

**RELATIONAL FEMINISM: THE AUTONOMY OF WOMEN WITHIN AN ABUSIVE  
HOME**

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## Summary

The purpose of my research is to conceptualise an understanding of home within South African law and how certain relationships create such an understanding. Home can be thought of as a place of safety, security, peace and identity. Home encapsulates values such as human dignity, freedom and equality. Furthermore, it is a space where one can exercise your identity autonomously. Home is a space for autonomy. However, some relationships give rise to this positive concept of home and autonomy whilst others are detrimental thereto. I explore these relations, specifically relations of domestic violence which threaten these values of home. I further argue that the public/private divide has been a contributing factor to domestic violence that occurs within the home.

Efforts used to protect the private sphere has resulted in the public sphere compromising the privacy and autonomy of the victim. I put forth the argument that privacy should not be equated with the private sphere and should rather be understood in terms of autonomy and a right which should be afforded to individuals. Autonomy itself, has for a long time been equated with the private sphere, and has, therefore, been used as a tool to protect the abusive party from state action, rather than protecting the abused party from the actions of the abuser. Therefore, autonomy itself should not be equated with the private sphere, as this conception lacks creativity in achieving autonomy within the collective. Therefore, I suggest an alternative understanding of autonomy: relational autonomy. Relational autonomy examines how specific relationships are beneficial to the meaning of autonomy. Relational autonomy calls for the restructuring of destructive relations which stand in the way of achieving autonomy and therefore also stands in the way of achieving a positive concept of home.

## Acknowledgments

For the longest time, it has just been me, my mom and my sister. This research is largely inspired by observations and experiences from my personal life. Therefore, to a large extent, I'd like to thank my mother for showing me that there is always hope, that there is always a way out of a horrible space. I want to thank her for taking the leap and having faith that it will all work out for the better. It has not always been easy, and sometimes impractical, but it has shown me that there is more to life than any material possessions can hold. Her kindness towards everyone around her has allowed us to be safe wherever we go. I admire her strength, resilience and resourcefulness. Where my mom has been the fire, and I the water, my sister has been the earth between us. She has grounded us and has always provided the solid foundation we needed. Her loyalty to us both has always kept us three solidly together, even in the toughest of times. I've moved around more times than I can count, but I have never been without a home. My home has always been where my mother and my sister were. Dankie mamma en sus, baie lief vir julle.

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## Introduction

### 1 1 Introduction

The question at large of my dissertation is whether home can be reclaimed as a space of autonomy for women, especially in the face of domestic violence. Accordingly, the first point of departure is to question what home is; secondly, how domestic violence has an impact on the understanding of home; and lastly, I question what autonomy truly means.

I examine the home environment of women in particular, as well as what women endure in various home spaces. I further consider how domestic violence has an impact on the conceptualisation of home. I explore a relational theory of feminism as a way to restructure and reconsider the current defining factors which contribute to home and autonomy. Furthermore, I canvas how a gendered approach to rights, in the liberal discernment, is not to the overall benefit of women. I argue that although a liberal approach addresses the lived realities of women to some extent;<sup>1</sup> it is incapable of changing women's lived realities. I argue that gendered laws are understood and implemented in a traditional liberalist context, which merely seeks entry into the existing system, rather than transforming it. Although the liberal feminist approach focuses on the specific needs of women and, recognises the existence of gender inequality, it nonetheless believes that gender inequality is dissolved once we afford women identical rights to men. The liberal feminist approach, therefore, fails to alter the understanding and interpretation of the laws that it aims to replace. It merely affords women identical rights to men and reforms rights within an already-existing

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<sup>1</sup> L Chenwi and K McLean 'A woman's home is her castle? Poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 517—545 517.

oppressive system. Instead, total transformation of the existing system is required - the liberal approach merely offers a reform thereof.<sup>2</sup>

I argue that the relational perspective allows for total transformation to be achieved. Replacing laws with other laws as interpreted in the same static and bounded manner merely reproduces the problem, instead of altering the interpretation of these laws holistically. I maintain that a relational approach steers away from the building blocks which perpetuates inequality.

In order to restructure policies and laws in a meaningful manner, which puts an end to gender-based violence, the disadvantages that women experience must be considered on a deeper level.<sup>3</sup> The disadvantages women face runs deeper than meets the eye. The inherent dominance and violence men display towards women does not cease to exist merely by implementing altered laws and policies, especially if we implement such laws and policies in terms of boundaries (which often worsens the violence). Building onto the rules and regulations which exist in a society of unfair relations, does not assist women. I argue that we require a complete stripping of boundaries instead of building further boundaries as a means of protection. I use a relational approach to encourage transformation. More specifically, I use a relational feminist approach to address how laws are understood, interpreted and accepted, rather than a somewhat hollow liberal feminist approach.

I investigate relationships within the home to determine how relations create an understanding of home. I analyse different power relations within the home since these relations often distort the understanding of home as a place of safety and security. I further argue that rights constructing further boundaries impede the possibility of a relational form of autonomy. I challenge these boundaries to reconceptualise the understanding of autonomy and rights. The right to safety and security should be seen in relation to the right to a home.<sup>4</sup> Most importantly, in this context, I use a relational

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<sup>2</sup> J Nedelksy 'Law, boundaries, and the bounded Self' (1990) 30 *University of California Press Journals* 162—189 162.

<sup>3</sup> L Chenwi and K McLean 'A woman's home is her castle? poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 539—542.

<sup>4</sup> Section 12 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides for the right to freedom and security of the person. Also see I Currie and J de Waal 'Freedom and security

theory to consider how rights are held in relation to other rights. A relational approach to rights challenges the authority and justice of the processes by which the law is created, and by which the law creates.<sup>5</sup>

### **1 1 1 Assumptions**

The first assumption I make is that home is seen and defined in a negative light; therefore, many feminists reject the meaning of home altogether. In light of this, I make the further assumption that domestic violence has an impact on women's reality of the home. For this reason, I investigate and critique the current understanding of home. Briefly, the home is conflated with the private sphere. Similarly, the private sphere is conflated with autonomy. Therefore, the inference is made that having a home is equivalent to having autonomy; thus, the lack of home results in the lack of autonomy and *vice versa*. However, domestic violence, as well as the overprotection of the private sphere, threatens autonomy and the home. Protecting the private sphere at all costs, seals in the threats occurring within the private sphere. Therefore, instead of protecting autonomy as intended, the insulation of the private sphere from external review results in the detriment of autonomy and privacy alike. The private sphere is protected to such an extent that domestic violence occurring within its boundaries is safeguarded.

I further assume that conventional ideals of autonomy are based on liberal ideologies. Although liberalism places its focus on the freedom and equality of individuals (which is essential to feminism), it also places emphasis the public/private divide. The divide limits the usefulness of the liberal agenda to ensure freedom and equality for all individuals. I argue that the problem arises from the overprotection of the private sphere. The protection of the private sphere aims at protecting the autonomy of individuals; however, this refers to autonomy as understood through the lens of liberalism. In other words, autonomy understood in terms of an 'unrealistically unencumbered individual or "atomistic man".'<sup>5</sup> This conception of autonomy is not only masculinist since it undervalues characteristics of care and relationships, but for the

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of the person' in I Currie and J de Waal (eds) *The Bill of Rights Handbook 6th edition* (2013) 269—289 for a discussion of section 12 of the Constitution.

<sup>5</sup> C Albiston *et al* 'Feminism in relation' (2002) 17 *Wisconsin Women's Law Journal* 1—21 6.

same reason, it is also individualistic, and independence-based. Liberalism places a considerable amount of reliance on choice and the choice to determine boundaries between public and private spaces. However, it fails to consider the effects of gender inequality on such choices. Therefore, it insulates the private sphere from regulation and by doing so, contributes to the subordination of women within the private sphere - thus protecting the abuser and not the abused. In cases of domestic violence, this is evident. I argue that domestic violence takes away the very definition of autonomy.

Furthermore, overprotection of the private sphere takes away from the meaning of home - where home is a place in which you should feel autonomous and where privacy should be valued, it is not because relationships of abuse are being protected instead. I critique the overprotection of the private sphere, and I propose that we consider other relations (outside of the private sphere) in the interest of autonomy. Other relations provide for an alternate view on autonomy based on relations rather than independence. A relational theory of autonomy relies on valuable social relationships, including the public sphere, to reconceptualise autonomy in terms of relations. Therefore, I suggest that relationships should be broadened in order to assist with the development of an individual's autonomy outside of the private sphere; which leads me to my final assumption: that a relational feminist approach responds positively to achieving autonomy and reclaiming home.

By broadening the scope of relationships, autonomy can develop outside the private sphere. Power disparities in relationships within the private sphere influence current understandings of home. Abusive relationships decrease a person's sense of autonomy and thus their sense of home. I argue that a relational feminist approach to understanding and practising autonomy breaks down power disparities in abusive homes and enables women in such spaces to break free from abuse. The relational feminist approach allows for autonomy to be thought of in terms of relations. It, therefore, shows that some relations are detrimental to autonomy and others are beneficial to it. For this reason, it is essential to determine which relationships are detrimental and which are beneficial. Under these circumstances, it is necessary to revisit autonomy to the extent that broadening relations outside the private sphere contributes to a more autonomous being. I argue that relationships in the public sphere caters for this, which consequently gives abused women a wider range of choice,

meaning that they are not forced to give up their autonomy in exchange for the luxuries that the private sphere provides.

## **1 1 2 Motivation**

In this dissertation, I conceptualise an understanding of home. Furthermore, I investigate how relationships establish the definition thereof. Since the home forms such a focal point of people's everyday lives, it is necessary to conceptualise it. However, currently, there is no legal definition for *home* in the South African legal context. Nevertheless, South African case law and legislation refer to the 'home'.<sup>6</sup> Home provides a personal space to which a person belongs. Home is furthermore associated with safety, security, freedom and autonomy. Therefore, the lack of a definition is unsettling. I put forth the argument that home should not be rejected, despite difficulties in defining it and the negative connotations it often holds. I contend that we should rather reclaim home because it is the cornerstone of a person's autonomy. The positive values of home should be extended to everyone, especially to women who have historically been oppressed by it as a concept.

I aim to reclaim home as a concept, and as a source of autonomy, however, domestic violence poses a challenge. Accordingly, I must consider how domestic violence

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<sup>6</sup>Section 14(a) of the Constitution deals with the right to privacy and reads as follows: "Everyone has the right to privacy, which includes the right not to have – their person or home searched". This is significant for my research because privacy as a value to home is discussed. It is already seen that home and privacy are connected. Additionally, section 26(3) of the Constitution reads as follows: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions". Further, section 3(5)(b) and 17(1) of the Housing Act 107 of 1997 ('Housing Act') speaks of "home ownership" and not "house ownership". Finally, the preamble of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') reads as follows: "AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances". Lastly, case law also refers to the home and has attempted defining it in some cases. For example, in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('*PE Municipality*'), par 17, the court considers home as a concept in relation to adequate housing. The court states that the Constitution recognises that "home is more than just a shelter". It considers the importance of the house as a home, and the home as a place of "personal intimacy" and "family security" which becomes a "familiar habitat".

impacts the understanding of home. Domestic violence serves as proof that it is dangerous to sentimentalise home as a place of safety, security, peace, serenity and even dignity and equality. It threatens these characteristics and takes away from the very existence of home. Domestic violence makes the task of defining home in law challenging since home is already a subjective concept, and it is even more complicated to understand with abusive relational structures within the home.

I therefore, consider how to restructure the law in order to assist abused victims in ways which will secure their autonomy, and thus their right to home. In order to address the tensions that exist when dealing with the autonomy of women in abusive homes, it is necessary to go beyond merely replacing rights with other rights which also fundamentally serve as boundaries.<sup>7</sup> In other words, I will have to move beyond mere reform of these rights if I want to see change.

Autonomy for women in abusive relationships will only realise once we restructure the institutions that implement these power imbalances through relational conceptions.<sup>8</sup> It is an essential task of the state to ensure that they implement laws in such a manner that they meet the goals they have set out to achieve. Law is an important aspect which constructs and validates certain social norms through the legitimising view of law. It, therefore, has the potential to recreate gendered patterns of power imbalances which it claims to want to destroy.<sup>9</sup> My research is not necessarily proposing a need for *more* state involvement, but rather a form of *different* state involvement taking note of relations and using a contextual analysis as Nedelsky proposes.<sup>10</sup> Noting any doubts that the patriarchal state might not be any better than the patriarchal man, feminists put forth the argument that the private/public divide nevertheless threatens women's autonomy and equality regardless of whether it imitates state power. It has

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<sup>7</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 162.

<sup>8</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 162.

<sup>9</sup> C Albiston *et al* 'Feminism in relation' (2002) 17 *Wisconsin Women's Law Journal* 3.

<sup>10</sup> With this being said, I limit my focus on relationships between men and women and do not extend it to queer or other relationships. I am also aware that relations differ within different geographical settings, making them contextually unlike. However, my focus lies with the concept of intimate partner violence which does not discriminate between race, class, religion, age or socio-economic status and applies equally to all women (as will briefly be expanded on).

been argued that private power is the principal threat to women's equality<sup>11</sup> – just like charity starts at home, so does oppression. Women have suffered from oppression long before the operation of law and long before any state involvement.<sup>12</sup> Although women are afforded some protection through the constraints of the state, it is not equivalent to the protection afforded to men.<sup>13</sup> Therefore, the relational approach attempts to balance the scales through different forms of state involvement (and not necessarily more state involvement) and challenges any relationships that cause inequality, including those relationships which foster a false sense of autonomy for women.<sup>14</sup> Relational feminism seeks to implement institutional change by recognising broader structures of relationships and pinpointing which of these relations have positive effects on underlying relationships which foster inequality.<sup>15</sup> Thus, instead of implementing more state involvement, the relational approach changes the nature of the state's involvement from being invasive to an application of equal law enforcement which restructures destructive relationships.<sup>16</sup>

A conception of rights that routinely directs our attention to relationships rather than the protection of boundaries is required. For real transformation to take place, rights in terms of boundaries need to be abandoned and reconceptualised in terms of relations.<sup>17</sup> A relational approach challenges the authority and justice of the processes by which the law is created and by which the law creates.<sup>18</sup>

### **1 1 3 Method and Sources**

My research relies on critical theory and specifically focuses on the public/private divide. I argue that the divide insulates violence within the home and impedes the

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<sup>11</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629—1641 1631.

<sup>12</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1631.

<sup>13</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1632.

<sup>14</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 354.

<sup>15</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 355.

<sup>16</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 360.

<sup>17</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 360. Also see V Nourse 'Law's constitution: A relational critique' (2002) 17 *Wisconsin Women's Journal* 23—56 23.

<sup>18</sup> C Albiston *et al* 'Feminism in relation' (2002) 17 *Wisconsin Women's Law Journal* 6.

realisation of autonomy rather than enhancing it. My research further relies on relational theories and defines home and autonomy in terms thereof. The purpose is to provide a new and refreshed meaning to home, rather than rejecting it altogether.

Relevant sources considered in this research are of relational feminists. Jennifer Nedelsky is thought of as the "founder" of the relational feminist theory; therefore, she is the guiding author. Further relational theorists are used to supplement her theories throughout this dissertation. In order to provide an understanding of home, feminist theorists such as Iris Marion Young aids in defining home as a place that expresses uniquely human values such as preservation, safety, individuation and privacy.<sup>19</sup> Additionally, the works of Currie and de Waal are valuable sources, specifically in my initial stage of defining home and what it could potentially be (especially in light of the absence of the definition thereof in law).<sup>20</sup> I investigate further research studies completed by Lillian Artz and Dee Smythe on the Domestic Violence Act 116 of 1998 ('DVA'),<sup>21</sup> and information from Statistics South Africa is used to illustrate the extent to which domestic violence affects South Africa.

Specific legislation and policies, such as the Housing Act 107 of 1997 ('Housing Act') and the policies to it, provide guidelines for defining home in law. It is a challenging task because home has not yet been defined in law. Therefore, these sources are used firstly to define adequate housing and I link this to the home.<sup>22</sup>

Together with the South African sources of law, international sources are further considered to broaden the understanding of housing which allows for a more extensive understanding to the home. Furthermore, the DVA is also a comprehensive source of reference when determining what domestic violence is. I briefly consider common law to supplement the DVA, since the DVA is only partial legislation of a technical nature. The DVA was enacted after the enactment of the Constitution of the Republic of South Africa, 1996 ('the Constitution') and is likely to demonstrate its desired features. Such

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<sup>19</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 124—125.

<sup>20</sup> I Currie and J de Waal *The Bill of Rights Handbook 6th edition* (2013) 587.

<sup>21</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 200—226 204 The complainant brings all applications for protection orders without notifying the respondent (*ex parte* application orders) and often, the respondent brings a counter-protection order as a form of retaliation.

<sup>22</sup> Preamble of the Housing Act.



features are beneficial because the Constitution displays values such as human dignity, equality, safety, security and freedom.

For this reason, the Constitution also provides a significant source of my research and is referred to continuously. I suggest that the constitutional approach is akin to the relational approach, which I promote throughout this dissertation. A constitutional approach (like the relational approach) promotes a shift towards viewing rights in terms of relations and encourages the legal system to view a matter holistically and contextually, moving away from an "all-or-nothing" approach.

Lastly, case law furthers my argument that a relational approach is necessary to define home and autonomy. For example, *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>23</sup> ('*Grootboom*') establishes a foundation for defining housing aside from its physical existence which emanates into the right to a home. *Makama v Administrator, Transvaal* ('*Makama*') also provides an explanation on the concept of home<sup>24</sup> and *Port Elizabeth Municipality v Various Occupiers* ('*PE Municipality*') recognises home as being "more than just a shelter".<sup>25</sup> These cases are also useful sources to critique the public/private divide and how the divide negatively impacts society - specifically on how the public sphere is reluctant to assist individuals in need of public assistance.

#### **1 1 4 Overview of chapters**

Chapter 2 of my dissertation deals with the notion of home, what home could or should be, and provides that home is the core source of autonomy. I conceptualise home within South African law by looking at how various relationships affect it. Various case law and legislation refers to home, despite the lack of definition. Courts have noticed the gap in the law and have attempted to define home. Therefore, case law and international law are used in the first instance to assist in defining adequate housing, which contributes to the definition of the home. I demonstrate that a comprehensive

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<sup>23</sup> 2001 (1) SA 46 (CC).

<sup>24</sup> *Makama v Administrator, Transvaal* 1992 (2) SA 278 (T) par 285.

<sup>25</sup> 2005 (1) SA 217 (CC) par 17.

understanding of housing as a concept could assist in establishing a meaningful definition of home as a concept.

Furthermore, I consider gender as a concept in relation to adequate housing and home. Lastly, I briefly consider how property law theory has influenced the understanding of home. I demonstrate how the bounded and hierarchical nature of property law affects our understanding of home. The hierarchical nature of property law often leaves the right to a home in second place. I argue that when dealing with a matter in which property rights, and what I call home-ing rights are in opposition, there is a need to "break away from a purely legalistic approach" and to consider alternative external factors including "morality, fairness, social values and implications and circumstances" that arise.<sup>26</sup> To put it briefly, I consider what home currently means and what home could mean if the law were to protect it as a right.

In chapter 3, I analyse the dangers of romanticising the notion of home, especially in the face of domestic violence. I consider the many factors of how domestic violence affects home and argue that it not only destroys the notion of home but in addition to that, it interferes with the victim's autonomy and their understanding thereof. Furthermore, I consider why women do not respond to the systems in place designed to assist them in these instances. I examine the purpose as well as the ineffectiveness of the DVA. I contend that despite the extensiveness of the DVA, domestic violence persists primarily due to the public/private divide and the need to restructure relations. Lastly, I deliberate on the various reasons why many women choose to stay in abusive homes and why authorities are reluctant to remove perpetrators from the home. Fundamentally, Chapter 3 deals with the impact of domestic violence on the home.

In chapter 4, I provide an analysis of why it is unsafe to protect abusive relationships in the private sphere. I examine the importance of developing relationships between the private individual and the public. I assert that these relationships contribute to the development of the individual's autonomy because their relations emerge within the public sphere. I provide an in-depth discussion of the public/private divide and how it contributes to the perpetual subordination of women - not only in the private sphere where domestic violence occurs - but also in the public sphere. In effect, I make room for the discussion of welfare systems and critique them based on evidence proving

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<sup>26</sup> *PE Municipality* par 33.

that welfare is only given to those individuals that society generally considers as "deserving candidates"; consequently, reducing their autonomy. The overall purpose of this chapter is to rethink and redevelop an understanding of autonomy in which relationships and engagement can assist in achieving it. I maintain that a relational form of autonomy allows people to develop a sense of home outside of the private sphere, which is often necessary - especially for women in violent relationships which are often protected by the private sphere. Lastly, I propose that one should think of rights in relational terms. This proposal is premised on the argument that a person has certain rights in relation to other rights and because people hold rights, people have rights in relation to others. The purpose of rights is in every sense to regulate relations and to ensure that no unjustified infringement takes place on the rights of other persons. However, the rights afforded to women to protect them from domestic violence has not protected them enough. I argue that this is because we view rights in terms of boundaries. Rights viewed in terms of boundaries inevitably creates a boundary between the public and private sphere. A false choice between conceding to collective control or maintaining your individual autonomy (as rooted in independence) is created when we view rights in terms of boundaries. Rights viewed in terms of boundaries thus provides a false choice; whereas rights viewed in terms of relations does not force a choice between the collective (which can be a source of protection) and your autonomy. Instead, it allows you to exercise autonomy within the collective. If we rely on a conception of rights, which continuously refers us to relations, we can restructure relations that are detrimental to the goals of autonomy.

## Adequate home(ing)

### 2 1 Introduction

The purpose of this chapter is to conceptualise an understanding of home within South African law and how certain relationships form its definition. I, therefore, question the meaning of home. Secondly, I consider why the concept of home should be reclaimed rather than rejected. Lastly, I determine how specific relationships give rise to a positive concept of home and how others can be detrimental to it, therefore, resulting in the need to alter them.

Unfortunately, the South African legal system does not currently provide for a legal definition of 'home' or what it entails. Although case law and legislation refer to 'home', no formal definition is in place.<sup>1</sup> Home is a central part of life. Therefore, it seems

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<sup>1</sup> Section 14(a) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') deals with the right to privacy and reads as follows: "Everyone has the right to privacy, which includes the right not to have – their person or home searched". This is significant for my research because I discuss privacy as a value to home (however, not privacy as understood in the liberal context). Additionally, section 26(3) of the Constitution reads as follows: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions". Further, section 3(5)(b) and 17(1) of the Housing Act 107 of 1997 ('Housing Act') speaks of "home ownership" and not "house ownership". Finally, the preamble of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') reads as follows: "AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances". Lastly, case law also refers to the home and has attempted defining it in some instances. For example, in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('PE Municipality'), par 17, the court considers home as a concept in relation to adequate housing. The case provides that the Constitution recognises that "home is more than just a shelter". It considers the importance of the house as a home, and the home as a place of "personal intimacy" and "family security" which becomes a "familiar habitat".

necessary to have a coherent understanding of it. Home is a personal space to which an individual belongs. It is often associated with safety and security - although this is not always the case, as is illustrated in the following chapter, which deals with domestic violence. Ian Currie and Johan de Waal have recognised this gap in the law. Therefore, they present an interpretation of what home could mean. They have proposed the idea that home should qualify as a place where there is an intention to “occupy a dwelling for residential purposes permanently or for a considerable period of time”.<sup>2</sup> This definition is provided within the ambit of section 26(3) of the Constitution, which places a negative duty on the state to prohibit unlawful or arbitrary evictions of people from their home.<sup>3</sup> However, it seems premature of the Constitution to refer to the word home,<sup>4</sup> yet there is no legal definition for it, not even in other Acts which support constitutional ideals. It seems somewhat unattainable to protect something if you do not know what you are protecting. Supporting legislation, such as the Housing Act 107 of 1997, (‘Housing Act’) should, at the very least, define this concept to some extent in order to give it the protection it requires. The law cannot protect the home if it has no idea what the home truly is. Home may be an abstract concept, but without practically defining it, at least in broad terms, no protection can be afforded.

Courts have also considered the lack of definition and have attempted to define home. The court in *Port Elizabeth Municipality v Various Occupiers*<sup>5</sup> (‘PE Municipality’) recognises that home is “more than just a shelter” and that it is a place of “personal intimacy” and “family security” which becomes a “familiar habitat”. In this judgment, the court recognises the home as the “only relatively secure space of privacy and tranquillity in a turbulent and hostile world.”<sup>6</sup> However, I argue that these definitions fall short and do not encompass all the positive values of home. We cannot protect

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<sup>2</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 587.

<sup>3</sup> Section 26(3) of the Constitution.

<sup>4</sup> Section 14(a) of the Constitution reads as follows: “Everyone has the right to privacy, which includes the right not to have (a) their person or their home searched”. Section 14 of the Constitution, which deals with privacy, will also have a significant impact on the understanding of what home entails. Further, section 26(3) of the Constitution reads as follows: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions”.

<sup>5</sup> 2005 (1) SA 217 (CC).

<sup>6</sup> *PE Municipality* par 17.

home as a legal right if we do not have a mindful understanding thereof. If it is assumed that home is a “familiar habitat” of “personal intimacy” and “family security” to be protected from the outside world (in other words the public sphere) at all times, then how would it be possible to protect the home if the abovementioned turbulence and hostility comes from within the home?

Furthermore, I propose that it is not merely enough to reject home as a concept because of its the negative connotations (such as abuse within the home). Home is meant to be the foundation of autonomy and identity. Although the comforts and tranquillity of home may historically come at the expense of women,<sup>7</sup> home should not be rejected altogether. There should preferably be an extension of these positive values to everyone - especially to women historically oppressed in the home. This may require delicate restructuring of barriers which prevents accessibility of the positive values of home to everyone.<sup>8</sup> Keeping the private sphere insulated may be detrimental when it is a place of hostility and fear. This is to say that relationships enabling the public/private divide may be detrimental to the realisation of home. Other relationships previously overlooked, will therefore, need to be brought to light in order to preserve the positive values of home. These relations consist of internal relationships established within the home-space, as well as those between public and private spaces.<sup>9</sup>

Section 26(2) of the Constitution provides a mode of access to these positive values that comprise home. It provides that the state has a duty to take reasonable steps within its available resources to provide people with the right to adequate housing (adequate housing must to some extent mean home as I discuss below). Furthermore, it opens the barrier between the public and private spheres and places a positive duty

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<sup>7</sup> Here I am referring to the plethora of cultures that have historically secluded women from access to the public sphere due to their “womanly/wifely duties” being home-based and the expectation that women should be of service to the men and children in the home. In this context, it is clear to see why many women reject home as an ideal since it is synonymous with the confinement of women for the purpose of advancing male projects while obstructing any growth for women.

<sup>8</sup> Positive values, such as safety, privacy and autonomy, will be the foundation of my proposed definition to home.

<sup>9</sup> S Bowlby *et al* ‘Doing home: Patriarchy, caring and space’ (1997) 20 *Women’s Studies International Forum* 343—350 347.

on the state to provide the comforts and tranquilities to the private sphere. Although only section 26(3) of the Constitution refers to home, the provision should be considered in its entirety.<sup>10</sup> You cannot arbitrarily be evicted from your home if you did not have one.

Section 26 comprises two parts: a positive part dealing with subsections 1 and 2, and a negative part dealing with subsections 1 and 3. Section 26(2) places a positive obligation on the state, to take reasonable legislative and other measures within its available resources, to provide access to adequate housing to everyone. This is followed by section 26(3), which prevents arbitrary evictions from your home.<sup>11</sup> Therefore, the state must first provide you with a home, before it can protect you from arbitrary evictions. You cannot be evicted from a home if you do not have one. Section 26 must be understood and read in its entirety and altogether.<sup>12</sup> One must read the Constitution as a whole and the language used in the Constitution must be understood consistently and coherently.<sup>13</sup> Since they are both constitutional provisions, and they are both rights guaranteed by the Constitution, they should be “promoted equally, optimally and simultaneously as part of one single system of law.”<sup>14</sup> Considering the provision in its entirety may lead to housing meaning home – at least to some extent.

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<sup>10</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*) par 19 provides that rights, such as the rights in section 26 of the Constitution, need to be “considered in the context of the cluster of socio-economic rights enshrined in the Constitution.” Also see par 22—24 which provides that when interpreting a right in its context, rights must be understood in their “textual setting” which requires a consideration of “Chapter 2 and the Constitution as a whole”. It further provides that “the right of access to adequate housing cannot be seen in isolation” and that there is “a close relationship between it and other socio-economic rights”.

<sup>11</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 586.

<sup>12</sup> *Grootboom* paras 19, 22—24. Also see *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) (*Dladla*) par 64. Also see AJ van der Walt *Property and Constitution* (2012) 24 who provides that in the context of property law, there should be a focus on the “overall system of property rights rather than on the individual property rights or specific property institutions or rules because the goal of the single, Constitution-driven property law can be promoted only by focusing on the systemic characteristics and features that property law should have in view of the applicable constitutional provisions and requirements.” I argue that this view is applicable in all spheres of law. Therefore, instead of focusing on a specific provision, the provisions should be considered within their context as a whole.

<sup>13</sup> *Dladla* par 74.

<sup>14</sup> AJ van der Walt *Property and Constitution* (2012) 22.

