
being a Thesis submitted for the Degree of Doctor of Philosophy in the University of Hull

by

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TO MIKE AND ANNA
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<td>BSA</td>
<td>Building Societies Act</td>
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CHAPTER ONE
1. Introduction

1.1 Themes

The legal device of the mortgage has, during the twentieth century, come to serve as the means by which millions of households within England and Wales have gained access to the home-ownership sector. Despite having been a feature of the English property system since the tenth century, it was not until the late nineteenth century, and the advent of the building society movement, that the potential for mortgage finance to assist in the purchase of residential property was first recognised. Prior to this, it had served primarily as a means by which landowners could obtain liquid funds to assist in the alleviation of financial difficulties.

This transformation in the use made of the legal device of the mortgage derives partly from the high level of demand for home-ownership, the willingness of building societies to provide mortgage finance for this purpose and the implementation of policies by central government which privilege home-ownership above all other forms of housing. In combination, these factors have led to a dramatic increase in the number of home-owners within England and Wales, rising from only ten per cent of all dwellings in 1914, to 68 per cent in 1998, and the introduction of a new and significant role for mortgage finance within the housing system, with 42 per cent of all dwellings subject to an outstanding mortgage debt in 1998.
Despite the fundamental transition witnessed in the function served by mortgage finance and the environment in which it operates, the current legal device of the mortgage has altered little since its inception in the early sixteenth century. Regardless of whether it was used by a sixteenth century landowner to obtain funds, or a twentieth century household to purchase a home, the legal device of the mortgage has always been characterised as a disposition of some ownership interest in property, 'as a security for the payment of a debt or the discharge of some other obligation for which it is given.'

This ability, on the part of the legal device of the mortgage, to remain unchanged whilst the function it serves within society has undergone a radical alteration raises a number of questions in respect of the relationship between the juridical content of the law of mortgage and its operation within the social context. In particular, how has it proved possible to put the legal device of the mortgage to new uses without altering its juridical content? Stewart, in offering an answer to this question, contends that there are three possible explanations. The first is that the form of the legal device of the mortgage has been framed so precisely and adequately that no change is required in order to improve upon it. The second explanation offered by Stewart is that the legislative framework considers the mortgage agreement to be unimportant and, therefore, has sought to reform other aspects of the mortgage relationship.

Stewart suggests, however, that neither of these arguments offer a plausible explanation for the stagnancy apparent within the legal device of the mortgage. Rather, 'it is that the relationships between the parties to the mortgage have not been regulated legally but administratively by the institutional lenders.' According to Stewart, the lack of legal
intervention within the mortgage relationship has allowed mortgage lenders to manipulate the mortgage relationship in line with perceived objectives. In order to alter the use made of mortgage finance, therefore, it has not proved necessary to alter the legal device of the mortgage.

Whilst Stewart's reasoning may appear convincing in relation to the current mortgage transaction, it is not her intention to offer a detailed theoretical explanation as to how it has proved possible for the legal device of the mortgage to remain unchanged for nearly five centuries despite radical changes to the environment in which it operates and the uses made of it. Such an account is, however, offered by Karl Renner in the *Institutions of Private Law and Their Social Functions*. In accounting for the stability of legal norms, Renner contends that legal institutions, such as the legal device of the mortgage, are 'normatively pure'. They operate as 'empty frames', the substance of which is left to be filled in by the operation of the norm within the social context. A legal institution can, therefore, operate in isolation from the function it serves within society, allowing for a manipulation of its uses without the need to alter its juridical content. This proposition raises as a natural corollary, the contention that a purely juridical analysis of the law will fail to identify the true social and economic significance of legal institutions.

The implication of Renner's theory is somewhat controversial, challenging as it does the value of analyses of the law which confine themselves solely to an examination of the juridical content of legal institutions. It would, however, appear to offer a valid explanation for the stability identified within the law of mortgage. A juridical analysis of
the legal device of the mortgage, for example, will inform as to the structure and content of that legal institution, namely that it involves the conveyance of an interest in property as security for a loan but, it will not offer any information relating to the uses made of that legal device, the category of individual who seeks to use it, or its role within the wider social, economic or political contexts. It is Renner’s contention, therefore, that legal institutions can only be truly understood if a juridical analysis is supplemented by an examination of the function which that institution serves within the social context and the evolutionary process by which that function was arrived at.

It is this contention which forms the foundation of this thesis. Essentially the proposition is that a representative account of the significance of legal institutions can only be obtained by reference to three elements, namely, the origin, juridical content and social function of those institutions. In undertaking an examination of this contention, it is the aim of this thesis to apply aspects of Renner’s thesis in the pursuit of a contextual analysis of the English law of mortgage.

It is implicit in the claims made by Renner, that the lawyer must look to factors other than the juridical content of the law in order to obtain a representative account of it. In line with this reasoning, this thesis presents an analysis of the three constituent elements of the law of mortgage. In so doing, this thesis hopes to make a unique and valuable contribution to current knowledge in respect of the English law of mortgage. The basis for this aspiration derives in part from the use made within this thesis of information not currently available in a published format. This information is constituted by qualitative data obtained as a result of the implementation of a primary research study involving
mortgagees, district judges and other interested groups, and relates to the manner in which both mortgagees and the judiciary influence the social function of the law of mortgage. It is through the combination of both theoretical and empirical material that thesis attempts to offer a detailed contextual analysis of the law of mortgage. The manner in which this task is to be achieved is examined in detail below.

1.2 Focus and Context

In undertaking an examination of the law of mortgage, the aim of this thesis is not simply to offer an account of its juridical content but also to explain, 'why doctrine has a particular form and content at a given time and place' (Original emphasis). In its attempt to offer an account of the law of mortgage which extends beyond the exclusive concerns of the lawyer, this thesis could have drawn upon one or more of a vast number of legal theories. Reliance is, however, placed upon one theory in particular, namely that propounded by Karl Renner in the *Institutions of Private Law and their Social Functions*. The following section offers a critique of Renner's work and examines the reasons that underpinned the decision to utilise aspects of his theory as the foundation for this thesis.

1.2.1 Karl Renner

The *Institutions of Private Law and their Social Functions* has been described as, 'the classic Marxist text on the law of property' (Original emphasis). Despite drawing heavily upon Marx' analysis of the law, Renner's theory differs markedly from those
offered by other theorists within the Marxist tradition. This distinction derives from the 'positivist' approach which Renner adopts in his analysis of legal institutions, as Hirst notes, 'Its methodology in respect of law is ... not drawn like Pashukanis' from the general body of Marxist theory. Renner adopted the formalist legal philosophy dominant in central Europe at the time.'

Whereas other theorists, such as Pashukanis, contend that the law serves as the vehicle by which the dominant classes further their own interests, Renner is concerned with what the law is as opposed to what it should be and denies that the juridical content of the law has any significant moral content. In line with the guiding principles of legal positivism, Renner claims that legal institutions operate in isolation from the function they serve within society, as Hirst notes,

Renner, a leading Austro-Marxist, adopts a neo-Kantian positivist conception of scientific method and accepts the theory of legal formalism ... which argues that the law is an autonomous sphere of concepts and that legal institutions must be analysed as constructions of pure legality without reference to their use in legal practice.

In examining claims made in respect of the relationship between the juridical content of the law and its social function, Renner focuses upon those legal institutions which seek to regulate aspects of the property system. In relation to the normative purity of such institutions he notes that,

The kind of subject-matter which is the object of the property norm is irrelevant to the legal definition of property. One object is as good as another. The norms which make up the
It is this conception of legal institutions as ‘autonomous’ spheres which is central to Renner’s theory and from which flow a number of inherent claims. One of the principal claims which Renner expounds, and which is of particular significance in relation to the law of mortgage, is that the ability on the part of the juridical content of legal institutions to operate free from social, economic or moral influences enables it, in turn, to remain unchanged for a number of years. In support of this contention, Renner traces the development of society from feudalism to capitalism and notes that during this transformation in the institution of property, the legal structure of that institution remained unchanged, ‘Fundamentally, the norms which make up the law have remained absolutely constant, and yet an enormous revolution has occurred without any change of norms.’

Having illustrated that, ‘as a legal institution “property” can mean the same thing, say, in 1750 and in 1900,’ Renner’s theory diverges from what would be considered to be a traditionally positivist approach. Whereas a theorist within the positivist tradition would tend to disregard the economic and social significance of an institution, Renner proposes to, ‘examine only the economic and social effect of the valid norm as it exists…. ’ Bottomore and Goode, in their account of the ‘Austro-Marxists’, highlight the extent to which Renner’s theory extends beyond a purely ‘positivist’ analysis of the law,
Renner, it is true, took as his starting point the conception of law as a system of norms which could be analysed and interpreted in its own right, but he then proceeded to extend his inquiry in a sociological direction by investigating how the same legal norms could change their functions in response to changes in society, and particularly changes in its economic structure.  

In undertaking this sociological task, Renner divides the law into three elements, namely, juridical content, origins and social function. In defining this latter element, Renner contends that the ultimate aim of law is to ensure that society survives as a group, every legal institution, therefore, has a specific function which it must satisfy in order to achieve this aim, ‘Thus all legal institutions taken as a whole fulfil one function which comprises all others, that of the preservation of the species.’ The manner in which use is made of the institutions of the law within society in pursuit of this objective constitutes the social function of legal institutions, ‘If we correlate all specific effects of a legal institution upon society as a whole, the individual partial functions become fused into a single social function.’

In distinguishing between the juridical content of legal institutions and their social function, Renner contends that whilst the former may remain stable, the latter can undergo a radical transformation, ‘The essential character of the social process as preservation and reproduction of the species undergoes continual change while the form of the law is constant.’ Kahn-Freund, in his introduction to the *Institutions of Private Law and their Social Functions*, summarises this aspect of Renner’s thesis by utilising the following analogy,
Society handles the institutions of the law much in the same way as a child handles his bricks. It uses the same bricks all the time – or for a long time, - today to build a manor house, tomorrow to build a factory, and the day after to build a railway station. The number of bricks is limited; the manor house may have to pulled down to make way for the factory. But – this is Renner’s positivist axiom – the bricks remain the same.32

It is possible, therefore, for the normative content of a legal institution, such as the legal device of the mortgage, to remain constant whilst the uses made of it within society change beyond all recognition. Renner does not deny that change within the juridical content of legal institutions will be undertaken, but, and this is central to his thesis, he claims that such change usually occurs only after the need has already arisen within the social context. Whilst he accepts that changes within society may be achieved as a result of legal developments, he proposes that it is more common to find that changes within society ultimately lead to a change in the law and that such change may in some instances, only occur after a considerable time-lag.33

This contention may appear at face value to be controversial, in that it denies an inherent ability on the part of all legal developments to effect change, but it would account for the continued existence of legal institutions which appear to be anachronistic. The English property system offers a multitude of examples, but to take only one, the mortgagee’s inherent right to possession of the property secured by way of mortgage has, by virtue of a term contained within the majority of mortgage contracts concerning residential property, been restricted by mortgagees. In effect, mortgagees have determined that possession should not be taken until the mortgagor defaults in payment or fails to comply with any other of the terms established by the
mortgage contract. Despite recognition by mortgagees of the unsuitability of the inherent right to possession within the current housing system, the law continues to uphold it as a fundamental aspect of the mortgage relationship. The need for reform of this aspect of the law of mortgage seems apparent, yet no such reform appears forthcoming. If reform were to be undertaken, it would be as a result of changes that have already taken place within the mortgage relationship, rather than as a means of initiating such change.

It is in relation to the claim that legal change often only occurs after the need has arisen within the social context and claims in respect of the relationship between the juridical content of legal norms and their social function, that the third element of the law, categorised by Renner as its origins, becomes important. In order to validate the claim that a legal institution has remained stable while its social function has altered dramatically, it is necessary to examine its historical development, as Renner notes,

We must study the process in its historical sequence, the gradual transition of a social order from a given stage to the next. The inherent laws of development can only be revealed if the events are seen in motion, in the historic sequence of economic and legal systems.

In order, therefore, to understand fully the nature of a legal institution it is necessary, according to Renner, to examine not only its juridical content, but also its social function and its historical development. Such an examination should not, however, focus solely upon the legal institution which is the subject of the research for, legal institutions, although enjoying a degree of independence from all other institutions within a society, do not operate in isolation from them. As the ultimate aim of society is
to ensure that it remains as a group, then each social, legal or economic institution plays a specific role in the achievement of that purpose. As Kahn-Freund notes, legal institutions are, ‘cogs in the mechanism of the production, consumption and distribution of the social product.' If one ‘cog’ undergoes an alteration, then this affects other institutions within the mechanism. Legal institutions must not, therefore, be viewed in isolation for, as Renner notes,

[In]either the legal substance, nor the normative content, of the individual legal institution, nor the combined effect of its complementary institutions, reveals completely its social function; which can only be understood if the institution is seen within the whole of its economic context.37

Renner’s thesis as a whole presents a challenge to the manner in which research into the nature of legal institutions is undertaken and presented. In particular, he questions the validity of accounts of the law which do not extend beyond a purely positivist analysis. If, as he contends, legal institutions operate as ‘empty frames’ then an analysis of their content alone will fail to offer an account of their social function. It is this aspect of Renner’s theory which informs much of this thesis. It is necessary, however, to be aware of the omissions apparent in and criticisms made of his work.

The adoption by Renner of a clearly positivist foundation within the Institutions of Private Law and Their Social Functions,38 lays his work open to those criticisms generally made in respect of this approach. It is not the aim of this chapter to discuss in detail the well-rehearsed criticisms of legal positivism,39 but it is worth noting those which relate specifically to Renner’s theory. Although Renner makes clear his
misgivings in respect of legal positivism, his conception of legal institutions is clearly founded within this theoretical tradition.

In conceiving of legal institutions as 'colourless frames', Renner denies that the juridical content of such institutions has any moral significance. The opposite view has, however, been argued persuasively by theorists such as Durkheim, Weber, and Unger, who notes that 'These rules are not just facts devoid of moral significance to those who make, apply, and follow them, and give praise or blame according to them.' The issue concerning the moral content of the law has been a feature of jurisprudential debate for many years and whilst it is beyond the scope of this thesis to enter into a critique of this debate, it is clear that Renner accepts to some extent the claim made by Unger. In distinguishing between the normative content of legal institutions and their social function, Renner rejects a purely positivist approach to understanding the law and accepts that the manner in which use is made of these institutions within the social context will be influenced by moral, social and economic concerns.

In claiming that the social function of legal institutions is open to external influences while the juridical content of these institutions is not, Renner's theory exhibits characteristics similar to those apparent within 'autopoietic' theories. Although it is not possible to examine in depth the complex theory of autopoiesis, a summary of its fundamental tenets, offered by King, does serve to elucidate upon Renner's conception of law as a 'closed system'.

Law is seen as a communicative system which produces norms of conduct both for its own operations and for society at large. As such it is closed in the sense that it cannot produce
anything but law and also in that its operations are impervious to direct communications from other social systems. This does not mean that legislation or the decisions of judges are free of any influence from political or economic factors. What autopoietic theory is proposing is rather that the legal system is normatively closed but cognitively open. (Original emphasis).45

The rather uncommon mix of positivism and Marxism identified within Renner’s work may be accounted for by reference to the type of legal system with which he is concerned and the time at which he conceived of his thesis. Writing in Austria at the turn of the twentieth century, Renner is not surprisingly concerned with codified systems of law. Renner’s categorisation of legal institutions into the three elements of content, origins and social function appears appropriate to such a system. When referring to ‘legal institutions’, Renner is concerned only with written law as contained in statutes and codes. If legal reform is to be undertaken, then it requires a positive redrafting of written law thereby allowing for a clear identification of legal change.

It is this clear demarcation of law as a distinct entity within society, which allows Renner to distinguish between the juridical content of legal institutions and their social function and to claim that they operate in isolation from each other. The social meaning ascribed to the legal institution of property, for example, underwent fundamental changes during the transition from a feudal system to a capitalist system, yet the juridical content of that institution remained unchanged. This could not be classified as legal reform but only as a change in its ‘social function’. The stability and autonomy, which Renner identifies in these institutions, is, therefore, conceivable in a codified system of law. The question is whether his theory has any relevance within a ‘common law’ system.
The particular difficulty raised by Renner’s concern with a codified system relates to the ability on the part of the judiciary within a common law system, to create or alter the content of the law. The stability and autonomy of legal institutions is unlikely to be a feature of such a system and the distinction between the law and its social function may become blurred. In being solely concerned with ‘written law’, judicial creativity is an aspect of the legal system which Renner does not account for and despite the fundamental role played by the courts within the English legal system, the common law does not form part of the juridical content of the law within the meaning ascribed to it by Renner.

This omission has serious implications in relation to the validity of Renner’s claims. In particular, it may be the case that within a common law system, the juridical content of the law is subject to constant alteration as a result of the decisions of the judiciary, as Kahn-Freund notes, ‘the social and political position of the judiciary has enabled them to translate into norms many changes which, on the Continent, had to await the intervention of the legislature.' Although these problems suggest that Renner’s thesis is inapplicable in relation to a common law system, Kahn-Freund contends that his claims in respect of the methodology to be adopted in understanding the law remain valid. Despite the ability on the part of the judiciary to alter the juridical content of the law, it is clear that the English legal system contains many institutions which have remained unchanged over a number of decades despite fundamental changes to their social function, as Kahn-Freund notes, ‘Definitions and precedents linger on, social
phenomena and processes are "construed" in terms of concepts designed to cover situations intrinsically antithetic to those to which the norm is now made to apply.47

In support of this contention, Kahn-Freund draws upon a number of examples taken from English law, including the reliance upon the principle of freedom of contract in situations where exchange of offer and acceptance are clearly not in operation; the conception of the incorporated enterprise as a legal personality separate from its members has survived the fundamental changes witnessed in the size and structure of corporations; and the continued use of feudal concepts, such as the fee simple, in a property system now based upon capitalism.48

The stability of these 'legal institutions' despite fundamental changes to the environment in which they operate, suggests that a common law system exhibits those characteristics with which Renner is concerned. It is necessary, however, to take account of the omission apparent within Renner's work by including within the definition of the juridical content of the law, those aspects of the legal framework which arise out of judicial creativity. Where mention is had within this thesis to the 'juridical content' of the law, therefore, this term is intended to refer to those aspects of the law contained in legislation, statutory instruments and the common law.

Although the difficulty apparent within Renner's work in respect of the common law can be remedied by a simple alteration in the definition of the juridical content of the law, there remains a further omission which relates to the ability on the part of the judiciary to implement and interpret 'written law'. Although aspects of the law, which
may be categorised as 'judge-made law', show an ability to remain stable over many years, the manner in which the judiciary interprets and enforces 'written law' appears to be the subject of constant reappraisal. Despite the omission apparent within Renner's theory, it is possible to include within Renner's terminology, the role of the judiciary in this respect.

In relation to the English legal system, judicial interpretation and enforcement of legislation is classified as part of the juridical content of the law. In relation to Renner's typology, however, the role of the judiciary in this respect is more appropriately categorised as part of its social function. This classification derives from Kahn-Freund's contention that, the manner in which the judiciary interprets and implements legal norms will be influenced by, 'considerations of what is expedient for the community concerned.' The judiciary has the ability to alter the social meaning ascribed to certain statutory provisions in line with the function which those provisions are intended to serve within the social context but, it cannot alter the 'juridical content' of the law within the definition attributed to it by Renner. It seems appropriate, therefore, to classify the ability on the part of the judiciary to give meaning to legislative provisions, within Renner's typology, as part of the social function of the law.

Although the classification of the judiciary's ability to give meaning to and to enforce legislation, as part of the social function of the law, increases the relevance of Renner's theory in relation to a common law system, a problem remains in terms of obtaining information in respect of this matter. Although traditional analyses of the juridical content of the law offer accounts of the manner in which the judiciary interprets and
implement written law, these accounts usually make reference only to the decisions of the higher courts. In consequence, such analyses fail to elucidate upon the meaning ascribed to legislation on a daily basis by the lower courts. It is difficult, therefore, to evaluate the extent to which the judiciary is responsible for altering the social function of the law without an understanding of the manner in which the law operates in practice.

In seeking to remedy the omission apparent within Renner's work and the current literature relating to the law of mortgage, this thesis presents an analysis of the practical implementation of the law of mortgage which draws heavily upon qualitative data obtained as a result of a primary research study, discussed in more detail below, involving district judges, mortgagees and other relevant parties. In relying upon such data, this thesis intends to offer a unique insight into an aspect of the law of mortgage which has, to date, received little attention within the relevant literature.

The difficulties which arise out of Renner's concern with codified systems of law are also compounded by the anachronistic nature of his theory. The first edition of the *Institutions of Private Law and Their Social Functions,* was published in 1904 and despite a second edition in 1929 which recognised the changes which had occurred within society during that period, Kahn-Freund notes that, 'It is impossible to read Renner's work without being constantly reminded of the distance which separates our own time from the time when the book was written.'
Despite the changes which have been witnessed since 1929 in economic relations between employer and employee, in the relationship between public law and private law with an increasing role for the former, and in the relationship between the individual citizen and the state, Renner's theory continues to be of value in terms of its methodology, as Kahn-Freund notes,

The material which Renner uses, the examples which he gives to demonstrate the working of his method and his theory may be out of date, the jurisprudential foundation of his structure may have been shaken by the course of history. Nevertheless the method itself remains fruitful, and can and should be used for a better understanding of many legal developments of our own time.54

When stripped of its anachronistic references to society as it operated at the beginning of the twentieth century, Renner's thesis retains potential as a methodological guide to an improved understanding of many aspects of English law. His contention is that a true representation of a legal institution can only be presented by an account which encompasses an analysis of the juridical content, origins and social function of that institution. Whilst it is this claim which forms the foundation of this thesis, it is necessary at this stage to make clear that this research study does not seek to validate or substantiate the reasoning propounded by Renner which underlies this contention. His claims in respect of the normative purity of legal institutions and the relationship between social and legal change are potentially suggestive of further research but it is beyond the scope of this research study to undertake a detailed evaluation of the validity of these claims.
Although concerns regarding the cogency of Renner’s fundamental assertions, deriving from his reliance upon a positivist conception of the law and the anachronistic nature of his theory, have been identified and accepted, the value of the methodological approach he promotes in order to gain a deeper understanding of many legal institutions should not be underestimated, as Schwarzchild notes, ‘The more judges and lawyers abandon positivism and turn towards a functional approach to the law, the greater the practical importance of the methods suggested by Renner.’ The value of Renner’s theory, therefore, lies not in its substantive claims, but in its provision of a methodological tool, the application of which will lead to a contextual account of the law of mortgage.

Although this thesis seeks to make use of the methodological approach promoted by Renner, the claims he makes in respect of the law cannot be detached easily from his claims in respect of methodology. The contention propounded by Renner that legal institutions are devoid of any moral content, for example, leads to the conclusion that the significance of such institutions can only be evaluated by reference to their origins and social function. The interdependence of the analytical and methodological aspects of Renner’s theory, therefore, necessitates an examination of his substantive claims. During this examination, it will become apparent that aspects of Renner’s theory would appear to have particular relevance to the law of mortgage. The legal device of the mortgage, for example, has indicated a capacity to remain stable while its social function has altered dramatically. It should be pointed out, however, that this thesis does not wish to suggest that Renner’s theory serves as the only possible explanation for this phenomenon, neither does it seek to promote the validity or accuracy of that explanation. Rather, this thesis seeks to utilise the application of aspects of his theory as
a means to an end, namely, to facilitate the presentation of a contextual account of the law of mortgage.

The application of Renner's theory, in allowing for a detailed understanding of the significance of many legal institutions, forms the first stage in the critique of such institutions. It is in relation to questioning whether such institutions and the uses made of them are consonant with an accepted underlying value system, however, that Renner's theory becomes of limited value. It is implicit in his claims regarding the normative purity of legal norms that the manner in which such norms operate within the social context will be influenced by social, political, economic and moral concerns. Whilst Renner is concerned to offer the methods by which such values may be identified, in the form of the social function of such institutions, he does not question whether such values are 'legitimate'.

If, as Renner contends, legal institutions operate as 'empty frames' within the social context, then the substance of those institutions remains open to 'capture'. It may be the case that such institutions will be manipulated to serve the overriding purpose of maintaining society as a group, but it also seems reasonable to assume that the politically or economically 'powerful' within a society will have the opportunity of importing values into these 'colourless frames' which best serve their own interests. The extent to which this is true of the law of mortgage will become apparent through the application of Renner's methodology. The question remains, however, as to whether the values which inform the social function of that legal framework are 'justifiable'.

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In answering this question, it is necessary to have recourse to 'standards' which can be used in the evaluation of the legitimacy of the content and uses made of legal norms. It is necessary to be aware of the potential for arbitrariness in defining such standards, but it would seem reasonable to make use of generally accepted principles which are founded within liberal-democratic theory. The requirement that like cases should be treated alike, for example, derives from the fundamental expectation of equality of treatment. Whilst it is not the primary aim of this thesis to prescribe the ethical standards which the law of mortgage should satisfy, it does seek to evaluate the legitimacy of that legal framework through an examination of concepts such as 'discretion', 'due process' and 'consistency' within a liberal-democratic context.

1.2.2 Secondary themes and objectives

A proposition fundamental to this thesis is that any attempt to undertake a critique of legal institutions must be founded upon an understanding of their origins, juridical content and social function. In an attempt to validate this contention, this thesis presents an analysis of these three elements of the law of mortgage. Had the information contained within this thesis been available in a previously published format, then this thesis could have attempted a detailed critique of the law of mortgage which served to question, for example, its legitimacy or need for reform. Despite the fact that the majority of this thesis is concerned with providing a detailed exposition of the three elements of the law of mortgage, it is possible to pay at least a small degree of attention to the critical analysis of it. Whilst this critique will be somewhat limited due to the
practical constraints imposed upon this thesis, it will offer 'signposts' in respect of the potential routes which future research into the law of mortgage might choose to take.

One such possible route includes an evaluation of the extent to which the law of mortgage satisfies requirements as to 'due process'. The significance of this concept derives from its close relationship with the concept of justice, as Lewis and Birkinshaw note, 'we feel confident that the minimum content of justice is procedural fairness or, to use an American expression, “due process”.' It is not possible within this introduction to undertake a detailed examination of this concept but the intention, in raising it at this stage, is to allow the reader to consider, during the examination of the law of mortgage undertaken in Chapters Three to Seven, the extent to which the law of mortgage achieves 'procedural fairness'. This issue will then be considered in more detail in the conclusions to this thesis.

An issue which will also be considered in the final chapter, and which is related to the concept of due process, is consistency in the treatment of similar cases. Hart proposes that if justice is to be achieved within the legal system, like cases must be treated alike. The extent to which the practical operation of the law of mortgage satisfies this requirement will become apparent in Chapters Six and Seven, but it will not be considered in detail until the concluding chapter.

An evaluation of the extent to which the law of mortgage meets the demands of due process and consistency in the treatment of similar cases can only be undertaken on the basis of information contained within the first seven chapters of this thesis. It is
possible, however, within these chapters to examine a further concept which will assist in the critical analysis of the law of mortgage. This issue concerns the exercise of ‘discretion’ by both mortgagees and district judges within the mortgage relationship. In defining this term, Dworkin notes that, ‘The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority.’ He goes on, however, to qualify this basic definition by suggesting that the term ‘discretion’ can be used to denote two different meanings. The first, categorised by Dworkin as the ‘weak sense’, relates to the situation where, ‘for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment.’ The second, classified as the ‘strong sense’, is defined by Dworkin in the following manner,

We use “discretion” sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question.

As will become apparent during the examination of the social function of the law of mortgage, district judges exercise discretion in the ‘weak sense’, whilst mortgagees exercise discretion in the ‘strong sense’. The ability on the part of district judges to exercise discretion, in respect of the terms to be established under a suspended order for possession, arises by virtue of and is constrained to some extent by, s.36 of the Administration of Justice Act 1970 (AJA 1970). Mortgagees, on the other hand, have discretion to deny a mortgagor access to mortgage finance, to determine the terms of
the mortgage contract and to determine when and how to seek possession without reference to enforceable standards.

The ability to take decisions which affect significantly the welfare of individual mortgagors raises questions regarding the factors which influence the exercise of such discretion. One of the primary aims of this thesis is to identify these factors, whether legal or not, and on the basis of such information to question whether the exercise of such decision-making power is 'legitimate' and also whether the processes adopted satisfy requirements as to 'consistency' and 'transparency'. The importance of ensuring that decision-makers abide by such requirements derives from the concern to avoid arbitrariness and capriciousness, as Sainsbury notes, 'it is desirable, per se, that individuals understand why certain decisions have been taken about them in order that they can be convinced of their acceptability.'

The concern to ensure that the exercise of decision-making power by mortgagees, in particular, is legitimate also derives from the public nature of such power. The decision to seek possession, for example, not only has consequences for the individual mortgagor but also, as was seen during the early 1990s when the number of possessions reached unprecedented levels, for society generally. This ability on the part of private enterprise to exercise 'public power' raises questions regarding the extent to which such power is legitimate. In offering a standard by which to measure the legitimacy of such 'social decision-making power', namely that it should be exercised 'in the public interest', Parkinson contends that, 'society is entitled to ensure that corporate power is exercised in a way that is consistent with that interest.' The extent to which a
regulatory regime premised upon a ‘public interest’ justification would serve as an effective method by which to structure the exercise of significant power by mortgagees will be explored in greater detail in the final chapter of this thesis.

In undertaking a critical analysis of the law of mortgage, this thesis would appear to diverge significantly from the theory propounded by Renner. It is possible, however, to relate this analysis to the work of Renner. In accounting for the stagnancy of many legal institutions, Renner contends that the ability on the part of a society to alter the social function of such institutions reduces the need for reform of their juridical content. This ability to manipulate the uses made of legal institutions has the potential to be open to abuse by those who have significant economic or political influence. In seeking to question whether this is the case in relation to the law of mortgage, this thesis adopts Renner’s framework but looks elsewhere for assistance in defining the standards which can be applied in the critical analysis of the law of mortgage.68

1.2.3 The relevance of the law of mortgage

In seeking to test the hypothesis which is central to this thesis, namely that the significance of the law can only be evaluated by reference to its juridical content, origins and social function, any number of legal institutions would serve as appropriate subjects for research. This thesis, however, focuses upon the legal device of the mortgage and the law of mortgage more generally. The extent to which the law of mortgage is suitable as a candidate for the application of the methodological approach adopted
within this thesis and the reasoning behind the decision to focus upon this particular aspect of English law is examined below.

In the first instance, the law of mortgage exhibits characteristics, which are of particular relevance to Renner’s work. In his attempt to, ‘utilise the Marxist system of sociology for the construction of a theory of law,’ Renner examines legal institutions which fall within the category of ‘private law’, including, ‘ownership in land and movable property, contracts of various types, mortgage and lease, marriage and succession.’ In relation to these institutions, Renner identifies a phenomenon common to them all, namely that the juridical content of these institutions has indicated a capacity to remain constant whilst their social function has undergone radical change. The legal device of the mortgage offers perhaps one of the best illustrations of this phenomenon.

The classic definition of the legal device of the mortgage, pronounced by Lindley LJ in Santley v Wilde, is that a ‘mortgage’ is a disposition of some ownership interest in property, ‘as a security for the payment of a debt or the discharge of some other obligation for which it is given.’ The significance of this pronouncement relates not to its content, but to its chronology. Despite having been enunciated in 1899, this definition remains an accurate description of the current legal device of the mortgage. In relation to Renner’s thesis, the stability of this legal institution becomes significant when it is compared with the function it serves within the social context.

The statement made by Lindley LJ offers a description of the mortgage device as it operated not only in 1899, but also as it had operated in the preceding two centuries.
The conveyance of an interest in property as security for a debt had become popular during the sixteenth century as a means of assisting landowners with their financial difficulties. In the late twentieth century, the same device is being used to achieve a very different purpose, namely to enable millions of households to purchase residential property. This transformation in the function served by the legal device of the mortgage has been achieved whilst the juridical content of that legal institution has remained static. In identifying this phenomenon, Renner poses the question, summarised by Kahn-Freund as, 'How can one account for the functional transformation of a norm which remains stable?'

Renner’s answer to this question is founded upon a conception of legal institutions as ‘empty frames’ which operate in a manner distinct from the function they serve within the social context. It is possible to argue that this contention offers an explanation for the stability apparent within the legal definition of the mortgage device despite the changes to its function. The content of the legal device of the mortgage, as stated above, appears to be normatively pure for it is descriptive rather than prescriptive. It informs as to the distinct qualities of a mortgage but it does not demand that the device be used in any particular manner or by any particular category of individual. In effect, the legal device of the mortgage operates as a tool which may be used within society in whatever manner is considered appropriate in ensuring the ‘maintenance of the human species.’ It is this aspect of the legal device of the mortgage which has enabled the uses made of it to undergo a transformation whilst its content has remained unchanged and which also indicates the value of using Renner’s work in an attempt to analyse the law of mortgage, as Schwarzchild notes,
The proposition that the content of legal institutions is normatively pure necessarily leads to a conclusion that the juridical analysis of these institutions can offer little if any insight into their social or economic significance. Such an analysis may offer detailed information relating to the content and structure of a legal institution, but it will not allow for any understanding of the manner in which that institution is used within the social context. A juridical analysis of the legal device of the mortgage, for example, could inform as to its definition but could not, without reference to information external to the juridical content of the law, inform as to its social function. It follows, therefore, that a representative account of legal institutions can only be achieved if reference is had to the content of the law and its social function. Added to these two elements, however, must also be a third, namely the origins of a legal institution.

In examining the sociology of the law, Renner is concerned with the manner in which use is made of the institutions of the law within society. In undertaking such an examination, Renner contends that it is necessary to view society as a 'dialectical process' to examine the sequential nature of the manner in which alterations to the uses made of legal institutions are achieved within society. The alteration witnessed in the uses made of the legal device of the mortgage, for example, can only be fully accounted for by reference to a historical survey. An awareness of the historical development of the law of mortgage is also of particular relevance in relation to
Renner’s contention that legislation is often introduced in response to changes within society, rather than in order to effect such change. This element of Renner’s thesis can be illustrated by those aspects of the law of mortgage contained within the Law of Property Act 1925 (LPA 1925). In order to question whether this legislation was introduced in response to changes which had already occurred within society, it is necessary to have some understanding of the circumstances which led to its introduction.

The legal device of the mortgage, as it operated prior to 1926, involved the conveyance of the mortgagor’s leasehold estate or lands outright in fee simple to the mortgagee, with a covenant for re-conveyance if the debt was re-paid on time. If the debt was not re-paid by the fixed date, the mortgagee retained the leasehold estate or fee simple. In recognising the true nature of this arrangement, namely that the mortgagee was not primarily concerned with obtaining ownership of the land but simply wished to obtain security for the debt, the Courts of Equity developed the mortgagor’s ‘equity of redemption’. This term signifies the, ‘sum total of the mortgagor’s equitable rights in the realty after the due date.’ One aspect of the ‘equity of redemption’ is the mortgagor’s ‘equitable right to redeem’ which allows the mortgagor to repay the mortgage debt even after the legal date for redemption has passed. Added to this were a number of other measures designed to protect the mortgagor, including the imposition of onerous duties upon mortgagees in possession.

By the beginning of the twentieth century, the principles developed by the Courts of Equity had created a conflict between the legal position of the parties to the mortgage
and the manner in which that relationship operated in practice. In strict legal terms, the
mortgagee was viewed as the owner of the property and yet in practice, it was the
mortgagor who enjoyed the benefits usually associated with ownership, subject only to
the mortgage. The LPA 1925 was introduced to ensure that the legal position reflected
the reality of the mortgage relationship and it achieved this by altering the manner in
which the legal device of the mortgage was to be created. After 1925, it was no longer
the mortgagee who retained the leasehold estate or fee simple but the mortgagor. It is
possible to argue, therefore, that the LPA 1925 merely gave legislative approval to a
practice that had already been adopted within the social context.

Although an account of the introduction of the LPA 1925 appears to support Renner’s
contention that legislation is often reactive, as opposed to pro-active, it also serves to
highlight the deficiencies apparent within his work. Renner’s work is confined to
codified systems which explains to some extent his claims in respect of the nature of
legal institutions. The application of his theory, and particularly his contention that legal
institutions can remain stable for many years, to common law systems, however, seems
inappropriate due to the ability on the part of the judiciary to alter the content of the
law. Evidence in support of this contention is provided by a survey of the historical
development of the law of mortgage and the role of the Courts of Equity in altering the
juridical content of the law of mortgage.

Upon closer inspection, however, it is clear that even common law aspects of the law of
mortgage indicate a capacity to remain unchanged over many years. In particular, it
would appear that the definition of the legal device of the mortgage has remained stable
over a number of centuries despite fundamental changes to the function it serves and the ability on the part of the judiciary to alter its meaning. The law of mortgage also offers further examples of provisions which have remained constant including, the reliance upon the principle of freedom of contract which became popular in the early nineteenth century and continues to be employed by the courts in relation to the current mortgage relationship. The mortgagee’s inherent right to possession has always been a feature of the mortgage relationship and continues to operate today in strict legal terms as it did five centuries ago. It would appear that the law of mortgage within the English legal system exhibits characteristics similar to those which form the focus of Renner’s work. In seeking to make use of his methodology in respect of a common law system, therefore, it would simply appear necessary to include within the definition of the juridical content of the law of mortgage, the judicial formulation of legal concepts and principles.

Whilst it is possible to remedy this difficulty as regards the common law, a problem remains in respect of the ability on the part of the judiciary to alter the social meaning of legal institutions. The role of the judiciary in interpreting, implementing and exercising discretion upon the basis of ‘written law’ is of particular significance in relation to the law of mortgage. This significance derives from the ability on the part of the judiciary to exercise discretion in the legal process of possession within the terms established by s.36 of the AJA 1970. By virtue of this section, the court has discretion to suspend or postpone an order for possession where it is convinced that the mortgagor can repay any sums due within a reasonable period. The inclusion of terms such as ‘a reasonable period’ also allows for an alteration in the meaning ascribed to such terms by the
judiciary in the exercise of its ability to enforce and give meaning to s.36 of the AJA 1970. In an attempt to account for the current form and content of the law of mortgage, therefore, it is necessary to be aware of the manner in which the judiciary exercises discretion and its ability to implement and interpret written law.

Difficulties arise, however, in attempting to utilise the methodological framework proposed by Renner to achieve this task due to his failure to account for the role of the judiciary in exercising discretion and in interpreting and implementing legislation. It has been proposed above, however, that Renner’s theory can be extended so as to include the role of the judiciary in this respect by classifying it as part of the social function of the law within the meaning ascribed to it by Renner. The extent to which the ability on the part of the judiciary to exercise discretion and to give meaning to and to enforce legislation is more aptly classified as part of the social function of the law, as opposed to forming part of its juridical content, can be illustrated by reference to s.36 of the AJA 1970. The ability on the part of the judiciary to exercise discretion within the possession process allows for an alteration in the manner in which s.36 of the AJA 1970 operates in practice, but it does not allow for an alteration of the juridical content of that legislative provision. The classification of the exercise of discretion by the courts as part of the social function of the law of mortgage, in accordance with Renner’s typology, therefore, appears more appropriate.

Although it is possible only with the aid of theoretical creativity, to validate the application of Renner’s theory to a common law system, reference to the role of the judiciary does serve to support the primary contention of this thesis, namely, that the
law can only be understood by reference to its origins, juridical content and social function. In the first instance, it would appear to validate the claim made by Renner that a juridical analysis of the law is not sufficient to present a representative account of it. If the meaning ascribed to legislative provisions is the subject of constant reappraisal at the hands of the judiciary, then the significance of the law can only be understood if reference is had to the practical operation of the law and the factors which influence the judiciary in interpreting and implementing it. A juridical analysis of the law of mortgage would, for example, inform as to the wording of s.36 and the inclusion of the phrase ‘reasonable period’, but it would not offer any information relating to the definition of that term as applied by the courts or the reason as to why that particular definition was applied.

Secondly, it is possible to argue that the ability on the part of the judiciary to alter the meaning of certain provisions of the law of mortgage so as to meet with the needs of modern society derives from the normative purity of such provisions. The terms of reference contained within s.36, for example, establish a specific formula for the exercise of discretion by the court, namely, that the mortgagor must be able to show an ability to clear the arrears within a reasonable period. Beyond this, s.36 does not require that the court question the reasons as to why the mortgagor fell into arrears, the ‘moral worthiness’ of the mortgagor’s claim to avoid possession or the reasonableness of the mortgagee’s claim for possession. In applying the formula established by s.36, however, the court is not precluded from considering these factors and may interpret terms such as the ‘reasonable period’ based upon such factors.
It may be possible to argue, therefore, that it is the normative purity of aspects of the law of mortgage which ultimately accounts for the stability apparent within them, allowing as it does for an alteration in the function which that legal framework serves within the social context. If the stability of legal institutions is due to an ability on the part of society, and in particular the judiciary, to alter the uses made of them, then legal reform only becomes necessary where those institutions can no longer facilitate the achievement of the function which they are intended to serve. It may be assumed, therefore, that the stability of legal institutions which operate within a common law system derives to some extent from the ability on the part of the judiciary to ensure that the law adapts to its changing social function. The natural corollary of this proposition is that the judiciary, in exercising the ability to interpret and implement legislation, will be influenced by what it perceives to be the intended social function of that legislative provision. This thesis does not suggest that the social function of the law is the only factor which exerts an influence over the judiciary, but it does serve to suggest, in line with Renner’s reasoning, that the law of mortgage can only be understood truly by reference to its origins, juridical content and social function.

The relevance of the law of mortgage to the work of Renner is, therefore, apparent. It may well be the case that other legal institutions would serve the purposes of this research study to the same extent. There is, however, a further reason for focusing upon this particular legal framework, namely, that as a result of its changing social function, the law of mortgage has become a matter of increased social, economic and political significance during the last century.
The increased importance of mortgage finance has arisen out of the growth in the number of home-owners within the housing system in England and Wales during the last century. The increased availability of mortgage finance, for the purpose of purchasing residential property, offered by mortgagees to an increasingly wide range of mortgagors has enabled millions of households to purchase a home. The significance of this increase relates not only to meeting the challenge of satisfying the housing needs of society, but also to the effect which home-ownership, as opposed to other forms of housing, has upon the social and economic welfare of households. As Gray notes,

The nature of the borrower's tenure as a home-owner or occupier becomes an important determinant of social and economic status. It may affect the individual's personal life and marriage prospects. It certainly affects creditworthiness for a number of purposes: the possession of a permanent home base is generally considered to be a good indicator of financial reliability.83

The financial benefits which are often associated with home-ownership derive not only from the improved 'creditworthiness' of the home-owner but also from the 'ownership' of the property itself. If the property is purchased with the assistance of mortgage finance, the difference between the amount owed on the mortgage and the price of the house has usually increased over time, constituting what is generally termed the mortgagor's 'equity' in the property. This may be utilised by the mortgagor as security for a 'second' mortgage which in recent times has served a number of purposes including financing improvements to the home, or the purchase of commodities such as a car or holiday.
The apparent financial benefits to be gained by becoming a home-owner may account, in part, for the increase in home-ownership witnessed during the last century. It is also the case, however, that central government housing policy has played an active role in promoting the potential advantages which home-ownership can offer households. A recurrent theme in the housing policies of successive governments during the post-war period, and particularly since 1979, has been the promotion of an increase in home-ownership. The preference afforded to this form of housing by central government, as opposed to other available alternatives, has been founded upon and, in turn, has engendered a perception that home-ownership offers benefits, particularly increased security of tenure, which cannot be obtained to the same degree by renting. This perception has been reinforced by the explicit claims of central government. The following assertion, taken from the Housing White Paper *Fair Deal for Housing* in 1971, is representative of such claims,

> Home-ownership is the most rewarding form of house tenure. It satisfies a deep and natural desire on the part of the householder to have independent control of the home that shelters him and his family. It gives him the greatest possible security against the loss of his home; and particularly against price changes that may threaten his ability to keep it.

The perceived benefits of home-ownership derive from the home-owner’s legal estate in the property. Unlike tenants, home-owners can enjoy their land free from the constraints imposed by a third party who has a greater claim to the property. In turn, the property also provides owner-occupiers with an asset which they can choose to retain, in the hope that its value will increase, or exchange and use the money derived from that sale to purchase a different dwelling. The fall in house prices witnessed during
the recession of the early 1990s to some extent dispelled this notion of wealth accumulation, but it may account, in part, for the increase in home-ownership. The irony, however, is that the benefits which are claimed to derive from ‘ownership’ are defeated by the means by which that ownership has been obtained.

Unlike renting, home-ownership, by its very nature, requires the payment of substantial funds in order to purchase the property outright. For some households, this is not beyond their means. For the majority, however, access has only been possible with the assistance of mortgage finance. The significant use made of mortgage finance by households to purchase residential property appears to serve as an inherent contradiction to the claims made by central government regarding the advantages to be gained by becoming a home-owner, particularly in relation to security of tenure. By virtue of the English law of mortgage, mortgagees are granted an inherent right to possession, which allows for the withdrawal of the status of home-owner from mortgagors whenever mortgagees wish, without reference to the courts. The relationship of mortgagee and mortgagor can, therefore, be equated with the relationship of landlord and tenant, thereby denying the benefits which are claimed to derive from the status as home-owner. Despite this apparent inconsistency, the rhetoric of central government policy, particularly since 1979, has promoted the benefits to be gained by becoming a home-owner as opposed to a tenant.

The perceived benefits associated with home-ownership account to some extent for the change witnessed in the use made of the legal device of the mortgage. In order to understand fully the means by which the social function of a legal institution can
undergo change, however, it is necessary to examine the role of central government housing policy. The influence which such policy initiatives have upon the housing choices of individual households is significant, and in recent decades, they have had a notable influence upon the social function of the law of mortgage. A review of such policies also indicates the political and economic significance of mortgage finance.

During the period 1979 - 1997, mortgage finance played a pivotal role in the achievement of both the political and ideological objectives of the Conservative governments. Their commitment to increasing the number of home-owners within England and Wales necessitated the increased availability of mortgage finance which was achieved through the deregulation of the mortgage market and through policies specifically designed to encourage potential home-owners to choose home-ownership in preference to rented accommodation and particularly state funded rented accommodation. The increased availability of mortgage finance and the consequent rise in the number of home-owners, evidenced by a fifteen per cent increase during the eighteen years of Conservative government, served as a means to an end. The objectives which were to be achieved as a result of this increase were numerous.

In the first instance, mortgage finance and its direct relationship to home-ownership assisted the Conservative governments in their attempts to reduce state expenditure and to centralise executive power. The policy most directly associated with these objectives was the council tenants’ ‘right to buy’ which afforded local authority tenants of sufficient standing a right to purchase their home at a substantial discount. By 1997, more than two million council properties had been purchased as a result of the ‘right to
buy’. The significance of this in relation to the housing role of local authorities was increased by a simultaneous reduction in the funding granted to local authorities. Essentially, the Conservative governments restricted the ability of local authorities to replace those homes which had been purchased under the ‘right to buy’. As these properties constituted the better quality dwellings owned by councils, both the quantity and quality of local authority housing was diminished. This formed part of a process which has been termed ‘residualisation’ namely, making the social rented sector a ‘welfare net’ for those who cannot afford home-ownership.

Secondly, home-ownership fell into line with the Conservative governments’ ideological objectives by assisting in the promotion of the rhetoric of ‘individualism’ and ‘self responsibility’. The outcome of the housing policies implemented by the Conservative governments included transference of the responsibility for the provision of housing away from the state and towards the market. In order to obtain what was perceived to be ‘decent’ housing, therefore, households could no longer look to the state or privately rented accommodation but only to home-ownership and the mortgage market.

Despite the fundamental changes achieved by the Conservatives to the housing system in England and Wales and the relationship between the citizen and the state, which continue to impact significantly upon the social function of the law of mortgage, the juridical content of that legal framework remains as it did prior to 1979. This thesis seeks to offer an explanation for this occurrence by utilising aspects of the theory propounded by Renner and in so doing, will present a contextual analysis of the law of mortgage.
In undertaking this research task, this thesis seeks to achieve a further aim which is, to remedy many of the deficiencies apparent within the current literature. A review of the textual material relevant to the law of mortgage indicates that individual sources tend to focus upon only one aspect of the legal framework, thereby offering information in relation only to its juridical content, practical operation or historical development. The current literature, in failing to encompass all three aspects of the law of mortgage, offers little if any insight into a number of related issues, including the relationship between the juridical content of the law and its social function, the reason as to why the content of the legal framework takes on a particular form and the relationship between legal reform and social change. In offering an account of these and other issues, this thesis seeks to make a unique and hopefully valuable contribution to current knowledge in respect of the law of mortgage.

1.3 An overview of the thesis

The principal concern of this thesis is to account for the current form and content of the English law of mortgage by undertaking a contextual analysis of it. In undertaking this task, reliance is placed upon the methodological approach suggested by Renner in the *Institutions of Private Law and Their Social Functions*. The extent to which Renner’s work offers an appropriate vehicle by which to gain such an understanding of the law of mortgage has been discussed above. The aim of this section, however, is to detail the manner in which that methodology will be implemented and the findings which will be consequent upon the completion of this research task.
The initiation of this research study was, in large part, due to the identification of an apparent anomaly within the law of mortgage. Despite the dramatic changes witnessed in the uses made of the legal device of the mortgage during the latter half of the twentieth century and the environment in which it operates, particularly after 1979, the law of mortgage remains much as it did in the mid-1920s. In seeking an explanation for this phenomenon reference was had to the work of Renner and its relevance became obvious almost immediately. The questions he poses and the answers he offers in respect of them were almost identical to those raised in the initial stages of this research study, including, 'How does society use the institutions of the law, what does it make of them, how does it group and re-group them? How does it put them to new services without transforming their normative content?' The answers which Renner offers in respect of such questions may be considered dubious, but the methodological approach which is consequent upon the application of his theory serves as the first step in seeking an answer to such questions. In effect, any attempt to offer an explanation for the manner in which use is made of legal institutions within the social context must begin with a detailed understanding of the juridical content, origins and social function of those institutions. It is the aim of thesis, therefore, to complete this first stage in the critical analysis of the law of mortgage.

Renner accounts for the stability of legal norms on the basis that, 'Institutions such as property, contract, succession by inheritance, are “neutral”, “colourless”, “empty frames”, they are neither “feudal”, nor “capitalist”, nor “socialist”.' In essence, legal institutions operate in isolation from the function they serve within the social context,
they exist as tools which may be used to serve any number of purposes. A corollary of this conception is that a purely juridical analysis will fail to provide sufficient information in respect of the social function which legal institutions serve. In seeking to examine these contentions and thereby provide a contextual account of the law of mortgage, Chapter Three of this thesis undertakes a ‘positive legal analysis’ of the law of mortgage. Its concern will be with the structure and content of the current law relating to the legal device of the mortgage. Although it will intentionally adopt a strict ‘doctrinal’ approach, reference will be had to aspects of the law of mortgage which are external to a purely positivist analysis. The aim will be indicate the extent to which such an approach fails to offer an insight into the social, economic and political significance of the law of mortgage.

In offering an account of the law of mortgage similar to that found in traditional land law texts, the material contained within Chapter Three will offer a point of comparison with the material contained in the chapters which follow. In particular, a claim central to Renner’s thesis is that whilst the juridical content of legal institutions often remains stable, the uses made of them can witness radical transformations. In order to determine whether this offers a representative account of the law of mortgage, it is necessary to have some understanding of the historical development of that legal framework. It is only by comparing the operation of the law of mortgage, both in terms of its juridical content and social function, at different chronological stages that this contention can be analysed. It is the aim of Chapter Four to undertake such a task.
The aim, in providing a historical survey of the law of mortgage, is not only to evaluate the extent to which that legal framework has remained stable, but also to question other aspects of Renner's thesis. The contention posited by Renner that legislation is often introduced after the need has already arisen within the social context, for example, requires an examination of the reasons which underpinned the introduction of such legislation. In relation to the law of mortgage, the relevant legislative provisions were enacted in 1925 and 1970. An examination of the factors which influenced the introduction of these legislative provisions will necessarily, therefore, have a historical dimension.

The historical survey undertaken in Chapter Four is also intended to achieve one further aim, namely to assist in an understanding of aspects of the current law of mortgage. If, as Chapters Three and Four hope to illustrate, the current law of mortgage is constituted by provisions which have altered little over a number of decades, if not centuries, then it may only prove possible to explain the form and content of those doctrines by reference to their historical development. To take one example from the law of mortgage, the mortgagor's 'equitable right to redeem' survives as part of the current law and yet, at face value, serves no apparent purpose. As Kahn-Freund notes, 'norms which, at an earlier period of history, may have been a true mirror of social relations, may cease to be an adequate expression of factual conditions.'

In order to understand the form and content of this principle, it is necessary to have some understanding of the manner in which it was introduced and the function it was intended to serve. As already indicated above, the principle was introduced in the
sixteenth century in order to deal with problems associated with the legal device of the mortgage as it operated at that time. The need for the continued operation of the mortgagor’s ‘equitable right to redeem’ was apparently removed by the introduction of the LPA 1925 which allowed the mortgagor to retain the fee simple or leasehold estate. Despite this, the principle remains as an element of the current law of mortgage.105 Without a historical account of its development, therefore, it would be difficult to gain an understanding of the ‘equitable right to redeem’. It is possible to argue, however, that an examination of the juridical content and origins of the law of mortgage is not sufficient to provide a representative account of it. Added to these factors must be a third element, namely the social function of the law of mortgage.

In providing a positive legal analysis of the law of mortgage, Chapter Three will attempt to illustrate the manner in which the law constitutes a series of ‘empty frames’. This contention will be supported by a historical account of the law of mortgage in Chapter Four, which will indicate the extent to which aspects of this legal framework have remained unchanged over a number of years and the function which it served prior to 1979. In order to support further, the contention that the law may remain stable whilst its social function undergoes change, it is necessary to examine the current social function of the law of mortgage. If it can be shown that the social function operates, in the latter part of the twentieth century, in a manner different to that at an earlier point in history, then the contention appears valid. It is the aim of Chapter Five to examine whether this is the case.
The primary aim of this chapter is to indicate the extent to which it is possible for the social function of a legal institution to undergo change, whilst its normative content remains stable. In relation to the law of mortgage, the period during 1979 – 1997 offers perhaps the most appropriate example of this phenomenon. It was during this period that the environment in which the law of mortgage operates witnessed a radical transformation. Prior to 1979, the legal device of the mortgage had served as the means by which many households had gained entry to the home-ownership sector but, it was after this date and the election of the Conservative government, that home-ownership became, for the first time, the focal point of central government housing policy. The policies implemented by the Conservative governments in pursuit of a mass home-ownership market altered fundamentally the relationships between the individual, the state and mortgage lenders. Whereas in previous decades, mortgage finance had enabled those who could afford home-ownership to take advantage of it, after 1979, mortgage finance became the only vehicle by which households could obtain what they perceived to be decent housing.

The policies implemented by the Conservative governments during the period 1979 – 1997, examined in Chapter Five, continue to exert a significant impact upon the uses made of mortgage finance. It is possible to argue, therefore, that the current social function of the law of mortgage was created during and remains a legacy of this period. This contention is also justified by reference to the policies of the current Labour government, also examined in Chapter Five, which have indicated Labour’s continued commitment to many of the policies implemented by their predecessors. In offering an account of these policies, Chapter Five not only intends to account for the transition in
the social function of the law of mortgage but also, in comparison with the material contained in Chapters Three and Four, to indicate that during this period of transition, the juridical content of the law of mortgage remained unchanged.

The influence which central government policy exerts upon the social function of the law of mortgage will be shown to be significant but, it seems reasonable to assume that the social function of legal institutions will also be influenced by other groups within society. In relation to the law of mortgage, it is possible to argue that mortgage lenders have also played an important role in altering the uses made of mortgage finance. It was only due to their willingness to offer mortgage finance for the purpose of purchasing residential property that the increase in home-ownership became viable. In order, therefore, to account fully for the changes witnessed in the social function of the law of mortgage, Chapter Five undertakes an examination of the role played by mortgage lenders in initiating and maintaining this process of change.

The material contained within Chapter Five is intended to identify and account for the current social function of the law of mortgage. Its primary aim is to establish the means by which the function served by mortgage finance within the social context transformed from one of assisting landowners with their financial difficulties to one of assisting millions of households to purchase a home. Having accounted for this transition, it will be the task of Chapter Six to identify, in more detail, the manner in which both mortgagors and mortgagees are able currently to utilise the legal device of the mortgage in the purchase of residential property. The chapter will be concerned in particular, with an examination of the practical operation of mortgage finance and the relationship
between a mortgagor and mortgagee. In addition to identifying the practical operation of the legal device of the mortgage, the aim of Chapter Six will also be to examine the manner in which mortgagees exercise decision-making power within the mortgage relationship and the extent to which the law of mortgage seeks to regulate such power.

In undertaking such an examination, Chapter Six will draw upon qualitative data obtained as a result of semi-structured interviews with a number of mortgagees and the secondary analysis of material concerning the experience of mortgagors of the mortgage relationship. The chapter will focus upon the relationship prior to the initiation of proceedings for possession, examining the manner in which potential mortgagors choose a particular mortgagee, the mortgage 'products' available to them, the terms contained within a typical mortgage contract and the manner in which mortgagees exercise discretion within the mortgage relationship.

In combination, Chapters Five and Six offer an account of the role played by central government, mortgagees and mortgagors in allowing mortgage finance to serve the function of enabling households to gain access to the home-ownership sector. It has been suggested above, however, that an additional group has a significant role to play in altering the social function of the law of mortgage, namely, the judiciary. Chapter Seven is concerned with this aspect of the social function of the law of mortgage, its aim, however, is not simply to describe the outcome of possession hearings but also to identify those factors which influence the exercise of discretion by the judiciary.
In an attempt to identify such factors, Chapter Seven relies upon qualitative data obtained as a result of semi-structured interviews with a number of district judges and the secondary analysis of literature relating to the practical operation of the law of mortgage. The aim of this chapter is to examine the contention, discussed above,\textsuperscript{107} that the judiciary is responsible, in part, for the stability identified within the juridical content of the law of mortgage. If, in exercising the ability to interpret and implement legislation, the judiciary has attempted to ensure that the law of mortgage facilitates the achievement of its social function then reform of that legal framework becomes unnecessary. It is the aim of Chapter Seven to examine whether this is the case and in turn, to provide an account of the legal process of possession. In order to complete the examination of the practical operation of the law of mortgage, Chapter Seven will also offer an account of the circumstances following possession, including in particular the manner in which mortgagees exercise the power of sale.

The material contained within each chapter of this thesis, although concerned with distinct aspects of the law of mortgage, is primarily intended to support the contention that the law can only be truly understood by reference to its juridical content, origins and social function. In this respect, Renner's theory serves as the thread which binds these chapters together. The aim of the concluding chapter to this thesis will be to synthesise the material contained in the preceding chapters so as to evaluate the validity of this contention.

It would appear that Renner's theory offers a valuable methodological guide to a deeper understanding of the law, but beyond this offers little in the way of a critique of such
institutions. Whilst he suggests that reform of the law often only occurs after the need has already arisen and that there may be a significant time-lag between the two, he does not offer any guidance as to determining whether reform is necessary or justified. Although it is not the primary aim of this thesis to question the need for reform of the law of mortgage or to prescribe the means by which such reform might be undertaken, the concluding chapter will make reference to these issues. The aim will be to indicate the possible uses which might be made of the material contained within this thesis in the critical analysis of the law of mortgage. In particular, an examination will be undertaken in respect of the extent to which the law of mortgage satisfies requirements as to ‘due process’ and consistency in the treatment of similar cases.

Although this concluding analysis of the law of mortgage will be limited as a result of the constraints placed upon the length of this research study, it is to be hoped that this thesis at least validates the claim that similar analyses must be founded upon a detailed understanding of the law of mortgage, encompassing knowledge of its juridical content, origins and social function, if they are to offer a representative account of it.

1.4 Scope of the study

Although this thesis seeks to offer a contextual account of the law of mortgage, the practical limitations imposed upon it do not allow for an examination of all aspects of the law of mortgage. This section identifies and justifies the omissions apparent within this thesis.
A proposition fundamental to the work of Renner and this thesis is that aspects of the juridical content of the law of mortgage have remained unchanged whilst its social function has transformed. In attempting to analyse this contention it would be possible to focus upon any number of the uses made of mortgage finance, whether for the purchase of residential property, the funding of commercial enterprise or the purchase of commodities. Focus is, however, given to the former for this serves as perhaps the best example of the fundamental transition which has been witnessed in the uses made of the legal device of the mortgage.

Home-ownership achieved with the assistance of mortgage finance is a relatively new occurrence within the English property system; its popularity only beginning to increase in the late 1930s. The dramatic rise in the number of home-owners since the early part of this century and the role played by mortgage finance in allowing for this increase, has taken place without the need to alter significantly the juridical content of the law of mortgage. It serves, therefore, as an appropriate example of the themes apparent within this thesis. A further justification for the focus given to this particular use of mortgage finance also derives from the increased political, economic and social importance of home-ownership since the late 1970s as discussed above.\(^{108}\)

In relation to the purchase of residential property, which forms the focus of this thesis, it is possible for the home-owner to obtain a number of advances of loan monies by using the mortgagor’s home as security. The ability to undertake more than one mortgage transaction using the same property as security for the loan creates a distinction between what may be termed ‘first’ and ‘second’ mortgages.\(^{109}\) Whilst the
discussion in relation to the content of the law of mortgage, undertaken in Chapter Three, applies equally to first and second mortgages, this thesis is concerned primarily with 'first' mortgages. The importance of the distinction between these two terms, in relation to this thesis, concerns not their legal form, but the uses made of the loan monies received. A 'first' mortgage is generally used to purchase the property in question, with the property serving as security for the debt. A 'second' mortgage will normally be secured upon the difference in value between the market price of the property and the amount outstanding on the first mortgage with the money obtained often being used to purchase commodities. The second mortgage market is subject to regulation by virtue of the Consumer Credit Act 1974. This thesis will not, however, be concerned with examining this particular aspect of the regulation of mortgages. The reason for this being that the issue of home-ownership serves as a more appropriate illustration of the themes apparent within this thesis than does the issue of 'second' mortgages.

