

ORIGINAL ARTICLE

The housing crisis goes to law

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Abstract

This paper considers how constructions of a ‘housing crisis’ have impacted on judicial consideration of the rights of applicants for social housing and homelessness assistance. Drawing on Bacchi’s framework for appreciating problematisations (What’s the problem represented to be?) and understandings of housing crisis, we examine how crisis is translated into three elements of the passage of homelessness law: decision letters, witness statements and judgements. This can lead to narrowing of interpretations of the rights of homeless people. Even when that is not the outcome, crisis is accepted as a ‘fact’ and embedded as the context for decision-making.

1 | INTRODUCTION

The housing crisis appears both ubiquitous and permanent: this is not a ‘crisis’ as an acute malfunction but crisis as deep-rooted, chronic and pervasive dysfunction. Yet the status and nature of a ‘crisis’ is never self-evident: it is declared and constructed. It can be substantively, spatially and temporally fluid. Declaring a ‘crisis’ (or ‘emergency’) can be a tactic aimed at spurring a response from policymakers. Claims to ‘crisis’ are made, but they are not necessarily accepted. Nor do they necessarily trigger action.

This paper focuses on an unexamined issue: the translation of the housing crisis into public law. Our key concern is with constructions of housing crisis within the legal process and how such constructions shape judicial consideration of the rights of applicants. Attention to this granular level can illuminate the way in which discourses of crisis are deployed to justify courses of (in)action and, in the process, have the potential to erode established legal rights. We consider

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homelessness law—a domain in which housing rights are asserted and contested. An applicant to a local housing authority for homelessness assistance is owed certain housing duties if they satisfy the relevant criteria.¹ However, these rights come up against one element of the housing crisis—the shortage of low-cost rental housing: Local housing authorities can face both a queue of households they have a statutory duty to assist and a severe shortage of suitable housing to be allocated.

Our concern is with the ways in which the courts' construction of these duties is affected by this imbalance. Our argument is that constructions of the housing crisis are commonly used by authorities as a justification for *not* complying with their duties and, in the process, as a mechanism for the *narrowing* of rights. Although legal action has been used to *defend* welfare and political rights in austerity conditions since 2008,² we trace the pressures to narrow rights in the shadow of the housing crisis back to the creation of rights in homelessness law in 1977. Our intention is not to conduct doctrinal analysis. Rather, in tune with developments in socio-legal studies,³ we treat law as a socio-technical object in which apparently persuasive narratives are obscured and translated into technical analysis. Nor do we claim that housing law is unique in this regard: analogous processes are operating in policy areas such as community care. Rather, homelessness law is selected as a fruitful case study for illuminating the types of strategies deployed and to what ends.

We present our argument in three stages. First, we discuss the idea of a housing crisis, the investigation of discourse and the link between crisis, law and rights. Second, we discuss our methodology. Unusually in this kind of research, we draw attention to the decision letter and witness statement as narrative tools. Although witness statements are not translated directly into technical law, they provide the primary epistemological basis for judicial statements about crisis, especially as they accrete over time and provide common sense knowledge.⁴ Such letters and statements can undoubtedly be deployed in judicial decisions as rationalisations, whereas we cannot know if they provide the rationale.⁵ In Section 3, we develop our argument by analysing our data. Although narratives of housing crisis may be invoked, they do not always gain traction nor lead to the effects local authorities seek. Yet, even when that is the case, they remain a significant consideration and potential constraint. We illustrate that narratives of housing crisis become sedimented, judicial empathy with the plight of public administrators shapes thinking, and creates a climate in which there is an increased risk that rights are eroded is consequently created.

2 | HOUSING CRISIS, PROBLEMATISATION AND PUBLIC LAW

We now consider how 'crisis' has been theorised and deployed in the academic literature. We start by briefly reviewing 'housing crisis' and how it has been analysed. The more recent literature has emphasised the discursive foundations of crisis while recognising its materiality. This leads us to a presentation of how discourse is investigated in this paper. We then note that law is an important but neglected site for the transmission of crisis discourses.

¹ Housing Act 1996, Part 7.

² *Carmichael v DWP* [2016] UKSC 58; *DA v DWP* [2019] UKSC 21; *SC v DWP* [2021] UKSC 26.

³ D. Cowan and D. Wincott, *Exploring the Legal* (2016).

⁴ M. Valverde, *Law's Dream of a Common Knowledge* (2003).

⁵ B. Flyvbjerg, *Rationality and Power* (1998).

2.1 | Analysing ‘housing crisis’

Summaries of the housing crisis can emphasise different issues: the focus could be quantitative—insufficient housing to meet the needs of the population; qualitative—the housing stock is poor quality and unhealthy; or, economic—available housing is unaffordable.⁶ These issues are not independent, but they are given different emphases depending on ideological perspective.⁷ Interpretations may differ, but the crisis narrative appears ever-present.

We might argue that the core of the housing crisis is lack of affordability and view this as a global phenomenon.⁸ For some, this state of affairs results from political failure, and deregulated and financialised capitalism.⁹ We might alternatively view the crisis as having strong local characteristics, such as, in the United Kingdom, being associated with distinctive structures of housing supply or the history of privatisation policy.¹⁰ Hence, even if there is broad acceptance that the housing situation can appropriately be designated a ‘crisis’, the diagnoses of its origins, and appropriate remedies, may still be varied and contested.¹¹

An established narrative of housing crisis provides the context through which individual episodes and events are interpreted. Acute episodes can be coupled with chronic systemic maladies or constructed expansively to demand action on seemingly loosely related issues. For example, the Grenfell Tower fire in 2017 morphed into various other crises, including a ‘crisis’ of tenure, specifically long leasehold.¹² The death of Awaab Ishak in Rochdale in 2020 from health problems resulting from poor housing conditions morphed into a ‘crisis’ of social sector responsiveness to occupiers.¹³ These acute episodes illustrate the agency inherent in ascribing the ‘crisis’ label; or, in different terms, the ‘crisis’ label enabled longstanding problems (leasehold and tenant voice, respectively) to be brought back to the active policy agenda.¹⁴

The research programme on discourses in housing encompasses analysis of the framing of housing crisis and its strategic use in housing policy debates.¹⁵ Recent academic debate has focused on how dominant narratives are constructed and received. It is argued that housing crisis narratives are used by political parties, think tanks and the media to channel the search for solu-

⁶ Respectively, D. Dorling, *All that is Solid* (2014); J. Preece, D. Robinson, K. Gibb and G. Young, *Housing Policy and Poor Quality Homes* (2021); G. Galster and K.O. Lee, ‘Housing Affordability: A Framing, Synthesis of Research and Policy, and Future Directions’ (2021) 25S *Int J Urban Sci* 7.