Subsequently, the language used in section 26(3) becomes relevant to section 26(2). Although they are separate concepts, they are nonetheless related.

It is, therefore, necessary to consider concepts such as “housing” since the South African legal system provides for an understanding of housing rights to a certain extent. An understanding of housing rights may act as a foundation for the development of an understanding to home. The concept of home requires some structural/physical form to it which housing can provide. The court in *Makama v Administrator, Transvaal* (*‘Makama’*)<sup>15</sup> provided that the concept “home” does imply some form of shelter against the elements providing some of the comforts of life.<sup>16</sup> However, these two concepts should not be conflated. They are interrelated yet separate. Home is a more personal and subjective concept which considers additional factors, such as gender and the relationships that bring the conceptualisation of home to life. The already-established concepts of housing often overlook these factors. Therefore, as much as it is essential to establish a link between housing and home, it is equally as important to separate home as a self-standing concept.

If a link is established between the two concepts, a clear understanding of adequate housing must first be determined since there is no entrenched definition of “adequate” or “housing” or “adequate housing” in South African legislation. Once housing has been determined in isolation, it may become easier to define what home means. It will then become clearer how specific relationships between the public and private spheres could provide access to it, and how property rights, therefore, also affect the definition of home since property rights provide a bridge between the public and private spheres.

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<sup>15</sup> 1992 (2) SA 278 (T)

<sup>16</sup> *Makama* par 285.



## 2 2 What is adequate housing?

### 2 2 1 Introduction

Since there is only one system of law,<sup>17</sup> it is essential to establish where to initiate the process of determining and understanding housing as a legal concept in order to understand home as a legal concept. The Constitution has promoted a shift away from binary notions of autonomy between the various sources of law, towards a singular system of law which promotes the spirit, purport and objects of the Bill of Rights.<sup>18</sup> However, the relationship between the sources of law in South Africa is complex. Based on the principle of subsidiarity, the single-system-of-law and the supremacy of the Constitution,<sup>19</sup> it seems appropriate, firstly to refer to the Constitution from which the use of other sources of law derives.<sup>20</sup> On this basis, the research commences with section 26 of the Constitution, followed by the legislation put in place to give effect to it. Further, case law is considered in line with the legislation. Finally, international law is also briefly considered, especially in cases where South African legislation is insufficient in defining the legal concepts.

Housing is a complex matter, hence the difficulty in defining adequate housing. Housing has a profound emotive aspect because it plays such a central role in the formation of a person's life and livelihood. Having access to adequate housing gives life to living as a human being. It is therefore vital to establish a definition of what adequate housing entails. There is no definition of adequate housing within South African legislation; however, there is mention of it in policies, case law and international law which has proven to help understand what it entails. As a starting point, section 26 of the Constitution provides that everyone has a right to have access

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<sup>17</sup> *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) par 44 reads as follows: "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control." See also AJ van der Walt *Property and Constitution* (2012) 20.

<sup>18</sup> Section 39(2) of the Constitution. Also see AJ van der Walt *Property and Constitution* (2012) 20.

<sup>19</sup> Section 2 of the Constitution reads as follows: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

<sup>20</sup> AJ van der Walt *Property and Constitution* (2012) 25.

to adequate housing and that the state must take reasonable legislative and other measures to progressively realise the right.<sup>21</sup>

Section 26 of the Constitution forms part of what is known as “second-generation” rights and “first generation” rights. “First-generation” rights such as equality, liberty and freedom of speech, remove state powers from interfering with private lives. “First generation rights” are more commonly known as “negative rights”. Whereas, “second-generation” rights are more commonly known as “positive rights”. This means that the state has a positive obligation in order to fulfil the realisation of specific rights.<sup>22</sup> Where sub-section 26(2) places a positive duty on the state to achieve the progressive realisation of the right to access to adequate housing, sub-section 26(3) specifically deals with negative duties of the state, in other words their duty not to interfere and arbitrarily deprive people from their homes; it limits the state’s duty. As mentioned above, my focus is on section 26(2) of the Constitution, specifically dealing with the state’s positive duty in providing people with access to adequate housing. This particular provision acts as an enabler in achieving access to housing *and* a home since housing, must to some extent mean home if section 26 is read in its entirety. Section 26(3) would be meaningless without section 26(2) since you cannot arbitrarily deprive someone of their home if they do not have a home.

Furthermore, the right to housing may not be subjected to “deliberately retrogressive” measures, in other words, measures that take something away from someone which they already have.<sup>23</sup> I argue that in instances of domestic violence, non-interference by the state results in deliberately retrogressive measures. In instances of domestic violence, it is necessary for the state to act positively in order for the right to home to be realised. The state needs to actively act against any individual who threatens the

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<sup>21</sup> Section 26 of the Constitution reads as follows:

“26. Housing – (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

<sup>22</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 564.

<sup>23</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 568.

right to home. However, before the state can protect the right to a home, it is vital to determine what precisely the right to home means. The state, in the first instance, needs to provide access to the right before it can prevent any interference (be it from the state or the individual) from it. Therefore, it is imperative to focus on section 26(2) which deals with providing access to housing, and I argue to home as well, which section 26(3) thereafter sets out to protect by non-interference, but only once the right has been provided. The focus is on defining home as a legal concept and how to provide home as a legal right. Logically it flows that one must first have a right before said right can be protected.

Section 26 is further a socio-economic right which means that it displays a concern for past inequalities. Therefore, it places a duty on the state to do as much as possible to guarantee greater equality.<sup>24</sup> Section 26 is therefore relevant when dealing with matters of equality, since women have historically been mistreated and oppressed by home as a concept. Access to housing as a socio-economic right shows concern for this inequality. Therefore, I consider how the state can achieve greater equality by providing homes, especially to women (and children) who are exposed to domestic violence. Considering this, I contemplate whether a space of domestic violence can qualify as a home. I am, therefore, not necessarily suggesting the removal of the victim or the perpetrator from the home, but rather suggesting a reconsideration on how these abusive and oppressive relationships come into existence and then working through a process of achieving equality by restructuring such relations.

The Housing Act was implemented to give effect to section 26 of the Constitution.<sup>25</sup> The preamble of the Housing Act states that housing, in the form of adequate shelter, is a “basic human need” and that it forms a vital part to the “socio-economic well-being of the nation”.<sup>26</sup> This is a highly regarded right. Despite this, there is no definition for

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<sup>24</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 564.

<sup>25</sup> Preamble of the Housing Act reads as follows: “WHEREAS in terms of section 26 of the Constitution of the Republic of South Africa, 1996, everyone has the right to have access to adequate housing, and the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;”

<sup>26</sup> The preamble of the Housing Act.

housing. The closest definition relating to adequate housing, is the definition of 'housing development':

“which means the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to –

- (a) Permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- (b) Potable water, adequate sanitary facilities and domestic energy supply”.

This definition is imperative in the sense that it ensures both internal and external privacy.<sup>27</sup> Section 3(2)(a) of the Housing Act states that the Minister must determine a national housing policy which must include the national norms and standards in respect of housing development.<sup>28</sup> However, adequate housing has still not been defined and therefore, it is necessary to determine the definition of such a valued right through case law and other international instruments where legislation is lacking.<sup>29</sup>

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<sup>27</sup> See part 2 4 for an extensive discussion on privacy in relation to home.

<sup>28</sup> Section 3(2)(a) of the Housing Act. In this sense, the 1999 National Norms and Standards for the Construction of Stand-Alone Residential Dwellings was introduced by the Minister in response to the provision, and it provided for minimum technical specifications for housing in the KwaZulu-Natal area. These standards were further revised in the National Norms and Standards in terms of the Permanent Residential Structures in 2007, which is contained in the National Housing Code. The National Housing Code is published in response to section 4 of the Housing Act and contains the national housing policy as prescribed by section 4. The National Norms and Standards policy in terms of the Permanent Residential Structures provides that each house must have a minimum gross floor area of 40m<sup>2</sup>; have two separate bedrooms; a separate bathroom with a toilet, a shower and a hand basin; a combined living area and kitchen with a wash basin and a ready board electrical installation. However, these policies still do not provide a sufficient definition for adequate housing and therefore, cannot adequately assist in defining the home. Therefore, we must turn to case law and international instruments to assist in achieving an adequate definition.

<sup>29</sup> Section 39(1)(b) of the Constitution affirms the use of international instruments and provides that international law must be considered when interpreting the Bill of Rights.

## 2 2 2 Case law and adequate housing

Section 165 of the Constitution deals with judicial authority.<sup>30</sup> Section 165(5) explicitly confirms that court decisions are binding and form part of the law. Therefore, definitions established by court decisions suffice as standing definitions where such definitions are lacking in legislation. For this reason, case law forms a vital part of our law and is a useful tool in determining the meaning of housing and home, especially where it is lacking in legislation.

In *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>31</sup> ('*Grootboom*') the court dealt with the definition of adequate housing. The judgment confirms that housing consists of more than just "bricks and mortar".<sup>32</sup> The court further provides that the right to housing, includes human dignity, equality and other human rights and freedoms.<sup>33</sup> Relying on *Grootboom* as the framework, a link between housing and human dignity is further affirmed in other judgments, such as in *PE Municipality*.<sup>34</sup> The court in this matter provides that it is important to take account of the "actual situation of the persons concerned" when determining availability of alternative accommodation. Furthermore, "everyone must be treated with care and concern" and human dignity, equality and freedom are key factors when dealing with

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<sup>30</sup> Section 165 of the Constitution reads as follows:

"(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

<sup>31</sup> 2001 (1) SA 46 (CC).

<sup>32</sup> *Grootboom* par 35.

<sup>33</sup> *Grootboom* par 1.

<sup>34</sup> 2005 (1) SA 217 (CC).

matters pertaining to evictions and alternative accommodation.<sup>35</sup> Further, in the matter of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*<sup>36</sup> ('*Residents of Joe Slovo*'), the court states that dignity is arguably one of the most significant rights, especially in the context of housing.<sup>37</sup> Lastly, in the matter of the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*<sup>38</sup> ('*Blue Moonlight Properties*'), the court expresses its concern that the City undermined the occupiers' right to dignity by excluding them from any consideration for temporary emergency housing.<sup>39</sup> It must be borne in the mind that, the right of access to adequate housing is embedded in the value for human beings. It is a right which ensures that their basic human needs are met in a manner that recognises and embraces human dignity, freedom and equality.<sup>40</sup> With that being said, one cannot fulfil the right to access to adequate housing in isolation; it must be considered in the context of other socio-economic rights embedded in the Constitution which brings us closer to defining home. Socio-economic rights require the state to do its utmost to secure these rights, and in doing so, it enables society to enjoy their right to human dignity.<sup>41</sup>

It is essential to interpret a right within its set context, inclusive of its textual setting as well as its social and historical context.<sup>42</sup> The right to access to adequate housing cannot be determined in isolation. Other socio-economic rights play a vital role in realising the right, and should, therefore, be read and interpreted simultaneously to achieve a comprehensive understanding of such right.<sup>43</sup> If the right is interpreted in an interrelated/interconnected manner, it additionally allows for the fulfilment of these interrelated/interconnected rights (such as human dignity, freedom and equality). Such interpretation considers the relationship between rights and promotes their optimal fulfilment to produce a society where both men and women can achieve their full

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<sup>35</sup> *PE Municipality* par 29.

<sup>36</sup> 2010 (3) SA 454 (CC).

<sup>37</sup> *Residents of Joe Slovo Community* par 75.

<sup>38</sup> 2012 (2) SA 104 (CC).

<sup>39</sup> *Blue Moonlight Properties* par 84.

<sup>40</sup> *Grootboom* par 44.

<sup>41</sup> I Currie and J de Waal *The Bill of Rights Handbook 6th edition* (2013) 564—565.

<sup>42</sup> *Grootboom* par 22.

<sup>43</sup> *Grootboom* par 24.

potential.<sup>44</sup> The enjoyment of one right results in the enjoyment of others connected to it as independent, but interrelated rights.<sup>45</sup> For example, the exercise of the right of access to adequate housing affects the exercise of human dignity, equality and freedom in a community. Therefore, it is essential to consider the inherent dignity of individuals when dealing with housing related matters. Human dignity is not only a right that should be respected and enforced independently, but it also informs other fundamental rights,<sup>46</sup> such as housing. Human dignity is a central value which informs the interpretation of other socio-economic rights especially with regard to the positive duties of the state when implementing these socio-economic rights.<sup>47</sup> The judgment in *Grootboom* states that the constitutional value of human dignity must be considered when looking into the reasonableness of state action in providing housing. Therefore, if the state does not fulfil the right of access to adequate housing, individuals will have reasonable action against the state, with particular regard to human dignity.<sup>48</sup> Consequently, it cannot be said that section 26 of the Constitution is the only constitutional provision relevant to the right of access to adequate housing. Other rights, such as human dignity as entrenched in section 10 of the Constitution, are equally relevant in determining the right of access to adequate housing.<sup>49</sup> There are relations between values such as human dignity, equality and freedom to other material conditions necessary to enable people to develop and exercise their capabilities. As illustrated in the case law above, access to adequate housing is not only essential for purposes of physical survival, but also affects a person's ability to develop their potential and to shape their identities in becoming autonomous

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<sup>44</sup> *Grootboom* par 23.

<sup>45</sup> L Chenwi and K McLean 'A woman's home is her castle? poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 519.

<sup>46</sup> I Currie and J de Waal *The Bill of Rights Handbook 6th edition* (2013) 252.

<sup>47</sup> S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1—31 3. Also see *Grootboom* par 83 where the court states that "[i]t is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings."

<sup>48</sup> *Grootboom* par 83.

<sup>49</sup> *Grootboom* par 83 and L Chenwi and K McLean 'A woman's home is her castle?' – Poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 519.

individuals.<sup>50</sup> Housing, for this reason, brings us a step closer in finding a definition for home.

In *PE Municipality*,<sup>51</sup> the court once again deals with the definition of adequate housing. The court considers home as a concept in relation to adequate housing. The judgment provides that the Constitution recognises that “home is more than just a shelter”.<sup>52</sup> It considers the importance of the house as a home, and the home as a place of “personal intimacy” and “family security” which becomes a “familiar habitat”.<sup>53</sup> Sachs J expresses that home may often only be a relatively secure space of privacy and tranquillity. Although Sachs J may not be referring to violence within the home, but rather as he puts it: “the turbulent and hostile world”; it still forms a relevant part of this study because it acknowledges that the home is subject to the risk of violence - whether it is external or internal.<sup>54</sup>

Further, the judgment of Sachs J in *PE Municipality* recognises that home creates certain relationships. His judgment refers to the relationships between occupiers and their community which is established over a period of time. In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998<sup>55</sup> (‘PIE’), these relationships are considered when dealing with eviction matters. Section 4(6) of PIE provides that if the land was occupied for less than six months, an eviction order may be granted if it is just and equitable to do so once all the relevant circumstances have been considered.<sup>56</sup> The judgment in *PE Municipality* states that, in order for an eviction to be just and equitable, there should be a consideration for the relationships that occupiers have with the community and the effect that such eviction may have on the community. A court should be more restrained evicting well-settled families with well-established relationships in the community.<sup>57</sup>

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<sup>50</sup> S Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ (2005) 21 *SAJHR* 13 and 18.

<sup>51</sup> 2005 (1) SA 217 (CC).

<sup>52</sup> *PE Municipality* par 17.

<sup>53</sup> *PE Municipality* par 17.

<sup>54</sup> *PE Municipality* par 17.

<sup>55</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’).

<sup>56</sup> Section 4(6) of the PIE Act.

<sup>57</sup> *PE Municipality* par 27.



Lastly, *Dladla and Others v City of Johannesburg and Another*<sup>58</sup> (*Dladla*) dealt with the matter as to whether temporary housing qualified as a step in the realisation of the right of access to adequate housing and what temporary housing entails.<sup>59</sup> In this matter, the City of Johannesburg made the space it provided to residents uncomfortable and unpleasant in the hopes that residents would leave and become autonomous/independent without state assistance. This matter revealed that access to state provisioned housing is conditional to some form of conventional morality and compliance with such morality. The morality in this specific matter was based on gender stereotypes - women had the duty of care-taking, regardless of whether they were the usual caregivers or not.<sup>60</sup> The City consequently took away the resident's individual decision-making ability, and thus, their autonomy. The City made it mandatory to submit to heteronormative ideals of morality; thus, removing the possibility of autonomy and a home existing (even in its temporary nature). Ironically, this was used as a tactic to induce "imagined autonomy" by pushing residents in a direction where they could find their own living arrangements without state assistance/reliance. The City, therefore, implied that autonomy can never exist when the state is involved. This is an unreasonable expectation because the state will always be involved in most instances.<sup>61</sup> Separating autonomy and state involvement would mean that autonomy cannot be achieved because the state forms a central part of life and living. Autonomy should not be denied simply because the state is involved. Autonomy cannot exist if one is entirely privatised and walled off from the public sphere. Autonomy comes into existence when there are mutually beneficial relations between the private and public sphere – even when the state is present. The relationship between the state and individual seems inevitable and, autonomy cannot be disregarded because of this. *Dladla* showcased the issues of relationships between the state and individuals. The state made it impossible for people to be autonomous wherever the state was involved. This is a perverse relationship because the state has a responsibility and a positive duty to provide people with access to housing. A relationship between the state and individuals is inevitable in any given situation,

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<sup>58</sup> 2018 (2) SA 327 (CC).

<sup>59</sup> *Dladla* par 6.

<sup>60</sup> *Dladla* par 12.

<sup>61</sup> See part 4 3 on a discussion of the inevitable relationship between the public and private sphere.

especially one regarding housing and access to it. The state cannot reasonably expect people to be autonomous only once it removes itself from the equation. There is, therefore, a need to reinterpret and reconstruct relationships between the state and individuals so that autonomy can exist regardless of state involvement, and in fact, because of state involvement.

The matter in *Dladla* dealt with temporary housing (as opposed to permanent housing), therefore, the City argued that the full array of rights ordinarily associated with housing was not applicable.<sup>62</sup> The City argued that home is ordinarily associated with permanent housing, whereas the shelters which they provided was of a temporary nature. In other words, it could not be regarded as a home, and thus the ordinary rights attached to the home, such as the right to dignity, freedom and security of person did not apply.<sup>63</sup> The City based their entire definition of home solely on permanency. However, nothing is permanent; thus, their definition is flawed and insufficient when defining home. Home cannot solely mean permanency. There was an apparent difficulty in understanding home and therefore, a definite need to define home. The City essentially argued that permanency constitutes home, and since they were only providing temporary housing, the elements of a home did not apply. But what are these elements of home? The City argued that due to the nature of the housing they provided, rights ordinarily associated with home such as dignity, freedom of security of person and privacy did not apply.<sup>64</sup> This would mean that these rights/elements form part of the definition of a home in the “ordinary” sense of the word. However, one must take note of the fact that these fundamental rights can never, in any instance, be taken away from people. People will always be entitled to the protection of these rights.<sup>65</sup> The Constitution confers these rights to everyone at any given time.<sup>66</sup> Therefore, even in the setting of temporary housing and alternative accommodation, these rights cannot be removed. Since these rights are associated with home, even temporary housing and other shelters will constitute a home because these elements must

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<sup>62</sup> *Dladla* par 27.

<sup>63</sup> *Dladla* par 28.

<sup>64</sup> *Dladla* par 27.

<sup>65</sup> *Dladla* par 43.

<sup>66</sup> *Dladla* paras 43—44.

consistently be present - even in shelters which do not constitute a home in the everyday, colloquial sense of the word.<sup>67</sup>

The residents appealed on this basis. In the concurring judgment, Cameron J relied on section 26(2) of the Constitution and provided that the form of temporary housing provided was in fact a measure in achieving the progressive realisation of the right to access to adequate housing.<sup>68</sup> He further reasoned that even temporary housing, (like adequate permanent housing) entails more than just “a roof and four walls”. The conditions attached to the accommodation formed an integral part of the housing.<sup>69</sup> Furthermore, the right at issue was grounded in section 26 of the Constitution dealing with the right of access to adequate housing which can either be temporary or permanent in nature.<sup>70</sup> Madlanga J supported this submission in the main judgment.<sup>71</sup>

In light of the question of what adequate housing is and whether temporary housing falls within this definition, the *amici curiae* in this matter provided apt submissions. The Centre for Child Law provided that *home* should be interpreted generously. In this particular instance, the applicants were “entitled to a home in the wide sense of the term” even if the accommodation was merely temporary certain basic characteristics of a home exist, such as the right to dignity, freedom and security of person as well as privacy, which cannot be disregarded despite the accommodation being of a temporary nature.<sup>72</sup> This submission not only confirms that the right to adequate housing cannot be determined in isolation, but also that, the right of access to adequate housing must be interpreted in an interrelated manner to allow for the realisation of other rights and *vice versa*.<sup>73</sup>

Lastly, the Centre for Applied Legal Studies (as another *amicus curiae*) submitted that the right to adequate housing is recognised in international human rights law. International law is concerned with the influence of housing on women, and therefore, an inference is drawn that housing is in fact a gendered concept. The impact of access

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<sup>67</sup> *Dladla* par 43.

<sup>68</sup> *Dladla* par 59.

<sup>69</sup> *Dladla* par 57.

<sup>70</sup> *Dladla* par 64.

<sup>71</sup> *Dladla* par 132.

<sup>72</sup> *Dladla* par 30.

<sup>73</sup> *Grootboom* paras 19 and 23.

to housing on women is crucial to their enjoyment of other human rights. Therefore, states must be aware of the different circumstances that prevail with specific genders in the context of housing, since it forms an integral part of women's overall wellbeing. This is true especially because women are primarily the home-makers and are thus particularly vulnerable to gender-based violence.<sup>74</sup> With this being said, it is necessary to consult international law in determining the definition of adequate housing. International law may bring light to the gendered nature of housing.<sup>75</sup>

### **2 2 3 International law and adequate housing**

Section 233 of the Constitution deals with the application of international law in the Republic. It reads as follows:

“233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>76</sup>

International law may provide a more comprehensive definition of adequate housing than legislation and case law. South Africa became the 163<sup>rd</sup> state party to the International Covenant on Economic, Social and Cultural Rights ('ICESCR') on 12 January 2015.<sup>77</sup> Therefore, the ICESCR has interpretive value in South Africa, and a definition of adequate housing may be considered from this covenant. South Africa is further informed by the Convention on the Elimination of All Forms of Discrimination

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<sup>74</sup> *Dladla* par 29.

<sup>75</sup> Although *Grootboom* was decided before South Africa signed the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the judgment nonetheless relied on international instruments to define adequate housing. See par 26 of the judgment, which specifically relies on section 39(1)(b) of the Constitution. This section requires a court to consider international law when interpreting the Bill of Rights. The use of international law may provide a clearer understanding of the correct interpretation of a particular provision. Especially now, where South Africa is a part of the ICESCR. Such law is binding on South Africa and will apply directly. Since South African legislation does not have a clear definition of adequate housing, and the case law analysed only provides a vague definition thereof, it can only be beneficial to consider international law in determining a definition for adequate housing.

<sup>76</sup> Section 233 of the Constitution.

<sup>77</sup> ICESCR available online at <https://treaties.un.org> (accessed 2018/08/12).

Against Women 1979 ('CEDAW') which was ratified by South Africa on 15 December 1995.<sup>78</sup>

The international standard of housing should be the minimum standard of housing at a national level.<sup>79</sup> Furthermore, adequate housing, even on an international level, means more than just having a place to live - it is interconnected with other rights including the right to privacy, freedom, equality and even property rights.<sup>80</sup> The interdependence and interrelatedness of other human rights associated with housing rights must be recognised on an international basis as they are on a national basis. Once again, the right to adequate housing cannot be understood in isolation and must be considered within its context of other human rights.<sup>81</sup>

Article 11 of the ICESCR deals with the right to an adequate standard of living which includes: "adequate food, clothing and housing, and the continuous improvement of living conditions".<sup>82</sup> The ICESCR General Comment no. 4: The Right to Adequate Housing, was implemented in response to Article 11 (1) of the Covenant which holds

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<sup>78</sup> CEDAW

<sup>79</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 1.

<sup>80</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 2.

<sup>81</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 34. Also see the UN Habitat Fact Sheet No. 21 The Right to Adequate Housing (2009) 1—51 9 which provides the following:

"Human rights are interdependent, indivisible and interrelated. In other words, the violation of the right to adequate housing may affect the enjoyment of a wide range of other human rights and vice versa. Access to adequate housing can be a precondition for the enjoyment of several human rights, including the rights to work, health, social security, vote, privacy or education."

The difference between the ICESCR and the Constitution is that the ICESCR provides for a right to adequate housing, whereas the Constitution provides for the right of access to adequate housing. The provision in the Constitution is appropriate in terms of the ICESCR because Article 2.1 of the latter provides that the state parties must undertake steps to progressively realise the rights recognised in the ICESCR by all appropriate means including the adoption of legislation. In this instance, the Constitution fulfils the duty of progressive realisation of the right through stipulating that the right involves access to adequate housing and not purely a direct right to adequate housing, as well as through the implementation of the Housing Act as a tool for the progressive realisation of the right. Therefore, the Constitution is in line with its international duty to progressively realise the right to adequate housing. However, for purposes of this research, the differences are not elaborated on since the purpose is instead to determine a definition for adequate housing.

<sup>82</sup> Article 11 of the ICESCR.

an interpretive value.<sup>83</sup> It recognises the importance of the right to adequate housing on the enjoyment of other economic, social and cultural rights.<sup>84</sup> The document provides that the right to adequate housing applies to everyone regardless of their age, economic status or group and that the right must be absent from any form of discrimination.<sup>85</sup> Furthermore, this right must be interpreted in the wide sense of the word, meaning that the right to adequate housing consists of more than a roof and four walls. The right to adequate housing includes a right to security, peace and dignity since it is not a right interpreted in isolation, but rather within its context with other human rights that affect it and which it affects. Furthermore, it is not merely a right to housing, but a right to *adequate* housing which means that there should be adequate privacy, space, security, lighting and ventilation, adequate basic infrastructure and adequate location to work and basic facilities, all at a reasonable cost.<sup>86</sup> Many factors affect adequacy, including social, economic, cultural, climatic and other factors, all of which must be considered when defining adequacy in respect of housing. A few factors which affect the adequacy of the housing are listed and includes the right to legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.<sup>87</sup> These factors must also be considered with other human rights such as human dignity, equality, the right of freedom of association, the right to freedom of residence, the right to privacy and the right not to be arbitrarily evicted from one's home.<sup>88</sup> Therefore, the lack/deprivation of the right to adequate housing (as defined above) results in the lack of other interrelated rights and autonomy - which all of these rights aim towards

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<sup>83</sup> ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

<sup>84</sup> Article 1 of the ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

<sup>85</sup> Article 6 ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

<sup>86</sup> Article 7 ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

<sup>87</sup> Article 8 ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

<sup>88</sup> Article 9 ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

achieving.<sup>89</sup> Since adequate housing has now broadly been defined with multiple factors and other human rights affecting it, it is worth considering whether gender has an impact on the definition. Would a gendered approach result in a different outcome on the understanding of adequate housing?

#### **2 2 4 Gender and adequate housing**

Gender is clearly of importance in matters of housing and it is further of significance in both national and international law. The Housing Act makes provision for the protection of women in terms of housing. Section 2(1)(e)(iv) provides that the national, provincial and local spheres of government have an obligation to promote “measures to prohibit unfair discrimination on the ground of gender...”. Further, section 2(1)(e)(x), provides that the government must also promote “the housing needs of marginalised women and other groups disadvantaged by unfair discrimination”.<sup>90</sup> The Housing Act is sensitive to vulnerable groups and makes specific reference to women since they particularly face discrimination. The Act further brings to light the importance that the right to equality has on the right to access to adequate housing.<sup>91</sup> Similarly, the PIE Act states that courts must give special consideration to the rights and needs of households headed by women when determining whether it is just and equitable to evict an unlawful occupier.<sup>92</sup>

Moreover, the Centre for Applied Legal Studies as an *amicus curiae* to the *Dladla* case asserted that international law is “concerned with the impact of housing on women.”<sup>93</sup> Why is national and international law concerned with the impact of housing on women specifically? Perhaps it is because access to adequate housing is unequal for men and women. Perhaps the effects of adequate housing are different for men and women. CEDAW explicitly provides that despite the various instruments put in place

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<sup>89</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 5.

<sup>90</sup> Sections 2(1)(e)(iv) and (x) of the Housing Act.

<sup>91</sup> L Chenwi and K McLean ‘A woman’s home is her castle?’ – Poor women and housing inadequacy in South Africa’ (2009) 25 *SAJHR* 524—525.

<sup>92</sup> Section 4(6) and (7) of the PIE Act of 19 of 1998.

<sup>93</sup> *Dladla* par 29.

to combat discrimination against women, discrimination against women still extensively exists.<sup>94</sup>

Paragraph 6 of General Comment No. 4 of the ICESCR states that adequate housing applies to everyone (regardless of it stating “himself and his family”). It takes note of the gender stereotypes that existed when the document was put in place and attempts (through the General Comments) to rectify, thus making special provision for female-headed households. The special provision in terms of female-headed households leads us to believe that such groups are at risk of inadequate housing in particular. Furthermore, it states that family as a concept must be interpreted in the wide sense of the word – which not only includes heteronormative ideals of families (for example a husband, wife and children) but rather that there are many varieties of families that are entitled to this right - including female-headed households.<sup>95</sup> Furthermore, the ICESCR General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005), highlights that states parties are bound to “provide victims of domestic violence, who are primarily female, with access to safe housing”. This right to adequate housing requires that “women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so”.<sup>96</sup> Likewise, CEDAW also considers housing rights for women. Article 14(2)(h) of CEDAW provides that state parties must ensure the equality of men and women “to enjoy adequate living conditions, particularly in relation to housing” specifically in rural areas. Lastly, Article 15(4) provides that state parties will apply the law equally to men and women in relation to the freedom to choose their residence and domicile.<sup>97</sup>

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<sup>94</sup>CEDAW.

