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# Exit the Rentier State: Legislating to Provide Affordable and Secure Tenure in Kenya

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**Governing Informal Settlements: On Whose Terms**

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## ABSTRACT

Classical liberal economists argue that an efficient rent market can be achieved according to four rationales, which justify rent controls. Under the proposed Kenyan Landlord and Tenant Bill "'premises' means a place of residence or business to which the Act applies." It proposes to dilute the existing Landlord and Tenant (Shops Hotels and Catering Establishments) Act protections accorded to informal (unwritten) and short term (less than 5 years) business premises while raising the Rent Restriction Act residential premises' protective ceiling for dwelling houses with rentals from below the current Kshs 2,500/= (30 US dollars) to a new minimum of 15, 000/= (190 US dollars). Standard rent freezes rent at such low levels depending on their assessed rates as at the year when standardized. Insensitively, however, the new Bill substitutes the rigid concept of "standard" rent with his second generation market-driven concept of "fair" rent. The criterion for its determination of fair rent is no longer to be according to standardized rent, frozen on the date the law becomes operationalized, but by comparison to naked "'market

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value'…which means the current value of the premises and the land on the open market." Such " 'market rent' means the rent at which the premises concerned might reasonably be let on the open market, based on the going rent for comparable lettings taking into consideration 'the factors'."Not not only does the proposed Landlord and Tenant Bill provide far inferior protection to middle classes than does the existing Rent Restriction Act, but also it proposes greater illusory comfort to informal settlements than the liberal World Bank-sponsored "slum upgrading" and "sites and services" schemes of the 1970's and 1980's, which never took the issue of land into consideration. Commendably, the under the Landlord and Tenant Bill, protected premises mean "any living accommodation used or intended for use as rented premises" thus including informals. Moreover, "'tenancy agreement'….includes a license to occupy." However, all rents are at risk of determination according to open market values. Worse still, appeals are to be restricted to points of law. Critical legal scholars question the rationale behind reviewing the Business Premises Rent Tribunal's relevance "in light of progressive liberalization." They reject radical free-market contention that rent decontrol enhances affordability and secures tenure. Instead, critical legal scholars' support the National Land Policy's call for a needs-based approach that would effectively freeze rental markets. In the short-term, Kenyan constitutional courts are urged to adopt creative decisions to interpret the right to life so as to include the right to adequate housing.

## 1. INTRODUCTION

Article 25 of the Declaration of Human Rights recognizes 'everyone's right to a standard of living adequate for the health and well-being of himself and of his family including.... housing and the necessary social services and the right to social security even in the event of...lack of

livelihood in circumstances beyond his control'.[1] Represented in Article 11(1) of the International Covenant on Economic Social and Cultural Rights the right to an adequate standard of living entails that 'state parties will take appropriate steps to ensure the realization of the right, recognizing to this effect the essential importance of international co-operation based on free consent'.[2] Adequate housing means more then a roof over one's head. It also includes secure tenure and basic facilities all of which must be affordable. Hence the right to housing is a derivative of the right to health and in turn, life. It is a survival right[3] which the state is obligated to secure. Yet its importance is undermined in liberal rights theory.

Individual land titles ousted collective ownership, thereby creating landlessness in colonial Kenya. Landlord's powers to remove trespassers were only curtailed using rent restriction, introduced to prevent tenants from becoming homeless amid looming urban housing shortages during war times. [4] Although the independence struggle was waged for land and freedom, the independence settlement retained capitalist private property rights. The post-independent government promised *inter alia*, health, as the right to an adequate standard of living is the primary *social* right. Proclaiming African socialism, consequently, it became democratically unreasonable to utilize criminal trespass law to prosecute the masses for encroachment on private, leave alone government land. To subsidize middle-classes, rent controls were widened thus protecting entrepreneurs in business premises. To include slum dwellers, the recent

[1] Article 25, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[2] Article 11(1), International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, signed and ratified by Kenya on 1 May 1972 and entered into force Jan. 3, 1976.
[3] Jack Donnelly &Rhoda Howard cited by Klaus Beiter& Detier Beiter, The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights ( Martinus Nijhoff, 2005).
[4] W. Mutunga, *The Impact of the Housing Shortage on the Implementation of the Rent Acts in Kenya* in Urban Legal Problems in East Africa edited by G. W. Kanyihamba &J. P. W. B. McAuslan (SIAS and ICLD, Uppsala & New York, 1978) pp 218-256 p 219.

National Housing Policy[5] adopts World Bank 'slum upgrading' and 'sites and services' measures introduced last century to contain the squatter scenario administratively, thereby subjecting real estate to free-market shock therapy. To prevent private access to collective land, statutory bodies act administratively to forcibly evict trespassers, often without notice, rendering thousands homeless. Such 'development' contradicts the pledge to fight disease. The National Land Policy[6] ambiguously reconciles residential premises rent controls with collective land forum mechanisms. While the Landlord and Tenant Bill[7] purportedly introduces rent restriction to informal settlements, it provides weak protection in that it recognizes the market forces as the determining criterion. Yet internal security, a public good and hence a key state function, should be efficiently achievable through the legal strategy of limiting individual freedom.[8] In order to act freely, people require space. However, property rules tactically restrict performance of actions indirectly through dividing the country spatially into defined regions and locations. Thus land is held either privately, commonly or by the government.

The technique our liberal democratic constitution deploys is to empower landowners to determine its user. Municipal land comprises common space including roads, parks and social amenities allocated for specific public utilities which prioritize access to markets or recreation. Attempts to perform unauthorized activities, like holding of unlicensed public demonstrations, hawking, or constructing temporary shelters may warrant removal or attract trespass prosecution. Access to government land is restricted to persons with official collective purposes. A human

[5] Adopted in sessional paper no. 3 of 2004 (hereafter NHP).
[6] Kenyan Ministry of Lands, Draft National Land Policy, National Land Policy Secretariat, adopted by Parliament on 8 December 2009 (hereafter DNLP).
[7] 8 June 2007 (hereafter L&TB).
[8] Jeremy Waldron *Homelessness and the Issue of Freedom* in Robert E. Goodin and Philip Pettit, Contemporary Political Philosophy: An Anthology (London, Wiley-Blackwell, 1997) p 423.

rights problem arises where occupants cannot afford to own, rent or license land. Expensive and insecure tenure contradict the public interest to maintain security.

Historically, the Kenya government's *raison d'être* justifying evictions[9] from road reserves, railway lines, forests and power wayleaves is the danger people living near these public utilities face. Yet failure to provide any low-cost housing causes encroachment upon unoccupied land, including public utilities. By 2005, 2 million poor people comprising fifty five percent of Nairobi's total population crowded into one hundred and ninety-nine informal settlements, half the city's total land surface. Curiously, rent control is ineffective in protecting temporary structures from illegal distress or forced eviction. This paper therefore evaluates whether the approach in the proposed NLP, of providing affordable and secure housing indirectly through democratic community structures which recognize customary land rights rather than directly through judicial enforcement of rent restriction legislation, fulfils the country's international obligations. Part two illustrates how rent dispute adjudication achieves the rent affordability function by assessing standard rent of residential premises under the Rent Restriction Act[10] and fair rent of business premises under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.[11] While middle classes invoke the Rent statutes to automatically secure tenancies, part three demonstrates how squatters obtain court injunctions to achieve irremovability. Part four adumbrates Kenya's obligations under international treaties to protect the right to housing. Part five critically appraises the L&TB's intention to 'modernize and consolidate' what the NLP terms the Rent Restriction Tribunal's (RRT's) protection of 'workers

[9] Advisory Group on Forced Evictions (AGFE), Forced Evictions towards Solutions: First Report of the Advisory Group on Forced Evictions to the Executive Director of UN-HABITAT (Pietermartizburg, South Africa, Interpak books, UN HABITAT, 2005) pp 18-26.
[10] Chapter 296 Laws of Kenya, hereafter RRA.
[11] Chapter 301 Laws of Kenya, hereafter L&TA.

and poor tenants', with the Business Premises Rent Tribunal's. By insisting on market-driven criteria to guide the BPRT in determining 'fair' rent, while scrapping RRA's assessment of 'standard' rent, L&TB effectively liberalizes real estate in informal settlements. Critical legal scholars question the rationale behind reviewing the BPRT's relevance 'in light of progressive liberalization'. They reject radical free-market[12] contention that rent decontrol enhances affordability and secures tenure. Instead, the critical legal scholars' support the NLP's call for a needs-based approach that would effectively freeze rental markets. In the short-term, Kenyan constitutional courts are urged to adopt creative decisions to interpret the right to life so as to include the right to adequate housing. Beyond the legal dimension, governmental consultation with community groups can facilitate implementation of sustainable solutions to Nairobi's forced eviction epidemic. In the long-term responsive governance entails greater inquisition by the Housing Ministry and both rent tribunals in maintaining comprehensive information registers of protected rental premises, involvement of rent inspectors in negotiating lease agreements and prosecution for breach.

