Expounding Theoretical Foundations of Rent Control Through A Moderate Approach: A Critical Appraisal

Issa Akanji ADEDOKUN *

ABSTRACT

The dynamics of development and change in rental housing had engendered structured modes of effecting landlord and tenant contractual relationship through rent control mechanism. Rent control has been described as an interventionist instrument introduced by the government to check incessant and arbitrary increases in rent by the shylock landlord. This policy instrument is not without its foundation, as various theories and rationales for its imposition have been put forward by scholars. To this end, this paper sets out to expound the theoretical foundation of rent control with a view to espousing an ideal theory. The ideal theory is capable of guiding policymakers in making all-encompassing rent control legislations that integrates socio-economic concerns of the relevant stakeholders in the housing market. Using the doctrinal method of research, this paper critically explores three distinct theories of rent control that have been identified. Beginning with the libertarian theory espoused by Epstein; the personhood theory remodeled by Radin; and the economic welfare approach. Within the latter perspective, the paper proposes a moderate theory drawn from economic welfare account as an ideal theory capable of interrogating the most effective model for regulation in the rental market. The proposed theory shows that a well-established regulatory system, can enhance a reasonable balance between protecting tenants and encouraging investment in the rental market.

KEYWORDS: Rent control; Theories; Rental housing; Legislation; Policy.

Introduction

Across the world, the role of the private rented housing sector in meeting a range of housing needs that cannot be met through social housing is increasingly at the forefront of housing policydebates.[1]

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[*] ***LL.B (Hons), B.L., LL.M., Ph.D. (Lagos); Lecturer, Department of Private and Property Law, Faculty of Law, University of Lagos, Akoka, Yaba, Lagos, Nigeria. Email: isadedokun@unilag.edu.ng***

[1] M. Colean, 'The Rental Housing Mystery,' in *Architectural Record*, (February 1947) Vol. 105 No. 2, pp.81-85; L. Rodwin, 'Rent Control and Housing,' *Social Research*, (September 1950) Vol. 17, No. 3, pp. 302-319; B. C Abdullahi, & W. A Abdul Aziz, 'Nigeria's Housing Policy and Public Private Partnership (PPP) Strategy: Reflections in Achieving Home Ownership for Low Income Group in Abuja, Nigeria.' (2010), *Urban Dynamics*

A key aspect of the debate is how best to regulate the private rented sector to ensure an adequate supply of units while simultaneously protecting tenants from the vicissitudes generatedby market forces. Amidst this debate, advocates of rent control argue that introducing control can cap rent payable at a reasonable level and protect tenants from excessive rental increases in the face of housing supply shortages. The effect of such housing shortages gives the investors in *laissez-faire* free-market capitalism the latitude to fix rent at will, thereby leaving the tenants at the mercy of the shylock landlord.[2]Given the scale of these extortionate tendencies, assuring a just price in such a market represents a justified intrusion of government in the free-market economy when a market failure exists or when the operation of a free market erodes the interests of the least-advantaged members of the society.[3] Sharp criticisms have, however, been raised on the ground that rent control as a policy mechanism is misguided.[4] Several literature expressly declared that rent control accelerates housing from tenancy status to homeownership status, discourages housing production and results in inefficient use of housing resources.[5]

Against the backdrop of this debate, this paper critically appraises rent control as a policy instrument and its various theories with a view to recommending an ideal theory for interrogating and ascertaining the most effective rationale for regulation. The paper is, however, aware of the existence of numerous theories of regulation in general and rent control in particular that have been propounded over the years by many theorists.[6] But for the purpose of this paper, the focus shall be

and Housing Change. Available at: <http://bmdynamics.com/issue_pdf/bmd110384-%2060-68>. accessed 22/02/25.

[2] L. Sirr, 'Renting: 'Urbanisation, Legislation and Professionalization', in L. Sirr (ed), *Renting in Ireland*: The Social, Voluntary and Private Sectors. (2014) *Institute of Public Administration* 266.

[3] As with all vital societal resources, government holds a legitimate interest in ensuring reasonable access to housing for all its citizens. See M. Norris & D. Coates, 'Private Sector Provision of Social Housing: An Assessment of Recent Irish Experiments' (2010) *Journal of Public Money & Management* Vol. 30 Issue 1, p.19.

[4] F.A. Hayek, M. Friedman and G. J. Stigler, et al, *Rent Control: a Popular Paradox (*Canada: The Fraser Institute Publishing 1975) 14.

[5] (n 1).

[6] Such theories include but not limited to public interest theories; the Chicago theory of regulation; the public choice theories; the libertarian theory; the home and personhood and economic welfare theory. A. C Pigou,*The Economics of Welfare*, 4th ed., (London: Macmillan and Co, 1960) 336-380.

to examine in brief the public interest theory as it applies to regulation in general before discussing theoretical approaches that are of particular relevance to rent control. The analysis begins with the economic welfare theory of rent control. The next analysis explores the libertarian theory espoused by Epstein, and lastly, the Home and personhood theory analysed by Radin. The core of the diverse of these theories is critically analysed, and the criticisms that have been levelled against them. From the economic welfare perspective, the paper finds that regulation is designed to benefit the public by solving collective action problems and the need for the State to intervene when the private market fails to allocate resources appropriately. In contrast, the libertarian views rent control as an unjustified tool for expropriation on the assumption that it constitutes a confiscation of private property without compensation by the government for private purposes. Upon a critique of these theories, this paper shall contend that, notwithstanding the concerns expressed by the Libertarians and other critics of rent control in general, if properly employed, rent control can be a more effective policy mechanism that can improve the security of a tenant's tenure while improving landlord's drive for fair returns on his investment.

To this end, this paper posits that, except for the economic welfare theory, which takes a wider view of the rationale for the State's intervention in the private rental market, other theories analysed are too narrow to interrogate the policy of rent control. The paper subsequently proposes a moderate theory of rent control drawn from economic welfare theory as an ideal theory. This proposed theory can be used as a template for interrogating rent control policy to guide policymakers in making all-encompassing rent regulation. The proposed theory advocates a decontrol of rents for prospective tenants, while advocating steady rise in rent in occupied apartments at market rates monitor by a designated government agency.

For proper interrogation of this paper, it is divided into four parts. Part one is the general introduction to rent control and some conceptual clarifications. Part two highlights the rationale for rent control and traces, in brief, a sense of historical perspective, its evolving paradigm in bothformer centuries and modern times. Part three analyses the theoretical foundations of rent control as well as the criticisms that have been levelled against these theories. Part four and five conclude with concise recommendations.

Conceptual Clarifications

To guide the discussions in this work, the paper clarifies some of the key concepts that underpin the discussion, namely: "Rent control", "First-generation rent control", and "Second-generation rent control".

Rent Control

The subject "rent control", otherwise known as rent regulation, is very wide. It covers many areas such as: the aspect that deal with the control of rents regarding agricultural land, industrial property, or it may be limited either to dwelling houses or commercial buildings.[7]It has been defined as a drastic form of statutory intervention to provide tenants with continued occupational rights on termination of their leases.[8]Learned writers have also proffered definitions of rent control.[9] It also allows a landlord to set rent freely when letting by a new tenant but subject to the tenant's right not to accept and prevent the landlord from raising the rent or ejecting the tenant at will.[10] It sometimes functions as a price ceiling. This definition implies that a ceiling is placed on the amount that can be charged, in which government usually imposes a limit to which rent on accommodation could rise. The limit represents the maximum rent which is usually below the open market value of such accommodation units.[11]

[7] K. Frimpong, 'A Review of Rent Control Legislation in Botswana.' (1989) *Journal of African Law* 33 (1) (Spring), 45-54;L. Sturtevant, 'The Impacts of Rent Control: A Research Review and Synthesis'. Available at <www.nmhc.org> accessed 21/03/25.