⁷ D. Madden and P. Marcuse, *In Defence of Housing* (2024).

⁸ S. Wetzstein, ‘The Global Urban Affordability Crisis’ (2017) 54 *Urban Studies* 3159.

⁹ For example, Madden and Marcuse, op cit n 7; M. Aalbers, ‘The Great Moderation, the Great Excess and the Global Housing Crisis’ (2015) 15(1) *Int J Hous Policy* 43; M. Robertson, ‘The Great British Housing Crisis’ (2017) 41 *Capital Class* 195.

¹⁰ For example, C. Hayes, *Wrong to Sell* (2025) <<https://www.common-wealth.org/publications/wrong-to-sell>>.

¹¹ C. Foye, ‘Framing the Housing Crisis: How Think-Tanks Frame Politics and Science to Advance Policy Agendas’ (2022) 134 *Geoforum* 71.

¹² W. Wilson, *Leasehold High-Rise Flats: Who Pays for Fire Safety Work?* (2023).

¹³ MHCLG, *Awaab’s Law* (2024).

¹⁴ See, respectively, S. Blandy and D. Robinson, ‘Reforming Leasehold: Discursive events and Outcomes, 1984-2000’ (2001) 23(3) *JLS* 384; L. Cairncross, D. Clapham and R. Goodlad, *Housing Management, Consumers and Citizens* (1997).

¹⁵ For example, J. Heslop and E. Ormerod, ‘The Politics of Crisis: Deconstructing Dominant Narratives of the Housing Crisis’ (2020) 52(1) *Antipode* 245; I. White and G. Nandedker, ‘The Housing Crisis as an Ideological Artefact: Analysing How Political Discourse Defines, Diagnoses and Responds’ (2021) 36(2) *Housing Studies* 213; C. Hochstenbach, ‘Framing the Housing Crisis: Politicization and Depoliticization of the Dutch Housing Debate’ (2025) 40(5) *Housing Studies* 1226.

tions towards market-friendly policies, rather than more fundamental transformation.¹⁶ There is no ‘critical adjustment’ or ‘critical juncture’ in an ever-present housing crisis: instead, there is a concern for path-dependent deterioration and policy responses which, when they arrive, perhaps rely on the intentional production of ignorance to bolster superficial or simplistic analyses and place deeper reforms beyond consideration.¹⁷ In one recurrent rendering, causes of the housing crisis are smoothed into a simple narrative—more housing is required; the problem is regulation; therefore, we need enabling and facilitative planning (de)regulation.¹⁸

Although scholars have discussed policy effects, our argument is that crisis has been translated into the different, but parallel, system of law where it has material effects. It has become folded into the ‘passage of law’.¹⁹ This is subsequently folded back into the housing system when public administrators revise policy and practice in light of changing precedent.

Much of the broader cross-disciplinary crisis literature defines out this notion of chronic crisis. The housing crisis is not, for example, a sudden ‘... event that has the potential to cause a large detrimental change to the social system and in which there is lack of proportionality between cause and consequence’; though it is both real and discursively formed.²⁰ There is not (or, at least, has not been) a ‘moment of *decisive intervention*’.²¹ From this perspective, a social system displaying particular behaviours over an extended period—for example, a chronic shortage of accommodation—is not in crisis but behaving as it is set up to operate. This argument has recently been advanced in the housing context, with the suggestion that immiseration rather than crisis is the appropriate analytical framing for recent housing system behaviour.²² In contrast, the concept of ‘creeping crisis’ gets closer to the housing situation: a creeping crisis (like climate change) develops slowly over time, possibly without recognition or because a succession of political actors have short-term incentives not to take decisive action, with the result that eventually there is an acute episode.²³

Nevertheless, generalised notions of ‘housing crisis’ are of limited analytical value beyond Roitman’s important point that the discursive use of crisis creates ‘moments of truth’ through which history is re/formed.²⁴ It is more fruitful to investigate how the term is used discursively by social actors to try to influence policy and practice and consider the material outcomes. A generalised housing crisis can splinter into more specific concerns and in response to certain events. As Roitman notes, ‘*The point is to take note of the effects of the claim to crisis, to be attentive to the effects of our very accession to that judgment*’.²⁵ The effects of a housing crisis discourse penetrate systems beyond policy, including the legal system.

¹⁶ Foye, op cit n 11.

¹⁷ T. Slater, ‘The Invention of the “Sink Estate”: Consequential Categorisation and the UK Housing Crisis’ (2018) *Sociological Review* 877.

¹⁸ White and Nandedker, op cit n 15.

¹⁹ B. Latour, *The Making of Law* (2010).

²⁰ S. Walby, *Crisis* (2015)

²¹ C. Hay, ‘Narrating Crisis: The Discursive Construction of the “Winter of Discontent”’ (1996) 30(2) *Sociology* 253, 254, original emphasis.

²² S. Holgersen and T. Blackwell, ‘Housing Crisis or Immiseration? Revisiting the Housing Question Under Urban Capitalism’ (2025) *Antipode* 1515.

²³ For example, A. Boin, M. Ekengren and M. Rhinard (eds), *Understanding the Creeping Crisis* (2021).

²⁴ J. Roitman, *Anti-crisis* (2014).

²⁵ Id: 12.

