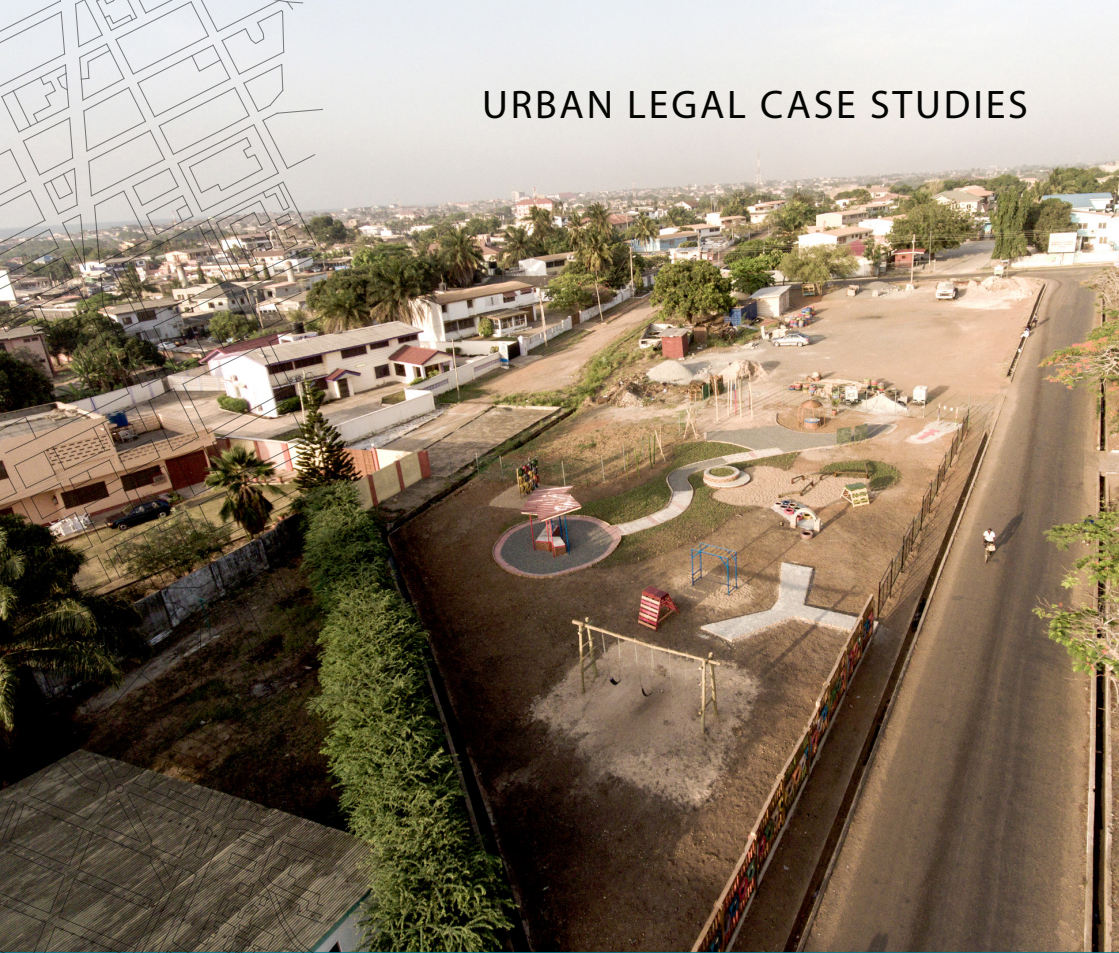


URBAN LEGAL CASE STUDIES



RENT REGULATIONS IN KENYA, LAGOS- NIGERIA, BOTSWANA AND SOUTH AFRICA: A COMPARATIVE ANALYSIS

URBAN LEGAL CASE STUDIES | VOLUME 9

UN HABITAT
FOR A BETTER URBAN FUTURE

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United Nations Human Settlements Programme (UN-Habitat)

P. O. Box 30030, 00100 Nairobi KENYA

Tel: 254-020-7623120 (Central Office)

www.unhabitat.org

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ACKNOWLEDGEMENTS:

Principal author: Nicola Pierre

Team leaders: Gianluca Crispi, Maria Mousmouti

Design and lay out: Christiana Sullivan

Editors: Samuel Njuguna, Christiana Sullivan

Contributor: Samuel Njuguna

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INTRODUCTION

This document examines the legal framework regulating the urban landlord and tenant relationship in Botswana, Kenya, Lagos State- Nigeria, and South Africa. It is not an essay on the ideology of rent regulation, but rather an examination of legislation those states enacted for regulating tenancies to identify what rules may be included in a comprehensive rent regulating regime that promotes security of tenure and affordable rental housing for the urban poor.

This document begins by briefly discussing rent regulation, and proceeds to explain commonly used methods of rent regulation. Chapters 3 through 10 set out to examine the legislation of the four countries and categorize, compare, contrast and comment on their sources of law, types of regulated tenancies, methods of rent control, availability of distress for rent, required lease formalities, rights and obligations of landlords and tenants, procedure for terminating a tenancy, and their courts with jurisdiction over rent and possession. Tables are used throughout for a clear comparison and analysis of the data within each segment. Chapter 11 looks at the levels of protection offered to tenants, the responsiveness of the methods of regulation used, the clarity and accessibility of the legislation, and ease of access to the court, in determining which combination of regulations may be most effectual in providing security of tenure and predictable rents for the urban poor.

01 RENT REGULATION

Rent regulation is a system of laws controlling rents and tenant evictions aimed at ensuring that rentals are affordable. It is designed to reduce both the incidence and fear of homelessness by setting substantive and procedural guidelines to control increases in rent and eviction of tenants.

