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WHEN THE SOCIAL BECOMES AN ASSET CLASS:
THE FINANCIAL TRANSFORMATION OF ENGLISH HOUSING ASSOCIATIONS

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contested cities

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The financial transformation of English housing associations

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ABSTRACT

The aim of this paper is to explore how law has restructured the relation between English housing associations and the state in the context of austerity and financialisation. Focusing on the regulatory and legal frameworks underpinning the consents regime governing the disposal of housing association stock, I argue that the construction of housing associations as private for the purposes of borrowing has depoliticized the entry of private financial interests into social housing. This has further enabled some housing associations to be transformed into rent gap exploiting entities. Austerity has revealed the tensions within this funding model through undermining the sector's stability and implicit state backing, creating the potential for state or provider exit and further potential for urban dispossession.

KEYWORDS: Financialisation, property, austerity, governance, law.

1. INTRODUCTION

In achieving their often conflicting aims English housing associations have an ambiguous relation to the state, legally private yet benefitting from subsidy regimes and implicit government backing while carrying out important public functions (Cowan & McDermont, 2008). The aim of this paper is to explore how law has been used to reshape the relations between housing associations and the state in the context of financialisation and austerity. Focusing specifically on the regulatory and legal frameworks governing English housing associations, I argue that the law's ability to construct divisions between public and private has been used to enable financialisation through the protection of lender interests at the expense of social housing stock. Since the 1988 Housing Act a regulatory system underpinned largely through policy and not law has enabled the development of a lending market in which housing associations have been permitted to use their stock as collateral for loans, governed by the consents regime operated by the regulator over stock disposal. Ambiguity emerges as a key tool of neoliberal statecraft as the law's construction of housing associations as private enabled them to borrow independently from the government and assume risk in exchange for capital. In turn, their receipt of public subsidy and implicit backing by the state in the event of insolvency enabled housing associations to access long term credit on terms they could afford.

Drawing on fieldwork data conducted with sector stakeholders, I explore some of the ways in which the disruption of this model by austerity has been interpreted by housing association CEOs, treasury consultants, auditors, and senior policymakers. Analysing this small sample of PhD fieldwork data conducted over 2015 and 2016, I argue that the effective depoliticisation of housing association finance through a regulatory regime that structured it as largely private has enabled financial interests to predominate over collective interests of maintaining public protection of social housing assets. In the first part of this paper I review the academic literature relating to housing financialisation and critical urban theory, arguing that law provides a useful lens to understand how processes of urban enclosure and privatisation are accomplished in practice. Drawing on socio-legal analysis of "obscurity" as a tool of governance, argue that the policy-led definitions of social housing's content and a regulatory regime permitting housing associations to be treated as private borrowers has depoliticised the interests of finance, naturalising policy decisions by neoliberal states not to directly invest in social housing themselves. This has enabled the conversion of social housing stock into potentially commercial assets, opening up new avenues for financial accumulation in urban landscapes. I conclude by arguing that austerity has revealed the limits of this model, converting ambiguity into uncertainty for investors and raising the possibility of the state divesting itself of social housing.

1.1 Finance, space, and the construction of social housing assets

The privatisation of municipal council housing owned and operated by local government authorities has been a flagship project of neoliberalism's implementation in the UK. With the brief and partial exception of the Brown government's (2007 – 2010) post-financial crisis response, public housing has been progressively eroded for the past four decades under both Labour and the Conservatives, most famously through the Thatcher government's (1979 – 1991) Right to Buy policy enabling council tenants to buy their homes at a discount (Hodkinson & Robbins, 2012). As council housing has been residualised, the majority of "social housing" delivered with some reference to need and

not just ability to pay has been provided by housing associations, legally independent yet tightly regulated private registered providers. The sector has grown from the margins to the centre of housing policy since the late 1980s, benefitting from public subsidy and "Large Scale Voluntary Transfer" (LSVT) policies transferring stock from local authorities to housing associations. A complex and diverse sector, housing associations are necessary for policy measures relating to issues such as homelessness or urban development, with a combination of regulatory targets and commercial pressures have led to increasing concentration of influence among a small number of large associations (Manzi, 2007).

