

Social Tenure Based on Intimacy – Avoiding Family Disasters: South African Marital Contracts as an Innovative Pro-Poor Land Tool

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Key words Marital Agreements, Pro-Poor Land Tool, Security of Tenure.

SUMMARY

The Social Tenure Domain Model currently being developed by the Global Land Tool Network emphasizes the need to find innovative land tools that can function in a pro-poor way. One such tool that has not previously been explored is the use of marital and cohabitation agreements to secure tenure. Private agreements can go beyond a legal arrangement between spouses to record and entrench diversified forms of land rights that protect third parties. It is possible to use such agreements to secure housing rights for the entire household, to agree succession of land, and to agree to alternative conflict resolution procedures. Such agreements can take cognizance of both formal and informal strategies used by the poor to secure tenure, rather than being narrowly focussed on formal regularisation processes alone. It is possible to develop a model pro-poor prenuptial agreement under South African law that complies with constitutional principles, for use by couples in State subsidized housing. A similar construct could be replicated elsewhere in the region. Public trust in land administration systems is likely to be enhanced by the use of such privately determined records of rights, although legal aid remains a necessity for their implementation. Formal marital agreements are recorded in formal registries, meaning they are able to interface with land ownership records and are accessible to citizens as a public document. They can reduce fraud and eviction arising from dysfunctional family relationships and are fit for the purpose of recording family ties pre-conflict, in a manner that can assist with the management of family conflicts over land and housing after they arise.

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1. INTRODUCTION¹

It is often stated that in Africa the traditional normative view is to see people as belonging to land, rather than land belonging to people. Nevertheless, the perception of people belonging to land is predicated on people seeing themselves as either belonging – or not belonging – to each other. As Heaton (2007:14-15) notes, in the context of her South African research: “Family groups share the following features: they are intimate and interdependent; they are relatively stable over time; and they are set off from other groups by boundaries related to the family group, such that one family is separate from another in a variety of ways”. Like physical land boundaries, relational boundaries are vulnerable to being redrawn arbitrarily by family members. For the poor this is a particular hazard if their access to land depends on unrecorded family ties.

UN-Habitat (2011:5) defines tenure as based on “relationships between people and land directly, and between individuals and groups of people in their dealings with land”. This makes the legal consequences of personal relationships a significant sphere to examine with a view to creating innovative land tools capable of securing different rights and interests in land. Recording family-based rights can be critical to the future of vulnerable individuals. This is so both in times of peace, and in times of disaster, when individuals are separated from relatives with a legal duty of support, who may be able to help them in the future.

Contracts agreeing the matrimonial property consequences of an intimate relationship incorporate important data relevant to the land information system. They have considerable potential not only as a family law construct, but also as a land tool. In South Africa formal prenuptial agreements are legally the most developed form of cohabitation agreements. They are recorded in a public registry, meaning they are able to interface with land ownership records and are accessible to citizens as a public document. They can reduce fraud and eviction arising from dysfunctional family ties and are fit for the purpose of recording family relationships pre-conflict, in a manner that can assist with the management of family disputes post-conflict.

¹ This paper summarises aspects of the MPhil research of Leslie Downie relevant to the 2016 FIG Working Week. The author wishes to express her thanks to Jenny Whittal of the Geomatics Division at the University of Cape Town, for her MPhil promotion and her comments on this paper, and to Amanda Barratt who acted as co-promoter to assist with the family law content of the MPhil. Any errors are of course the author's. [Note: MPhil results pending]

2. PRO-POOR PRENUPTIAL AGREEMENTS AS AN INNOVATIVE LAND TOOL

Couples can use prenuptial and cohabitation agreements to record the terms of their commitment to each other and their dependents. This limits the harm of a possible personal disaster caused by the breaking of these promises by one or both of the parties. Such agreements are not a tactic currently used by poor couples (as individuals) to strengthen their rights, although lobola agreements (between families) are still common in Africa, sometimes used in addition to a prenuptial agreement. Nevertheless, marital and cohabitation agreements have many attributes that lend themselves to their use as a pro-poor innovative land tool to protect family and household tenure. The question “who is your family” can also be phrased: “Who are you family to?” How members of a couple answer this question is central to the formation of the intention to commit to a relationship that will be, as Heaton phrases it, “stable over time.” This is relevant not only for the rights of the couple *inter se*, but for the rights of their dependents as well.

