

Gendered Housing Imbalances: The Devil is in the Data

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By Leslie Downie BA LLB HONS MPhil (Geomatics) - Michalsons Attorneys

South Africa's housing policies and laws strongly promote equal rights. As part of the democratic transition since the end of apartheid in 1994, a truly commendable edifice of laws has been developed to address discrimination against women. Yet unequal gendered outcomes remain. Why? The devil seems to be in the data. Official documentary evidence is often necessary to prove or enforce land and housing rights. Much gender discrimination has its roots in state record-keeping processes that have rendered women and children's interests less visible. This is true both for records from the apartheid era, and for a number of years post-apartheid. How the facts about vulnerable women were captured in the past can have a more profound impact on women's housing rights than current laws designed to protect their equality.

Throughout the world it has been common practice for officialdom to prioritise recording the narrative of men's lives. This is rightly described as '*history*.' Narratives about women ('*her-story*') are often absent in state records or cleaned out as irrelevant when bringing information forward. The stories of South African women in low-cost housing today are particularly at risk in this regard.

South African housing is still heavily influenced by the contorted social engineering of the apartheid state, prior to its demise in 1994. During apartheid, race-based laws only permitted ownership for people recorded as being 'white' in most of the country. Other races held land under other, much less secure, forms of tenure. Land itself was described geographically along racial lines, with particular areas designated for particular groups. This kept other races and their land needs and rights suitably invisible, and women more so – and this carried over into the data, as data fields for capturing race, marital, and cohabitation information were geared to facilitate apartheid social engineering.

During apartheid, officialdom had to define every person's race closely. 'Mixed' race marriages were prohibited in 1949, triggering the need to render 'mixed' relationships invisible. This of course required a dislocation of officially recognised facts from many of the facts in the real world. Customary and polygynous marriages were also not given the same status as civil marriage. This affected the way marital and cohabitation status was recorded in different state databases. The accuracy of certain marriage and birth records must inevitably have been corrupted in the course of filling in official forms, due to the information fields for family and birth status that officials were required to capture. Officials worldwide compile human and land records working from legislated templates with predetermined fields. They are often the equivalent of today's automated telephonic conversations that only allow you to answer the wrong question.

¹ For more information, please visit: <https://citiesalliance.org/how-we-work/our-operations/innovation-programme/secure-tenure-african-cities>

The legal framework also entrenched patriarchal relationships to land. 'Marital power' gave husbands administrative power over their wives' property.² Marital power included the power of the husband to administer both his wife's separate property and common property jointly owned. A wife was not able to enter into a contract, or sue or be sued, in her own name or without the permission of her husband. One outcome was that wives were not directly included in certain processes that generated official documents relevant to their rights. For example, today a spouse must consent in writing to the alienation of land co-owned with her husband, so she is involved in the creation of the record relating to the alienation from the outset. Although 'marital power' was abolished between 1984 and 1993 for civil marriages³, it took until the late 1990's for it to be removed from African customary marriages.⁴ The choice of whether to enter into a customary marriage (registered or unregistered), a civil marriage (in or out of community of property) or to cohabit, deeply affects housing and land rights.⁵ Even today, savvy suitors can choose the matrimonial property regime most advantageous to themselves. Their choice of cohabitation or marital form can be to the disadvantage of their cohabiting partners. The impact of so-called 'norm shopping' is usually researched in the context of choosing whether to use customary or civil courts, but it applies equally to the choice of cohabitation form.

Since 1994, South Africa has taken an extremely vigorous approach to delivering pro-poor housing. Almost a third of the privately-owned title deeds registered in the deeds registry in South Africa today are for properties transferred from the state to housing beneficiaries. This has mainly been through the government's Reconstruction and Development Programme (RDP). The other subsidised-housing programmes are now also colloquially referred to as 'RDP' housing. Millions of beneficiaries have 'RDP' housing, and millions more have provided household information to state databases to apply for it. Beneficiary selection criteria include a household income threshold and the existence of dependents needing housing support. This housing land information system captures information about people, subsidy approvals, and subsidised land. These records represent South Africa's most developed housing information system.⁶ The system incorporates many facts upon which women's right to claim housing depend.

