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Recognising the family house: a problem of urban custom in South Africa

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ABSTRACT

In South Africa, popular notions of the township family house derive from an interplay of customary norms and the racialised history of administration and urban government – particularly exclusion from urban property rights. They also represent an insistence on the materialisation of kinship through fixed property, and on the home as transcending individual ownership or market asset. Focusing on the metropolitan area of South Gauteng, this paper argues that township family houses require understanding and recognising in terms of urban customary rules, and addressing in the context of competing rights, custom, and the place of the law in formalising these. Urban custom, too often neglected in scholarship, warrants constitutional recognition. The paper contends that there is, in fact, acknowledgment in state administration and judicial decisions of the customary force of the family house, as collective and cross-generational. Yet this is always through practical norms rather than official ones, as sympathetic state representatives navigate the lack of legislation that would enable formal recognition. In our concluding discussion, we reflect on a constitutional basis for recognising the family house, noting that even issues of constitutional compliance are better attended to within the law rather than in its gaps.

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1. Introduction

During apartheid's twilight, the South African state enacted a series of overlapping processes through which rented and quasi-owned family houses in black townships would become private property. This meant registering individual owners who came forward on the basis of permits listing multiple family members. Decades later, the first generation of title holders are dying, and disputes over the legitimate ownership of these houses have become intense. Reporting deceased estates reveals the substantial gap between popular understandings of the collective family house and the legal frameworks of individualised ownership, land registration and intestate succession.

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Family houses have real economic significance, as property passes en masse to the next generation. In recent years, economists and policy-makers have begun to recognise the huge global implications of inheritance for family opportunities and constraints.¹ In South Africa, making sense of cross-generational wealth transfer is especially crucial because of the country's acute inequality and its only recent extension of equal property rights to the majority of the population. And, whereas debates about access to land have often taken a rural focus, it is imperative to understand how people access and use urban land. South Africa is distinctive in global terms, because the transfer of township houses into individual title represented the unusually widespread and rapid creation of small-scale landowners in cities. The implications of this unprecedented devolution of housing stock require careful analysis for policy in South Africa and beyond. Houses remain, for many, the most significant items of property as well as homes in a broader sense. In this context, it is crucial to appreciate the relationship between legal and popular conceptions of tenure.

In metropolitan areas such as Gauteng, popular notions of the family house themselves derive from an interplay of customary norms and the racialised history of administration and urban government, particularly exclusion from urban property rights. The family house is thus part of a broader legacy of racially discriminatory spatial planning in South African cities, which will take years to repair. It is one example of the sheer complexity involved in addressing discrimination in relation to title and security of tenure. However, whatever its provenance, the family house is widely insisted upon as a matter of obligatory urban custom, not just habitual cultural usage.²

Custom in urban settings is too often neglected in scholarly commentary. This paper argues that township family houses do indeed require understanding and recognising in terms of urban customary rules, and addressing in terms of competing rights, custom and the place of the law. It makes the case for a constitutional basis for recognition. It contends that there is, in fact, some acknowledgement in state administration and judicial decisions of the customary force of the family house, as collective, cross-generational patrimony. Yet this is always through 'practical norms' rather than official ones,³ that is, sympathetic state representatives navigate the lack of legislation that would enable formal recognition.

Acknowledging the family house as a matter of urban custom raises crucial questions regarding the extent of basic rights in South Africa today. The Constitution of the Republic of South Africa, 1996, protects customary norms and cultural rights. Indeed, it requires that customary law principles be given equal weight to those of common law. But, when it comes to property and inheritance, these are generally imagined to pertain to rural settings, even as commentators resist positing an equivalence between customary norms and rural, chiefly authority. Taking living customary law seriously invites us to treat equally seriously popular claims to shared norms in metropolitan areas. This means looking beyond engagement with formal law itself, to investigate how people reckon property and inheritance in their lives, decisions and disputes, and how state officials

¹ See especially T Piketty *Capital in the Twenty-First Century* (2014).

² C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: problems solved or just beginning?' (2000) 117 *South African Law Journal* 306, 321.

³ On the distinction and recognising custom, see O Zenker & MV Hoehne 'Processing the paradox: when the state has to deal with customary law' in Zenker & Hoehne (eds) *The State and the Paradox of Customary Law in Africa* (2018) 1, 24–25.

deal with succession matters in practice. Arguing for recognition of the family house requires care. Claims made in its name often serve to marginalise women in a manner that endangers the fundamental right to gender equality under s 9 of the Constitution. They often do so in the gaps left by the system, with the result that there is no oversight or legal protection. Such claims also represent attempts to insist on a materialisation of kinship through fixed property, and on the home as transcending individual ownership or market asset. These sensitivities are better addressed within the terms of the law than by relegating an important normative concept to the legal margins.

We start in [Section 2](#) of this article by explaining the history of family houses. We then set them in terms of urban custom, approaching them in [Section 3](#) through debates regarding the recognition of living customary norms. Armed with this perspective, we turn to our data to demonstrate that the family house is a broadly recognised category of property, and one with the obligatory force of custom, but one that lacks legislative support. In [Section 4](#), we first describe the definitions reported at a community meeting, to reach towards a working ideal type. In [Section 5](#), we examine how this takes on reality in the practice of inheritance, concluding that it does so as a basis for making claims. The paper then turns to how the courts deal with family house disputes in [Section 6](#), and how they figure in the formal administration of deceased estates in [Section 7](#). In both, practical recognition is evident, but limited by a lack of legislative provision. [Section 8](#), our concluding discussion, returns to the family house concept as a cultural norm that is eligible for protection under the Constitution, and whose sensitive recognition may, in fact, help address potential issues of discrimination and marginalisation.

The paper focuses on three densely populated townships in the Gauteng area. It is informed by case work seen at ProBono.Org, and by author Maxim Bolt's research since 2016 across the world of deceased estates in South Gauteng. The latter research involved a year's ethnographic fieldwork shadowing deceased estates officials, property valuers, wealth management practitioners and lawyers in 2017; attending court hearings and following the progress of particular cases; out of court, sitting in on inheritance-related meetings and mediations, from government offices, to ProBono.Org consultation rooms, to African National Congress (ANC) local branches. This understanding was complemented by interviews with Soweto residents, civil society organisers, community mediators, and officials in key government institutions (the Master of the High Court, the Deeds Office, the Department of Human Settlements, magistrates' courts). The authors placed all of this in the context of analysis of judgments in the High Court, Supreme Court of Appeal and Constitutional Court. [Section 4](#) draws on a community meeting convened by ProBono.Org to gain greater definitional clarity regarding the family house.