Existing legal measures used to secure land and housing rights are often either inadequate, or the poor are not able to access the justice system that enforces the necessary protection (Holness 2013:129). The poor are therefore often required to use their own informal initiatives to protect themselves if faced with eviction by family or the refusal by relatives to fulfil the duty of support. The commitment of intimate partners to satisfy the need for maintenance and housing support for each other and their dependents is therefore an important area worthy of record. This is so even if at the time of recording the partners are not able to meet those needs. In times of personal (or national) disaster such records can serve as the foundation for future stability for individuals, based on the private duty of support owed to them by their family circle, as opposed to State support.

As Laufer-Ukeles (2015:283) explains in her research on the needs of children and caregivers: “Relational rights do not protect two individuals together. Rather, the rights attach to the individuals, but the duty to the individual comes in the form of support for the relationship”. Marital and cohabitation agreements constitute a legal record confirming the nature of support due in such relationships. One of the most important sets of rights and obligations affected by such agreements are those that relate to land. Their nature as a tool to record and determine land rights, and not just relationship rights, is highly relevant to initiatives such as those being developed by the Global Land Tool Network under the auspices of UN-Habitat (Van Asperen 2014; Saers *et al* 2015).

3. PRENUPTIAL AGREEMENTS AND THE SOCIAL TENURE DOMAIN MODEL

Existing land information system approaches often assume that the most important information that needs to be recorded is people’s relationship to land, with people’s relationship to each other being secondary. It may be that knowing which people belong to what land is of secondary importance. The primary need may actually be to record in a public database the intricate web of relationships that bind people and their dependents to each other. If land tenure (based on family support rights)

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cannot be secured against the family, it is unlikely to be secure against the world at large. Similarly, an absence of records that can be used to prove such legal duties of support can result in a loss of private (as opposed to public) support for vulnerable individuals.

Intimate relationships are a major means by which enduring social bonds are brought into being. Families or household groups are amongst the first building blocks of society and these blocks need a firm legal cornerstone. If not, in times of disaster they may be crushed by the weight of title-holders who see land ownership as vesting the right to unfettered discretion, free from relational obligations. Many areas in Africa function according to the ownership paradigm, with land title registered in a public database. In this context the creation of a tenure right that is capable of being secured as a real right over land, but has as its cause relational rights, is a clear need. The tenure debate must be taken into the private realm of household power imbalances that occur in the lives of the poor. Such imbalances are exacerbated by the absence of a direct charge against land that protects vulnerable household members. A direct charge against land need not merely be dreamt of as a desired future statutory right. It can be achieved in the present, by means of the agreements that record relational rights, namely those private prenuptial and cohabitation agreements that are capable of registration in a Deeds Registry.

4. PRO-POOR PRENUPTIAL AGREEMENTS IN THE SOUTH AFRICAN SUBSIDIZED HOUSING CONTEXT

4.1. BENEFICIARIES OF SOUTH AFRICAN SUBSIDIZED HOUSING

It is estimated that by 2050 70% of the world population will live in cities, with the housing challenges immense (Augustinus 2010:4). State subsidized housing in South Africa aims to address the poor's housing challenges in the local context. South Africa has made phenomenal strides with the provision of millions of subsidized houses in recent years. Accordingly these households are ideal for testing prenuptial agreements as a pro-poor tool to protect marginalized household members' right to access housing that is controlled by their intimate circle. Subsidized housing ownership is in the unique position of having been awarded largely through State grants. This means that if legal aid is provided for cohabitation agreements, it can be prescriptive about fair terms with regard to the subsidized property. The public mores would clearly require that the tenure security of vulnerable household members not be undermined.

Individuals must pass a means test confirming poverty to acquire a fully funded subsidized house. The means threshold for the individual housing subsidy in South Africa is currently a combined gross household income of less than R3 500 per month (Western Cape Department of Human Settlements 2015). This converts to just under £177 per month.² The South African National Housing Code definition of dependents is significantly different to the definition of legal

² At the exchange rate on 1-08-2015.

dependents (National Housing Code 2009:13). The Code's definition is pro-poor, being based not only on degrees of family consanguinity and marriage, but also on need in the form of "financial dependence".³ The dependents of housing applicants are therefore not necessarily construed according to the narrow legal definition of dependency. They include those relatives and partners in need that the applicants have committed themselves to support.⁴ The paperwork recording these relationships can accordingly be seen as recording a form of social tenure that may, or may not, correlate with legal categories. This makes South African subsidized housing highly relevant to social tenure land information models that wish to bridge the formal-informal divide.

