsection, the same legal test of possession, discussed in relation to stage one, applies. This subsection effectively allows local authorities to remove all priority from applicants if the test is satisfied.

It is difficult to discern the intended relationship between stages two and three of the assessment. It appears that at the second stage an applicant's priority can be reduced but s/he must still be given a 'reasonable preference'. The third stage suggests that the applicant may legitimately be accorded no preference at all and his/her claim would then presumably fall to be determined against other applicants who cannot bring themselves within the reasonable preference categories. It has been suggested that this third stage was added in response to the concerns of a number of local authorities in areas where there is no shortage of housing.<sup>204</sup>

The Liberal Democrat, Don Foster, sought to introduce an amendment to require the same test (of possession) to be applied at all three stages.<sup>205</sup> While the Under-Secretary of State understood "the good intentions behind the amendment", nevertheless she believed that

---

<sup>200</sup> Homelessness Act 2002, ss.160A(7)(a) and (b).

<sup>201</sup> Under the Housing Act 1985, s.84 on any ground mentioned in Part I of Schedule 2, other than ground 8; Homelessness Act 2002, s.160A(8)(a). Lord Falconer intimated that a suspended possession order would not suffice; HL Debs, col.CWH51, 10 December 2001. See also DTLR, May 2002, op cit n.166 para.4.19(ii).

<sup>202</sup> Homelessness Act 2002, s.167(2A)(b).

<sup>203</sup> ibid s.167(2B) and (2C).

<sup>204</sup> Campbell, 2002, op cit n.38 p.30.

<sup>205</sup> HC Debs, Standing Committee A, col.87, 12 July 2001.

local authorities must be given the discretion to make balanced judgements, in the interests of the majority of tenants, on the basis of their knowledge of individual circumstances.<sup>206</sup>

## Local Authority Discretion

There appears to have been broad support for the abolition of the 1996 Act's blanket exclusions.<sup>207</sup> However, it is clear that the LGA's support for the abolition of such exclusions is predicated on local authorities retaining (or, indeed, gaining) the discretion to decide that *individual* applicants should not be allocated housing because of their behaviour.<sup>208</sup> It was noted earlier that the 2002 Act effectively abolishes the imposition of 'waiting list' qualifications. It might be presumed that this provision would be highly contentious, given the historically strong support by local authorities for such qualifications, discussed in earlier chapters. However in a report preceding publication of the Homes Bill 2001, the LGA advocates the principle of 'open' housing registers, but combined with the ability of local authorities to refuse housing to individual applicants on specified grounds such as inappropriate conduct.<sup>209</sup> It is probable that the LGA's support for the abolition of waiting list qualifications (in return for the anti-social behaviour provisions) accounts for the lack of discussion of the provision.<sup>210</sup>

These points raise the question of whether the measures contained in the 2002 Act represent 'top-down' or 'bottom-up' influences. In chapters 4 and 5 doubt was cast on whether the local authorities (via their associations) had exerted any real influence on policy development during the Thatcher (and to a lesser extent Major) years. By contrast, there is evidence to suggest that concern about anti-social behaviour in social housing originated in the localities. The Social Landlords Crime and Nuisance Group was established as an issue-specific lobbying group following a major local authority

---

<sup>206</sup> ibid cols.92-3, Keeble.

<sup>207</sup> As the LGA observes, "local exclusion policies do not fit comfortably with the development of proactive prevention of homelessness strategies and employment mobility or with the government's broader agenda on promoting welfare to work and combating social exclusion"; LGA, 1999, op cit n.12 p.14.

<sup>208</sup> For example, HC Debs, Standing Committee A, col.86, 12 July 2001, Waterson; Hunter, 2001, op cit n.168 p.78.

<sup>209</sup> LGA, 1999, op cit n.12 p.14.

<sup>210</sup> It should also be noted that the Act allows local authorities to take into account a person's 'local connection' in determining priorities between those people falling into the reasonable and additional preference categories; s.167(2A)(c).

conference on anti-social behaviour in 1995.<sup>211</sup> The inclusion of locally inspired measures in the 2002 Act might then signify a strengthening of local power under a Labour government. However, it is also important to acknowledge that unanimity existed between the Government, the Opposition and the LGA on the issue.<sup>212</sup> It is therefore not possible to attribute the LGA's success unequivocally to renewed influence of local government, or to the existence of a single representative body. This point is returned to in the concluding chapter, when the effect of the local authority associations over the period 1924 to 2002 is assessed.

The new tests for anti-social behaviour incorporated in the 2002 Act raise important questions concerning discretion. The first point to note is that local authorities are given the freedom to decide whether to frame their allocations schemes to take into account an applicant's behaviour. This supports the contention that the Act accords local authorities a significant degree of discretion in housing allocation matters at policy-making level. Should a local authority decide to use behaviour as a determining factor, a further question is raised with regard to the degree of discretion permissible within the statutory framework in day-to-day decision-making.

In one sense the constraints on local authority activity imported by the 2002 Act are stricter than those contained in the 1996 Act; at two stages the authority must ensure that its decision is capable of passing a statutorily defined (and well-litigated) test.<sup>213</sup> On another view, the 2002 Act provides local authorities with ample opportunity effectively to refuse housing to a particular individual because of his/her behaviour, by reducing the applicant's priority to such a level that an offer of housing is improbable. This is certainly the view of Shelter, which is concerned that the provisions will allow some local authorities to deny people in need access to social housing in unjustifiable circumstances.<sup>214</sup> Shelter's concerns are, it is submitted, justified. The legislation allows a local authority that is so minded to minimise the risk of legal challenge to its (non)-allocation decision by using the second stage of determination to reduce the applicant's priority on the grounds of "any

<sup>211</sup> Law Commission, 2002, op cit n.147 p.232, footnote 1.

<sup>212</sup> Indeed, a new provision was included in the Homelessness Bill to reflect debates at Committee Stage of the previous Homes Bill; HC Debs, Vol. 371, col.46, 2 July 2001, Waterson.

<sup>213</sup> Under the 1996 Act a legal challenge could potentially be mounted on the basis that the groups of those excluded are irrationally wide; T. Schmeer, 'Hard and Fast' (1997) *ROOF*, September/October p.16.

<sup>214</sup> Shelter Parliamentary Briefing; quoted in HC Debs, Vol. 371, col.46, 2 July 2001, Waterson.

behaviour ... which affects his suitability to be a tenant".<sup>215</sup> In reality, then, the inclusion of a statutory test for unacceptable behaviour in a process laden with discretion might amount to no more than a 'presentational' use of the law.<sup>216</sup> Such a phenomenon was described in chapter 2.<sup>217</sup>

## INDIRECT EFFECTS

This chapter has generally concluded that the 2002 Act accords local authorities greater discretion than the 1996 Act. However, it was noted that in the past governments have used indirect means to control local authority action in housing allocations. This section considers the implications of two such 'indirect' methods; first, the 'Best Value' regime and secondly LSVTs.

The concept of Best Value was introduced by the Local Government Act 1999.<sup>218</sup> The general duty requires a best value authority to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.<sup>219</sup> Authorities are required to conduct Best Value Reviews of their functions.<sup>220</sup> In their Reviews, authorities must challenge (why, how and by whom a service is being provided), compare (with the performance of others across a range of relevant indicators, taking into account the views of both service users and potential suppliers), consult (local taxpayers, service users, partners and the wider business community), and use fair and open competition wherever practicable as a means of securing efficient and effective services.<sup>221</sup> Authorities will conduct reviews of specified functions within the Best Value regime according to a

---

<sup>215</sup> Lord Falconer conceded that, in areas of high demand, a decision not to give preference could have the same practical effect as a decision to treat an applicant as ineligible; HL Debts, col.1018, 15 January 2002.

<sup>216</sup> For a criticism of the statutory test see also 'Not Quite Home and Dry', *Legal Action* (2001) December, p.3.

<sup>217</sup> It was observed in chapter 2 that governments can use rules presentationally "so as to give the appearance of taking action or in order to enhance the perceived legitimacy of decisions"; R. Baldwin, 'Rules and Alternatives' in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25<sup>th</sup> Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995) p.114.

<sup>218</sup> The Act received the Royal Assent on 27 July 1999.

<sup>219</sup> Local Government Act 1999, s.3(1).

<sup>220</sup> *ibid* s.5.

<sup>221</sup> The Local Government (Best Value) Performance Plans and Reviews Order 1999 (SI 1999 No. 3250). Department of the Environment, Transport and the Regions, Circular No. 10/99 (London, The Stationery Office, 1999).

timetable prescribed by the Secretary of State.<sup>222</sup> It is expected that all council services will be reviewed initially within five years.<sup>223</sup>

Both the Government and the Audit Commission have a statutory role in setting performance indicators. This effectively means that there are two sets of performance indicators: the best value performance indicators (BVPIs)<sup>224</sup> and the Audit Commission's performance indicators (ACPIs) for local services.<sup>225</sup> As far as housing allocations are concerned, under the BVPI local authorities were required to monitor average relet times for their dwellings,<sup>226</sup> while the relevant ACPI required authorities to monitor new tenancies given to vulnerable people, excluding elderly people, as a percentage of all new tenancies.<sup>227</sup>

The Best Value regime has been welcomed as being "potentially more respectful of local democracy than [Compulsory Competitive Tendering]".<sup>228</sup> However, according to Vincent-Jones, the lifting of specific restrictions (imposed under the CCT regime) on how services should be provided has been replaced by pressures favouring certain types of competitive practice and encouraging financial responsibility.<sup>229</sup> An important point to note in this regard is that the scope of the Best Value regime is broader than CCT, since it applies to all local authority services.<sup>230</sup> Indeed, Leigh qualifies his broad welcome for Best Value, as a replacement for CCT, believing it to be part of the "steady incursion of ever more sophisticated forms of audit into the public sector."<sup>231</sup>

---

<sup>222</sup> Local Government Act 1999, s.5(2).

<sup>223</sup> Leigh, 2000, op cit n.10 p.322.

<sup>224</sup> BVPIs are specified by the Government under its powers in the Local Government Act 1999, s.4(1).

<sup>225</sup> The Commission prescribes Audit Commission Performance Indicators (ACPIs) under ss. 44 and 46 of the Audit Commission Act 1998.

<sup>226</sup> Department of the Environment, Transport and the Regions, *Best Value and Audit Commission Performance Indicators for 2000/2001 Volume One: The Performance Indicators including The Publication of Information Direction 1999 (England)* (London, DETR, 1999), BVP168.

<sup>227</sup> ibid AC-D4.

<sup>228</sup> Leigh, 2000, op cit n.10 p.323.

<sup>229</sup> Vincent-Jones, P., 'From Housing Management to the Management of Housing: The Challenge of Best Value' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001) p.255.

<sup>230</sup> CCT applied to a limited range of council landlord responsibilities; ibid p.243.

<sup>231</sup> Leigh, 2000, op cit n.10 p.339.

Vincent-Jones has coined the term the ‘responsible local government’ to describe a further way in which the Labour Government is employing indirect methods of controlling local authority autonomy.<sup>232</sup>

This concept refers ... to the ways in which the organisational thinking and strategic orientation of local authorities are being brought into alignment with central policy objectives through the inculcation of common ... norms and values whose combined effect is the ‘self-steering’ of these corporate bodies in directions the government wishes them to move.<sup>233</sup>

One way in which this has been achieved is through the greater financial dependency of local authorities on central government.<sup>234</sup> It has also been argued that the process of managerialisation, embodied in the Best Value regime, has resulted increasingly in local government becoming a ‘policy-free zone’ and the role of local authorities has become to deliver centrally determined policies in a managerialist, strategic way.<sup>235</sup>

Specifically in relation to housing allocations, Somerville argues that local authorities are subjected to the Best Value regime as part of the move towards a managerial ‘lettings’ system, rather than a bureaucratic ‘allocations’ model.<sup>236</sup> One argument made above, to support the view that the Government is committed to the principle of local authority autonomy, was that the 2002 Act did not prescribe the type of allocation scheme to be adopted by local authorities. This is despite the Government’s clear support for a move away from highly bureaucratic ‘allocations’ systems towards more market-oriented ‘lettings’ systems. However, it appears to be at least plausible that the Best Value regime represents an indirect way of ensuring that local authorities adopt the Government’s preferred ‘lettings’ model.

As far as the ‘managerialisation’ of local government through Best Value is concerned, however, it should be recalled that chapter 2 described how the rise in managerial professionalism (especially following World War II) established the traditional pattern of

---

<sup>232</sup> Vincent-Jones, 2001, *op cit* n.229 p.255.

<sup>233</sup> *ibid* pp.255-6.

<sup>234</sup> *ibid* p.256.

<sup>235</sup> S. Maile and P. Hoggett (2001), ‘Best Value and the Politics of Pragmatism’, *Policy & Politics* 29, 4, 509-19, p.512.

central-local relations. Indeed, the breakdown of such managerial consensus was identified as one of the factors that led the central-local relationship to become more politicised during the 1980s and 1990s. In that regard, it is possible that the relationship is simply reverting to its pre-politicised state. It was also observed in chapter 2 that the development of professionalisation was central to the post-war managerial consensus. Recent research has discovered that both senior housing officers, at the level of policy development, as well as the professional body, the Chartered Institute of Housing, have largely accepted the government's position on housing management,<sup>237</sup> once again reinforcing the notion that housing management has returned to an apolitical position.<sup>238</sup>

A further indirect effect that is relevant to this thesis is the continued, and indeed increased, use of LSVTs since their introduction in 1985. As Mullen observes, Labour's stance on stock transfer shifted during its opposition years and, following its election in 1997, the policy of encouraging stock transfer has been maintained.<sup>239</sup> It is not the purpose of this thesis to investigate the relative merits of LSVTs. Nevertheless, the Government's enthusiasm for divesting local authorities of their housing stock is, it is submitted, relevant to the point being made throughout the thesis about indirect influences on local discretion. In chapter 1 LSVTs were identified, along with the Right to Buy (RTB), as being routes to 'privatising' council housing, in the sense of removing ownership from the local authority. However, the two instances need to be more closely examined in order to assess the impact on local discretion.

The significant effect of the RTB in reducing local authorities' housing stock (and consequently their allocation discretion) was explained in chapter 4. It goes without saying that the exercise by sitting tenants of their RTB does not relieve the authority of its statutory responsibilities to other housing applicants, albeit that the authority's ability to

---

<sup>236</sup> Somerville, 2001, op cit n.116 p.120. See also Vincent-Jones, 2001, op cit n.229.

<sup>237</sup> B.J. Franklin (2000), 'Demands, Expectations and Responses: The Shaping of Housing Management', *Housing Studies* 15, 6, 907-927, p.925.

<sup>238</sup> See also R.M. Walker, 'The Changing Management of Social Housing: The Impact of Externalisation and Managerialisation', (2000) *Housing Studies*, 15, 2, 281-299.

