LET'S BREAK THE LAW: LANDLORDS, TENANTS, NORMS AND ADVANCED RENT DEPOSITS IN GHANA

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Kofi Oteng Kufuor*

INTRODUCTION

One current issue in Ghana is the cost of securing private rental accommodation. Contrary to the 1963 Rent Act[1] landlords in Ghana are demanding advanced rent payments of in some instances, up to 5 years before a rental agreement is signed with prospective tenants. This is in violation of the Rent Act which expressly forbids landlords from demanding rent advances in excess of 12 months of the rental value of the accommodation. Rent advance in breach of the Act is particularly acute in Ghana's major cities as high rates of urbanization have created a situation where demand for private rental accommodation outstrips supply. The breach of the terms of the Rent Act has led on the one hand to calls to stronger enforcement of the Act and, on the other hand, it has led to calls to amend the Rent Act in order to allow landlords derive increased returns on their property above what is provided for in the existing legislation. Reform of the Act in this regard should be by allowing landlords to collect advanced rent deposits of up to 12 months.

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*University of East London

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[1] See Rent Act 220 (1963).

This call for state activism in the housing market flows from the view that tenants, especially those looking for low-income accommodation are at a bargaining disadvantage *vis-à-vis* landlords. As at writing there is a rent bill under consideration in Ghana in which when passed it will be illegal to demand an advance of more than 1 year's rent.[2] The bill therefore proposes to abolish the current 6 month limit, it consolidates a 12 month ceiling for rent advances, and thus it affords tenant relief from single payments of sometimes up to 5 years.

In this paper we argue that while huge rent deposits can be a financial burden, available evidence suggests that even for low-income tenants rent costs form only part of the relationship between themselves on the one hand and their landlords on the other. Rather, prospective and existing tenants we argue, are shaped by both financial and non-financial relationships with their landlords and their neighbourhoods and these relationships cast a shadow over any bargains to enter into new tenancy agreements, or renew existing ones. Tenants, we assert, anticipate transaction costs as part of their decisions to sign tenancy agreements and thus we stress that landlord-tenant non-financial relationships and the complexities associated with signing tenancy agreements can have implications for the quest for private accommodation. At the core of our contention is that lower transaction costs can offset the problem of large rent advance payments and therefore the financial burden of renting notwithstanding, some tenants might prefer to bargain outside the law with potential

[2] See "Rent Draft Bill to be Placed before Parliament", (25 June 2014), available at http://elections.peacefmonline.com/pages/parliament/201401/187284.php (last visited 24 June 2015).

or current landlords and therefore voluntarily lock themselves into a costly financial arrangements on account of the social benefits of long-term relationships.

Part I of the paper draws on the New Institutional Economics (NIE) research programme to provide a theoretical basis for our claim on the possible path some landlord and tenant relations will take. The focus in Part I will be on concepts of transaction costs, relational contracting, and norms. Part II of this paper describes the problem that the 1963 Rent Act is supposed to prevent. Part II also outlines the key provisions of the Rent Act relevant to the arguments we make in this paper. Part III applies the concepts of the NIE research programme to the issue at hand. In Part III we argue the following: that transaction costs associated with searching for tenants or landlords will play a role when contracts are being negotiated *ab initio* or when existing bargains are being renewed. Thus high transaction costs can produce rental agreements that are contrary to the provisions of the Rent Act. Moreover contracts are not shaped solely by financial dividends to be gained by parties to a bargain but rather, understanding rental bargains is enriched by incorporating insights from relational contract theory. Hence as landlord-tenant relations develop these actors are likely to bargain around the Rent Act, craft their own private norms or deepen existing ones, and consequently secure mutually beneficial terms. Part IV examines possible complexities that can stunt private extra-legal tenancy agreements and whether any reservations about entering into bargains that fly in the face of the law will therefore be adhered to or not by landlords. Part V concludes.

PART I

NEW INSTITUTIONAL ECONOMICS

NIE is an interdisciplinary endeavour combining economics, law, organization theory, political science, sociology and anthropology to enable an understanding of social, political and commercial life. It borrows at length from various social science disciplines, but its primary language is economics. Its objective is to expound on institutions, (described as formal and informal rules and their enforcement characteristics) analysing their origins, their roles, their resistance to change, and why some succeed and why some fail to attain their goals.[3]

The NIE research programme started with the article by Ronald Coase entitled, "The Nature of the Firm" with his introduction of the concept of transaction costs into economic analysis[4] a concept that he developed further in his paper the "Problem of Social Cost."[5] In "The Nature of the Firm" Coase addressed the presumption that the market was the most efficient arrangement within which to carry out commercial exchange. Coase argued in response to

[3] See Peter G. Klein, "New Institutional Economics", in Boudewijn Bouckeart and Gerrit De Geest, (eds.), Encyclopaedia of Law and Economics (2000), Edward Elgar: Cheltenham, pp.456-489, p.456.

[4] See Ronald H. Coase, "The Nature of the Firm", 4 Economica (1937), pp.386-405.

[5] See R.H. Coase, "The Problem of Social Cost", 3 Journal of Law and Economics (1960), pp.1-44, p.1.

this presumption that notwithstanding the efficiency and superiority which the market is supposed to have there are a number of transaction costs that arise out of market activity which can breed inefficiency. Transaction costs include search and information costs, bargaining costs, the cost of keeping trade secrets, and policing and enforcement costs and that the significance of transaction costs is that they should be included in calculating the efficiency of markets.

Developing further his argument on transaction costs, in his paper "The Problem of Social Cost" Coase's thesis is that in a transaction cost free world parties to a bargain will smoothly negotiate between themselves and so reach mutually beneficial outcomes even if these outcomes fly in the face of an initial assignment of rights to the parties. Thus extremely small or zero transaction costs and clearly-specified property rights allow individuals to resolve contractual problems through voluntary exchange in a free market.

However, as Coase demonstrated in this paper, the world is not free of transaction costs and thus as these costs rise to resolve any dilemmas requires a shift from non-existent organizational frameworks to hierarchical and centralized arrangements.[6] Government intervention is necessary to resolve any disputes through the use of taxes, regulations and prohibitions, but, however, this should not be the default option. If the parties can overcome transaction costs then state intervention is not required. In the entirely theoretical world of a perfectly functioning market, with no transaction costs and everyone in possession of correct information, it is easy to strike bargains. In the real world of course, individuals and organizations face the prohibitive costs of continually working out with whom to do business

[6] It is in this regard that Coase describes the government as a super-firm, ibid., p.17.

and which goods and services they need to obtain. In effect the real world is fraught with varying degrees of transaction costs.