The focus given to the use made of the legal device of the mortgage in the purchase of residential property also limits the scope of this thesis to a further extent, namely, that it will not be concerned with the 'clogs or fetters' doctrine. The equitable doctrine which, insists that no 'clogs or fetters' should be imposed upon the exercise of the mortgagor's equity of redemption, is more commonly applied to mortgages secured upon commercial property and is, therefore, not directly related to the themes explored within this thesis.
The importance of identifying the current social function of the law of mortgage derives from the attempt to examine the manner in which use is made of the institutions of the law within society. In relation to the law of mortgage and the use made of it in the purchase of residential property, it seems reasonable to assume that the most influential participants within the mortgage relationship include both mortgagees and mortgagors. By identifying the manner in which these parties utilise the legal device of the mortgage it should prove possible to identify its social function. Although this thesis examines this contention in Chapter Six, there is one aspect of this relationship which will not be the subject of detailed examination, namely, the manner in which mortgagees seek to protect their interest in the secured property.

The distinguishing feature of a mortgage is that it provides the mortgagee with a proprietary interest in the secured property. As regards that interest, the mortgagee will want to ensure that it is protected against third parties who may seek to deal with the secured property. There are currently two systems in operation which serve to protect interests in land, namely registered and unregistered title. The legal rules regarding the operation of these two systems are extremely complex and they have little influence on the relationship between mortgagor and mortgagee or the possession process, which operates in broadly the same manner regardless of whether the property is of registered or unregistered title. The question as to whether the property operates within the registered or unregistered title system is, therefore, of little significance for the purposes of this thesis.
In order to devote full attention to the main concerns of this thesis, it is not possible, within the limitations imposed upon this research study, to discuss issues that have only an indirect influence upon the relationship between a mortgagor and mortgagee.\textsuperscript{112}

Whilst it is possible to justify the omissions apparent within this thesis in respect of juridical aspects of the law of mortgage, the omissions which may become apparent in respect of the conceptual development of particular lines of analysis are more difficult to account for. It is, obviously, not possible to allude to the many different approaches which this thesis could have adopted in its analysis of the law of mortgage. There is, however, one approach in particular which could reasonably have been adopted and which becomes apparent during the course of this thesis. It would appear necessary, therefore, to account for the reasons as to why this approach was not adopted.

It was noted above,\textsuperscript{113} that the relationship between the mortgagor and mortgagee has characteristics similar to those found in the relationship between landlord and tenant. The characteristic shared by both relationships which is perhaps most obvious concerns the ability on the part of the landlord/mortgagee to ‘evict’ the tenant/mortgagor. In light of the claims made by central government in recent decades that home-ownership offers a degree of security of tenure in excess of that offered by rented accommodation, it would seem reasonable to question the extent to which this claim holds good in practice.

It would not be possible, however, within the limitations imposed upon this thesis, to offer a sufficiently detailed examination of the juridical content, origins and social function of the law of mortgage, if this thesis also sought to compare the mortgage
relationship with the relationship between a landlord and tenant. A detailed examination of this issue will not be undertaken, therefore, although reference will be made to it, particularly in Chapters Six and Seven.\(^n14\)

One final point to note in relation to the scope of this research study is that it offers an account of the law of mortgage, related issues and events as they stood prior to January 1\(^{st}\) 1999. It is to be hoped, however, that, regardless of any substantial changes which might or have occurred since this date in relation to the juridical content of the law of mortgage or the environment in which it operates, the contribution which this thesis seeks to make in respect of current knowledge regarding the English law of mortgage, will be of value for many years to come.

### 1.5 Methodology and Sources

The material which will be presented in the chapters which follow has been collected, analysed and presented as a result of the implementation of a number of research methods. Although it is the substantive content of this thesis which is of primary significance, the process by which that content has been arrived at is also important. The legitimacy of propositions can be undermined if the research methods used are of questionable validity. It is important, therefore, to detail the research methods adopted in the formulation, analysis and presentation of this thesis so as to allow for an evaluation of their validity. A detailed examination of these methods is undertaken in Chapter Two, only a summary, therefore, is provided here.
The initial stages of the research task were concerned with the formulation of the hypothesis presented within this research study. In achieving this task, a wide range of conventional library sources was used. The consideration of textual material relevant to the law of mortgage and related issues provided a detailed understanding of the juridical content of the law, its origins and aspects of its social function. More significantly, it assisted in the formulation of the research hypothesis by allowing for the identification of an omission in the available material. That omission concerned the relationship between the juridical content of the law and its social function, with particular reference to the implementation and interpretation of the law of mortgage within the social context.

The review of literature relevant to this research study assisted both in the formulation of the research hypothesis and in its presentation. As will become clear, a significant amount of the material contained within this research study arises out of the implementation of secondary research, namely the re-analysis of data or material presented by another researcher. In particular, heavy reliance is placed upon the work of Renner in the *Institutions of Private Law and Their Social Functions*. It is Renner’s work which provides the methodological framework for this research study, within this structure, however, each chapter is primarily concerned with analysing distinct aspects of the law of mortgage. Chapter Three offers a juridical analysis of the law followed in Chapter Four by an analysis of its origins and in Chapters Five, Six and Seven by an analysis of its social function. The analyses presented within these chapters are informed and supported by the consideration of a range of secondary sources, including traditional land law texts, socio-legal literature and political texts.
The presentation of the secondary research undertaken for the purposes of this thesis offers an account of the juridical content, origins and transition in the social function of, the law of mortgage. It is in relation to the current function served by the law of mortgage, however, that secondary research becomes of limited value. In seeking to identify the manner in which use is currently made of the legal device of the mortgage and the law of mortgage generally, reference was made to a number of secondary sources relating to the practical operation of the law of mortgage. The data contained within these texts, including Ford and Bull, *Services to Borrowers in Debt*; Ford, *et al*, *Mortgage arrears and possessions; perspectives from borrowers, lenders and the courts*; the National Association of Citizens Advice Bureaux (NACAB), *Dispossessed*; and Nixon, *et al*, *Housing Cases in the County Courts*, provided invaluable data relating to aspects of the operation of the law of mortgage within the social context and in particular the possession process. That data, however, was not sufficient to answer all of the questions raised by this research study.

In particular, the scope of these reports tends to be limited to the possession process whereas this research study extends to wider aspects of the social function of the law of mortgage, including the manner in which both mortgagors and mortgagees seek to make use of the legal device of the mortgage. One of the fundamental aims of this study is also to examine the role played by central government, mortgagees and in particular, the judiciary, in altering the social function of the law of mortgage, thereby allowing for stability in its juridical content, a factor not directly addressed by these reports.
The lack of available material concerning these issues necessitated, therefore, the implementation of a primary research study. Prior to its initiation, a substantial degree of planning was required to ensure that the methods adopted in the collection and analysis of the data were suitable and valid. This initial stage was assisted by the consideration of the vast amount of literature currently available in respect of the implementation of primary research studies, including, Hakim, *Research Design. Strategies and Choices in the Design of Social Research*, May, *Social Research. Issues, Methods and Process* and Punch, *The Politics and Ethics of Fieldwork*.

The review of this literature assisted in the decisions regarding the type of information which was to be obtained during the primary research study, the most appropriate method of collecting that data and the respondents who could provide such information.

It was determined that the primary research study would be designed so as to obtain information relating to the factors which influence the manner in which the judiciary and mortgagees take decisions in respect of the mortgage transaction. The means by which that information was to be collected involved the use of semi-structured interviews, a face-to-face encounter with the respondent in which a check-list of issues are discussed with the respondent but allowance is also made for discussion in respect of other matters.

The primary research study involved interviews with thirteen lenders and six district judges. In addition, interviews were also held with a representative of the Council of Mortgage Lenders, the representative trade body for mortgagees, the Building Society Ombudsman, two lawyers and two researchers. These additional contacts were intended
to supplement the information obtained from the mortgagees and district judges. The question as to whether these respondents as a group could provide information which was representative of the experiences of all mortgagees and district judges is examined in Chapter Two but to summarise, many of the problems associated with the validation of primary data can be avoided by the use of ‘triangulation’.\textsuperscript{124} This involves the use of multiple sources of information to verify a single point made by a respondent during the interview process. Data obtained during the primary research study, which is presented in Chapters Six and Seven, has, therefore, been verified by reference to the data obtained by other respondents and to information obtained as a result of secondary research.

The primary data, namely data which has not been the subject of prior analysis by another researcher, used within this thesis also includes material taken from \textit{Hansard} and other government publications. This data will be used to inform the examination of the reasons which underpinned the introduction of legislation, including the LPA 1925 and the AJA 1970, the policies of the Conservative governments of 1979 – 1997 and the policies of the Labour government elected in May 1997.

The information obtained as a result of both primary and secondary research is interwoven throughout this research study so as to present a contextual analysis of the law of mortgage. The concluding chapter will be concerned with synthesising this material so as to present an overall view of the arguments advanced throughout this thesis and to consider the extent to which they offer a valid explanation for the current form and content of the law of mortgage. The final chapter will also question the need
for reform of this legal framework and, in examining concepts such as ‘due process’, ‘consistency’ and ‘discretion’, will place reliance upon in particular, the work of Scanlon,\textsuperscript{125} Parkinson,\textsuperscript{126} and Hawkins.\textsuperscript{127}

1.6 Concluding Remarks

This chapter has provided an outline of the aims, themes, and methodology which underpin this thesis. The aim has also been to establish and justify the rationale for focusing upon the law of mortgage and the work of Renner. It is the aim of the chapters which follow to expand upon these factors, beginning with a detailed examination of the methods adopted within the research process implemented for the purposes of this thesis.


4 DETR *Housing: Key Facts* at www.housing.detr.gov.uk/information/keyfacts/index.html.

5 ibid.

6 *Santley v Wilde* [1899] 2 Ch 474 per Lindley LJ.


9 ibid.


11 Renner, at pp. 48, 51 and 112.

12 Kahn-Freund, p. 2.

13 The classification of judicial interpretation as part of the social function of the law is examined at p. 16.


15 Renner, *op. cit.* n. 10.


17 Renner, *op. cit.* n. 10.


19 ibid. p. 122.


22 Hirst, *op. cit.* n. 18, p. 100.

23 Renner, p. 112.

24 ibid. p. 89.

25 Kahn-Freund, pp. 1 – 2

26 Renner, p. 55.


28 Renner, pp. 69 – 70. A similar perspective can be found in the theory propounded by Karl Llewellyn in the 1940s which contends that any group, which is concerned to ensure that it remains as a group, must undertake certain tasks in pursuit of this aim, Llewellyn, K. ‘The Normative, the Legal and the Law-Jobs’ [1940] 49 *Yale Law Journal* 1355.

29 Renner, p. 75.

30 ibid. p. 252.

31 Renner, *op. cit.* n. 10.

32 Kahn-Freund, p. 6.

33 Renner, p. 252.

34 Proposals for reform were published by the Law Commission in their report *Transfer of Land - Land Mortgages* No. 204 (HMSO: London, 1991). Their recommendations have not been implemented.

35 Renner, p. 58.

36 Kahn-Freund, p. 5.

37 Renner, p. 271.

38 Renner, *op. cit.* n. 10.

39 For a critique of this approach see Beirne, P. and Quinney, R. (eds.) *Marxism and the Law* (John Wiley & Sons: New York, 1982); Hirst, *op. cit.* n. 18; and Simmonds, *op. cit.* n. 21.

40 Renner, pp. 48 – 49.


Kahn-Freund, pp. 42–43.

Kahn-Freund, pp. 42–43.


For an account of the relevant literature, see pp. 55–57 and 65–68.

At pp. 57–58.

Renner, op. cit. n. 10.

Kahn-Freund, p. 37.

ibid. p. 38.

Schwarzchild, A. ‘Notes, Chapter I, Section II’ in Renner, p. 79, n. 52.


Lewis, N. and Birkinshaw, P. op. cit. n. 57, p. 3.

For an examination of the distinction between ‘due process’ and ‘procedural fairness’ see Galligan, op. cit. n. 57, pp. 73–75.


ibid.

ibid. p. 32.


ibid. p. 23.

ibid.

The literature used in the critical analysis of the law of mortgage will be referred to at p. 59.

Kahn-Freund, p. 1.

ibid.

op. cit. n. 6.

ibid.

Gray, p. 949.

Kahn-Freund, p. 2.

ibid. p. 5.

Schwarzchild, A. ‘Notes, Chapter I, Section II’ in Renner, p. 193, n. 212.

Kahn-Freund, p. 2.

ibid. p. 5.

Gray, p. 938.


See p. 16.

See, for example, Dworkin, op. cit. n. 61, pp. 84–130 and Hawkins, op. cit. n. 56.

Gray, p. 934.

Defined at p. 51.

The principal alternative is rented accommodation provided by local authorities, private landlords or housing associations.

87 Four-Maids Ltd. v Dudley Marshall (Properties) Ltd. [1957] Ch 317 at 320 per Harman J.


89 Kahn-Freund, p. 35.


94 See pp. 65 – 68.

95 The practical limitations imposed upon this research study do not allow for a full account of all aspects of the law of mortgage. For a list of those aspects which are not examined in detail within this thesis, see pp. 49 – 54.

96 Renner, op. cit. n. 10.

97 At pp. 25 – 34.

98 Stewart, op. cit. n. 8, p. 41. This thesis will also argue that aspects of the juridical content of the law of mortgage remain the same as they did in the sixteenth century.

99 Kahn-Freund, p. 2.

100 See pp. 11 – 21.

101 Kahn-Freund, p. 2.


103 Kahn-Freund, p. 4.

104 At p. 29.

105 It will be shown at pp. 121 – 122 that the ‘equity of redemption’ and particularly the equitable right to redeem now serves a new purpose within the current mortgage relationship.

106 See pp. 15 – 16 and 31 – 34.

107 At p. 34.

108 See pp. 35 – 40.


110 Fairest, op. cit. n. 109, p. 2.

111 For a full examination of this doctrine see Burn, op. cit. n. 109, pp. 673 – 680, and Gray, pp. 949 – 951.

112 Information relating to these aspects of the law of mortgage can be obtained by reference to texts such as Fairest, op. cit. n. 109; Gray; Jackson, P. ‘The Need to Reform the English Law of Mortgages’ [1978] 94 Law Quarterly Review 571; and Tyler, E. L. G. (Ed.) Fisher and Lightwood’s Law of Mortgage (Butterworths: London, 1988).

113 At p. 37


115 Renner, op. cit. n. 10.

116 An account of the various texts which have informed this thesis can be found at pp. 65 – 68.


126 Parkinson, op. cit. n. 65.
127 Hawkins, op. cit. n. 56.
CHAPTER TWO
2. Methodology

2.1 Introduction

The presentation of this thesis represents the culmination of a research process that has involved a number of sequential yet different tasks. Cooper, in summarising the process of research synthesis, aptly describes the five stages of the research process adopted for the purposes of this thesis as, '[(a) problem formulation; (b) data collection or the literature search; (c) data evaluation; (d) analysis and interpretation; and (e) presentation of the results.]' The completion of each of these stages necessitated the use of a number of different research methods so as to obtain, analyse and synthesise a wide range of material relating to all aspects of the law of mortgage. Denzin contends that these methods may be as significant as the findings that result from their application,

Methodology ... represents the principal ways the sociologist acts on his environment; his methods, be they experiments, surveys, or life histories, lead to different features of this reality, and it is through his methods that he makes his research public and reproducible by others.2

It is important, therefore, to ensure that the presentation of information and ideas within a research study is supported by some reference to the manner in which that information was collected and analysed. In line with this reasoning, this chapter examines and describes the different stages of the research process and the research methods adopted within this thesis.
2.2 The initial stages of the research process

2.2.1 Formulating the hypothesis

The first two stages of the research process, as described by Cooper, namely, problem formulation and data collection or the literature search, are, to some extent, mutually dependent. In order to formulate a hypothesis which offers a new insight into the issue which forms the subject of the research, it is necessary, not only to gain a detailed understanding of the research subject, but also to identify aspects of it which have not been the subject of previously published research. A review of available material relevant to the research subject, therefore, offers invaluable assistance in the formulation of a research hypothesis. As Stewart notes in, Secondary Research - Information Sources and Methods,

Secondary sources provide a useful starting point for additional research by suggesting problem formulations, research hypotheses, and research methods. Consultation of secondary sources provides a means for increasing the efficiency of the research dollar by targeting real gaps and oversights in knowledge.

The initial stages of this thesis were, therefore, concerned with identifying material relevant to the law of mortgage and using the information contained within that literature to assist in the formulation of the research hypothesis. One of the first steps undertaken in this process was to gain a detailed understanding of the juridical content of the law of mortgage. This necessitated a review of a number of the many ‘textbooks’ currently available relating to the law of mortgage, including works by, Burn, Cousins and Ross, Hanbury and Waldo, and Tyler. Reference was also had
to less 'traditional' material which offered a doctrinal approach supplemented by an examination of other aspects of the law of mortgage, including, for example, aspects of its historical development or social significance. These texts included works by, Fairest, Gray, Haley and Jackson.

A review of this literature offered an insight into the juridical content of the law of mortgage, but reference within these texts to the historical development, practical operation or social significance of the law of mortgage was relatively brief. It was necessary, therefore, to complement the review of this legal material with a survey of textual material relating to these factors. In relation to the historical development of the law of mortgage, a number of texts provided an examination of the history of land law generally, including reference to the legal device of the mortgage. These included texts written by, Simpson, Holdsworth and Maitland.

In addition to providing invaluable information in respect of the content of the law of mortgage and aspects of its history, these secondary sources also indicated a need to examine other aspects of the law of mortgage. In particular, many of these texts made reference to the role of the building societies in facilitating the use of mortgage finance in the purchase of residential property, but did not expand upon this issue. This aspect was, therefore, explored in more detail through a review of the literature relating to the building society movement, including works by, Boddy, Cleary, Drake and Price.

A second aspect of the law of mortgage referred to, but not examined in detail within the texts cited above, concerned the apparent influence which central government exerted upon the uses made of the legal device of the mortgage within the modern context. As Gray notes, for example, 'Mortgage finance enjoys a certain public
importance not least because the ideology of home-ownership has a clear political
dimension. The apparent relationship between mortgage finance and central
government housing policy was investigated with the assistance of the substantial
amount of published research concerning housing policy, including in particular,
works by, Balchin, Kemeny and Malpass and Murie.

The textual material referred to above offered information relating to the content of the
law of mortgage, its historical development, and the role of the building societies and
housing policy in altering the uses made of the legal device of the mortgage. It became
apparent, as a result of the review of this material, that certain issues relevant to the
law of mortgage were not the subject of detailed analysis within these texts. The ‘gaps’
in current knowledge regarding the law of mortgage, which became apparent
concerned, in particular, the practical implementation of the legal framework.

The relationship between the juridical content of the law of mortgage and its
interpretation and implementation within the social context was identified as an issue
that had received little attention within the relevant literature. This is not to suggest,
however, that there was no material available in respect of this issue. During the initial
stages of this thesis, a number of reports had been published which offered information
relating to the experience of mortgagors of the legal process of possession. Whilst
these texts offered information in respect of certain aspects of the practical
implementation of the law of mortgage, a number of questions remained unanswered.
In particular, the scope of these reports is limited to the legal process of possession.
They do not, therefore, offer sufficient information in respect of the operation of other
aspects of the law of mortgage within the social context including, for example, the
mortgagor’s ‘equity of redemption’ or the extent to which the law seeks to regulate the
relationship between mortgagor and mortgagee prior to the completion of the mortgage
ccontract or the initiation of possession proceedings.

Having recognised those aspects of the law of mortgage that required investigation, it
was then necessary to construct an analytical framework which would act as a guide to
further and more detailed research. It was in relation to this research task that Renner’s
work offered invaluable assistance. A critique of his theory and its relevance to the law
of mortgage has been undertaken in Chapter One, but to reiterate, his work appeared to
provide answers to the questions which had arisen upon the initial review of the
relevant literature. It was determined, therefore, to utilise aspects of Renner’s theory in
the formulation of the research hypothesis which underpins this thesis.

The formulation of the research hypothesis constituted a prior and substantial task
within the research process, achieved primarily through a review of conventional
library sources. Having determined that this thesis would undertake an analysis of the
relationship between the juridical content of the law, its origins and its social function,
it was then necessary to obtain information relating to these issues. Although the initial
literature review had offered such information, it had been undertaken to achieve a
different purpose, namely, to identify gaps in current thinking. Having formulated the
hypothesis, it was possible to return to these texts with the aim of obtaining
information relevant to that hypothesis and to identify other material which would also
be of particular relevance.
2.2.2 Data collection

The information obtained as a result of the completion of the literature review undertaken subsequent to the formulation of the research hypothesis, has been used to inform and support much of the discussion which follows in this thesis. This use of secondary sources constitutes 'secondary research', which Hakim defines as, 'any re-analysis of data collected by another researcher or organisation.' In undertaking such an analysis it is possible to utilise the work of other researchers to inform and support the claims made within this thesis.

Whilst it may preferable, in respect of this textual material, to present a conventional 'literature review', which offers summaries of the work of other researchers in order to make clear the omissions in current knowledge, this thesis seeks to integrate such reviews within the body of the work. This presentational format is preferred for a number of reasons. In the first instance, the inclusion of a distinct chapter concerned solely with describing the content of secondary sources has the potential to divert the reader away from the hypothesis that forms the focus of the work. Secondly, this thesis does not intend to simply 'review' the relevant literature, but to present an analysis of it in response to the research hypothesis. As Cooper notes, 'The value of any single study is derived as much from how it fits with previous work as from the study's intrinsic properties.' An integrative approach to the literature review was, therefore, considered to be the most appropriate means of identifying the relationship between this research study and the work undertaken by other researchers.

Although the secondary sources referred to throughout this thesis offered invaluable assistance in the formulation and presentation of the hypothesis, there remained a
number of issues in relation to which they could not offer sufficient information. Those issues included, in particular, the extent to which the stability identified within the juridical content of the law of mortgage was due to an ability on the part of the judiciary to alter the social meaning of legal institutions and the manner in which mortgagors and mortgagees utilise the legal device of the mortgage so as to allow for the purchase of residential property. Due to the lack information available within secondary sources in respect of these matters, it was necessary to look to primary sources of information, the most appropriate of which appeared to be those individuals who participated in the mortgage relationship.

It is in relation to primary research that concerns regarding the methodology adopted by the researcher are most often associated. The research methods utilised within a primary research study can have a significant influence upon the type of information obtained and its relevance to the research study. The choice of research methods and the manner in which they are implemented are, therefore, significant and the following section of this chapter examines these aspects of the primary research study undertaken for the purposes of this thesis.

2.3 The primary research study

2.3.1 Structuring the fieldwork

Having established the need for primary research it became apparent, through the experiences of other researchers, that fieldwork could prove to be a hazardous venture. Primary research is, by its very nature, an unknown quantity. It may produce
information that undermines the initial hypothesis or may result in time consuming and financially expensive programmes of research which fail to produce any valuable data. Punch’s account of his experience with the ‘Dartington Project’, involving interviews with police officers, set out in The Politics and Ethics of Fieldwork,31 would be enough to discourage even the most experienced of researchers. Despite the fact that all research projects are unique in terms of those who participate, Punch believes that the ‘Dartington Project’,

[s]erves ... as an excellent example of the unforeseen pitfalls of fieldwork that can radically alter original intentions - changing definitions of the situation (related to mutations among the key personalities or internal political shifts) can rebound on the researcher ....32

Despite the potential problems associated with empirical research, Huffer and Lloyd-Bostock,33 contend that it has a valuable contribution to make to the study of law. In line with the attempts made by this thesis to extend the examination of the law of mortgage so as to include related issues and concepts, Huffer and Lloyd-Bostock note that empirical research is of value for a number of reasons,

It expands our enquiry, not only beyond traditional approaches, but also beyond traditional arenas (such as the courts), traditional legal actors (such as the judiciary), and traditional sources of law (such as judicial decisions and the Law Reports) to study the use, enforcement, and workings of legal rules in out-of-court contexts by regulatory and other legal officials, the professions, and the general public.34

The value to be gained in using empirical research, it may be argued, tends to outweigh the potential problems that may encountered, it remains necessary, however, to take precautions so as to avoid such problems. In an attempt to avoid the ethical and
practical problems associated with a primary research study, a review of the substantial amount of literature relating to the implementation of primary research studies was undertaken. This literature provided guidance on the initiation and implementation of fieldwork and it informed much of the following discussion. In utilising the guidance provided by other researchers it was hoped that the primary research project would be structured in such a way as to obtain relevant information within the shortest period practicable while at the same time avoiding any ethical dilemmas.

The success of the primary research study would depend to a large extent on the degree of planning undertaken prior to its initiation. If a research study is to obtain relevant information in the shortest period possible it is essential that the researcher is clear as to the type of information which is to be obtained, that the chosen respondents can provide such information and that the researcher will be able to elicit that information from the respondents without difficulty. The first step, therefore, is to identify the type of information required.

The review of secondary sources, referred to above, illustrated the need for more information relating to the practical implementation of the law of mortgage. Beyond this, however, it was difficult to be more specific. Without a detailed knowledge of the practical operation of the law of mortgage it was difficult to construct a detailed list of issues which would require further elaboration. The lack of secondary data relating to this aspect of the law of mortgage, therefore, meant that the primary research study would have to be largely exploratory in nature, dealing with issues ranging from the initial stages of the mortgage relationship through to issues such as possession and sale of the secured property.
In obtaining such general information it would be possible to gain an understanding of the practical operation of the law of mortgage. In order to test the hypothesis put forward within this thesis, however, it would be necessary to construct a more specific focus for the primary research study. One aspect of that hypothesis contends that whilst the law of mortgage has remained static, its interpretation and implementation by the judiciary and the exercise of discretion by mortgagees has altered in line with changes within the social context. The principal aim of the primary research study, therefore, was to gather information relating to the factors that influenced the decisions taken by mortgagees and district judges that had a direct or indirect relationship to the law of mortgage. Having determined the type of information that the primary research study was intended to obtain, the next step was to determine which sources could provide that information.

2.3.2 Choosing the sites

In light of the information that the primary research study was intended to obtain, the sources that appeared to be most relevant included district judges, mortgagors and mortgagees. There were, however, other interested parties, such as government representatives, the Building Society Ombudsman (BSO), Banking Ombudsman, Council of Mortgage Lenders (CML), consumer organisations and lawyers who might also prove useful as sources of relevant information. Having determined the classes of respondents who were to form the focus of the primary research study, it was then necessary to determine the number and location of the respondents within each class and initiate contact with them.
Before initiating contact with district judges, permission was required from the Lord Chancellor’s Department and that permission was received on the 3rd August 1995. In deciding which district judges to contact, time and financial constraints necessitated contact with local judges, therefore, thirteen district judges located in Hull and Yorkshire were contacted. In order to achieve a comparison with other areas, four district judges located in Birmingham and London were also approached. The lack of representation within other areas was not considered to be significant as the law applies equally to all areas of England and Wales. It was also considered that if the views of the district judges in Birmingham and London differed significantly from those located in the North, because of the difference in location, other district judges from different areas would be contacted. These additional contacts proved unnecessary.

In determining which mortgagees to contact it was necessary to take into consideration their size and location. Within the mortgage market, certain mortgagees provide a high proportion of all mortgage advances. By contacting these larger mortgagees, it would be possible to obtain information relating to policies that affect over 50 per cent of all mortgagors. In choosing which lenders to contact, therefore, the aim was to obtain information from those who held relatively large shares of the mortgage market. In order to discover whether policies operated by mortgagees differed according to the market share held by the lender, a sample of medium and smaller sized mortgage lenders, located in different areas of England, were also contacted.

The smaller lenders were chosen on the basis of their geographical location as they tended to conduct business in a relatively small local area. The geographical location of the larger lenders was irrelevant due to the fact that they provided mortgages on a
national basis through their local branches, with policy decisions taken centrally at their head offices.

During discussions with the representatives of two mortgagees, it was suggested that contact should also be made with the solicitors employed by those mortgagees to deal with possession cases. One solicitor was located in Yorkshire and the other in Nottinghamshire. It was considered that contact with these legal representatives might provide information that could be used to verify data obtained as a result of discussions with the district judges in respect of the legal process of possession.

Contact with mortgagors was more difficult to arrange. Mortgagors who have been involved in possession proceedings are difficult to locate due to the fact that they no longer occupy the property and forwarding addresses are rarely given. Also constraints on time and expense meant that as a sole researcher, it was extremely difficult to contact a representative group of borrowers. Their views have, however, been set out in a number of published reports and these will be used to indicate the views and experiences of borrowers.38

As direct participants in the mortgage relationship, district judges, mortgage lenders and mortgagors were the most obvious candidates for inclusion within the primary research study. The significant influence exerted by bodies not directly associated with the mortgage relationship, however, could not be disregarded. In particular, the role of central government in encouraging households to choose home-ownership and the influence which housing policy exerts upon the social function of legal institutions, matters discussed in greater detail in Chapter Five, made contact with ministers an obvious choice. At the time of the primary research study, the Conservative Party,
under the leadership of John Major, was in government. The Housing Minister at the
time was David Curry and the shadow Housing Minister was Nick Raynsford.
Following the election of the Labour government in May 1997, Hilary Armstrong
became the new Housing Minister. Contact with all three Members of Parliament was,
therefore, considered appropriate in terms of obtaining information in respect of both
government and Opposition housing policy.

In relation to other bodies associated with the regulation of aspects of the mortgage
market, an obvious point of contact was the BSO, an impartial adjudicator of disputes
between building societies and their members, with the Banking and Insurance
Ombudsmen taking on similar roles within their own areas of jurisdiction. The BSO
Scheme, introduced under Part IX of the Building Societies Act 1986, establishes
arrangements for an independent adjudicator to investigate and resolve certain
categories of complaints from individuals about action taken by those building
societies and their associated bodies which are participants in the scheme. The
Ombudsman Scheme operates as an addition to the law of mortgage, dealing with
complaints relating to matters including maladministration. Although the Ombudsman
does not operate within the ambit of the law of mortgage, as a part of the general
regulatory framework it was considered that the BSO might be able to supply
important information concerning the operation of the law of mortgage and related
issues.

The same considerations were also appropriate in relation to the CML and the Building
Societies Association (BSA). The CML had been established in response to the
deregulation of the mortgage market in the early 1980s, one result of which was that
building societies were no longer the principal suppliers of mortgage finance. A
representative body which encompassed all mortgage lenders, including banks and insurance companies, was required and hence the creation of the CML. Despite the continued existence of the BSA, its role had, in practice, been subsumed within that of the CML, both sharing the same offices and director-general. In January 1997, however, the CML and BSA underwent a reorganisation, including the appointment of different director-generals. The conversion of many building societies from mutual societies to public limited companies, resulted in a situation in which, ‘the remaining mutuals have decided they need a distinctive voice.’ The BSA has, therefore, taken on the role of representing the few remaining building societies, with the CML acting as the representative trade body for all other mortgage lenders.

During the initiation and implementation of the primary research study, however, this split had not occurred, with the CML acting at the time, as the representative trade body of 98 per cent of all mortgage lenders. Any reference to qualitative data provided by the representative of the CML who participated in the primary research study should be read in light of this fact. The functions of the CML included and remain as follows: to disseminate research and statistics on matters relevant to the mortgage market; to promote the adoption of ‘good practice’ by its members; and to represent its members in discussions with the government and the Bank of England. As the mission statement of the CML states,

The Council of Mortgage Lenders provides a service to mortgage lending institutions by helping to establish a favourable operating environment in the mortgage and related housing markets, by providing a forum for discussion on non-competitive issues, and by providing information to assist them in their business.
The CML’s insight into the operation of the mortgage market and its close links with mortgagees made it an obvious candidate for inclusion within the primary research study.

The respondents detailed above were chosen on the basis of their specialised knowledge of particular aspects of the practical operation of the law of mortgage. In order to verify and support the information obtained as a result of contact with those respondents, contact was also made with two researchers who had recently completed primary research studies relating to the possession process.

2.3.3. Contact and access

Contact with the chosen respondents was made initially by letter requesting a personal appointment with a specific individual or a representative of the organisation. Of the seventeen district judges contacted, six agreed to an appointment. One district judge had retired and the remainder did not reply to the initial letter. A second letter was sent to those who had not responded to the initial request for a meeting, but no responses were received.

In relation to mortgagees, it was necessary to determine which representative of each particular mortgagee would be contacted. In relation to the larger mortgagees, the organisation will usually be divided into separate sections each dealing with a particular aspect of the mortgage transaction. As this thesis places a particular emphasis upon the law of mortgage, contact was made with a member of the litigation department within each of the larger mortgagees. In order to initiate contact, a phone call was made to the mortgage department of each of the chosen mortgagees in order to
obtain the name of the person who dealt with matters relating to the law of mortgage and in particular the possession process. Letters were then sent to those people, thereby avoiding any potential problems with internal communication within the organisation.

Twenty representatives of building societies were contacted by letter and eight agreed to a meeting. Two societies refused any such contact and the remainder did not reply to the initial letter. In relation to the representatives of banks, eleven were contacted and five agreed to an appointment, one refused, and five did not reply. A second letter requesting an interview was sent to those who had failed to reply to the initial contact but replies were not forthcoming and it was determined that the lenders who had agreed to an interview constituted a ‘representative’ sample and further contact was, therefore, unnecessary.

In the initial stages of the primary research study, in the summer of 1995, a letter was sent to the then Housing Minister, David Curry and the shadow Housing Minister, Nick Raynsford, requesting a meeting with them. Due to their commitments, they were both unable to agree to a meeting but did provide written information concerning both government and Opposition policies in respect of home-ownership. Following the election of the Labour government in May 1997, contact was made by letter with Hilary Armstrong, the Housing Minister. Once again, a meeting was not possible but information relating to the commitments of the Labour government in respect of housing was provided.

Contact with two lawyers was initiated through the building societies for which they worked. Permission was obtained from the relevant building society and the lawyers were contacted by letter and agreed to a meeting. The CML, the BSO and the two
researchers also agreed to a meeting in response to the initial letter. The Banking and Insurance Ombudsmen felt that they could not offer any further relevant information than that provided in their reports.  

The relative ease with which access to these respondents was obtained came as a welcome surprise. Advice from other researchers had led to an expectation of a far greater number of negative responses, particularly in relation to the larger commercial organisations who might have considered issues such as possession to be too sensitive and controversial an area for discussion. The positive responses received from the district judges were also welcomed. Gaining access to those so closely involved in the legal system is a relatively rare occurrence in primary research studies, particularly for a postgraduate student. The extent to which these organisations and individuals would be willing to provide information during the meetings, however, was unknown.  

2.3.4 A representative sample?  

The raw data obtained as a result of the implementation of a programme of primary research will be analysed by the researcher so that certain claims or assumptions can be made in regard to an aspect of social reality. If those claims are intended to present a true reflection of the experiences of individuals of a particular relationship or process, then it is important to gain as many views from as many different individuals as possible. In an ideal situation, all individuals who have experience of the social phenomena which is the subject of the research would provide the raw data. If the subject of the research concerns a relationship or process which affects the population of a society as a whole, then it would prove impracticable, if not impossible, to obtain data from all of the potential respondents. Purely anecdotal evidence gathered from
particular individuals will, in turn, fail to provide information from which valid propositions can be derived, particularly where the information relates to issues or processes which are applied on a national basis, such as the law of mortgage. It is still possible, however, to obtain raw data from which valid claims can be made regarding such relationships and processes, through the use of a sample of respondents. In seeking to make use of this research method, the researcher must be aware of a number of potential problems.

In the first instance, the raw data provided by the sample of respondents may not be representative of the experiences or views of the group as a whole. If the raw data is provided by a handful of respondents chosen from a group of several million potential respondents, then it is unlikely that the researcher will be able to make valid claims or assumptions regarding the experiences of the group as a whole. The size of the sample relative to the total number of respondents may, therefore, prove significant in determining the quality of the data obtained as a result of primary research. It is also important to recognise that, in addition to the size of the group, the location of the respondents may also affect the quality of the data they provide. If the respondents within a chosen sample are all located within the same area, the data obtained as a result of discussions with this sample may not be representative of the experience of individuals in other areas.

The problems associated with the use of a sample of respondents can, however, be overcome by the employment of a number of techniques. One obvious method is to ensure that the sample used is representative of the group as a whole. This can be achieved by obtaining information from a large number of respondents located within different organisations and areas. The number of respondents who participate in the
research study, however, is not always the determining factor in relation to obtaining information that provides a true reflection of social relations or contexts. This proposition is highlighted by the position of mortgagees within the primary research study undertaken for the purposes of this thesis.

The mortgage market within England and Wales is characterised by a concentration of market share in a few large mortgagees. Increased merger activity in recent years, with many of the smaller mortgagees being subsumed into larger mortgage lenders and mortgagees of comparative size choosing to merge, has increased the concentration of assets and market share. By contacting only a handful of mortgagees, therefore, it is possible to gain information relating to policies that affect the majority of mortgagors within England and Wales.

The thirteen lenders who agreed to a meeting provide over 50 percent of all mortgage advances in England and Wales. The information they might provide could, therefore, be used to elicit general claims regarding the policies of mortgagees and their impact upon mortgagors. The larger lenders also undertake mortgage business on a national basis thereby reducing the effect which regional variations might have had on their policies. The proposition that a small number of mortgagees can provide information which is representative of the entire mortgage market is supported by Boddy when he notes that, 'Policy and procedures of a relatively small number of societies are ... of major significance for the supply of finance for house-purchase, and lending policy in particular.'

The degree to which the sample of mortgagees could provide information representative of lending practice in general was also enhanced by the participation of
a number of smaller lenders, located in the South-West of England, Northern England and the West Midlands. Through contact with these smaller lenders it would be possible to gain information relating to the size of the market share held by the lender and its impact upon the approach adopted by mortgagees in respect of issues relevant to the mortgage relationship.

The degree to which the mortgagees chosen for the purposes of the primary research study, constituted a representative sample was determined by reference to the number of mortgagors who were affected by their policies and decisions. A similar factor could not be used in relation to district judges. In order to achieve a representative sample of district judges, contact would have to be made with the majority of district judges located throughout the country. As a sole researcher with limited resources, this level of contact was not possible. This does not, however, invalidate the use made of the information provided by the six district judges who agreed to participate in the primary research study. In terms of providing an insight into the possession process, their views would prove invaluable and, more significantly, they would be able to provide information in respect of a process which applies equally to all County Courts throughout England and Wales. Whilst the information they might provide would not serve to represent the views of all district judges within England and Wales, it would provide a unique insight into the manner in which some district judges exercised discretion within the possession process.

More significantly, the information supplied by the respondents, including the six district judges, could be verified as providing a representative account of the general approach adopted by other members of the class of respondents, through the process of 'triangulation'. This involves the use of multiple sources of information to verify
information provided by a respondent during the interview process. Denzin contends that single method investigations cannot produce valid propositions, 'because each [research] method reveals different aspects of empirical reality.' In response to this problem, Denzin proposes that, 'multiple methods of observation must be employed.'

The process of triangulation necessitates the use of a variety of research methods to elicit information relating to the same issue. As has already been stated above, secondary research was employed to gain information relating to issues such as housing policy and the juridical content of the law of mortgage. This informed the primary research study and in turn, it can also be used to verify the information provided by the respondents. In relation to the information provided by district judges, the primary research studies undertaken by other researchers, including Ford, et al, and Nixon, et al, which include data provided by district judges, have also been used to verify the data used within this thesis.

This process of triangulation could also be assisted by the information provided by respondents other than district judges and mortgagees. Information provided by those who have experience of, or who are closely linked with, the decisions of district judges and mortgagees, such as the CML, lawyers, researchers and the BSO, could be used to support the accuracy or validity of generalisations made on the basis of the data provided by district judges and mortgagees.

The validity of the claims that might be made as a result of the information provided by the respondents was an issue that had to be addressed in the early stages of the primary research study. This issue would, however, only arise if the information obtained were of sufficient quality and relevance to enable an analysis to be made of it. This would depend, to a large extent, on the methods adopted in gathering that
information. It was important, therefore, to ensure that an appropriate method of data
collection was employed.

**2.3.5 Data collection - the options**

In seeking to obtain ‘qualitative’ data, namely data regarding the views and
experiences of those who participate in the mortgage process, the most appropriate
method of data collection was the interview, which Ackroyd and Hughes define as,

> encounters between a researcher and a respondent in which the latter is asked a series of
> questions relevant to the subject of the research. The respondent’s answers constitute the raw
> data analysed at a later point in time by the researcher.

There are a variety of interview techniques including structured interviews,
unstructured or focused interviews and semi-structured interviews. It was necessary,
therefore, to determine which interview type would best suit the needs of the primary
research study.

**2.3.5.1 The structured interview**

Fontana and Frey define the structured interview as, ‘a situation in which an
interviewer asks each respondent a series of pre-established questions with a limited
set of response categories.’ The aim of the structured interview is usually to obtain
information from which generalisations can be made about the population as a whole.
It is, therefore, most commonly used in research surveys that aim to elicit information
from large groups of individuals.
The method of data collection most often associated with the structured interview is the questionnaire. By asking a number of people the same set of questions in the same order and in the same tone of voice the researcher is hoping to gain information which is untainted by the interview context. The need for uniformity within this type of interview raises a number of questions regarding the validity of the propositions that may be derived from it. The principal difficulty faced by the researcher in using the structured interview is that it demands a homogeneous group of respondents. The structured interview requires that each question reflect the same meaning to each respondent. Variations in meaning, due to cultural or language differences, must, therefore, be avoided if the information obtained is to be considered valid.

A questionnaire can prove particularly valuable where personal contact cannot be arranged with a group of respondents. A list of questions can be sent to the respondents in the hope that they will provide written answers. In relation to the primary research study initiated for the purposes of this thesis, the use of a questionnaire to increase the size of the respondent base was considered. The rigidity of the structured interview combined with its relevance to large group surveys, however, made it inappropriate for application within the primary research study. The exploratory nature of the primary research study required a degree of flexibility that would allow the respondent to elaborate on certain issues. Questionnaires do not allow for such elaboration, as May notes, 'by the very design of questionnaires, it has already been decided what are important questions to ask. This deductive method fails precisely because the theorist's presuppositions have guided the research.'
Despite being inappropriate in relation to the general aims of this thesis, it was necessary to use written correspondence on two occasions. The first was due to the respondent's inability to attend the arranged meeting. The meeting did take place with another representative of the mortgagee but that representative's knowledge of the law of mortgage was limited. The original interviewee was unable to arrange an alternative appointment and, therefore, a list of questions was sent by post to obtain at least some information, albeit in a limited form.

The second occasion arose as a result of the decision of the Court of Appeal in the case of *Cheltenham and Gloucester Building Society v Norgan*. The decision was reported shortly after the interviews with the district judges had been completed. The Court of Appeal held that when assessing a 'reasonable period' for the purposes of s.36 of the Administration of Justice Act 1970 (AJA 1970) for the payment of arrears by a defaulting mortgagor, it was appropriate for the court to take account of the whole of the remaining part of the original term of the mortgage. In order to assess the significance of this decision and its impact upon the discretion exercised by district judges it was necessary to contact the district judges who had participated in the primary research study. Time and financial constraints did not permit interviews to be undertaken in respect of this issue. It was necessary, therefore, to elicit the views of the district judges in writing and this was achieved by sending a list of written questions by post.

2.3.5.2 The unstructured interview

The unstructured or in-depth interview is situated at the opposite end of the scale from the structured interview. The unstructured interview involves the interviewee
talking freely about certain issues. The interviewer has no set questions but merely
guides the discussion in such a way as to cover the relevant topics. This type of data
collection method is most commonly used for interviewing vulnerable groups such as
children or victims of violence.

Its open-ended character does not allow for ease of comparability and the lack of
formality within the interview makes it unsuitable in relation to certain types of
respondents, particularly those who hold positions of power within their respective
fields. As the intended respondents of the primary research study included district
judges and the representatives of mortgagees, the unstructured interview was deemed
unsuitable for use within the fieldwork.

2.3.5.3 The semi-structured interview

A method of data collection that combines elements of both the structured and
unstructured interview is the semi-structured interview. This method involves the
interviewer asking a number of questions with a degree of flexibility that allows the
interviewer to follow new avenues of information as they arise during the interview.
The interviewer will have a checklist of issues that will be raised during the interview
and the interviewee will be encouraged to elaborate on or clarify the answers given.
May distinguishes the semi-structured interview in the following terms, ‘These types
of interviews are ... said to allow people to answer more on their own terms than the
standardised interview permits, but still provide a greater structure for comparability
over the focused interview.’

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The aim of the fieldwork implemented for the purposes of this thesis was to gather information on the operation of the law of mortgage within the social context. This would involve discussions with those who participated in the mortgage transaction and associated procedures, with their opinions proving valuable as a guide to the social function of the legal framework. This combination of a fact-finding exercise and the collection of personal views on the law of mortgage required the degree of flexibility and comparability that the semi-structured interview could provide.

2.3.6 Disadvantages of the interview method

Silverman argues that interviews are nothing more than social encounters in which one observes the internal views of the respondent thereby providing no valid information about the world outside of the interview itself,

[i]nterview data report not on an external reality displayed in the respondent’s utterances but on the internal reality constructed as both parties contrive to produce the appearances of a recognisable interview.57 (Original emphasis).

The interview is an artificial encounter in which the interviewer and interviewee discuss issues that may be of an intimate or controversial nature. It is possible, therefore, that respondents will react in such a way as to provide information which they believe the interviewer wants to hear. This ‘internalisation’ of the interview process can obstruct the extent to which the information obtained is able to reflect on the external reality of the issues discussed.
A further difficulty associated with the interview process is that the information provided by the interviewee may be ‘inaccurate’.\textsuperscript{58} This may be due to a lack of understanding on the part of the respondent as regards the particular issue being discussed or the imposition of a personal opinion which taints their view of what they consider to be an ‘objective’ statement. Respondents may also be unwilling to provide answers to questions which they consider to be of a confidential nature or simply inappropriate.

These problems, although significant, do not invalidate the interview as a method of collecting information about the ways in which people view the ‘real world’. Having identified the problems faced by the researcher in using the interview method it is possible to perceive ways of avoiding them. If the researcher is aware of the possibility that the information gained from the interview might be inaccurate or unrepresentative of the real situation external to the interview then the process of ‘triangulation’ can be adopted.\textsuperscript{59}

2.3.7 The interview schedule

Having determined that the semi-structured interview was the most appropriate form of interview in satisfying the purposes of this research study, it was necessary to turn to the most important aspect of the interview, namely, the questions that would be asked of each respondent. The ultimate aim of the interview is to obtain data that will inform the research, either by testing a hypothesis established prior to the initiation of primary research or by enabling the researcher to construct such a hypothesis. It is essential, therefore, that the questions asked within each interview elicit information relevant to
that hypothesis and that the information so obtained is not invalidated by any misunderstanding or misinterpretation due to the wording of the questions.

In constructing the interview schedule that would be used during the semi-structured interviews, it was necessary to undertake a review of the information currently available as regards the law of mortgage. There is little use in obtaining information from a primary research study that is already available from conventional library sources. As Creswell notes,

One of the chief reasons for conducting a qualitative study is that the study is exploratory; not much has been written about the topic or population being studied, and the researcher seeks to listen to informants and to build a picture based on their ideas.60

As has already been stated above,61 the review of available literature undertaken in the early stages of this thesis identified the gaps in current knowledge regarding the law of mortgage thereby ensuring the identification of the issues which needed to be addressed within the interview schedule. The semi-structured interview requires the interviewer to establish a list of questions prior to the interview and to be able to adapt those questions to the particular context of the interview and the respondent. Copies of the type of questions put to district judges are contained in Appendix 1, and those put to mortgagees are contained in Appendix 2. The issues which were to be raised during the interviews included: the factors which influenced the decisions by mortgagees to advance mortgage monies to a mortgagor; the factors which influenced the decision to seek possession; and the manner in which district judges exercised discretion under s.36 of the AJA 1970.
The construction of the interview schedule required detailed planning, particularly in relation to the wording of the questions that were to be asked. This aspect is significant for the reason that the questions must be worded in such a way as to reflect the meaning that will be applied to them by the respondent. The construction of the interview schedule was, therefore, an important and complex task. As Denzin notes, 'This form of the interview requires that each interviewer be highly trained in the meaning of the desired information and in the skills of phrasing questions for each person interviewed.'

In order to avoid any such misinterpretation of the questions asked within each interview it was necessary to have a developed understanding of the work undertaken by each respondent, the language adopted within their work and issues which were relevant to them. This was achieved through the process of secondary research, analysing published literature on issues such as the commercial operations of mortgagees and the mortgage industry and the role of district judges. In attempting to tailor the interview schedule according to the particular respondent in each interview, it was necessary to be aware of the position that each respondent held within their respective fields and organisations. All of the respondents were members of the 'elite' and such interviews have particular requirements.

2.3.8 Interviewing the elite

Marshall and Rossman define the 'elite' as, 'the influential, the prominent, and the well-informed people in an organisation or community.' The respondents in the primary research study could, therefore, be classified as members of the 'elite'. In order to ensure that the interviews extracted as much relevant information as possible,
it was important to ask broad and challenging questions which made full use of the respondent's knowledge of their organisation, their work and wider home-ownership issues. The benefit of using the semi-structured interview is that it allows for flexibility, a characteristic that is important in elite interviews. It allows for situations where the respondent wishes to control the interview to some degree and for a general discussion on issues that the respondent considers to be important.

The interview schedule, therefore, comprised a number of questions tailored for each respondent. The information sought from each meeting referred to issues such as: general information regarding the organisation concerned; views on the current housing market; the process adopted in seeking possession; possession policies; the sale process in respect of repossessed properties; views on the legal framework; and suggestions for reform.

2.3.9 Piloting

The degree of planning which had been undertaken prior to the initiation of the primary research study was intended to ensure that resources, including both time and finances, were utilised in the most efficient manner. It may be surprising to note, therefore, that a full 'pilot' scheme was not implemented prior to the principal research study. Piloting involves the implementation of a smaller version of the primary research study so as to identify the type of information that is likely to be obtained and any problems which might be encountered. By undertaking a pilot scheme, the researcher should be able to avoid difficulties at an early stage and use the information obtained to narrow the focus of the main study.
Despite the potential advantages to be gained from a comprehensive pilot study, the implementation of such a study proved unsuitable in relation to the primary research study. In the first instance, the individuals who had agreed to participate in the study were not of a sufficiently large number to enable a full pilot study to be undertaken. All of the respondents had the potential to provide information significant to the research, it was not possible, therefore, to use some of them for the pilot study and others for the main study. The employment of all of the respondents within the primary research study was also necessary so as to ensure comparability between the data provided by different respondents. With only six district judges having agreed to participate in the primary research, it would have been inappropriate to utilise one or two of them in a pilot study which might have produced information which could not be compared with the information obtained from the main study due to the application of a different interview schedule.

Despite these difficulties in implementing a conventional pilot study, interviews were arranged so as to ensure that the first few interviews involved at least one mortgage lender and one district judge. These interviews, while forming part of the main study, were used as ‘pilots’ with the aim of ensuring that the interview schedule was relevant and to question whether the interview skills adopted could be improved. Following the completion of these initial interviews, substantial alterations in the interview schedule were not considered necessary.
2.4 The interview experience

2.4.1 Issues common to all of the interviews

The interviews were held over a nine-month period during 1995 – 1996 with relatively few problems encountered. On only one occasion did it become obvious that the interviewee, a representative of a mortgage lender, could not provide relevant information on the law of mortgage and that was remedied by an impromptu meeting with the head of the litigation department. On another occasion one of the respondents was unable to attend the meeting but a list of questions was answered by correspondence at a later date by that respondent.

In relation to the manner in which the data was recorded in each interview, permission to record the interview on audio cassette was requested prior to the interview and on only one occasion was permission refused. Handwritten notes were, therefore, used on this occasion.

2.4.2 District judges

The interviews involving district judges took place in chambers and on two occasions, possession hearings were witnessed in progress. The time allowed for the interviews ranged from fifteen minutes to two hours. The differences in length were due to the time at which the meetings were held. In relation to two of the district judges, the meeting took place fifteen minutes before the start of their caseload for the day. At the other extreme, one judge was interviewed at the end of the working day and the
interview took place over a two-hour period. The interviews that took place over a longer period obtained more qualitative data. Due to the nature of the semi-structured interview, however, it was possible to obtain valuable and relevant information from the fifteen-minute interviews through the application of concise questions that dealt with the most important issues. The interviews were relatively formal but the district judges were willing to answer all questions put to them in varying degrees of detail dependent, to a large extent, on the time allowed for the interview.

Following the completion of the interviews with the district judges, a case decided by the Court of Appeal, *Cheltenham and Gloucester Building Society v Norgan*, appeared to have potentially significant consequences for the manner in which district judges exercised discretion under s.36 MA 1970. In order to evaluate the significance of this case, it was necessary to obtain data from the district judges in respect of the influence that this decision was likely to exert upon the exercise of discretion within the possession process. The implementation of a second round of interviews with the district judges would have involved further financial expense and a considerable amount of time in their organisation. The collection of data in respect of this decision through written correspondence was, therefore, considered to be a more suitable option. All of the district judges returned the correspondence having provided written answers to the questions posed.

2.4.3 The mortgagees

The programme of interviews with the thirteen representatives of mortgagees was undertaken over a four-month period. Interviews were usually held either at the head office of the mortgagee or, where the mortgagees operated a centralised mortgage
lending system, at their mortgage department. The length of the interviews ranged from one to three hours depending on the respondent's availability and willingness to discuss the issues raised. They were located in relatively formal surroundings, usually in a meeting room or in the office of the respondent, with coffee, and on occasion, lunch being provided.

The interviews were recorded on audio cassette except on two occasions when tape recording was inappropriate due to the transient nature of the interview. These involved discussions with a number of respondents who were responsible for different stages of the possession process, including arrears management, litigation and the sale of repossessed properties. Of the remaining eleven interviews, five involved discussions with two respondents, with the senior representative providing the majority of the answers, and six involved only one respondent who was either the head of the litigation department or responsible for overseeing the entire possession process. The respondents were willing to answer virtually all questions put to them except in relation to the number of possessions, with only four of the respondents agreeing to supply statistical data.

2.4.4 The lawyers

During the interviews with the representatives of the mortgagees it became apparent that external solicitors were employed by some mortgagees to undertake court-based work on behalf of the mortgagee. Contact with two such solicitors was made, having first obtained the permission of the relevant mortgagees. The interviews were located at the offices of the lawyers' firms and both were willing to answer all questions put to them. The interview schedule was designed so as to give a greater degree of focus to
the technical aspects of the law of mortgage and possession process. The lawyers were, however, also willing to elaborate on their personal experiences of the legal system, including reference to the different attitudes adopted by some district judges towards the possession issue.

2.4.5 The Building Society Ombudsman

The interview took place at the BSO’s office in London and involved a general discussion regarding the aims of the BSO and its success in achieving them. Reference was also made to the possession policies of the building societies, their general attitude to the receipt of complaints, and their responses to the decisions of the BSO.

2.4.6 The Council of Mortgage Lenders

The interview took place at the CML’s offices in Savile Row, London and involved an informal discussion about the financial lending industry. The CML were extremely helpful, not only in answering questions, but in providing a number of their publications and allowing access to their library.

2.4.7 The researchers

Two researchers were interviewed using relatively informal meetings during which general home-ownership issues were discussed. Both respondents had recently undertaken a primary research study into the possession process. The information they
provided would, therefore, prove extremely useful in verifying the information obtained during the fieldwork.

2.4.8 Anonymity

The respondents were asked whether they wished to remain anonymous in the published thesis and the majority of respondents answered in the affirmative. Whilst it is preferable to cite the sources of qualitative data in exact detail, so as to allow for clarity and comparison between different sources, it was considered that anonymity would not impact upon the validity of the data used within this thesis. It was considered that anonymity was a price worth paying in order to obtain the cooperation of the respondents and would enable them to speak more freely in respect of issues that they might consider commercially sensitive. Where qualitative data provided by different respondents is used to identify differences in approach in relation to a specific matter, then that fact is made clear in the text of this thesis.

2.5 Presentation and analysis of the primary data

Chapters Six and Seven of this study will be concerned with presenting and analysing the data gathered during the primary research study. Before undertaking such a research task, however, it is necessary to understand the methodological issues involved in the analysis of the qualitative data. The presentation of data in a purely narrative form may provide useful information on specific facts or events but in order to develop a deeper understanding of the context within which the social phenomena operate it is essential that the researcher applies an analytical framework to the raw
data. Analysis implies that the raw data obtained as a result of the primary research is used to test particular ideas or a particular hypothesis. 

The analytical framework adopted within this thesis has been detailed in Chapter One, but to summarise, this thesis contends that in order to evaluate the significance of the law of mortgage, reference must be had, not merely to its juridical content, but also to its origins and social function. The data obtained during the primary research study will serve a particular purpose in relation to this hypothesis, namely, it will be used to identify aspects of the social function of the law of mortgage. The data provided by the representatives of the mortgagees, for example, will be used, in conjunction with information obtained from secondary sources, to present in Chapter Six, an account of the manner in which society currently seeks to utilise the legal device of the mortgage.

The data obtained as a result of the interviews involving district judges will be presented within Chapter Seven so as to provide an account of the factors which influence the exercise of discretion within the possession process. This information will allow for an evaluation of the extent to which it is the ability on the part of the judiciary to interpret the law in line with social change which allows for the juridical content of the law of mortgage to remain static.

The qualitative data as a whole will also offer an account of the manner in which the law of mortgage operates in practice. In order to allow for a chronological account of the practical operation of the law of mortgage, Chapter Six will present an analysis of the data relating to the stages of the mortgage relationship prior to the initiation of proceedings for possession. Chapter Seven will then examine the possession process as it operates within the County Courts and the circumstances following possession. The
primary data contained within Chapter Seven will, therefore, include data provided by both district judges and mortgagees. The data presented in Chapters Six and Seven will be used as a point of comparison with the positive legal analysis of the law of mortgage undertaken in Chapter Three so as to identify the relationship between the two.

The primary research data by itself will not, however, provide a comprehensive view of the practical operation of the law of mortgage. In particular, it does not offer any information relating to the mortgagor’s experience of the mortgage relationship. The data will, therefore, be used in conjunction with information obtained as a result of secondary research. As regards information concerning the views of mortgagors, the reasoning behind the decision not to undertake the collection of primary qualitative data from a representative sample of mortgagors has been discussed above. Information regarding the mortgage relationship taken from the perspective of the mortgagor has, therefore, been obtained through the secondary analysis of data contained in reports written by Ford, et al, Hull Independent Housing Aid Centre (HIHAC), the National Association of Citizens Advice Bureaux (NACAB), Ford and Bull, Ford, and Nixon, et al.

A review of these reports will be undertaken at relevant points within this thesis. It is necessary at this stage, however, to identify the manner in which these reports differ from the primary research study undertaken for the purposes of this thesis. A primary research study is only necessary where there is insufficient information already available in an accessible form. These reports would appear to offer sufficient information in respect of the practical operation of the law of mortgage but, upon closer examination, a number of ‘gaps’ become apparent.
In the first instance, they tend to focus on the reasons that lead to the initiation of legal proceedings for possession and the operation of the possession process. In contrast, this thesis is concerned with all aspects of the law of mortgage, including its origins, content and social function. It is in relation to this contextual account of the law of mortgage that the primary research study was intended to extend beyond gaining information in respect of the possession process alone. In particular, it sought to gather qualitative data regarding aspects of the mortgage relationship, including factors determining access to mortgage finance and the sale of repossessed properties.

Secondly, the reports, with the exception of those written by Ford, *et al.* and Nixon, *et al.*, tend to focus upon the experiences of mortgagors within the possession process. Whilst this data will be relied upon within this thesis, the primary research study was also initiated so as to obtain the views of mortgagees, district judges and other related bodies. This aim is supported by the information contained in the reports by Nixon, *et al.*, and Ford, *et al.*, and whilst there is some duplication in the areas covered, they do not directly address some of the issues raised within the primary research study, including the initial stages of the mortgage relationship and the negotiation of the mortgage contract. The implementation of the primary research study can also be justified by reference to the problems that may be encountered in using data collected by other researchers and organisations.

### 2.5.1 The limitations of secondary analysis

Despite the obvious financial and time-saving advantages to be gained by using the work of other researchers it is important to be aware of the weaknesses which may
arise upon the use of this research method. In the first instance, the collection of primary data by another researcher may be based on a research question that differs from that posed by other researchers who seek to use it. Although primary research is often undertaken with the aim of obtaining general information on a particular issue the researcher has to construct a set of questions which will elicit relevant information. In order to know which questions to ask, the researcher has to have some knowledge of the issues to be discussed and some idea of how that information will be used. The interview schedule will, therefore, be constructed in such a way as to achieve a particular aim. The information collected will be influenced by the objectives of the researcher and may be argued to be of little use to other researchers who have different objectives.

Secondly, the process of selection of primary data for use within these reports is unknown. Each report contains references to the experiences of individual mortgagors, either through summaries of the particular circumstances of the case (as with the NACAB\textsuperscript{77} and HIHAC\textsuperscript{78} reports) or by reference to verbatim material provided by the respondents (as with the Ford\textsuperscript{79} and Ford, \textit{et al.}\textsuperscript{80} and Nixon, \textit{et al.}\textsuperscript{81} reports) or through the provision of statistical data (as with the report by Ford and Bull\textsuperscript{82}). Due to the fact that the reader does not have access to all of the raw data obtained by these researchers it is difficult to assess how typical these case studies are.

It is only through the process of triangulation that these case studies can be verified as accurate examples of the more common experiences of mortgagors with financial difficulties. As there are at least six reports that will be used to obtain information regarding the views of mortgagors, it is possible to compare their findings for evidence
of convergence or divergence. If each report offers similar findings then it may be assumed that they offer a representative view of the experiences of mortgagors.

Each report involves a different research question but there is a strong degree of similarity between the information provided by each report. In order to verify this information further, reference will be made to the research study undertaken by Ford, et al,\textsuperscript{53} which sought primary data from respondents on the basis of the fact that they were in arrears rather than on the basis of their visit to an advice agency. The report by Ford, et al,\textsuperscript{54} therefore, adopts a different selection process from the reports published by the advice agencies. The information relating to the experiences of mortgagors is, however, similar throughout these publications.

The secondary analysis of these reports would, therefore, appear to provide valid information relating to the perspective of the mortgagor. In order to ensure that this is the case, information was sought from the respondents during the primary research study regarding their views of the mortgagor's experience of the mortgage relationship. If this information were comparable to that provided by the reports then verification would be complete.