‘Housing is at once a prime necessity and a most formidable instrument of oppression’ a shortage of which places the population in a state of intranquillity, an ‘anguish in which rent and the prospect of an increase in rent constitutes an obsession; in which all resources are insufficient to pay this unavoidable cost; and in which it is necessary to submit in whatever manner to the exigencies of the landlord because no other dwelling can be found, and if it could be it would be just as dear. . .’¹

The majority of economists stridently criticize rent regulation. They claim that it does more harm than good — “rent control appears to be the most efficient technique presently known to destroy a city—except for bombing”² — and offer statistics showing that less new rental housing is created in rent-controlled markets. However, such arguments are skewed³ and demonstrate a narrow understanding of rent regulation. They insist that “if rents are established at less than their equilibrium levels, the quantity demanded will necessarily exceed the amount supplied, and rent control will lead to a shortage of dwelling spaces”⁴ without acknowledging that rent control is usually imposed on free markets precisely to address a shortage of dwelling spaces, and that there are means of encouraging new supply other than rent gouging.

The conversation around rent regulation can instead expand to embrace a two pronged approach that couples protections for tenants with preferential loans and tax incentives to stimulate supply.⁵ This model can be found in Germany, which has successfully used tax incentives and low interest loans to encourage developers to build rental housing units under the condition that they remain bound to a specified term of rent control.⁶

The pervasive right-libertarian discussion of rent regulation contorts the issue by measuring it against a benchmark of perfection and by failing to present scenarios in which rent regularization may be a success.⁷ Furthermore, their insistence that government ought not to interfere in private sector relationships is arguably normatively vacant. Rent control is most often presented as an erosion of private interests, but many believe that public interest regulation is essential in democratic societies to promote collective values and challenge the dominance of individual interest.⁸ It may be both in the public and private interest to preserve tranquility and spending in the space between the one percenters and the destitute.

02 METHODS OF RENT REGULATION

Rent regulation, rent control, and rent stabilization, are terms often used interchangeably, but in fact these terms refer to distinct, albeit overlapping, measures. Rent regulation covers any government interference in the landlord and tenant relationship, while rent control refers to caps on rent and rent stabilization refers to limiting rent increases. Rent regulation is used to keep rents below the free market or equilibrium price and to prevent the landlord evicting tenants in a bid to circumvent the control.

Rent control specifically is an effective mechanism for protecting security of tenure by preventing a landlord who wants possession of a tenement from drastically raising the rents unilaterally, and then evicting a tenant for non-payment. However, if rent increases are controlled but evictions are not, then a landlord may evict a tenant to circumvent the rent control and get a new tenant at a higher rent. Effective rent regulation therefore requires rules for security of tenure coupled with rules to control rent.

According to traditional economics, in a free market there will be a single price which brings demand and supply into balance, called the equilibrium price. Both parties want what the other has, the landlord - a dwelling, the tenant - rent money, and they engage in an exchange. That repeated set of exchanges within a community reveals both the price the average buyer is willing to pay for the commodity, and the total quantity of that commodity the buyers will purchase in the community. That intersection of price and quantity is the equilibrium, making the price at that point the equilibrium price and that quantity at that point the equilibrium quantity. At equilibrium, a market balance is reached, there is no shortage nor wastage.⁹

A shortage of housing, however, whether caused by an increased population, destruction of housing, or lack of investment, can disrupt the market and cause sudden and drastic changes to equilibrium price and quantity, putting them at points where the available and foreseeable rentals and rent monies cannot match. This results in ‘intranquility’ and homelessness. This is the stage at which governments impose rent regulations. At times of high existing or imminent housing shortages, they may cap rents and restrict evictions to prevent landlords profiting from the shortage and enable tenants to remain in existing rentals under reasonable price conditions.

The interventions are to limit rents below the equilibrium price by freezing rents, setting the maximum rents, and/ or fixing the rate of rent increases to slow down the raising of rents to the equilibrium price.

The rent specific interventions are categorized as either first generation, which refers to strict rent freezing temporary measures, or second generation, which refers to long term measures that allow rents to move but regulate the frequency of increases and quantum of increases.¹⁰ These interventions can also be characterized by the specific method of rent control: fixing a maximum rent date, setting percentage rent rate, imposing a fair rent requirement, or a combination of the three.

The *maximum rent date* method freezes rents at the amount they were at a specific date. The amount at which the rent is frozen is the equilibrium price existing when the market was normal, before the event or circumstances that caused the sudden shortage occurred. Even though it was fixed in the free market, that rent was likely reasonable since it was fixed before the shortage caused prices to escalate. This method was often used in emergency situations such as war time by imposing moratoriums on rents increases and evictions.¹¹

The *percentage method* is designed to fix rent for all rentals covered by the legislation with a view to ensuring a fair return to the landlord while protecting the tenant from price gouging.¹² Using this method maximum rents are fixed as a percentage of the value of the property.¹³ The percentage set applies to all rentals covered by the legislation. The 'value' can be the assessed tax value, or the cost price, or the market value of the individual property. The rent allowed to be charged is fixed as percentage of that value: a low percentage when the real or market value of the property is used and a high percentage when the lower assessed value is used. In addition to that percentage return, the landlord is often allowed to pass to the tenant the actual costs of utility services, security services and maintenance.

Fair rent methods are designed to fix rents in individual cases with a view to ensuring a fair return to the landlord on his investment while preventing gouging. However, fair rent methods can be quite vague. The legislation may simply demand that rents be 'fair' or 'reasonable' without defining or establishing standards for what constitutes a "fair" or "reasonable" price. Alternately, it may provide that the tenant can complain of 'unfair' or 'unreasonable' rent, again without offering clear definitions. In these circumstances, the court determines what is fair or reasonable for each individual case. Courts may consider the value of the property, comparable rentals, maintenance costs, the landlord's property expenses including mortgage and rates payments, and also what would be a fair return on the investment to the landlord. It has been suggested that the fair return to the landlord is a rate higher than the current interest rate on the fair value of the property plus an additional amount for entrepreneurial effort.¹⁴ The return is a net return, after running costs which are passed through to the tenant, or tenants pro rata.

As mentioned above, it is not enough to mandate that rents not be raised on a current tenant. Rent regulation legislation must also ensure that the

tenant cannot be evicted at the will of the landlord. Protecting tenants' right to remain in the premises prevents the landlord from replacing them with a new tenant at a higher rent and gives them the freedom to safely complain of rent control breaches without retaliatory eviction.