Where do transaction costs come from? Oliver Williamson asserts that transaction costs are the consequence of opportunism in socio-economic intercourse and these costs emerge under conditions of imperfect information. Williamson claims that in the wake of information asymmetries there is the likelihood of transactions being impacted by the problem of 'self-interest seeking with guile' as given the opportunity, actors may serve their own interests rather than those of other parties to a contract.[7] The difficulties of monitoring and enforcing contracts in information-poor arrangements will produce transactions costs that tend to complicate exchange. With ostensibly little faith therefore in the selflessness of rational actors, Williamson argues that economic man is a subtle and devious creature capable of exploiting difficulties that arise after contracts are entered into and it is here that monitoring and enforcing agreements becomes problematic.

Williamson's opportunism amounts to a wider conception of self-interest seeking as he includes guile as a critical determinant.[8] While this conception of the origin of transaction costs has gained wide acceptance in the literature other scholars locate transaction costs in different circumstances that surround relationships. Thus, for instance, there is the view by Geoffrey Hodgson that transaction costs grow out of differences that the parties have in

[7] See Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975), Free Press: New York, p.255.

[8] See Oliver E. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations", 22 Journal of Law and Economics (1979), pp.233-261, p.234, note 3.

construing an agreement.[9] Hodgson doesn't seek not to overturn Williamson's arguments but, rather he aims to expand the understanding of how transaction costs come about and therefore he goes beyond just guile as the cause for such phenomena.

Opportunism as defined by Williamson might not exist in every transaction. We point to research that suggests economic actors are not always opportunistic in the Williamson sense or even in the normal sense of the word. Thus by viewing economic relations from a broader perspective, our argument is that relationships between landlords and tenants in Ghana can be rooted in social considerations which exclude shrewd, calculating individual self-interest. Hence we should not automatically assume opportunistic guile or even ordinary opportunism in relationships and extend this assumption to landlords or tenants as, based on research, relations tend to be stitched into a skein of social interactions and this helps to understand housing markets and landlord-tenant relationships.[10]

[9] See Geoffrey M. Hodgson, "Opportunism is Not the Only Reason Why Firms Exist: Why an Explanatory Emphasis on Opportunism May Mislead Management Strategy", 13 Industrial and Corporate Change (2004), pp.401-418.

[10] Scholars have identified this pattern of behaviour in a number of economic relationships in Ghana: see Sara Berry, "Property Rights and Rural Resource Management: the Case of Tree Crops in West Africa", 24 Cahiers des Sciences Humaines (1988), pp.3-16; and A.F Robertson, "Abusa: the Structural History of an Economic Contract", 18 Journal of Developmental Studies (1982), pp.447-478.

In this vein therefore, we acknowledge the interaction between economics and sociology under the NIE canopy.[11] In his influential article "Economic Action and Social Structure"[12] Mark Granovetter points out that actors do not behave or decide issues as atoms outside a social context. Rather an actor's purposive action tends to be grounded in concrete, on-going systems of social relations"[13] as social relations "produce trust in economic life."[14] For Granovetter therefore, we should take into account the history of relationships and network structures as in his opinion any analysis of relationships must try and incorporate these two phenomena for a clearer understanding of social and commercial excahnge.

Embedding contracts in history and networks brings us to McNeil's classification of contracts. McNeil identifies three types of contracts. First there are classical contracts where there is what he calls discrete exchange between the parties. In a truly discrete exchange, the parties have virtually no social relations, either past, present, or future. All that is of concern is the transaction and thus this type of transaction tends to be a simultaneous exchange between strangers who, most probably will not encounter each other again. This by no means, however, renders the classical contracts construct useless as a tool of economic or legal analysis, because in reality some discreteness is present in all exchange transactions and

[11] See the following papers which explore this extension of NIE: Victor Nee, "New Institutionalism, Economic and Sociological", in Handbook for Economic Sociology (2005), Neil Smelser and Richard Swedberg (eds.), Princeton University Press: Princeton, New Jersey, pp.49-74; Victor Nee and Richard Swedberg, "Economic Sociology and New Institutional Economics", in Claude Menard and Mary Shirley (eds.), Handbook of New Institutional Economics (2005), Springer-Verlag: Berlin, pp.789-818.

[12] See Mark Granovetter, "Economic Action and Social Structure: the Problem of Embeddedness", 91 American Journal of Sociology (1985), pp.481-510.

[13] Ibid., p.487.

[14] Ibid., p.491.

relations.[15] Unable to anticipate future contingencies arising from exchange; the potential for disputes; and the assertion by McNeil himself that the classical world is a rare instance of contracting, there is a variation on classical contracting referred to as neoclassical contracting. At the heart of the neoclassical model and what makes it differ from classical contracting is that it incorporates a third-party governance structure to resolve any disputes arising between the parties.[16]

Our argument that repeated landlord-tenant relationships are rooted in lengthy periods of interaction as a consequence of lengthy advanced rent deposits brings us to McNeil's third type of contracting – relational contracting. Relational contract theory focuses on the relationship between parties being bounded by repeated interactions within a particular well-defined group together with a set of norms governing the behaviour of the group members. In this context the potential for opportunism is minimized if not eliminated as repeated interactions can enable cooperation.