\textbf{2.6 Other primary sources}

The majority of this chapter has been concerned with the interview process undertaken for the purposes of this thesis. That process does not, however, serve as the only method by which primary data has been obtained. In addition to the views of those who participate in the mortgage relationship it was also necessary to gain information regarding the views of those who enacted the relevant legal provisions. A theme that
informs much of this thesis is that the social function of the law of mortgage may have altered radically, despite the law remaining the same, in line with changes within the social context. In order to identify change, it is necessary to obtain and compare information relating to the law of mortgage and its social function at different chronological stages. As much of the law of mortgage is contained in two statutes namely, the Law of Property Act 1925 and the AJA 1970, it is possible to identify the 'intended' social function of the law of mortgage at the time of the introduction of these statutes by reference to Parliamentary documentation. This information could then be compared with the current social function of the law of mortgage so as to identify whether any change had occurred.

Although there is some literature available regarding the relevant legislation, it does not provide sufficient information regarding the claims made by those who implemented it. It was necessary, therefore, to refer to primary sources, the most obvious being *Hansard* and other government publications such as Green and White Papers. From these sources it was possible to obtain information relating to the explicit purposes which the relevant provisions were intended to serve and the context within which those provisions were intended to operate. The analysis of this primary data, undertaken in Chapter Four, is supported by reference to the literature concerning the historical aspects of the law of mortgage. From this analysis, it is possible to compose an account of the origins of the law of mortgage and the changes that have occurred both in relation to the social function of the law of mortgage and the social context.
2.7 Synthesising the primary and secondary data

The collection of data relating to all aspects of the law of mortgage was merely the first step in the completion of the research task undertaken within this thesis. The next step was to apply an analytical framework to that data so as to present a coherent and comprehensive hypothesis. It is through the synthesis of the data obtained as a result of both primary and secondary research that this thesis attempts to provide a contextual analysis of the law of mortgage. By drawing together the primary and secondary data relating to the law of mortgage it is possible to gain information in respect of its juridical content, origins and social function. The following chapters present the results of this research task, beginning with an examination of the structure and content of the law of mortgage.
3 Cooper, op. cit. n. 1, p. 5.
10 Fairest, P. B. Mortgages (Sweet & Maxwell: London, 1980).
11 Gray, see also Gray, K. J. and Symes, P. D. Real Property and Real People (Butterworths: London, 1981).
21 Gray, p. 935.
26 Information in respect of the content of this literature can be found in Chapters Six and Seven.
29 Cooper, op. cit. n. 1, p. 1.
32 Punch, op. cit. n. 30, p. 50.
34 ibid. p. 24.
37 Lenders annual reports provide information on their share of the mortgage market.


The extent to which this group constitutes a 'representative' sample will be discussed below at pp. 80 - 85


Boddy, op. cit. n. 17, p. 31.

Denzin, op. cit. n. 2.


ibid.


May, op. cit. n. 35, p. 92.


Denzin, op. cit. n. 2, p. 123.

May, op. cit. n. 35, p. 86.

[1996] 1 All ER 449.

Marshall, C. and Rossman, G. B. Designing Qualitative Research (Sage: London, 1989) and Hakim, op. cit. n. 27.

May, op. cit. n. 35, p. 93.


See May, op. cit. n. 35, p. 109 and Denzin, op. cit. n. 2, p. 130.

See pp. 83 - 84.

Creswell, op. cit. n. 28, p. 21.

At pp. 65 – 68.

Denzin, op. cit. n. 2, p. 125.

Marshall, C. and Rossman, G. B. op. cit. n. 55, p. 94.

[1996] 1 All ER 449.


At p. 75.


Hull Independent Housing Aid Centre, op. cit. n. 38.

NACAB, op. cit. n. 25.

Ford, J. and Bull, G. op. cit. n. 38.

Ford, J. op. cit. n. 38.


ibid.


Hull Independent Housing Aid Centre, op. cit. n. 38.

ibid.

Ford, J. op. cit. n. 38.


Ford, J. and Bull, G. op. cit. n. 38.


ibid.

Traditional land law texts offer some insight into the legislation. See also Maitland, op. cit. n.16.

See Holdsworth, op. cit. n. 15; Maitland, op. cit. n.16; and Simpson, op. cit. n. 14.
CHAPTER THREE
3. The Juridical Content of the Law of Mortgage

3.1 Introduction

'We can only develop a complete theory of the law if we supplement positive legal analysis by an investigation of the two adjoining provinces, the origin and the social function of the law.'

Renner’s assertion that the juridical analysis of the law, by itself, will fail to provide an accurate reflection of its true social significance demands, in its assessment, an analysis of the content of the particular legal framework, its origins and its social function. The following four chapters of this thesis are concerned with implementing this analytical framework. The starting point, however, must be to gain a detailed understanding of the juridical content of the law of mortgage, only then it is possible to analyse its ‘two adjoining provinces’. It is the aim of this chapter, therefore, to initiate this analytical process through the application of a ‘positive legal analysis’ of the law of mortgage.

Descriptive accounts of the law of mortgage can be found in a number of legal texts, and although these will be used to inform much of the discussion which follows, it is not the aim of this chapter to reiterate the information which is already available in a published format. Its aim is to use a ‘positive legal analysis’ of the law to test a number of assumptions that are implicit in the hypothesis examined within this thesis. That hypothesis was discussed in detail in Chapter One, it is necessary, however, to
reproduce in summary, aspects of it which are relevant to the juridical analysis of the law of mortgage.

In the first instance, this thesis contends that a positive legal analysis of the law will fail to provide an accurate reflection of the law of mortgage. The reasoning offered by Renner in respect of this contention is that legal institutions are 'empty frames' that derive their true meaning from their operation within the social context. An implication of this view of legal institutions is that positive legal rules serve only to set the boundaries of relationships by defining terms and establishing procedures, leaving the substance of that relationship to be 'filled in' by the social context. This chapter evaluates the extent to which this is true of the law of mortgage. In undertaking this task, it is necessary to adhere rigidly to a juridical analysis of the law. In order, however, to develop themes that recur throughout this thesis and to highlight the deficiencies of a positive legal analysis of the law, it will be necessary to refer to aspects of the origins and social function of the law of mortgage. These references and themes will be expanded upon in the chapters that follow.

Secondly, if as Renner contends, legal institutions are neutral it follows that these institutions can be made to adapt to the needs of society without the need to alter their normative content. According to Renner, legal norms can remain constant despite fundamental transformations to their social functions. There will, however, come a point at which changes within the social context necessitate a change in the legal norm. Legislation, therefore, is not seen as the cause of change but as a reaction to it, as Kahn-Freund notes, legislation 'is, at best, a response of the law to a change that has already taken place in the womb of society.' This chapter seeks to examine these
propositions by identifying the degree of inertia within the juridical content of the law of mortgage and its response to changes within the social context.

In relation to Renner's claims regarding the ability of legal norms to remain static for decades, if not centuries, it is necessary to reiterate his failure to account for the ability on the part of the judiciary to alter the social meaning ascribed to the law. Although Renner's definition of the juridical content of the law does not include the decisions of the judiciary, it will be necessary within this chapter to refer to these decisions. A distinction is made, however, between aspects of the common law which have established long-held principles and the exercise of discretion by district judges within the possession process. The former will be the subject of examination within this chapter, forming as it does a fundamental part of the juridical content of the law of mortgage. The latter will be the subject of examination in Chapter Seven, with the aim of identifying the extent to which the judiciary has been influenced in the exercise of its ability to interpret and implement the law by its perceptions of the function which the law is intended to serve within the social context.

The first part of this chapter will be concerned with an examination of the nature of the legal device of the mortgage, examining the distinguishing features of the mortgage transaction, the parties to it and the means by which it may be created. The second part will examine the terms and conditions of the legal device of the mortgage and the remedies available to the mortgagee. The chapter will conclude by presenting an overall view of the law of mortgage with the aim of identifying those aspects of the positive legal analysis of the law which serve to support or deny the contentions examined within this thesis.
3.2 The legal definition of the ‘mortgage’

The fundamental proposition posited by Renner is that the social function of a legal norm can undergo a radical transformation whilst the norm itself remains static. An examination of the definition of the legal device of the mortgage appears to demonstrate the accuracy of the latter aspect of this proposition. The definition most often quoted in modern legal texts, is that pronounced by Lindley LJ in Santley v Wilde, which is that a ‘mortgage’ is a disposition of some ownership interest in property, ‘as a security for the payment of a debt or the discharge of some other obligation for which it is given.’

This pronouncement is notable in relation to the purposes of this thesis, not merely for its concise description of the elements that distinguish the mortgage device from other forms of money lending, but also for the reason that it was expressed in 1899. Despite being conceived of a century ago, this statement continues to provide an accurate description of the modern legal device of the mortgage.

Renner contends that the ability of legal norms to survive unchanged over many years arises out of their normative purity. The nature of a legal norm, such as the legal device of the mortgage, does not demand that it is used to achieve any particular purpose or be used by any particular category of individual, it merely exists as a mechanism for achieving whatever objectives society considers to be appropriate. This would appear to be the case in relation to the legal device of the mortgage, which demands little more than the transference of an interest in property to the lender as security for the debt.
An assumption that arises as a natural consequence of the normative purity of legal norms is that the juridical content of legal norms remains distinct from the social function. In the same manner as a spade remains a spade regardless of the uses to which it is put, the content of legal norms cannot be influenced by their function. It is this separation of content and function which accounts for the ability of legal norms to remain static whilst the functions they serve undergo radical change. If society wishes to put the mortgage device, for example, to new uses it can do so without the need to alter its normative content. A consequence of this separation, however, is that an account of the juridical content of the law of mortgage will fail to provide information relating to aspects such as, the uses made of mortgage monies, the type of individual who becomes a mortgagor and the role played by mortgage finance within the wider social, economic and political contexts. In order to evaluate the validity of the proposition that the normative content of the legal device of the mortgage has remained unchanged whilst its social function has transformed, it is necessary to have some understanding of the latter.

During the twentieth century mortgage finance has come to serve a new and significant function, namely to assist households in the purchase of residential property. The suitability of mortgage finance in achieving this purpose derives from the ability on the part of the household to borrow the money necessary to purchase a home whilst at the same time using that home as security for the loan. Households who, therefore, do not have the substantial funds necessary to purchase accommodation can do so through the payment of regular and affordable instalments. This application of the mortgage device became popular during the early part of the twentieth century and by 1998, more than 42 per cent of all dwellings within England and Wales were subject to an outstanding
mortgage debt. The addition of this relatively new function to those already served by the legal device of the mortgage, was achieved without the need to alter the juridical content of the legal norm of the mortgage. The separation of the content and social function of the mortgage device, therefore, appears to be in evidence, a proposition that will be examined in more detail throughout this thesis.

The ease with which the social function of the mortgage device has been transformed is due, in part, to the flexibility that derives from its normative content. In failing to prescribe factors such as the method of repayment, the length over which repayment should be made or the rate of interest to be charged, the normative content of the legal device of the mortgage has allowed the manipulation of the mortgage form to take place in line with the objectives of society. In order to enable households within England and Wales to purchase a home, mortgagees have, for example, been able to increase the length of repayment, to an average of 25 years, and to offer different forms of repayment, including the ‘endowment’ and ‘instalment’ mortgage.

The repayments made under an ‘endowment’ mortgage consist only of the interest payable by virtue of the mortgage with the capital sum borrowed remaining unpaid during the term of the mortgage. When the mortgage debt matures, the full capital amount will be paid by virtue of a life assurance policy taken out by the borrower at the date of the commencement of the mortgage and assigned to the lender. This policy ensures that should the borrower die during the term of the mortgage, the debt will be paid in full to the lender.
In contrast, a ‘repayment’ or ‘instalment’ mortgage takes the form of repayment by periodical instalments, comprised partly of capital and partly of interest, over the term of the mortgage. The amount of each instalment may vary throughout the term of the mortgage in line with interest rate fluctuations, but the proportion of each instalment that is allocated to capital or interest varies, with the amount allocated to interest decreasing over time.

The lack of information provided by a positive legal analysis of the law of mortgage, in respect of the use made of the legal device of the mortgage and its manipulation so as to achieve the objectives of society, is also apparent in relation to the parties to the mortgage transaction. An examination of the content of the law produces a definition of the term ‘mortgagor’ as, ‘the party who conveys the property by way of security.’ 5 In order to satisfy the ‘security’ requirement of a mortgage, the mortgagor must hold an interest in property sufficient to grant a proprietary interest to the lender. This is the only requirement made by the law in respect of an individual who wishes to become a mortgagor. Information relating to the age, gender, income group, ethnic background or employment status of the typical mortgagor is, therefore, unobtainable by reference to a juridical analysis alone.

The same is also true in relation to the ‘mortgagee’, defined as, one ‘who obtains an interest in the property’16 or alternatively as, ‘the person who provides the money and takes the interest in the property as security for the money which he has lent.’17 The proprietary interest granted to the mortgagee by way of mortgage places the mortgagee in the position of a secured creditor. As such, the mortgagee will take priority over unsecured creditors should the mortgagor become insolvent.18 A further consequence of
the proprietary nature of the mortgage transaction is that the mortgagee, in addition to obtaining a personal right to recover the amount of the loan by virtue of the contract with the mortgagor, also enjoys a proprietary right to recover the amount of the loan by selling the secured property.19 These are the factors that distinguish a mortgagee from other types of lender but beyond this, a positive legal analysis of the law offers little elaboration on the typical mortgagee.

The boundaries set by the definition of the legal device of the mortgage are so wide as to encompass a broad range of individuals and institutions as both potential mortgagors and mortgagees. It is the imprecise nature of this definition that allows for a number of potential functions to be served within the social context by the mortgage device. There are, however, certain aspects of the law of mortgage which are prescriptive, demanding in particular specific procedural requirements to be met before a mortgage can be said to have been created.

3.3 Modes of creation

A characteristic feature of the English property system is the reliance on formality as the means of creating certainty in dealings with land. The imposition of formal rules ensures that the parties to, and the subject of, the agreement or dispute concerning land can be identified. It is perhaps this pursuit of certainty which offers an explanation for the demand made by the English law of mortgage that particular formalities be adhered to in the creation of a mortgage.
What is significant, for the purposes of this thesis, in respect of these formalities is that they were established over 70 years ago. The ability of legal norms to remain static while their social function undergoes radical change suggests that legal norms will rarely, if ever, require reform. If the demands of society can be met by altering its social function, then the juridical content of the law can remain untouched. This may explain, therefore, the continued existence of legislation that came into effect in 1926.20

3.3.1 Legal mortgages

By virtue of s.85(1) of the Law of Property Act 1925 (LPA 1925) a legal mortgage of freehold land can only be created by a, 'demise for a term of years absolute, subject to a provision for cesser on redemption’, or, ‘a charge by deed expressed to be by way of legal mortgage’. By the first method, a long term, generally 3,000 years, is granted to the mortgagee. As a long leaseholder, the mortgagee is entitled to enjoy possession of the secured property. The second method does not create a term in the mortgagee, but the mortgagee is given the same powers, protection and remedies as if the mortgagee had a term of 3,000 years.21 In order to have effect at law, the charge must be by deed and be expressed to be by way of legal mortgage.22 The 'charge by deed' constitutes a less cumbersome method of creating a mortgage in freehold land and is, therefore, more often used as the means of creating a legal mortgage of freehold land.23

Where the secured property consists of leasehold land, by virtue of s.86(1) of the LPA 1925, a legal mortgage can be created in one of two ways: by ‘subdemise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for cesser on redemption’; or by ‘a charge by deed expressed to
be by way of legal mortgage'. As with freehold land, the ‘charge by deed’ affords the mortgagee the same protection, powers and remedies as if the mortgage had been created by subdemise.  

3.3.2 Equitable mortgages

An equitable mortgage confers on the mortgagee an equitable interest in the mortgaged property.  

The LPA 1925 does not establish any procedural rules regarding the creation of equitable mortgages for the reason that they generally arise as a result of some deficiency of form within the mortgage transaction. The most obvious means by which an equitable mortgage will arise is where the mortgagor holds only an equitable interest in or subsisting in reference to land and the mortgagor assigns the equitable interest to the mortgagee as security for the loan. 

It is also possible for the owner of a legal estate in land to create an equitable mortgage by virtue of a specifically enforceable agreement to create a legal mortgage. The mortgage cannot be a legal mortgage but by virtue of the doctrine established in Walsh v Lonsdale, the agreement will be deemed to be an informal equitable mortgage. It must, however, be made in writing and signed by both parties according to s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 [LP(MP)A 1989].

The introduction of the LP(MP)A 1989 appears to have abolished a previously acceptable means of creating an equitable mortgage, namely an equitable mortgage by deposit of title deeds. Prior to the 27th September 1989, an owner of land could create an equitable mortgage by depositing the title deeds to that land with the
mortgagee with the intention that the mortgagee should hold those title deeds as security for the loan. The requirement set out in s.2(1) LP(MP)A 1989 that, any contract for the disposition of an interest in land must be made in writing and signed by both parties, would appear to deny this method of creating an equitable mortgage.

The introduction of s.2 of the LP(MP)A 1989 represents the only alteration, since 1926, in the methods which may be adopted in the creation of a mortgage. A mortgage completed in 1998, would, therefore, except for an equitable mortgage by deposit of title deeds, be created in exactly the same manner as one created 70 years ago and yet the functions they serve would appear to be very different. This phenomenon appears to derive from the separation of the content of the law from its social function. The enduring quality of the legal norm of the mortgage and provisions relevant to it contained within the LPA 1925, arises out of their non-prescriptive and abstract nature. The requirements imposed as to formality in the creation of the mortgage device, for example, do not determine its content or the purposes that it is intended to serve.

The degree of flexibility afforded to the mortgagor and mortgagee, by the law of mortgage, in relation to the construction of the terms and the intended function of their agreement allows for the continued existence of rules established over 70 years ago. What it does not appear to allow for, however, is the formation, by reference to a juridical analysis of the law of mortgage alone, of a detailed understanding of the content of mortgage agreements or their impact upon the respective parties. It is necessary, therefore, in respect of these matters to refer to information relating to the social function of the mortgage device.
3.4 Terms and conditions of a mortgage

Despite the freedom afforded to the mortgagor and mortgagee to determine the terms and conditions of their agreement, it is possible to identify terms which are representative of the majority of mortgage contracts. This is as a result of the imposition, by mortgagees, of terms that are standard throughout all mortgage contracts. One such term relates to the maintenance of the value of the security.

The privileged position which legal mortgagees enjoy over and above other forms of creditor derives from the disposition of a legal estate in the secured property to the mortgagee. In order to ensure that this security remains adequate in terms of its value, the majority of mortgagees insert, in the contract of loan, a covenant by the mortgagor to keep the property in good repair. There will also be a covenant by the mortgagor that the mortgagee will be allowed to enter and effect repairs should the mortgagor fail to keep the property in good repair. The mortgagor will be held liable for the costs incurred as a result of such action.

In relation to ensuring that the security afforded by the property remains sound, the mortgagee has, by virtue of s.101(1)(ii) of the LPA 1925, the power, where the mortgage is made by deed, ‘to insure against loss or damage by fire any building or property of an insurable nature’. Rather than relying on this statutory power, which usually only allows for the insurance to cover two-thirds of the value of the property, the majority of mortgage contracts will include a term which allows the mortgagee to
insure the property to its full value and which makes the mortgagor liable for the cost of the premiums.

In addition to the covenant to keep the property in good repair, the mortgagor will also find terms in the mortgage contract by which the mortgagor covenants to repay the debt, and to refrain from undertaking certain acts including, the letting of the property unless permission is granted by the mortgagee and the substantial alteration of the premises. These terms are intended to ensure that the security afforded to the mortgagee is protected and maintained.

There is one term, contained in virtually all mortgage contracts, which is distinct from those described above in that it appears to contradict the agreement reached between the mortgagor and mortgagee. The legal device of the mortgage has proven suitable as the means by which millions of households have entered the home-ownership sector for the reason that it allows households to repay the substantial capital sum borrowed, over a long period, usually twenty to 25 years. A standard term contained in the mortgage contract, however, states that the mortgagor is required to repay the principal sum with interest by a fixed date, usually no more than six weeks from the date of the mortgage.

The significance of this term appears at face value to be considerable, it is, however, largely illusory for the reason that the mortgagor has the right to redeem the mortgage even after the date for repayment has passed. This right to redeem, known as the mortgagor’s ‘equitable right to redeem’, appears to make the inclusion of such a term anomalous. The inclusion of a term requiring payment of the entire capital sum after only six weeks, although apparently anachronistic, does serve a purpose within the
modern mortgage transaction. A mortgagee is only entitled to pursue all or any of the remedies relating to the enforcement of the security, except for the right to possession, once the legal date for redemption has passed. By fixing that date in the early stages of the mortgage relationship, the mortgagee is ensuring that those remedies will be available if necessary. As the mortgagor is still required to repay the mortgage debt after several weeks, despite having agreed to repay the debt over many years, the ‘equitable right to redeem’ remains a necessary part of the law of mortgage.

3.5 Variation of the mortgage

The degree of freedom afforded to the mortgagor and mortgagee to negotiate the terms of their mortgage contract extends to the determination of the rate of interest that is to be paid by the mortgagor on the capital sum for the duration of the mortgage term. Unlike many other forms of money lending in this country, and the provision of mortgage finance in many other countries which apply a fixed rate of interest, the mortgage device includes a term which allows for the variation of the amount of interest to be paid by the mortgagor.

A recent innovation by mortgage lenders has been to offer ‘fixed rate’ mortgages that limit the interest rate for a period, usually for the first three to five years of the term of the mortgage. In order to avoid mortgagors redeeming the mortgage before the expiration of this fixed period and entering into another fixed rate mortgage, thereby never being liable to varying rates of interest, mortgagees impose financial penalties should the mortgagor seek an ‘early’ redemption.
The ability of the mortgagee to vary the terms of the mortgage has been described by Gray as ‘astonishing’, ‘The mortgagor agrees to pay any rate of interest demanded by the lender of the money.’ Although the mortgage transaction is subject to the principle of freedom of contract, Parliament and the judiciary have recognised the need for supervision of these agreements. The courts have an equitable jurisdiction to strike down any term in a mortgage transaction that operates in an ‘oppressive or unconscionable’ manner. The main focus of the operation of this jurisdiction has been excessive interest rates but as Gray, writing in 1993, notes,

Despite occasional suggestions that an entirely unqualified general power unilaterally to vary interest rates may “savour of being harsh and unconscionable” there has as yet been no successful legal challenge to the right of mortgagees to adjust interest rates at their discretion.

This reluctance on the part of the courts to intervene in the contractual relationship between a mortgagor and mortgagee may be subject to change by virtue of the Unfair Terms in Consumer Contracts Regulations 1994 (UTCCR 1994). The 1994 Regulations were intended to implement European Council Directive 93/13 and came into force on 1st July 1995. Unlike the Unfair Contract Terms Act 1977, the 1994 Regulations do apply to contracts concerning land. Under these Regulations, any ‘unfair’ term in a contract concluded between a seller or supplier and a consumer, where the said term has not been individually negotiated, shall not be binding on the consumer. The Regulations define an ‘unfair term’ as, ‘any term which contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and
obligations under the contract to the detriment of the consumer. The Regulations provide guidance on the assessment of ‘good faith’, stating that regard shall be had in particular to:

(a) the strength of the bargaining positions of the parties;

(b) whether the consumer had an inducement to agree to the term;

(c) whether the goods or services were sold or supplied to the special order of the consumer;

and

(d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

The 1994 Regulations would appear to have significant implications for the mortgage relationship, as Holbrook notes, ‘by making certain terms in contracts unenforceable, they will be particularly welcome to tenants, long leaseholders and borrowers.’ In particular, a mortgagor could argue possibly that standard terms such as those permitting a unilateral variation of the interest rate or requiring repayment of the principal sum and interest after only six weeks are ‘unfair terms’ within the meaning of the UTCCR 1994. As Stewart notes, in respect of the ability of mortgagees to vary the rate of interest, ‘What other commercial contract would give one party such an advantage?’ The courts in respect of the mortgage relationship have not, however, as yet, been called upon to apply these Regulations and until such time as they are, it is difficult to evaluate their true impact. Such an evaluation is made more difficult by the existence of conflicting views regarding the significance of the Regulations. In support
of the view that the UTCCR 1994 have the potential to exert significant change within
the legal system of the United Kingdom, Dean argues that the Regulations constitute,

[j]o]ne of the most significant pieces of consumer protection legislation to emanate from
Brussels. It will have a far-reaching impact on the law of contract through the introduction of
a general concept of fairness and provide an opportunity to deal with some of the inadequacies
of the inaccurately named Unfair Contract Terms Act 1977.49

The Department of Trade and Industry (DTI) have indicated in a Consultation Paper
published in January 1998, however, that future caselaw, which could be used to assist
in the evaluation of the significance of the UTCCR 1994, will be relatively rare, ‘so far
no cases have been brought under the Regulations and it is the DTI’s view that court
cases will be few and far between under the new regime proposed in this document.’50
The proposals put forward by the DTI recommend a system which places greater
reliance upon negotiation between traders and consumer organisations to exclude or
remedy ‘unfair terms’, rather than reliance upon court action. It would appear,
therefore, that any evaluation of the significance of the UTCCR 1994 would, until
judicial comment is provided, be speculative.

An examination of the terms contained within the typical mortgage contract suggests
that the mortgagee has a considerable degree of influence in respect of the content of
such agreements. A mortgagee will, for example, impose obligations upon a mortgagor
to ensure that the value of the security is maintained. Stewart supports this contention
when she notes, ‘Noticeably absent from the document is any reference to the
mortgagor’s rights although the mortgagee’s rights are set out in some detail.’51 The
emphasis given to the interests of the mortgagee within the mortgage agreement appears to be preserved by the law of mortgage in relation to the rights and remedies of the parties.

3.6 The mortgagee’s rights and remedies

The terms of the mortgage contract are primarily concerned with ensuring the protection of the security afforded to the mortgagee. The rights and remedies which arise upon the creation of the mortgage or upon the mortgagor’s failure to adhere to the terms of the mortgage contract are also designed to enable the mortgagee to maintain or enforce the security. In contrast, the mortgagor’s interest lies in remaining in occupation of the home. The balance that the legal framework strikes between the commercial interests of the mortgagee and the social interests of the mortgagor appears to weigh heavily in favour of the former.52

The remedies available to a legal mortgagee are, an action on the personal covenant to repay, the appointment of a receiver,53 possession,54 sale,55 and foreclosure56. In relation to residential mortgages the appointment of a receiver and foreclosure are extremely rare,57 they will, therefore, not be discussed in detail.58 The remedies available to the mortgagee, except in the case of possession, do not arise until the mortgage monies have become due and there has been default by the mortgagor.59

Once the remedies of the mortgagee have arisen, the mortgagee is entitled to pursue all or any of the available remedies against the mortgagor.60 This ability on the part of
mortgagees to undertake a multiplicity of actions has come to serve a new function within the social context, proving to be of particular use in relation to the modern phenomenon of 'negative equity'. Where the market value of the house is worth less than the amount outstanding on the mortgage debt, then the mortgagor is said to have 'negative equity'. Should a mortgagee exercise the power of sale, the proceeds of sale will be insufficient to cover the outstanding debt. The mortgagee may, however, seek to recover the amount outstanding by initiating a personal action for the debt against the mortgagor.

3.6.1 Action on the personal covenant

In all mortgage agreements, the mortgagor will covenant to repay the principal sum and interest on that amount. Should the mortgagor fail to meet the terms of this covenant, the mortgagee will be entitled to bring an action for the recovery of the amount owing under the mortgage or the arrears of instalments. Unlike the other remedies available to the mortgagee, the action on the personal covenant does not provide the mortgagee with the advantages associated with being a secured creditor. As with any judgment creditor, the mortgagee will be entitled to have the judgment satisfied out of the assets of the mortgagor, but, the mortgagee will have to take their place amongst any other judgment creditors.

The action on the personal covenant is rarely undertaken as the sole means of recovering the debt. In relation to a mortgage secured upon residential property, it is unlikely that the mortgagor will have the funds necessary to repay the entire capital sum.
plus any outstanding interest. It is now more commonly used to recover any shortfall on the sale of the secured property.

3.6.2 The mortgagee's power of sale

During the initial stages of the creation of the legal device of the mortgage, the law of mortgage prescribes little in the way of substantive conditions. In relation to circumstances where the mortgagor is in default, however, the law provides a legal mortgagee with a substantive power, namely a power to sell the secured property. The ability to undertake a sale of the secured property derives from two sources, the express and the statutory power of sale. A mortgagee may insert in the contract of loan an express power of sale but this is now rare as a legal mortgagee can rely on the power of sale granted by the LPA 1925.

3.6.2.1 The statutory power of sale

By virtue of s.101 of the LPA 1925, a mortgagee has a power to sell the mortgaged property or any part thereof by public auction or by private contract. The mortgagee's statutory power of sale proceeds by two stages, set out in ss.101(1)(i) and 103 of the LPA 1925. Under s.101(1)(i), the power of sale arises if, the mortgage was made by deed, the mortgage money has become due and there is no contrary intention contained within the mortgage. The requirement that the mortgage be made by deed has implications for equitable mortgagees where the mortgage was created informally. In this situation, the equitable mortgagee has no automatic power of sale but can apply to the court by virtue of s.91 of the LPA 1925 for a direction that the property be sold.⁶³
With regard to the time when the statutory power can be exercised, s.103 sets out the following requirements:

(i) Notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii) There has been a breach of some provision contained in the mortgage deed or in this Act, or in an enactment replaced by this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

The distinction made by the LPA 1925 between the power of sale having arisen and become exercisable has implications for the selling mortgagee. Should the mortgagee sell the secured property before the power of sale has arisen, the sale will not be effective to transfer the legal estate to the purchaser, "but will vest in the purchaser only the rights of mortgagee as mortgagee, and so will only operate as a transfer of mortgage." If the power of sale has arisen, but is not exercisable, then, the purchaser obtains a good title, but the mortgagor has a remedy in damages against the selling mortgagee by virtue of s.104(2) of the LPA 1925.

The requirements set out in s.103 of the LPA 1925 can be varied or extended by the mortgage deed. This raises a question regarding the extent to which the typical
mortal agreement does vary or extend the requirements of s.103. Unfortunately, such information is unavailable as regards a juridical analysis of the law, the matter will, therefore, be explored in more detail in Chapter Seven.

3.6.2.2 Duties of the selling mortgagee

Once the power of sale has arisen and if not varied by the mortgage deed become exercisable, the mortgagee may sell the property without reference to the court. The method and timing of the sale are at the discretion of the mortgagee and the LPA 1925 does not set out any requirements as to the standard of conduct to be employed. The courts do, however, expect at least a minimal degree of equitable dealing on the part of the mortgagee, a matter discussed in the following chapter.

In relation to the sale price, a building society is under a statutory obligation to take reasonable care to ensure that the price achieved on the exercise of the power of sale is, ‘the best price that can reasonably be obtained’. The Court of Appeal in Cuckmere Brick Co Ltd. v Mutual Finance Ltd., made it clear that other mortgagees owe a similar duty. Salmon LJ described it as a responsibility to, ‘take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell.’ In essence, the mortgagee must take reasonable care in exercising the power of sale. The sale price achieved by the mortgagee is, however, rarely challenged for the reason that it is generally accepted that repossessed properties tend to sell for a price lower than occupied properties, as Nolan LJ notes in Target Home Loans Ltd. v Clothier, an occupied house, ‘is far more likely to look attractive and to command a buyer than one which has been repossessed by a mortgage company.’
The duty to undertake reasonable care in relation to the sale of the secured property does not impose an obligation on the mortgagee to undertake the sale at any particular time. It is open to a mortgagee to sell at a time when the price obtained may be lower than if the mortgagee had sold at another time. The mortgagee’s discretion as to the timing of the sale may, however, be qualified by virtue of s.91(2) of the LPA 1925. This section allows the mortgagee or ‘any person interested either in the mortgage money or in the right of redemption’, which includes the mortgagor, to request the court to order a sale of the mortgaged property. In circumstances where a mortgagee refuses to sell the property, therefore, the mortgagor can request a sale to be ordered.

3.6.2.3 Application of the proceeds of sale

Following the sale of the secured property, the mortgagee is deemed by statute to be a trustee of the proceeds of sale. By virtue of s.105 of the LPA 1925 the proceeds of sale are to be applied, first, ‘in payment of all costs, charges and expenses properly incurred by [the mortgagee] as incident to the sale’. Secondly, ‘in discharge of the mortgage money, interest, and costs, and other money, if any due under the mortgage’. Any amount remaining must be paid to the mortgagor. It is possible, however, for the mortgagor to owe money to the mortgagee at the end of the sale process. If the mortgaged property is subject to negative equity, following the application of the proceeds of sale, some part of the mortgage debt will remain outstanding. The mortgagee is entitled to recover this amount by initiating an action on the personal covenant to repay, thereby ensuring that the mortgagee’s financial interest is protected.
3.6.3 The mortgagee’s right to possession.

In strict terms, an action for possession by a legal mortgagee is not a remedy but a ‘right’ which derives from the mortgagee’s legal estate in the secured property. An equitable mortgagee, having no legal estate in the secured property, however, is not entitled to seek possession without the permission of a court. In relation to a legal mortgagee, the right to possession can be enjoyed regardless of default by the mortgagor. The exercise of the right to possession is also not dependent on the legal date for redemption having passed. Harman J succinctly put this point in *Four-Maids Ltd. v Dudley Marshall (Properties) Ltd.*, when he noted that the mortgagee,

[m]ay go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right.

The inherent right to possession serves as perhaps one of the most appropriate examples of Renner’s proposition that changes in society may result in the need to reform legal norms or implement legislation where none existed before. Such change will, however, only occur after the need has arisen within the social context and the period between the need arising and change being implemented may extend for decades, if not centuries. The suggestion that the right to possession is in need of reform requires an understanding of the origins and the modern social function of the law of mortgage, matters discussed in the following chapters. As a precursor to these chapters, a summary of the argument is provided here.
The inherent right to possession arose out of the pre-1926 method of creating the legal device of the mortgage. The conveyance of a fee simple estate or assignment of the mortgagor’s leasehold term transferred absolute ownership to the mortgagee and the benefits normally associated with such ownership, including possession of the secured property. The post-1926 methods of creation allow the mortgagor to retain the fee simple or leasehold term, the interest which is carved out of those estates, however, invests in the mortgagee a legal estate to which is attached the right to possession.

This manipulation of existing estates has been criticised by Gray who suggests that, ‘This practice has brought about the consequence that the law of mortgage is heavily marked by fiction.’ When reference is had to the operation of the right to possession in practice, the fictional nature of the law of mortgage becomes apparent. In relation to mortgage monies utilised for the purpose of purchasing residential property, a mortgagee rarely wishes to gain possession as a remedy *per se* but as an ‘adjunct’ of the power of sale. The mortgagee’s principal concern usually is to ensure that the mortgagor makes regular payments. It is not in the mortgagee’s interests, therefore, to take possession until default in such payments. The majority of mortgage contracts reflect this by incorporating an express term that states that the mortgagee will not seek possession until the mortgagor is in default.

The adoption of this practice by mortgagees serves as an example of the manner in which the social function of the law of mortgage may be altered so as to meet with the changing needs of the modern mortgage relationship. It is also suggestive of a need to reform the juridical content of the law of mortgage. The inherent and absolute nature of the right to possession has been deemed by mortgagees to be inappropriate in relation
to a mortgage used for the purpose of purchasing residential property. Mortgagees have recognised and reacted to this need for change and despite calls for reform by the Law Commission, a change in the law itself does not appear to be forthcoming. As Haley notes,

[i]t is undeniable that the right to immediate possession, albeit historically explicable, is out of step with the contemporary relationship of mortgagor and mortgagee. The inescapable conclusion is that the mortgagee’s possessory right is outmoded, serves no useful purpose and should be consigned to the annals of legal history.

Despite the contention that the mortgagee’s inherent right to possession is an anachronism, the question remains as to whether the maintenance of this absolute right creates difficulties in practice, for only then may it be possible to justify legal reform. A juridical analysis of the law, in failing to offer information in respect of the practical operation of the law of mortgage, offers little assistance in answering this question. It will be necessary, therefore, to return to this issue in Chapters Six and Seven. The potential problems which this absolute right to possession may give rise to, however, seem obvious.

In spite of the mortgagee’s self-imposed restriction on the right to possession, the law of mortgage would appear to allow for an unqualified taking of possession. The mortgagee may simply enter the premises without reference to established procedures or supervision by an external body, such as a court. It has been suggested, however, that a mortgagee would be prevented from obtaining possession, ‘except where it is sought bona fide and reasonably for the purpose of enforcing the security and then only
subject to such conditions as the court thinks fit to impose. This approach has not been followed in subsequent caselaw and it has been argued that the mortgagee’s right to possession remains unqualified, except in relation to limitations imposed by the contractual agreement. If a legal mortgagee wishes to exercise the right to possession, therefore, they may either take physical possession of the secured property, or bring an action for possession in the County Court. The mortgagee need not give notice either before entering, or commencing proceedings.

3.6.3.1 Physical possession

The taking of physical possession of the secured property imposes upon the mortgagee a number of onerous duties. In the first instance, the mortgagee will be responsible for taking reasonable care of the property. Secondly, the mortgagee may be liable to criminal prosecution, if violence is used either against the occupier or the property, to gain entry. Physical possession will, therefore, only be undertaken where the mortgagor consents to the possession or has abandoned the property. In relation to residential mortgages the taking of physical possession by a mortgagee of the secured property, where it is still occupied by the mortgagor, appears to be extremely rare.

3.6.3.2 A possession action in the County Court

The inherent right to possession, whilst apparently supporting Renner’s contention that changes in the content of the law may not be undertaken despite the need having arisen within the social context, also serves as an example of the changes which may be occasioned as a result of mutations in the social context. The increasing prevalence of
home-ownership within England and Wales, achieved with the assistance of mortgage finance, has led to an alteration of the content of the law of mortgage in line with the changing nature of the relationship between mortgagor and mortgagee. Whereas, at face value, the remedies afforded to the mortgagee appear to be concerned solely with protecting financial interests, a legislative provision, introduced in 1970, was intended to afford the mortgagor’s interest in remaining in occupation of the home with a degree of protection.

The judiciary had, prior to 1962, exercised discretion in respect of the postponement of an order for possession in circumstances where the mortgagor had shown an ability to clear the arrears within a relatively short period. Russell J in *Birmingham Citizens Permanent Building Society v Caunt and another,* however, determined that no such jurisdiction existed and that an order for possession could be suspended for no more than 28 days. In response to this decision, the legislature enacted s.36 of the Administration of Justice Act 1970 (AJA 1970).

By virtue of s.36 of the AJA 1970, the court has discretion to adjourn an action for possession or postpone the grant of an order for possession if it appears to the court that the mortgagor is likely, within a reasonable period, to be able to pay any sums due or to remedy any other default. The intention of Parliament in introducing s.36 of the AJA 1970 was to provide ‘assistance to a mortgagor who found himself temporarily in difficulty.’ The need for legislative intervention to ensure that the interests of the mortgagor are protected derives from the inherent nature of the right to possession. As Tyler notes, the mortgagee’s right to possession requires the court to grant an order for possession,
Whilst today, possession is rarely taken under any mortgage without an order of the court, the existence or non-existence of such a right is of some significance because, if there is a right, on an application to the court an order for possession is a matter of course, subject to the powers of adjournment, etc., (where they apply).\(^{100}\)

Smith suggests that mortgagees may avoid the protection afforded to the mortgagor by virtue of s.36 of the AJA 1970 by initiating an action on the personal covenant to repay. It is unlikely that a mortgagor will be able to repay the entire debt and will, therefore, be adjudged bankrupt, leading to a sale of the mortgagor's assets, without reference to s.36 of the AJA 1970.\(^{101}\) Smith recognises that this option will not be commonly invoked by mortgagees but Clarke goes further in suggesting that s.36 of the AJA 1970 imposes a duty upon mortgagees to seek possession through the courts.\(^{102}\) Clarke contends that, to allow mortgagees to take possession without first obtaining an order of the court would deny the intention of Parliament in enacting s.36 of the AJA 1970. This contention has been refuted, however by the Court of Appeal in the case of *Ropaigealach v Barclays Bank Plc.*\(^{103}\) The reasoning behind this decision was summarised by Chadwick LJ in the following terms,

I find it impossible to be satisfied that Parliament must have intended, when enacting s.36 of the Act of 1970, that the mortgagee's common law right to take possession by virtue of his estate should only be exercisable with the assistance of the court.

Despite the arguments put forward by Clarke having been discounted,\(^{104}\) it would appear that the majority of mortgagees do seek a possession order from the County
Court, although this is probably due to the problems inherent in the taking of physical possession of the property rather than adherence to a requirement of due process.

When first introduced, s.36 of the AJA 1970 contained a fundamental drafting defect, made apparent by Pennycuick V-C in *Halifax Building Society v Clark.* Due to the fact that most mortgage contracts include a term making the whole mortgage sum payable upon default, mortgagors found it extremely difficult to convince the court that they could pay 'any sums due', that is, the whole mortgage debt, within a reasonable period. The result of the decision in *Clark,* has been described as consigning 'the 1970 Act to a state of utter uselessness.' This defect was remedied, however, by the introduction of s.8 of the AJA 1973 which states that the term 'any sums due' contained in s.36 of the AJA 1970 relates only to 'such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.' As a result of this new definition, the mortgagor has to indicate an ability to pay within a reasonable period the instalments normally required under the contract of loan and any arrears in repayment. The protective nature of s.36 of the AJA 1970 was, therefore, restored, as Griffiths LJ notes in *Bank of Scotland v Grimes,*

It is the intention of both sections to give a measure of relief to those people who find themselves in temporary financial difficulties, unable to meet their commitments under their mortgage and in danger of losing their homes.

The extent to which the mortgagor is able to rely on the exercise of the court's discretion under s.36 of the AJA 1970 is dependent on the provision of information relating to the mortgagor's financial circumstances. If such information is not provided,
the court will be prevented from exercising its discretion in favour of the mortgagor. In order to encourage the provision of such information, the mortgagor is requested to complete a form that is attached to the court summons. The mortgagor will also be asked to attend the hearing which will be held in chambers. The relatively informal surroundings of the hearing should, in theory, ensure that mortgagors are not deterred from attending.

In order to ensure that the court has as full a picture of the financial circumstances of the mortgagor as is possible, the mortgagee is also required to submit a document detailing the particulars of claim. The County Court (Amendment No 3) Rules 1993, which came into force on November 1st 1993, require mortgagees to provide more information than was previously the case. The information that must be provided under CCR Ord. 6, r 5A includes,

[s]uch relevant information as is known by the plaintiff about the defendant’s circumstances and, in particular, whether (and, if so, what) payments on his behalf are made direct to the plaintiff by or under the Social Security Contributions and Benefits Act 1992.

With both the mortgagor and the mortgagee providing information relevant to the hearing for possession, the court should have sufficient information to enable it to exercise its discretion under s.36 of the AJA 1970. Jones, in support of this assumption, summarises the objectives that underpinned the 1993 Regulations in the following terms,
The philosophy behind the changes is to ensure that as much information as possible is placed before the court at an early stage to enable the court to dispose of the application as efficiently and quickly as possible.\textsuperscript{113}

There are instances, however, where the court is precluded from exercising its discretion.

\textbf{3.6.3.3 Limitations on the operation of s.36 of the AJA 1970}

By virtue of s.36 of the AJA 1970, the court can only exercise its discretion where it appears that the mortgagor is, ‘likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default’. If the mortgagor fails to provide any evidence relating to their financial circumstances, the court has no option other than to grant immediate possession. The order will usually be suspended for 28 days to allow the mortgagor time to repay the entire sum or to find alternative accommodation. Even where the mortgagor does provide such information, it may not be enough to convince the court that the mortgagor’s financial situation is sufficiently stable to ensure the payment of any sums due. If this were to be the case, the court would be unable to exercise its discretion in favour of the mortgagor.

The protective element of s.36 of the AJA 1970 derives from the court’s discretion to allow the mortgagor time to clear any arrears in mortgage payments. The reference to ‘any sums due’ has, however, been interpreted in a restrictive manner so as to exclude the operation of s.36 of the AJA 1970 in relation to a mortgage given as security for a
bank overdraft. This is due to the nature of a bank overdraft, under which no money becomes due unless and until the bank demands repayment.

If the court determines that it is able to exercise its discretion in favour of a mortgagor, it must determine the period within which the mortgagor must repay the sums due or remedy the default. It cannot postpone proceedings for an indefinite period, but must determine a 'reasonable period' according to the circumstances of the case. The manner in which the courts have sought to interpret terms used within s.36 of the AJA 1970 will be discussed in Chapter Seven.

3.7 Costs

A recurrent theme in the nature of the law of mortgage is a concern to protect the financial interests of the mortgagee. The distribution of rights and remedies and even s.36 of the AJA 1970, which is intended to protect the interests of the mortgagor, place an emphasis upon maintaining the value of or enforcing the security. This theme is apparent in the issue of costs, for the mortgagee is entitled to be indemnified for all charges and expenses reasonably incurred in enforcing or preserving the security. In Re Wallis, Fry LJ stated that a mortgagee's claim may comprise the following five items, the principal debt, the interest thereon, the costs in proceedings for redemption or foreclosure of the security, all proper costs, charges and expenses incurred by the mortgagee in relation to the mortgage debt or the mortgage security and the cost of litigation properly undertaken by the mortgagee in reference to the mortgage debt or security.
If the mortgagor is required to pay such costs, it is usual for them to be added to the
debt as opposed to being paid personally by the mortgagor. It is within the jurisdiction
of the court to order the mortgagee to pay costs but this will only be exercised where
the mortgagee has acted improperly or is guilty of gross misconduct.\textsuperscript{119} In order to
supplement this general legal principle, mortgagees tend to incorporate terms within the
contract of loan which impose liability for costs upon the mortgagor.

The ability of mortgagees to impose such liability upon mortgagors raises questions in
respect of the ability on the part of mortgagors to take advantage of the protection
afforded to them by s.36 of the AJA 1970. With the emphasis being placed upon the
mortgagor’s ability to clear any arrears within a reasonable period, any measure which
significantly affects the financial status of the mortgagor will, it may be assumed,
influence the court in the exercise of its discretion within the terms of s.36 of the AJA
1970. The extent to which this assumption is corroborated by the practical operation of
the law of mortgage will be examined in Chapters Six and Seven.

3.8 An overview of the law of mortgage

The first section of this chapter was concerned with providing a ‘positive legal analysis’
of certain aspects of the law of mortgage. Throughout that analysis, reference has been
made to factors that tend to support the hypothesis examined within this thesis. The
following section of this chapter seeks to expand upon those references and in so doing,
offers an overview of the juridical content of the law of mortgage.
3.8.1 The functional transformation of the untransformed norm

It was stated at the outset that legal norms can remain constant whilst their social function sustains radical alterations for the reason that legal institutions are neutral. The extent to which the legal norm of the mortgage constitutes an ‘empty frame’ can perhaps best be illustrated by a comparison between its legal definition and its use within the social context. Within legal terminology, the mortgage has a simple and specific definition, any agreement that leads to a disposition of an interest in property to the lender as security for the debt will be deemed to be a mortgage. Built upon this basic foundation can be any number of variations in terms of the form of repayment of the loan, the interest obtained by the mortgagee and the purpose which the loan is intended to serve.

The neutrality of the mortgage device has enabled those who seek to use it to adapt it to their needs within the social context. This is particularly apparent in relation to the use made of mortgage finance to purchase residential property. The security granted to the mortgagee makes ‘safe’ the loan of a substantial amount of money to a household of relatively insubstantial means. In order to make the use of mortgage finance more viable for such households, institutional lenders have developed different forms of repayment methods, including the ‘endowment’ and the ‘repayment’ mortgage. It has also been possible to introduce ‘fixed rate’ mortgages to provide households with a degree of certainty regarding the payments to be made during the first few years of the mortgage.
These innovations in the uses made of mortgage finance have been possible without any need for change in the basic legal definition of the mortgage. It would appear, therefore, that the legal norm of the mortgage is, as Renner contends, an ‘empty frame’ but to what extent is this true of other aspects of the law of mortgage? The mortgage itself may be neutral but the rules which determine its operation, as between the mortgagor and mortgagee, may go some way in ‘filling in’ the substance of the mortgage transaction. It would seem, however, that the juridical content of the law of mortgage is primarily concerned with establishing formality requirements and procedural rules rather than with any substantive issues including, for example, the regulation of the conduct of the parties within the mortgage relationship.

At face value, the law of mortgage would appear to regulate the substantive relationship between the mortgagor and mortgagee by granting particular rights and remedies to the parties. On closer examination, however, the relevant legislative provisions seek only to impose procedural requirements as regards the exercise of those remedies. In relation to the mortgagee’s power of sale, for example, the LPA 1925 establishes the circumstances in which the power arises and becomes exercisable. It does not establish any standard of conduct which mortgagees must abide by in exercising this power. The Building Societies Act 1986 requires building societies to obtain the best price reasonably obtainable but it does not require adherence to any standard of conduct as regards the manner in which the property is sold. The failure by the legislation to impose any substantive duties upon the selling mortgagee has to some extent been remedied by the courts. The approach of the judiciary in respect of this matter is discussed in Chapter Seven, to summarise, however, the courts have recognised the need for supervision and regulation of the activities of the selling mortgagee by
imposing duties as to ‘good faith’ and ‘reasonableness’. It is possible to argue, therefore, that the law of mortgage is only concerned with formality and procedure, leaving substantive issues to be determined within the social context.

Renner postulates that legal norms can remain constant whilst their social functions undergo a radical alteration for the reason that these norms are ‘colourless’. In turn, the changes that occur within the social function of the law ultimately lead to the necessity for a change in the law. Legislation is, therefore, as Kahn-Freund notes, ‘not seen as the prime mover of social change’ but merely a reaction to it. If this assumption is applied to the juridical analysis of the law of mortgage then it would appear to be correct. This is particularly the case in relation to the AJA 1970. Prior to the implementation of this legislation, the judiciary had for many years exercised a discretion to postpone the granting of possession to allow the mortgagor time to clear any arrears. It was not until 1962 and the case of *Gaunt* that it was made clear that the judiciary did not have the power to exercise such discretion. At most, they were empowered to adjourn a hearing for no more than 28 days. As a direct consequence of this judgment, s.36 of the AJA 1970 was introduced in order to reinstate a practice that had previously been undertaken. It was not a ‘pro-active’ step by the legislature but a reactive one, a point that will be examined in greater detail in Chapter Four.

If legislation is, in some instances, reactive then it may also be the case that legislation will not implemented as soon as the need arises. Kahn-Freund makes this contention clear when he states that a change in the law ‘invariably occurs after a time-lag, which may have to be measured in centuries.’ This may provide an explanation as to why the majority of the provisions of the law of mortgage are contained in a statute introduced
over 70 years ago. The LPA 1925 was introduced at a time when mortgage finance was not used to any significant extent in the purchase of residential property, yet it continues to regulate the use of mortgage finance within the modern housing system.

It has already been indicated that the neutrality of legal norms and rules allow them to remain as law because they can be made to adapt to the needs of modern society. How then, is it possible to determine when the time has come for a change in the law, and in particular, is now the time for such reform? Renner contends that where the law no longer provides an accurate reflection of social relations and thereby ceases to be "an adequate expression of factual conditions" then it is necessary to undertake reform. It is only possible, therefore, to determine whether the law of mortgage is in need of reform by reference to its social function. If the provisions of the LPA 1925, for example, can no longer be used to satisfy the demands of the modern mortgage market then it must be reformed. Undertaking a comparison between pre-existing legislation and its social function is relatively easy, but how is it possible to determine the need for the introduction of legislation in areas not already covered by the law?

It may be that changes within society create new relationships or social problems which legislation failed to take account of at the time of its introduction. Taking an example from the law of mortgage, it is clear that in exercising the inherent right to possession, a mortgagee is not constrained by any legal requirements as to the standard of conduct to be employed. The changing nature of mortgage finance, with institutional mortgagees lending money to households to enable them to purchase a home, has created a situation in which mortgagees no longer wish to obtain possession as a right per se. As Fairest
notes, 'the traditional remedies and rights of the mortgagee have needed some re-adjustment to meet the changing social role of the mortgage.'

The need for re-adjustment is reflected in mortgage contracts, with terms stating that possession will not be sought until the mortgagor defaults in payment or breaches some other term of the mortgage contract. Smith argues that the law should be reformed to reflect this practice by ensuring that possession only becomes exercisable upon default. If the inherent right to possession no longer reflects the needs of mortgagees, should the law intervene to ensure that it is adopted as a means of enforcing the security as opposed to an unqualified right? It may be argued that it should only do so if the current position leads to difficulties within the social relations which exist within the current housing system. If the inherent right to possession, for example, is open to 'abuse' then it may be necessary to implement legal constraints on its use. The question as to whether the law of mortgage is in need of reform will be addressed in the final three chapters of this thesis.

3.9 Conclusions

The contention put forward at the beginning of this chapter was that a juridical analysis of the law can take us no further in understanding its material importance. It is only through an analysis of the content of the law, its origins and social function that such an understanding can be obtained. The validity of this contention is difficult to assess in the absence of an examination of these additional elements, this chapter has, however, indicated that it is necessary to undertake such an examination. This necessity derives
from the need to make reference to the origins and social function of the law in order to understand fully aspects of the juridical content of the law of mortgage.

In addition to supplementing the positive legal analysis of the law, an examination of the origins and social function of the law of mortgage is necessary in order to resolve a number of questions which have been evoked by the positive legal analysis of the law but which cannot be answered by reference to it alone. There are questions which relate to specific aspects of the law of mortgage, including, for example, what is considered to be a reasonable period for the purposes of s.36 of the AJA 1970? There are also questions which relate to more general issues, including who is representative of the typical mortgagor and mortgagee? Questions such as these can only be answered by reference to the operation of the law of mortgage within the social context, a task undertaken in the chapters that follow.

The examination of the content of the law of mortgage undertaken within this chapter was also intended to set out a number of ‘signposts’ to indicate the route of hypothetical development which will be undertaken in the following chapters. Although the aim of this chapter was to illustrate that the juridical analysis of the law, by itself, presents an incomplete picture of the law of mortgage, it was necessary to refer to aspects of its origins and social function in order to support aspects of the hypothesis. The contention, for example, that the normative purity of the legal device of the mortgage has allowed the function it serves within the social context to undergo radical change while it has remained static, required some reference to the origins and the social function of the law of mortgage. The aim of the following four chapters is to
expand upon these 'signposts', beginning with an analysis of the origins of the law of mortgage.
1 Renner, p. 54.
2 A task undertaken in Chapters Four to Seven.
4 Kahn-Freund, pp. 1 - 3.
5 Kahn-Freund, p. 4.
7 (1899) 2 Ch 474.
8 Santley v Wilde [1899] 2 Ch 474 per Lindley L.J.
9 Kahn-Freund, pp. 2 - 3.
10 See Fairest, op. cit. n. 3.
11 DETR Housing: Key Facts at www.housing.detr.gov.uk/information/keyfacts/index.html. See also Gray, p. 931.
12 Prior to the twentieth century, the legal device of the mortgage was more commonly used to service debts, see Chapter Four.
13 Whilst the LPA 1925 introduced changes to the legal device of the mortgage, this thesis will contend at pp. 169 - 173 that, in practice, it achieved little in the way of reform.
14 This issue is discussed in more detail in Chapter Five.
15 Burn, op. cit. n. 3, p. 657. See also Fairest, op. cit. n. 3, p. 4.
16 Burn, op. cit. n. 3, p. 658.
17 Fairest, op. cit. n. 3, p. 4.
19 The mortgagee’s proprietary interest will be potentially enforceable against third parties.
20 The LPA 1925.
21 The LPA 1925, s.87(1).
22 ibid.
23 See Fairest, op. cit. n. 3, p. 13 and Gray, p. 939.
24 The LPA 1925, s.87(1).
25 The distinction between a legal and equitable mortgage is significant in relation to the rights and remedies which the equitable mortgagee may claim, see p. 128 and n. 80 below.
26 Unless made by will, the mortgage must be made in writing by virtue of s.53(1)(c) of the LPA 1925.
27 (1882) 21 Ch D 9, the doctrine states that equity ‘looks on that as done that which ought to have been done’.
28 This will also be the case where an owner of a legal estate in land attempts to create a mortgage but fails to comply with the formalities established by ss.85 and 86 of the LPA 1925.
30 Russel v Russel (1783) 1 Bro. CC 269.
31 An equitable mortgagee is in a less privileged position than a legal mortgagee, see p. 128 and n. 80 below.
32 See the LPA 1925, s.108(1).
33 In strict legal terms, this is a ‘right’ as opposed to a ‘remedy’ and can, therefore, be invoked regardless of the date for redemption or default on the part of the mortgagor, see p. 132.
34 The LPA 1925, s.101.
35 Fairest, op. cit. n. 3, p. 9.
36 Ford, J. ‘As Safe as Houses?’ in Goodwin, J. and Grant, C. Built to Last? Reflections on British Housing Policy (Shelter: London, 1997) p. 188.
37 The complexities of the interest rate and its relationship with the economy generally are beyond the scope of this chapter.
38 Gray, p. 959.
39 Knightsbridge Estates Trust Ltd. v Byrne [1939] Ch 441 at 457.
41 SI 1994/3159.
43 The UTCCR 1994, para. 3(1).
44 The UTCCR 1994, para. 5(1).
45 The UTCCR 1994, para. 4(1).
46 The UTCCR 1994, schedule 2.
48 Stewart, *op. cit.* n. 40, p. 47.
51 Stewart, *op. cit.* n. 40, p. 46.
52 The protection afforded by s.36 of the AJA 1970 is discussed at a later point in this chapter.
53 The LPA 1925, s.101(iii).
54 Technically, this may be considered a ‘right’ as opposed to a ‘remedy’.
55 The LPA 1925, s.101(i).
56 The LPA 1925, ss.88(2) and 89(2).
57 See Gray, p. 1028.
59 The LPA 1925, s.101(i) and (iii).
60 Fairest, *op. cit.* n. 3, p. 74. A mortgagee may, however, be prevented from exercising a remedy where the debt has been repaid but the security cannot be returned or where the mortgagor has been adjudged bankrupt, see s.285(1) Insolvency Act 1986.
61 An action on the mortgagor’s covenant for payment of the principal money secured by the mortgage may not be brought after twelve years from the date when the cause of action accrued if the mortgage is by deed, s.8(1) of the Limitation Act 1980, or after six years if the mortgage is not by deed, s.5 of the Limitation Act 1980.
62 Fairest, *op. cit.* n. 3, pp. 75 - 76.
63 See Gray, pp. 1031 – 1032.
64 The LPA s.196 establishes requirements as to the type of notice and the method by which it should be served.
65 Fairest, *op. cit.* n. 3, p. 94.
66 *ibid.* p. 95.
67 The LPA 1925, s.101(4).
68 Gray, p. 1008.
69 Building Societies Act 1986, s.13(7), sch. 4, para. 1(1)(a), (2).
70 [1971] Ch 949.
71 *ibid.* at 968H - 969A.
73 *ibid.* at 54.
76 The response of the courts to such an application is examined in Chapter Seven.
77 The mortgagee is not, however, a trustee on behalf of the mortgagor.
79 See Gray, pp. 990 – 991.
80 The inherent right to possession derives from the legal estate granted to the mortgagee. An equitable mortgagee, therefore, does not have such a right. In order to gain possession, an equitable mortgagee must make specific provision in the mortgage deed or seek an order for possession in the courts.
81 [1957] Ch 317.
82 *ibid.* at 320.
The right of a mortgagee to bring an action for possession will be barred twelve years after the right of action accrued, Limitation Act 1980, s.15. Where there is a provision that allows the mortgagor to enjoy possession until default, time does not begin to run until such default.


Arguments in respect of the imposition of a requirement of due process as a result of the introduction of s.36 of the AJA 1970 are discussed later in this chapter.

Quennell v Maltby [1979] 1 All ER 318 at 322G-H, per Lord Denning.

See Gray, p. 990, Haley, op. cit. n. 89, p. 488 and Smith, op. cit. n. 78, p. 268.

Birch v Wright (1786) 1 Term Rep 378 at 383.

Jolly v Arbuthnot (1859) 4 De G & J 224 at 236.

Palk v Mortgage Services Funding Pte. [1993] 2 WLR 415 at 421A, per Nicholls V-C.

Criminal Law Act 1977, s.6.

Criminal Law Act 1977, s.6(4).

[1962] Ch 883.

Hansard, Commons, Vol. 795, col. 458, the Attorney-General, Sir Elwyn Jones.

Tyler, op. cit. n. 3, p. 333.

Smith, op. cit. n. 78, p. 281.


Gray, p. 997.

The County Courts Act 1984, s.21(3) has been amended to require that all actions for possession of land, which includes a dwelling-house outside Greater London by a mortgagee, must be brought in the County Court. The appropriate County Court is the one for the district in which the land is situated, County Court Rules 1981, Ord. 4, r 3.

[1973] 2 All ER 33.

ibid.


[1985] 2 All ER 254.

Bank of Scotland v Grimes [1985] 2 All ER 254 at 259.

See Citibank Trust Ltd. v Ayivor [1987] 3 All ER 241.

SI 1993/2175.


Habib Bank Ltd. v Tailor [1982] 1 WLR 1218.


A matter discussed in more detail in Chapters Seven and Eight.

Detillio v Gale (1802) 7 Ves 583.

(1890) 25 QBD 176, at 181.

Smith v Green (1844) 1 Coll 555 at 564.

Kahn-Freund, p. 6.

See Fairrest, op. cit. n. 3, p. 1.

See pp. 164 – 166 and 324 – 325.

[1962] Ch 883.

Kahn-Freund, p. 4.

Kahn-Freund, p. 4.

Fairrest, op. cit. n. 3, p. 72.

Smith, op. cit. n. 78, p. 284. A similar recommendation has also been proposed by the Law Commission, op. cit. n. 88.
CHAPTER FOUR

4.1 Introduction

'A modern mortgage, and particularly some of its terminology, can only be understood in the light of the history of mortgages.'

The English law of mortgage has evolved over a number of centuries, as Simpson notes, 'Pledges of land as security for a debt are very ancient; they are found in Anglo-Saxon times and in Domesday Book.' The origins of many of the legal concepts and principles relating to the legal device of the mortgage, which persist today, can be traced back to the early sixteenth century. In order to understand fully, therefore, how the law of mortgage came to take the form that it currently possesses, some knowledge of its historical development is required. It is the aim of this chapter to provide an account of the origins of the law of mortgage. The purpose, which this account intends to serve, however, extends beyond merely surveying the historical development of the legal framework, for it also intends to inform the hypothesis which forms the focus of this research study.