2.2 | Investigating discourse

Our understandings are influenced by Bacchi's 'What's the problem represented to be?' approach.²⁶ That approach enables us to think through housing problematisations so as to consider what Roitman herself does—recognising that the dominant framing of crisis constrains the change agenda but, at the same time, that framing is not immutable.²⁷ Bacchi and Goodwin argue that their approach '... uses texts as "levers" to open up reflections on the forms of governing, and associated effects, instituted through a particular way of constituting a "problem"'.²⁸ They ask six questions which are the centre of our inquiry here, in particular about the translation of the problem—how it is analysed, classified and regulated—between governance sites (including law), arguing that 'the problematisation forms a part of the policy'.²⁹ Their questions are meant to be applied generally to policy representations:

- What's the problem represented to be in a specific policy or policies? (BQ1)
- What deep-seated presuppositions or assumptions underlie this representation of the 'problem' (problem representation)? (BQ2)
- How has this representation of the 'problem' come about? (BQ3)
- What is left unproblematic in this problem representation? Where are the silences? Can the 'problem' be conceptualised differently? (BQ4)
- What effects (discursive, subjectification, lived) are produced by this representation of the 'problem'? (BQ5)
- How and where has this representation of the 'problem' been produced, disseminated and defended? How has it been and/or how can it be disrupted and replaced? (BQ6)

The relationship between 'crisis' and temporality can be complex and fluid.³⁰ Crisis theorists posit that, when a primary definer³¹ calls 'crisis', a 'temporal hierarchy' emerges which can be exploited by different actors for their own purposes such that its definition can change significantly over time.³² A claim to 'crisis' can be accompanied by strategies to discount systemic policy responses as too slow to deliver and to press for accelerated short-term action; or, conversely, act as a window of opportunity for addressing long-standing systemic—and possibly unrelated—issues. The articulation between discourse and material circumstances is contingent and time-specific: even if a claim to crisis does not succeed at one time in a given set of material circumstances, that does not preclude a subsequent claim being accepted.

Heslop and Ormerod address the question of time—specifically, how the housing crisis has lasted. They argue it has lost its 'sense of decisive action' as a result of its longevity.³³ However,

²⁶ C. Bacchi, *Analysing Policy: What's the Problem Represented to be?* (2009).

²⁷ The WPR framework has been deployed in a range of circumstances. See, for example, C. Bacchi, 'Problematisations in Health Policy: Questioning How "Problems" Are Constituted in Policies' (2016) 6(2) *Sage Open* <<https://journals.sagepub.com/doi/full/10.1177/2158244016653986>>; L. Rahm and J. Rahm-Skågeby, 'Imaginariness and Problematisations: A Heuristic Lens in the Age of Artificial Intelligence in Education' (2023) 54(5) *Br J Educ Technol* 1147.

²⁸ C. Bacchi and S. Goodwin, *Poststructural Policy Analysis* (2nd edn, 2025)

²⁹ id: 17.

³⁰ For example, J. Fleischer, 'Time and Crisis' (2013) 15 *Public Management Review* 313.

³¹ S. Hall et al, *Policing the Crisis* (1978).

³² Fleischer: 321.

³³ Heslop and Ormerod, n11, 146.

arguably, a strength of the idea of housing crisis lies in its open-ended temporality. It can be brought to life seemingly spontaneously, as illustrated above. Further, a strength of the concept in the policy process context is its flexibility. The issues to which the label ‘crisis’ has been applied have become more severe and widespread over time.

Consider, for example, Malpass’ framing of the English housing crisis in the mid-1980s. Malpass framed it as ‘a crisis of quantity, quality and access’, albeit that ‘very considerable improvements have been made’, especially in housing conditions. The housing problem had assumed ‘crisis proportions’ as a result of demography, housing stock and tenure, and arose ‘... from structural features of the housing system and the wider economy’.³⁴ In retrospect, the housing problems which Malpass regarded as worthy of the label in 1986 are dwarfed by the problems today.

The splintered version of housing crisis in this study relates to the under-supply of social housing, the large numbers of applicants for assistance, and the difficulties public administrators have in discriminating between those applicants. Those applicants are sometimes supposed to be gaming the system.³⁵ The problem representation is ‘worked backwards’ from the data we discuss below, but we highlight it here to focus our analytical frame. It contains well-known tropes about welfare deservingness and feeds off policy discourse about the ‘queue jumping’ effects of homelessness legislation.³⁶ It leaves unaddressed the reasons for the lack of affordable housing and the issue of how to increase the supply of social housing. This is an effect not only of the splintering of the housing problem but also the splintering of this part of the problem into a different system (law). Systemic policy questions relating to shortage of supply largely lie beyond local authority control and the courts; explanation is sought at the microlevel, deploying factors over which the law has some purchase. We address Bacci’s other questions as we develop our argument below.

2.3 | The homelessness context

Although our primary focus is the contingency of the crisis discourse, this is not to deny that the social housing system has, in practice, been transformed since 1977. Over this period, the challenges of accessing social housing have increased considerably. In 1977, it was assumed—though contested—that homeless applicants would be allocated a long-term tenancy in social housing,³⁷ but, since the 1990s, there has been growing use of the private rented sector, bed and breakfast accommodation and, more recently, former office space. This change is a result of an increasing population of households seeking social housing facing a substantially depleted social housing stock in England. Since 1977, tenure restructuring—with properties exiting the sector and moving into owner occupation or private renting—has led to the decline of social housing.³⁸ By 2022/23, the proportion of households living in social renting had declined from 30.1% in 1977 to 17%. At the same time, changing understandings of housing subsidy combined with market-oriented policy mean that the costs of private renting have risen. Access to an increasingly financialised hous-

³⁴ P. Malpass, ‘From Complacency to Crisis’, in P. Malpass (ed), *The Housing Crisis* (1986), 3, 18–19.

³⁵ D. Cowan, ‘Legal Consciousness: Some Observations’ (2004) 67(6) *MLR* 904.

³⁶ I. Loveland, *Housing Homeless Persons* (1995).