Encouraged by the government to combine public grant with private finance in order to develop new housing, associations have been able to borrow considerable amounts in transactions that are increasingly sophisticated, with derivatives routinely used to fix interest rates and bond markets an increasingly major source of new capital following the 2007/08 financial crisis (HCA, 2016). Austerity measures however have cut subsidy, increasing reliance on private finance and riskier, more commercialised developments (Smyth, 2015). The Conservatives' May 2015 victory with a full Parliamentary majority has placed the sector's future into further question, with policies including the extension of the Right to Buy to cover all associations and the imposition of an annual 1% rent cut from 2016 – 2020 to reduce housing benefit expenditure. Lenders have expressed unease at the changes, and the prospect of undermined rental income led the credit ratings agency Moody's to place the sector on "negative outlook" in July 2015 (Apps, 2015).

How should this financialisation of housing associations be understood? Although most studies in housing financialisation have historically focused on mortgage markets and owner occupation, a growing body of research is examining processes of financial ownership and value extraction within rented housing (Aalbers, 2016). These include studies of the rise of corporate landlords (Fields & Uffer, 2016), the use of state-owned "bad banks" to transfer distressed assets to Private Equity firms in the aftermath of the financial crisis (Byrne, 2015), and the rise of global corporate landlords operating across multiple national and urban contexts (Beswick et al, 2016). Critical studies on the opening up of UK social housing to profitable interests include analysis of schemes such as the Private Finance Initiative (PFI) that opened up selected council estates to private accumulation (Hodkinson, 2011), evaluations of accountability within stock transfers (Smyth, 2013), or the privatisation of social housing (Glynn, 2009). As of yet there have been few critical studies of the financialisation of housing associations, though emerging works include analysis of reduced public grant finance leading to increased reliance on volatile property market developments for income for English housing associations (Smyth, 2015), or near bankruptcy caused through managers speculating on derivatives in some Dutch housing associations (Aalbers, 2016).

Money and states are deeply intertwined, and studies of neoliberalism's construction of financial markets have problematized assumptions of a clear divide between the state and private markets. As a political project, neoliberalism generates a flexible process of neoliberalisation that incorporates both roll-back moments of commodification and opening up of assets to private accumulation, and roll-out moments of institutional and regulatory creation where new markets are temporarily stabilised (Peck & Tickell, 2002). The means through which this is done such as state-backed gentrification, the privatisation of public space, punitive policing and security regimes, and the breakup of public housing, has been characterised as a process of "urban enclosure" (Hodkinson, 2012) as part of a

wider class project of accumulation through dispossession (Harvey, 2009). These enclosures do not just occur through state rollback, but through an ongoing process of "deregulated regulation" in which the state continually reshapes and redefines markets to facilitate private accumulation (Aalbers, 2016).

In charting potential links between the state, finance, and urban space in assessing the enclosure of social housing through financialisation, it is important to analyse the role of law in reworking the field of action between states and other social actors. Understanding law as the process by which social claims take on the status of legal authority enforceable through state violence, as well as codified rules and protocols (Barkan, 2011), critical academics have argued for close empirical attention to how law shapes and creates private markets (Christophers, 2014). Finance is closely structured by law, and its embeddedness within complex regulations and systems of private and public law operating across multiple and overlapping geographic jurisdictions has been the focus of recent scholarly attention (Knuth & Potts, 2016; Kay, 2016). To the extent that finance creates new forms of property through rending social entities into tradable objects (Christopherson, 2013), this focus converges with socio-legal scholarship into the interactions between law and geography (Blandy & Sibley, 2010).