<sup>95</sup> Article 6 of the ICESCR General Comment No. 4 on adequate housing, 12 December 1991, contained in *UN doc E/1992/23*.

<sup>96</sup> ICESCR General Comment No. 16 on *The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3 of the ICESCR) 11 August 2005, contained in *UN doc E/C.12/2005/4*.

<sup>97</sup> Article 15(4) of CEDAW.



On both an international and national level, there is a focus on the impact of housing on women. The common reason being that violence against women has an impact on their access to adequate housing.<sup>98</sup> It is, therefore, necessary to integrate gender perspectives when developing housing (and home-ing) law. Gender plays an essential role in discrimination, especially with regard to housing rights.<sup>99</sup> A gender neutral approach does not address the particular vulnerabilities of women, especially since women continue to make up the majority of people who live in poverty.<sup>100</sup> Women subjected to inadequate housing are more vulnerable than men since it is often homelessness, forced evictions and inadequate conditions that trigger gender-based violence. This occurs in addition to the vulnerabilities of sexual and other forms of violence and harassment that women face in cases of homelessness and inadequate housing.<sup>101</sup> Violence against women has a particular closeness to women's experience of adequate housing; it not only affects their current living arrangements but it also their ability to leave an abusive household.<sup>102</sup> It is, therefore, necessary to consider women's specific needs and circumstances when dealing with housing. This cannot be achieved by looking at housing rights in isolation. There must be a consideration for any additional rights having an impact on housing rights.<sup>103</sup>

When one considers gender-based violence, it can be seen that rights such as privacy, dignity, equality, peace and security are not necessarily violated from outside sources, but that this violation often occurs from within the home. When outside sources violate these aforementioned rights, it results in a violation of the right to adequate housing as well (since the rights are interrelated). Therefore, if internal sources violate these same rights, would the same results not apply? In cases of intimate partner violence, can one truly say that the right to adequate housing is being upheld?

Gender also affects property rights. I argue that property rights can also be used as a tool to define home-ing rights. Therefore, it is relevant to discuss how property rights are also gendered. The right to adequate housing is not the same as the right to

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<sup>98</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 49.

<sup>99</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 50.

<sup>100</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 50—51.

<sup>101</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 52.

<sup>102</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 53.

<sup>103</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 57—58.

property. However, they are related in the sense that one effects on the other. It has been argued that the right to adequate housing often threatens the right to property;<sup>104</sup> however, the same can be said for the reverse. For instance, most eviction proceedings occur because someone's right to their property is being threatened, but evictions cause homelessness and inadequate housing conditions, therefore a strict protection of property rights effects the right to access to adequate housing. A focus on property rights shows how the right to adequate housing can be violated. For example, forced evictions of dwellers residing on private property affects their adequate housing needs, but keeping the dwellers on private property inversely affects the property owner's rights. Therefore, property rights have an effect on housing rights, and housing rights influence home-ing rights. It is for this reason that property rights certainly have an effect on defining home-ing rights.

Furthermore, property rights, like housing rights, are also gendered. Article 16 of CEDAW provides that State parties will take all reasonable measures to eliminate discrimination against women and shall ensure, based on equality of men and women, that the same rights "for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property" applies.<sup>105</sup> Additionally, when implementing article 3, in relation to article 11 of the ICESCR, it requires that women must have an equal right to own, use or otherwise control housing, land and property, and must also be provided with equal access to the necessary resources to do so.<sup>106</sup> Finally, article 17 of the Universal Declaration of Human Rights ('UDHR'), also makes provision for the equal right to own property and that no-one shall be arbitrarily deprived of his property.<sup>107</sup> The socio-economic factors that I discuss in the following chapter,<sup>108</sup> make it more challenging for women to own

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<sup>104</sup> UN Habitat Fact Sheet No. 21 The Right to Adequate Housing (2009).

<sup>105</sup> Article 16 of CEDAW.

<sup>106</sup> ICESCR General Comment No. 16 on *The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 11 in relation to art. 3 of the ICESCR) 11 August 2005, contained in UN doc E/C.12/2005/4. Also note, that housing and property are placed in close proximity in this instance, confirming a relative relatedness of the two concepts.

<sup>107</sup> Article 17 of the Universal Declaration of Human Rights 2015 ('UDHR') UN General Assembly Resolution 217 A (III).

<sup>108</sup> In many cases of domestic violence, women are pressured into giving up their career and are forced to depend on the man of the household. Often, he has control over the property and the house within

property. Therefore, these provisions have been put in place to ensure equal access to property.

Finally, private property has been central in maintaining the boundary between the public and the private spheres.<sup>109</sup> Property rights have been used as a means to separate the public and private spheres. Property rights are symbolic of boundaries and boundedness. However, the “walls of protection” is an “endless and doomed search for security, a security that seems possible only in power and domination”.<sup>110</sup> Therefore, we should not only view threats as emanating externally but as things that can be sourced internally. The security necessary for a home to exist entails projecting all threats outward. However, by seeking security exclusively within the four walls, domination presents real threats which cannot be protected by external sources.<sup>111</sup> Since property rights are symbolic of boundaries, in other words, keeping the private and public spheres separate, it creates a real issue when violence is sourced from within the private sphere and not the public sphere. The private sphere is meant to provide a source of security, but when this is threatened by domination, there is nowhere to go, because the public sphere is unable to provide the safeties and securities which the private sphere is meant to provide. When these threats emanate from within a space that should provide safety and security, the right to adequate housing is threatened, and thus also the right to home. Therefore, it is necessary to

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which they reside. Therefore, in cases where she does leave, she is often rendered homeless because the property is not registered in her name. This is a classic example of how property rights affect a person’s access to adequate housing, especially in cases of domestic violence. Further, because she probably has not been working, her prospects of a career and a steady income is reduced. Alternatively, if she is able to get a job, in abusive relationships, men often try to jeopardise her chances of remaining there (all of these challenges are often in addition to the fact that women are the caretakers of children which also makes it a challenging task to get a career and to excel therein). This will make it challenging for her to obtain a property in her own name. Once again, she is rendered homeless or with inadequate housing, because whether she chooses to stay or leave, she will be unsafe. The lack of safety results in the lack of adequate housing and an adequate home.

<sup>109</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 7—36 19.

<sup>110</sup> J Nedelsky ‘Violence against women: Challenges to the liberal state and relational feminism’ (1996) 38 *American Society for Political and Legal Philosophy* 454—497 464.

<sup>111</sup> J Nedelsky ‘Violence against women: Challenges to the liberal state and relational feminism’ (1996) 38 *American Society for Political and Legal Philosophy* 464—465.

move away from the dominant metaphor of rights as boundaries, which property rights symbolises, towards a conception of rights as relationships.<sup>112</sup> For this reason, I discuss property rights and how they affect home-ing rights, as the bounded nature of property rights is cause for concern. However, it is only through a property analysis in relation to home that one can begin to move away from the “dominant metaphor of rights as boundaries” towards a conception of rights as relationships.

### **2 3 Finding a home in property theory and law**

Property law theory (like housing) influences the conceptualisation of the home. Property law provides an understanding of the relationships existing between the public and the private sphere. Property law theory and the concept of home are separate but interrelated concepts. Property law theories cannot be overlooked when determining what the home entails. Property law forms such an integral part of the home, and therefore I further explore how property law in its conservative language and understanding is restrictive and boundary-creating, which inhibits the actualisation of real autonomy it aims to achieve.<sup>113</sup> I compare home and property as two separate but interrelated concepts and attempt to reconcile them through a more boundary-breaking/relational interpretation.

The traditional notion of property law is founded in private law language, which traditionally refers to property in its tangible, physical and quantifiable nature.<sup>114</sup> Whereas, housing consists of more than just “bricks and mortar” and includes human dignity, equality and other human rights and freedoms,<sup>115</sup> which is more in line the home theory. These aspects are not readily quantifiable and are intangible, which makes it challenging to reconcile them with one another. Traditional property law notions are restrictive and hierarchical in nature.<sup>116</sup> This restrictive/hierarchical approach is countered by the Constitution, which acknowledges certain interests as

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<sup>112</sup> J Nedelsky ‘Violence against women: Challenges to the liberal state and relational feminism’ (1996) 38 *American Society for Political and Legal Philosophy* 465.

<sup>113</sup> AJ van der Walt *Property and Constitution* (2012) 115.

<sup>114</sup> AJ van der Walt *Property and Constitution* (2012) 113—114.

<sup>115</sup> *Grootboom* par 1.

<sup>116</sup> AJ van der Walt *Property and Constitution* (2012) 115.

worthy of protection despite any denial thereof in property theory.<sup>117</sup> The Constitution allows for a more context-specific, purposive and broad interpretation of property rights (which counters the traditional property notions ingrained in South African legal tradition).<sup>118</sup> It is thus necessary to infuse these traditional private law property notions with a Constitutional notion of property. Failure to do so will result in a binary set of rules in constant irreconcilable tension.<sup>119</sup>

*PE Municipality* discusses the importance of property theory and the effect of the Constitution on it, as well as the sequential effects thereof on the home. It provides that the Constitution implements a different understanding of property law not previously understood under common law and offers a new contrasting but equally important right: not to be deprived of a home arbitrarily.<sup>120</sup> The judgment recognises that the traditional understanding of property rights may limit access to the home. The judgment acknowledges that property rights are placed on a pedestal and that a new approach to property rights is necessary in order to realise the importance of the rights to home (and the impact that the loss of a home has on a person). There is a need to prioritise property rights and socio-economic rights equally.<sup>121</sup> Currently, property law

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<sup>117</sup> AJ van der Walt *Property and Constitution* (2012) 115.

<sup>118</sup> AJ van der Walt *Property and Constitution* (2012) 117.

<sup>119</sup> Section 2 of the Constitution reads as follows: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with is invalid, and the obligations imposed by it must be fulfilled.” In other words, the Constitution will not deny traditional property rights insofar as they are consistent with the Bill of Rights. Keeping in mind the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution, it may be challenging to uphold the restrictive notions of property rights. Furthermore, it will be challenging to maintain a binary set of rules especially in light of the judgment in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) at par 44 which reads as follows:

“There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”

Put differently, principles, rules and institutions that are indirectly and obliquely in conflict with the purpose and objects of Constitution, relies on the Constitution as a source to obtain its legitimacy. Thus, the restrictive notions of property law may suffer under the Constitution’s accreditation. Also see AJ van der Walt *Property and Constitution* (2012) 121—122.

<sup>120</sup> *PE Municipality* par 23.

<sup>121</sup> *PE Municipality* par 23.

creates barrier between individual property rights and public interest. It therefore creates an unresolved tension between the individual and the collective.<sup>122</sup> The judgment in *PE Municipality* reads as follows:

“In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.”<sup>123</sup>

When dealing with a situation in which property rights and home-ing rights are in opposition, there is a requirement to “break away from a purely legalistic approach” and to consider other external factors such as “morality, fairness, social values and implications and circumstances” that would arise.<sup>124</sup> This allows us to move beyond merely replacing property rights with other rights, which also fundamentally serve as boundaries.<sup>125</sup> In other words, in matters where property rights and home-ing rights compete, there is a need to move away from the technical flow that usually arises from the provisions of property rights.<sup>126</sup> The judgment in *PE Municipality* stated that the PIE Act explicitly compels courts to “infuse elements of grace and compassion into the formal structures of the law” to balance the opposing interests involved - which promotes a “caring society based on good neighbourliness and shared concern”.<sup>127</sup> Based on this judgment, an inference can be drawn that property rights have a direct impact on the right to a home. It is therefore necessary to implement a conscious and revised understanding of property law into the understanding of home. When one

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<sup>122</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 162.

<sup>123</sup> *PE Municipality* par 23.

<sup>124</sup> *PE Municipality* par 33.

<sup>125</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and the law* (2011) 162.

<sup>126</sup> *PE Municipality* par 35.

<sup>127</sup> *PE Municipality* par 37.

conceptualises home for an occupier, the interest of the occupier in the use and occupation of the property as a home should be considered. Property rights directly influence the conceptualisation of the home, and thus, there is a need not only to understand these rights in their relevant context but also to achieve a balance of competing rights.<sup>128</sup>

How conflicts are usually resolved when dealing with the rights of property owners and the home interests of occupiers, serves as another reason to balance these interests. The standards and legal reasoning of property law often prevails in these instances.<sup>129</sup> Home interests are shaped by policies, and these policies are dominated by property law. Therefore, an imbalance continually exists in the competing right.<sup>130</sup> Consequentially, the remedies used to resolve disputes between property rights and home interests is ingrained in the restrictive definition of property rights as tangible, quantifiable objects,<sup>131</sup> making it challenging for home interests to find a place in these theories (especially since the home is not a readily quantifiable concept). There is a preference for the restrictive, technical, mechanical and rational analysis as found in property law theories, which are objective and easily quantifiable, above the emotional (although not irrational) and unquantifiable qualities attached to the occupier's interests.<sup>132</sup> In other words, there is a hierarchy of rights, which exists in "binary opposition"<sup>133</sup> and in a "syllogistic relationship" between rights and remedies.<sup>134</sup> This makes sense if one considers the fact that it is merely simpler to institute a straight-forward claim - which is possible in terms of property rights - but it does not justify the dismissal of the occupier's interests.<sup>135</sup> Ownership has all the required characteristics in property law and is the complete and perfect right in terms of property law, making it challenging for other limited rights (such as the occupier's rights) to compete.<sup>136</sup> It

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<sup>128</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 245.

<sup>129</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 11 and 245.

<sup>130</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 245.

<sup>131</sup> AJ van der Walt *Property and Constitution* (2012) 115.

<sup>132</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 245. Also see AJ van der Walt *Property and Constitution* (2012) 115.

<sup>133</sup> AJ van der Walt *Property and Constitution* (2012) 114.

<sup>134</sup> AJ van der Walt *Property and Constitution* (2012) 115.

<sup>135</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 23.

<sup>136</sup> AJ van der Walt *Property and Constitution* (2012) 114.

seems apparent that there are some discrepancies between “home” interpretations and “property speak”. They seem to counter each other and there is an apparent hierarchy. In terms of the rational and restrictive property analysis, the property owner has the “stronger” right, which always trumps the “weaker” property rights.<sup>137</sup> This is particularly challenging in cases of domestic violence where the abuser is also the owner of the property. There is a general reluctance to remove the abuser from the home - which they are legally entitled to reside in through the right of ownership even though such removal will not affect their legal title to the property.<sup>138</sup> Therefore, it is essential to reconceptualise property rights in a way that considers home interests as valuable. The home not only forms a central part of everyday life but is also central in various other legal matters.<sup>139</sup>

When balancing the scales between the property owner and the occupier’s home interest, it is important to consider the matter holistically - not just the economic impact or some other one-sided right that is affected. Other rights and interests such as equality, human dignity, peace and security must be taken into account since they all form part of the Bill of Rights and the holistic image which the Constitution is promoting.<sup>140</sup> To achieve this will require some attachment of personhood to property.<sup>141</sup> Interactions with property should enable the realisation of one’s life and personality within the social context.<sup>142</sup> The precondition of the social context further suggests a synthesis of the private and public spheres and recognises the relations between them to achieve goals such as human dignity and equality; thus, shifting the

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<sup>137</sup> AJ van der Walt *Property and Constitution* (2012) 115 and 116.

<sup>138</sup> L Artz and D Smythe ‘Bridges and barriers: A five year retrospective on the Domestic Violence Act’ (2005) *Acta Juridica* 200—226 216—217.

<sup>139</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 3 reads as follows: “Legal matters concerning ‘home’ may take various forms, and may fall within a range of areas of legal activity from family law to criminal law, from constitutional and human rights law to housing law... focuses on the significance of home in the context of property law...”

<sup>140</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 362. See also AJ van der Walt *Property and Constitution* (2012) 123 providing that the broad constitutional context will affect the development on the notion of property law.

<sup>141</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 287.

<sup>142</sup> AJ van der Walt *Property and Constitution* (2012) 127.



focus from individual property rights towards the overall property system and allowing for autonomy in relation.<sup>143</sup>

## **2 4 Adequate home: Conceptualisation of the home in law and gender**

Home forms a central part of one's life and it finds relevance in various other legal matters including housing law and property law.<sup>144</sup> A connection has been established between the home and adequate housing, as well as between the home interests and property rights. However, home remains a vague notion without any discernible meaning in law. So, what is the home and why is it important?

Home as a physical location is often defined as a place of safety, peace and security. This safety is the safety from the harsh pressures of the public sphere but, often insecurities, inequality and dangerous relations which exist within a home are overlooked.<sup>145</sup> Therefore, home is a physical location as well as an emotional construct which becomes a place of security/safety and threat alike.<sup>146</sup> In order to protect persons from dangers initiated within the space of apparent safety and security, one must first determine a proper understanding of home. Without an organised concept of home, there cannot be a legal framework within which to protect the home or the relevant aspects thereof.<sup>147</sup> The difficulty in defining home in law is that it is not a readily quantifiable concept - it is subjective and complex, which often causes confusion in its contradictory ideology.<sup>148</sup> It is also not a concept that can easily be watered to "housing" - it is more symbolic than that. The difficulty in defining home does not justify ignorance of the potential that it holds in adding value to the legal

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<sup>143</sup> AJ van der Walt *Property and Constitution* (2012) 127—128.

<sup>144</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 3.

<sup>145</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343.

<sup>146</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343.

<sup>147</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 3 and 132.

<sup>148</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343.

sphere.<sup>149</sup> Home does not only consist of tangible meanings such as being a financial asset or a physical structure (this would instead be classified as a house), home has additional, intangible meanings, making it significant and unique. Moreover, home is also a place of identity, and it forms part of a socio-cultural unit.<sup>150</sup>

Heidegger's philosophy of dwelling serves as a relevant point of departure in defining home. He refers to the relationship between people and the places they live and argues that *being* is having some connection to a particular place.<sup>151</sup> In other words, he attaches some personhood to the property.<sup>152</sup> To dwell means to be at peace and to be kept safe from harm and danger.<sup>153</sup> By investing time and energy, a house becomes a home where relationships are established, and values such as safety and security are also established.<sup>154</sup> Similarly, Currie and de Waal also refer to the importance of dwelling in their definition of home. They define home as being a place where one has the intention to dwell for a substantial amount of time.<sup>155</sup> By dwelling, home becomes a projection of identity of the individual and the relationships which form him/her. Home is also often associated as a place suitable for a family, (which highlights some potential gender issues) which is further associated as a place of safety, security, privacy and comfort.<sup>156</sup> Furthering the argument that home as a concept is determined by boundary-creating "property speak", home is also seen as a bounded and clearly demarcated space for safe-keeping of the family unit.<sup>157</sup> The problem with this definition reveals itself in Heidegger's theory that humans attain dwelling only through building (in other words building boundaries). Heidegger abandons the importance of preservation. He argues that "to build is to make" and that by building, man establishes himself and his identity. On the whole, women do not build but rather preserve. Based on the argument that Heidegger sets out, women

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<sup>149</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 27.

<sup>150</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 139.

<sup>151</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 135.

<sup>152</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 169.

<sup>153</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 135.

<sup>154</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 168.

<sup>155</sup> I Currie and J de Waal *The Bill of Rights Handbook 6th edition* (2013) 587.

<sup>156</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 177.

<sup>157</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343.

therefore do not establish themselves or their identities.<sup>158</sup> Although Heidegger's philosophy of dwelling can be used as a starting point to define home (because he recognises the relationships between people and places) the insistence that building is to make and that preserving is to make nothing, is problematic and gendered in nature.

Heidegger argues that the material resources available (usually provided by men) to those who construct the home and those who occupy, nurture and preserve it has considerable influence to the gendered hierarchy of power within the home.<sup>159</sup> This gendered issue is cause for concern. The work done by men to the home generally entails building, which is readily quantifiable. Whereas women's labour in relation to the home generally entails the preservation thereof. Heidegger argues that preservation does not add as much value to the home as building, and that it is merely an activity keeping the already built home in its current and constant state. The fixation with prioritising home as a physical entity belittles the value that women as the traditional home-makers (in the sense of preservation) add to the home, especially when considering that this role was originally assigned to them by men. Moreover, the benefits of home-making and preservation are acquired for men at the women's expense.<sup>160</sup> Women are expected to serve and nurture the family unit for their growth and development however, their contributions are still viewed as invaluable.<sup>161</sup> Young displays just how disadvantaged women are by Heidegger's approach:

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<sup>158</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 126 provides a discussion on how building and construction as a whole remains a male-dominated domain, and even where women do partake in construction projects, it is a rare sight. There are some traditional societies where women physically erect structures such as mud-houses. However, due to the changes in the world, many of these people have been forced to migrate to cities. It has become nearly impossible to 'live off the land', meaning that these societies where women - to some extent - erect the physical structure of a house, has become a rare sight in itself. Therefore, men seem to dominate the construction world. Based on Heidegger's theory that building equates to making, it results in women not making anything, and thus not establishing themselves in the world in Heidegger's theory.

<sup>159</sup> L Chenwi and K McLean 'A woman's home is her castle?' – Poor women and housing inadequacy in South Africa' (2009) 25 *SAJHR* 518. See also S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 346.

<sup>160</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 369.

<sup>161</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 369.

“If building establishes a world, if building is the means by which a person emerges as a subject who dwells in that world, then not to build is a deprivation. ... Those who build dwell in the world in a different way from those who occupy the structures already built, and from those who preserve what is constructed. If building establishes a world, then is still very much a man’s world.<sup>162</sup>”

Despite the argument presented by Heidegger that to preserve and nurture is to make nothing, and that identity is established through building, homemaking and preservation (which are largely carried out by women) hold more value than given credit for. Homemaking and preservation mean arranging material things in a certain way that displays an extension of the self.<sup>163</sup> Where construction breaks the continuity of history, preservation allows for that history to recur. History is a part of the individual’s identity, and preservation and homemaking, allow for this identity to emerge and exist through taking considerate care of the individual’s history. Furthermore, the activities of preservation are gender-specific: just as men dominate the construction and building world, women tend to dominate the world of preservation and homemaking.<sup>164</sup> It shows that just as construction and building are world-making, so is preservation and homemaking. Not only is preservation world-making, but it also provides value and meaning to the world that is being made.<sup>165</sup>

Home may be that unique quality necessary to establish a relationship between person and place – which gives personhood to property. Home as a concept considers other aspects, such as gender (which also plays a significant role in the family unit) which housing and property often overlook.<sup>166</sup> The concept of home generally revolves around the family unit and an expected image of the family unit. In other words, gender roles and familial relations are central to home as a concept.<sup>167</sup> This family unit is often

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<sup>162</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 369.

<sup>163</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 142 provides a discussion on how homemaking consists of arranging material objects in a certain way that allows for the life activities of the individuals within that space to take place. Preservation results in keeping these physical objects intact and prolonging their history, which also serves as an extension of the individual.

<sup>164</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 144.

<sup>165</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 145.

<sup>166</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 24.

<sup>167</sup> S Bowlby *et al* ‘Doing home: Patriarchy, caring and space’ (1997) 20 *Women’s Studies International Forum* 344.

associated with heteronormative ideals of what a family unit should consist of.<sup>168</sup> This results in the invisibility of women, now not only within the public sphere but in the private home sphere as well.<sup>169</sup> In this context, the home can be a site for the creation and maintenance of patriarchy in what appears to be natural and ordinary.<sup>170</sup> Man builds for the very purpose to make himself a home, while women's role is to "be the home by being at home."<sup>171</sup> She is an object in his home - an object of self-reflection.<sup>172</sup> In this heteronormative ideal of what a family unit should be, women are confined to the private sphere of caring and maintenance of the household. This role is deemed their "natural role" in a heteronormative society. Whereas men are situated in the more "uncaring" public sphere.<sup>173</sup> Men build in order to project a reflection of themselves outwards into the public sphere.<sup>174</sup> The public sphere allows him to have external relationships. External relationships therefore also have an impact on the understanding of a home. The boundaries between the public and private sphere affect the understanding of a home and oppressive gender norms.<sup>175</sup> In a space where man builds to make himself a home and to project a reflection of himself outwards, creating a space where women's role is to "be the home by being at home", her only comfort is to draw fulfilment from being *in* the home. She tries to give herself a place *within* his space. In the end, she is left with no place of her own. She is left homeless.<sup>176</sup>

Since the public sphere is inherently thought of as being more significant than the private sphere, and since men project a reflection of themselves outwards through

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<sup>168</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 344.

<sup>169</sup> This heteronormative ideal of what a home should entail also runs the risk of excluding and marginalising persons who do not conform to this ideal. See S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343—344 for a discussion on this.

<sup>170</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 345.

<sup>171</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 129.

<sup>172</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 128—30.

<sup>173</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 345.

<sup>174</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) (2004) 128.

<sup>175</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 347.

<sup>176</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 130.

building, male dominance in the public sphere supports patriarchy and gives men the power to prevail over women in the private sphere (especially since men are potentially abused themselves within the public sphere, specifically in their work environment and the heavy heteronormative expectation/burden placed on them to solely support their entire family unit).<sup>177</sup> There is a desire to release any pent-up anger within the private sphere because of the situations they face within the public sphere. They try to balance the scales in order to feel more empowered within their own private domain - within their space. Feminists have therefore argued that private power is the principal threat to women's equality and autonomy.<sup>178</sup> Women had suffered from this oppression within the home long before the boundaries were relatively broken-down to allow women into the public sphere and affording them the same protection as men.<sup>179</sup> If a stark boundary between the public and private sphere persists, the patriarchal gender roles within the home will continue to persist.<sup>180</sup> It is for this reason that many feminists wholly reject the idea of home. If house and home equate to the confinement of women only to liberate the ventures of men, house and home should, rightfully so, be rejected. However, I argue that home carries with it core positive values and it would be wasteful to reject such values entirely.<sup>181</sup> Home "expresses uniquely human values" and provides us with a fixed identity.<sup>182</sup> Home carries positive and meaningful values such as preservation, safety, individuation and privacy.<sup>183</sup> It is, therefore, possible to possess an idea of home as "supporting the individual subjectivity of the person, where the subject is understood as partial, fluid and shifting, in relations of reciprocal support".<sup>184</sup> If men and women alike took part in the act of preservation, for instance, women would no longer be seen as the material subjectivities of men. There would be

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<sup>177</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 361.

<sup>178</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629—1641 1631.

<sup>179</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1631.

<sup>180</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 345.

<sup>181</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 123.

<sup>182</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 124.

<sup>183</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 125.

<sup>184</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 130.

a reciprocal relationship of support - a relationship of equality and dignity.<sup>185</sup> Equality for women requires a reevaluation of the preservation of things which results in a de-gendering of gendered activities.<sup>186</sup>

Home embodies gender because of the traditional associations with the feminine and the private sphere, and the masculine with the public sphere. These associations endorse patriarchy in both the public and private spheres. Patriarchy results in gender-based violence within the home, which should be a place of safety and security. In other words, the public/private divide enables the violation of home-ing rights. Upholding this stark boundary between the public and private sphere makes women invisible in the public sphere, which consequently makes them invisible to the laws that are put in place to protect them, and sequentially makes them more vulnerable to abuse within the home without access to the public resources.<sup>187</sup> These imposed boundaries between the public and private sphere are essential to the understanding of the home and the families within these homes. Any attempt to challenge these boundaries usually comes with its challenges because it threatens the power imbalances put in place through the use of the boundaries. "Occupying a fundamental but underappreciated place within societies that affirm patriarchal values both explicitly and subtly, the home is a space within which identities and boundaries are learned, perpetuated, and challenged. It is both safe and dangerous, perpetual and evolving."<sup>188</sup> Romanticising the home implicitly suggests that the outside world should be feared, whereas often even the home is a place to be feared for women.<sup>189</sup> If women are expected to confine themselves within the private sphere as associated with the home, it makes sense why many feminists reject the idea of home - it plays into the hands of oppressive patriarchal values. However, home offers certain human values, which may be a privilege, but should not be. The values of home should not be rejected because they are privileges; instead, these values should be provided to

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<sup>185</sup>IM Young *On female body experience "throwing like a girl" and other essays* (2004) 145.

<sup>186</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 145.

<sup>187</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 367.

<sup>188</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 347.

<sup>189</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 367.

everyone because they are in fact basic human values.<sup>190</sup> These values broadly consist of safety, individuation, privacy and preservation.<sup>191</sup>

A basic human right, such as safety seems to be a privilege at this point. Where safety should be a space where one can retreat from the harsh pressures and violence of the outside world, violence for women seems to emanate from within the home - within the space, which is meant to provide as a source of safety and comfort.<sup>192</sup> Where privacy is also a human right, it has often been abused because it has served as a justification for the public sphere to turn a blind eye to the violence that occurs within the home. This compromises safety as a basic human value. The private sphere has often confined and excluded women instead, *privacy* should more closely relate to autonomy.<sup>193</sup> Feminists have often rejected privacy because it has been used as a tool to justify the non-interference of the private space where violence occurs. Instead, there should be an insistence that privacy is a value which should be extended to all *individuals*, and not specifically to the family unit or the private sphere.<sup>194</sup> If privacy is viewed in this manner, it is apparent that women deserve privacy within the private sphere and public sphere alike, but do not have it in either.<sup>195</sup> With privacy, comes the value of individuation and autonomy. Therefore, in order to be autonomous, relationships which respect privacy need to exist, and these relationships do not necessarily originate from within the private sphere.

