

THE FAMILY HOUSE

A POLICY TOOLKIT



MAXIM BOLT, UNIVERSITY OF BIRMINGHAM AND
UNIVERSITY OF THE WITWATERSRAND

TSHENOLO MASHA, PROBONO.ORG

26 MARCH 2019



**UNIVERSITY OF
BIRMINGHAM**

CONTENTS:

1. INTRODUCTION AND PURPOSE

2. SUMMARY OF CONSULTATIVE MEETINGS

3. KEY CONSIDERATIONS:

a) DEFINITION AND CONTEXT

b) CONSTITUTIONAL COMPLIANCE

c) CURRENT LEGISLATION AND POSSIBLE AMENDMENTS

d) POLICY AND REGULATIONS

4. RECOMMENDATIONS

1. INTRODUCTION AND PURPOSE

This policy toolkit addresses apartheid-era rental properties, now privately owned, in formerly black townships. Known popularly as ‘family houses’, they became a particular focus of Bolt’s research on property and inheritance in Johannesburg, and ProBono.Org’s practitioner experience in housing and inheritance disputes.

The key findings were:

- Extending property rights was a crucial part of the breakdown and transcending of apartheid. But urban custom is central to what has actually happened. While property ownership and inheritance are key to a shared post-apartheid economy, we have shown that the family house – a materialisation of trans-generational kinship – has far greater significance and normative weight than simply as an asset.
- Family houses are treated as cross-generational and collective patrimony and as a core part of urban custom. Reinforced by the ‘family permit’ – the apartheid-era Permit to Reside that listed all residents – this collective understanding diverges from the law’s insistence on exclusive and usually individual ownership.
- The gap between law and popular norms has been further exacerbated by the terms under which rentals were devolved as private property. Administrative processes themselves were sometimes unclear to people, as individual family members gained title without the knowledge of other kin with claims to the house.
- In other cases, though, the confusion about granting title was the result of a mismatch between the popular concepts of ‘custodian’ and ‘family representative’ – the person sent to have the house transferred on behalf of the family – and the exclusive ownership that resulted when the house was transferred into that person’s name. The current systems for land registration and succession do not sufficiently recognise customary notions of fixed property (or the land underneath it) or inheritance.
- Houses are, for many, the most significant items of property passed on at death. And, in metropolitan areas like Gauteng, this often means the family house – with its complex administrative legacies and its embeddedness in norms of urban custom. Death and succession raise their own distinct issues. The popular emphasis on patrilineal inheritance, by the children of an original



patriarch and their descendants, divergences from the promotion of the nuclear family in South African intestate succession law.

- The gap between intestate succession and popular norms of property and inheritance lead many township dwellers to avoid formal processes. They prefer to recognise the cross-generational, collective family house by leaving it in the name of the deceased (or sometimes the previous deceased a generation earlier). This avoids accusations that any individual is making a bid for the house, conforms to a popular view that inheritance is a private family matter, and recognises the place of ancestors in anchoring lineages.
- Even so, when disputes spill beyond the capacities of senior male ‘uncles’ to mediate, the state is often brought in by reporting the estate to the Master of the High Court. At that point, the formalisation involved in reporting catalyses disagreements. It reveals the huge gap between popular understandings of the family house and the legal frameworks of individualised ownership, land registration and intestate succession.
- The avoidance of formal process – completely, or until disputes lead one or both parties to seek state support – leaves already-marginalised people beyond legal protection. Being off the legal radar profoundly affects not only those arguing for the collective and private nature of home inheritance, but also those sidelined by the ensuing family dynamics – especially widows and children.

We therefore identified a distinct set of problems. One was the gap between the law and popular norms regarding houses and inheritance. But, in South Africa, this gap has particular significance. Those popular norms are widely viewed as customary in nature – shared, established and with obligatory force. Seeking to address the gap between the law and popular norms, in this case, means recognising a customary concept under the South African Constitution’s protection of custom and cultural rights.