## 2. AFFORDABLITY UNDER RENT CONTROL LEGISLATION

### 2.1 *Sanctity of Tenancy Contracts, the Function of Rent Control and Statutorily Implied Terms*

Legal security of tenure involves providing tenants with some form of due process designed to protect them from arbitrary deprivation of their housing rights. Assuming that the legal and administrative process operates effectively, all tenants with a formal rental contract have secure

[12] F.A. Hayek, The Constitution of Liberty (Chicago, Chicago University Press, 1960) p 344.

tenure. A radical liberal appraisal the Rent Acts therefore necessarily begins with understanding the doctrine of sanctity of contract.[13] However, moderate liberals concede that contractual consent may be vitiated by misrepresentation, undue influence or economic duress.[14] Moreover, the effect of service charges dilutes the effect of the rent controls. Hence the lack of economic capacity of the working urban tenant class to effectively bargain against the few wealthy landowning class, justifies state regulation regarding the reasonable consideration payable not only in exchange for adequate housing of habitable quality, but also for utility.[15]

Land, because of its unique nature and the crucial role it plays in human settlement cannot be treated as an ordinary asset, controlled by individuals and subject to the pressures and insufficiencies of the market. Human rights law thus distinguishes housing as a noun, thing, and goal or material item capable of commodification, from housing as a verb, activity, process or tool which serves a function for human utility.[16] To the extent that housing fulfils a basic need, then vulnerable individuals are justified in compelling governments to legislate constitutional protection against exploitation and eviction, irrespective of whether or not individuals are able to afford the costs entailed by urban housing. Rent control is a means of protecting tenants from high market rents that would otherwise result from shortages of rented accommodation.[17] In Kenya, rent tribunals for residential and business premises subject landlords to rent restriction to protect workers and poor tenants from too rapid rises in house rents. In residential dwellings, it involves specifying a maximum rent that the landlord may charge so that the tenant receives an

[13] Rental Housing: An Essential Option for the Urban Poor in Developing Countries (Nairobi, UN-Human Settlements Programme, UN-HABITAT, 2003).
[14] *Supra* note 12 p 344.
[15] Uche Jack-Osimiri &Chima Jack-Osimiri, *Service Charge and Furnished Lettings Dilute the Efficacy Rent Control Laws in Nigeria* (2003) University of Zambia Law Journal, 126-147.
[16] Leland S. Burns, et al. Housing: Symbol and Shelter, (Los Angeles, University of California, 1970) pp 1-3.
[17] Julia Le Grand, Carol Propper & Carol Robinson, The Economics of Social Problems (London, MacMillan Press (1976) 1982).

implicit subsidy equal to the difference between the market rent and the controlled rent. In business premises the subsidy is accorded to informal or short-term leaseholders. Unless the parties consent to certain terms which effectively exclude the Rent Acts, then their relationship, according to Kenyan law, is automatically governed by various statutorily implied terms.[18] Both tribunals function to resolve disputes applying natural justice through adversarial processes.[33]

### 2.2 *Affordability under the Rent Restriction Act*

The aim of the RRT is 'to restrict the increase of rent and the right to possession, extraction of premiums', and 'for the fixing of standard rents in relation to dwelling houses'.[34] The categories of premises, which attract protection under the RRT relate, firstly,[35] to 'dwelling houses' or parts thereof, for which 'there must be a permanent structure not temporary shelters, e.g. tents, canvass etc.'. [36] Although Onalo correctly recognizes that a composite tenancy includes many separate rooms with common facilities, his interpretation wrongly excludes temporary structures such as the mud and water or *mabati* (tin sheets) 'huts' erected in informal settlements. First, because section 3 expressly includes 'temporary' dwelling houses.[37] Second, the monthly rent must not exceed Kshs. two thousand five hundred,[38] which amount, on broad evidence, would include on average, rent payable for majority of modern Nairobi slum areas. The RRA was last reviewed in the early 1980's when such threshold gave tenants access to middle income estates in Nairobi. Exchange rate fluctuation and inflation over the years have however made such a rent

[18] section 2(1) RRT and s 2(1) L&TA supra notes 10 and 11 respectively.
[33] The provisions of the Civil Procedure Act (Chapter 21 Laws of Kenya) are incorporated into both RRT by virtue of Rent Restriction Regulations under section 36 of the RRA; as well as the L&TA vide the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Tribunal) (Forms and Procedure) Regulations, particularly regs 15-17.
[34] preamble RRA.
[35] section 2(1) RRA.
[36] A.L. Onalo, Land Law and Conveyancing in Kenya (Nairobi, Heinemann, 1986).
[37] section 3(2) (a) (i) RRA.
[38] *Ibid*. s 2 (1) (c).

ceiling inapplicable to adequate houses. Rent means the 'standard rent' together with any increase duly made under the RRA.[39] As shown below, 'standard rent' covers old housing premises whose standards were determined prior to 1 January 1981.[40] The Housing Minister,[41] supposedly in accordance with the NHP, regulates the RRT. However, it lacks jurisdiction over service tenancies. Furthermore, government houses and local authorities are 'excepted dwelling houses'[42] apparently on grounds of the unique position played by civil servants, whose official deployment in any region of the Republic may require abrupt mobility.[43]

The RRT has power to assess 'standard rent' upon application by either party or assess whether a controlled tenancy has legally determined.[44] In ***Shah v Aggarwal*** [45] upon purchasing a maisonette over the head of a sitting tenant, the landlord gave notice to vacate. Potter JA held that a controlled tenancy must first be terminated before increase of rent can be recovered under the RRA. A recovery order for arrears and mesne profits may accompany an order for vacant possession. These powers safeguard the tenant's protection against arbitrary increases and provide security of tenure. Furthermore, the RRT has discretion to fix rent payable in accordance with justice and apportion amounts of service charge payable. Premises may be let furnished or unfurnished. In ***Sands v Mutual Benefits Ltd*** [46] Chanaan Singh J dismissed claims that a cooker and refrigerator are substantial enough to constitute furnished lettings under the RRA. The RRT may authorize the tenant to repair neglected premises and deduct the cost from future rent. The

[39] *Ibid.* s 3(2) see ***Kakkad v Assistant Registrar of Buildings*** [1976] 2 Tanzania Law Reports; See also Tom Ojienda, Conveyancing: Principles and Practice (Nairobi, LawAfrica, 2008) pp 242-246.
[40] section 3 (1) (a) furnished and (b) unfurnished, RRA.
[41] *Ibid*. s 36(1).
[42] *Ibid*. s 13(1).
[43] R.W. Tenga, *Effects of Rent Control Measures on the Rental Housing Market in Tanzania* in Rental Housing Proceedings of an Expert Group Meeting (Nairobi, UN Center for Human Settlements (Habitat), 1990) pp 180-5.
[44] section 13(1) RRA.
[45] [1983] KLR 476.
[46] [1971] EA 156 pp 160-162.

criteria by which the standard rents of controlled tenancies of dwelling houses are determined are prescribed in the RRA, and depend on the time when the assessment is being made. Assessments between 1965 and 1980 had their rental values assessed at the rate of standard rents as on 1 January 1965, while those dwelling houses which were assessed after 1 January 1981, are assessed at the value on 1 January 1981.[47] In the landmark case of ***Thakker and Another v Jeram and Others*** [48] Wicks CJ held that rent for flats let on 1 January 1965 bought by the appellant in 1965 could not be increased for fair return on capital investment. The landlord could not elect since the cost of construction was incurred on the builder. Because statutory rent yielding uneconomic return is personal to the landlord, therefore the only consideration was fair return on purchase price. No provision was made for abnormally low purchase price or gift since no hardship would presumably arise.