The stern public/private divide, and the (literal and figurative) walls surrounding the private sphere often leave women in a very vulnerable position when seeking assistance from the public sphere. Protection of the personal from the political through boundaries of the home, in fact protects privilege.<sup>196</sup> One should rather incorporate the two spheres with one another to introduce a different form of state involvement, which deals with the issues of vulnerability and abuse of women hidden in the private sphere. There should be a concept of home which does not oppose the

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<sup>190</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 146.

<sup>191</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 151.

<sup>192</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 151.

<sup>193</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 152.

<sup>194</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 153.

<sup>195</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 153.

<sup>196</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 149.



personal and the political, but one which makes the political possible. Bell hooks provides that the home can, in fact, be a site of resistance where the personal becomes political.<sup>197</sup> Home is a place where identity is established; it is a space where one can exercise resistance from exploitative social structures such as patriarchy. Home is a space where autonomy is established.<sup>198</sup> Home is a space which anchors and secures identity.

## 2 5 Conclusion

The purpose of this chapter is to conceptualise an understanding of home within the South African legal context. In order to obtain this purpose, I questioned what home means. I further questioned why one should not reject the concept of home, but rather reclaim it in order for the positive values attributed to it to be extended to everyone. Home carries positive values such as autonomy and identity that contribute to humanness, and to reject home would mean being lost. Lastly, I considered how certain relationships affect the definition of home and how some relationships are detrimental to it. When relationships are detrimental to defining home, there should not be a complete rejection of home, instead an alteration of the negative relations in order to reclaim the positive values that home as a concept encapsulates.

The absence of a definition for home has created confusion in the legal sphere, especially in instances where the word home has physically been used. Where home has been referred to in case law and legislation,<sup>199</sup> there is uncertainty as to what is being protected. However, it is distinct from housing rights.<sup>200</sup> I Currie and J de Waal considered the absence of a definition and provided an interpretation of what home could mean: there must be “an intention to occupy a dwelling for residential purposes

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<sup>197</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 146.

<sup>198</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 149.

<sup>199</sup> The preamble of the PIE Act 19 of 1998 reads as follows: “AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances”. Further, in the case of *PE Municipality par 17* the court considers home as a concept in relation to adequate housing.

<sup>200</sup> See section 2 1—2 2 in this chapter for a discussion on how the home and house are separate but interrelated rights.

permanently or for a considerable period of time.”<sup>201</sup> Additionally, the courts have also attempted to define home. The judgment in *PE Municipality* stated that home is “more than just a shelter” and that it provides a space of “personal intimacy” and “family security”.<sup>202</sup> Furthermore, the judgment in *Grootboom* indicates that housing consists of more than just “bricks and mortar”.<sup>203</sup> Although the judgment refers to housing and not home, as discussed above, the concepts of house and home are separate but interrelated. In this sense, *Grootboom* uncovered the link between the two concepts. This link is significant because Section 26 of the Constitution refers to both house and home.<sup>204</sup> Therefore, an inference can be made that the two concepts are at the very least related concepts, albeit not the same. As mentioned above, section 26 should be read and understood in its entirety, and the subsections cannot be separated too distinctly as they ultimately form part of the same provision. It is, for this reason, that housing as a concept is considered in order to provide a more apt understanding of what home could mean. Housing provides the structural and physical form to a home.

Additionally, the judgment of *Grootboom* establishes a link between housing rights and human dignity as a core value captured in the Constitution. This linkage was affirmed by other judgments such as the judgment in *Residents of Joe Slovo* where the court considers dignity to be a significant right in the context of housing.<sup>205</sup> Additionally, the judgment in *Blue Moonlight Properties* also considers the impact that the right of access to adequate housing has on the right to human dignity. The court found that values such as human dignity, freedom and equality are embedded in housing rights and due to this, housing rights should not be considered a privilege only obtainable by a few, but it should be a right extended to everyone. This will ensure that core human

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<sup>201</sup> I Currie and J de Waal *The Bill of Rights Handbook 6<sup>th</sup> edition* (2013) 586.

<sup>202</sup> *PE Municipality* par 17.

<sup>203</sup> *Grootboom* par 35.

<sup>204</sup> Section 26 of the Constitution reads as follows:

“26. Housing – (1) Everyone has the right to have access to adequate **housing**.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their **home**, or have their **home** demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

<sup>205</sup> *Residents of Joe Slovo* par 75.

values such as human dignity, equality and freedom are provided to everyone.<sup>206</sup> This relates to why home as a concept should not be rejected but rather reclaimed and extended to all. The very fact that home carries such core positive human values confirms that the concept should not be a privilege and that it should be democratised.<sup>207</sup>

I consider the reason why home has been rejected in the past. Historically and even today, home and home-making come at the expense of women for the benefit of men. This makes home a privileged concept, only benefitting a particular group of people. However, I conclude that this is because of the existent unequal relationships, specifically between genders, where male has oppressed female in the home-ing context. Oppressive relationships between genders isolate women within the home and this is clearly detrimental. Where home is meant to be a place of safety and security, it becomes a place of imprisonment. My argument is that we do not need to reject the concept of home. Instead, these relationships which define home (especially those which are oppressive) need to be reconceptualised in such a manner that all the positive attributes of the home can be enjoyed by everyone alike. It is possible to possess an idea of home as “supporting the individual subjectivity of the person where the subject is understood as partial, fluid and shifting in relations of reciprocal support”.<sup>208</sup> However, these relationships do not always come from the private sphere. In many instances, the boundary between the public and private sphere isolates women to the private sphere, making them feel trapped and vulnerable to abuse within the home. If home is a place of safety and security from the outside world, then what is it when the abuse comes from within the home? Abuse within the home defeats the very meaning of home. Therefore, there is a need to restructure not only internal private relationships but also those external relationships, which affect private relations. The boundary between public and private should be limited so that the private sphere no longer means the confinement of women and the protection of patriarchal norms. The public sphere should use its powers when basic human rights such as safety and privacy are threatened from within the private sphere. In the following chapters, I consider how abuse within the home takes away from the very

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<sup>206</sup> *Grootboom* par 44.

<sup>207</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 146.

<sup>208</sup> IM Young *On female body experience “throwing like a girl” and other essays* (2004) 130.

meaning thereof. I further consider in greater detail, how the stark boundary between the public and private sphere has not been to the benefit of women. I lastly consider how the divide has delayed the process of defining home and creating equal and deserving relations.

Overall an alternative interpretation and understanding of laws aimed to protect the home is required to ensure that gender issues are addressed. An analysis and understanding of the home and the relationships that affect and create it is necessary in determining what the home entails. You cannot make men good by law, so a mere replacement of the current laws which already take limited cognisance of the oppressive relationships both within and out of the home will not suffice. Instead, an altered *interpretation* of laws which recognises the importance of relationships in the formation of these concepts is required. I promote a gendered, or relational feminist perspective which considers the lived realities of women in the home, instead of the existing laws and social practices which perpetuate inequality.

## Should I stay or should I go?

### 3 1 Introduction

In my previous chapter, I consider what home means. I define home as a physical location and a place of safety, security, peace and identity.<sup>1</sup> I further consider why many feminists reject home. I conclude that in many instances, home comes at the expense of women, their independence and their identity.<sup>2</sup> To a large extent, home has become a privatised concept and women often associate the private sphere with confinement to that. In many instances, privacy has been a right which justifies non-interference with patriarchal practices within the home.<sup>3</sup> If we understand home in this sense, it makes women more vulnerable to the abuse that occurs within the home unseen and deregulated.

In the first instance, the purpose of this chapter is to establish the impact of domestic violence on the concept of home (as defined previously) since it primarily occurs within the privatised realm. Domestic violence serves as proof that it could be dangerous to romanticise the home as a place of safety, security, peace, serenity, dignity and equality. Domestic violence threatens these characteristics of home and therefore takes away the very existence of it. These threats make the task of defining home in law challenging. Home carries very subjective and complex understandings in every

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<sup>1</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 177.

<sup>2</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 369.

<sup>3</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 153. In *S v Baloyi* 2000 (2) SA 425 (CC) par 16 the court reasoned that:

"although women cherish personal autonomy, in practice the concept of autonomy has been used to protect the abusive husband from the actions of the state, but not the abused wife from the actions of the husband. Similarly, despite the high value set on the privacy of the home and the centrality attributed to intimate relations, all too often the privacy and intimacy end up providing both the opportunity for violence and justification for non-interference."

different situation that a person finds themselves in. Although it may be true that interference from external sources may disrupt the aspects of privacy or safety and security from home, domestic violence serves as an example that the veil of privacy around the home from the public sphere may have the same effect as non-interference.

Since home attaches identity to a person,<sup>4</sup> any interference with the right to a home, equally interferes with the right to autonomy and the capability of developing individual identity. Domestic violence threatens the positive values attributed to the home, especially safety, individuation and even privacy. This form of privacy is not privacy as associated with the private sphere, but privacy as associated with the individual and the ability to exercise individual decision-making.<sup>5</sup> The Domestic Violence Act 116 of 1998 ('the DVA') was implemented to target these abovementioned issues and to reduce violence that occurs within homes. Therefore, I consider how the DVA has been successful/unsuccessful in combatting domestic violence. I question whether the DVA has made an impact on domestic violence and whether this statute serves its purpose – to protect women from abuse to its fullest extent.<sup>6</sup> From the outset, I argue that the DVA has not reached its full potential of protection because studies have shown that in one out of three South African households, domestic violence takes place. These studies have further shown that on average, every six days, a woman is murdered by her male partner.<sup>7</sup> According to Statistics South Africa, femicide has drastically increased in the South African setting at a level of 117% between 2015 and 2017. The number of women who experience sexual offences has also increased by 53% between 2015 and 2017.<sup>8</sup> In 2018 the South African Medical Research Council found that 40% of men have hit their partners and one in four men have raped women.

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<sup>4</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 124.

<sup>5</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004)152.

<sup>6</sup> The Preamble of the Domestic Violence Act 116 of 1998 ('DVA') provides that it is the purpose of the Act to provide as much protection to victims from domestic violence as the law can provide.

<sup>7</sup> HB Kruger 'Addressing domestic violence: To what extent does the law provide effective measures?' (2004) 29 *Journal for Juridical Science* 152—173 153.

<sup>8</sup> SA News *Gender based violence on the rise* (2018) available online at <https://www.sanews.gov.za/south-africa/gender-based-violence-rise> (accessed 12 May 2019) and Statistics South Africa *Statistical release: Victims of crime survey* (2016/17) 1—97 85 where sexual offences include domestic sexual abuse.

Sadly, only 2% of women raped by a partner, have reported the incident to the police. In 2019, the number of murders in South Africa has reached the highest ever in a decade.<sup>9</sup> The number of reported rapes has also increased to 3.9% in 2019, to the highest it has been in four years<sup>10</sup> (which is concerning over and above the fact that this is merely cases which have been reported). Just in the month of August 30 women were killed (which we know of).<sup>11</sup> Moreover, women mostly experience sexual offences, so much, so that it has been recorded that twice the number of women experience sexual offences compared to men.<sup>12</sup> Many victims are reluctant to disclose this information meaning that the official statistics of domestic violence in South Africa are insufficient.<sup>13</sup> Such insufficiency is based on several factors, including fear to approach authorities and specific perceptions of what constitutes domestic violence.

Certain relations over time have created common perceptions and attitudes of what constitutes a crime and what may be acceptable. These perceptions determine how women and men understand domestic violence and determine how women are treated in society. Statistics South Africa conducted a study which explored the difference in attitudes of men and women on the question of violence against women. They questioned men and women of different cultures and races on whether it is acceptable for a man to abuse a woman. The study found that in total, about 3.3% of men and 2.3% of women in South Africa found it acceptable for men to hit women. Although this percentage may seem low, it becomes impossible to eliminate domestic violence

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<sup>9</sup> See P Vecchiatto and MC Cohen *SA murders increase to highest level in a decade* (2019) available online at <https://www.moneyweb.co.za/news-fast-news/sa-murders-increase-to-highest-level-in-a-decade/> (accessed 6 October 2019).

<sup>10</sup> See P Vecchiatto and MC Cohen *Horror of SA's gender-based violence revealed in report* (2019) available online at <https://www.moneyweb.co.za/news-fast-news/horror-of-sas-gender-based-violence-revealed-in-report/> (accessed on 6 October 2019).

<sup>11</sup> The Department of Women, Youth and Persons with Disabilities media statement, 3 September 2019 available online at <http://www.women.gov.za/images/20190903-War-on-Women-Continues-V2-2.pdf> (accessed 17 September 2019).

<sup>12</sup> Statistics South Africa *Statistical release: Victims of crime survey* (2016/17) 40.

<sup>13</sup> HB Kruger 'Addressing domestic violence: To what extent does the law provide effective measures?' (2004) 29 *Journal for Juridical Science* 153. Also see Statistics South Africa *Statistical release: Victims of crime survey* (2016/17) 82.

in its entirety if such misconceptions continue to exist.<sup>14</sup> Furthermore, as mentioned previously, these statistics are insufficient since many women who suffer as a result of domestic abuse choose not to disclose such information. This comes to show that certain relations exist creating the possibility for domestic violence to occur and continue. These relationships are harmful to both parties involved. Therefore, an in-depth analysis of how these relationships arise and continue to exist is considered. In order to understand an abusive relationship of this nature, there needs to be additional awareness and understanding of how such relationship is ingrained in others, including familial and community relationships and to a larger extent, other societal structures.<sup>15</sup>

Therefore, I consider how particular relationships give rise to domestic violence which disrupts the right to a home. I argue that the law will only be able to offer protection to the extent that it understands the relationships which result in this abuse. Women cannot adequately be protected from abusive relationships by the law unless the roots of such relationships are understood.<sup>16</sup> In order to understand the relationships of domestic violence, there must be a broader systemic relational analysis rather than solely focusing on an individual psychological analysis.<sup>17</sup> For this reason, I lastly investigate how relations from within the private sphere (as associated with the home) in the form of domestic violence, often create a sense of insecurity, danger and inequality and how the boundary between the private and public sphere can be dangerous in this regard. The boundary between the two spheres is meant to protect persons in the private sphere from interference by the public sphere, but what happens if it is not the public sphere but rather the private sphere that you need protection from?

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<sup>14</sup> Statistics South Africa *Crime against women in South Africa: An in-depth analysis of the victims of crime survey data* (2018) Report No. 03-4-05 1–24 9. Also take note that as mentioned above, these statistics are insufficient and are often not a true reflection of the situation.

<sup>15</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 213.

<sup>16</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 200.

<sup>17</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 311.



### 3 2 The Impact of domestic violence on the home

Home is where the heart is. This is not true when a home is filled with violent relationships. Thus far, home has been defined as something that does not merely consist of tangible meanings. Home has an additional x-factor consisting of many intangible aspects including emotional, psychological, social and cultural aspects.<sup>18</sup> Home is not merely a physical location but an emotional construct as well.<sup>19</sup> As an emotional construct home carries with it many values such as privacy, security, control and even personal identity.<sup>20</sup> Home as a physical location is frequently defined as a place of safety, peace and security. However, this refers to safety, peace and security from the public sphere. Sachs J speaks of home as a “relatively secure space of privacy and tranquillity in what is a turbulent and hostile world” (in other words from external sources emanating from the public sphere).<sup>21</sup> However, I refer to the insecurities and dangerous relations that exist *within* the home, which are often overlooked.<sup>22</sup>

Home is further a gendered concept. Similarly, domestic violence is a gendered concept. In a study on the DVA conducted by Lilian Artz and Dee Smythe they found that, majority of the people bringing forth applications for protection orders through the DVA as a remedy for domestic violence, were married women against their husbands. In total, 78% of the applications were brought by women against men. Whereas men against women brought only about 14% of the applications, and these applications were predominantly counter protection orders.<sup>23</sup> A further study conducted by

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<sup>18</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 24 and 138.

<sup>19</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343–350 343.

<sup>20</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 134.

<sup>21</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('PE Municipality') par 17.

<sup>22</sup> S Bowlby *et al* 'Doing home: Patriarchy, caring and space' (1997) 20 *Women's Studies International Forum* 343.

<sup>23</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 200—226 204. All applications for protection orders are brought by the complainant without notifying the respondent (*ex parte* application orders) and often the respondent brings a counter-protection order as a form of retaliation.

Statistics South Africa found that although the number of victims who report crimes such as sexual offences and assault are low (potentially because intimate partners commit these offences) the number of women who are exposed to such crimes are more than double than the rate for men.<sup>24</sup> These statistics come to show that physical abuse and sexual abuse - both included in the definition of domestic violence - <sup>25</sup> can be classified as gendered crimes (just like home is a gendered concept) since the violence is largely aimed against women. Where home as a neutral concept it is often associated with feelings of warmth, security and a sanctuary from the public sphere, domestic violence makes it a site for the production and operation of unequal relations expressed through violence. Home as a concept, therefore, carries with it contradictory ideologies, being both a safe space for some and a place of fear and subordination for others.<sup>26</sup> However, Young argues that since home carries such a “core positive meaning as the material anchor for a sense of agency and a shifting and fluid identity” it is important to reclaim home and to extend this meaning to everyone rather than to reject it altogether.<sup>27</sup>

As cited previously, Young maintains that there are four normative values of home that stand as regulative ideals, namely: safety, individuation, privacy and preservation.<sup>28</sup> Firstly, Young argues that safety should be accessible to all. She argues that home should ideally be a space where one feels safe, a place of retreat from the dangers of collective life. She acknowledges that perhaps it is too much to expect that everyone be safe everywhere, but there should at least be a space where one feels safe and

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<sup>24</sup> Statistics South Africa *Statistical release: Victims of crime survey* (2016/17) 40—43.

<sup>25</sup> Section 1 of the DVA provides that the definition of domestic violence includes physical abuse and sexual abuse.

<sup>26</sup> S Bowlby *et al* ‘Doing home: Patriarchy, caring and space’ (1997) 20 *Women’s Studies International Forum* 343.

<sup>27</sup> IM Young *On female body experience: “throwing like a girl” and other essays* (2005) 149.

<sup>28</sup> IM Young *On female body experience: “throwing like a girl” and other essays* (2005) 151—153. When Young speaks of individuation as a regulative ideal to the home, she speaks of a space not in terms of ownership or private property, but rather a space in the sense of meaningful use and re-use for life which creates and reflects part of that person’s individual existence. When she speaks of preservation as a regulative ideal to home, she speaks of home being a site of the construction and reconstruction of one’s self which entails the activity of safeguarding meaningful things in which one sees the stories of one’s self embodied.

secure. Unfortunately, we are alarmingly far from achieving this ideal because even a space designated for safety and security is not. Far too many women are threatened with violence and fear from the men living with them in that space.<sup>29</sup> The Constitution affords people the basic human right to safety from violence. Section 12(1)(c) of the Constitution provides that everyone has the right to freedom and security of person, which includes the right to be free from violence from either public or private sources.<sup>30</sup> Section 12(1)(c) requires the state to protect individuals from violence in the case where their safety is being threatened by private individuals, even if this source of threat emanates from the private sphere.<sup>31</sup> The specific inclusion of private sources acknowledges that serious threats to the security of a person may arise from within private spheres. Section 12(1) read with Section 7(2) of the Constitution places a positive duty on the state to protect everyone and to ensure that everyone is free from private violence, also commonly known as domestic violence.<sup>32</sup> Violence against an individual is considered a gross violation of that individual's personal security and right to privacy.<sup>33</sup> If safety is meant to be such a basic right afforded to everyone, at least to some extent, why is it such an onerous process in ensuring this right? If home is ideally meant to be a safe space, violence emanating from within the home puts the very meaning of home as a safe place to disgrace. If the idea of a safe home serves as a regulative ideal by which to criticise all home spaces we can see that domestic violence takes away from this regulative ideal and that there is a need to affirm the value of safety and home as a safe space.

Secondly, when Young refers to privacy, she does not associate this with the private sphere to which women have historically been confined. Instead, she speaks of privacy in the sense of autonomy and the control a person has to make individual

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<sup>29</sup> IM Young *On female body experience: "throwing like a girl" and other essays* (2005) 151.

<sup>30</sup> Section 12 of the Constitution of the Republic of South Africa, 1996. Specific reference is made to private sources as well as public sources since safety is usually provided in private sources, but in this sense, there is the recognition that violence may occur in these so-called spaces of safety.

<sup>31</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 281.

<sup>32</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11. Also see section 7(2) of the Constitution of the Republic of South Africa, 1996 which reads as follows: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

<sup>33</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 281.

decisions free from external influences.<sup>34</sup> Privacy is a right afforded to individuals which assists them in achieving their own autonomous identity.<sup>35</sup> Since privacy is so closely connected with identity, to violate someone's privacy would be to violate that which is necessary to develop an individual's autonomous identity.<sup>36</sup> Therefore, we protect privacy not because it is an intrinsic value, but because it contributes to the realisation of other values which make it possible to become an autonomous being with a safe and secure identity.<sup>37</sup>

Privacy also means having a space which you can call your own, a space that you can retreat to when necessary.<sup>38</sup> The law should allow for the exercise of privacy in this sense. However, practically, privacy is a tool used to protect the abuser from the actions of the state instead of protecting the abused.<sup>39</sup> In practice, the right to privacy has allowed for the justification of non-interference of dominant male power in the family.<sup>40</sup> Traditionally, when there is talk of privacy, it refers to keeping the state at bay and protecting the family unit from the collective, which results in the law often turning a blind eye to violence within the home.

However, privacy should not be seen as a right only afforded to households and families; it should be seen as a right afforded to individuals. This view serves as a substantial defence against the justification of protecting patriarchal power in the private sphere.<sup>41</sup> Young cites Anita Allen who explains that if we insist on privacy as a value to all individuals, the extent to which women deserve privacy within the home (a unit that is often ruled by patriarchal power and afforded privacy as a family unit) and elsewhere, and do not have it, becomes evident.<sup>42</sup> It becomes particularly evident in cases of domestic violence because the right to bodily integrity and decisional privacy

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<sup>34</sup> IM Young *On female body experience: "throwing like a girl" and other essays* (2005) 152.

<sup>35</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 299.

<sup>36</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 299.

<sup>37</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 299.

<sup>38</sup> *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) 50 ('*Dladla*').

<sup>39</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 16.

<sup>40</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 16.

<sup>41</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 153.

<sup>42</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 153.

in terms of intimate relations are negatively affected.<sup>43</sup> Domestic privacy and patriarchy have, for an extended period been sustained by lawlessness. Therefore, the involvement of the state in the private sphere will be beneficial in instances of domestic violence, which can be achieved through an altered understanding of privacy.<sup>44</sup> Further, the ideal of privacy is a condition of autonomy, and in this sense, autonomy by extension is also a regulative ideal which is negated by domestic violence. I, therefore, refer to a form of relational autonomy (as Nedelsky does) which is not rooted in the model of individual freedom, based on the ownership of private property, but rather a form of autonomy related to “supportive interdependence”, which should be understood as “normal conditions of being autonomous”.<sup>45</sup> If safety, privacy, and by extension, this form of relational autonomy, are normative values of home, home should then be a source of connection with others and nurturing of the self. Home should be a space where one can exercise the freedom to be in the relationships one chooses and desires and to expand oneself through such relationships.<sup>46</sup> However, domestic violence removes this choice and growth and imprisons a person in an often undesired, toxic relationship, thus violating the normative values of the home.

From this perspective, domestic violence is a pertinent topic of discussion in relation to the home. Domestic violence violates several human rights, for example, the right to privacy, safety and security, dignity, bodily integrity and sometimes in extreme cases the right to life.<sup>47</sup> Alongside these rights, domestic violence violates the right to a home – which, as seen above, is meant to be a place of safety, peace and security.<sup>48</sup> Domestic violence violates the right to a home regardless of how adequate the home may be, since the concepts of living in peace, security, safety, privacy and dignity are

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<sup>43</sup> A Weir ‘Home and identity: In memory of Iris Marion Young’ (2008) 23 *Wiley* 4—21 13.

<sup>44</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 18.

<sup>45</sup> A Weir ‘Home and identity: In memory of Iris Marion Young’ (2008) 23 *Wiley* 14—15.

<sup>46</sup> A Weir ‘Home and identity: In memory of Iris Marion Young’ (2008) 23 *Wiley* 15—16.

<sup>47</sup> Section 14 of the Constitution provides for the right to privacy; Section 12 of the Constitution allows for protection to the right to freedom and security of the person (which includes the right to be free from all forms of violence either public or private sources - meaning that one has a right to safety, because safety can be seen as having freedom from risk of injury, danger or loss.) This right also encompasses the right to bodily and psychological integrity. Section 10 of the Constitution protects the right to human dignity. Lastly, section 11 of the Constitution protects the right to life.

<sup>48</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 102.

overlooked.<sup>49</sup> Home is meant to be a haven, a place free from external pressures and a place to exercise one's autonomy without any fear or prejudice. Domestic violence takes away this sense of safety and imprisons its victims.<sup>50</sup> Domestic violence leaves women caught between a rock and a hard place: either becoming homeless (to escape the violations of her rights from within the home and running the risk of her rights being violated from outside sources) or risking her mental and physical health by further abuse, but at least having a roof over her (and her children's) head..<sup>51</sup> Either way, her right to the home (integrated with the various other rights mentioned here) has been violated.

I now consider whether the DVA has been successful in combatting domestic violence and what options a victim of domestic violence has and lastly, how such options have an impact on her right to a home.

### **3 3 The Domestic Violence Act**

#### **3 3 1 The Purpose of the Domestic Violence Act**

The DVA was enacted as a means to provide for more effective legal remedies. Before the enactment of any legislation in response to domestic violence, victims could only rely on common law remedies such as assault, assault with the intent to do grievous bodily harm, indecent assault, murder, rape and malicious damage to property.<sup>52</sup> These common law remedies were expanded on by the Prevention of Family Violence Act 133 of 1993, which was promulgated to address the increase in domestic violence.<sup>53</sup> However, these measures were ineffective, and the DVA was enacted to provide for more effective legal remedies. The preamble of the DVA states that the purpose of the Act is to provide victims of domestic violence with the “maximum

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<sup>49</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 121.

<sup>50</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 121.

<sup>51</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 102 and 121.

<sup>52</sup> HB Kruger 'Addressing domestic violence: To what extent does the law provide effective measures?' (2004) 29 *Journal for Juridical Science* 155.

<sup>53</sup> HB Kruger 'Addressing domestic violence: To what extent does the law provide effective measures?' (2004) 29 *Journal for Juridical Science* 155—156.

protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence".<sup>54</sup> I examine whether the DVA has lived up to its legal promise, and I look into the impact which it has made on the reduction of domestic violence.

The DVA was enacted after 1994 and reliance on it should afford a generous amount of deference to the democratically elected legislature that enacted it. It will likely demonstrate the desired features and attempt to steer clear from the unwanted outcomes. Furthermore, the DVA is partial/covering legislation that gives a direct effect to the rights in the Constitution.<sup>55</sup> The DVA is partial legislation in that there are other common law rules which regulate small aspects of domestic violence. The common law crime of assault finds application in the regulation of domestic violence because it is the unlawful and intentional application of force to another person or creating the belief in another person that force is immediately to be applied.<sup>56</sup> Furthermore, the common law crime of rape, especially marital rape consists of the intentional and unlawful penetration of a person without their consent,<sup>57</sup> and may also regulate some aspects of domestic violence since it falls within the category of sexual and physical abuse which finds application in the definition of domestic violence.<sup>58</sup> Additionally, the common law crime of malicious injury to property, which consists of the unlawful and intentional damage to the property of another person,<sup>59</sup> also finds application in the law governing domestic violence, since domestic violence also means damage to property.<sup>60</sup> Furthermore, there are other statutes, which regulate small aspects of

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<sup>54</sup> The Preamble of the DVA.

<sup>55</sup> The DVA is concerned with the following provisions of the Constitution: section 9: the right to equality which provides that everyone is equal before the law and has the right to equal protection and benefit from the law; section 10: the right to human dignity; section 11: the right to life; section 12: the right to freedom and security of the person which includes the right to be free from all forms of violence either from public or private sources and the right to bodily and psychological integrity which includes the right to security in and control over their body.

<sup>56</sup> J Burchell *Principles of Criminal Law* 5<sup>th</sup> edition (2016) 591.

<sup>57</sup> J Burchell *Principles of Criminal Law* 5<sup>th</sup> edition (2016) 610.

<sup>58</sup> Section 1 of the DVA provides that domestic violence means physical abuse and sexual abuse.

<sup>59</sup> J Burchell *Principles of Criminal Law* 5<sup>th</sup> edition (2016) 757.

<sup>60</sup> Section 1(h) of the DVA provides that domestic violence means damage to property.

domestic violence such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007<sup>61</sup> and the Protection from Harassment Act 17 of 2011.