One aspect of that hypothesis is that a legal norm can remain static whilst its social function undergoes a radical transformation. It is only possible to test this hypothesis by examining and comparing a legal norm and its social function at different chronological stages. In seeking to achieve this task regard has been had to some of the literature currently available relating to the history of land law. The information gathered as a
result of the review of this literature suggests that the juridical content of the law of mortgage has remained relatively unchanged for a number of centuries. In order to discover whether the social function of the law of mortgage has also been subject to transition, the information provided in this chapter, relating to the social function of the law of mortgage prior to 1979, will serve as a point of comparison with the examination of the current social function undertaken in the chapters which follow.

In order to test other aspects of the hypothesis, reference will be made to information gathered from both primary and secondary sources. The use of primary data will be particularly apparent in relation to the contention that legislation is often introduced after the need for change has arisen within the social context. The principal legal instrument regulating the mortgage device is the Law of Property Act 1925 (LPA 1925). In order to determine whether this, and other relevant statutory provisions, were introduced as a result of changes which had already occurred within the social context, it is necessary to have some comprehension of the reasons which led to their introduction. The information relating to this issue, obtained from secondary sources, will be supplemented by reference to primary data, including parliamentary debates and government publications.

The primary data obtained for the purposes of this chapter will also be used to inform and support claims made in relation to the social function of the law of mortgage. The relationship between social change and the reform of legal institutions is considered by Renner to be an intrinsic one. Central to his thesis, however, is the assertion that changes in the social context do not lead automatically to a change in the content of legal institutions. The time which expires between the need for legal reform arising and
being undertaken has significant implications in relation to the content of legal norms, as Kahn-Freund notes, ‘during this time-lag norms which, at an earlier period of history, may have been a true mirror of social relations, may cease to be an adequate expression of factual conditions.’ With the principal statute of the law of mortgage having been enacted over 70 years ago, it appears valid to question the extent to which the LPA 1925 continues to ‘be an adequate expression of factual conditions.’

It may prove possible to answer this question by reference to the explicit objectives that underpinned the introduction of legislation relevant to the law of mortgage, including the LPA 1925. If those who introduced it intended it to serve a particular function within society at that time, and modern society still requires that function to be served, then it may be possible to argue that the legislation continues to be a ‘true mirror of social relations.’ It may be the case that the social function of the LPA 1925 has changed beyond all recognition since its introduction, and yet it has been adapted to meet that change without the need for any alteration in its content. A third scenario is that the social function has changed, but the LPA 1925 is unable in its current form to serve that function. In order to determine which scenario best describes the development and current position of the law of mortgage, it is necessary to compare the explicit objectives which the legislation was intended to achieve at the time it was introduced, and the objectives which the same legislation is intended to serve within the current housing system. This chapter examines the former of these issues, with the latter being examined in Chapter Five.

The examination undertaken in this chapter is divided into two distinct sections. The first examines the historical development of the law of mortgage prior to the
fundamental property reforms of 1925. The second is concerned with the changes that occurred during the period 1926 - 1979. This division may seem a little unbalanced when one considers that pledges of land have been in evidence since the tenth century. The aim of this chapter, however, is to examine those aspects of the historical development of the law which had, or which continue to have, a significant impact upon the current law of mortgage. As the law of mortgage is constituted principally by legislation introduced after 1926, the contents of these two parts should be relatively equal.

The decision to set the boundaries of the examination of the origins of the law of mortgage to those events that took place prior to 1979 is in recognition of the fundamental changes implemented after that date by the Conservative governments. One of the aims, which this chapter seeks to achieve, is to provide information relating to the social function of the law of mortgage at different chronological stages so that it can be compared with an examination of the current social function in order to identify whether any change has taken place. This thesis contends that the current social function of the law of mortgage was formed during the eighteen years of Conservative government. An examination of the period during 1979 - 1997 is, therefore, undertaken in the following chapter.

4.2 The position prior to 1925

The transference of an interest in property as security for a debt has been a feature of the English property system for at least eleven centuries. The form that the current
mortgage device now assumes, however, began to take shape in the early sixteenth century with the introduction of the ‘classical common law’ mortgage.\(^6\) This involved the conveyance of the mortgagor’s lands outright in fee simple to the mortgagee, with a covenant for re-conveyance if the debt was re-paid on time.\(^7\) This ingenious manipulation of existing estates in land, by sixteenth century conveyancers, established a mortgage device that was to remain in popular use until the early 1920s.\(^8\) The ability to utilise this legal norm for nearly five centuries and, as will be shown below, it did not change significantly in the reforms of 1925, gives credence to Renner’s contention that legal norms can retain the same meaning from one decade, or even one century, to another.\(^9\)

While its form remained unchanged during these five centuries, namely that a mortgage involved the conveyance of an ownership interest in land as security for a debt, the classical common law mortgage witnessed radical changes in terms of the manner in which it was interpreted and enforced by the judiciary. A review of the historical development of judicial attitudes towards the legal device of the mortgage serves as an example of the judiciary’s ability to alter the social meaning afforded to legal norms.

The development of the law of mortgage between the sixteenth and late nineteenth centuries was characterised by the conflicting views adopted by the Courts of the Common Law and Equity in relation to the mortgage transaction,\(^10\) as Digby notes, ‘when the jurisdiction of the Chancellor was firmly established, the rights and duties of a mortgagor and mortgagee recognised by Equity became wholly different from those recognised by Law.’\(^11\) Having no statutory recognition, the classical common law mortgage was viewed purely as a private contractual arrangement between the
mortgagor and mortgagee. It is not surprising, therefore, as Simpson notes, that the
Common Law Courts adopted a purely formal interpretation of the agreement,

The common law courts construed mortgage transactions strictly and
unsympathetically. If the mortgage provided that the mortgagor was to lose his land
through defaulting in payment upon a fixed day then that was that; it mattered
nothing that he defaulted by a single day, or that the property was worth infinitely
more than the debt.12

The strict approach adopted by the Common Law Courts was as a natural consequence
of the estate conveyed to the mortgagee by virtue of the mortgage transaction.13 At law,
the mortgagee was the absolute owner of the property,14 constrained only by the duty to
reconvey the land should the mortgagor repay the debt on the date stipulated by the
mortgage contract. As absolute owner, the mortgagee was entitled to exercise all of the
rights usually associated with such ownership. A mortgagee was, therefore, entitled to
possession of the land and to exercise discretion to sell the land.15 If the mortgagor
failed to repay by the stipulated date, the mortgagee merely retained ownership of the
property.

In contrast to the narrow interpretation of the mortgage agreement taken by the
Common Law Courts, the Courts of Equity developed a number of principles which
continue to impact upon the current law of mortgage. The factor which most offended
against the sensibilities of the Courts of Equity was the strict application of the legal
date for redemption. The consequences that flowed from the mortgagor's inability to
repay the debt on a specified day were considered to be disproportionate to the effect of
repayment occurring some time after that date. The Courts of Equity, therefore, began, in the mid-sixteenth century, to allow the mortgagor to repay the debt after the legal date for redemption had passed in circumstances where the mortgagor had been prevented from meeting the deadline due to factors beyond their control, for example, where the money had been stolen. By the mid-seventeenth century, the mortgagor was no longer required to indicate any special form of hardship for the Chancery was now routinely willing to deny the mortgagee's claim to the land.

The extent to which the Courts of Equity were willing to intervene in the contractual relationship between mortgagor and mortgagee increased during the following centuries and reflected a more 'realistic' view of the mortgage contract. Unlike the Common Law Courts, the Courts of Equity looked to the substance rather than the form of the mortgage transaction. They did not, therefore, view the contract as a means of transferring ownership to the mortgagee but purely as security for a debt; the mortgagee's interest was considered to lie, not in the ownership of the land, but in the recovery of the loan monies. The mortgagee was considered by the Courts of Equity to be entitled to enforce the security but not to exercise the entitlements that were normally associated with absolute ownership of land.

In viewing the transference of ownership to the mortgagee as being undertaken for the sole purpose of serving as security for the debt, the Courts of Equity raised an assumption that the principal concern of the mortgagee was to ensure that the debt was repaid, and not to obtain ownership in itself. The continued intervention of the Courts of Equity, during the sixteenth and seventeenth century, developed in line with this reasoning. In particular, the Courts of Equity came to view the mortgagor and not the
mortgagee as the true owner of the secured property. It was clear, however, that at common law, the mortgagee was the owner of the property allowing the mortgagor an equitable interest only, as Maitland notes, 'In the eye of the Court of the Common Law the mortgagee was already owner of the land: nothing that such a court could do would make him more of an owner than he was.'

This did not deter the Courts of Equity from viewing the mortgagor as the owner and in consequence the mortgagor was afforded an interest in the property which was equivalent to absolute ownership subject only to the mortgage. This interest became known as the mortgagor's 'equity of redemption', which Simpson describes as, 'a peculiar form of property which could be dealt with by the debtor like other forms of equitable property.'

The foundations of the 'equity of redemption' are to be found in the equitable relief granted to mortgagors who wished to be able to repay the mortgage debt after the legal date for redemption had passed. During the mid-sixteenth century this protection was only afforded to mortgagors where they had been prevented from paying on the date fixed for repayment by circumstances beyond their control, whereas, by the beginning of the eighteenth century, the 'equity of redemption' had been developed to the extent that it represented the mortgagor's proprietary interest in the land.

In attempting to restrict the rights of the mortgagee, the Courts of Equity were unable to constrain the exercise of the mortgagee's right to possession, for this was a matter for the common law. In response, the Courts of Equity proceeded by an indirect route, imposing onerous duties upon a mortgagee in possession, including the duty to account
for any excess profits received or damage caused to the property. The imposition of onerous duties upon a mortgagee in possession led to a change in the social function of the legal device of the mortgage. This change was initiated by mortgagees, who altered the terms of mortgage contracts so as to allow the mortgagor to remain in possession of the secured property. This reluctance on the part of mortgagees to retain possession of the mortgaged property represented the beginning of a process of change that has led, ultimately, to the creation of the current social function of the law of mortgage. Whilst mortgagees initiated the process of change, it was the Courts of Equity who ensured that it maintained its momentum.

The justification for this degree of interference by the Courts of Equity in the contractual relationship between a mortgagor and mortgagee was founded upon a belief that mortgagors were vulnerable to the demands of the mortgagee. Prior to the late nineteenth century, the legal device of the mortgage was utilised either by merchants as the means of obtaining financial support, or by the poor as the means of obtaining funds which could be used to alleviate their financial difficulties. Mortgagors would use their already acquired property, usually farmland or chattels, to serve as security for the purposes of the mortgage.

It was the aspect of ‘need’ in relation to these mortgagors which led Lord Henley LC to note that, ‘necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.’ The mortgagor was seen as an individual who was vulnerable to the demands of the mortgagee who, unlike current mortgagees, was also likely to be an individual. It was considered to be the role of the Courts of Equity, therefore, to protect mortgagors who
were party to a contractual agreement in which the balance of power weighed firmly in favour of the mortgagee. As Haley notes, the history of judicial intervention,

[has been marked by the uneasy interaction between the 
\textit{laissez-faire} attitude of the common law (which upheld the lender's contract and estate rights) and the more protective and tender treatment of the mortgagor in equity (which, in appropriate cases, sought to restrict the exercise of those rights).]

This increase in the protection afforded by the Courts of Equity to the mortgagor within the mortgage relationship resulted in an equivalent loss of power for the mortgagee. If the mortgagee wished to extinguish the mortgagor's 'equity of redemption', for example, by selling the property, the Courts of Equity would only allow this to take place if they considered it reasonable to grant a decree of foreclosure. The mortgagee's ability to sell the secured property was, therefore, often restricted by injunction granted by the Courts of Equity.

The transformation of the position of the mortgagee from one of absolute owner to one of secured creditor necessitated an alteration in the mortgage relationship and the social function of the law of mortgage. The loss of the absolute rights of ownership, apart from the right to possession which was retained by the mortgagee, were compensated for by the incorporation of terms within mortgage contracts which would allow for the sale of the secured property where the debt had become due and the mortgagor had fallen into arrears in payment. This alteration in the social function of the law of mortgage poses a strong challenge to the claim propounded by Renner that legal change often only occurs after a change in the social context. In relation to this aspect of the
law of mortgage, the reverse has taken place; the Courts of Equity altered the juridical content of the law which ultimately led to a change in the social function.

This challenge can be rebutted to some extent by reference to Renner’s concern with a codified system of law. In failing to take account of the ability on the part of the judiciary within a common law system to alter the juridical content of the law, Renner’s theory becomes of limited value in seeking to explain the relationship between the law and its social function. It would be difficult in relation to this issue to classify the interventionist role adopted by the Courts of Equity as part of the social function of the law of mortgage for the reason that they clearly altered its juridical content. Despite this fundamental problem in relation to Renner’s theory, his work continues to have some relevance in relation to ‘written law’, as indicated by the following example.

The approach, adopted by conveyancers, whereby the mortgage contract afforded mortgagees with a power of sale was given legislative approval in the Conveyancing Act 1881 which stated that, where the mortgage was made by deed, the mortgagee as soon as the debt had become due may sell the secured property. This power of sale was, however, restricted to circumstances in which,

(a) notice had been given to pay off the debt and default has been made in so doing for three months after the notice, or (b) some interest is in arrear for two months, or (c) there has been a breach of some provision ....

The introduction of the Conveyancing Act 1881 was, to some extent, a recognition by Parliament of the changing nature of mortgage finance, a factor recognised by the
Courts of Equity at a much earlier stage. During the sixteenth century, mortgage finance had been utilised by the characteristically ‘needy’ individual who, as a last resort, turned to mortgage finance to assist with financial difficulties. By the end of the nineteenth century, mortgage finance was becoming popular as a means of purchasing land by the more affluent working class, as Haley notes,

> As owner-occupation by those of modest incomes increased ... the nature and role of the mortgage in society changed. Advances by private individuals secured on investment property (such as farms and development estates) became less common; most mortgages were granted by institutional lenders on the security of the mortgagor’s home.\(^{34}\)

The reform of the law of mortgage had proved necessary in order to meet the changing needs of society. In support of Renner’s contention, that legal reform is only undertaken after changes in society have already occurred, the Conveyancing Act 1881 merely gave statutory approval to a practice previously adopted by mortgagees. This aspect of the law of mortgage would also appear to support Kahn-Freund’s proposition that the judiciary will alter the manner in which the law is interpreted and implemented in line with what is expedient for the community. The power of sale given to mortgagees by virtue of the Conveyancing Act 1881, removed the need to obtain an order for foreclosure prior to sale and consequently detached the supervision of the courts in respect of this matter. In interpreting the provision relating to the power of sale, contained in the 1881 Act, however, the courts reinstated their supervisory role.

The concern of the courts was to ensure that the mortgagee abided by fair and equitable principles when exercising the power of sale. The Act of 1881 did not establish criteria
relating to the standard of conduct to be adhered to by the mortgagee in exercising that
power. The courts, however, expected at least a minimal degree of equitable dealing on
the part of the mortgagee, particularly for the reason that mortgage finance was now
being used to purchase residential property. The mortgagor, therefore, stood to lose,
not merely a financial asset, but a home.  

In more specific terms, the duties of the selling mortgagee came to be categorised by
two requirements, one of which was ‘subjective’ and the other ‘objective’. The first
centered the requirement of ‘good faith’ which implied that the mortgagee should not
deal, ‘wilfully and recklessly ... with the property in such a manner that the interests of
the mortgagor are sacrificed.’ This subjective test prohibited the mortgagee from
acting in collusion with the purchaser or in any other fraudulent manner. This limited
requirement of ‘good faith’, established in the late nineteenth century, was
supplemented by an objective criterion of ‘reasonableness’. The Privy Council in

McHugh v. Union Bank of Canada, 37 defined the objective criterion thus,

It is his duty to behave in conducting the realisation of the mortgaged property as a reasonable
man would behave in the realisation of his own property, so that the borrower may receive
credit for the fair value of the property sold. 38

The subjective and objective criteria, in relation to the duties imposed upon a selling
mortgagee, remain as part of the current law of mortgage. The conduct expected of a
mortgagee by virtue of the imposition of these duties includes, the taking of reasonable
care in ascertaining the value of the property and ensuring that there is no conflict of
interest. 39 Ultimately, the standard of conduct expected of the mortgagee is interpreted
in a negative manner; that is, the mortgagee is expected to refrain from acting unreasonably, negligently or fraudulently. The reluctance on the part of the judiciary to intervene substantially in the selling process, except where there was clear evidence of ‘unacceptable’ behaviour on the part of the mortgagee, was indicative of the approach adopted by the courts during the nineteenth century.

The ‘paternalistic’ approach once adopted by the Courts of Equity towards the mortgagor was gradually eroded during the nineteenth century by a belief in the principle of ‘freedom of contract’. This transformation in judicial attitudes towards the mortgage relationship may have been due to the changes witnessed in the use made of the legal device of the mortgage. Atiyah, however, offers a different explanation,

During the nineteenth century, paternalistic ideas waned, as the philosophy of *laissez-faire* took root. Most educated people, including the judges, took *laissez-faire* to mean that the law should interfere with people as little as possible.\(^{40}\)

This belief in the ‘sanctity of contract’\(^{41}\) which gained prominence in the nineteenth century continues to inform much of the current law of mortgage. As was indicated in Chapter Three, the imposition of procedural requirements by the law of mortgage is preferred over and above any substantive interference in the contractual relationship between a mortgagor and mortgagee. The extent to which current judicial attitudes continue to reflect this adherence to the principle of freedom of contract will be examined in Chapter Seven. The important point to note in relation to this transformation in the approach adopted by the judiciary is that it increases the relevance of using Renner’s theory as a means of gaining a deeper understanding of the law of
mortgage. The reluctance on the part of the judiciary since the nineteenth century to alter significantly the juridical content of the law of mortgage, preferring instead to exercise its power to interpret and implement legislation alone, allows for the classification of the current role of the judiciary as part of the social function of the law of mortgage within Renner's terminology.

The examination of the development of the law of mortgage between the sixteenth and early twentieth centuries highlights two recurrent themes. The first relates to the contractual nature of the mortgage. Until 1925, English land law did not recognise the mortgage, it was simply a conveyancing device which formed the subject of a privately negotiated contract. As such, the parties were free to negotiate the terms of their contract and, according to the rules of common law, were bound by them.

The second theme concerns the transformation in the approach adopted by the judiciary towards the mortgage relationship. During the early sixteenth century, the harsh edges of the approach adopted by the Courts of the Common Law were gradually softened by the intervention of the Courts of Equity. This intervention was, in the main, undertaken so as to protect the mortgagor. The power exerted by those who had sufficient funds to lend to those in need was gradually eroded by the imposition of equitable principles that sort to achieve a balance between the interests of the parties to the mortgage. The interventionist role once adopted by the Courts of Equity was, however, rejected by the judiciary in the nineteenth century with preference being shown towards the principle of freedom of contract.
The intervention of the Courts of Equity highlights the deficiencies apparent within the work of Renner, suggesting as it does that the courts have the ability to alter the juridical content of the law of mortgage so as to effect change in its social function. An examination of the current law of mortgage undertaken in Chapter Three, however, indicates that some of the principles established by the Courts of Equity in the sixteenth century and in particular, the mortgagor’s ‘equity of redemption’, have been maintained. The principle of contractual freedom, adopted by the courts during the nineteenth century also appears to influence significantly the current law of mortgage. The capacity for judge-made law to remain stable over many years, therefore, appears to be in evidence, increasing the relevance of Renner’s work. The extent to which legislation indicates a similar capacity will be examined below.

4.3 Post 1925

The piecemeal introduction of equitable principles during the centuries preceding the early 1920s, combined with the contradictory rules of the common law, had resulted in a mortgage device that was complex and artificial. As Maitland notes, the legal device of the mortgage, ‘does not in the least explain the rights of the parties; it suggests that they are other than they really are.’ This was particularly the case in relation to the mode of creation of the mortgage. The transference of the fee simple or leasehold estate to the mortgagee appeared to grant absolute ownership and yet, according to the principles of equity, it was the mortgagor who was perceived as the owner. It was both the change in the use made of mortgage finance and the complex state of the law which led to the fundamental reforms undertaken in 1925.
4.3.1 The Law of Property Act 1925

The property legislation of 1925 attempted the most comprehensive and significant reforms of the English property system ever witnessed. Aspects of this legislation, particularly the LPA 1925, continue to impact upon the current mortgage transaction. The enduring quality of the LPA 1925 was recognised by Lord Birkenhead, the then Lord Chancellor, in the early stages of its passage through Parliament.

The Bill touches great interests, and if it should pass into law will effect very far-reaching and, as I believe, very valuable changes which will have their effect for years to come, and indeed for all time, upon the system of the holding and the conveying of property in this country.\(^{45}\)

The extent to which legislation, such as the LPA 1925, is able to effect change within the social context is challenged by Renner. His claim, that the introduction of legislation is often undertaken in response to changes that have already occurred within the social context, suggests that legislation is often not the cause of change but merely a reaction to it.\(^{46}\) An examination of the reasons underpinning the introduction of the LPA 1925 suggests that this contention is correct in relation to aspects of the law of mortgage, for its introduction merely gave statutory recognition to the principles developed by the Courts of Equity during the preceding centuries, as Fairest suggests, ‘the Act in general only codifies principles already established at common law.’\(^{47}\)
In particular, the LPA 1925 was designed to ensure that the mortgagor, and not the mortgagee, was viewed as the owner of the secured property. The tension that had existed between the Courts of Common Law and Equity and the complexity that had arisen as a result was to be removed. As the Solicitor-General, Sir Leslie Scott, noted in 1922,

Legal mortgages are to-day generally effected by conveying this legal estate to the mortgagee. This is in reality a legal fiction; in equity, as in business, a mortgage is nothing more than a charge for which the land is used as a security.48

The means by which this reform was to be achieved involved the introduction of new modes of creation for the legal device of the mortgage. Rather than the conveyance of the fee simple to the mortgagee, a mortgage would be created, in relation to freehold land, by granting a long leasehold term to the mortgagee or in the case of leasehold land, by the execution of a subdemise, rather than by assignment. By these methods the fee simple or leasehold estate would remain with the mortgagor until possession was taken or the security was realised.49

The aim in relation to this aspect of the mortgage relationship was not to alter the substantive interests of the parties but to simplify the position that existed prior to the legislation. According to the rules of equity, the mortgagor was to be viewed as the owner of the secured property, and the mortgagee was to be viewed as a secured creditor; the LPA 1925 merely ensured that this approach was given legislative approval. It is possible to argue, therefore, that the LPA 1925 did not initiate change within the social context, but merely reacted to it. This contention is supported by
reference to the mortgagee’s power of sale. The LPA 1925 maintained the position that existed previously in relation to the power of sale, consolidating the provisions contained in the Conveyancing Act 1881. Maitland recognises the latent nature of the LPA 1925 when he notes that, ‘This change in the form of mortgages is often treated as an important alteration in the law and in theory perhaps it is. In practice it has probably made no substantial difference.’

While the simplification of a pre-existing transaction may not effect substantial change, it can prove to be indicative of a general policy objective. Marsh defines such policies as ‘symbolic’, ‘some policies have a symbolic purpose and their objective is to demonstrate that action is being taken, rather than that the issue or problem is being addressed seriously.’ In relation to the LPA 1925, that objective was to increase the opportunity for the purchase of land and particularly the purchase of a home, as Lord Buckmaster noted during the discussion of the LPA 1925 in the House of Lords,

We want to make land transfer as simple and as cheap as possible, believing that by so doing we are serving the best interests of the State, and particularly the interests of the small holder whom it is to the advantage of the State to multiply by every means in its power.

This statement suggests that the social function of the law of mortgage was undergoing a transformation. Its function was no longer to assist the poor with their financial difficulties, but to assist wealthier individuals in the purchase of residential property. It would appear that the LPA 1925 was introduced in order to sustain this transformation. According to Renner’s hypothesis, however, the content of the law and its social function are separate, so that one cannot influence the other. This apparent
contradiction can be explained, for it is possible to argue that the LPA 1925 did not significantly alter the content of the law of mortgage. An overview of the LPA 1925 suggests that despite its reputation as a statute that effected great change, it did not significantly alter the mortgage transaction.\textsuperscript{53} Without doubt, the introduction of new modes of creation for the mortgage device made the transaction much less complex but, as Maitland notes, ‘Questions of foreclosure, redemption, sale by the mortgage and the like are all substantially unaltered by the change.’\textsuperscript{54} It seems reasonable to assume, therefore, that the LPA 1925, in failing to effect substantive legal reform, did not have any significant influence in respect of the social function of the law of mortgage.

In addition to questions of foreclosure, redemption and sale, other aspects of the law of mortgage also remained untouched by the LPA 1925. The mortgage transaction was still perceived as a private contractual arrangement in which the parties were free to negotiate their own terms. The inherent right to possession, which derived from the pre-1925 mode of creating a mortgage, remained intact, with no regulation being introduced as regards the exercise of that right.

In essence, the LPA 1925 was concerned more with form than with substance, as Fairest notes, ‘The property legislation of that year [1925] radically altered the form of a mortgage …’\textsuperscript{55} (Emphasis added). Its underlying objective was to simplify the mortgage transaction without undertaking any substantial interference in the relationship between the mortgagor and mortgagee. The enduring nature of the LPA 1925 would appear to support the approach that was adopted within it. The objective of increasing the number of households who were able to purchase land was certainly achieved, although the extent of the role played by the LPA 1925 in achieving this is
questionable. It is more likely that the increased availability of building society funds exerted a much greater influence on the availability of home-ownership, as discussed in Chapter Five. The length of period over which a statute remains on the statute book does not necessarily vouch for its continued effectiveness or suitability. As Renner contends, legislation can cease to be ‘an adequate expression of factual conditions’ and yet remain as law. The extent to which the LPA 1925 reflects the needs of modern society will be examined in Chapters Six and Seven.

4.3.2 The Administration of Justice Act 1970

The preservation of the mortgagee’s inherent right to possession in its original form, by the LPA 1925, was followed by instances of ‘abuse’ in which mortgagees were obtaining immediate possession and, upon default, entering judgment for the mortgage monies, thereby obtaining both the land and the money. In response to this activity by mortgagees, the Supreme Court Rule Committee recommended, in 1935, that all actions for possession by a mortgagee be assigned to the Chancery Division, a recommendation implemented by 1937. The significance of this change of venue concerned the ability of this court to adjourn cases and its willingness to afford the mortgagor a degree of protection. It became common practice, therefore, from the late 1930s until the early 1960s, for actions for possession to be adjourned so as to allow the mortgagor time to remedy any default, as Fairest notes, ‘In fact, the Chancery Masters … began to see their role in such a case as that of “a social worker rather than a judge”.'
The exercise of this discretion was brought to an end in 1962, following the case of 
*Birmingham Citizens Permanent Building Society v Gaunt,* and it was not until eight years later that this discretion was reinstated by the introduction of the Administration of Justice Act 1970 (AJA 1970). In a manner similar to the LPA 1925, the AJA 1970 is significant for the purposes of this thesis for it serves as a further example of the way in which legislation appears to respond to change rather than implement it.

The exercise of, what the courts believed to be, an inherent jurisdiction to postpone possession proceedings, so as to allow the mortgagor an opportunity of making good the default, was considered by Russell J in the case of *Caunt,* who found,

\[n\]o trace of such a jurisdiction, or of any jurisdiction in any court ... in relation to a legal mortgagee’s established right to possession which goes further than to adjourn for a short time in order that the mortgagor should have an opportunity to displace the mortgagee from his position by payment, or to compound with him.\[62\]

In response to this decision, the then Lord Chancellor, The Rt. hon. Lord Gardiner, requested that the Payne Committee, established to investigate the enforcement of judgment debts, consider the, ‘question whether the courts should have power to postpone the operation of an order for possession of mortgaged property.’\[63\] In relation to those terms of reference, the Committee concluded that the power exercised by the courts prior to the decision in *Caunt,* should be reinstated.

The Committee was keen to provide a degree of protection to a mortgagor in circumstances where the income or earnings received by the mortgagor had fallen
suddenly ‘through no fault of his own’. The reinstatement of the courts’ discretion to postpone an order for possession would provide such protection but the question remained as to the length of time within which the mortgagor should be allowed to remedy any default. In relation to this issue, the Committee concluded that in the majority of cases, six months would probably prove sufficient but that in order to account for exceptional circumstances, the courts would be left to exercise an unfettered discretion in determining the length for suspension or adjournment.65

During its investigation, the Payne Committee consulted with those involved in the mortgage transaction, including building societies. Following their deliberations, the proposal put forward by the Committee was rather lengthy and detailed but it is presented here for ease of reference,

[w]hen possession is sought under a mortgage of a dwelling-house having a rateable value which would bring it within the protection of the Rent Acts and the defendant is in arrear with any instalments, and it appears to the court that the defendant ought to be given opportunity to pay off the arrears of instalments or interest, or to have time to make arrangements to redeem the mortgage, or otherwise requires the protection of the court, the court should have a discretion to adjourn the application or, if an order or judgement for possession is, or has been, made, and not executed, to stay or suspend the execution of any such order or judgment or postpone the date of possession for such a period or periods as it thinks fit, subject to such conditions (if any) in regard to payment by the mortgagor of arrears as the court thinks fit, and, if such conditions are complied with, the court should have discretion to discharge or rescind any such order or judgment.66 (Emphasis added).
In allowing the court discretion to suspend a mortgagee's claim for possession, the intention of the Payne Committee was to ensure, 'that justice is done in every class of case.' In order to ensure that this was achieved, the Committee recommended that the courts' discretion should be exercised, 'judicially and with due regard to the interests of the mortgagee as well as the mortgagor and to the terms of the mortgage deed.'

In addition to the question of whether the court should have such discretion, the Payne Committee considered the question of the imposition of costs in relation to any action taken by the mortgagee in enforcing the security. In relation to this question, the Committee stated that,

[w]e should not recommend any change in the present practice, but should recognise that the right to add the costs to the security springs from the mortgage contract itself and ought not to be defeated by an order made in the action for possession.

The report of the Payne Committee was not published until seven years after the decision in Caunt, and it was not until 1970 that their recommendations were implemented by the AJA 1970. The proposals of the Payne Committee were adopted by the government of the time in Clause 28 of the Administration of Justice Bill 1969 (AJB 1969). By virtue of this clause, the government sought to implement the proposals of the Payne Committee in all respects but one, namely any reference to the 'rateable value' of the dwelling-house would be omitted. Lord Ilford suggested that this omission should be reconsidered for the reason that,
The effect of that recommendation would have been that all the houses with a rateable value above that to which the Rent Acts apply would not have been affected by the recommendations. There was no reason why they should be affected, because one does not encounter the same type of abuse in respect of that class of property.72

The Lord Chancellor defended the omission on the basis that all mortgagors deserved the protection afforded by the Bill. In particular, the Act was intended to afford mortgagors with a degree of protection against the activities of ‘unscrupulous’ mortgagees,

One is merely ensuring that somebody who ... is in the process of buying a house who owes some money on mortgage, is treated fairly. Whilst most building societies are very reputable and behave perfectly, there are a few, unfortunately, who sometimes do not.73

This reference to the different approaches adopted by building societies was indicative of the changes that were occurring in the nature of the housing system and the building society movement. During the 45 years between the introduction of the LPA 1925 and the AJA 1970, the number of mortgage advances granted by building societies for the purpose of purchasing residential property, had increased significantly, as Burnett notes, ‘In 1945 only 26 per cent of all houses in England and Wales were owner-occupied; by 1966 the proportion was 47 per cent and by 1973, 53 per cent.’74

The removal of the courts’ jurisdiction to grant relief to mortgagors would allow for the instances of abuse of the mortgagees’ rights, witnessed during the early part of the century, to recur. The promotion of an increase in home-ownership had been an objective of successive governments since 1925, it was not surprising, therefore, that
legislation was introduced to sanction the provision of at least some degree of protection to mortgagors.

The protective element of this legislation was intended to encompass all mortgagors, reference to the rateable value of the property secured under the mortgage was, therefore, not to be included in the legislation. This was not, however, the only question raised regarding the wording of Clause 28. During its consideration in Standing Committee, questions were raised regarding the length of time for suspension of the order for possession. Clause 28 stated that adjournment or suspension should be for a ‘reasonable period’, a term of reference unacceptable to some members of the Standing Committee due to its imprecise nature, as Percival MP noted, ‘I wonder whether “reasonable” is a better alternative. “Reasonable” in relation to what?’75 A proposal was made, therefore, that a fixed time limit should be imposed, the justification for which was made clear by Percival MP,

It is fair to say that what the Government should decide to do here is to hold a fair balance between everybody’s interests. We must not let ourselves be carried away by a desire to be too kind to people who find themselves in difficulty.76

This statement was indicative of a more generally held notion that mortgagors who were experiencing financial difficulties through no fault of their own were deserving of protection but that those who had merely been unable to deal adequately with their finances were not.77 The establishment of a fixed period during which the mortgagor would be required to remedy any default would ensure, it was believed, that ‘undeserving’ mortgagors would not receive protection. The Payne Committee had
recommended that such a distinction was inappropriate in relation to the reinstatement of the courts’ discretion to adjourn an order for possession. The rigidity that would be consequent upon a fixed limit for the period for suspension or adjournment was, therefore, considered to be inappropriate in relation to cases involving default under a mortgage. As the Attorney-General noted,

There can be no definiteness about a point of time in this matter. If a mortgagor, for instance, falls ill, it would be difficult for a court to determine precisely when he was likely to recover, so some latitude should be granted to the court to grant such period of time as it thinks reasonable.

The maintenance of the term ‘reasonable’ within the intended legislative provision fell into line with the government’s aim of providing a degree of protection to a mortgagor who was experiencing difficulties in meeting the terms of the mortgage. The extent of this protection was, however, a cause for concern for one member of the Standing Committee. Rossi, MP, considered that the courts’ discretion should be exercised sparingly and with caution otherwise,

...one can see a situation arising where the court will give a mortgagor more and more time, and that will simply put the mortgagor in greater financial difficulty because his indebtedness will merely continue to accumulate without his ever being able to discharge his obligations.

In order to allay such fears, an amendment was made to Clause 28 whereby the court would only be able to exercise its discretion where it was satisfied that the mortgagor would be able to pay any sums due within a reasonable period. The amendment was intended to ensure that the AJB 1969 satisfied the objective of assisting those
mortgagors who found themselves ‘temporarily in difficulty’. The extent to which such fears have been assuaged in practice will become clear in Chapter Seven of this thesis. Clause 28 of the AJB 1969 was introduced as s.36 of the AJA 1970, the objectives of which were set out by the Attorney General,

The Government have considered this matter very carefully, because it is imperative to maintain a balance between the interests of the mortgagor and the interests of the mortgagee. We think that the Clauses now contained in the Bill do achieve that balance, and do leave it to the court, in the exercise of its discretion, to see that the balance is maintained.

The origins of this provision can be found in the denial of the courts’ apparent discretion to postpone an order for possession. It may be considered ironic, therefore, that following the introduction of s.36 of the AJA 1970, the discretion of the court was again restricted, this time as a result of the wording of s.36. In the case of *Halifax Building Society v Clark*, Pennycuick V-C held that the discretion granted to the courts by the AJA 1970 could not be exercised in relation to the majority of possession cases.

The reasoning for this decision was that, contained in most mortgage contracts is a term, commonly known as a ‘default clause’, which, states that if the mortgagor fails to pay the required instalments, the whole mortgage debt becomes due. By virtue of s.36(1) of the AJA 1970, the court has to be convinced that the mortgagor can pay ‘any sums due’ within a reasonable period before the discretion to suspend the possession order can be exercised. A mortgagor would find it extremely difficult to convince the
court of their ability to repay this amount if the term 'any sums due' related to the entire mortgage debt. Pennycuick V-C decided that it did,

It occurred to me that, where s.36(1) refers to 'any sums due under the mortgage', the subsection might conceivably have been intended to mean any instalments due, in contradistinction to the entire redemption moneys, but again I think that is an impossible construction of the section.87

This decision appears to contradict Kahn-Freund's proposition that the judiciary interpret legislation in line with what is most expedient for the community. The introduction of s.36 of the AJA 1970 was intended to achieve a balance between the interests of the mortgagor and mortgagee by providing the mortgagor with a degree of protection. This judgment served to deny the protective import of s.36, thereby contradicting the intention of Parliament. It may be possible to explain this contradiction, however, by reference to the power of the judiciary to look to the intention of Parliament when interpreting legislation.

Prior to 1993, and the decision of the House of Lords in the case of Pepper (Inspector of Taxes) v Hart,88 the courts were prohibited from referring to parliamentary material to assist them in the interpretation of legislation. Pennycuick's decision in the case of Clark,89 was founded upon a literal definition of the terms used within s.36 of the AJA 1970 rather than an attempt to implement the objectives which Parliament had determined the AJA 1970 was intended to achieve. This case serves as an example of the difficulties which may be encountered as a result of reliance being placed upon the

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judiciary to ensure that legislation serves its intended function, a matter which will be returned to in the concluding chapter of this thesis.

The case of *Clark*,⁹⁰ can also be used to support the contention that the judiciary have played a significant role in maintaining the stability apparent within the juridical content of the law of mortgage. It has been suggested at an earlier point in this thesis,⁹¹ that the ability on the part of the judiciary to alter the social meaning of legal institutions may account for the lack of reform of the juridical content of the law of mortgage. The outcome of Pennycuick's decision in the case of *Clark*,⁹² validates this claim to some extent for, his refusal to interpret the legislation in line with the social function it was intended serve, led to the implementation of legislative reform. Had he adopted a different stance, legal reform would probably have proved unnecessary, thereby ensuring stability within the juridical content of the law of mortgage.

The need to implement legal reform so as to counteract the implications of the decision in *Clark*,⁹³ was recognised by the Conservative government who, in 1972, sought to reinstate the original objective of s.36 of the AJA 1970 through the introduction of the Administration of Justice Bill 1972 (AJB 1972). The Lord Chancellor, Lord Wilberforce, recommended the Bill to the House of Lords on the following basis,

> It was intended by the Payne Committee (until Vice-Chancellor Pennycuick decided that that was not achieved by the Act of 1970), that in fact the borrower could be protected either by successive adjournments or by other procedural devices if he kept up his payments, even though the whole capital sum - the whole pound of flesh - might have fallen due owing to the stringent form in which mortgages are drawn at law; and I still think that is right.⁹⁴
In order to reinstate the protective element of s.36 of the AJA 1970, the AJB 1972 redefined the meaning of 'any sums due' to ensure that it related only to the normal contractual payments and any arrears in payments owed by the mortgagor at the time of the hearing. This proposal was implemented in s.8 of the Administration of Justice Act 1973 (AJA 1973), the objective of which was recognised by Goulding J in *Centrax Trustees Ltd. v Ross*.

Parliament has attempted to give legislative shelter to a wide class of owner-occupiers, and it is unlikely that in what may be called social legislation of this sort Parliament intended an occupier’s situation to depend on distinctions in conveyancing. Therefore, in my opinion, notwithstanding that the Acts restrict the rights of lenders without giving compensation, the language used must receive a reasonably liberal interpretation.

It was apparent during the introduction of the AJA 1970 and AJA 1973 that the legislature considered that mortgagors were deserving of protection against the loss of their home, as the Lord Chancellor noted in 1972, it is 'in the best tradition of Lord Chancellors to protect borrowers who are in danger of losing possession under a mortgage.' The protective element of s.36 of the AJA 1970, however, does not extend to an ability on the part of the court or the mortgagor to challenge the mortgagee’s decision to initiate proceedings for a possession order. The right of the mortgagee to take physical possession of the mortgaged property, without reference to the court and the exercise of its discretion under s.36, also remains intact. This may be due, in part, to a concern on the part of Parliament to ensure that mortgagees continue to provide mortgage funds, as Gray notes,
In order that the flow of mortgage finance should be sustained, particularly for the purpose of facilitating home purchase, it is essential that certain safeguards and remedies be maintained on behalf of those who lend money on the security of real property.98

The enactment of both s.36 of the AJA 1970 and s.8 of the AJA 1973, although explicitly intended by Parliament to ‘maintain a balance between the interests of the mortgagor and the interests of the mortgagee’, can be viewed as an attempt to address wider community concerns. Despite appearing to serve as a compromise between the conflicting interests of an individual mortgagor and mortgagee, it may be possible to argue that s.36 of the AJA 1970 is founded upon an implicit assumption that it is in the interests of society generally to ensure that access to mortgage finance remains open and that home-owners receive a degree of protection in possession hearings.

The identification of the particular values which underpinned the enactment of s.36 of the AJA 1970 would appear to deny Renner’s contention that the juridical content of legal institutions is normatively pure. The language used within s.36 of the AJA 1970, however, makes no reference to such values and offers no guidance as to the aims it is intended to satisfy. In effect, this statutory provision operates as an ‘empty frame’, a contention supported by the decision of Pennycuick V-C in the case of Clark,99 where a literal interpretation of the section made no reference to the values which had informed its introduction. The vacuum created by the juridical content of this section may, however, be filled in by its operation within the social context. The manner in which this legislative provision is used within the social context will be guided by particular aims and values which, in turn, will inform the social meaning ascribed to it. It is only
possible to identify the significance of s.36 of the AJA 1970, in terms of its ability to satisfy such objectives, therefore, by reference to its social function, a task undertaken in the three chapters which follow.

Although it is not possible without further information to evaluate the extent to which the practical operation of s.36 of the AJA 1970 satisfies the needs of society, it is possible at this stage to contend that an account of the process by which that statutory provision was introduced, validates the contention examined within this thesis that legislation is often enacted as a reaction to social change. In terms similar to those identified in relation to the LPA 1925, the AJA 1970 was introduced so as to reinstate the jurisdiction, which the courts had wrongly believed to be available to them, to grant relief to a mortgagor faced with possession. It would appear, therefore, that the continual and sometimes imperceptible process of social change has necessitated the reform of some aspects of the juridical content of the law of mortgage and has also created a new and significant social function for mortgage finance.

4.4 Conclusions

The English law of mortgage serves as perhaps one of the best examples of a legal framework that remains heavily influenced by its origins. It would be difficult to gain an understanding of, for example, the mortgagor's 'equity of redemption' without reference to its historical development. The ability of these legal concepts and principles, established in the early sixteenth century, to persist through centuries of change is perhaps due to the static nature of the mortgage device itself. At its most
fundamental level, the mortgage device has remained unaltered, signifying the transfer of an interest in land as security for a debt, whether those utilising it operated in the sixteenth or twentieth century. The introduction of legislation has done little to alter the defining element of the mortgage. This is, however, not the only aspect of the mortgage relationship that has remained untouched during the last few centuries.

The law of mortgage is perhaps as notable for what it fails to regulate as for what it seeks to regulate. It is clear from this and the preceding chapter that the legal framework seeks to do little more than to impose certain procedures and formalities within the mortgage relationship. If a mortgage is to be created it must be done so according to the LPA 1925. If a mortgagee wishes to sell the secured property, the mortgage debt must have become due. Beyond these requirements, mortgagees appear to be free to exercise an unstructured discretion as regards who they may lend to, what terms they may impose upon them and when and how they may determine to seek possession. This is not to say that this approach is to be disapproved of. The imposition of procedural rules can in themselves facilitate substantive justice. The question is whether in practice they do. The answer to this question, in relation to the law of mortgage, is examined in Chapters Six and Seven.

This reluctance on the part of the legislature to intervene directly within the relationship between a mortgagor and mortgagee may be accounted for by reference to the origins of the legal device of the mortgage. From its earliest form, the mortgage device has always been categorised as a privately negotiated contractual agreement between a mortgagor and mortgagee. As Stewart contends, the mortgage device, ‘evolved at a time when the shining principles of freedom of contract and the sanctity of property
were in the ascendancy.\textsuperscript{100} The introduction of piecemeal legislation, such as the LPA 1925 and AJA 1970, was designed to soften some of the harsh edges of this contractual arrangement but ultimately, the substantive content of the legal device of the mortgage has been left untouched and remains a matter for the individual parties concerned.

Stewart contends that the contractual approach, which began to gain dominance in the late nineteenth century and which is now enshrined within the current law of mortgage, led to the denial of the protective supervision once shown by the Courts of Equity, so that, 'the flexible and interventionist approach to the mortgagor's position came to an end, never to be regained.'\textsuperscript{101} The belief once held by the courts that mortgagors, 'will submit to any terms that the crafty may impose upon them',\textsuperscript{102} appears to have been eroded by the development of new uses for the legal device of the mortgage. The growth witnessed in the use made of mortgage finance to fund the purchase of residential property has led to a new perspective on the mortgage form as, 'a commercial transaction negotiated between knowledgeable and equal parties on the terms which should be enforced.'\textsuperscript{103} The guiding tenet of the current law of mortgage as evidenced in this chapter and Chapter Three, therefore, appears to be reliance upon the principle of freedom of contract. Mortgagors and mortgagees are unrestrained in negotiating the terms of their mortgage contract and the mortgagee may even undertake a unilateral variation of the terms of that contract.

In relation to those aspects of the mortgage transaction which the law does seek to regulate, it is clear that the relevant legislation was introduced to deal with what we may call 'context specific' issues. The LPA 1925 was intended to give legislative support to the principles established by the Courts of Equity. In the same vein, the AJA
1970 was introduced to reinstate discretion previously enjoyed by the courts. In each case, therefore, it is possible to argue that Renner's contention that legislation is often only introduced after a time-lag has been proved in relation to the law of mortgage.

An examination of the introduction of s.36 of the AJA 1970 also serves to support a further contention posited by Renner, which is, that the juridical content of the law is normatively pure. It has been argued above, that this provision was intended by Parliament to support certain values and to achieve particular objectives but that the wording of it makes no reference to such factors. It may well be the case that, 30 years on since the introduction of s.36 of the AJA 1970, the objectives which it was intended to achieve at the time of its enactment are no longer relevant. This assumption appears to be supported by reference, in Chapter Five, to the fundamental transition which has been witnessed within the housing system in England and Wales since the introduction of both the LPA 1925 and the AJA 1970, and particularly since 1979. The normative purity of the language contained within relevant provisions, such as s.36 of the AJA 1970, should, however, according to Renner, allow for an alteration in the uses made of them and the values which inform their social meaning.

It may be assumed that responsibility for importing such values into this 'empty frame' rests, in large part, with the judiciary in the exercise of its ability to interpret and implement legislation. In turn, as Kahn-Freund suggests, the judiciary will be influenced in the exercise of this ability by what it perceives to be the needs of society generally. The question as to whether the placement of such responsibility in the hands of the judiciary is legitimate or appropriate, particularly in light of decisions such as those in the cases of and Clark, will be returned to in the concluding chapter of this
thesis. It is apparent, however, that the true meaning and significance of provisions such as s.36 of the AJA 1970 can only be identified by undertaking an examination of the social function of the law of mortgage. It is the aim of the following three chapters to present such an examination, beginning in Chapter Five, with an analysis of the development of the current social function of the law of mortgage.


5 Kahn-Freund, p. 4.


9 Kahn-Freund, pp. 1 - 2.

10 The courts of Common Law and Equity were amalgamated on the 1st November 1875 by virtue of the Judicature Act 1875.


13 For an account of the distinction between the 'crystalline' rules created by the common law and the 'muddy' principles of the Courts of Equity see Rose, C. M. 'Crystals and Mud in Property Law' [1988] 40 *Stanford Law Review* 577.

14 'Ownership' is a contested term but Honore offers perhaps one of the most coherent examinations of the concept, see Honore, A. M. 'Ownership' in *Making Law Bind* (Clarendon Press: Oxford, 1987).


17 *Emmanuel College v Evans* (1625) 1 Ch Rep. 18.


19 *Howard v Harris*, I Vern 1. See also Simpson, *op. cit.* n. 2, p. 228.


22 The term was first used in 1654 in the *Duchess of Hamilton v The Countess of Dirlton* 1 Ch R 165.


24 *ibid.* p. 228 and Gray, p. 938.


27 See Chapter Six.

28 Gray, p. 949.


30 *Vernon v Bethell* (1762) 2 Eden 110 at 113.


33 See Maitland, *op. cit.* n. 3, p. 190.


35 *ibid.*

36 *Kennedy v De Trafford* [1897] AC 180 at 185, per Lord Herschell.

37 (1913) AC 299.

38 *ibid.* at 311.

39 A mortgagee cannot, for example, sell to themselves, *Martinson v Clowes* (1882) 21 Ch 857.


41 *ibid.*


43 Maitland, *op. cit.* n. 3, p. 182.

45 Hansard, Lords, Vol. XXXIX, col. 262.
46 Kahn-Freund, p. 4.
47 Fairest, op. cit. n. 1, p. 72.
48 Hansard, Commons, Vol. 154, col. 96.
49 Jackson, however, criticises this approach as another example of where 'theory and reality diverge' within the law of mortgage, see Jackson, P. 'The Need to Reform the English Law of Mortgages' [1978] 94 Law Quarterly Review 571, p. 577.
50 Maitland, op. cit. n. 3, p. 207.
52 Hansard, Lords, Vol. XLIV, col. 980.
53 See Fairest, op. cit. n. 1, p. 9.
54 Maitland, op. cit. n. 3, p. 207.
55 Fairest, op. cit. n. 1, p. 9.
56 See Fairest, op. cit. n. 1, pp. 80 – 81 and Haley, op. cit. n. 3, p. 486.
57 Haley, op. cit. n. 3, p. 486.
59 Fairest, op. cit. n. 1, p. 81.
60 [1962] 1 All ER 163.
61 ibid. at 171B - C.
63 op. cit. n. 63.
64 op. cit. n. 63, para. 1388.
65 ibid. para. 1390 (i).
66 ibid. para. 1386 (b).
67 ibid. para. 1390 (iv).
68 ibid. para. 1432.
69 op. cit. n. 60.
70 Haley, op. cit. n. 3, pp. 487 - 488.
75 ibid. col. 290, per Mr. Percival.
76 Haley, op. cit. n. 3, p. 488.
77 op. cit. n. 63, para. 1386 (b).
79 Hansard, Commons, Vol. 795, col. 458.
81 Hansard, Commons, Vol. 795, col. 458.
83 [1973] 2 All ER 33.
85 Fairest, op. cit. n. 1, p. 75.
86 op. cit. n. 84, at 38D.
88 op. cit. n. 84.
89 ibid.
90 See p. 34.
91 op. cit. n. 84.
92 ibid.
94 [1979] 2 All ER 952.
95 ibid. at 955E-F.
98 Gray, p. 973.
99 op. cit. n. 84.
101 ibid. p. 49.
102 Vernon v Bethell (1762) 2 Eden 110 at 113.
103 Stewart, op. cit. n. 100, p. 50.
104 At pp. 177 – 180 and 182 – 184.
105 op. cit. n. 60.
106 op. cit. n. 84.
CHAPTER FIVE

5.1 Introduction

The positive legal analysis of the law of mortgage combined with a survey of its historical development provides an account of the content and structure of the legal framework. It is clear from this account that aspects of the juridical content of the law of mortgage have remained relatively unchanged since the late sixteenth century. Despite the static nature of the legal framework, mortgage finance has witnessed radical changes in the uses made of it, in those who seek to use it and its role within the wider economic, political and social contexts. Kahn-Freund summarises the question posed by Renner in respect of this observation in the following terms, ‘How can one account for the functional transformation of a norm which remains stable?’

In response, Renner contends that the stability of legal norms, such as the mortgage device, derives from their ‘normative purity’. A corollary of this assertion is that legal norms cannot be influenced by the function they serve. They exist purely as tools which may be used in whatever manner is considered appropriate or necessary within the social context. Any alteration in the uses made of these legal norms, therefore, does not require any change in the legal norm itself. If this proposition is correct then it must also be the case that to view the law purely from a juridical perspective would paint an incomplete picture of the significance of the law of mortgage. The positive legal
analysis of the law may inform as to its content and structure but it can provide little if any information regarding the function which that legal framework serves within the social context. This omission is crucial for, as Renner contends, it is not the content of the law but the manner in which it is used within society which determines its true significance.

This contention is supported by Kemeny who, in The Myth of Home-Ownership, adopts a new approach to the question of housing distribution. Rather than examining housing policy generally, he attempts to apply a sociological analysis to housing choice and contests what has been accepted as a ‘natural’ phenomenon, namely, the preference for home-ownership. He argues that home-ownership has been encouraged through the implementation of measures designed specifically to make home-ownership more attractive and through ‘negative discrimination’ in respect of public renting. As Kemeny states,

\[o\]ne cannot hope to understand either the economics or the politics of housing without a clear appreciation of the social structural arrangements which underpin and facilitate both the economics and politics of housing. The economic organization of housing and the influence of political actions upon housing tenures must be seen as refracted through the social structure of housing and its wider context.\^4

This chapter, and the one which follows, attempt to provide a more complete picture of the law of mortgage through an examination of the social, political and economic aspects of mortgage finance, beginning with an examination of the development of the current social function of the law of mortgage. Chapter Six continues this analytical
framework by presenting an analysis of the manner in which mortgage finance is utilised by both mortgagors and mortgagees within the current housing system.

The aim of this chapter is to account for the changes which have been witnessed in the social function of the law of mortgage. In tracing the development of the uses made of the legal device of the mortgage, this chapter supports Renner’s contention that to view a society at only one stage in its development fails, ‘to reveal the manner in which legal concepts and institutions are used and grouped for economic and social purposes. Society must always be viewed as a process, a dialectical process.’ It is necessary, therefore, not merely to identify the current manner in which use is made of the law of mortgage within society but also to examine the origins and development of those uses. In achieving this task, the previous chapter was concerned, in part, with the social function of the law of mortgage as it operated during the period prior to 1979. In order to complete this task, this chapter examines the development of the social function of the legal framework during the period 1979 - 1998.

It is also explicit within Renner’s theory that legal institutions do not operate in isolation from other legal or economic institutions. Any alteration in the social function of the law of mortgage will exert an influence upon other institutions and vice versa. The general policy of ‘deregulation’ within the financial services industry, implemented by the Conservative governments, for example, exerted significant influence upon the mortgage market which, in turn influenced the social function of the law of mortgage. It is important, therefore, to extend the examination of the law of mortgage so as to encompass all relevant aspects of the environment in which it operates.
It is clear that the social function of the law of mortgage has undergone a radical
transformation during the last century. Its original function of assisting a relatively small
number of individuals to obtain monies to relieve their financial difficulties has
transformed into enabling the majority of households in England and Wales to gain
access to the home-ownership sector. In 1998, 68 per cent of all dwellings in England
and Wales were owner-occupied, with 42 per cent subject to an outstanding mortgage
debt,8 as Gray notes,

The twentieth century has, in effect, witnessed a revolutionary shift in tenure from subsistence
renting to home-ownership – a transformation attributable in no small measure to the
unprecedented extension of mortgage facilities to broad sections of the population.9

The causes underlying this transformation can be categorised by reference to two
factors, namely, the increased availability of mortgage finance for the purpose of
purchasing residential property and high levels of demand for home-ownership.10 The
first section of this chapter is concerned with examining the former of these two
influences. The ability of individuals within society to utilise the legal device of the
mortgage as the means of gaining access to home-ownership, without any alteration in
its normative content, is due in large part to the development of the building society
movement. The influence now exerted upon the housing system in England and Wales
by mortgagees and particularly the building societies, prior to the introduction of
conversion, is recognised by James, et al, who suggest that building societies exercise a,
‘major influence on housing demand, and therefore on house prices, land prices, and the
house building industry.’11
It was the first building societies who recognised that mortgage finance could be used to serve this purpose and it was the willingness of their successors to make mortgage finance accessible to more households which has played some part in the creation of the current social function of the law of mortgage. As Fairest notes, ‘the contribution of the institutional lenders to the growth of the movement towards owner-occupation cannot be over-estimated.’

The willingness of building societies to offer mortgage finance for the purpose of purchasing residential property forms an essential ingredient in the changing nature of the social function of the law of mortgage, but the driving force behind this process of change has been the high levels of demand for home-ownership. The second section of this chapter examines the factors which have led to the dramatic rise in the number of households within England and Wales using mortgage finance as the means of gaining access to the home-ownership sector. Particular attention is paid to the influence which central government housing policy has exerted upon housing choices.

Government support for home-ownership has been a feature of housing policy throughout the post-war period. It is the period since 1979, however, which has had the most fundamental impact upon the current social function of the law of mortgage. As Malpass, et al, contend, the Conservative governments of 1979 - 1997 were able to exercise a significant degree of influence over the issue of housing provision,
The policies they implemented during their time in government played a major role in the creation of the current social function of the law of mortgage. Although having lost power in May 1997, the changes they introduced within the housing system in England and Wales continue to exert a significant degree of influence over the nature of mortgage finance. The pursuit by the Conservative governments of a 'property-owning democracy' is examined by Daunton, who recognises the enduring political significance of a housing system dominated by home-ownership, 'Once owner-occupation became the majority tenure, the need to protect and sustain it became a crucial part of government policy, whatever its political complexion.'

This effect upon central government policy is highlighted by the housing policies of the new Labour government, which apparently do not seek to reverse the changes, and in some instances, maintain a commitment to the policies, implemented by the previous government. The extent to which the policies implemented by the Conservative governments and continued in large part by the Labour government have exerted an influence upon the social function of the law of mortgage is considered in the second part of this chapter. The first section of this chapter, however, is concerned with an examination of the changes implemented by the building societies and other mortgagees, including in particular, the increased availability of mortgage finance for the purpose of gaining entry to the home-ownership sector.
5.2 The building society movement

The initiation of the process by which the social function of the law of mortgage has transformed into one of enabling access to home-ownership can be traced back to the late eighteenth century and the introduction of the first building societies.18 Although these early societies bare little resemblance to modern building societies Boddy argues that, 'An account of the societies’ origins and evolution is ... an essential element in understanding their character today.'19 A survey of the historical development of the building society movement and their role in transforming the social function of the law of mortgage is, therefore, undertaken below.

The early building societies owed their existence to the friendly societies that became popular in the late seventeenth century.20 Workers joined together to form friendly societies into which they would pay weekly sums, with the accumulated fund then being used to assist the members in times of illness and unemployment.21 Similar organisations were created by the more affluent working class to enable them to purchase housing, with the first recorded building society, the Ketley Society, being established in Birmingham in 1775.22 James, et al, summarise the aims of these early building societies in the following terms,

Historically, the ideology of building societies is based on Victorian values of thrift and mutual self-help and their origins can be traced back to the co-operative and friendly societies formed in the nineteenth century to support migrants to the new industrial urban areas by establishing a mutual fund to finance the purchase of a house for each member.23
Members of these first building societies paid regular subscriptions and were then allotted by selection, either by ballot or auction, a share that would enable them to purchase a house built or purchased by the building society. They would continue to pay their subscriptions until all members had received their share, at which point the society would terminate. In the first 50 years up to 1825, 250 societies were involved in the building or buying of only 2000 houses, mainly in the Midlands and the North of England.\(^4\)

Unlike the friendly societies, which received legal recognition as a result of the Friendly Societies Act 1793, the building societies were not recognised or made subject to regulation until the introduction of the Building Societies Act 1836 (BSA 1836). The preamble to the Act declared,

\begin{quote}
Whereas certain societies commonly called building societies have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies and the property obtained therewith.\end{quote}

The growth of the building society movement in these first years was restricted due to the nature of the ‘terminating’ societies. Once the society had been established, any new member would have to make back payments, which defeated the object of these societies which was to allow their members to obtain housing through regular affordable payments. This obstacle to the increased growth of the movement was overcome by the introduction of ‘permanent’ societies. Rather than terminating on the
allocation of all shares, these societies allowed for the payment of interest to investors who did not necessarily wish to purchase property. These societies were able, therefore, to continue providing funds to members beyond the payment of all shares to their original members. The means by which the member of the society received assistance also changed. Rather than making subscriptions and then receiving their share, borrowers received loans that they repaid over a fixed number of years.25

The introduction of permanent societies fundamentally transformed the building society movement: the ability to invest in these societies without necessarily borrowing money from them allowed for a more middle-class membership; the original function of building homes for the membership transformed into one of lending money to purchase housing, usually to landlords, landowners, and house builders; and these societies no longer held meetings in local public houses but moved into dedicated offices.26

In effect, building societies adopted a form similar to incorporated associations but their status, whether as corporations or not, remained vague until 1874. Rather than allowing them to incorporate under the Joint Stock Companies Act 1844, the Royal Commission recommended that building societies receive a distinct corporate form, a recommendation enacted by the Building Societies Act 1874 (BSA 1874). The Act came into force on 2nd November 1874,27 and repealed the BSA 1836. The purpose that these societies were to serve was set out in s.13 of the 1874 Act,

Any number of persons not less than three may establish a terminating or permanent society to raise by subscriptions of members a fund for making advances to members upon security of
Despite criticisms regarding its poor drafting, the 1874 Act was consolidated in the Building Societies Act 1962, and remained in force until the introduction of a new legal framework in 1986. The regulatory framework, prior to 1986, was concerned with ensuring that these growing building societies maintained their primary function of ‘making advances to their members upon security of freehold or leasehold estate by way of mortgage’. The Chief Registrar of Friendly Societies whose function was to ensure that societies operated in the best interests of their members and the public at large administered this framework. The Chief Registrar scrutinised societies’ annual returns, and could request information, conduct investigations and, with Treasury approval, prohibit or restrict societies taking or advertising for new investment.

The legal recognition of building societies combined with the introduction of permanent societies provided the foundation for the growth of the building society movement. Their success, however, was to a large extent achieved through their willingness to make mortgage finance more attractive to a wider range of households. During the 1930s, building societies extended the period for repayment of the loan from the original length of between sixteen and twenty years, to between 21 and 25 years, as Burnett notes,

By the 1930s a regular salary or wage of £200 a year was widely regarded as adequate security for a mortgage which might involve repayments of as little as 9s a week, well within the reach of engineers, fitters, printers, engine-drivers and other skilled workers.
A further measure designed to increase the range of households able to utilise mortgage finance involved the removal of a factor that had operated as a disincentive to potential borrowers. Building societies were restricted to lending between 70 and 75 per cent of the value of the property, which resulted in borrowers having to find the remaining 25 or 30 per cent. This was overcome by the use of insurance policies. The borrower would pay a premium to the insurance company who would then guarantee the amount over and above what the building society would usually lend. As Burnett notes,

In a period of embarrassingly swollen assets after 1931 the societies offered mortgages at five per cent and four and a half per cent interest, extended the repayment period from fifteen – twenty years to twenty-five – thirty years, and developed various devices to reduce the amount of the deposit and the legal and survey charges.