Yet arguments for custom here can serve to marginalise women (especially widows) and children. Crucially, therefore, formally recognising the family house means not only making the law more responsive to customary definitions of family, property and succession, but also ensuring constitutional compliance. That is, change must safeguard mechanisms for recourse on the part of those marginalised in the name of the family house concept.

Building on the research findings and insights from ProBono.Org’s legal assistance, the purpose of this policy toolkit is to help legal professionals, government institutions, applied academics and civil society and community-based organisations to identify legislative, policy and regulatory changes that would recognise the family house concept. It outlines and explores the key considerations – enablers and obstacles – that would have to be addressed in achieving positive legal-administrative change.

2. SUMMARY OF CONSULTATIVE MEETINGS

The findings provided a core body of evidence and analysis, to ground stakeholder debate and responses in a series of consultative meetings. These meetings, and the responses to our findings, brought government, legal, academic and popular views into our recommendations for legal, policy and regulatory change regarding the family house. We detail these below.

Launch of the Family House Position Paper and stakeholder consultation Wits Institute of Social and Economic Research, July 2018

This was attended by legal professionals; key government departments involved in the administration of housing and inheritance; social justice organisations; academics; community-based paralegals; and representatives from community structures. Our co-authored position paper put our research findings on the table and provided the basis for a shared understanding regarding the problems surrounding the family house. Respondents from government departments shared their experiences of the family house concept, and suggested for points of departure in recognising the concept in mainstream policy and legislative frameworks:

a) **Master of The High Court, Johannesburg**

As a custodian for deceased estates, this office is usually the first administrative structure to encounter the concept through disputes related to deceased estates. The office supported the position paper's findings in respect of the disconnect between the current legislative frameworks and popular beliefs and norms. Its submissions on possible solutions were:

- **The Deeds Registries Act should be extended to include family agreements**, to prevent the sale of the immovable property out of the deceased estate.
- **Administration within departments involved in immovable property should be centralised** to ensure that flow of information is consistent and to ensure better tracking and oversight.
- **Public education should be proactive** and not reactive to public needs.
- **We should see access to justice as more than people litigating in court** – the state also has a duty to ensure that it is progressive in its approach to legislative reform.



b) Johannesburg Magistrates Court

The Family court division of the Johannesburg Magistrates' Court inherited the deceased estates of black South Africans from the previous Commissioners' Courts that dealt with deceased estates in terms of the Black Administration Act. Its submissions were:

- **Promote public education on the administration of deceased estates.** If the family house concept is to be adopted into a regulatory or legal framework, there will still be legal processes to follow. Communities need to understand and engage with them.
- **The system would benefit from greater capacity.** The court ensures oversight over the administration of deceased estates and guards against manipulation of the system. However, support is limited to legal service NGOs who are sometimes unable to assist within the timeframes set by the court.

c) Registrar of Deeds, Johannesburg

The Deeds Office, where land rights are registered, noted its frustration at not being able to provide such registration within a framework that is understood by the majority of the population. Its submissions were as follows:

- **There needs to be a clear definition of family ownership,** clarifying the relationship between custodianship and ownership and the rights entailed. There is no point in having a personal right if another individual in the family has a real right, which would subject the property to the normal administration of estates processes that currently contribute to disputes within families.
- **There could be a family house registration office,** similar to the way trusts are handled. The most appropriate state department to enact this would need to be identified. A family registration number would be given to the family upon successful application. The Deeds Office would then endorse title against the registration number. This would require **amendment of Deeds Registries Act.** The registration office would not only accommodate the concept, but also ensure that the concept itself passes constitutional muster and does not further perpetuate marginalisation of vulnerable groups. How custodianship is awarded will form part of the registration process and ensure oversight in instances when changes need to be effected or if there is a dispute in application or interpretation of the family registration agreement.

d) Gauteng Provincial Department of Human Settlements

This department has been tasked with implementing the constitutional mandate that citizens have access to adequate housing. Its directorate to regularise



housing, which began work in 1998, has encountered many challenges in making housing accessible on terms that are recognisable to the majority of the population. The department supported our finding that problems result from a property being awarded to one sibling, while it is considered a collective family house. That property is later disputed when it falls into the deceased estate of the individual, and is then dealt with as an asset of the deceased alone. This is a problem not only in older townships, but also in the newer settlements. There have been many deliberations and suggestions on how to address this impasse within the department but these have not yet yielded tangible results.