If we accept the duration of relationships as an aspect of contractual relationships, then relational contracting challenges, if not displaces, the discreteness of classical contracts and the need for a third party governance structure that is central to neoclassical contracting. Instead a contract's success and durability depends as much on norms that have emerged and developed among the parties as it does on formal law, if not more so. It is here therefore that there is a marked distinction between relational contracts on the one hand, and classical and neoclassical contracts on the other hand. Relational contracts are far more complex and more

[15] See Ian R. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational; Contract Law", 72 Northwestern University Law Review (1977-1978), pp.854-905, p.856.
[16] Ibid., pp.865-867.

lasting than the two latter types of contracts. Also when resolving disputes the method taken by parties to a relational contract is not always the same as that found under the neoclassical system.[17]

Robert Ellickson's work enables us shed further light on relational contracting. Ellickson studied the relationships between cattle ranchers in Shasta County, California and in his conclusions he challenged the assumption that parties to a contract always keep faith with their obligations as stipulated by law.[18] Ellickson's analysis of disputes found that they were usually resolved by appeal to generally accepted social rules, and not by bargaining over legal rights. He claims that members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that they obtain in their normal daily affairs with one another. Thus through repeated play, individuals normally converge on strategies of cooperation that improve joint well-being and these strategies replace traditional legal remedies. Ellickson's findings about Shasta County are that parties to an agreement that is supposed to be executed within the framework of existing law tend to rely on quasi-legal or non-legal measures to solve disagreements; thus reliance on norms reduces transaction costs.[19] Ellickson thus stresses the import of what arguably falls under the umbrella of law and behavioural economics. Here psychological and sociological variables are critical in forging relations between parties who have developed or about to develop a long-term relationship.[20]

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[17] Ibid., pp.886-894.

[18] See Robert C. Ellickson, "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County", 38 Stanford Law Review (1986), pp.623-687.

[19] Ibid., pp.672-685.

[20] Traditional law and economics is largely based on the standard assumptions of neoclassical economics in which individuals have rational preferences among a set of outcomes; individuals maximize their utility, and

Furthermore, when negotiating their obligations, parties to an agreement also agree that informal methods of dispute dissolution are used prior to before resorting to litigation. Ellickson notes in this regard that interactions between neighbours in Shasta County are not controlled not by law but by a system of norms; there is a private law code having no connection to courts, legislatures, or any other agency of state power.[21] What Ellickson points out is that if the transaction costs of learning the law are high, then there is little use for governmental moulding and re-moulding of the law since actors will ignore it anyway. Hence these high costs become an argument for bargaining among actors rather than governmental solutions to conflicts.[22]

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they act on the basis of full and relevant information. These assumptions are useful but they are insufficient, from the standpoint of behavioural economics, in explaining human behaviour. The insufficiency of law and economics' basic assumptions lies in the claim that individuals are boundedly rational. The aim of this challenge to this model of economic man is to replace him with a kind of man whose behaviour while still rational is more realistic and which reflects limits to information and a wider set of biases which are deemed non-rational: see Christine Jolls, Cass R. Sunstein, and Richard Thaler, "A Behavioral Approach to Law and Economics", 50 Stanford Law Review (1998), pp.1471-1550; and Herbert A. Simon, "A Behavioral Model of Rational Choice", 69 Quarterly Journal of Economics (1955), pp.99-118.

[21] See Ellickson, "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County", supra, pp.681-682.

[22] Ibid., p.686.

PART II

PRIVATE TENANTS AND THE 1963 RENT ACT

As at writing Ghana has a housing deficit of about 1.5 million houses.[23] Published work suggests increasing rural-urban flows are responsible for this deficit: Based on the most recent population census data the Greater Accra region has the largest population with around 4 million residents[24] with 1.8 million residents in the Accra metropolis.[25] According to the census the Greater Accra region is also Ghana's most densely populated region with a recorded density in 2010 of approximately 1,236 persons per square kilometre-a rise from 895.5 persons per square kilometre in 2000.[26] Rural-urban migration has had an impact on population in Kumasi, Ghana's second largest city, with its 2 million residents according to the census[27] and this city has, as a consequence, the third largest population density.[28]

[23] See Irene Appeaning Addo, "Urban Low Income Housing Development in Ghana: Politics, Policy and Challenges", (2014), available at Google Scholar. There has been a major increase in land prices leading to an inelastic housing-supply market. As a result demand for housing continues to outstrip supply with Accra in particular feeling the impact of this development. Even though new houses are being built it is noted that most of them are large houses and luxury apartments and are therefore not the type to meet the needs of low-income tenants. By 2020, it is claimed, Accra will need 5.7 million new rooms to house the growing low-income dwellers: see Sharon Benzoni, "Crowded House: Accra Tries to Make Room for a Population Boom", 4 Next City (2013), pp.1-15, p.1.

[24] See Ghana Statistical Service, 2010 Population & Housing Census: Final Results (2012), Accra: Ghana, Table 1, p.1.

[25] See Paul W.K. Yankson and Monique Bertrand, "Challenges of Urbanization in Ghana", in Elizabeth Ardayfio-Schandorf, Paul W.K. Yankson and Monique Bertrand (eds.), The Mobile City of Accra: Urban Families, Housing and Residential Practices (2012), CODESRIA: Dakar, pp.25-46.

[26] See Ghana Statistical Service, 2010 Population & Housing Census: Final Results, supra, Table 3, p.2.

[27] Ibid., Table 10, p.8.

[28] Ibid., Table 3, para.2.

Apart from the housing deficit, renting private accommodation is costly. As at writing rental rates for a two-bedroom apartment in Accra can start at 200 US dollars and reach as high as 2,000 US dollars in more expensive areas while currently, the daily minimum wage in Ghana is 2.50 US dollars and the average Ghanaian salary is around 400 US dollars per month.[29] Having to make large deposits in advance of up to 5 years has therefore produced a barrier to entry into the accommodation market for low-income tenants in particular and this has led to the National Tenants Association of Ghana to call for the government to enforce the Rent Act.[30]

What is said to compound the rental market for low-income tenants in particular is that as at writing, over 95% of all houses supplied in Ghana are from the private sector while only 5% are supplied by the government.[31] This dominance of the private sector in providing rental accommodation creates two problems: first the state, presumably more likely to comply with

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[29] See Billie McTerman, "Accra's High Rents Means Ghanaians Lose", (4 December 2013), available at http://www.ipsnews.net/2013/12/accra-city-high-renting/ (last visited 22 March 2016).

[30] See "Tenants Association of Ghana Petitions President Mahama", (23 April 2013), available at http://www.ghanaprimeproperties.com/tenants-association-of-ghana-petitions-president-mahama/ (last visited 24 April 2015). This breach of housing legislation seems to be an issue in a number of African countries. For example in the Gambia rent advance demands range from 2 months to 8 months, in contravention of existing legislation: see Alagi F. S. Sora, "Gambia: KMC Rent Tribunal on House to House Campaign", (7 June 2013), http://allafrica.com/stories/201306101866.html (last visited 24 April 2013). In many cities in Nigeria, and Cameroon for instance, tenants have to pay 24 months' rent in advance in cash. To renew a tenancy requires another cash payment covering another 2 years. This too is alleged to be a product of a mismatch between demand and supply in the housing market: see Harmut Sieper, "A Look at the Residential Property Market in Africa", (December 31 2013), http://www.afribiz.info/content/2013/a-look-at-the-residential-property-market-in-africa (last visited 24 April 2015).