4.2. SOUTH AFRICAN MATRIMONIAL PROPERTY LAW

The default matrimonial system for all South African marriages is that of community of property and profit and loss. Monogamous marriage without a prenuptial contract results in the ownership of an undivided half share in land (and any buildings on the land) owned by the other spouse. Ownership rights vest on date of marriage, before registration of transfer at the Deeds Office. This means that the consequences of formalization of land rights and formalization of relationship status hang together. Marriage formalisation is a free procedure.⁵ It is therefore also a free way to dispose of the right to land ownership in a legally enforceable manner. This makes it highly relevant to the poor. All the marriage statutes make provision for couples to exclude this default system with a prenuptial agreement. A default accrual prenuptial contract is provided for by statute, for couples that choose to exclude community of property. While this is the most common prenuptial form, couples are free to contract out of it, or to adjust it. A prenuptial contract is however not a free process. A "cheap" prenuptial agreement currently costs about R950 (Law2ticks: 2015). In other words this is just under a third of the household monthly income required to pass the subsidized housing application means test.

All marriages give rise to a reciprocal duty of spousal support, *pro rata* according to each spouse's means, irrespective of whether a couple is married in community of property or by prenuptial agreement. There are also duties of support that arise separately from marriage, particularly towards children and parents, with South African family law giving needy dependents rights to claim from relatives. Nevertheless, as noted in the *Volks NO v Robinson* constitutional court case: "Unfortunately the reality is that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way" (2005:para 66). Duties of support arise *ex lege* and cannot be removed by prenuptial contract, although prenuptial contracts can strengthen the practical ability to enforce these rights and duties. This can be achieved by the manner in which rights to spousal assets are determined.

³ "Consanguinity" means people descended from the same ancestor.

⁴ While this does have pro-poor benefits, it can result in a mismatch between heirs who succeed to title and the financial dependents of the original household.

⁵ The marriage statutes make provision for charges in some cases, but there are many organizations that would solemnize marriages for the poor for free.

A study of the law relating to prenuptial agreements can give an indicator of the capacity of agreements between couples to secure land tenure for the poor.⁶ Marital agreements are not usually regarded as a land tenure tool, despite the fact that (like title deeds) they are public documents registered at the Deeds Office. Significantly they are currently the only type of cohabitation agreement capable of including a succession agreement under South African law. Prenuptial agreements are conventionally used as a tool to protect the property of spouses against claims by third parties and to exclude assets from the default matrimonial property system. They can however also include terms for the benefit of third parties, which can include the couple's dependents. These qualities make them highly pertinent to land tenure.

South Africa recognizes customary marriages (Recognition of Customary Marriages Act 1998), civil unions (Civil Union Act 2006) and civil marriages (Marriage Act 1961 and Civil Union Act 2006). All of the family arrangements under these Acts are able to use prenuptial agreements (cf Matrimonial Property Act 1984). Prenuptial agreements manage the outcome of death, divorce and loss of property to debtors. They can accordingly be structured according to a couple's own normative views, rather than a top-down imposition of a matrimonial property system over which they have no say. Many couples holding a hybrid system of personal marital norms marry under the civil system. Marital contracts can be structured in a manner that they respect civil, customary, and religious or hybrid norms. This means they are able to address very real social issues underlying the marginalization of dependents, across a range of normative views.

4.3. THE SUBSIDIZED HOUSING OWNERSHIP CONSTRUCT

In South Africa urban State-subsidized housing is transferred to poor beneficiaries by registration of individual ownership or co-ownership at the Deeds Registry, making the title deeds public documents. This individual titling process results in title deeds in the name of an adult individual or a co-owning couple. The intention of this titling approach was no doubt to confer the high level of protection offered by a real right. The ownership approach has, however, had some drawbacks. Dependents (as opposed to the caregiving title-holder) do not acquire a real right over the land. This leaves them in the precarious position of only having a claim for support from those caregivers who are under such an obligation.