³⁷ *Id.*

³⁸ B. Christophers, ‘A Tale of Two Inequalities’ (2021) 53(3) *Environment & Planning A* 573.

ing association sector has become more contingent on affordability and other factors unrelated to need.³⁹

The cost of private accommodation generally prices out low-income households, so the search for affordable accommodation is more difficult and the calls on social housing greater. Public authorities with legal duties to provide accommodation have access to a depleted social rented stock and also face difficulties sourcing additional affordable private rentals. The result of this is that households commonly find themselves in private ‘temporary’ accommodation for increasingly lengthy periods, and it is costly for authorities to secure that accommodation. Yet, since 2008, local authorities have borne the brunt of austerity cuts, the local government budget being cut by more than half between 2009 and 2016.⁴⁰

English public authorities received around 300,000 applications for homelessness assistance each year between 2018 and 2022. In the 2000s, the range was 89,120 (2009) to 298,390 (2003)—the difference largely caused by more widespread adoption of pre-application prevention strategies as the decade progressed.⁴¹ In 2010, for example, it was estimated that around 162,000 households were assisted pre-application.⁴² All such applicants are now included in the statistics because a change in the law placed duties on public authorities to prevent or relieve homelessness.⁴³

2.4 | Housing crisis in law

A key question we address is how the representation of the housing problem emerged in the legal system and became sedimented over time. This speaks directly to Bacchi’s BQ6 and BQ5 - that is, where the crisis has been disseminated and reproduced, and its effects. We argue that local authorities are adopting discursive strategies, asserting the housing crisis as a rationale for narrowing and limiting rights. However, these problem representations are not automatically accepted: rather, they are debated, contested, and occasionally rejected. Nonetheless, they can be translated into legal technicality to the disadvantage of applicants seeking housing. This is an iterative process in which ideas of housing crisis become legally domesticated.⁴⁴

Although this is happening in plain view, it is not particularly visible. Accordingly, although it may be transparent to a select group (housing lawyers) that is the primary audience, for others, for whom the legal outcomes can carry direct implications, the obscurity of the technical legal discussion can be, at best, offputting. However, this does not diminish what is happening—the work that is being done by coupling housing law and discourses of housing crisis, with the objective of eroding the scope of state obligations, is an issue with broad significance for social policy scholars.

³⁹ T. Manzi and N. Morrison ‘Risk, Commercialism and Social Purpose’ (2018) 55(9) *Urban Studies* 1924.

⁴⁰ M. Gray and A. Barford, ‘The Depths of the Cuts: The Uneven Geography of Local Government Austerity’ (2018) 11(3) *Camb J Reg Econ Soc* 541.

⁴¹ H. Pawson, ‘Local Authority Homelessness Prevention in England: Empowering Consumers or Denying Rights?’ (2007) 22(6) *Housing Studies* 867.

⁴² CLG, *Homelessness Prevention and Relief: England 2009/10 Experimental Statistics* (2010).

⁴³ Homelessness Reduction Act 2017.

⁴⁴ I. Van Oorschott and W. Schinkel, ‘The Legal Case File as Border Object: On Self-Reference and Other-Reference in Criminal Law’ (2015) 42(4) *J Law Soc* 499, 501.

3 | METHODOLOGY

There is a body of knowledge about homelessness decision-making in both housing and socio-legal studies.⁴⁵ This is a highly pressured part of the housing system: statutory duties are recurrently placed under pressure by inadequate resources. These are consequently areas which are heavily litigated: the leading textbook has a list of cases which runs to more than 50 pages.⁴⁶ Our period of study is from the implementation of the Housing (Homeless Persons) Act 1977.

3.1 | Constructing a sample

Our research method was scientific in the sense understood in legal doctrinal research. It is a requirement of the Housing Act that each application, as homeless, should result in a formal decision. There will have been many million such decisions over the years. Our research method was not to consider those decisions. Rather, we sample those considered in reported cases. Although this might be said to weight our consideration towards contested letters, in practice decision letters typically adopt a boilerplate format. Some version of a crisis framing of the housing problem underpins nearly all decisions considered below.

We restrict our discussion to those which are courts of ‘record’—those that have some precedent value and are reported (County Court decisions, e.g., are not reported). We started by searching databases of law cases (Westlaw and LexisNexis) for ‘housing crisis’. This yielded a sample of 45 cases in which the expression had been used explicitly: 14 cases were housing and homelessness cases, and the remainder were mostly planning law cases. In some cases, reference to ‘housing crisis’ was solely in witness statements, whereas elsewhere it was also adopted by the judge. This alerted us to the importance of the framing of the witness statement. Witness statements are not generally available, even though they are in the public record, so to speak, because what matters to lawyers and the audience is their construction in the judgment. They are, however, quoted in judgments.

In addition to the sample generated by our search, we re-read leading cases in the field. These did not necessarily invoke the term ‘housing crisis’ explicitly, but they all addressed the substance of such discussion. They drew attention to the under-supply of housing stock, the large numbers of applicants for it, and the authority’s constrained administrative resources. Accordingly, although lacking the label, they were effectively discussing the same phenomenon. A ‘leading case’ is a case which develops a new point of law or understanding and becomes a precedent. It is then a point of reference in subsequent cases. In other words, the learning and rationale in leading cases become sedimented knowledge within the schema of law in the field. That learning and rationale (commonly stripped of the original context) is then repeated and considered in subsequent cases. What becomes important is the answer to the point of law, not its framing.

We have also reviewed a developing jurisprudence on relief—even when a claimant is successful on the substance of the claim, the court has discretion to refuse them any remedy (or relief). The jurisprudence has developed around the argument that, in some cases, it is impossible for

⁴⁵ See, for example, S. Alden, “On the Frontline: The Gatekeeper in Statutory Homelessness Services” (2015) 30(6) *Housing Studies* 924; S. Fitzpatrick and L. Davies, “The “Ideal” Homelessness Law: Balancing ‘Rights Centred’ and ‘Professional-Centred’ Social Policy” (2021) 43(2) *J Soc Welfare Family Law* 175.

⁴⁶ J. Luba, L. Davies, C. Johnston and T. Buchanan, *Housing Allocation and Homelessness: Law and Practice* (2022).

the local authority to find suitable accommodation for the particular household because of the absence of affordable accommodation.