- The department has tried to develop policies that fit the contexts of the communities they serve, but it has become clear that doing so raises legal questions extending beyond the department's administrative reach. This has contributed to a **vacuum in the administration of housing**.
- The department underlined the **importance of community education** and **stronger cross-departmental systems** to ensure that communities are not disadvantaged by departments working in silos.

e) **Gauteng Provincial Legislature**

The Provincial Legislature is mandated with provincial legislation development and reform. In 2017, the office of the legislature formed a task team which included state and civil society organisations in reviewing law related to property rights. The task team is reviewing a number of factors that have negatively affected Gauteng residents' ability to access legal assistance in disputes related to property and the transfer thereof.

- **One of the key barriers to access to justice is the means test that is applied by Legal Aid South Africa**, with the cut-off set too low at R250 000.
- Evictions are another key area of concern, because of the widespread unlawful sale of family homes, and **the application of the family house concept to exclude vulnerable groups from laying a claim to the property**.

Community Consultation Jabulani, Soweto, February 2019

In response to our position paper and proposed programme to set out avenues for change, one particular priority was underlined by government stakeholders. It was noted that policy and legislative reform historically failed to address issues on the ground because of the lack of substantive consultation with intended beneficiaries.



While the Position Paper was itself based on on-the-ground research and practitioner experience, it was important to seek popular perspectives in the process of framing policy recommendations.

We thus held a public consultation workshop in Soweto, in which we distributed a simplified and summarised version of our Family House Position Paper, prompted debate and sought responses. Around 180 members of the communities of Jabulani, Zola and Zondi attended the session. The key points raised were:

- **Defining the family house is not straightforward.**
 - As more than one participant put it, ‘a family house does not exist in black and white’.
 - It must involve a custodial representative, but that person should not have the right to evict. Yet, at the same time, the other residents must have a responsibility for costs such as repairs and rates.
 - There will need to be clarity about the role of custodians in relation to ownership.
 - Residents may be marginalised by being left out of a definition of the family. For some community members, spouses should not be entitled to houses. In one case, children of second wives were seen not to be legitimate heirs. This reminds us that recognising the family house raises thorny issues in relation to broader constitutional protections.
- **There needs to be greater clarity about the meaning of title deeds and the legality of ownership.**
 - Crucial is the relationship between this legality and on-the-ground practice, as well as family histories materialised in family house permits.
 - This includes specifying who among those living in the family house is (and should be) on the title deed. The uncertainty causes fights.
 - There needs to be a better fit between formal registration and popular understandings of tenure.
 - The legitimacy of existing title deeds is currently easily called into question. Deeds can be acquired without the knowledge of family members with claims to the property – even fraudulently. Deeds appear easy to change in contrast with the permanence of family entitlement.
 - The law is seen as ignoring the culture of many South Africans.
- **There should be law to recognise the family house.**
 - This was a widely held view. But there was a range of opinions, and a small number of community members asserted that family houses ‘do not exist’ or should ‘have one owner’. This underlines the need for a choice of legal forum, as in other areas of South African law.
 - The house often includes new structures built by family members.