However in ***Devani and Another v Patel***[49] the RRT assessed overpayment and reassessed the new tenancy rent at Kshs. four hundred and fifty increased from pre-1 January 1965 rent of Kshs. three hundred and eighty per month, instead of Kshs. nine hundred agreed by the parties. Simpson and Kneller JJ recognized that there is a mark-up allowed if a landlord has effected structural improvements or alterations, which alter the identity of the premises. Because another bedroom and study were added, new rent was calculated on cost of construction. Onalo[50] criticizes ***Devani*** given the RRT's failure to use the correct assessment formula. Therefore, it lacked power to refund rental overpayments. The assessment[51] depends on the temporary nature of the construction of the dwelling houses; short duration of the lease or license or the seasonal

[47] section 3 (1) (b) RRA.
[48] [1973]EA 133.
[49] [1974] EA 465.
[50] *Supra* note 36.
[51] section 3(2) (a) RRA.

market demand for the premises; as well as the landlord's right to a fair capital return on either the 1981 market value or cost of construction or purchase price, but not both, and provided that the purchase price was not exorbitant. Ojienda recently restates the absence of discretion by parties to consent on standard rent. These objective parameters, it is submitted, indicate a legislative intention that the determination of standard rent should be guided preferably by expert valuation reports.[52] Only where it is impractible to obtain sufficient evidence to apply the relevant formula, 'may' the RRT 'determine the standard rent to be such amount as it considers fair having regard to the standard rent of comparable dwelling houses.'[53] Where a tenant requests valuation, it is upon the landlord to engage a valuer to ascertain the value. An aggrieved tenant may desire to dispute the landlord's valuation. Ultimately the RRT may require production of a joint valuation report or select from two widely differing reports. If the RRT's determination is unfair in the circumstances, the RRA provides a right of appeal[54] within fifteen days. [55] Furthermore the effect of the alteration is stayed pending conclusion at the High Court. In ***Nthege v Wambua*** [56] in a suit for damages that the court bailiff did not hold a distress for rent certificate, Simpson J held that the RRT is not empowered to authorize anyone to act as a bailiff. Such power is exclusive to the High Court. Illegal distress involves trespass to goods, but proof of actual loss sustained is not necessary since the law gives the right to recover damages not limited to the actual loss. Thus only controlled tenants who either evince habitual arrears or exceed 2 months rental arrears are liable to warrant a distress order.[60] Following a determination

[52] Contrast with L&TA infra notes 87-88. Ang'awa J. held in ***Sumaria v Valbaivaji & Another*** H.C. Civil Appeal no. 192 of 1994(unreported) cited in Ojienda, *supra* note 39.
[53] section 3(2) (b) RRA.
[54] *Ibid*. section 37, provides right of appeal as read with Rent Restriction (Appeal) Rules; while section 5(1) (m) provides the right to review.
[55] Rent Restriction (Appeal) Rules.
[56] [1984] KLR 799.
[60] Pursuant to the Distress for Rent Act (Chapter 293 Laws of Kenya)

of the RRT, no reference may be made regarding the rent assessment until after 1 year,[61] and on any other issue, 2 years.[62]

### 2.3 *Affordability under the Landlord and Tenant Act*

The aim and object of the L&TA, is 'to make provision with respect to certain premises for the protection of tenants of such premises from eviction and exploitation'.[63] Unlike the RRA, protection is conferred not on the rental *quantum*, but depends on the *nature* or *duration* of the lease i.e. unwritten tenancies or those for a period not exceeding 5 years or those which can be terminated other than for breach, within 5 years.[64] The definitions of a shop, hotel or catering establishment are interpreted as covering traders but not manufacturers. 'Shop' means premises occupied wholly or mainly for purposes of a retail or wholesale trade or business rendering services for money or money's worth. Hence in ***Mary Wanjiku v Michael John Waweru***,[65] where the dominant user of a quarry was to sell stones the court upheld its controlled status, unlike in ***Balbin v Panesar*** [66] where a manufacturer owned another retail shop, which conducted the bulk of furniture sales, protection of the factory was declined.

Tenancy 'includes a sub-tenancy'[68] and is generally defined as the duration of time granted to an individual to occupy or possess a given piece of land. In ***Pollock House Ltd v Nairobi Wholesalers*** [69] the court held that a sub-tenancy continues despite termination of a head-

[61] section 8(3) RRA.
[62] s 8(2) RRA provides right of appeal to High Court.
[63] preamble L&TA.
[64] *Ibid*. sections 2(1) (a) and (b) (i), (ii) and (iii).
[65] HCCC 1452 of 1980.
[66] [1972] EA 90.
[68] Martin Partington, Landlord and Tenant: Cases, Materials, and Text (Law in context). (1981).
[69] [1969] EA 144.

tenancy. In ***Sapra Studio v Kenya National Properties Ltd,***[70] a tenancy contract was due to expire on 7 November 1975. In 1965 the unexpired portion of the lease had been assigned to another party who in 1973 in turn made a sub-tenancy to the appellant who held over and applied to the landlord to create a direct tenancy. Following expiry of the head-tenant's lease, the court declared the sub-tenancy valid. ***Mnazi Njoya Estates Ltd v Mistry & Five others*** [71] subsequently laid down the principles a court should consider determining whether a landlord's consent to sublet has unreasonably been withheld.

In ***Kibuti v Kenya Shell Ltd*** [72] a licensee was threatened with eviction from the Kilimani petrol station where he was permitted to enter since 1968 and remain until 1980. However, Cotran J declined to grant a temporary injunction. First, since the applicant was not a protected tenant, but a licensee. Second, because the respondent, being a multinational company, had financial capacity to compensate the tenant, if successful in a suit. With respect, his Lordship's restrictive interpretation fails to consider housing as fulfilling a human need, dispossession of which comprises irreparable harm which cannot be adequately compensated in money damages. Instead the applicant was directed to refer to the BPRT for confirmation of whether or not he is a protected tenant. 'Landlord' means the person for the time being entitled to rent.[73] Because the L&TA constitutes the landlord as a trader and the tenant as consumer therefore the minister for commerce[74] 'may make regulations for the better carrying out of the Act'.[75] No architect, quantity surveyor, estate agent, land valuer or other building construction expert is expressly required to determine BPRT disputes under rule 16 of the subsidiary legislation. The BPRT

[70] [1985] KLR 186.
[71] [1987] KLR 269.
[72] [1981] KLR 390.
[73] section 2 L&TA.
[74] *Ibid*. s 16.
[75] *Ibid*. s 11 (1).

relies on quasi-judicial power derived from the Civil Procedure Act.[76] This was held in ***Standard Bank Ltd v Kenya Crafts***[77] and its orders are consequently enforceable by ordinary civil courts. Where it consists of more than 1 person, the members shall, if the chairman is absent, elect 1 of their own to act as chairman of the Tribunal.[78] Where in ***Equator Inn v Tomasyan***,[79] the gazetted chairman did not preside, the decision was a nullity. Yet nowadays the chairman presides alone. Therefore, this position remains vacant in event of absence of its chairman thus creating a backlog of disputes.[80]

L&TA puts a heavy onus on a 'Requesting Party' to file a reference in order to defend the effect of an alteration or eviction notice.[81] Invariably a tenant who refuses to comply with a landlord's 2-month formal notice whether to increase rent[82] or quit,[83] should not only, within 1 month, express written intention to reject the proposed increment or termination, but also within 2 months, pay filing fees upon lodging a reference for the BPRT to summon the landlord. Only then is the effect of landlord's notice automatically stayed until the dispute's determination. The L&TA prescribes certain specific grounds upon which alteration or eviction is permissible.[86] However, the degree by which alteration of rent may be permitted is uncertain since no formula is expressly prescribed to guide the BPRT, save the preambular requirement to generally prevent unexploitative increases or exceed market rent. I submit that this lacuna is an obvious shortcoming preventing the legislation from manifestly achieving its purpose of effectively

[76] *Ibid*. reg 14(1).
[77] [1971] EA 421.
[78] Reg 21 (1) L&TA.
[79] [1973] EA 405.
[80] E.g. during the suspension of Mrs Nelly Owino between June 2005 and December 2006.
[81] section 6(1) L&TA.
[82] *Ibid*. s 4 (2).
[83] *Ibid*. s 7 (1).
[86] *Ibid*. sections 4 and 7.

protecting commercial tenants against potential exploitation. The BPRT chairman by a mysterious, arbitrary or *subjective* process apparently averages the proposed valuation rentals offered by contending valuers to fix a new fair rent. The valuation reports base their proposals on widely divergent comparables for which practice the legality is common law. In ***Karibu House (1973) Ltd v Travel Bureau Ltd*** [87] Kneller and Chesoni JJ held:

> It is the reasonableness of the rent that must be in the forefront of the mind of the tribunal and the appeal court too. The average rates per square foot or square meter of a number of nearby buildings on the ground floor of the premises, on which similar trades are expressed, are among other things relevant to the assessment. The tribunal has discretion on all these which must be exercised in a judicial fashion.