2. What is the family house?

Houses in historically black townships, overwhelmingly former rental properties, came to be known as family houses.⁴ This was partly because residents strove to live in them

⁴ While the article focuses on South Gauteng – Johannesburg and its surroundings – it is important to note that the analysis that follows does not include Alexandra in northern Johannesburg, which is unusual because of its history as a black freehold township. See N Nieftagodien & P Bonner *Alexandra: A History* (2009).

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.⁵ While these permits could officially be passed down within families, gradual administrative breakdown meant that they often became cross-generational dwellings informally.

As Erica Emdon has described in detail,⁶ the late 1970s and the 1980s saw steps towards transfer of township houses into long-lease agreements and then into private ownership. Shorter leases had been available from the 1950s, but not widespread. These new measures were encouraged by the Urban Foundation, a corporate alliance that campaigned for the creation of a black property-owning class. But doing so meant contending with administrative incapacity and the lack of proper registration. 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. This process was made especially difficult by the intricacy of residence patterns, poorly captured by a crumbling bureaucracy.⁷ Disputing parties today report fraud on the part of relatives who secretly acquired title. Other families chose 'custodians' to represent them, unaware that the latter would come home with exclusive individual title. Houses could be and sometimes were divided in equal shares, but this then led to different difficulties around future use, credit and sale. All this occurred in a programme initially accelerated by monetary incentives to local authorities for each house converted to individual title.⁸

Inserting family houses into a property market was thus no simple matter from the point of view of families themselves. As in rural and peri-urban settings, 'capitalist relations, commercial contracts, wage labour, migration, etc' have left norms inseparable from 'adaptive strategies', and the notion of family property has emerged from this intersection.⁹ The result is 'some elasticity in how social relationships are interpreted'¹⁰ and, as we will demonstrate, how the family house concept is defined and applied.

Even at this stage, there was recognition of the customary force of the family house, and especially the importance of 'custodians' for families. In Gauteng, the province-level Transfer of Rental Property Scheme (TORPS), 1998, introduced family rights agreements by which families formally recognised custodians, while protecting broader entitlements to the property and against eviction or alienation. But the agreements were not legally enforceable, as they lacked recognition in formal property registration. Later attempts to incorporate the agreements into deeds registration proved equally thorny in legal terms.

Changes in succession law added to the gap between customary norms and legal stipulations. In 2004, *Bhe v Khayelitsha Magistrate*¹¹ declared male

⁵ Occupancy of the houses was governed by Regulation 6 (site), 7 (residential) or 8 (occupancy) permits. See the Regulations Governing the Control and Supervision of an Urban Black [originally Bantu] Residential Area No. R. 1036 (14 June 1968) <http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/A1132/A1132-Ea38-001-jpeg.pdf>.

⁶ E Emdon 'Privatisation of state housing: With special focus on the greater Soweto area' (1993) 4 *Urban Forum* 1.

⁷ See D James *Money From Nothing: Indebtedness and Aspiration in South Africa* (2014).

⁸ Emdon (note 6 above).

⁹ R Kingwill 'Lost in translation: Family title in Fingo village, Grahamstown, Eastern Cape' 2011 *Acta Juridica* 198, 217.

¹⁰ *Ibid.*

¹¹ *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC).

primogeniture¹² in the Black Administration Act (originally the Native Administration Act 37 of 1927) unconstitutional along gender lines. Although this eliminated a key example of segregation in the law, it had the effect of eradicating customary succession as an option for people without wills. All South Africans became subject to the same intestate succession law, prioritising spouses, then children; in the absence of both, the line of succession continues to the deceased's parents and then siblings and their descendants. 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.

Today, custom is invoked for the notion of the unsaleable family house, with its emphasis on collective ownership resembling the rural homestead. But it is also the result of earlier state planning. The houses were not assets, because their residents were denied ownership rights. Their administrative background is made explicit when family permits are produced today in official mediation meetings, as a way to prove the family house's legitimacy against the legal weight of the title deed.

The family house thus needs to be understood historically, because it is the result of an apartheid legacy, and because it represents a claim about the importance of family history over individual property or the market. Indeed, today it has the force of living urban custom, raising questions about the extent of legal recognition of cultural norms in contemporary South Africa. The next section sets the family house in the context of legal and scholarly debates on living customary law.

3. A problem of urban custom

A major focus of South African jurisprudence and legal debate since the end of apartheid has concerned the accommodation of customary law. This has meant striving to accord it equal footing alongside common law, as stipulated in the Constitution,¹³ while also ensuring that other constitutional principles such as the outlawing of discrimination¹⁴ are adhered to. Central has been debate about the nature of customary law in a post-apartheid context. The township family house, we argue, provokes still further, as-yet-underexplored questions: about custom in urban life, and the place of urban life in the official recognition of custom.

Official customary law has a fraught history. In the version promoted by colonial and apartheid regimes in South Africa, African custom was distorted to form part of a comprehensive raft of legislation setting African people apart regardless of where or under whom they lived. An early example, the Native (later Black) Administration Act of 1927, stipulated a crude version of customary succession along racial lines. All African people without wills were deemed most suitably served by a blanket rule of male primogeniture. In the Constitutional Court's *Bhe* judgment, Langa DCJ was explicit about this. While in principle interpretable as giving space to custom, the Act was

¹² Inheritance by the first male child, or in this case the closest surviving male relative.

¹³ Section 211(3).

¹⁴ Section 9.

at its core ‘specifically crafted to fit in with notions of separation and exclusion of Africans from the people of “European” descent’.¹⁵

Even beyond such explicit racial segregation, official customary law occupies an uncomfortable place in contemporary South Africa. Here, too, *Bhe* has offered important commentary in relation to the passing on of property. Tackling the nature of customary law, Langa DCJ drew on the important distinction between customary law as it was ossified by an imposed system before 1994 – as well as by written codes and textbooks – and living customary law that reflects popular norms and their changes over time. He emphasised the limitations of top-down rules, as opposed to ‘the dynamism of customary law in the face of changing circumstances’.¹⁶

Thandabantu Nhlapo contends that ‘there is no longer any doubt in South African legal circles that the customary law recognised by the Constitution is living customary law as opposed to official customary law’.¹⁷ However, the contrast between official and living custom has further implications, extending beyond apartheid’s legislative legacies, and even beyond the problems with codes and textbooks. A narrower framing of custom can appear to foreground a relationship with particular places and authorities. As in other former colonial settings, custom has often been imagined as rural tribal law under kings and chiefs. Such arrangements were justified as emerging from older polities. But they also distinguished rural ‘subjects’ from metropolitan ‘citizens’.¹⁸ This upheld a form of legislated despotism, prevented change, and removed any possibility for Africans to have a say in the norms governing their lives. While versions of this pattern existed in other colonial settings,¹⁹ it became especially rigid and acute in South Africa with the elaboration of homeland governments.