<sup>239</sup> T. Mullen, 'Stock Transfer' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, Policy Press, 2001) p.48. Whereas over the period between 1988 and Spring 2000 an average of fewer than 40,000 houses per year were transferred, the housing transfer programme announced for 1999/2000 anticipated that 140,000 houses would be transferred in that year alone. The Housing Green Paper states that the Government will support the transfer of up to 200,000 homes per year; DETR/DSS, 2000, para.7.19. At 7 March 2002 in total more than 597,000 homes had been transferred; Law Commission, 2002, op cit n.147 para.2.110.

meet that duty is necessarily limited by the diminution in its stock. Similarly, following a LSVT the authority retains its allocations responsibilities despite the fact that it might no longer own any housing stock. However, unlike under the RTB, following transfer the housing stock remains in the socially rented sector. Usually the transfer agreement provides for the local authority to have a certain percentage of nominations to the transfer landlord's stock; the two contracting parties decide the level of nominations. It is clear that the level at which the agreement is set can have a significant effect on local authorities' allocations discretion (and indeed their ability to meet their statutory duties under Parts VI and VII of the 1996 Act).<sup>240</sup>

It is worth noting at this point that the 1996 Act also requires housing associations to co-operate with local authorities in offering accommodation to people with priority on the authority's housing register,<sup>241</sup> and this duty applies irrespective of whether a LSVT has taken place. The obligation to co-operate is usually given effect by nominations agreements.<sup>242</sup> The Housing Corporation's Performance Standards place an expectation on housing associations that nominations agreements will provide for 50 per cent of vacancies to be available to the local authority, although higher levels of nominations may be appropriate in particular circumstances.<sup>243</sup> Thus, pre-transfer, a local authority will have 100 per cent nominations to its existing stock plus (usually) a minimum of 50 per cent nominations to one or more housing associations. Post-transfer, the local authority has the same statutory responsibilities but will have only a negotiated percentage nomination to the transfer authority's stock,<sup>244</sup> with a proportionate reduction in available vacancies (albeit that the transfer landlord's stock has increased).<sup>245</sup> Consequently, while LSVTs do not constitute the same diminution in the socially rented stock as does housing sold under the

---

<sup>240</sup> For the potentially adverse effect of transfer on the housing prospects of homeless people, see J. Bennett, *Out of Stock: Stock Transfer, Homelessness and Access to Housing* (London, Shelter, 2001).

<sup>241</sup> Housing Act 1996, s.170.

<sup>242</sup> Bennett, 2001, op cit n.240 p.5.

<sup>243</sup> Department for Transport, Local Government and the Regions, *Housing Transfer Guidance 2002* Programme (London, DTLR, 2002) section 15.7.

<sup>244</sup> Housing associations are not governed directly by the allocations scheme of the 1996 Act. However, they are required by the Housing Corporation's statutory housing management guidance to give priority to the same reasonable preference categories as those contained in the 1996 Act; Housing Corporation, *Performance Standards and Regulatory Guidance for Registered Social Landlords* (London, Housing Corporation, 1997) Standard F2, p.38.

<sup>245</sup> Bennett, 2001, op cit n.240 p.7.

RTB, nevertheless post-transfer it is almost inevitable that the authority's allocations discretion will be more limited.<sup>246</sup>

In summary, the measures described above may effectively constitute indirect methods of circumscribing local autonomy while maintaining the appearance of discretion within the housing allocations legislation. It will be recalled that chapter 4 reached a similar conclusion in relation to previous Conservative administrations.

## CONCLUSION

At the risk of repetition, the most striking feature of the 2002 Act debates is the consensus between the major political parties, as well as bodies such as the LGA and Shelter. The agreement extends to virtually all of the provisions,<sup>247</sup> including the desirability for a generous measure of local discretion. It was argued that while the 1996 Act displayed a relative consensus concerning the allocations provisions, the issue of local autonomy was barely discussed in the Commons. In that regard, the consensus displayed in the 1996 Act and that found in the 2002 Act cannot be directly compared. Furthermore, the agreement in 1996 was not freely expressed, but rather inferred from the lack of dispute concerning the extended and amended reasonable preference categories and the continued use of the reasonable preference formula itself. In the 2002 debates, the principle of, and desirability of, local autonomy is thoroughly aired.

The 1996 and 2002 Acts share many features in common, both prescriptive and discretionary. The 2002 Act maintains the allocations framework of its predecessor as well as the reasonable preference formula. To that extent, David Curry was correct when he asserted that the 2002 Act builds on the 1996 version. However, the tenor of the two Acts is completely different; the implicit threat of the regulation-making powers is removed in the 2002 Act. Furthermore, the sections of this chapter that explored alternative allocation

---

<sup>246</sup> Regardless of whether the authority transfers its stock, it has the option of contracting out certain allocations (and homelessness) functions; The Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996 No. 3205). However, the regulations specify that some elements of the allocations function cannot be contracted out; for example provisions regarding the process for adopting or altering an allocation scheme. Furthermore, the final responsibility for any act done by a contractor in exercise of a transferred function rests with the authority; Deregulation and Contracting Out Act 1994, s.72.

<sup>247</sup> Notwithstanding Shelter's opposition to the provisions concerning anti-social behaviour, discussed above.

systems and anti-social behaviour also appear to demonstrate the Government's commitment to the principle of local authority autonomy. Although the Government has clearly set out its policies on both areas, local authorities are nevertheless given considerable latitude within the legislation to develop and implement their own local responses.

However, it has been suggested that the effect of related policies (Best Value and LSVT) on local autonomy in housing allocations should not be overlooked. To that extent, the Labour Government has demonstrated the same tendencies as its Conservative predecessors. This observation tends to militate against the view that central-local relations have returned to the halcyon days of 'partnership' (if indeed such a period ever existed). It has been observed that while the overall central-local relationship may be more positive in tone than it was in the 1980s, "local government is by no means guaranteed more autonomy under New Labour".<sup>248</sup> Indeed, Tony Blair has made it clear that the Government is willing to intervene directly in local government affairs if local authorities fail to adopt the Government's modernisation agenda;<sup>249</sup> a chief component of which is enhancing service quality.<sup>250</sup>

---

<sup>248</sup> H. Atkinson and S. Wilks-Heeg, *Local Government from Thatcher to Blair* (Cambridge, Polity, 2000) p.268.

<sup>249</sup> Tony Blair speaking at the Labour Party's local government conference in February 1998; quoted in *ibid* p.266.

<sup>250</sup> *ibid* p.253.

## Chapter 7

# CONCLUSION

## INTRODUCTION

The introductory chapter of this thesis identified two primary objectives of the research. The first was to establish the nature and extent of the legal rules governing housing allocations and the degree of discretion they confer on local authorities. The second objective was to analyse the rationale for adopting those rules and particularly the connection between the adoption of those rules and the central-local relationship. It was hypothesised that a relationship exists between the status of central-local relations and the degree of discretion conferred on local authorities. This concluding chapter aims to draw together the findings of chapters 3 to 6 and to test them against the theoretical framework established in chapter 2.

The chapter begins by considering what has been learnt through this research concerning the nature of the legal and quasi-legal rules in this sphere of local authority activity and, specifically, whether the rules can be considered 'discretionary' according to the theoretical definitions examined in chapter 2. It then proceeds to review the rationale for adopting the rules in the context of the two models of the central-local relationship identified as offering the greatest analytic value to the thesis. A view is reached on whether the remarkable consistency of the housing allocations rules is mirrored by similar consistency on the principle of local autonomy. The chapter then moves on to consider the enduring appeal of the key statutory formula in housing allocations; 'reasonable preference'. It seeks to establish what inferences can be drawn from the maintenance of the reasonable preference formula over such a relatively long period. The chapter concludes by considering whether the longevity of the legal rules concerning housing allocations is adequately explained by either theory of the relationship between central and local government.

## **THE NATURE AND EXTENT OF THE LEGAL RULES**

As chapter 1 demonstrated, the traditional view is that local authorities have consistently been granted a wide degree of discretion in their housing management functions, including allocations decisions. The first aim of this thesis has been to discover whether this is a sustainable claim, through an examination of the legal and quasi-legal rules governing this area. Chapter 3 charted the origins of the legislation governing public sector housing allocations. The Housing Act 1924 introduced the key legislative formula that required local authorities to give a reasonable preference to certain groups of applicants. An examination of the parliamentary debates leading to the 1924 Act reveals that MPs were fully cognisant of the wide degree of discretion imported by this phrase. Indeed, criticisms were made at the time that it introduced too much discretion and that consequently local authorities would be able to circumvent Parliament's intention to give certain people a degree of preference in the application process.

The reasonable preference formula has been maintained in housing allocations legislation ever since. Adopting the legal theorists' definition of discretion as an absence or indeterminacy of rules, this fact alone justifies the claim of considerable local authority discretion in allocations decisions. Nevertheless, the legal obligations imposed on local authorities in this sphere have not remained totally static during the period from 1924 to 2002. Subsequent legislation has undoubtedly affected housing allocations in both direct and indirect ways. The focus of this thesis is on the direct methods of controlling local authority discretion in this area. However, it was emphasised in chapter 2 that, according to socio-legal definitions of discretion, it is necessary to look beyond the confines of the 'rules', since discretion can only properly be understood in its socio-political context. Consequently it would be simplistic to ignore the indirect effects of other related policies on local authorities' allocations activities. A significant finding of this thesis is the marked reluctance on the part of governments of both political persuasions to alter radically the degree of discretionary authority conferred on local authorities in this sphere. However, the thesis also indicates that local authorities' allocations activities have been substantially indirectly affected by successive government policies. The heterogeneity model of the

central-local relationship, which is explored in more detail below, particularly emphasises the importance of wider socio-political influences.

The Housing (Homeless Persons) Act 1977 is a prime example of legislation that directly modified local authorities' allocations responsibilities only relatively modestly but which, arguably, had a significant indirect impact on their ability to house applicants through the 'conventional' waiting list. Chapter 4 described how the Act required local housing authorities (as opposed to county councils' social services departments) to take the primary responsibility for housing those people found to be statutorily homeless. The 1977 Act effectively created two ways for applicants to access council housing. As far as allocations from the waiting list were concerned, the Act merely added a further category to the reasonable preference categories. However, indirectly the Act had a much greater impact on local authorities' housing allocations. It has been argued (particularly as a justification for amending the homelessness provisions) that the increase in applications for housing via the homelessness 'route' reduced the number of houses available to those applying via the housing waiting list (later the housing register). This is because the common practice of local authorities was to grant those people housed under the homelessness provisions a secure tenancy from the council's stock, although the legislation did not specifically require this. The 1977 Act undoubtedly circumscribed local authorities' discretion in housing allocations by obliging them to house statutorily homeless people. However, it also gave local authorities considerable discretion to interpret the key terms and therefore to determine who was 'genuinely' homeless and eligible for housing. In summary, then, the 1977 Act did have a significant effect on local authorities' discretion in this area. However, this was not achieved through the medium of greater legislative prescription. Indeed, a key feature was the use of a code of guidance to provide amplification of the vaguely worded legislation. The effect of such quasi-legislation is discussed in more detail below.

The Housing Act 1980 did not make any direct changes to the housing allocations legislation. However, in common with the 1977 Act, it had a profound indirect impact on local authorities' housing allocations as a result of the statutory Right to Buy (RTB) introduced by the Act. As was seen in chapter 4, the RTB resulted in a significant proportion of the overall council housing stock becoming 'privatised' through its sale to existing council tenants. This inevitably reduced the number of council properties that

were potentially available to new applicants, with a concomitant effect on local authorities' housing allocation decisions. The RTB also coincided with a virtual halt in the construction of new council housing owing to centrally imposed restrictions on local government spending. The circumscription of local authorities' discretion to allocate housing was, therefore, not achieved by direct means but occurred as a knock-on effect of related policy decisions.

The Tenants' Rights Etc. (Scotland) Act 1980, while mirroring many of the features of its English/Welsh counterpart, did contain a provision that affected local authorities' housing allocations in a much more direct way. It prohibited, for the first time, the imposition by local authorities of certain waiting list qualifications, for example the so-called residence qualification. There is no doubt, given the prevalence of such qualifications, that this provision did constitute a direct curtailment to local authorities' discretion. Furthermore, unlike the reasonable preference formula, the prohibition was contained in clear, unambiguous and directive terms. The introduction of the provision itself is noteworthy, in that it marks a departure (albeit limited) from the traditional approach of non-interference by central government. However, the more interesting issues are the reasons for adopting this provision and the Labour opposition's support for it. These reflected the ambivalent attitude displayed by both main political parties to the principle of local authority autonomy, discussed in more detail below.

At face value the Housing Act 1996 marked a distinct departure in legislative style from previous Acts, as shown in chapter 5, in that it instituted a much more detailed and prescriptive framework for the allocation of housing by local authorities. Furthermore, it introduced extensive and broadly drafted regulation-making powers for the Executive. However, the reasonable preference formula was maintained and the new reasonable preference categories introduced by the Act arguably gave local authorities greater, rather than less, discretion through the introduction of vaguely worded terms. Indeed, the claim that the 1996 Act maintained a high degree of discretion was explicitly recognised during the Act's parliamentary debates and has been borne out by subsequent empirical studies into the Act's implementation, which were also discussed in chapter 5. The 1996 Act is, therefore, a curious mixture of prescription and discretion and its importance lies in the fact that it might signal a change in the role of law within the central-local relationship. Whether this change supports the politicisation-juridification model of the central-local

relationship is discussed below. Chapter 2 explained that, according to this model, the role of law shifted from a background, facilitative role to a foreground, instrumental role.

The Homelessness Act 2002 shares many features in common with the 1996 Act, both prescriptive and discretionary. For example, it maintains the allocations framework of the 1996 Act as well as the reasonable preference formula. There are five new reasonable preference categories, two of which concern people to whom certain homelessness duties are owed. The remaining three categories are simplified versions of those contained in the 1996 Act. The 2002 Act does appear to justify the claims made during the parliamentary debates of offering local authorities considerable discretion in allocating their housing stock. It could be claimed that the maintenance of the reasonable preference phrase alone supports this argument. Also notable by their absence are the numerous and broad regulation-making powers that were such a prominent feature of the 1996 Act. It could not be argued that the 2002 Act represents a return to the legislatively unstructured pre-1996 era; the 2002 Act contains far greater detail than the Housing Act 1985. However, the tenor of the legislation is significantly less oppressive than the 1996 Act. Although both contain a combination of powers and duties, the emphasis in 1996 was on duties, whereas the balance in 2002 is with powers. The significance of the new Act is that it is the first piece of legislation to deal with the issue of housing allocations passed under a Labour government since the 1977 Act. As such, it provides a point of comparison with its immediate predecessor, the 1996 Act, and allows tentative conclusions to be drawn about whether the central-local relationship has changed since 1997. Chapter 6 concluded by doubting whether the new legislation signals a return to the halcyon days of 'partnership' in the central-local relationship (if indeed such a period ever existed); a point considered in the latter part of this chapter.