There are substantive and procedural security of tenure methods.¹⁵ Substantive security of tenure provisions limit both the times at which and reasons for which a tenant may be evicted. Procedural provisions ensure that tenants have an opportunity to be heard before being evicted.

Substantive methods include mandating that after a notice to quit is sent to a tenant the tenant must continue in possession with all their contractual tenancy rights (now a statutory tenant), until and unless the court orders eviction. Alternatively, they may mandate that a landlord may only recover possession of the property in specific circumstances such as breach of contract by the tenant, and place the burden on the landlord to prove the existence of those circumstances.

Procedural methods include mandating that a notice be served on the tenant terminating the tenancy, that there be no eviction unless the court orders it, that the application to court for the eviction must be served on the tenant, and that the tenant be heard by the court before any possession or eviction order is made.

Different combinations of these methods of rent control and securing tenure are used in individual countries securing different levels of protections to its tenant population. The following paragraphs examine the urban rent regulation regimes of Kenya, Lagos- Nigeria, Botswana, and South Africa to assess their level of rent regulation by identifying, categorizing, and comparing the occurrences and methods of rent control and security of tenure in their legislation.

03 SOURCES OF LAW

Botswana, Kenya, Nigeria, and South Africa are all countries located in Africa and former colonies of England. South Africa gained independence first, with autonomy in 1910, and full independence in 1931, Nigeria in 1960, Kenya in 1963 and Botswana in 1966. These similarities in location and political history encourage comparison, but South Africa's and Botswana's legal regimes differ due to the fact that they were once subject to Dutch Rule.

Because Botswana and South Africa were colonized by the Dutch prior to British rule their common law is a Roman-Dutch/English Common Law hybrid, with emphasis on the Roman Dutch principles. In contrast Nigeria and Kenya were colonized only by the British and have received the English Common Law in their legal system. All four countries have written constitutions, but only the South African 1996 Constitution enshrines access to adequate housing as a fundamental right¹⁶, likely because of their particular history of mass evictions to enforce segregation.

All four countries have a history that includes communal land ownership, customary Law, and customary justice systems. In South Africa¹⁷, Botswana¹⁸ and Kenya¹⁹, a general mandate is that customary justice and law are to be applied by all Courts, but subject to the Constitution and any written laws. Nigeria has Sharia Courts and Customary Courts²⁰ but the Magistrates and High Courts have exclusive jurisdiction in matters under the Tenancy Law Act of Lagos. Thus it appears that where the rent regulations apply, they will supersede customary law.

All four countries have had rent regulation prior to and post-independence, the earliest being South Africa in 1920. South Africa and Lagos have had the most legislative changes in their rent laws. In the case of South Africa, its rent regime has become less stringent. It moved from the comprehensive Rent Acts that allowed rents to be limited and substantively restricted the right to evict tenants, to a mix of Acts and the Common Law, that allow the court to reduce ‘exploitative’ rents but contain only procedural security of tenure protections. Lagos, Nigeria has refined its previous 1948, 1965 and 2007 Rent Acts into a comprehensive Tenancy Law Act, 2011 that does not limit rent but prohibits ‘unreasonable’ rent increases and contains substantive security of tenure provisions. Kenya’s last meaningful changes to its rent regulations were in 1981 but the 2007 Landlord and Tenant Bill is before its parliament. Botswana’s rent regulation regime has remained unchanged since 1977.

Table 1: Sources of Law

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
Sources of Law generally	<ul style="list-style-type: none"> • Constitution • Acts of Parliament • Received UK Acts • UK Common Law • Indigenous Customary Law²¹ 	<ul style="list-style-type: none"> • Constitution • Acts of Parliament • UK Common Law • Indigenous Customary Law • Islamic law²² 	<ul style="list-style-type: none"> • Constitution • Acts of Parliament • Common Law (Roman-Dutch/English hybrid) • Indigenous Customary Law²³ 	<ul style="list-style-type: none"> • Constitution • Acts of Parliament • Common Law (Roman-Dutch/English hybrid) • Indigenous Customary Law²⁴
Current sources of urban Landlord and Tenant Law	<ul style="list-style-type: none"> • Common Law • Rent Restriction Act 1959, Chapter 296 (RRA) • Landlord and Tenant (Shops Hotels and Catering 	<ul style="list-style-type: none"> • Common Law • Tenancy Law 2011 (TLA) 	<ul style="list-style-type: none"> • Common Law • Rent Control Act, 1977 Chapter 43:09 (RCA) • Rent Control Regulations, 1978 	<ul style="list-style-type: none"> • Constitution • Common Law • Rental Housing Act 1999, amended 2014 (RHA) • Unfair Practices Regulations

	Establishments) Act, 1965 • Community Land Act, 2016 (applies Community Lands only)		• Rent Control [Application] Order, 1983	2008 (UPR) • Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1988 (PIEUOL) • Magistrates Court Act 1944
Historical sources of urban Landlord and Tenant Law	• Rent Restriction Act 1959 • Landlord and Tenant (Shops Hotels and Catering Establishments) Act • Eviction of Tenants (Control) (Mombasa) Ordinance No. 61 of 1956	• Increase of Rent Restriction Act 1948 • The Rent Control (Lagos) Act 1965 • Rent Control and Recovery of Premises Law Cap R6 • The Rent Tribunals (Abolition and Transfer of Functions) Law 2007	• Rent Control Act of 1977	• Tenants Protection (Temporary) Act 1920 • Rents Act 13 of 1920 • Rents Amendment Act 26 of 1940 • Rents Act 43 of 1950 • Rent Control Act 80 of 1976
Year Landlord and Tenant laws last amended	2015 (substantial amendments last made 1981)	2011	1977	2014
Proposed reforms	The Landlord and Tenant Bill, 2007			

04 REGULATED TENANCIES

South African rent regulations do not apply to commercial tenancies. The Lagos regulations apply to both residential and commercial tenancies. In Kenya, there are separate regulations for residential and commercial tenancies. In Botswana the regulations can apply to both but have been implemented only for commercial tenancies. The definition of a dwelling house is broad²⁵ in all the Acts, expressly including rooms, huts and parts of buildings or structures used as a residence. There is no need to establish exclusive possession of the whole, or any minimum criteria for a structure to be considered a dwelling.