The DVA requires circumspect application of the subsidiarity principles because it does not exhaust the constitutional obligation in terms of equality, human dignity, the right to freedom and security of the person or the right to life in the Constitution. Nor does it replace the common law regarding physical or sexual assault, rape or malicious damage to property in its entirety. However, relying on the subsidiarity principles in the context of partial legislation, the DVA still serves the general purpose of ensuring that identification of the relevant source of law favours the promotion of constitutional goals despite the reduction in their directive force.

The concept of domestic violence through diction alone, leads us to believe that it is a private or familial matter, which discredits the seriousness thereof because as previously mentioned, in practice, domestic privacy protects the abuser from state action since the public sphere fears intrusion into the domestic sphere - even when such interference is necessary.<sup>62</sup> However, “domestic” should not be understood in narrow terms. It is not limited to the home. Domestic violence involves the entire domestic sphere of the victim, including other people’s homes, vacation homes and even shelters and any other forms of temporary housing.<sup>63</sup> The preamble of the DVA recognises “that acts of domestic violence may be committed in a wide range of domestic relationships.”<sup>64</sup> Domestic relationships in terms of the DVA is not limited to married partners, same-sex partners or even persons who live together and may include family members as well.<sup>65</sup> A domestic relationship means a relationship where

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<sup>61</sup> I refer specifically to section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which defines rape, section 13 which sets out a list of circumstances in which a person does not voluntarily or without coercion agree to an act of sexual penetration, as well as section 5 which defines sexual assault which victims of domestic violence are often exposed to. Furthermore, harassment is often a key factor that contributes to domestic violence and the Protection from Harassment Act covers the law in terms of harassment where the DVA is insufficient.

<sup>62</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 16.

<sup>63</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 103. To a large extent, the domestic sphere means the private sphere. In other words, any private sphere could also be a domestic sphere and the domestic sphere is therefore not limited to a home.

<sup>64</sup> The Preamble of the DVA.

<sup>65</sup> Section 1 of the DVA.



two persons are or were married to each other, (including marriage according to any law, custom or religion); where they (whether they are of the same or opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other; where they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time); or where they are family members related by consanguinity, affinity or adoption; where they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or where they share or recently shared the same residence.

Furthermore, “violence” should not be construed as only meaning physical force. In terms of the DVA, the term “violence” is broad and includes physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant’s residence without consent, where the parties do not share the same residence or any other controlling or abusive behaviour towards a complainant, where such conduct harms or causes imminent harm to, the safety, health or wellbeing of the complainant.<sup>66</sup>

Furthermore, the DVA also provides definitions of what physical abuse, sexual abuse, stalking, economic abuse, emotional, verbal and psychological abuse, harassment and intimidation entails.<sup>67</sup> Economic abuse, for instance, includes the unreasonable deprivation of economic or financial resources which the victim is either entitled to or which is necessary.<sup>68</sup> Emotional, verbal and psychologic abuse involves the degrading or humiliating conduct towards a victim such as insulting her, ridiculing her, threatening her emotionally (e.g. I will leave you if you do not have sex with me) and even expressing repeated jealousy.<sup>69</sup> Harassment includes repeatedly watching the victim,

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<sup>66</sup> Section 1 of the DVA.

<sup>67</sup> Section 1 definitions of the DVA.

<sup>68</sup> Section 1 of the DVA.

<sup>69</sup> Section 1 of the DVA.

repeatedly calling them or repeatedly sending the victim messages or letters or delivering packages, all of which has the potential to induce fear of harm.<sup>70</sup>

The purpose of the DVA is to provide maximum protection from domestic abuse by relevant organs of state which will convey the message that the state is committed to the elimination of domestic violence. In response, section 2 of the DVA deals with the duty of any member of the South African Police Service (SAPS) to assist and inform the complainant of their rights, which includes assistance in finding suitable shelter for the victim.<sup>71</sup> Further, section 3 provides that any person who witnesses the domestic violence taking place may arrest the perpetrator without a warrant.<sup>72</sup> Additionally, the National Policy Guidelines for the Handling of Victims of Sexual Offences was also finalised in 1998 and is applicable to police officers.<sup>73</sup> These guidelines provide that victim assistance/support is the “basic principle of the rendering of a service by the police”. Any complaint to the police must be treated professionally, and every victim must be treated with the necessary respect and empathy.<sup>74</sup>

However, despite the broad definitions provided by the DVA, which recognises that domestic violence can occur in a variety of ways, and despite it imposing duties on organs of state to prevent this abuse, the DVA has still proven to be ineffective. South Africa remains one of the countries with the highest incidence of domestic violence worldwide.<sup>75</sup> As expected, the DVA which aims at regulating intimate human

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<sup>70</sup> Section 1 of the DVA.

<sup>71</sup> Section 2 of the DVA.

<sup>72</sup> Section 3 of the DVA.

<sup>73</sup> L Vetten ‘Addressing domestic violence in South Africa: reflections on strategy and practice’ (2005) *Division for the Advancement of Women* Expert group meeting 1—12 2 provides that the National Policy Guidelines for the Handling of Victims of Sexual Offences applies to health workers, prosecutors, social workers and lay counsellors as well as parole boards and institution committees of the Department of Correctional services.

<sup>74</sup> The National Policy Guidelines for the Handling of Victims of Sexual Offences 1998. The policy guidelines also provide that the first officer at the scene and the investigating officer’s duty is to, among other things, offer support to the victim by showing empathy to the victim.

<sup>75</sup> R Furusa and C Limberg ‘Domestic Violence Act: Does it protect?’ (2015) *University of Cape Town Final Report* 1—11 2.

relationships, has presented a number of difficulties.<sup>76</sup> I now explore the reasons why the DVA is ineffectual and the difficulties in dealing with intimate human relations through legislation.

### **3 4 (In)Effectiveness of the Domestic Violence Act**

“All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.”<sup>77</sup>

The law alone cannot stop domestic violence. Thus, despite the broad scope of the DVA, it has still proven to be ineffective. The premise of this argument is that the DVA is ineffective due to the private/public dichotomy and the need to restructure relations. Despite the DVA recognising that “domestic violence” should not be interpreted narrowly by referring to all the various circumstances that it may take place in, traditionally domestic violence is seen as an issue that occurs within the private sphere.<sup>78</sup> Perhaps in this instance, it may, therefore, be more appropriate to refer to the violence as “intimate partner violence” - which more aptly refers to the relationship existing between the perpetrator and the victim.<sup>79</sup> The term domestic violence threatens to domesticate, privatise and trivialise the abuse.<sup>80</sup> Essentially, the term itself creates a boundary between the public and private sphere, which may partly serve as the reason for the ineffectiveness of the DVA. Whereas, the term intimate partner violence invites for the understanding of more extensive violent relationships existing outside of the domestic sphere and which often gives rise to violence within the domestic sphere.

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<sup>76</sup> L Artz and D Smythe ‘Bridges and barriers: A five year retrospective on the Domestic Violence Act’ (2005) *Acta Juridica* 210.

<sup>77</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

<sup>78</sup> R Furusa and C Limberg ‘Domestic Violence Act: Does it protect?’ (2015) *University of Cape Town Final Report 2*.

<sup>79</sup> J Nedelsky *Law’s relations: a relational theory of self, autonomy, and the law* (2011) 310.

<sup>80</sup> J Nedelsky *Law’s relations: a relational theory of self, autonomy, and the law* (2011) 310.

However, this research is based on why violence has been domesticated and even trivialised, and why there has been difficulty in eradicating such violence - even with the use of an in-depth Act aimed at preventing it. My research proposes that the ineffectual nature of the DVA is due to the public/private dichotomy which is maintained by the term “domestic violence” and which creates the boundary and stark dichotomy between the two spheres. I, therefore, continue to refer to “domestic violence” to display how it upholds the public/private dichotomy and how this, in turn, threatens to domesticate, privatise and even trivialise the violence.

Many organs of state are reluctant to interfere with domestic violence because of the public/private divide.<sup>81</sup> The traditional social view remains that it is a private family matter with which government should not interfere.<sup>82</sup> Thus, there needs to be a change in perception that domestic violence is exclusively a private matter to be resolved from within the home because by not regulating this violence, the state is complicit in the subordination of women within their own home. Such complicity then becomes a public matter.<sup>83</sup> The problem with “private” but systemic violence is that the fear, which is privately inflicted, forms an essential part of a larger social system that keeps a group of people subordinate.<sup>84</sup> Sachs J cites the South African Law Commission Discussion Paper 70 Project 100 on Domestic Violence in the matter of *S v Baloyi*, which stated that domestic violence is a “pervasive and frequently lethal problem that challenges society at every level.”<sup>85</sup> Furthermore, this complicity suggests that women are not

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<sup>81</sup> Section 239 of the Constitution reads as follows:

“organ of state” means

- (a) Any department of state or administration in the national, provincial or local sphere of government; or
- (b) Any other functionary or institution –
  - (i) exercising power or performing a function in terms of the Constitution or a provincial constitution or
  - (ii) exercising public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.’

<sup>82</sup> GP Mullins ‘The battered woman and homelessness’ (1994) 3 *Journal of Law and Policy* 237—255 240.

<sup>83</sup> KD Bailey ‘Criminal law lost in translation: Domestic violence, “the personal is political,” and the criminal justice system’ (2010) 100 *The Journal of Criminal Law & Criminology* 1255—1300 1261.

<sup>84</sup> J Nedelsky *Law’s relations: a relational theory of self, autonomy, and the law* (2011) 213.

<sup>85</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

worthy of protection. This veil of privacy around the home keeps women in violent relationships unsafe and vulnerable, rather than protecting them as intended.<sup>86</sup>

Because society views domestic violence as a private matter, many victims who do break the barriers of the private sphere, receive limited responses from organs of state that are meant to assist them - regardless of the legislation in place enforcing them to fulfil such duties. The limited involvement of the state is rooted in liberal theory, which speaks of the state's role to protect people while guaranteeing maximum freedom from state interference.<sup>87</sup> The right to privacy against state interference is much-desired. However, it is also an instrument in the hands of the perpetrator(s) at the expense of the victim(s).<sup>88</sup> If domestic violence is seen as a family affair, not to be interfered with from organs of state,<sup>89</sup> women will be afraid to approach courts and engage with the legal system due to negative responses they receive for making a private matter, public.<sup>90</sup> Furthermore, victims have reported that their first line of defence, in other words the police, has often been especially harmful. Police officers remain convinced that the DVA is being abused. From the outset, this engagement with police officials sets a negative and uneasy tone for many victims of domestic abuse.<sup>91</sup> Engagement with police officials has essentially become a mechanical procedure - not one of meaningful engagement. Considering the consequences that victims face, one would expect at the very least for the police officials to engage meaningfully and one a case-by-case basis with the victims.

In light of all the events that have taken place in the last couple of months in South Africa,<sup>92</sup> there has been a public outcry for help. Although the government has been

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<sup>86</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1262.

<sup>87</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1259.

<sup>88</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 105.

<sup>89</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 105.

<sup>90</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1277.

<sup>91</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 219.

<sup>92</sup> For more information on the events which occurred over the last couple of months and which motivated the #AmINext social media movement, see C Maphanga *Wits students join countrywide*

more responsive than usual, it is simply because it cannot afford to look away this time. Unfortunately, such a response is too late for many. Government has now made promises to tackle gender-based violence head-on by allocating additional funding to campaigns against gender-based violence.<sup>93</sup> However, Michael Sachs, Adjunct Professor at Wits University's Southern Centre for Inequality Studies, correctly argues that budget constraints are not necessarily something to be too concerned about.<sup>94</sup> The problem at large remains how society deals with gender-based violence and therefore, how police officials deal with domestic violence. He argues that instead of allocating resources to improve technology around issues of gender-based violence, the issue of training police officials to be more gender-sensitive could be more cost-effective and useful in other respects as well. Such training would not require much funding. It may, however, require a completely different outlook on how to deal with such issues, which is challenging, but not impossible because of budget constraints.

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Drawing from the judgment in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*<sup>96</sup> ('*Occupiers of 51 Olivia Road*'), meaningful and sensitive engagement has the potential to contribute towards an increased understanding and sympathetic care if parties are willing to participate in the process.<sup>97</sup> Officials who are required to assist victims should at the

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*march against gender-based violence* (2019) available online at <https://www.news24.com/SouthAfrica/News/wits-students-join-country-wide-march-against-gender-based-violence-20190909> (accessed 6 October 2019), as well as R Bonorchis *Woman murdered every three hours in South Africa stokes protests* (2019) available online at <https://www.moneyweb.co.za/news-fast-news/woman-murdered-every-three-hours-in-south-africa-stokes-protests/> (accessed 6 October 2019).

<sup>93</sup> T Tshwane *Can government fund measures to tackle gender-based violence?* (2019) available online at <https://www.moneyweb.co.za/news/south-africa/can-government-fund-measures-to-tackle-gender-based-violence/> (accessed 13 October 2019).

<sup>94</sup> However, the allocation of funds to shelters for women fleeing from abuse could be beneficial (and will be discussed at length below) and in this instance, additional funds are necessary.

<sup>95</sup> T Tshwane *Can government fund measures to tackle gender-based violence?* (2019) available online at <https://www.moneyweb.co.za/news/south-africa/can-government-fund-measures-to-tackle-gender-based-violence/> (accessed 13 October 2019).

<sup>96</sup> 2008 (3) SA 208 (CC).

<sup>97</sup> *Occupiers of 51 Olivia Road* par 15.

very least consider what the consequences for the victim may be, whether they could assist in mitigating those dreadful consequences, whether it is possible to provide a space of safety for an interim period, whether they have any obligations towards the victims and how they will fulfil these obligations.<sup>98</sup> Furthermore, as much as victims are reluctant to engage with these persons legal obliged to assist them (due to the trauma they have endured/are enduring), these officials cannot simply walk away. There must be a reasonable and considerate effort on their part to understand the victim's reluctance and to engage and assist meaningfully and sensitively.<sup>99</sup> The parties to the engagement will maintain the partnership only "if their concerns and limitations are appreciated as legitimate and real".<sup>100</sup>

In a research project conducted by Lilian Artz and Dee Smythe, 600 application orders from three different jurisdictional magistrates were analysed alongside 60 in-depth interviews conducted with clerks, police officers, magistrates and prosecutors. I reflect on the responses from the organs of state, how they respond to domestic violence, and why they respond in such a manner. As mentioned, the victim's first line of defence, namely police officials, are sceptical of the use of the DVA by victims.<sup>101</sup> Among the police officials interviewed, it was stated that it was demotivating to deal with a case of domestic violence because the applicants would repeatedly withdraw their complaints.<sup>102</sup> Understandably, the constant withdrawal of complaints could be frustrating because police work is in many respects results-orientated.<sup>103</sup> However,

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<sup>98</sup> *Occupiers of 51 Olivia Road* par 16 of the judgment considers objectives of engagement in the context of a city who wishes to evict people who may, thereafter, be rendered homeless. I have accordingly adjusted these objectives to find application in cases where victims of domestic abuse seek assistance from organs of state, including a police officer and what the objectives of engagement should be in these circumstances.

<sup>99</sup> *Occupiers of 51 Olivia Road* par 15.

<sup>100</sup> G Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) *Stellenbosch Law Review* 742—758 755.

<sup>101</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 219.

<sup>102</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 220.

<sup>103</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 220.

there is a lack of understanding of why many victims withdraw complaints, and as a result, a lack of sensitivity exists.. Some police officials do not understand the social and economic context within which the withdrawals occur.<sup>104</sup> Most police officials are not adequately equipped to deal with interpersonal relations and find it difficult to interfere in a person's personal, intimate, private part of their life.<sup>105</sup> The way the notions of public and private spheres are understood influences certain service responses.<sup>106</sup> Unfortunately, there is still the view that domestic violence is a family matter and that police interference will not resolve that family matter which falls within the private sphere.<sup>107</sup> Once again, the private sphere is being protected and not the privacy of the individual.

An additional factor that makes it difficult for police to deal with interpersonal relations is the “strongly masculinist institutional culture of the SAPS” which holds particular biased views about women's complicity.<sup>108</sup> On this basis, even the erstwhile National Commissioner of Police of 2001, General J.S. Selebi, argued that domestic violence complaints could not be policed.<sup>109</sup> The erstwhile National Commissioner of Police admitted that many of the members of the SAPS were involved in domestic violence themselves.<sup>110</sup> The social discourse that exists surrounding domestic violence is

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<sup>104</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 222. Withdrawal of complaints by victims occurs in the primary stage of complaint and extends to secondary and tertiary stages. For instance, protection orders may be withdrawn, or women may not appear on their scheduled court date. It is thus difficult for magistrates to continue with the finalisation of protection orders. However, several factors affect the applicant's non-appearance, including coercion, duress, threats, lack of money and transport or inability to leave work.

<sup>105</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 220.

<sup>106</sup> SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 4—15 5.

<sup>107</sup> L Artz 'Policing the Domestic Violence Act: Teething troubles or system failure' (2001) 47 *Agenda: Empowering Women for Gender Equality* 4—13 10.

<sup>108</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 220.

<sup>109</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 221.

<sup>110</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 221.



strongly patriarchal making it harmful for women to seek help in these instances.<sup>111</sup> The explicit complicity by the SAPS in the subordination of women makes private matters, public matters. They are failing to comply with their legislative duties to serve and protect these victims. The DVA requires the National Commissioner of SAPS and the National Director of Prosecutions to issue national instructions and policy directives in terms of which its members, in other words the police, courts and magistrates, must comply with the execution of their functions.<sup>112</sup> The inconsistent application of the law by these organs of state serves as proof that no matter how progressive the legislation may be, it will remain a theoretical exercise if the persons involved lack the necessary skills to deal with these sensitive matters.<sup>113</sup> There is an apparent failure in contextualising domestic violence and understanding that it comes in many variations and is often not an isolated incident, but rather a repetitive and widespread matter.<sup>114</sup>

From this lack of understanding and proper assistance comes a lack of engagement by victims. This lack of engagement is cause for concern because it suggests that the system is ineffective. There are several reasons why victims choose not to engage in the system put in place to protect them.<sup>115</sup> However, instead of neglecting the lack of engagement, it should be questioned *why* there is a lack of engagement, besides the insensitivity experienced from authorities.<sup>116</sup> There is a connection between the lack of sensitivity and engagement offered from the public sphere to suffering individuals within their private lives. In other words, the personal lives of individuals are influenced

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<sup>111</sup> SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 5.

<sup>112</sup> Section 18(5)(a) and (b) of the DVA.

<sup>113</sup> L Artz 'Policing the Domestic Violence Act: Teething troubles or system failure' (2001) 47 *Agenda: Empowering Women for Gender Equality* 5.

<sup>114</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 222.

<sup>115</sup> Many victims are afraid to engage with the legal system because they fear that their abusers may escalate the violence, or because there is a lack of trust in the legal system, or because they believe that domestic violence should remain a private matter and they therefore do not welcome state intervention.

<sup>116</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1275.

by public life. However, there seems to be some light at the end of the tunnel due to the abovementioned public outcries. Article 5 of the declaration signed after the gender summit in November 2018, provides that existing laws and policies applicable to gender-based violence will be reviewed to ensure that they are more “victim-centred and responsive”.<sup>117</sup> It further declares that legislative gaps will be addressed without any delay. Article 13 is also essential because it declares that victims will not be subjected to “secondary victimisation”,<sup>118</sup> which often occurs when engaging with police officials.

Furthermore, although the DVA only addresses one aspect of the public when it comes to the protection of victims from domestic violence - state institutions; the public comprises of much larger aspects than merely state institutions. It consists of public spaces, which are filled up by friends, family, neighbours and even strangers who do not act in state capacity. The fact that the DVA only places its focus on one aspect of the public when it comes to responses and responsibilities to domestic violence is inadequate for eradicating domestic violence because social discourses that support the continuation of violence against women will be persistent and enduring across communities and will even infiltrate state institutions which have been put in place to protect these victims.<sup>119</sup> These social discourses privatise domestic violence and reinforce the patriarchal *status quo*.<sup>120</sup> Therefore Article 18 of the declaration declares that new social behaviour programmes will be introduced or strengthened in communities in order to address toxic “patriarchal values and norms and structural

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<sup>117</sup> Article 5 of the Presidential Summit Declaration against Gender-based Violence and Femicide (2018) available online at [https://www.gov.za/sites/default/files/gcis\\_document/201903/summit-declaration.pdf](https://www.gov.za/sites/default/files/gcis_document/201903/summit-declaration.pdf) (accessed 13 October 2019).

<sup>118</sup> Article 13 of the Presidential Summit Declaration against Gender-based Violence and Femicide (2018) available online at [https://www.gov.za/sites/default/files/gcis\\_document/201903/summit-declaration.pdf](https://www.gov.za/sites/default/files/gcis_document/201903/summit-declaration.pdf) (accessed 13 October 2019).

<sup>119</sup> SR Bassadien and T Hochfield ‘Across the public/private boundary: Contextualising domestic violence in South Africa’ (2005) 66 *Agenda: Empowering Women for Gender Equality* 8.

<sup>120</sup> SR Bassadien and T Hochfield ‘Across the public/private boundary: Contextualising domestic violence in South Africa’ (2005) 66 *Agenda: Empowering Women for Gender Equality* 8.

drivers of gender-based violence”.<sup>121</sup> Given these points, a deeper understanding of the public/private dichotomy will open the door to understanding domestic violence as not merely a private matter, but a systemic form of violence affecting private and public alike.<sup>122</sup>

### **3 5 Should I stay or should I go?**

#### **3 5 1 Should I stay?**

Why doesn't she just leave? This question is frequently asked in cases of domestic violence - as if victims hold the power of choice. This question unfairly suggests that battered women are in control of the violence they endure. It is a perverse way of suggesting that women are to blame for the battering. It suggests that she has a choice in preventing it. It trivialises the abuse and allows the state to avoid its duty to act.<sup>123</sup> With no assistance from law enforcement, it leaves women with two choices: endure the violence; or face the consequences of leaving the abusive household.

But why doesn't she just leave? The question should rather be whether she can support herself (and her children) if she chooses to leave.<sup>124</sup> Domestic violence involves a process of systemic depersonalisation. It is more than just physical abuse; it involves psychological battering in a manner that depersonalises the victim.<sup>125</sup> It

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<sup>121</sup> Article 18 of the Presidential Summit Declaration against Gender-based Violence and Femicide (2018) available online at [https://www.gov.za/sites/default/files/gcis\\_document/201903/summit-declaration.pdf](https://www.gov.za/sites/default/files/gcis_document/201903/summit-declaration.pdf) (accessed 13 October 2019).

<sup>122</sup> SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 5. Cultural and religious spheres also form part of the public sphere, and in many instances, culture and religion are effective tools in affirming and maintaining male authority.

<sup>123</sup> GP Mullins 'The battered woman and homelessness' (1994) 3 *Journal of Law and Policy* 238.

<sup>124</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 343—372 343.

<sup>125</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 430—439 431 provides that victims of domestic violence not only suffer physical injuries but

causes trauma and what makes this specific trauma significant is that it becomes a trauma-induced routine.<sup>126</sup> Not only does the trauma repeatedly occur in the victim's every-day lives to such an extent that it becomes normalised, but when victims decide to act against it, these efforts to seek redress often involve further traumatisation.<sup>127</sup> Nedelsky refers to Judith Herman, who explains that when post-traumatic stress disorder ('PTSD') was first defined, it was described as "outside the range of usual human experience." However, in terms of domestic violence, this description seems inaccurate since domestic violence is so prevalent in many women's lives that it hardly falls outside the range of her "usual human experience".<sup>128</sup> PTSD is a common diagnosis in women who suffer from domestic violence, and whereas survivors of war (who also commonly have PTSD) can escape their war, victims of domestic violence cannot escape theirs. The impact of such trauma shatters her sense of safety and security, and it instils her with constant fear – fear of further fear and fear of fear itself. Such fear not only immobilises the victim but can also completely take over the victim's life.<sup>129</sup> This fear threatens her potential for freedom to be an autonomous person.<sup>130</sup>

Domestic violence is largely about power and control, which is displayed through violence and coercion. Abusers achieve power and control by battering as well as by using economic, social and legal tools to bar the victim from escaping the abuse. Violence displayed in an intimate relationship to gain power and control usually increases in severity and frequency over time but reaches its peak once the victim attempts to leave.<sup>131</sup> The final decision of leaving may provoke the abuser to kill the victim, the children and even himself.<sup>132</sup> It therefore, seems clear why the victim would

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additionally face psychological and social consequences such as depression, post-traumatic stress disorder and even poverty and social isolation.

<sup>126</sup> J Nedelsky *Law's relations: a relational theory of self, autonomy, and law* (2011) 209.

<sup>127</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 24 — 33 31.

<sup>128</sup> J Nedelsky *Law's relations: a relational theory of self, autonomy, and law* (2011) 209.

<sup>129</sup> J Nedelsky *Law's relations: a relational theory of self, autonomy, and law* (2011) 210.

<sup>130</sup> J Nedelsky *Law's relations: a relational theory of self, autonomy, and law* (2011) 211.

<sup>131</sup> GP Mullins 'The battered woman and homelessness' (1994) 3 *Journal of Law and Policy* 242.

<sup>132</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 346.

attempt to endure the abuse, rather than escaping from it.<sup>133</sup> Many women are forced to tolerate the abuse because they have no other choice.<sup>134</sup> In addition to the physical and psychological effects that inform the victim's decision to stay, economic control by the partner is a further determining factor as to why victims rather stay in abusive households.<sup>135</sup> Where women generally have less access to economic opportunities, they have fewer exit options. This economic control places women in a position where staying in an abusive relationship is economically preferable.<sup>136</sup> If women in these abusive relationships choose to leave, they run the genuine risk of homelessness. Domestic violence causes homelessness for several women. It is, therefore, a gendered cause of homelessness because the perpetrators (who are primarily men) rarely get removed from their home. Whereas victims, who are largely women and who generally-speaking have less economic resources, are forced to leave the home for their safety.<sup>137</sup>

To a large extent, women have less economic resources when compared to men.<sup>138</sup> This limitation is due to several factors, which runs both within the public and private spheres of life. The fact that women have less economic power than men in the public sphere, relates to their vulnerability to violence in the private sphere.<sup>139</sup> Many women

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<sup>133</sup> GP Mullins 'The battered woman and homelessness' (1994) 3 *Journal of Law and Policy* 243 and CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 431 reads as follows: "separation from the abuser is a known "trigger" for severe violence and is a risk factor for intimate partner femicide (murder of women); this means that just at the time she is seeking safety through relocation and separation, she is most at risk from the abuser."

<sup>134</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 346.

<sup>135</sup> GP Mullins 'The battered woman and homelessness' (1994) 3 *Journal of Law and Policy* 243.

<sup>136</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 25.

<sup>137</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 102.

<sup>138</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 25 and KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1281.

<sup>139</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1281.

in relationships of domestic violence, often do not leave their abusive partners due to the economic restraints they may face if they do.<sup>140</sup> Many women cannot afford separation: a victim of domestic violence faces a 50% chance that her standard of living will drop below the poverty line if she decides to leave the abuser.<sup>141</sup> It is often found that if women take this economic risk to escape, she once again falls victim to the lack of economic resources at her disposal. Further, these abused women often choose not to engage in the legal systems put in place to protect them because they cannot afford or prioritise such engagement over more immediate needs such as food, employment and childcare.<sup>142</sup> Moreover, they run the risk of further traumatisation within the legal system, which is meant to protect them.<sup>143</sup> The risk of reporting an abusive partner to authorities is too high if it may impact his employment opportunities, especially if he is the sole breadwinner.<sup>144</sup> Where there is already a shortage of jobs and tenure, welfare systems are often under-resourced, leaving these women with some tough decisions to make. Therefore, women often choose to stay in the relationship not just for herself but often for the sake of her children.<sup>145</sup>

This leads to the following question: why doesn't she find a job? This question caused me to evaluate the institutionalised economic vulnerability of women in society. Traditional gender roles enthrone women on matters such as family and marriage, which affect the choices they make regarding their careers; which in turn, results in the differentiation of occupations by sex, and even in the event where a woman enters a male-dominated occupation, she faces different challenges such as discrimination

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<sup>140</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 25

<sup>141</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1281.

<sup>142</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1281.

<sup>143</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 31.

<sup>144</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1281.

<sup>145</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 26.

within the workplace on the basis of sex, whether it be explicit or implicit.<sup>146</sup> Despite the gendered pay-gap that already exists (which contributes to the dependence of women on their male counterparts), many employers additionally use subtle tactics to prevent women from receiving equal job opportunities. For example, some insurance companies have denied women health, life or disability coverage to battered women.<sup>147</sup> Additionally, whether consciously or subconsciously, her work-life affects her home-life.<sup>148</sup> Many women have difficulty balancing the needs of their workplace and the needs of their children.<sup>149</sup> Based on general standards of discrimination in the workplace, and limitations on your choice of occupation based on sex (which occurs due to several factors such as work-life, having adverse effects on family-life, or because of fear of discrimination in the workplace or just retreating from the workplace because of discrimination) women often enter a marriage with lower salaries, and the traditional family model where the wife is expected to handle a larger portion of the homely duties, makes rational and economic sense.<sup>150</sup> Since she makes less money than her male counterpart, his career takes priority, and she takes on more duties within the home. Her lower salary gives her less bargaining power to challenge the traditional division of household duties, which in turn affects the amount of time and

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<sup>146</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1284 reads as follows: "discrimination in the workplace does not make it an attractive place for many women to be. They are demeaned and sexually harassed, and they are represented in token numbers in positions of influence that could help shape the workplace and political policies that would make things more equal."