[8]*South African case of Maphango v Aengus Lifestyle Properties 2012 ZACC 2.*

[9]The term '*price'* connotes more than the monetary value placed on goods (or service), but means the entire consideration attached to the goods. A.O Oni, et al ''Rent Control and Residential Property Values in Lagos State Nigeria.' (2007) *Journal of Land Use and Development Studies, 3(1), 78 – 94;* W. Tucker, 'How Rent Control Drives Out Affordable Housing.'' Cato Policy Analysis No. 274, May 21 1997 p.15; K. Basum, and P. M. Emerson, 'Efficiency Pricing, Tenancy Rent Control and Monopolistic Landlords.' (2003) *Economica* 70, 223 – 232.

[10] Ibid.

[11] This is exemplified in the United States of America where there are laws or ordinances that set price controls on the renting of residential housing. (It was first adopted in the U.S.A. in response to World War II-era shortages, and remained in effect in some cities with large tenant populations. Such large cities are New York, Washington,

The term rent control is sometimes referred to as first-generation controls, otherwise known as a hard or strict control, and second-generation controls as soft controls, otherwise known as moderate rent controls.[12] Whether hard or soft control, it is instructive to know that a general consensus exists among economists and various theorists of control about the consequences of rent control regimes such as first-generation control, which fails to provide for rising maintenance costs or housing price inflation.[13]

First and Second Generation Control

It is difficult to predict exactly what results control will have independently of the specific type of control which are being used and the context of their use without a proper evaluation of rent control typology. Consequently, for better clarification of the concept of rent control, a distinction is made in this paper between what is called first- and second-generation systems of rent control, referred to as "hard" and "soft" rent control, respectively.[14]

First Generation Rent Control

In its purest form, rent control is a freeze on rents. Economists often refer to this type of rent control as "hard", "pure", or sometimes "first generation" rent control. The first-generation controls were nominal rent freezes; this hard form of rent control is almost unequivocally bad.[15] These first-generation rent controls create 'rent ceilings' beyond which landlords cannot statutorily increase rents. As such, they only create shortages of rental accommodation if they are set below the market-clearing rent level. On this point, a wide range of theoretical and empirical evidence suggests that

D.C., San Francisco, and smaller communities like Santa Monica, Berkeley and so on. K. H. Carlson, ‘‘Rent Control Made Simple’’ Available at http://www.caltenantlaw.com. Last accessed October 19, 2024.

[12] G. Fallis, and L.B Smith, ‘Uncontrolled Prices in a Controlled Market: the Case of Rent Controls.’ (1984) *American Economic Review* 74, 193-200.

[13] R. P. Albon, & D.C. Stafford ‘Rent Control and Housing Maintenance,’ (1990) *Urban Studies,* 27(2), pp. 233-240; R Arnott, ‘‘Rent Control and Options for Decontrol in Ontario’’ (1980) (Toronto, Ontario Economic Council); M. Frankena, ‘Alternative Models of Rent Control’, (1975) *Urban Studies,* 12, pp. 303-308; J. Cooper & R. Dhavan (ed)., *Public Interest* (Blackwell Ltd: New York, 1987) 53.

[14] For indepth analysis of rent control typology: R. Arnott, ‘Time for Revisionism on Rent Control?’ *(*1995) *Journal of Economic Perspectives* 9, 99-120.

[15] First-generation rent control programmes were introduced in most major cities in Western Europe during World War I to mitigate the disruptive effects of the War and to prevent profiteering. D. Coleman, ‘Rent Control: the British Experience and Policy Response.’ (1988) *Journal of Real Estate Finance and Economics* 1: 233

first-generation controls have many other negative unintended consequences.[16] By the late 1900s, many of these types of rent control had developed into more complex systems which regulated rents within tenancies: widely known as 'second generation rent control'.[17]

Second Generation Rent Control

As noted previously in this paper, the negative effect of first-generation control on the private housing market is profound. Over time, these crude controls were abandoned, and more recently, 'second generation' controls were implemented.[18] Various terms have been used for such regimes. Gilderbloom uses 'moderate rent control', Gupta & Rea also use the term 'second-generation controls', Arnott uses 'soft rent control', 'rent review' and such controls are often referred to by using the more benign-sounding phrase 'rent regulation.[19]

In such regimes, part of the rental housing stock such as new construction or units vacated by their tenants—is typically exempt from controls.[20] The second-generation controls are more flexible and allow nominal rent increases in several situations.[21]Arnott opined that the economists' critique might be correct concerning first-generation rent control. However, the arguments are not relevant against second-generation rent control given the reliefs it offers the investors in the rental

[16] First generation control also known as simple controls on nominal rents were implemented in many countries during and after periods of war in the 20th century to prevent alleged profiteering by landlords. See S. Heath, 'Rent Control in the Private Rented Sector in England'. *House of Commons Library Standard, Note: SP/6760. (2014).* Unsurprisingly, they proved more difficult to abolish than to implement. These 'first generation' rent controls in effect create 'rent ceilings' beyond which landlords are unable to increase rents. B. Jenkins, "Rent Control: Do Economists Agree?" *Econ Journal Watch* (2009) 6 (1).

[17]R. Arnott, 'Tenancy Rent Control', *Swedish Policy Review,* (2003) 10, 89-121, at 102-3.

[18] From the 1970s onwards, particularly after the energy crisis of 1973, many governments, imposed rent controls as part of their strategy of reducing inflation, but did allow for rents to be increased by a defined annual amount, usually related to the general cost of living, and that improvements to the dwelling etc. These more flexible rent controls are known as second-generation rent controls. Ibid.

[19] J.I Gilderbloom, 'Moderate Rent Control: Its Impact on the Quality and Quantity of the Housing Stock,' (1981) *Urban Affairs Quarterly* 17(2), pp. 123-142; D.K Gupta, & L.M Rea, 'Second-Generation Rent Control Ordinances,' (1984) *Urban Affairs Quarterly,* 19(3), pp. 395-408. This writer had concluded in his doctoral thesis that the second-generation control is interchangeably referred to as third generation control as its effects are the same with the second-generation control. This explains why it is needless to create a categorisation of it as a separate heading for discussion. Issa Adedokun, *Moderate Rent Control Approach As A Mechanism of Maintaining Balance of Interests Between Landlords and Tenants in Lagos State, Nigeria* (Ph.D. Thesis, University of Lagos, Nigeria 2023), pp.1- 213, 45.

[20]Ibid.

[21] Coleman (n 15) 233.

market. He opines thus:*Since second-generation rent controls are so different, they should be mainly evaluated independently of the experience with first-generation rent controls.*[22]

There are, of course, significant variations between different second-generation rent control regimes, but they all seem to have far fewer adverse effects than old-style regimes.[23] As Arnott asserts, a well-designed rent control programme can improve efficiency in an imperfect market by eliminating externalities.[24]

This paper opines that in view of beneficial effects of second-generation rent control, it is thus difficult to generalise that rent control reduces the quality of housing and other ills attributed to it by its critics due to recent perspectives showing revisionism in rent control debate and growing acceptability that a well-designed rent control program can be beneficial.[25]The next segment of this paper, therefore, examines the rationale of rent regulation.