Despite still being regulated by legislation introduced in 1874, the relatively small mutual societies of the late eighteenth century had, by the late twentieth century, developed into a movement with collective assets of nearly £40,000 million with 43 per cent of the population investing in a building society. The virtual monopoly held by the building societies in relation to the provision of mortgage finance had enabled them to grow into what Drake describes as, ‘vast, national, multi-million member financial institutions ....’ That monopoly position and other aspects of the building society movement, were, however, to come under the scrutiny of central government during the 1980s. The changes introduced during this time, by the Conservative governments, have had an enduring effect upon the status and role of building societies within the housing system in England and Wales.
5.3 Housing policy 1979 - 1997

Although the current social function of the law of mortgage owes much to the willingness of the building societies to offer mortgage finance for the purpose of purchasing residential property, the driving force behind the process of change has been the high level of demand for home-ownership. During the twentieth century, households within England and Wales have expressed a clear preference for home-ownership, as opposed to other available forms of housing. The factors underlying this demand for owner-occupation are numerous, the individual’s choice of housing may be influenced by a number of factors including: relative cost, the need for mobility, and family circumstances. Balchin, however, argues that the demand for home-ownership and consequently the change in the social function of the law of mortgage, has been fuelled by the policies of central government.

Although a large number of factors determine household tenurial preferences, government policy has undoubtedly had a significant impact on tenure choice over the past three-quarters of a century and particularly since 1979.

The extent to which central government policy may influence the housing choices of individual households is significant. The implementation of measures by central government which seek to modify, ‘the quality, quantity, price and ownership and control of housing’, can ensure that certain forms of housing become or are perceived to be more attractive than others, thereby increasing demand for that particular form of housing. As Ball notes, ‘households have limited means by which to satisfy their
housing needs, and the state has the power and the means to deny or satisfy those needs via its housing policies. The dramatic rise in the number of home-owners during the post-war period can, therefore, be explained, in large part, by reference to the housing policies of successive governments.

A review of post-war housing policy indicates that successive governments have provided both direct and indirect support for the home-ownership sector. The provision of fiscal incentives in the form of Mortgage Interest Tax Relief at Source (MIRAS), for example, was indicative of the support given to home-ownership by central government prior to 1979. The outcome of these measures was a slow but steady growth in the number of home-owners, rising to 57 per cent of all dwellings in England and Wales by 1980. Ford contends that despite this rise, demand for home-ownership, prior to 1979, was high but often unmet. For the majority of households, home-ownership could only be achieved with the assistance of mortgage finance but the limited supply of mortgage funds combined with stringent lending criteria had led to ‘mortgage queues’. Barnes, writing in 1984, argued that the existence of mortgage queues afforded building society managers a considerable degree of power in relation to the provision of mortgage finance,

Managers prefer to lend at the least possible risk, so are likely to be biased against people on a low income, ethnic minority groups, people of the “wrong” sex or the “wrong” sexual inclination, people who have uncertain health or job records, and people who want to buy in a “bad” area.
The period after 1979 witnessed a new approach within housing policy,\textsuperscript{46} the consequences of which continue to reverberate around the current housing system. The promotion of an increase in home-ownership had been an objective of successive governments during the twentieth century but this policy objective had been combined with support for the public rented sector. As Murie notes, 'From 1919 to the early 1970s both tenures had expanded, admittedly with different degrees of advocacy and support from different groups.'\textsuperscript{47} The objective of the new Conservative government, however, was not merely to continue the steady growth in home-ownership but to create a mass home-ownership market primarily through a reduction in the public rented sector.\textsuperscript{48}

The measures they were to introduce in their attempts to achieve this objective continued a specific theme apparent in the housing policies of previous governments. Hills and Mullings note that the significance of the type of support provided by central government throughout the twentieth century, in relation to housing, is that it does not require direct state expenditure in order to ensure the provision of housing to every citizen, 'Government has never seen its role as being a universal provider or funder of housing in the same way as it has for education or health.'\textsuperscript{49} This view was perpetuated by the Conservative governments who recognised the potential which mortgage finance held for widening access to the home-ownership sector without requiring substantial public expenditure. Mortgage finance was, therefore, to play a central role in the achievement of their housing policy objectives, endowing it with a new and significant social function.
In order to create a mass home-ownership market, the Conservative governments had to increase demand for home-ownership whilst at the same time widening access to that sector. One of the most successful policy initiatives in this respect was the introduction of the council tenants 'right to buy'. The option to purchase council property had always been available to council tenants but this had been at the discretion of the local council. As Daunton notes, 'In the 1950s, councils had a right to sell, they were not compelled to and tenants did not have a right to buy, by 1956 only 5,825 [council dwellings] had been sold.' The discretion once afforded to local authorities was removed by the Housing Act 1980 (HA 1980). By virtue of the 1980 Act a council tenant of three years standing could purchase their home from their local council at a substantial discount, regardless of whether the council wished to sell or not.

Following the introduction of the ‘right to buy’, council house sales to sitting tenants rose from only 568 in 1980 to 169,430 in 1982. After 1982, however, the number of council houses sold as a result of the ‘right to buy’ began to fall. In order to encourage an increase in sales, the government introduced the Housing and Building Control Act 1984, which lowered the qualifying period to two years and changed the discounts to a minimum of 32 per cent up to a maximum of 60 per cent. Further changes were introduced in the Housing and Planning Act 1986. Discounts on the purchase of houses remained unchanged but the minimum discount for flats was raised in January 1987 to 44 per cent increasing by two per cent for each year in residence beyond the two year qualifying period, up to a maximum of 70 per cent. By the end of 1996 more than two million public sector dwellings had been purchased under the ‘right to buy’.  

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The significance of this initiative, for the purposes of this thesis, extends beyond the practical outcome of increasing the number of home-owners in England and Wales, for it also serves to discount Renner’s claim that the law is normatively pure and only introduced after changes in society have already occurred. The HA 1980, in combination with a number of other measures, was introduced, it would appear, so as to achieve significant change within the housing system in line with the political and ideological aims of the Conservative government. One such aim was to redefine the housing role of local authorities. Their traditional role, as both builders and providers of housing was to be transformed, as the housing White Paper made clear in 1987,

[t]he Government will encourage local authorities to change and develop their housing role. Provision of housing by local authorities as landlords should gradually be diminished, and alternative forms of tenure and tenant choice should increase.55

The ‘alternative forms of tenure’ designed to act as a substitute for the provision of housing by local authorities included Housing Association tenancies.56 Blake and Dwelly define these associations as, ‘semi-charitable bodies that have been around in many cases for as long as local authorities, [but] really came of age just twenty years ago.”57 Whilst monitored and partly funded by a quango, the Housing Corporation, Blake and Dwelly argue that Housing Associations were used by the Conservative governments as, ‘a vehicle for attracting private investment in social housing, gradually reducing the proportion of public money available for new developments.'58 Housing associations have essentially been encouraged by central government to take on the role once played by local authorities in the provision of housing. In particular, the majority of new social housebuilding has been undertaken by these associations, the number of
dwellings built by housing associations rising from only 13,000 new homes in 1988, to 32,500 in 1996.59

The 'right to buy' necessarily reduced the stock of local authority housing but it was their inability to replace this housing, as a direct result of financial constraints placed upon them by central government, which has had an enduring effect upon local authority housing. During the period 1979 - 1994, public expenditure on housing decreased in real terms by approximately 60 per cent.60 In addition to these cuts, the government introduced a new financial regime for local authorities in the Local Government and Housing Act 1989. In relation to the 'right to buy', the 1989 Act restricted the ability of local authorities to use the receipts from the sales of council houses. In effect, local authorities were required to set aside 75 per cent of receipts from housing to redeem their debts. The ability of local authorities to undertake new housebuilding completions was, therefore, severely restricted and led to a decrease from 108,700 in 1978 to only 4,600 in 1992.61

Forrest and Murie have written extensively on this issue and in, Right to Buy? Issues of Need, Equity and Polarisation in the Sale of Council Houses,62 their aim is to analyse the sale of council houses within the context of the development of housing policy in the United Kingdom. The report examines the expectations raised prior to the implementation of the 'right to buy' and the outcome of its first years of operation. Its empirical findings are of less importance today but its general themes are still relevant,
Progressively the emphasis of the sales policy has shifted from discretion to compulsion, from an option which could be exercised to an offer which cannot be refused, from an alternative route to home-ownership to an aggressive attack on council housing as a matter of principle.63

The inability of local authorities to undertake new constructions combined with the loss of their better quality dwellings as a result of the ‘right to buy’ has led to, what Murie, Forrest and Malpass term, the ‘residualisation’ of the public rented sector.64 The reduction in both the quality and quantity of local authority housing stock has created a perception that the public rented sector does not serve as a viable option for those seeking decent housing but instead serves as a ‘welfare net’ for those who cannot afford home-ownership, as Murie, et al, note,

The more that access to owner-occupation is extended, the more it is bound to pull in households just at the margin of being able to afford it. Increasingly that leaves behind a relatively pauperised group - those people who cannot afford to make the move.65

In addition to the implementation of measures which reduced both the quantity and quality of local authority housing, the Conservative government also introduced changes to the allocation of services to those deemed to be homeless within an authority’s area. The Housing Act 1996,66 one of the last major pieces of legislation introduced by the Conservatives prior to their defeat in the election of May 1997,67 replaced the ‘reasonable preference’ once afforded to the homeless, by a single route into social housing.68 Part VI of the 1996 Act required that all new lettings to council housing be made through a housing register, with priority between applicants on the register being determined by factors which do not include being owed a duty under homelessness legislation.69 Local authorities were, therefore, no longer able to give
priority to homeless households, instead the homeless had to be treated in the same respect as other households on the council’s housing register or waiting list. Even in situations where a local authority is able to offer accommodation to a homeless household, it may only do so for a limited period.

In relation to the duty owed by local authorities to the homeless in their area, Part VII of the 1996 Act imposes a duty to provide housing for two years, with a discretion to extend the period on the basis of certain criteria. The Housing Act 1996, however, prohibits local authorities from using their own accommodation to satisfy this duty, for more than two years out of any three. Arden and Hunter summarise the impact of this reform as follows,

The principal effect ... related to homelessness, is to lock the homeless out of permanent local authority housing ... unless and until they qualify within the mandatory scheme, pending which their stay in the authority’s accommodation is necessarily finite, and may even mean a periodic (every two years) move out of the permanent stock for a further year. (Original emphasis).

The significance of this legislation related not only to its impact upon the ability of homeless households in practice to obtain housing, but also to its implicit support for the perception that home-ownership could afford individuals with a privileged status. It may be argued that the 1996 Act, in promoting the view that local authority housing served as merely a temporary means of satisfying the housing needs of individual households, served as a persuasive force in channelling people into home-ownership and
in encouraging those who could not afford owner-occupation to accept the burden of mortgage finance.

The 1996 Act was, therefore, consistent with the underlying objectives of the Conservative governments and, in combination with the 'right to buy' and the changes to the financial regime for local authorities, proved successful in terms of satisfying those objectives. The most obvious outcome of the 'right to buy', as Malpass notes, was that it increased the number of home-owners within England and Wales by over two million households, 'In the period 1979 to 1995 the stock of social rented housing in Britain declined by more than a quarter, contributing nearly half the growth of home-ownership.' A further and perhaps more significant outcome of these initiatives was the removal of the main competitor to home-ownership. Kemeny argues that the increase in home-ownership has been achieved by preventing the public rented sector from developing in competition with home-ownership,

Unfortunately, this cannot very easily be proved to be a specific policy aimed at increasing home-ownership, particularly because such policies are rarely justified explicitly in such terms. Rather, they reflect a disinclination to provide an alternative to home-ownership and a concern to limit all governmental expenditure on tenures other than home-ownership.74

In residualising the public rented sector, the Conservative governments had succeeded in making it less attractive to those seeking decent affordable housing. It would not, however, necessarily follow that these households would choose to enter the home-ownership sector. Despite having effectively removed the public rented sector from the range of housing choices available to the majority of households, these households
could still decide to enter the private rented sector rather than home-ownership. The ability on the part of households to exercise an effective ‘choice’ of housing is questioned by Merrett who contends that choice is determined as much by the policies of central government as by individual factors, ‘Individual acts of choice … are structured by these processes and by the history of the state’s implementation of its housing policy.’

The Conservative governments sought to ensure that households chose home-ownership through the implementation of a number of policies that made home-ownership appear more favourable as an option to households than private renting. As Doling, *et al*, note ‘Whatever the “natural” preference for home-ownership, as a form of housing tenure, government has also established the circumstances – such as a housing subsidy system – which has made this option more attractive.’ One of the methods adopted in an attempt to increase the number of home-owners included the provision of fiscal incentives for owner-occupiers as opposed to tenants. The provision of MIRAS had been in existence prior to 1979, but the Conservative governments sought to increase the differential between tenant subsidy and home-owner subsidy. As Pearce and Wilcox point out, during the 1980s, subsidies for tenants declined by 60 per cent while MIRAS increased by over 50 per cent in real terms. Kemeny argues that this is one of the most effective means by which households can be encouraged to choose home-ownership,

The most obvious measures designed to encourage home-ownership are clearly ones which increase subsidies or selectively reduce taxation on home-owners with the explicit purpose of making home-ownership both more relatively attractive and accessible to more households,
and this is the best-researched and most widely understood meaning of how governments encourage home-ownership. 78

In addition to the improved economic advantages of becoming a home-owner, central government also sought to encourage households to enter the sector through a campaign that highlighted the social advantages of home-ownership. In 1980, the Minister for Housing and Construction, Stanley MP, on the question as to why home-ownership was one of the government’s top priorities, stated that, ‘It provides a measure of independence, choice and financial benefit that for most people, cannot be achieved to the same degree by renting.’ 79 This statement was indicative of the general rhetoric promoted by the Conservative governments during their time in government. 80 Home-ownership was promoted and came to be perceived as the form of housing to be preferred. 81 Having increased demand for home-ownership, however, it was still necessary to widen access to the sector.

The difficulty faced by the majority of potential home-owners was that they did not have the funds necessary to purchase accommodation or found it difficult to qualify for mortgage assistance. The creation of a mass home-ownership market had necessitated the inclusion of households who previously would have or had been considered unsuitable as candidates for home-ownership by mortgagees. In order to widen access to home-ownership, therefore, it was necessary to widen access to mortgage finance. The means by which this aim was achieved led to a fundamental transformation in the nature of mortgage finance, altering the type of mortgagee, mortgagor and mortgage products. 82
The first step taken by the Conservative governments to achieve this end was the deregulation of the mortgage market in the early 1980s. By removing the constraints placed on those, other than building societies, who sought to lend mortgage funds the Conservatives encouraged new institutional lenders to enter the mortgage market. The first to take advantage of this opportunity were the banks, followed by insurance companies and specialised mortgage lenders, such as ‘National Home Loans’. The introduction of competition into a market previously dominated by the building societies led to calls for the reform of the legal framework that regulated the activities of the societies. The legislation in operation during the early 1980s was enacted over one hundred years previously in the BSA 1874. The building societies were concerned that the ‘new’ mortgagees would have an unfair advantage because of their ability to offer a wider range of services. It was also clear that the building societies had changed beyond all recognition since the introduction of the 1874 Act. As Drake notes,

In the early 1980s ... it was becoming increasingly apparent that the prevailing legislative framework was no longer appropriate to the nature of building societies nor to the competitive environment in which they operated.

The deregulation of the mortgage market by the Conservative government was seen by the building societies as an opportunity to bring the regulation of their activities into line with the changes that had occurred in their size and structure. Recommendations for change were proposed by the Spalding Report, published in January 1983, under the chairmanship of John Spalding, Chief Executive of the Halifax Building Society. The Spalding Report recommended new powers for building societies that would allow them to act as ‘one stop shops’ for home buyers. It was proposed that building societies
should be able to act as estate agents in respect of mortgaged property, carry out structural surveys for borrowers and undertake conveyancing for borrowers. In line with the Spalding Report, the Building Societies Association (BSA) published a report, *New Legislation for Building Societies*, in which they recommended that building societies should retain their principal function of providing loans for house purchase but that their banking services should be extended to include unsecured loans, overdrafts, cheque books with cheque guarantee cards, credit cards and second mortgages.

The report recommended that the mutual status of building societies should remain but that if societies wished to diversify to such an extent that they no longer became recognisable as building societies then they should be allowed to incorporate. In response to these recommendations, the Government, in July 1984, published its Green Paper, *Building Societies - A New Framework*. In the foreword the Chancellor of the Exchequer, Nigel Lawson stated that,

> Our purpose is to ensure that the building societies continue primarily in their traditional roles - holding people's savings securely and lending for house purchase - while loosening the legal restraints under which they have operated for a century or more so that they can develop in other fields.

The Green Paper acceded to many of the proposals set out by the BSA and resulted in the introduction of the Building Societies Act 1986 (BSA 1986). Unlike previous legal reform, it did not seek to amend existing legislation but to establish a new legal framework with some of the more detailed provisions to be set out in regulations and orders. Under the 1986 Act, the main function of building societies was to remain,
namely making advances to members for the purchase of land for residential use, but unlike other legislation this was to be their ‘primary’ and not ‘principal’ function. This alteration in emphasis is contained in s.5(1) of the BSA 1986, which states that, ‘A building society may be established if its purpose or principal purpose is that of raising, primarily by subscriptions from members, a stock or fund for making to them advances secured on land for their residential use.’

Provisions contained within the Act were intended to broaden the range of services which building societies could offer, including estate agency services, insurance services, surveys, conveyancing and unsecured loans. The advances that may be made by building societies are categorised in the following manner,

- Class 1 advances include advances secured on land in the UK made, subject to other requirements, to an individual for the residential use of the borrower or a dependant of his of a prescribed description.
- Class 2 advances include other advances secured on land in the UK.
- Class 3 advances include loans for mobile homes and certain other secured or unsecured loans to individuals.

In order to counterbalance the favourable treatment offered to the building societies, the BSA 1986 introduced a new form of regulation. A new commission, the Building Societies Commission (BSC) was to be established to, ‘exercise and extend the functions at present carried out by the Chief Registrar of Friendly Societies.’ The general function of the BSC is to promote the financial stability of building societies and
the protection by building societies of investments held with them. In addition to the
BSC, with its focus on the financial security of building societies,96 the BSA 1986
established an Ombudsman scheme that was designed to redress complaints made by
building society members. The Building Societies Ombudsman (BSO) scheme,
troduced under Part IX of the BSA 1986, establishes arrangements for an independent
adjudicator to investigate and resolve certain types of complaints from individuals about
action taken by those building societies and their associated bodies which are
participants in the scheme.96 James, et al, in examining the role of the BSO, establish the
criteria essential for an effective Ombudsman scheme,

The essential characteristics of the office of Ombudsman are that it is independent of the
institutions concerned, accessible for the individual complainant and cheap to provide and
with adequate powers to investigate and require evidence.97

The Ombudsman’s jurisdiction includes the investigation of complaints by individuals
relating to matters including: share accounts; deposit accounts; borrowing members,
class 1 or class 2 advances; and loans by appropriate mortgage companies. The grounds
of any complaint must be that the action complained of constitutes, in relation to the
complainant: a breach of the building society’s obligations under the 1986 Act, its rules
or any other contract; unfair treatment; or maladministration.

The Ombudsman scheme is clearly not intended to act as a substitute for any legal form
of grievance redress, for the Ombudsman is unable to question the decisions of building
societies relating to the taking or conduct of legal proceedings to enforce any of its
rights. The Ombudsman will also require the complainant to exhaust the internal
complaints procedures offered by the building society before any investigation is undertaken. James, et al, however, recognise the significance of such a scheme within the mortgage market,

The Ombudsman remedy is now firmly embedded in the UK administrative justice system as an independent and informal mechanism for dispute resolution, particularly for cases where recourse to the courts would be inappropriate, and the institution has now been extended into the private sector.98

Following an investigation by the Ombudsman, if a complaint has not been resolved in some other way for example, via arbitration, the Ombudsman will make a determination by reference to what is fair in all the circumstances. The powers available to the Ombudsman to enforce such decisions are to direct the building society to take or cease from taking specified steps and/or to order the building society to pay the complainant a sum not exceeding £100,000 by way of compensation for the loss, expense or inconvenience caused by the action complained of. A building society is not obliged to implement the direction given by the Ombudsman but if the society does not wish to comply, then it must notify its members of the reasons for its decision in its next directors’ report and notify the public in such manner as the Ombudsman requires.

The introduction of this new tier of regulation was, in part, recognition by the government of the changing nature of the building societies. Ball argues that the vast increase in the size and membership of these societies had created a relationship between the societies and their members that made personal or direct contact between them more difficult,
The largest societies are monster organizations with over £5,000 million assets each. Their size makes them remote from the building society ideal of a mutual society from which investors and borrowers directly benefit, and have a considerable say in the running of its affairs.\(^9\)

The introduction of the Ombudsman scheme would ensure that members had at least some opportunity to have their grievances redressed in relation to these large organisations. The creation of new regulatory bodies did not, however, assuage fears regarding one of the most controversial aspects of the 1986 Act, namely the issue of conversion. By virtue of the Act, a building society may, with the consent of its members,\(^\text{10}\) convert to a deposit-taking business, thereby converting from a mutual society to a public limited company.\(^\text{11}\) The purpose of which is to enable it to raise funds from wider sources, including share capital. The Economic Secretary to the Treasury argued, during the passage of the Act, that mutual status was no longer appropriate in all cases,

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\text{[m]utuality in the conditions of today is not without its problems. It can, in particular, cause difficulties of accountability when applied to institutions as large as some of the major societies today.} \text{\(^\text{12}\)}
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Although the BSA 1986 was not opposed, concerns were raised regarding the issue of conversion. The historical foundations and mutual status of building societies had invested them with the reputation of being organisations concerned only with assisting their members in the purchase of their home. The conversion of a building society into a public limited company would necessarily alter the focus of concern for that
corporation, with the interests of shareholders, as opposed to members, being given priority. Further concerns were also raised regarding the issue of conversion, as Pike MP noted,

I am aware that the Minister has tried to build safeguards into the process of conversion, but it could lead to mergers. Building societies could become even more dominated by a few large societies, which may then convert into public limited companies.103

The justification for this provision was due, it was claimed, to the changing nature of the building societies. To continue to equate their status with the status adopted by their predecessors over a century ago was no longer considered appropriate. In order to compete in the current mortgage market it was necessary to allow them to progress in line with changes which were already occurring, as Lord Suffield notes,

[i]n 1986, it would be a brave soul who would assert that societies - co-operative, friendly or building, and some with millions of members - could still honestly claim to be mutual in their former and real sense.104

Despite the concerns raised regarding the issue of conversion, it was recognised, by Parliament, that the building societies and the mortgage market required reform. In line with Renner’s contention that legislation is often introduced after the need for change has arisen within the social context, the BSA 1986 was enacted in recognition of the significant changes that had occurred within the building society movement during the previous century. Legislation introduced in 1874 could not be expected to deal effectively with the changes that had occurred in the provision of mortgage finance.
In contrast to Renner’s claim regarding the normative purity of legislation, however, it is possible to argue that the BSA 1986 was informed by particular values. Whilst the wording of legislation may appear to be devoid of any moral content, the objectives which underpin such legislation may serve to promote particular values. Through the deregulation of the mortgage market and the widening of the scope of building society services, for example, the government’s aim was to increase competition, as the Economic Secretary to the Treasury made clear, ‘by allowing the societies more scope, we will not only enable them to develop their business but will bring extra healthy competition into housing and finance.’

By introducing competition within the mortgage market, the government had removed the obstacles that had limited access to mortgage finance in previous decades, as Doling, et al, writing in 1988 note, ‘central government has … brought about the circumstances whereby the mortgage queues of the 1970s have been eradicated.’ Malpass and Murie contend that with mortgagees competing for business, they were willing to offer higher percentage mortgages on the basis of less stringent requirements regarding the status of the mortgagor.

Following this legislation [the BSA 1986] there was a pronounced shift from mortgage rationing towards lending on demand and loans related to a high proportion of property value. Lenders competed for custom by being willing to lend more.

The combination of housing policy initiatives, such as the ‘right to buy’ and the increased availability of mortgage finance led to a ten per cent increase in home-ownership during the 1980s. The attention given to home-ownership was, however, superceded in the late 1980s by measures designed to modify the private rented sector. In the Housing White Paper of 1987, Housing: The Government’s Proposals, the
Conservative government made clear its commitment to improving the private rented sector, with one of its principal aims being, ‘to reverse the decline of rented housing and to improve its quality.' Malpass, et al, account for this change in focus within housing policy by reference to a number of factors,

Having come into office in the late 1970s with a clear and well worked out, if narrow, housing policy, the Conservatives approached the end of the 1980s with a need to devise new measures; partly to broaden the base of housing policy, partly to maintain the momentum of existing policies and partly to respond to problems arising from the implementation of earlier legislation.

The attention paid to the private rented sector after 1987 appears to serve as a contradiction to the Conservative governments’ whole hearted commitment to increasing home-ownership. Monk and Kleinman, however, contend that this approach by the Conservatives was in response to a belief that home-ownership had reached ‘saturation point’. Murie, et al, also point to other factors, including that the decline of the public rented sector had led to housing problems which could not be mitigated by reliance on home-ownership alone,

The shift in emphasis towards renting is also a logical response by government to the widely held view that the lack of opportunity to rent is creating problems of homelessness, lack of labour mobility and general inflexibility in the housing system.

In relation to the parity between the number of dwellings within each housing sector, private renting has shouldered the majority of the burden of the increase in home-ownership, falling from 90 per cent of all dwellings in England and Wales in 1914 to 223
only ten per cent in 1998.\textsuperscript{114} The decline in the private rented sector has been gradual and its causes have been sufficiently detailed elsewhere.\textsuperscript{115} The fact that the private rented sector has not disappeared completely appears to be related to its ability to accommodate those who do not wish or are not able to enter into home-ownership. As Cullingworth notes,

\begin{quote}
[\textit{t}he privately rented sector performs specific functions which other sectors either cannot or will not discharge. It caters particularly for the young, the student, the single and the mobile; it provides a stepping-stone to owner-occupation or the public sector; and it provides the most easy 'access' for newcomers to an area and those who require immediate accommodation.\textsuperscript{116}
\end{quote}

Due to its advantages in providing housing for those who did not wish or could not afford to enter into home-ownership, the Conservative government sought to increase the availability of private rented accommodation through the introduction of the Housing Act 1988 (HA 1988). The Act sought a deregulation of tenancies from January 1\textsuperscript{st} 1989, making the letting of property more attractive for the landlord. Carey describes the provisions of the HA 1988 in the following manner,

\begin{quote}
They allowed landlords to charge a market rent on lettings starting after that date [15\textsuperscript{th} January 1989] and introduced a new form of tenancy agreement, the Assured Shorthold, which gave the landlord repossession of the accommodation at the end of the agreed term.\textsuperscript{117}
\end{quote}

In opposition to Renner’s assertion that legislation is introduced as a consequence of change within the social context, Cotterrell suggests that the Housing Act 1988 serves as one example of legislation which has been employed, ‘to promote change by removing or relaxing duties previously attaching to individuals in certain social or
economic relationships. It would be misrepresentative of Renner’s thesis to suggest that he denies any ability on the part of the law to effect social or economic change, it is notable, however, that despite the introduction of the HA 1988, the number of dwellings within the private rented sector has remained relatively unchanged. Goodwin suggests that the number of dwellings within the private rented sector has grown from 1.9 million homes in England and Wales in 1989, to 2.2 million homes in 1997. This relatively low level of growth may be due to the increase in the level of rents charged within the private rented sector. Prior to 1989, the mean rent in England’s private rented sector was £36 per week, in 1994 it was £74 per week, and in 1996 the average market rent stood at £88 per week. This necessarily makes private renting less attractive, which may account for its failure to increase its share of dwellings within England and Wales.

The first ten years of Conservative government achieved fundamental changes within the housing system in England and Wales. As Figure 1 illustrates, during the period 1979 – 1989, a mass home-ownership market had been achieved, at the expense of the public rented sector, with mortgage finance playing a pivotal role in its creation.
The increase in the levels of home-ownership had been achieved through the combined impact of reducing the main competitor to that sector, increasing demand through incentives such as MIRAS and increasing access to mortgage finance. Despite these major changes to the environment in which the law of mortgage operated and in the nature of mortgage finance, the Conservative governments did not seek to reform the juridical content of the law of mortgage. The mortgagee’s inherent right to possession, therefore, remained and during the early 1990s, that right was exercised to the extent that possessions reached unprecedented levels.

A combination of factors, including high interest rates, rising unemployment and falling house prices, resulted in a situation where many of those who had undertaken a mortgage debt during the 1980s could no longer afford their mortgage repayments.
The inter-relationship between the housing market and the economy is illustrated by McRae in this summary of the causes of the ‘housing crisis’ in the early 1990s,

The spiral effect equals: high interest rates increase mortgage payments; people spend less; less spending and demand led to unemployment; that led to repossessions; which led to further falls in house prices; which cut spending still further.\textsuperscript{124}

The recession witnessed during the early 1990s necessarily had a significant impact upon the ability of individual households to meet their mortgage payments. There was, however, an additional factor not apparent in the ‘spiral effect’ described by McRae, which increased the likelihood of households falling into arrears. Ford and Wilcox identify this additional factor as, an inability on the part of households to escape the ‘housing bust’ by selling their homes and ‘trading down’ to a less expensive property or changing to rented accommodation, ‘As the housing market slowed, and house prices fell, this route was closed off in many instances and the number of borrowers with more serious arrears rose, along with possessions.’\textsuperscript{125} The extent to which possessions increased during this period is illustrated by Figure 2.
This dramatic rise in the number of possessions brought the issue to the forefront of social and political debate. In response to this 'housing crisis' the Council of Mortgage Lenders (CML), entered into discussions with the government in 1991, to negotiate the introduction of measures that would curb this increase. The outcomes of these discussions were:

1. The consideration of proposals designed to implement a 'mortgage rescue' scheme, under which mortgagors could transfer to shared ownership or tenant status, thereby potentially becoming eligible for Housing Benefit.\(^{126}\)

2. The enactment of the Social Security (Mortgage Interest Payments) Act 1992 which provided for the payment of Income Support for mortgage interest (ISMI) direct to the lender, rather than to the claimant as was the case previously. In return, lenders agreed that they would not repossess where full ISMI payments were being received.
3. The publication of the CML Statement of Practice in July 1992 encouraging its members to adopt more efficient methods of communication with their borrowers and more flexible forbearance arrangements.127

The characteristic element that underpins all of these initiatives is the lack of direct financial support from central government.128 During the discussions held in 1991, the government refused to provide any funding for the implementation of ‘mortgage rescue’ schemes.129 The responsibility for establishing such schemes was, therefore, placed with the lenders, but they were not legally obliged to implement them. Following the initial promise of £800 million of finance for these schemes,130 lenders reconsidered their financial pledges when they realised that mortgage rescue schemes would not provide the expected rate of return.131

Ford et al, undertook research into the implementation of these schemes and found that the majority of lenders were not prepared to accept the costs involved in establishing them. As one lender in the report states, ‘They don’t work because no-one’s prepared to put up the money that would make them work. Nobody!’132 It is not surprising, therefore, that the report found that the ‘mortgage rescue’ scheme assisted fewer than the 20,000 mortgagors predicted by the government in 1991,133 ‘Data from the lenders’ survey indicated that by December 1993 under 700 borrowers facing possession had completed a mortgage rescue transfer and only eight per cent of lenders had taken part in such schemes . . .’134
Despite the subsequent reduction in the commitment to mortgage rescue schemes, a few lenders have developed such schemes. It would appear, however, that even where mortgage rescue schemes are available, mortgagors are unwilling to utilise them. Ford and Wilcox found in their survey of mortgagors,\textsuperscript{135} that borrowers view transfer to tenant or shared owner status as a last resort and would prefer to remain as homeowners. The reluctance on the part of mortgagors to undertake tenant transfers is understandable when one considers that mortgage rescue schemes do not assist mortgagors in their attempts to avoid possession but merely provide an alternative route out of home-ownership. The underlying philosophy of mortgage rescue schemes is that they allow mortgagors to remain in their homes, albeit as tenants rather than homeowners, but as Ford and Wilcox found, mortgagors attach special importance to the 'status' of home-owner, 'respondents saw renting as denying them their long-term financial gains from home-ownership and they valued the higher status they felt attached to owner-occupation.'\textsuperscript{136}

It may be argued that this view of home-ownership has been engendered by the housing policies of the Conservative governments. In promoting home-ownership as the form of housing to be preferred, they have engendered a belief that home-ownership is superior to all other forms of housing. The mortgage rescue scheme, however, seeks to remove the mortgagor's apparent 'privileged' status as home-owner, thereby making mortgagors reluctant to participate in it.

The reliance placed upon mortgagees to implement these mortgage rescue schemes was indicative of the government's approach to the 'housing crisis' of the early 1990s. A further measure, introduced as a result of the negotiations between the government and
the CML in 1991, namely the publication of the CML’s *Statement of Practice*, also required action on the part of mortgagees rather than the state. The CML’s *Statement of Practice*, on the current practice of mortgage lenders when dealing with mortgage arrears and possessions, states that its members may assist a mortgagor in arrears in a number of ways, including:

- allowing the mortgagor to pay off a small amount of the total arrears each month in addition to the contractual payments;

- converting endowment mortgages into repayment mortgages;

- ‘freezing’ the arrears for a short period on the basis that an increase in earnings is expected soon;

- accepting interest only payments and capitalising the arrears; or

- increasing the length of the repayment of the loan.

The *Statement of Practice* is not legally enforceable, but there is an ‘expectation’, on behalf of the CML, that its members will adhere to the provisions contained within it. In relation to the management of arrears and possessions by mortgage lenders, therefore, the government had chosen not to implement direct legal intervention but rather to allow for ‘self-regulation’, which Graham defines as, ‘the delegation of public policy tasks to private actors in an institutionalised form.’ Despite the non-interventionist stance taken by the Conservative government, possessions did fall in the years following 1991. Ford contends that this decrease in the number of possessions was, ‘in large part,
a result of initiatives by lenders to improve their arrears management along with the
impact of direct payment of mortgage interest (in whole or in part) by DSS to
lenders.\textsuperscript{139} It may be argued, however, that the fall in possessions was also due to the
preponderance of negative equity, rather than any positive action on the part of central
government or mortgagees to assist mortgagors in financial difficulty.

The increased incidence of negative equity during the early 1990s shattered the once
widely held assumption that buying a home was, ‘a sage investment — an asset which
continually increased in value.’\textsuperscript{140} In 1992, there were over one million borrowers whose
homes were worth less than the outstanding mortgage debt.\textsuperscript{141} If a mortgagee seeks
possession in respect of a property in negative equity, the proceeds of sale derived from
the sale will not cover the mortgage debt. In practice, the shortfall from such sales is
covered by an insurance policy known as a Mortgage Indemnity Guarantee (MIG). The
insurers pay to the mortgagee the amount of the shortfall, and then claim that amount
from the mortgagor as a personal debt. In the early 1990s, however, insurers altered the
terms of MIGs stating that lenders had to cover at least twenty \textit{per cent} of the loss from
their own funds. This necessarily made possession less attractive, which may account, in
part, for the fall from their peak of 75,540 in 1991, to 49,210 in 1994.\textsuperscript{142}

This reduction in the number of possessions, however, simply meant that mortgagors,
who would previously have been repossessed, were falling further behind with their
mortgage payments, a proposition supported by Ford and Wilcox writing in 1992,
One consequence of any reduction in possessions by the mechanisms currently operating is a growth in long-term arrears. These remain a serious, outstanding issue that may in time act as a pressure to increase the possession rate again.\textsuperscript{143}

The increase in the disparity between the number of possessions and the number of mortgagors in arrears of six months or more between 1991 - 1994 is illustrated by Figure 3 below.

\textit{Figure 3}

\textbf{Mortgage arrears and repossessions}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{mortgage-arrears-repossessions}
\caption{Mortgage arrears and repossessions.}
\end{figure}

Source: Council of Mortgage Lenders at \url{www.cml.org.uk/stats/arrears5.html}

The rescue package of 1991 had not implemented any measures that were designed to assist mortgagors with their financial problems and consequently, long-term arrears remained high in the two years which followed.\textsuperscript{144} The period since 1994 has, however, witnessed a reduction in both the number of possessions and long-term arrears. This reduction may be due to an improvement in the arrears management practices adopted by lenders and the economy generally since the early 1990s,\textsuperscript{145} it is particularly
surprising, however, in light of the changes made, in 1995, to the payment of Income Support for Mortgage Interest (ISMI).

The Social Security (Income Support and Claims and Payments) Amendment Regulations 1995,\textsuperscript{146} introduced new rules regarding the payment of ISMI, which state that borrowers who took out their mortgage before October 2\textsuperscript{nd} 1995 and who now claim Income Support will receive no ISMI for the first eight weeks of their claim; for the next eighteen weeks they will receive 50 \textit{per cent} of their full entitlement and will then receive full payments. For those borrowers who took out their mortgage after October 2\textsuperscript{nd} 1995, they will receive no ISMI for the first 39 weeks of their claim; full ISMI will then be paid. The government intended that the gap between the receipt of no ISMI payments and full ISMI would be met by private mortgage protection insurance.

As Lord Mackay of Ardbrecknish noted in 1995,

\begin{quote}
[t]he consequence of our decision will be the development of comprehensive, high-quality, private mortgage protection insurance. That will provide better protection for all home-owners, including those who fall into difficulties with their mortgage payments and cannot be helped by the present system because they have savings, a modest pension or working spouses.\textsuperscript{147}
\end{quote}

Criticism regarding this reliance on private insurance has been made by a number of commentators,\textsuperscript{148} and most notably by the CML, which stated that,

\begin{quote}
The CML’s view is that the further restriction of the availability of income support for mortgage interest and its replacement by private insurance would ... increase the number of
\end{quote}
possessions by 1997, because private insurance would not be as comprehensive for eligible
groups as state assistance.  

Dwelly suggests that in 1998, approximately 80 per cent of all mortgagors had no
mortgage protection policy, yet this prediction of a rise in the number of possessions
in 1997 has proven to be incorrect. Repossessions actually fell from 49,410 in 1995 to
32,770 in 1997. This decrease may be accounted for, however, by virtue of the
'windfall payments' that many households have received following the conversion of
some of the larger building societies. As the CML Director-General, Michael Coogan
states,

The latest fall in arrears and possessions is good news, but the figures are unlikely to fall
much further. Some people used their windfalls in 1997 to alleviate mortgage repayment
difficulties - this will not continue in 1998. In addition, the combination of reduced tax relief
from April, and the effect of higher mortgage rates ... means that there is likely to be some lag
in the arrears figures, with some effects from last year not showing up until this year.

The prediction by Coogan that possessions would not continue to fall has been shown
to be correct by virtue of figures published by the CML which indicate a rise in the
number of possessions from 15,790 in the second half of 1997, to 17,310 in the first
half of 1998. Whilst the CML highlights the difference between these figures and the
higher levels seen during the early 1990s, it also suggests that this 'improved' situation
should not detract attention away from the changes implemented by the Conservative
governments in relation to the payment of ISMI. In addition to measures introduced
coop eratively by the CML and Association of British Insurers, to encourage
mortgagors to use Mortgage Payment Protection Insurance cover, the CML also
recommends that changes are introduced within the welfare system, for the reason that it is, 'vital that private insurance is complemented by State support for cases of longer-term serious difficulty.'

The Labour government has not indicated, to date, any substantial commitment to reversing the changes made to the payment of ISMI. Home-owners who, therefore, fall into financial difficulty, may find that the only source of assistance available to them in their attempts to avoid possession, derives from the law of mortgage in the form of s.36 of the Administration of Justice Act 1970 (AJA 1970), a situation envisaged by the Payne Committee,

Any man's income or earnings can fall suddenly through no fault of his own, and he should be able to look to the court for any protection he may need against onerous claims arising out of the change in his means and circumstances.

Although it has been suggested earlier, that the language used within s.36 of the AJA 1970 does not refer specifically to the objectives which underpinned it at the time of its introduction, it may be the case that, in practice, such protection is afforded to the mortgagor. The practical operation of the law of mortgage and the extent to which the changes introduced by the Conservative governments during the period 1979 - 1997 have exerted an influence upon its interpretation and application are examined in Chapters Six and Seven.
5.4 Conclusions

The legacy of eighteen years of Conservative government is a housing system radically different to that which they inherited in 1979. The policies they implemented within the housing system achieved substantive changes that can be easily identified, including the reduction in the quantity of local authority housing and the increase in home-ownership. As the Centre for Housing Policy notes,

The policy of increasing home-ownership was significantly accelerated by the Conservative governments in office since 1979. In fact, 3.8 million more households now own their own home compared with 1979 .... 158

A more subtle and perhaps a more significant change has also been achieved in relation to the perception of housing and the role of the state as provider. As Malpass and Murie contend, the housing policies implemented by the Conservative governments were not merely designed to deal with the important task of ensuring that decent housing was available to all citizens.159 Rather, these housing policy initiatives served as a tools in the achievement of wider ideological and political objectives, as Ford contends,

These policies were underpinned by a clear ideological stance, sometimes referred to as ‘new right’ policies, characterised by their emphasis on greater individual responsibility, the depoliticisation of welfare, a reduced role for the state and the primacy of the market.160
In opposition to Renner's claims regarding the separation of the social function of the law from its juridical content, the review of housing policy undertaken within this chapter indicates that the introduction of legislation can be undertaken so as to achieve specific policy aims and can also lead to substantive changes within the social context. The implementation of policies such as the council tenants 'right to buy' and the promotion of home-ownership as the form of housing to be preferred were, therefore, not merely attempts to alter the structure of the housing system but were also intended to redefine the expectations and perceptions of housing held by the majority of households. As Daunton notes, 'the increase in owner-occupation was consciously encouraged by governments precisely in order to modify political and social attitudes.' The impact of these changes in combination with the more substantive reforms has been to create a housing system in which households feel compelled to enter the home-ownership sector if they wish to obtain what they perceive to be decent housing. A survey of home-owners in Bristol and Glasgow undertaken by Maclennan, et al, confirms this proposition by revealing that pre-1970 entrants into owner-occupation did so because of factors such as,

- House type, location, bequest aspects, long term saving, and few expressed a negative view of council housing. Entrants in the period 1970 to 1990 stressed different reasons for buying; a quarter gave strong negative views on rental housing and half emphasised the attractiveness of home-ownership as an investment.

In turn, this perception of home-ownership as the form of housing to be preferred has led to an increased demand for mortgage finance, endowing it with a new and significant role within the housing system. The changed relationship between the state,
the individual and the mortgagee has created a new environment for the law of mortgage.

The preference shown towards home-ownership by the Conservative governments was in large part due to its suitability as a means of achieving a number of ideological and political aims. Although it has been argued that Conservative ideology and particularly 'Thatcherism', was not a coherent philosophy but rather a combination of sometimes inconsistent policies arising out of political opportunism, it is possible to identify particular aims and objectives which persisted throughout the eighteen years of Conservative government. One such aim, particularly apparent during the Thatcher era, was the 'rolling back of the state' so as to centralise the exercise of executive power.

The desire to reduce local government autonomy may offer an explanation for the implementation of policies which undermined one of the principal functions of local authorities, namely the provision of housing. In enabling millions of council tenants to purchase their council homes under the 'right to buy' combined with the reduction in financial support, the Conservatives achieved a fundamental restructuring of the role played by local authorities. Rather than acting as 'providers' within the housing system, local authorities have been transformed into 'enablers'. Their role within the current housing system is essentially to provide advice to their members on how to obtain housing within the private sector. The Parliamentary Under Secretary for the Department for the Environment in 1996, Clappison MP, confirmed this as one of the governments objectives,
Though they [local authorities] would no longer be dominant as landlords, they had a continuing role as strategic enablers - shaping the provision of new social housing, making effective use of existing housing in all sectors, and getting new investment in council housing.\textsuperscript{166}

The residualisation of the public rented sector combined with the rise in the number of home-owners has also served to achieve a further aim of the Conservative governments, namely to promote self-responsibility. They created a perception that it was no longer the responsibility of the state to provide housing but the responsibility of individual households to ensure that their housing needs were met. As Monk and Kleinman note,

Thatcher’s policies, in actively promoting home-ownership at the expense of public rented housing, places severe pressures on people, not only to become owner-occupiers - because that is the only attractive option - but also, once in the housing market, to support policies which preserve the privileges of home-owners.\textsuperscript{167}

This, in part, accounts for the increased demand for mortgage finance and the increased availability of mortgage finance achieved through the deregulation of the mortgage market. In transferring the burden of housing provision onto individual households, the Conservatives recognised that these households would require financial assistance if they were to become home-owners. The consistent aim of reducing state expenditure meant that direct financial support from the government was not a favoured option. The obvious answer, however, was to increase the availability of mortgage finance, enabling millions of households to enter the home-ownership sector at no direct cost to the state. The increased availability of mortgage finance, with lenders being more willing to lend money to those households who previously might have been considered unsuitable as
mortgagors, has altered the constituency of home-owners. In particular, the increase in 
home-ownership has largely been achieved through the inclusion of low-income families 
as potential mortgagors, as Foster notes,

> The growth in owner-occupation over the last twenty five years has seen many families with 
low and moderate incomes taking on relatively large mortgage commitments. These families 
have been encouraged to become owner-occupiers through Government policy, yet at the same 
time the Government has taken few steps to realign and target the support available to meet 
housing costs.¹⁶⁸

The increased use of mortgage finance has also created a new and powerful role for 
mortgagees. Mortgagees have become the gatekeepers of the home-ownership sector, 
determining who will and who will not be allowed to enter and remain within home- 
ownership. The desire to maintain high levels of home-ownership necessitates low-
levels of ‘exit’ from the housing sector, namely possession levels will have to be 
restricted. In seeking to regulate this increase in power afforded to mortgagees, 
however, the Conservatives chose to place heavy reliance upon market forces and self-
regulation. The deregulation of the mortgage market combined with the increase in the 
range of services which building societies could offer under the BSA 1986, introduced 
competition into a market previously dominated by the building societies. The equation 
was simple, any mortgagee who did not meet the demands of consumers, for example 
by undertaking high levels of possessions, would not survive within this highly 
competitive market.
This reliance on market forces was questioned in the early 1990s with unprecedented levels of possessions. In response to this ‘housing crisis’, the Conservatives remained committed to their belief in the regulatory efficiency of the ‘consumerist’ model which they had sought to introduce into the housing system. They were, therefore, reluctant to intervene directly in the ‘free’ operation of the mortgage market, preferring instead to rely on self-regulation in the form of the CML Statement of Practice.

This reluctance to intervene directly in the mortgage relationship may account, in part, for the degree of inactivity witnessed within the law of mortgage during this ‘privatisation’ of housing within England and Wales. Despite the fundamental changes achieved by the Conservative governments they did not consider it necessary to reform the law of mortgage in order to achieve their housing objectives. This passivity may be explained by reference to the non-interventionist nature of the law of mortgage. As has already been made clear in previous chapters, the law of mortgage does not seek to regulate the substantive relationship between the mortgagee and mortgagor, preferring instead to demand certain procedural formalities. The law is, therefore, suited to a laissez-faire market approach, allowing the participants to the mortgage to transact without direct legal intervention, particularly in relation to the contractual terms of the mortgage. Potential home-owners are free to negotiate their own terms with a mortgagee whom they have chosen from the competitive market environment. As Lewis notes,

Changes in the perceptions and practices of government have moved almost unilinearly; they have been ‘anti-state’, they have favoured individualism, have extolled market solutions and, significantly, self-expression, even if the preferred language has been self-help.
Whilst promoting the concept of 'self-help' in relation to housing provision, home-ownership also extolled the Conservative governments preference for individualism. By encouraging an increase in home-ownership, the government could attempt to ensure that each household became principally concerned with their individual home and mortgage debt. Kemeny views this approach as an attempt to fragment society,

In home-ownership each individual household has a different mortgage burden, ranging from the financially crippling to none at all. This in itself essentially fragments and limits any social solidarity which might be possible among owner-occupiers in a home-ownership system. It is this privatisation effect, which is reinforced by the wider privatizing social correlates of home-ownership … which makes home-ownership most amenable to incorporation into conservative political ideology.¹⁷²

A further political aim may also account for the Conservative governments’ preference for home-ownership, namely that it ‘breeds political conservatism’.¹⁷³ Forrest and Murie, for example, contend that the reduction in the quantity and quality of local authority housing can be interpreted as being intended to achieve a very simple political aim,

Rightly or wrongly the Conservative Party believes that the dismantling of the public rental sector is one means of undermining allegiance to socialism. Crudely the equation is that more home-owners means more potential Conservative voters.¹⁷⁴

Despite the challenges posed to Renner’s substantive claims in respect of the normative purity of written law, the examination of Conservative housing policy undertaken within
this chapter serves to highlight the relevance of the questions posed by Renner in respect of the law and the methodological approach he promotes. In particular, it is apparent that whilst the law of mortgage has remained unchanged since 1979, its social function and the environment in which it operates have transformed. It seems reasonable to assume that these changes will exert a degree of influence over the manner in which the law of mortgage operates within the social context, an assumption examined in greater detail in Chapters Six and Seven. It would appear, therefore, that in order to understand fully the nature of the law of mortgage, it is necessary to have some conception of its social function.

In a housing system in which households are now expected to shoulder the burden of meeting their own housing needs, mortgage finance serves as the only means by which this responsibility can be met. Households may still choose to enter the public or private rented sectors, but it has been argued that in practice, home-ownership serves as the only viable option for those seeking decent, affordable housing. Lord Houghton of Sowerby summarised the consequences of Conservative housing policy in the following terms,

As things are at the present time - when we realise that we have killed off the private landlord by rent control; we have reduced the local authorities' stock of housing by offering the sale of council houses at bargain prices, and have insisted that they should sell them; and have deprived local authorities of the right to use their capital accumulations from the sale of council houses to build more houses for municipal letting - we have made house purchase on mortgage almost the only option for thousands and thousands of people who are in search of accommodation at the present time. 

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The changes implemented by the Conservative governments to the social function of the law of mortgage continue to be of relevance for the reason that the new Labour government has shown little commitment to altering the path of housing policy adopted by their predecessors. Despite Nick Raynsford’s claim, made in 1995 when he was the Shadow Minister for Housing that, ‘Housing has inexcusably been allowed to slip down the political agenda, and this must be reversed.’ Wylie and Saigol argue that housing has not been a priority for the Labour government, ‘Before the election, Labour promised home-owners it would introduce tough new laws to protect borrowers, but the issue has since dropped off the Government’s agenda.’

The ‘promises’ made by the Labour Party prior to their election to government in May 1997, included: ‘the withdrawal of the changes made to the payment of ISM’; ‘a phased release of the Capital Receipts which local authorities have obtained from sales of land and housing’; and to ‘extend choice and opportunities for people to find a home which best meets their needs and aspirations’. The phased release of Capital Receipts is the only significant proposal that has been implemented to date by the new Labour government, with £174 million released in 1997/98 and £610 million to be released in 1998/99.

The proposals of the Labour government, presented by the new Housing Minister, Hilary Armstrong MP, indicate a clear preference for self-regulation as opposed to direct state intervention, an approach favoured by the previous Conservative governments. Those proposals include: the introduction by mortgagees of ‘payment holiday mortgages’ which allow borrowers to pay more than their normal monthly repayments when they can afford to and less when they are experiencing financial
difficulties; encouraging mortgagees to increase the availability of effective mortgage payment protection insurance; and economic measures designed to prevent ‘overheating’ within the economy and a repeat of the housing crisis of the early 1990s. The preference shown by the Labour government to the approach adopted by their predecessors also extends to specific policy initiatives. In particular, the government has indicated a commitment to the continued support of the ‘right to buy’. In light of the Labour government’s apparent commitment to maintaining many of the policies first introduced by the Conservatives, it seems reasonable to assume that the social function of the law of mortgage, as described in this chapter, will remain in place in future years.

It has been the aim of this chapter to identify whether any change has occurred in the social function of the law of mortgage and, if such a transition has been occasioned, to account for the manner in which such change has been achieved. In undertaking this research task, focus has been given to what may be termed ‘macro’ issues, namely those factors which operate at a general and national level, including the policies of central government. The aim of the following chapter is to continue the examination of the social function of the law of mortgage by focusing upon ‘micro’ issues, namely, the manner in which individual households and mortgagees seek to use the legal device of the mortgage so as to allow for the purchase of residential property.
1 Kahn-Freund, p. 2.
2 Ibid.
5 Kahn-Freund, p. 5.
6 Ibid.
7 Achieved through measures such as the Financial Services Act 1985.
8 DETR Housing: Key Facts at www.housing.detr.gov.uk/information/keyfacts/index.html.
9 Gray, p. 933.
16 Daunton, op. cit. n. 13, p. 86.
17 See pp. 245 – 246.
18 See Murie, op. cit. n. 10, pp. 80 – 83.
22 Boddy, M. ‘Our Mutual Friends’ in Goodwin, J. and Grant, C. op. cit. n. 10, p. 41.
24 Boddy, op. cit. n. 19, p. 6.
25 Boddy, op. cit. n. 22, p. 42.
26 Boddy, op. cit. n. 19, p. 8, see also Barnes, op. cit. n. 23, p. 3.
28 Ibid.
31 This survives today as the Mortgage Indemnity Guarantee.
32 Burnett, op. cit. n. 30, p. 248.
33 Boddy, op. cit. n. 19, p. 1.
35 During the early and middle part of the twentieth century, the building societies operated a cartel in relation to interest rates. A full discussion of the implications of the operation of this cartel and its abolition in the late 1980s is beyond the scope of this chapter. An examination of these issues can, however, be found in Barnes, op. cit. n. 23.
37 Balchin, op. cit. n. 36, p. 6.
38 Malpass, P. and Murie, A. op. cit. n. 36, p. 9.
40 See Duclaud-Williams, R. H. *The Politics of Housing in Britain and France* (Heinemann: London, 1978); Malpass, P. and Murie, A. *op. cit.* n. 36; Murie, *op. cit.* n. 10; and Balchin, *op. cit.* n. 36.
42 Daunton, *op. cit.* n. 13, p. 4.
44 Ford, *op. cit.* n. 43, p. 186.
45 Barnes, *op. cit.* n. 23, p. 5.
46 See Daunton, *op. cit.* n. 13, pp. 4 - 5.
47 Murie, *op. cit.* n. 10, p. 89.
48 *ibid.*
50 Daunton, *op. cit.* n. 13, p. 79.
51 A tenant of three years' standing could purchase their home at a discount of 33 *per cent* and this rose to 50 *per cent* for those with twenty or more years' standing.
52 Balchin, *op. cit.* n. 36, p. 173.
58 *ibid.*
61 Balchin, *op. cit.* n. 36, p. 37, Table 3.4. This decline in new housebuilding by local authorities has continued, with the majority of new constructions within the public sector now undertaken by housing associations.
66 The relevant Parts of the 1996 Act in respect of the allocation of services are Parts VI and VII.
67 Parts VI and VII of the Housing Act 1996 came into force on 1st April 1997 and 20th January 1997 respectively.
68 In July 1997, the Labour government modified the homelessness provisions in respect of the 'unintentionally homeless', claiming that such households, 'should now receive a degree of preference in the allocation of permanent accommodation', see the DETR *Annual Report 1998*, para. 3.32, available at [www.detr.gov.uk/annual98.html](http://www.detr.gov.uk/annual98.html).
70 Bayley, R. 'The Race Against Time' *Rooftop* Nov/Dec 1996, p. 34.
71 Mullins, D. and Niner, P. *op. cit.* n. 69, p. 187.
74 Kemeny, *op. cit.* n. 4, pp. 71 - 72.
78 Kemeny, op. cit. n. 4, p. 72.
80 See, for example, Blake, J. and Dwelly, T. op. cit. n. 57, p. 34 and Merrett, S. op. cit. n. 75, p. 63.
83 The Act was consolidated in the Building Societies Act 1962.
84 Drake, op. cit. n. 34, p. 82.
87 Cmd. 9316.
88 Building Societies Act 1986, s 5(1).
89 *ibid.* sch. 8.
90 *ibid.* s.11(2).
91 *ibid.* s.11(4).
92 *ibid.* s.15.
93 *ibid.* s.16.
94 *Hansard*, Commons, Vol. 89, col. 596.
95 James, et al, op. cit. n. 11, p. 220.
96 All building societies are participants in the scheme.
97 James, et al, op. cit. n. 11, p. 216.
98 *ibid.*
99 Ball, op. cit. n. 65, p. 32.
100 By virtue of the Building Societies (Transfer Resolutions) Order 1997, 50 per cent of the members of a building society qualified to vote on a shareholding members' resolution must have voted on such a resolution for it to be effective in transferring the business of the society to a specially formed company if it is passed.
101 In the case where a society wished to convert into a company, specially formed for that purpose, 75 per cent of the eligible voting investing members must approve the conversion via a special resolution of the society. In addition, 50 per cent of eligible borrowing members voting must also approve an appropriate borrowers' resolution. A minimum of twenty per cent of all eligible shareholders must vote.
102 op. cit. n. 94, col. 598.
103 *ibid.* col. 601.
104 *Hansard*, Lords, Vol. CDLXXVI, col. 1215.
105 op. cit. n. 94, col. 592.
106 Doling, et al, op. cit. n. 76, p. 5.
109 *ibid.*
110 Department of the Environment, op. cit. n. 55, para. 1.1.
113 Murie, et al, op. cit. n. 65, p. 15, para. 2.21.
114 DETR *Housing: Key Facts* at www.housing.detr.gov.uk/information/keyfacts/index.html.
117 Carey, op. cit. n. 115, p. 9.
168 Foster, op. cit. n. 127, p. 3.
170 Daunton, op. cit. n. 13, p. 5.
172 Kemeny, op. cit. n. 4, p. 64.
173 Gray, p. 935.
174 Forrest, R. and Murie, A. op. cit. n. 63, p. 60.
175 See Kemeny, op. cit. n. 4, p. 145.
176 op. cit. n. 104, col. 1205.
177 See Williams, P. ‘Hindsight’ in Goodwin, J. and Grant, C. op. cit. n. 10, p. 204.
178 Speech made to the Building Merchants Federation, Barcelona, 3rd June 1995.
181 Letter received from Paul Lipscombe, DETR, 17th December 1997. See also www.housing.det.gov.uk/.
182 ibid. See also Birch, op. cit. n. 180, p. 24.
183 Letter received from Paul Lipscombe, op. cit. n. 181. See also Bayley, R. ‘Options to Own’ Roof Nov/Dec 1998, pp. 26 – 27.
CHAPTER SIX

6.1 Introduction

The previous chapters of this thesis have been concerned with an examination of the manner in which the social function of the law of mortgage has transformed from one of assisting landowners with their pecuniary difficulties to one of assisting millions of individuals to take advantage of the ‘benefits’ associated with home-ownership. The aim of this chapter is to continue this theme by examining the manner in which both mortgagors and mortgagees put the legal device of the mortgage to use within the current housing system. In addition to its primary aim of presenting an account of aspects of the practical operation of the mortgage relationship, this chapter also endeavors to advance themes that have recurred throughout this thesis.

The claim that the juridical analysis of the law can do little to increase an understanding of its real significance, for example, will be examined by reference to the operation of the law of mortgage within the social context. A juridical analysis may inform as to the content of the law of mortgage, but it would appear to provide little if any information relating to the manner in which that legal framework operates in practice. It may be the case, for instance, that certain statutory provisions, considered to be significant within juridical analyses of the law, are in practice obsolete within the social context. In order
to determine whether a positive legal analysis of the law does fail to offer a representative view of the law of mortgage, it will be necessary to compare such an account with the operation of the legal framework within the social context. This chapter will, therefore, serve as a point of comparison with Chapter Three.

It has been suggested in previous chapters that the law of mortgage does not operate in isolation but influences and is influenced by other social, legal and economic institutions. In order to provide an account of the operation of the legal framework within the social context, therefore, it is necessary to make reference to all aspects of the mortgage relationship and not merely those affected by the law of mortgage. In particular, mortgagees are able to exercise discretion, unstructured by the law, in respect of matters including: allowing a mortgagor access to mortgage finance; the terms of the mortgage contract; and the initiation of the possession process. Whilst this discretion operates free from substantial legal regulation, its exercise can influence the operation of the law of mortgage. The decision to seek a possession order from the court, for example, invokes the operation of s.36 of the Administration of Justice Act 1970 (AJA 1970). It is important, therefore, in attempting to provide a representative account of the practical operation of the law of mortgage to have some understanding of the factors that influence the exercise of such discretion.

Information in respect of these factors may be obtained through secondary research, thereby utilising data collected by other researchers. Whilst there are a number of secondary sources which provide qualitative data in respect of certain aspects of the mortgage relationship and in particular the practical operation of the possession process, the attempt to use such sources to support a particular hypothesis can
encounter a number of problems, as was indicated in Chapter Two. In order to avoid such difficulties, this chapter places heavy reliance upon qualitative data obtained during the primary research study undertaken for the purposes of this thesis.

The analysis of the qualitative data collected as a result of primary and secondary research will be presented so as to provide a detailed account of each stage of the mortgage process, beginning in this chapter with the initial mortgage contract and ending with possession other than that obtained through the courts. The remaining stages of the mortgage relationship, including compulsory possession through to the circumstances following possession will be discussed in Chapter Seven. In order to further the aims of this thesis, however, reference will be made, at relevant points in this chapter, to aspects of the practical operation of the legal framework which inform, support or deny contentions relevant to the hypothesis. This chapter will conclude by drawing these references together in order to provide a thematic account of the uses made of the legal device of the mortgage.

6.2 Accessing mortgage finance - the pre-contractual and contractual stages

It has been suggested in previous chapters that the law of mortgage serves principally to establish requirements as to formality within the mortgage relationship, with the substance of the mortgage relationship being constructed by the parties through private negotiation. The freedom afforded to the parties to devise the terms of their mortgage agreement raises questions regarding the extent to which the typical mortgage contract
is the product of negotiations which lead to the construction of mutually acceptable and beneficial terms. The following section of this chapter examines the contractual stages of the mortgage transaction and the extent to which both mortgagor and mortgagee are able to negotiate terms that reflect their interests within the mortgage relationship. The negotiations regarding the formation of the mortgage contract can only begin, however, if the mortgagee, chosen by the mortgagor, is willing to lend mortgage monies to that particular mortgagor.