<sup>147</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 346.

<sup>148</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1282.

<sup>149</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1287. Also see <sup>149</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 431 which states that especially in cases of domestic violence, a woman's ability to work is impaired because they not only have to deal with their own mental and physical health needs but also the mental and physical health needs of their children resulting from the abuse.

<sup>150</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1282—1283.

energy she may have left to focus on her career.<sup>151</sup> Unfortunately, in most instances, the possession of resources that each partner holds as valued by external sources affects the distribution of power within the home. Thus, the possession of money reinforces the asymmetric power relation between them within and out of the home. In other words, the limited access that women have in the public sphere can decrease their economic and political power in the private sphere making them more vulnerable within the home. Therefore, it is often not a choice of staying or leaving. This abovementioned analysis underscores how economic dependence comes about and also how it makes it challenging for women in abusive relationships to leave (should they choose to do so) especially in instances where job opportunities are scarce, and livelihoods are fragile.<sup>152</sup> Low socio-economic status can be associated with domestic violence. People with low earning incomes are often faced with stress and long working hours to make ends meet. This source of stress becomes a source of domestic violence.<sup>153</sup>

Past exposure to domestic violence can also be linked to future unemployment and poverty of many women.<sup>154</sup> Even in the case of employed women, continued employment may become challenging since dealing with the consequences of domestic violence can lead to poor work attendance and work performance.<sup>155</sup>

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<sup>151</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1284. Moreover, with this view in mind, her worth to the household is purely measured based on what she contributes financially and her other qualities are overlooked. Her husband may, for instance, generate a much larger income, which allows him to believe that he has more bargaining power. I argue that this in itself is a form of abuse because it is a means of quantifying people based on their ability to generate income, making it easier to objectify people. People are not seen as worthy so long as they cannot contribute financially; their worth is based on something inanimate – money, not human qualities.

<sup>152</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 31

<sup>153</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 348.

<sup>154</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 431.

<sup>155</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 3



Moreover, the abuser will likely affect her work environment by stalking or harassing the victim in her workplace, affecting her ability to maintain employment.<sup>156</sup> It seems more likely that women who have more economic freedom will apply for orders pertaining to domestic violence compared to the many women who lack the resources.<sup>157</sup> Even so, landlords often deny housing to women who are economically empowered but fleeing from domestic violence. They have the concern that the abuser poses a potential risk to other tenants and may damage property.<sup>158</sup> Lastly, if she manages to gain more economic power than her male counterpart, the so-called imbalance may cause him to reassert his dominance through further abuse.<sup>159</sup> Batterers know that money holds power and will withhold financial resources to maintain their power. When that no longer becomes an option, they resort to other forms of abuse.<sup>160</sup> This cycle of power relations pervades both family and workplace, and the inequalities of each reinforce those that already exist in the other.<sup>161</sup>

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<sup>156</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 431. The DVA provides that domestic violence also means harassment. Harassment means engaging in a pattern of conduct that induces the fear of harm to a complainant, including repeatedly watching, or loitering outside or near the building or place where the complainant resides or works. According to the Protection from Harassment Act 17 of 2011, harassment similarly means directly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires reasonable belief that harm may be caused to the complainant or related person by unreasonably following, watching, pursuing or accosting of the complainant or related person, or loitering outside or near the building or place where the complainant or related person resides or works, carries on business, studies or happens to be. Both of these definitions include the workplace.

<sup>157</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 205.

<sup>158</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 431.

<sup>159</sup> OW Barnett 'Why battered women do not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma Violence and Abuse* 347.

<sup>160</sup> L Artz and D Smythe 'Money matters: Structural problems with implementing the DVA' (2005) 66 *Agenda: Empowering Women for Gender Equity* 27.

<sup>161</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1284.

### 3 5 2 Should I go?

The aforementioned economic challenges may leave women homeless or faced with a situation of inadequate housing if they decide to leave the abusive home.<sup>162</sup> If she decides to leave home cannot take the 'physical site' with her, and she also leaves behind the 'intangible elements' of the home, which forms part of her identity.<sup>163</sup> Shelters for battered women are, therefore critical and could provide women with a way out of abusive relationships.<sup>164</sup> However, the result of homelessness goes hand-in-hand with the shortage of shelters. Currently, the Department of Social Development has only set up 84 shelters nationally.<sup>165</sup> In addition to the lack of shelters, the lack of funding results in the inadequacy of these shelters, which cannot effectively provide the necessary services that victims need.<sup>166</sup> Many of these shelters have inadequate infrastructures and facilities because of limited funding for

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<sup>162</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 123.

<sup>163</sup> G Muller 'On considering alternative accommodation and the rights and needs of vulnerable people' (2014) 30 *SAJHR* 41—62 44.

<sup>164</sup> J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no. 1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018).

<sup>165</sup> J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no.1 — 12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018). In 2017 the Department of Social Development reported that 84 shelters were set-up nationally. However, the majority of these shelters have been established and are run by non-profit organisations. When the Department of Social Services does provide financial support, it is often inadequate. Where the Department does assist in funding shelters, it comes from the Restorative Services programme budget, which makes provision for crime prevention, victim empowerment and substance abuse prevention and rehabilitation. Expenditure on shelter services only forms one component of this budget. In total, only 1% of the total Department of Social Services budget on a national level has been dedicated to the social development budget. Therefore, in terms of shelter services to victims of domestic abuse, the state is failing in its duty to provide adequate support, and it has resulted in the situation where most shelters struggle financially and have faced closure.

<sup>166</sup> J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no.1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018).

improvements.<sup>167</sup> Furthermore, shelters are never a permanent solution. Due to the lack of space and finances, most shelters can only accommodate women and children for a period of 3–6 months at a time and only provide for an extended stay in exceptional circumstances.<sup>168</sup> Additionally, most shelters cannot provide second-stage housing.<sup>169</sup> Moreover, some shelters have certain admission criteria – for instance, some shelters may exclude women because they have male children over a certain age.<sup>170</sup> In these instances, women face the risk of being placed in general

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<sup>167</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 434. Also see J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no.1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018) which states that most shelters operate in precarious situations with funding being an ongoing struggle. Funding remains the biggest challenge facing shelters. The shelters are either faced with closure or the reduction of services that it initially provided. Majority of the shelter must source additional funding to make up for the shortfall that exists. The state is failing in its duty to provide adequate shelter, especially in terms of structural facets and safety and security of the residents. Regarding the limited funding, the women in presidency Committee Report on the Department of Women and Commission for Gender Equality Budget, held on 8 May 2018 provided the following findings: that the Department of Women in Presidency had still received the smallest allocation when comparing all votes; the Department unnecessarily commissioned service providers to review the inter-ministerial committee on the Integrated Plan of Action to address violence and that this had additional costs involved; that the Department was reporting a vacancy rate of 10% although it had more than enough employees and which could've been allocated more appropriately to women in need of the funds and resources - as read on Memela T *Parliamentary monitoring group department of women and commission for gender equality budget” Committee report* (2018) available online <https://pmg.org.za/committee-meeting/26289/> (accessed 28/05/2019).

<sup>168</sup> J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no. 1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018).

<sup>169</sup> Second-stage housing is safe and affordable housing that enables women and their children, who have experienced family violence, to work towards personal and economic independence and a future free of violence. J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no. 1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018).

<sup>170</sup> J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no. 1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 29/10/2018). This can be

shelters (which are more readily available), with their children alongside men who could enhance the possibility of abuse again.<sup>171</sup> Additionally, these shelters may not provide the same safety measures as shelters for domestic violence. Furthermore, staff are generally not equipped to deal with the results of domestic violence.<sup>172</sup> Even in the cases where shelters allow admission, women and children are often turned away because of the lack of space.<sup>173</sup> These women are completely deprived of their autonomy because they are unable to make any choices. They are completely reliant on authorities and the organisations funding the shelters because the government lacks funds in this area.<sup>174</sup> The lack of autonomy (in the sense of being able to make your own choices) becomes very dangerous for these women seeking assistance. When shelters turn these women away (which is often their last resort), they run the risk of homelessness or facing the horrid reality of returning to the source of abuse.<sup>175</sup>

Many shelters for abused women provide certain development programs to emancipate women and to remove the responsibility that the state holds in protecting these women. Much like the City of Johannesburg in the case of *Dladla v City of*

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confirmed as was the case in *Dladla*. Although this was not a shelter for women and children escaping from domestic violence, it was a shelter, nonetheless, which separated children from their caregiver depending on their age. Boys and girls under the age of 16 were forced to live with a female caregiver. Once they reached the age of 16 years, boys were forced to live in the male dormitory and girls would remain in the female dormitory. This perpetuated gender stereotypes and has no regard for family life outside of heteronormative ideals.

<sup>171</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 432.

<sup>172</sup> CK Baker *et al.* 'Domestic violence, housing instability, and homelessness: A review of housing policies and program practices for meeting the needs of survivors' (2010) 15 *Aggression and Violent Behavior* 432.

<sup>173</sup> J Thorpe *South Africa's domestic violence shelters forced to turn women away* (2017) available online at <https://www.newsdeeply.com/womenandgirls/community/2017/05/18/south-africas-domestic-violence-shelters-forced-to-turn-women-away> (accessed 29/10/2018).

<sup>174</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 124.

<sup>175</sup> J Thorpe *South Africa's domestic violence shelters forced to turn women away* (2017) available online at <https://www.newsdeeply.com/womenandgirls/community/2017/05/18/south-africas-domestic-violence-shelters-forced-to-turn-women-away> (accessed 29/10/2018).

Johannesburg,<sup>176</sup> (*Dladla*) the aim is for victims to “take responsibility for their own lives” and to “discourage a dependency relationship” with the city.<sup>177</sup> The Department of Social Development has 84 recorded shelters for abused women and their children.<sup>178</sup> Each shelter has its admission policies and certain restrictions that apply. Firstly, this idea that welfare should only be afforded to “deserving” candidates creates a distorted power relationship of dependency that undermines autonomy.<sup>179</sup> “People in need of housing are not, and must not be regarded as a disempowered mass.”<sup>180</sup> The state should not be in a position where it dictates who is morally deserving and who is not. This only creates a rhetoric of *them and us*,<sup>181</sup> which repeatedly excludes *them* because *they* are not considered worthy because *they* are different from what *we* accept as the social norm. *They* are considered to be a burden to the community and undeserving of any public assistance because there is a belief that they have placed themselves in these dire positions<sup>182</sup> - as if they chose to give up their own autonomy. Therefore, the only way to ensure that those “morally” and “socially” deserving/acceptable attain public assistance, is to place these limitations on victims in other words only providing shelters for women who have physically been abused, or only aiding where it shows that she is willing and able to contribute to society economically, or implementing “lock-out” and “family separation” rules as in the case of *Dladla*.<sup>183</sup> There is a strong belief that exists in the patterns of society that some

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<sup>176</sup> 2018 (2) SA 327 (CC).

<sup>177</sup> *Dladla* par 6.

<sup>178</sup> J Watson and C Lopes (2017) *Shelter services to domestic violence victims – policy approaches to strengthening state responses* (policy brief no. 1—12) available online at [https://za.boell.org/sites/default/files/policy\\_brief\\_final\\_02\\_web.pdf](https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf) (accessed 28/05/2019). The Department for Social Development’s funding model varies in every province depending on the needs within each province. However, there is a critical need to review this model as it is not able to ensure uniformity and equality across the provinces.

<sup>179</sup> J Nedelsky *Law’s relations: a relational theory of self, autonomy, and law* (2011) 154.

<sup>180</sup> *Occupiers of 51 Olivia Road* par 20.

<sup>181</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1499—1547 1508.

<sup>182</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1505.

<sup>183</sup> *Dladla* par 22 provides that the purpose of the lock-out rule was to “ensure the safety and protection of the occupiers” and “to discourage an attitude of dependence”. The lock-out rule completely disregarded certain circumstances of the occupiers in that some occupiers had to work night shifts. It

people in need are deserving, where others are not.<sup>184</sup> Instead, the state should train officials accordingly to treat every situation sensitively and on a case-by-case basis to ensure the safety of the victims regardless of their background and preconceived notions that may exist.<sup>185</sup>

In addition to admission policies and restrictions that apply to each shelter, each shelter has its own specified development programs. Some of these development programs include skills development, empowerment, life skill programmes and social skills. Of course, these skills are beneficial and necessary in many instances but, to promote them in order to discourage the dependency relationship with the state is perhaps not sending the best message. This message disguises another set of unequal power relations, and this time not between the victim and perpetrator, but rather between the victim and the state from a welfare perspective. In this instance, the state carries the power through deciding who may receive its welfare and for how long; welfare recipients must, in turn, be grateful that they are the chosen ones. This deprives the victim of a true sense of autonomy because her choices depend on the decisions made by the state. Autonomy should not be defined by independence. It should be made possible, and defined by constructive relationships and meaningful engagement.<sup>186</sup> Meaningful engagement could result in the democratic partnership between state authorities and victims of abuse who need shelters.<sup>187</sup> Dependence and interdependence are intrinsic parts of life, and therefore they need to be structured in

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also made it impossible to provide an environment of independence. It was as if the occupiers were being treated like naughty children disobeying their curfew. Therefore, I argue that the City contradicts its goal aimed at discouraging dependence, when it was in fact creating a dependency relationship. It was as if the occupiers were being treated as undeserving of the City's occupation because they were poor, and because they were poor, they had to take what they could get. Instead of emancipating the occupiers, the City further deprived them of their dignity and their autonomy.

<sup>184</sup> T Ross 'The rhetoric of poverty: Their immorality, our helplessness' (1991) 79 *Georgetown LJ* 1499—1547 1505.

<sup>185</sup> G Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) *Stellenbosch Law Review* 756.

<sup>186</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 152.

<sup>187</sup> G Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) *Stellenbosch Law Review* 745.

such a way that they enhance, rather than undermine autonomy.<sup>188</sup> The state indeed has an aim to emancipate the victims and to provide them with a new sense of autonomy, however, the sense of autonomy that they are promoting stands at the core of liberal theory and carries with it an individualistic characteristic of liberalism.<sup>189</sup> When a democratic society assumes collective responsibility for individual social welfare, it has to implement this in a manner that enhances the person's sense of their competence, control and integrity. Only once a long-term relationship of trust and reliability has been established between the state and victims of abuse, will victims be able to rise above the false perception of "helpless, passive and weak recipients of government largesse" and will they be able to feel emancipated with a true sense of autonomy.<sup>190</sup> However, the traditional individualistic understanding of autonomy stands in the way of achieving this since it sets individual autonomy in direct opposition with collective power.<sup>191</sup> If autonomy is understood in such an opposing manner, it gives people a false choice between either conceding to collective control or preserving their individual autonomy. In other words, the more the collective provides for the material needs of a person, the less autonomy that person has once he/she has received those material needs from the collective - because dependency equates to lack of autonomy.<sup>192</sup> This opposing understanding of autonomy excludes a whole range of social arrangements and places the collective as a complete threat to autonomy.<sup>193</sup> The view that the collective threatens autonomy is the basis of the

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<sup>188</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 152.

<sup>189</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7—36 7.

<sup>190</sup> G Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) *Stellenbosch Law Review* 757.

<sup>191</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 13.

<sup>192</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 14. In *Dladla* the City denied the applicants certain rights with the intention of "[facilitating] the transition of evictees from a state of homelessness to a position of independence" (par 11). In other words, through receiving the welfare from the collective, the applicants were denied a sense of autonomy and were subject to the rule of the city in this case which applied many restrictions and rules to living space provided (not by choice).

<sup>193</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 14.

private/public divide. This serves as a reason for non-interference in the private realm, where the violence occurs, and where victims of domestic violence want to escape from. There is an assumption that these relationships are incompatible with autonomy.<sup>194</sup> However, the collective is constitutive of the individual and thus can be a source of their autonomy. Therefore, I argue that we should rather view autonomy in terms of relations which will develop and flourish.<sup>195</sup> In this sense, autonomy can be achieved within the context of dependence. In the case of women in abusive relationships, and what the state has to offer in terms of shelters, it remains a reality that these women, as welfare recipients, are dependent on the state. Even in these instances, autonomy should not be denied. The nature of her relationship should not be dictated by the power that the state holds. The relationship that she has with the state should be one that fosters her autonomy, and it should not be like the relationship from which she is fleeing.<sup>196</sup>

### **3 5 3 Should he go?**

Why does the perpetrator not just leave the household? Surely, the law should criminalise the perpetrator by removing the him from the scene of the crime and not the victim. In cases of housebreaking, a crime ordinarily committed between unrelated parties, the victim remains in their home, and the perpetrator is removed from the scene of the crime. Why is this so different when dealing with partners who have more intimate relations?

Section 4 of the DVA provides that a complainant may apply for a protection order and section 5 deals with the considerations for the application and issuing of an interim protection order.<sup>197</sup> Section 7 then deals with the court's power in respect of protection orders and provides that the court may prohibit the respondent from entering the shared residence of the complainant and respondent; prohibit the respondent from

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<sup>194</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 154.

<sup>195</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 21.

<sup>196</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 27—28.

<sup>197</sup> Sections 4 and 5 of the DVA.



entering a specific part of the shared residence or prohibit the respondent from entering the complainant's residence.<sup>198</sup> In the case of prohibiting the respondent from entering the shared residence, the court may additionally impose certain obligations as to the discharge of rent or mortgage payments, taking into consideration the financial needs and resources of the two opposing parties.<sup>199</sup> These provisions provide effective measures to protect women from abuse and potential homelessness. However, prohibiting the perpetrator from entering the shared residence based on an interim protection order seems to be a difficult task for magistrates. Many magistrates believe that such removal violates the perpetrator's due process rights.<sup>200</sup>

Magistrates face the difficult task of balancing the interests of both parties - considering the applicant's safety and the respondent's financial difficulties, which ordinarily results in removing him from the household.<sup>201</sup> However, they often do not consider that keeping the respondent in the household may also cause financial difficulties for the applicant. If she decides to leave the household, she runs the risk of suffering financially (as discussed above) and even more so if she leaves with her children. However, it remains challenging for magistrates to remove the respondent because even though the respondent's removal is temporary, such removal amounts to *de facto* eviction. This is a cause of concern for many magistrates which is why they are reluctant to grant such orders. Magistrates remain reluctant to physically remove the respondent from a place of which he is legally entitled to through either ownership or tenancy, regardless of their powers to do so in terms of the DVA. .<sup>202</sup> Since such removal results in serious material consequences, it is uncommon for magistrates to grant such orders. Magistrates have argued that they will only grant such an order if the respondent is present at the hearing to argue their side of the case because many magistrates fear that such an order violates the perpetrator's right to

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<sup>198</sup> Section 7(1) (c)—(e) of the DVA.

<sup>199</sup> Section 7(3) of the DVA.

<sup>200</sup> GP Mullins 'The battered woman and homelessness' (1994) 3 *Journal of Law and Policy* 240.

<sup>200</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 247.

<sup>201</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 216.

<sup>202</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 216.

due process.<sup>203</sup> Their reluctance presents cause for concern because in Artz and Smythe's research, in only a third of the cases both parties were present on the return date.<sup>204</sup> However, the DVA does not require that the respondent must be heard before imposing such a court order. Section 7(1) merely states that "the court *may*, by means of a protection order referred to in section 5 or 6, prohibit the respondent from" entering the shared residence, or a specified part of the shared residence, or the complainant's residence. It does not state that such an order can only be imposed once the parties have returned on the specified return date.<sup>205</sup> In fact section 6(1) provides that in the absence of the respondent on a scheduled return date as contemplated in section 5(3) or (4),<sup>206</sup> the court may continue to issue a protection order if it is satisfied that: (a) proper service has been effected on the respondent; and (b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence.<sup>207</sup> Nevertheless, it seems to be the general practice that such an order is only made in the final protection order, with certain exceptions that apply, such as when the violence is of a serious nature, which ordinarily warrants immediate removal.<sup>208</sup> Not to mention that some judges may even refuse to implement such order

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<sup>203</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 216.

<sup>204</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 218.

<sup>205</sup> Section 7(1) (c)-(e) of the DVA.

<sup>206</sup> Section 5(3) of the DVA reads as follows:

- (a) An interim protection order must be served on the respondent in the prescribed manner and must call on the respondent to show cause on the return date specified in the order why a protection order should not be issued.
- (b) A copy of the application referred to in section 4(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order.

Section 5(4) reads as follows: "If the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued."

<sup>207</sup> Section 6(1) of the DVA.

<sup>208</sup> L Artz and D Smythe 'Bridges and barriers: A five year retrospective on the Domestic Violence Act' (2005) *Acta Juridica* 216.

because they still prescribe to the old maxim that “a man’s home is his castle,” and argue that if they evict the man, they nevertheless create homelessness.<sup>209</sup> This is a distorted view, especially based on the discussion above regarding the economic advantage men usually have. Men typically have more financial means at their disposal, and therefore, they will more readily find adequate alternative housing. Moreover, it is easier to find alternative housing for one person compared to several people (referring to the children that ordinarily accompany women.) Furthermore, it is a better solution for the children to remain in the household than being uprooted.<sup>210</sup>

Although it is generally accepted that women should leave the abusive household, it seems inappropriate to punish her by inevitably forcing her to leave while the perpetrator remains comfortably in the home.<sup>211</sup> In a like manner, if the perpetrator is afforded the right to continue occupying the shared residence and the victim stays, it may result in depriving her rights in this respect, thereby exacerbating her vulnerability.<sup>212</sup>

Once again, there is a reluctance to interfere in the matters of the private sphere. As Minister Nkoana-Mashabane stated in her media statement on 3 September 2019, “relationships should not result in death, they should be loving and supportive.” I argue

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<sup>209</sup> GP Mullins ‘The battered woman and homelessness’ (1994) 3 *Journal of Law and Policy* 240.

<sup>209</sup> KD Bailey ‘Criminal law lost in translation: Domestic violence, “the personal is political,” and the criminal justice system’ (2010) 100 *The Journal of Criminal Law & Criminology* 247.

<sup>210</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 108. Also see G Muller ‘On considering alternative accommodation and the rights and needs of vulnerable people’ (2014) 30 *SAJHR* 50 — 54 in which he argues that children are more vulnerable since they are more susceptible to external influences. Children, therefore, require constant care and protection or suitable alternative care, especially when removed from the environment in which they find comfort. Where children are forced to leave home as a result of abuse, especially in circumstances where their mother cannot take care of them financially, the children will run the risk of living in overcrowded households with little to no electricity, sanitation or water available. Such living conditions are certainly not in the best interests of the child per section 28 of the constitution. Furthermore, children are more vulnerable to relocations since they may have to enrol in new schools, they may have to partake in unfamiliar activities in an unfamiliar environment, and therefore I argue that every effort should be made to keep children where they are comfortable and that they should not be uprooted.

<sup>211</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 109.

<sup>212</sup> L Artz and D Smythe ‘Bridges and barriers: A five year retrospective on the Domestic Violence Act’ (2005) *Acta Juridica* 216.

that there is thus a need to restructure relations in order to enhance autonomy within necessary relations. It is clear to see that merely implementing legislation and certain policies to prevent abuse and to protect victims, has not been beneficial because there remains a lack of reform in restructuring relations that deal with these issues. As Minister Nkoana-Mashabane further stated, “we need stronger interventions if women are to enjoy the fruits of democracy the same way majority of men do.”<sup>213</sup> Thus, I argue that there should be a conception of rights that consistently reflects on the structures of relationships.<sup>214</sup>

### 3 6 Conclusion

Home is a physical location as well as an emotional construct. What makes home so significant is that it carries additional intangible factors such as emotional, psychological, social and cultural factors. Therefore, being home should mean being safe, secure and settled in one’s identity and the relations that form it.<sup>215</sup> Young refers to four normative values of the home that stand as regulative ideals, namely safety, individuation, privacy and preservation.<sup>216</sup> However, domestic violence affects these values to such an extent that it negates them completely.

Domestic violence affects the home in such a manner that it produces a place of unequal relations expressed through violence. Even a space meant for safety and security becomes a site for fear and threat of violence. Safety is a place where one can retreat from the dangers of collective life,<sup>217</sup> but domestic violence threatens this. Domestic violence takes away from the regulative ideal of a safe home, and therefore, a need exists to re-affirm the value of safety and home as a safe space. If home is meant to be a safe space, domestic violence puts the very meaning of home to shame.

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<sup>213</sup> The Department of Women, Youth and Persons with Disabilities media statement *The war on women continues* (2019) available online at <http://www.women.gov.za/images/20190903-War-on-Women-Continues-V2-2.pdf> (accessed 17 September 2019).

<sup>214</sup> J Nedelsky *Law’s relations: a relational theory of self, autonomy, and the law* (2011) 200.

<sup>215</sup> L Fox *Conceptualising home - theories, laws and policies* (2007) 24 and 138.

<sup>216</sup> IM Young *On female body experience: “throwing like a girl” and other essays* (2005) 151—153.

<sup>217</sup> IM Young *On female body experience: “throwing like a girl” and other essays* (2005) 151.

Furthermore, privacy as a regulative ideal, which contributes to the meaning of home, is also threatened by domestic violence. Privacy is a value associated with identity and therefore, autonomy.<sup>218</sup> Therefore, any violation of the right to privacy equates to the violation of a person's autonomous identity. In practice, privacy is used as a tool to protect the abuser in the setting of domestic violence. In such an instance, the right to bodily integrity and decisional privacy to intimate relations are negatively affected.<sup>219</sup> Non-interference and over-protection of the private sphere from the public sphere leads to the complicity of violence against women within the home. Instead of protecting women as intended, this curtain from the private sphere places women in violent relationships in danger.<sup>220</sup>

If safety and privacy (and therefore by extension autonomy) are normative values of the home, home should ideally be a source of connection with others and a source of nurturing for the self.<sup>221</sup> However, domestic violence stands in the way of achieving this ideal and completely removes this choice of connection and self-growth. Domestic violence violates the right to home because concepts of peace, safety, security, privacy and dignity are entirely overlooked. Therefore, in order to protect the right to a home (and other constitutional rights), domestic violence needs to be eliminated.

The DVA was enacted in an attempt to combat domestic violence. I established that the DVA is very extensive and all-inclusive. The DVA has the aim to provide maximum protection from domestic abuse that the law can provide and to introduce measures, which seek to ensure that the relevant organs of state give full effect to the provisions of the DVA, thereby conveying the message that the state is committed to the elimination of domestic violence.<sup>222</sup> The DVA further realises that domestic violence can occur in a wide range of domestic relationships and that violence does not only equate to physical violence but has a broader definition.<sup>223</sup> However, South Africa remains one of the countries with the highest incidence of domestic violence

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<sup>218</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6<sup>th</sup> edition (2013) 299.

<sup>219</sup> A Weir 'Home and identity: In memory of Iris Marion Young' (2008) 23 *Wiley* 4—21 13.

<sup>220</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1262.

<sup>221</sup> A Weir 'Home and identity: In memory of Iris Marion Young' (2008) 23 *Wiley* 15—16.

<sup>222</sup> The Preamble of the DVA.

<sup>223</sup> Section 1 of the DVA.

worldwide.<sup>224</sup> I question why that is the case, especially since the DVA is so extensive. I, therefore, evaluate how relationships give rise to domestic violence, not only intimate relationships between the abuser and the victim but also broader relationships which could potentially lead to domestic violence. I further consider how the public/private divide contributes to the perpetuation of domestic violence.

Preconceived notions of the public and private spheres limit engagement in the private sphere. The public/private dichotomy creates a reluctance to interfere with domestic violence within the private sphere. There needs to be a change in this perception of domestic violence as only being a private matter with no effect on the public sphere. By not engaging and adequately regulating the issue of domestic violence, the state becomes complicit in its duty to prevent the subordination of women within their own home, which then makes it a public matter of the state not fulfilling its duties.<sup>225</sup> The problem with private but systemic violence is that the fear that is privately inflicted forms an essential part of the larger social system and it “challenges society at every level”.<sup>226</sup>

The relationship between the state and individual is problematic in the way that the state reacts to an incidence of domestic violence. For example, police engagement has become a cold and mechanical procedure where meaningful and sensitive engagement is required.<sup>227</sup> Organs of state should be mitigating the consequences women face when coming forward that she is suffering in an abusive relationship. Organs of state should not further aggravate these consequences. There is a reluctant relationship especially from the victim’s perspective. However, if the concerns of the victim were to be taken seriously and considered to be real and legitimate, the process of engagement and thus assistance from the state, may become a more satisfying process for both parties involved.<sup>228</sup>

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<sup>224</sup> R Furusa and C Limberg ‘Domestic Violence Act: Does it protect?’ (2015) *University of Cape Town Final Report* 1—11 2.

<sup>225</sup> KD Bailey ‘Criminal law lost in translation: Domestic violence, “the personal is political,” and the criminal justice system’ (2010) 100 *The Journal of Criminal Law & Criminology* 1255—1300 1261.

<sup>226</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

<sup>227</sup> *Occupiers of 51 Olivia Road* par 15.

<sup>228</sup> G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 755.

