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CORE ANALYSIS

The political economy of tenancy contract law – towards holistic housing law

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Abstract

Europe's aggravating housing crisis lies in the blind spots of law. While central in constructing housing both as a home and as an asset, law bears the task of mediating between housing's multiple – social, economic, and cultural – dimensions. However, inner-legal fragmentation and a legal imaginary of property, the nation state, and its welfare system have depoliticized, deflected and rendered inaccessible the 'housing question'. Turning to tenancy contract law in particular, this article argues that the 'social' orientation of this early example of a 'materialised' field of contract law is not only ill-suited to reflect the recent structural shifts in the housing market brought about through financialisation. Tenancy contract law has effectively taken a conservative drift by claiming to adequately administer the bilateral landlord–tenant relation while being insensitive to macro-level developments. Tenancy contract law reindividualises tenant responsibility in the eye of hardships whose roots lie outside the contractual sphere and thereby furthers, rather than curtails, neoliberal housing policies. As a reaction, the article proposes political economy as a conceptual vantage point from which to develop a 'holistic housing law'. Such a perspective combines a concern for democratic and collective agency with careful attention to law's tacit and technical role in shaping the flow of finance and the techniques of landlords' governmentality. Part of this is a 'transformative tenancy law', to be reformulated to protect not against landlord bargaining power in the first place but against a hegemonic and expansive market rationality that structurally corrupts the social and material meaning of housing.

Keywords: contract law; tenancy contract; law and political economy; financialisation of housing; EU law; right to housing

1. Introduction: contemporary dimensions of the 'housing question'

Housing markets in bigger European cities have seen structural shifts over the past two decades. Despite considerable local differences, stark price increases, shortage of adequate housing and increases in evictions, displacement and homelessness across the board mark the return of the 'housing question' in a new guise.[1] In his early formulation when reflecting on precarious worker housing in Manchester, Friedrich Engels had identified the state of housing as reflective of social order more broadly. He claimed that in a capitalistic society, housing shortage is no coincidence, but a necessary occurrence.[2] During the 20th century and under the compromises of the welfare State, housing policies gradually lost some of their pressing undertone and bracketed more foundational questions of political economy. Frequent changes and readjustments in housing policies

[1]See Housing Europe, The State of Housing in Europe 2021, available at <https://www.stateofhousing.eu/#p=1>; K Knoll, M Schularick and T Steger, 'No Price Like Home: Global House Prices, 1870–2012' 107 (2017) American Economic Review 331.

[2]F Engels, 'Zur Wohnungsfrage [1872]' in J Fezer et al. (eds), *Zur Wohnungsfrage* (Spector Books 2015) 20–1.

suggested tight public scrutiny of the housing market, and an array of legal mechanisms contributed to the impression of the 'housing question' being somewhat tamed and well-administered.[3] This overlooked, first, how the most extreme forms of housing shortage had by no means ceded to exist but were relegated to more marginalised groups in society, such as to migrants and undocumented persons.[4] Second, it concealed how the social substratum of housing policies has been gradually undermined by broader fiscal developments, exacerbated especially since the Financial Crisis of 2008/9. In Piketty's account, rising housing prices make housing wealth a prominent example of the increasing capital/income ratio and a motor of inequality.[5] While the façade of welfarist housing policies remained intact; its interior began to erode. Strains on public households have led to waves of privatisation,[6] while private capital relocated investment streams from bonds to real estate as a reaction to near-zero interest rates. The bundle of policies and ideologies referred to as neoliberalism[7] has deeply penetrated the housing market structure and distributive arrangement. To take only one example, the rise of transnational real estate investors exposes how housing markets are not merely *local* – but driven by global-local connections, and are not merely composed of *bilateral relations* – but display systemic effects of complex multi-actor relations. Yet, the local nature and composition of interpersonal relations were the essence of existing key mechanisms of social embeddedness of housing markets, such as the provision of social housing and the protective provisions of tenancy law.

This article argues that asking the 'housing question' today, ie interrogating the complex dynamics, interests and ideologies that openly and tacitly govern access to affordable and decent housing, requires sets of answers that depart from the local and interpersonal imaginary of housing markets to reflect the interconnections between local and global actors, dynamics and regulatory layers. Before turning to law as a possible *solution* to the housing question, its role in the emergence of a housing crisis and in *shaping* the way the housing question can be confronted today needs to be explored. Levers to the housing question are dispersed and scattered across multiple legal fields and levels of competence. The resulting range, in the current debate, of progressive policy proposals and legal reconceptualisations challenging the status quo is remarkable. From pricing and rental caps, decommodification and reconceptualising property, and discrimination in the private sphere to forms of collective enforcement – housing has become an exemplary laboratory for fundamental discussions on the legal constitution of markets. It would be illusory to expect single and comprehensive policy 'solutions' to emerge from this laboratory. Rather – and it is these perspectives that this article addresses and wishes to further – this suggests working on our cognitive frames with which to think about housing in its multiple dimensions.

[3]D Madden and P Marcuse, *In Defense of Housing* (Verso 2016); on the genealogy of USA housing legislation Robert Solomon, How to Increase Our Affordable Housing Stock, in P Enrich and R Dyal-Chand (eds), *Legal Scholarship for the Urban Core. From the Ground Up* (Cambridge University Press 2019) 117, 118–20.

[4]P Marcuse and WD Keating, 'The Permanent Housing Crisis: The Failures of Conservatism and the Limitations of Liberalism' in RG Bratt, ME Stone and CW Hartman (eds), *A Right to Housing: Foundation for a New Social Agenda* (Temple University Press 2006) 139–62; S Dotsey and A Lumley-Sapanski, 'Temporality, Refugees, and Housing: The Effects of Temporary Assistance on Refugee Housing Outcomes in Italy' 111 (2021) Cities (ahead-of-print) (showing how refugees switch from temporal residences to informal housing and lack legal protection or social benefits).

[5]T Piketty, *Capital in the 21st Century* (Belknap Press 2014) 116–23. For legal perspectives on Piketty's work, see DS Grewal, 'The Legal Constitution of Capitalism' in H Boushey, JB de Long and M Steinbaum (eds), *After Piketty: The Agenda for Economics and Inequality* (Harvard University Press 2017) 471–90 and J Croon-Gestefeld, 'Piketty und die Rechtswissenschaft im 21. Jahrhundert' (2019) *Juristenzeitung* 340–6.

[6]M Byrne and M Norris, 'Housing Market Financialization, Neoliberalism and Everyday Retrenchment of Social Housing' 54 (2022) Environment and Planning A: Economy and Space 182–98.

[7]For conceptualisations of neoliberalism, see D Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005); C Crouch, *The Strange Non-Death of Neoliberalism* (Polity 2011); T Biebricher, *The Political Theory of Neoliberalism* (Stanford University Press 2019).

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One institution that is tasked with mediating between these different dimensions while being constitutive for the housing market is law.[8] Law is centrally involved in the two principal and antagonistic understandings of housing: on the one hand, housing as a shelter, basic need, human right and a protected political space,[9] and on the other hand, housing as a property asset. Housing appears as being hybrid from a legal perspective, located at the intersection of 'socially' programmed and 'economically' programmed legal regimes alike. Each of these legal regimes is insufficiently receptive towards the other and generates a partial imaginary of the many dimensions of housing. This article reads law's involvement in the (re-)production of the schism between the two tropes of 'housing as right' and 'housing as an asset' as the epitome of the ambivalent and constitutive function of law for housing markets and, more broadly, housing realities. Law is integral to both axes, as it engages with housing in different frameworks of social meaning, including but not limited to the economic system.[10] As the housing bubbles ahead of the Financial Crisis 2008/9 show, the housing market self-generates a level of fragility which has spill-over effects on the exercise of the right to housing.[11] This prompts us to identify a vantage point from which both axes can be put in perspective – a framework that can render visible the path dependencies that each axis inherits from established legal categories around which they are built. These loosely follow the old and porous public/private distinction, with the basic institutions of property and contract on the one hand ('housing as an asset') and the institutions of human rights and various mechanisms of the welfare State on the other ('housing as right').

One promising candidate to gain a critical and comprehensive perspective on the real-world effects of inner legal fragmentation comes from approaches around Law and Political Economy (LPE).[12] This line of legal thought that gains renewed traction on both sides of the Atlantic quickly reveals both axes as incomplete. Conceptualising housing as an asset misses the exclusionary dynamics and relational nature of property and its effects on and beyond the urban fabric. The tactics of institutional investors is precisely to decontextualise and reject any socio-cultural peculiarity of property in housing that would hinder their construction as a financial asset.[13] Perspectives on housing as a basic need, on the other hand, have gained shape and support in

[8]On law's role in mediating and translating between social contexts see G Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in R Rawlings (ed), *Law, Society and Economy* (Oxford University Press 1997) 149–76; D Wielsch, Iustitia mediatrix: Zur Methode einer soziologischen Jurisprudenz' in F für Gunther Teubner zum 65. *Geburtstag* (de Gruyter 2009) 395–414.

[9]On the homeplace as a place of resistance during racial segregation in the USA see bell hooks, *Yearning: Race, Gender, and Cultural Politics* (Routledge 2015) 42.

[10]On the balancing between an economic and a social dimension within the right to housing before European Courts see I Domurath and C Mak, 'Private Law and Housing Justice in Europe' 83 (2020) Modern Law Review 1188–220.