Official customary law has, therefore, been seen as following from rigid forms of historically constituted traditional authority, at the cost of popular access to justice.²⁰ Indeed, such an interpretation has dominated understandings of tenure in rural former homeland settings.²¹ Recent scholarly writing, by lawyers and others, has sought to challenge this. Anthropologist Hylton White shows how even archetypal customary disputes are often mediated by authorities other than chiefs, including kin and schoolteachers. Based on this, he insists that customary norms not be conflated with political sovereignty, as they were in the homeland system and in Mahmood Mamdani’s comparative analysis of Africa’s colonial legacy.²² In their review of land rights and upgrading, historians William Beinart, Peter Delius and Michelle Hay underline the enduring stability of rural family entitlements over time, against those who see occupation as

¹⁵ *Bhe* (note 11 above) para 61.

¹⁶ *Ibid* para 82.

¹⁷ T Nhlapo ‘Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and “living law”’ (2017) 33 *South African Journal on Human Rights* 1, 12.

¹⁸ M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996).

¹⁹ *Ibid*.

²⁰ See especially the aborted Traditional Courts Bill, which bolstered the legacy of apartheid-era homelands and restricted residents’ rights of appeal beyond the traditional authorities associated with those territories. Nhlapo (note 17 above) 11–12.

²¹ See B Cousins ‘Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa’ in A Claassens & B Cousins (eds) *Land, Power & Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (2008) 3.

²² H White ‘Custom, normativity and authority in South Africa’ (2015) 41 *Journal of Southern African Studies* 1005.

directly dependent on chiefly permission.²³ Developing a related point, legal scholars Aninka Claassens and Sindiso Mnisi argue that proper attention to living customary law takes us beyond the apparent tension between ‘rights’ and ‘custom’. The tension can appear stark when the latter is depicted as top-down and grounded in conservative authority. Understanding how people are actually changing their practices and making claims on the ground invites a reconsideration of both terms. It suggests a conception of rights as relational and vernacularised, not abstract and decontextualised, and of custom as containing greater democratic potential than is apparent when chiefly rule is privileged.²⁴

All of this takes discussions of custom beyond a restrictive framing in terms of chiefs, traditional land – and even rigid and ethnicised notions of ‘community’.²⁵ That, in turn, opens space for appreciating how customary norms may be key even where other legal regimes, and other principles of justice and regulation, are more visible. The formalism of professional legal culture contrasts starkly with the perspectives of most South Africans,²⁶ and the effects can be alienating. Yet people nevertheless choose strategically between normative frameworks in a legal pluralist environment.²⁷ The results are entangled legal histories, from which new understandings of law emerge: the living custom, for example, surrounding such an apparently ‘un-customary’ legal artefact as freehold. Rosalie Kingwill shows how, in the Eastern Cape, title has not undermined conceptions of family property; instead, lineage and collective responsibility remain key in a view of property that fits neither official definitions of title nor an official version of customary law.²⁸ As in urban townships, new customary forms have emerged from the relationship between legal process and popular notions of fairness, property and kinship.

Despite expansive understandings of living custom, urban settings occupy a strange and uncomfortable place, especially when it comes to property and succession. Of course, there is widespread recognition that other aspects of ‘custom’ are far from territorialised, as evident in the diversity of marital regimes in metropolitan areas. And, to be sure, the foundational *Bhe* judgment was itself urban. But only passing mention was made of ‘the real values and circumstances of [...] particularly the people who live in urban areas’.²⁹ More substantively, the dissenting judgment by Ngcobo J recognises 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 [...] [E]ven within this transformative process, a majority of Africans have not forsaken their traditional cultures. These have been adapted to meet the changing circumstances’.³⁰ His concern was that liquidation because of intestate succession would damage forms of security anchored in living

²³ W Beinart, P Delius & M Hay *Rights to Land: A Guide to Tenure Upgrading and Restitution in South Africa* (2017) 15–16.

²⁴ A Claassens & S Mnisi ‘Rural women redefining land rights in the context of living customary law’ (2009) 25 *South African Journal on Human Rights* 491.

²⁵ Beinart et al (note 23 above) chapter 11.

²⁶ M Chanock *The Making of South African Legal Culture: Fear, Favour and Prejudice* (2004) 525.

²⁷ Claassens & Mnisi (note 24 above).

²⁸ RA Kingwill ‘Papering over the cracks: an ethnography of land title in the Eastern Cape’ (2014) 40 *Kronos* 241.

²⁹ *Bhe* (note 11 above) para 82.

³⁰ *Ibid*, Ngcobo J dissenting judgment para 228.

customary notions of kinship and property, and he argued for preserving a developed form of customary succession with a place for the family custodian.³¹ Whereas custom in rural areas often provokes questions about traditional authorities, and about formalising 'off-register' and communal tenure,³² urban custom foregrounds the problem of squeezing popular understandings of collective homeownership into narrow legal frameworks of property, registration and succession.

Why does urban custom present such difficulties, even while research like Kingwill's encourages an appreciation of customary norms in freehold title? A crucial reason is that many people, especially outside metropolitan centres like Johannesburg, see such places as the antitheses to 'proper' family houses in which lineage and collective responsibility are grounded. This is clear among Khumisho Moguerane's research participants on the South Africa-Lesotho border.³³ For them, urban townships comprising government-built houses are places where people are unable to build personhood through their abodes or bury their children's umbilical cords. They are reduced to 'wanderers' without connection to proper kinship.³⁴ Moguerane's interlocutors counterposed their own attainments to the evils of city life. Yet their aspirations closely resemble those of the Johannesburg residents described below.

Another difficulty is that urban custom is complicated to define. Living customary law is difficult to determine in any setting, because of its local specificity and its changeability, as Langa DCJ noted in his *Bhe* judgment. Indeed, the Constitutional Court has on numerous occasions dealt with the question of defining customary law concepts. In *Pilane v Pilane*, the court noted that 'the true nature of customary law is as a living body of law, active and dynamic, with inherent capacity to evolve in keeping with the changing lives of the people whom it governs'.³⁵

But such challenges are especially acute in urban contexts. This is not only because of the kind of social change highlighted by Ngcobo J; it is also because of the ways customary norms are flexibly mobilised. As people seek support networks in urban life, for example, shared clanship may be used strategically, selectively and sometimes temporarily.³⁶ So Johannesburg's township family houses bring together customary kinship and formal title, in a manner comparable to the non-metropolitan Eastern Cape. But they do so while also refracting the contingency and malleability of urban kinship.

All of this contextualises the difficulties of recognising urban custom when it comes to titled property and inheritance. But several factors point to the importance of doing so: the broad-reaching analyses of living custom that now predominate, the recognition that customary values inflect popular engagement with other legal frameworks, and the acknowledgement that cities are not simply the opposite of customary life. The last of these is especially crucial for addressing the divided geography produced by

³¹ *Ibid* para 231.