A direct claim to land must be distinguished from the duty of support, which is a general duty, although it does include the duty to provide shelter. The duty to provide shelter is not constituted under South African law as a direct charge against land. In those cases where the duty of support towards a spouse or dependent is not fulfilled, it can be enforced by litigation through the courts. However, an owner is free to sell their house and spend the proceeds, unless there is a prior court order prohibiting this. Dependents are then without redress if this is the person upon whom they

⁶ In the interest of brevity, a separate discussion of cohabitation agreements cannot be included in this paper.

depend, and that person is without the means to meet a claim for support by the time the claim is made.⁷

The housing tenure security of dependents in subsidized housing households is prejudiced by the absence of some form of group registration that includes real rights for the dependent members of the household. The individual titling system can at times undermine the State's original intention to provide housing protection for the main beneficiary and all dependents, not for a single beneficiary or the couple alone. From the State's perspective how best to achieve broad protection of dependents is complex, not least in view of differing beliefs. Some may believe that land tenure is best secured by means of private individual (or co-) ownership. Others may see tenure as a group's right to the use of the land, buttressed by the right to limit the disposal of land in a manner that threatens such rights. Prenuptial agreements offer a route for households to privately commit to a particular normative approach. Both an individual and a communitarian normative worldview can be entrenched by private contract, by using the particular legal strategies necessary to give them force.

The poor's broader lack of access to legal education, advice and remedies is widely recognized. Housing beneficiary couples are often not able to register transfer of a half or whole share of their subsidized property if their relationship breaks down.⁸ Intervening transfers due to deceased succession are often not registered due to the high cost of registration and other social factors, such that the number of land disputes grows exponentially. The conveyancing cost for subsequent transfers of previously subsidized houses is beyond the reach of most poor titleholders. As Holness (2013:129) notes, it is apparent that "access to a lawyer in civil matters is for well-off South Africans only". As a result informal practices have developed by way of a response in respect of the sale, inheritance and donation of land. This sometimes results in a loss of housing for the original beneficiaries and their dependents. The use of informal tenure practices varies with South African State-subsidized houses, but was noted by Barry and Roux as pervasive in some areas (Barry & Roux 2015; Roux 2013:220-230). Some of these practices reflect Ubuntu values deserving legal protection, but function less than optimally because of their informality.

It has for some time been recognized in South Africa that there is a need for diversification or fragmentation of land rights to ensure protection of broader rights and interests (Badenhorst *et al* 2003:5). The need to protect overlapping use rights is recognized in various statutes promulgated after the advent of the democratic era in 1994, but these statutes are conventionally invoked with disputes against the State or outsiders, not against household members or relatives.⁹ Badenhorst *et*

⁷ In addition, dependents in subsidized housing who are "financial" dependents, but do not fall into the category of a "legal" dependent, are not currently owed a duty of support by subsidized housing title deed holders.

⁸ The 2015 cost of registering transfer of ownership of a house valued below R100 000 according to the Law Society guidelines is R3 950 before the additional costs for rates certificates, deeds office fees and the like, with the disbursements taking it up to approximately R5 320 (GhostDigest 2015; Fairbridges Attorneys 2015).

⁹ The Extension of Security of Tenure Act 1997 and the Interim Protection of Informal Land Rights Act 1996 are examples of such Acts.

al (2003:11) point out that the property clause in the South African Constitution should not be interpreted as a guarantee “to insulate the status quo and existing position of the individual property holder against any interference,” but rather as a guarantee “to establish and maintain a balance between the individual’s existing position and the public interest”. The first group affected by an “individual’s existing position” are those people who share housing with the individual. Dependents are by definition more vulnerable than those upon whom they depend, due to age, youth, misfortune or illness. A needy dependents’ interest in the use of specific land controlled by another household member is therefore the interest *par excellence* that must be protected against arbitrary deprivation. In the absence of a statutory provision protecting dependents’ direct rights to land, prenuptial agreements can achieve the same result through the incorporation of a housing servitude, as discussed below.