Kneller J followed ***Barot v Valji*** [88] where O'Connor CJ held that: 'Apart from the *objective* test of what evidences comparable premises, the *subjective* test of what is fair and right is also required'. In ***Elite Studio Ltd. v New Kenshoes Co. Ltd***,[89] the tenant served a reassessment notice on the landlord but did not specify the required sum. Dismissing the landlord's appeal, Chanaan Singh and Simpson JJ held that the BPRT was right in assessing the fair rent. It is concluded that reform is urgently required to adopt a transparent mechanism to guide the parties and the BPRT to ascertain fair rent, for example 10% of the cost of construction per annum with a 5% increase every 2 years to account for inflation.[90]The Kenyan Court of Appeal in ***Gusii Mwalimu Investment Co Ltd and Another v Mwalimu Hotel Kisii Ltd*** [91] restrained a landlord from levying distress with the intention of determining tenancy. Shah JA held that unless a tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or statutory tribunal (as appropriate) to obtain an order for possession.

[87] [1980] KLR 27.
[88] [1955] KLR 168.
[89] [1975] EA 67.
[90] United Nations Review *supra* note 39.
[91] [1995-1998] 2 EA 100 Tunoi, Shah and Lakha JJA (Lakha dissenting).

## 3. IRREMOVABILITY UNDER RENT CONTROL LEGISLATION AND COMMON LAW

### 3.1 *Irremovability under the Rent Restriction Act*

Repossession of a dwelling house may be ordered[92] on the pretext of a desire to remove tenants who are breaching the tenancy without valid excuse e.g. failure to pay rent,[93] either neglect of premises or causing nuisance to other tenants or neighbours, [94] or for a local authority to take over the premises in the public interest,[95] e.g. for public safety or public health, or overcrowding, or for unconsensual subletting.[96] In ***Parmar v Kiberio*** [97] the respondent who regularly paid rent declined to surrender possession. The landlord moved the High Court for mesne profits and vacant possession. Alternatively, a landlord who previously occupied the premises and wishes to resume occupation or accommodate a family member or relative must give at least 3 months notice,[98] or if reasonably required for his own occupation or for his wife or full time employee, but 6 months notice to enable reconstruction or rebuilding whereafter the tenant is entitled to first reoccupancy option.[99] Alternatively, a landlord who requires to reconstruct must thereafter occupy the premises for a period over 1 year before letting the premises to another tenant. A landlord who has no other abode in the city and wishes to reside in his own premises without having previously done so must give at least twelve months notice.[100] In ***Chaheema v Rodrigues***

[92] Notice to quit is required under s 15.
[93] *Supra* note 20.
[94] *Supra* note 21.
[95] section 14(1) (f) RRA see also *infra* s 2.3 notes 116-122 on judicial review and injunctory relief against abuse of statutory power.
[96] s 14(1) (g) RRA.
[97] [1981] KLR 340.
[98] section 14 (1) (h) RRA.
[99] *Ibid*. s14 (1) (i) RRA.
[100] *Ibid*. s 14 (1) (j) RRA.

[101] the landlord needed to give his family occupation of the ground floor of the respondent's tenancy premises to create a maisonette. Unfortunately, the RRT made observations regarding the foreseeable marriages to the landlord's children and manner this would affect the number of people occupying the house in future. On appeal the High Court held that the RRT erred in holding that by creating more than one place to occupy the landlord would contravene the RRA. Cotran and Cockar JJ held that the test of whether 2 entities constitute 1 place of residence is not physical or structural composition of the entities, but method of occupation. The case was referred for rehearing before the RRT which erred by failing to guide itself by the prevailing circumstances at the time of the case. In ***Jetha v Chagan***[102] it was held that a landlord who has 2 homes is not permitted to recover possession for purposes of putting in another tenant who pays a decontrolled price. The principle of transmission is that where a statutory tenant dies his widow–or family members he is living with–continue in possession.

### 3.2 *Irremovability under the Landlord and Tenant Act*

BPRT tenancy determination grounds include the tenant's allowing the premises to deteriorate,[103] rent arrears exceeding 2 months,[104] or persistent delays,[105] substantial tenancy breaches,[106] sub-letting without landlord's consent,[107] or where the landlord requires to demolish and reconstruct the premises,[108] or for his own use for a period exceeding 1 year having owned it for over 5 years.[109] In ***Choitram v Mystery Model Hair Salon***[110] the landlord applied for

[101] [1984] KLR 382.
[102] section 14 (1) (h) RRA.
[103] s7(1) (a) L&TA.
[104] *Ibid*., s 7(1) (b).
[105] *Ibid*., s 7(1) (d).
[106] *Ibid*., s 7(1) (c).
[107] *Ibid*., s 7(1) (e).
[108] *Ibid*., s 7(1) (f).
[109] *Ibid*., s 7(1) (g).

termination for non-payment of rent. It was held that disputes between parties could not be used to delay future rent payments and the tenancy is determinable where rent is due for more than 2 months on the date of the notice. In ***National Drycleaners and Another v Ndume*** [111] Shah CA (as he then was) held that while the BPRT may 'vary' or rescind its own orders the tribunal is not empowered to grant stay of execution of a final determination as it is not a Subordinate Court, but is specially established under the L&TA to exercise the limited jurisdiction granted.

In ***Caledonian Supermarket Ltd v Kenya National Examination Council***[112] the tenant occupied 1 floor carrying on supermarket business in a building was served with a notice to vacate. A temporary injunction was declined by the High Court. However, following ***Tiwi Beach Hotel Ltd. v Julian Ulrike Stamm*** [113] the Court of Appeal (Kwach, Shah and O'Kubasu JJA) reversed Kuloba J's restrictive interpretation on the purpose of secure tenure. Their Lordships opined that if on acquisition, property was subject to a controlled tenancy, the landlord had to comply with the L&TA. The case was referred back to the High Court to assess damages incurred upon failure to grant meritorious injunctory relief. In ***Tiwi Beach*** since the landlord's notice did not specify whether it intended to either terminate or alter the terms of the tenancy, therefore it was not in the prescribed form. Hence, per Kwach JA, the tenant was entitled to a restraining order. In ***Gatanga General Store V Githere*** [115] (Nyarangi, Masime and Platt JJA [dissenting]) prohibited both interlocutory and substantive appeals to the Court of Appeal from BPRT decisions. Hence a 2-judge High Court bench is the final appeal.

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[110] [1973] EA 140.
[111] [1987] KLR 565.
[112] [2000] 2EA 357.
[113] [1988-1992] 2 KAR 189.
[115] [1988] KLR 603.

### 3.3 *Prohibiting and Restraining Forcible Eviction by Statutory Authorities*

In tort law, a person cannot complain of a wrong which is authorized by statute. However when a statute merely permits a thing to be done and it is done without causing injury to another, the authority is *conditional* and *directory*, not *absolute* and *imperative*. The defense of statutory authority will fail if it is established that the interference exceeded that which would inevitably have resulted from the works authorized, or if the harm complained of is avoidable or is due to negligence in doing the authorized act.[116] Hence in ***Butt v Rent Restriction Tribunal*** [117] the purpose of a stay pending appeal application was to prevent the decision of the appellate court from being rendered nugatory should it reverse the High Court's refusal of the initial summons which sought leave to quash the RRT's judgement. Hence notwithstanding that the High Court dismissed tenant's summons seeking stay pending judicial review, the Court of Appeal found no inconsistency in granting stay pending appeal.

In ***Nderu and Others v Kenya Railways Corporation***,[118] over eighty residents living on the rail line operational corridor in Kibera filed a case seeking on injunction to restrain KRC from forcibly evicting them. As recently as March 2004 KRC issued receipts for rent paid by people occupying plots on the rail line operational corridors including Kibera, Korogocho, by the *wazee wa vijiji*, administration offices plus chiefs who allocate official permits. The occupants had been issued with temporary occupancy licenses which had not expired. Yet the KRC issued demolition notice on grounds of 'public safety'. Hence the eviction notice was *ultra vires* the

[116] Yash Vyas, The Law of Torts (Nairobi, Research and Civic Awareness Programme (RECAP), Centre for Law and Research, Claripress Ltd, 1997) p 41.
[117] [1982] KLR 417 (Madan, Potter and Miller JJA).
[118] High Court of Kenya at Nairobi in *supra* note 9.

Railways Corporation Act,[119] Children's Act[120] and international procedures which prohibit forced eviction. It was withdrawn in May 2004 upon parties entering negotiation.