After 1994, many housing information systems retained the practice of recording the name of the man as the primary rights holder when housing was awarded, even though such housing was for the use of the man and his household. His wife or cohabiting partner was seen as his dependent. This resulted in title deeds being registered in the man's name, as sole title holder. This problem is avoided by more accurate record-keeping, as required by later RDP housing policy, whereby cohabiting partners began to be recorded as co-owners

²The report of the Women's Legal Disabilities Commission in 1949 led to the enacting of the Matrimonial Affairs Act in 1953. This restricted marital power, but did not abolish it.

³The Matrimonial Property Act of 1984 abolished marital power for marriages contracted after the Act came into force, but not for marriages between black people, which came about in 1988. A further amendment in 1993 repealed it for all civil marriages, whenever they were contracted. It persisted in the Transkei until some years later.

⁴The Recognition of Customary Marriages Act of 1998 abolished the marital power for all marriages under customary law throughout South Africa.

⁵ See L Downie, 'Pro-poor legal practice: Household rights and subsidised housing in South Africa,' Juta 2016.

⁶ The people listed are by definition vulnerable, as beneficiary households qualify via a means test for household income. Later occupants of such housing, who are not the initial beneficiaries, are often equally vulnerable. Many RDP properties and apartheid-era properties that have been upgraded to ownership have now also been sold and bought, creating an important secondary market of low-cost housing. A sizeable proportion of this market functions as poor-to-poor transactions, which bring with them their own set of gender issues.

in the deeds registry. We now have much stronger legal protections for women – a remarkable post-apartheid achievement, with a distinct pro-poor emphasis. Therefore, the gender justice gap as it manifests today does not lie so much in the substantive law, as in the manner in which the law functions as a record-keeping process.

Past record-keeping processes often consigned women into an abyss of invisibility, with men recorded as primary right-holders. Information captured under the fields of ‘family head’ or ‘household head’ and ‘family’ or ‘dependents’ can cover a multitude of sins. It was only as late as 2018 that the automatic upgrading of certain types of apartheid tenure (to ownership) for men alone was declared unconstitutional by the Constitutional Court, despite numerous prior equality cases and legislation fair to women being in place.⁷ The Rahube case finally called for legislation to bring to an end the practice of using of old apartheid records to identify the ‘family head’ as the title holder.

The housing rights of dependent cohabiting partners and unregistered customary wives can be hugely at risk if their partner discards them or dies. Whenever state records are used to establish rights, an extensive enquiry into the rights of past female dependents or right holders is necessary. Sadly, they are often overlooked due to absent records. These missing records pick up where ‘marital power’ left off. Their absence can enable the empowerment of men by disempowering the women they cohabited with in the past, by making them invisible to the legal system.

Many cohabiting partners – and even wives – became largely invisible to the legal system, due their names not being carried forward into the deeds registry records. Many of the title deeds currently in the registry are still reflective of the old practice of titling in the names of men alone. Should a man decide to sell a property, wives’ rights appear to be protected by the conveyancing process. However, the rights of many cohabiting partners, unregistered customary wives, second partners, widows, and divorcees are invisible to conveyancers, due to the records they are presented with. These women must depend largely for their protection on the male title holder giving an honest account of ‘her’ story.

The soundness of our equality law can be precisely what obscures proper insight into the invisibility of women’s interests. Formal record-keeping processes beneath inherently good laws must be looked at closely. New records (such as blockchain) will also have to commence from pre-determined fields for capture, presenting similar challenges. The Transaction Support Centre is currently looking into the use of blockchain for various land applications and this could be a useful place to start addressing this issue.⁸ We must learn from the past. Words such as ‘family head’ and ‘household head,’ or ‘family’ and ‘dependents’ have made many rights invisible, since they appeared to be innocently gender-neutral. The disempowerment of women is often achieved indirectly by the language used to describe a field. A rose by any other name does not smell as sweet if that naming promotes male empowerment at the cost of invisible women. South Africans must always interrogate why women’s names are present or absent in official documents, and what words have been used to describe their status.

Vulnerable women’s housing tenure is still often influenced more by the strength of their social relationships than by legal rules. This so-called ‘social tenure’ must be carefully scrutinised in the context of urban housing rights. It is not enough to say social tenure is a useful construct, then add the problem of gender imbalances as a mere qualification. ‘Social

⁷Rahube v Rahube and Others (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018).