Rent Control and its Rationale

Academic and policymakers differ significantly in their views on the rationale and purpose of regulations by the State. Friedman and Stigler opine that Governments have three main reasons for imposing rent control.[26] The first is the fear that those who can afford the payment of arbitrary rent will get all the housing benefits, and the poor will be relegated to the background. The second is that landlords benefit too much from rents that rent-gouging landlords can indefinitely raise.[27]

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[22] Arnott, (n 14).
[23] A. Boersch-Supan, 'On the West German Tenants' Protection Legislation', (1986) *Journal of Institutional and Theoretical Economics*, 142, pp. 380-404.
[24] R. Arnott (n 14) 100-1.
[25]Ibid, 99. Unsurprisingly, few commentators now advocate the sort of crude controls that were seen in Britain and elsewhere instead there are calls for 'second-generation' rent controls, in particular in the form of 'tenancy rent controls'. D. Dorling, *All that is Solid: the Great Housing Disaster*. (London: Penguin Books 2014) 5.
[26] M. Friedman and G. Stigler, 'Roofs or Ceilings? The Current Housing Problem' *Popular Essays on Current Problems* (Irvington-on-Hudson: Foundation for Economic Education, 1946) Vol. 1, No. 2.
[27] Gouging is considered as charging rent above market clearing. It involves landlords receiving an increase in rents through an increase in the value of his or her property caused simply by short supply and excessive demand. W. Stanbury, 'The Normative Bases for Rent Regulation' 1985a, (Research Study No. 15 prepared for the Ontario Commission of Inquiry into Residential Tenancies, Toronto). Ch. 2, 8.

The third is that a rise in rents is a form of inflation and should not be allowed. However, counter-arguments against these tripod rationales have also been identified.[28]

The first rationale is highly questionable: as Friedman and Stigler observed upon examination of the housing record of San Francisco in 1906 and concluded that during the acute shortage in the year 1906, inexpensive flats and houses were available. Lastly, the response to the second and third argument that landlords benefit too much from rents and high rents are a form of inflation. Friedman and Stigler further observed that one does not keep prices down in an economy merely by taking commodities off the market, as rent controls do.[29]

Literature also exists to the effect that government intervention through regulation is necessary only where there is market failure.[30] This assertion is rooted in the public interest theory of regulation first developed by Arthur Cecil Pigou.[31] Though an in-depth analysis of public interest theory is outside the scope of this paper, a brief account of public interest theory is, however, necessary as it highlights the basis for regulation that promotes the general welfare of the society in general rather than the interests of well-organised stakeholders. In his analysis of public interest theory, Pigou opines that the economic markets are very fragile and tend to operate inefficiently in favour of individual's concern while ignoring the importance of society as a whole.[32] Consequently, regulation is supplied in response to the public's demand for the correction of inefficient or inequitable market practices. Precisely, the theory explains government intervention in markets and associated regulatory rules as responses to market failures and market imperfections.

From the point of view of Public interest theory, it appears that appropriate regulation and, by extension, rent control is desirable because of the vulnerable nature of the poor and low-income

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[28] Friedman and Stigler, (n 26) 87.
[29]Ibid.
[30] Fallis and Smith, (n 12) 193.
[31] A. C Pigou, (n 6); V.S Akaayar, 'Reconstructing the Current Legal Framework for Building Insurance in Nigeria: A Public Interest Perspective' (2015) *UBJPPL* Vol. 4, p.17.
[32] Ibid.

population.[33] This is because regulation is akin to market commodity and therefore subject to the forces of demand and supply. Consequently, regulation is necessary as the vulnerable may find it challenging to compete for limited rental space in the face of an astronomical increase in rentals.

Another rationale for rent control is drawn from Gary's analysis.[34]He opines that the issue of whether there are good reasons for government intervention in the rental market should ideally take two steps. The first should begin with the question: what is the reason for government action, or put differently, is there a case for government intervention? Second, if the reason is compelling enough, what form of action should be taken? In this sense, the forms of government action or intervention can be very diverse. According to him, the measure may take any form of government regulation such as the creation of civil liability, the use of taxes or subsidies and the direct regulation or standard-setting for the quality of the product or service that the government can impose.[35]The justifications that follow such impositions by government needs further examination.

Sunstein suggests two justifications for regulation in general: human rights and the need to further social solidarity.[36] One such justification in furtherance of social solidarity is hinged on the firm belief that the bargaining between landlord and tenant is often unbalanced, both in terms of information and ability to understand economic affairs.[37] To void this fiction, the government has a legitimate obligation to act as a referee in the ring of a contract to protect the weaker parties. This is more compelling especially in long-term relationships which have a direct, substantial and

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[33]Historically, from the legal and regulatory perspective, the available literature traces the idea of public interest theory of regulation to the 1718 work of Lord Mathew Hale entitled *The Paribus Maris.* In the work, Lord Hale hypothesizes that if a business activity is licensed by the King, then they were affected with a public interest and consequently, the business ceased to be *juris-private,* only to become *jurispublici*.. In this connection, Lord Hale argues that if, for instance, there is a licensed wharf in a port, the duties it charges the members of the public for cranage, wharfage, or other services must be reasonable' and 'moderate. Thus, the singular act of being licensed or chartered by the king injects them with public interest. M. Hale (Sir), "A Treatise, in Three Parts. Pars Prima, De jure maris et brchiorumejusdem. Pars Secunda, De portibusmaris. Pars Tertia, Concerning the Custom of goods imported and exported. Considerations Touching the Amendment or Alteration of Laws: A Discourse Concerning the Court of King's Bench and Common Pleas," in: A. Hargrave, *Collection of Tracts,* (1787) vol. 1.

[34] Y. Gary, 'Rationales for Tenant Protection and Security of Tenure' (1989) 5 *Journals of Law and Social Policy*. 35-60.

[35]Ibid.

[36] Most recent regulatory thinking is premised on an acceptance of the central role of the market, however commentators such as Sunstein have questioned whether 'existing societal preferences should be taken as natural or sacrosanct' arguing that markets should be understood as a legal construct. C.R Sunstein, 'Empirically Informed Regulation' (2011) *University of Chicago Law Review*: vol. 78: Iss. 4.

[37]F.A. Hayek et al, (n 4) 38.

personal impact on the weaker party, such as marriage or employment and indeed in the area of rental housing.[38]

The second leg of Sunstein's argument is anchored on the premise that housing being a basic human need, cannot be left entirely to the invincible forces of market operation. To allow market forces to regulate rents would deny many individuals access to affordable and adequate housing.[39] Such wide discretions are prone to abuse by any landlord and could be injurious to the interests of tenants.[40] Perhaps this explains why the government exist in the first place, hence the need for the State to perform its constitutional duties of guaranteeing a citizen with socio-economic and cultural right to shelter.[41] Being the basic necessity for fulfilling life beyond bare existence, the right to adequate housing or shelter is arguably the most integrated of all species of socio-economic rights.[42] This argument is consistent with the movement in the modern world, which is geared towards housing as a prime social need in respect of which legislative intervention must be allowed to interfere to ensure greater security of tenure in the sphere of people's homes.[43]

The above rationale implies that regulatory strategies in the rental market have both strengths and weaknesses. Some degree of evaluation of the rationale of rent control will be further

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[38]Law Reform Commission of British Columbia, *Report on Landlord and Tenant Relationships; Residential Tenancies* (Vancouver: L.R.C. of B.C., 1973) at 62 [hereinafter L.R.C. of B.C.]; and Institute of Law Research and Reform, *Residential Tenancies* (Edmonton: University of Alberta, 1977) at 6.

[39] M.J Radin, 'Residential Rent Control' (1986) 15 *Philosophy & Public Affairs* 6.

[40] This argument has a judicial backing in the case of *James and Ors v. The United Kingdom*: (1986) ECHR 2 where the court put it thus: "no modern society would be able to provide housing to its population as a prime social need if housing as a commodity is left entirely to the play of market forces". This rationale explains the pattern of government intervention in the market--what we may call ''economic regulation''.

[41] Shelter provides psychological stability to individuals by affording them personal space and privacy. Such personal space is vital for the processes of procreation and upbringing of children, which are indispensable for the human family to thrive as the basic fulcrum of society. C. R Sunstein, (n 36).

[42] Ebie also notes that the right to adequate shelter is universally recognized at the international level, as well as over one hundred national constitutions across the world. However, at no point has it been adequately supplied either quantitatively or qualitatively. Over time, the need for adequate shelter has continued to attract global attention especially in developing countries where the urbanization process has been growing at an alarming rate. S.P Ebie, 'Statutory Components on Housing Policy: Legislative and Regulatory Requirement of the New Housing Policy. Housing today' (2004) vol.4, no.8, pp 6-9.