For the majority of households wishing to enter the home-ownership sector, gaining access to mortgage finance is crucial. The decision as to whether an individual household will be granted the funds necessary to purchase a home lies solely with the mortgagee. The qualitative data provided by the representatives of mortgagees within the primary research study, indicated that a variety of factors influence the decision to allow a potential mortgagor access to mortgage finance. The principal concern of the mortgagee appears to be to ensure that the mortgagor has a sufficiently secure financial position to enable the mortgagor to meet the payments required by virtue of the mortgage contract. The terms of this 'sufficiency' requirement have altered, however, during the last few decades.

Prior to the early 1980s, prospective mortgagors had to prove to mortgagees that their financial position was adequately secure by fulfilling relatively strict demands, as Boddy notes, writing in 1980, ‘societies have generally continued to require that at least £500 or in some cases ten per cent of the purchase price be invested for six months or more before a loan is granted ….’ The stringent lending criteria applied by the building
societies, however, came under review in the early 1980s with the deregulation of the mortgage market.

The introduction of competition within this market resulted in mortgagees being willing to lend more on the basis of less stringent lending criteria regarding the status of the mortgagor. As Ford, et al, note, in 1981, 26 per cent of first-time buyers were granted a 100 per cent advance. The increased availability of mortgage finance to a wider range of households played a pivotal role in the creation of a mass home-ownership market but questions were raised regarding the operation by mortgagees of these lending practices during the ‘housing crisis’ of the early 1990s.

Malpass considers that the provision of mortgage monies to households who previously may have been considered unsuitable as candidates for mortgage finance, had increased the number of home-owners who would be susceptible to mortgage arrears and possession,

The rapid expansion of home-ownership in the 1980s had been boosted by the increased availability of mortgage credit and the willingness of lenders to provide up to 100 per cent of the valuation; this had drawn into the market increasing numbers of low-income purchasers and they, and other heavily borrowed owners, were clearly most at risk of losing their homes when unemployment struck.

Ford, et al, however, suggest that, ‘The effects of injudicious lending were rather less apparent than critics have suggested they might have been.’ The basis for this proposition is that possessions during the early 1990s affected households from all
income groups, not merely first-time buyers with high loan to income ratios. It is perhaps in relation to the non-discriminatory nature of the ‘housing crisis’ of the early 1990s that the majority of mortgagees have maintained post-deregulation lending policies, including the offer of 100 per cent advances although Ford, et al, have found that some mortgagees have altered their lending practices as a direct result of the ‘housing crisis’.9

In relation to current lending practice, the representatives of mortgagees interviewed during the primary research study, indicated that a mortgagor would usually be granted mortgage funds if the amount of money which is to be the subject of the loan was equivalent to two, or in some cases, three times the amount of the mortgagor’s annual income. Access to mortgage finance was also dependent, in relation to certain prospective mortgagors, on the payment of a deposit prior to the transference of the loan monies, which on average amounts to a minimum of five per cent of the value of the property.

Whilst mortgagees appear to be concerned primarily to ensure that the debt will be repaid, the representatives of mortgagees indicated a willingness to be ‘flexible’ in the provision of mortgage funds. The representatives of the mortgagees were aware of the need to increase the number of potential mortgagors that they might lend to and that this could be achieved by widening access to mortgage finance. First-time buyers, who do not have the opportunity of using funds obtained as a result of the sale of a previously owned property, for example, may not be required to pay a deposit.
The flexibility apparent in the lending criteria of these mortgagees also extended to the offer of what may be classified as 'mortgage products'. The legal norm of the mortgage is defined as the conveyance of an ownership interest in property as security for a debt. It has been suggested throughout this thesis that this 'normative purity' allows for its manipulation within the social context so that the mortgage device may be put to new services. This contention is supported by reference to the variety of loan agreements made available by mortgagees all of which come within the definition of a mortgage. Whether a prospective mortgagor chooses to seek mortgage finance from a building society, bank, insurance company or centralised lender, they will be able to choose between, for example, an endowment or repayment mortgage at a fixed or variable rate of interest. Maclennan, et al, during a survey of home-owners in Bristol and Glasgow found that, 'At the time of the sample [1995], there were around 200 mortgage products available to purchasers.'

In an attempt to assist mortgagors in their choice of mortgage product, the Council of Mortgage Lenders (CML) published the *Mortgage Code* which came into effect on July 1\textsuperscript{st} 1997. By virtue of the code, mortgagees may choose to offer three levels of service: advice and recommendation as to which mortgage is most suitable for the mortgagor; information on the different types of mortgage product the mortgagee offers so that the mortgagor can make an informed choice of which to take; and information on a single mortgage product only, if the mortgagee only offers one mortgage product or if the mortgagor has already made up their mind.

Regardless of the level of service offered by a mortgagee, information should also be provided to the mortgagor in respect of the repayment method; the financial
consequences of repaying the mortgage early; the type of interest rate; details of any compulsory insurance; and where a mortgage indemnity guarantee is required, that it covers the mortgagee and not the mortgagor. The **Mortgage Code** is a voluntary code but the Government has indicated that, unless all mortgage lenders adhere to the code, legislation will be introduced imposing similar terms,

Lenders will have to demonstrate that the Code works, not just to avoid the fear of statutory regulation, but because ultimately the success of lenders depends on their reputation for giving sound advice and dealing fairly with their customers ... The Code is the industry's last chance to show that it can regulate itself.

The increase in the different types of mortgagee willing to lend money for the purpose of purchasing residential property and the variety of mortgage products appears to afford mortgagors a degree of choice within the mortgage market. The factors which influence that choice have not been the subject of published research, a number of the representatives of mortgagees interviewed, however, indicated that the main factor related to price, with mortgagors choosing what they perceived to be the cheapest mortgage.

Many mortgagors appear to be influenced, in particular, by short-term financial incentives when choosing a mortgage. The provision of mortgage products which offer 'cash-back' on completion, usually to the value of £1000, or a fixed rate of interest for the first few years of the mortgage were the most popular products according to the mortgagees interviewed. The emphasis given to short-term gains by mortgagors when choosing a mortgage product raises questions as to whether that particular mortgage
product is suitable in respect of the mortgagor’s long-term interests. The introduction of the *Mortgage Code* was intended, in part, to avoid such ill-informed choices on the part of mortgagors. The Chairman of the CML in 1998, John Massey,\(^\text{14}\) however, indicated scepticism as regards the extent to which it should be the responsibility of lenders to interfere in the mortgagor’s choice of mortgage product,

> **[s]hould there be a responsibility on lenders and intermediaries to encourage borrowers to make sure that they have properly considered the overall deal? How far does a lender need to go to explain the financial implications to consumers who make their own choice without advice?** There are no easy answers to these questions in the CML’s view.\(^\text{15}\)

Despite these concerns, the CML has indicated a clear commitment to monitoring the implementation of the *Mortgage Code*. A survey of 1,900 people in July 1998, undertaken by MORI on behalf of the CML, found that 43 *per cent* of those mortgagors who had taken out a mortgage in the twelve months prior to the survey were aware of the *Mortgage Code*.\(^\text{16}\) It is difficult to assess the extent to which mortgagees offer all three levels of service but it would appear that potential mortgagors are now more likely to receive a higher degree of advice and information than was the case prior to the introduction of the *Mortgage Code*.

Following the completion of these initial stages of the mortgage relationship, namely that the mortgagor has chosen and applied to a particular mortgagee and that mortgagee has approved their application, the parties are free, in theory, to negotiate the terms and conditions of the mortgage contract. It seems reasonable to assume that the introduction of competition into the mortgage market would furnish prospective
mortgagors with a degree of influence within the contractual negotiations. A mortgagor who is dissatisfied with a mortgagee’s offer of terms, for example, can exercise some degree of bargaining power by threatening to seek mortgage finance from another mortgagee.\textsuperscript{17}

The rhetoric of competition has not become the practice, however, within the mortgage market. A mortgagor rarely has the ability to influence the contractual terms, regardless of the mortgage product or mortgagee chosen, as one representative of a mortgagee notes, they offer, ‘Non-negotiable standard terms. If you want to borrow then these are the terms.’ The assumption that a prospective mortgagor, who does not wish to accept the terms established by this mortgagee, may seek mortgage finance from a different source is misplaced for the reason that all mortgagees offer non-negotiable standard terms. Having read the mortgage conditions offered by twenty mortgagees, including both banks and building societies of varying size and location, it is apparent that mortgagees offer terms that are similar throughout the industry.\textsuperscript{18} These conditions include standard terms which:

- restrict the mortgagor’s ability to alter any feature of the secured property;

- require the consent of the mortgagee prior to the establishment of a tenancy agreement concerning the secured property;

- require the mortgagor to insure the property with an insurance company which the mortgagee recognises as suitable; and
• impose liability upon the mortgagor for all costs properly incurred should the mortgagee seek to enforce any of the rights granted to the mortgagee by virtue of the mortgage contract.

A prospective mortgagor is obliged to accept these terms if they wish to obtain mortgage finance, a proposition supported by Taylor MP, who noted, during a debate in respect of the Building Societies Act 1986 (BSA 1986) that,

> With the dominant position of the societies, usually the home buyer reconciles himself to a society’s terms. There is not much variation between one society and another. It is no more than Hobson’s choice for the borrower who buys his home.\(^{19}\)

It became apparent during the primary research study, however, that mortgagors may not be aware of this level of standardisation within mortgage contracts due to the failure on the part of prospective mortgagors to read the contents of the mortgage contract. All of the representatives of mortgagees interviewed stated that they did not believe that their mortgagors read any of the terms and conditions of the mortgage contract.

This view is supported by evidence provided by the National Association of Citizens Advice Bureaux (NACAB) in relation to mortgage indemnity guarantees (MIGs). Mortgagees have differing policies regarding MIGs but where a loan covers more than 75 percent of the value of the secured property the mortgagor must pay the premium for an insurance policy which covers any shortfall made by the mortgagee as a result of the sale of that property.\(^{20}\) Despite s.28 of the BSA 1986 which requires mortgagees to inform mortgagors of the effect of the MIG, it is clear that some mortgagors still remain
ignorant of the fact that it is the *mortgagee*, and not the mortgagor, who is covered by this policy even though that fact is clearly stated in the mortgage conditions. The NACAB report highlights this misunderstanding of MIGs,

A CAB in Wiltshire reports a client who paid £500 for a mortgage indemnity policy when he took out a mortgage in 1989. In 1992 the property was repossessed and sold leaving a shortfall of £22,000. The underwriters have now approached the client for the shortfall. He was under the impression that he was covered by the mortgage indemnity: it was never made clear to him that only the lender was covered.²¹

Information gained as a result of interviews with the representatives of mortgagees indicated that this example is not unusual but, due to publicity in the media regarding MIGs and moves by the mortgagees to provide more information on these policies such as informing their solicitors to make the effect of the policy clear to a prospective mortgagor, mortgagors are gradually becoming more aware of their continuing liability following repossession.

This reluctance on the part of mortgagors to read the conditions of their mortgage may be due to a number of factors. As the representatives of mortgagees interviewed pointed out, the majority of prospective mortgagors do not wish to concern themselves with situations which might occur in the future which would lead the mortgagee to enforce any of its rights under the mortgage conditions and in turn, the mortgagee should not consider the possibility of having to enforce its rights if it believes that the mortgagor is a suitable candidate for a mortgage. It would appear that both parties to the mortgage choose to ignore the possible consequences of the mortgagor failing to
meet the conditions of the mortgage contract because it undermines the confidence of the parties within the contractual relationship. As a representative of the CML notes, ‘Most borrowers don’t take out a mortgage with the presumption that they are going to lose the house. People hear what they want to hear and ask the questions they want to ask.’

Secondly, it may be assumed that it is not in the commercial interests of the mortgagee to point out to a prospective mortgagor that if they breach any of the mortgage conditions, such as a failing to pay the required instalments, they will be subject to additional charges on their account and possibly possession. Mortgagees do provide their solicitors with guidance notes which state that the solicitor is responsible for advising the mortgagor as to the effect of the mortgage conditions, however, the guidance notes do not state that the solicitor should inform the mortgagor as to the possession policies of the mortgagee. The mortgagor will be aware of the fact that if they fail to pay their mortgage instalments they may have their home possessed but it will not be clear as to when or how this procedure will be invoked.

Thirdly, current mortgagors will have received mortgage conditions that were framed in legalistic terms. It would have proved difficult, therefore, to understand these terms if the mortgagor had attempted to read them, as this clause taken from one mortgagee’s set of mortgage conditions illustrates,

The Borrower will discharge the primary obligations of the Borrower under sub-clauses 2.1.1 and 2.1.2 hereof by making to the Society on the like date in each month as the date of the Mortgage (except where such date is after the 28th day of the month in which case payment
shall be made on the 28th day of each month) or on such other date as the Society may
determine a Combined Payment (which will be of the same amount as the Monthly Amount
unless the Proviso in sub-clause 2.1.4 hereof is applied) ....

Of the thirteen representatives of mortgagees interviewed, however, eight mortgagees
either had or were in the process of adopting 'Plain English' in the drafting of their
mortgage conditions. The following clause, taken from a mortgagee's revised
conditions, illustrates the manner in which they now read,

You must repay the Amounts Secured by the end of the Term. You must pay the Monthly
Payment by direct debit on the Monthly Date. If you make the Monthly Payment by any other
method, We will charge You an administration fee. We may change the amount of Your
Monthly Payment or this administration fee at any time. We will tell You about any changes.

The lack of influence exerted by mortgagors within the construction of the mortgage
contract and their unfamiliarity with its terms challenges any adherence to the principle
of freedom of contract. The parties to the mortgage transaction have not entered into a
contract that was freely negotiated and mortgagees are aware of the failure by those
they contract with to read the terms of the document. What is perhaps more significant
than the manner in which these terms are arrived at is the extent to which this ability, on
the part of mortgagees, to determine the content of the mortgage contract impacts upon
the interests of both parties to the mortgage relationship.

The moves by some mortgagees to adopt 'Plain English' in the construction of their
mortgage contracts suggests that they consider it important that the mortgagor read and
understand the terms of the agreement. The question that arises, however, is how much
relevant information would the mortgagor gain if they did read the conditions of the mortgage? The answer, in practice, is very little, particularly in relation to the process by which the mortgagee exercises the inherent right to possession.

The majority of mortgage conditions state that all monies become due upon the happening of any one of the following events, including: failure to pay the required instalments; the breach of any other covenant under the mortgage conditions; or bankruptcy of the mortgagor. Mortgage conditions go on to state that if the mortgage monies do become due, the mortgagee reserves the right to: take possession of the property; exercise the power of sale under s.101 of the Law of Property Act 1925; or lease the property. In failing to provide any further information regarding how or when these rights will be exercised, mortgagees are reserving for themselves discretion to determine when a mortgagor will be subject to possession.

This discretion is regulated to some extent by the CML Statement of Practice,22 which encourages mortgagees to assist mortgagors in their attempts to clear their arrears and thereby avoid possession. The general principles established by the Statement of Practice include,

(a) When a borrower falls into arrears, the problem should be handled sympathetically and positively by the lender. The lender's first step will be to try to contact the borrower to discuss the matter. (b) As soon as financial difficulties arise, the borrower should let the lender know as soon as possible. (c) Once contact has been established, a plan for dealing with the borrower's financial difficulties and clearing the arrears will be developed consistent with the interests of both the borrower and the lender. (d) Possession of the property will be sought
only as a last resort when attempts to reach alternative arrangements with borrowers have been unsuccessful. The borrower will remain liable for the full mortgage debt.23

In accordance with the Statement of Practice, the majority of the representatives of mortgagees stated that they would seek an arrangement with their mortgagors whereby the arrears will be cleared within a specified period. In order to reach such an arrangement, however, it is essential that communication between the mortgagee and the mortgagor is initiated and maintained.

The larger mortgagees have introduced a number of technological tools to enable them to identify and contact mortgagors in arrears, including helplines, ‘predictive dialling systems’, which enable them to contact mortgagors at the first sign of financial difficulties, and software programmes which list those mortgagors in arrears and the extent of the arrears. As the representative of one of the larger mortgagees notes,

Since 1991 we try and counsel all of our customers to avoid taking possession proceedings, they may only be short-term unemployed and we can hopefully see them right. We have mortgage rescue schemes which are advised on by the branches during counselling to try and avoid possession.

The smaller mortgagees suggested that they are able to recognise those mortgagors who are experiencing difficulties with their payments by regular reference to all of the accounts that they hold and, due to the relatively small number of mortgage advances they provide, they have a more detailed personal knowledge of their mortgagors’ circumstances.
A mortgagor in arrears who does make contact with their mortgagee may have a number of available options to assist them in clearing their arrears. The CML *Statement of Practice* sets out a number of ‘forbearance arrangements’ including: paying off a small amount of the total arrears each month in addition to the contractual payments; converting endowment mortgages into repayment mortgages; ‘freezing’ the arrears for a short period on the basis that an increase in earnings is expected soon; accepting interest only payments and capitalising the arrears; and increasing the length of the repayment of the loan.

The directions provided by the CML’s *Statement of Practice* operate as guidance only; mortgagees are not obliged to adhere to its terms. The decision to seek possession, therefore, operates free from legal regulation, allowing mortgagees an unstructured discretion. In relation to the exercise of that discretion, the representatives of mortgagees suggested that a number of factors are taken into account before possession is sought, including: the willingness of the mortgagor to enter into discussions regarding the repayment of arrears; the amount of the arrears; and the likelihood of the mortgagor being able to repay the arrears within a reasonable period.

The mortgagee’s inherent right to possession of the secured property, was discussed in some detail in the preceding chapters where, it was suggested, the right has become an anachronism within the current mortgage relationship. This proposition derives from the incorporation, by mortgagees, of a term within the mortgage contract that restricts the exercise of the inherent right to possession unless and until the mortgagor is in default. In support of Renner’s contention that the social function of a legal institution
does not disappear but merely transforms, the inherent right to possession has come to serve a new and useful purpose for mortgagees, namely as a debt recovery service.

All of the representatives of mortgagees interviewed stated that they adhere to the principle, set out in the CML *Statement of Practice*, that possession should be seen as a last resort. This statement is, however, open to interpretation for the reason that, although the representatives of mortgagees considered *outright* possession to be a last resort, they differed in their policies regarding the use of *suspended* possession orders. Mortgagees recognise that the inherent right to possession, if exercised in response to default on the part of the mortgagor, guarantees that the court will have to grant an order for possession. Nixon, *et al*, make this point clear, ‘In mortgage arrears cases there is no discretion (once the arrears are proven) to refuse to grant possession,’ although the court does have a discretion to suspend the execution of such an order by virtue of s.36 of the AJA 1970. The intention which underlies the decision by a mortgagee to seek a possession order, however, is in many cases, not to gain vacant possession but to ensure that the mortgagor continues to pay the monthly instalments and clears an amount off the arrears, as one representative notes,

> Although we may have a lot of possession orders in a year the bulk of them don’t lead to possession they lead to the borrower realising that there is a commitment to be undertaken and with the power of the law behind it, it does assist. But if people haven’t got the money then it will lead to possession.

Data provided by the representatives of mortgagees indicated that they would always attempt to negotiate a forebearance arrangement with a mortgagor who is in arrears.
Some of the representatives of mortgagees, however, considered that this arrangement should be formalised by seeking a suspended possession order in the County Court,

The main aim of [seeking a possession order] is to put the account on a regular footing, to get the court to determine what the monthly payment should be to clear the arrears. That is the shortest and tidiest way of doing that. We repossess a very small amount of the cases we take to court.

Others considered that court action should only be undertaken where all other efforts to clear the arrears had failed, as one representative made clear, ‘We only take legal proceedings if everything else fails and even if we have a hearing date then we will cancel it if circumstances change.’ It is clear, therefore, that different mortgagees operate different policies regarding the use of legal proceedings for possession, a finding which is supported by research undertaken by Ford, et al, who found that,

Lenders ... varied in their approaches and particularly in the stringency with which they assessed cases and sought outright possession. Consequently, borrowers in similar circumstances, but with different lenders were not necessarily treated in similar ways.29

The inherent nature of the right to possession allows mortgagees to utilise it in different ways and to achieve different ends. It may be argued that this inconsistency in the possession policies operated by different mortgagees is inevitable within the market system because each mortgagee will have different needs and aims within the market. Justification of this inconsistency is difficult to achieve, however, for the reason that information regarding the individual commercial policies of the mortgagees is not made available to prospective mortgagors. An informed choice of mortgagee within this
market regime is, therefore, unobtainable and in a small number of cases this lack of informed choice proves crucial in the mortgagor’s attempts to avoid possession, as Ford notes,

Many borrowers indicated that they assumed that everything was in order, rather than understanding the financial details and nature of the agreements they had concluded. This lack of financial understanding may be crucial if and when default occurs, as misunderstandings about financial arrangements can exacerbate default situations.³⁰

The lack of information provided by mortgagees in respect of the policies they operate in relation to possession may also prove significant in the mortgagor’s attempts to avoid possession as a result of the liability, imposed upon mortgagors by the conditions of their mortgage, to meet all costs incurred in the enforcement of the mortgagee’s rights under those conditions. If possession proceedings are brought in the County Court the mortgagor will be liable for the legal costs, which on average amount to approximately £600. As the legal process of possession imposes a burden upon the mortgagor to convince the court that the mortgagor’s financial circumstances are sufficient to ensure that any arrears can be cleared, it seems reasonable to assume that the addition of £600 to the mortgagor’s account will not be advantageous.

By seeking a suspended possession order as a means of enforcing a forebearance arrangement, or as a general policy, mortgagees are increasing the financial burden already being experienced by the mortgagor. A mortgagor who is subject to legal proceedings will, therefore, find it more difficult to avoid possession in the future than a
mortgagor who is allowed to clear their arrears without reference to the court. NACAB makes its opposition to this policy clear when it states that,

In the view of the CAB Service it is not an appropriate use of the courts to seek a suspended possession order merely to formalise an agreement to repay arrears, which the borrower has kept. There is presently no disincentive to the lender to use the courts in this way, since any costs incurred can be passed on to the borrower ....

In addition to the financial costs imposed upon the mortgagor, the receipt of a court summons where the mortgagor has already reached an agreement with their mortgagee may result in the belief that possession is inevitable and may result in the mortgagor handing in the keys or failing to meet the necessary payments, as the NACAB report notes,

Whilst the lender may argue that they are simply taking the action in order to safeguard their position and that they have no intention to repossess, as long as the arrangement is adhered to, the situation presents very differently to the borrower. Any court summons not surprisingly creates considerable anxiety and distress and reduces the borrower’s belief that possession can be avoided, thereby reducing their commitment to repay.

The freedom afforded to mortgagees to exercise an unstructured discretion in respect of possession derives, in part, from their ability to construct the terms of the mortgage contract. In having the power to determine the content of the mortgage agreement, mortgagees are also able to determine those matters that will not be referred to within that contract. The procedures that will be adopted in exercising the right to possession serve as one example but there are others, including information relating to ‘additional
charges'. In addition to the inconsistency in the policies adopted by different mortgagees as regards possession it also became apparent, during the primary research study, that individual mortgagees operate different policies regarding the imposition of charges upon mortgagors in arrears. Despite the availability of forbearance agreements, the difficulties faced by mortgagors in attempting to clear the arrears on their mortgage appears to be exacerbated by the imposition of charges upon their accounts by the mortgagees. NACAB provide evidence of such charges,

A CAB in Hertfordshire reports a client who received a statement from their building society outlining charges for each of eight different arrears collection actions, ranging from £10 for each telephone call, to £30 for a home visit, to £50 for the issue of a solicitor’s letter. The charges were to be debited to the account and interest charged accordingly.33

The imposition of additional charges on the accounts of mortgagors in arrears is not subject to direct legal regulation. The CML’s Statement of Practice in respect of this issue, however, states that,

If an alternative payment has been agreed, and is being adhered to by the borrower, lenders may either cease levying a fee on that account or continue to charge fees until the account has been brought up to date.34

A mortgagee, therefore, has the discretion to set the amount of the charge and the services that are to be the subject of the charge. In criticising the lack of legal regulation in respect of additional charges, the National Consumer Council (NCC) points to the deficiencies of self-regulation,
We accept that there is some merit in a code which encompasses principles not generally found in statutory legislation. An example is the principle that the lender will deal "fairly and reasonably" with the borrower. Such a principle is of no use, however, if there are lenders who do not have to be members of the club that requires adherence to it. It is of even less use if there is no sanction for members of the club who break the principles of the code.\(^3^5\)

The lack of legal regulation in this area may be based on the assumption that mortgagees, as the providers of services within the financial market, will only set charges that cover the actual cost of the service in order to remain competitive within the market system. Data gathered during the primary research study suggests that this assumption is incorrect for the reason that different mortgagees charge different amounts in relation to similar arrears services.

The majority of the representatives of mortgagees interviewed stated that the charges were imposed merely to cover administrative costs, however, one representative stated that, 'The scale fees that we charge in terms of letters are used to provoke a response from the customer.' Mortgagors with this mortgagee were charged higher amounts for each subsequent letter, indicating that a charge higher than that necessary to cover administrative costs was imposed. Other representatives of mortgagees stated that they charged the same amount for each letter regardless of how many had been sent previously. The amount of additional charges imposed on the accounts of mortgagors in arrears, therefore, differs depending on the mortgagee involved. The important point to note is that information regarding the imposition of these additional charges is not made available to prospective mortgagors. In consequence, prospective mortgagors cannot make an informed choice of mortgagee on the basis of the charges that will be imposed.
if the mortgagor falls into arrears. Proposals made by NACAB regarding measures designed to regulate the imposition of additional charges upon mortgagors in arrears were published in 1993 and included,

a) Regulation be introduced prescribing both what services can be charged for, and the amount that can be charged; b) No charges should be levied where an arrangement to pay has been agreed and is being maintained; and c) Clear information about any liability for such charges should be given to the borrower at the outset of the loan, as well as when arrears start to accrue.36

These and similar proposals put forward by the NCC in 1996,37 have not been implemented, allowing for the continued operation of inconsistency in the amount of additional charges imposed upon mortgagors in arrears. The important point to note in respect of this inconsistency is that it may prove crucial within the possession process for the reason that, as will be discussed in Chapter Seven, the County Court has a discretion to suspend a possession order where the mortgagor can show an ability to clear the arrears within a reasonable period. It would seem reasonable to assume that a mortgagor who has been subject to higher additional charges than other mortgagors will find it more difficult to convince the court that they have a sufficiently strong financial position to clear their arrears within a reasonable period.

A review of the standard mortgage contract indicates that mortgagors are placed at a disadvantage within the mortgage relationship. Mortgagees are able to incorporate terms that favour them, imposing all costs and duties upon the mortgagor, and omit information that would allow for increased transparency within the mortgage
relationship and the mortgage market more generally. The importance of transparency in the decision-making process is emphasised by Sainsbury who notes that, ‘it is desirable, *per se*, that individuals understand why certain decisions have been taken about them in order that they can be convinced of their acceptability.’

The ability of mortgagees to control the contractual stages of the mortgage transaction does not necessarily result in an ability to enforce these terms in an unstructured or unregulated manner. A potential restriction upon the contractual power exercised by mortgagees is provided by the Unfair Terms in Consumer Contracts Regulations 1994. As has already been made clear in Chapter Three, these Regulations have yet to be the subject of judicial interpretation. The NCC, however, has proposed an alternative use for the Regulations that would involve the incorporation of the Regulations within the CML *Statement of Practice*.

We believe it would be useful to state a commitment to the principles of the regulations in the code: that lenders will not take advantage of their superior bargaining power to impose standard terms which weigh unfairly on the borrower. This should include the core terms (which are outside the ambit of the regulations). This is implicit in the commitment in the code’s guiding principles that lenders and intermediaries will act fairly and reasonably in all their dealings with their customers.

This proposal has not, as yet, been implemented by the CML. It remains open for the judiciary, however, to intervene in the relationship between a mortgagee and mortgagor so as to redress the apparent imbalance in the bargaining strengths of the parties. The extent to which the judiciary is able or willing to undertake such an interventionist role is discussed in Chapter Seven.
6.3 Taking possession

The intention of both parties following the completion of the mortgage transaction is that the mortgagor will repay the mortgage debt through the payment of regular monthly instalments. In some instances, however, the mortgagor fails to adhere to the conditions of the mortgage agreement leading the mortgagee to invoke one or more of the following remedies, an action on the personal covenant to repay, possession or sale. The most common example of default by a mortgagor concerns a failure to meet the payments required by virtue of the mortgage contract and the most common ‘remedy’ invoked by mortgagees in response is to seek possession of the secured property. In practice, mortgagees do not take possession of the land as a remedy *per se* but rather as a means of obtaining vacant possession in order to sell the secured property and reclaim the debt.⁴⁰

In line with the changing social function of the mortgage device, the inherent right to possession granted to mortgagees by virtue of their interest in the secured property has been restricted. One aim of the modern mortgage transaction, in relation to residential property, is to allow the mortgagor to occupy the mortgaged property. It is common, therefore, to find mortgage terms that state that the right to possession will not be exercised until default by the mortgagor.⁴¹ If such a term is not contained in the mortgage, the court may imply that possession has been deferred until default.⁴² If mortgagees do wish to exercise their right to possession, in compliance with the terms

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of the mortgage, the right is exercised either by the physical taking of possession of the secured property or by seeking an order for possession in the County Court.

In the majority of cases, possession will be obtained by virtue of a court order rather than through the physical taking of possession. This is partly in response to the imposition, upon a mortgagee in possession, of liability to account to the mortgagor for what they have, or without wilful default, would have received from the date of possession. A mortgagee will also be keen to avoid the possibility of prosecution under the criminal law where violence is used towards the occupier or the secured property in the act of taking possession. There are, however, two instances where a mortgagee may not feel compelled to seek a court order for possession, namely where the mortgagor has abandoned or gives up possession of the secured property.

6.3.1 Abandonment and ‘voluntary’ possession

Abandonment relates to a situation in which the mortgagor vacates the secured property without notification to the mortgagee. In such a case, the representatives of mortgagees interviewed stated that they will try to ensure that the property has been abandoned by entering the property and, where possible, talking to neighbouring occupants. If the property has been abandoned, rather than merely vacated for a short period, the mortgagee will attempt to contact the mortgagor, which often proves impossible due to the fact that the mortgagor rarely leaves a forwarding address. If no contact is made, the mortgagee will take possession of the property and sell it in the usual manner. If there is a shortfall on the sale the mortgagee may be able to recover
some of the remaining debt through the MIG, otherwise, if the mortgagor cannot be traced, it is a debt that has to be met by the mortgagee.

The representatives of mortgagees interviewed also stated that some mortgagors decide to give up their home and as a result hand in the keys to the mortgagee. Ford has estimated that in the twelve months to March 1996, over 34 per cent of possessions were ‘voluntary’, equivalent to an additional fifteen households per week compared with the previous twelve months. The reasons underlying this increase are set out by Ford in the following terms,

> [s]ome borrowers were now giving up hope that their situation would improve - either by an increase in their incomes and/or a real improvement in the housing market - and simply handing the keys back.46

If the mortgagor makes contact with the mortgagee at the time of handing in the keys the mortgagee, if it wishes to accept voluntary possession, will ensure that the mortgagor signs a document stating that they are transferring possession of the property to the mortgagee, thereby avoiding the need for a court order and the legal costs involved in seeking such a remedy. The decision by a mortgagor to give up possession of their home is a drastic measure and it is important, therefore, to try and understand why this decision is made. The report by Ford, et al, provides some indication of the reasoning behind such a decision,

> [c]ompared with people who lost their homes following court action, borrowers who “voluntarily” surrendered their homes had over committed themselves with their mortgages.
After struggling for some time they decided to give up and to move out of their homes, usually recognizing that they would lose their home anyway.\textsuperscript{47}

It appears that the majority of voluntary possessions are based on a belief, held by the mortgagor, that the mortgaged property will be possessed in the near future and that voluntary possession will prevent the financial situation from becoming any worse.\textsuperscript{48}

This may indeed be the case as possession through the courts involves financial costs for the mortgagor. Many mortgagors, however, appear to misunderstand the implications of possession, as a representative of one of the largest mortgagees stated,

There is a general feeling that you can hand the keys back to the society. Well you don’t hand them \textit{back} you hand them \textit{in}. But there is the concept that somehow the building society owns the house and if you don’t want it you don’t need it.

In giving up the possession of the secured property, mortgagors may feel that it will result in the disposition of the financial burden associated with home-ownership. They may not realise that they remain liable for all costs involved: in repairing and maintaining the property; in the sale of the property; and any shortfall that may be made on the sale of the property. This is more likely to be the case in relation to those mortgagors who abandon the property as there is no opportunity of receiving information from the lender regarding the continuing liability. Those mortgagors who do receive such information may be unaware of the \textit{amount} of debt that they will remain liable for, as one case taken from the NACAB report makes clear,

A CAB in Kent reports a client whose house was recently sold, two years after they had handed back the keys. The loan was for £65,000 and the property was sold for £63,000, with

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mortgage indemnity insurance covering the shortfall. When they handed the keys in, they were told that the proceeds from the sale plus the insurance would cover all outstanding debts. However they have now been summoned for a debt of £12,000 owing to interest charges accumulated since voluntary possession. 49

In order for mortgagors in arrears to make an informed choice regarding 'voluntary' possession it is essential that sufficient information is made available regarding the issue of continuing liability following possession and the alternative course of action, namely to remain in occupation of the mortgaged property and have the mortgagee seek a possession order in the County Court, thereby invoking the protection afforded by s.36 of the AJA 1970.

6. 4 Summary

This chapter has been concerned with presenting the qualitative data obtained through both primary and secondary research in respect of the uses made of the legal device of the mortgage and the exercise of discretion by mortgagees. Throughout the presentation of this data, reference has been made to a number of themes and contentions relevant to this thesis. It is the aim of the following section of this chapter to examine in more detail the themes which can be evinced from this data.

In relation to the current social function of the law of mortgage, mortgagees clearly have a significant role to play in ensuring that the legal device of the mortgage can be used so as to allow as many households as possible to gain entry to the home-ownership sector. In the first instance, mortgagees have been willing to extend the range of
households who will be allowed access to mortgage finance. The provision of 100 per cent advances to first-time buyers and the degree of flexibility shown towards the level of income required of second-time buyers has enabled many more households to become owner-occupiers than was the case prior to the early 1980s. The introduction of competition to the mortgage market has also influenced the lending activities of mortgagees, resulting in the creation of a wide range of mortgage products.

Secondly, the inclusion of a wider range of households, which assisted in the creation of a mass home-ownership market, has led to change in the management practices adopted by mortgagees in respect of arrears and possession. Ford and Bull found in 1992 that, 'lenders continue to give a low priority to dealing effectively with customers in arrears and the services provided for them.'\(^{50}\) The report by Ford \textit{et al}, however, writing in 1995 found, 'a higher incidence of contact between borrower and lender and a higher proportion of borrowers entered and kept to recovery agreements.'\(^{51}\) This improvement in the practices adopted by mortgagees is, in part, a result of the high number of households who fell into arrears during the early 1990s. The aim, on the part of the Conservative government, to maintain a high level of home-ownership, necessitated low levels of possession. When the number of possessions reached unprecedented levels in the early 1990s, therefore, the government stepped in to encourage mortgagees to find alternative methods of dealing with mortgagors in arrears.

The 'housing crisis' of the early 1990s had clearly had an impact upon the mortgagees interviewed during the primary research study. The larger lenders in particular indicated an obvious commitment to dealing effectively with their customers who were experiencing financial difficulties. The means by which they sought to satisfy this
commitment included the establishment of centres within the organisation designed specifically to deal with arrears and many had invested in technological devices such as ‘predictive dialling systems’ to improve the management of such cases.

Despite these improvements, it also became clear during the primary research study that there was inconsistency in the policies adopted by different mortgagees in respect of arrears and possession management practices. All of the representatives interviewed indicated that they adhered to the CML’s guidance that possession should be seen as a last resort, yet some of them clearly used the legal process of possession as a means of ensuring that the debt was cleared. The difficulties which mortgagors face as a result of this inconsistency have been referred to above, but what is more significant, in respect of the themes apparent within this thesis, is that this inconsistency is symptomatic of the lack of regulation apparent within the initial stages of the mortgage relationship.52

The English law of mortgage imposes a number of requirements upon a mortgagee in respect of the mode of creation of the mortgage and the form it is to take.53 Beyond this, however, the mortgagee is free to determine the terms of the mortgage contract and to exercise unstructured discretion in respect of the decision to seek possession. The factors which influence that decision appear to relate to issues including, the financial stability of the mortgagor, the amount of the arrears and the willingness of the mortgagor to contact the mortgagee. As soon as a mortgagor falls into arrears, however, the mortgagee may refer to any factors considered relevant and may adopt any procedures considered appropriate in determining whether to seek possession and may do so without informing the mortgagor as to those factors or procedures. Hawkins
notes the significance of this failure on the part of mortgagees to provide relevant and sufficient information in respect of the manner in which decisions are taken,

Privacy not only obstructs the possibility of review and the general accountability of decision-makers; it also leads to a lack of understanding about how decisions are made, not only by those who are the subject of decision, but also by those who decide.54

This contention is examined in more detail in the chapter which follows, it is clear, however, that mortgagees are free to refer to whatever factors they consider relevant in deciding whether to possess without recourse to enforceable standards. This contention is endorsed by an examination of the activities of mortgagees during the ‘housing crisis’ of the early 1990s. As Hawkins suggests, those who exercise discretion rarely do so in an unfettered manner, to claim the opposite would imply, ‘that discretion in the real world may be constrained only by legal rules, and to overlook the fact that it is also shaped by political, economic, social, and organizational forces outside the legal structure.’ 55 During the period of recession in the early 1990s, it would appear that macro-economic factors played a significant role in the decision by mortgagees to seek possession. Mortgagees were willing to undertake unparalleled numbers of possessions in response to the high levels of interest rates and unemployment that resulted in mortgagors being unable to meet their mortgage payments. This activity on the part of mortgagees contrasts significantly with the position described by Fairest in 1980,

[the building societies, and other institutional lenders, are usually willing to show a considerable amount of indulgence to a borrower who falls temporarily into difficulties, and have not taken unfair advantage of the power which they possess in a time of housing shortage.56]
The increasing incidence of negative equity and moves by the government in 1991 led to a readjustment in the decision to seek such high levels of possession. Ultimately, however, mortgagees could not be restrained by reference to any provision within the law of mortgage, from undertaking 246,510 possessions during the period 1990 — 1993.

The lack of regulation in respect of the exercise of discretion by mortgagees also extends to the construction of the mortgage contract. The legal device of the mortgage is, by its very nature, a privately negotiated contract. The degree to which the terms of that contract are ‘negotiated’, however, is limited. In relation to mortgage finance used for the purpose of purchasing residential property, a prospective mortgagor is prevented from entering into negotiations by virtue of the standard term contracts, similar throughout the mortgage market, offered by mortgagees. This ability on the part of mortgagees to construct the terms of the mortgage contract creates a relationship in which the mortgagee is able to impose terms upon a mortgagor which favour the mortgagee. Included in mortgage contracts, therefore, are terms that impose a duty upon the mortgagor to maintain and insure the secured property.

Similar terms, which can exert a more significant impact upon the interests of the mortgagor, impose upon a mortgagor liability for all costs incurred in the enforcement of the mortgagee’s rights and costs, including accruing interest, while the mortgagor’s account remains in arrears. The significance of these terms will become more apparent in the examination of the legal process of possession that is undertaken in the following chapter. To summarise, however, it seems reasonable to assume that in relation to the
decision as to whether to suspend a possession order, which is founded upon the
financial security of the mortgagor, the imposition of costs upon a mortgagor in arrears
has the potential to restrict severely the ability of that mortgagor to avoid possession.

In addition to the terms contained within the mortgage contract, mortgagees are free to
determine the amount of information that will be contained within it. In this respect,
mortgagees have determined that mortgage contracts will contain little, if any,
information in respect of the imposition of additional costs upon a mortgagor in arrears
or the decision to seek possession. Ford and Took account for this decision on the part
of mortgagees on the following basis,

Building societies may have their own good reasons to limit the discussion of arrears. Fears
that demand might be curtailed, or that investors may question the liberalisation of lending
policies may well justify attempts to define the extent and fervour of public discussion by
controlling the production and availability of data. This ensures that the parameters of any
public discussion takes place in terms of the lenders’ preferences and frameworks.58

It may be argued that the ability on the part of mortgagees to construct the terms of the
mortgage contract and to make use of the inherent right to possession in any manner
which they consider suitable, derives from the normative purity of much of the law of
mortgage. In failing to specify the objectives or values which should guide the operation
of the mortgage relationship, the law of mortgage allows those who have the power or
opportunity to do so, to import into the relationship values which they consider
appropriate. Some mortgagees have determined that the possession process should, for
example, be used as a debt recovery service. Whether this use is legitimate is a question
which will be addressed in the concluding chapter but reference to it at this stage does serve to suggest that the law of mortgage is open to 'capture' by the economically powerful. The extent to which the judiciary seek to structure or constrain this power will be examined in the following chapter.

6. 5 Conclusions

The dominant theme that arises out of the qualitative data concerning the practical operation of the legal device of the mortgage is that the majority of the mortgage relationship is not subject to direct legal or other regulation. Other than requirements as to form and procedure, the legal device of the mortgage remains the subject of private negotiation between a mortgagor and mortgagee. An examination of the mortgage relationship, as it operates in practice, however, indicates a significant imbalance in the protection afforded to the interests of the mortgagor and mortgagee. The policies implemented by central government during recent decades have, to some extent, compelled mortgagees to alter the approach they adopt to the issue of access to mortgage finance and the practices they operate in respect of the management of arrears and possessions. Ultimately, however, mortgagees are afforded unstructured discretion in respect of determining the terms of the mortgage relationship.

This description may be a genuine one in respect of certain aspects of the mortgage relationship, but there are other aspects that are the subject of regulation by virtue of the law of mortgage. In particular, the majority of possessions, where the mortgagor has not abandoned or given voluntary possession of the property, will be sought

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through the legal process of possession which will encounter the supervision of the courts. The extent to which the courts are able or willing to intervene within this relationship is the subject of the following chapter.

This chapter and the one that preceded it, in combination, offer an account of the social function of the law of mortgage, namely, the manner in which society has sought to use the legal device of the mortgage. With this information to hand, it will be possible, in the following chapter, to examine the extent to which the judiciary has been influenced in its ability to interpret and implement the law of mortgage by this current social function.
1 See, for example, pp. 10 – 11 and p. 195.
3 At pp. 144 – 145, 172 and 186.
6 ibid.
9 ibid. pp. 44 – 47.
12 ibid.
13 Letter from Paul Lipscombe, DETR, 17th December 1997.
14 A new chairman, George Wise, was appointed in January 1999.
18 See also Stewart, A. Rethinking Housing Law (Sweet & Maxwell: London, 1996) pp. 43 - 49.
19 Hansard, Commons, Vol. 89, col. 636.
21 NACAB, op. cit. n. 2, p. 40.
22 The CML has updated the Statement of Practice on a number of occasions, the latest version being published in July 1997, (CML: London).
24 See also, Nixon, et al, op. cit. n. 2, p. 12.
27 ibid. p. 31.
28 ibid. p. 35.
31 NACAB, op cit. n. 2, p. 15.
33 ibid. p. 11.
34 Council of Mortgage Lenders, op. cit. n. 23.
37 NCC, op. cit. n. 35, p. 38.
39 NCC, op. cit. n. 35, p.27.
41 Birmingham Citizens Permanent Building Society v Caunt [1962] Ch 883 at 890 per Russell J.
42 Esso Petroleum Co Ltd. v Alstonbridge Properties Ltd. [1975] 1 WLR 1474 at 1484B per Walton J.
43 White v City of London Brewery Co. (1889) 42 Ch D 237.

46 ibid.


48 Ford, op cit. n. 20, p. 238.


52 The following chapter will also indicate the lack of regulation apparent in subsequent stages of the mortgage relationship.

53 See pp. 116 – 119.

54 Hawkins, K. 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Hawkins, op. cit. n. 38, p. 16.

55 ibid. p. 38.


CHAPTER SEVEN

7.1 Introduction

Previous chapters of this thesis have been concerned with examining the functional transformation of a legal norm that has remained static. It has been shown that the legal norm of the mortgage, despite maintaining its original form, has witnessed a radical transformation in aspects of its social function. Despite Renner’s contention that the normative content of legal institutions operates in isolation from their function or vice versa, Kahn-Freund admits that this is not always the case. In systems which allow for ‘judge-made law’, the meanings ascribed to legal institutions may undergo change in line with changes which are occurring within society. Kahn-Freund takes a passage from Holmes to illustrate the power of the judiciary to alter the interpretation of well-established legal norms,

[w]hen ancient rules maintain themselves ... new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the ground to which they have been transplanted.¹

Despite being principally concerned with procedural formalities, there are aspects of the law of mortgage, which allow for the exercise of discretion by the judiciary. In order, therefore, to understand fully the manner in which the law of mortgage operates in practice, it is essential to have some understanding of the manner in which such discretion is exercised, as Hawkins notes, ‘Discretion is the means by which law – the
most consequential normative system in a society — is translated into action. It is the aim of this chapter to examine the extent to which the exercise of such discretion is influenced by the changing social function of the law of mortgage and in turn, the influence which such discretion exerts upon the meaning ascribed to and the operation of the provisions of the law of mortgage.

The previous chapter of this thesis was concerned with presenting the qualitative data obtained as a result of both primary and secondary research in respect of those aspects of the mortgage relationship which are not subject to substantial legal regulation. That examination offered an account of the initial stages of the mortgage relationship, beginning with the construction of the mortgage contract and ending with 'voluntary' possession. In relation to the majority of cases where possession is sought, however, it is common practice for the mortgagee to initiate proceedings for a possession order in the County Court, thereby invoking the supervision of the court. In order to offer a representative picture of the practical operation of the law of mortgage, therefore, it is necessary to examine the role of the judiciary in implementing and interpreting its provisions and the circumstances which follow possession. The first section of this chapter will be concerned with the role of the judiciary and the second will examine the process by which the secured property is sold by the mortgagee.

The initiation of court proceedings by a mortgagee in order to obtain an order for possession invokes the operation of s.36 of the Administration of Justice Act 1970 (AJA 1970). By virtue of this section, the court is required to answer two related questions: in the first instance, does the mortgagor qualify for assistance by virtue of the terms established by s.36; and if so, what are the terms of the assistance which the court is willing to provide? In answering these questions, the court can refer to the
wording of s.36 for guidance, for example, in relation to determining whether the
possession order should be suspended, the court has to be convinced that the
mortgagor can repay the arrears and meet the normal contractual payments within a
reasonable period. If the court is satisfied that the mortgagor meets these criteria, the
order can be suspended on payment terms established by the court.

The terms of reference established by s.36 establish the boundaries of the decision-
making processes within the legal process of possession but beyond this, the court is
free to exercise wide discretion in relation to the factors that may be taken into
consideration in determining whether to suspend the order for possession or the terms
which may be established under such an order. The wide discretion apparently
afforded to the courts by virtue of s.36 does not, however, result in a situation in which
the courts remain entirely free from limitation in the exercise of discretion. As
Hawkins suggests, discretion is not solely constrained by legal rules, ‘it is also shaped
by political, economic, social, and organizational forces outside the legal structure. It is
important not to strip away these contexts since they exert considerable influence.’

The question remains, therefore, as to the factors, which in practice, influence the
exercise of discretion by the courts within the legal process of possession. Only by
identifying these factors is it possible to account for the manner in which the courts
interpret and implement the law of mortgage.

There also exists a further element of judicial decision-making power within the legal
process which is not explicitly accounted for by virtue of the legislation. This factor
relates to the manner in which the judiciary ‘interpret’ the wording of legislative
provisions. In relation to s.36, for example, the court is required to establish a
‘reasonable period’ within which the mortgagor is to clear the arrears. The legislation

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offers no guidance as to the meaning that should be ascribed to this term, leaving the court free to establish a period for suspension, which the court considers appropriate.

Before examining the factors that influence the exercise of discretion within the legal process of possession, it seems reasonable to examine generally the role of the judiciary in interpreting legislation. The process by which the judiciary seeks to interpret the words contained within a statutory section can range from a simple, uncontroversial definition of the relevant term, to the introduction of a meaning, which would not commonly be associated with such a term. As McEldowney notes, 'The courts’ role in interpreting statutory enactments depends on resolving ambiguities through the interpretation of the meaning of words in the statute and giving account to parliamentary intention.' It may be the case, however, that the courts, in interpreting a legislative provision, ascribe to it a meaning which runs counter to the intention of parliament. In the case of *Halifax Building Society v Clark,*8 for example, Pennycuick V-C held that the term ‘any sums due’, contained within s.36 of the AJA 1970, related to the entire mortgage debt, thereby denying the intention of those who had enacted it.9

The extent to which the judiciary is able or obliged to refer to the intention of parliament in the exercise of its power of interpretation is an issue, which has raised a degree of controversy in recent decades. Prior to 1993, reference by the judiciary to parliamentary material for the purpose of assisting in the interpretation of legislation was prohibited,10 the reason for this, as McEldowney explains, is that it is not the responsibility of the courts to make, ‘executive or administrative decisions’11.

Harpum,12 in criticising Lord Reid’s preference for a liberal principle of statutory interpretation pronounced in the case of *Luke v I. R. C.*,13 suggests a further reason for
the limitation of judicial creativity. He contends that the reading of words into a statutory provision amounts to a, "naked usurpation of the legislative function" so trenchantly condemned by Viscount Simonds." Harpum does recognise, however, that in circumstances where the wording of a statutory section is ambiguous, the judiciary may reasonably refer to the intention of parliament, where it has been clearly stated, or, "to the report of the committee which preceded the enactment of the statute in order to determine the mischief it was designed to correct."

The ambiguity apparent in respect of this issue has been lessened to some extent by the decision of the House of Lords in the case of *Pepper (Inspector of Taxes) v Hart.* The House accepted that reference to parliamentary materials might be of assistance to the courts where the legislation is ambiguous or obscure or if the application of its literal meaning would lead to an absurdity. It was determined that the material to be made available to the courts should, however, be limited to the statements of Ministers or other promoters of the Act in question and not entire debates held within parliament. It remains open to the court within the process of possession, therefore, to refer to such material in respect of the AJA 1970 and even to refer to the report of the Payne Committee, in seeking to interpret the wording of s.36. The extent to which district judges make use of this material is a matter which will be examined in the first section of this chapter.

In addition to the influence which the explicit intention of parliament may exert upon the judiciary, it has also been suggested by Holmes, that one of the most significant factors affecting the interpretation of legislation by the judiciary, concerns their, "definitely understood views of public policy". He suggests that the judiciary will be aware of the changing needs of society and will attempt to alter the meaning ascribed
to the law in line with these needs. Hawkins supports this contention by suggesting that, ‘Implicit social rules constrain discretion powerfully.’ Chapters Five and Six of this thesis were concerned with detailing aspects of the social function of the law of mortgage and in particular, the policies implemented by central government, which have influenced it. The task undertaken in this chapter, is to examine whether, and if so to what degree, this changed function and environment has exerted an influence upon the meaning ascribed to the law by those who implement it.

In seeking to identify and analyse the factors which influence the exercise of discretion and the power of interpretation by the courts, this chapter places heavy reliance upon the qualitative data obtained as a result of the primary research study undertaken for the purposes of this thesis. Much of the data contained within the first section of this chapter was obtained as a result of semi-structured interviews with several district judges and concerns the manner in which they exercise discretion within the legal process of possession. As Hawkins notes, ‘it is important that legal discretion is understood better and that this requires that it be seen empirically, in its natural state, and in holistic perspective.’

The process of possession is not, however, the final stage in the mortgage relationship. In relation to a mortgage secured upon residential property, possession is rarely sought by the mortgagee as an end in itself but as a prelude to the exercise of the power of sale. The second section of this chapter draws once again upon the qualitative data obtained as a result of semi-structured interviews with the representatives of mortgagees to present an account of the practical operation of this stage of the mortgage relationship.
The chapter will conclude by analysing this data by reference to the hypothesis which forms the focus of this thesis. In particular, the concern of this chapter is to identify the extent to which the changing social function of the law of mortgage has altered the manner in which the law of mortgage is implemented and interpreted within the social context.

7.2 Compulsory possession

If a mortgagee decides to initiate proceedings in the County Court for possession,\textsuperscript{22} the result of the hearing may be one of four options: an outright possession order, which will be delayed for 28 days in most cases to allow the mortgagor to find alternative accommodation or to repay the entire mortgage debt; a possession order suspended on specified payment terms; the case may be adjourned;\textsuperscript{23} or the case may be dismissed. The first three options are regulated by s.36 of the AJA 1970 which allows the district judge to exercise a discretion to adopt any one of these three options if,

\begin{quote}
[i]t appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.\textellipsis
\end{quote}

The term ‘any sums due’ contained in s.36 of the AJA 1970 now relates merely to the contractual payments and arrears existing at the time of the hearing.\textsuperscript{24} A district judge, therefore, has discretion to suspend a possession order where the mortgagor can show an ability to clear their arrears, whilst maintaining the contractual payments, within a ‘reasonable period’. Figures published by the Lord Chancellor’s Department indicate that, of the actions entered for possession by mortgagees, over half will result in the
provision of a suspended possession order. The concern of this chapter is to establish the factors which influence the decision by district judges to suspend such an order.

In determining whether a mortgagor qualifies for the protection offered by s.36 of the AJA 1970 and the extent of that protection, the statutory section does not provide district judges with any specific guidance. District judges can, however, refer to the guidance offered by the Court of Appeal in the case of Cheltenham and Gloucester Building Society v Norgan. In this case, Waite LJ summarised the objectives, which the court should attempt to achieve in exercising its discretion,

[the court is bound to be even-handed in its approach to the claims of each side, matching a concern on the one hand that the mortgagor should be allowed a proper opportunity of making good his default, with a concern that a mortgagee who has contracted for a steady flow of interest ... should not be compelled to wait for payment through an enforced capitalisation of interest.]

In attempting to achieve this balance, district judges are constrained in the exercise of their discretion to some extent by the wording of s.36 and the law of mortgage generally. It is made clear within the section, for example, that the court’s discretion can only be exercised where the property which is the subject of the action, includes a ‘dwelling-house’. District judges are also obliged, by virtue of the mortgagee’s inherent right to possession, to grant an order for possession. The discretion afforded by s.36 of the AJA 1970 merely allows district judges to determine whether that order should be suspended upon payment terms for a defined period. As will become apparent within this chapter, this obligation to grant an order for possession has significant implications in respect of the mortgagor’s ability to avoid possession and in the exercise of the courts’ discretion. As Schneider notes, ‘a decision-maker’s
discretion is limited where one or more of the parties before him is endowed with rights.\textsuperscript{29} 

Despite establishing boundaries within which district judges are able to exercise discretion, on closer examination it would appear that the ambiguity of some aspects of the language used within s.36 of the AJA 1970 allows for a wide degree of flexibility in its interpretation. This is particularly the case in relation to the use of term, 'reasonable period'. The wording of s.36 of the AJA 1970 has raised many questions, the most prominent being, what is a ‘reasonable period’ in which a mortgagor should be able to remedy the default. The Payne Committee recommended a period of six months,\textsuperscript{30} whilst the \textit{Supreme Court Practice 1995} recommends a period of at least two years.\textsuperscript{31} In light of this uncertainty the Court of Appeal in \textit{Norgan},\textsuperscript{32} sought to provide guidance on the definition of a ‘reasonable period’.

The Court of Appeal held that when assessing a ‘reasonable period’ for the purposes of s.36 of the AJA 1970 for the payment of arrears by a defaulting mortgagor, it was appropriate for the court to take account of the whole of the remaining part of the original term of the mortgage. Accordingly, the court suggested that the existing practice of imposing a shorter fixed period of two or more years should no longer be followed. In giving the main judgment, Waite LJ stated,

\[\text{[The court should take as its starting point the full term of the mortgage and pose at the outset the question: would it be possible for the mortgagor to maintain payment-off of the arrears by instalments over that period?]^{33}}\]
In reaching this decision, Waite LJ, was attempting to reduce the problems associated with the imposition of costs upon a mortgagor, particularly where multiple actions are brought. The decision to suspend a possession order by virtue of s.36 of the AJA 1970, will usually demand that a certain amount be paid off the arrears on a regular basis by the mortgagor. If the mortgagor fails to abide by those terms, the mortgagee may take possession unless the mortgagor seeks a suspension of the warrant for eviction. This process may be repeated on several occasions, thereby involving both mortgagor and mortgagee in multiple actions, as one district judge interviewed during the primary research study confirms, some lenders,

[w]ill jump on a mortgagor as soon as they fail to meet the suspended order terms and that has serious consequences in terms of cost. So someone might only be a few days late and they will come before the court and be suspended again.

Whilst recognising that the costs of legal proceedings are added to the mortgagee’s security, rather than having to be paid immediately from the personal funds of the mortgagor, Waite LJ recognised that, ‘one day, be it sooner or later, those costs will have to be borne by the mortgagor.’ In response to the, ‘disadvantages which both lender and borrower are liable to suffer if frequent attendance before the court becomes necessary as a result of multiple applications under s 36,’ he determined that the court should consider the remaining term of the mortgage as starting point for the suspension of an order for possession.

This decision by the Court of Appeal may be interpreted as recognition on the part of the courts of the practical operation of the mortgage transaction as opposed to its strict legal application in relation to residential mortgages. Although the mortgage contract
may state that the entire capital sum becomes repayable after only six weeks, the mortgagee agrees to accept repayment by instalments over a longer period, usually 25 years. Where the mortgagor defaults in repayment after a relatively short period, for example within one year, the mortgagee is entitled to seek possession despite the majority of the mortgage term remaining. The decision in *Norgan*, appears to recognise the tension which exists between the contractual terms negotiated by the parties and the strict legal rights of the mortgagee and has indicated a preference for the former.

It has been suggested throughout this thesis, that the judiciary will interpret and implement statutory provisions in line with principles which are considered appropriate to the needs of society. This contention is supported to some extent by the decision in *Norgan*, as Allen and Sutton note, it 'reflect[s] the maturity of the judiciary in facing up to the realities of the times.' In particular, the decision may be interpreted as an attempt by the Court of Appeal to promote a more protectionist stance in relation to mortgagors threatened with possession, a position which appears appropriate within a housing system which has actively promoted home-ownership as the form of housing which offers a higher degree of security than any other form of housing.

According to the decision in *Norgan*, the court may suspend a possession order for a period in excess of twenty years provided that the mortgagor can show an ability to clear any arrears by the end of this period. In determining the mortgagor’s ability to ‘maintain payment-off of the arrears by instalments over that period’, Evans LJ suggested that the court should take account of a number of factors, including,
(a) How much can the borrower reasonably afford to pay, both now and in the future? (b) If the borrower has a temporary difficulty in meeting his obligations, how long is the difficulty likely to last? (c) What was the reason for the arrears which have accumulated?

The guidance provided by the Court of Appeal appears to clarify the uncertainty that surrounded the calculation of a ‘reasonable period’ for the purposes of s.36 of the AJA 1970. Its significance in relation to increasing the protection afforded to mortgagors, however, appears to be limited. The data obtained as a result of the interviews with district judges suggests that it is unlikely that district judges will take the opportunity of suspending possession orders for periods of more than five or six years. This assumption is founded upon the decision of the Court of Appeal in *First Middlesborough Trading and Mortgage Company v Cunningham,* and the response of the district judges to this case and the decision in *Norgan.*

The Court of Appeal in *Cunningham,* provided district judges, in 1974, with guidance similar to that provided in 1996 by the decision in *Norgan.* The decision in *Cunningham,* was based upon the law as it operated prior to the enactment of s.8 of the Administration of Justice Act 1973 (AJA 1973) and it was generally considered that s.8 replaced the need for the remaining term of the mortgage to be used when exercising the discretion to suspend an order for possession. This assumption was discounted by the district judges, interviewed during the primary research study, on the basis that *Cunningham,* continued to provide them with the opportunity of applying the remaining term of the mortgage for the purposes of s.36 of the AJA 1970, as one district judge noted before the decision in *Norgan.*

There is a Court of Appeal case [*Cunningham*] which says that the arrears can be stretched over the remaining term of the mortgage, I’ve never done that because if it is so bad the chances are
that you are not doing the people any favours particularly in days of negative equity, because it’s going to get worse.

It is apparent that the guidance provided by the Court of Appeal in Norgan,\textsuperscript{50} merely reiterates what the district judges already believed to be the extent of their discretion and it will not, therefore, alter the manner in which they exercise that discretion. Smith, writing in 1979, confirms this view in his account of the relationship between s.8 of the AJA 1973 and the decision in Cunningham,\textsuperscript{51} ‘Of course, the Administration of Justice Act 1973, amending s.36, much diminishes the importance of Cunningham\textsuperscript{52} but, and this is implicit in his statement, it does not invalidate it.

The failure by Norgan,\textsuperscript{53} to have any significant impact upon the discretion exercised by district judges in relation to the determination of the ‘reasonable period’ for the purposes of s.36 of the AJA 1970, would appear to have serious implications for mortgagors within the possession process. The qualitative data provided by the district judges indicates that, in determining what is a reasonable period in which a mortgagor should be able to clear any arrears, they ensure that reference is made to the individual facts of the case, as one district judge made clear,

\begin{quote}
I can’t give you a hard and fast rule because we have a discretion and we like to exercise that discretion in the interests of justice, but effectively if someone is less than three months in arrears that is no justification for a possession order unless the payments are say £1000 a month.
\end{quote}

It became apparent, however, that some district judges limit the discretion afforded to them by s.36 of the AJA 1970 by fixing a maximum limit on the length of the ‘reasonable period’. The important point to note is that different judges set different
limitations on the reasonable period, as indicated by these statements made by different district judges,

- ‘I’ve gone as far as five years. It’s got to be serious arrears to spread them over five years.’

- ‘Whereas there was a time when you would have probably said that over two years would be sticking your neck out, I take the view now that I don’t regard any period of time as being unreasonable’

- ‘I suppose depending on what the parties problems have been one has to say that if one goes beyond the period of six years one has to ask whether you are doing them any favours.’

- ‘The longest I’ve had is five years and a colleague had seventeen years.’ (Solicitor)

It would seem, therefore, that the length of time during which a mortgagor is allowed to recover any arrears is dependent on the district judge who hears the case. This leads to inconsistency in the treatment of similar cases, with some district judges stating that five years is the limit for the ‘reasonable period’ and others preferring longer periods, as one solicitor stated,

> You get to know certain ones [district judges] who are more likely to take a certain course, some will use any excuse to avoid giving possession, others are quite harsh, but that is an issue of personality rather than law. (Emphasis added).