- Family houses should not be opportunities for enrichment. For example, one participant said that people should not be given title deeds 'who already have more than 2 T-Deeds' (the underlining was hers).
- Wills might offer one way forward within existing law, although this was only suggested by a small number of community members.
- One participant noted the importance of retaining a collective definition of the house while avoiding preference being given to the first male child.
- **The family needs to be recognised.**
 - This should be through family meetings regarding inheritance, which focus on resolving disputes and deciding who should take over safeguarding the property.
 - One participant suggested that these might be held at the Deeds Office.
 - For another community member, wills and family meetings were seen as alternatives to choose the next family head ('who will be on top').
 - Bullying and elders discriminating against the young are dynamics that need considering, and collective entitlement may leave individuals vulnerable or cast as objects of suspicion.
- **Fights over family houses are a major problem.**
 - These may be down to people regarded as not having a right to them.
 - Fights are exacerbated by overcrowding and a shortage of housing.
 - It is important that the official process not be seen to take sides in fights.
- **Public knowledge is crucial.**
 - Community meetings, television and radio are very important.
 - Even if there is legal change, the law needs to be better understood by families themselves.
 - One participant said that our explanation of going to the Master for a Letter of Authority came as news.
 - A large number of community members called for more workshops like the one we ran, even as often as every month. This might involve Human Settlements.
 - Several participants suggested door-to-door education.
- **Engaging between community and government is important.**
 - This builds a shared understanding of the situation.
 - There was a call for us to take our proposals for legal change to government.

3. KEY CONSIDERATIONS

a) **DEFINITION AND CONTEXT**– The research findings offer important context and a working definition for a complex and dynamic concept:

DEFINITION: THE FAMILY HOUSE IS AN URBAN CUSTOMARY CATEGORY OF COLLECTIVE FIXED RESIDENTIAL PROPERTY. FOR HISTORICAL REASONS, IT IS GENERALLY LOCATED IN TOWNSHIPS IN WHICH OWNERSHIP RIGHTS WERE LACKING. ALTHOUGH IN PRINCIPLE SALEABLE, THE FAMILY HOUSE STANDS APART FROM THE MARKET AS MORE THAN SIMPLY AN ASSET. IT RELIES ON A DISTINCTION BETWEEN INDIVIDUAL CUSTODIANSHIP, ON THE ONE HAND, AND COLLECTIVE OWNERSHIP, ACCESS AND SECURITY OF TENURE, ON THE OTHER. THE FAMILY IS A CROSS-GENERATIONAL LINEAGE DESCENDED FROM AN ORIGINAL OCCUPANT, PROTECTING THE RIGHTS OF THE CHILDREN OF THAT OCCUPANT AND THEIR CHILDREN (AND ON TO FUTURE GENERATIONS), RATHER THAN THE NUCLEAR FAMILY OF A SINGLE OWNER AS IN INTESTATE SUCCESSION LAW.

Houses in historically black townships – overwhelmingly former rental properties – came to be known as family houses. Custom is invoked for the notion of the unsaleable family house, with its emphasis on collective ownership like the rural homestead. This was partly because residents strove to live in them according to rural kinship-based residence norms. But it was also because apartheid law denied African people the right to own urban property, regulating residence through rental permits listing all family members as occupants.

The family house and legal administration: While permits could officially be passed down within families during apartheid, gradual administrative breakdown meant that they often became cross-generational dwellings informally. The late 1970s and the 1980s saw steps towards transfer of township houses into long-lease agreements and then into private ownership. Mass-transfer to private property became a priority in the 1990s. Individual owners were registered after coming forward on the basis of Native Affairs permits for co-habiting families. Many families chose ‘custodians’ to represent them, unaware that they would return with exclusive individual title. As part of the Transfer of Rental Property Scheme (TORPS), the Department of Human Settlements attempted to recognise a family right by drafting agreements between family members during the conversion process. But these agreements were not endorsed against the title, demonstrating how the family house as a customary law concept is practically



recognised but cannot be given sufficient effect within existing law. **For their occupants, family houses are not accommodated in ‘mainstream’ property law.**

Family norms and legal administration: Changes in succession law added to the gap between customary norms and legal stipulations. *Bhe v Khayelitsha Magistrate* (2004) desegregated succession law. But its effect was to eradicate customary succession for people without wills. All South Africans became subject to the same intestate succession law, prioritising nuclear families. This stands in contrast to a model of the family in which sons inherit houses from fathers, and then brothers (and sometimes sisters) take over the house as core members of the patrilineage. **This is generally the family implied in the family house.**

b) CONSTITUTIONAL COMPLIANCE – This sets basic parameters for policy and legislative reform, and guides debate regarding the interests of the South African public. In our analysis, we have made a case for the constitutional basis of recognising the family house concept as follows:

We note the following sections in the Constitution of the Republic of South Africa as sections that allow for the development of the concept and place a further guard on what will be deemed constitutional:

- **Section 31(1)(a)** provides for the rights of cultural, religious and linguistic communities.
- **Section 15 (3)(a)(ii)** – provides that everyone has a right to systems of personal or family law under any tradition or adhered to by persons professing a particular religion.
- However, **Section 15 (3)(b)** further requires that these rights and practices must be consistent with the Constitution. This requires us to consider the constitutional compliance of the customary family house concept in relation to **Section 9**, which outlaws unfair discrimination – in this case especially on grounds of gender. It also requires us to attend to **Section 28**, protecting the rights of all biological children.
- **Section 26 (1)** affirms a right to adequate housing and **Section 26 (2)** requires the state to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right’. Read with the constitutional protection of cultural/customary norms, this suggests a right to access housing on legal-administrative terms recognisable to people themselves.
- In addition, **Section 185** mandates the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to investigate and report on issues affecting these communities



Thus far, the family house concept has been viewed as an inferior right to social tenure, and one terminated once the individual owner disposes of the property or requires the eviction of its users. An important step is recognising that a common law understanding of property is not constitutionally superior to indigenous customary law understandings, and considering possible amendments to the current legal framework to ensure this recognition. As has been demonstrated by other researchers in rural areas, customary tenure functions to maintain family bonds, promote interaction and protect the family as an entity. We have argued for the importance of such a perspective in cities.

Because of the longstanding assumption that urban areas lack customary norms, urban custom remains under-recognised, even where it is clear that popular norms exist and have been established over generations. The dissenting *Bhe* judgment by Ngcobo J affirmed the continuing importance of custom in metropolitan settings: ‘African communities have been transformed from their traditional settings in which the indigenous law developed into modern and urban communities ... even within this transformative process, a majority of Africans have not forsaken their traditional cultures. These have been adapted to meet the changing circumstances’.¹ The persistence of urban custom affects how policy, legislation and administration influence society.

Ngcobo J’s concern about the *Bhe* decision was that liquidation because of intestate succession would damage forms of security anchored in living customary notions of kinship and property. The family house involves crucial claims about the nature of property. Urban customary norms invite consideration of homes as collective goods beyond the market, which materialise kinship across generations.

Group entitlement and access risk forms of exclusion that have been deemed unconstitutionally discriminatory in terms of Section 9 and as impinging on the rights of children in terms of Section 28. Yet bringing the family house more squarely under formal law could offer greater purchase in ensuring that its manifestation is constitutionally compliant. Our research and analysis suggest that the practices that sustain the family house often occur beyond the law, or are shaped by the law’s gaps. The effect is to prevent the development of the concept in a manner that protects basic rights as enshrined in South Africa’s Constitution.

This presents a clear challenge: how to treat the family house as a living customary principle that emerges from practice, while also ensuring that the

¹ *Bhe v Khayelitsha Magistrate*, para 228.



concept's application passes constitutional muster, especially in relation to gender discrimination and the rights of all biological children. Ngcobo J argued for preserving a developed form of customary succession, without the privileging of male heirs, but with a place for the family custodian.² We suggest that, however difficult, Ngcobo J was right to advocate for legal recognition rather than relegation in his dissenting *Bhe* judgment. Such relegation clearly often intensifies social exclusion and marginalisation, including of women and children, by leaving arrangements entirely beyond state purview.

c) CURRENT LEGISLATION AND POSSIBLE AMENDMENTS – The family house concept is not accommodated in the current legislative landscape. In light of the research, this section evaluates existing legislation fundamental to the development of a formal framework for the concept.

The Deeds Registries Act 47 of 1937, as amended

This makes provisions for land registration, cadastral management and the functioning of the Deeds Office. Yet, despite its reach over formal land tenure, the Act makes no provision of registration of land rights in terms of customary law and practices. That said, it does have provisions relating to the registration of personal rights. These sections could be amended to expand the use of land for customary practices, but those rights would apply to an individual and not to a family as the family concept requires.