³² Beinart et al (note 23 above); Cousins (note 21 above).

³³ K Moguerane 'A home of one's own: Women and home ownership in the borderlands of post-apartheid South Africa and Lesotho' (2018) 52 *Canadian Journal of African Studies* 139.

³⁴ *Ibid* 140–141.

³⁵ *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 34.

³⁶ AD Spiegel 'Reconfiguring the culture of kinship: poor people's tactics during South Africa's transition from apartheid' (2018) 88 *Africa* S90, S90.

colonialism and apartheid, grounded in ideologies of racially and ethnically separate government. Despite the history and legacies of separation, urban custom raises issues familiar from rural settings: not only the question of how to determine living custom, but also the very nature of ownership, the protection of both individuals and groups, and the endurance of gender inequality.³⁷

As we show below, the township family house is far from simply a real-estate asset. Its own fraught and multi-layered history, and the urban customary values through which people see it, require greater attention. A particularly important source of complexity comes from the entanglement of notions of kinship and property with the past and present effects of law and administration, including their gaps and limits. What follows examines what the family house means to people as an idea, its dynamics in practice, and the ways it plays into popular claim-making.

4. The family house as an ideal type

In this section, we elaborate an ideal type of the family house concept – a first step towards a definition. We will then show how it is mobilised, both in people’s plans and perspectives and by state officials sensitive to popular norms.

In attempting to gain further understanding, two consultative sessions were held wherein stakeholders – including academics, legal professionals, state department representatives and township community members – were asked how they define and interact with the concept. Both sessions, the first with professional experts and practitioners, the second with community members, highlighted that a clear definition is currently lacking, even though the term is ubiquitous, taken for granted, and often seen as highly consequential. Indeed, even the responses from academics and legal professionals varied substantially depending on what roles particular institutions play in housing, property and inheritance. Here, though, we focus on the session with community members. During this engagement, a questionnaire asked four simple questions:

1. Do you have a family house?
2. Where is the house situated?
3. How many people reside in it?
4. What makes this house a family house?

Thirty-seven responses were received from African residents of Soweto, Tembisa and Kagiso. These revealed a substantial range of views. This range itself differed by township (although conclusions are necessarily very tentative with such a small sample size). The twelve respondents from Tembisa, who were women above the age of 55, referred to a property that initially had a permit, is currently occupied by family members, and is also used for ancestral ceremonies. Here, entitlement to occupy the property is mainly based on either having been listed on the permit or being a descendent of a person who was on the permit. Similarly, in Soweto, the property is used to maintain familial identity, according to the eighteen respondents hailing from there (men

³⁷ Cousins (note 21 above).

and women between their 40s and 70s). That sense of materialised kinship is not always defined by physical occupation by family members. Rather, it is often grounded in election of a custodian who manages the property after the death of the elder or title deed holder. This was the majority view, but not the only one. The alternative was in greater evidence in Kagiso, a 'newer' township. Here, the seven respondents (women between 33 and 59) defined the family house simply as a property that is inherited from direct ascendants – that is, divorced from more historically embedded interpretations. Nevertheless, in all responses there was clear reference to a custodian who takes care of and preserves the property for future use. There was also clear insistence on shelter for family members in need of housing, rather than simply property owned by an individual or an asset on the market.

The family house is thus a social form of property which, after the death of an elder, instead of following testate or intestate succession law and registration of title, continues a more collective family relationship to the property. There is also a strong sense of allowing a sibling or relative unable to acquire their own home to be afforded dignity by taking on the deceased's property.

It is important to note that the family house concept is not equally salient for all African families in urban settings. Factors such as education, socio-economic standing and general familiarity with the current legislative framework for administration of deceased estates play important roles in determining how immovable property is seen after the death of the title deed holder. Such variation has been evident at ProBono.Org's weekly help desk at the Master's Office, which Bolt also attended as a researcher. Here, not all people seek broad kin-based access to the family house. A large number of matters are deceased estates involving middle-class individuals: those with stable and even professional employment, substantial education, and economic means – especially important is that they have acquired their own houses. They often pursue the administration of a deceased parent's property through official administrative processes and simply allow the family relative who is in need of shelter continued occupation of the immovable property. They may effect transfer of title to the resident relative, leave the latter to municipal indigence support, and cut themselves off from any responsibility. While we cannot go into such variation (for example, class) systematically, the ethnographic research presented below reveals the complexity produced by it on the ground.

Even so, the family house is an enduring and recurring trope. It can be defined as a social property form that is central to the social organisation of many urban African families. Its significance is in preserving and anchoring family relationships, and the ties that family members have with the house. The use and control of the property, and access to it, are a matter of collective mores. The family house thus has the obligatory character of customary rules rather than simply being a matter of individual preference or general customary usage.³⁸ This provisional definition was confirmed in Bolt's ethnographic research in Soweto. There, as in the findings of Deborah James,³⁹ it became clear that the family house is regarded as a place to which an extended group of kin members *should* have access. It is a refuge from the vagaries of economic

³⁸ Himonga & Bosch (note 2 above) 321.

³⁹ James (note 7 above) chapter 6.

uncertainty and shifting domestic arrangements. A conception of collective property, set out for the Eastern Cape by Kingwill,⁴⁰ intersects with the particular significance of 'reconfigured' metropolitan kinship.⁴¹ In the sections that follow, we extend beyond this working definition to show how, although the family house has no legal protection, a whole range of practices, popular and state, are organised around its recognition.

5. The family house in the practice of inheritance

In practice, the family house is often thrown into relief after a death. In the course of disputes over inheritance, immovable property takes centre stage. Opposed parties turn to the official administration of deceased estates in support of their own interests, and a key faultline of disagreement is whether the house will remain a family house. We see this at the point when an elder or a custodian has passed away, and there is no collective agreement on how the immovable property is to be dealt with. Most commonly, it is to be inherited in terms of intestate succession, by a spouse or children of the deceased. Disgruntled or victimised family members then turn to official administration processes that, however, disregard the family house concept completely. Meanwhile, the property may cease to be identified as a family home if a male relative has not been 'appointed' as a custodian. Despite the fact that it was declared unconstitutional in *Bhe*, male primogeniture (first-born inheritance) continues to be the dominant principle in the social organisation of family house succession (an important alternative is male ultimogeniture, or last-born inheritance). Although not applied in strict terms, and usually taking into account the surviving family members who require housing, there is still a tendency to refer to a male child or descendant as the preferred custodian. We will show how this interacts with administration and legal process in the sections below.