It has been emphasised that the reasonable preference phrase has formed the backbone of housing allocations legislation since 1924. Its inherently discretionary nature does not appear ever to have been doubted, politically, academically or judicially. The reasonable preference categories have been expanded and amended during the period from 1924 to 2002. However, the evidence suggests that the categories of applicant to whom such a preference must be given have also proved similarly discretionary. They have been memorably judicially described as linguistically elastic. In addition to the various statutory provisions enacted since 1924, numerous pieces of quasi-legislation have been published.

Chapter 1 argued that the various circulars and codes of guidance could at best have only a persuasive effect on local authorities because of their legally non-binding nature.

Furthermore, the parliamentary perception of the relative ineffectiveness of departmental circulars, in influencing local authorities' actions, is a recurring theme of this thesis. This is not to deny that quasi-legislation may contribute to a prevailing discourse. However, the analysis in chapter 5 of the empirical research into the implementation of the 1996 Act tended to suggest that quasi-legislation (and, indeed, legislation itself) was only one of the many factors to affect local authorities' actions.

In chapter 1 it was demonstrated that the received wisdom is that local housing authorities have traditionally been granted a high degree of discretion in deciding how to allocate their housing. The examination carried out in this thesis of the nature of the legal and quasi-legal rules governing allocations has not provided any basis on which to contradict this view. Indeed, the evidence suggests that the sphere of allocations has been highly legally discretionary. Housing allocations legislation thus appears to exemplify the legal theorists' definition of discretion, as an absence or indeterminacy of rules. However according to the socio-legal theorists' definition, discretion (its exercise or conferment) can only be understood by relating it to the broader socio-political context. Consequently, the thesis has considered the rationale for adopting the allocation rules and has attempted to locate the conferment of discretionary authority within a theoretical model of the central-local relationship.

## **THE CENTRAL-LOCAL RELATIONSHIP**

Chapter 2 analysed various models of the central-local relationship and identified two that offered the greatest analytic value to this thesis in their ability to test the hypothesis. They were, first, the heterogeneity model and secondly the politicisation-juridification model. If the latter model were valid, then this would support the hypothesis that there is a relationship between the status of central-local relations and the degree of discretion conferred on local authorities. Conversely, the validity of the heterogeneity model would tend to disprove the hypothesis and would suggest that developments in housing allocations legislation must be understood within the broader socio-political context, rather than simply in the context of the central-local relationship. Consequently, the thesis sought

to discover whether the conferment of discretionary authority, specifically in the sphere of housing allocations, could be satisfactorily explained by either of these models.

The politicisation-juridification model provides a very definite analysis of the way in which the central-local relationship has changed, particularly under successive Conservative administrations between 1979 and 1997. As the name suggests, the politicisation-juridification analysis contains two strands. The first is that the relationship between central and local government has become more politicised. The second is that the relationship has become juridified. These two strands will be considered separately in reverse order.

## **Juridification**

It was seen in chapter 2 that a distinctive feature of juridification is the desire (on the part of central government) to structure local authority discretion through the imposition of detailed statutory procedures on local authority decision-making. The implication is that legal rules become more instrumental in nature and form. In order to determine whether the central-local relationship has become more juridified in this sphere, it is useful briefly to summarise the conclusions reached concerning the function played by legal rules in housing allocations. In chapter 2 a number of possible functions of law within discretionary decision-making were highlighted at a theoretical level; for example, law as a legitimator of existing power relations or, alternatively, as a controlling or instrumental force. It was further postulated that law (both its presence and absence) might be used in a presentational way.

The preceding discussion of the nature of the legal rules governing housing allocations does not lead to the conclusion that they were intended to have an explicitly instrumental effect, in the sense of directing decision-makers' actions. The 1977 Act and the 1980 Scottish Act should perhaps both be treated as limited exceptions in this regard. The 1977 Act was clearly intended to have an instrumental effect, by requiring local housing authorities to assume responsibility for housing statutorily homeless people. However, the way in which this was effected reserved considerable power to local housing authorities to define who was 'homeless' and consequently owed the statutory duty. Furthermore,

although it was local authorities' standard practice to house such people under secure tenancies in their own housing stock, the legislation did not specifically oblige them to do so. This might be a rather simplistic argument, however. It could be argued that the cost of housing statutorily homeless people in the private sector would have been prohibitive and consequently the legislation left local authorities little choice but to use their own housing stock. A further way in which the 1977 Act might be regarded as exceptional is that it was envisaged that homeless applicants would account for a relatively small proportion of those seeking council housing. To that extent, the Act would have only a limited impact on local authorities' overall housing allocation decisions.

Similarly, the 1980 Scottish Act removed from local authorities the absolute power to exclude people who did not meet certain 'qualifications' (e.g. age, lack of residence within the local authority area) from either gaining access to the housing waiting list or from being allocated housing. However, the prohibition against waiting list qualifications was limited to the Scottish Act and while the proportion of council house tenancies in Scotland was high, compared to England and Wales, the absolute numbers were comparatively small; once again demonstrating the relatively limited impact of these rules.

Whereas the 1977 Act was aimed directly at only a relatively small proportion of those seeking housing from local authorities (or so it was originally thought), the 1996 Act might be thought to have moved towards a more instrumental approach for the entirety of local authorities' allocations. Indeed, the regulation-making powers contained within the Act certainly gave the potential for it to be used in this way. However, we have already seen that the 1996 Act was a mixture of prescription and discretion. It is submitted that the maintenance of the reasonable preference phrase alone militates against a simplistic analysis of the 1996 Act as exemplifying the process of juridification.

There appears to be no difficulty in identifying the juridificatory effects of some of the housing measures passed under Conservative governments of this era. The RTB, for example, falls squarely within its ambit. It was a statutory measure that directly removed local authorities' discretion to decide whether to sell council property to existing tenants. The legislation was worded in the most clear and unambiguous terms and was clearly intended to have an instrumental effect. Furthermore, the Act reserved to the Secretary of State broad powers of intervention which, despite protestations made at the time of the

Bill's parliamentary passage, were used against a supposedly dilatory local authority. However, the weight of the evidence suggests that the legal rules governing housing allocations were not intended to have an explicitly instrumental effect and this position has not changed under governments of different political persuasion. It should be noted that a recurring theme of chapter 2 was that the presence of legal rules does not imply a lack of discretion and *vice versa*. This, it was explained, is because legal rules are only one way and not necessarily the most important way in which discretion is constrained. In other words, the legal rules provide only a partial understanding.

## Politicisation

Turning now to the second strand within the model, that of politicisation, there appears to be little doubt that Conservative administrations from 1979 onwards translated highly politically controversial housing policies into practice through the medium of prescriptive legislation. Indeed, the RTB is a paradigm of the politicisation of the central-local relationship. However, the measures directly concerning housing allocations do not exhibit such a clear trend. On the contrary, a theme of this thesis is the apparent consensus concerning many of the issues surrounding allocations. Furthermore it has been demonstrated, through an analysis of the parliamentary debates, that the desirability for local authority autonomy is not associated exclusively with any of the main political parties. It is common for ministers to reject opposition parties' proposals for curtailing local authorities' discretionary decision-making in certain spheres (referring specifically to the desirability of maintaining local autonomy) while, simultaneously, taking action significantly to diminish local discretion in other related areas. Similarly, opposition parties have vehemently opposed the diminution in local discretion in some circumstances while supporting such measures in other areas. The position, therefore, is not clear-cut. Rather, the analysis of the parliamentary debates suggests a highly fragmented picture. This supports more closely the heterogeneity analysis than that of politicisation-juridification.

It would be simplistic, however, to reject completely the politicisation-juridification model in the context of housing allocations. The 1996 Act does exhibit certain juridificatory tendencies; the move to a more structured allocations framework and the creation of

numerous regulation-making powers. Indeed, as observed in chapter 5, the fact that the previous Conservative Government did not make use of the regulation-making powers may be attributable to the limited time between the enactment of the Act and the party's departure from office following the May 1997 general election. Nevertheless, it is submitted that the structure and content of the Act itself provides only a partial account. It was suggested above that the significance of the 1996 Act might lie in signalling a different role for law in the central-local relationship. In order to gain a more complete understanding of the central-local relationship, in the context of housing allocations, it is necessary to consider the inter-related questions of the rationale for adopting the rules and the role played by law in the central-local relationship.

## **RATIONALE FOR THE RULES**

It has been argued above that the reasonable preference formula is inherently discretionary, supporting the view that local authorities have been given a broad discretion in the allocation of their housing. Furthermore, the formula has been re-enacted in all housing allocations legislation between 1924 and 2002. Indeed, a recurring theme is the lack of change in housing allocations legislation and an apparently broad consensus between different political parties concerning the conferment of discretionary authority in this sphere. This conclusion casts doubt on the applicability of the politicisation-juridification analysis and raises a further question; have the two major political parties (while in government and opposition) displayed a consistent attitude towards the conferment of discretionary authority on local authorities? It might be expected that the maintenance of a statutory formula, acknowledged by both main political parties to be inherently discretionary, would indicate a consistent stance in this respect. After addressing this question, it is necessary to consider possible explanations for the relative lack of change in the statutory rules and, particularly, the enduring appeal of the reasonable preference formula.

Such discussion that exists on the rationale for adopting the housing allocations provisions in the 1924 Act suggests that there was a general desire to leave day-to-day allocations decisions to local authorities. Indeed, chapter 3 observed that the original draft of the 1924 Act contained no limitations on allocations at all. The reasonable preference formula was

introduced as an amendment, apparently to stave off a Liberal amendment (concerning the rent to be charged by local authorities) that the Government found even less appealing. The Housing Acts of 1930 and 1935 are both also characterised by an apparent inter-party consensus that local authorities should be accorded a wide measure of discretion in conducting their housing management functions. Differences of opinion did exist but the differences were not at a level of principle. Furthermore, it appears that the local authorities and their representative associations were widely consulted on measures affecting them. Indeed, the level of co-operation was such that one MP accused the minister of having formed a 'mutual admiration society' with the local authorities. However, it is open to question whether the willingness to confer considerable discretion on local authorities was a matter of principle or, rather, political pragmatism; a *quid pro quo* for the co-operation of the local authorities in building new housing. There is also insufficient evidence to draw a conclusion concerning the efficacy of the role of the local authority associations in lobbying for their member authorities' interests.

As discussed above, the 1977 Act is in some respects distinguishable from the 'normal' Housing Acts, in that it was aimed at ameliorating the scourge of homelessness. Consequently, the rationale was to cure this specific evil and discussions were largely based around issues of practicality. Debates on the principle of local autonomy are rare. Nevertheless, it is relevant that the final legislative formula adopted reflected to a large degree the wishes of the local authorities, rather than those acting on behalf of homeless people. While there are frequent references to consultation with local authorities and their associations, and evidence to suggest that both were extremely effective in making their concerns felt, it is not possible to attribute their relative success unequivocally to respect for the institution of local government. Indeed, it was observed in chapter 4 that the apparent power wielded by the authorities and their associations may be attributable both to the fact that their views coincided with those of the Opposition and the vulnerability of the Government because of its minority status.

The two Housing Acts of 1980 provide a much clearer indication of the inconsistent and fragmented attitude of both political parties to local authority autonomy. It was described above and in chapter 4 that the Scottish Act contained a new prohibition on the imposition by local authorities of certain waiting list qualifications. Until then, governments of both political persuasions had demonstrated a marked reluctance to legislate on this issue,

despite the publication of successive reports highlighting the detrimental effect of such qualifying criteria. Of even greater interest is the fact that the provision was included only in the Scottish Act; attempts by the Opposition to introduce an equivalent measure in the English/Welsh Act were resisted by the Government. Perhaps even more telling is the Government's ostensible rationale for such resistance; the preservation of local autonomy. Despite the undoubted (albeit numerically relatively limited) incursion into local autonomy resulting from this provision, there are no discussions on the principle of local autonomy. This is because the Labour Opposition supported its inclusion. This point highlights a further theme of the thesis; the tendency of both political parties to invoke the principle of local autonomy selectively, depending on whether they support or oppose the particular measure.

The debates leading to the Housing Act 1980 show a concern among many MPs that the local authorities and their associations had not been consulted adequately on the Act's most important provision, the RTB. Even where such consultation had taken place, the associations' views were given scant regard. Such a state of affairs corresponds with the general arguments in chapter 4 that the associations' relationship with central government seriously deteriorated under the Thatcher Governments. Notwithstanding the veracity of that general proposition, it is too simplistic a view. Writing as early as 1968,<sup>1</sup> Walkland observed that "when a Bill has a party political origin, and when it features prominently in the mandate which the party has secured from the electorate, then the authority of the relevant organized groups is at a minimum."<sup>2</sup> Griffith's study of the impact of the Committee stage on government policy in two parliamentary sessions also concluded that governments are not often swayed from their original intentions.<sup>3</sup>

The RTB clearly fits Walkland's criteria; it was a highly party political measure on which the Conservative Party had fought the 1979 general election and had secured a national mandate. Furthermore, there were aspects of the Housing Act 1980 that dealt with management issues, upon which the associations had obviously been consulted. This is not to deny that the relationship between central government (specifically the Department of

---

<sup>1</sup> This period has been classified (in chapter 2) in terms of the central-local relationship as 'consensual' and 'cooperative'.

<sup>2</sup> S.A. Walkland, *The Legislative Process in Great Britain* (London, Allen & Unwin, 1968) p.41.

<sup>3</sup> J.A.G. Griffith, *Parliamentary Scrutiny of Government Bills* (London, Allen & Unwin, 1974) p.203.

the Environment) and the local authority associations did change after 1979, but to caution against an over-simplification of the nature and form of that change.

The first impression one receives from the debates of the 1996 Act is of high political tension and vehemently expressed opposition. However, on closer examination there appears to have been a great deal of agreement concerning many of the allocations provisions. There is no discussion around the maintenance of the reasonable preference formula and an Opposition amendment concerning the reasonable preference categories differed only from the Government provision by its inclusion of statutorily homeless people. The interesting point, as far as this thesis is concerned, is the lack of debate around the principle of local authority autonomy. Indeed, the issue appears to have been virtually irrelevant to MPs of all parties; the Lords being the only forum in which the principle was debated. Sitting somewhat uncomfortably with the preceding observations concerning consensus is the apparent desire by the Government to 'nationalise' standards of council housing. This objective was translated into practice through the inclusion of the broad regulation-making powers, discussed above. However, even on this question there was little discussion on any point of principle. Indeed, in common with the 1980 Scottish Act support for, or opposition to, the regulation-making powers appeared to depend on the specific provision in question.