Table 2: Regulated Tenancies

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
Are residential tenancies rent regulated?	Yes Dwelling houses with a monthly rental of less than 2,500 shillings	Yes Partly regulated. TL s. 37 ‘Unreasonable’ increases in rent may be challenged by tenant	No RCA is designed to regulate residential rents but has not been implemented for residential tenancies - s.3 ²⁶	Yes
Are commercial tenancies rent regulated?	Yes Landlord and Tenant (Shops Hotels and Catering Establishments) Act	Yes Partly regulated. TL s. 37 ‘Unreasonable’ increases in rent may be challenged by tenant	Yes	No

Definition of dwelling house	RRA s3(1) 'any part of a house or room used as a dwelling or place of residence'		RCA s.2 'a building or part of a building separately let or room separately let which is used mainly as a dwelling or place of residence'	RHA s. 1 'any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage, or similar structure which is leased'
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05 RENT CONTROL

The four countries all have rent control. Botswana, which retains its 1977 rent legislation, controls initial rents requiring that the landlord apply to the rent tribunal to have the initial ‘controlled rent ascertained and certified.’ Kenya’s legislation last amended in 1981 allows initial rent to be fixed by mutual agreement of the parties but allows the tenant to ask the tribunal to fix the ‘standard rent’ according to the statutory formula or what the tribunal considers fair. In South Africa, although initial rents are agreed upon by the parties, tenants can complain of ‘exploitative rents.’ In Lagos initial rents are fixed by the parties not the law.

Botswana and Kenya both have percentage method rent control formulas pegged to the market value of the properties, while Lagos and South Africa rely on fair rent methods requiring the rents to be ‘reasonable’ and not ‘exploitative’ having regard to similar premises in the locality.

Rent increases are regulated in all four countries. In Kenya and Botswana, rent increases by formula and only when circumstances change, either when the tenancy period is up or the formula variables have increased. In South Africa and Lagos, it may be increased at any time, with notice to the tenant, but the increases must not be unreasonable or exploitative.

In Botswana, where the rent control laws are not yet applied to residential tenancies, the complaint is that the standard practice is to increase rent by 10% per year even though inflation has been around 2.8%,²⁷ on the face of it an unreasonable practice.

In Kenya, the Act has not been amended to keep pace with inflation and it still applies only to dwelling houses with a monthly rental of less than 2,500 shillings (USD\$25), which cannot be many.

Kenya's 1977 and 1981 Acts use the percentage method formula, while the 2007 and 1999/2014 Acts use the fair rent approach. It is clear that the modern rent control approach is to peg rents to what is 'reasonable' or 'fair' having regard to the value, condition and locality of the property and comparables as opposed to using the percentage method formula.

The earlier Acts control initial rents, the modern ones allow the parties to set initial rents but regulate increases. It is clear that modern approach is to allow freedom of contract in the beginning but maintain the status quo thereafter by ensuring that subsequent dealings are fair to the tenant.

The differences in approaches are not based on historical sources of law, Roman Dutch versus English Common Law jurisdictions, but appear to be based on the date the legislation was enacted. The modern approach is less intrusive: it does not regulate the initial rent or set a fixed formula for its increases, but instead allows the parties freedom of contract and the court discretion in assessing what is fair in their subsequent dealings - second generation rent regulation measures.

06 DISTRESS FOR RENT

All four countries allow landlords to seize and sell tenants household goods to recoup arrears of rent. In South Africa and Botswana, the ‘tacit hypothec’ (in effect an implied lien) is a Roman-Dutch Common Law right to seize and sell. In Kenya, the UK 1938 Distress for Rent Act is still employed. It could not be confirmed whether the 1933 Distress for Rent Bailiffs Act is still in force in Nigeria. In all countries the landlord must get a court order before the goods are sold. There are some limitations in the Distress Acts received from the UK as to what goods are immune from seizure and in the Botswana Tacit Hypothecs Act a limitation as to how much of the arrears may be distrained for, but the Courts do not interpret the limits purposively. In *Rh Industries Pty Ltd V Pasella Pty Ltd*²⁸ the court held that the provision, “The tacit hypothecation possessed by landlords ... shall not be claimable for any sum greater than one whole years rent,”²⁹ did not prevent the seizure of goods valued in excess of a year’s rent. The Tacit Hypothec can therefore be used to punish a tenant by depriving the tenant of the use of more of their goods than the landlord has the right to sell.

Table 4: Distress for Rent

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
Can landlords seize and sell tenants goods to recover rent owed them?	Yes Distress for Rent Act chapter 293(1938) RRA ss 5, 16 – must get permission of Rent Tribunal to distraint.	No TLA s. 8(v) the landlord shall not seize any item or property of the tenant. [possibly - Distress for rent Bailiffs Act 1933]	Yes s.5 Tacit Hypothecs Act, 1891 Cap. 12:01 codified Common Law. Landlords have a tacit hypothec over the tenants movables (invecta et illeta) ³⁰ in the leased premises ³¹ .	Yes Sections 31 and 32 of the Magistrates’ Courts Act, 1944 - landlord can prevent removal and apply to seize tenant’s movable goods for rent arrears. RHA r4 court order required.

07 LEASE FORMALITIES

The Courts recognize all agreements, whether oral or written, of fixed or unfixed terms, but the South African legislation encourages the use of written agreements and commands the Minister to develop and publish a standard lease form.

Agreements may be renewed by implication on the payment and acceptance of rent after the agreed term once a notice to quit has not been served.

Although lease agreements may be oral, landlords must give written rent receipts, in all the countries except Botswana. Landlords may charge a deposit at the beginning of the tenancy, (in Lagos not more than six months' rent and in South Africa it attracts interest) but are prohibited from imposing any additional fee as a premium to agree to rent or renew a lease in all of the countries except South Africa.