To do this, it is important to appreciate the contingency, variation and intricacy of family house inheritance in practice. What is evident is the entanglement of, and strategic choice between, different principles of legality, formal process and urban customary norms. One research participant, a teacher in Mzimhlophe, Soweto, whom we shall call Mr Mthembu, set out the intricacy of his father's estate and his own plans. For both, patrilineal norms jostled with recognition of state laws and procedures. Threats to use the law kept the father's assets away from his five out-of-marriage children. This worked because little of the estate was reported (only the money, via a will leaving it to all biological children but with larger shares for sons). Meanwhile, a lack of legal education left the children outside his marriage vulnerable to intimidation; they were warned of a costly legal battle if they approached the authorities. The family house went to Mr Mthembu himself, with his parents' other two sons acquiring rural property and livestock respectively. But what was clear was that the family house was different from other assets. Mr Mthembu had begun considering his own estate, and he had written a will. But this only covered a house he had bought in his own name, with a mortgage, for his partner and baby son. He was renting out the family house for the time being. Nevertheless, he emphasised, it has to remain outside the will and beyond formal

⁴⁰ Kingwill (note 28 above).

⁴¹ Spiegel (note 36 above).

administration, passing as a 'family thing' through the patriline: 'it must rotate among members of the family'.

Plans for the family house are often left unwritten, and many people see family houses as private matters to be sorted out away from state oversight. This was a common refrain in interviews, including with older and less affluent households. Wills may be considered 'verbally written', in the sense that a meeting was convened with kin, and wishes were explained. Such arrangements are often reinforced by the widely accepted principles of male primogeniture or ultimogeniture. For one elderly couple, their youngest son would receive the house and car, but the furniture would be split among all six children. In their view, writing this was not categorically different from saying it face to face. They were not concerned about the proof or the legal weight that a written testament might afford. If someone has written a will, they explained, it is just read in the house with the family, as though it had been an oral will. Their comments were borne out in other interviews. Writing a will might be a way to focus in-person discussions of someone's wishes, both in life when they gathered relatives, and also after death when the will was simply read at home to outline a way forward.

A common point was the importance of ensuring the indivisibility of the family house, as something to which the family, however it was defined, should have access. And, for many ageing Soweto residents, contemplating what will happen when they die, their own experience of inheriting the house followed from their place in the family as eldest or youngest son, even if this was only in a *de facto* sense because Africans could not own urban property for much of apartheid. It is in relation to this notion of collective and broadly defined family property that the law appears a particular problem. Wills mean stipulating the entitlements of individuals and, as the elderly couple added, if a will is written about the house, then people who are not in it will come and damage it. Meanwhile, intestate succession raises the dire possibility of liquidation: the vanishing of a family house as a materialisation of lineage and a place for the ancestors, in a puff of cash shares. Ideally, as the elderly couple put it, the family handles any dispute. People go to the state (the Master of the High Court, in this case) only when 'the uncles' are unable to resolve and contain disagreements.

These examples underline how complex and varied the very idea of the family house is, defended as a particular property form, but nevertheless available for multiple uses and in different arrangements. Mirroring what we saw in the examination of the family house as idea, there are substantial differences in how people see the family house in practice. An assertion of family privacy over state intervention, family house plans may nevertheless be combined with reporting estates and/or writing wills. They may rely on principles of male primogeniture (first born) or ultimogeniture (last born). Or, as discussed below, they may be a defence of family precisely against an earlier era of legally sanctioned male primogeniture. Across these variations, people's suspicion of legal administration may coexist with a desire for the formal protection of their interests and rights on terms that they themselves recognise.

When disputes do arise about family houses, the most common fight is between the siblings of the deceased and the surviving spouse. Yet claims to shared family access may be combined with challenges to the way that apartheid regulated that access in the past. A final example illustrates this, taking us to the South Gauteng High Court in

2017.⁴² It concerns a settlement formalised between a group of siblings and their deceased brother's wife. The siblings' father had died in 1985, with a Soweto house under a 99-year lease. This passed to his eldest son, and subsequently to the latter's wife upon his own death. She was relying on her in-community-of-property marriage to inherit the house. Yet her husband had been a mere custodian of their parents' home, the siblings said of their brother, and a home in which one of the sisters actually resided. He had somehow exploited his role to register it in his own name, even though he was not living there. After his death, when it became clear to everyone who actually had title, the deceased's wife tried to evict the resident sister and sell the property. The siblings were fortunate in having neighbours who could recommend an attorney, the means to pay one, and the confidence in the system to seek relief in the High Court.

Their application had been to reverse the deceased brother's title deed, on the grounds that he had inherited the house as eldest son under the Black Administration Act. Long after *Bhe*, discrimination persisted because of the enduring effects of disinheriting all but the beneficiary of male primogeniture. The siblings with collective entitlement had supported their brother as custodian. But their attempt to contest intestate succession took the form of challenging the way custodianship had been formalised as individual ownership. Such shock is common, as people confront the slippage between popular notions of custodianship and its legal manifestation as individual title, years after residence rights were upgraded in the manner summarised earlier.

There was never a judgment, because the wife withdrew, but the court-sanctioned settlement split the house equally among the surviving siblings and their brother's spouse. This amounted to reversing transfer of title from father to son and divided the house between all the children. Although we cannot know how the judge would have decided, the application itself was not far-fetched. It raised similar issues to *Rahube v Rahube*, on which the Constitutional Court passed judgment in October 2018.⁴³ The Court held s 2(1) of the Upgrading of Land Tenure Rights Act (ULTRA) 112 of 1991 to be constitutionally invalid, for it automatically converted holders of land tenure rights into owners of property, without providing the occupants and affected parties lacking ownership rights with notice or opportunity to make submissions to an appropriately established forum.⁴⁴ Indeed, it effectively formalised access to land tenure in terms of the Black Administration Act, entrenching the apartheid-era principle that African women could not hold tenure rights. The first respondent had acquired the permit as the eldest male child of the initial permit holder. The applicant in this matter was, for all intents and purposes, the caretaker of the property but, as a woman, lacked any formal or secure tenure. In this matter, Goliath J provides a reminder that, under apartheid, the effects of patriarchy were compounded by legislation that codified the position of African women as subservient to their husbands and male relatives.⁴⁵

⁴² This is based on a group interview with the applicants, South Gauteng High Court (August 2017).

⁴³ *Rahube v Rahube* 2019 (1) BCLR 125 (CC).

⁴⁴ The constitutional invalidity was deemed retrospective to 27 April 1994. However, the application of this judgment was suspended for a period of eighteen months to allow parliament the opportunity to introduce a constitutionally permissible procedure to address the constitutional invalidity.

⁴⁵ This is one example of the need for South Africa's courts to review legislation enacted to provide rights in respect of ownership of land, to ensure its constitutional compliance. See also *Ramuhovhi v President of the Republic of South Africa* 2018 (2) SA 1 (CC).