[31] See Addo, "Urban Low Income Housing Development in Ghana: Politics, Policy and Challenges", supra, p.5.

the law, is a marginal actor in the housing market and thus private tenants are very unlikely to encounter a landlord (the state) who complies with the Rent Act. Second there is a problem with monitoring the behaviour of private landlords as the state apparatus must be efficient enough to ensure the huge pool of private landlords complies with all aspects of the Rent Act including the provisions on rent deposits. As we indicate below, the current apparatus is unable to effectively discharge its responsibilities so as to protect low-income tenants.

Another issue complicating the housing market is that changing cultural practices and the so-called westernisation of family systems have led to an increasing preference for the construction of single family dwellings. This type of house is opposed to the multi-habited houses that have traditionally been a major source of housing provision among low income households. Thus some observers claim that there is a gradual shift away from old-style multifaceted dwellings with their role of absorbing members of extended families which in the past could have shielded private tenants from supposedly rapacious private landlords.[32]

Reasons for rent deposits in breach of the Rent Act include preventing tenants from defaulting on rent;[33] that landlords require lump sums of money to undertake repairs to houses that are in poor condition;[34] and also huge advances are as a means of increasing the net value of low rents in the country.[35] Some tenants also support the system of large

[32] Ibid.

[33] See Godwin Arku, Isaac Luginaah and Paul Mkandawire, "You Either Pay More Advance Rent or You Move Out: Landlords/Ladies' and Tenants' Dilemmas in the Low-income Housing Market in Accra, Ghana", 49 Urban Studies (2012), pp.3177–3193, p.3188.

[34] Ibid., p.3189.

[35] Ibid., p.3182.

advanced payments on financial grounds asserting that this practice ‘‘provides a considerable level of stability and long-term shelter” as tenants do not have to shoulder monthly rent obligations.[36]

As noted above the Rent Act was adopted to regulate landlord-tenant relationships. For our purposes, under article 25(5) landlords are prohibited from demanding in advance rent of more than one month for a tenancy of one month or shorter or, in the case of a tenancy of six months or more, the landlord is prohibited from demanding rent of six months or more.[37] A breach of article 25(5) carries a fine of not more than 250 penalty units[38] which is currently equivalent to 250 Ghanaian cedis. To oversee landlord-tenant relations, the Act provides for a bureaucracy with the power to administer the Act. Positions that are created for administrative purposes are a Rent Commissioner,[39] charged with the responsibility of the general administration of the Act and Rent Officers to discharge the functions assigned to them under the Act.[40]

The provisions of the Rent Act prohibiting advance rent payment are difficult to enforce for the following reasons: First there is the problem of regulatory arbitrage: regulatory arbitrage is the manipulation of the structure of a transaction to take advantage of a gap between the economic substance of a transaction and its regulatory treatment.[41] Regulatory arbitrage

[36] Ibid., p.3185.

[37] See Rent Act, supra, article 25 (5).

[38] Ibid.

[39] Ibid., article 2.

[40] Ibid., article 3.

[41] See Victor Fleischer, "Regulatory Arbitrage", 89 Texas Law Review (2011), pp.1-65.

usually happens if the rules of a regime do not match the economic substance of transactions that the regime is intended to regulate.[42] Regulatory arbitrage is therefore a phenomenon that follows from having regulations that fail to take economic reality into account. The arbitrage dimension to the Rent Act is that given the low level of penalty points the punishment is virtually costless; a landlord who violates the restrictions on rent deposits faces a fine, as at writing, of 250 penalty points which is currently equal to 120 United States dollars.[43]

[42] See Jordan M. Barry, "On Regulatory Arbitrage", 89 Texas Law Review (2011), pp.69-78.

[43] See Fines (Penalty Units) Act 2000 (Act 572). Under this Act one penalty unit is equal to the amount of cedis specified in schedule where it states that a penalty unit is equal to 20,000 old Ghanaian cedis. When converted to United States dollars is approximately, as at writing, 48 cents. Thus 250 penalty units is equal to 120 US dollars demonstrating, evidently, the advantage to be gained from charging rent beyond that which is set out in the Rent Act. Even if there is dissatisfaction with the penalty units the method amendment can only in the long run be through the normal legislative amendment process or in the relatively shorter run an amendment can be done through the procedure specified in the Fines Act itself. Here the Attorney-General may by legislative instrument amend schedule 1 subject to the proviso however, that the value of one penalty unit shall not exceed a sum equivalent to one third of the prevailing national daily minimum wage multiplied by thirty. For penalty units to have an impact on landlord behaviour will require multiple legislative instruments and the hope that the value between the cedi and the dollar remain rather stable. The first can easily bring the legislative instrument process into disrepute and the second is rather unlikely given the decline in value of the cedi. On the cedi's loss of value see: Ghana's Exchange Rate Challenge: can we ever get out of it? (No date) Position Paper, International Institute for the Advanced Study of Cultures, Institutions, and Economic Enterprise, (exploring the decline of the cedi up to 2014) available at http://www.interias.org.gh/sites/default/files/Position%20Paper/Exchange-Rate-IIAS-Paper...-Edited.pdf (last visited 20 December 2016); and Masahudu Kunateh, Falling Cedi Drags Ghana Exchange Down (November 29, 2015) available at https://www.african-markets.com/en/stock-markets/gse/falling-cedi-drags-ghana-exchange-down (last visited 20 December 2016).

Second, there are organizational challenges facing the Rent Control Department (RCD). The RCD is the mechanism for enforcement of the Rent Act yet its offices are understaffed and ill-resourced and thus there is little outreach to landlords and tenants regarding education of rights and adjudication procedures. In terms of settling disputes, there is a lack of capacity for real enforcement due to the fact that the RCD has no *subpoena* power.[44] In a recent account the RCD received a total of 28,219 complaints of which only 7,073 have been settled. This shows the RCD's importance but also that it is operating below its capacity with only 23 District and Regional offices[45] across the country and 21 professional staff.[46] Thus problems of access to justice through the RCD highlight the complexities that come in the wake of demands for greater state activism in the market for private rental accommodation.