[11]See AJ Levitin and SM Wachter, 'Explaining the Housing Bubble' 100 (2012) *Georgetown Law Review* 1177–258; PF Kjaer, G Teubner and A Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011).

[12]See only J Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' 129 (2020) Yale Law Journal 1784–835; A Harris and JJ Varellas III, 'Law and Political Economy in a Time of Accelerating Crises' 1 (2020) Journal of Law and Political Economy 1–26; S Deakin et al., 'Legal institutionalism: Capitalism and the Constitutive Role of Law' 45 (2017) Journal of Comparative Economics 188–200; K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019). The German concept of 'Wirtschaftsrecht' (economic law) has early been understood as similarly dialectic between law, politics and the economy, see R Wiethölter, Die Position des Wirtschaftsrechts im sozialen Rechtsstaat (1965)' in P Zumbansen and M Amstutz (eds), *Recht in Rechtfertigungen: Ausgewählte Schriften von Rudolf Wiethölter* (Berliner Wissenschaftsverlag 2014) 293 and P Zumbansen, 'Economic Law: Anatomy and Crisis' 1 (2021) Journal of Law and Political Economy 461–92.

[13]See eg J Van Loon and M Aalbers, 'How Real Estate Became "Just Another Asset Class": The Financialization of the Investment Strategies of Dutch Institutional Investors' 25 (2017) European Planning Studies 221–40.

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various institutionalised and more loose formats in recent years,[14] but must apprehend economic dynamics and actors structuring housing markets, even if only to alter them. The biggest obstacle to claims of housing as a human right is not normative, pertaining to its status as a human right, but material, pertaining to how such claims are deflected and watered down in market realities.[15] Approaches from LPE help expose how basic legal concepts of contract and property give a certain orientation to those market realities. The malleability of the legal infrastructure allows turning the human right to housing from an external normative claim into a distributional mechanism intrinsic to the administration and provision of housing as a public good.[16] LPE's legal realist[17] and institutionalist[18] heritage challenges law's methodological individualism with structural perspectives. In particular, this calls for a political economy analysis that goes one tier deeper to include the dynamics of the real estate industry.[19] But law is not only implicated in the economic dimension of housing, but also the personal, cultural and spatialised experience around it, through discrimination, surveillance and displacement practices.[20] The question then is not merely how law constructs markets, but how law shapes social structures which in turn construct markets.[21] Moreover, LPE's renewed attention to the way the law insulates the economy from democratic contestation and invisibilises the stakes underlying an allegedly naturalistic market order[22] points towards further complications of the distributive patterns of housing markets. Housing affects and operates at different scales (from local to transnational) which are detached from one another in the legal framework. This fragmentation limits the political agency of city dwellers and urban strategies to social transformation that Henri Lefebvre famously invoked.[23] And housing policies have large spill-over effects on third parties and general society, as illustrated

[14]See J Kusiak, Trespassing on the Law: Critical Legal Engineering as a Strategy for Action Research' 53 (2021) Area 603–10 (on the successful referendum for the socialisation of apartments held by big corporate landlords in Berlin, 'Deutsche Wohnen & Co. enteignen', September 2021); J Hohmann, *The Right to Housing – Law, Concepts, Possibilities* (Hart 2013); Y Donders, 'Protecting the Home and Adequate Housing' 5 (2016) International Human Rights Law Review 1–25.

[15]M Pieterse, 'Urbanizing Human Rights Law: Cities, Local Governance and Corporate Power' 23 (2022) German Law Journal 1212–25. For a human-rights based initiative with a broad and multi-level toolkit to penetrate housing markets see 'The Shift Directives – From Financialized to Human Rights Based Housing' (2022), developed by former UN Special Rapporteur on the right to housing (2014–2020) Leilani Farha at The Shift, available at <https://make-the-shift.org/wp-content/uploads/2022/05/The-Directives-Formatted-DRAFT4.pdf>.

[16]KS Rahman, 'Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities' 118 (2018) Columbia Law Review 2447, 2459.

[17]See R Pound, 'The Call for a Realist Jurisprudence' 44 (1931) Harvard Law Review 697; RL Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 (1923) Political Science Quarterly 470; F Cohen, 'Transcendental Nonsense and the Functional Approach' 35 (1935) Columbia Law Review 809.

[18]*Locus classicus* for European debates M Hauriou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism' in A Broderick (ed), *The French Institutionalists* (Harvard University Press 1970) 93 and S Romano, *The Legal Order* (Routledge 2018); on the latter see M De Wilde, 'The Dark Side of Institutionalism: Carl Schmitt Reading Santi Romano' 11 (2018) Ethics & Global Politics 12–24.

[19]P Derrington, *Built Up. An Historical Perspective on the Contemporary Principles and Practices of Real Estate Development* (Routledge 2021); D Rogers, *The Geopolitics of Real Estate: Reconfiguring Property, Capital, and Rights* (Rowman & Littlefield International 2017); M Büdenbender and O Golubchikov, 'The Geopolitics of Real Estate: Assembling Soft Power via Property Markets' 17 (2016) International Journal of Housing Policy 75–96.

[20]Eg KS Rahman, 'Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities' 118 (8) (2018) Columbia Law Review, 2447, 2452 (arguing that legal rules and practices of the housing market constitute 'background rules that govern the terms of access to public goods and necessities', amounting to 'exclusionary techniques as part of a common "exclusionary playbook"').

[21]M Fourcade, 'Theories of Markets and Theories of Society' 50 (2007) American Behavioral Scientist 1015, 1019 *et seq.*

[22]See Polanyi's famous claim that 'laissez-faire was planned, planning was not', K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001), 141; for a Polanyian reading of EU economic policies see S Klein, 'European Law and the Dilemmas of Democratic Capitalism' 1 (2019) Global Perspectives 133–78. Moreover BE Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Harvard University Press 2012) 78–102.

[23]H Lefebvre, *The Right to the City, in Writings on Cities* (Eleonor Kofman and Elizabeth Lebas eds. and transl., Blackwell 1996 [1967]).

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by the carbon footprint of the construction sector[24] and the effect of such policies on neighbourhood quality and general social resilience.[25] The social sustainability of the current housing policies in the mid- and long-term is questionable and, as a realm with notorious boom-bust cycles,[26] one can read housing as approaching a possible social 'tipping point' for the social order,[27] just as climate has become an ecological tipping point.

The article seeks to carve out a space and provide a vernacular to address the contemporary 'housing question' in its multiple dimensions in law. To do so, I will first argue that law plays a central role in parcellating the debate around housing into different legal and policy regimes. This gives rise to a multi-layered arrangement that – in the abstractions of the liberal architecture of law – purports to serve diverse interests, but in practice has depoliticised, deflected and rendered inaccessible the 'housing question' (Section 2). I will then turn to private law institutions and tenancy contract law more specifically to show that the social guarantees of a 'materialized' private law are increasingly undermined by the logic of finance that penetrates the tenancy relation. The aspiration towards justice between contracting parties is not perceptive towards macro-level shifts in housing markets and hence today rather serves to reindividualise responsibility in the eye of structural developments and furthers, rather than curtails, neoliberal housing policies (Section 3). I take this point to press us to explore how the social substratum of tenancy law can be reinforced and elevated into other legal regimes. Some thoughts on future directions of a 'transformative housing law' conclude (Section 4).

2. Blind spots in the legal constitution of housing

Why is it that the housing crisis puts legal discourse, especially in private law, at unease, catches it by surprise and struggling to find adequate conceptual language? I will argue that this is because relevant developments in housing markets have remained in the blind spots of legal debates around housing and only become a topic once their manifestations (such as price peaks) have become undeniable. The working assumption of adequate social embeddedness of housing markets has been unbreakable over the past decades, creating a guise of stability that has made invisible drastic shifts that occurred in this time span.

Several legal fields intuitively come to mind when thinking of how law affects housing. Those comprise private law realms of contract, property, and investment next to rules on construction, zoning, and urban planning. These stand in a systematic context to one another; they are no eclectic collection, no 'law of the horse' in Llewellyn's famous formulation,[28] but reflect a specific division of labour between legal regimes. The division between those legal regimes furthering housing as a marketised commodity to be sold and rented on the 'free' market ('housing as an asset') and those legal regimes that embed these market procedures in the individual and societal

[24]Eg CJ Kibert, *Sustainable Construction: Green Building Design and Delivery* (5th edn., Wiley 2022).

[25]See generally R Florida, *The New Urban Crisis* (Basic Books 2017); for gentrification C Hochstenbach, 'State-Led Gentrification and the Changing Geography of Market-Oriented Housing Policies' 34 (2017) Housing Theory and Society 399–419; for touristification see Veronica Pecile, Between urban commons and touristification: Radical and conservative uses of the law in post-austerity Southern Italy, City 2022 (ahead of print).

[26]On the spill-over effects of the near-bankruptcy of the Chinese property developer China Evergrande in 2022 see 'A Ponzi Scheme by Any Other Name: The Bursting of China's Property Bubble' (*The Guardian*, 25 September 2022), available at <https://www.theguardian.com/business/2022/sep/25/china-property-bubble-evergrande-group>.

[27]See European Parliament resolution of 21 January 2021 on access to decent and affordable housing for all (2019/2187(INI)) ('AB. whereas housing market failures endanger social cohesion in Europe, increase homelessness and poverty, and affect trust in democracy').