That same year, at Lugari District ***Samuel Kirwa and Others v Kenya Railways Corporation***[121] the plaintiffs obtained a temporary injunction pending trial from the High Court granted on the basis that they 'were likely to establish that the notice was issued unprocedurally and unlawfully. They are also likely to establish at the trial that the notice was arbitrary and unreasonably inadequate'.[122] The learned judge held:

> The other matter which has struck my attention is that the conduct of the defendant has not been impressive. They have allowed the plaintiffs to occupy its land for a period of over 30 years without removing them why would they now give such citizens a 30 day notice to remove what they have invested for such a length of time? Why has the defendant failed to comply with section 16(3) of the Kenya Railway Corporation Act?[123]

Significantly, KRC's residential premises being RRA 'excepted dwelling houses', none of the aggrieved licensees facing *ultra vires* administrative discretion were entitled secure tenure. Moreover, instead of those licensees who were conducting business enterprises seeking BPRT protection following Cotran J's decision in ***Kibuti***, they employed skilled lawyers to overcome complex injunctory procedures using group solidarity to afford capacitation. Thus Mutunga's Marxism[124] criticizes the Rent Act protections as being mere propaganda designed to placate the middle income tenants who are forced to reluctantly believe that some protection exists while in reality no real remedy is accessible.

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[119] Chapter 397 Laws of Kenya.
[120] no. 8 of 2003.
[121] HCK Eldoret in *supra* note 9.
[122] *Ibid.*
[123] *Ibid.*
[124] *Supra* note 4.

In ***Gusemi v Ombima***,[19] because both parties consensually agreed to create new rent, therefore the previous tenancy was held to be extinguished and there was nothing for the RRT to terminate. ***Gusemi*** suggests that most tenants prefer to persevere by maintaining harmony with landlords or are forced to simply quit without much resistance. [125] New tenants thus are often charged 'goodwill' or 'key money' as a condition for occupying, which constitutes an illegal payment since it is outside the standard assessed rent.[126] Mwangi[127] argues that the existing rent tribunals should be decentralized to allow for local authority jurisdiction over landlord-tenant arbitration disputes. This can expedite the speed of hearings. Secondly, he recommends that information about landlord-tenant rights and the normal rules of landlord and tenant practice should be diffused more widely. All agreements should be in writing and a literate relative should countersign the agreement as a witness. These can be standard form contracts.[128]

## 4. THE RIGHT TO HOUSING UNDER INTERNATIONAL LAW

### 4.1 *MDG's and General Comments by the UN Committee on Economic Social and Cultural Rights*

Kenya has signed and ratified both the UNDHR and ICESCR, relevant Articles of which are set out in the introduction to this paper. The goal of reducing housing poverty was encompassed in the 1973 UN-Habitat target of 'shelter for all by 2000'.[129] Section 25 of the 1993 Vienna

[19] [1975] EA 135.
[125] *Supra* note 19.
[126] *Supra* note 4.
[127] J.K. Mwangi, *The Nature of Rental Housing in Kenya*, 1997, Environment and Urbanization Vol. 9 no.2, 141-159.
[128] UN-HABITAT and Global Human Rights.
[129] UN-HABITAT 1973.

Declaration on Human Rights affirmed that 'extreme poverty and social exclusion constitute a violation of human dignity…recognizing to this effect the importance of international cooperation based on free consent'.[130] Establishing a link between poverty and human rights, Target 11 of Goal 7 of the Millennium Development Goals aims 'to have achieved a significant improvement in the lives of at least 100 million slum dwellers' by 2015.[131] It recognizes that:

> Adequate housing means more than a roof over one's head. It also entails adequate privacy; space; physical accessibility, security, secure tenure, structural, stability and durability, lighting, heating and ventilation, basic infrastructure, suitable environmental quality and adequate accessible location with regard to work and basic facilities all of which must be affordable.

The Committee for Economic Social and Cultural Rights (the UN Committee) has adopted 3 General Comments which identify specific obligations relating to Article 11(1) thereby facilitating the task of implementation. Firstly, General Comment No. 4 on 'himself and his family' declares that the right to adequate housing requires that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats'.[132] It is reinforced by Article 17 of the International Covenant on Civil and Political Rights which recognizes *inter alia*, the right to be protected against 'arbitrary or unlawful interference' with one's home.[133] For example, the UK Protection from Eviction Act[134] criminalizes forced evictions. Secondly, General Comment no.7 on 'right to adequate housing: forced evictions,' provides that 'the state itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced

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[130] Section 25, Vienna Declaration, World Conference on Human Rights, Vienna, 14-15 June 1993, U.N.Doc. A/CONF./157/24(Part I) at 20 (1993).
[131] Established in 2000, the eight Millennium Development Goals (MDGs) –see http://www.un.org/millenniumgoals/ visited on 19 April 2011.
[132] General Comment No. 4, ICESCR *supra* note 2.
[133] Article 17, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
[134] 1977.

evictions…furthermore the state's obligation to ensure respect for this right is not qualified by considerations relating to the availability of resources'.[135] Thirdly, with respect to national legislation, General Comment No. 7 provides that evictions should not result in homelessness since Article 2(1) of the ICESCR requires state parties to 'use all appropriate means, including adopting legislative measures, to promote all rights under the Covenant'.[136]

According to Otto, the 'steps' which the government must 'take' towards the realization of the right is an obligation of conduct though not 'guaranteed'. 'Hence the government cannot be seen not to be taking any steps or to remain inactive thus increasing homelessness, but must fully realize Article 11(1). These steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations'.[137] Secondly, the steps should be taken 'with a view to achieving progressively the full realization of the rights recognized'. Thirdly, 'the government should take steps to the maximum of its available resources'. Finally, while legislative measures are preferable, 'all appropriate means' expresses latitude for use of other means, provided that 'progressive movement towards' full realization is of primary importance. Given limited budgetary allocations the Nairobi housing problem has received disproportionately less prioritization as compared to school and hospitals, than it warrants. Yet housing too is more than just an end in itself. It sustains the labour force, which provides the means of development.[138] Because the majority of tenants in developing countries lack formal tenancy contracts therefore

[135] General Comment no.7 Committee on Economic Social and Cultural Rights (1997) Covenant Art no. 11(1) 'forced evictions' paras 8 and 16.
[136] Article 2(1), imposes duty to find alternative solutions when forced evictions are inevitable.
[137] Dianne Otto, *Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations*? in Tom Campbell, Jeffrey Goldsworth and Adrienne Stone (eds.) Protecting Human Rights: Instruments and Institutions (UK, Oxford University Press, 2003) pp 281-306.
[138] S*upra* note 16.

'under operational definitions based on the HABITAT Agenda and Global Campaign (for secure tenure) the bulk of people with insecure tenure are renters'.[139]

### 4.2 *UN Housing Rights Programme*

An UN-Housing Rights Programme was launched in April 2002 by UN-HABITAT and the UN High Commissioner for Human Rights. The Realisation Programme for the right to housing comprises packages and policies rather than a single 'ultimately unenforceable right' e.g. protecting secure tenure, preventing illegal and mass evictions, removing discrimination promoting participation and freedom of information particularly in land markets.[140] By the end of the 1980's an estimated one hundred and fifty countries had either rent control measures or subsidies.[141] By 1998 the national laws of seventy countries promoted the full and progressive realization of the right to housing.[142] The Proposed New Constitution of Kenya, albeit rejected at the 2005 referendum, provided that 'everyone shall have the right to affordable and adequate housing'.[143] In the Kenyan context however, Mwangi laments skeptically that 'the goal of adequate shelter for all remains more of a statement of social and political intention rather than a feasible objective in the foreseeable future'.[144]

Under international law, steps should be taken by states to ensure that the percentage of housing-related costs is generally commensurate with income levels. As for rental leasehold

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[139] *Supra* note 13.
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*
[143] The Attorney General, section 63 the Proposed New Constitution of Kenya, The Government Printer, Nairobi, dated 22August 2005; Furthermore, the Main Report of the Constitution of Kenya Review Commission dated 18 September 2002, states at para 185 'On infrastructure,' that the new constitution includes *inter alia*, the right to shelter.
[144] Mwangi *supra* note 127.

arrangements, tenants should be protected from unreasonable rent levels or rent increases by appropriate including legislative means.[145] Lind[146] distinguishes between first and second generation controls. The first tends to freeze rents at a level significantly below the market level and to prohibit evictions. The second tends to permit rent hikes linked to the inflation rate thus allowing evictions in certain conditions. His approach avoids the all-or-nothing argument advanced by radical free market proponents.[147] A second indirect method to ensure that housing is affordable remains through financial housing subsidies. The difficulty would be in determining which classes of citizens actually deserve to benefit from the housing subsidies so as to avoid maladministration through corruption. According to UN-HABITAT,[148] national laws should be amended to be consistent with international laws, enforce and implement housing rights provisions with more vigour and adopt the right to housing in the following aspects: Security of tenure of informal housing, protection from forced eviction by the state of non state actors and affordable housing for the poor. What direct actions should the governments take to regulate landlord-tenant relationships?