⁸For more about the TSC work see <http://housingfinanceafrica.org/projects/transaction-support-centre/> .

tenure' can be a smooth euphemism – rather like offering 'pre-owned' cars rather than 'second-hand' cars – code words so as not to put women off from the deal being offered. Social tenure is often very far from any sociable ideal. Take the example of a man who has acquired RDP housing in the past and now has a new woman in his life, or chooses to live alone. A past customary wife without a marriage certificate or a cohabiting partner who was recorded as his dependent (in the housing application) would have to rely largely on her relationships to prove her right to that housing. Relying on family and community relationships to secure tenure in low-cost housing can be a very tough call.

Females are the more vulnerable gender. Children are more vulnerable than adults. Therefore, survival of firstly the 'fittest' men, and secondly the 'fittest' women, should be expected as a common social tenure outcome. Vulnerable members of households are likely to be the losers of rights if the law is unable to demote unsociable tenure practices. All too often women need to confirm the facts about their life by relying on people whose relationship with them is already broken, or lost. Their rights are defined not by their real story, but by the story that is captured in official data, be it on paper or in the cloud. When, where and how data about a vulnerable woman's life is recorded largely determines her ability to enforce her rights.

The best way to challenge this sad legacy is to oust it with another concept that can be popularised. Official records are seen as *prima facie* proof of what they contain. People see them as gospel. Most legal land processes rely heavily on written evidence to prove rights, but much of the evidence needed to prove rights is not accessible, due to past record-keeping practices. This means the devil is not in the law itself – the devil is in the data. The phrase 'data disempowerment' captures the experience of many women, and should be constituted as a formal legal principle in South Africa and internationally. The adjudication of women and other vulnerable household members' housing rights should be subject to a legal 'data disempowerment test'. Only something of that nature will counter this devil at his source.

A solution may be found in the concept of a 'legal fiction.' A legal fiction can go a long way towards making something that is invisible, visible. The '*nasciturus* fiction' in South African law, for example, creates the fiction that a foetus is born before it is. This protects a child's right to inherit from a pre-deceased parent, if born after their death. We need a legal fiction that imagines what records would be kept by 'a reasonable official in a fair legal environment.' A data disempowerment test could then work backwards from those imaginary records to identify missing records, the absence of which might have disadvantaged a right holder. How such a test would be applied is illustrated in the footnote below, using the example given earlier of the man with the RDP house, who applied for housing with either an unregistered customary wife or a cohabiting partner.⁹

⁹ 'A reasonable official in a fair legal environment' would be deemed to keep a permanent record of the woman's unregistered customary marriage, despite there being no marriage certificate to capture. Similarly, the reasonable official would be deemed to keep a permanent record of the cohabiting partner. The data disempowerment test could then be applied, resulting in the assertion that the absence of such data makes a *prima facie* case for 'data disempowerment.' This would then have to be dealt with as a necessary prelude to determining the land and housing rights, not as an afterthought, if considered at all. This would move away from the reliance on existing records as the *prima facie* default position, with the emphasis on the man having to step up to the plate to prove his rights, rather than the other way around. In legal terms the onus would not be on the state to correct the record, the onus would be on the man to prove his rights. In ordinary language: A legal test for 'data disempowerment' would initiate a legal process that would force a man to put 'her'-story first, and 'his'-story second. This would assist women as a previously disadvantaged group to recover lost rights.

In 2019 the *Presidential Advisory Panel Report on Land Reform and Agriculture* recommended a single, national data portal for all land information be developed immediately. This would form the foundation for a comprehensive land recordal and administration system, to populate the e-cadastre. Should South Africa embark on this new integrated and consolidated land information system, it must include adequate processes to record present facts about women's lives, as well as counter data disempowerment resulting from past record-keeping. South Africa's new electronic registration process now paves the way for gaps in state records to be incrementally filled and upgraded with far greater ease. Other databases that rely more on public participation can also hopefully facilitate this.

In the 21st century, rights are being driven primarily by technology and data. The state, lawyers and civil society have to learn how to read 'her-stories' between the lines of existing official records. These narratives of women's lives must be made visible. New technologies such as blockchain can then capture them, to build evidentiary records more fit for the purpose of promoting gender justice.

Author byline

Leslie Downie is a South African attorney, notary and conveyancer with Michalsons, Cape Town. Michalsons specialises in ICT, IT, electronic signatures, data protection, cybercrime and robot law. In 2016 Leslie conceptualised LIS law (land information systems law) as a distinct legal specialisation. Her main focus is data for state-subsidised housing and how it interfaces with informal and household land rights. See <https://www.michalsons.com/about-michalsons/our-people/leslie-downie>