2. HOUSING ASSOCIATIONS, LAW AND THE NEOLIBERAL STATE

Housing associations are an important case study for examining how law structures operations of capital, being hybrid entities that are legally private yet conduct important public functions. Socio-legal scholars in the UK have pointed to how the "obscurity" of the term social housing has enabled housing associations to emerge as distinct entities within the UK's regulated environment (Cowan & McDermont, 2006). Neither fully public or private, yet defining itself in reference to both, social housing as a term has been tricky to define since it gained currency in the 1980s as a policy and professional term to encompass both housing associations and municipal council housing (Rose, 1995). Social housing is a distinct tenure, displaying markedly different characteristics to private renting in terms of regulation, access, standards, and control of rents, but it is difficult to define a consistent set of analytical standards for the sector over time. Although commonly regarded as low cost housing regulated for those whose needs are not served by the commercial market (Harloe, 1993), a definition codified by the 2008 Housing Act, this meaning is an inherently relational one in which social housing can only be defined in relation to both the private market and the state, rather than independently of both.

This relational aspect of social housing is important in understanding how the law's divide between public and private in housing associations is a necessarily political one. The Housing Act 1988 established a funding regime in which housing associations are treated as private entities for the purposes of borrowing, offering security against their stock in exchange for credit and enabling their debts to not appear on official government balance sheets (Cowan, 2011). Housing associations nevertheless are necessary for meeting necessary legal requirements such as the duty of local authorities toward homelessness rehousing, among other policies, giving them responsibility for carrying out legal public functions. Analysing the public-private divide within social housing providers in practice, Cowan and McDermont (2008) have shown the drifting content of need, dependent with necessarily value-laden and political judgements on who should be excluded from having a legitimate need for housing. They also demonstrate how clear distinctions between public

and private are further blurred when it is recognised that the scarcity of social housing means that the UK's rehousing system could not function without the existence of private landlords willing to take households subsidised through housing benefit. Although courts can make legal decisions over public and private, commercial pressures and a *policy* encouragement to adopt economic rationalities in order to access private finance means that the meaning of what is 'social' as distinct to commercial has become blurred. In this sense, the law structures obscurity as a regulatory governance mechanism, obscurity which has been exploited to shift the boundaries between social landlords and the state over time in a regulatory context defined largely through policy and not law (McDermont, 2007). In the next section, I argue that this obscurity as to the purposes of social housing has facilitated the development of a collateralised lending system that has enabled the entry of financial interests into the housing association sector.

3. MAKING SOCIAL HOUSING INTO AN ASSET

To what extent has the legal delineation between public and private discussed above helped construct the financialisation of English housing associations? For much of the post-war era housing associations were a marginal part of the housing system, though one with increasing links to state policy goals from the 1970s (McDermont, 2010). The Housing Act 1988 was to formalise their move from the margins to the centre, creating a funding regime in which housing associations would bid for formula social housing grant on a scheme by scheme basis which they would explicitly be expected to top up with private finance (Cowan, 2011). In order to make a private finance system work, the Act tore up rent controls and introduced a new type of private tenancy for housing association tenancies, Assured Tenures, with much greater strengths of protection to alternative Assured Shorthold Tenancies used in the private rented sector but without statutory protection against rent rises. To offset the effects of this, a means tested Housing Benefit system of welfare support was set up for low income renters. Importantly, the Act also enabled housing associations to use their stock as security for loan agreements with lenders, ensuring that lenders could take a fixed charge on specific assets they could repossess as security in the event of default, even where a property had public social housing grant embedded within it.

The financial model set in motion by the Act had major consequences for the nature of the sector and its regulation, leading to consolidation and the rising importance of treasury management within associations and a greater focus on financial imperatives (Pryke & Whitehead, 1994). The ability to use stock as security was still regulated however, in that housing associations had to secure consent from the Housing Corporation before they could use their stock as collateral. Furthermore, housing providers that had been formed through large scale voluntary stock transfer from local authorities had additional restrictions on their borrowing capacity through s133 of the 1988 Housing Act, which required the further consent of the secretary of state before properties could be sold out from the sector. For social housing stock to be used as security, it needed to be translated into a form of property that lenders would recognise.