[28]K Llewellyn, 'Across Sales on Horseback' 52 (1939) Harvard Law Review 725, 735, 737; K Llewellyn, 'The First Struggle to Unhorse Sales' 52 (1939) Harvard Law Review 873. The metaphor was excavated in the debate between and Frank Easterbrook and Lawrence Lessig around a holistic perspective on regulating cyberspace in the late 1990ies, see F Easterbrook, 'Cyberspace and the Law of the Horse' (1996) The University of Chicago Legal Forum 207 and L Lessig, 'The Law of the horse: What Cyberlaw might teach' 113 (1999) Harvard Law Review 501.

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context ('housing as a right') echoes the dichotomies of liberal legality. Here is not the place to rehearse at length some of the conceptual and practical challenges brought forward against the self-portrayed neatness of the liberal legal architecture.[29] Seeing the individual as Archimedean point and ontological basic unit rather than as socially embedded and prefigured in many ways essentialises individual autonomy and structurally underexposes law's implication in sustaining existing inequalities,[30] both domestically and in a global political economy.[31] The abstractions of a liberal legal architecture generate a system of rights and recourse that assigns responsibility for every legitimate individual and collective interest to specific legal regimes or institutions. Every such interest, so the idea goes, has a legal regime, an entitlement, a procedure, a level of competence, a clerk, a form, a legal professional etc to address it. This comprehensive nature and purported social inclusivity is a central pillar of its legitimacy. It is however built on a number of preconceptions on agency, power and social structure as reflected in law and politics. If one legal regime fails to satisfy its assigned role, in most cases, its task cannot and will not be covered by other regimes. Welfare law has ample illustrations of how its existence exerts legitimising effects on socially straining economic policies – even in the eye of the many constellations where welfare law fails its addressees and is hollowed out by global competitive pressures.[32]

Traditionally, the different interests related to housing have been processed by separate legal mechanisms. Those were largely unconnected from one another conceptually, systematically, and in the level of regulatory competence. Legal regimes from economic law vs social law, from the national vs the local and transnational level, even different conceptions of markets (a 'free' market as opposed to one for social or subsidised housing) created a differentiated legal landscape. It was however calibrated on implicit underlying premises on the pace, scale, actors, and regulatory levers in the housing market, many of which became anachronistic through decades of deregulation. Three examples shall illustrate how legal regimes and debates missed developing an 'evolving' concept of housing and its market.

A. Financialisation and the imaginary of property

Across many European countries, albeit with considerable geographic diversity, homeownership has risen to become the dominant form of tenure. Political discourses on housing have widely adopted the liberal promise of property[33] and portrayed homeownership as the superior form of tenure, often placing a certain stigma on renting.[34] By 'imaginary of property'[35] I shall denote here a set of implicit background assumptions that become operational when looking at the social

[29]See G de Almeida Ribeiro, *The Decline of Private Law: A Philosophical History of Liberal Legalism* (Hart 2019).

[30]On the connection between semantics and social epistemology see N Luhmann, 'Gesellschaftliche Struktur und semantische Tradition' in *Gesellschaftsstruktur und Semantik Studien zur Wissenssoziologie der modernen Gesellschaft* (vol. 1, Suhrkamp, 2000) 9–72.

[31]D Kennedy, 'Law in Global Political Economy: Now You See it, Now You Don't' in PF Kjaer (ed), *The Law of Political Economy. Transformation in the Function of Law* (Cambridge University Press 2020) 127–51.

[32]See JS Hacker, 'Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States' 98 (2004) The American Political Science Review 243–60; FW Scharpf, The Viability of Advanced Welfare States in the International Economy: Vulnerabilities and Options' 7 (2000), Journal of European Public Policy 190–228; P Zumbansen, 'Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' 56 (2008) American Journal of Comparative Law 769–805.

[33]See recently H Dagan, *A Liberal Theory of Property* (Cambridge University Press 2020).

[34]R Ronald, *The Ideology of Home Ownership – Homeowner Societies and the Role of Housing* (Palgrave Macmillan 2008); on asset-based inequalities B Christophers, 'A Tale of Two Inequalities: Housing-Wealth Inequality and Tenure Inequality' 53 (2021) Environment and Planning A: Economy and Space 573, 577–81.

[35]See for the more ontological roots as 'social model' F Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der modernen Gesellschaft* (Juristische Studiengesellschaft Karlsruhe 1953); for a political economy reading see M Bartl, 'Socio-Economic Imaginaries and European Private Law' in PF Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 228–53.

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world through the lens of property, in other words that mark the 'invisible. . . power of property'.[36] Property, as a central institution of the liberal state, relies on its depoliticising impetus that places certain questions front and centre while relegating others to a realm outside of legal debate.[37] Three illustrations for this come to mind. First, property thinking has privileged questions of access to property over concerns for non-owners. Countries with a particularly vehement promulgation of homeownership (such as under the UK's right-to-buy agenda[38]) have discontinued or scaled down their policies on social housing and rent caps. For families who did not reach the 'property ladder', the increase of housing prices considerably above inflation meant that inequalities in homeownership exacerbated general wealth inequalities. Property has been conceptualised in unitary terms, detached from local cultural and historical trajectories. As a result, existing differences in homeownership rates among EU countries have remained puzzling. While Anglophone countries traditionally have a high ownership rate, only exceeded by Southern and Eastern European countries, German-speaking countries in the EU are among the lowest.[39] For long, these differences were explained in economic terms and based on universal conceptions of property alone, rather than as reflecting diversity in the socio-political perspectives on housing and 'varieties of tenure' in the EU.[40] These abstractions from context are particularly deplorable and to some extent surprising as the street-level urban space is generally rich in informal and bottom-up understandings of ownership, both in public and private space, and lends itself to a realist and pluralistic conception of property.[41]

Thinking through the lens of private property has, second, obscured the many ways in which housing markets diverge from neo-classical assumptions of perfectly competitive markets.[42] This reinforced the perspective of a 'natural order' of housing markets in which law 'intervenes',[43] rather than being an integral part of it at the outset. Housing markets have porous geographical and temporal configurations – think of how housing serves current residents but can also attract newcomers. Increasing the housing supply through additional construction is a lengthy process. Lastly, housing prices cannot be regarded as the 'natural' outcome of market dynamics, but are subject to deliberate corporate strategies and culturally engrained practices of valuation.[44] For instance, the geographical location of a house contributes in large part to its valuation, illustrating the centrality of social context.[45]

[36]M Koskenniemi, 'Sovereignty, Property and Empire: Early Modern English Contexts' 18 (2017) *Theoretical Inquiries in Law* 355, 389.

[37]On the 'metaphorical' and 'story-telling' nature of property see LF O'Mahony and ML Roark, *Squatting and the State. Resilient Property in an Age of Crisis* (Cambridge University Press 2022) 146–64 and A Lehavi, *Property in a Globalizing World* (Cambridge University Press 2019) 91–125.

[38]See CM Hunter and S Blandy, The Right to Buy: Examination of an Exercise in Allocating, Shifting and Re-branding Risks' 33 (2012) Critical Social Policy 17–36.

[39]For the typology between English- and German-speaking countries initially J Kemeny, *The Myth of Home Ownership. Private Versus Public Choices in Housing Tenure* (Routledge 1981).

[40]S Kohl, *Homeownership, Renting and Society. Historical and Comparative Perspectives* (Routledge 2017); HM Schwartz and L Seabrooke, 'Varieties of Residential Capitalism in the International Political Economy: Old Welfare States and the New Politics of Housing' in H Schwartz and L Seabrooke (eds), *The Politics of Housing Booms and Busts* (Palgrave Macmillan 2009) 1–27.

[41]A Thorpe, 'Hegel's Hipsters: Claiming Ownership in the Contemporary City' 27 (2018) Social & Legal Studies 25–48.

[42]For this argument J Ryan-Collins, T Lloyd and L Macfarlane, *Rethinking the Economics of Land and Housing* (Zed Books 2017).

[43]See eg VM Molinari, *Die Tradition staatlicher Interventionen in den Mietwohnungsmarkt* (Mohr Siebeck 2021).

[44]On the construction of housing prices see L Murphy, 'Performing Calculative Practices: Residual Valuation, the Residential Development Process and Affordable Housing' 35 (2000) Housing Studies 1501–17; generally on the resurgence of 'just price' debates R Hockett and R Kreitner, 'Just Prices' 27 (2018) Cornell Journal of Law and Public Policy 771.