In Ghana the state has always sought to correct the perceived power imbalances between landlord and tenant. The basis for state intervention has been the assertion that policy-makers have immense faith in the role formal law can play in addressing problems in the housing

[44] There is currently a backlog of 59000 cases in the courts: see "Over 59,000 Cases Pending in Ghana Courts – Judge Reveals", (15 March 2016), available at http://www.modernghana.com/news/680317/over-59000-cases-pending-in-ghana-courts-judge-reveals.html (last visited 28 March 2016). Resolving disputes in Ghana in general is highly problematic on account of the volume of cases in the courts. The cause of this backlog has a number of probable explanations: subject of national debate: some insist that the problem is a demand side one – a consequence of Ghanaians being too litigious and thus they pursue cases unnecessarily; there is the view that Ghana's land tenure and land administration systems are so ambiguous and confusing that they automatically generate a large degree of conflict. Others see the problem as a supply side one – with the courts lacking the capacity to handle the caseloads: see Richard C. Crook, "Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspective", 36 Journal of Legal Pluralism and Unofficial Law (2004), pp.1-28, p.8.

[45] As at writing Ghana has 10 administrative regions and 212 administrative districts: see http://districts.ghana-net.com/ (last visited 4 September 2016).

[46] See United Nations Human Settlements Programme (UN-HABITAT), Ghana: Housing Profile (2011), Nairobi: Kenya, p.33.

market.[47] From rent controls[48] to proposals that estate agents be regulated[49] the state has always been called upon to act to protect the more vulnerable in Ghana's housing market. Perhaps the most activist measures on the part of the state were during the administration of the Provisional National Defence Council (PNDC) from 1981 to 1992 when in the 1980s, and aimed at increasing the supply of affordable accommodation, the PNDC passed laws on rent controls and compulsory letting of private accommodation. Landlords were compelled to reduce rents and fix them at levels deemed to be within the means of private, low-income tenants.[50] Legislation also granted power to state officials to forcibly enter unoccupied dwellings and to let them to prospective tenants irrespective of the wishes of the landlord.[51]

[47] See E. Nii-Ashie Kotey, "Legal Control of Rents of Premises in Urban Areas of Ghana: Lessons and Prospects", 27 Review of Ghana Law (1989-1990), pp.118-137.

[48] See Graham A. Tipple and Kenneth G. Willis. "The Effects on Households and Housing of Strict Public Intervention in a Private Rental Market: a Case Study of Kumasi, Ghana", 20 Geoforum (1989), pp.15-26; and Graham A. Tipple, The History and Practice of Rent Controls in Kumasi, Ghana (1988), World Bank Working Paper Washington, DC: World Bank.

[49] See Franklin Obeng-Odoom, "Real Estate Agents in Ghana: A Suitable Case for Regulation?" 45 Regional Studies (2011), pp.403-416; and Ghana Introduces Real Estate Authority Bill to regulate sector http://www.ghanaweb.com/GhanaHomePage/business/Ghana-introduces-Real-Estate-Authority-Bill-to-regulate-sector-448082. Regulating estate agents through licensing is supposed to minimize the likelihood of poor tenants being the victims of fraud with low-income tenants bearing the brunt of this activity.

[50] See Rent Control Law (1982) PNDC Law 5. This law reduced the rent for all residential accommodation by 50 per cent and also froze rents which were considered to be at a reasonable minimum at the time of the law's enactment. In addition it prohibited landlords from raising rents until a year after the promulgation of this law. Furthermore, the law mandated a 50% tax on all rents which were 1000 cedis or more and sanction for breach of the law was confiscation of the property by the state. For an analysis of this see K. Oteng Kufuor, "Private Sector Housing in Ghana: Some of the Legal Aspects of State Control since 1982", 37 Journal of African Law (1993), pp.46-51.

[51] See Compulsory Letting of Unoccupied Room and Houses Law (1982) PNDC Law 7; also see Kufuor, "Private Sector Housing in Ghana: Some of the Legal Aspects of State Control since 1982", supra.

Judicial decision in Ghana to clarify the rights of tenants and landlords have also added to the array of measures to regulate landlord-tenant relationships with the aim, ostensibly, to protect tenants from excesses of their landlords when terminating leases.[52] The courts have also been used to shed light on the burden shouldered by both landlords and tenants in respect of residential tenancies given that in some instances these tenancies are oral agreements between the parties.[53] However notwithstanding legislative and judicial decisions, for some scholars law's role is limited given the complexity of housing in Ghana and thus the ultimate solution likes in an increase in the supply of the housing stock.[54]

PART III

TRANSACTION COSTS AND RENTING PRIVATE ACCOMMODATION IN THE GHANAIAN HOUSING MARKET

Housing markets give rise to transaction costs for tenants.[55]John Quigley has identified a number of transaction costs in housing markets including: search costs; adjustment costs; and the costs of uncertainty.[56] Search costs arise when tenants seek new accommodation as identifying and evaluating a new accommodation normally entails inspecting dwellings in a

[52] See E Nii-Ashie Kotey, "The Termination of Leases", 18 University of Ghana Law Journal (1990-1992), pp.30-48.

[53] See E. Nii-Ashie Kotey, "The Rights and Obligations of Residential Landlords and Tenants", 17 University of Ghana Law Journal (1986-1990), pp.100-159.

[54] See Kotey, "Legal Control of Rents of Premises in Urban Areas of Ghana: Lessons and Prospects", supra.

[55] We should remind ourselves here that Coase said a world free of transaction costs is virtually non-existent: this is the essence of his papers "The Nature of the Firm", supra, and "The Problem of Social Cost", supra.