[43] K. Gray, *Element of Land Law*: 2nd Ed. Butterworths (1993) p. 169; see further E. Chegwe, 'The Right to Housing in the Context of Nigeria'. (*2014) AGORA International Journal of Juridical Sciences Law and Human Rights Practice No.1*, pp.11-23.

undertaken in this paper through the analysisof various theories of rent control. That will be the task of the next discussion.

Theoretical Foundations of Rent Control

Theories represent intense and deep conceptualisation or hypothesis regarding why and how regulation emerges, which actors contribute to the emergence and the pattern on interactions among regulatory actors.[44] Numerous theories of rent control have been put forward by various writers and policymakers on the justifications for rent control as a policy instrument. The need tounderpin the rent control mechanism through theories becomes necessary to discover its root and effects and the reasons for its retention from time past up till contemporary time. To achieve this task, the paper is poised to critically appraise three distinctive theories: economic Welfare theory, the Libertarian theory, and Home and Personhood theory. The moderate theory recommended by this paper is further discussed in closing as an ideal framework for rent control.

The Economic Welfare Theory

The economic welfare theory of rent control posits that the most important reason for intervening in a market is efficiency; intervention is justified if economic efficiency is improved.[45]In this wise, if a market operates efficiently, society's welfare is maximised. Consequently, improving social equality between citizens is a second legitimate reason for the government to intervene in a market to enhance welfare distribution. However, the resulting distribution of welfare in such a situation does not need to be such that society or politicians are comfortable with it. This theory further posits that housing is a basic essential need of man and

[44] V.S Akaayar, 'In Quest for Micro Insurance in Nigeria: Tracking some Legal Challenges and Potentials for Effective Regulation', in *Trajectory of Nigerian Law,* (ed.) A. Ibid.Ibidapo-Obe, and B.A Oni, Faculty of Law University of Lagos (2016) 459; I.O Boledeoku, 'International Dimensions of Corporate Governance: Theories and Practices,' (a paper Presented at the National Workshop on Corporation Government, organized by the Nigeria Institute of Advanced Legal Studies in collaboration with the Nigerian Bar Association (NBA) Section on Business Law, held at Federal Palace Hotel, Victoria Island, Lagos, November, 2016) 6.

[45] P. Kemp, & S. Kofner 'Contrasting Varieties of Private Renting: England and Germany', (2010) *International Journal of Housing Policy* 10(4), 379-398; K.K Baar, 'Rent Control in the 1970s: The Case of the New Jersey Tenants' Movement,' (1977), *28 HASTINGS LJ*.631, 634-36.

should not be left to the whim and caprices of the landlords. Thus, the State owes it a duty, under her social contract with the citizens, to ensure that her citizens are properly sheltered in affordable and decent accommodation and to ensure that market efficiency is maximised.[46]

The centerpiece of welfare economics is hinged on the aphorism called "Fundamental Theorem", which states that as long as producers and consumers act as perfect competitors, then under certain conditions, the resources will be allocated efficiently, without any need for centralised intervention. To the extent that these certain conditions do not hold in a given situation, then government intervention may enhance efficiency. In addition, the theory of welfare economics indicates that,in the circumstance where the allocation of resources is efficient, government intervention may be necessary if the distribution of income is inconsistent with society's ethical beliefs. However, such redistributions should be undertaken in a way that minimises any detrimental effects on efficiency.[47]

The crucial question thus becomes: what are the certain conditions required for the fundamental theorem to hold? Markets may fail to allocate resources efficiently under the condition of Market power. A situation when some firms have the ability to raise the price of a commodity above the incremental cost of its production, and an inefficiently small quantity of resources will be devoted to that good; Externalities is another condition. In a properly functioning market, the price of a commodity reflects the costs of all resources that were consumed in its production. An externality refers to a situation in which individuals or firms may use resources they do not have to pay. Consequently, the price of the commodity is too low relative to its social costs, and the market provides an inefficiently large quantity of the commodity.[48]

Finally, asymmetric information is another condition. The competitive model assumes that information is perfect; or that all agents share the same degree of uncertainty in situations of uncertainty. However, when information is asymmetric, one party to an exchange knows more

[46] R. E .Megarry, and H.W.R. Wade, *The. Law of Real Property* (London: Stevens, 1975) 63.
[47] F. M. Bator, 'The Anatomy of Market Failure', (1958) 72 *Q.J. ECON*. 351.
[48]Ibid123.

than the other; hence, markets may not operate efficiently in such a situation. In summary, in order to achieve economic efficiency devoid of government intervention, Barr opines that four standard criteria must be met to wit: perfect information, perfect competition, complete market and no market failings.[49] If these criteria are not met, the government can improve economic efficiency by regulation, for example, by way of subsidies or rent control. He concludes that since conditions for a perfect market are not generally met in the rental sector as there is information asymmetric, hence government intervention is almost indispensable.[50] Since the landlord has a great insight into the quality of the accommodation, at the same time, he is fortified with information as of a dwelling housing and any possible defects than the tenants. Against this background, rent regulation can reduce this asymmetry by linking a specific quality to a maximum rent.

It should be noted that economic welfare theory has its foundation in the Public Interest theory of regulation, which Pigou viewed from two fundamental perspectives: social perspective and the economic perspective.[51] From the social perspective, Pigou asserts that regulation is desired to pursue collective goals to promote the general welfare of society. Similarly, from an economic perspective, regulation is considered an instrument for correcting market failures.[52]Additionally, he further opines that regulation is a necessary exercise of collective power through government to cure 'market failures' so as to protect the public from such evils as monopoly behaviour, destructive competition, and the abuse of private economic power or effect of externalities.[53] He concludes that the pursuit of curing market failures and protecting the public against market evils underpin virtually all public account of regulation.[54] Pigou, however, cautions that any attempt to formulate a comprehensive list of public interest goals that may be used to

[49] (n 45).
[50] (n 47).
[51]A.C Pigou, (n 6); V.S Akaayar, (n 31) 23.
[52] Ibid.
[53]A.Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing: Oxford, 2004), part II.
[54]Akaayar, (n 31) 24.

justify regulation would be futile. Since what constitutes the 'public interest' will vary according to time, place, and specific values held by a particular society.[55]

Relating the foregoing assumptions to the rental market, the criterion for perfect competition requiring that all players have equal power is often not met in the housing market, thereby giving the landlord a monopolistic power to raise rent at will arbitrarily. Indeed, the tenant must incur high financial and emotional costs to keep his home. Another argument in favour of rent control under the economic welfare theory is often put forth on equity grounds. Tenants as a group have less wealth than landlords, and the housing policy is a way of increasing the latter's income and decreasing that of the former. In sharp contrast to this argument, Block holds the view that there is no equity in rent control as it transfers wealth from landlord to tenant and dissipates the wealth of the owners of residential rental units.[56] Such control can have complex effects and lead to unintended consequences. It does not always produce a simple redistribution of resources to the less well-off. For instance, it has been observed that controls, originally designed to help the poorer tenants, have now precipitated a situation where many landlords are poorer than their tenants.[57]

Fallis also queried this rationale as it is unclear why wealthy landlords should pay and that poor tenant should benefit rather than the wealthy and poor classes as a whole. In this wise, evidence abound that not all landlords are rich and not all tenants are poor.[58]By redistributing wealth from the landlord to tenant, rent control puts the burden for the redistribution on a specific group (landlords) rather than on all wealthy persons as in programmes funded through a progressive income tax. This seems unfair in that some landlords may be relatively poor and some

[55]Ibid.
[56] W. Block, 'A Critique of the Legal and Philosophical Case for Rent Control' (*2002) Journal **of** Business Ethics* 40: 75-90.
[57] For example, W. Knight found in his study of Lansing, Michigan, that the median income of tenants was greater than the median income of landlords. While the difference might be due to the effect of age the encouragement of this difference does not seem to be a sensible way to solve any housing shortages. W. Knight, 'Postwar Rent Control Controversy', Research Paper 23 (Atlanta: Georgia State College School of Business, 1962) 24.
[58] G. Fallis, 'Possible Rationales for Rent Regulation' (1984) (Toronto: Research Study No. 5 prepared for the Ontario Commission of Inquiry into Residential Tenancies).

tenants relatively wealthy, so the governments are taking from the poorer and transfer to the richer in some instances. By holding on to rent control, the government arbitrarily singles out the housing market as the appropriate forum for redistribution.