5. PRENUPTIAL AGREEMENT TERMS TO SECURE LAND TENURE

An overview of prevailing international approaches to marital agreements can be found in *Marital Agreements and Private Autonomy in Comparative Perspective* (Scherpe 2012) that draws a comparison between fifteen different countries. The use of prenuptial agreements is shown still not to be the norm, with the default system of the country much more important. The countries chosen for the book are all in the first world, meaning the book speaks into a more affluent environment. Scherpe sees the Netherlands as particularly relevant, due to it being the only country in Europe with the default community of property regime. The default system in South Africa is also that of community of property and of profit and loss. Countries that include the same default system outside of the first world include Botswana, Namibia, Zimbabwe, Lesotho and Swaziland. If the Netherlands is deemed to have become a relevant country to research on marriage contracts due to its default community of property system, this makes South Africa equally relevant, particularly in Southern Africa and the developing world.

The reasons given for the use of a prenuptial agreement in the closing chapter of *Marital Agreements* reflect the typical conventional understanding of its function, namely: The desire to insure against the risk of marital breakdown; to “ring-fence” property owned before marriage; protecting a fair share of property for children from a previous marriage; tax efficiency; protecting a spouse from creditors; and protecting “of course, generally speaking one’s own financial advantage” (Scherpe 2012:445-446). This being the case, it is unsurprising that it is difficult to find any reference to research on marital agreements being used for pro-poor purposes, or on such contract’s use primarily as a means to benefit dependent third parties.

Prenuptial agreement templates can be structured as an innovative land tool predicated on the protection of rights according to need. A pro-poor prenuptial agreement must proceed primarily from the need to protect the housing interests of all members of a household, not the conventional approach of protecting spousal interests alone. This is not the same as taking the conventional route of creating a group right that can function as a single entity. Rather, it requires a synthesis of

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various legal mechanisms to create a new form of tenure that reflects a diversification of existing constructs able to protect the vulnerable while respecting the norms of couples with diverse worldviews.

In the South African subsidized housing context, *housing* tenure can be secured by means of a personal *usus* servitude, registered as a real right limiting the ownership of dependents' caregivers.¹⁰ Using such servitudes in the context of poverty is an innovation, as they are currently used only rarely, and even then usually by affluent testators to benefit their family members. Such housing rights cannot endure beyond the lifetime of the person who benefits from the right. As a real right burdening the land they are a very secure right. A housing right entrenched by registration of a servitude is not tradable and is therefore secured by de-commodification. This does not preclude sales and transfers of ownership, recognizing that families must retain their freedom of mobility. It merely limits the ease with which they can occur, since ownership must be transferred subject to the servitude, until the agreed term of its duration has expired. Terms allowing for substitution of a new property subject to the housing servitude can be included in a prenuptial agreement, to allow for greater flexibility. The registration of housing use rights mirrors other legal attempts to secure the tenure of occupants against eviction in both rural and urban areas. Interestingly, in *Wormald NO v Kambule* (2005:para25(d)) the right of a customary wife to reside in a home was construed as being a "type of customary law personal servitude of *usus* or *habitatio*".

A prenuptial agreement can protect housing rights of aging spouses by agreeing to an *usus* servitude, as well as protect their capacity to secure tenure for their vulnerable descendants when they pass away, by means of a succession agreement. Succession terms can follow the simple route of determining heirs or co-heirs, alternately a trust can be constituted on the death of the landowner, with the trust serving as a vehicle for group rights. Since prenuptial agreements in South Africa are lodged at the Deeds Registry, such succession arrangements have the added value of being a public document. Couples can agree rights to future ownership, even if on date of marriage they do not yet own land, as is often the case with housing applicants. In other words a prenuptial agreement can focus on solutions and opportunities that might arise in the long term and need not be predicated on present assets.

6. PRENUPTIAL AGREEMENT TERMS TO RESOLVE CONFLICT

Relationship conflicts can be addressed in one of three ways: either by informal resolution; by expensive litigation after the fact; or proactively by contractual agreements. Marital agreements can clarify the intentions of parties up front to avoid future disputes and provide for affordable and accessible mediation and arbitration, should a dispute be unavoidable. Many conflicts in poor

¹⁰ An *usus* servitude is likely to be the best suited to this purpose, although *habitatio* and usufruct servitudes are also a possibility.

households begin when the relationship of an intimately involved couple breaks down. Informal remedies to cure land conflicts can then be triggered by an absence of records, or a vacuum of accessible legal solutions. A formal agreement confirming rights and duties would considerably ease this situation, both for government officials and for households. For those countries where resolving conflicts becomes the responsibility of the normal court system, the impact on the State of a couple's failure to clarify their interpersonal obligations is immense. The legal aid required to address these conflicts retrospectively is far too sophisticated and expensive for the State to achieve at scale.