The 2002 Act stands in quite dramatic contrast to the 1996 Act on the question of local autonomy. Chapter 6 described how this issue was thoroughly aired and support for it claimed by all parties. Indeed, the Government's rationale for the scheme of the Act was to give local authorities as much freedom as possible, within a broad statutory framework. Nevertheless, while many of the regulation-making powers of the 1996 Act are absent, the 2002 Act contains a combination of powers and duties. Given the rather prescriptive framework of the 1996 Act, the Conservatives' support for the 2002 Act might be thought surprising. However, it will be recalled that during the debates of the 1996 Act the Conservative Government consistently claimed that the Act constituted a broad framework, within which local authorities were free to exercise their discretion. Indeed, a common feature of both legislative measures is local authorities' ability to decide whether to exclude applicants from the housing register. Under the 1996 version local authorities had the power to define broad categories of people who could be excluded, whereas the 2002 Act permits the exclusion of individual applicants from the housing register because

of their (anti-social) behaviour. In this context, the 1996 Act was largely directed at a class of (potential) applicants; specifically the 'undeserving' homeless. To that extent, the issue of local autonomy for both main political parties was very much a side-issue during the parliamentary debates. By contrast, the 2002 parliamentary debates display a much greater focus on local autonomy and, specifically, its desirability in relation to housing allocations. This is true of all three main political parties.

This distinction leads onto the question of whether the central-local relationship has changed since the election of the Labour Government in 1997, and its subsequent re-election in 2001. It has been alluded to above that certain of the allocations provisions contained in the 1996 and 2002 Acts manifest a different attitude by central government towards local authorities. Indeed, we have seen above and in chapter 6 that the 2002 Act, while not marking a return to the pre-legislative days of the Housing Act 1985, does appear to promote a certain amount of local autonomy. It was observed in chapter 6 that although the Government clearly favours the adoption by local authorities of so-called 'alternative' allocations policies, it has not prescribed by statute any particular format. To this extent, local authorities are to retain a considerable degree of discretion concerning their allocations policies and practices. Furthermore, the abolition of the requirement for local authorities to maintain a housing register is intended to allow authorities to depart from traditional allocations schemes. It also appears that the local authorities' representative body, the Local Government Association (LGA), was fully consulted and, further, that the provisions relating to anti-social behaviour emanated largely from the localities. Whether this influence is attributable solely to the LGA's new status as the single representative body was doubted in chapter 6 and is returned to below. Notwithstanding the ostensibly more positive central-local relationship evidenced by the Homelessness Act 2002, this thesis has consistently stressed the need to look at the wider socio-political backdrop in order to gain a more complete understanding of the relationship between central and local government; a point that is developed in relation to the Labour Government below.

To summarise the preceding discussion, the rationale for adopting the specific rules on housing allocations is rarely explicitly articulated. The desirability, or otherwise, for the principle of local autonomy is a subject that has waxed and waned over the period. In the parliamentary debates of some Acts it is a central theme while in others it is hardly mentioned, much less rigorously debated. Furthermore, the key statutory formula,

reasonable preference, appears not to have been debated since its initial appearance in 1924 when it seems to have been adopted somewhat fortuitously. The conclusion reached, therefore, is that neither of the two main political parties has exhibited a consistent approach towards the issue of local autonomy. Indeed, as was observed above, support for the principle changes according to the subject matter at issue. One particularly vexatious question is why successive governments have historically consistently failed to intervene to prohibit 'bad' management practices, such as the imposition of waiting list/housing register qualifications in England and Wales, despite the apparently widespread parliamentary support for such action.

From the observation of governmental inconsistency flows a second more fundamental point; that the principle of local autonomy is frequently subservient to other policy considerations. This conclusion is further supported by an examination of the local authority associations' ability to influence the policy-making/legislative process, which is summarised below. Collectively, these conclusions tend to support the heterogeneity model of the central-local relationship that emphasises the broader socio-political influences on central governments' decision to confer or limit discretionary authority.

Throughout this thesis, the ability of local authorities and their representative associations to influence government policy and legislation has been examined. A number of points emerge from this analysis. Perhaps the most important is that it is fallacious to speak of the 'voice of local government'. It will be recalled that the heterogeneity model held that it was similarly an over-simplification to speak of 'central government' as a single entity. Local government is disparate with widely differing interests. Disagreements exist not only between the various associations but also within them, where the association represents different types of authority. This has necessitated a measure of compromise and may have led the associations to remain silent on contentious issues. It has also meant that the associations have not always been able to command total support from their member authorities and their ability to influence central government may have been consequently diminished. It is also possible that the differences within and between the associations have enabled central government to play them off against each other, for its own ends.

A further conclusion concerning the local authority associations is that a pre- and post-1979 dichotomy is also an over-simplification. Disagreements existed before 1979 and

commentators have suggested that during the immediate post-war period, the associations were largely preoccupied with the subject of local government reform, over which there was bitter and protracted inter-association conflict.<sup>4</sup> Indeed, it is possible their relative ineffectiveness can be attributed, at least in part, to this state of internecine conflict. The extent to which the emergence of a single body, the LGA, has overcome these deficiencies has been considered. It was argued in chapter 6 that the LGA's influence may stem from the fact that its views apparently largely coincided with those of the Government (and, indeed, the Opposition). Rhodes has claimed that once government has decided to act, the associations are unable to change the principles of that legislation.<sup>5</sup> This view is echoed by Isaac-Henry who believed that the associations do not appear to be an exception to the general rule which applies to pressure groups in Britain: namely that, once a policy has been decided on by a government, groups rarely change the basic principles although they sometimes affect changes in detail.<sup>6</sup>

## THE ENDURING APPEAL OF REASONABLE PREFERENCE

The conclusions reached thus far are that the conferment of discretionary authority on local authorities is not associated exclusively with either of the political parties, attitudes towards such conferment have not remained constant, and the local authorities (and their associations) have been relatively powerless in influencing government policy in this sphere. Nevertheless, there has been relatively little change in housing allocations legislation between 1924 and 2002. This is despite the fact that the role of council housing has changed dramatically over this time.<sup>7</sup> This lack of change again tends to undermine the politicisation-juridification model of the central-local relationship in the context of housing allocations legislation. According to that model, the central-local relationship changed in fairly dramatic ways under Conservative governments from 1979 onwards.

<sup>4</sup> See for example: W. Robson, *Local Government in Crisis* (London, Allen & Unwin, 1966); R. Leach, 'Local Government Reorganisation RIP?' 1998) *Political Quarterly*, 69, pp.31-40.

<sup>5</sup> R.A.W. Rhodes, *Beyond Westminster and Whitehall: The sub-central governments of Britain* (London, Unwin Hyman, 1988) p.199.

<sup>6</sup> K. Isaac-Henry, 'The English Local Authority Associations' in G.W. Jones (ed.), *New Approaches to the Study of Central-Local Government Relationships* (Farnborough, Gower, 1980) p.56.

<sup>7</sup> However, it should be noted that the reasonable preference categories have been amended to reflect, at least in part, council housing's changing role; from housing the skilled and relatively affluent working class in

The relatively minor changes in housing allocations legislation leads to a further question; whether the function of legal rules within housing allocations has remained static during the period under examination.

As discussed in chapter 2, law may play a variety of roles; an instrumental function (in the sense of directing the actions of those concerned) being just one of the possibilities. It was argued that the primary role of law in central-local government relations during the post-World War II period was to facilitate the establishment of a constitutive structure within which central departments and local authorities could negotiate and bargain. One feature of the politicisation-juridification model is that law has moved from a background (facilitative) to a foreground (instrumental) role. However, the point made above is that an analysis of the statutory and quasi-legal constraints on housing allocations does not display an instrumental approach; moreover this has not changed substantially since 1924. Indeed, it was argued that this is one of the weaknesses of the politicisation-juridification model in relation to housing allocations. However, this does not necessarily mean that the function of law within the relationship has remained constant. On the contrary, it is argued that the function of law has changed but in a more subtle way.

It has already been noted that the most controversial feature of the 1996 Act (as far as housing allocations was concerned) was the removal of statutorily homeless people from the reasonable preference categories. However it was acknowledged, even during the Bill's parliamentary passage, that in practice homeless people would almost invariably fall within one of the other, expanded reasonable preference categories. This view is supported by an analysis of the empirical studies into the implementation of the 1996 Act. It could be argued, therefore, that in removing this particular category from the legislation, the Government was not in reality seeking to prevent local authorities from housing statutorily homeless people in secure council accommodation. An alternative view is that this change in the law exemplifies the presentational use of legal rules that was discussed in chapter 2; in essence that governments use rules to give the appearance of taking action or in order to enhance the perceived legitimacy of decisions. The 1996 Act re-opened the debate, dating back at least to the Poor Laws, concerning the deserving/undeserving poor dichotomy. During the mid-1970s, the debates were reinvigorated by the 1977 Act through notions of

---

the 1920s, to slum clearance in the 1930s, general needs housing in the 1940s, 1950s and 1960s, to become the residualised service it is today, providing housing for the poorest and most disadvantaged people.

‘intentionality’. The debates resurfaced once again under John Major’s leadership of the Conservative Government in the lead up to the 1996 Act and have arguably continued into the 2002 Act. Chapter 6 demonstrated that the focus of attention under the 2002 Act has shifted from homeless people to those accused of ‘anti-social behaviour’. Indeed, the Act provides local authorities with three separate opportunities to exclude applicants from housing because of their anti-social behaviour.

However, an important difference exists between the 1996 and 2002 Acts in respect of the role played by law within the central-local relationship. The removal of homeless applicants from the reasonable preference categories appears to have been inspired by the Government’s political and moral agenda, exemplified by the ‘Back to Basics’ campaign of the early-to-mid 1990s. The parliamentary debates of the 1996 Act do not demonstrate strong support by local authorities for these changes to the law. By contrast, the provisions contained in the 2002 Act appear to emanate from local government or, at the very least, to be strongly supported by it. This conclusion is relevant to the issue of local authorities’ relationship with central government, their ability to influence the policy-making/legislative agenda and the role of law within the central-local relationship. In relation to the latter point, it was observed in chapter 6 that the anti-social behaviour provisions are expressed as powers rather than duties; i.e. local authorities may choose whether to exclude applicants on the basis of their behaviour. By contrast, the 1996 Act explicitly removed homeless people from the reasonable preference categories. If local authorities wished to continue to house such people, it was necessary to do so by virtue of their gaining priority under another reasonable preference category.

There appears to be plausible evidence to suggest that the role of law within the central-local relationship did change under the 1996 Act. However, this shift does not support the politicisation-juridification model of the central-local relationship. If this model cannot provide an adequate account, it is necessary to consider alternative explanations for the relative lack of change in the statutory provisions governing housing allocations. One such explanation is that housing allocations has attracted relatively little political attention, at least initially. The parliamentary debates of the early Housing Acts demonstrate clearly that the focus was on the production of housing, rather than its subsequent management. The evidence appears to suggest that little thought was given to the question of how local authorities would allocate the housing built with the aid of public subsidy. Such discussion

as exists suggests that central government's granting of significant discretionary authority in this area was a *quid pro quo* for local authorities' assumption of the primary responsibility for the construction of housing for the working classes. The debates reveal that MPs were far more concerned about the question of rents. There is a strong theme running through the debates of the early legislation that the effectiveness of requiring local authorities to give certain specified groups a reasonable preference was limited by the ability of potential tenants to pay the rent.

As far as later governments are concerned, there appears to be little doubt that successive Conservative administrations from 1979 onwards pursued a radical agenda of reforming local government; specifically with regard to the provision of services traditionally delivered by local authorities, including housing. That Conservative administrations of 1979 to 1995 did not attempt to intervene directly in housing allocations, despite enjoying healthy parliamentary majorities,<sup>8</sup> could be interpreted as signalling a respect for the principle of local autonomy. However, it is submitted that the lack of substantial intervention does not necessarily signify central government's commitment to the preservation of local discretion. Two alternative explanations are tenable. The first is that the maintenance of the reasonable preference formula may owe as much to legislative momentum as it does to a positive commitment to local autonomy. Secondly, in practice local authorities' discretion in this sphere was constrained by a variety of other measures, making direct interference otiose. As regards the first point, Cranston observes that just as institutions develop a momentum, so too does legislative form and once a particular approach is adopted there are incentives for it to be continued. This may be the property of lethargy, a reluctance to think out new legal approaches, or of familiarity with the existing approach by its administrators.<sup>9</sup> That the reasonable preference formula does not appear to have created serious problems since its inception (administratively, politically or judicially) surely constitutes a valid reason for its preservation. This observation supports the heterogeneity model of central-local relations, according to which the rules adopted do not necessarily reflect a coherent or rational approach.

---

<sup>8</sup> Ironically, the most direct reform of housing allocations was enacted under John Major's wafer-thin majority.

<sup>9</sup> "Rather than being rationally related to its ostensible goals, regulation comprises an accretion of provisions from different historical periods"; R. Cranston, *Legal Foundations of the Welfare State* (London, Weidenfeld and Nicolson, 1985) pp.120-1.

A further explanation for the relative lack of change within housing allocations is one that has been highlighted throughout this chapter; that successive governments (particularly since 1979) have circumvented local authorities' discretion by indirect rather than direct means. This indirect interference is not confined to Conservative administrations. There is evidence to suggest that the Labour governments of 1997 and 2001 are pursuing with equal enthusiasm similar tactics, albeit presented in a different form.<sup>10</sup> A point of continuity between the Government and previous Conservative governments is the 'privatisation' of council housing stock via Large Scale Voluntary Transfers (LSVTs), introduced originally by the Housing Act 1985. Indeed, as the Conservative spokesperson on housing, Nigel Waterson, melodramatically remarked during the Homelessness Bill debates, the 'death' of council housing by virtue of LSVTs could occur during the lifetime of the current Government.<sup>11</sup> It might reasonably be thought that the combined effect of the RTB and LSVTs has been to reduce the total number of local authority tenancies allocated annually under the 1996 Act and, consequently, to diminish the political and practical significance of the allocations provisions. Lord Falconer, as Housing Minister, indirectly conceded this point during the 2002 debates.<sup>12</sup> However, a closer examination of the statistics does not support such a clear-cut picture. The total number of lettings to new tenants has indeed diminished during the period 1979/80<sup>13</sup> to 2000/01.<sup>14</sup> However, the number of local authority nominations to Registered Social Landlords (RSLs) (also governed by the 1996 Act<sup>15</sup>) has substantially increased.<sup>16</sup> Furthermore, the Homelessness Act 2002 for the first time extends the provisions on allocations to existing tenants (i.e. transfers), rather than limiting them to new tenants.<sup>17</sup> While the number of allocations to existing tenants has

<sup>10</sup> B. Mauthe, 'The Politicalisation of Social Rents' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001). Mauthe observes that the Green Paper proposals may represent an extension of the process of juridification as far as local authorities are concerned; p.309.