The family house thus may be supported, as idea and practice, even as its patriarchal aspects are challenged. Although gender discrimination may be disputed by families today, the family house is routinely legitimised by people using the apartheid-era residence permit listing kin members. Such a combination of positions on the family house is consistent with the argument made by Ngcobo J in *Bhe*. As mentioned earlier, he argued for the importance of finding a way to remove gender discrimination while retaining a place for customary norms relating to succession, including the all-important family home.

The family house is often at the centre of disputes and, as we have seen, formal legal processes are resorted to only in instances where disputes arise regarding use, access and control. In attempting to retain broad family entitlement to a house, it also becomes useful to leave the property registered in the deceased's name.⁴⁶ The house is, after all, understood as a place for the ancestors, and doing so offers a way for people to squeeze their version of property into the narrow forms designated by official law. Even so, people's practices are regularly intertwined with official process, albeit unevenly. Indeed, ProBono.Org's own client statistics confirm that some people are now attempting to protect the family house through estate planning.

This section has highlighted the variation and complexity of practice. But the core features of the family house concept, outlined in the previous section, remain in place. What a focus on practice emphasises is that the family house is rarely just a description – whether of an ideal or of practices. Invoking it is a way to make claims, which rely on their obligatory force as urban custom. These can be grouped as follows:

Claims about kinship

- Asserting the entitlements of siblings – the children of an earlier patriarch in whose name the apartheid-era family permit was issued.
- Asserting the entitlements of brothers, and especially oldest or youngest brothers. It is important to note that this claim can diverge in its implications from the previous one about siblings. We saw this in the High Court example above.
- Attempts to marginalise spouses (especially wives) of the deceased.
- Attempts to marginalise children outside the marriage.

Claims about property

- Asserting the significance of the house beyond its value as a market asset.
- Asserting attachments to houses beyond individual ownership.

The claims about kinship, with the exception of the first, make family house claims difficult territory. Existing intestate succession law diverges from popular notions of urban custom, but it does also protect wives. Similarly, the law's emphasis on biological descent is an uncomfortable fit with popular norms, but its effect is (in theory) to protect children. Group entitlement and access remain shot through with forms of exclusion and discrimination that have been deemed unconstitutionally discriminatory in

⁴⁶ Kingwill (note 9 above).

terms of s 9 and as impinging on the rights of children in terms of s 28. Yet, at the same time, the family house involves crucial claims about the nature of property, whose recognition Ngcobo J was arguing for in his dissenting *Bhe* judgment. Even while the definition of the family raises issues of exclusion and discrimination, urban customary norms invite consideration of homes as collective goods beyond the market, which materialise kinship across generations. Indeed, bringing the family house more squarely under formal law could offer greater purchase in ensuring that its manifestation is constitutionally compliant.

How, then, do state officials weigh these issues? Below, we show how the family house is indeed regularly acknowledged among those who routinely encounter it, even while it lacks formal legal recognition. We turn first to the courts and case law.

6. The family house and the law

If the family house has no legal reality, how is it treated in legal matters where it is an important category for disputants? Conversion and upgrade processes⁴⁷ have seen numerous applications to reverse title awarded to the first claimant and to review the decision to award the property to one individual (in the absence of others, and/or to their exclusion).⁴⁸ And here, recent cases make explicit reference to the family house.

For example, in two recent matters before Francis AJ in the South Gauteng High Court, the history of family houses was absolutely key. As the judge noted, *Khwashaba v Ratshitanga*⁴⁹ and *Maimela v Maimela*⁵⁰ were remarkably similar. In both, there were disputes over claims to own ‘property claimed to be a family house’,⁵¹ by virtue of in-community-of-property marriage. The challenges had been prompted by attempts on the part of ex-wives, already divorced in *Khwashaba*, and in the process of divorce in *Maimela*, to claim rights of ownership. In *Maimela*, a sibling challenged how one brother had earlier acquired title, resembling our earlier discussion, but with the agreement of the brother in question. The mother of the parties had been the Regulation 7 permit holder. She died after having claimed the property in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988, but before her claim was finalised. Her daughter-in-law claimed that she and her husband had been given the house verbally, something he denied and that the court found unverifiable. In *Khwashaba*, a man denied the validity of his own legal title – leasehold had been acquired under the Conversion Act (and subsequent title under ULTRA) in place of

⁴⁷ In terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 and the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA). Under the former, converted properties required a leaseholder or titleholder to be decided by process of adjudication. Under ULTRA, leaseholders were automatically registered as titleholders once township registers were established. Both often relied on the previous sole right of men to tenure over township houses, leading to fights over the legal conditions under which previous generations inherited.

⁴⁸ In terms of the Conversion Act, authority and decision-making regarding a property vests with the Director-General of Human Settlements. S/he must be cited as a respondent in any application to reverse title of a converted or upgraded property.

⁴⁹ *Khwashaba v Ratshitanga* (27632/14) [2016] ZAGPJHC 70.

⁵⁰ *Maimela v Maimela* (13282/16) [2017] ZAGPJHC 366.

⁵¹ *Ibid* para 1.

his mother, who could not be given tenure rights at the time.⁵² Here, divorce had been followed by the ex-wife's claim as joint owner, sale of the house and an attempt to evict the ex-husband's brother.

At issue, in both, was the context of ownership in practical and historical terms. In *Khwashaba*:

The applicants [the ex-husband and his brother] already mentioned maintain that the property is a family house and were [sic] never intended to be the exclusive property of the first applicant. The first applicant was only the *de jure* holder of leasehold on behalf of his mother and her family. On the housing permit the applicant replaced his father as the head of the family and his mother was reflected as an occupant under him. This marks the property as a family house and not as his private personal property entitling the second respondent [the ex-wife] to a half share of their joint estate.⁵³

Thus, Francis J not only referred to the homes as family houses, but also noted the particular historical complexity involved. She recognised that 'many of the family houses were transferred in the name of single individuals', and those family agreements were supposed to restrict rights of ownership.⁵⁴ In *Khwashaba*, she moreover emphasised the difference between *de jure* leaseholds and the actual collective entitlements of family members as residents of the house, as shown above. This specification of *de jure* status acknowledged the gap between overt legal recognition, on the one hand, and popular practice and administrative histories on the ground, on the other.

Yet, in both matters, the ultimate result was an emphasis on process. The court ordered that title of the property revert back to the Gauteng Provincial Department of Housing and that an enquiry in terms of s 2 of the Conversion Act be held to determine entitlement to ownership of the property for all competing claims.⁵⁵ This followed legal precedent, as set in *Kuzwayo v Estate late Masilela*.⁵⁶ In this matter, the Supreme Court of Appeal pronounced the s 2 inquiry to be the legal remedy applicable in instances where the property is transferred to an individual without having taken account of the entitlement of other occupiers of the property in question. (Indeed, it is a remedy deemed not to rely on the Promotion of Administrative Justice Act 3 of 2000, which reviews any procedural flaws in adjudication processes.)