The Deeds Registries Act was the focus of stakeholder recommendations in response to our Position Paper. The Johannesburg Master suggested that the Act be extended to provide for family agreements that would prevent the sale of a house out of a deceased estate. This suggestion amounts to establishing legal grounds for a scheme similar to that attempted by the Department Human Settlements under TORPS.

The Johannesburg Registrar of Deeds also called for the Act's extension – it would be under such amended legislation that title could be endorsed against a special family registration number. Yet this latter recommendation also noted that the family house registration office would lie outside the usual terms of deeds registry. Resembling the way trusts are administered, it would determine how custodianship is awarded and family agreements defined. Moreover, it would be the registration office that would ensure that the family house concept be constitutionally compliant in practice, rather than perpetuating marginalisation of vulnerable groups. From research in the Master's

² *Bhe*, para 231.



Office and in legal consultations, and from practitioner experience in the latter, we found brokering family agreements and choosing representatives to be especially fraught. Thus, while the Deeds Registries Act could usefully be extended, doing so would leave a crucial battleground beyond its remit.

Even so, extending the Deeds Registries Act may require further consideration than simply allowing for family agreements as endorsements. As Rosalie Kingwill notes, ‘family tenure is captured by the idea of “belonging”. People *belong* to the extended family; property *belongs* to the whole family; and family members *belong* to the family land. Ownership functions to maintain family bonds, promote interaction and protect the family’.³ This is a research finding about non-metropolitan South Africa, but our contention, based on research and practitioner experience, is that such understandings of property are also important in metropolitan areas such as Johannesburg.

The Land Titles Adjustment Act 111 of 1993

The purpose of this Act is to regulate the allocation or devolution of land where one or more people claim ownership but do not have registered title deeds. It ‘provides for commissioners to adjudicate ownership in situations where the register does not reflect current ownership’.⁴ This legislation could perhaps offer a starting point for recognising the family house.

Yet commissioners appointed in terms of this Act primarily operate in the rural areas. Our research highlights the need for formal recognition of urban custom. If this were to be achieved, could the Act be expanded to include the appointment of a commissioner to preside over claims for the family house?

This would provide an adjudicative function but, as noted above, the Deeds Registries Act would still have to be amended to allow for family title registration. As set out in the previous section, one possibility is that the formalised process of reaching a family agreement would generate a family registration number which would be endorsed against the title deed.

The Administration of Estates Act 66 of 1965, the Intestate Succession Act 81 of 1987 and the Wills Act 7 of 1953

These acts make provision for the process of administering deceased estates, determine who is entitled to inherit in instances of intestate succession, and establish

³ R. Kingwill, ‘Lost in Translation: Family Title in Fingo Village, Grahamstown, Eastern Cape’ *Acta Juridica* (2011), p. 203.

⁴ *Ibid*, p. 211.



the rules of testation. They are crucial to the ways that family houses are handled by the state. This is because, for most people, the main interaction between property and legal administration comes with the process of administration of deceased estates. The research made clear that, on the ground, the Master's Office is a setting where family disputes are fought. Assistant Masters come to have an important informal function as mediators between warring factions, in attempts to achieve a measure of agreement in families. At the same time, the concept of the family house shapes popular understandings of the Master's decisions. Letters of Authority, awarded to Master's Representatives, become akin to recognition of custodianship and even ownership.

It is clear that these acts would have to be brought in line with amended legislation along the lines set out above, unless this could be achieved simply by regulation from the Minister. Yet, as with the Deeds Registries Act above, there is perhaps more to consider than simple extension. In this case, formalisation of the family house could make use of existing trust in audiences before the Master to achieve resolution in family disputes. Amendment of legislation or regulation could thus align official process more closely with popular perception. On the other hand, once any amendment has been achieved, public education – already important as highlighted above – will be crucial in articulating the law and its consequences. In particular, the process of granting responsibility for the distribution of assets – especially houses in this case – will continue to need distinguishing from informal interpretations.

d) POLICY AND REGULATIONS – we turn now to the policy and regulatory frameworks, as opposed to full-blown legislative provision, that might allow for the development of the family house concept.