3.2 | Analysing law—different approaches

Socio-legal scholars have begun to ‘take on the technicalities’, arguing that in their obscurity they encapsulate a certain politics.⁴⁷ As Valverde puts it:

In order to avoid sociological reductionism and better understand the ‘how’ of legal mechanisms, analyses need to be simultaneously inside and outside law, simultaneously technical and theoretical, legal and socio-legal. Doctrinal ‘technicalities’ would be as important in such a study as sociological analyses of power effects.⁴⁸

Accordingly, we are interested in the transformation of a range of documents and sources of law into judgments—scholars have understood the legal assemblage to be made up of diverse ideas, translated into documents, which can illuminate apparently obscure areas of law.⁴⁹

The developing literature has paid particular attention to the court file in the civil system.⁵⁰ It is argued that the production of the file and evidence discloses how law can remain cognitively open to its exterior (through witness evidence) but normatively closed (the law is the law). In English public law, somewhat more prosaically, we refer to two different bundles—of evidence and legal authorities (statutes and case law).

It is in these bundles that the representation of the problem comes about, in Bacchi’s terms, and is made legible. The evidence bundle comprises correspondence between the parties and any witness evidence. It also contains the decision letter, which is the subject of the proceedings. This bundle seeks to enrol ‘... actors and events considered “external” in law and records their enrolment in self-referential inscriptions’.⁵¹ It identifies the actors as legal, providing identities, and gives shape to the claim and defence.

3.3 | Representation of the problem

Our analysis examines three different sites, which facilitate the representation of housing crisis: decision letters, witness statements, and court judgments.

Although court judgments might typically be regarded as the core site, the earlier stages are revealing. The decision letter and witness statement are not only legal actors but also keying processes⁵² because they are both transformative and performative. Their narratives are ‘a performative accomplishment which the mundane social audience, including the actors themselves,

⁴⁷ A. Riles, ‘A New Agenda for the Cultural Study of Law’ (2005) 53(3) *Buffalo Law Rev* 973.

⁴⁸ M. Valverde, ‘Jurisdiction and Scale: Legal “Technicalities” as Resources for Theory’ (2009) 18(2) *Social and Legal Studies* 139, 145.

⁴⁹ Latour, n19.

⁵⁰ van Oorschott and Shinkel, n44.

⁵¹ Id: 509.

⁵² E. Goffman, *Frame Analysis* (1974), ch 3.

come to believe and to perform in the mode of belief.⁵³ This is all the more so because many actors (managers, solicitors and barristers) are ‘repeat players’, who recurrently reproduce the narrative, seeing it as persuasive. In the English system, the doctrine of precedent reinforces the role of the past in the present through subservience to previous authority: notions of the housing crisis once written are subsequently reinforced. In this way, the politics of the housing crisis becomes translated into law.

Our second site is witness statements. In the kinds of adversarial judicial review proceedings with which we are partly concerned, both the applicant and the authority will generally produce a witness statement. These are designed to present the facts as that party sees them and wants others to see. Such statements end with a signed statement of truth that acknowledges that any untruth constitutes perjury. Oral evidence is generally not permitted, so these written documents are generally accepted as being ‘the truth’. The advocates construct their case around this truth; they form the basis on which the judge adjudicates.

In witness statements, the Claimant’s plight is described, and the housing crisis is given life. They ‘structure’ and ‘amplify’ the decision.⁵⁴ They provide ‘hard facts. And there is no fact so “hard” as a number’.⁵⁵ The version of the housing crisis deployed by public authorities generally focuses on two elements: the lack of available housing and the effect of a broad construction of the law on public administration.

The third site is the court judgment. Court judgments are usually written and handed down once the judge has had the opportunity to deliberate after the hearing. As the decision letter and witness statements commonly refer to the housing problem (generally or locally) often framed as a housing crisis, and these are the primary documents for the judgement, statements within them are commonly transposed, either in summary form or by quotation, into judgments. The statements are designed to advance the parties’ different cases: the public authority’s case is generally that their narrow interpretation of the law is correct, in part because of the crisis. That interpretation is either endorsed or not. Even where it is not endorsed, there are usually judicial expressions of concern about the administrative effects of the ambit of the right.

The existing structure is balanced in favour of public administration. The threshold for claimant success is high (the public authority’s decision must be shown, for example, to be irrational or perverse, or breach natural justice principles) and, in housing cases, notably higher. The law recognises that public administrators are not housing lawyers, have difficult decisions to make, and nitpicking with those decisions is actively discouraged. Courts are encouraged to be ‘realistic and practical’.⁵⁶

4 | CASE ANALYSIS

Our analysis is in three sections. In the first, we consider the decision letter, which forms the subject of all that follows and which generally speaks to resource issues as housing crisis. In the second, we discuss witness statements because they performatively construct the housing crisis

⁵³ J. Butler, *Performative Acts and Gender Constitution* (1988).

⁵⁴ Hall et al, op cit n 31, 38. Witness statements are generally not used in substantive homelessness appeals in county courts as the decision-letter provides all the evidence which can be considered.

⁵⁵ Id: 9.

⁵⁶ *Rother DC v Freeman-Roach* [2018] EWCA Civ 368, [23].

and provide a further frame for judicial analysis. We then consider key aspects of a selection of judicial decisions in homelessness and allocations.

Our analysis demonstrates how the housing crisis narrative is performed in this alternative forum. We primarily address the first, fifth and sixth of Bacchi's questions: The way the problem is represented (BQ1); the effects produced by that representation (BQ5); and its production, dissemination and defence (BQ6). Problem representation aims to focus the minds of the audience (applicants, lawyers and judges) on the effects of the lack of affordable accommodation as part justification for a narrow reading of the law. The effect is that the applicant's claim is rejected by the authority, which then leeches into the legal and judicial interpretation.

4.1 | Decision letters

The decision letter is the key document in any claim. It typically works to a template. It sets out the local housing authority's reasons for its decision and is the formal subject of any challenge. It represents the problem (BQ1)—it is the primary definer which structures all that follows and its framing is enabled by the structure of the law.⁵⁷ It represents the more-or-less successful translation of the 'facts' and 'law' (as identified by the administrator) into a quasi-judicial decision. The decision letter justifies why the authority does not accept that it has any duty towards the household or is proposing to fulfil its duty in a way other than that desired and considered appropriate by the applicant (unless the applicant successfully appeals). The housing crisis is commonly invoked as a contribution to a negative decision. Broadly, the narrative is that insufficient resources mean the applicant cannot be given what they need, including cases in which those needs have been formally assessed as activating a statutory duty. Lack of resources makes this the appropriate way to represent the problem (BQ3), hence, the local policy of narrowly interpreting legal obligations is justified, and the housing authority is not required to meet the applicant's needs as might have been expected (BQ5). Otherwise, unmet needs would be acknowledged but impossible to fulfil. Most decision letters are not the subject of any form of legal challenge; these simply frank the housing crisis into the everyday lives of its subjects.