Inconsistency within the legal process of possession raises concern in relation to, what Schneider describes as, ‘our basic assumption that like cases should be treated alike.’ If a mortgagor’s chances of avoiding possession depend upon luck rather than the consistent application of a statutory provision designed specifically to afford
mortgagors with a degree of protection, then this offends against the principle that, ‘Citizens should be subject to the rule of law not of men, to established law not individual whim or retrospective decision.’ Hawkins suggests, however, that inconsistency is an element which flows naturally from the use of discretion,

[w]hile the flexibility of discretion can be valuable in individualizing the application of the law, its subjectivism can also be the cause of inconsistency in decision outcomes; apparently similar cases may not be treated in the same way by decision-makers. The question is whether the disadvantages, which flow from such inconsistency, outweigh the advantages to be gained by the use of discretion. The only viable alternative to discretion is the application of rules which must be applied equally in all situations without any degree of flexibility in their implementation or interpretation. In comparing these two options, Schneider identifies two advantages which may be achieved through the use of discretion as opposed to mandatory rules: in the first instance, discretion can be used to broaden the range of legal rules, ‘Sometimes rule-makers fail to anticipate all the problems a rule is written to solve. Discretion can fill gaps in rules’; in the second instance, discretion allows for a degree of flexibility, ‘it allows the decision-maker to do justice in the individual case.’

It is this latter aspect of discretion which is of particular value within the legal process of possession. Although each case which comes before the court will be similar in respect of matters such as the existence of arrears and the question as to whether the mortgagor should lose a home, each case will involve an individual(s) with distinct circumstances. If a mandatory rule were to be applied in the place of the current discretion afforded to district judges which, for example, required that in all cases
involving arrears of six months or more possession should be granted automatically, this would not allow for a distinction to be made between those mortgagors who are able to repay the arrears and those who are not. It is open to question, therefore, whether the inconsistency apparent within the legal process of possession should be used as justification for the removal of discretion within this process.

This is not to suggest, however, that the current situation should remain unchanged. In order to determine whether such inconsistency can be avoided without the need to withdraw the exercise of discretion and the advantages to be gained by its use, it is necessary to gain an understanding of the reasons which underpin the decision taken by district judges to limit the length of the reasonable period.

The data provided by the district judges indicates that the limitation of the reasonable period to terms of between three to five years is undertaken so as to ensure that mortgagors are not subjected to years of ever increasing financial debts. The basis for this argument relates to the liability imposed upon a mortgagor for the costs of any legal proceedings undertaken in relation to the mortgage and additional charges while they remain in arrears with their mortgage payments. Reference to the ability on the part of mortgagees to impose costs upon a mortgagor in respect of these matters was examined in the previous chapter. To reiterate, however, a mortgagor in arrears will be charged for services provided by the mortgagee which are apparently intended to assist the mortgagor in clearing the arrears and avoiding possession. In addition, the mortgagor will also be charged interest on the arrears. The futility of imposing these charges on borrowers who are already experiencing financial difficulties is set out in the National Association of Citizens Advice Bureaux (NACAB) Report *Dispossessed*,59
Given that the reason a borrower falls into arrears is almost invariably a shortage of money, then it must be counter productive for lenders to impose additional charges in these circumstances even though the presence of arrears inevitably adds to lenders' costs.\textsuperscript{60}

Smith confirms the importance of the mortgagor's increasing financial burden when he notes that in relation to instances of substantial default, 'it will be best for him [the mortgagor] to give up and cut his losses – to continue the mortgage will only drag him deeper into the mire of debt.'\textsuperscript{61} If a district judge were to suspend a possession order for twenty years, for example, the mortgagor would remain in arrears for this period and would be required to pay interest on the amount in arrears. Although the mortgagor would be making payments in respect of clearing the arrears as they stand at the time of the hearing, the interest payments would continue to accumulate leading to an increasing financial debt. District judges, therefore, believe that a period shorter than that of the remaining term of the mortgage is in the best interests of the mortgagor, as one district judge notes, 'You can't forget that although you are making orders in respect of what has got to paid off the arrears you have got to think of what the incidence of interest is going to be.'

In addition to the requirement to pay interest and other costs as a result of arrears, mortgagors are also liable for any legal costs incurred as a result of the mortgagee’s decision to enforce any of the rights pertaining to the mortgagee within the mortgage contract. The decision in \textit{Norgan},\textsuperscript{62} was intended to diminish these costs by reducing the number of hearings undertaken to obtain or re-suspend a possession order. The reasoning which underpinned this decision was simple: by fixing a longer period during which the mortgagor will be expected to clear any arrears, the payments to be
made by the mortgagor will be of smaller amounts thereby reducing the likelihood that the mortgagor will fail to meet the payment terms of the suspended possession order. Further hearings would be unnecessary and the legal costs associated with such hearings would be avoided.

The reluctance on the part of district judges to extend the length of the reasonable period to the ‘remaining term of the mortgage’ appears to deny the intention of the Court of Appeal in respect of avoiding unnecessary legal costs. The majority of the district judges interviewed suggested that this reluctance is based upon a belief that a mortgagor who does not have a sufficiently stable financial position to clear any arrears within three to five years would not benefit from an extended period of suspension, as one district judge notes, ‘We started with a couple of years and it went to three and now it’s gone to five, I’ll go to five, I haven’t gone over the whole length of the mortgage, because I think anyone who needs to do that is in real trouble.’

The reluctance on the part of district judges to implement the guidance provided by the Court of Appeal is also apparently due to an attempt by district judges to achieve, in line with the intentions of the Act, a balance between the interests of the mortgagor and mortgagee, as one district judge notes, ‘We have to hold a balance, we are not necessarily to be painted as the borrower’s friend.’ In this respect, the district judges interviewed were aware of the costs which have to be met by mortgagees as a result of mortgagors falling into arrears. As Doling, et al, note,

The full cost of arrears to lenders covers not only the administrative costs of the debt recovery process and the interest foregone when instalments are not paid, but also the need to maintain investors’ confidence in the security of his or her savings.
An evaluation of the extent to which district judges achieve a balance between the commercial interests of the mortgagee and the mortgagor's interest in remaining in occupation of the home requires a more complete picture of the practical operation of the law of mortgage, this issue will, therefore, be examined in more detail in the later stages of this chapter.

It is perhaps significant in relation to the attempt to achieve a balance of interests, however, that district judges suggested that the length of time they apply in the suspension of an order for possession can be qualified by the mortgagee. If a possession order is suspended upon terms, the mortgagee is prohibited from taking possession, but this does not prevent the mortgagee from altering the terms as established by the court, as one district judge notes, 'The longest I would give without the permission of the lender is about five or six years, but the building society sometimes realises good sense and I have known them go up to ten years.' (Emphasis added).

This statement appears to suggest that mortgagees have a greater degree of influence within the legal process of possession than might first appear to be the case. It should be noted that this reliance upon the willingness of mortgagees to extend the length of the reasonable period was relatively common amongst the district judges interviewed. This raises questions regarding the extent to which mortgagees are able to influence the discretion exercised by district judges, a point which will be returned to in the conclusions to this chapter.65
The imposition of periods shorter than the remaining term of the mortgage, in relation to the suspension of orders for possession, remains a matter of concern in respect of the ability of mortgagors to avoid possession. This is for the reason that a relatively short period of suspension will require mortgagors to pay larger amounts off the arrears each month, thereby increasing the likelihood that they will default in payment, leading to further legal proceedings and the imposition of legal costs. District judges have the power to award costs against a mortgagee, but they may only do so where the case has been brought 'unreasonably'. As the mortgagor will be in breach of their mortgage contract, for example, by failing to pay the required instalments, it is extremely difficult for district judges to determine that the case has been brought 'unreasonably', as one district judge notes,

'It is very difficult if a borrower is behind to say that a case has been brought 'unreasonably'. Where costs usually come in is where the information is not to hand and the borrower comes in time and time again saying this amount is wrong and you get sick to death of the lender and you make an order that no part of the costs will fall against the borrower. Very rarely if there are arrears can you say that proceedings have been brought unreasonably.

The mortgagee is, therefore, said to be acting 'reasonably' in seeking an order for possession for the reason that the mortgage contract states that they may seek such an order should the mortgagor fail to meet the specified payment terms. In addition, the contract will also state that it is the responsibility of the mortgagor to meet the costs of the legal proceedings involved. District judges recognise that costs are a major hurdle in the mortgagor's attempts to avoid possession but they feel unable to interfere in the contractual relationship between the mortgagor and mortgagee.
This adherence to the principle of freedom of contract is based upon an assumption that the parties entered the contract on a voluntary basis and were free to negotiate its terms. The parties should, therefore, be bound by the terms of that contract. Waite LJ in the case of Norgan,$^67$ reinforced this supposition in the following terms,

The delaying powers under s 36 represent a substantial interference with the contractual right which the parties have themselves freely negotiated, namely the right of the mortgagee to repayment in full of the whole mortgage debt as soon as default occurs.$^68$

The reliance placed upon this aspect of free negotiation is misplaced within the mortgage market, as evidenced in the previous chapter. In practice, the mortgagor rarely has the ability to influence the contractual terms, regardless of the mortgage product or mortgagee chosen.$^69$ In light of the power held by mortgagees to determine the terms and conditions of the mortgage contract it is possible to argue that reliance should no longer be placed on the legal principle of freedom of contract, a contention returned to in the conclusions to this chapter.

The evidence provided by district judges within the primary research study concerned the interpretation of the ‘reasonable period’ in relation to circumstances where the mortgagor had fallen into arrears and was attempting to clear them by virtue of periodical payments. There are other situations, however, where the reasonable period is to be applied in respect of a mortgagor who wishes to clear the entire debt by selling the property. In circumstances such as these, the question arises as to whether, and if so for how long, a possession order should be suspended. The Court of Appeal in Bristol and West Building Society v Ellis,$^70$ provided some guidance on this issue.
In this case, the mortgagor had fallen into arrears and, according to terms established under a suspended warrant for possession, was attempting to clear them by paying a small amount each month in addition to the normal contractual payments. By virtue of these payment terms, it would have taken the mortgagor 98 years to clear the debt. The mortgagor had proposed, however, to discharge the entire debt by selling the house after her children had completed their university education, a period of three to five years, which the district judge had taken into account when suspending the order.

Auld LJ, confirming the decision in *Norgan*, stated that as regards the issue of the reasonableness for the payment of sums due under the mortgage, the starting point, in the absence of unusual circumstances and where discharge of all arrears by periodic payments was proposed, was the outstanding period of the mortgage. He went on, however, to state that where a mortgagor could not discharge the arrears by periodic payments and whose only prospect of repaying the entire loan and accrued and accruing interest was from sale, that starting point would not be available to them. In a situation such as this, where the borrower wished to delay the sale of the property for up to five years, and there was insufficient evidence before the court to show that the borrower could sell the property within that time, or that the sale proceeds would be sufficient to discharge the mortgage debt and any arrears, the court should grant an order of immediate possession.

This case serves as perhaps an example of the limitations imposed by the wording of s.36 upon the exercise of discretion by district judges. The assistance which s.36 provides for mortgagors is to allow for a suspension of the order for possession on specified payment terms which are intended to clear the arrears within a reasonable period. On the basis of the decision in *Ellis*, it would appear that this assistance does
not extend to mortgagors who wish to pay a regular amount off the arrears so as to delay possession until a sale can be achieved where the amount to be paid will be insufficient to clear the arrears within a reasonable period.

The issue of what constitutes a 'reasonable period' for the purposes of s.36 of the AJA 1970 appears to be problematic but the issue only arises where the mortgagor is able to convince the court that the arrears can be cleared and the normal contractual payments can be met during this period. The court has to determine, by virtue of s.36 of the AJA 1970, whether the mortgagor is 'likely to be able' within a reasonable period to pay any sums due. In *Royal Trust Co. of Canada v Markham,* the Court of Appeal held that 'likelihood', for the purposes of s 36 of the AJA 1970, was a question of fact to be determined by the judge on the evidence as presented. The Court of Appeal’s decision in *Norgan,* has gone some way in providing guidance on the factors which should be considered in respect of the likelihood of the mortgagor being able to repay the arrears by instalments over a reasonable period. The court can only determine this issue, however, if sufficient information is available in respect of the mortgagor's financial circumstances.

The importance which attaches to the provision of information to the court proved influential in the introduction of the County Court (Amendment No 3) Rules 1993. By virtue of these amendments, the mortgagee is now obliged to provide greater detail, in the particulars of claim, of the mortgagor's payment history. In addition to this, the mortgagor will receive a form, attached to the court summons, which requests details of their financial situation and which should be returned to the County Court before the hearing. Information gained as a result of primary and secondary research, however, suggests that many mortgagors do not attend the court hearing and do not complete the
form requesting details of their financial circumstances sent to them prior to the hearing. Secondary sources suggest that only 50 per cent of mortgagors attend the court hearing.76

This poor attendance record may be due to a number of factors. Hill and Mercer, following a survey of housing cases, found that the reasons given for non-attendance included: ‘did not think it important to go’; ‘ill/infirm’; and ‘was told there was no need to go/wasn’t necessary to go’.77 In addition, the lack of information available to a mortgagor regarding the legal process may serve as a disincentive to attend. The publicity given to the high number of possessions by the media during the early 1990s may have led some mortgagors to believe that once the courts have become involved, there is little possibility of avoiding possession and, therefore, little point in attending the hearing. It may also be the case that the mortgagor has been given poor advice regarding the legal process, as the NACAB report indicates,

A CAB in Berkshire reports a client threatened with possession who was in a position to make a reasonable offer. However, the lender rejected this and told the client there was no point in attending the court hearing as the judgments always went in favour of the lender.78

Qualitative data provided by the representatives of mortgagees suggests that although this is not a typical case, these mortgagees did not provide their mortgagors with information regarding the possible outcomes of the hearing. It is likely that many mortgagors may, therefore, be ignorant of the fact that the court has the discretion to suspend the possession order or even to dismiss the case, as one district judge notes,

If a borrower does come in it is a matter of astonishing news to them that the court isn’t necessarily going to steam-roller them even further into their corner, but can postpone what
they thought was the inevitable and make a decent and reasonable and affordable repayment programme.

The failure by a mortgagor to attend the court hearing, for whatever reason, necessarily raises important questions in relation to the ‘fairness’ of the hearing, as Hill and Mercer note, ‘It is clearly a matter for concern if individuals fail to have the opportunity to put their cases effectively to hearings whose decisions will have implications for their welfare.’

It is also a matter of concern, therefore, that Nixon, *et al*, have found that many mortgagors fail to submit written evidence to the court. The difficulties which arise upon non-attendance by a mortgagor may be mitigated by the submission of the ‘Right to Reply’ form which will inform the court as to the mortgagor’s financial circumstances. Nixon, *et al*, however, in their survey of 490 possession cases, found that only 22 per cent of defendants returned the ‘Right to Reply’ form to the court.

The failure by a mortgagor to attend the hearing or to return the court forms may prove crucial in the possession process for the reason that the judge will have no information regarding the mortgagor’s financial situation. The judge will, therefore, be obliged to grant an outright order or to adjourn the case until the relevant information can be obtained, thereby adding the costs of another hearing to the mortgagor’s account. It is perhaps not surprising, therefore, that a number of surveys have found that those mortgagors who attend the possession hearing and particularly those who are represented, tend to achieve more beneficial outcomes than those who do not attend or are not represented.

The representation of mortgagors by solicitors or a member of an advice agency is of particular importance in relation to the possession process. As ‘one-shot’ litigants, mortgagors will be unfamiliar with the law, the court process and
the requirements made of them, whereas, mortgagees as 'repeat players' will be familiar with all of these factors, providing them with an advantage within this process,\textsuperscript{82} as one district judge made clear,

The lender is in the more powerful position. They have not only the security but also the power of representation and all the forensic support that is needed to pursue their case. The poor old borrower, if it is the poor old borrower, has very little.

In particular, those mortgagors who do attend the hearing may have the opportunity of seeking advice, and in some cases representation, from one of a number of 'duty desk' schemes. These schemes offer independent 'on-the-spot' advice to mortgagors but are still relatively rare, with only one in four courts in England and Wales able to offer them.\textsuperscript{83} A mortgagor who does not have the opportunity of utilising one of these 'duty desk' schemes may still obtain a more beneficial outcome to the possession hearing by simply attending before the court. District judges interviewed during the primary research study stated that attendance by a mortgagor increases the possibility of a suspended order being granted on terms which the mortgagor can afford, as one district judge made clear,

If they are there to explain their predicament and how much they can afford very often you can make a suspended order where you wouldn't make a suspended order where there wasn't sufficient information on the file to do it because the lender would say, "they have not filled the form in, the arrears are low but what can we do?"

In relation to those mortgagors who do attend the court hearing, the manner in which the hearing is conducted may lead to those mortgagors becoming disillusioned with the legal process. In particular, mortgagors may be surprised to find that the case, during
which the decision as to whether they will be allowed to remain in occupation of their home, is heard in under ten minutes. NACAB suggest that the speed with which these cases are heard can have a significant impact upon mortgagors, 'By the time the case reaches the court, the borrower may well feel they have all but lost their home. This impression is likely to be reinforced by the speed with which possession hearings are dealt with by the courts.'

The speed with which possession cases are dealt with may be argued to be due to the high number of possessions undertaken since 1990. Information gained during the primary research study, however, indicates that despite the fall in possessions since 1991, hearings are still completed within an average of five minutes, a finding supported by the NACAB report. The explanation provided by the representatives of mortgagees and district judges for this short period was that possession cases are based on very simple claims, namely that the mortgagor has failed to comply with the conditions of the mortgage, for example, by failing to pay the required instalments, and the mortgagee is merely enforcing its rights as stated in those conditions. Hawkins contends also that the speed with which these cases are decided is due to the often extensive experience which district judges have of such cases,

Shorthand decision methods are employed partly because familiarity with the broad features in typical cases gives decision-makers confidence in being able to see similarities in other cases, and partly in the interest of saving the time and anxiety otherwise involved in addressing each new case afresh.

The simplicity of these claims and district judges' knowledge of them may also account for the amount of time which district judges spend on reading the facts of the case prior to the hearing. It was common amongst the district judges interviewed to
find that they rarely read the file prior to the hearing, as these statements by three
different district judges suggest,

- ‘I don’t read the file before the hearing.’

- ‘I don’t see the paper prior to the hearing they just come in a block list of twenty or 30 cases.’

- ‘I look at it as they walk in. Files are fairly thin, it’s only when people come in and tell you the
situation that you know what’s happening.’

Whilst mortgagors might be concerned to discover that the district judge who will
determine whether the property which is the subject of the claim will be repossessed or
not, does not read the facts of the case prior to the hearing, Hawkins suggests that the
lack of time given to these files by district judges arises out of the repetitive nature of
the work involved,

[The frequency with which legal actors make decisions has important implications for the
nature of their discretion. Those legal actors, however, who make decisions relatively
infrequently are likely to approach the matter in a more complex way, taking more time and
considering more information.87

The only fact that has to be contested in relation to these cases is whether the
mortgagor’s financial situation enables the district judge to exercise discretion under
s.36.88 If the judge does not have such information, the case may be dealt with in under
60 seconds and will result in an outright order or the adjournment of the case, as this
statement by one district judge illustrates,
If there is no borrower here it can take 60 seconds, if the borrower is here and they have sorted something out, subject to seeing the documents, two to three minutes. If there is a real problem it could be seven or eight minutes on average, if you really get stuck with one it could be ten minutes.

If the mortgagor is present during the hearing the district judge has the ability to question them as to a realistic repayment scheme on which to base a suspended possession order. Nixon, et al, found that other factors are also taken into consideration in the exercise of judicial discretion, including: the borrower's employment prospects; the likelihood that the mortgagor will be able to repay the arrears over a realistic period of time; and evidence concerning additional debts and commitments.89

In considering these factors, the district judges interviewed during the primary research study reiterated their concern to achieve a balance between the interests of the mortgagee and mortgagor, as one district judge notes, in respect of the aims of s.36 of the AJA 1970,

In layman's language I suppose it is to ensure as far as possible in respect of the roof over their [the mortgagors'] head that you keep them in that property as long as you are satisfied that at the end of the day the lender is going to get their money back. It is essentially a piece of social legislation and for that reason I wouldn't hesitate to interpret it as far as I can in favour of the borrower.

The emphasis given to the interests of the borrower made apparent by this statement may be viewed as a return to the protectionist stance once adopted by the Courts of Equity in the sixteenth century.90 Evidence in support of this contention was provided by the district judges who suggested that they have attempted to assist mortgagors,
threatened with possession, by introducing what are termed 'stepped orders'. Rather than requiring the mortgagor to repay a fixed sum each month off the arrears, a stepped order will require a smaller payment, each month for the first six months, which will then be increased for the remaining term of the order. These orders are designed to allow mortgagors to avoid possession by allowing them more time in which to improve their financial situation.

The use made of stepped orders was not universal amongst the district judges interviewed. In the majority of possession cases, the district judges determined the length of the period for suspension which they considered reasonable and then calculated the payments which would have to be made by the mortgagor in order to clear the arrears by the end of that period. An approach adopted by one of the district judges interviewed involves the calculation of the amount which will have to be paid each month in order to clear the arrears within three years. If the mortgagor cannot afford these payments, it is calculated it on the basis of five years and if the mortgagor cannot afford these payments an outright possession order will be granted, suspended for 28 days. In order to avoid such an outcome, mortgagors are inclined to agree to repayment schemes that they cannot afford, as the NACAB report suggests,

When people are desperate to keep their homes, they may tend to overestimate what they can afford to pay. In this context it is of concern that questions on the revised Reply Form for mortgage possession assume that the borrower can afford to make payments off the arrears in addition to the contractual payment.

The emphasis given to the ability on the part of the mortgagor to repay the arrears within a reasonable period by s.36 of the AJA 1970 to some extent constrains the discretion exercised by district judges. Despite their concern to provide assistance to a
mortgagor in financial difficulties, district judges are only able to provide such assistance where the mortgagor can show an ability to clear the arrears within the near future. It may be argued, therefore, that s.36 of the AJA 1970 is primarily concerned with the financial, as opposed to the social, aspects of the mortgage relationship. Its ultimate concern is to ensure that the mortgage debt is repaid by the mortgagor, a concern which can be argued to be appropriate within the current housing system in England and Wales. Due to the commitment on the part of central government to maintain high levels of home-ownership, it is essential that mortgagees are willing to provide mortgage finance. Without protection being afforded to the financial interests of the mortgagee within the possession process, mortgagees may decide to limit the advance of mortgage monies, as one district judge notes, 'The lenders lent money in the course of a business and are dependent on regular payments so that they can re-lend it. So one has to have regard to that, the money they are lending is not theirs but their investors ....'

It is this concern which, it may be argued, accounts for the response of district judges to situations where the mortgagor fails to meet the terms of a suspended possession order. District judges indicated that in such circumstances, the mortgagee would have little difficulty in obtaining outright possession. The commercial interests of the mortgagee were an obvious concern for the district judges, but there were two other factors that influenced this decision. In the first instance, the mortgagee will already have an order for possession. A suspended possession order only remains suspended if the mortgagor satisfies the payment terms imposed by it. Where the mortgagor has failed to pay the sums required by the suspended order, the mortgagee can seek possession immediately unless the mortgagor seeks to have the order suspended for a second time, as one district judge explained, 'The lender already has an order, it is up
to the borrower to make an application to re-suspend. I will suspend it again because I
don't like throwing people out on the street.'

The view held by this district judge was not representative of all the district judges
interviewed. The majority of judges felt that, where a mortgagor failed to meet the
payments required under the suspended possession order, their ability to clear the
arrears would be minimal and in order to avoid further debt, the only option would be
to grant an outright possession order suspended for 28 days.

If possession has been obtained by the mortgagee by virtue of an order from the court,
it will be postponed in order to enable the mortgagor to find alternative
accommodation. The period for postponement is usually 28 days and during this time
the mortgagee will apply to the court for a warrant for eviction. If the warrant is
granted, the mortgagee is not required to inform the mortgagor, although as Nixon, et
al, note, 'usually the Bailiff will let the occupiers know when they intend to take
possession of the property. At this point it is not uncommon for the borrower/tenant to
give up the property without further legal action.'

7.3 Circumstances following possession

Following the eviction of the mortgagor, the mortgagee will either lease the property
or exercise the power of sale afforded by s.101 of the Law of Property Act 1925 (LPA
1925). In some rare circumstances the mortgagee may feel that it is appropriate for the
mortgagor to remain in the property until it is sold. The reasoning behind such a
decision is that an occupied property is likely to sell at a higher price than a vacant
one. The more common situation, however, is that the mortgagee will seek to sell a vacant property.

Unlike the construction of the mortgage contract and the inherent right to possession, the law of mortgage appears to demand that a mortgagee in the exercise of the power of sale satisfy certain formal and procedural requirements. In particular, the mortgagee's power of sale does not become exercisable until one of the conditions established by s.103 of the LPA 1925 has been satisfied. The conditions include: notice requiring payment of the mortgage money having been served on the mortgagor and default having been made in payment of the mortgage money for three months after such service; or some interest under the mortgage is in arrear and unpaid for two months after becoming due.

A purely juridical analysis of the law would suggest that s.103 of the LPA 1925 imposes relatively substantial requirements upon a mortgagee who intends to exercise the power of sale and in turn, affords a mortgagor protection against the immediate loss of the secured property in the absence of default. According to s.101(4) of the LPA 1925, however, the terms of s.103 apply, 'only if and as far as a contrary intention is not expressed in the mortgage deed, and has effect subject to the terms of the mortgage deed and to the provisions therein contained.' In practice, the majority of mortgage conditions take advantage of the opportunity provided by s.101(4) of the LPA 1925 and exclude the conditions set out in s.103 of the LPA 1925. The contention that a juridical analysis of the law can provide little if any information relating to the material significance of the law, therefore, appears to be supported by reference to the practical operation of s.103 of the LPA 1925.
In addition to avoiding the requirements established by virtue of s.103 of the LPA 1925, thereby allowing mortgagees to exercise the power of sale as soon as possession is obtained, mortgagees are also able to impose all costs involved in the maintenance and repair of the property and any costs incurred by the mortgagee during its marketing and sale upon the mortgagor. The mortgagor does not have the right to be consulted on any of these matters and the LPA 1925 does not establish any standards relating to the conduct of selling mortgagees.

In response to this lack of regulation, the courts have sought to provide the mortgagor with at least some degree of protection during the process of sale. The imposition of duties upon a selling mortgagee by the courts has its origins in the late nineteenth century, with the creation of two distinct duties, one applying a subjective test of ‘good faith’ and the other an objective test of ‘reasonableness’. Gray contends that the conduct now expected of a mortgagee when selling secured property has been created as a result of the ‘fusion’ of these subjective and objective principles. In consequence a mortgagee must act in good faith and take reasonable care in selling the mortgaged property. In more precise terms, a mortgagee should ensure that no potential conflict of interest arises as a result of the sale of the property to the purchaser in question.

A selling mortgagee is also under a duty to take reasonable care to ensure that a reasonable price is achieved. The imposition of a duty in relation to sale price derives from different sources depending upon the type of mortgagee. In relation to building societies, the Building Societies Act 1986 imposes upon them a duty to take reasonable care to ensure that they obtain ‘the best price that can reasonably be obtained’. As regards other mortgagees, a similar duty is imposed by virtue of the decision in
Cuckmere Brick Co. Ltd v Mutual Finance Ltd,\textsuperscript{101} which has been summarised as a
duty, 'to exercise reasonable care to sell only at the proper market value.'\textsuperscript{102}

It is possible to argue that the introduction of this duty in relation to sale price, arose
out of the changing social function of the law of mortgage. The increase in the number
of mortgage advances used for the purpose of purchasing residential accommodation
increased the significance of the sale price for the reason that any amount of money
remaining after sale, and the repayment of all relevant costs, could be used by the
mortgagor to obtain alternative accommodation. An indication, perhaps, that the
judiciary have altered the interpretation and enforcement of the law of mortgage in line
with its changing social function.

An indication of the extent to which these duties impact upon the manner in which
mortgagees exercise the power of sale was provided by the representatives of
mortgagees interviewed during the primary research study. They suggested that prior
to the sale of a repossessed property, two valuations would be obtained to ensure that
the property is marketed at a realistic price. In defining what is a ‘reasonable’ price,
however, the representatives of mortgagees emphasised that certain factors have to be
taken into consideration. In the first instance, repossessed properties often achieve
lower prices than similar properties sold by the owner-occupiers.\textsuperscript{103} This may be due to
the willingness on the part of mortgagees to accept any price provided it repays a
proportion of the mortgage debt and that any remaining shortfall will be covered to
some extent by the MIG. This attitude may also have created a market for repossessed
properties in which buyers know that they can obtain these properties at a lower price
and, therefore, will not offer to pay the full market price.
Secondly, properties purchased during the housing boom of the 1980s have dramatically decreased in price as a result of the economic recession in the early 1990s, leading to the increased prevalence of ‘negative equity’. In December 1993, one in four people who purchased their homes between 1988 and 1991 were living in properties worth less than the value of their mortgage debt, with over 40 per cent of these buyers located in the South-East of England. Negative equity cases have fallen slightly since 1993, but the Nationwide Building Society estimated that around 1.5 million mortgagors still have homes worth less than their outstanding mortgage. It is possible, therefore, that even if the mortgagee does achieve a true market value on the sale of a repossessed property the existence of negative equity will create a shortfall on the sale. These factors, in lowering the price which can reasonably be expected to be achieved, often lead to a belief held by many mortgagors that the property has been sold at a price which does not reflect its true value, as one mortgagor’s case, cited by the NACAB report, indicates,

A CAB in Surrey reports a client who bought a flat three years ago for £60,000. Following voluntary possession, the flat was sold at auction for £30,000. The client is concerned that this was not a reasonable price.

These criticisms, in respect of the sale prices achieved by mortgagees, may be due to a lack of awareness regarding the continuing liability of the mortgagor after possession. This is especially true of the situation where a shortfall is made on the sale of the property. NACAB suggest that many mortgagors are surprised to find that, after possession, they remain financially liable in respect of the property,

For many people, the trauma of possession may seem to be the worst that could happen. However this is by no means the end of the story. CABx report that many clients are unaware
of their continuing liability after possession for interest payments, for maintenance and repair costs, for costs of sale as well as for any capital shortfall once the property is sold.\textsuperscript{107}

Criticism has also been levelled at mortgagees for refusing to allow mortgagors to sell their homes where the proceeds of sale would not cover the mortgage debt. In many cases, the mortgagee will gain possession of the property and sell it for an amount lower than would have been achieved had the mortgagor been allowed to sell while still in occupation. The outcome for the mortgagor of such a practice is the accumulation of a larger than necessary debt, as the description of one mortgagor's experience in the NACAB report illustrates,

A CAB in Kent reports a self-employed man who bought a two bedroomed maisonette for £51,000 in 1989. When his business was affected by the recession, he found he could no longer keep up his mortgage payments and so decided to sell. He was offered £49,000 but the building society refused to let the sale go through because it would not clear the outstanding mortgage. In desperation he, therefore, handed back the keys to the lender. The building society subsequently sold the property for £20,000, which, with additional charges and outstanding interest left the man with a bill for £92,500.\textsuperscript{108}

It is open to a mortgagor, however, to request a sale of the mortgaged property regardless of the mortgagee's dissent. By virtue of s.91(2) of the LPA 1925, the mortgagee or 'any person interested either in the mortgage money or in the right of redemption', which includes the mortgagor, may request that the court order a sale of the mortgaged property.\textsuperscript{109} In circumstances where a mortgagee refuses to sell the property, therefore, the mortgagor can request a sale to be ordered.
The advantage which the mortgagor may gain in using this section was illustrated in the case of *Palk v Mortgage Services Funding Plc.* In this case, the mortgagors owed £358,000 to the mortgagee and in order to prevent their arrears increasing further they negotiated a sale for £283,000. The mortgagee refused to allow the sale and instead sought to let the property until the housing market improved. The mortgagors requested an order for sale under s 91(2) of the LPA 1925. The Court of Appeal held that the mortgagor should be allowed to sell the property on the basis that the mortgagee was unfairly prejudicing the mortgagor. Nicholls V-C stated that the course of action proposed by the mortgagee was, ‘likely to be highly prejudicial to [the mortgagor’s] financial position as borrower.’ The court ordered a sale notwithstanding that more than £75,000 would remain owing.

The court’s decision in *Palk,* serves as an example of the ability of the judiciary to adapt the manner in which the law is interpreted and implemented to meet with changes in the social context. The introduction of the relatively new phenomena of ‘negative equity’ to the housing system in England and Wales required a new approach within the law of mortgage. That approach, as evidenced in *Palk,* recognises the difficulties faced by both the mortgagor and mortgagee where ‘negative equity’ is in existence and that the only course of action available to both parties is one of ‘damage limitation’. It was accepted in that case, however, that in circumstances involving negative equity, the court would only exercise its discretion under s 91(2) of the LPA 1925 in ‘exceptional circumstances’.

The willingness of the judiciary to apply the rationale adopted in *Palk,* was registered in the case of *Barrett v Halifax Building Society,* where the mortgagor had an outstanding mortgage debt of £324,000 and wished to sell the secured property at a
market value of £252,000. The mortgagee refused to release the property from its mortgage and instead sought possession. The mortgagee had also claimed that, if such a sale were to take place, the proceeds of sale would have to be given, in their entirety, to the mortgagee, with payment of any fees imposed by the estate agent or solicitor to be made from the personal finances of the mortgagor. Mr. Justice Evans-Lombe held that the mortgagee had shown ‘no discernible advantage’ in refusing to allow the couple to complete the sale and ordered that the couple should be allowed to sell the property with deductions of conveyancing costs.116

This case has been described as a ‘small ray of hope’117 for home-owners with negative equity for it appears to allow for the sale of secured property without the additional burden of conveyancing costs being imposed upon the mortgagor. Upon a strict construction of the decision, however, it is clear that mortgagors do have to pay for the cost of sale, whether from the proceeds of sale or another source, as Urquhart notes, ‘The effect of the order is to discharge the security, not the debt and after expenses, etc., the Barrett’s will still owe the Halifax in the region of £85,000.118 If the costs are paid from the proceeds of sale it will only increase the shortfall for those mortgagors with negative equity. The decision in Barrett,119 does, however, support the decision in Palk,120 and consequently, it may be assumed that a mortgagor is now entitled to sell the secured property against the wishes of the mortgagee, as Pratt notes,

[w]here a borrower has a buyer at a fair price the court should step in to prevent possession and enable that sale to avoid unnecessary additions to the residual debt, for which the borrower remains liable.121

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This confidence in the courts’ willingness to recognise the difficulties faced by mortgagors in negative equity has, however, been dented to some extent by the decision of the Court of Appeal in Cheltenham & Gloucester Building Society v Krausz.\(^{122}\) The circumstances of this case where similar to those in Palk,\(^{123}\) the mortgagors had arranged to sell the secured property but the price achieved fell short of covering the mortgage debt by £18,000. The mortgagors had requested a sale by virtue of s.91(2) of the LPA 1925 but the Court of Appeal refused to grant such an order. The reasoning which underpinned the decision concerned the operation of s.36 of the AJA 1970. In order to allow the mortgagors time to complete the sale, the court would be required to suspend an order for possession requested by the mortgagee. Applying reasoning similar to that in the case of Ellis,\(^{124}\) the Court of Appeal in Krausz,\(^{125}\) determined that s.36 did not allow for the suspension of an order for possession on the basis of a future sale, which would not repay the entire mortgage debt.

In examining this case, Dixon contends that it results in an assumption that both Palk,\(^{126}\) and Barrett,\(^{127}\) were wrongly decided.\(^{128}\) He goes on, however, to challenge this assumption, claiming that s.91(2) of the LPA 1925 could be interpreted in such a way as to offer the courts an implicit jurisdiction to suspend the right to possession pending sale.\(^{129}\) Until such time as the courts determine whether this is the case, it would appear that the Court of Appeal has altered the approach taken in respect of cases involving negative equity. This new approach may be explained by reference to the high numbers of mortgagors experiencing negative equity. The argument is similar to that advanced in relation to the objective of s.36 in ensuring that the commercial interests of the mortgagee are protected.\(^{130}\) If mortgagees are prevented from exercising the power of sale merely because a property is the subject of negative equity, mortgagees
may reconsider their willingness to provide mortgage finance, a result that would be incompatible with the aims of central government.

On completion of the sale of secured property, whether undertaken by a mortgagor or mortgagee, the mortgagee becomes a trustee of the proceeds of sale, although not a trustee of the mortgagor. By virtue of s.105 of the LPA 1925 the proceeds of sale are to be applied, first, ‘in payment of all costs, charges and expenses properly incurred by [the mortgagee] as incident to the sale’. Secondly, ‘in discharge of the mortgage money, interest, and costs, and other money, if any due under the mortgage’, with any amount remaining to be paid to the mortgagor.

If the proceeds of sale are not sufficient to repay the outstanding mortgage debt, the MIG comes into operation. The insurer will pay the amount outstanding on the mortgage debt to the mortgagee and then seek, as a personal debt, the same amount from the mortgagor. The National Consumer Council (NCC) suggests that, ‘The sense of injustice that borrowers feel when they find that the insurer can pursue them for the whole of the amount outstanding on the loan is a regular source of grievance.’

Ultimately, a mortgagor can emerge from the mortgage transaction having lost the secured property, which served as a home, and having incurred a considerable financial debt.

7.4 Summary

The presentation and analysis, in this chapter and Chapter Six, of the qualitative data obtained as a result of the primary research study has sought to offer an account of the mortgage relationship and the practical operation of the law of mortgage. In providing
such an account, it should be possible to compare the practical operation of the law of mortgage with information provided in previous chapters so as to evaluate the extent to which the hypothesis examined within this thesis has been validated. This task is undertaken primarily in the concluding chapter, it is possible, however, to detail some of the themes and propositions which arise out of this chapter and which will be developed at this later stage.

A principal contention of this thesis is that the legal norm of the mortgage has remained unchanged whilst its social function has altered dramatically in recent decades. The evidence supplied in previous chapters appears to indicate that this is the case in relation to the legal device of the mortgage. Essentially, the use made of mortgage finance in the creation of a mass home-ownership market has been undertaken without the need to reform the content of the law of mortgage. If the law of mortgage was constituted solely by legislation, the need for reform of its content may well have arisen during the last few decades. As statutory provisions require interpretation, however, it is possible to argue that the judiciary have altered the social meaning ascribed to aspects of the legal framework in order to ensure that it adapts to its changing social function, thereby avoiding the need for reform of its content.

Evidence in support of this proposition is provided by the manner in which district judges interpret and implement s.36 of the AJA 1970. Although originally intended to assist mortgagors in temporary financial difficulties, the increased prevalence of possessions and long-term arrears in the early 1990s led district judges to increase the average length of the ‘reasonable period’ from approximately six months to three years and to introduce innovative measures such as ‘stepped orders’. This attempt on the part of district judges to interpret the law so as to make it adapt to the needs of the modern
mortgage relationship, however, appears to be thwarted to a large extent by the failure of the legal framework to regulate certain aspects of the mortgage relationship.

The district judges interviewed during the primary research study indicated that, in line with the intentions of parliament, they would always attempt to suspend an order for possession, provided that the commercial interests of the mortgagee were not damaged to a significant extent. If a mortgagor failed to meet the terms established by that order, however, the district judges considered that it was in the best interests of many mortgagors to grant outright possession. The reasoning which underpins this decision derives from the mortgagee’s ability to impose additional costs and interest on a mortgagor in arrears. The power which mortgagees exercise in relation to constructing the terms of the mortgage contract, as evidenced in the previous chapter, therefore, exerts significant influence upon the possession process. Although the law of mortgage does not explicitly allow for the exercise of such power, its failure to regulate the contractual aspects of the mortgage transaction implicitly legitimates it.

It is this aspect of the mortgage relationship in combination with the wording of s.36 of the AJA 1970 which also limits the attempt by the district judges to achieve a balance in the interests of the mortgagee and mortgagor. The introduction of s.36 of the AJA 1970 was undertaken with the explicit aim of achieving such a balance, but as Haley notes, this is not an easy task,

[The tension between the commercial interests of the mortgagee and the need for the mortgagor to maintain a home persists. Although the court must attempt to achieve a balance between these competing claims, under the present legal regime this is, patently, not a simple task.]^{132}
An aspect of the 'present legal regime' which hinders any attempt to achieve such a balance concerns the focus given to the financial aspects of the mortgage relationship by the wording of s.36. In demanding that the court be convinced that the mortgagor's financial circumstances are sufficient to allow for the repayment of arrears, s.36 of the AJA 1970 is implicitly giving preference to the commercial interests of the mortgagee rather than the 'social' interests of the mortgagor. It may be argued that this focus accounts for the reluctance on the part of district judges to suspend possession orders for periods in excess of five years, despite the guidance provided by the Court of Appeal in *Norgan*.\(^{133}\) It may also account for the recent restriction, imposed by *Krausz*,\(^{134}\) upon the operation of s.36 in relation to the mortgagor's attempt to sell the secured property where a shortfall will be occasioned. The wording of s.36 demands that an order for possession can only be suspended if the arrears are paid within a reasonable period. The Court of Appeal held that this does not allow for an order to be suspended so that the property can be sold where part of the mortgage debt will remain outstanding.

Despite the limitations placed upon district judges in the exercise of decision-making power, it is clear that their perception of the needs of society exerts a significant influence upon the manner in which they interpret and implement its provisions. The cases of *Palk*,\(^{135}\) *Barrett*\(^{136}\) and *Krausz*,\(^{137}\) for example, can all be explained by reference to an attempt on the part of the judiciary to ensure that the law complements the function which mortgage finance serves within the social context. In all of these cases, the judiciary have expressed an understanding of the problems associated with negative equity and the need to ensure that access to mortgage finance remains open whilst at the same time protecting the interests of mortgagors.

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The qualitative data presented within this chapter offers an account of the practical operation of the law of mortgage and the factors which influence the judiciary in the exercise of the ability to give meaning to and implement aspects of that legal framework. Reference to such data would appear to support the contention, discussed at the beginning of this chapter, that the judiciary have played some part in allowing legislation such as the LPA 1925 and the AJA 1970 to remain unchanged over a number of decades.

7.5 Conclusions

The themes and propositions that inform this thesis, apparent in this chapter and those which preceded it, have been discussed within the context of particular aspects of the law of mortgage. The following chapter seeks to draw these themes together in order to evaluate the extent to which the hypothesis propounded within this thesis has been validated. It will also raise a subject which has not been the primary concern of this study but which is relevant to it, namely whether the law of mortgage is in need of reform. Despite attempts by the judiciary to alter the social meaning ascribed to the law of mortgage so as to ensure that it adapts to the changed environment in which it operates, it is apparent that these attempts are constrained to a large extent by a legal framework that was designed to deal with a very different housing system to that which operates in the late twentieth century. As Stewart notes,

The twentieth century has witnessed the development of a mass market in owner-occupation although the legal foundation for this expansion emerged from the property law reforms of 1882 – 1925, at a time when the overwhelming majority of the population rented their dwellings from landlords.138
The anachronistic nature of certain aspects of the law of mortgage is perhaps best illustrated by the mortgagee’s inherent right to possession. As was indicated in Chapter Six, mortgagees no longer treat possession as an absolute right but instead have chosen to qualify it by virtue of a term contained within the mortgage contract which requires default by the mortgagor. This is not, however, the only example, for it may also be argued that aspects such as, the wording of s.36, the failure to regulate the contractual stages of the mortgage transaction, and the failure to impose standards on mortgagees when exercising the power of sale, are all incompatible with the current social function of the law of mortgage, issues examined in more detail in the conclusions to this thesis.

To take one of these examples, however, the wording of s.36 was intended, by parliament, to limit the operation of the section to those mortgagors in temporary financial difficulties. The statutory section, introduced in 1970, did not envisage a situation in which many mortgagors would be experiencing long-term financial difficulties. In 1998, however, 108,920 mortgagors owed the equivalent of six or more months payments in arrears. Section 36 is not and never was designed to deal with these mortgagors and can, therefore, be said to be out-of-date.

The anachronistic nature of the law of mortgage may serve as one means of justifying the reform of the law of mortgage but it may also be suggested that reform is necessary due to the failings of the legal process of possession identified within this chapter. In particular, there is evidence to suggest that the possession process operates as a lottery, with the ability on the part of mortgagors to avoid possession dependent upon the mortgagee who advanced the loan and the district judge who presides over the possession hearing. The important point to note is that a mortgagor does not have the ability to influence either of these factors.
In choosing a mortgagee, a mortgagor will have little or no information in respect of the possession policies operated by different mortgagees. A mortgagor may, therefore, unknowingly choose a mortgagee who implements a rigid policy in respect of possession and may find that a possession hearing is initiated upon falling into arrears equivalent to a few months payments. The mortgagor will be liable for the costs of that hearing and any further hearings initiated by the mortgagee should the mortgagor fail to meet the terms of a suspended possession order and, as suggested in this chapter, may find that outright possession is granted. Had that mortgagor chosen a different mortgagee, they might have found that the mortgagee was willing to allow them to clear the arrears without reference to the court and the costs associated with such action.

A mortgagor who is subject to a possession hearing may also find that the chance of avoiding possession is dependent upon the judge who hears the case, rather than the mortgagor’s financial situation as established by s.36. As the district judges indicated, different limitations will be placed upon the extent of the reasonable period. If the district judge establishes a relatively short period for suspension, the payments expected of the mortgagor will be larger than under a longer period of suspension. The mortgagor may, therefore, find that possession is granted due to an inability to meet those payments, whereas the mortgagor’s financial situation may have been sufficient to avoid possession had the longer term been granted.

It is this element of arbitrariness which raises questions regarding the extent to which the legal process of possession meets requirements in respect of ‘due process’. As has been suggested within this chapter, inconsistency within the process of possession
derives from the use of discretion and yet discretion is probably more appropriate within this process than mandatory rules. This does not, however, invalidate claims in respect of the need to reform the exercise of discretion whilst maintaining it as an appropriate aspect of the legal process of possession.

The qualitative data presented in this chapter has provided an account of the practical implementation of the law of mortgage. The material contained within this chapter constitutes the final aspect of the law of mortgage which this thesis intends to examine. In combination, the chapters contained within this thesis have attempted to provide information in respect of three elements of the law of mortgage, its juridical content, origins and social function. Having completed this stage of the research process, it is now possible to synthesise this material with the aim of evaluating the extent to which the hypothesis examined within this thesis has been proven. This is the task undertaken in the chapter which follows.
1 Holmes, O. W. *The Common Law*, pp. 35 - 36, taken from Kahn-Freund, p. 43.
3 See p. 297.
4 The AJA 1970, s.36(1).
5 ibid. s.36(2), (3).
8 [1973] 2 All ER 33.
11 ibid. p. 508.
14 Harpum, *op. cit.* n. 12, p. 359. The quotation referred to was pronounced by Viscount Simonds in *Magor v St Mellons RDC v Newport Corp.* [1952] AC 189 at 191.
15 Harpum, *op. cit.* n. 12, p. 359.
21 ibid. p. 12.
22 One of the criticisms levelled at the nature of s.36 of the AJA 1970 is that its protection extends only to those cases brought before the court. Despite claims that s.36 of the AJA 1970 imposes a requirement of due process upon a mortgagee seeking possession, the inherent right to possession remains and an order from the court is not necessary.
23 The AJA 1970, s.36(2).
24 The AJA 1973, s.8.
26 [1996] 1 All ER 449.
27 ibid. at 458C-E, per Waite LJ.
30 op. cit. n. 18, para. 1383.
31 Vol. 1, para. 88/5/9, see also Parmiter, ‘Wrongly Dispossessed?’ (1992) 16 *LS Gaz* 17 which refers to a Judicial Studies Board recommendation of two years.
32 op. cit. n. 26.
33 op. cit. n. 26, at 458G-J.
35 op. cit. n. 26, at 459H.
36 ibid. at 4591.
37 op. cit. n. 26.
38 ibid.
40 op. cit. n. 26.
41 op. cit. n. 26, at 463A-D.
43 op. cit. n. 26.
44 op. cit. n. 42.
45 op. cit. n. 26.


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95 ibid. p. 33.
96 The LPA s.196 establishes requirements as to the type of notice and the method by which it should be served.
97 This power derives from the terms of the mortgage contract. See also s.105 of the LPA 1925.
98 See Chapter Four of this thesis for a more detailed discussion of the historical development of these duties.
99 Gray, p. 1011.
100 Section 13 and sch. 4, para 1(1)(a), (2).
101 [1971] Ch 949 at 968H - 969A.
102 Palk v Mortgage Services Funding Plc. [1993] 2 WLR 415. See also Gray, p. 1014.
104 The Independent, December 6th 1993.
105 The Times, August 15th 1995.
106 NACAB, op. cit. n. 59, p. 37.
107 ibid. p. 2.
109 See Madge, op. cit. n. 42.
111 ibid. at 421G.
112 op. cit. n. 110.
113 ibid.
114 ibid.
117 ibid.
119 op. cit. n. 115.
120 op. cit. n. 110.
121 Pratt, J. op. cit. n. 103, pp. 10 - 11.
122 [1997] 1 All ER 21.
123 op. cit. n. 110.
124 The Times 2nd May 1996, see also National and Provincial Building Society v Lloyd [1996] 1 All ER 630.
125 op. cit. n. 122.
126 op. cit. n. 110.
127 op. cit. n. 115.
129 ibid. pp. 289 – 293.
130 See p. 321.
133 op. cit. n. 26.
134 op. cit. n. 122.
135 op. cit. n. 110.
136 op. cit. n. 115.
137 op. cit. n. 122.
CHAPTER EIGHT
8. Conclusions

8.1 A synopsis of the research task

It was stated at the outset that this thesis sought to analyse the law of mortgage, with particular reference to the manner in which it is interpreted and implemented within the social context. In pursuit of this goal, an analytical framework was adopted which followed closely the theory propounded by Renner that the law can only be understood truly by reference to a tripartite system, encompassing an examination of the form, origins and social function of the law of mortgage. In applying this analytical framework, particular attention was paid to the significant role played by mortgage finance in the creation of a mass home-ownership market within England and Wales.

The research task was initiated as a result of the identification of an apparent peculiarity within the law of mortgage. Despite the legal framework having remained relatively unchanged for over 70 years, the uses made of mortgage finance had undergone a radical transformation. The pivotal role played by mortgage finance in the creation of a mass home-ownership market within England and Wales during the last century, had been undertaken without any obvious need for a change in the legal device of the mortgage. In seeking an explanation for this occurrence, regard was had to the thesis propounded by Renner in the Institutions of Private Law and Their Social Functions. The questions which Renner posits in relation to the institutions of private law generally, had particular resonance in relation to the law of mortgage, including the inquiry into how legal institutions are put to new uses within society without
transforming their normative content. It was determined, therefore, to utilise, for the purposes of this study, Renner's thesis as a methodological guide to an understanding of the law of mortgage. A question which is fundamental to both Renner's thesis and this research study concerns the relationship between legal norms and the functions they serve within the social context, namely, 'How can one account for the functional transformation of a norm which remains stable?' In order to provide such an account, it was necessary to gain a detailed understanding of the law of mortgage, a task which would be assisted by an examination of Renner's theory.

In accounting for the stability of legal norms, a fundamental contention propounded by Renner is that such stability derives from the 'normative purity' of certain legal norms. In effect, these norms are 'empty frames', the content of which is filled in by operation of the norm within the social context. In seeking to examine this aspect of Renner's hypothesis, it was necessary to examine the extent to which the legal institution of the mortgage is devoid of any moral content. In undertaking this task, it was not only necessary to examine the juridical content of the legal norm of the mortgage, and the law of mortgage generally, but to compare that account with an analysis of the social function of the law of mortgage.

This element relates to the manner in which use is made of legal institutions within society in, 'the social processes of “production” and “reproduction”, of the maintenance of the human species'. In relation to the law of mortgage, this would include the manner in which use is made of the legal device of the mortgage within the social context and the economic and political significance of mortgage finance. If it could be proven that the legal norm of the mortgage was normatively pure, then it must also
follow that a juridical analysis of the law would fail to provide information relating to its social function. In order for colour to be added to the ‘colourless frame’, which is the legal device of the mortgage, Renner contends that it is necessary to detail the function which it serves within society.

This apparent separation of the juridical content of the law from its function raises a further proposition which this thesis sought to examine. If the juridical content of legal institutions cannot be influenced by the function it serves within society, then the relationship between the law and social change cannot be reduced simply to one of cause and effect. Renner contends that changes in the economic system may be the result of legal developments, but that it is more common to find that changes in economic relations produce changes in the law. The significance of this relationship, which Renner is at pains to point out, is that this change does not occur automatically but only after a time-lag.

This claim may appear, at first, controversial for it seeks to deny any ability on the part of ‘law-makers’ to effect changes within society. In relation to legislation which, for example, prohibits discriminatory behaviour in relation to employment policies, it seems reasonable to assume that it plays a major role in causing employers to alter the manner in which they behave. It must remembered, however, that Renner’s hypothesis was formulated on the basis of a codified system and social facts as they operated in 1900 and not as they operated in 1990, as Kahn-Freund notes, ‘the world which forms the background of his analysis is not that of industrial monopolies, of price-fixing trade associations, of international cartels in which we live, it is still the world of competitive capitalism.’
The changes that have occurred since the publication of Renner’s work relate not only to the economic system, but also to the role of the state. The expansionist nature of the state in Britain, particularly at the time of Kahn-Freund’s contribution to the *Institutions of Private Law and Their Social Functions*, has been substituted by the centralisation of executive power and the ‘minimalist state’, particularly during the period after 1979. The impact that this model of the state has upon the relationship between the individual and the state, particularly in relation to the provision and perception of housing, has been hinted at in Chapter Five and will be discussed further below. It is important to recognise, however, that these changes may account for some of the apparent anomalies within Renner’s thesis, as Cotterrell notes,

> The modern idea of law as an instrument of wide-scale social and economic planning could hardly have been seriously entertained when the state was less powerful, had less technological facilities available to it for surveillance and control, and was less able to rely on vast networks of communication controlled by mass media.\(^{12}\)

The ‘anachronistic’ nature of Renner’s work does not, however, invalidate the methods he prescribes for a better understanding of legal institutions, as Kahn-Freund notes, ‘It is as true today as it was fifty years ago that legal institutions may thoroughly change their social function as a consequence of a transformation in their environment.’\(^{13}\)

Having acknowledged the problems associated with Renner’s thesis, it was still necessary to test his contention that legislation is only introduced after change has already occurred in the ‘womb of society’.\(^{14}\) This task made an analysis of the origins of
the law of mortgage and its social function unavoidable. In order to know whether legislation, such as the Law of Property Act 1925 (LPA 1925), was introduced as a result of changes in society, it was necessary to make reference to the reasons which underpinned its introduction and to any significant and relevant social events which preceded it.

A review of the origins of the law of mortgage was also necessary in order to verify the proposition fundamental to this thesis, namely, that legal norms can remain static whilst their functions undergo radical change. If it could be shown that the juridical content of the legal norm of the mortgage was the same in 1997 as it was, say in 1797, then the first element of the contention would be established. In order to validate the second part, namely that the social function of the law of mortgage had during the same period undergone a transformation, then knowledge of the function it served in 1797 would have to be obtained and compared with its social function in 1997.

Information relating to the historical development of the social function of the law of mortgage could be obtained from texts concerned with the history of the law of mortgage, the building society movement and social and economic history more generally. In relation to the social function currently served by the law of mortgage, it was necessary to obtain a detailed understanding of the housing policies of the Conservative governments of 1979 - 1997. Despite having lost power in May 1997, it is possible to argue that the Conservative governments established the current social function of the law of mortgage, which in its most simple terms, is to maintain a mass home-ownership market within England and Wales.
In addition to the policies of central government, the social function of the law of mortgage also includes the manner in which society currently seeks to utilise the legal device of the mortgage. It was necessary, therefore, to obtain information in respect of this factor. By comparing the current social function with that served at different historical periods it would be possible to examine the contention that the social function of the law of mortgage has undergone change.

To summarise, one aspect of the research task undertaken for the purposes of this thesis was to examine the means by which legal institutions are put to new uses within society without altering their content. The solution offered by Renner, namely, that the normative purity of legal institutions allows for change to occur in the social function without the need to alter the juridical content, served as one possible explanation. Whilst there may be a multitude of other explanations, Renner’s theory is significant in that its application leads to a contextual account of the law of mortgage. It is on the basis of such an account that further research into the ability on the part of the law of mortgage to remain stable while its social function undergoes change can be undertaken. It was the aim of thesis, therefore, to provide such an account. A further aspect of the research task, however, departs from Renner’s thesis by examining the manner in which legal institutions are implemented and interpreted by the judiciary within the social context.

Renner’s claims regarding the static nature of legal norms and their detachment from their social function are undermined by the ability of the judiciary to alter the meaning given to and enforcement of these legal institutions. The thesis propounded by Renner has specific application to codified systems and does not, therefore, make allowance for
the potentially significant role played by the judiciary in exercising discretion and ‘interpreting’ the law, thereby altering its ‘social meaning’. It does not necessarily follow, however, that Renner’s thesis is unsuitable for application to systems that allow for ‘judge-made law’.

The relevance of Renner’s thesis to common law systems derives from its attempt to account for the stability of legal institutions. In distinguishing between the juridical content of legal institutions and their social function, Renner contends that legal norms are capable of remaining unchanged for many years for the reason that their social meaning can be altered to meet with the needs of society. It is possible to include within this broad theoretical framework the role of the judiciary. Essentially, the argument is that the judiciary has a significant role to play in altering the social meaning of legal institutions, thereby allowing their juridical content to remain static for decades, if not centuries.

In order to examine this contention, it was necessary to obtain and analyse information relating to the manner in which the judiciary interpret and implement the legal framework. In relation to this issue, Holmes contends that the judiciary will be influenced in the exercise of their discretion by, ‘definitely understood views of public policy.’ It is possible to contend, therefore, that the social function of the law of mortgage inspires the judiciary to alter the manner in which they interpret and implement the law, once again bringing the decisions of the judiciary within the theory propounded by Renner.
This thesis sought to question the validity of this contention through the analysis of secondary sources relating to the judiciary’s role within the possession process. Information relating to the extent to which the judiciary altered the meaning ascribed to the law of mortgage in line with the perceived objectives of society generally, objectified by the policies of central government, could not, however, be obtained by reference to these sources alone. It was necessary, therefore, to undertake a primary research study. The ability of the judiciary to alter the social meaning of the law of mortgage made their participation in the primary research study an imperative. Data obtained from the judiciary could be utilised in the verification of propositions raised within this thesis. In particular, information relating to the factors that influence their decisions would either support or disprove the contention that the judiciary is receptive to the demands of social change.

In relation to one of the principal concerns of this thesis, namely, to indicate how it is possible to alter the uses made of legal institutions within society without altering their normative content, data provided by members of the judiciary would provide information relating to the practical implementation of the legal framework. Reliance on such information alone, however, would prove insufficient in the construction of a true representation of the law of mortgage. As Renner notes, legal institutions do not operate in isolation but, ‘are cogs in the mechanism of the production, consumption and distribution of the social product’. It would be necessary therefore to obtain information relating to the operation of the law of mortgage within the social context, the influence it exerted upon its environment and the influence which that environment exerted upon the legal framework.
It has been stated above, that in forming one element of the social function of the law of mortgage, the policies of central government would be examined. In addition, a further element of the social function relates to aspects of the mortgage relationship which fall outside the ambit of the law of mortgage. A review of the juridical content of the legal framework indicates that the law of mortgage is concerned primarily with establishing formalities in the creation of the legal device of the mortgage and in establishing a distinction between the interests of the mortgagor and mortgagee in the secured property. Aspects of the relationship which are not regulated by virtue of the law of mortgage include the contractual terms of the agreement and the exercise of discretion by a mortgagee in respect of access to mortgage finance, possession and sale. These elements of the mortgage relationship, whilst not forming part of the law, would appear to have the potential to exert significant influence upon the operation of the law of mortgage and vice versa. They could, therefore, be included within the definition of the social function of the law of mortgage and consequently, information was required in respect of these non-legal elements.

Information concerning the experience of mortgagors of the mortgage relationship and particularly the possession process was made available in secondary literature. The supply of information relating to the role of mortgagees within the relationship, however, was insufficient for the purposes of this thesis and consequently mortgagees were included as respondents within the primary research study. The inadequacy of the information available during the implementation of this research task related to the factors that influenced, and the procedures that were adopted, in the exercise of discretion by mortgagees. The aim of the primary research study therefore, was to obtain data in respect of the exercise of discretion by mortgagees in relation to issues
such as allowing access to mortgage finance and the initiation of possession proceedings.

In summary, the ultimate aim of this research study was to identify and analyse the relationship between the juridical content of the law of mortgage and its operation within the social context. The application of Renner’s thesis would prove invaluable in structuring this research task. It must be noted, however, that Renner’s thesis was intended to serve only as a methodological guide to an understanding of the law of mortgage. As Kahn-Freund notes, despite the limitations of Renner’s thesis, ‘the method itself remains fruitful, and can and should be used for a better understanding of many legal developments of our own time.’ Through the application of this methodology, this thesis serves as a ‘first step’ in understanding the law of mortgage. Had another researcher prior to the initiation of this research undertaken that task, this thesis could have adopted a number of approaches in critically evaluating the law of mortgage. Some of those approaches are canvassed in the later sections of this chapter with the aim of indicating the next step that might be taken following the completion of this research. Such approaches will be based upon the findings of this research study, which are examined below.

8.2 Findings

Lindley LJ gave the classic definition of the legal device of the mortgage in 1899, as a disposition of some ownership interest in land or other property, ‘as a security for the payment of a debt or the discharge of some other obligation for which it is given’. This
definition, despite being pronounced before the apparent reforms of 1925, remains as an accurate description of the modern mortgage device. The juridical meaning ascribed to the legal norm of the mortgage has therefore remained unchanged during the last century and, as the examination of the origins of the law of mortgage undertaken in Chapter Four suggests, the four centuries which preceded it.

The development of the 'classical common law' mortgage during the sixteenth century, which involved the conveyance of the mortgagor's lands outright in fee simple to the mortgagee, with a covenant for re-conveyance if the debt was re-paid on time, established the foundations of the modern mortgage transaction. The reforms of 1925 altered the manner in which the legal device of the mortgage was to be created but the essential elements of the mortgage device remained unchanged. In spite of the static nature of the law of mortgage, the uses made of mortgage finance have undergone a radical transformation during the last century. Whereas it once served as the means by which landowners could obtain funds to ameliorate their financial difficulties, it now serves as the primary vehicle by which households enter the home-ownership sector.