This paper is confined to prenuptial agreements between couples, but a few comments about additional customary approaches follow. Lobola agreements can be entered into in addition to a prenuptial agreement in South Africa, irrespective of whether a couple chooses to marry under a civil or customary marriage statute (Mofokeng 2009:117). The Recognition of Customary Marriages Act (1998:s3(b)) refers to marriage as something that is "negotiated". This reflects the customary understanding of marriage, which Claassens & Smythe (2013:8) describe as being entered into by means of a "flexible range of consensual arrangements that had previously been negotiated within and between families". Intrinsic to this is the recognition that agreements reached before marriage can anticipate future conflicts, including conflicts with third parties, particularly family conflicts over inheritance. Customary lobola arrangements are negotiated between families, while the rights entrenched in prenuptial agreements are usually negotiated between the spouses alone, although the terms agreed can benefit third parties. Couples can enter into either a prenuptial agreement or lobola agreement alone, or enter into both concurrently. Prenuptial contracts (as provided for by the common law and by statute) can potentially offer the same "flexible range of consensual arrangements". Unlike prenuptial agreements, lobola agreements are not registered at the Deeds Registry, although it would be possible to choose to draft them as notarial deeds and register them. This would make them easily accessible (as public documents) to those entitled to benefit from the lobola arrangements. Alternately, it would be possible for a registered prenuptial agreement to include third party benefits that support less formal lobola arrangements.

Prenuptial agreements can be used to manage tenure insecurity arising from the loss of housing through eviction, the death of an owner, family disputes, or conflicts arising from unresolved differences in worldviews. They can be structured to ensure that diverse beliefs are respected, particularly African normative views that are in a state of flux and not easily expressed in either the civil or the customary frame. In the South African urban subsidized housing context (which is based in private ownership) a wide range of perspectives could be entrenched, provided the landowners are willing to sacrifice their individual personal rights in the interest of securing broader relational rights, and legal aid is available. Couples with nuclear family commitments could freely protect individual rights narrowly within the nuclear group. Couples with communitarian commitments could freely contract to protect the community of their choice in a mutual way, rather than protecting individual rights. Couples with custodian views of family land could freely limit their estate in a manner that ensures the land is, indeed, held for the benefit of the family group, not

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for the benefit of individuals alone. Any South African is free to enter into such arrangements for urban land (and some rural land) provided they are able to afford the prenuptial contract.

A prenuptial agreement accordingly offers couples the opportunity to *be* the change they wish to see in the world. Provided the terms are not against the law or contrary to constitutional mores, a couple can freely determine the rights that will follow at the time of marriage, in times of conflict, and upon their death. Provided necessary checks and balances are in place, such contracts could therefore serve as the vehicle for socially embedded norms to be *privately* embedded in the legal frame (across a flexible range of possibilities). This would result in a public document able to enforce normative structures from the bottom up. Public trust in land administration systems is likely to be enhanced if State records could include privately delineated rights. If appropriated by the poor, such agreements could be a key source of validation and acquisition of third party data.

7. FORMALITY, INFORMALITY AND REGULARISATION

Those who work with the urban poor soon recognise that informal systems are often used to secure tenure, rather than formal systems. Common examples in the South African context include: the use of the original title deed document itself as proof of the land being traded (rather than a formal sale agreement and transfer of ownership being registered); the pledging of credit cards and identity documents as security for debts; proof of rates payment being seen as proof of entitlement to occupy; family evictions following alternative channels to legally established rules; or a letter of authority to act for an estate being used as proof of land ownership without formal transfer. The poor often informally adjust formal processes to secure tenure. If tenure is to be secured at grassroots, a pro-poor prenuptial agreement must first and foremost be able to be applied and recognized within this informal context.