Economic welfare theory also justified rent control on account of the security of tenure. This justification of rent control is hinged on the firm belief that to ensure tenant's security of tenure, the government usually adopts devices in the law to prevent sudden large increases in rent caused by the ability to "gouge". In any event, if there are significant tax increases that are passed through provisions of the law, then rents may increase considerably. This entails that rent control protects tenants from expenses caused by "gouging"; a result of tax increases by the government and allows only commensurate returns due to tax increment on homeowners.[59] By so doing, rent control serves as a catalyst to prevent landlords from redistributing tenant's funds to landlords.

This theory has been adopted in many jurisdictions of the world.[60] For instance, in developed economies where rent is regulated, such as in the United States of America, France and Germany, to mention but few. The argument usually is that it is the responsibility of the State to assist the less privileged tenants and protect them against the greed and rapacity of landlords who might want to exploit their weak bargaining power to extort unfair rents.[61] The argument is further strengthened in the third world countries by the naked fact of shortage of accommodation, especially in urban centres, coupled with the absence of social security, including housing for the less privileged.[62]

It is worthy of note that most of the provisions of various Rent Control and Recovery of Residential Premises Laws and Edicts in different States in Nigeria, which serve to give meaning and significance to the existence of a right to housing, are in tandem with the economic welfare theory.[63] Many of these laws reinforce the position that tenants are entitled to adequate housing

[59] Ibid.
[60] (n 46).
[61] (n 45).
[62] *(*n 61).
[63] Generally the provisions of Recovery of Premises Act No. 45, 1945 adopted in Lagos State as Cap 118 Laws of

like their landlords, and that tenant should neither be charged arbitrary rents nor be evicted without due process of law. The economic welfare theory of rent control has succeeded in laying a strong pillar for the retention of rent control legislation. However, the welfare's assumption has been rejected by the Libertarians on account of it being a redistributive tool of landlord's property rights to the tenant and consequently confiscatory.[64]

Libertarian Theory

The Libertarian theory takes its premise on the firm assumption that rent control is an illegal confiscation of property from landlords by the government without compensation.[65]Richard Epstein, leading the charge for Libertarians is typically opposed to rent control. Epstein views rent control as a 'taking' of private property without compensation by the government for private purposes and is thus unconstitutional.[66]He posited that rent control and other forms of regulation are unconstitutional because they amount to confiscation of private property without the just compensation required by the fifth and fourteenth amendments to the United States of American's Constitution.[67]

In particular, Epstein points to the American Constitution, which provides, *''nor shall private property be taken for public use, without just compensation,''* as legal support for his claim. He contends that this clause raises three questions explicitly and one by implication. One of the central questions he asked is: has the private property been taken? Second, was it taken for public use? Third, was the owner of the property justly compensated? Fourth, by implication, was the taking justified under the 'police power' of the U.S. Constitution? For Epstein, the answer to the

Lagos State, 1973; Rent Control and Recovery of Residential Premises Law, Cap R6 Laws of Lagos State, 2003; Rent Control and Recovery of Premises Law Cap 102, Laws of Cross River State, 1979; Recovery of Premises Law Cap 114, Laws of Niger State 1989; to mention but a few are instructive on this point.

[64] It has also been queried for laying foundation for rent control legislations which creates an inefficient allocation of rental space. R.A. Epstein, ‘‘Rent Control and the Theory of Efficient Regulation’’ (1988) 54 *Brook. L. Rev*.741**.**

[65] Ibid.

[66] Ibid.

[67]Ibid746.

first question is answered in the affirmative, while the latter three questions are all answered in the negative.[68]

By regulatory takings, rent control laws violate the fundamental purpose of the just compensation clause.[69] It places a disproportionate burden on landlords by physically invading the property of the landowner. The typical taking's claim arises when the government exercising its power of an eminent domain, physically seizes property for public use.[70] A taking may also occur when the government exercises its police power.[71] In justifying Epstein's claim to the first question posed by him, he states that a landlord who leases out a property that he or she owns in fee simple has part of his or her reversion interest 'taken' if rent control is imposed. Epstein concluded that rent control laws never provided for just compensation which would have compensated the landlord for compulsory acquisition of landlord's property through rent control.[72]

He opines further that compelling a landlord to renew a lease at a price determined by the government amount to confiscating private property. Epstein then submits that the taking is best

[68] While the specific constitutional law aspects of Epstein's analysis are confined to the United State, his thesis has general significance for those concerned about the effects of rent.

[69] The Fifth Amendment provides in pertinent part that private property shall not be taken for public use, without just compensation. U.S. CONST. amend. V. The Fifth Amendment applies to the states through the fourteenth amendment. See the case of *Chicago, B & Q R. Co. v. Chicago, 166 U.S. 226, 241 (1897)* (private property taken by the state for public use without compensation violates the due process clause of the fourteenth amendment). This provision is similar to the provision of 1999 Nigeria constitution as amended which guarantees the right to own moveable and immovable property and subject to the known exceptions as to its use for overriding public interest by the government, adequate compensation must be paid thereon. s.44 (3) of the 1999 Nigerian Constitution As Amended.

[70] Eminent domain is the government's power to appropriate, within constitutional constraints, private property for public use. For instance, *United States v. Jones,* 109 U.S. 513, 518 (1883). (The power to take private property for public use, termed eminent domain, is an incident of sovereignty. It requires no constitutional grant, but is limited by the fifth amendment)

[71] The police power is the power inherent in a sovereign government to "direct the activities of persons within its jurisdiction." Stoebuck, 'Police Power, Takings and Due Process,' (1980). 37 *Wash. & L. REV.* 1057, 1057. Implicit in the concept of police power is the idea that government shall only exercise the power to advance the public interest. Id. A court will declare a regulatory measure void if found to be "arbitrary, capricious, or unreasonable." Id. at 1058. In the context of the regulatory takings issue, courts will apply a "means-ends" or "rationally related" test in varying degrees where the court questions whether the regulation serves a legitimate public purpose and, if so, whether the means reasonably relate to that purpose. *East Coast Lumber Terminal v. Town of Babylon,* 174 F.2d 106, 110-11 (2d Cir. 1949) (unreasonable conditions imposed upon use of land, even though not an "out and out taking," is unconstitutional if accomplished without compensation).

[72] Epstein (n 64).

characterised as one for private, not for public use. Rather than taking property for use by the general public, rent control takes property for the use of specific tenants to the exclusion of others. He captures the hypothesis thus:

> Rent control statutes operate to take part of the landlord's interest in his reversion and to transfer it to the tenant...The coerced renewal of a lease under the rent control statutes is hardly voluntary, but it is most surely a transfer from landlord to tenant. Thus, there is a "taking of private property" both for the student of ordinary English and the conveyancing master.[73]

In determining whether a regulatory taking has occurred, the court held that if a regulation comports with substantive due process of law, no taking exists. The court, in arriving at whether regulationimpacts on the landowner's interests qualifies as a taking, adopts four tests to wit: the physical invasion test;[74]the noxious use test;[75] the balancing test;[76] and the diminution in value test.[77]

The Flaw of Libertarian Theory

[73] (n 72).