The explanation offered by Renner for this functional transformation of a legal norm that has remained stable is that the legal norm, 'is indifferent towards its social function, the economic effect extraneous to the definition of a legal concept.' The definition of the legal device of the mortgage, as the transfer of an ownership interest in land as security for a debt, for example, distinguishes it from other forms of money lending but it does not demand that it should serve any particular function or be used by any particular category of individual.
In recognising the mortgage device as a ‘colourless frame’, it necessarily follows that the juridical analysis of the law can offer little if any understanding of its social function. The positive legal analysis of the law of mortgage undertaken in Chapter Three indicates this to be the case for it offers no information concerning the uses made of the legal device of the mortgage, those individuals who seek to use it or its role within the wider economic and political contexts.

It is also possible that a positive legal analysis of legal institutions, which does not benefit from supplementary information concerning the origins and social function of those legal institutions, may produce a descriptive account which is misrepresentative of the true significance of particular legal norms or provisions. This proposition is highlighted by s.103 of the LPA 1925 which, by virtue of a juridical analysis, would appear to be a significant constraint on the exercise of the power of sale by a mortgagee. An examination of the practical operation of the law of mortgage, however, reveals that this section is irrelevant within the mortgage relationship for it is excluded by virtue of a term contained within the typical mortgage agreement.25

The contention that a juridical analysis offers an insight into only one aspect of the law of mortgage is further supported by the analysis of the current social function of the law of mortgage. One of the principal functions served by the law of mortgage has been to enable the creation of a mass home-ownership market within England and Wales. In addition to assisting in the increase of the number of home-owners, mortgage finance also played a central role in the achievement of many of the other political, economic and ideological objectives of the Conservative governments during the period 1979 - 1997. A positive legal analysis of the law, however, fails to offer little more than
superficial allusions to the significant changes which have occurred during the last century in the role played by mortgage finance within the housing system.

In order to obtain an understanding of the significance of the law of mortgage, however, it is not only necessary to combine a juridical analysis of its content with an examination of its social function but also to supplement those accounts with a survey of its historical development. An aspect of the law of mortgage which underlines this contention to good effect is the mortgagor’s equitable right to redeem. In relation to the modern mortgage transaction, this ‘right’ appears anomalous. A mortgagor, by virtue of the equitable right to redeem, is entitled to repay the debt even after the legal date for redemption has passed. That date, being set only a few weeks after the completion of the mortgage, is therefore apparently made irrelevant by the equitable right to redeem. The question as to why the current law of mortgage maintains the equitable right to redeem as a fundamental aspect of the mortgage relationship, can only be answered in detail by reference to the origins of the law of mortgage.

In addition to supporting the contention that the law of mortgage can only be understood by reference to its origins, the equitable right to redeem also supports the proposition that legal institutions may survive as part of the law even though, from a juridical perspective, they appear to be anachronistic for they will serve different functions within the social context. The introduction of new modes of creation in the LPA 1925 made the continued existence of the equitable right to redeem appear unnecessary but as was indicated in Chapter Three, it now serves a new purpose. As the mortgagee is only entitled to pursue the available remedies after the entire sum has become due, the short period prior to the expiration of the legal date for redemption has
been maintained. The equitable right to redeem, therefore, remains a necessary part of
the modern mortgage transaction but for purposes different to those that it served
originally.

The inadequacy of a juridical analysis of legal institutions made apparent by this thesis
appears to derive from the normative purity of much of the law of mortgage. It is,
however, the normative purity of the legal formulation of the mortgage device that
provides society with a tool that it may use in whatever manner is considered
appropriate. If society wishes to alter the uses made of the mortgage device, it may do
so without the need to alter the juridical content of the legal norm. This contention is
supported by an account of the changes that have been occasioned in the uses made of
mortgage finance during the period 1979 - 1997. The objective of the Conservative
governments, to increase the number of home-owners within England and Wales, led to
fundamental changes in the housing system and in particular to the types of mortgagee,
mortgagor and mortgage product.

The deregulation of the mortgage market in the early 1980s introduced competition into
a market previously dominated by the building societies. The result was willingness on
the part of mortgagees to offer an increased range of mortgage products on the basis of
less stringent lending criteria. The range of potential mortgagors was, therefore,
increased, enabling households who previously would have been considered unsuitable
as candidates for mortgage finance, to gain access to the home-ownership sector. The
implementation of these fundamental changes within the mortgage market did not,
however, require an equivalent alteration in the juridical content of the law of mortgage.
One outcome of these policies and others, including the ‘residualisation’ of the public rented sector, was to create a home-ownership sector which encompassed all categories of household, ranging from the most affluent to those with low-incomes. In combination with these tangible changes in the housing system was a change in the perception of housing, with home-ownership being conceived as the form of housing which could offer stability and security in excess of that offered by alternative accommodation. The extent to which these changes in the social function of the law of mortgage influence the manner in which the legal framework is interpreted and implemented appears to be significant. Kahn-Freund raises the possibility that the judiciary may alter their interpretation of the law of mortgage so as to ensure that it meets the changing needs of society, ‘the judge constantly recurs to an analysis, articulate or inarticulate, of the moral, social, economic function and effect of the rules and principles he applies, and of his own decision.’

Through the analysis of qualitative data provided by those who participate in the mortgage transaction, it is possible to state that the judiciary has been influenced in the exercise of its discretion by the changing needs of modern society. The decision of the Court of Appeal in Cheltenham and Gloucester Building Society v Norgan, is indicative of the ability of the courts to alter the meaning ascribed to legal institutions or provisions in line with that they perceive to be the needs of society generally. Other examples of the significant role played by the judiciary in altering the meaning of aspects of the law of mortgage include the introduction of ‘stepped orders’, an innovation within the possession process introduced in order to deal with the rising numbers of mortgagors in arrears during the early 1990s. The emergence of negative equity during the same period has also led to changes in the exercise of discretion by the
judiciary, the case of Palk v Mortgage Services Funding Plc., serving as one example. It is these examples of judicial creativity which appear to validate the claim made throughout this thesis that the stability identified within the juridical content of the law of mortgage is in large part due to the ability of the judiciary to make it adapt to the needs of society.

The function that the law of mortgage serves in relation to meeting the demands of mortgagees has also undergone change during the last decade. The ability of mortgagees to undertake a multiplicity of actions, for example, has been available to mortgagees for centuries but in recent years it has been utilised so as to deal with the modern phenomenon of negative equity. Where a shortfall arises upon the sale of the secured property, the mortgagee is entitled to seek the remaining amount of the debt as an action on the personal covenant to repay. This serves as yet another example of the manner in which the social function of the law of mortgage has transformed without the need to alter the juridical content of the law itself.

The nature of the current social function of the law of mortgage, as indicated by factors including the policies of central government, the decisions of mortgagees, and the role of the judiciary, contrasts with the function it served in previous centuries. In terms of the manner in which the legal device of the mortgage was used within the social context prior to the early twentieth century, it served only one general purpose, namely to allow individuals to obtain funds. Those liquid funds could then be used to finance debts or to invest in the business of the mortgagor. The approach adopted by the courts during the sixteenth century in relation to these mortgage agreements was to afford the mortgagor an increasing degree of protection. As Stewart notes,
The balance of legal protection tended to be in favour of the borrower, quite contrary to the legal form. These developments cannot be divorced from their social and economic circumstances. The borrowers were landowners, in need of cash at a time when they could not use their land as capital.29

In contrast to this protectionist stance in favour of the mortgagor, the interpretation given to the law of mortgage since the nineteenth century, has placed heavy reliance upon the principle of freedom of contract and, particularly as concerns the issue of possession, has tended to favour the commercial interests of the mortgagee. The refusal by district judges to extend the reasonable period, for the purposes of s.36 of the Administration of Justice Act 1970 (AJA 1970), to the remaining term of the mortgage, for example, is in part due to the financial burden that this would impose upon mortgagees, as one district judge notes, ‘Where we have got a man with a good income there is no reason why he shouldn’t pay within a shorter period. It would be unreasonable to expect the lender the spread the arrears over the length of the mortgage term.’

The emphasis given to the commercial interests of the mortgagee can be explained by reference to the changes witnessed within the housing system and the mortgage finance industry in recent decades. The objective of central government to increase the number of home-owners required willingness on the part of mortgagees to offer mortgage finance to an increased number of households. It may be argued that in return for such action, mortgagees were assured that their interests would be considered in the implementation of the law of mortgage. The use made of mortgage finance in the
purchase of residential property on such a large scale has also led to a change of emphasis within the mortgage relationship. The growth of the institutional lenders into multi-million pound enterprises and the conversion of many of the larger building societies into public limited companies, has led to the provision of mortgage finance being undertaken in the pursuit of profit, as opposed to the provision of housing for members of the society. The judiciary, therefore, in seeking to protect the financial interests of the mortgagee, appear to be influenced in their decisions by what they perceive to be the interests of society generally.

It is this inter-relationship of the roles of central government, mortgagors, mortgagees and the judiciary which results in the construction of the social function of the law of mortgage. If demands are made by these parties, for example, that mortgage finance should be used to enable households to purchase residential property, then the social function of the law of mortgage can be altered to meet these demands without the need to alter the normative content of the legal framework. This contention assumes that the juridical content of the law of mortgage has remained static during the last few centuries. This is obviously not the case for changes have been introduced in the form of, for example, the LPA 1925 and the AJA 1970. According to Renner’s thesis, the reform of a legal norm or the introduction of legislation in a previously unregulated field arises out of changes in society. It is suggested by Renner, however, that such a change never occurs automatically, but only ‘after a time-lag which may have to be measured in centuries.’

This would appear to be the case in relation to the law of mortgage. As Chapter Four indicated, both the LPA 1925 and the AJA 1970 sought merely to give legislative
approval to principles that had already been established and operated by the courts. The introduction of s.36 of the AJA 1970, for example, was undertaken so as to reinstate an ability on the part of the judiciary to exercise discretion to suspend an order for possession which they had exercised prior to the judgment of Russell J in the case of *Birmingham Citizens Permanent Building Society v Caunt and another.* The period between this need for change arising and it being implemented constituted eight years, not a significant time-lag, but it does serve as an example of the reactive nature of legislation.

Although Renner’s theory appears to be validated by reference to certain aspects of the law of mortgage, the findings of this research study also serve to suggest that his theory cannot offer a comprehensive explanation for the relationship between the juridical content of the law and its social function. Evidence in support of this contention is provided by an account of legislation introduced by the Conservative governments during the period 1979 – 1997. The introduction of the ‘right to buy’ in the HA 1980, for example, achieved a fundamental transformation in the housing role of local authorities, indicating that legislation can be intimately linked with its intended social function. Further evidence which serves to deny the claims made by Renner is also provided by the role of the Courts of Equity during the sixteenth century. The changes achieved by the Courts of Equity in the juridical content of the law, including the introduction of the mortgagor’s ‘equity of redemption’ led to an alteration in the social function of the law of mortgage, not vice versa as Renner would assume.

It would appear, therefore, that whilst Renner’s theory may offer a coherent explanation for the stability identified within some aspects of the law of mortgage, including, for
example, the legal device of the mortgage, his work cannot be validated as a coherent or consistent explanation for the relationship between the juridical content of the law and its social function generally. The important point to note, however, is that in seeking to apply aspects of his theory, this thesis offers a contextual account of the law of mortgage on the basis of which further research can be undertaken. This thesis has indicated, for example, that the legal device of the mortgage has remained constant while its social function has altered dramatically. If that stability cannot be accounted for on the basis of the normative purity of that legal institution, then some other explanation needs to be found in order to understand fully the nature of the legal device of the mortgage. Such an explanation can only be arrived at, however, on the basis of a developed understanding of the juridical content, origins and social function of the law of mortgage. It has been the aim of this thesis to offer information in respect of these three elements and in so doing, has sought to lay the foundations for further research into the law of mortgage.

The potential routes which further research may take will be examined in the section which follows. In particular, one obvious route may be to question whether recent changes in society necessitate a change in the law of mortgage. The last major legislative reform was undertaken over 25 years ago, with the introduction of the AJA 1970. The changes that have occurred within the social context since that time have been dramatic. In addition to the changes already mentioned above, the implementation of policies by the Conservative governments achieved a fundamental restructuring of the relationships which once existed between the state, the individual and mortgagees. Households who previously may have turned to their local authority for assistance in meeting their housing needs are now turning to mortgagees. This transference of much
of the responsibility for the provision of access to housing from the state to the mortgage market has endowed mortgage finance with a new and significant role within society.

Although it was not the primary aim of this thesis to prescribe suggestions for the reform of the law of mortgage, the information contained within it can be used to advance such arguments. At various points throughout this thesis, reference has been made to a number of ‘secondary themes’ that can be identified through an examination of the three constituent elements of the law of mortgage. These themes concern issues including: the exercise of discretion by mortgagees and district judges; the lack of regulation of the contractual relationship between a mortgagor and mortgagee; the transference of responsibility for the provision of housing from the state to the private market; and the inability or unwillingness of the judiciary to intervene substantially within the mortgage relationship. The following section of this chapter draws upon these themes to present a critical analysis of the law of mortgage. Whilst it is not possible to allude to all of the possible means by which the law of mortgage may be critically evaluated, it is possible to hint at the potential routes that might be taken.

8.3 Justifications for reform

The examination of the law of mortgage undertaken within this thesis has indicated that the social function of the law of mortgage has altered beyond all recognition during the last century and yet the content of the law has remained relatively unchanged. Renner
accounts for this through claims of normative purity, Stewart, however, offers three possible explanations, which rely more upon practice than theory,

On the one hand, it could be that the principles and form of the mortgage provide an adequate foundation. On the other, it could be that there is a legislative framework that relegates the importance of the mortgage agreement. Neither offers the answer. Rather it is that the relationships between the parties to the mortgage have not been regulated legally but administratively by the institutional lenders.  

The lack of legal regulation within the mortgage relationship has been highlighted at various points throughout this thesis. In particular the contractual terms of the relationship remain outside the ambit of the law, leaving the parties free to negotiate the boundaries and content of their relationship. In failing to intervene in these matters the current legal framework legitimates the resulting nature of the mortgage relationship, making it a matter of relevant concern within this thesis. The following section examines both the legal and non-legal aspects of the mortgage relationship and questions whether the changes in society now demand that reform of the law of mortgage be undertaken.

8.3.1 Private enterprise and the exercise of public power

The legacy of eighteen years of Conservative government is not only a housing system dominated by the home-ownership sector, but a radical transformation in the relationships which exist between the state, the individual and corporations, including mortgagees. The reduction in the role played by the state as a provider of housing,
achieved through the promotion of an increase in home-ownership, has led to an increased role for mortgagees. This transference of social responsibilities away from the state and towards private actors within a market regime was indicative of the general policy aims of the Conservative governments. What is significant about this transfer, however, in relation to the law of mortgage, is its impact upon the level of acceptable behaviour that a mortgagor can legitimately expect in the exercise of power by these 'private' organisations. As Stewart notes,

If the responsibility for provision is relocated in the market, the issues become ones between the individual consumers and individual suppliers, in the present case between mortgagors and mortgagees not between voters and government.33

This substitution of the state by private commercial enterprises operating within a market system has significant implications in relation to the standards that the individual can legitimately expect to be applied and enforced in the exercise of decision-making power by those enterprises. The legitimacy of decisions taken by the state, which significantly affect the interests of individuals, can be measured by reference to standards of 'accountability'34 and 'due process'. In defining this latter concept, Galligan notes that,

[The logic of the due process clause [in the American Constitution] is clear: where a person has an interest in life, liberty, or property, which is affected by a legal or administrative action, certain procedures must be followed.35

Despite its categorisation as an American doctrine, 'it is not now so unusual in the British context for reference to be made to ideas of due process.'36 This adoption of
American terminology derives, in part, from the similarity between the concepts of due process and 'procedural fairness', the term more commonly used within English law. Whilst the American term, unlike its English counterpart, denotes both procedural and substantive due process, Galligan contends that both terms can be used to express two meanings. The first relates to, 'a set of procedural doctrines, largely created by the courts, which express fundamental principles about the fair treatment of persons and the procedures needed to give effect to fair treatment'. The second meaning refers, 'not to the legal rules of procedures but to the values which justify those rules'. It is this latter aspect of the terms 'due process' and 'procedural fairness' which implies that procedural rules can ensure fair and accurate outcomes within legal processes.

It is in relation to achieving fairness, both in terms of the treatment afforded to individuals within legal processes and in the outcome of those processes, that public bodies are subject to the standards of procedural fairness. Decisions taken by private actors, however, have traditionally not been subject to such generally applicable standards. The decisions taken by private actors are generally measured against principles determined within that private relationship, including reference to factors such as the terms of any contract which exists and expectations raised by the behaviour of both parties during the relationship.

The distinction made by the nature of the law between the decisions made by private and public bodies is particularly apparent in relation to the possession process. The examination of the practical operation of the law of mortgage undertaken in Chapter Seven indicates that a mortgagor does not have the ability to question or challenge the decision to repossess or the manner in which that decision was taken. The only matter
that can be considered is whether the mortgagor has a sufficiently stable financial position to allow them to clear their arrears within a reasonable period.

In relation to decisions taken by public bodies, the individual who is affected by that decision is able to challenge it through the process of judicial review, which Lewis and Birkinshaw define as, 'the process by which judges keep powers exercised on behalf of the public within their allotted legal bounds.' The major obstacle in the application of judicial review to the decisions of mortgagees concerns the 'private' nature of such organisations and the contractual basis of the relationship between mortgagor and mortgagee. Where the powers exercised by a body derive from a contract, its decisions remain a matter for consideration under the principles of private law and are not open to judicial review.

The distinction made by the nature of the law between private and public relationships has been criticised for its failure to recognise the significant influence which private commercial enterprises, and in particular large companies, can exercise within the public domain. The major concern is that private enterprises are exercising public power without recourse to meaningful procedural standards or legitimate justification. Parkinson identifies the manner in which corporations can exercise power that extends beyond the merely private relationship, which he terms, 'decision-making power'. In defining this power he states that, 'The key elements are ... discretion and significant effects' (Original emphasis).
8.3.2 ‘Discretion’

Taking the case of mortgagees, evidence provided within this thesis suggests that mortgage lenders have the first element of ‘decision-making power’, namely discretion. The ability to exercise discretion as regards the timing of the initiation of the possession process and the sale process serve as two examples. It may be possible to argue, however, that mortgagees are prevented from exercising absolute discretion in respect of these matters by virtue of the Council of Mortgage Lender’s (CML) *Statement of Practice* and aspects of the law of mortgage.

The absolute nature of the right to possession is undermined to some extent by the self-regulatory guidelines published by the CML. The *Statement of Practice* constitutes the only published standards concerning the manner in which mortgagees exercise the right to possession. Mortgagees are not, however, under any obligation to adhere to the guidelines set out in the *Statement of Practice*, it has no legal force and the CML cannot impose any sanctions on those who do not follow it, as a representative of the CML stated,

> We hope that they do but in detail many wouldn’t because they are generalised recommendations and the reality of mortgagees is that they have a different approach and an obvious difference is the speed with which they take possession.

This does not necessarily result, however, in a failure by the *Statement of Practice* to achieve effective regulation of the activities of mortgagees. Where there is collective self-will on the part of the relevant members to abide by the terms of self-regulatory
codes then such regulation can prove effective. The effectiveness of this self-regulatory scheme in regulating the activities of mortgagees, in relation to arrears management and possession procedures, can be evaluated by reference to the standards set out by the National Consumer Council (NCC), which are,

(i) The scheme must be able to command public confidence.

(ii) There must be strong external involvement in the design and operation of the scheme.

(iii) As far as possible, the operation and control of the scheme should be separate from the institutions of the industry.

(iv) Consumers and other outsiders should be fully represented ... on governing bodies of self-regulated schemes.

(v) The scheme must be based on clear statements of principle and standards - normally a code.

(vi) There must be clear, accessible and well-publicised complaints procedures where breach of the code is alleged.

(vii) There must be adequate and meaningful sanctions for non-observance.

(viii) The scheme must be monitored and updated in the light of changing expectations and circumstances.

(ix) There must be a degree of public accountability, such as an Annual Report.46 (Original emphasis).
The CML’s *Statement of Practice* fails to achieve a number of these standards, for example, it is not operated and controlled by an external body and there are no meaningful sanctions for non-observance. Page also identifies an inherent problem in the use made of self-regulatory schemes, namely that, ‘Since adherence is voluntary it is not universal and those whose activities are most in need of regulation are least likely to subscribe to them.’ This would appear to be the case in relation to the mortgage market. In particular, there is evidence to suggest that mortgagees adopt varying degrees of compliance to the terms established by the *Statement of Practice*.

Although the majority of mortgagees would appear to adhere to the CML code in the interests of ‘good practice’, it is not sufficient to prevent some mortgagees acting in a manner which is inconsistent with its general principles and terms. One such principle is that possession should be seen as a last resort. As the following statement made by a representative of one mortgagee indicates, however, they operate an ‘automatic’ system of arrears management,

There are a number of trigger points - three months arrears with a minimum of £1000 arrears, solicitor will send letter before action and that usually gets customer to respond; no payments goes back to solicitor and an order is sought.

Mortgagees who operate such systems will seek a possession order as a matter of course immediately upon the mortgagor falling three months in arrears, regardless of whether there is a forbearance arrangement in place. Other mortgagees, however,
operate a discretionary system deciding each case on its merits and viewing legal
proceedings as a last resort, as one mortgagee notes,

If they continue to default they will be asked to come in for a counselling session. If they don’t
reply telephone calls will be made. If it’s willful intent or a no-hoper of a case then those
factors come in. We don’t lightly take possession proceedings. I have some cases with huge
arrears and we still haven’t taken possession.

Inconsistency in the possession policies adopted by mortgagees produces a possession
process in which mortgagors in similar circumstances are not treated in similar ways.
Some mortgagors may become more vulnerable to outright possession than other
mortgagors in similar financial circumstances, for example, a mortgagor with arrears of
three months who borrowed from a mortgagee which operates a ‘rigid’ possession
policy will find that they are subject to legal proceedings for possession. The order may
be suspended but that mortgagor will be liable for the legal costs incurred. If they fail to
meet the payments required by the suspended possession order, they will find it
extremely difficult to avoid outright possession. A mortgagor with a mortgagee who
operates a more ‘flexible’ policy may find that they are allowed several months in which
to clear their arrears without reference to the County Court and the additional financial
burden.

In addition to the CML’s *Statement of Practice*, the majority of mortgagees are subject
to the supervision of the Banking and Building Society Ombudsmen (BSO). The BSO is
independent of the building societies and can impose sanctions where a complaint is
upheld. The BSO, however, has no jurisdiction to question the decisions of building
societies relating to the taking or conduct of legal proceedings to enforce any of its
rights. The BSO cannot therefore investigate complaints relating to a building society’s
decision to seek possession.

The failure of the CML’s *Statement of Practice* to ensure that mortgagees adhere to its
guidelines coupled with the exclusion of the jurisdiction of the BSO means that
mortgagees can determine when to repossess without reference to external supervision
or regulation. Self-regulation in the context of the mortgage market has, therefore,
failed to constrain the decision-making power of mortgagees. The consequence of this
failure is that there is inconsistency in the treatment of mortgagors in financial difficulty
by mortgagees, which has significant implications for mortgagors within the possession
process.

It may be argued, however, that by virtue of s.36 of the AJA 1970, mortgagees are
constrained in the exercise of this discretion by virtue of the supervisory role adopted by
the courts. This process has been promoted as the means by which the commercial
aspects of the mortgage transaction are overridden by the aims of social justice." It is
possible to argue, however, that the ultimate decision regarding possession lies not with
district judges, but with the mortgagee.

Due to the mortgagee’s inherent right to possession, the district judge is obliged to
grant an order for possession. The order may be suspended on specified payment terms
or for 28 days to allow the mortgagor time to find alternative accommodation or pay
the entire mortgage debt, as one district judge notes, ‘If the mortgagor doesn’t turn up,
isn’t paying his mortgage, and the arrears are simply worsening, I have no jurisdiction
to make anything other than a possession order.’ Having obtained the possession order, whether it is suspended or not, the mortgagee is then allowed to determine the course of action considered to be appropriate.

If the order is for outright possession, the mortgagee can choose to ignore it and come to an arrangement with the mortgagor knowing that if the mortgagor fails to comply with that arrangement, the possession order can be implemented, as one mortgagee notes,

The powers of district judges are not as wide as people think. If they do make an order then they should make it on payments that cover the arrears within a reasonable period. In some cases the borrowers simply cannot afford to pay a sum which is sufficient to pay off the arrears within a reasonable time. We've got round that by asking the judge to make an order suspended for 28 days and we make an arrangement outside the court.

If the order is suspended on payment terms, the mortgagee cannot take possession provided the mortgagor continues to comply with those terms. The ability on the part of the mortgagor to meet the payment criteria will be dependent to a large extent on the length of suspension granted by the district judge. A mortgagor who owes £1000 will obviously find it easier to clear those arrears over five years rather than two years. The length of time over which a district judge is willing to suspend a possession order is generally determined by reference to the facts of each case. District judges did suggest, however, that they would be willing to go beyond the usual period, which on average amounts to three years, if the mortgagee agreed, as these statements by different district judges indicate,
‘The longest I would give without the permission of the lender is about five or six years.’

‘Some lenders get a bit uppity if you give more than five years, but up to five years no one complains.’

‘With the lender’s consent, I made an order for fourteen years.’

This contention is supported by a statement, reproduced in the report of Norgan, made by Judge O’Malley in dismissing the appeal by Mrs. Norgan to have the warrant for eviction suspended, ‘Whether the family is allowed the chance must be left to the plaintiffs to decide. They have established their claim to possession in law and have obtained an order for possession.’ The influence that a mortgagee may exert within the possession process, therefore, extends to determining the exercise of discretion by district judges, as Hunter and Nixon note,

[The approach of judges that has been urged upon them by lenders and which has been internalized in the application of discretion, is one which recognizes that the role of the judge is to defend the commercial property rights of the lender.]

In some cases, however, the length of suspension is irrelevant for the reason that the mortgagee can alter the payment terms in favour of the mortgagor, should they so wish, as one mortgagee notes, ‘If we get a court order for two years and the borrower can’t cope then we will try and stretch it over four years.’ In circumstances where the mortgagor fails to meet the terms set out by the court under a suspended possession order, the mortgagee has discretion to continue allowing the mortgagor to make
payments or to seek possession, as one mortgagee notes, ‘If it is suspended on terms
the mere fact that the borrower did not pay that does not bring the order into effect
immediately, it is the choice of the society.’ If they choose to take possession following
the breach of a suspended possession order, they will usually seek a warrant for eviction
from the County Court. As with the original order, the district judge has the discretion
to suspend the warrant but only if the mortgagor requests such action.

The power afforded to mortgagees within the possession process, therefore, appears to
be significant. In the cases illustrated above, the power to override the decision of the
court was generally exercised in favour of the mortgagor, allowing them more time or
reducing the payments specified by the court. This does not, however, provide a
justification for the exercise of this degree of influence, for there is evidence to suggest
that it can be used to the disadvantage of the mortgagor. In some cases, mortgagees
were utilising the legal process of possession as a debt recovery service, ensuring,
through the threat of possession, that mortgagors met the terms of any ‘forbearance
arrangement’, as one mortgagee notes, ‘The possession process is just a process we can
utilise to ensure that the mortgagor recognises the responsibility he has got.’ Using the
process in this manner can, however, have a significant impact on the ability of the
mortgagor to avoid possession due to the imposition of liability for all costs involved. A
mortgagor will find it more difficult to convince the court that they have the funds
necessary to clear their arrears when they have also to pay the costs of the court
hearing.

This policy is particularly damaging to the interests of the mortgagor where the
mortgagee involves them in a number of hearings. If a mortgagor does fail to meet the
terms of a suspended possession order, the mortgagee may seek a warrant for eviction which may be suspended again. This process can continue, involving a number of court hearings costing on average approximately £600 each time. The mortgagor will, therefore, find it increasingly difficult to avoid possession each time the case is brought before the court, a factor recognised by district judges who in some instances believe that it is better to grant possession than to involve the mortgagor in any further costs, as one district judge notes, 'I have to take that into account if the arrears are X pounds they will be X pounds plus £600 each time the case comes back.'

The legal process of possession, therefore, offers no protection against the excessive power exercised by mortgagees within the mortgage relationship. They can initiate legal proceedings knowing that they have nothing to lose. If the order is granted outright, they can sell the property and reclaim the debt. If it is suspended, they will receive the payments contracted for and an amount off the arrears, as this mortgagee made clear,

There is a tendency to give the benefit of the doubt to the borrower which doesn't overly prejudice us because if they don't pay the sum agreed in the order then we can get our warrant and if they do pay then that is exactly what we want.

It must be noted, however, that the legal process does offer sufficient protection to those mortgagors who do have the funds necessary to meet the payment terms set out in a suspended possession order. For those mortgagors who are in a more vulnerable financial situation, the process may serve only to inhibit their chances of avoiding possession.
8.3.3 ‘Significant effects’

The second element of the power described by Parkinson, namely, ‘significant effects’, also appears to be in evidence. The decision to repossess is equivalent to the decision to withdraw an already acquired interest, as Megarry VC held in *McInnes v Onslow-Fane*, the ‘forfeiture’ of an already acquired interest by a non-governmental body requires a high degree of procedural protection. The significance of the decision to seek possession is increased by the outcome of the possession process. In exercising the right to possession, mortgagees are not simply withdrawing an item of property from the ownership of the mortgagor, but are also evicting the mortgagor from their ‘home’. The significance of this action, in relation to the social welfare of the mortgagor, is that it severs any attachment which the mortgagor may have developed in relation to their home. Dupuis and Thorn, in recognising the limitations of their findings, suggest that such perceptions will tend to be context specific, with younger households less likely to have a developed sense of ontological security in relation to their home. This is not to deny, however, that many households will perceive of having lost both a degree of ontological security as well as security of tenure following the repossession of their home.

Whilst it is difficult to evaluate the emotional or psychological impact of possession upon a particular individual, there are more practical consequences which arise as a
result. The mortgagor will necessarily require alternative accommodation following possession and eviction. Any attempt to gain access to the home-ownership sector through the use of mortgage finance will be hindered by the mortgagor’s past payment history under the previous mortgage agreement. The CML *Statement of Practice* highlights the difficulties which will be faced by an individual who has been subject to possession,

Potential borrowers should not conceal the fact that they have defaulted on a previous loan. The subsequent lender will be aware of the previous mortgage either as a result of enquiries of the original lender or the CML Mortgage Possessions Register which lists borrowers who have had their properties taken into possession.

The options available to such an individual will, therefore, be either private rented accommodation, a housing association tenancy or accommodation within the public sector. For those households who are experiencing serious financial difficulties and who require immediate re-housing as a result of eviction, the most obvious course of action appears to be to seek housing from their local authority. The reduction in the quantity of local authority housing and changes to their duty to house the homeless under the Housing Act 1996, however, have increased the burden on local authorities, resulting in households being placed in temporary accommodation until a permanent home can be found. The report by Ford, Kempson and Wilson highlights the problems faced by those who have been repossessed in seeking alternative housing, ‘It was clear that some local authorities took, or had to take, a fairly hard line on intentional homelessness so that even with a possession order families would not necessarily be re-housed straight away.’ The outcome of the possession process is clearly significant for the individual
mortgagor but it is also clear that the exercise of this discretion can have wider ranging consequences. The 'housing crisis' of the early 1990s had significant effects upon hundreds of thousands of households and the economy generally, leading the government to intervene to curb the increasing number of possessions.

8.3.4 Regulating the exercise of social power – the role of the judiciary

The decision to undertake possessions may be viewed as an internal matter for individual mortgagees but as Parkinson notes, 'companies are able to make choices which have important social consequences: they make private decisions which have public results.' Recognition of the public nature of the power exercised by corporations raises questions regarding the legitimacy of that power. As Parkinson notes, viewing corporations as social enterprises derives from the political theory that, 'the possession of social decision-making power by companies is legitimate ... only if this state of affairs is in the public interest.' If corporations wish to continue to have the opportunity of implementing decisions which affect the public generally then they should ensure, or be made to ensure through regulation, that the outcomes of those decisions are in the 'public interest'.

The need for a 'public interest' justification in the legitimation of the exercise of public power by mortgagees derives in large part from the normative purity of much of the law of mortgage. As this thesis has indicated, regulation of the mortgage relationship is devoid of any particular moral or value-laden content. The ability on the part of the economically or politically powerful to manipulate the mortgage relationship to serve their own ends is the price that has been paid for this normative purity. In order to
redress this situation, it is necessary to have recourse to ‘higher values’, such as the ‘public interest’, particularly in relation to a common law system which has no written constitution.

Any attempt to define the values that should guide the regulation of particular relationships within the social context, however, meets with a number of difficulties. In the first instance, the task of constructing a coherent, uncontroversial and universally accepted definition of the ‘public interest’ has yet to be resolved. Even if the criteria necessary for the application of a public interest justification can be established, problems will arise in implementing them. If, as has been suggested throughout this thesis, legal provisions operate as ‘empty frames’ within the social context, then legal reform will prove unhelpful in attempting to constrain the exercise of power by those who have the opportunity to do so by reference to higher values. The AJA 1970, for example, was enacted in order to import particular values into the possession process and yet its wording failed to make reference to them.

It may be possible to argue that the normative purity of legal provisions does not necessarily result in an inability on the part of the legislature to effect change. By making explicit the objectives and values which are intended to underpin new legislation, Parliament can encourage the judiciary to ensure that such objectives are satisfied in the exercise of their ability to give meaning to and enforce legislative provisions. The information contained within this thesis, however, presents a challenge to this contention. An examination of aspects of the law of mortgage suggests that the extent to which the judiciary is willing or able to ensure that the operation of legal provisions meets with underlying values or objectives is minimal.
An example taken from the law of mortgage which supports such a contention relates to the judiciary's continued adherence to the principle of freedom of contract within a contractual relationship which can no longer support such reliance. The material changes within the housing system combined with the more ephemeral changes in the perceptions of housing, namely that home-ownership has come to be conceived of as the form of housing to be preferred, offer an impression of the transformation which has occurred within society during the last century. The qualitative data provided by district judges suggests that they have attempted to alter the social meaning of the law of mortgage to meet with the demands of this changed society. It also became clear, however, that the judiciary are or prefer to remain constrained by legal institutions which have not altered in line with changes in society.

The most obvious example of this is the adherence by the judiciary to the principle of freedom of contract. Their inability or unwillingness to intervene within the contractual relationship between the mortgagor and mortgagee places the mortgagor at a severe disadvantage within the mortgage relationship. The offer of standard term contracts that are similar throughout the mortgage market affords the mortgagee a disproportionate degree of power within the mortgage relationship. The judiciary, however, continue to view the contractual relationship as one entered into voluntarily and on the basis of equal bargaining strength as regards the mortgagor and mortgagee.

This adherence to the principle of freedom of contract is one example of the static nature of certain legal institutions that operate within the realms of the mortgage relationship. There is also evidence to suggest that the law of mortgage itself constrains
the ability on the part of the judiciary to make the law adapt to the modern social context. Despite the judiciary’s ability to alter the manner in which they interpret legislative provisions according to the social conditions prevailing at that time, they remain constrained to some extent by the manner in which those provisions are drafted.

This is particularly apparent in relation to s.36 of the AJA 1970. Whilst certain aspects of the language used within that section are open to a number of interpretations, the ‘reasonable period’ being an obvious example, others are not. The requirement that the mortgagor must be able to convince the court that they can clear their arrears whilst meeting their normal monthly contractual payments cannot be avoided by the use of creative interpretation by the courts. In addition, the mortgagee’s inherent right to possession requires that the court grants an order for possession. The judge may suspend that order so as to avoid the loss by the mortgagor of the secured property. If the mortgagor fails to meet the payments required by the suspended possession order, the judge will have little choice other than to grant outright possession. Ultimately, the ability of the mortgagor to avoid possession depends on their financial situation, a factor reinforced by the law of mortgage.

The changes in society since 1970, however, indicate that the emphasis placed upon the financial stability of the mortgagor requires re-evaluation. The Conservative governments of 1979 - 1997, having encouraged people to undertake owner-occupation, the majority of which could only do so with the aid of mortgage finance, have left mortgagors to fend for themselves in times of financial difficulty. In 1998, 108,920 mortgagors owed the equivalent of six or more months payments in arrears.62
Ford, *et al*, suggest that the numbers of mortgagors with long-term arrears could easily increase if current trends in the labour market continue,

There is ... clear evidence that current trends in the labour market are towards a further decline in full-time, male, skilled employment, an increase in service sector employment, much of it part-time, low paid work, as well as an increase in temporary working and self-employment and sub-contracting.63

Coupled with this movement towards low paid temporary employment are the changes made to the payment of mortgage interest under the Social Security (Income Support and Claims and Payments) Amendment Regulations 1995.64 It would seem unlikely, on the basis of the evidence provided by mortgagees within the primary research study, that mortgagees will be willing to allow their mortgagors to accumulate arrears during the nine-month period in which they have to wait for the payment of ISMI. Hunter and Nixon provide evidence to support this contention, ‘Failure of the benefit system to provide a safety net for households on very low incomes was cited by a number of respondents as being a major contributory cause of their arrears.’65

The inability on the part of the judiciary to deal effectively with these changes to the social security system is in large part due to the wording of s.36 of the AJA 1970. Having been introduced at a time when long-term arrears were relatively rare, the section focuses upon the mortgagor’s financial security and offers protection only to those experiencing short-term difficulties. It was not designed, therefore, to take account of the changing nature of the safety net provided by the state for those mortgagors who fall into financial difficulty. As Haley notes, ‘It serves as a strong
reminder that old laws do not necessarily adapt well to changing economic and social circumstances.\textsuperscript{66}

It is difficult to contend that, in a housing system that has encouraged individual households to meet their housing needs through mortgage finance, mortgagees should subsidise those home-owners who fall into financial difficulties. It is possible, however, to argue that the courts already have available to them, measures that could be used to readjust the imbalance in the interests of the mortgagor and mortgagee so as to allow mortgagors a greater opportunity of avoiding possession.

The emphasis given to the financial security of the mortgagor by the wording of s.36 demands that the court give priority to this criterion. The manner in which they currently exercise discretion within the possession process, however, tends to work to the disadvantage of the mortgagor. In the first instance, district judges in applying different definitions in respect of the ‘reasonable period’ create inconsistency within the legal process of possession. Analysis of the qualitative data collected for the purposes of this study, indicates that different district judges apply different limitations on the reasonable period, ranging from a maximum limit of five years to the remaining term of the mortgage. Hart proposes that consistency in the treatment of similar cases is one of the fundamental elements required if justice is to be achieved within the legal system. In distinguishing between ‘formal’ and ‘substantive’ justice, Hart contends that a necessary requirement of ‘formal’ justice is that like cases should be treated alike and different cases should be treated differently.\textsuperscript{67} The legal process of possession is clearly failing to satisfy this requirement of formal justice, a contention supported by Nixon, \textit{et al}, who note,
While recognising the value of discretion in providing flexibility to judge each case on its merits, there appears to be a need for some directions to judges to ensure that like cases are treated alike and that unfairness does not occur.68

Mortgagors with identical financial positions who have their possession cases heard in different County Courts may find that they receive very different treatment. For example, a mortgagor who comes before district judge X may be allowed ten years in which to clear their arrears, whereas a mortgagor with an identical financial position who comes before district judge Y may find that the judge is not willing to extend the reasonable period beyond five years and, as the mortgagor would not be able to clear their arrears within that period, is, therefore, unwilling to suspend the possession order.

The guidelines provided by the Court of Appeal in Norgan,69 which recommend that the court should be begin with the presumption that the remaining term of the mortgage is reasonable, will apparently do little to alter the current situation. The discretion allowed to district judges in determining the outcome of possession hearings is to be welcomed, but if consistency is to be achieved, that discretion must be structured by the introduction of more effective guidelines on the definition of the reasonable period.

The suggestion by district judges that they feel unable to implement the guidelines provided by the Court of Appeal in Norgan,70 also works to the disadvantage of the mortgagor in another respect. By limiting the extent of the reasonable period to an average of three to five years, district judges are demanding that mortgagors pay a higher amount off the arrears than if the order was suspended for a longer period. The
justification expressed by district judges for not applying the ‘remaining term of the mortgage’ as the starting point for the definition of the reasonable period is that it would involve the mortgagor in ever increasing financial debt.

In effect, a mortgagor who attempts to recover any arrears over a period of fifteen years, for example, will remain in arrears for the majority of that period. During this time, the mortgagee will impose additional charges and interest upon the account for the reason that it is in arrears. The mortgagor will, therefore, find it extremely difficult to clear the arrears in this time, hence the decision by district judges to limit the extent of the reasonable period. The reasoning that underpins this decision can, however, be argued to be flawed. The power afforded to mortgagees to impose additional charges and interest upon an account in arrears derives from the mortgage contract. A contract which this thesis has shown to be entirely within the powers of the mortgagee to construct. If the courts or legislature were willing to intervene within this contractual relationship, perhaps by preventing the accumulation of interest once a suspended possession order has been granted, then the courts could extend the length of the reasonable period, thereby enabling more mortgagors to avoid possession.

This contention is reinforced by the availability of a power on the part of the courts to intervene within the mortgage contract. The Unfair Terms in Consumer Contract Regulations 1994 allow for such intervention. Under these Regulations, any ‘unfair’ term in a contract concluded between a seller or supplier and a consumer, where the said term has not been individually negotiated, shall not be binding on the consumer. The Regulations define an ‘unfair term’ as: ‘any term which contrary to the requirement
of good faith causes a significant imbalance in the parties’ rights and obligations under
the contract to the detriment of the consumer.373

As this thesis has already proposed,74 the non-negotiable standard terms offered by
mortgagees, which impose additional costs on the mortgagor and do not provide
sufficient information regarding possession, cause a ‘significant imbalance in the parties’
rights and obligations under the contract to the detriment of the consumer.’ At the
current time, however, mortgagors and interest groups face difficulties in bringing an
action under these Regulations for the reason that they do not have sufficient
information regarding the possession policies adopted by mortgagees. If these policies
were published, both mortgagors and interest groups could challenge their ‘fairness’
under the 1994 Regulations, thereby ensuring a degree of transparency within the
possession process.

Reliance upon these Regulations by the judiciary would be in line with the attempts
already made by them to alleviate the difficulties faced by a mortgagor in the attempt to
avoid possession, including the use of stepped orders and the increase in the length of
the reasonable period. In light of the Labour government’s commitment to sustainable
home-ownership and the availability of the measures described above to the judiciary,
the continued preference shown towards the freedom of contract principle and a
definition of the reasonable period which limits it to a period of less than five years, may
become progressively less tenable.
8.3.5 Substantive or procedural reform?

The examination of the current provisions of the law of mortgage and the role of the judiciary in interpreting and implementing them suggests that neither the juridical content of the law nor the judiciary can be relied upon to import particular values into the mortgage relationship. It may be possible to argue, however, that the power currently exercised by mortgagees can be constrained, not by recourse to substantive concepts such as the ‘public interest’, but by the imposition of procedural safeguards. The attempt to justify reform of the law of mortgage on the basis of introducing certain mandatory procedures does not avoid the difficulties associated with defining what the moral content of legislation should be, but it may prove easier to identify the preferred outcomes of particular procedures than to identify the content of higher values such as the ‘public interest’. In addition, it seeks to take advantage of what the juridical content of the law and the judiciary is capable of achieving, namely, the imposition of procedural rules. The question remains, however, as to whether procedural reform, in practice, can prove effective in achieving meaningful reform.

Before being able to answer this question, it is necessary to be aware of the reasons as to why reform is necessary, for it is only by establishing the rationale for reform that effective regulatory measures can be introduced. The examination of the law of mortgage presented in this thesis and particularly within this chapter has indicated that the law of mortgage requires reform in respect of at least three matters. In the first instance, it fails to ensure consistency in the decision-making processes adopted by both mortgagees and district judges. Secondly, the law of mortgage fails to ensure that such decision-making processes are transparent and thirdly, it fails to constrain effectively the
exercise of power by mortgagees. The introduction of procedural reform within the law of mortgage must, therefore, address these issues but to what extent can it prove effective in attenuating these problems?

In examining the distinction between procedure and substance, Galligan notes that, ‘In a common-sensical kind of way, the distinction seems straightforward: the substance of a decision refers to the outcome sought, while procedures are the steps leading to the outcome.’ He goes on, however, to argue that the distinction between substantive and procedural values can become blurred, ‘is the principle that a person, subject to a discretionary decision, should have his case properly considered, a matter of substance or procedure?’ What this example indicates and what Galligan argues is that the imposition of procedural rules can lead to a just and accurate outcome.

The contention that procedural reform can effect substantive change, however, appears to be opposed by the information contained within this thesis. As has been suggested at various points, the law of mortgage is concerned solely with imposing either formal or procedural requirements upon the mortgage relationship and yet it still fails to achieve transparency or consistency within relevant decision-making procedures. This contradiction can be explained by reference to a simple argument, namely that the failure by current procedural rules to ensure consistency and transparency derives, not from an inability on the part of procedures to achieve such standards, but as a result of these rules being too few in number.

It remains open, therefore, to argue that increased procedural regulation within the law of mortgage may lead to improvements in respect of the problems identified within the
mortal relationship. As Schneider notes, 'The underlying idea is that, if a decision-maker has followed the right procedure, the right decision is likelier to follow. In other words, procedural rules limit substantive discretion.' It seems plausible, therefore, in an attempt to introduce consistency, transparency and structured discretion into the mortgage relationship, to argue for the application of 'due process'.

The problem associated with this claim is that 'due process' is more commonly associated with the decisions of 'public' bodies. Scanlon, however, makes the case, on moral grounds, for the extension of due process to institutions other than those that exercise 'state power'. These institutions are identified by their ability to exercise power that affects the lives of others. In legitimating that power, Scanlon contends that these institutions must adhere to requirements of due process for the reason that it, 'is one of the conditions of the moral acceptability of those institutions that give some people power to control or intervene in the lives of others.'

Scanlon uses the example of employers and school administrators in exercising the power to fire employees or to suspend or expel students. Exercise of authority in these cases may be justified on the basis that it is necessary to the effective functioning of these organisations. In relation to mortgagees, the right to seek possession may be justified in the same manner but this does not signify that mortgagees should be afforded unlimited power to exercise such a right. Scanlon suggests that if authority of this nature were exercised capriciously or arbitrarily then justification becomes difficult,
will be exercised only within the limits and subject to the conditions implied by their justification.\textsuperscript{81}

It is difficult to contend that mortgagees exercise the right to possession in a 'capricious' manner. The decision will usually be guided by a concern to protect or maximise profits, reasoning which the law legitimates by affording mortgagees an absolute right to possession. Rather than categorising the decision to seek possession in some instances as an 'abuse of power', it seems more appropriate to question whether the decision is 'legitimate'. This change in emphasis, however, raises difficulties similar to those examined in relation to the use of the concept of the 'public interest'. The question as to whether the power to seek possession is being exercised in a legitimate manner requires recourse to standards deemed to be acceptable within the social context at that time.

Whilst it is not the aim of this chapter to identify or prescribe the values which currently underpin the mortgage relationship, it would appear that certain behaviour on the part of mortgagees is considered 'unscrupulous' or 'unjustifiable'. Evidence in support of this contention is provided by an examination of the AJA 1970, and the intentions of Parliament in introducing it, as the Lord Chancellor, speaking in 1969, noted, 'Whilst most building societies are very reputable and behave perfectly, there are a few, unfortunately, who sometimes do not.'\textsuperscript{82} An example of the type of behaviour on the part of mortgagees which will generally be deemed to be disreputable is provided by Haley, who notes in respect of the inherent right to possession that,
First, relief remains dependent upon the mortgagee going for a court order for possession and does nothing to prevent a mortgagee either from otherwise persuading a vulnerable or ill-informed mortgagor to quit the premises or selling the property without vacant possession.83

The exercise of the right to possession serves as one example of the power afforded to mortgagees and the potential that exists for that power to be used without recourse to meaningful substantive or procedural standards. This thesis has also identified other areas where mortgagees exercise authority to the disadvantage of mortgagors. The most obvious example concerns the terms of the mortgage contract. Mortgagees remain free to impose terms, favourable to themselves, upon mortgagors, including making the mortgagor liable for an insurance premium which covers the mortgagee should a shortfall be made on the sale of the secured property.

Having identified the opportunity for mortgagees to use the power afforded to them to serve their own interests and in excess of its justification, the next question concerns the manner in which such activity is prohibited. Scanlon proposes that in order to deter those in authority from exceeding the justification of their powers, requirements must be imposed on the manner in which those in authority make decisions that affect others. In particular, he envisages those in authority being required to, ‘justify their intended actions in a public proceeding by adducing reasons of the appropriate sort and defending these against critical attack.’84 The objective, in requiring the reasons for decisions to be made public, is to allow for those reasons to be measured, preferably by a judge, against acceptable standards, such as reasonableness and due process. Scanlon suggests that even where the interests of individuals are not considered in the decision making process, they are still entitled to challenge it on the basis of due process, for it,
involves the recognition of those subject to authority as entitled to demand justification for its uses and entitled to protection against its unjustified use but not necessarily as entitled to share in the making of decisions affecting them.85

The question, however, is what would it mean if a mortgagor could demand that a mortgagee adhere to requirements of due process? Scanlon, in attempting to define the outcome of a ‘right’ to due process, distinguishes between two types of due process. The first is ‘procedural due process’, which involves circumstances where the court may decide that procedures have not been followed, or that the reasoning was faulty. The second, ‘substantive due process’, involves circumstances where all procedures were followed and the reasoning was acceptable, but the institution exceeded its authority. Substantive due process can, therefore, be equated with the concept of ‘vires’. In determining whether the exercise of authority by an institution should be scrutinised in this manner, Scanlon recommends that reference be had to the following questions,

(1) How likely is it that a given form of power - if unchecked - will be used outside the limits of its justification? (2) How serious are the harms inflicted by its misuse? (3) Would due process be an effective check on the exercise of this power? (4) Would the costs of a requirement of due process in cases of this kind be excessive? Is the additional effectiveness of due process over other forms of control worth the additional cost?86

The answers to these questions in relation to the mortgage relationship suggest that the level of judicial intervention should be high. It is clear that mortgagees have the potential to use the power afforded to them outside the limits of its justification; the
harm inflicted is serious, for the mortgagor loses their home and is relegated to local authority housing, which may be temporary; and due process would be effective for it would make information relating to the possession policies of mortgagees open to the public introducing true competition into the mortgage market, thereby facilitating consistency in the treatment of mortgagors in similar circumstances.

The argument against judicial intervention on the basis of due process is that private enterprises should be left to establish their own rules of association. The 'contractarian approach' to the private enterprise conceives of the institution as a 'nexus of contracts' entered into voluntary by the members of that enterprise. In consequence, those members should be left to determine their own rules of engagement, leaving company law to impose standard terms that make the contractual process easier.

Scanlon admits that in relation to purely voluntary associations, substantive due process might be inappropriate but that in relation to non-voluntary associations it should be applied,

There is an important distinction between those institutions of a society that are truly voluntary and those that, because they are the means of access to benefits desired by most in that society, are so important to life in the society that their power cannot plausibly be justified merely by saying that anyone who does not wish to deal with them on their own terms may simply refrain from dealing with them.

This definition of the non-voluntary organisation can be applied to mortgagees. The promotion of home-ownership by central government as the form of housing to be preferred encouraged millions of households to enter the home-ownership sector. The
majority of households, however, could only achieve access to this sector through the use of mortgage finance. If individuals can choose between these non-voluntary associations then protection may be afforded against capricious restrictions but the choice which potential mortgagors are allowed to exercise is ‘superficial’. In relation to choosing a mortgagee on the basis of, for example, the offer of more suitable contractual terms or less stringent possession policies, a potential mortgagor is unable to exercise such a choice.

It can be argued, therefore, that mortgagees should be subject to increased regulation for the reason that they are able to exercise discretionary power that significantly affects the welfare of individual citizens in the absence of meaningful procedural standards. This is not to suggest that mortgagees should be prevented from succeeding in their claims for possession, this would be inconsistent with a housing system which promotes access to home-ownership through the use of mortgage finance. It does suggest, however, that mortgagees should be made to adhere to procedural standards, including the requirement that they publish information relating to: the reasons regarding the decision to seek possession; possession policies; and additional charges. Essentially, in a housing system that privileges home-ownership, mortgagors should reasonably expect to have recourse to procedural safeguards within the mortgage relationship and in particular, within the process of possession.
8.4 Concluding Remarks

The previous section of the chapter was concerned with an evaluation of the extent to which the English law of mortgage stands in need of reform. The significance of this analysis relates not only to its findings in respect of the necessity for reform but also to the need to rely upon a contextual account of the law of mortgage in order to reach such a conclusion. Without a developed understanding of the juridical content, origins and social function of the law of mortgage it would be difficult to establish claims in respect of the failure by the legal framework to achieve consistency, transparency and due process within the mortgage relationship. In turn, this examination has also indicated that any attempt to implement legal change must be informed by an understanding of the relationship between the juridical content of the law and its potential to achieve change within the social context. It would appear, therefore, that the hypothesis which has informed this thesis is proven.

In establishing that the law can only be understood fully by reference to its three constituent elements, this thesis has perhaps raised more questions than it has answered. In particular, the contention propounded by Renner, that legal institutions are normatively pure, has been largely undermined by this thesis. A question remains, therefore, as to how it has proved possible for certain aspects of the juridical content of the law of mortgage to remain stable despite fundamental changes to its social function. One answer offered by this thesis concerns the ability on the part of the judiciary to alter the social meaning of legal institutions but this answer does not offer a theoretical framework by which to understand the relationship between the juridical content of the
law and its social function. The aim of this thesis, however, in utilising aspects of Renner's work has not been to offer a definitive theory in respect of the law of mortgage but rather, to apply the methodology he promotes to establish a basis upon which further research into this aspect of the English legal system may be undertaken.

In offering an explanation for the relationship between the juridical content of the law of mortgage and its social function based upon a conception of legal institutions as 'empty frames' and focusing attention on the three constituent elements of the law of mortgage, this thesis challenges other researchers to prove or disprove this hypothesis or even to construct an alternative explanation. In so doing, it is to be hoped that this thesis, at the very least, offers the necessary foundation upon which such research must be based.
2 Renner, p. 52.
3 Kahn-Freund, p. 2.
4 ibid.
5 ibid. p. 5.
6 ibid. p. 2.
7 Renner, p. 252.
8 ibid.
10 Kahn-Freund, p. 37.
11 op. cit. n. 1.
12 Cotterrell, op. cit. n. 9, p. 44.
13 Kahn-Freund, p. 38.
14 ibid. p. 4.
15 Holmes, O. W. The Common Law, pp. 35 - 36, taken from Kahn-Freund, p. 43.
17 Kahn-Freund, p. 5.
18 At p. 346.
19 See, for example: Ford, et al, op. cit. n. 16; NACAB Dispossessed (NACAB: London, 1993); and Nixon, et al, op. cit. n. 16.
20 Kahn-Freund, p. 38.
21 Santley v Wilde [1899] 2 Ch 474 per Lindley LJ.
23 See Chapters Four, Five and Six.
24 Kahn-Freund, p. 2.
25 See p. 323.
26 Kahn-Freund, p. 8.
27 1996] 1 All ER 449.
28 1993] 2 WLR 415.
30 Kahn-Freund, p.4.
31 1962] 1 All ER 163.
32 Stewart, op. cit. n. 29, p. 41.
33 ibid. p. 23.
36 ibid. p. 74.
37 ibid.
38 ibid.
39 ibid.
45 (CML: London, 1997).


See Centrax Trustees Ltd. v Ross [1979] 2 All ER 952 and p. 183 of this thesis.

op. cit. n. 27.

Cheltenham & Gloucester Building Society v Norgan [1996] 1 All ER 449 at 457A.


ibid. p. 31.

ibid. p. 43.


Ford, et al, op. cit. n.16, p. 95.

Parkinson, op. cit. n. 44, p. 10.

ibid. p. 23.


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Hunter, C. and Nixon, J. op. cit. n. 51, p. 91.


op. cit. n. 27.

ibid.

The UTCCR 1994, para. 3(1).

The UTCCR 1994, para. 5 (1).

The UTCCR 1994, para. 4(1).

See p. 124.

Galligan, op. cit. n. 35, pp. 50.

ibid. p. 51.

See pp. 144 – 145, 172 and 186.


ibid. p. 94.

ibid. p. 95.


Haley, op. cit. n. 66, p. 489.

Scanlon, op. cit. n. 79, p. 96.

ibid. p. 97.


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APPENDICES
Appendix 1

A.1 Interview Schedule – District Judges

The semi-structured interview method, applied during the primary research study, allows for a degree of flexibility in respect of the issues discussed during the meetings. The questions asked of each respondent will, therefore, differ according to factors including the time allowed for the meeting and the willingness on the part of the respondent to discuss specific issues. In consequence, it is not possible to make use of a standard interview schedule. It is possible, however, to provide some indication of the type of questions asked during the interviews involving district judges.

A.2 A representative sample of questions posed

Q. Could you describe the procedure adopted within a possession hearing?

Q. What factors do you take into consideration when exercising discretion under s.36?

Q. Does it make a difference if the defendant attends the hearing?

Q. Is it more likely that you will give an outright possession order if they don’t attend?

Q. What happens if the mortgagor is only one month in arrears, would you agree to a possession order?

Q. Does the fact that all monies have become due under the mortgage have any influence on your decision?

Q. Is the lender usually seeking an outright order?

Q. Do you consider some lenders to be more ‘aggressive’ than others?

Q. Do you change your attitude towards those who are more ‘aggressive’?
Q. Have you ever awarded costs against a lender?

Q. What is ‘unreasonable’ in terms of costs?

Q. What is a ‘reasonable period’ under s.36?

Q. Do you set a maximum limit on the reasonable period?

Q. If you grant a suspended order and the borrower fails to comply with the terms of it will the lender will get outright possession?

Q. Do you believe that mortgagors agree to repayment schemes that they really can’t afford?

Q. Do you prefer to have only one hearing per case?

Q. What do you think the aims of the law are and in relation to those aims, do you feel that your powers under s.36 are sufficient?

Q. Where does the balance of power lie within the mortgagor/mortgagee relationship?

Q. How many borrowers attend?

Q. Do you think that the provision of more information regarding the legal process will encourage more mortgagors to attend the hearing?

Q. Have you noticed a decline in the number of repossessions?

Q. Are there any aspects of the law which could be improved and how might that be achieved?
Appendix 2

A.1 Interview Schedule - Mortgagees

The semi-structured interview method, applied during the primary research study, allows for a degree of flexibility in respect of the issues discussed during the meetings. The questions asked of each respondent will, therefore, differ according to factors including the time allowed for the meeting and the willingness on the part of the respondent to discuss specific issues. In consequence, it is not possible to make use of a standard interview schedule. It is possible, however, to provide some indication of the type of questions asked during the interviews involving mortgagees.

A.2 A representative sample of questions posed

1. In relation to the mortgage transaction, how do you arrive at the final mortgage document, do you use standard terms?

2. Would it be possible for you to supply me with a copy of those terms?

3. How typical are your mortgage terms?

4. Do you include a term in your mortgage document restricting your ability to repossess?

5. In relation to defaulting mortgagors, which of the remedies available to you do you most commonly use?

6. To what extent does the CML Code of Practice influence your policies regarding arrears and repossessions?

7. The CML Statement of Practice states that there are three methods of gaining possession, (Court, agreement, absent mortgagor) which of these is used most often?
8. Who takes the decision to seek possession?

9. What are the key factors that regulate that decision to repossess?

10. Do you have internal policy guidelines which set out certain requirements before you can repossess?

11. What are they?

12. Will the decision to repossess be affected by the current market value of the property?

13. Are the criteria for possession set out in the mortgage document or in advance of the agreement?

14. Are the criteria for possession different for repayment and endowment mortgages?

15. Does the law restrict your ability to repossess in any significant way?

16. What is the average period for suspension of a possession order under s.36 AJA 1970?

17. What percentage of mortgagors attend the court hearing?

18. ‘Possession is sought only as a last resort’ (Statement of Practice) is this the case?

19. If so, how can you help a mortgagor to avoid repossession?

20. How effective is the ‘mortgagor to tenant’ rescue scheme?

21. Do you advise people to seek independent advice regarding their debts?
22. If you fail to contact a mortgagor in default how long before you initiate proceedings for possession?

23. How many people vacate the premises before repossession takes place?

24. Government statistics indicate that long term arrears (6 months and over) have dramatically increased, is this the case in relation to your organisation? If so, why do you think this has occurred?

25. Do you charge for letters sent to defaulting mortgagors, or debt counselling?

26. Do you make charges on mortgage arrears?

27. The NACAB report 'Dispossessed' has evidence which alleges that even where a 'forbearance agreement' has been arranged and is being complied with the lender has still initiated possession proceedings, has this ever occurred in relation to your organisation?

28. Do you provide your mortgagors with literature, in advance of the agreement, clearly stating that indemnity insurance covers you and not them?

29. Also, that they remain liable for any shortfall after sale?

30. Do your customers realise that they will be liable for any court costs incurred in the repossession process?

31. Have you ever had any dealings with the Ombudsman?

32. Are there complaints or appeals procedures available to a mortgagor who feels that your decision to repossess is unreasonable?

33. Do your shareholders know how you decide repossessions? Are these matters discussed at your AGM?
34. Having repossessed a property how long does the mortgagor have before having to leave?

35. Do you provide assistance in finding a repossessed mortgagor alternative accommodation?

36. Having repossessed a property, what method of sale do you use?

37. To what extent does the law intervene in the selling process?

38. How long on average does it take to sell that property?

39. Do you usually recover the debt?

40. How often do you seek foreclosure or an action on the personal covenant to repay?

41. How relevant is the law to your work?

42. Is the legal framework satisfactory, does it cause more problems than it solves?

43. How do you think the situation can be improved?

44. How significant is the law?

45. Why a statement of practice for arrears and possessions and not a code of practice?

46. What do you understand to be the difference between a code of practice, a statement of practice and legal regulation?

47. Are codes of practice more suitable?

48. Should there be national criteria determining when lenders can repossess?
49. Should they be implemented by law or codes of practice?

50. Thank you for your time, is there anything you think I should be aware of that we have not discussed. Anything you want to expand on?