### 4.3 *Comparative Cases from Common Law Jurisdictions*

***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others***,[149] endorsed the UN Committee's emphasis of the need not to give the right to housing a too restrictive interpretation and the importance of security of tenure. The South African Constitutional Court (SACC) held that lack of socioeconomic rights is a blight to human dignity. It considered the leading case of

[145] UN-HABITAT, Housing Rights Legislation: Review of International and National Instruments (Nairobi, Habitat, 2002).
[146] H. Lind, *Rent Regulation: A Conceptual and Comparative Analysis* (2001) European Journal of Housing Policy, Vol. 1. pp 41-57.
[147] *Supra* note 12.
[148] *Supra* note 13.
[149] [2005] 3 LRC 435.

***Government of the Republic of South Africa and Others v Grootboom and others***,[150] where Ms Grootboom and other squatters were evicted from land earmarked for low-cost housing development in the process of demolishing their shanties and building materials were destroyed. Upon subjecting the proposed housing policy to administrative law-like scrutiny for reasonableness, and because the plan did not cater for vulnerable groups therefore, the SACC issued a declaratory order that the provincial housing development plan did not meet the required standard under section 26(2) of the Constitution. That section imposes the obligation on the State to protect the right to have access to adequate housing 'within its available resources, (and) to achieve the progressive realisation of this right'. To satisfy its obligations enshrined by the right, the State was bound to clearly ensure that adequate budgetary support was made available for implementation of the nationwide housing programme. 'Recognition of such needs' their Lordships held 'requires it to plan budget and monitor the fulfillment of the immediate needs and management of crises and to cater for the urgent needs of the most vulnerable sectors of society'. In order for socioeconomic measures to be reasonable they had to be aimed at the effective and expeditious progressive realization of the right and had to be within the state's financial means and capacity for implementation.[151]

In the conservative Kenyan case of ***Shah Vershi Devshi & Co Ltd v The Transport Licensing Board*** [152] the old Kenyan constitutional court comprising Chanaan Singh and Simpson JJ granted an order of certiorari quashing a decision of the Transport Licensing Board which offended section 82 of the Kenyan constitution barring discrimination. Its statutory discretion

[150] [2001] 3 LRC 209; See also Otto *supra* note 137 and Buhle Dube, (2007) *Domestic Application of Human Rights: Norms in the Forced Eviction Cases on Africa* AHRAJ Casebook Series, ICJ-K, ICJ S, SIDA, Vol. 2, 102-139.
[151] *Supra* note 137.
[152] [1971] EA 89.

was exercised on the invalid ground that the applicant Company had no African shareholders and because there was an imbalance between African and Asian citizens. However, their Lordships' restrictive interpretation rejected claims for protection of a socioeconomic right to work under section 70. 'Although given a separate number, it is quite clearly in the nature of a preamble. Section 70, may be of help to interpreting the later sections of chapter V (on fundamental rights and freedoms) but it gives no rights and protections'. (brackets mine)

Yet elsewhere in the Commonwealth, even without an explicit constitutional or legislative right to adequate housing, national courts have found that right to be implicit in national or constitutional frameworks. The Indian Supreme Court has interpreted the right to life enshrined in Article 21 of their Constitution to imply a right to shelter and protection from forced eviction. In the case of ***Maneka Gandi v Union of India***,[153] it was held that the constitutional right to life must be held to mean 'the right to live with dignity'. In ***Francis Coralie v Territory of Delhi***,[154] it added that the right to live in dignity included all that goes along with it, namely the basic necessities of life such as adequate nutrition, clothing and shelter. In ***Olga Tellis v Bombay Municipal Corporation***[155] the Indian Supreme Court went even further to hold that: 'The right under Article 21 is the right to livelihood, because no person can live without the means of living i.e. the means of livelihood. If the right to livelihood is not treated as part of the Constitutional right to life,'… per Chandrachud CJ. Exceeding the recent ***Grootboom*** decision where the SACC declined to supplement its declaratory order with any structural mechanism to compel compliance with the dictates of reasonableness, rather, the Delhi Development Authority was ordered by their Lordships to, within a fortnight, provide alternative accommodation for eight

[153] [1987] LRC (const) 351; [1978], 1 SCC 248.
[154] AIR 1981, S.C.R.746.
[155] 1985, 3 SCC 545.

leprosy patients it forcefully evicted notwithstanding that their huts were unauthorized *ab initio.* Subsequently, in ***Shanti Star Builders v Naryan Khimalal & Others*** [156] the ISC stated that the right to shelter "has to be a suitable accommodation which would allow him to grow in every aspect-physical, mental and intellectual'. In ***Ram Prasad v Chairman Bombay Port Trust*** [157] their Lordships conditionally prohibited public authorities from proceeding with an intended eviction of slum families pending reallocation to suitable alternative sites. The pioneering shelter rights case was ***Callahan v Carey***, [158] a class action suit filed on behalf of the homeless on Lower East Side of New York City. The New York SC required the NYC, by a mandatory injunction to furnish a sufficient number of beds to meet the needs of all homeless men applying for shelter. Subsequently, ***Southern Burlington County NAACP v Township of Mt Laurel*** [159] the New Jersey SC held 'shelter along with food are among the most basic human rights'.

Art 43 under the Bill of Rights of Part IV of the new Kenyan Constitution promulgated on 27 August 2010 provides for economic and social rights including the right to shelter as follows: '(1) Every person has the right…(b) to accessible and adequate housing, and to reasonable standards of sanitation;'

[156] JT 1990 (1) S.C. 106, Civil Appeal No. 2598 of 1989.
[157] AIR, 89 S.C.R. 1306.
[158] N.Y 2d. [N.Y. 1979].
[159] 456 A.2d 390 [N.J. 1983] Mount Laurel II .

## 5. APPLICATION OF CRITICAL THEORY

## TO INFORMAL SETTLEMENTS IN KENYA

### 5.1 *Liberal Rent Restriction Theory*

#### 5.1.1 *The Landlord and Tenant Bill 2007*

Neither scholars nor practitioners agree on the origins, causes or solutions to inadequate levels of housing.[160] Classical liberal economists argue that an efficient rent market can be achieved according to four rationales, which justify rent controls.[161] Under the L&TB '"premises" means a place of residence or business to which the Act applies.' It proposes to dilute the existing L&TA protections accorded to business premises while raising the RRA residential premises' protective ceiling from Kshs two thousand five hundred to fifteen thousand.[162] Mischievously, it substitutes Lind's first generation rigid concept of 'standard' rent with his second generation market-driven concept of 'fair' rent. Thus, '"fair rent"[162] means the rent assessed and determined by the Tribunal on the basis of the going rent for comparable lettings taking into consideration the location, size, age tenantable quality and outgoings of the premises'[163] (hereafter 'the factors'). The criterion for its determination of fair rent is no longer to be according to standardized rent, frozen on the date the law becomes operationalized, but by comparison to naked '"market value"…which means the current value of the premises and the land on the open market'.[164] Such '"market rent' means the rent at which the premises concerned might

[160] World Bank, Kenya: Inside Informality of Poverty, Jobs, Housing and Services In Nairobi Slums (Washington, World Bank, 2006) note on the definition of slums by the Central Bureau of Statistics entitled 'Stratification of the Major Urban Areas in NASSEP (IV)'.
[161] Mark Pennington, Liberating The Land: The Case for Private Land Use Planning,(London, IEA, 2002)
[162] Morris, Aron 'House Rents for Poor in Steep Increase' in *Business Daily newspaper* 11 December 2007.
[162] *Supra note* 6
[163] *Ibid.*
[164] *Ibid.*

reasonably be let on the open market, based on the going rent for comparable lettings taking into consideration "the factors"'.[165]

What is meant by 'reasonably' where demand exceeds supply? In short, not only does the L&TB provide far inferior protection to middle classes than the existing RRA, it also proposes greater illusory comfort to informal settlements than the liberal World Bank-sponsored 'slum upgrading' and 'sites and services' schemes of the 1970's and 1980's, which never took the issue of land into consideration.[166] Commendably, L&TB premises mean 'any living accommodation used or intended for use as rented premises'[167] thus including informals. Moreover, '"tenancy agreement" ….includes a license to occupy'.[168] However, all rents are at risk of determination according to open market values. Worse still, appeals are to be restricted to points of law.