[74] The physical invasion test applies to traditional eminent domain takings. This domain gives the government broad power to seize landlord property for overriding public interest with adequate compensation. For example, where the government builds a dam that floods the claimant's land for public consumption. In *Seawall Associates v. City of New York* 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989) the highest court of the State of New York invalidated New York's Single Room Occupancy Law. The court found a physical invasion in the city that forced control over the owner's property; most importantly, on the owner's right to exclude others.

[75] The noxious use test holds generally that if a land use regulation only prevents a harmful or noxious use of land, then a taking will not result regardless of its impact. Under this rationale, landlord "profiteering" when rental unit supply is short is considered a noxious use of land similar to pollution, excessive noise, or some form of private misconduct causing a nuisance. In effect, this theory effectively holds that one who provides an essential good may not raise the price of that good in response to the law of supply and demand arbitrarily. N. Stout, 'Making Room at the Inn: Rent Control As a Regulatory Taking,' (1990) 38 *Wash. U. J. Urb .& Contemp. L.* 305. Available at: http://openscholarship.wustl.edu/law_urbanlaw/vol38/iss1/14. Last accessed 4/03/2025.

[76] If the public benefit were greater, there would be no taking even though the landowners' interest would be completely destroyed. Ibid.

[77]If the landowner's use is restricted by legislation such that the value of his property is drastically diminished, a taking exists no matter how great the benefit to the public. *Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938)*

The theory of Libertarian appears laudable, however, this paper, identified some significant weaknesses of the theory. First, the basic criticism of Epstein's radically conservative view of American constitutional law lies in his refusal to recognise that the exercise of the police power is not a *per se* taking. His assertion that the police power must be read into the Constitution exposes this weakness as the courts have pronounced exactly so for decades. They have frequently distinguished between the legitimate exercise of the police power and a regulatory taking.[78]

The above point was originally decided in *Block v. Hirsh*[79]where the court held that rent control was not an unconstitutional taking of property. Rent control was deemed a justified response under the police power to a housing crisis in Washington due to the First World War. Furthermore, the statute provided that landlords would receive a '"reasonable return" on their properties.[80]The court recognised an important restriction on the police power under the *Hirsch's* case when it held that landlords were entitled to a "reasonable rent".[81]

Secondly, this paper had earlier observed some inherent benefits in second-generation rent controls that allow a fair return on investment. This form of control allows cost-pass-through provisions and reasonable returns on investment. Epstein, therefore, errs when he asserted that rent control statutes by definition require the setting of rents below market levels and thus can never fairly compensate landlords. This paper views that rent control, which allows landlords to earn a competitive rate of return, justly compensates landlords, and such regulation cannot amount to unconstitutional taking in this regard.

Furthermore, Epstein's theory is also flawed by his admittance that 'taking' for public use would not amount to confiscation of landlord's property once compensation is paid. Since Epstein

[78] For example, in the United States of America, there have been a long line of state and federal precedents dating from the original rent cases of 1921 which contradict Epstein's analysis.
[79] 41 S. Ct. 45 b8 (1921) [hereinafter referred to as *Block]*.
[80] Ibid.
[81] Ibid.

is not aversed to taking for public use upon compensation, there may be an 'indirect public benefit in rent control once the landlord is compensated with a fair return on his investment.

This paper also takes the view that rent control statutes differ significantly from the ordinary takings argument of property for two reasons. The State does not retain possession of the leasehold term for its use through rent control. However, it directs by ordinance that the tenant use it for his enjoyment subject to observance of reasonable covenants as contained in various lease agreements. Similarly, the State does not pay any compensation for the use of the leased property but instead directs the tenant to pay standard rent to the landlord. At one level, these two features seem to distinguish rent control from the paradigmatic taking of land for overriding public use: such as the building of schools, general hospitals, road constructions and other similar projects, where the State both keeps the property and pays the compensation itself. This argument of libertarians thus falls in the face of constitutions of various countries that have provisions for just and adequate compensation.[82]This paper shall, in turn, explore the argument of Home and Personhood theory in the next segment.

Home and Personhood Theory

The personality theory of property, otherwise known as Home and Personhood theory had its origin in the philosophy of Hegel, who posits that property rights play an essential role in the full development and self-realisation of individuals in the society. In Hegel's philosophy, property occupancy serves as a means by which individuals, project their abstract wills into the external world.[83]This theory was further analysed and developed by Professor Margaret Jane Radin into the Home and Personhood theory.[84]Radin constructed personhood theory on the basis of moral philosophy drawn from Hegel's Philosophy of Right.[85]She argued that certain kinds of property

[82] For example, in Nigeria, section 44(3) of the 1999 Constitution (as amended) provides for just compensation.
[83] D. L. Rosendorf, 'Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights', (1991) 45 *U. Miami L. Rev*. 701. Available at: http://repository law.miami.edu/umlr/vol45/iss2/1. Last accessed 18/11/2024.
[84] M.J Radin, 'Property and Personhood' 1981-1982 *Stanford LR* 957-1015.
[85] The attribution of personal and social values to the home dates back to the nineteenth-century Romantic philosophy of the home as a paradise on earth and a refuge from the corruption and danger of urban life. C.

like housing are so "bound up with the holder" that they are necessary for "self-constitution" and human flourishing" and are worthy of societal protection from complete commodification, the loss of which "causes pain that cannot be relieved by the object's replacement". She opines that an individual must have some control over resources in the external environment to achieve proper personal self-development.

In effect, property rights are the assurances of that control. Radin contends that people have certain irreplaceable objects that they identify as "almost part of themselves", which are different from other types of replaceable objects. These forms of property, such as housing, are integral to one's personhood and should not be fully commodified.[86] In essence, residential tenants attach substantial value to their leased property because it resembles their homes. Such homes grant tenants a sense of connectedness and establish them a place in society.

Radin explicitly rejected all standard accounts of efficiency as proclaimed by economists and Libertarians. She invoked in their stead the "intuitive general rule" that the interests of the landlord or some potential tenant do not reach the same level of dignity or strength as that of the tenant in possession.[87] By his intuitive general rule, Radin opines that preservation of one's home is a stronger claim than the preservation of one's business or that non-commercial personal use of an apartment as a home is morally entitled and has more weight than purely commercial landlording.[88]Her argument on some general intuitive notion was captured thus:

> Most of us, I think, feel that a tenant's interest in continuing to live in an apartment that she has made home for some time seems somehow a stronger or more exigent claim than a commercial landlord's interest in maintaining the same scope of

Despres, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development,' *(1991)* 8 *J.ARCHITECTURAL & PLAN. RES. 96, 104.*

[86] Ibid.

[87] In a sense the argument dates back to Justice Holmes in *Block v. Hirsh*, in which he observed that preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law. A. Simpson, *A History of the Land Law* (2d ed. 1986).

[88] (n 84).