[45]See K Renner, *The Institutions of Private Law and their Social Functions* (Routledge & Kegan Paul Ltd., 1949, Agnes Schwarzschild trans.), 154 ("The locality which in itself is but a geographical point, has become so important because the economic development of society has become so enlarged and distributed in space, that the traffic of men and goods has a special need for this locality. If the locality can be called a "product" at all, then it is a product of the society which surrounds

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The third and most far-reaching effect of adopting a property lens has been to embrace the dominant normative and methodological individualism surrounding it. By consequence, the entry of financial actors and speculators with its depersonalisng and cascading effects on markets, emblematised by the rise of Blackstone Group L.P. as the world's biggest landlord,[46] has remained conceptually under the radar. Housing is an example for the catalytic effect of finance on all sectors of the economy and into 'everyday life'.[47] Financialisation can generally be defined as 'the increasing dominance of financial actors, markets, practices, measurements, and narratives, at various scales, resulting in a structural transformation of economies, firms (including financial institutions), states, and households'.[48] In the realm of housing, it leaves a mark on the materiality of the built environment, as it manifests itself in design and geographies of cities. Finance values real estate that generates consumer desires over one satisfying housing needs.[49] Thereby, it adds to existing inequalities in the affordability and stability of housing. Using a typology by David Harvey,[50] it can be said that legal institutions spurred the transition from valuing houses at their use value to their exchange value, and from there on, the speculative value. Once financialised, a house becomes a financial asset as much as it is a material asset, affecting the pace of urban development as it comes with its own temporalities of return on investment.[51] The cultural and material peculiarities of housing as a commodity – stressed in philosophical accounts that suggest specific distributive principles different from universal principles of justice[52] – are stripped away. What began with luxury homes in capital cities has quickly expanded and today targets single-family homes, student housing, elder care facilities and refugee accommodation, including in peripheral localities.[53] The animating impetus is to identify 'rent gaps',[54] ie gaps between the actual 'capitalised' and the 'potential' ground rent. Asset managers, insurance funds, pension funds and hedge funds, as well as commercial banks, acquire real estate ownership through different investment

it. It is society which gives value and importance to the locality, not the individual holder who owes his position to the mere chance of the law. The lucky holder may, however, exploit the importance of the locality created by society in an economic way by demanding from all passers-by a share of their profit.").

[46]See Letter by Surya Deva, UN Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and Leilana Farha, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, to Blackstone's CEO Steve Schwarzman of 22 March 2019, Ref. OL OTH 17/2019, available at <https://www.ohchr.org/Documents/Issues/Housing/Financialization/OL_OTH_17_2019.pdf>. On ramifications on the Dutch housing market see Stichting Oderzoek Multinationale Ondernemingen (SOMO), 'Blackstone als nieuwe huisbaas', March 2022, available at <https://www.somo.nl/nl/wp-content/uploads/sites/2/2022/02/Blackstone-als-nieuwe-huisbaas.pdf>.

[47]See the leading account by GR Krippner, 'The Financialization of the American Economy' 3 (2005) Socio-Economic Review 174; for housing B Christophers, 'Revisiting the Urbanization of Capital' 101 (2011) Annals of the Association of American Geographers 1347–64; G Fuller, *The Political Economy of Housing Financialization* (Agenda Publishing 2020).

[48]M Aalbers, *The Financialization of Housing. A Political Economy Approach* (Routledge 2016) 2.

[49]A Yates, *Seeing Like a Speculator, in Selling Paris: Property and Commercial Culture in the Fin-de-siècle Capital* (Harvard University Press 2015) 59–97.

[50]D Harvey, 'A Tale of Three Cities' (2019) *Tribune* <https://tribunemag.co.uk/2019/01/a-tale-of-three-cities>.

[51]F-J Grafe and H Hilbrandt, 'The Temporalities of Financialization' 23 (2009) *CITY* 606–18; D Gabor and S Kohl, '"My Home is an Asset Class": The Financialization of Housing in Europe' (2022), Study funded by GREENS/EFA in the European Parliament, available at http://extranet.greens-efa-service.eu/public/media/file/1/7461.

[52]M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 14–5.

[53]See UN Human Rights Council, Forty-third session, 24 February–20 March 2020, Guidelines for the Implementation of the Right to Adequate Housing. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; moreover M Aalbers, C Hochstenbach, J Bosma and R Fernandez, 'The Death and Life of Private Landlordism: How Financialized Homeownership Gave Birth to the Buy-to-Let Market' 38 (2021) Housing, Theory and Society 541–63; B Christophers, 'For Real: Land as Capital and Commodity' 41 (2016) Transactions of the Institute of British Geographers 134–48.

[54]N Smith, 'Gentrification and the Rent Gap' 77 (1987) Annals of the Association of American Geographers 462; B Christophers, 'Mind the Rent Gap: Blackstone, Housing Investment and the Reordering of Urban Rent Surfaces' 59 (2022) Urban Studies 698–716; L Calbet i Elias, 'Financilialised Rent Gaps and the Public Interest in Berlin's Housing Crisis' in A Albet and N Benach (eds), *Gentrification as a Global Strategy: Neil Smith and Beyond* (Routledge 2018) 165–76.

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structures. They replace traditional landlord–rentier capitalism with the logic of finance. In countries with high financialisation, the increases in rents are most strikingly decoupled from the development of income.[55] Finance increasingly sees its traditional function of lending credit to other economic activities supplanted by aspirations of geo-economics and wealth preservation.[56] It is important to add that financial actors do not simply take the role of landlords or individual savers but build a 'chain' of intermediaries that channel and bundle financial flows.[57] Integrating financial actors in the conception of housing markets hence requires integrating intermediaries – analysts, realtors, rating agencies, accountants, asset managers, developing companies,. .. – with their respective interpretations and expert practices.[58] Marginalised in neoclassical economics and political debates around housing, intermediaries are key to tracing finance's flow and underlying logic.

B. Globalisation, multi-level regulation and the imaginary of proximity

The local materiality of housing and the absence of explicit EU competencies have long led to an underestimation of the transnational economic and regulatory entanglements.[59] A key contributor is legal analysis's difficulty in thinking and connecting transversally and across scales of regulation.[60] In policy and academic debates, housing markets are mostly conceived of as locally situated and subject to national regulations, driving a host of comparative cross-country studies.[61] This 'imaginary of proximity' concealed the gradual weakening of local and national policy levers. In law, it manifests itself in the idea of subsidiarity or 'home rule'[62] as the central concept of local government law. Such a concept grants municipalities the power to regulate matters of mere 'local' nature out of their own right. Urban scholars and international political economists have long pointed out that globalisation draws the world's largest cities into an economic and regulatory competition to attract different forms of capital.[63] Financial flows, as we have seen, permeate city walls and give housing markets a 'glocal' dynamic[64] – manifesting themselves locally but shaped

[55]C Dewilde, 'Explaining the Declined Affordability of Housing for Low-Income Private Renters across Western Europe' 55 (2017) Urban Studies 2618–39.

[56]F Dafe et al., 'Introduction: The Structural Power of Finance Meets Financialization' 50 (2022) Politics & Society 523–42.

[57]D-L Arjaliès et al., *Chains of Finance: How Investment Management is Shaped* (Oxford University Press 2017).

[58]On law's construction of economic expertise see D Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[59]On the transnational legal embedding of cities as a starting point of giving effect to Sustainable Development Goal (SDG) 11 see KH Eller, 'SDG 11: Sustainable Cities and Communities' in R Michaels, VR Abou-Nigm and H van Loon (eds.), *The Private Side of Transforming Our World: UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2021) 353–81.

[60]See recently MC Canfield, J Dehm and M Fassi, 'Translocal Legalities: Local Encounters with Transnational Law' 12 (2021) Transnational Legal Theory 335–59.

[61]For a direction of comparative law that would transcend this focus on the national in favor of infra-, supra- and transversal comparisons see R Michaels, 'Transnationalising Comparative Law' 23 (2016) Maastricht Journal of European and Comparative Law 352–58; HM Watt, 'Globalization and Comparative Law' in M Reiman and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 599–623; N Krisch, 'Framing Entangled Legalities Beyond the State' in N Krisch (ed), *Entangled Legalities Beyond the State* (Cambridge University Press 2021) 1–32.

[62]For an overview GE Frug and DJ Barron, *City Bound: How States Stifle Urban Innovation* (Cornell University Press 2008) 60–74; R Briffault, 'Our Localism: Part I – The Structure of Local Government Law' 90 (1990) Columbia Law Review 1; on the alternative conception of local power as state creature (which predated home rule in the USA) see H Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870* (Cornell University Press 1983).

[63]S Sassen, *The Global City* (Princeton University Press 1991); C Parnreiter, 'Global Cities and the Geographical Transfer of Value' 56 (2019) Urban Studies 81–96; P Kenna, 'Globalization and Housing Rights' 15 (2008) Indiana Journal of Global Legal Studies 397–469; R Hirschl, *City, State. Constitutionalism and the Megacity* (Oxford University Press 2020) 181 *et seqq.*

[64]B de Sousa Santos, 'Globalizations' 23 (2006) Theory, Culture & Society 393 speaks of the overlap of 'globalized localism' (describing the global replication and dissemination of a specific economic, cultural phenomenon) and 'localized globalism' (denoting the local repercussions of transnational practices and imperatives).

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by the integration of metropolitan cities into the global economy. While the interplay between the national level and local housing regulations has long dominated our thinking about housing, the 'glocal' nature draws attention to the rules and processes that bridge regulatory scales, what might be called 'connectivity norms',[65] ie the mechanisms that expose housing markets to transnational buyers and financial market rationalities.

One of the most impactful 'connectivity mechanisms' has been EU law. Despite – or rather because of – the absence of explicit competencies in the field of housing, instruments and legislation at the EU level were insufficiently scrutinised in their effects on housing.[66] The deeper reason behind this is that the inherent tensions between 'housing as an asset' and 'housing as a right' and the different levels of competence are 'irritants'[67] from the perspective of EU law, falling through the cracks between the EU's economic and social goals. As such, EU law has taken steps of negative integration in the Internal Market by cutting back restrictions on the movement of capital and labour and distortions of competition. EU fiscal policies have had restrictive effects on public spending for social housing. Next to this, instruments of positive integration have made the housing market operate at a higher pace and subject to non-local influences. Rules on travelling and tourism, such as the Timeshare Directive[68] and the Package Travel Directive,[69] as well as rules on consumer finances like the Mortgage Credit Directive[70] have – each through a specific perspective tied to the Internal Market – altered the demand-side of housing markets and indirectly affected price levels. These implications of EU law could only, to a limited extent, be counterbalanced at the national level, and those national reactions are subject to EU law.