Additional socio-economic factors also make it challenging for victims to engage with organs of state and make it even more challenging to leave an abusive relationship. Where women generally have less access to economic opportunities, they have fewer exit options.<sup>229</sup> The fact that women have less economic power in public is connected to their vulnerability and inability to escape violence within the private sphere.<sup>230</sup> If women decide to escape the violence, they are entirely deprived of their autonomy in the sense that they are totally reliant on authorities and organisations.<sup>231</sup> As established previously, a perverse power relationship exists between the state and victim where welfare options are often only available to those “worthy” of it. It induces further distorted power relationships - this time not between the abuser and the victim - between the victim and the state, meant to assist the victim. Therefore, I argue that the state should not be in the position to determine who is morally deserving and who is not because once again, this generates another abusive relationship. Instead, the state should engage meaningfully, sensitively and on a case-by-case basis in order to ensure the safety of the victim and not further vulnerability.<sup>232</sup>

I have argued that dependence and interdependence are intrinsic parts of life and relationships should be structured in a symbiotic manner which enhances the autonomy of both parties involved and which does not undermine that autonomy any further. The collective is constitutive of the individual and can, therefore, be a source of the individual’s autonomy, which allows us to view autonomy in terms of relations.<sup>233</sup> Therefore, my final chapter considers what it truly means to be autonomous and how the boundary between the public and private spheres can be detrimental to the true meaning of autonomy. I attempt to re-evaluate and reconsider how relations can contribute to the project of autonomy, I analyse how relations are structured, and how to restructure them in a manner that gives life to a form of relational autonomy.

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<sup>229</sup> L Artz and D Smythe ‘Money matters: Structural problems with implementing the DVA’ (2005) 66 *Agenda: Empowering Women for Gender Equity* 25.

<sup>230</sup> KD Bailey ‘Criminal law lost in translation: Domestic violence, “the personal is political,” and the criminal justice system’ (2010) 100 *The Journal of Criminal Law & Criminology* 1281.

<sup>231</sup> I Westendorp *Women and housing: Gender makes a difference* (2007) 124.

<sup>232</sup> G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 756.

<sup>233</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 21.

## Autonomy Reconceived

### 4 1 Introduction

In my previous chapters, I attempt to conceptualise home. I question what home means and why home should be reclaimed as a concept with positive meanings and values, rather than being rejected. I find that home is more than just “bricks and mortar”<sup>1</sup> and that it encapsulates values such as human dignity, freedom and equality.<sup>2</sup> Further, it is a place of autonomy and identity. It is a space in which one should feel safe and secure in the exercise of one’s identity. It is also a place of privacy.<sup>3</sup> Because home carries such core positive values, these values embedded in home should be extended to everyone as democratic values,<sup>4</sup> instead of rejecting home as a whole because of the negative associations that sometimes flow from it.

I further consider whether relationships could be beneficial to the conception of home with positive values. I look into which relationships have an impact on home, and I specifically consider domestic violence and how the public/private divide insulates this violence. I find that domestic violence affects the home by producing unequal relations expressed through violence. Despite domestic violence occurring within the private realm, it forms part of the larger social system.<sup>5</sup> Lastly, I consider how the protection and insulation of violence within the private sphere compromises both home and autonomy as ideals because home gives life to an autonomous identity.<sup>6</sup> Efforts used

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<sup>1</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*‘Grootboom’*) par 35.

<sup>2</sup> See *Grootboom; Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (*‘Residents of Joe Slovo’*) and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*‘PE Municipality’*) and part 2 2 2 above for a discussion on this.

<sup>3</sup> L Fox *Conceptualising home: Theories, laws and policies* (2007) 177.

<sup>4</sup> IM Young *On female body experience: “throwing like a girl” and other essays* (2004) 153.

<sup>5</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

<sup>6</sup> L Fox *Conceptualising home: Theories, laws and policies* (2007) 139.



to protect privacy results in the public sphere compromising the privacy of the victim. Privacy has become a tool which protects the abuser from state action.<sup>7</sup> I argue that privacy is intrinsically linked to a person's autonomous identity; thus, any violation of privacy results in the violation of autonomous identity. The public/private divide, therefore, provides a breeding ground for abusive relations. Furthermore, escape from private abuse is not a walk in the park. Victims of domestic violence become recycled victims of abuse by organs of state. In this chapter, I endeavour to reconceive autonomy in terms of relations. I consider restructuring destructive relations in such a way that interdependence (and even dependence) can allow for autonomy.

The initial purpose of the public/private divide was to protect the *private sphere* but not necessarily *privacy*. Privacy should be understood in terms of autonomy and a right to be afforded to *individuals*, not the protection of a particular sphere within society.<sup>8</sup> Therefore I question what autonomy means. If a home is meant to provide a space of autonomy, in other words: a space where an individual can make uncoerced decisions for themselves, a space of self-government – can an abusive home truly be a space of autonomy? Furthermore, can the protection of such a space give rise to autonomy?

I argue that autonomy is defined in terms of liberal concepts rooted in individualism and independence with the aim of keeping the state at bay.<sup>9</sup> This notion of autonomy maintains a public/private divide and fails to recognise the effects of each sphere on the other. This conception of autonomy lacks creativity in achieving autonomy within the collective. It allows for continued disengagement between state parties and the private sphere. The disengagement of the spheres allows for the protection of abusive relations within the private sphere. Therefore, I consider alternative interpretations of autonomy, which allow for meaningful engagement between various parties. The alternative interpretations that I propose are rooted in Jennifer Nedelsky's conception of relational autonomy.

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<sup>7</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 16.

<sup>8</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 152—153.

<sup>9</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 118. Also see J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7—36 12.

Relational autonomy does not view relatedness and dependence as antithetical to autonomy. Relational autonomy examines how relations of dependence do not have to deprive the victim of autonomy to the extent that their choices are dependent on the decisions made by others with supposedly “more power”. Relational autonomy offers an alternative by providing that relations of relatedness and dependence can be constructive and can add value to autonomy.<sup>10</sup> Constructive relations are created by meaningful engagement which results in a democratic relationship<sup>11</sup> which in turn gives rise to autonomy, especially for those who have been deprived thereof. Whereas, a liberal and individualistic notion of autonomy places the individual in direct opposition with collective power,<sup>12</sup> relational autonomy assumes autonomy within the collective. The collective is constitutive of the individual and thus should be a source of the individual’s autonomy. Both the community and the individual are affected by domestic violence; therefore, it is within both parties’ best interest to maintain a relationship where their “concerns and limitations are appreciated as legitimate and real”.<sup>13</sup>

I now examine how domestic violence impairs the value of autonomy since it creates an environment of fear and subordination. After that, I look into how the public/private dichotomy contributes to this impairment. Following these investigations, I consider what it means to be autonomous and how autonomy could be understood in terms of constructive relations. Lastly, I look into how rights can potentially be interpreted in

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<sup>10</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011)124.

<sup>11</sup> G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 742—758 756.

<sup>12</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 13.

<sup>13</sup> G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 755.

terms of relations, which holds the potential of restructuring destructive relations<sup>14</sup> into constructive relations.<sup>15</sup>

## 4 2 The problem of domestic violence

Domestic violence will not stop unless abusive relations are restructured. The task of restructuring abusive relations is challenging because it aims at restructuring intimate relations as well as relations within the broader public, which shape and uphold domestic violence.<sup>16</sup> Where domestic violence against women should be shocking, it no longer is because it has become the norm in a society which values a misunderstood concept of privacy<sup>17</sup> over the safety and security of women and the right to a home (as a place of safety, security and privacy). Since domestic violence is viewed as a private matter, liberal theory dictates that the state should not interfere in family matters, which arguably should remain private.<sup>18</sup> Although all crimes affect society, domestic violence is of particular danger because of its hidden and repetitive

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<sup>14</sup> I refer to destructive relations within the private sphere and the public sphere, i.e. abusive relations between individuals within the private sphere, e.g. domestic violence and power relations between the public/collective as a whole and the private individual which usually follows abusive relations existing within the private sphere.

<sup>15</sup> Rights serve the function to structure relations, e.g. rights govern marriages - the build-up of a relationship; and divorce - the breakdown of a relationship. J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 308 reads as follows: "the way rights are implemented institutionally shapes both people's relation with the state and their relations (of say power and trust) with each other."

<sup>16</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 307.

<sup>17</sup> A "misunderstood" concept of privacy is a sense of privacy solely associated with the private sphere, which aims at keeping the state at bay. Further, it is a sense of privacy which believes that privacy as a value is best maintained by separating the private and public sphere in order to exercise unconstrained power within the private sphere. If privacy is understood and interpreted as a value in terms of the autonomy i.e. the control a person has to allow another person access to himself/herself, it is clear that in an abusive household, the value of privacy is not respected.

<sup>18</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1255—1300 1259. Also see I Westendorp *Women and housing: Gender makes a difference* (2007) 105.

nature which often results in it going unpunished.<sup>19</sup> Domestic violence affects a wide range of relationships and challenges society at every level.<sup>20</sup> Even if it does not affect society directly and immediately, the knowledge exists (whether this knowledge is acknowledged or not) that society collectively tolerates the perverse power relationships between men and women.<sup>21</sup> Public life influences and structures the personal lives of individuals,<sup>22</sup> therefore, tolerance of domestic violence in the public realm “reinforces patriarchal domination, and does so in a particularly brutal form.”<sup>23</sup>

It is recorded that in many instances, when women approach police services to assist them, these services are unsatisfactory because of the unwillingness of the police officials to assist victims. Even in severe cases, where physical abuse is evident, police officers often act with no sense of urgency, leaving her feeling unsafe and victimised for a second time.<sup>24</sup> This is in addition to the masculinist culture of SAPS, where members themselves contribute to the popular culture of domestic violence and hold the belief that women are at fault.<sup>25</sup> Sometimes corruption is involved, and the

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<sup>19</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11

<sup>20</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

<sup>21</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 309. Often in extreme cases of domestic violence where physical abuse is evident, the victim must stay away from work because of her bruises. She will feel that she cannot go into the public without feeling embarrassed. Many women in these instances face certain discomforts, such as having to wear long sleeves and scarves during summertime to cover up bruises, or not being able to cut their hair to cover up bruises on their necks. In some instances, the public is aware of the domestic violence that occurs but, do not act against it. There is a reluctance to interfere with “family affairs”. The public does not only consist of organs of state but also neighbours, friends, colleagues and even strangers. If a person is abused mentally, verbally, physically and/or sexually it is more likely than not, that other people either living nearby, or working with, or friends of the abused person is aware of it. In other words, if the public is aware of the violence that occurs, domestic violence moves outside of the private sphere, and into the public sphere, which blatantly tolerates such violence.

<sup>22</sup> SR Bassadien and T Hochfield ‘Across the public/private boundary: Contextualising domestic violence in South Africa’ (2005) 66 *Agenda: Empowering Women for Gender Equality* 4—15 5.

<sup>23</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 12.

<sup>24</sup> K Moutl ‘Providing a sense of justice: Informal mechanisms for dealing with domestic violence’ (2005) 12 *SA Crime Quarterly* 19—24 23. Also see part 3 4 of chapter 3 on a discussion of the ineffectiveness of the DVA.

<sup>25</sup> L Artz and D Smythe ‘Bridges and barriers: A five year retrospective on the Domestic Violence Act’ (2005) *Acta Juridica* 200—226 222. Also see KD Bailey ‘Criminal law lost in translation: Domestic

perpetrator himself has a good relationship with police, rendering her cry for help completely irrelevant.<sup>26</sup> Furthermore, these complaints of abuse do not always occur in a private office. These complaints occur in the public where everyone in the police station observes the interaction before them. It is very seldom that an individual in the presence of such an interaction will assist the victim or confront the police officer for not assisting. A further example of such complicity occurs in informal settings as well, such as at the workplace, or even general social interactions. Often a victim of abuse will not attend work because she has physically been beaten-up to such an extent that it is visible. Not only does this affect her career negatively by non-performance, but she must compromise on certain comforts in her life, such as wearing long sleeves in summer to cover up bruises, or wearing scarves to cover up bruises from strangulation. Therefore, she removes herself from social interactions to avoid embarrassment and the feeling of shame as well as the fear that her reasonable complaints will be silenced. Her removal from social interactions is largely determined by attitudes towards women and how they should be treated in society.<sup>27</sup> This

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violence, “the personal is political,” and the criminal justice system’ (2010) 100 *The Journal of Criminal Law & Criminology* 1279.

<sup>26</sup> Corruption Watch *Latest CW report highlights erosion of democracy* available online at <https://www.corruptionwatch.org.za/latest-cw-report-highlights-erosion-of-democracy/> (accessed 02/06/2019) records the corruptions statistics of 2018 and in which the Corruption Watch reports that complaints of corruption within the SAPS has increased from 6% in 2017 to 9% in 2018, reaching the highest level over the seven year period which they have been monitoring corruption. Also see Corruption Watch *SA sees SAPS as most corrupt within the state – survey* available online at <https://www.corruptionwatch.org.za/sa-sees-saps-as-most-corrupt-within-the-state-survey/> (accessed 02/06/2019) which provides that two-thirds of South Africans believe the most corrupt government officials are in the national police service. I have personally witnessed an incident where a police official refused to assist a victim of domestic violence because of their close relationship with the perpetrator. The police officer refused to believe that the perpetrator was capable of abuse, despite the evidence that was before him.

<sup>27</sup> Statistics South Africa *Crime against women in South Africa: An in-depth analysis of the victims of crime survey data* (2018) Report No. 03-4-05 1–24 9. From the statistics provided in the report, it seems clear that the problem does not solely lie with the perception by men of how women should be treated. The problem is further the perception by women of how men can treat them. For example, Table 2 displays the percentage of people who think it is acceptable for a man to hit a woman, by race and gender, and where for example where 30% of coloured men believe it to be acceptable, surprisingly, a larger group of coloured women - 41% - believe that it is acceptable. Also see L Vetten ‘Addressing

collective complicity allows for men to exercise violent behaviour against their partners in the private sphere where they are largely in control and free from state interference.<sup>28</sup>

The DVA was introduced as a measure to combat this complicity. To a large extent, the DVA applies a relational approach to challenge the relations that lead up to the violence.<sup>29</sup> The preamble of the DVA recognises that “domestic violence is a serious social evil” and it is prevalent in society. Acknowledging its prevalence involves an understanding of how domestic violence is embedded in various relationships, including intimate relationships, familial and community relationships *and* how it further extends to economic structures and hierarchies of racialisation. However, despite the DVA’s awareness of the various relations that give rise to domestic violence, organs of state still view the issue of domestic violence as an isolated matter rather than

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domestic violence in South Africa: Reflections on strategy and practice’ (2005) *Division for the Advancement of Women Expert group meeting 1—12* where another study was undertaken with a sample of 168 women drawn from 15 rural communities in the Southern Cape. It was estimated that, on average, 80% of rural women are victims of domestic violence. Interviews conducted with 1 394 men working for three Cape Town municipalities found that approximately 44% of the men were willing to admit that they abused their female partners. Further, the true extent of sexual violence in South Africa is unknown. Statistics South Africa found that one in two rape survivors reported being raped to the police while the Medical Research Council (MRC) found that one in nine women reported being raped. Both studies clearly find rape to be under-reported although their findings differ as to the extent of such under-reporting.

<sup>28</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 311.

<sup>29</sup> The Preamble of the DVA reads as follows:

“RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships;”

The DVA takes note of the wide array of relationships that affect domestic violence and that it is an issue that society as a whole should be concerned with, not just the parties subject to it. Furthermore, see the definition of a ‘domestic relationship’ in section 1 of the DVA which recognises that domestic violence occurs in a wide range of relationships and is not exclusive to married couples. Domestic relations are also discussed in part 3 3 1 in chapter 3 above.

seeing it in a broader spectrum.<sup>30</sup> The cycle of participation in structuring relations that perpetuate violence persists because there is not a systemic relational analysis on the issue of domestic violence.<sup>31</sup> Women in abusive relationships feel isolated in their experience and do not realise that such violence forms part of a much wider fabric in society.<sup>32</sup> Women coming from abusive relationships are left with no societal structures in place to support them, and so, the abuse inevitably persists. With no systemic relational analysis, the root causes of women's oppression are not uncovered. Perhaps the evident issue with the DVA and the implementation thereof is that it is aimed at assisting women who are already in abusive relationships instead of questioning why so many men are violent towards their intimate partners.<sup>33</sup>

There thus needs to be a consideration of men's role in domestic violence and what causes such violence to ensue. Perhaps, it has something to do with the exercise of dominance in an environment where men have control (free from state interference) in order to compensate for the lack thereof elsewhere. A relational approach reflects on all dimensions of relational structures which provide an understanding into how relationships are structured and why they are structured in such a manner. Thereafter, the relational approach attempts to restructure destructive relations.<sup>34</sup> The violence that men display in their personal lives arises from much wider accepted patterns of male violence in society. In order to eliminate violence, power relations between men and women and the public at large need to be restructured.<sup>35</sup> Society instils toxic masculinity by romanticising violence by providing appealing hunting games to men and other violent sport, for instance, while simultaneously making in unappealing for women.<sup>36</sup> Therefore, the project of restructuring relations is much larger and deeper

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<sup>30</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 311. Also see SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 12.

<sup>31</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 312.

<sup>32</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1263—1265.

<sup>33</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 312.

<sup>34</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 358.

<sup>35</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 324.

<sup>36</sup> Toxic masculinity is created by various patterns of male violence in society including violence which occurs in many sports and entertainment that romanticises male violence and even violence from cut-

than merely restructuring intimate relations – it involves a restructure of hierarchical power relations in society as well, which preserve the violence occurring between intimate partners. There needs to be consideration of the relationships between the public and private realms, and, how they inform one another in maintaining toxic hierarchical power relations both within and out of the home space (and how these relationships could potentially be restructured).

### 4 3 The public/private divide

The public/private dichotomy insulates the private sphere from state regulation which leads to the continuous subordination of women within it.<sup>37</sup> The divide takes away the victim's autonomy, security and safety, and threatens home as a right.<sup>38</sup> Although state regulation may be threatening to some, insulating dominance and control is detrimental to the internal relations. It would therefore be more beneficial for organs of state to regulate these relations, than to exclude them entirely.<sup>39</sup> In instances of domestic violence, the exercise of state power is not as threatening to these women as the exertion of power by their partners within the private sphere. In these instances, state regulation may even be welcomed by these women who fear for their lives. However, state interference can sometimes be an even worse threat to autonomy,

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throat profit-seeking. From a young age, boys are socialised to inflict pain and endure pain. They run the risk of social exclusion if they fail to comply with masculine norms.

<sup>37</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629—1641 1629. Also see KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1261. Also see SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 12.

<sup>38</sup> It does not mean that the home concept should be rejected in its entirety because it is often associated with a source of violence. Instead, it implies that relations within should be restructured in order to satisfactorily reach an ideal of home and that such an ideal should be reclaimed. If home becomes a space of violence it is no longer a *home*. Home carries with it values such as safety, privacy and the ability to exercise autonomy. Once it becomes violent, that sense of safety, privacy and autonomy. is taken away. Home is then a space of intrusion – not intrusion from the state, but by an intimate partner. The home definition therefore no longer applies, and the excuse of the public's reluctance to interfere is invalid since *home* as a concept no longer stands.

<sup>39</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1631.



especially when the state upholds patriarchal practices. But, the relational project does not promote more state interference. Instead, it invites a different form of state involvement that reduces violence against women and enhances their autonomy.<sup>40</sup> It invites a form of state involvement where organs of state meaningfully engage with victims of abuse sympathetically to such an extent that their autonomy is not further threatened by their interference in the private sphere.<sup>41</sup>

In order to achieve a form of state involvement, which generates autonomy, the law also requires restructuring (because laws structure relations). Only thereafter, can we expect the state to be involved in such a manner that does not tolerate violence.<sup>42</sup> In relation to the general fear of state involvement, it could be said that state involvement is already-existing. In other words, the law already structures intimate relations and always will.<sup>43</sup> For example, the state regulates the private sphere by defining and regulating matters such as marriage and divorce (which are relationships). These laws assist people in decision-making on how they want to structure their relationships and families.<sup>44</sup> Therefore, whether the law is directly involved in intimate relations (for example divorce) or whether it leaves it up to the private sphere to handle, it nevertheless structures relations, since the personal lives of individuals are largely influenced and structured by public life.<sup>45</sup> The public/private divide therefore affects

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<sup>40</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 337.

<sup>41</sup> In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) ('Occupiers of 51 Olivia Road') the court issued an interim order where the parties had to "engage with each other meaningfully."

<sup>42</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 337.

<sup>43</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1260.

<sup>44</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1260.

<sup>45</sup> SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 5. Public life influences relationships in many various ways. For instance, society and cultural norms often create an expectation that people should get married. The law then regulates these relations in order to ensure that these are equal and safe relationships to be in (e.g. prohibiting minors from getting married or interfering when domestic violence is evident. It is apparent that the law therefore aims to involve itself only where necessary in order to ensure that these relationships, which people inevitably find themselves in, are at least safe and equal relationships).

how organs of state operate when dealing with victims of abuse.<sup>46</sup> It often leaves organs of state reluctant to intervene, even when it is necessary and within their scope.

Moreover, the public sphere also consists of neighbours, family, colleagues, friends and even strangers. Domestic violence does not always occur in a domestic environment. Domestic violence sometimes occurs in public spaces (however it is still regarded as domestic violence because it is violence between intimate partners – not between strangers). Nonetheless, the public (including organs of state) tolerates such violence because it perceives it as a private matter which should be dealt with between the persons in the relationship. This discourse privatises domestic violence and obstructs it from being dealt with accordingly by organs of state which have been put in place to deal with such matters; which ultimately reinforces the patriarchal *status quo*.<sup>47</sup> Furthermore, completely removing the state would merely result in relations being structured differently.<sup>48</sup> The relational approach considers how existing laws structure relations and reconsiders how these destructive relations can be structured differently.<sup>49</sup> A relational approach does not deny the fact that law structures relations, and by this acknowledgement, it holds the potential to structure relations differently and on an equal basis.

There needs to be a transformation of the harmful underlying structures before the material conditions of women's lives can change.<sup>50</sup> Domestic violence occurs due to several factors but, the way in which society is structured (which is largely determined by the way laws are structured and implemented) is the most challenging to alter.<sup>51</sup> Patriarchal structures emanate from underlying structures which allows which domestic violence to occur. Domestic violence is essentially a reflection of patriarchal

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<sup>46</sup> SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 5.

<sup>47</sup> SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 8.

<sup>48</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 344–345.

<sup>49</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 327.

<sup>50</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 350.

<sup>51</sup> OW Barnett 'Why do battered women not leave, Part 1 external inhibiting factors within society' (2000) 4 *Trauma, Violence and abuse SAGE Social Science* 343–372 345.

norms which allow men to control women.<sup>52</sup> If the dynamics in the public sphere inform those in the private sphere, which, I argue they do, then patriarchal practices follow through into private lives. For example, the legal rules informing the structure of the market requires re-thinking (e.g. unequal pay) in order to enhance values like autonomy in the public sphere which will then translate into the private sphere.<sup>53</sup> inequality in the public sphere keeps women in an economically vulnerable position resulting in their reliance on their male counterparts.<sup>54</sup> Female economic dependency is one of the main reasons that women do not leave an abusive relationship.<sup>55</sup> This results in economic abuse, which is a form of domestic violence in accordance with the DVA.<sup>56</sup> Economic issues in the public sphere (e.g. where women are paid less, or restricted from job opportunities due to their homely responsibilities) display how conditions in the public sphere have a direct impact on the private sphere.

Furthermore, social, religious and cultural practices also form part of the public discourse. Some religions, cultures and societies find it acceptable, and even to some extent, encourage violence towards women.<sup>57</sup> A patriarchal social setting makes it all the more challenging for women to leave. Where patriarchy is a system of society in which men hold the power, sexism is the “social, political, and personal expression of patriarchy”.<sup>58</sup> If violence and degradation of women is tolerated in public spheres, it is more likely that it is tolerated (if not exacerbated) in the private sphere. These underlying structures in the public sphere inform what will and will not be tolerated in

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<sup>52</sup> OW Barnett ‘Why do battered women not leave, Part 1 external inhibiting factors within society’ (2000) 4 *Trauma, Violence and abuse SAGE Social Science* 343.

<sup>53</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 351.

<sup>54</sup> KD Bailey ‘Criminal law lost in translation: Domestic violence, “the personal is political,” and the criminal justice system’ (2010) 100 *The Journal of Criminal Law & Criminology* 1262.

<sup>55</sup> OW Barnett ‘Why do battered women not leave, Part 1 external inhibiting factors within society’ (2000) 4 *Trauma, Violence and abuse SAGE Social Science* 347.

<sup>56</sup> Section 1 of the DVA defines domestic violence as inclusive of economic abuse. Economic abuse includes the unreasonable deprivation of economic or financial resources which the complainant is under law entitled to or which the complainant requires out of necessity.

<sup>57</sup> SR Bassadien and T Hochfield ‘Across the public/private boundary: Contextualising domestic violence in South Africa’ (2005) 66 *Agenda: Empowering Women for Gender Equality* 8.

<sup>58</sup> OW Barnett ‘Why do battered women not leave, Part 1 external inhibiting factors within society’ (2000) 4 *Trauma, Violence and abuse SAGE Social Science* 346.

the private sphere. There is a correlation between patriarchy and domestic violence. If men largely have control in the public sphere, they largely have control in the private sphere. Unfortunately, societal norms inform this through the media, religion, the government and even the legal system. In many instances, domestic abuse is the norm both within the private sphere and out of it because patriarchal beliefs have normalised it.<sup>59</sup>

Therefore, the relational approach redirects existing state power in order for the current relationships that it has structured to be restructured in a manner that enhances the autonomy of women and not patriarchal social norms.<sup>60</sup> Although, initially this may seem like more state involvement, it is in actual fact just an implementation of rights which already exist. It is merely a matter of “making overt what has been covert and then trying to mandate change”.<sup>61</sup> Of course, if the state’s involvement were intrusive, it would go against the goals of autonomy. A relational approach does not refer to intrusive state involvement, but rather, encourages a form of state involvement that enhances values like autonomy. The relational approach requires organs of state to assist victims and not to re-victimise them. This is achieved through sensitive and sympathetic methods of engagement where organs of state attempt to understand the interests and needs of the victims, and where their background and economic status is also taken into consideration.<sup>62</sup> This requires the state to fulfil its constitutional duty to “establish a society based on democratic values, social justice and fundamental rights; lay the foundations for a democratic and open society...” and “improve the quality of life of all citizens”.<sup>63</sup> Therefore, it requires simply implementing the already-existing duties, and implementing them in a manner that mandates change. A relational approach contemplates how to restructure the entire structure of relations in such a way that directly opposing choices do not need to be

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<sup>59</sup> OW Barnett ‘Why do battered women not leave, Part 1 external inhibiting factors within society’ (2000) 4 *Trauma, Violence and abuse SAGE Social Science* 346—347.

<sup>60</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 354.

<sup>61</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 356—357.

<sup>62</sup> G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 753.

<sup>63</sup> The preamble of The Constitution of the Republic of South Africa, 1996.

made. The purpose of the relational approach is to structure relations in a way that enhances autonomy.<sup>64</sup>

Even though the public/private divide affords women some protection, it is certainly not at the same level that men receive,<sup>65</sup> and further, it does not address the most profound issue of maintaining individualism within the collective. It is suggested that the main objective of the public/private divide is to enforce autonomy by providing the individual with protection from the collective.<sup>66</sup> However, this protection does not necessarily ensure safety and security, and often violence is protected within the walls of the private sphere, instead of the autonomy it aims to protect. Autonomy should not be seen as a static human characteristic. Autonomy is a value that grows through healthful relations which encourage it. It is therefore, essential to structure relationships so that they foster autonomy, because autonomy is only achieved through relations, not by keeping constructive relations at bay. These relations include relationships with the public sphere. Once we understand autonomy in terms of relationships, rather than through exclusion and independence, will we realise that the exclusion of the public sphere in cases of domestic violence - in fact undermines autonomy.<sup>67</sup> The absence of autonomy within the private sphere results in the perpetuation of violence through gender hierarchies and imbalanced power relations.<sup>68</sup> The central issue should not be on how to maintain boundaries, but rather how to foster autonomy between these boundaries. There needs to be an acknowledgement that the collective can be a source of autonomy and that it is not always a direct threat thereto.<sup>69</sup> The dichotomy between the state/individual and the public/private and the threats that they pose to each other, has always been illusory.<sup>70</sup>

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<sup>64</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 359—360.

<sup>65</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1632.

<sup>66</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 167.

<sup>67</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 169.

<sup>68</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1637.

<sup>69</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 169.

<sup>70</sup> This is like the illusions presented in chapter 3: one cannot be autonomous when reliant on public assistance. I argue that public assistance can in fact contribute to a person's autonomy. If it can contribute to an individual's autonomy, it can also contribute to the collective's autonomy. The two concepts (public assistance and autonomy) are not mutually exclusive. Instead, they are two concepts that must exist together in order for them to reach their full potentials.