> freedom of choice regarding lease terms and in maintaining a high profit margin.[89]

Essentially, the theory of home and personhood maintains that an individual constitutes herself as a person through a secure and ongoing relationship with certain property. Loss of property jeopardises selfhood and impairs psychological flourishing.[90]In support of the argument favouring rent control, Radin opines that rent control that keeps rents below market levels, which permits a tenant to stay in her or his home, maybe justified to permit the tenant's personhood to flourish. Rent control enables individuals to obtain some stability and a sense of belonging, contributing to better social structures and improved individual wellbeing.[91]

The account of personhood theory may be justified where it is irrefutable that tenants are indeed poorer than their landlords and thus more likely to be economically evicted in the face of arbitrary rents. This is particularly so where landlords hold their property strictly for investment purposes.[92]Arguably, if the landlord unilaterally decides to terminate the lease and decide on eviction, the tenant will lose her home, her sense of connectedness and place in society in a matter of month; if not weeks, and the chances of such a tenant becoming a wanderer on the street is high as he would be left without a roof.[93]

On the other hand, if the tenant decides to terminate a periodic tenancy, the landlord might lose some commercial gain, if anything at all. The landlords' interest is purely commercial and "fungible" as she can replace the current tenant, while the tenant's loss could be substantial from a personhood perspective.[94]This theory finds patronage in the Lagos State Tenancy Law in that the

[89] Ibid.
[90]The theory that one's home is a psychologically special form of property has become a cherished principle of property law, cited by legislators and touted extensively in the legal scholarship. Other commentators have expounded a communitarian vision of the home as rooting individuals in communities of close-knit social ties. S. M. Stern, 'Residential Protectionism and the Legal Mythology of Home,' (2009) 107 *Mich. L. Rev.* 1093.
[91] Ibid.
[92] S. Maass 'Rent Control: A Comparative Analysis' (2012) *P.E.R,* Vol. 15 no. 4.
[93] J. Knetsch,.etal, 'Residential Tenancies: Losses and Fairness' (1984) (Toronto: Research Study No. 14 prepared for the Ontario Commission of Inquiry into Residential Tenancies) 12.
[94] (n 26).

statute makes lawful occupation the hallmark of a statutory tenancy without qualification.[95] For instance, recovery of premises from a tenant is subject to strict procedure in ejecting a statutory tenant; otherwise, the landlord would be liable to civil liability and criminal prosecution.

Home and Personhood Theory: its Shortcomings

This paper notes that although Radin's analysis on the impact of a loss of a tenant's home as the main justification for her theory is worthy of empathy, however, her utility of assumption that people value personhood property than fungibles appears far–fetched. Contrary to this assumption, people do not necessarily prize personhood property over the fungible or instrumental property.[96] To conclude that homes deserve legal protection from creditors, taxing authorities and the government because of their self-expressive capacity also seems far-fetched. Research has shown that citizens of capitalist nations have many ready substitutes for self-expression like Cars, clothes, and jewellery which serves similar functions of announcing identity and benefit from broader visibility than dwelling as home decorations can be transferred to a new residence.[97]

Other alternatives for self-expression, such as group membership, religion and other similar adventures, do not also depend on the property. With its emphasis on continuity and ongoing control of property, personhood theory wrongly assumes that change is detrimental and self-identity is best left undisturbed. The changing environment is not an obstacle to growth but a prerequisite for it. In the context of residential mobility, psychologists once observed that relocation may offer the opportunity for the development of new skills, new identity

[95] See Section 13 of the Lagos State Tenancy Law 2011. Smith also opined that a statutory tenant does not cease to be so merely because his landlord has sold the reversion. It does not matter that as between the new landlord and the tenant there is no privity of contract since the purchaser is the person entitled to immediate reversion of the premises as prescribed by statute. The purchaser of the reversion cannot eject the tenant in question unless he complies strictly with the provisions of the statute as to the issuance of the appropriate notices followed by the issuance of a writ against any such person refusing to deliver up possession. I.O Smith, 'The Scope and Application of the Concept of Statutory Tenancy in Nigeria: a Critical Appraisal' in Essays on the Nigerian Law of Landlord and Tenant, (ed.) Oretuyi et al, 1966 Law Centre, Lagos state University, 151.

[96] See M. L. Richins, 'Valuing Things: The Public and Private Meanings of Possessions,' (1994). *21 J. CONSUMER RES. 504, 508-09*.

[97] Ibid.

configurations, and the possibilities for considerable growth.[98] In summary, the weight of the psychological evidence does not support the idea that homes or possessions, in general, are strongly constitutive of psychological personhood.

Anthony Downs also identified a major deficiency of Radin's analysis noting that, it is incorrect to conclude that in all cases landlords prioritise their houses as investment to personal relations with their tenants.[99]Evidence abounds thatlandlords often develop personal relationships with their tenants and worry more about losing good tenants than achieving high rents. He further asserted that landlord's tenant-selective behaviour is described better by "turnover minimising rather than by rent maximising".[100]

One way to minimise turnover is to find good tenants who will stay a long while, pay on time, and not damage the property. Most small owners give such tenants an incentive to remain in the leasehold apartment by keeping their rents relatively low. As a result, long-term tenants typically have lower rents than short-term ones.[101] Therefore, it follows that landlord and tenant often develop a mutually rewarding relationship with or without rent control.

This paper further contends that failure to appreciate the need to protect the interest of prospective tenants'security of tenure is another deficiency of Radin's hypothesis for being selective and discriminatory of the interest of prospective tenants. As queried by Edward Iacobucci, if people do not generally believe that losing an apartment is more undesirable than being denied an apartment, then people do not place the same emphasis on housing and personhood as Radin does. The strength of the personhood argument for rent control is thus diminished.[102]

By the analogy of logic, high rent leaves both prospective and sitting tenants without housing (by assumption), but the incumbent tenant has lost a home. In contrast, the prospective

[98] K. Gordon, and S. Werkman, 'Geographic Change as a Stressor: Developmental Perspectives', *in Stressors and the Adjustment Disorders* 418, 421.
[99]A. Downs, 'A Revaluation of Residential Rent Controls*', Urban Land Institute,* (1996), Brookings Institution. P.123.
[100] Ibid.
[101] Ibid.
[102] E. Iacobucci, 'Rent Control: A Proposal for Reform' (1995) 27 *Ottawa Law Review* 311.

tenant has lost an opportunity to obtain a home. In any event, both are equally disadvantaged as neither has a home. A more accurate statement would then be that: "eviction of an incumbent tenant is worse than denying someone an apartment; therefore either personhood is important, or the endowment effect is present or both".[103]Thus, it is equitable to hold that potential entrants to housing markets equally deserve the State's protection of their goals, aspirations, and desires as much as those of sitting tenants.However, despite the flaws identified against this theory, the personhood assumption may be adopted in explaining the basis for government intervention in securing tenant's tenure as contained in various rent control statutes. Personhood hypothesis in favour of rent control are also useful to the extent that they highlight the different interests of landowners and tenants, emphasising the importance of property and personhood.

Towards an Ideal Theory: Moderate Theory of Rent Control

It is beyond doubt that various theories have been advanced on the appropriateness of rent control as a dominant policy instrument. The view of this paper is that except for the welfare theory of rent control, which takes a broader view (than the two other theories) on the rationale for the State's intervention in the private rental market, other theories analysed are too narrow to interrogate the policy of rent control.[104] Consequently, this paper adopts the assumptions of economic welfare theory with some modifications in recommending an ideal model for further interrogation of rent control policy. It thus sets forth a moderate theory of rent control drawn from economic welfare theory with a view to laying an appropriate foundation towards an ideal model capable of designing all-encompassing rent control legislation that would benefit both the renter and the housing provider.

Moderate Theory of Rent Control

Among the theories analysed above, this paper posits that the jurisprudence of the economic welfare theory affords a better option for a good rent control law. It has also, to a

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[103] Ibid.
[104] Economic welfare assumption is a model employed by most government to justify the imposition of rent regulation in the private rented housing market. See generally welfare account of rent control *infra* pp. 16-22.

reasonable extent, passed a good objective for rent control law. The paper however contends that the theory has failed to address one or two issues while exhausting its facilities to offer a plausible explanation on the welfare aspect of rent control to humanity.

Without stack objection to the widely-spread belief of the proponents of this theory, it is undisputed that shelter is vital for the survival of human existence. As such, the government has a duty to ensure access to affordable housing for all categories of man. This paper further posits that housing being a basic essential need of man, should not be left to the whim and caprices of the landlords. Hence, the State owes it a duty under the social contract with her citizens to ensure that her citizens are properly sheltered with affordable and decent accommodation, and that market efficiency is maximised. However, the postulations of the welfarist philosophers cannot equitably explain the justification of the State to regulate rent at the expense of private property investors. One wonders the equity in controlling products of items that government cannot provide.