A prominent illustration comes from the ECJ's *Libert*[71] case. The Flemish Region had issued a Decree according to which in certain communes, authorisation for land development and real estate purchase was granted only to persons with a 'sufficient connection' with the communes in question. Such a connection could be established through six years of continuous residency, activities in the commune or other professional or personal ties of long duration. In addition, the Decree placed a 'social obligation' on the purchaser or developer to guarantee a certain percentage of social housing units. The stated motivation behind the Decree was to curb the gradual displacement of low-income residents through gentrification. Testing the rules in such a Decree against the Four Freedoms, the ECJ concludes a violation of each. It criticised that the chosen criterion of a 'sufficient connection' did not per se protect low-income residents and left considerable discretion to the provincial assessment committee that evaluates if such requirements are being met. The case reflects a known tension between the liberalising rationality of EU law and its local and culturally loaded instantiations and groundings.[72] The proportionality

[65]PF Kjær, 'Constitutionalizing Connectivity: The Constitutional Grid of World Society' 45 (2018) Journal of Law and Society 114–34.

[66]For two country illustrations see M Allegra et al., 'The (Hidden) Role of the EU in Housing Policy: The Portuguese Case in Multi-Scalar Perspective' 28 (2020) European Planning Studies 2307–29; M Elsinga and H Lind, 'The Effect of EU-Legislation on Rental Systems in Sweden and the Netherlands' 28 (2013) Housing Studies 960–70.

[67]I Domurath, 'Housing as a "Double Irritant" in EU Law: Towards a SGEI between Markets and Local Needs' 38 (2019) Yearbook of European Law 400, 413 *et seq.*

[68]Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts OJ L 33/10.

[69]Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC OJ L 326/1.

[70]Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 OJ L 60/34.

[71]Cases C-197/11 and C-203/11 *Eric Libert and Others v Gouvernement flamand* and *All Projects & Developments NV and Others v Vlaamse Regering* (Libert).

[72]See for the example of retail regulation G Tagiuri, 'Can Supranational Law Enhance Democracy? EU Economic Law as a Market-Democratizing Project' 32 (2021) European Journal of International Law 57, 87.

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test that the Court resorts to takes EU free movement as a default and places the onus of justification on locally motivated restrictions. This limits the scope of actions by the local level where shifts in housing markets are most noticeable and where a need to react is felt most imminently. A similar effect is reached in the realm of short-term rentals. Following the ECJ decisions in *Airbnb Ireland*[73] and *Cali Apartments*,[74] delocalised platform activities are subjected to the liberal framework of the E-Commerce Directive while the Four Freedoms bind municipal authorities.[75]

Together, these factors gave EU law an inconspicuous role in facilitating a financialisation of housing markets while simultaneously limiting local reactions to it. The changes occurred largely unacknowledged and outside of consultations involving the local level. Only in the past few years, different EU initiatives have called for a multi-level understanding of housing regulation. As part of the EU Urban Agenda launched in 2016 with the Pact of Amsterdam, the European Commission initiated a 'Housing Partnership'[76] as a multi-level working method involving Member States, cities, the EU COM and other stakeholders. Some years later, the 'New European Bauhaus' initiative seeks to give an aesthetic and cultural grounding to the European Green Deal within the built environment.[77] Most recently and importantly, a European Parliament resolution of 2021 developed a broad panoramic view of housing-related policy goals anchored in an understanding of housing as human right.[78]

C. Neoliberalism and the imaginary of the state

A third blind spot that has impeded law's ability to capture and thematise changes in housing markets stems from a static imaginary of the State, both concerning its role vis-à-vis markets and the power of its welfare regime. Homeownership and housing affordability are intrinsically linked to broader welfare policies and political economy, especially in Western Europe where homeownership is the central asset of the middle-class. In the account of Colin Crouch, the drive towards private homeownership as 'asset-backed welfare' can be understood as 'privatized Keynesianism', wherein, unlike traditional Keynesianism, it is not the State that incurs the debt for stimulating the economy, but rather private households.[79] Some see mortgaged homeowners become a vehicle for capital interests on the search for additional investments. Mortgage – just like debt regarding other basic services and provisions like energy or education – emerges as new legally constituted relation of inequality in a model that advocates for homeownership as chief form of tenure.[80] This model can become circular and self-reinforcing: Rising housing prices affect homeowners' political preferences, making them less supportive of redistributive or welfare policies as the increased property value operates as self-supplied social insurance. By consequence,

[73]Case C-390/18 *Airbnb Ireland* EU:C:2019:1112.

[74]Case C-724/18 *Cali Apartments* EU:C:2020:743.

[75]See the compelling analysis by D Kramer and M Schaub, 'EU Law and the Public Regulation of the Platform Economy: The Case of the Short-Term Rental Market' 59 (2022) Common Market Law Review 1633–68.

[76]EU Housing Partnership, Action Plan (December 2018) <https://ec.europa.eu/futurium/en/system/files/ged/final_action_plan_euua_housing_partnership_december_2018_1.pdf>.

[77]Commission President Ursula von der Leyen, *A New European Bauhaus* (October 15, 2020) <https://ec.europa.eu/commission/presscorner/detail/en/AC_20_1916>.

[78]European Parliament Resolution of 21 January 2021 on access to decent and affordable housing for all (2019/2187(INI)). See in preparation of the resolution D Caturianas et al., 'Policies to Ensure Access to Affordable Housing', Study requested by the EMPL Committee of the European Parliament (August 2020).

[79]C Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime' 11 (2009) The British Journal of Politics and International Relations 382–99; from a consumer perspective I Domurath, G Comparato and H-W Micklitz, 'The Over-Indebtedness of European Consumers: A View from Six Countries', EUI Working Papers 2014/17.

[80]M García-Lamarca and M Kaika, 'Mortgaged Lives': The Biopolitics of Debt and Housing Financialization' 41 (2016) Transactions of the Institute of British Geographers 313–27; C Di Feliciantonio, 'Subjectification in Times of Indebtness and Neoliberal/Austerity Urbanism' 48 (2016) Antipode 1206–27.

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political parties on the right will propose spending cuts on social policies during housing booms and further exacerbate neoliberal housing and urban policies.[81]

It was a rather seamless step for legal analysis to endorse the neoliberal narrative of individual responsibility[82] at the expense of a more contextual understanding of the underlying political economy. The imaginary of the (welfare) State as a guarantor of minimum needs remained in place while legislative and bureaucratic practices gradually cut back its effectiveness. While welfare States were traditionally both providers of public housing and of public capital to support housing construction, these functions are now limited to enabling privatised housing transactions.[83] Legal analysis has contributed to a façade of continuity by developing self-regulatory paradigms which propelled market logic into an increasing number of social fields.[84] In the realm of housing more specifically, law has made intuitive the commodification and economic valuation of housing by normalising such cognitive frames. This is reflected in discourses on the power of markets to incentivise construction of new buildings, the alleged objectivity of the price mechanism and the rise of intermediaries such as realtors and mortgage consultants who, at the fringes of the housing market set the tone for a market-friendly framing.[85] This framing in turn has effectively delayed the argument for housing as a human right and replaced a perspective of public planning ('seeing like a State')[86] by one of market logic itself ('seeing like a market').[87]

This section has argued that the housing question is invisibilised and thereby depoliticised through at least three cognitive frames that are rooted in the legal imaginary in the European legal tradition (which, for that purpose, is not and should not be understood as a rigid and shared set of legal principles but rather alludes to an epistemological meta-perspective). These frames have contributed to the late and conceptually eclectic reception, within law, of the changing parameters of the housing question and law's implication in it.

3. Situating tenancy contract law within its political economy

For anyone but homeowners, tenancy contract law is the most immediate legal connection to decent and affordable housing. Nonetheless, it has been at the margins of academic and political attention,[88] especially in countries which set strong incentives for homeownership. Here, tenancy contract rules have often been less protective, with flexible options for the landlord to opt for a temporary duration. When the Financial Crisis of 2008/9 pushed families who would otherwise have been expected to become homeowners in such countries into tenancy ('generation rent'), these countries' tenancy laws were improperly prepared for long-term tenants.[89] In other words,

[81]B Ansell, 'The Political Economy of Ownership: Housing Markets and the Welfare State' 108 (2014) American Political Science Review 383–402; N Theodore, J Peck and N Brenner, 'Neoliberal Urbanism: Cities and the Rule of Markets' in G Bridges and S Watson (eds), *The New Blackwell Companion to the City* (Wiley-Blackwell) 15–25.

[82]Locus classicus M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (Picador 2008).

[83]LF O'Mahony and ML Roark, *Squatting and the State. Resilient Property in an Age of Crisis* (Cambridge University Press 2022) 167–70.

[84]See eg E Christodoulidis's, 'Account of Law's Market Capture Under Paradigms of "New Governance"' in *The Redress of Law. Globalization, Constitutionalism and Market Capture* (Cambridge University Press 2021) 327: H Brabazon, 'Understanding Neoliberal Legality' in H Brabazon (ed), *Neoliberal Legality. Understanding the Role of Law in the Neoliberal Project* (Routledge 2016) 1–21; DS Grewal and J Purdy, 'Introduction: Law and Neoliberalism' 77 (2014) Law and Contemporary Problems 1; M Viljanen, M Rajavuori and T Kastner, 'Introduction: Imagining Post-Neoliberal Regulatory Subjectivities' 23 (2016) Indiana Journal of Global Legal Studies 377–82.