To convert social housing stock into assets that can be offered as security, the institutional regulatory framework matters. Private property is not a pre-given relation between a subject and an object, but an institution governing a "bundle of rights" regulating access between people over the right to either exclude or be included in access to identifiable

resources (Rose, 1998). These rights can be activated by critical legal events (Blandy et al, 2006), and shape subjectivities and create power relations across their landscape through their interactions with space (Blomley, 2011). Property relations, like financial relations, do not exist in a vacuum but are embedded in particular contexts (Massey, 2011). As pointed out by Kay (2016) in a study of the creation of property relations through conservation easements, the work of property nevertheless generates social abstractions that disembed qualitatively different features of the material world and reinscribes them in quantitative, tradable form, with law drawing the boundaries of what is tradable and sophisticated techniques of appraisal establishing a price (Kay, 2016: 512).

The importance in this process of obscurity as a tool of governance over the aims and politics of social housing can be seen here, with the redrawn boundaries of the 1988 Housing Act aligning the sector with private market interests and creating new needs for social housing stock to be represented as potentially commercial assets. Consistent accounting methods and valuation techniques aping commercial models became an important matter of practice throughout the 1990s, with the sector's representative body the National Housing Federation working with the accountancy profession to develop consistent financial reporting standards that could be digested by lenders (McDermont, 2010: 123). In this way a subtle realignment of the interests of social landlords to the need to satisfy private lenders was taking place, with representative bodies of providers and lenders together shaping their professional practice.

The legal and regulatory decision to characterise finance as a private matter through the consents regime allowing housing associations to collateralise their assets can therefore be seen to depoliticise the interests of financial lenders, naturalising the rights of lenders to repossess as part of the price of their assumption of the risk of lending. This has serious consequences for regulatory priorities as the need to prevent provider bankruptcy becomes paramount, as fieldwork interview data conducted in summer 2015 with a senior housing policymaker indicates:

> "The biggest risk to a consumer is if a lender repossesses. Because if a lender repossesses, at that point it ceases to be social housing. So all of the protections of being in a regulated sector disappear at a stroke. While they'll have the protection of their tenancy, in most cases that does not confer protection as to the rent level. So on the next anniversary of the rent increase, in principle a mortgagee in possession could put that rent up to commercial market level. And if the tenant can't pay, the tenant can't pay." (Senior housing policymaker, PhD fieldwork data, 2015.)

Here we see how the particular interests of the lender have become substituted as the general interest in social housing's goal of meeting need. This identification with lender interests has occurred to stave off a very real threat to people living in a housing association property - that their rent protections and potentially their home is at risk in the event of repossession. This is only in place however because of a wider policy context in which governments do not wish to publically borrow to fund the development of social housing, but have not so far been willing to dispense with the functions provided by a regulated sector whose rents are not set on a commercial basis.

4. AUSTERITY AND SOCIAL HOUSING FINANCE

Regulation has shaped financialisation, but how has this changed as a result of the financial crisis and austerity giving rise to new eras of uncertainty? The consents regime governing

the ability of housing associations to dispose of their stock that until recently was operated by the regulator, at present the HCA, has therefore been an important legal mechanism through which the entrenchment of financial interests has been established in housing associations. The development of a regulatory framework determined primarily through policy and not law has facilitated the presentation of financial interests as general interests, owing to the lack of statutory protections over keeping social housing assets within the sector.

At several stages over the past 30 years new legislation has been used to make this framework more permissive, with s172 of the Housing and Regeneration Act 2008 deregulating the requirement to obtain permission for land disposal that was previously required under s9 of the Housing Act 1996. Recent years have seen instability, with over-eager credit-fuelled expansion led two housing associations into effective insolvency, Ujima in 2008 and Cosmopolitan in 2013. Although mergers with larger housing associations guided by the HCA protected the social assets from repossession, both affairs raised disquiet as to the stability of the sector in the event of another financial crash or property market downturn. The period since the financial crisis has seen some attempts by the HCA to impose some stronger protections, including a failed attempt to introduce a ringfence of social housing assets and a pre-2015 election regulatory regime, now obsolete, that would have withdrawn consent for social housing stock to be used as collateral for potentially risky index-linked financial structures (HCA, 2015). Implied state backing plays a large part in the ability of housing associations to borrow, with their main attracting being a long term, stable and relatively risk free proposition, rather than being an exciting investment prospect in themselves.