Doing so requires us to ask which state institutions have core responsibilities for ensuring that land law and administration are in line with broader social dynamics. In rural areas, an obvious candidate would be the **Department of Rural Development and Land Reform**. But, of course, here we are addressing a distinctly urban problem.

The **Department of Human Settlements** also has policy imperatives. In its Strategic Framework for the period 2004-2020, the Department has a programme specifically related to research and planning for housing needs. This demonstrates the Department's understanding that society changes constantly, and that this needs to be researched and planned for in terms of housing needs. We hope to have contributed to one aspect of this research, as it pertains to the endurance and changing significance of the urban family house.



An important policy framework demonstrating a key focus on housing is the **National Development Plan**.⁵ Chapter 8 of the plan outlines key markers for change, which largely relate to ensuring access to housing as a constitutional imperative and as a means of addressing massive inequality. It notes that there should be a concerted effort to ‘reverse the spatial effects of apartheid’ (p.46). Our research has shown how family houses are a legacy of apartheid spatial planning, but that a lack of recognition of urban custom has deepened the resulting marginalisation, rather than alleviating it. On the question of addressing legacies in urban human settlements, the NDP notes that this is ‘a complex, long-term project, requiring major reforms and political will’ (p.47). Action 50 of Chapter 8 provides for introduction of ‘mechanisms that would make land markets work more effectively for the poor and support rural and urban livelihoods’ (p.69). Catering to the family house, and to the customary norms of urban marginalised people, is a central way to achieve this.

Such broad policy frameworks provide a space for the family house concept to develop, as a means to make land available on an equitable basis, and as a way for tenure to be recognisable in relation to popular norms. We note that the family house concept is not only a matter for old apartheid-era township housing. Rather, reforms to recognise the concept are equally crucial after the delivery of new housing. They would enable the Department of Human Settlements to ensure that citizens access and utilize housing on terms that are identifiable to them.

However, the formalisation of tenure rights remains far from straightforward. A **2017 report of the High Level Panel on Assessment of Key Legislation and Acceleration of Fundamental Change** noted the vulnerability of off-register rights, where ‘close to 50% of all low-income houses built through the housing subsidy scheme have not been registered on the Deeds Registry’ (p.477).⁶ This is partly a matter of widespread inability to pay for registration or state levies. But the report also corroborated our findings that people avoid transferring houses into individual family members’ names. On the one hand, people suspect the result of such transfer will be eviction; conversely, nominated ‘custodians’ may wish to avoid the combination of suspicion and responsibility that comes from individual ownership. The result, we discovered, is a common preference for leaving an ancestor as the official titleholder – the customary, ritual, social and now quasi-legal lynchpin of the family. Thus, the 2017 report noted, ‘even when the state offers support through subsidies or free title updating by Titles Commissioners, other factors continue to mitigate against titleholders keeping their title deeds current. It seems unlikely that the Deeds Registry will close this gap, and even if it were able to, it is doubtful whether this would have beneficial impact’ (p.478).

⁵ <https://www.gov.za/issues/national-development-plan-2030>.

⁶ https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.



UNIVERSITY OF
BIRMINGHAM

Recognizing the family house must take account of this complexity. Yet formalizing it remains important, as we noted above, if this customary norm is to be protected and also subjected to a standard of constitutional compliance. Protection and constitutional compliance are distinct but mutually reinforcing ways of closing the gap between law and popular norms.

4. RECOMMENDATIONS

We have examined and set out a point of departure for achieving legislative recognition for the family house concept. Below we offer recommendations as next steps, noting the role players in each step.