[56] See John M. Quigley, Transactions Costs and Housing Markets (2002), University of California Berkeley Working Paper No. WO2-005, p.2. Quigley does, however, include financial costs in his types of transaction costs; ibid, pp.2, 6, and 7.

variety of locations. While it is possible to observe potential new accommodation by driving past them, reading newspapers or relying on web-based technologies, some physical inspection of the property must take place. Hence properties need to be physically inspected before an agreement is entered into.[57]

Specific to Ghana, rental information is rarely advertised and potential renters tend to find accommodation units through networks of friends and relatives, personal enquiries or third-party middlemen.[58]Although there are estate agents available through whom information about new accommodation can be obtained research suggests that landlords and tenant try to avoid or minimize transaction costs associated with using estate.[59] Consistent with Quigley's assertion, the cost of searching for property or tenants has been reduced somewhat in the wake of the emergence and use of technologies to advertise rental accommodation.[60] Websites in Ghana such as Lamudi,[61] Ghanafind[62] Tonaton[63] and Ghanaweb[64] give landlords and tenants renting options. Landlords and tenants therefore need not rely solely on friends, relatives and other personal networks to enter into bargains. Notwithstanding the impact of

[57] Ibid., p.4.

[58] See Godwin Arku, Isaac Luginaah and Paul Mkandawire, "You Either Pay More Advance Rent or You Move Out: Landlords/Ladies' and Tenants' Dilemmas in the Low-income Housing Market in Accra, Ghana", 49 Urban Studies (2012), pp.3177–3193, p.3182.

[59] See Paul W.K.Yankson, "Landlordism and Housing Production in Greater Accra Metropolitan Area", in Ardayfio-Schandorf, Yankson and Bertrand (eds.), The Mobile City of Accra: Urban Families, Housing and Residential Practices, supra, pp.163-182, p.174.

[60] See Quigley, Transactions Costs and Housing Markets, supra, p.4.

[61] See http://www.lamudi.com.gh (last visited 7 September 2016).

[62] See http://www.ghanafind.com (last visited 7 September 2016).

[63] See http://tonaton.com/en/ads/property-in-ghana-623 (last visited 7 September 2016).

[64] See http://www.ghanaweb.com/GhanaHomePage/realestate/residential_rentals.php (last visited 7 September 2016).

technology though, we still hold to Quigley's assertion above that some physical inspection of a property is required before a tenant decides to rent a dwelling and also landlords will prefer to meet prospective tenants in person before they agree to let their rooms or houses. Thus this dimension to rental bargains makes for transaction costs as we assume there are limits to the number of dwellings a tenant can physically inspect and there are limits also to the number of tenants a landlord will want to meet and judge for suitability before entering into a bargain.

The adjustment costs include the "psychic costs" of moving to a different residence. Presumably these costs are larger for long distance moves than for short distance moves[65] but they are costs all the same as tenants have to adjust themselves to new socio-economic surroundings which can be very different from that which they are used to. Uncertainty and adjustment costs arise in the wake of the NIE assumption that individuals have incomplete information and limited mental capacity by which to process information. It is these limitations that impose constraints on decisions including, in this instance, the search for and move to new neighbourhoods and new accommodation.[66]

In addition to the costs set out by Quigley is the cost of resolving housing disputes between landlord and tenant. There is a lack of faith on the part of both tenants and landlords in the RCD. Some tenants point out that it is a "sheer waste of time going to the RCD'', with the view that they would ''never lodge any complaints with the RCD again''. Inordinate waiting times to have disputes resolved and allegations that to have a dispute heard requires illegal

[65] See Quigley, Transactions Costs and Housing Markets, supra, p.4.

[66] See Douglass C. North, The New Institutional Economics and Development, available at http://www2.econ.iastate.edu/tesfatsi/NewInstE.North.pdf (1993), (last visited 10 December 2016).

payments to officials in the RCD[67] make it an unattractive forum for tenants and landlords that seek to have tenancy issues resolved.[68] Here, transaction costs peculiar to landlords is that they sometimes have difficulty monitoring tenants' movements and behaviour to prevent them from defaulting on their rent. Thus long-term advances ensure this cost is minimized.[69]

While landlord income maximization may be true as a general rule, this goal is still compatible with any non-financial goals landlords may have. The peculiarity of housing is such that it tends to be set apart from many other investments. Housing assets are neither divisible nor fungible; instead housing assets are lumpy, representing a major portion of assets owned by an individual. Furthermore, the adjustment and transactions costs associated with housing tend to be large and lumpy too and for these reasons participants in the housing market tend to economise on transactions costs by limiting the number of market transactions.[70] Arguably, Ghanaian landlords fit into this mould. Research suggests that

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[67] NIE developed from the early work by Coase into a very rigorous intellectual agenda and one of the consequences of his work was the development of the public choice school. Public choice theory takes the same concepts that economists use to analyze people's actions in the marketplace and applies them to people's actions in non-market settings such as bureaucracies. Economists who study behaviour in the private marketplace assume that people are motivated mainly by self-interest. Public choice theorists make the same assumption—that although people acting in the political marketplace have some concern for others, their primary motive, whether they are voters, politicians, lobbyists, or bureaucrats, is self-interest. James Buchanan one of the foremost scholars in this tradition says the public choice research programme replaces the romantic and illusory notions about the workings of governments with notions that embody more scepticism. For an introduction to public choice theory see James M. Buchanan and Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962), University of Michigan Press: Ann Arbor, Michigan.

[68] See Arku, Luginaah and Mkandawire, "You Either Pay More Advance Rent or You Move Out: Landlords/Ladies' and Tenants' Dilemmas in the Low-income Housing Market in Accra", supra, p.3188.

[69] Ibid.

[70] See Quigley, Transactions Costs and Housing Markets, supra, p.4.

income maximization is not the sole goal behind the decision to become a landlord. Rather becoming a landlord is explained by more complex financial motives. Landlords rent out accommodation to supplement their income and thus they distinguished this from renting out dwellings for the sole purpose of income maximization.[71] Maximizing income could lead to a situation where landlords compromise on risk factors associated with renting to tenants that they do not know much about such as the costs of resolving disputes in multi-habited dwellings, or recovering rent due, or maintaining common areas in multi-dwelling houses. What comes into play here is Herbert Simon's satisficing as contrasted with optimization. Simon's concept of satisficing is that it is a decision-making strategy where individuals have as their goal an adequate outcome instead of the optimal outcome. Satisficing is on account of the desire to minimize time and resources to be invested in search of the optimal outcome.[72]

Furthermore, if income maximization is the sole aim then there is the possibility that rooms will remain unoccupied for inordinate periods of time as landlords will most probably continue to hold out for more income from tenants, turning down each successive tenant with the view that more a higher rate of return on their dwellings can be realized. This is a holdout scenario. Holdouts arise when owners of a valuable resource choose not to transact with a willing potential partner on account of strategic behaviour as each side haggles for the most favourable outcome. Holdouts tend to arise when consent to a bargain cannot be obtained

[71] See Yankson, "Landlordism and Housing Production in Greater Accra Metropolitan Area", supra, p.170.