Table 5: Lease Formalities

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
Types of tenancies legally acknowledged	Oral, written, any duration	Oral, written, any duration	Oral, written, any duration ³²	Oral, written, any duration
Must agreement be in writing?	No	No TLA s.3 -express, implied, written, oral, fixed/unfixed term	No	Yes RHA 5(6A) Minister to develop standard lease precedent RHAA s 5 leases should be in writing UPR r.3 statutory terms apply whether oral or written lease UPR r. 4 delivery premises and payment of rent creates a tenancy
Renewal	By agreement	By agreement	By agreement, express or implied (Tacit relocation)	By agreement, express or implied (Tacit relocation).
Can landlords impose a deposit?	Yes	Yes TLA s.10	Yes	Yes RHA 4B RHA s.4 must refund deposit with interest.
Can landlords charge a fee or premium to agree to rent, or renew lease, or to remove tenant?	No RRA s.17– Charging premium to grant or renew a tenancy is a criminal offence.	No And, TLA s.4 prohibits paying or accepting more than 6 month's rent in advance.	No RCA s.8 an offence attracting imprisonment or a fine.	
Must landlords issue rent receipts to tenants?	Yes RRA s.21	Yes TLA s.5		Yes RHA s.4 UPR r.11

08 RIGHTS AND OBLIGATIONS OF THE LANDLORD AND OF THE TENANT

In Botswana, the rights and obligations of the parties are those at common law. In Kenya, Lagos and South Africa, the traditional common law rights have been codified and a few added.

The Roman Dutch and UK Common Law duties of parties to a lease are virtually the same. The Roman Dutch Common Law obligations on the Landlord are to deliver occupation, guarantee quiet enjoyment, do repairs, guarantee against defects and pay taxes. The tenants' obligations are to pay rent and take care of the property.³³ The UK Common law obligations on the landlord are to guarantee quiet enjoyment, not to derogate from grant (do anything that makes the tenement less valuable or unfit for lease purposes), and to keep the property in repair. The tenant has to pay rent and property rates and take care of the property.³⁴

The additional statutory provisions to provide utility services and not harass tenants by disturbing the supply of services to them speak to living arrangements that did not exist in the past. The very existence of utilities delivered to individual dwellings and shared dwellings like rooms, condominiums, that may include shared use of a utility supply, are newer incidents of modern living. The statutory interventions to impose duties and obligations regarding utilities on the parties are therefore minimal since existing legislation is largely a codification of the common law.

Table 6: Rights and Obligations of the Landlord and of Tenant

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
Tenants obligation- to pay rent	RRA s. 14 arrears is a ground for termination.	TLA s.7	Common law	UPR r.5
Tenants obligation – to keep in repair (fair wear and tear excepted)	RRA s.26	TLA s.7	Common law	UPR r.6
Tenants Obligation – to use premises only for rented purpose		TLA s. 25		UPR r.6
Tenant’s obligation -Not create a nuisance		TLA s. 25		UPR r.13
Tenant’s Obligation – to not sublet or assign without agreement	RRA s.27	TLA s.7		RHA s.4A UPR r13
Tenants Obligation- to not alter premises without permission		TLA s.7		
Landlord’s Obligation-deliver occupation to tenant			Common Law ³⁵	Common Law
Landlords obligation- keep premises in habitable condition	s. 26	TLA s. 8	Common Law	UPR r.6
Landlord’s obligation - to pay rates & taxes on property		TLA s.8	Common Law	
Landlord’s obligation- to insure		TLA s.8		
Landlord’s obligation-to provide utility services	No By agreement RRA s.23 –	No TLA s. 10 - By agreement and		No UPR r.6 – provide all

Landlord's obligation-to provide utility services.	depriving tenant of services agreed in lease is a crime.	attract a separate charge form rent.		services agreed to in lease UPR r. 12 not cut off utilities, charge only for those used.
Landlord's obligation- to afford tenant privacy		TLA s.7		RHA 4A right to privacy UPR r. 9 must give reasonable notice before inspecting tenement.
Landlord's obligation- to afford tenant quiet enjoyment of the premises		TLA s. 8	Yes Common Law - Commodus usus	Yes Common Law - Commodus usus UPR r.6
Landlord's obligation - not to harass or wrongfully evict tenants	RRA s.29 wrongful eviction or annoyance is a crime punishable with imprisonment and a fine.	TLA s.44 wrongful eviction, harassment, damage to premises punishable with imprisonment and a fine.		UPR r. 12 not cut off utilities
Landlord's obligation -to insure premises		s. 8 landlord to pay		
Landlord's obligation - to compensate tenants for Improvements by tenant		Yes TLA 6(2) value recoverable by tenant if improvements were with consent of landlord.		

09 TERMINATING A TENANCY

In all four countries, it is the duty of the tenant to vacate when the tenancy ends. If the tenant stays and the landlord continues collecting rent, the tenancy continues by mutual agreement as a periodic tenancy, the period being that at which rent is paid. If the tenant stays and does not pay rent, the landlord is entitled to damages/mesne profits, being the rental value.

No matter how the termination occurs, once the tenant remains in the premises, the tenant and the landlord are subject to the common law and statutory obligations and duties outlined above, until the tenant is evicted pursuant to an order of court.

All four countries have procedural safeguards. Each country, no matter how a tenancy comes to an end, requires that the tenant be served with a written notice to quit, even if it was a fixed term tenancy and the term has expired. All four countries mandate that if the tenant refuses to give up possession, the landlord cannot forcibly eject the tenant but must apply to the court for a possession order and if the tenant disobeys that order, then obtain an order for ejectment. These are procedural safeguards that guarantee a tenant a right to be heard by a tribunal before being evicted, and therefore protects the tenant from sudden, and also unlawful, evictions.

These safeguards are where the law diverges in the four countries. Some have substantive safeguards and some do not. Substantive safeguards afforded to tenants are those that dictate the circumstances in which a

Fixed term leases end with the expiration of the term; periodic tenancies (weekly, monthly, yearly) on service of notice; all tenancies by mutual agreement, destruction of the property, or forfeiture or renunciation of the lease by one party for cause. In Lagos, legislation specifically sets out the notice periods for different periodic tenancies.