Access to formal justice cannot be the bar a prenuptial agreement must reach before any enforcement is possible. A pro-poor prenuptial agreement must be predicated on current tenure approaches that regard informal practices as equally relevant for the poor's tenure security as the formal law. Prenuptial agreements for the poor should therefore primarily aim at securing tenure, not necessarily regularizing tenure, although this could result. As such, template contracts should attempt to stand in the gap between both the formal legal context and the informal social context. Processes developed would need to be informally appropriated in a participatory way, with communities moving forward the discussion about when and how dependents rights should be secured within a household.

The legal rules of private contract can diverge from the typical private ownership paradigm and show themselves fit for the purpose of regularising existing informal arrangements. Identifying whether a woman is a wife or a mistress, or in a polygynous marriage, or involved only in a casual sexual encounter, is a very tense issue. The effect this has on all the dependents of the couple involved must become part of the urban housing tenure debate. Housing terms can be agreed within

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households (that know and understand their own private affairs intimately) provided the terms do not run counter to legal support requirements and public policy, as marriage is a public status.

Regularization by means of formal registered prenuptial agreements may prove to be idealistic, or only something that can be achieved incrementally over a long period. The first manifestation of the informal success of the pro-poor prenuptial concept might be the spontaneous emergence of simple affidavits speaking into the acceptance of obligations. If they followed the pattern of informal sales, such affidavits would only partially record a much wider agreement, with the bulk of it remaining a verbal arrangement. Community recognition of the contents of both the written and the verbal components would evolve in its own way. The widespread use of formal prenuptial agreements reflecting constitutional principles is a long-term hope. Normative education regarding the use of formal contracts can be used strategically to act as the catalyst for more structured *informal* processes of household rights determination, incrementally securing tenure in this way.

As Nedelsky (1993:355; 2011) points out, the State should foster conditions where people (as family members, friends, members of a community and citizens) can “form caring, responsible and intimate relationships with each other”. Cohabitation and marital agreements can be used to secure overlapping land rights that the ownership paradigm does not currently protect.¹¹ At present in South Africa there is no legal aid for cohabitation and prenuptial contracts. Even if a prenuptial contract can be afforded, contracts that differ from the statutory accrual contract are not available in standard form. There is no existing template that can be used to enhance the capacity of marriage as a protective legal structure for the poor. In South Africa prenuptial agreements currently represent the only private relational contract with the full spread of legal mechanisms necessary to achieve total housing security between a household *inter se*. This is due to their privileged position of being the only contract in which an irrevocable succession agreement is possible. As such they need to be brought into the debate of what fields of law should benefit from legal aid for the poor. The norms of good governance may require of the State to facilitate assistance in this regard, recognizing the far-reaching consequences of failures of clarification, both for individuals and the State.

8. CONCLUSION

The poor often handle the tenure conflicts that arise between kinship and household groups by informally agreeing what is, in essence, a private contract. The joyous event of matrimony (or the decision to commit to a stable, long term relationship) is an opportune time for couples to contract

¹¹ A “right” is used in the “concrete legal sense” as “a power, privilege, demand or claim possessed by a particular person by virtue of law”.¹¹ In other words a popular legal definition of “right” is used, as opposed to the broader social tenure usage whereby a “right” is contextually conceived according to the perception of the holders and their communities, which could be based on values, culture, social, custom or legal systems. Group rights are also used in this concrete sense.

in advance to fetter discretion over land tenure. Agreements such as these are best reached before either blessings or sufferings have the power to bring about changes of heart. It is in the interest of the couple (and their current and future dependents) that oral promises made at this time of goodwill are recorded. Prenuptial contracts that determine rights to South African State-subsidized housing are capable of being drafted in a manner that could serve as an innovative pro-poor land tool securing housing tenure.

The poor are in need of legal contractual support to manage their exposure to relational risk and its impact on housing and land tenure. Prenuptial provisions can establish entry-level rules of law capable of practical, free and private use, as well as holding the benefit of being capable of formal registration. They may therefore be a bridge between the broader social contracts already being entrenched (through the formal and informal justice systems respectively) and the formal legal system. Legal template contracts customised to meet the requirements of the poor need to be made available. The benefits of their use in the context of a social tenure domain model should be explored, as well as the need for State legal aid in this regard.

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