Housing associations are subsidised not just through public grant but through rent subsidies in housing benefit, and although “rent convergence” policies from 2002 – 2015 restricted their ability to raise rents outside of an approved formula basis, their rents were still generally guaranteed above-inflation rent rises. This made housing associations attractive borrowers to lenders looking for long term liabilities to offset against their assets, enabling housing associations to continue to access credit through the bond markets from institutional lenders such as pension funds and insurance companies, as indicated by the following quote from an auditor to the sector:

> “[Funders] love them. They love housing associations. These are cash cows. These are organisations that deliver, day in day put, cash. That kind of security for a lender is a godsend.” (Auditor, PhD fieldwork data, 2016.)

This provides an indication of not just the dependency of housing associations on their stability to present themselves as borrowers, but of the limits financial lenders themselves have in finding attractive investment opportunities in a weak investment climate. This also indicates the status of housing association loan collateral from the lenders perspective, with lenders less concerned about ownership or potential ownership of subsidised rental housing assets than the cash flows that can be extracted from them, cash flows reliant largely on state subsidy and implicit state guarantees of stability.

The tensions within this financial model have been revealed within the last year, following the re-elected Conservative government’s undermining of the stability of housing associations, particularly the extension of the Right to Buy to housing associations and the planned 1% annual rent cut until 2020 in order to dampen housing benefit expenditure. These “urban austerity” policies (Peck, 2012), imposed on urban institutional contexts that

have been *already* neoliberalised, have undermined incomes and are likely to put pressure on providers with more precarious finances or exposure to unreliable sources of income such as commercial property development, as indicated by an auditor to the sector:

> "You're going to see a lot more of that merger and takeover activity now, so a lot of consolidation. You'll see less and less of the one thousand to five thousand unit housing associations, and a lot more of the 50 to 25 thousand lets. A much more sustainable housing association size. I think the mega-mergers that are also right at the top will happen more." (Auditor, PhD fieldwork data, 2016.)

Here, mergers are explicitly referred to as 'takeovers' and greater consolidation is predicted as a result of financial pressures, which could have the potential to undermine other principles such as the accountability of social landlords to tenants. This quote also indicates the norms and values imputed into the meaning of social housing by private advisors to the sector, with "sustainable" – itself an obscure term - defined in terms of the quantitative size of an association, naturalising the political and policy contexts that might determine what counts as sustainable in different situations.

Housing systems are not static however, and the imposition of austerity urbanism has created contradictions within social housing finance for the state to manage and capitalise on. Undermining the subsidies and stability of housing association incomes through policies such as the Right to Buy extension has been concurrent with the decision by the Office for National Statistics (ONS) in late October 2015 to reclassify housing associations as public entities for the purposes of statistical recording of government borrowing, adding the sector's £68bn in debt back onto state balance sheets. The reclassification bears no material legal weight on the ownership of social housing assets, and although the review itself was based on an analysis of the power governing disposals within the 2008 Housing and Regeneration Act, the Treasury appears to have had some influence on setting its remit according to media reports (Apps & Duxbury, 2015). The reclassification nevertheless added to the government's impetus in adding deregulatory measures to the Housing and Planning Act 2016, removing the consents regime entirely for traditional and stock transfer associations, replacing it with a duty of providers to inform the HCA of their disposals policies. With major implications for stock rationalisations, borrowing, and the ability of housing associations to sell vacant stock in high value areas, the full consequences remain to be seen and need to be the subject of further study. One potential consequence could be further divergences within the sector as providers located in high value central urban areas find avenues to exploit rent gaps for more commercialised developments, although the impact of this would be varied and providers have other motives for stock rationalisation, including the management of their relations with local authorities.