Administration is a way to re-assess family houses, but it avoids making explicit legal claims about them.⁵⁷ What this means is that, despite recognition of them along the way, the court has not yet dealt with family houses in terms that recognise the category as a customary law concept – albeit an urban one – or that interrogate its application in any particular scenario. The concept is largely used as a mitigating factor in

⁵² This was a reference to the Regulations Governing the Control and Supervision of an Urban Black Residential Area, GN R 1036, 1968, which prohibited African women from holding leasehold over a property.

⁵³ *Khwashaba v Ratshitanga* (note 49 above) para 9.

⁵⁴ *Ibid* para 6.

⁵⁵ Section 2(1): 'Any secretary shall conduct an inquiry in the prescribed manner in respect of affected sites within development areas situated within his province, in order to determine who shall be declared to have been granted a right of leasehold with regards to such sites.'

⁵⁶ *Kuzwayo v Estate late Masilela* (28/10) (2010) ZASCA 167.

⁵⁷ The emphasis on fair process rather than recognition of living customary norms and concepts was also evident in *Rahube*. There, a sibling's attempt to evict prompted litigation, but the family house concept was not mobilised even though the applicant had assumed family entitlement on the basis of residence since 1977 (Lawyers for Human Rights, personal communication).

such applications and not as the basis of a claim in terms of customary property rights.⁵⁸

In family house disputes, evictions become a particular focus of people's encounters with the law. In eviction proceedings, most respondents (those contesting eviction) argue for their right to the property in terms of familial relationships or the documented family rights agreement. The courts tend to afford the respondents the right to seek legal advice. This is to enable them to make a case, either for the family rights agreement or for their familial relationship to the property, in a separate court application. Failing that, the application to evict will be ordered. Yet orders are also granted when respondents cannot access legal services.

Outside the legal system, family members are often assisted by neighbours or community members to regain physical occupation of the property once eviction has been executed by the sheriff of the court. This results in further legal action: here, criminal proceedings against trespass. The criminal court's response is, once again, to afford the defendant(s) the opportunity to consult and obtain legal assistance in bringing a High Court application to reconsider who should have title. In short, eviction involves a complex to-and-fro between legal and extra-legal processes and dynamics, mirroring the entanglements we describe elsewhere in the paper. And, again, it involves court recognition of family attachments, but not of the family house itself.

The family house concept thus currently offers only an indirect and limited basis for legal argument. As noted above, should the respondents access legal assistance, an application to reverse title will deal with how title was obtained by the current owner and if the said process was fraudulent in any way (for both conversion and succession). The court seldom hears applications that directly rest on the basis of the property being a family house. This might be because the application must be brought against the Registrar of Deeds, who is regulated by the Deeds Registries Act 47 of 1937 on how title registration is to take place. This makes provision for registration of individual or co-ownership title but not for a 'family house'. It is equally notable that the Deeds Registries Act and its amendments do not recognise indigenous customary law as the basis of norms and practices regarding land. Nor do these measures provide for the registration or adjudication of tenure in such contexts. Contrary to the Constitutional Court's own ruling in the past,⁵⁹ custom becomes subordinated to common law and to regulation built on a distinctly uncustomary legal edifice.⁶⁰

In practice, most people experience legal stipulations through administrative process, and specifically the administration of deceased estates. Describing how the family house as a customary concept relates to the law means not only demonstrating its extra-legality; it is equally important to examine how the concept is shaped by the

⁵⁸ The other implication here is that any legal change will rely on the actual workings of administration to be effective. This is especially pertinent in light of the overburdened administrative process described below.

⁵⁹ In *Alexkor*, the Constitutional Court held that that it was clear that the Constitution acknowledged the originality and distinctiveness of indigenous law as an independent source of norms within the legal system, subject to the Constitution's own values. See *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC).

⁶⁰ A Claassens & G Budlender 'Transformative constitutionalism and customary law' (2014) 6 *Constitutional Court Review* 75; Nhlapo (note 17 above); see also HWO Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' (2003) 1 *University of Nairobi Law Journal* 107.

system in practice, and how administrators engage with it in their work. We turn to this in the next section.

7. The family house in the administration of deceased estates

Death represents a moment when the future of a family house is thrown into question. But it is when (or if) the estate is reported that this situation most squarely confronts the state and the law. We have shown the range and the commonalities in the perspectives, plans and claims around the family house. But the formal system itself comes to shape the conditions in which the concept exists. The system's legacies – including the effects of its lacunae – inflect urban customary norms well beyond the version of custom that was enshrined in the Black Administration Act and its regulations. Yet officials' 'practical norms' at times give greater recognition to people's conceptions of fairness than does the law itself.⁶¹

The Master of the High Court is responsible for administering deceased estates under the Administration of Estates Act 66 of 1965. As stipulated by statute, an office is attached to each regional High Court. Decisions are made with close attention to legislation,⁶² and many officials are legally trained. At the same time, they have substantial autonomy in their decisions, since the Master, the supervisory Deputy Masters, and the much larger number of Assistant Masters who make most day-to-day decisions are all equivalent – formally, they are all simply 'the Master'. The upshot is that decisions cannot be overturned internally. They may be taken on review to the High Court. But this must contend with the fact that many South Africans are unable to devote the time or resources involved in such an application, all the more because matters are routinely postponed. People are also aware that court judgments may be hard to enforce where non-state forms of coercion are central to struggles over family houses. Thus, whereas the Master is officially part of a legal infrastructure backstopped by judicial oversight, many people experience the office as freestanding and itself like a court.

The Office of the Master of the High Court for South Gauteng, in Johannesburg, is the busiest. It administers 32,000 to 33,000 files annually, around double the next largest in Pretoria. Its building is routinely teeming with people, especially on the ground floor where intestate estates can be reported on a walk-in basis. The actual work of the Master's Office requires flexibility, even though the process is sharply defined by law. For officials, making the system work involves persuasion, not just routine. It involves paperwork, but also maintaining goodwill among parties, and trying to explain to the aggrieved why 'fair' does not always mean 'legal'. It also requires a holistic view: from legal bureaucracy to the realities of death, and from the future of property to the future of families. As one Assistant Master put it, 'You know, these legal issues, they transgress into other areas. Everything gets brought into the estate'.

The law often shocks members of the public in meetings and mediations, with its insistence on intestate succession rules rather than recognition of patrilineages, and its definition of exclusive title. In this context, the 'family house' becomes central to

⁶¹ Zenker & Hoehne (note 3 above).