<sup>11</sup> HC Debs, Standing Committee A, col. 9, 10 July 2001. See also T. Mullen, 'Stock Transfer' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, Policy Press, 2001). Cole and Furbey predicted in 1994 that by 2000 council housing would have become an historical relic; I. Cole and R. Furbey, *The Eclipse of Council Housing* (London, Routledge, 1994) p.1.

<sup>12</sup> In response to an amendment to change the name of the measure to the Homelessness and Housing Allocations Act, the Minister stressed that the Act's principal purpose was to deliver the Government's manifesto commitment to strengthen the homelessness safety net. The allocations provisions were simply "other issues" that had been included in the Bill; HL Debs, col.CWH66, 10 December 2001.

<sup>13</sup> The date that statistics on allocations were apparently first published.

<sup>14</sup> In 2000/01 52,200 fewer tenancies were allocated than in 1979/80; S. Wilcox, *Housing Finance Review 1995/96* (York, Joseph Rowntree Foundation, 1996) table 87a and Office of the Deputy Prime Minister, *Housing Statistics 2001* (London, ODPM, 2002) table 4.2; available via the departmental website [www.housing.odpm.gov.uk](http://www.housing.odpm.gov.uk).

<sup>15</sup> Housing Act 1996, s.159(2)(c).

<sup>16</sup> From 31,309 in 1991/92 to 67,923 in 2000/01; *ibid* ODPM, 2001, *op cit* n.14.

<sup>17</sup> Homelessness Act 2002, s.13 amends Housing Act 1996, s.159(5).

decreased,<sup>18</sup> nevertheless in 1999/00 they amounted to 118,400.<sup>19</sup> Taking the three figures together (allocations to new tenants, nominations to RSLs and allocations to existing tenants) the total number of allocations made by local authorities in 1999/00 was in the region of 415,000; a not insubstantial number.

The second way in which the Government may be seen to be employing indirect methods of controlling local authority autonomy is through what Vincent-Jones has characterised as the 'responsibilisation' of local government. The Government has made it clear that greater powers for local government are linked to it embracing the Government's modernisation agenda.<sup>20</sup> The relevance of the 'Best Value' regime in this context was examined in chapter 6. It is too soon to reach any firm conclusions about the implications of Best Value for housing allocations. However, chapter 6 tentatively suggested that the requirement for local authorities to achieve managerial efficiency might result in the adoption of more market-based 'lettings' policies. Since the Government favours such schemes (although the 2002 Act is not prescriptive in this regard), Best Value might be seen to constitute a further indirect method of controlling local authorities' activities.

## CONCLUDING REMARKS

Returning to the hypothesis, the evidence adduced by this thesis suggests that it is invalid; the state of the central-local relationship does not appear to be the primary determinant in the decision to confer greater or less discretion on local authorities at the level of housing allocations. The primary conclusion of this thesis is that the changes and perhaps more importantly, the *lack* of changes, in housing allocations legislation can only be understood by reference to the broader socio-political background; not simply the relationship between central and local government. This finding is closely associated with the heterogeneity model. That model suggested that a single theory that attempts to explain the entirety of central-local relations is not possible, since central government departments vary in their attitude to local authorities and behave differently in response to varying socio-political

<sup>18</sup> From 184,000 in 1982/83 to 118,000 in 1999/00; Wilcox, 1996, op cit n.14 table 86 and ODPM, 2002, op cit n.14 table 4.2.

<sup>19</sup> ODPM, 2002, op cit n.14 table 4.2.

<sup>20</sup> H. Atkinson and S. Wilks-Heeg, *Local Government from Thatcher to Blair* (Cambridge, Polity, 2000) p.268.

circumstances. Under the heterogeneity model, the socio-political background becomes the prime focus of attention since the conferment of discretionary authority can only be understood within its context.

While certain housing policies of the period exemplify the inter-related processes of politicisation and juridification, applied by Loughlin to the central-local relationship, the specific case of housing allocations does not fit squarely within this model. The most obvious question that leads from this conclusion is the explanation for this phenomenon. There are, it is submitted, two possible (related) conclusions; either that the theory is too broadly stated or that central-local relations in the sphere of housing allocations are atypical. There is some support for the first proposition. Chapter 4 identified research within other areas of housing management that limited the scope of the politicisation-juridification model.<sup>21</sup> More generally, commentators have pointed to the diversity that continues to exist in local policies, again militating against the politicisation-juridification model.<sup>22</sup> There also appears to be evidence to support the second proposition; for example, the private law origins of the landlord-tenant relationship, the fact that public housing has never attained the same universality as other locally provided services, such as health or education. However, it is submitted that any over-arching theory must deal adequately with both the typical and exceptional cases.

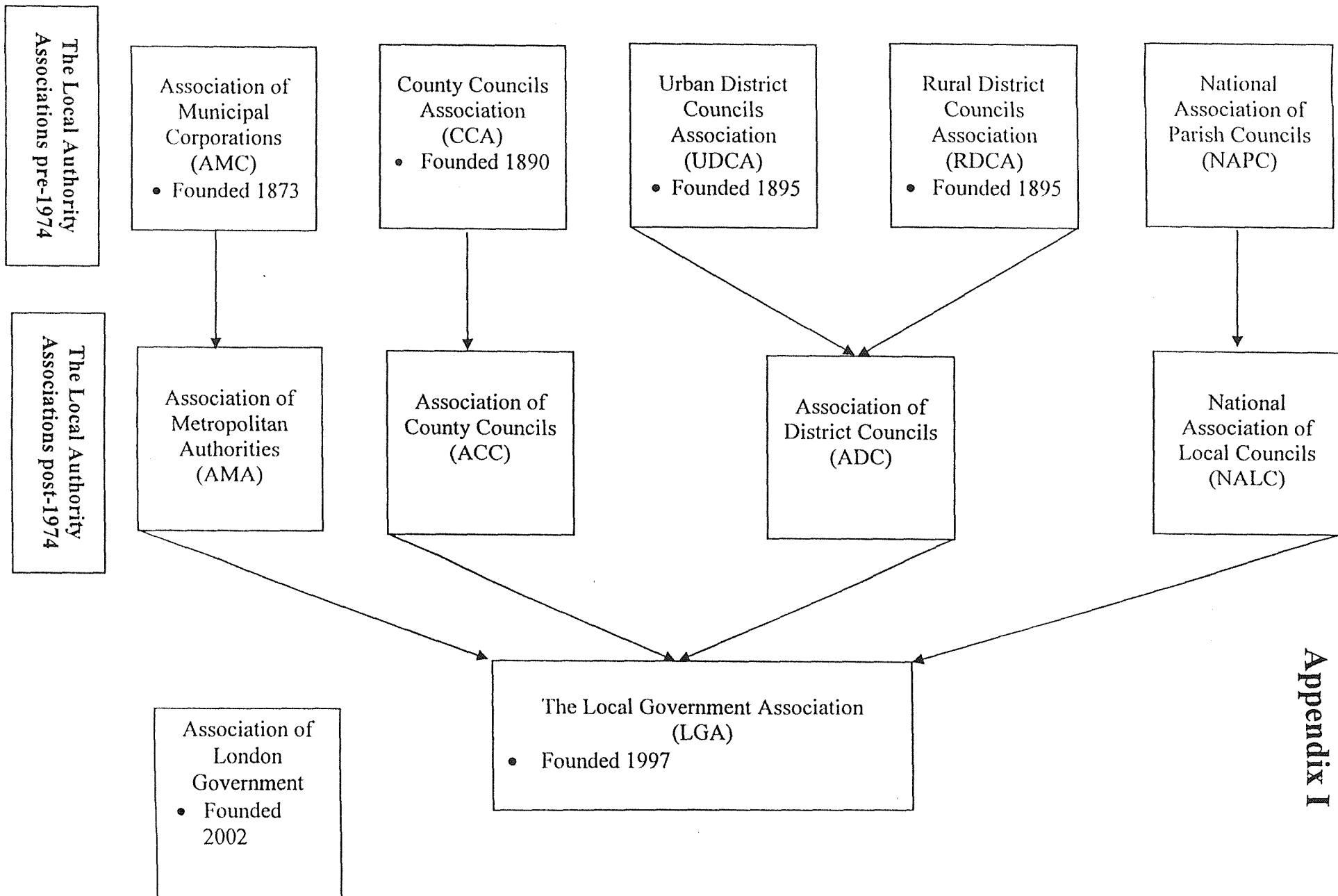
---

<sup>21</sup> On the subject of CCT, see also B. Mauthe, 'The Notion of Rules and Rule-Making in the Central-Local Government Relationship' (2000) *Anglo-American Law Review*, 29, 3, 315-341. On LSVT see Mullen, 2001, *op cit* n.11.

<sup>22</sup> Atkinson and Wilks-Heeg, 2000, *op cit* n.20 p.78; P. John, *Recent Trends in Central-Local Government Relations* (London, Policy Studies Institute, 1990) p.18.

## Appendix I

244



## Bibliography

Adler, M. and Asquith, S., 'Discretion and Power' in M. Adler and S. Asquith (eds.), *Discretion and Welfare* (London, Heinemann, 1981).

Adler, M., 'Decision-making and Appeals in Social Security: In Need of Reform?' (1997) *Political Quarterly*, 68, 388-405.

Agnew, J., 'Allocations: But Not As We Know It' (2001) *Adviser*, September/October.

Alder, J., 'Incommensurable Values and Judicial Review: The Case of Local Government' (2001) *Public Law*, 717-735.

Arden, A. and Hunter, C., *Homelessness and Allocations: A Guide to the Housing Act 1996 Parts VI and VII* (London, Legal Action Group, 1997).

Association of District Councils, *Report of Annual Meeting and Conference* (London, ADC, 1974).

— *Report of Annual Meeting and Conference* (London, ADC, 1976).

— *Report of Annual Meeting and Conference* (London, ADC, 1981).

— *Report of Annual Meeting and Conference* (London, ADC, 1984).

Atkinson, H. and Wilks-Heeg, S., *Local Government from Thatcher to Blair* (Cambridge, Polity, 2000).

Atkinson, R. and Kintrea, K., 'Owner-occupation, Social Mix and Neighbourhood Impacts' (2000) *Policy & Politics*, 28, 1, 93-108.

Bacon, N., 'Model Choice?' (2001) *ROOF*, January/February.

— *Access Denied* (London, Shelter, 1998).

Baggott, R., *Pressure Groups Today* (Manchester, Manchester University Press, 1995).

Baldwin R. and Houghton, J., 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) *Public Law*, 239-284.

Baldwin, J., Wikeley N. and Young, R., *Judging Social Security* (Oxford, Clarendon, 1992).

Baldwin, R. and Hawkins, K., 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law* 570.

Baldwin, R., 'Rules and Alternatives' in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25th Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995).

Ball, A. and Millard, F.A., *Pressure Politics in Industrial Societies: A Comparative Introduction* (Basingstoke, Macmillan, 1986).

Baker, K., *The Turbulent Years* (London, Faber, 1993).

Barratt Brown, M. and Coates, K., *The Blair Revelation: Deliverance for Whom?* (Nottingham, Spokesman, 1996).

Bell, J., 'Discretionary Decision-Making: A Jurisprudential View' in K. Hawkins (ed.), *The Uses of Discretion* (Oxford, Clarendon Press, 1992).

Bennett, J., *Out of Stock: Stock Transfer, Homelessness and Access to Housing* (London, Shelter, 2001).

Blake, J., 'Exclusion Units' (1997) *ROOF*, November/December.

Bowley, M., *Housing and the State 1919-1944* (London, Allen and Unwin, 1945).

Bridgen P. and Lowe, R., *Welfare Policy Under the Conservatives 1951-1964* (Kew, Surrey, PRO Publications, 1998).

Bright S. and Gilbert, G., *Landlord and Tenant Law: The Nature of Tenancies* (Oxford, Clarendon, 1995).

Brown, T., Hunt, R. and Yates, N., *Lettings: A Question of Choice* (Coventry, Chartered Institute of Housing, 2000).

Budge, I., Crewe, I., McKay, D. and Newton, K., *The New British Politics* (Harlow, Addison Wesley Longman, 1998).

Burnett, J., *A Social History of Housing 1815-1970* (London, Methuen, 1978).

Burney, E., *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Winchester, Waterside Press, 1999).

Butcher, H., Law, I.G., Leach, R. and Mullard, M., *Local Government and Thatcherism* (London, Routledge, 1990).

Butler, S., *Access Denied* (London, Shelter, 1998).

Campbell, R., 'Homelessness Act 2002 – Strengthening the Safety Net and Restoring Discretion' (2002) *Legal Action*, July, 28-30.

Card, P., 'Managing Anti-social Behaviour – Inclusion or Exclusion?' in D. Cowan and A. Marsh (eds), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001).

Central Housing Advisory Committee, *Management of Municipal Housing Estates*. Second Report of the Housing Management Sub-Committee of CHAC (London, HMSO, 1945).

— *Selection of Tenants and Transfer and Exchanges*. Third Report of the Housing Management Sub-Committee of CHAC (London, HMSO, 1949).

— *Residential Qualifications*. Fifth Report of the Housing Management Sub-Committee of CHAC (London, HMSO, 1955).

— *Council Housing Purpose, Procedures and Priorities*. Ninth Report of the Housing Management Sub-Committee of CHAC (London, HMSO, 1969).

Central Policy Review Staff, The, *Relations Between Central Government and Local Authorities* (London, HMSO, 1977).

Chadwick, E., *Report on the Sanitary Conditions of the Labouring Population and on the Means of its Improvement* (1842), edited by M.W. Flinn (1965) Edinburgh.

Chinkin, C., 'Local Authority Response to the Local Ombudsman' (1979) *Journal of Planning and Environment Law*, 441-448.

— 'Power of the Local Ombudsman Re-examined' (1980) *Journal of Planning and Environment Law*, 87-93.

Cloke, P., Milbourne, P. and Widdowfield, R., 'Change but no Change: Dealing with Homelessness under the 1996 Housing Act' (2000) *Housing Studies*, 15, 5, 739-756.

Cochrane, A., *Whatever Happened to Local Government* (Buckingham, Open University Press, 1993).

Cohen, S., *Folk Devils and Moral Panics* (London, MacGibbon and Kee, 1972).

Cole, I. and Furbey, R., *The Eclipse of Council Housing* (London, Routledge, 1994).

Cole, I., *Estate Profiling and Community Balance* (Sheffield Hallam Centre for Regional Economic and Social Research, 1998).

Commission for Local Administration, *Annual Report of the Commission for Local Administration for the year ended March 31, 1978*.

— *Digest of Cases 1997*.

Committee of the Management of Local Government, *Management of Local Government Vol. 1* (The Maud Report), Ministry of Housing and Local Government (London, HMSO, 1967).

Committee on Housing in Greater London, *Report of the Committee on Housing in Greater London*. Cmnd. 2605 (London, HMSO, 1965).

Cooper, D., 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) *Journal of Law and Society*, 22, 4, 506-526.