In South Africa and Botswana, the Roman Dutch Common Law applies and dictates that the landlord is entitled to possession: if the tenancy term has expired, on notice for periodic tenancies, or if the tenant is in breach of the lease agreement. There is no longer security of tenure beyond the duration of the lease³⁶ since the abolition of the old Rent Acts under which the landlord was only allowed possession in specific circumstances. At Common Law, the landlord brings an action for possession the ‘*rei vindicatio*’, where the landlord proves that the landlord owns the premises and that the defendant is in occupation. The landlord need not prove unlawful occupation— the burden is on the tenant to prove a right to occupy.³⁷ There is no need for the landlord to give a reason for terminating the tenancy or wanting possession. The landlord may demand possession virtually at will if it’s a periodic tenancy.

The only curtailment of that right to possession in South Africa is by section 4(9)(c) of the RHA which mandates that a landlord’s reasons for termination must not “constitute an unfair practice.” What is unfair falls under the discretion of the Court and is not limited to systemic conduct, as a termination of a lease solely to get a higher rent from a new tenant was held to be an unfair practice.³⁸ Whether the termination is unfair is not a question for the High Court in the possession action but rather is to be determined by the Rental Housing Tribunal.³⁹

In Kenya and Lagos, landlords are only allowed to retake possession and evict tenants if the tenant owes rent, has breached the agreement, created a nuisance, used the premises illegally, or if the landlord needs it for his own use or substantial repairs.

In Kenya and Lagos, the landlord must prove a right to evict. In Botswana and South Africa, the tenant must prove a right to stay.

There is therefore no substantive safeguard in Botswana and only a discretionary ‘unfair practice’ safeguard in South Africa, as opposed to the substantive detailed safeguards in Kenya and Lagos. These differences are not explained on the basis of when the legislation enacted since Kenya has the oldest legislation (1959) and Lagos the newest (2011). They must therefore be on the basis of policy.

Table 7: Terminating Tenancies

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
How to terminate lease	s. 15 – Notice in writing	TLA s. 13 - statutory notice periods for different tenancies TLA s.16 – serve notice to quit	Serve notice cancelling lease Common Law	Serve notice cancelling lease ⁴⁰
Grounds for termination	RRA s.14 <ul style="list-style-type: none"> • arrears of rent • breach of agreement • tenant creates nuisance • tenant used the premises illegal or immorally • tenant gives notice 	TLA s. 13 – tenancy shall lapse and possession order issue if rent not paid for prescribed periods TLA s. 25: <ul style="list-style-type: none"> • arrears of rent • breach of agreement • required for landlord’s own use • tenant used the premises illegally 		Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) came into operation on 5 June 1998.

		<ul style="list-style-type: none"> • tenant abandoned premises • premises uninhabitable • tenants creates nuisance <p>TLA s. 26 Fixed term tenancy ended</p>		
Status of tenant on termination	s.24 – Statutory tenancy – tenant retains possession until court makes order of possession and that statutory occupation is subject to the benefits and obligations of the tenancy	TLA s.16, 24- Statutory tenancy-tenant retains possession until court makes order of possession TLA s. 31 Landlord can claim sum for use and occupation	Common Law Tenant in possession until court orders ejection. Landlord can claim sum for use and occupation.	Common Law Tenant in possession until court orders ejection. Landlord can claim sum for use and occupation.
Prerequisites to eviction	Serve notice to quit Bring legal action for possession and ejection RRA ss. 5, 14, 15	Serve notice to quit Bring legal action for possession and ejection TLA ss 13- 36, 39-45	Serve notice cancelling lease Bring legal action for cancellation of lease and order of ejection ⁴¹ Common Law action rei vindicatio ⁴²	Serve notice canceling lease Bring legal action for eviction order RHA s4B(7)(d) UPR r.8- order of court PIEUOL ss. 4,5,9
Courts that can grant possession	RRA s.5(1)(f) Rent Tribunals RRA s.30 Rent Tribunals have the power of the High Court RRA s. 8 Appeals to Environment and Land Court	TLA s. 45 Magistrates Court, Appeals to the High Court	High Court	Magistrates Court and High Court ⁴³ in area where premises are

10 COURTS WITH JURISDICTION

In Kenya, the Rent Tribunal has the power to deal with both rent and possession. In Lagos, the Magistrates Court has the power to deal with both rent and possession. In Botswana, the Rent Control Tribunal deals with rent and the High Court with possession. In South Africa, the Rental Housing Tribunal determines what constitutes an ‘unfair practice’ and the Magistrates or High Court deals with possession.

In South Africa, therefore, to challenge possession proceedings a tenant may have to make two separate applications to two separate courts, which is a burden and an access to justice issue.

Table 8: Courts with Jurisdiction

Characteristics	Kenya	Lagos- Nigeria	Botswana	South Africa
What court deals with rent conflicts?	RRA ss.4, 5, 30 - Rent Tribunals RRA s.8 -appeal to Environment and Land Court on points of law.	TLA s. 45 - Magistrates Court or High Court	RCAs.4 -Rent Control Tribunal RCA s.7 -Appeals to the High Court	RHA s.13 - Rental Housing Tribunal Any complaint of ‘Unfair practices’ which may include 13(4) (c) ‘exploitative rentals’

Courts that can grant possession	RRA s.5(1)(f) Rent Tribunals RRA s.30 Rent Tribunals have the power of the High Court RRA s. 8 Appeals to Environment and Land Court	TLA s. 45 Magistrates Court, Appeals to the High Court	High Court	Magistrates Court and High Court ⁴⁴ in area where premises are
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11 ANALYSIS

The four countries have similar political histories but apply different common laws. South Africa and Botswana apply Roman Dutch, and Kenya and Nigeria, English Common Law principles. That difference has little impact because the Roman Dutch and English Common Law are very similar in relation to the rights and duties of landlords and tenants. The countries all apply customary law when it doesn't conflict with the constitution and written laws, which means that specific rent regulation legislation will likely override customary laws.