Consider the following decision as to whether accommodation 4 hours by bus from the children's school and the Claimant's employment was 'suitable':

While I accept it would benefit the children to be located in reasonable proximity to their schools, I have also had regard to the severe shortage of accommodation available to the council ... or local to it and the particular shortage of family accommodation and larger family accommodation. It is not possible to provide every household who is being accommodated under [homelessness law] with accommodation in close proximity to schools.⁵⁸

The decision letter communicates the authority's sense of the housing crisis in part-justification of its decision that accommodation miles from the household's points of reference (schooling, employment, friends) is an appropriate fulfilment of duty.

In one case considered by the Supreme Court, the decision letter is recorded as saying:

⁵⁷ Hall et al, n31, 59.

⁵⁸ *YR v Lambeth LBC* [2023] EWHC 2813, [21].

[there is] “a social housing crisis in this borough and a severe shortage of permanent accommodation locally”, which [the reviewing officer] regarded as a “highly relevant factor” in concluding that the offer was suitable and reasonable for her to have accepted⁵⁹

Authorities can take this type of position, generally, because the issue of available resources is hard-wired into the law—definitions of homelessness, intentional homelessness, and whether accommodation provided by an authority is suitable are all intimately related to the availability of alternative accommodation in the area. So, for example, it is lawful for an authority to find a household not to be homeless, even when they are committing a criminal offence because their current accommodation is overcrowded:

[The applicant’s barrister’s] central argument had for me, at least as a matter of first impression, an attractive ring to it. Surely the answer to a question: “Is it reasonable for the appellant to continue to occupy this flat when doing so constitutes a criminal act?”, must be, “No, it cannot be reasonable to require that of her.” On further thought, however, I am persuaded that the error in this approach lies in the way the question is framed. The statutory question is not so simple. It is not properly expressed if asked in terms of such generalities. . . . Properly directing himself, the decision-maker would then ask: “Having regard to the general circumstances prevailing in relation to housing in my district, including overcrowding in the district, is it reasonable for the appellant to occupy her accommodation?” When the question is expanded in that way, it permits of the affirmative answer which the Housing Review Officer in fact gave it.⁶⁰

In other words, the structure and format of the law enable the housing crisis to define the negative outcome (BQ5).

4.2 | Witness statements

A witness statement provides the opportunity to set out the facts and not address legal issues. Statements are commonly relatively short (a few pages long) and append various documents, such as background assessments of the local (re)housing situation and policies. They enable the advocate to develop a persuasive narrative as to how the legal problem and solution should be constructed—a re-problematisation in Bacchi’s terms (BQ1). The witness statement enables the law to be cognitively open to the housing crisis, providing a veridiction through the translation of the issues faced by the authority in the individual case by relating it to something more general. They are the words of the witness, but those words are commonly the subject of their lawyer’s comments, and they always have a purpose. Their effects are to justify the authority’s desired narrow interpretation of the right (BQ5).

Witness statements usually construct the ‘facts’, which are contextualised through the prism of crisis. A key point is that this type of construction has been a constant over time. So, for example, in a case about the use of bed and breakfast accommodation as temporary accommodation, decided

⁵⁹ *Poshteh v Kensington and Chelsea RLBC* [2017] AC 637, [13].

⁶⁰ *Harouki v Kensington and Chelsea RLBC* [2007] EWCA Civ 1000, [14].

nearly quarter of a century ago, the authority stated: ‘we are constrained from doing everything that we might wish because we do have to contend with a very serious shortage of resources’. The Judge reframed that performatively as a housing crisis which was ‘unchallengeable’ (a judicial fact) (BQ3).⁶¹

Consider the following judicial summary in the YR case of Lambeth’s assessment of suitability (which was appended to the witness statement), constructing a quantitative picture of crisis:

The Suitability Assessment is a lengthy document so I will highlight the key salient features. One key underlying fact to which it attests is the scarcity of temporary accommodation in Lambeth. As at 7 September 2022, the Defendant was housing 3,469 households in temporary accommodation. 2,593 of these households were families; 1,712 were accommodated outside Lambeth. Larger properties for families are in particularly short supply. For 3 bedroom properties, there are 231 households in temporary accommodation within Lambeth and 486 outside the borough. The corresponding figures for 4 bedroom properties are 17 households within Lambeth and 45 outside.⁶²

Although the Claimant challenged some of these ‘facts’, witnesses do not give oral evidence and the relevant administrator was not cross-examined; it is for the advocates to construct oral legal arguments around these statements at the hearing.

In *Bell*, the council’s officer framed the case as follows:

This case is largely about public resources. There is a national housing crisis, with the problem being particularly acute in London and the South East. In an ideal world, the Council would want to operate so that housing applicants are provided with suitable accommodation shortly after the needs arise. Unfortunately, this simply is not always possible in practice. The Council faces significant difficulties as a result of acute budgetary pressures, very high demand for housing in the Borough and a limited pool of properties available to meet this demand. Funding for housing from central government has decreased significantly over the years and the Council, like many authorities, is dealing with the difficult consequences of this.⁶³

This framing was, in fact, unsuccessful because the council conceded subsequently that, if Ms Bell and her family (which included two children with significant extra needs) lost their current accommodation, the council would find them somewhere else that was suitable. The witness’ claim to crisis was rather undermined by that concession. Nevertheless, even when the defence is unsuccessful, our points about structure, amplification and truth claims about the housing crisis continue to apply.

⁶¹ *R v Newham LBC ex p Sacupima* (2001) 33 HLR 1, [7] & [38].

⁶² YR, ([19]).

⁶³ *Bell v Lambeth LBC* [2022] EWHC 2008.