[85]See G Slater, *Freedom to Discriminate. How Realtors Conspired to Segregate Housing and Divide America* (Heyday 2021).

[86]JC Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).

[87]M Fourcade and K Healy, 'Seeing Like a Market' 15 (2017) Socio-Economic Review 9–29.

[88]Notable exception C Schmid (ed), *Tenancy Law and Housing Policy in Europe. Towards Regulatory Equilibrium* (Edward Elgar 2018).

[89]PA Kemp, 'Private Renting After the Global Financial Crisis' 30 (2015) Housing Studies 601–20.

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the policy-driven differences in the legal and economic framework between homeownership and rental made tenure inequality a root cause of housing wealth inequality.[90] In what follows, I shall argue that tenancy contract law provides an illustration of how a 'materialised' field of contract law reacts to some of the structural shifts underlying today's housing crisis. Through decades of relative academic neglect, tenancy law has been cut off from debates that have stirred up contract law and theory. It seems timely and necessary to pull tenancy contract law (back) into these debates in order to develop a critical vocabulary that transcends its status quo. To do so, I will use the German legal system as illustration.

A. The rise and conservative drift of 'social' tenancy contract law: the example of the German BGB

The development of tenancy law since the German Civil Code (Bürgerliches Gesetzbuch – BGB) came into force is closely linked to the crises and economic conditions in the 20th century.[91] The deliberations on the BGB took place at a time of housing shortage triggered by industrialisation and urbanisation,[92] in particular a lack of affordable housing for low-income classes of the population and a lack of security of tenure after transfer of ownership.[93] This made tenancy law a focal point in the controversy over a 'social' orientation of the codification and the metaphorical 'drop of socialist oil' that Otto von Gierke famously advocated for.[94] Next to its legal-political significance, tenancy contract law has also been a field of doctrinal-conceptual innovation, eg on third-party rights, standard-form contracts and coordination between different contractual relationships.[95]

Despite its obvious societal relevance and its centrality for many aspects around housing, including access, affordability, safety and security of tenure, tenancy law has been largely absent in major debates in private law in Europe. In the post-war period, tenancy law developed a highly specialised discourse, essentially limited to national perspectives, with a strong role for legal practitioners and little attention to the interfaces with other areas of law.[96]

The early encapsulation of tenancy law as a 'materialized' or 'special' private law field has arguably been a key factor here – contributing to a cut-off from general private law principles and debates. The origins of tenancy contract law as a specialised contract regime with particular concern for tenant protection goes back to war-time emergency legislation. For the first time in 1917, newly established 'Rent settlement offices' (*Mieteinigungsämter*) were entitled to reverse terminations and determine an appropriate rent level.[97] These regulations were popular and remained in force after World War I. The destruction and displacement after World War II again

[90]B Christophers, 'A Tale of Two Inequalities: Housing-Wealth Inequality and Tenure Inequality' 53 (2021) Environment and Planning A: Economy and Space 573, 578–84.

[91]For a more detailed account of the following, see KH Eller, 'Privatrecht in der Wohnungskrise: Soziales Mietrecht und die Verfassung des Wohnungsmarktes' in J Croon-Gestefeld et al. (eds), *Das Private im Privatrecht* (Jahrbuch Junge Zivilrechtswissenschaft, vol. 5, Baden-Baden, Nomos 2022) 75–98.

[92]See J Reulecke, *Geschichte der Urbanisierung in Deutschland* (Frankfurt a.M.: Suhrkamp 2005) 68.

[93]See T Repgen, *Die soziale Aufgabe des Privatrechts. Eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts* (Mohr Siebeck: Tübingen 2001) 231 *et seq.*

[94]Otto v. Gierke, The Social Role of Private Law (1889), Ewan McGaughey transl., reprinted in German Law Journal 19 (2018) 1017–116.

[95]S-B Beil, *Historische Entwicklungslinien des Wohnraummietrechts* (Tübingen: Mohr Siebeck 2021) 57–69.

[96]See eg the recent compendium of the most visible voices in the German debate, M Artz et al. (eds.), *Facetten des Mietrechts. Festschrift für Ulf P. Börstinghaus zum 65. Geburtstag* (Beck 2020).

[97]First Tenant Protection Ordinance (Erste Mieterschutzverordnung) of 26 July 1917 (RGBl. 1917 I p. 659); on this J Herrlein, '100 Jahre "Mietpreisbremse". Entwicklungslinien in Politik und Recht 1916 bis 2016' (2016) Neue Zeitschrift für Mietrecht 2016, 1, 3.

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led to a dramatic housing shortage and anew to ad hoc regulations on tenant protection which lasted until the 1950s.[98] Those regulations comprised rules on rent control, an obligation to contract as well as protection against eviction. Large parts of the tenant-friendly orientation of tenancy law hence stem from emergency regulations outside the BGB and were only incorporated permanently in the BGB in retrospect, through a 1960 law that sought to 'finally transfer the housing stock to the social market economy'.[99] Tenancy contract law today diverges from the general contract law of the BGB through procedural, temporal and formal rules concerning the contract's substance, its termination regime and protection against evictions.[100]

By the 1960s at the latest, 'social' had become a consistent attribute of tenancy contract law, suggesting that the field had adequately resolved its basic normative conflicts and pacified the tense relationship between tenant and landlord. 'Social tenancy law' became a standing and metaphorically highly suggestive titulation used routinely in case law[101] and academic debates. The attribute 'social' designated it as 'materialised' private law *avant la lettre* – referring to the emergence of the topos of the 'social' in early 20th-century legal thought that became shorthand for realist contextualisations of private autonomy and, as such, spread globally.[102] The exact meaning of this attribute in the tenancy law context remained however vague. Core debates and trajectories of private law over the past decades, such as those around constitutionalisation,[103] Europeanisation,[104] competing regulatory paradigms[105] or different economic models[106] have left little mark on tenancy law. When the 'materialisation' of contract law sparked controversy towards the end of the century, tenancy law was treated as an outlier, long excluded from the aspiration towards a 'unity of private law' and hence of little generalist conceptual interest.[107] Singling out tenancy law from the general law of contract not only moved it into a niche, shielded from conceptual innovation, but also contributed to the myth of general private law being 'alleviated' from political considerations.[108]

[98]See P Oestmann, in *Historisch-Kritischer Kommentar zum BGB* (Tübingen 2013), §§ 535–580a, marginal no. 77.

[99]Law on the Dismantling of the Housing Coercion Economy and on a Social Tenancy Law (Gesetz über den Abbau der Wohnungszwangswirtschaft und über ein soziales Mietrecht), BT-Drucks. 3/1234, S. 53.

[100]For an overview see M Häublein, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn., Beck 2020), § 535 paras 59 *et seq*.

[101]See the references to 'social tenancy law' as a standing phrase in Bundesverfassungsgericht, Order of March 25, 2021 – 2 BvF 1/20 et al, paras. 118, 120, 128, 135 ('the social tenancy law in general').

[102]D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in D Trubek and A Santos (eds), *The New law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19; D Kennedy, 'The Globalisation of Critical Discourses on Law: Thoughts on David Trubek's Contribution' in G de Búrca, C Kilpatrick and J Scott (eds), *Critical Legal Perspectives on Global Governance. Liber Amicorum David M. Trubek* (Hart 2014) 3; O Jouanjan, 'Le souci du social: Le 'moment 1900' de la doctrine et de la pratique juridiques' in O Jouanjan and E Zoller (eds), *Le 'moment 1900'. Critique sociale et critique sociologique du droit en Europe et aux États-Unis* (LGDJ 2015) 13.

[103]For a comparative view see eg C Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International 2008); for the German debate C-W Canaris, 'Grundrechte und Privatrecht' 184 (1984) Archiv für die civilistische Praxis 201; C-W Canaris, *Grundrechte und Privatrecht – eine Zwischenbilanz* (de Gruyter 1999).

[104]See eg Ns Jansen and L Rademacher, 'European Civil Code' in J Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar 2012) 299–313.

[105]See eg H-W Micklitz, 'On the Intellectual History of Freedom of Contract and Regulation' 4 (2015) Penn State Journal of Law & International Affairs 1; A Hellgardt, *Regulierung und Privatrecht* (Mohr Siebeck 2016).

[106]See eg the recent debate between H-B Schäfer, 'National Wealth and Private Poverty through Civil Law' 85 (2021) RabelsZ 854 and K Pistor, 'Law and Economics at the Crossroads of Different Schools' 85 (2021) RabelsZ 876.

[107]See the absence of tenancy law in Canaris' stock-taking intervention on the occasion of the 100th anniversary of the BGB, C-W Canaris, 'Wandlungen des Schuldsvertragsrechts – Tendenzen zu seiner "Materialisierung"' 200 (2000) Archiv für die civilistische Praxis 273.

[108]See R Wiethölter, Vom besonderen Allgemeinprivatrecht zum allgemeinen Sonderprivatrecht? (1982/3)' in P Zumbansen and M Amstutz (eds), *Recht in Recht-Fertigungen* (Berliner Wissenschaftsverlag 2014) 199, 200.