[72] See Herbert A. Simon, "A Behavioral Model of Rational Choice", 55 Q*uarterly Journal of Economics* (1955), pp.99-118; and Herbert A. Simon, "Theories of bounded rationality" 1 *Decision and Organization* (1972), pp.161-176.

because one party's welfare will be negatively affected[73] or where transaction costs are so high leading to a failure of fruitful bargaining between parties.[74]

The problem of holdouts can be resolved by institutionalizing a framework for dispute resolution. However this option is not available in our thesis given that parties are transacting outside the law and thus falling by their actions intend to ignore the relevant provisions of the Rent Act. In some instances holdouts can be overcome by astute bargaining[75] whilst in other instances they can be overcome when there is a competitive market with numerous actors. In our instance this is the existence of multiple dwellings available for rent by tenants thus allowing them to abandon transactions with potential landlords that continue to holdout on them and seek alternatives.[76]

Research on residential mobility suggests that tenants consider a range of factors in determining residential choice which, we assume, will make possible tenancy agreements in breach of the law. One important factor for residential choice in Ghana is job location and the ability of tenants to avoid long journey times between home and work. Tenants have indicated that they are also influenced by the distance between where they live and the availability of bodies that provide public goods. Their neighbourhood choice is also influence by access to services that improve their social and cultural lives. Accordingly, they take into

[73] Richard A. Epstein, "Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase" 36 Journal of Law and Economics (1993), pp.553-586, p.559.

[74] See Robert Cooter and Thomas Ulen, Law and Economics, (6th edition, 2016), Addison-Wesley, p.177.

[75] See Epstein, "Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase", supra, p.560

[76] See Gideon Parchomovsky, and Peter Siegelman, "Selling Mayberry: Communities and Individuals in Law and Economics", 92 California Law Review (2004), pp.75-146, pp.109-124.

account easy access to schools, police stations, religious buildings, and bus and taxi stations. Another non-financial aspect of accommodation choice is that some tenants place importance on the aesthetic nature of their communities. Tenants gave particular importance factors such as green spaces, and environmental health or pollution. Some tenants become mobile, moving out of current accommodation in search of new ones largely because they desire increased levels of privacy. In this regard families seek to avoid sharing of facilities with other tenants that tends to be the practice in multiple-occupancy dwellings.[77]

The advantage of living close to one's relatives is also a determinant of residential choice as relatives can be a source of beneficial social capital especially for low-income households. As a social support system, relatives enable the pooling of income, sharing consumption and thus serves as a safety net by minimizing the vulnerability of its members. The migrant household experience in Accra is a particular reflection of this factor. In the absence of a well-developed state social security system, and in the context of being detached from the ethnic group to which they belong on account of migration to Accra, mutual assistance is provided by co-tenants or neighbours from the same ethnic group. The desire for harmonious co-existence is another explanation for the choices tenants make, especially those in migrant compound houses. Disputes between tenants are resolved rather easily and the overall running of the house tends to be done with the barest minimum of friction and disagreement over assigned administrative roles for all residents.[78]

[77] See Elisabeth Ardayfio-Schandorf, "Urban Families and Residential Mobility in Accra", in The Mobile City of Accra: Urban Families, Housing and Residential Practices, supra, pp.47-72, pp.65-66.

[78] See Irene Appeaning Addo, "Assessing Residential Satisfaction among Low Income Households in Multi-habited Dwellings in Selected Low income communities in Accra", 53 Urban Studies (2015), pp.1-20, pp.7-8.

Similar consideration applies to renting decisions in Kumasi where studies on residential housing satisfaction in Kumasi suggest that satisfaction is shaped by a range of non-financial variables. Factors such as the number and size of occupied rooms, materials used to construct the house, and the availability of water and electricity were deemed important by tenants. Tenants also laid stress on the multi-habited social dynamics such as the number of households sharing cooking and bathing facilities. Others placed emphasis on whether they can use their accommodation location as a means of earning income through commercial activities.[79]

Thus while the financial cost of renting is an issue that informs both landlord and tenant decision-making it is not the only issue and, in some instances, arguably, it is not even the paramount issue. The social relationship with landlords and other tenants, family ties, the availability of public goods, the social setting of dwellings all come into play to impact on landlord and tenant relationships. Landlords also factor into account their social relationships with tenants as a means of deciding on entering into agreements.

PART IV

THE DANGERS OF EXTRA-LEGAL TENANCY AGREEMENTS

What prevents landlords from collecting advanced rent deposits of, for instance, 2 years and then, after 6 months, serving notice to the tenant to quit? A tenant, in these circumstances, would find it hard to obtain satisfaction from the RCD or the courts where the burden of

[79] Ibid., p.2.

proof is on the aggrieved tenant that the bargain between him and the landlord was a 2 year bargain and not a 6 month one. Most probably there will be no formal record of this transaction as it is in breach of the law and thus transaction between the landlord and tenant is really a black market transaction. This type of relationship tends to be unrecorded, bedevilled with the potential for violence to resolve disputes, deception on the part of one or all parties. Furthermore, there is the strong probability of inferior goods and services being traded in such a market.[80]

The implications of a black market transaction is that parties to a tenancy agreement in breach of current or new legislation are in effect entering into an agreement where there is no state police power, and where there is little assurance that promises will be kept. Moreover, the courts in Ghana have refused to uphold illegal contracts and a number of judicial decisions attest to this. The Supreme Court in *Zalgoul Real Estates co Ltd* v *British Airways*[81] has clarified any obfuscation about the consequences of illegal contracts. In this case the Court held that a deed of indemnity between two parties in which advance rent of 40 million cedis was paid to cover a 25-year lease was in breach of the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law was illegal, void and therefore unenforceable.

[80] For transaction costs in black markets see Philip J. Cook, Jens Ludwig, Sudhir Venkatesh and Anthony A. Braga, "Underground Gun Markets", 117 Economic Journal (2007), pp.558-588.