Many housing associations are not in a position to extract high value rents from urban land however, particularly those not based in London and the South East. In managing the contradictions of social housing financialisation, the willingness of the current Conservative government to contemplate divesting itself of housing associations should not be underestimated. An under-reported threat to the sector at the time of the ONS reclassification, reported in the *Financial Times*, came from consideration by the Treasury to sell off its historic state in social housing grant (Allen, 2015). Effectively treated as non-interest bearing debt on housing association balance sheets, the discounted sale of the debt to the private sector who could then demand repayment at the full amount would have had serious consequences, as indicated by one housing association CEO within the sector:

> "Were we required to repay a coupon on say 5% return on [Social Housing Grant], that would completely dwarf all of the damage that has been done because of the rent reductions etc, and would mean we wouldn't have a future as an association. Nor would most associations really, there would be very, very few associations that could survive anything like that. And they would be the southern richer associations." (Housing Association CEO, PhD fieldwork data, 2015).

Here again the refusal of the government to allow the debt to be repaid shows its continuing power over the sector, power that sits uncomfortably with its private status. The line between public or private within housing associations was further raised by provisions within the Act for a special administrations scheme to be established in the event of a housing association undergoing bankruptcy. Early amendments giving a court-appointed administrator the priority of ensuring social housing assets remained within the sector were withdrawn following warnings that lenders would again demand additional security (Spurr, 2016), with provisions in the final Act prioritising instead the ability of lenders to enforce their security.

Although this is a rather bald demonstration of how the interests of private investors have come to be identified with the interests of social housing, the ability of housing associations to be financialised has depended not just on the regulatory obscurity that has enabled social housing stock to be converted into assets. It has also relied on the ambiguity of implied state backing, support that could not be stated explicitly and jeopardising the construction of housing association borrowing as a private matter. In the words of a senior consultant to the sector, this has had a significant impact on lender confidence:

> "There's been a very beneficial willing suspension of disbelief on the part of investors, the HCA and the government. There is no guarantee but let's pretend there is, sort of thing, and very right. It's £60bn of private finance on very good terms that's been arranged on that, and government action has at a stroke more or less destroyed that." (Treasury management consultant, PhD fieldwork data, 2016.)

This suggests that the ambiguity of a guarantee that could not be admitted has been removed, to be replaced by genuine uncertainty over the government's future willingness to support the sector. Ambiguity therefore can be seen to act as a tool of neoliberal statecraft, with the financialisation of social housing in the case of English housing associations necessarily dependent on a regulatory framework governed through obscurity over the politics and aims of social housing. This ambiguity over housing association's hybrid nature has been necessitated by the need for financial interests for assurance over the security of their loans, resulting in the imposition of a legally constructed private/public divide that does not necessarily reflect the material realities of the blurred boundaries of states as they are restructured by neoliberal reforms to actively construct and support markets.

5. CONCLUSION

In structuring the borrowing of housing associations as private, the law has enabled the conversion of social stock into potentially commercial assets for purposes of loan security by an infrastructure of lawyers, valuers, treasury consultants and lenders. This effectively depoliticised financialisation, protected by a regulatory regime that has been unable to protect social housing stock as public resources over the interests of lenders. Finance has been territorialised through the landscape by enabling some providers in central urban areas to exploit rent gaps and diversify into commercial products and services, opening up

new frontiers of accumulation. Austerity and the Conservatives' re-election has revealed the tensions within this model however, converting ambiguity into uncertainty for lenders through state policies undermining the sector's stability and actively holding down rental income. The consequences of this will likely lead to increased instability and consolidation within the sector as associations undergo merger in an attempt to resolve financial difficulties, with associations in central urban areas able to exploit rent gaps and potentially opening up new avenues for urban accumulation and dispossession.

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