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A telling example for a certain conservative drift in the way 'social tenancy law' operates and is invoked in legal debates concerns the Berlin 'rent cap' (*Mietendeckel*),[109] enacted by the state legislature of Berlin in early 2020 and invalidated by the German Constitutional Court in March 2021[110] for lack of legislative competence. The legislation comprised three independent mechanisms on rent control: a moratorium freezing rents in existing tenancy contracts on a given cut-off date, a maximum rent level introduced for new tenancy relations, and an actual 'capping' mechanism to be activated two years after the entry into force of the legislation. This 'capping' mechanism would reduce the rents due in existing contracts as far as they exceed this upper limit. Challenged by a phalanx of liberal-conservative political parties and representatives of the real estate lobby on both formal and substantive grounds, the rent cap was brought before the Constitutional Court. The Court's decision revolved exclusively around the state of Berlin's legislative competence. In the differentiated federal system of competences between the federal and the state level, the federal level has the primary competence for 'civil law'.[111] Ironically, in order to avoid the rent cap to qualify as mechanism of 'civil law', the Land of Berlin presented it as public law mechanism that would affect private law relations from the outside – a view that identified private law with a realm governed by 'freedom of contract, free price formation and the idea of market value'[112] and constructed a neat antagonism between private and public law uncommon in progressive legal debates.[113] The Court however adopts a broad understanding of 'civil law' and classifies the rent cap as part of it. Importantly, the Court's reasoning essentialises the concept of 'social tenancy law' and argues that related rules would in their entirety qualify as 'civil law'.[114] This suggests a timeless and uniform understanding of the 'social' impetus of tenancy law whose authority of interpretation is monopolised with the federal legislator. The historical trajectory of 'social' tenancy law lends it a retrospective orientation and centres it around a historicised understanding of the landlord/tenant relation allegedly pacified in the past and hence administered along these lines. Missing is a reimagining of what normative direction and regulatory mechanisms would be necessary to translate past 'social' guarantees into the future.

B. 'Social' tenancy law as shell: responsibilising tenants

A retrospectively oriented tenancy law is a mere shell vis-à-vis financialised landlords. Drawing on economies of scale, such landlords pursue strategies of cost-optimisation driven by economic rationalities that stem from outside the (eroding) interpersonal relation upon which tenancy contract law is calibrated. Issues such as the systematic delay of maintenance work, the lack of contact options for tenants, and the refusal of out-of-court settlement raise structural barriers for tenants to invoke and enforce their rights, all while remaining in an informal terrain that is hardly attained by contractual remedies.[115] Operating as a filter between macroeconomic shifts in a financialised housing market and the bilateral micro-level, tenancy law upholds the ethos of individual responsibility and effectively serves to hold tenants accountable. As Atiyah notes in his

[109]Gesetz zur Mietenbegrenzung im Wohnungswesen in Berlin (MietenWoG Bln) in der Fassung von Art 1 des Gesetzes zur Neuregelung gesetzlicher Vorschriften zur Mietenbegrenzung vom 11. Februar 2020 (GVBl of 22 February 2020, p. 50).

[110]Bundesverfassungsgericht, Order of 25 March 2021 – 2 BvF 1/20 et al.

[111]Article 74 (1) no. 1 of the Basic Law; on this see C Bumke and A Voßkuhle, *German Constitutional Law* (Oxford University Press 2019) ch. 28.

[112]See Statement of the Berlin Senate and the House of Representatives to the proceedings before the Bundesverfassungsgericht, reproduced in Bundesverfassungsgericht, Order of 25 March 2021 – 2 BvF 1/20 et al, para 38.

[113]K Barnes, 'Reframing Housing: Incorporating Public Law Principles into Private Law' 31 (2020) Duke Journal of Comparative & International Law 91.

[114]Bundesverfassungsgericht, Order of 25 March 2021 – 2 BvF 1/20 et al, para 135.

[115]For a recent socio-legal study on access to justice in tenancy law in Berlin see M Wrase et al., *Zugang zum Recht in Berlin*. Zwischenbericht explorative Phase, WZB Discussion Paper P 2022-004, July 2022, available at <https://bibliothek.wzb.eu/pdf/2022/p22-004.pdf>.

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famous anthology on contract law: 'The whole essence of this form of individualism was that a man was left free to choose, but he paid the 'natural' penalty if he chose wrongly. It was a splendid, simple and cheap way of imposing social discipline, or rather of encouraging the people to discipline themselves.'[116] The individual tenant is acting within a framework portrayed as 'social' tenancy law, complemented by welfare provisions, and can hence be made responsible for any difficulty they encounter despite these cushioning legal mechanisms. In such a climate especially, tenants are made to comply with informal disciplining powers of landlords, ranging from screening procedures and nominations,[117] being pushed into black markets devoid of legal protection,[118] seeing their rent payments and tenancy relation monitored through impersonal 'property tech' tools,[119] and controls of deviant behaviour out of fear of evictions.[120] Landlords exercise authority by making tenants act upon themselves and tenancy contract law legitimises this by tapping into the vernacular of personal freedom.[121] Consent alone is no sufficient justification for contracts which parties enter looking for substantive qualities brought about by extra-contractual dynamics.[122] Such substantive qualities like affordability and liveability are directly impacted by rationales of political economy which tenancy contract law locates *outside* the realm of the contract. To be sure, certain limitations of contract's epistemology are inherent in the very working and appeal of contract.[123] Several concerns might be better addressed by legal instruments other than contract. However, the centrality of contract for neoliberal policies stems precisely from its micro-level conception of justice inter partes that made the contractualisation of social life a proxy for its subjection to market rationality. Tenancy contract law, by remaining – as we have seen – largely indifferent to and unaffected by the shift to post-welfare housing policies and the rise of financial actors, sends a signal of continuity that validates the hardships of many tenants. Aside from the established adjustments to differences in 'bargaining power' between landlord/tenant, tenancy contract law appears aligned with the decontextualising and pre-realist gist of

[116]PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 273.

[117]See D Cowan, K Morgan and M Mcdermont, 'Nominations: An Actor-Network Approach' Housing Studies 24 (2009) 281–300.

[118]See E Bargelli and R Bianchi, 'Black Market and Residential Tenancy Contracts in Southern Europe: New Trends in Private Law Measures' in C Schmid (ed), *Tenancy Law and Housing Policy in Europe. Towards Regulatory Equilibrium* (Edward Elgar 2018) 117–46.

[119]See T Wainwright, 'Rental Proptech Platforms: Changing Landlord and Tenant Power Relations in the UK Private Rental Sector?' (2022) (ahead-of-print) Environment and Planning A: Economy and Space.

[120]See M Vols, 'European Law and Private Evictions: Property, Proportionality and Vulnerable People' 27 (2019) European Review of Private Law 719–52.

[121]H Carr and R Alcock, 'Understanding the (Re-)Regulation of Private Renting in England: Karl Polanyi, the Rogue Landlord, the Responsible Tenant and the Decent Home' in TT Arvind and J Steele (eds), *Contract Law and the Legislature* (Hart 2020) 297–328; see generally on neoliberal governmentality N Rose, P O'Malley and M Valverde, 'Governmentality' 2 (2006) Annual Review of Law and Social Science 83–104.

[122]R Wiethölter, 'Recht (1967)' in P Zumbansen and M Amstutz (eds), *Recht in Recht-Fertigungen. Ausgewählte Schriften von Rudolf Wiethölter* (Berlin: BWV 2014) 3, 17–8 ('It is not employment contracts as contracts that are of primary interest today, but job security and employment protection, adequate pay for adequate work in adequate working hours, not the contract for electricity, water, gas and transport, but the guarantee of supply, not the rental contract, but the housing culture for couples and families at adequate pay, not the price-fixing contracts on cement, chocolate or detergent, but the political-economic phenomenon of price-fixing, not the cartels and corporations as autonomous allocation of market shares and operational ranks, but as disruption of markets, as disruption of economic and thus general politics. Here, the problems shift from conclusion and agreement of the contract to the guarantee of substantive qualities, hence they shift away from the sphere of self-determination, which, however, does not yet mean shifting into areas of full heteronomous determination, as for example in a state planned economy' – own translation).

[123]See N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) 459 (contracts 'stabilize a specific difference over time, while being indifferent to anything else'); G Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' 9 (2000) Social and Legal Studies 399–417; E-J Mestmäcker, 'Über die normative Kraft privatrechtlicher Verträge' 19 (1964), Juristenzeitung 441–6.

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(neo-)formalist contract law.[124] A such tenancy contract law runs the risk of exposing tenants to structural and objectifying domination within the justificatory framework of contract.

C. From status to a market-based transactions: bringing market context back into tenancy law

The stasis of tenancy contract law, caught in the antinomies of individual freedom, has made it difficult to absorb changing market structures within the bilateral relation of contract. Just like other status-based contractual regimes – consumer contract,[125] employment contract,[126].. . – tenancy contract law is confronted with a growing fluidity of the social roles (landlord/tenant) it is built around. The critique of a certain coarseness of the stereotypical attributions of 'materialized' private law that cannot do justice to individual levels of autonomy and vulnerability has been raised early on[127] and continues to be virulent in tenancy law. In particular, tenancy law is indifferent to the natural or legal personhood of the landlord and the financial or corporate structure surrounding it, as well as to the degree of individual need and dependence of the tenant.[128] What is more, the bilateral configuration around landlord/tenant seems ill-attuned to third-party or general welfare concerns such as environmental requirements. Tenancy law lacks the conceptual grammar to process conflicts between social and environmental dimensions of sustainability.[129]

Given the broad brush with which tenancy law paints landlords/tenants, a recent development towards an internal pluralisation of tenancy law provisions merits attention. Special tenancy law regimes are increasingly emerging whose applicability is tied to certain characteristics of the local housing market. Examples from the German BGB concern inter alia: (1.) the rent price regime that takes into consideration the rent level in local surroundings,[130] (2.) the rules on non-discrimination in the private sphere that exceptionally allow justifying a tenant selection otherwise qualified as discriminatory if it serves to maintain a social mix of tenants and is formalised in a housing policy concept;[131] (3.) a certain rent cap ('rent brake') applies in 'areas with a tense housing market'

[124]See the most influential C Fried, *Contract as Promise* (Harvard University Press 1981); more recently, DG Baird, *Reconstructing Contracts* (Harvard University Press 2013).