Cooper, S. *Public Housing and Private Property 1970-1984* (Aldershot, Gower, 1985).

County Councils Association, *Official Gazette*, June 1952.

— *Official Gazette*, May 1958.

Cowan, D. and Fionda, J., 'Back to Basics: The Government's Homelessness Consultation Paper' (1994) *Modern Law Review*, 57, 610-619.

Cowan, D. (ed.), *The Housing Act 1996: A Practical Guide* (Bristol, Jordans, 1996).

— *Homelessness: The (In-)Appropriate Applicant* (Aldershot, Dartmouth, 1997).

— 'From Allocations to Lettings: Sea Change or More of the Same?' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001).

Cowan, D., Gilroy, R. and Pantazis, C., 'Risking Housing Need', (1999) *Journal of Law and Society*, 26, 4, 403-426.

Coxall, B. and Robins, L., *Contemporary British Politics*. 3rd edn (Basingstoke, Macmillan, 1998).

Cracknell, D., 'Prisioners Will Jump Housing Queues' (2000) *Sunday Telegraph*, 2 April.

Cranston, R., *Legal Foundations of the Welfare State* (London, Weidenfeld and Nicolson, 1985).

— 'Discretionary Powers by D.J. Galligan' (1988) *Public Law*, 289-292.

Craven, M., *The International Covenant on Economic, Social and Cultural Rights* (Oxford, Clarendon, 1995).

Crossman, R., *The Diaries of a Cabinet Minister, Vol. One, Minister of Housing 1964-66* (London, Hamish Hamilton and Jonathan Cape, 1975).

Cullingworth, J.B., *Housing and Local Government* (London, Allen & Unwin, 1966).

Daintith, T., 'The Techniques of Government' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford, Clarendon, 1994).

Daniel, W.W., *Racial Discrimination in England* (Harmondsworth, Penguin, 1968).

Daunton, M.J., *House and Home in the Victorian City: Working-Class Housing 1950-1914* (London, Edward Arnold, 1983).

— (ed.) 'Introduction' in *Councillors and Tenants: Local Authority Housing in English Cities, 1919-1939* (Leicester, Leicester University Press, 1984)

— *A Property-Owning Democracy?* (London, Faber & Faber, 1987).

Davis, K.C., *Discretionary Justice: A Preliminary Inquiry* (Louisiana, Louisiana State University Press, 1969).

Deacon, A. and Bradshaw, J., *Reserved for the Poor* (Oxford, Blackwell and Robertson, 1983).

Department for Social Security, *Reform of Social Security, Vol. 1*. Cmnd. 9517 (London, HMSO, 1985).

Department of Health and Social Security, *Report of the Committee on One-Parent Families*. Cmnd. 5629 (London, HMSO, 1974).

Department of the Environment, *Housing in England and Wales* (London, HMSO, 1961).

— Circular No. 18/74 (London, HMSO, 1974).

— Circular No. 54/75 'Housing for Ex-Servicemen and Ex-Servicewomen' (London, HMSO, 1975).

— Circular No. 78/77 'Housing for One-Parent Families' (London, HMSO, 1977).

— *Housing Policy*. Cmnd. 6851 (London, HMSO, 1977).

— *Housing Management: Eligibility* (London, DoE, 1979).

— *Access to Local Authority and Housing Association Tenancies: A Consultation Paper* (London, DoE, 1994).

— *Our Future Homes: Opportunity, Choice, Responsibility*. Cmnd. 2901 (London, DoE, 1995).

— *The Allocation of Housing Accommodation by Local Authorities* (London, DoE, 1996).

Department of the Environment, Scottish Development Department and Welsh Office, *Housing and Construction Statistics 1978-1988* (London, HMSO, 1989).

— *Housing and Construction Statistics March Quarter 1995 Part 2* (London, HMSO, 1995).

Department of the Environment, Transport and the Regions, *Local Authority Housing Allocations: Systems, Policies and Procedures*. Housing Research Summary No. 74 (London, DETR, 1997).

— *Best Value and Audit Commission Performance Indicators for 2000/2001 Volume One: The Performance Indicators including The Publication of Information Direction 1999* (England) (London, DETR, 1999).

— Circular No. 10/99 (London, The Stationery Office, 1999).

— *Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness* (London, DETR, 1999).

— *Quality and Choice: A Decent Home for All* (London, DETR, 2000).

Department of the Environment/Department of Health, *Code of Guidance on Parts VI and VII of the Housing Act 1996* (London, DoE, 1996).

Department for Transport, Local Government and the Regions, *Tackling Anti-Social Tenants* (London, DTLR, April 2002).

— *Allocation of Accommodation – Code of Guidance for Local Housing Authorities*. A Consultation Paper (London, DTLR, May 2002).

— *Housing Transfer Guidance 2002* Programme (London, DTLR, 2002).

Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1885).

Drabble, R. and Lynes, T., 'The Social Fund – Discretion or Control?' (1989) *Public Law*, 297.

Duncan, S. and Evans, A. /Department of the Environment, *Responding to Homelessness: Local Authority Policy and Practice* (London, DoE, 1988).

Dworkin, R., *Taking Rights Seriously* (London, Duckworth, 1977).

Editorial, 'Not Quite Home and Dry' (2001) *Legal Action*, December.

Elliott, M., 'Human Rights Review: Raising the Standard' (2001) *Cambridge Law Journal* 455-458.

Elliot, M.J., *The Role of Law in Central-local Relations* (London, Social Science Research Council, 1981).

Englander, D., *Landlord and Tenant in Urban Britain 1838-1918* (Oxford, Clarendon, 1983).

Feldman, D., 'The Constitution and the Social Fund: A Novel Form of Legislation' (1991) *Law Quarterly Review*, 107, 39-45.

Fitzpatrick, S. and Stephens, M., 'Homelessness, Need and Desert in the Allocation of Council Housing' (1999) *Housing Studies*, 14, 413-431.

Forrest R. and Murie, A., *Selling the Welfare State: The Privatisation of Public Housing* (London, Routledge, 1988).

Fox, D., 'Central Control and Local Capacity in the Housing Field' in K. Young (ed.) *National Interests and Local Government* (London, Heinemann, 1983).

Franklin, B.J. (2000), 'Demands, Expectations and Responses: The Shaping of Housing Management', *Housing Studies* 15, 6, 907-927.

Gallagher, P., 'Ideology and Housing Management', in J. English (ed.), *The Future of Council Housing* (London, Croom Helm, 1982).

Galligan, D.J., *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, Clarendon Press, 1986).

— ‘Discretionary Powers and the Principle of Legality’ in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25th Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995).

Ganz, G., *Quasi-Legislation: Recent Developments in Secondary Legislation* (London, Sweet & Maxwell, 1987).

Goodwin, J., ‘Locked Out’ (1998) *ROOF*, July/August.

Goodin, R.E., ‘Welfare Rights and Discretion’ (1986) *Oxford Journal of Legal Studies*, 6.

Griffith, J., ‘In Defence of Rights’ (1984) *New Society*, January 26, 139.

Griffith, J. *Judicial Politics Since 1920* (Oxford, Blackwell, 1993).

Griffith, J.A.G., *Central Departments and Local Authorities* (London, Allen & Unwin, 1966).

Griffith, J.A.G., *Parliamentary Scrutiny of Government Bills* (London, Allen & Unwin, 1974).

Griffith, J.A.G. and Ryle, M., *Parliament: Functions, Practice and Procedure* (London, Sweet & Maxwell, 1989).

Griffiths, M., Parker, J., Smith, R. and Stirling, T., *Local Authority Allocations: Systems, Policies and Procedures* (London, DETR, 1997).

Griffiths, M., Parker, J., Smith, R., Stirling, T., and Trott, T., *Community Lettings: Local Allocations Policies in Practice* (York, Joseph Rowntree Foundation, 1996).

Halliday, S., ‘The Influence of Judicial Review on Bureaucratic Decision-Making’ (2000) *Public Law* 110-122.

Hansard Society, *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London, The Hansard Society, 1992).

Harlow, C. and Rawlings, R., *Law and Administration* (London, Weidenfeld and Nicolson, 1984).

— *Law and Administration* (London, Butterworths, 1997).

Hawkins, K., ‘The Exercise of Discretion by Administrators’ in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25th Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995).

Hickley, D., ‘Prescott Pushes Convicts to Front of Housing Queue’ (2000) *Daily Mail*, 3 April.

Houlihan, B., *Housing Policy and Central-Local Government Relations* (Aldershot, Avebury, 1988).

Housing Corporation, *Performance Standards and Regulatory Guidance for Registered Social Landlords* (London, Housing Corporation, 1997).

Housing Services Advisory Group, *Allocation of Council Housing* (London, DoE, 1978).

Hughes, D. and Lowe, S., *Social Housing Law and Policy* (London, Butterworths, 1995).

— *Public Sector Housing Law* (London, Butterworths, 2000).

Hughes D.J. and Jones, S.R., ‘Bias in the Allocation and Transfer of Local Authority Housing: A Study of the Reports of the Commission for Local Administration in England’ (1979) *Journal of Social Welfare Law*, 273-295.

Hughes, D., Davis, M., Matthew, V. and Smith, N., *Cases and Materials on Housing Law* (London, Blackstone, 2000).

Hunter, C. and Blandy, S., ‘Housing Policy and Central-Local Relations: Resistance to and Subversion of Central Government Intent’; Unpublished paper to Socio-Legal Studies Association, Manchester Metropolitan University, 1999.

Hunter, C. and Dymond, A., ‘Housing Law’ in C. Baker (ed.), *Human Rights Act 1998: A Practitioner’s Guide* (London, Sweet & Maxwell, 1998).

Hunter, C., ‘“The Good, The Bad and The ...”: Reasonable Preference, Exclusion and Choice in Housing Allocation’ (2001) *Journal of Housing Law* 77.

— ‘Allocating Housing – Reasonable Preference and Composite Assessments’ (2001) *Journal of Housing Law*, 2, 17-20.

— ‘Anti-social Behaviour and Housing – Can Law be the Answer?’ in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press 2001).

Hunter, C., Mullen, T., and Scott, S., *Legal Remedies for Neighbour Nuisance: Comparing Scottish and English Approaches* (York, Joseph Rowntree Foundation, 1998).

Institute for Public Policy Research, *Housing United* (London, IPPR, 2000).

Institute of Housing, The, *One Parent Families – Are They Jumping the Housing Queue?* (Coventry, IoH, 1993).

Isaac-Henry, K., ‘The English Local Authority Associations’ in G.W. Jones (ed.), *New Approaches to the Study of Central-Local Government Relationships* (Farnborough, Gower, 1980).

Jennings, W.I., ‘Central Control’ in H.J. Laski, W. I. Jennings and W.A. Robson (eds.), *A Century of Municipal Progress 1835-1935* (London, Allen & Unwin, 1935).

— ‘Courts and Administrative Law - The Experience of English Housing Legislation’ (1936) 49 *Harvard Law Review*, 429-454.

John, P., *Recent Trends in Central-Local Government Relations*. Local and Central Government Relations Research Programme Report 3 (London, Policy Studies Institute, 1990).

Joint Committee on Human Rights, *First Report* (London, UK Parliament, 2001); available via the UK Parliament website [www.publications.parliament.uk](http://www.publications.parliament.uk).

Jones, G.W., ‘The Relationship Between Central and Local Government’ in C. Harlow (ed.), *Public Law and Politics* (London, Sweet & Maxwell, 1986).

Jones G. and Stewart, J., *The Case for Local Government* (London, Allen & Unwin, 1983)

Jowell, J., ‘The Legal Control of Administrative Discretion’ (1973) *Public Law*, 178-220.

Karn, V., ‘Housing’ in S. Ranson, G. Jones and K. Walsh (eds.) *Between Centre and Locality: The Politics of Public Policy* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1985).

Kay, A., Legg, C. and Foot, J., *The 1980 Tenants’ Rights in Practice* (London, The Housing Research Group, City University, 1986).

Kemp P. and Williams, P., ‘Housing Management: An Historical Perspective’ in S. Lowe and D. Hughes (eds.), *A New Century of Social Housing* (Leicester, Leicester University Press, 1991).

Kenny, M. and Smith, M.J., ‘Interpreting New Labour: Constraints, Dilemmas and Political Agency’ in S. Ludlam and M.J. Smith (eds.), *New Labour in Government* (Basingstoke, Macmillan, 2001).

Labour Party, *A Quiet Life: Tough Action on Criminal Neighbours* (London, Labour Party, 1995).

Laffin, M., *Professionalism and Policy: The Role of Professions in the Central-Local Government Relationship* (Aldershot, Avebury, 1986).

Laski, H.J., ‘Judicial Review of Social Policy in England’ (1926) *Harvard Law Review*, 832-848.

Law Commission, The, *Renting Homes 1: Status and Security Consultation Paper No. 162* (London, The Stationery Office, 2002).

Layfield Report, *Local Government Finance, Report of the Layfield Committee*. Cmnd. 6453 (London, HMSO, 1976).

Leach, R., ‘Local Government Reorganisation RIP?’ (1998) *Political Quarterly*, 69, 31-40.

Leckie, S., ‘The Right to Housing’ in A. Eide, C. Krause and A. Rosas (eds.), *Economic Social and Cultural Rights* (London, Kluwer, 1995).

Leigh, I., *Law, Politics, and Local Democracy* (Oxford, Oxford University Press, 2000)

Lipsky, M., *Street Level Bureaucracy* (Russell Sage Foundation, 1980).

Local Government Association, *No Place Like Home*. Report of the Allocations and Homelessness Task Group: Influencing the Green Paper (London, LGA, 1999).

— *Response to the Housing Green Paper 'Quality and Choice: A Decent Home for All'* (London, LGA, 2000).

Local Government Association/Chartered Institute of Housing, *Modernising the Legal Basis for Local Authorities' Strategic Housing Role* (London and Coventry, LGA/CIH, 2001).

Local Government Association/Department of the Environment, Transport and the Regions, *A Framework for Partnership* (London, LGA 1997).

Loughlin, M., 'Administrative Law, Local Government and the Courts', in M. Loughlin, M. D. Gelfand and K. Young (eds.), *Half a Century of Municipal Decline 1935-1985* (London, Allen & Unwin, 1985).

— *Local Government in the Modern State* (London, Sweet and Maxwell, 1986).

— *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford, Clarendon, 1996).

— *Sword and Scales* (Oxford, Hart, 2000).

Loveland, I., 'Welfare Benefits, Administrative Discretion, and the Politics of the 'New Urban Left' (1987) *Journal of Law and Society*, 14, 4, 474-494.

— *Housing Homeless Persons* (Oxford, Clarendon Press, 1995).

— *Constitutional Law: A Critical Introduction*, 2nd edn. (London, Butterworths, 2000).

Lowndes, V., 'Rebuilding Trust in Central/Local Relations: Policy or Passion?' (1999) *Local Government Studies*, 24, 5, 116-136.