A significant problem with this analysis of welfare theory could give rise to distortions in the rental market. It may likely result in an acute shortage of accommodation where rent is kept below market levels on the altar of welfarism; this may have a deleterious effect on the long-run supply of rental housing. If rents are kept artificially low, there is a likelihood detrimental effect on the supply of new rental housing.Consequently, current landlords may withdraw their units from the market, put them to alternative uses, and prospective landlords will be reluctant to build more housing stock to avoid reaping inadequate returns. Thus if rent control is imposed to respond to a housing shortage that has caused rents to rise drastically, it will only exacerbate the shortage of housing stock by decreasing the stock of current and future housing.[105] Rent control may therefore result in an increased disincentive for builders to add to the rental housing stock. To counteract this disincentive tendency, this paper proposes a moderate theory of rent control as a modification of the welfare account of rent control.

[105] (n 26).

By moderate theory, it posits that to ascertain the effectiveness of rent control to be enacted under any statutory law, efforts must be made to balance the interest of private housing providers with the renters. This is imperative because investment and development of housing units is largely a private-sector activity. The investors and developers who build, purchase, and maintain these properties expect to receive a return on investment. Since rents paid by tenants form part of the chunk used to build and maintain existing ones, ideal rent control legislations must imbibe rent control programs that will allow a fair return standard for the landlord and providing an incentive for investment that would encourage the creation of additional units of housing.

The summary of the proposed moderate theory is put succinctly thus: it considers a regime where the landlord is unconstrained in the initial rent charged to a tenant, but to address *expost opportunism,* future rent increases, whether optimally or to a maximum are decided by a rent control authority. This increase need not be below the change in an apartment's market value. The concern is to ensure that rents are not raised above their market value, thereby foreclosing exploitation of specific tenant investments.

To achieve the above, an index of housing market prices could be used to set the price increase. Rather than attempting to determine such an index remotely, reliance can be placed on the consumer price index. Using this index, this regime permits a more direct inference of the level of rents in the market. Since initial rents are unconstrained, there will always be a prospect of turnover apartments, the rental authority could create an index of the housing market by monitoring the change in initial rents being charged from year to year. A timeline could be drawn up to increase rents of controlled apartments up to market levels over a period of time. The projected period of increase could be between six to ten years threshold. This system of rent control would also require the investigation of the average costs of landlords in order to determine a fair return to landlords. The 'fair return' proposed here should ordinarily cover 'an amount equal to the aggregate of landlords' costs' including operating costs, investment in the property, capital value effects and tax effects. Keeping with the above proposition, rent control can be a desirable tool in laying a good framework for sustainable housing delivery.

Further to the above, as a prelude to introducing rent control legislation, the government can conduct a survey on the draft rent control bill and put the survey results on her website. For appropriate time duration, the draft bill should be available online for public comments. The public comments as aggregated online should be reviewed by a panel of experts to discover whether it meets the stakeholders' expectations. The panel's report on the draft bill should then be uploaded online or tabled at the stakeholders' meetings for transparency purpose. If the difference between the survey results and the public comments are excessively at variance, then the public interest should be kept above all other views.

Based on the above proposition, the public interest would be served if rent control law is approached in this way. Consequently, rent control can be a desirable tool in laying a good framework for sustainable housing delivery, and its implementation can be moderately successful. The foregoing analysis has shown that there is an arguable case for the retention of rent control. It is thus plausible to conclude that the proposed system is desirable from a moderate theory's perspective.

Conclusion

This research has established that rent control law is one of the most popular public policy prescriptions among metropolitan governments across the globe. The paper further examined the rationales of rent control as a policy mechanism by analysing its various theories. From the analysis of these theories, the paper found that stack oppositions to rent control was based on the ill-attributed to the "first-generation" controls, where rents are fixed at nominal levels without provisions for cost pass-through benefits. However, the "second generation" controls, which came about much later, involve not only allowable rent increases indexed to inflation or construction costs; but also contains cost pass-through provisions. These provisions permit landlords to apply rent increases above the regulated rent increase if justified by cost increases, hardship provisions and rate of return provisions. The usual arguments against rent controls in modern time are thus being qualified, and there is growing acceptability that a well-designed rent control program can be beneficial. Furthermore, the theorists examined in this paper differ significantly in their views on the impact of rent control on private rented housing. Due to the inequality of bargaining power between the renters and property owners, the economic welfare theory of rent control posited that tenants might be forced to pay excessive rent or be evicted by landlords without 'justifiable cause' in the absence of tenancy control. It follows therefore, that the intended effect of rent control stems from the need to address the imbalance of bargaining power between landlords and tenants– in particular. Flowing from that, control can be justified when there is market failure, such as those stemming from unequal bargaining power between landlords and tenants. This theory has been developed and embraced by the vast majority of scholars as the bedrock for adopting rent control policy.

From the home and personhood account, rent control is an appropriate form of government intervention to protect the personhood of sitting tenants. This argument is premised on the need to preserve the social linkages among tenants by reducing eviction. The hypothesis of personhood theory supports government intervention in implementing measures to prevent the frequent move of tenants from being evicted by landlords in order to preserve a close community network. This, in turn, allows the government to provide the necessary community services with precision and continuity. In stark contrast with the superficial attempts to justify rent control as resonated in Radin's detailed analysis, the paper found that, such a firm view could diminish the landlord's returns as no compelling justification has been offered for financing benefits to tenants through an implicit tax on landlords. In essence, no satisfactory explanation of why the magnitude of this tax on wealthy people should depend on the proportion of their assets held in rental housing to finance the personhood of another.From the account of libertarian theory, rent control is seen as an illegal confiscation of property from landlords without compensation. The libertarian hypothesis is difficult to believe as it is unclear how rent control could be construed as a taking of a valuable asset since landlords willexpect to earn precisely what they would earn in a market free of imperfections, it is therefore

Based on the shortcomings of the existing theories, this paper has espoused a moderate rent control theory as a model that would assist policymakers in designing rent control legislation to balance the interests of landlords, tenants, property developers, and other key stakeholders in private rented housing in a sustainable manner.

Recommendations

Based on the findings as demonstrated by this paper, the following recommendations are advanced:

1. Notwithstanding the criticism offered against rent control, if properly designed, rent control can address some of the crisis associated with rental housing. Such rent control legislations should be structured in such a way that would allow landlords to recover fair returns on their investments. Without this basic precondition, private housing investment may grind to a halt with all the attendant evils expressed by the antagonists of rent control policy, as highlighted in this paper. A system of rent control that would require the investigation of landlords' average costs to determine a 'fair' return to landlords is hereby proposed. The 'fair return' in the view of this paper would be "an amount equal to the aggregate of landlord's costs", including operating costs, investment in the property, capital value effects and tax effects.
2. The foregoing analysis has thus shown that there is an arguable case for the retention of rent control and it is plausible to conclude that the proposed system is desirable from the perspective of a moderate theory of rent control.This theory is developed on the basis of the functional criteria of regulatory equilibrium that offers profitability and respect of property rights for the landlord, and affordability, stability and flexibility of the lease for the tenant.Such moderate theory approach, should take into consideration the issue of equity in rent controlas it relates to the transfer of wealth from the landlords to the tenants.

In this prescription, landlords and tenants are allowed to develop mutually rewarding relationship based on allowable rent increases indexed to inflation or construction costs instead ofdissipating the wealth of the landlords to the tenants.

In determining the appropriate rent payable on rented apartment, the moderate regime also considers other important factors that determine the costs of investments and rents as they affect housing delivery. These factors include location of the rented apartment, the type of houses, ambience, facilities that are inbuilt with the property to mention but a few. For these considerations, the moderate regime proposes periodic adjustment to market returns as measure of some security to landlord while protecting the tenant from unexpectedly large increases in rent over the medium to long term renting.In the opinion of this paper, this is a sure way of encouraging investors in the rental market. The moderate theory thus ha**s** the potential of helping the policymakers in their quests for all encompassing rent control legislation that works for both landlords and tenants in the rental market.