Let's not be too hasty

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The proposed abolition of section 21 notices could create as many problems as it solves

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Residential tenants? rights in the UK reached their zenith under the Rent Act 1977 . This provided that landlords could only charge fair rents and were unable to recover possession automatically from tenants who had fallen into arrears.

Policy-makers? attitudes changed in the 1980s, when it was recognised that these burdens led some residential landlords to sell their properties and seek more lucrative returns in other sectors. Aiming to reverse the decline of rented housing and improve its quality, the Conservative government introduced assured shorthold tenancies (ASTs) in 1988. These provided that landlords could recover possession as of right on giving tenants 2 months? written notice at certain points of the tenancy ? that is, a section 21 notice. The pendulum swung further in landlords? favour in 1997, when, subject to certain exclusions, all new residential tenancies were deemed ASTs.

The Housing Act 2004 prevented landlords from serving section 21 notices where the tenant had paid a deposit that was not protected by an authorised scheme; subsequently, the Deregulation Act 2015 attempted to prevent landlords serving section 21 notices in retaliation for complaints from tenants about a poor or unsafe property. The latter act also expanded the list of measures that a landlord must take before serving a section 21 notice, including providing energy performance and gas safety certificates.

This year has already seen the Tenant Fees Act being passed banning unfair letting fees. Most dramatically of all, the government announced on 15 April that it would consult on abolishing section 21 notices altogether ? doubtless a result of campaigning by tenants? activists, with more than 50,000 people signing the End Unfair Evictions Coalition?s petition .

If section 21 notices are banned, many residential landlords wishing to remove their tenant will rely on the section 8 notice procedure. The main difference between these 2 kinds of notice is that the section 8 regime requires a landlord to prove that 1 or more of the statutory grounds for possession is satisfied.

This allows tenants to defend themselves against any allegations made. Tenants may seek to draw out any litigation under the section 8 notice to gain a tactical advantage; for example, they might bring a counterclaim for disrepair to the property, knowing that they can use the rental void caused by the delay to bring pressure to bear on the landlord.

The potency of these tactics becomes apparent when one considers that 94% of residential landlords are individuals , who may need their rental income as quickly as possible to meet other financial commitments, such as paying their buy-to-let mortgage. In general, possession proceedings brought under section 8 are longer and more expensive than evictions under section 21.

Tenants can use section 8 possession proceedings in other ways. For example, a landlord wanting to present the court with a mandatory ground for possession against a tenant who has accrued arrears and pays rent monthly must show that there are at least 2 months? arrears at the date of the hearing. A tenant can defeat the claim by reducing the arrears to just under the 2 month threshold, and there is nothing to prevent them using this tactic again.

The landlord may then have to fall back on a discretionary ground for possession ? such as seeking possession because, in the statutory wording, the tenant has some arrears. This is a second-best option, though, because it makes it effectively impossible to advise the landlord what the court will do at the hearing.

Section 8 notices may superficially appear more attractive than the section 21 regime. This is because the court may order the tenant to repay rent arrears in possession proceedings commenced pursuant to a section 8 notice. However, a money order will be toothless if the landlord cannot enforce it against the tenant. In practice, the delays to the procedure mean that a landlord is often best advised to draw a line under the arrears and focus on removing the tenant as quickly as possible. Doing so makes section 21 notices preferable to their section 8 counterparts.

Section 8 requires a landlord to prove that 1 or more of the statutory grounds for possession is satisfied, allowing tenants to defend themselves against any allegations

The government proposes strengthening the section 8 regime to mitigate the effect of abolishing section 21 notices. Under the proposals, landlords would be entitled to possession where they wish to move into the property or sell it. However, this could cause as many problems as it resolves.

A landlord intending to move into or sell the property will presumably have to prove an intention to do so, for instance. This question of intention is the subject of considerable judicial comment in the field of business tenancies, as was demonstrated with the recent Supreme Court decision of S Franses Ltd v The Cavendish Hotel (London) Ltd [2018] UKSC 62 .

While we need to wait for the draft legislation, therefore, it seems that arguments over landlords? intentions could be used by tenants to delay and frustrate possession proceedings, in the same way that counterclaims over disrepair are being used now.

According to the English Housing Survey 2016?17, only 10% of private renters who had moved in the past 3 years stated that they had done so because their landlord had given them notice. The statistics thus do not appear to support the popular narrative of voracious landlords preying on helpless tenants.

In their 2018 report The Evolving Private Rented Sector, Julie Rugg and David Rhodes argued that the abolition of section 21 notices would be a piecemeal measure, unlikely by itself to lead to greater tenant security . They recommend further legislation only after the effect of changes to tenancy law in Scotland has been evaluated. It seems likely that landlords remaining in the sector will make increasingly stringent checks to cherry-pick the best tenants, leaving the rest more exposed than ever. With Brexit continuing to dominate parliamentary time, it is doubtful that the proposed changes to the section 21 regime will be made immediately. Nevertheless, there is a need for a reasoned debate that avoids knee-jerk reactions on either side.

It can be seen that the relationship between private landlords and their tenants is better characterised as the swinging of a pendulum than as consistent and carefully thought-through policy. Although no system is perfect, I would submit that what is needed is not revolution but an evolution of ideas and policy.

Before making further changes, we should first assess the effects that the *Deregulation Act* 2015 and *Tenants Fees Act* 2019 have had on the rental market before deciding what to do next. It may be better to strengthen the existing legislation so as to maintain good-quality housing in the private rented sector. Certainly, legislators ought to avoid being forced into action by groups seeking to present an overly simple view of the complex issues that arise from the relationship between residential landlords and tenants.

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Further information

- Related competencies include: Leasing and letting
- This feature is taken from the RICS Property Journal (October?November 2019)
- Related categories: Landlord and tenant , Landlord-tenant relationship , Leases