Mackenzie, W.J.M., 'Pressure Groups in British Government' in R. Rose (ed.), *Studies in British Politics* (London, Macmillan, 1969).

Magdwick, P., *A New Introduction to British Politics* (Cheltenham, Stanley Thornes, 1994).

Maile, S. and Hoggett, P., 'Best Value and the Politics of Pragmatism' (2001) *Policy & Politics*, 29, 4, 509-19.

Malik, N., 'Nowhere to Run', (1998) *ROOF*, September/October.

Matthews, R. *Restrictive Practices: Waiting List Restrictions and Housing Need* (London, Shelter, 1983).

Maud, J.P.R. *Report of the Committee on the Management of Local Government* (London, HMSO, 1967).

Mauthe, B., 'The Notion of Rules and Rule-Making in the Central-Local Government Relationship' (2000) *Anglo-American Law Review*, 29, 3, 315-341.

— 'The Politicalisation of Social Rents' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001).

McAuslan, P., 'Administrative Law, Collective Consumption and Judicial Policy' (1983) *Modern Law Review*, 46, 1.

Merrett, S. *State Housing in Britain* (London, Routledge & Kegan Paul, 1979).

Metcalfe L. and S. Richards, *Improving Public Management* (London, Sage, 1990).

Mill, J.S., *Considerations on Representative Government* (1861).

Ministry of Health and Local Government, Circular No. 8/52 (London, HMSO 1952).

— Circular No. 60/65 (London, HMSO, 1965).

— Circular No. 2/67 (London, HMSO, 1967).

Ministry of Health, Circular No. 1138 (London, HMSO, 1930)

— Circular No. 1493 (London, HMSO, 1935).

- Circular No. 1740 (London, HMSO, 1938).
- Circular No. 109/45 (London, HMSO, 1945).
- Circular No. 176/45 (London, HMSO, 1945).
- Circular No. 184/45 (London, HMSO, 1945).
- Circular No. 98/46 (London, HMSO, 1946).
- Circular No. 155/47 (London, HMSO, 1947).
- Circular No. 160/47 (London, HMSO, 1947).
- Circular No. 74/47 (London, HMSO, 1947).
- Circular No. 15/48 (London, HMSO, 1948).
- Circular No. 31/49 (London, HMSO, 1949).
- Housing Act, 1935, Memorandum E. Consolidation of Housing Contributions and Accounts (London, HMSO, 1935).
- Ministry of Housing and Local Government, *The Housing Programme 1965 to 1970*.  
Cmnd. 2838 (London, HMSO, 1965).
- Circular No. 64/52 (London, HMSO, 1952).
- Circular No. 2/67 (London, HMSO, 1967).
- Circular No. 63/68 (London, HMSO, 1968).
- Morgan, J., *Textbook on Housing Law* (London, Blackstone, 1998).
- Morton J., “Cheaper than Peabody”: *Local Authority Housing from 1890 to 1919* (York, Joseph Rowntree Foundation, 1991).
- Mullen, T., ‘Stock Transfer’ in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, Policy Press, 2001).
- Mullins, D., Reid, B. and Walker, R.M., ‘Modernization and Change in Social Housing: The Case for an Organizational Perspective’ (2001) *Public Administration*, 79, 3, 599-623.
- Murie, A., ‘The Nationalization of Housing Policy’ in M. Loughlin et al, *Half a Century of Municipal Decline 1935-1985* (London, Allen & Unwin, 1985).
- National Housing Federation, *Flexible Allocations and Local Lettings Schemes* (London, National Housing Federation, 2000).
- Niner, P. *Local Authority Housing Policy and Practice* (Birmingham, Centre for Urban and Regional Studies, 1975).
- Niner, P. with White, V. and Levison, D., *The Early Impact of the Housing Act 1996 and Housing Benefit Changes* (London, Shelter, 1997).
- Office of the Deputy Prime Minister, *Housing Statistics 2001* (London, ODPM, 2002).
- Ogus, A., Barendt, E. and Wikeley, N., *The Law of Social Security* (London, Butterworths, 1995).
- Orbach, L.F., *Homes for Heroes: A Study of the Evolution of British Public Housing, 1915-1921* (London, Seeley, Service & Co., 1977).
- Papps, P., Rowlands, R. and Smith, R., ‘Shifting the Balance in Social Housing Allocations: Changing Access, Meeting Needs, Encouraging Choice and Promoting Sustainable Communities’, Paper presented at the Housing in the 21st Century Conference (2000) Sweden, Gavle, 26-30 June.
- Parliamentary Research Service, *The Local Government Companion* (Chichester, PRS, 1977/78).
- *The Local Government Companion* (Chichester, PRS, 1980/81).
- Partington, M., *Landlord and Tenant* (London, Weidenfeld and Nicolson, 1980).
- ‘Landlord and Tenant: The British Experience’ in E. Kamenka and A. Erh-Soon Tay (eds.), *Law and Social Control* (London, Edward Arnold, 1980).
- ‘The Restructuring of Social Security Appeal Tribunals: A Personal View’ in C. Harlow (ed.), *Public Law and Politics* (London, Sweet & Maxwell, 1986).

— 'The Juridification of Social Welfare in Britain' in G. Teubner (ed.), *Juridification of Social Spheres* (Berlin, New York, Walter de Gruyter, 1987).

Pawson, H., 'Top-down or Bottom-up? Influences on Changing Approaches to Social Housing Allocations'. Paper presented at Socio-Legal Studies Association Conference (Bristol, University of Bristol, 2001).

Pawson, H., Levison, D., Third, H., Lawton, G. and Parker, J.. *Local Authority Policy and Practice on Allocations, Transfers and Homelessness* (London, DETR, 2001).

Pearl, M., *Social Housing Management: A Critical Appraisal of Housing Practice* (Basingstoke, Macmillan, 1997).

Pooley, C.G., *Local Authority Housing: Origins and Development* (London, The Historical Association, 1996).

Power, A., *Property Before People. The Management of Twentieth-Century Council Housing* (London, Allen & Unwin, 1987).

Prescott-Clarke, P., Clemens, S. and Park, A., *Routes into Local Authority Housing* (London, HMSO, 1994).

Pross, P., *Group Politics and Public Policy* (Oxford, Oxford University Press, 1986).

Prosser, T., 'Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors' (1977) *British Journal of Law and Society*, 4, 39-60.

Pyper, R., 'Parliamentary Accountability' in R. Pyper (ed.), *Aspects of Accountability in the British System of Government* (Wirral, Tudor, 1996).

Public Record Office, Various documents.

Quigley, H. and Goldie, I., *Housing and Slum Clearance in London* (London, Methuen, 1934).

Ratcliffe, P. 'Methodological Refinement, Policy Formulation and the Future Research Agenda: Some Brief Reflections' in P. Ratcliffe (ed.), *Ethnicity in the 1991 Census, Volume Three* (London, HMSO, 1996).

Ravetz, A., *Council Housing and Culture: The History of a Social Experiment* (London, Routledge, 2001).

Redcliffe-Maud, *Report of the Royal Commission on Local Government in England*. Cmnd. 4040 (London, HMSO, 1969).

Reich, C., 'Individual Rights and Social Welfare: The Emerging Legal Issues' (1965) *Yale Law Journal*, 1245.

Rex J. and Moore, R., *Race, Community and Conflict* (Oxford, OUP, 1967).

Rhodes, R.A.W., *Control and Power in Central-Local Government Relations* (Farnborough, Gower (for SSRC), 1981).

— *The National World of Local Government* (London, Allen & Unwin, 1986).

— *Beyond Westminster and Whitehall: The sub-central governments of Britain* (London, Unwin Hyman, 1988).

Robertson, D., *Judicial Discretion in the House of Lords* (Oxford, Clarendon, 1998).

Robson, W., *Local Government in Crisis* (London, Allen & Unwin, 1966).

Rutherford, A., 'An Elephant on the Doorstep: Criminal Policy without Crime in New Labour's Britain' in A. Rutherford and P. Green (eds.), *Criminal Policy in Transition* (Oxford, Hart, 2000).

Sainsbury, R., 'Administrative Justice: Discretion and Procedures in Social Security Decision-Making' in K. Hawkins (ed.), *The Uses of Discretion* (Oxford, Clarendon Press, 1992).

Schmeer, T., 'Hard and Fast' (1997) *ROOF*, September/October.

Scottish Executive, *Better Homes for Scotland's Communities: The Executive's Proposals for the Housing Bill* (Edinburgh, The Scottish Executive, July 2000).

Scottish Executive Development Department, Circular 1/2002 (Edinburgh, SEDD, 2002).

Scottish Housing Advisory Committee, *Choosing Council Tenants*. Department of Health for Scotland (Edinburgh, HMSO, 1950).

— *Allocating Council Houses*. Department of Health for Scotland (Edinburgh, HMSO, 1967).

— *Allocation and Transfer of Council Houses*. Report by a Sub-committee of SHAC (Scottish Development Department, Edinburgh, HMSO, 1980).

Secretaries of State for the Environment and for Wales, *Local Government Finance*. Cmnd. 6813 (London, HMSO, 1977).

Select Committee on Relations Between Central and Local Government, *Rebuilding Trust*, HL Paper 97 (London, HMSO, 1996).

Select Committee on the Scrutiny of Delegated Powers, HL Paper 80, 23rd report, Session 1995-96 (London, HMSO, 1996).

Seneviratne, M., 'The Local Government Ombudsman Annual Report 1998-99' (2000) *Journal of Social Welfare and Family Law*, 22 (2), 209-217.

SHM London Group, 'The Residential Qualification' (1949) *The Society of Women Housing Managers, Quarterly Bulletin*, April, II, 13.

Silveira, L., 'Administrative Discretion as Perceived by the Public' in *Administrative Discretion and Problems of Accountability*. Proceedings of the 25th Colloquy on European Law (Strasbourg, Council of Europe Publishing, 1995).

Simmons, 'Teenage Scapegoats' (1993) *The Guardian*, 7 October.

Smith, R., Stirling, T., Papps, P., Evans, A. and Rowlands, R., *The Lettings Lottery: The Range and Impact of Homelessness and Lettings Policies* (London, Shelter, 2001).

Smith, S.J. and Mallinson, S., 'The Problem with Social Housing: Discretion, Accountability and the Welfare Ideal' (1996) *Policy and Politics*, 24, 4, 339-357.

Social Exclusion Unit, *National Strategy for Neighbourhood Renewal – PAT 5: Housing Management* (London, SEU, 2000)

— *National Strategy for Neighbourhood Renewal – PAT 7: Unpopular Housing* (London, SEU, 2000).

— *National Strategy for Neighbourhood Renewal – PAT 8 Anti-Social Behaviour* (London, SEU, 2000).

Somerville, P., 'Allocating Housing – Or 'Letting' People Choose' in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001).

Speak, S., S. Cameron, R. Woods and R. Gilroy, *Young Single Mothers: Barriers to Independent Living* (London, Family Policy Studies Centre, 1995).

Spicker, P., *Social Housing and the Social Services* (London, Longman for the Institute of Housing, 1989).

Starmer, K., *European Human Rights Law* (London, Legal Action Group, 1999).

Steiner, H.J. and Alston, P., *International Human Rights in Context*. 2<sup>nd</sup> edn. (Oxford, Oxford University Press, 2000).

Stephens, M., Burns, N. and MacKay, L., *Social Market or Safety Net?* (Bristol, The Policy Press, 2002).

Stewart, A., *Rethinking Housing Law* (London, Sweet & Maxwell, 1996).

Stewart, J.D., *British Pressure Groups* (Oxford, Clarendon, 1958).

— *Local Government: The Conditions of Local Choice* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1983).

— 'Dilemmas' in S. Ranson, G. Jones and K. Walsh (eds.) *Between Centre and Locality: The Politics of Public Policy* (London, Allen & Unwin for the Institute of Local Government Studies, University of Birmingham, 1985).

— ‘The Functioning and Management of Local Authorities’ in M. Loughlin et al (eds.), *Half a Century of Municipal Decline 1935-1985* (London, Allen & Unwin, 1985).

— ‘Changing Patterns of Central-Local Relations’ (2000) *Journal of Local Government Law*, 5, 88-96.

Swenarton, M., *Homes Fit for Heroes: The Politics and Architecture of Early State Housing in Britain* (London, Heinemann, 1981).

Teubner, G., ‘Juridification: Concepts, Aspects, Limits, Solutions’ in G. Teubner (ed.), *Juridification of Social Spheres* (New York, Walter de Gruyter, 1987).

Thompson, R., ‘A Critique of the New Budgeting Loans Scheme’ (2000) *Journal of Social Security Law* 7, 1, 35-53.

Timmins, N., *The Five Giants: A Biography of the Welfare State* (London, Harper Collins, 2001).

Titmuss, R., ‘Welfare “Rights”, Law and Discretion’ (1971) *Political Quarterly*, 42, 113-31.

Travis, A., ‘Straw Attacks Hypocrisy of ‘BMW Lawyers’ (1999) *The Guardian*, 15 September.

Turpin, C., *British Government and the Constitution*. 3<sup>rd</sup> edn. (London, Butterworths, 1995).

Urban Task Force, *Towards An Urban Renaissance* (London, E & FN Spon, 1999).

Vincent-Jones, P., ‘From Housing Management to the Management of Housing: The Challenge of Best Value’ in D. Cowan and A. Marsh (eds.), *Two Steps Forward: Housing Policy into the New Millennium* (Bristol, The Policy Press, 2001).

Wade, E.C.S. and Bradley, A.W., *Constitutional and Administrative Law*. 11<sup>th</sup> edn. (London, Longman, 1993).

— *Constitutional and Administrative Law*. 12<sup>th</sup> edn. (London, Longman, 1997).

Wade, D., *Behind the Speaker’s Chair* (Austick’s Publications, 1978).

Waldron, J., *The Law* (London, Routledge, 1992).

Walker, R.M., ‘The Changing Management of Social Housing: The Impact of Externalisation and Managerialisation’, (2000) *Housing Studies* 15, 2, 281-299.

Walkland, S.A., *The Legislative Process in Great Britain* (London, Allen & Unwin, 1968).

Welfare, D., ‘An Anachronism with Relevance: The Revival of the House of Lords in the 1980s and Its Defence of Local Government’ (1992) *Parliamentary Affairs*, 45, 205-219.

Welsh Office Circular No. 6/67 (London, HMSO, 1967).

Whelan, R. (ed.), *Octavia Hill and the Social Housing Debate* (London, Institute of Economic Affairs, 1998).

Wilcox, S. *Housing Finance Review 1993* (York, Joseph Rowntree Foundation, 1993).

— *Housing Finance Review 1995/96* (York, Joseph Rowntree Foundation, 1996).

— *Housing Finance Review 2000/2001* (York, Joseph Rowntree Foundation, 2000).