1. GAUTENG INTERDEPARTMENTAL STAKEHOLDER ENGAGEMENT COMMITTEE TO CONDUCT REGULATORY IMPACT ASSESSMENT

We propose collaborating with this existing committee, expanding its remit to assess the regulatory impact of the family house concept. As a general approach, Regulatory Impact Assessment can ‘increase integrity and trust in the policy-making process and improve regulatory outcomes by promoting informed decision-making, which is targeted, proportional, consistent, accountable and transparent’.⁷

In Johannesburg, the committee is comprised of a majority of stakeholders in the housing space. Chaired by the Johannesburg Deputy Registrar of Deeds, it could institutionalise and consolidate a multi-departmental and broader sectoral approach to recognising the family house concept. The first steps could include a cost-benefit analysis of the recommendations below. We recommend inviting the banking sector to ensure that effects on the housing market are considered.

2. AMENDMENT OF THE DEEDS REGISTRIES ACT TO INCLUDE PROVISIONS FOR REGISTRATION OF FAMILY TITLE

As the law governing land registration in South Africa, **no reform would be effective without it being provided for in terms of this Act.** The options include amendment to include registration of family title or a Chief Registrar Regulation. The latter might offer a cost-effective and quickly implementable measure pending legislative reform, although a regulation may be insufficient to formalise a distinct category of property. The legislative amendment process provides for public participation. This would draw input from sectors that might not have been considered to date, but that would be affected by the recognition of the family house concept.

⁷ C. Adelle, D. Macrae, A. Marusic and F. Naru, ‘Regulatory Impact Assessment in Developing Countries: Tales from the Road to Good Governance’, *Public Money & Management* 35, 3 (2015), p237.



3. AMENDMENT OF THE LAND TITLES ADJUSTMENT ACT AND EXPANSION OF THE OFFICE OF THE LAND TITLE COMMISSIONER TO INCLUDE FAMILY TITLE REGISTRATION OFFICE

Assigning a further function to this office would allow the Department of Land Reform to have a direct regulatory framework, enabling it to formalise family title ahead of its registration by the Deeds Office. This would allow for a coordinated response to the recognition of family houses and family title. We recommend that this include an adjudicative function that is accessible and can have both rural and urban application as is provided for in the Act. Building on the Land Title Commissioner would ensure that recognition of the family house concept is not burdensome and costly.

This measure would ensure access to an adjudication function that would in most instances be at state expense. In matters that are highly technical, it would be important that property legal practitioners offer services on a pro bono basis. Such a forum for adjudication would offer a means for justice in matters concerning housing that is as non-adversarial and as accessible as possible.

4. LIAISE WITH THE LAW REFORM COMMISSION ON POSSIBILITIES FOR LEGAL CHANGE.

The Law Reform Commission could have a specific role overseeing the terms of an expanded Land Titles Adjustment Act: the hearings process, who would preside over hearings, and the intersection with the court system in case of review of commissioners' rulings. But there may also be possibilities for legal change beyond the parameters of the particular acts and regulations discussed here.

5. RECOMMENDATION 5.5 OF THE HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE

The panel's own text is useful here:

The Panel motivates for the enactment of a Land Records Act to enable compliance with Sections 25 (6) and (9) of the Constitution, which should also



be read with Section 25 (1) and (2) guaranteeing the right to property, and Section 33 guaranteeing equitable and accountable administration.

The motivation is for national legislation and executive capacity to develop a robust, inclusionary land rights administration system to address the gap in the current state apparatus to recognise and administer land tenure rights that are insecure. As a whole, this approach rests on the proposition that a key driver of tenure insecurity is the breakdown in land administration. There are two key sides to this proposed law: firstly, the idea of having different categories of rights being made 'visible' and, secondly, the elevation of such rights to constitute property.⁸

6. IN ALL CASES OF LEGAL AND ADMINISTRATIVE CHANGE, ENSURE SUFFICIENT PUBLIC EDUCATION.

Based on our research and practitioner experience, we would reiterate the need to recognise urban custom as a neglected area of popular norms. We also underline the fact that people and property move between categories of law and rights: people choose between legal codes, and houses may be both assets and customary cross-generational homes. Allowing for this multiplicity is crucial to avoid the legal segregation of the past.

⁸ https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf, p.481.