### 5.1.2 *The National Housing Policy 2004*

Nowadays, land tenure is recognized as an essential precondition to successful slum upgrading policies. Under the NHP:

> Upgrading slum areas and informal settlements will be given top priority with minimal displacement and by streamlining land acquisition for housing the poor and adopting appropriate tenure systems. Slum upgrading will include comprehensive activities that promote living and working conditions.[169]

Such market-driven policies created 4 distinguishing peculiar features of the Nairobi slum situation. The 2006 World Bank Report reveals that:

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[165] *Ibid.*
[166] *Ibid*. see also Josef Gugler, *Cities, Poverty and Development*, in Alan Gilbert and Josef Gugler ( eds) Urbanization of the 3rd World (Oxford University Press, 1988)
[167] *Supra* note 7
[168] *Ibid.*
[169] *Supra* note 5.

> First this is a case of housing *for* the poor not *by* the poor. Second, the tenants are mobile. This combined with lack of ownership means they have no incentive to invest. Political barriers to market entry reduce landlord incentive to invest. Third, Nairobi slums provide low quality high cost shelter for low income families. Fourth, there is a highly developed rental market similar to formal real estate markets.[170]

The proposed Housing Bill is yet to be tabled before the Cabinet.

### 5.1.3 *The National Land Policy 2007*

The NLP [171] was formed as a 'result of widely consultative process towards policy formulation aimed at making it possible for more people to own access, control and sustainably use land. Concerning rent control legislation, NLP recognizes 'currently there are two tribunals that regulate rents for residential and business premises….'[172] Residentially, 'the RRA shall be reviewed in order to ascertain its necessity to protect workers and poor tenants from too rapid rises in the level of house rents'. [173] However, 'the continued relevance of the BPRT will be reviewed in light of progressive liberalization of investment and trade'.[174] It is noted that the Kenyan Chief justice has administratively established an 'Environment and Land' division in the central High Court at Nairobi, to deal exclusively with land issues including appeals from the Tribunals.[175] To empower the L&TB inspectors, NLP envisages that 'training shall be undertaken to build capacity of Ministerial staff of the Land Reform Unit, national and local level institutions that will be involved *inter alia* in arbitration functions'.[176]

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[170] *Supra* note 161 see caption 'Are Nairobi's Slums Atypical'?
[171] DNLP *supra* note 7 p iv.
[172] *Ibid.* para 254, section 4.3.3,'Properly Tribunals' p 50.
[173] *Ibid* para 255, s 4.3.3.
[174] *Ibid.* para 256, s 4.3.3.
[175] *Ibid.* para 259, part 4.3.5 , 'Land Courts' p 50 provides that land disputes, may, in addition to being addressed by DLB's and CLB's, be referred to the land division of the High Court.
[176] *Ibid.* para 261, part 5.1 establishes a LRTU while para265 endorses training, part 5.2 ,'Capacity Building' p 52

Furthermore, appointment of a Land Reform Coordinator is envisaged to first, draft the appropriate legislative reforms and prepare a memorandum of objects and reasons in to facilitate its passage through parliament.[177] Second, 'drive the reform process through the Land Reform Unit, co-ordinate and oversee through the various statutory bodies created for the purposes, the regulation of land related professions including planners, surveyors, valuers and estate agents'.[178] Hence to resolve the high handedness of greedy landlords who evict tenants using vigilantes as happened in ***Nthenge***, ***Lyimo*** and ***Mwalimu Traders***, L&TB proposes repealing the Distress for Rent Act (Chapter 293 Laws of Kenya). To resolve the problem of conflicting valuation reports it proposes to regulate the land valuation procedures.

### 5.2 *Critical Legal Theory*

#### 5.2.1 *The Procedure of Solidarity Rights*

Critical legal scholars argue that 'the transformative potential of socioeconomic rights is significantly thwarted by the fact that they are typically formulated, interpreted and enforced by liberal institutions and embedded in the political, social and economic status quo'.[179] Critical legal analysis is geared to restoring 'deviations and contradictions as intellectual and political opportunities rather than threats'.[180] Unger[181] upsets the legal system's tendency to assimilate the new to the old, its overwhelming of the innovative, its tendency to rationalize the incongruent into coherence. Gabel proceeds to show that liberal legal rights are typically

[177] *Ibid.* para 264, Chapter 5 'Land Policy Implementation Framework' p 52.
[178] *Supra* note 5.
[179] *Supra* note 13.
[180] Marias Pieterse, *Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, (2007) Human Rights Quarterly 29, 796-822.
[181] Emilios A. Christodoulidis, *The Inertia of Institutional Imagination: A Reply to Roberto Unger* (1996) Modern Law Review: 59:3 May pp 377-397.

articulated in abstract and indeterminate terms precisely….because rights discourse requires us to 'participate in the illusion that the right to an experience can create the experience itself, and to reverse the true relationship between the meaning of verbal concepts and the qualitative or lived milieu out of which they arise'.[182] Michelman[183] instead contends that for an adjudicative approach to be adopted that identifies certain core needs and attempts to satisfy them, rights discourse should be grounded in a 'good society' committed to affirmation of and respect for the inherent dignity of all human beings. By awarding enforceable entitlements to goods and services that are essential for human survival and flourishing, socioeconomic rights appear capable of effectively reconciling notions of need and right. Thus the generative principles that inform Unger's reconstructed system of rights brings together the institutional–the right–with the spontaneous–solidarity–in a moment that empowers them both. Solidarity, he says, is the foundation of community.[184] 'Solidarity rights' form part of a set of social relations enabling people to enact a more defensible version of communal ideals than currently available to them.

Neoliberal apologist Christoudoulidis, however, is skeptical about 'sacrifices made in solidarity towards fellow members of the community (which) must be voluntary if they are to express solidarity, since 'its symbolic value, –as a statement of an ideal' is undercut by lack of willingness to enforce it'.[185] Unger's institutional imagination, Christoudoulidis concludes therefore cannot safeguard solidarity against the structural inertia entailed by the law's

[182] Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination* (1996) Modern Law Review 59:1 January pp 1-23.
[183] Gabel quoted in Pieterse *supra* note 180.
[184] Frank I. Michelman, *The Supreme Court 1968 Term Foreword: On Protecting the Poor Through the Fourteenth Amendment* (1969)3 Harvard Law Review pp 7- 8, 13-14, 33-39.
[185] *Supra* note 182. See also An Na'im Abdullahi Ahmed (ed) Human Rights in Cross Cultural Perspectives;:A Quest for Consensus (Pennsylvania, University of Pennsylvania Press, 1990) Ch 6.

*integrative* reduction of phenomena into double contingency of legal or illegal. Pieterse[186] challenges progressive lawyers 'to assist in "translating" liberal rights from their currently empty articulation into more concrete, needs-linked notions of entitlement'.

### 5.2.2 *Informal Settlements*

Significantly, the exception to the worldwide trend of increasing homeownership is Kenya where renting seems to be dominated by larger absentee landlords.[187]

> Rental housing has become the main form of housing for middle income households and new urban residents from all income levels. The bulk of private rental housing accommodates low income families and most is informal…accommodation is typically a single room…Generally the whole rental process is informal. Contracts are rare, owners often lack formal title to their property and…rental legislation is often ignored.[188]

Surprisingly, 'Nairobi's slums provide low quality but high-cost shelter. This finding directly challenges the widely held notion that slums provide low quality, low cost shelter to a population that cannot afford better standards'.[189] Informal settlements are the basis of the informal sector enterprises which are gaining importance in the globalization process, and the majority of formal workers worldwide, even civil servants, have no access to legal and adequate housing.[190] Lower class houses, largely located mainly in Eastlands are largely temporary, made of mud-wall or timber-wall with cheap roofing materials, which may be *mabati* sheets, *makuti*, or even nylon paper or cartons. The infrastructure is relatively poor as there is no proper sanitation, no clear roads for entry and water is not even connected to the dwelling structures. 'Slum' is a pejorative term for poor quality housing e.g. contiguous

[186] *Supra* note 180 p 820.
[187] *Supra* note 13.
[188] *Ibid*.
[189] *Supra* note 160.
[190] Hernando de Soto, The Other Path: The Invisible Revolution in the Third World (Perennial Library, 1990).

settlement where inhabitants are characterisesd as having inadequate housing and basic services.[191] A slum is often not recognized and addressed by the public authorities as an integral or equal part of the city. 'Slum' indicates housing which falls below a certain level which is necessary to contribute to human development. '*Informal Settlements* refer to occupation of land without formal recognition and that do not comply with physical and land use planning arrangements" while "*squatter* refers to a person who occupies land that legally belongs to another person or institution without the owners' consent.'[192] Used together, the presence of slums and squatter settlement indicate a habitat, which fails to contribute to human development, and/or lacks the most fundamental guarantees necessary for the building of human communities.[193] The presence of either of the two is indicative of housing poverty.[194] However, a problem arises in convincing individuals to begin paying for the property they used to live on for free. Kibera is a case in point. Policies of the closed city are many and varied:[195] Leveling illegal settlements, colonialists expelling migrants without resident permits, arresting illegal workers, campaigns against street hawking, prohibiting certain occupations, extra-judicial killings and demolition of kiosks or permanent structures including Nakumatt shopping mall along Thika Road reserve in 2008 and the recent threat to remove Visa Oshwal Temple obstructing riparian rights along Nairobi River.