The countries all have rent regulation legislation: in Lagos all tenants are protected, in Kenya some residential and commercial tenants are protected, in South Africa residential tenants are protected, in Botswana commercial tenants are protected. The rent regulations in Lagos and Kenya therefore protect a greater part of the citizenry than the others. In Kenya, however, the residential tenancies to which the regulations apply are those with rents below 2500 shillings, a rate that has not kept up with inflation and therefore applies to very few tenancies.

Each of the countries have rent control. Botswana and Kenya use percentage method formulas, while Lagos and South Africa use fair rent formulas. In Lagos and South Africa, initial rents and rent increases are by mutual agreement but are subject to review for fairness if the tenant complains. In Botswana and Kenya, initial rent and rent increases are pegged to the percentage method formula. Lagos and South Africa therefore allow more freedom of contract, even though Lagos and Kenya

are more similar in legal history, as are South Africa and Botswana. The similarity in Lagos' and South Africa's legislation may be because they are more recent than the Botswana and Kenya legislation. The preferable modern approach to rent control may be to use the fair rent method.

The fair rent method relies on the court assessing whether rents are exploitative or not, having regard to the individual premises, comparable premises, the dealings of the parties, and the state of the market. Rent control is imposed in times of shortage and 'is conceived of as temporary and the legislation must be reviewed periodically.'⁴⁵ Ways to ensure review include mandating evaluation, or inserting a sunset clause limiting the legislation to a specific term of years. Short of that, the fair rent method may be more responsive to changes in circumstances than the percentage method. They both have regard to value of the property, but the percentage method, unlike the fair rent method, does not allow the court to consider the effects of a rental shortage, any of the prior history of the tenancy or of the parties in what may be fair in a landlord and tenant situation. The fair rent method may therefore be the more responsive to changing markets and more in keeping with the temporary nature of rent control, and thereby also be more considering of landlords' financial interests.

Rent deposits are best regulated in Lagos, which imposes a limit on the quantum. The second-best regulation is that of South Africa, which requires a landlord to refund the deposit with interest. These provisions prevent landlords from circumventing rent control by demanding excessive deposits.

South Africa seeks to ensure that all lease agreements are in writing, but all countries acknowledge oral and written agreements, and the obligations of landlord and tenant apply to all tenancies whether evidenced in writing or not. All tenants are entitled to enjoy habitable premises without interruptions of services or occupation, all landlords are entitled to receive prompt rent payments from non-destructive tenants who aren't a nuisance to neighbours. These rights apply in Kenya by Common

Law and in the other countries the same rights are codified, with a very few added. Although there is little difference, codifying these long-established principles may make knowledge of them more accessible to both landlords and tenants. Codification may also be used to make it clear that these rights apply to occupants of shared premises using shared utilities.

In all of the countries there are procedural safeguards from eviction. The tenant must be served with notice demanding possession, with notice of possession court proceedings, and has a right to be heard in court. There are no substantive safeguards in Botswana and limited substantive safeguards in South Africa. In Botswana, it is the tenants' burden to prove their tenancy is lawful, and in South Africa they must prove termination of the tenancy is unfair or face eviction. In contrast, Kenya and Lagos have substantive safeguards against eviction that place the burden on the landlord to prove that the landlord requires the premises for their personal use or that the tenant is in breach of their obligations. In Kenya and Lagos, the security of tenure provisions better protect tenants.

In all jurisdictions the Common Law impinges to varying degrees on the landlord and tenant relationship. In addition, the South African landlord and tenant relationship is regulated by at least five separate pieces of legislation, while in Botswana, Kenya and Lagos it is regulated by one. The Lagos Tenancy Law Act addresses more citizens and more incidents of the relationship than the others.

In Kenya and Lagos, rent and possession conflicts are heard by the same court, while in Botswana they are heard by separate courts. In South Africa, a possession conflict may have to be litigated before two separate courts. Having one court deal with rent and possession matters makes it easier for both landlords and tenants to access justice.

Which combination of rules may be most effectual in promoting security of tenure and predictable, if not affordable, rents for the urban poor? An effectual regime ought to have specialized courts that substantially protect tenants from arbitrary eviction and enforce rent control that is clear, predictable, allows capital recovery, and responds to inflation.⁴⁶

An effectual rent regime ought to be clear as to whom it applies, such as the Lagos Act which applies to all tenancies and the Kenya legislation which applies to tenancies of or below a certain value. However, it is unnecessary to restrict luxury rentals, and it may be hard to implement a regime based on rental value where inflation is faster than law revision. A good formula may be therefore be one that applies to tenancies of or below a certain value, like the Kenyan provision, but to allows that value to be set in subsidiary legislation so that the regime can be responsive to market changes.

Protection from arbitrary eviction is best secured by a scheme that has substantive security of tenure provisions like those of Kenya and Lagos that restrict the landlords right to possession and places the burden on the landlord to prove the right to possess.

Both fair rent and percentage methods of rent control may be clear and transparent, once the formulas are simple and easily understandable by both the court and the citizenry. Fair rent formulas are more flexible but may limit protection because what is a fair and comparable rental having regard to properties similar in location and repair, is not always fair having regard to economic factors like a stagnant minimum wage, coupled with rising inflation that facilitates rentals at a usurious rate of return on the landlords investment. The percentage method may also be unfair if it is pegged to a rate of return that becomes higher than the rate of inflation, or if it is too complicated to for the 'ordinary man' to calculate.

The freeze rent method is a drastic regime that is the least adaptable and most likely to discourage rental housing investment, so it ought only to be used in conjunction with a sunset clause that guarantees its review.

In societies with a large poor tenant population at risk, the percentage method rent control formulas pegged to the market value of the properties, like those in Botswana and Kenya, may be desirable. A realistic sustainable formula would apply to all rentals below a specific value, set the standard or controlled base rent fixed to the market value of the property and allow the landlord to pass through the running costs of the unit to the tenant. Increases may be linked to inflation, and or cost of repairs and upgrades, but implemented only when a tenancy period is up and with fair notice to the tenant.