[81] See *Zalgoul Real Estates Co. Ltd* (No.2) v *British Airways Ltd* Supreme Court of Ghana Law Reports, (1998-1999), p.378.

In *Re Sasu-Twum; Sasu-Twum v Twum*[82] it was held that a proposed partnership agreement that was not registered pursuant to the mandatory provisions of the Incorporated Private Partnerships Act was unenforceable. In *Kwarteng v Donkor*[83] the parties agreed that the plaintiff would forgive a substantial part of a loan he had made to the defendant the defendant would assist the plaintiff to elect one of the plaintiffs as a traditional ruler. The defendant was unable to ensure the election and neither was he able to repay the loan. The courts held that the attempted enstoolment was corrupt as both parties knew very well. Therefore no party should be assisted by law to recover anything given or promised to be forgone if it was in furtherance of an illegal transaction. In *Addy v Irani* the plaintiff alleged that he was a party to an illegal contract with the defendant that violated three statues relating to price controls and foreign exchange transactions. However, the defendant had failed to honour agreed obligations to him in exchange for the plaintiff's assistance. The court stated that where a contract which a plaintiff seeks to enforce is expressly proscribed, prohibited or forbidden by statute, no court will lend its assistance to give it effect.[84] A tenant caught up in an illegal tenancy situation has as his best outcome the decision in *Mensah* v. *Ahenfie Cloth Sellers Association* [85] where the Supreme Court held that an illegal contract, whilst a nullity and clearly unenforceable could in some instances be legal even if it was in breach of the terms of a statute. Such contracts were voidable and might be enforced in the wake of the satisfaction of certain conditions.

[82] See *Re Sasu-Twum; Sasu-Twum v Twum* (1976)1 Ghana Law Reports, p.23.

[83] See *Kwarteng v Donkor* (1962), 1 Ghana Law Reports, p.20.

[84] See *Addy v Irani* (1991), 2 Ghana Law Reports p.30.

[85] See *Mensah v. Ahenfie Cloth Sellers Association* (2010), Supreme Court of Ghana Law Reports, p.680

Notwithstanding the dangers of an illegal transaction there is a probability that parties to an extra-legal tenancy bargain are likely to keep faith with each other. As noted above there are transaction costs that both landlord and tenant face in searching for new tenants and accommodation. Relations are built and cemented to overcome transaction costs and thus there is very little incentive to complicate the cost of doing business by rupturing contractual relations. For instance, evicting a tenant after 6 months is possible under the Rent Act (assuming the tenant fails to establish that the tenancy agreement is really for more than two years) but as noted above this is to be done through the over-burdened RCD. Furthermore, a landlord can apply to the courts for eviction of a tenant but in these circumstances the landlord again faces a congested court system with its inordinate delays. It will not be an exaggeration to assert that litigation to establish the right to repossess accommodation based on the expiration of a 6 month tenancy could easily drag on for more than 2 years.

Moreover, we also noted the search for new tenants and new accommodation is done through personal networks. We thus hypothesize here that a landlord, woven into the networks of prospective tenants stands to suffer a decline in reputation, if he or she is seen to try and defect from previously agreed bargains as feedback mechanisms and self-regulation may prove to be a more cost-effective alternative to modern state-driven regulation. Tenants will therefore use checks and balances to constrain landlord by relying on networks for feedback and information. Even in black markets this information process promotes predictability and reliability which fosters faith in the market order.

PART V

CONCLUSION

The purpose of this paper is to add to existing research about how private ordering can serve as an alternative to state imposed top-down panaceas for social problems.[86] Scholars writing in the legal centralism tradition assert that the resolution of social problems requires disputing parties must have access to a forum external to the original social setting of the dispute and where remedies will be provided by experts who operate under the auspices of the state.[87] State power is therefore there to resolve social dilemmas including, in our instance, the supposed burden of advanced rent deposits. The scholars writing in the legal pluralism tradition however insist that most disputes are resolved by avoidance, self-help, and the like.[88] This latter approach to the resolution of disputes can fit with landlord-tenant relations

[86] On private ordering see for example: John McMillan & Christopher Woodruff, "Private Order Under Dysfunctional Public Order", 98 Michigan Law Review (2000), pp.2421-2458; Robert D. Cooter, "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant", 144 University of Pennsylvania Law Review (1996), pp.1643-1696; and Barak D. Richman, "Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering", 104 Columbia. Law Review (2004), pp.2328-2367, p.2330.

[87] See John Griffiths, "What is Legal Pluralism?" 18 Journal of Legal Pluralism and Unofficial Law, (1986), pp.1-55; Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", 13Journal of Legal Pluralism and Unofficial Law (1981), pp.1-47; and Sally Engle Merry, "Legal Pluralism", 22 Law & Society Review (1988), pp.869-896.

[88] See Oliver E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1985), The Free Press: New York, p.20. A good setting in which to appreciate conflict avoidance is in international relations. International treaties which contain provisions on dispute resolution tend provide for friendly settlements between the parties of any issues prior to litigation. In *Organisation Mondiale Contre La Torture v. Rwanda*, (African Commission on Human and Peoples' Rights, Comm. Nos. 27/89, 46/91, 49/91, 99/93 (1996) available at http://hrlibrary.umn.edu/africa/comcases/27-89_46-91_49-91_99-93.html) (last visited 7 September 2016), the African Commission on Human and Peoples' Rights stated that the primary aim of the

in Ghana. Thus we should not exclude the possibility of private ordering in resolving problems in Ghana's rental markets.[89] If we embrace Ellickson's thesis that he set out in his work on relations in Shasta county, we can see there is an advantage of incorporating private ordering into an understanding of how the circumventing the Rent Act can still work (or maybe is already working) to the advantage of both landlords and tenants.

communications procedure under the African Charter on Human and Peoples' Rights is to initiate a fruitful dialogue, resulting in an amicable resolution between the complainant and the state concerned. The World Trade Organisation has a similar approach to dispute resolution whereby parties to a dispute are obliged to enter into consolations with the aim of resolving the matter at stake. It is only after consultations fail to produce a satisfactory outcome that the complaining party may request that a panel be established to resolve the matter: see World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes, article 4, available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited 7 September 2016).

[89] See Williamson, The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting, supra, p.21.