4.3 | Judgments

In Bacchi's terms, the judgment represents the dissemination of a problem representation and, perhaps more importantly, its endorsement performatively signals what then becomes uncontestedly true: the nature of the crisis (BQ6). It brings everything together. In so doing, narratives of housing crisis are strategically deployed as a justification, sometimes combined with common sense (but largely evidence-independent) narratives. Even, when the court is deciding against a local authority, it must do so *in the face of the accepted truth of a housing crisis*. Accordingly, it must justify its approach by reference to that assumption and assertion. In so doing, it again franks the housing crisis as 'truth'. As the Supreme Court put it, in 2023, in response to the authority saying that they faced insuperable difficulties in providing suitable accommodation, this is a matter of the separation of powers between Parliament and the courts:

In principle, if resources are inadequate to comply with a statutory duty it is for the authority to use whatever powers it has to raise money or for central government to adjust the grant given to the authority to furnish it with the necessary resources, or for Parliament to legislate to remove the duty or to qualify it by reference to the resources available.⁶⁴

This stance does not relieve the authority of its duty but does signal the deep-seated assumptions contributing to framing the authority's narrative: namely, that decisions need to steer a difficult course in the light of the powers and resources currently available (BQ2). Yet, it also indicates that there are other routes out of these difficulties (BQ4).

From the outset, the highest courts referenced the administrative problems of authorities in complying with the new law, as well as setting the problem of housing supply for this group against concerns that they would jump the housing queue: 'Inevitably every allocation of priority housing to homeless persons must have the effect of deferring the hopes of persons in other categories, some of whom may have been waiting for a long time' (BQ2).⁶⁵ Applicants, it was said, had to bring themselves within the 'clear words' of the Act because failure to do so meant '... greater expense for a hard pressed authority, and greater pressure on the housing stock' (BQ3).⁶⁶

These concerns were crystallised in the most significant decision in the mid-1980s by the highest court in *R v Hillingdon LBC ex p Puhlhofer*.⁶⁷ This case concerned the meaning of 'accommodation' used throughout the Act in the context of a family of four living in B&B accommodation. The authority had found them to be not homeless. The decision is best known today for the expression of the limits of the court's role in considering challenges to authority decision-making.⁶⁸ Lord Brightman began his judgement with the following observation:

[The 1977 Act] has generated a mass of litigation, at the receiving end of which are local authorities endeavouring to cope with intractable housing problems and to balance competing claims to limited housing resources.

⁶⁴ *Imam v Croydon LBC* [2023] UKSC 45, [39].

⁶⁵ *Din v Wandsworth LBC* [1981] AC 657, 663.

⁶⁶ *Id.*: 667.

⁶⁷ *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484.

⁶⁸ cf M. Sunkin, 'What Is Happening to Applications for Judicial Review?' (1987) 50(3) *MLR* 432.

He then went on to narrow both the definition of ‘accommodation’ as well as the obligations under the Act (BQ1):

[The Act] is intended to provide for the homeless a lifeline of last resort; not to enable them to make inroads into the local authority’s waiting list of applicants for housing. Some inroads there probably are bound to be, but in the end the local authority will have to balance the priority needs of the homeless on the one hand, and the legitimate aspirations of those on their housing waiting list on the other hand.

The government amended the Act following this judgement to broaden the definition of homelessness to include accommodation which an applicant and their household could not reasonably be expected to continue to occupy.⁶⁹ However, the antipathy of the courts to the rights for homeless people remained.

The question is posed particularly sharply when the applicant (claimant) asks the court for an order forcing the authority to secure suitable accommodation for the household within a short period of time. In these cases, the authority will claim that it is impossible for it to carry out its statutory duty to an applicant because of the lack of available housing. London and Birmingham authorities are most affected because they have the largest numbers of applicants and more limited affordable accommodation available. The individual household commonly contains persons with extreme housing needs. This is where the effects of housing crisis discourse become starkly apparent.

The courts have generally struggled with this balance. In one case, the housing crisis narrative in the witness statement was reproduced by the judge as the justification for refusing to grant the order, even though the authority was in breach of statutory duty (BQ5).⁷⁰ The witness had said that ‘there is a national housing crisis in the South East of England’ and ‘demand for social housing in Croydon [a London Borough] far outstrips supply’. The Judge said: ‘I accept ... that due to the general shortage of accommodation which is set out in [the witness] evidence it is unlikely that a suitable property will be provided in the near future’.⁷¹

The judge acknowledged that, in addition to limited available housing, granting an order would place a serious financial burden on the authority that could negatively impact upon non-housing public services (BQ5):

In granting a mandatory order in terms which required the Defendant to provide a property for the Claimant, the court would either be requiring the Defendant to spend money which on the evidence it does not have, or to reallocate money from the provision of other public services ...

Embedded in this observation is an acceptance of the argument that the local authority, after a decade of austerity policy, has no financial room to manoeuvre. To grant an order would be to penalise the local authority for something that they can do little about.

That approach to the question of resources was, however, nuanced by the Court of Appeal and Supreme Court. They accepted that general statements as to the resources available to the

⁶⁹ Housing and Planning Act 1986.

⁷⁰ *Imam v Croydon LBC* [2021] EWHC 739.

⁷¹ *id.*

authority were not relevant at this stage of the analysis. Rather, resource issues had already been considered by the authority—for example, in deciding whether the currently occupied accommodation was ‘suitable’. If the authority could show that it had done all it reasonably could to secure accommodation in the circumstances, that would be sufficient to refuse relief. The evidence must be ‘... a detailed explanation of the situation in which [the authority] finds itself and why this would make it impossible to comply with an order’ (*Imam*, [53]). The authority has to prioritise its resources for meeting a duty (homelessness) rather than a discretionary power (allocation), but without creating unfairness between the applicant and others who are equally dependent on the authority ([70]). The Court of Appeal judgement ends with a judge recognising the very real ‘burden’ of the housing crisis:

I would not want it to be thought that the Court is unaware of the burden placed on very many local housing authorities by the need to comply with their duties under [homelessness law], in circumstances where housing may be in extremely short supply, particularly for applicants with large families or particular needs, and where the authority’s financial resources are seriously constrained. (Underhill LJ, [157])

Although the authority lost this case and primacy was given to their duty, local authorities were being offered a template for how, despite the existence of that duty, they could nevertheless be successful in future similar cases.