[125]For a critique of the current 'one-size-fits-all' model see V Mak, 'The Consumer in European Regulatory Private Law', in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 381–400; M Hesselink, 'EU Private Law Injustices' (2022 (ahead-of-print)) Yearbook of European Law, at 22.

[126]For a discussion on platform employment models see S Vallas and JB Schor, 'What Do Platforms Do? Understanding the Gig Economy' 46 (2020) Annual Review of Sociology 273–94; on the fluidity of crowdworking D Schönefeld and I Hensell, 'Autonomie und Kontrolle – Crowdworking "im Dazwischen"' in I Hensel et al (eds), *Crowdworking zwischen Autonomie und Kontrolle* (Nomos 2019) 9–40.

[127]See eg J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998) 392–408.

[128]Fabre-Magnan has proposed the creation of a new category of 'crucial contracts' that would take the access to vital goods, not a stylized imbalance of contractual power as a starting point, see M Fabre-Magnan, 'What Is a Modern Law of Contracts? Elements for a New Manifesto for Social Justice in European Contract Law' 13 (2017), European Review of Contract Law 376–88. Others propose the long-term nature as vantage point for the crucial nature, see L Nogler and U Reifner (eds), *Life-Time Contracts. Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law* (Eleven Publishing 2014).

[129]See however Bundesgerichtshof, Judgement of 1 July 2022 – V ZR 23/21 (validating a legislation in the Land of Berlin that provides a claim to a homeowner against their neighbour to tolerate the intrusion and construction on his property necessary for energy insulation of the house. The constitutional enshrinement of climate protection in Article 20a Basic Law justifies for a proportionate restriction of the right to property).

[130]Sect. 558(2) BGB. On recently introduced and ambitious Dutch price cap rules, see M Loos, 'Huurverhogingen, algemene voorwaarden en wijzigingsbedingen: Maakt het Hof van Justitie een einde aan oneerlijke huurverhogingen?' 97 (2022) Nederlands Juristenblad 192–200.

[131]Art 19(3) Allgemeines Gleichbehandlungsgesetz (AGG).

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designated by the state government.[132] These rules fine-tune their scope not via status-related application criteria, but via geographical and housing-market related – in other words: institutional – application criteria. Tenancy contract law becomes locally pluralised, leaving room for municipal intervention and local difference and echoing *v. Gierke's* early demand for more 'leeway (in the) consideration for local customs and needs'.[133] A contract law regime triggered by strained market conditions seems a suitable proxy for embedding contractual rules in their local economic context, the latter being understood as an amalgam of local and global dynamics.[134] Most importantly, such rules acknowledge tenancy law as part of urban governance and require it to confront its (changing) real-world context which transcends the bilateral micro-level perspective taken by contract law. Not least, an effective allocation of private claim rights can be used for legal mobilisation and fostering of public interests, curbing the power of financialised real estate.[135]

4. Conclusions: trajectories for a transformative tenancy contract law

This article has argued that the aggravating housing crisis lies in the blind spots of law's conceptual sensorium. Inner-legal fragmentation and a tunnel vision created through existing legal imaginaries of property, levels of regulation and the State have kept structural shifts of the housing market under the radar. With each legal domain taking a peculiar and necessarily partial perspective on housing, none can apprehend the social dynamics of housing more comprehensively. The schism between 'housing as an asset' and 'housing as a right' has materialised in plural and unconnected discourses on housing. As it stands, these discourses have developed in isolation so that it is no longer enough to recalibrate normatively between the two. A critical perspective on today's housing question requires the tools necessary to make such a recalibration practical. This points to the necessity to develop a 'holistic housing law' that explores doctrines, conceptual vantage points and legal-political practices that bridge, translate and create 'productive irritation' between presently secluded debates. In legal terms, this requires bringing into the picture those fields of law that, despite lacking a specific housing imprint, are central building blocks of housing markets, ie the economic areas of property, investment, capital markets and services law (and their respective EU law influence) as well as fiscal and monetary rules. This draws attention, for example, to the inclusion of housing in the EU's Social and Environmental Taxonomy.[136]

As a conceptual umbrella for such an endeavour, this article proposes to situate the different legal domains that shape housing firmly within the political economy – a framework that takes a genuinely transversal perspective at inner-legal categories and, even more importantly, is sensitive towards the political conflict lines between generations, urban and rural space, different

[132]Sect. 556d(2) BGB. Similarly, a stricter cap applies to rent increases in areas in which a sufficient supply of housing "on reasonable terms ... is particularly endangered" (section 558 (3) sentence 2 BGB).

[133]O v Gierke, *Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht* (Leipzig: Duncker & Humblot 1889) 240. For an overview of current municipality-level approaches see A Holm (ed), *Municipalism in Practice. Progressive Housing Policies in Amsterdam, Barcelona, Berlin, and Vienna* (Rosa-Luxemburg-Stiftung 2022), available at <https://www.rosalux.de/fileadmin/user_upload/RLS_Study_Municipalism_in_Practice.pdf>.

[134]For a similar exploration of alternatives to status-based contractual regimes see F Cafaggi, 'From a Status to a Transaction-Based Approach? Institutional Design in European Contract Law' 50 (2013) Common Market Law Review 311–29.

[135]For a such instrumentalisation of all status-based 'materialised' contractual rights see L Moncrieff, 'Creabimus!' Rethinking the Corporation and Social Contract for the Post-Pandemic Age' 1 (4) (2022) European Law Open 914.

[136]Regulation (EU) No. 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 OJ L 198/13; for a current overview see Platform on Sustainable Finance, Final Report on Social Taxonomy (February 2022), available at <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/280222-sustainable-finance-platform-finance-report-social-taxonomy.pdf>. See also The Shift Directives (supra n 15), Directive 2 ('Regulate Institutional Investment in Housing to Comply with Human Rights'), Directive 4 ('Restrict Investment in Residential Real Estate and Vacant Homes by Individuals') and Directive 9 ('Strengthen International, Regional and Industry Accountability Mechanisms').

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metropolises, levels of regulation and finally between social and ecological aspects of sustainability. Inspired by the breadth of recent scholarship on Law & Political Economy, the path towards a 'holistic housing law' will combine a concern for democratic and collective agency[137] with careful attention to law's tacit and technical role in shaping the flow of finance and the means of landlord power.[138] Such a perspective inscribes to a shift 'from norms to practices'[139] that complements the analysis of the justifiability of norms by tracing the everyday lives of legal provisions in guiding social practice. For tenancy law, this has two implications. First, the assumption of a general power imbalance between landlord and tenant that gave the field its 'social' character is too general and should not be assumed to provide an adequate safeguard for tenants in the housing crisis.[140] Second, rather than expanding rules around the protection of private autonomy of tenants as in 'materialised' private law,[141]'social' tenancy law today requires safeguards against the commodifying market rationality and the way it enables more subtle forms of landlord domination. Detecting and tracing them will require a bottom-up, often ethnographic analysis of landlord practices and the role of contract in shaping them formally and informally.[142] A 'transformative tenancy law' – and similarly the human right to housing[143] – would need to be reformulated to protect *not merely against an individual actor's power* but *against a hegemonic and expansive market rationality that structurally 'corrupts' the social and need-based meaning of a 'home'*. This offers a straight connection between tenancy law and rules on valuation and decommodification (such as rent caps, 'socialisation', property register etc.). 'Transformative tenancy law' would hence zoom into 'where the action is' and bring to the fore the question of justice in private law, understood as both interpersonal and societal and as being shaped both at the micro and the macro level.

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[137]A Akbar, 'Demands for a Democratic Political Economy' 134 (2020) Harvard Law Review 90–118.

[138]See D Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' *European Review of Private Law* 1 (2001) 7–25.

[139]For such a direction A Riles, *Collateral Knowledge. Legal Reasoning in the Global Financial Markets* (Chicago University Press 2011).

[140]See also The Shift Directives (supra n 15), Directive 7 ('Enact Effective Legislative Protections for Tenants and Ensure Their Participation').

[141]For a pluralistic account of main philosophical approaches to justifying 'materialized' contract law see M Hesselink, *Justifying Contract in Europe. Political Philosophies of European Contract Law* (Oxford University Press 2021).

[142]For an illustration of the power of an ethnography of contract see L Knöpfel, 'A Legal Anthropological Reimagining of Contract in Global Value Chains: Relations between Mining Firms and Local Communities at Corporate Frontiers' 16 (2020) European Review of Contract Law 118–38.

[143]For a such institutional reading of human rights see G Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private"' 69 (2006) Transnational Actors, Modern Law Review 327–46.

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