Wohl, A.S., *The Eternal Slum: Housing and Social Policy in Victorian London* (London, Edward Arnold, 1977).

Zacher, H., ‘Juridification in the Field of Social Law’ in G. Teubner (ed.), *Juridification of Social Spheres* (Berlin, New York, Walter de Gruyter, 1987).

## Hansard References

### Pre-1930 – House of Commons

Vol. 223 (3<sup>rd</sup> series), col.126, 19 March 1875, H. Fawcett.  
— col.126, 19 March 1875, Sir Sydney Waterlow.  
— cols.127-8, 19 March 1875, J.S. Hardy.  
— cols.128-9, 19 March 1875, Sir Richard Assheton Cross.  
Vol. 114, col.1956, 8 April 1919, W. Astor.  
Vol. 174, col.1120, 3 June 1924, John Wheatley.  
— col.1104, 3 June 1924, Wheatley.  
— col.1117, 3 June 1924, Wheatley.  
— col.1303, 4 June 1924, Neville Chamberlain.  
Vol. 175, col. 118, 23 June 1924, Lord Eustace Percy.  
Vol. 176, col.729, 16 July 1924, Ernest Simon.  
— col.681, 17 July 1924, Simon.  
— col.717, 17 July 1924, Simon.  
— col.718, 17 July 1924, Wheatley.  
— col.719, 17 July 1924, Simon.  
— col.719, 17 July 1924, Francis Blundell  
— col.722, 17 July 1924, Sir William Joynson-Hicks.  
— col.729, 17 July 1924, Simon.  
— cols.729-30, 17 July 1924, Viscountess Astor.  
— cols.732-33, 17 July 1924, Kenworthy.  
— cols.733-34, 17 July 1924, Wheatley  
— col.739, 17 July 1924, Chamberlain.

### Pre-1930 – House of Lords

Vol. 59, col.23, 27 July 1924, Lord Haldane.  
— col.41, 27 July 1924, Lord Edward Strachie.  
— cols. 354-5, 5 August 1924, Strachie.  
— col.471, 6 August 1924, Haldane.  
— col.471, 6 August 1924, Strachie.

### 1930-1969 – House of Commons

Vol. 237, col.1801, 7 April 1930, Arthur Greenwood.  
— col.1874, 7 April 1930, Sir Robert Gower.  
— col.1855, 7 April 1930, Malcolm MacDonald.  
— col.1870, 7 April 1930, R.S. Young.  
— cols.1825-6, 7 April 1930, Chamberlain.  
— col.1821, 7 April 1930, Greenwood.  
— col.1851, 7 April 1930, Countess Gwendolen Iveagh.  
— col.2008, 7 April 1930, Sir Kingsley Wood.  
— col.1842, 7 April 1930, Chamberlain.  
— col.2011, 7 April 1930, Kingsley Wood.  
— col.2022-3, 8 April 1930, Simon.  
— cols.3079-80, 17 April 1930, Eleanor Rathbone.

Vol. 241, col.326, 8 July 1930, Dr Arthur Davies.  
— cols.366-7, 8 July 1930, Kingsley Wood.  
— col.339, 8 July 1930, Simon.  
— col.328, 8 July 1930, Davies.  
— col. 327, 8 July 1930, Davies.  
— col. 332, 8 July 1930, Miss Lawrence.  
— col.332, 8 July 1930, Chamberlain.  
— cols.340-1, 8 July 1930, Simon.  
— cols.335-6, 8 July 1930, Greenwood.  
— cols.372-3, 8 July 1930, Greenwood.  
— col.379, 8 July 1930, Rathbone.  
Vol. 291, col.447, 20 June 1934, Rathbone.  
Vol. 297, col.363, 30 January 1935, Sir Hitton Young.  
— col.616, 31 January 1935, George Griffiths.  
— col.657, 31 January 1935, G. H. Shakespeare.  
— col.588, 31 January 1935, Sir J. Walker-Smith.  
Vol. 302, cols.108-9, 20 May 1935, Rathbone.  
— col.139, 20 May 1935, Rathbone.  
— col.118, 20 May 1935, H. Young.  
Vol. 421, col.232, 26 March 1946, Derek Walker-Smith.  
Vol. 462, col.2137, 16 March 1949, Walker-Smith.  
Standing Committee C, Col 1822, 5 April 1949, Elliot.  
Standing Committee C, Col 1847, 5 April 1949, V.F. Yates.  
Standing Committee C, Col 1848, 5 April 1949, Marlowe.  
Standing Committee C, col.1822, 5 April 1949, Elliot.  
Vol. 531, col.907, 30 July 1954, Ian Harvey.  
— col.909, 30 July 1954, Harvey.  
— col.920-1, 30 July 1954, Ernest Maples.  
— col.908, 30 July 1954, Harvey.  
— col.917, 30 July 1954, Maples.

## 1930-1969 – House of Lords

Vol. 78, col.458, 15 July 1930, Lord Parmoor.  
— col.478, 15 July 1930, the Earl of Beauchamp.  
— cols.616-7, 21 July 1930, Lord Balfour.  
— col.619, 21 July 1930, Balfour.  
— col.622, 21 July 1930, Lord Marley.  
Vol. 93, col.699, 18 July 1934, Balfour.

## 1970-1989 – House of Commons

Vol. 926, col.896, 18 February 1977, Stephen Ross.  
— col.899, 18 February 1977, Ross.  
— cols.941-2, 18 February 1977, Julius Silverman.  
— col.897, 18 February 1977, Ross.  
— cols.914-5, 18 February 1977, Paul Channon.  
— col.905, col.921 and col.972, 18 February 1977, W R Rees-Davies.  
— cols.899-900, 18 February 1977, Ross.  
— col.962, 18 February 1977, Ernest Armstrong.

— col.962, 18 February 1977, Armstrong.  
— col.905, 18 February 1977, Ross.  
— col.957-8, 18 February 1977, Hugh Rossi.  
— cols.941-2, 18 February 1977, Silverman.  
— col.904, 18 February 1977, Ross.  
— col.950, 18 February 1977, George Rodgers.  
Standing Committee A, col.11, 14 June 1977, Rossi and Ross.  
— col.11, 14 June 1977, Peter Morrison.  
— col.13, 14 June 1977, Ross.  
— col.47, 14 June 1977, Armstrong.  
— col.21, 14 June 1977, Reginald Eyre.  
— col.47, 14 June 1977, Armstrong.  
— col.20, 14 June 1977, Tim Sainsbury.  
— col.135, 16 June 1977, Morrison.  
— col.124, 16 June 1977, Rossi.  
— col.7, 16 June 1977, Tony Durant.  
— col.119, 16 June 1977, Morrison.  
— col.124, 16 June 1977, Rossi.  
— cols.67-8, 16 June 1977, Rossi.  
— col.281 21 June 1977, Bruce Douglas-Mann  
— col.306, 21 June 1977, Rossi.  
— col.230, 21 June 1977, Rossi.  
— col.245, 21 June 1977, Tim Sainsbury.  
— cols.219-20, 21 June 1977, Ross.  
— col.197-8, 21 June 1977, George Younger.  
— col.199, 21 June 1977, George Cunningham.  
— col.341, 23 June 1977, Robin Cook.  
— cols.426-7, 23 June 1977, Armstrong.  
— cols.424-5, 23 June 1977, Rossi.  
Vol. 934, col.1631, 8 July 1977, Ross.  
Vol. 936, col.882, 27 July 1977, Ross.  
Vol. 976, cols.1261-2, 14 January 1980, Bruce Millan.  
— cols.1288, 14 January, Gordon Wilson.  
— col.1333, 14 January 1980, George Robertson.  
— col.1273, 14 January 1980, Russell Johnston.  
— cols.1333-4, 14 January 1980, Robertson.  
— col.1245, 14 January 1980, Younger.  
— col.1245, 14 January 1980, Younger.  
— cols.1261-2, 14 January 1980, Millan.  
— cols.1287-8, 14 January 1980, Gordon Wilson.  
— col.1293, 14 January 1980, Cook.  
— col.1276, 14 January 1980, Michael Ancram.  
— col.1280, 14 January 1980, Ancram.  
— col.1283, 14 January 1980, Ian Lang.  
— col.1324, 14 January 1980, Bill Walker.  
— cols.1472-3, 15 January 1980, Roy Hattersley.  
— cols.1484-5, 15 January 1980, Frederick Mulley.  
— col.1505, 15 January 1980, William Benyon.  
— col.1501, 15 January 1980, David Alton.  
Standing Committee F, cols.85-6, 31 January 1980, John Stanley.

— col.70, 31 January 1980, Jack Straw.  
— col.55, 31 January 1980, Frank Allaun.  
First Scottish Standing Committee, col.7, 29 January 1980, John Maxton.  
— col.384, 30 January 1986, Maxton.  
— col.382, 30 January 1986, Ancram.  
— col.386, 30 January 1986, Robert Brown.  
— col.76, 31 January 1980, John Major.  
— col.95, 31 January 1980, George Robertson.  
— col.1191, 13 March 1980, Millan.  
— col.1192, 13 March 1980, Malcolm Rifkind.  
— col.1187, 13 March 1980, Millan.  
Vol. 126, col.623, 26 February 1988, Madam Deputy Speaker.

### **1970-1989 – House of Lords**

Vol. 385, cols.1168-9, 15 July 1977, Lord Gifford.  
Vol. 386, col.714, 22 July 1977, Lord Sandford.  
— col.693, 22 July 1977, Baroness Birk.  
— col.1025, 27 July 1977, Gifford.  
— col.1000, 27 July 1977, Birk.  
Vol. 410, col.1489, 24 June 1980, Lord Ross of Marnock.  
— col.200, 30 June 1980, Baroness David.  
— col.202, 30 June 1980, Lord Belstead.  
— col.200, 30 June 1980, David.  
— col.908, 30 July 1980, Birk.

### **1990-2002 – House of Commons**

Vol. 270, cols. 650-3, 29 January 1996, John Gummer.  
— col.697, 29 January 1996, John Sykes.  
— col.720, 29 January 1996, Jacqui Lait.  
— col.742, 29 January 1996, David Curry.  
— col.686, 29 January 1996, Diana Maddock.  
— col.704, 29 January 1996, Clive Soley.  
— col.679, 29 January 1996, Roy Thomason and Clive Betts.  
— col.660, 29 January 1996, Gummer.  
— col.679, 29 January 1996, Maddock.  
— col.679, 29 January 1996, Betts.  
— col.728, 29 January 1996, Gerry Sutcliffe.  
— col.728, 29 January 1996, John Gunnell.  
Standing Committee G, cols. 600, 617, 625, 12 March 1996, Curry.  
— col.588, 12 March 1996, Curry.  
— col.577, 13 March 1996, Nick Raynsford.  
— col.656, 14 March 1996, Curry.  
— cols. 648-9, 14 March 1996, Raynsford.  
— col.665, 14 March 1996, William O'Brien.  
— col.666, 14 March 1996, O'Brien.  
Vol. 276, col.1013, 30 April 1996, Maddock.  
Vol. 360, cols.727-8, 8 January 2001, Nigel Waterson.  
— cols.740-1, 8 January 2001, Don Foster.

— col.797, 8 January 2001, Tim Loughton.  
— col.726, 8 January 2001, Waterson.  
— col.800, 8 January 2001, Chris Mullin.  
— col.725, 8 January 2001, Waterson.  
— cols.727-8, 8 January 2001, Waterson.  
— col.814, 8 January 2001, Waterson.  
Standing Committee D, cols.256-7, 25 January 2001, Foster and Waterson.  
— col.343, 30 January 2001, Raynsford.  
— col.382, 30 January 2001, Raynsford.  
— col.342, 30 January 2001, Raynsford.  
— col.342, 30 January 2001, Waterson.  
— col.378, 30 January 2001, col.390, 1 February 2001, Waterson.  
— cols.344-5, 30 January 2001, Raynsford.  
— col.425, 1 February 2001, Waterson.  
— col.392, 1 February 2001, Robert Ainsworth.  
— col.392, 1 February 2001, Loughton.  
— col.397, 1 February 2001, Waterson.  
— col.410, 1 February 2001, Raynsford.  
— col.390, 1 February 2001, Waterson.  
— cols.430-2, 1 February 2001, Karen Buck and Waterson.  
— col.390, 1 February 2001, Waterson.  
Vol. 363, col.946, 7 February 2001, Simon Hughes.  
— col.946, 7 February 2001, Raynsford.  
— col. 991, 7 February 2001, Raynsford.  
Vol. 371, col.44, 2 July 2001, Nigel Waterson.  
— cols.46-7, 2 July 2001, Waterson.  
— col.46, 2 July 2001, Waterson.  
Standing Committee A, col. 9, 10 July 2001, Waterson.  
— col. 9, 10 July 2001, Foster.  
— col.87, 12 July 2001, Foster.  
— cols.92-3, 12 July 2001, Sally Keeble.  
— col.86, 12 July 2001, Waterson.  
Col.373W, 10 May 2002, Keeble.

## 1990-2002 – House of Lords

Vol. 572, col.592, 16 May 1996, Lord Jenkin of Roding.  
— col.615, 16 May 1995, Baroness Hollis.  
Vol. 573, cols. 329-30, 19 June 1996, Lord Mackay.  
— cols. 379-384, 19 June 1996, Mackay.  
— col.344, 19 June 1996, Mackay.  
— col.774, 25 June 1996, Baroness Flather.  
— col.329, 19 June 1996, Mackay.  
— col.816, 25 June 1996, Mackay.  
— col.333, 19 June 1996, Mackay.  
— col.334, 19 June 1996, Mackay.  
— col.362, 19 June 1996, Mackay.  
— col.390-1, 19 June 1996, Earl Russell.  
— col.392, 19 June 1996, Mackay.  
— col.348, 19 June 1996, Mackay.

— col.393, 19 June 1996, Mackay.  
— col.397, 19 June 1996, Russell.  
Vol. 574, cols. 43, 8 July 1996, Russell.  
— cols.45-6, 8 July 1996, Russell.  
— col.32, 8 July 1996, Earl Ferrers.  
— col.44, 8 July 1996, Ferrers.  
— col.56, 8 July 1996, Ferrers.  
Vol. 624, col.353, 28 March 2001, Baroness Maddock.  
Col.CWH63-4, 10 December 2001, Lord Falconer.  
Col.CWH51, 10 December 2001, Falconer.  
Col.CWH66, 10 December 2001, Falconer.  
Col.1018, 15 January 2002, Falconer.

### **Scottish Parliament**

Social Justice Committee Official Report, col.2079-80, 1 May 2001, Margaret Curran.  
— col.2081, 1 May 2001, Tommy Sheridan.  
— col.2082, 1 May 2001, Karen Whitefield.  
— col.2087, 1 May 2001, Sheridan.  
— col.2089, 1 May 2001, Robert Brown.  
— col.2081, 1 May 2001, Brown.