### 5.2.3 Squatters and the Evolution of Extra-Legal Rights

Kibwana categorizes various urban squatters into those:

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[191] Brian C. Aldrich, and Ravinder S Sandhu, *Housing the Urban Poor: Policy and Practice in Developing Countries* (London and New Jersey, Zed Books, 1995) p 17.
[192] *Supra* note 6 pp 53-54.
[193] *Supra* note 77.
[194] Erhard Berner, *Learning from Informal Markets; Innovative Approaches to Land and Housing Provision* in David Westendorf and Deborah Eade, Development and Cities, (UK, Oxfam) p 236.
[195] *Supra* note 190.

> Who own their own structures; Who are tenants or sub-tenants; Who construct business premises on private or public land, who are mobile or roving for when the whole city acts as a place of business as well as an abode e.g. hawkers, beggars, vagrants or lumpenproletariat; Unofficial and illegal sub-tenants especially those occupying mere servants squatters etc. A large proportion include those who partially migrate to new land as "squatters" while in their areas of origin they own land.[196]

Recognizing that 'spontaneous settlement becomes a survival strategy', he explains that informal acquisition of property is facilitated by existing land tenure and land use laws which permit absentee landlordism where land is unproductively used but retained for speculative purposes, migration results in spontaneous settlement where employment opportunities are missed.[197] However 'because group tenure is on the whole de-emphasized in Kenya, spontaneous settlers cannot easily be converted into *bona fide* legal land rights holders under customary law, joint or common tenancy, or in group ranches, or land held by co-operatives or land buying companies, settlement schemes etc.'.[198]

Unlike for Kibwana, for whom 'squatters are not subject to land tenural arrangements since they are definitionally invisible according to existing land tenure…',[199] de Soto instead insists that 'a set of extra legal norms do to some extent regulate social relations offsetting the absence of legal protection and gradually winning stability and security for acquired rights'.[200] He categorizes methods of informal acquisition into invasion, whether gradual or violent, as distinct from illegal purchase of land through associations and co-operations. The system of 'extra legal norms', customary laws and the rules borrowed from the formal legal system, when these are of use to

[196] Kivutha Kibwana, *Land Tenure Spontaneous Settlements and Environmental Management in Kenya* in Smokin C. Wanjala, (ed.) Essay on Land Law: The Reform Debate in Kenya,(Nairobi, University of Nairobi, Faculty of Law, 2000,) pp 105-136 p 116.
[197] *Ibid.,* p 124.
[198] *Ibid*.
[199] *Ibid*., p 110.
[200] *Supra* note 190 p 19.

the informals, is called on to govern life in the informal settlements when the formal law is absent or deficient. It is the law 'that has been created by informals to regulate and order their lives and transactions and as such is socially relevant.'[201] de Soto actually attributes burgeoning informal activities to the legal system's very imposition of rules, which exceed the socially accepted legal framework, do not honour the expectation, choices and preferences of those who it does not admit within its framework–and when the state does not have sufficient coercive authority, it distinguishes such illegality as unintended–unlike drug trafficking, theft or extortion. Indeed, it is out of self-defence, necessity or to avoid extinction that migrants became informals to achieve essentially *bona fide* objectives.[202] Over time, some informal settlements built in defiance of state laws,

> have come to be governed by an exceptional legal system, which can be regarded as an authorities' improvised response to the housing problem with the result that residents receive title to land–not ownership of the buildings, they are also subject for a period of time to a number of limitations in the exercise of their rights.[203]

It is therefore arguable that governmental policy of slum containment and clearance not only omits to provide resettlement plans but also fails to introduce effective rent control subsidies required to safeguard slum tenants from exploitation and eviction.

### 5.2.4 *Participatory Institutions under the Draft National Land Policy*

Reflecting critical legal theory, the NLP[204] criticizes the complexity in the Kenyan land administration and management system and proposes that there should be a complete overhaul of existing institutional structures to ensure that service delivery is efficient, effective and

[201] *Ibid*.
[202] *Ibid*., p 7.
[203] *Ibid*., p 12.
[204] *Supra* note 7 '*Customary Land Rights* refer to rights conferred or derived from African customary law whether formally recognized by legislation or not' p 53.

equitable.[205] The NLP envisages the establishment of 3 key management institutions the National Land Commission, District Land Boards and Community Land Boards.[206] While the function of land use planning and enforcement of approved development plans controls will continue to be carried out by local authorities under the Local Government Act[207] and Physical Planning Act,[208] the DLB's shall oversee the policies and standards of land use planning and enforcement of development plans. Community land under the NLP is 'land that is owned by the communities themselves and which is currently managed by county councils. It will be managed by communities which will create legal entitles to be known as Community Land Boards'.[209] Community empowerment entails capacitation and the NLP's NLB, CLB'S DLB's should provide solidarity to enable poor peoples' institutions with *locus standi* to litigate customary land rights in protection of the right to a home.

## CONCLUSIONS AND RECOMMENDATIONS

This paper argues that social capital, particularly in agrarian societies, such as Kenya, remains dominated by relations towards natural capital, i.e. land, unlike in industrialized countries, where production capital holds sway.[210] Hence landlords' interests dominate the L&TB and NHP while workers and tenant's interests are relegated to the NLP.[211] Because presently, both tribunals lack inquisitorial jurisdiction, and because of the complexity and expense of legal procedures, and further because of restrictive judicial interpretations of legislated liberal rights, therefore

[205] *Supra* note para 228, Chapter 4 entitled 'Institutional Framework' p 46.
[206] *Ibid.* para 231 s 4.2 entitled 'Policy Framework for Land Management Institutions' p 46.
[207] Chapter 265 Laws of Kenya.
[208] Chapter 286 Laws of Kenya.
[209] *Supra* note 7 para 242 p 48, section 4.2.2, 'District Land Boards', s 4.2.3 for structure of 'Community Land Boards'.
[210] Peter Saunders, Social Theory and The Urban Question (Hutchison, London, 1981).
[211] Supra.

attempts to preserve affordability and irremovability of premises have in practice been unsatisfactory. In relation to residential premises the L&TB fundamentally adopts Lind's second generation rent controls which permits extraneous considerations in determination of 'fair' rent thus embracing the *subjective* ***Devani*** holding which permits alteration of rent by a purchasing landlord's to recover investments on construction costs. It simultaneously rejects Lind's first generation controls thus abandoning the rationale of Wicks CJ in ***Thakker*** which insisted on objective assessment of 'standard' rent as at a fixed historical date. By adopting the test laid down in ***Karibu Traders***, L&TB effectively reduces residential protections to be at par with business premises. Notwithstanding that it proposes increases in residential protective ceilings L&TB remains essentially subject to market forces. This paper decries implications that the RRA distinction of 'standard' rent may be scrapped. However, the efficacy of both tribunals clearly need structural capacity-building and budgetary reinforcement. While the BPRT should be transferred from the Trade to Housing Ministry, the RRT should be strengthened and its geographical scope extended to embrace squatterments. Furthermore, the right of appeal before two judges should be retained including challenges on matters of fact. Also commendable under the L&TB, particularly given the advent of the information age, are mechanisms to maintain complete records of all rental premises albeit to be able to publicize 'fair' rents and enforce their maintenance. Recognizing that urban slums provide economic contribution to development nevertheless, our constitutional court, if liberated by broad-minded modern commonwealth authorities, should depart from its decision in ***Devshi*** so as to emphasize *social* adequacy of housing rights under broad rubric of the survival rights to health and life.