This reference to the ‘burden’ on authorities resonates with a second area in which the housing crisis has become keyed into the law—out-of-area placements. Authorities must provide accommodation for applicants in their area ‘so far as reasonably practicable’.⁷² When Westminster tried to send a family of five to Milton Keynes, the Supreme Court held that it fell foul of the law not because it had no power to send the household out of area but because it had not provided a fully reasoned decision. Westminster had justified its decision because ‘Westminster is currently suffering from a severe shortage of both temporary and permanent accommodation. It is therefore not reasonably practicable to offer temporary accommodation in the borough for everyone who applies for it and therefore we have to offer some people temporary accommodation located outside Westminster’ (BQ1).⁷³ The Supreme Court held that they had to provide more specific reasoning which addressed the statutory criteria.

This finding meant that, where the authority has satisfactorily addressed the relevant criteria and its own policy, any challenge to an out-of-area placement is almost bound to fail (BQ5). In a subsequent Court of Appeal judgement concerning the offer of accommodation in the West Midlands to a family which applied to Brent (a London borough):

You would need to be a hermit not to know that there is an acute shortage of housing, especially affordable housing, in London; and that local government finance is severely stretched. Under the homelessness legislation housing authorities in London have duties to procure housing for the homeless; and must, so far as it is reasonably practicable to do so, accommodate such persons within their own district.⁷⁴

⁷² s. 208, 1996 Housing Act.

⁷³ *Nzolameso v Westminster CC* [2015] UKSC 22.

⁷⁴ *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742, [1].

These opening remarks indicate the judicial standpoint in these cases. Judges are not hermits, whereas their experiences and knowledges are likely to be different both from public administrators and homeless persons. The judge in this case—Lewison LJ—has a background in property litigation but has developed a specialism in homelessness cases. As a repeat player, he will have considered many decision letters and witness statements over the years in which the problematisation of resources will have been raised as a consideration. They have contributed to the epistemological basis for his comment and the framing of the judgement.

That framing of his judgement was carried through into its substance in which he expressed concerns about the ‘judicialisation of welfare services’ (BQ1). In that context, he said:

A court must be wary about imposing onerous duties on housing authorities struggling to cope with the number of applications they receive from the homeless, in the context of a severe housing shortage and overstretched financial and staffing resources.⁷⁵

Further, here, Brent had explained why it had no access to accommodation nearer than the West Midlands. It ‘places an onerous burden on a housing authority’ to find somewhere a little closer to Brent than the West Midlands. The family’s challenge failed (BQ5).

5 | CONCLUSION

We have examined how narratives about the housing crisis become keyed into the law in one specific area. A discourse of housing crisis forms a consistent backdrop to the courts’ deliberations: It is repeatedly reproduced by authorities in decision letters and witness statements with the aim of reinforcing the authorities’ narrow interpretation of the law. Authorities deploy evidence indicating ‘crisis’ to support their local policy and decision-making as an appropriate reading of their duties in the context.

Although this narrative recurs in local authority documentation, we must be cautious in drawing a simple cause-effect relationship to the content of the courts’ judgments. The housing crisis may be claimed as sufficient rationale for narrow interpretation, but that claim is not always accepted. In addition, even when the claim to a housing crisis is accepted, the courts have not always taken it as sufficient justification for narrowing the ambit of the law. Either way, nonetheless, the status of crisis is accepted as a truth.

Although narratives of housing crisis have been a constant feature over our study period, they are not deployed in isolation in pursuit of their desired effect. The earliest homelessness cases express this concern alongside a narrative about queue jumping. Statistics provided to the court document the imbalance between the supply of suitable accommodation and the numbers waiting for accommodation. Recently, following the extended period of austerity policy, local authorities have identified budgetary constraints and the unacceptable implications for other services if funds were redirected to address housing pressure. Although the configuration of the reasons offered may differ, the consistent thrust of the discourse is towards the dilution or denial of rights.

Although the discourse of housing crisis has been ever-present, the way in which it articulates with the material conditions in the housing system changes. There is no question that the pressures on local housing authorities in many parts of the country are severe and have become more

⁷⁵ [38].

acute over time. Local authorities' room to manoeuvre has become more constrained. The implication we draw from this is that over time there is an increased likelihood of the courts accepting claims to crisis and, perhaps more importantly, of accepting such claims as a basis for narrowing the interpretation of statutory rights as the only available route out of increasingly intractable dilemmas.

Although housing policy analysis has drawn attention to the real effects of the housing crisis discourse on policymakers and policymaking, we must be alive to the diverse spaces in which this discourse has material effects. To be sure, the legal space is complex and confusing, but the message of socio-legal studies is that we cannot leave it to the lawyers because the consequences of developments in this space can be profound. Once we are both inside and outside the legal technicalities, we can see how appeals to resource limitations underpin so much of the jurisprudence.

Bacchi's framework invites us to think about problematisations differently and consider the disruption of, and resistance to, representations. The normative closure of the law, and its internal replication through the system of precedent, make thinking about the problem differently, at best, difficult. Disrupting it can be achieved only by way of appeal within the system and only on the basis of the evidence already within the system, which established the problem that one is seeking to challenge. Appeals in homelessness cases are limited only to points of law which have 'a real prospect of success' or 'raise an important point of principle or practice' or there is some other compelling reason.⁷⁶ The criteria are easier to establish if you are the primary definer of the general problem, and the law is weighted in your favour, as opposed to an individual with a particular need. Contesting sedimented 'truths' of housing crisis and their implications is a task of a different order.

What is left unproblematised in this representation of the problem and its effects are the structural origins of the lack of affordable housing and the poor quality of stock available to those on low and no incomes (BQ4). These are the silences produced by the assumption and assertion of housing crisis. In one sense, as the Supreme Court told us, this is not a problem for the courts, but for Parliament. The courts and local authorities cannot themselves control those facts nor provide authorities alchemically with more resources. However, the wholesale acceptance of the effects of the housing crisis (BQ5) means that the appalling conditions in which households live are silenced paradoxically by the fact that so many others in the locality exist in those conditions. That is hardly the basis for a rational public administration, but it is the effect of the law.

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⁷⁶ CPR 52.7(2).