This kind of regime protects tenants by automatically applying to all regulated tenancies whether or not a tenant makes a complaint, and therefore does not place a burden on a tenant to invoke the protection of the regime. It is more implementable because it applies to all regulated tenancies in the same manner at the same rates. The formula is responsive to economic changes because the original base rent is linked to the market value of the property, and rent increases are linked to inflation. It is sustainable in that it provides the landlord capital and expenses recovery and predictable rent increases.

One way to enhance predictability in the landlord and tenant relationship is to codify the common law obligations of landlord and tenant. In codification, new modern rights and obligations may be added as well as historical rights particular to the locality that are incidents of customary law. The Act can specify that the codified rights and obligations apply to all tenancies whether of shared premises, rent regulated or not, and whether evidenced in writing or not.

A regime that is easy to discover aids in access to justice. It is difficult to sift through several pieces of legislation to see which applies as is the case in discovering the South Africa regime. The rent control and security of tenure provisions for all residential and commercial premises ought to be combined in one easily accessible document, as it is in the Lagos regime. That same document ought to address security of tenure for premises that are not rent controlled.

Finally, the regime ought to be easy to enforce. This may be facilitated by having rent and possession conflicts heard by specialized courts whose decisions may only be appealed on a point of law. Lagos has both rent control and possession conflicts handled by the same court, but that court, the Magistrates Court, is not specialized. Botswana and South Africa have specialized courts for rent, but possession is dealt with in a separate court. The preferred approach may be in line with the Kenyan legislation which gives the specialized Rent Tribunal the power to deal with both rent and possession.

CONCLUSION

Rent regulation is much maligned and unfairly accused of creating a shortage of rental housing and eroding private interests. However, it is usually imposed on free markets precisely due to a shortage of rentals, and experience shows that a two pronged approach of protections for tenants coupled with incentives for landlords acknowledges private interests and can stimulate supply.

Rent regulation is a system of laws controlling rents and tenant evictions aimed at ensuring that rentals are affordable. It reduces both the incidence and fear of homelessness by setting substantive and procedural guidelines to control increases in rent and tenant evictions, thereby preventing landlords from profiting from rental shortages and enabling tenants to remain in existing rentals.

The rent specific interventions can be categorized as first generation, which are strict rent freezing temporary measures, and second generation long-term measures which allow rents to move but regulate the frequency and quantum of increases. Another characterization is by the specific methods of rent control, which are to fix a maximum rent date, set percentage rent rate, impose a fair rent requirement, or a combination of the three.

It is not enough to mandate that rents not be raised on a current tenant—rent regulation legislation must also ensure that the tenant can't be evicted

at the will of the landlord. Protecting their right to remain in the premises prevents the landlord from replacing them with a new tenant at a higher rent and gives them the freedom to safely complain of rent control breaches without retaliatory eviction. There are substantive provisions that limit the times at which, and reasons for which, a tenant may be evicted in addition to procedural provisions, which ensure that tenants have an opportunity to be heard before being evicted.

Different combinations of those methods of rent control and securing tenure are used in individual countries to secure varying levels of protections to its tenant population.

An examination and comparison of the urban rent regulation regimes of Kenya, Lagos- Nigeria, Botswana, and South Africa shows that each of the jurisdictions has rent control and security of tenure elements that if combined may be effectual in promoting security of tenure and predictable, if not affordable, rents for the urban poor. An effectual regime ought to have specialized courts that substantially protect tenants from arbitrary eviction and enforce rent control that is simple, predictable, allows capital recovery, and responds to inflation.

Protection from arbitrary eviction is best secured by a scheme that has substantive security of tenure provisions like those of Kenya and Lagos that restrict the landlord's right to possession and places the burden of proof on the landlord regarding the right to possess.

A good formula for rent control may be one that applies to tenancies below a certain value, like the Kenyan provision, but allows that value to be set in subsidiary legislation so that the regime can be responsive to market changes.

In societies with a large poor tenant population at risk, the percentage method rent control formulas pegged to the market value of the properties, like those in Botswana and Kenya, may be desirable. A sustainable formula would apply to all rentals below a specific value, set the standard or controlled base rent fixed to the market value of the property and allow the landlord to pass through the running costs of the unit to the tenant. Increases may be linked to inflation, and the cost of repairs and upgrades, but implemented only when a tenancy period is up and with fair notice to the tenant. The formula is responsive to economic changes because the original base rent is linked to the market value of the property and rent increases with inflation.


This kind of regime protects tenants by automatically applying to all regulated tenancies whether or not a tenant makes a complaint, thus it does not place a burden on a tenant to invoke the protection of the regime. Furthermore, it facilitates rental housing investment by allowing capital and expenses recovery and predictable rent increases.

The common law obligations of landlord and tenant should be codified. New rights and obligations that have arisen from modern living and historical customary rights and obligations may be added. These obligations and rights ought to apply to all tenancies whether oral or written, and whether rent controlled or not.

The rent control and security of tenure provisions for residential and commercial premises may be combined in one easily accessible document, as it is in the Lagos regime, and rent and possession conflicts ought to be heard by specialized courts whose decisions may only be appealed on a point of law.

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RENT REGULATIONS IN KENYA, LAGOS- NIGERIA, BOTSWANA AND SOUTH AFRICA: A COMPARATIVE ANALYSIS

URBAN LEGAL CASE STUDIES | VOLUME 9

Rent regulation is a system of laws controlling rents and tenant evictions aimed at ensuring that rentals are affordable. It reduces both the incidence and fear of homelessness by setting substantive and procedural guidelines to control increases in rent and tenant evictions, thereby preventing landlords from profiting from rental shortages and enabling tenants to remain in existing rentals.

This document examines the legal framework regulating the urban landlord and tenant relationship in Botswana, Kenya, Lagos State-Nigeria, and South Africa. It is not an essay on the ideology of rent regulation, but rather an examination of legislation those states enacted for regulating tenancies to identify what rules may be included in a comprehensive rent regulating regime that promotes security of tenure and affordable rental housing for the urban poor.

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UN  **HABITAT**

UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME
P.O.Box 30030, Nairobi 00100, Kenya
Tel: +254-20-7623120
Fax: +254-20-76234266/7 (Central office)
infohabitat@unhabitat.org
www.unhabitat.org