⁶² Especially the Administration of Estates Act, the Intestate Succession Act 81 of 1987 and the Wills Act 7 of 1953.

everyday administration, despite its lack of any legal weight. Assistant Masters have to be able to understand why families want to find ways to protect the family house through the system, and this means acknowledging the concept's everyday reality. Doing so may include seeing legal avenues to realise the family house ideal, as when kin have been excluded from access to the property in the wake of suspect transfers back in the 1990s. Again, the history of the house is recognised practically, and through an emphasis on fair process. But, constrained by a lack of legal provision, recognition cannot be explicitly of the customary norm itself.

For poorer families, among whom family houses are concentrated, the lack of legal recognition is given particular meaning by built-in institutional incapacity. The system, defined by the half-century-old Administration of Estates Act, is onerous. And intestate estates under a threshold of R250,000 have a simplified administrative track under s 18(3). This is important, given that the mainstream process is prohibitively complicated and requires an attorney. But official oversight is limited to awarding a 'Letter of Authority' to a 'Master's Representative', who is responsible for distributing assets in the estate without supervision. Unsurprisingly, the most bitter fights revolve around whose name will be on the letter, and many people see it as tantamount to acknowledgement of ownership. Assistant Masters are aware of this, and they attempt to catch the cases of fraud, the non-reporting of inconvenient heirs, or attempts to bully or disinherit the vulnerable. But they lack investigative powers. What this means is that family houses and their inheritance operate according to informal rules and norms, in a space left by the Letter of Authority and its lack of oversight. The family house survives as a living customary ideal, but outside of legal protections or constitutional guarantees of customary property and inheritance rights. The law, meanwhile, remains hemmed in by popular notions of family privacy.

A parallel process exists at magistrates' courts for African estates reported before 2004. In the Family Court building, the Johannesburg Magistrate's Court has an estimated 165,000 unresolved deceased estates in terms of the Black Administration Act, which go back to the late 1970s. In many instances, the matters are brought repeatedly before the court due to disputes between heirs on use and control of, and access to, the immovable property. Indeed, the Johannesburg Family Court has decided to hear these matters in open court in the hope that its authority helps achieve resolution. The dynamics are very similar to those for 18(3)s at the Master's Office except, ironically, that the magistrate's court – whose role is a legacy of apartheid law – has enhanced capacity to resolve matters because of its subpoena powers. Even so, matters are only resolved if disputants present themselves to the court in the first place, and the family house once again survives outside legal purview.

Mediation in grass-roots level organisations such as community advice offices and local parliamentary constituencies plays a critical role in arbitrating family disputes that involve the family house. For many people, seeking such assistance offers an important way to access legal information, bridge the gap between popular norms and state law, and find practitioners who can take disputes forward without immediately having to approach the state itself. However, due to a lack of formal authority or legal process, mediations depend on the parties adhering to agreements, indeed, often on goodwill. When mediation fails, many matters are then referred to the Master's Office

or Family Court to commence formal administrative processes or to legal aid institutions for legal advice.

The family house thus meets legal and administrative process in very particular ways. It is a category and claim that officials have to engage with, so as to understand the perspectives, circumstances and grievances of members of the public. What this reveals is that the family house is informally acknowledged throughout the system. But attempts to bridge the gap between popular norms and law are limited by the stark nature of that gap. Indeed, the family house takes on a particular reality because of the reduced oversight of the s 18(3) process and the power of the Letter of Authority, outside the protection of the law or rights under the Constitution. In the final section, below, we review the basis in the Constitution for recognising the family house more explicitly in terms of customary property and inheritance rights.

8. The family house and the constitutional protection of urban custom

As demonstrated above, the family house exists as social form governing a family's relation to a particular immovable property, founded on the premise that those who control the property have a collective kin-based obligation to preserve it. This implies that kin members' abilities to alienate the property from the rest of the family should be limited. It is a duty to maintain the relationship of the family to the particular property, based on the connection between the property and the ancestors. Individuals are mere custodians. Yet the family house's realisation is almost entirely beyond the purview of the law and its protections. We have shown how the concept is handled by state officials and how judicial officers have also had to make determinations on disputes related to the family house. Yet there remains a lack of law harmonising its recognition with land registration, tenure and succession rights. Addressing this means returning to urban customary property and inheritance rights, and their defensibility in terms of the Constitution.

The Constitution, s 15(3)(a)(ii), recognises the right to freedom of conscience, religion, thought, belief and opinion and enables the enactment of legislation recognising systems of personal and family law under any tradition or adhered to by persons professing a particular religion. The protection of urban custom can also be inferred in terms of s 31(1)(a), which provides for the rights of cultural, religious and linguistic communities.⁶³

It is evident that the current systems for land registration and succession do not speak sufficiently to how customary law views fixed property (or the land underneath it) or inheritance in relation to people's own norms. The Department of Human Settlements attempted to recognise customary understandings of property by drafting agreements between family members during the conversion process. But these agreements were not endorsed against the title, further demonstrating how the family house as a customary law concept is practically recognised but cannot be given sufficient effect within existing law. Its lack of recognition has further consequences. The practices that sustain the family house often occur beyond the law or are shaped by the law's

⁶³ Moreover, s 25(6) and s 25(9) stipulate that the state must introduce legislation giving effect to security of tenure, to address past racial discrimination, the effects of which we saw earlier.

gaps. The effect is to prevent the development of the concept in a manner that protects basic rights as enshrined in the 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 concept's application passes constitutional muster, especially in relation to gender discrimination and the rights of all biological children. We suggest that, however difficult this is, Ngcobo J was right to advocate for legal recognition rather than relegation. Such relegation clearly often intensifies social exclusion and marginalisation, including of women and children, by leaving arrangements entirely beyond state purview.

Thus far, the family house concept has been viewed as an inferior form of social tenure, and one terminated once the individual owner disposes of the property or requires the eviction of its users. We have demonstrated how the concept is not in itself viewed as a tangible defence in instances where the continued occupation of the property is threatened. 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. Kingwill notes that the existing Land Titles Adjustment Act 111 of 1993 'provides for commissioners to adjudicate ownership in situations where the register does not reflect current ownership'.⁶⁴ This legislation might offer a starting point 'to address the familial relationships embedded in tenure'.⁶⁵ But doing so would also require the amendment of the Deeds Registries Act. As Kingwill further 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'.⁶⁶

This paper has 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 persistence of urban custom affects how policy, legislation and administration influence society. Administration, especially, directly affects day-to-day experiences, and for the family house this often means the deceased estates system. It is staffed by practitioners and experts who are aware of the gaps between popular norms and the law, and who try to address the gaps in their own professional practice. But such gaps are stark, and attempts to bridge them are often restricted to counselling and popular education. Placing urban custom on an equal footing with common law would involve substantial change not only in legal recognition, but also in administrative process. 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, 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.

⁶⁴ Kingwill (note 9 above) 211.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* 203.

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