There need not be a choice between the concepts: being private and free on the one hand, or collective and coerced on the other. These oppositions are based on misleading categories, and so, a relational approach allows for the possibility of both: individual autonomy within the collective.<sup>71</sup>

## 4 4 Relational autonomy

### 4 4 1 A liberal concept of autonomy

In order for autonomy to develop as a value, there must be a proper understanding of it.<sup>72</sup> Autonomy is the ability to lead a self-determining life, to have the freedom to make decisions about your own life free from undue influence and domination of others.<sup>73</sup> Liberal theory provides a definition of autonomy, but the definition is rooted in individualism. Liberal theory considers autonomy to be an individual right – a right of the individual to be free from undue influence in the exercise of choice.<sup>74</sup> Liberal theory equates autonomy with independence, and values independence over all other values, specifically values arising from relations of interdependence.<sup>75</sup> This individualistic theory aims at keeping the state at a distance from the private sphere. It equates the private sphere with individualism and the maintenance of autonomy,<sup>76</sup> and the public sphere with the threat thereof.<sup>77</sup> Liberal theory believes that autonomy

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<sup>71</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 18—19.

<sup>72</sup> In the context of feminist theories, it is important to determine and claim autonomy as a value because it is central to the goal of feminism.

<sup>73</sup> C Mackenzie 'Feminist innovation in philosophy: Relational autonomy and social justice' (2019) 72 *Women's Studies International Forum* 144—151 146.

<sup>74</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 5.

<sup>75</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 6.

<sup>76</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 118. Also see J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 12.

<sup>77</sup> See C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 6 which provides that the liberal theory of autonomy suggests that "values,

is ideal when far removed from governance and free from other distracting influences.<sup>78</sup> One ideally achieves autonomy when relying on your senses, unencumbered by any external sources.<sup>79</sup> Autonomy, in this sense, celebrates mastery over the external world,<sup>80</sup> rather than integration with it. Liberal theory, therefore argues that in the case of domestic violence, women's autonomy is merely exchanged for the state's protection—“the abuser is out and the state is in”.<sup>81</sup> In other words, the state has the power to affect decisions of women in abusive homes.<sup>82</sup> The state's objective to protect the home is thus no longer an objective to protect the home from intruders, but to protect the home from family members. Liberal theory argues

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social practices, relationships and communities that are based on cooperation and interdependence threaten, or at least compromise autonomy.”

<sup>78</sup> C Mackenzie 'Feminist innovation in philosophy: Relational autonomy and social justice' (2019) 72 *Women's Studies International Forum* 146.

<sup>79</sup> L Code 'The perversion of autonomy and the subjection of women: Discourses of social advocacy at century's end' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 185.

<sup>80</sup> L Code 'The perversion of autonomy and the subjection of women: Discourses of social advocacy at century's end' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000)186.

<sup>81</sup> JL Grossman 'Independent together, reviewing Jeannie Suk, at home in the law: How the domestic violence revolution is transforming privacy and Jennifer Nedelsky, law's relations: A relational theory of self, autonomy, and law' (2012) 48 *Tulsa Law Review* 313—323 315—316

<sup>82</sup> JL Grossman 'Independent together, reviewing Jeannie Suk, at home in the law: How the domestic violence revolution is transforming privacy and Jennifer Nedelsky, law's relations: A relational theory of self, autonomy, and law' (2012) 48 *Tulsa Law Review* 314. This theory is, of course, true in a society where patriarchal practices are performed and maintained, and it has proven to be problematic in many instances such as in the case of *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC). The City of Johannesburg took control of vulnerable residents' lives by imposing restrictive and oppressive rules. However, the City's reasoning was grounded in liberal theory because it wanted to discourage a “dependency relationship” and wanted the residents to “take responsibility for their own lives”. The City's idea of empowering the residents was to force the residents to remove themselves from the City, thus removing themselves from relying on the state's funds, where it was clearly a necessity in order for them to achieve autonomy. Therefore, it is problematic if the state becomes involved, especially in cases where the state clearly imposes its authority to such an extent that it removes any opportunity for the growth of autonomy. However, I argue that the relational theory does not challenge state involvement, but rather challenges *how* the state involves itself.

that this shift of protection, equates to a reduction of autonomy and privacy for women and men by state interference, thus reinforcing the need to protect the home.<sup>83</sup>

In cases of domestic violence, autonomy and privacy as values are undeniably impaired. I argue that without such values, the definition of a home no longer stands. Therefore, in cases of domestic violence, the home is not protected. The public/private dichotomy protects violence within the private sphere instead of the home. The liberal belief in the concept of individual choice to define the boundary between private and public often leaves patriarchal power intact in the private sphere and fails to realise the effect of fear within that sphere on individual choice.<sup>84</sup> Liberal theories look at autonomy as a theory where individuals are atomistic beings and self-made/self-making individuals.<sup>85</sup> It provides for an asocial understanding of autonomy. This is problematic because it leaves you with the false choice between being completely autonomous, or compromising your autonomy for being a social subject.<sup>86</sup>

Moreover, there has been a deep-rooted association with freedom and this individualistic definition of autonomy.<sup>87</sup> Essentially, the liberal theory instils autonomy as an idea of inherent freedom and self-making individuals who are independent and unaffected by their social context.<sup>88</sup> However, this theory overlooks the fact that people are constituted within a system of rules, and there is no self-determining free will that can avoid these operations of power.<sup>89</sup> I argue that we should rather understand autonomy as reconcilable with an understanding of the self as relational; an understanding of the self in the sphere of the interpersonal, an understanding that

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<sup>83</sup> JL Grossman 'Independent together, reviewing Jeannie Suk, at home in the law: How the domestic violence revolution is transforming privacy and Jennifer Nedelsky, law's relations: A relational theory of self, autonomy, and law' (2012) 48 *Tulsa Law Review* 315—316.

<sup>84</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1630.

<sup>85</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 120. Also see J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7—8.

<sup>86</sup> J Keller 'Autonomy, relationality and feminist ethics' (1997) 12 *Hypatia* 152—164 155.

<sup>87</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 121.

<sup>88</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 121. Also see TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1639.

<sup>89</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 10.



even relationships contribute to the development of autonomy.<sup>90</sup> The liberal theory creates a sense of “hyperbolised autonomy conjoined with individualistic conceptions of subjectivity and agency.”<sup>91</sup> However, this approach fails to recognise the inherently social nature of people. It fails to see that people are not simply self-made,<sup>92</sup> but that relations, culture, politics and context affect behaviours and beliefs. Such conditions are often the breeding grounds for gender inequality,<sup>93</sup> and it is not necessarily based on the individual’s choice to be abusive (or to be abused).

Further, many liberal theories emphasise legal and political equality, in other words equality within the public sphere. Many such theories believe that once there is equality within the law and equal opportunities publicly, the subordination of women will be eliminated. These theories are thus less sensitive to other forms of inequality which often exist within private spheres (in other words the home).<sup>94</sup> Such belief insulates the private sphere from regulation and thus contributes to women’s subordination in the private sphere. Despite the necessity of legal and political equality, it has clearly not been sufficient to eliminate subordination.<sup>95</sup> This approach insists on maintaining the public/private divide in order to protect the home in the context of family – not the individual.<sup>96</sup> Liberal theory perhaps provides equality and

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<sup>90</sup> J Keller ‘Autonomy, relationality and feminist ethics’ (1997) 12 *Hypatia* 155—156.

<sup>91</sup> L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 184.

<sup>92</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 120.

<sup>93</sup> TE Higgins ‘Why feminists can’t (or shouldn’t) be liberals’ (2004) 72 *Fordham Law Review* 1632.

<sup>94</sup> M Szapuová ‘Mill’s liberal feminism: its legacy and current criticism’ (2006) 5 *Prolegomena* 179—181 189.

<sup>95</sup> Based on chapter 3, it seems that equality before the law does not necessarily result in equality within the home. Despite the progressive nature of the DVA, it is clear to see that oppression within other realms, and even the same realm, has not been eliminated.

<sup>96</sup> M Szapuová ‘Mill’s liberal feminism: its legacy and current criticism’ (2006) 5 *Prolegomena* 189 provides that Mills liberal theory on feminism does “not attack traditional assumptions regarding women’s and men’s different responsibilities in a household” and that he believes that “traditional sex roles within the family” are “suitable and desirable” and therefore, worth protecting. Also see page 190 which provides that Mill’s liberal feminist theory aims at “spousal friendship” and not “equal opportunity” – in other words: it supports the benefit of the family unit as a whole, and even man as an individual,

autonomy to women in the public sphere, but lacks creativity in achieving autonomy within the private sphere.<sup>97</sup>

It is therefore, necessary to develop a new concept of autonomy, which can achieve this goal. The problem is no longer how to keep the state at bay, but rather how to enhance autonomy within the sphere of the state, since so many women in abusive relationships find themselves having to form a relationship with the state.<sup>98</sup> Jennifer Nedelsky's relational conception of autonomy is therefore proposed, which directs the attention towards relations that foster autonomy, and the structures that create these relations.<sup>99</sup> The relational theory of autonomy reconsiders the traditional aspects that shape autonomy (such as isolation, independence and freedom) and turns the focus towards relations, which shape these aspects, which ultimately shape autonomy.<sup>100</sup> Therefore, it does not propose to get rid of freedom as a value; instead it proposes to structure relations in order to achieve freedom for women, especially for those who face domestic violence. It calls for freedom to create their lives free from fear and coercion, instead of accepting the definition given to them by a male-dominated society.<sup>101</sup> The relational approach focuses on social relations, which foster this freedom and provide for a true sense of autonomy, - not one based on false choices between the individual and freedom, or the collective and coerced.<sup>102</sup> Some relationships, which can either be constructive or destructive to autonomy, are not solely intimate relations but are often formed by formal structures of authority in the

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but not the women as an individual. This is peculiar because the entire liberalist theory is focused on freedom and equality of individuals.

<sup>97</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1630.

<sup>98</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 118.

<sup>99</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 119.

<sup>100</sup> JL Grossman 'Independent together, reviewing Jeannie Suk, at home in the law: How the domestic violence revolution is transforming privacy and Jennifer Nedelsky, law's relations: A relational theory of self, autonomy, and law' (2012) 48 *Tulsa Law Review* 317—318.

<sup>101</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 121 and J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7–8.

<sup>102</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 14.

public sphere.<sup>103</sup> One key point of relational autonomy is therefore, that state involvement is not necessarily always inconsistent with achieving the goal of autonomy.<sup>104</sup> The relational approach investigates relations and does not validate existing oppressive relationships. Instead, it differentiates between the relations that foster autonomy and those that are destructive to the value of autonomy, and then provides a pathway to transform such relations into autonomy-fostering relationships.<sup>105</sup>

#### 4 4 2 A relational concept of autonomy

Nedelsky provides insight into what autonomy embodies: comprehension, confidence, dignity, efficacy, respect and peace and security from oppressive powers.<sup>106</sup> However, instead of viewing autonomy in terms of isolation and independence, the relational theory views autonomy in terms of relationships. Relational autonomy challenges liberal theories of individualism.<sup>107</sup> Relational autonomy does not refer to a “single unified conception of autonomy but it is rather an umbrella term, designating a range of related perspectives.”<sup>108</sup> In contrast, liberal theories argue that determining autonomy in terms of relationships is problematic, because in the context of relationships women are not seen and defined as themselves but according to their relation with others. This, however, refers to perverse and impersonal relationships.

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<sup>103</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 12.

<sup>104</sup> JL Grossman ‘Independent together, reviewing Jeannie Suk, at home in the law: How the domestic violence revolution is transforming privacy and Jennifer Nedelsky, law’s relations: A relational theory of self, autonomy, and law’ (2012) 48 *Tulsa Law Review* 318. This is true only if state involvement is in line with achieving the goals of women’s autonomy, and that the state does not merely impose further patriarchal agendas.

<sup>105</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 122.

<sup>106</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 11.

<sup>107</sup> M Friedman ‘Relational autonomy and individuality’ (2013) 63 *University of Toronto Law Journal* 327—341 329.

<sup>108</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 4.

The relational approach does not view all relationships as worthy,<sup>109</sup> and critiques and attempts to redefine relationships, which are harmful to the achievement of autonomy. The relational theory requires concepts that incorporate human experience of embeddedness in their relations - both good relationships and oppressive relationships.<sup>110</sup> It analyses the specific ways in which oppressive social relationships interfere with the full realisation of autonomy. It focuses specifically on how social norms and institutions are potentially harmful to the realisation of autonomy.<sup>111</sup> The relational approach, therefore, considers it necessary to restructure destructive relations, which are detrimental to autonomy into relations that are constructive towards the goals of autonomy.<sup>112</sup> According to the relational approach, people are fundamentally social beings who develop their autonomy through social interactions,<sup>113</sup> therefore, these social interactions cannot be pushed aside, but they can be revised.<sup>114</sup>

Nedelsky's project of relational autonomy does not reject liberal theories outright, but she believes that some liberal goals such as equality and autonomy can be better achieved through the relational approach.<sup>115</sup> She believes that liberal theories cannot consider the constitutive connections between people and groups of people. She argues that the growth of autonomy and well-being can come to life through the recognition of constitutive interconnections.<sup>116</sup> In this view, it is unnecessary to view relatedness and dependency as an inverse to autonomy, and it becomes possible to

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<sup>109</sup> M Friedman 'Relational autonomy and individuality' (2013) 63 *University of Toronto Law Journal* 329.

<sup>110</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 9.

<sup>111</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 22.

<sup>112</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 124.

<sup>113</sup> M Friedman 'Autonomy, social disruption, and women' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 40.

<sup>114</sup> M Friedman 'Autonomy, social disruption, and women' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 46 provides that: "Some relationships should be preserved and others should be abolished. Even relationships that should be preserved can always be improved." This is because "many social relationships constrain and oppress women".

<sup>115</sup> M Friedman 'Relational autonomy and individuality' (2013) 63 *University of Toronto Law Journal* 329.

<sup>116</sup> M Friedman 'Relational autonomy and individuality' (2013) 63 *University of Toronto Law Journal* 329.

view it as an aspect that adds value to autonomy.<sup>117</sup> In other words, the collective can be a source of autonomy. Therefore, allowing collective responsibility to cater to some needs does not result in a correlative decrease in autonomy. The choice between either collective responsibility or autonomy is thus false and unnecessary.<sup>118</sup> Engagement between individuals and the collective is inevitable. Therefore, this engagement has to be meaningful. This is not to say that increased engagement with the state/collective would certainly foster autonomy, but rather that when such engagement is necessary, it should not be further detrimental to autonomy. What is problematic between the relations of individuals and the public sphere is not *per se* the reliability of the individual on the public, but rather the hyperbolised idea of autonomy held by society which becomes controlling.<sup>119</sup>

The goal of rethinking autonomy in relational terms does not deny the tension between the public/private spheres, but recognises this tension, and realises that certain compromises need to be made. A further goal is to realise that autonomy does not mean that people are separate units, but rather to think of autonomy in terms of constructive human interactions,<sup>120</sup> because such human interactions and dependency are inevitable. The goal in this instance would be to ensure that the inevitable relations, which consist of dependency relations, foster autonomy. Engagement with the collective is necessary in various instances, especially in the case of domestic violence where women are left with no other option but to engage

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<sup>117</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 124.

<sup>118</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 125–126.

<sup>119</sup> L Code 'The perversion of autonomy and the subjection of women: Discourses of social advocacy at century's end' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 184. The hyperbolised idea of autonomy is an individualistic conception of autonomy and holds the belief that autonomy is only achieved on your own – once assistance is granted by other parties, your autonomy automatically decreases in value. Therefore, many welfare institutions that believe in this conception of autonomy become controlling. This was the case in *Dladla*, where the City of Johannesburg took control of the resident's lives by imposing restrictive and oppressive rules. Their control was based on the reasoning that it wanted to discourage a "dependency relationship" and wanted the residents to "take responsibility for their own lives".

<sup>120</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 132. Also see J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 21–23.

with the public sphere. However, the confluence of autonomy with independence and individualism has resulted in many regulative principles, which have a very negative impact on women, especially abused women as a marginalised group.<sup>121</sup> As previously mentioned, these women are often left with no financial resources and therefore become welfare recipients of the state. Unfortunately, this is perceived as a burden to the community at large.<sup>122</sup> Society sees reliance on social welfare as failure: failure to achieve autonomy and a “social sin”.<sup>123</sup> In many instances, these women are criticised for placing themselves in this dire position.<sup>124</sup> Society at large views these women as capable of working and earning an income to take care of herself and her children. However, the several factors which prevent her from achieving this is often ignored. She is seen as dependent, and this is likened with weakness.<sup>125</sup> She is thought of as undeserving of welfare.<sup>126</sup> As a result, the public sphere devises many ways to make this dependency as unpleasant as possible. The public sphere develops many plans to enforce self-sufficiency and a perverse form of autonomy.<sup>127</sup> If women continue to live in these unpleasant conditions, the state and the public are

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<sup>121</sup> L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 184.

<sup>122</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1505 1499–1547.

<sup>123</sup> L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000)194.

<sup>124</sup> See L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000)185 which reads as follows: “Women come to be judged as unreliable knowers, women on welfare as failing to meet a standard of civic self-sufficiency, women seeking childcare as inadequately autonomous in assuming responsibility for their “own” children, all represented as “entirely up to them.”

<sup>125</sup> L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 194.

<sup>126</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1505–1506.

<sup>127</sup> L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 194.

disappointed and confused because they believe that these vulnerable women “choose” to remain in such conditions.<sup>128</sup> The state and public sphere at large, therefore, discourage dependency on their resources. However, they do not question *why* these consequences persist and therefore, they do not challenge these consequences at all. The public persists with its methods of further undermining vulnerable persons which leads to the impression that such vulnerability is “inherent in the structure of our society.”<sup>129</sup>

The first goal of the relational approach requires compromises. These compromises require changing the subjective understanding/belief of autonomy and how to achieve it. The public sphere pleads helplessness and believes that these circumstances, which abused women find themselves in, is inherent in the structure of society. They see no feasible solution to these vulnerable circumstances because the only reasonable solution would necessitate a complete loss of the most basic structures of society which is familiar to most.<sup>130</sup> The only solution requires sacrifices, and this will entail challenging the association of independence with autonomy, and rather viewing interdependence as a way of achieving independence, thus, denying the conventional claim to independence.<sup>131</sup> An alternate understanding of autonomy is required, one which does not negate the possibility that the development of a person stems from relationships, which includes relationships of dependency.<sup>132</sup> The importance of the relational approach in this context is to make oppressed women fleeing from domestic violence feel safe and more autonomous, regardless of their dependency on state welfare.<sup>133</sup> The relational approach denies the exclusive association of independence with autonomy because this association often devalues people who do not fit the ideal image of independence.<sup>134</sup> The relational approach re-defines autonomy in terms of relations which enhance this value.

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<sup>128</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1510.

<sup>129</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1510.

<sup>130</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ* 1510.

<sup>131</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 134.

<sup>132</sup> L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 361—383 372.

<sup>133</sup> M Friedman ‘Relational autonomy and individuality’ (2013) 63 *University of Toronto Law Journal* 339.

<sup>134</sup> M Friedman ‘Relational autonomy and individuality’ (2013) 63 *University of Toronto Law Journal* 339.

In order to re-define autonomy, one should first consider the definition thereof. Autonomy means “to be governed by one’s own law” “the right or condition of self-government.”<sup>135</sup> Therefore, to become autonomous, one has to find and live in accordance with your law and to do this by understanding which relationships and social forms foster that autonomy. A tension between finding autonomy within oneself and being shaped by your social context exists.<sup>136</sup> Autonomy does not mean rejecting individuality (but rather celebrating it), and instead of rejecting the exclusive idea of independence as autonomy.<sup>137</sup> Identity is formed within the context of social relations and is further shaped by factors such as culture, race, religion and gender because you are socially embedded in a specific society.<sup>138</sup> Essentially, the goal is to find the best, most cohesive relation between individual and collective and to focus on the implications of the intersubjective social dimensions of selfhood.<sup>139</sup> This allows understanding into the subjective feeling of autonomy, and which forms of the collective allow for this feeling.<sup>140</sup> If the self can be understood in terms of the relations that form it, it is easier to understand the individual as existing in a world autonomously with other “interpersonal selves”.<sup>141</sup> It is therefore, important to examine the subjective feeling of autonomy and how institutions shape these subjective feelings. The feeling of autonomy does not simply exist through subjective feelings and beliefs of what

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<sup>135</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 10. Autos (self), and nomos (law) – self-law. Also see L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 363 which states that autonomy was “originally used in a political context to refer to Greek city-states, which had *autonomia* when citizens made their own laws and, in this sense, it came to refer to self-government, self-determination, and sovereignty.”

<sup>136</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 10–11.

<sup>137</sup> L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 372.

<sup>138</sup> L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 363.

<sup>139</sup> L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 363.

<sup>140</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 21—22.

<sup>141</sup> L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 373.



autonomy is, but through structures of relationships and institutions that shape these beliefs.<sup>142</sup> The key point is that people are not “atomistic” or “radically individualistic”,<sup>143</sup> and that relationships make autonomy possible. Therefore, it is vital to understand how institutions affect ideas of relationships. Institutions inform the personal, therefore, in order to affect the personal, institutions must be examined.<sup>144</sup>

When examining institutions, it can be seen that they shape the subjective feelings of autonomy by associating it with independence and thus, making it challenging to change subjective feelings of autonomy, before changing how institutions shape relations. While one “cannot be autonomous without some feeling of autonomy, one can feel autonomous and not be so.”<sup>145</sup> For example, people in relative positions of power may feel autonomous, but they are usually blind to the many ways in which they are dependent and interdependent. For instance, an abusive partner may feel completely autonomous because he is in control of the particular situation, he may feel independent because the state cannot intrude in his private space which he controls, but he ignores how his life is made possible by the often unpaid labour and attention of his partner. He forgets that he feels in control but only because he is out of control. In cases of abuse, the abuser is not in control of his behaviour. Therefore, the exclusive use of independence to determine autonomy is misleading because independence is always reliant on the subordination of someone else.<sup>146</sup> To be truly autonomous is to feel a sense of power, but not a power over others.<sup>147</sup> The relational analysis challenges the link between independence and autonomy and demonstrates that people in relative positions of power falsely believe that they are completely independent and autonomous. They fail to see the many ways and spheres in which

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<sup>142</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 136.

<sup>143</sup> L Freeman ‘Reconsidering relational autonomy: A feminist approach to selfhood and other in the thinking of Martin Heidegger’ (2011) 54 *Inquiry* 372.

<sup>144</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 137. Also see JL Grossman ‘Independent together, reviewing Jeannie Suk, at home in the law: How the domestic violence revolution is transforming privacy and Jennifer Nedelsky, law's relations: A relational theory of self, autonomy, and law’ (2012) 48 *Tulsa Law Review* 320.

<sup>145</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 138.

<sup>146</sup> M Friedman ‘Relational autonomy and individuality’ (2013) 63 *University of Toronto Law Journal* 337.

<sup>147</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 25.

they are interdependent and dependent. When you realise the inevitability of interdependence and dependence, it would be senseless to equate independence with autonomy (because you would never be autonomous). It involves a deep change in oneself and how you experience autonomy.

The second goal is to consider autonomy in terms of constructive human relations. The collective could be a source of autonomy, through constructive relations, but it could also be a threat to it, through destructive relations. Democratic abuse remains a possibility,<sup>148</sup> especially in instances where democratic decision-making authorises intrusive surveillance of welfare recipients as “deserving” or “undeserving” candidates of welfare services.<sup>149</sup> The objective is, therefore, not to conflate democratic decision-making with autonomy.<sup>150</sup> Although democratic decision-making is an aspect of autonomy, democratic abuse remains a possibility.<sup>151</sup>

In the matter of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*<sup>152</sup> the court ordered the parties to “engage with each other meaningfully”.<sup>153</sup> Meaningful engagement gives rise to meaningful solutions. It leads to an “increased understanding and sympathetic care”<sup>154</sup> which increases the possibility of understanding how harmful relationships arise, which

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<sup>148</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 151.

<sup>149</sup> M Friedman ‘Relational autonomy and individuality’ (2013) 63 *University of Toronto Law Journal* 332. Also see T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ*.

<sup>150</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 33–34.

<sup>151</sup> This is especially true in cases of victims of domestic abuse who flee from the domestic home. She is seen as someone who is capable of securing a job. She is seen as someone who made a choice to live in poverty rather than “sticking it out” in an abusive environment. She is classified as the “undeserving poor” because in the eyes of the state and the public at large, she can simply choose to pull up her boot-straps and take the punch (literally). She made the “choice” to rely on collective resources, where other people are deemed more “deserving” and in need of the welfare e.g. children without a home, disabled people who are incapable of working. See T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Geo LJ*.

<sup>152</sup> 2008 (3) SA 208 (CC).

<sup>153</sup> *Occupiers of 51 Olivia Road*.

<sup>154</sup> *Occupiers of 51 Olivia Road* par 15.

results in victims seeking external assistance.<sup>155</sup> In realising that democracy exclusively does not achieve autonomy (although it is a component thereof), it ensures that the outcomes of democratic processes are constantly analysed,<sup>156</sup> so to ensure a standard of respect for the autonomy of all.<sup>157</sup>

As expressed on several occasions, autonomy is made possible through constructive relations and not independence alone. Dependence and interdependence are inevitable parts of human existence, and therefore relations of dependence and interdependence need to be structured in such a way that it fosters autonomy.<sup>158</sup> These relations are unavoidable; even if the state removes itself from personal relations, it will not stop structuring those relations, it would merely structure the relations differently.<sup>159</sup> Since relations with the state are unavoidable, the relationship

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<sup>155</sup> See G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 742–758 on this.

<sup>156</sup> As in the judgment of *Occupiers of 51 Olivia Road*.

<sup>157</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 149–150. Also see J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 33–34.

<sup>158</sup> J Nedelsky ‘Reconceiving autonomy: Sources, thoughts and possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 13. Also see G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* in which he provides that especially in cases where a relationship of dependency is necessary, such as where vulnerable people are in need of assistance from the state (e.g. victims of domestic violence), that the state “cannot be allowed to persist with its intractable institutional and bureaucratic attitude which dictates that all people living in intolerable conditions must be viewed as criminals” i.e. viewed and treated in a way which further undermines the victim’s autonomy. Instead, the state should consider the needs of these vulnerable persons as legitimate and real, and by doing so, together they foster a “long term *relationship*” (emphasis added) where vulnerable persons can “rise above the often-misconceived perceptions of being helpless, passive and weak recipients of the government largesse”.

<sup>159</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 344–345 in which she discusses that if the state completely removes itself from regulating relations within the private sphere, it results in the impunity of domestic violence. Whereas if the state removed this impunity, it might seem as if the state has increased its power and intervention into people’s private lives. However, this would be false, because the law already intervenes implicitly in allowing abusers to get away with murder. It is simply a shift on who is affected by the state and the laws. In other words, it is not more or less state intervention, but the parties who are affected by this intervention changes. Also see part 4 3 of this chapter, in which I discuss how the state regulates relations.

between the person (especially the vulnerable person) and the state needs to be one that enhances autonomy. This is especially true in the case where a victim is trying to escape abuse within the home. Her right to autonomy is already impaired internally, and her attempt to escape the violent home is an attempt to reclaim her autonomy. Her escape would be wasted if her autonomy were trampled on again by the very institutions put in place to uphold it. It is, therefore, crucial to structure relations between the state and individuals in such a manner that it fosters autonomy; before the individual is completely stripped of her autonomy for a second time. This requires a deep restructuring of relations, including the daily reactions that women coming from abusive homes have with their first line of defence - the police.<sup>160</sup> It requires a re-education of the criminal justice system about the realities that victims face which influence the decisions they are often forced to make, and in which context such choices are made.<sup>161</sup> It further requires a re-education of these institutions, specifically social welfare institutions which operate on the presumption of “individualistic self-reliance” because this generates “coercive, regulative autonomy imperatives”.<sup>162</sup> Some power imbalances are inevitable, and these power imbalances should not further undermine autonomy. Power imbalances can be harmful or useful; it depends on the nature of the relationships: whether that power imbalance is used to exploit the victim, or whether it is used to assist and enhance the autonomy of the victim.<sup>163</sup> Ultimately, relational autonomy seeks to achieve autonomy within the collective, and

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<sup>160</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 152.

<sup>161</sup> L Artz and D Smythe ‘Bridges and barriers: A five year retrospective on the Domestic Violence Act’ (2005) *Acta Juridica* 200—226 226. The word “re-education” is used to suggest that people are already educated in a certain way about the ongoing abuse and that a “re-education” is necessary in order to change what has already been learnt or to build up from the positive aspects of what has been learnt. Also see G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* who provides that the government must “rather ensure that it trains careful and sensitive officials to engage with communities” e.g. police officials must engage with these victims sensitively in a manner that displays sympathy and understanding.

<sup>162</sup> L Code ‘The perversion of autonomy and the subjection of women: Discourses of social advocacy at century’s end’ in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 190.

<sup>163</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 153.

by realising that relations within the collective can be restructured to enhance autonomy, both in the private and public sphere, this goal becomes more attainable.

## 4 5 Rights as Relations

Rights are necessary because they give the law the power to protect and enforce our basic needs and requirements to develop as human beings. The purpose of implementing rights in society is, therefore, to regulate relationships and to ensure that people do not abuse their power on those who are more vulnerable. Rights provide people, within a society, with a sense of safety and security that if their rights are violated, appropriate action will be taken to protect them. Rights are an extension of the value each human life holds. The purpose of rights is to provide a harmonious living environment in which people respect one another and respect humanity as a whole. The enactment of the DVA was for a laudable purpose. There was a realisation of the abuse of powers taking place, especially within domestic relationships. The DVA was an attempt at regulating this abuse of power in order to ensure that other rights such as equality, safety and security, were protected.<sup>164</sup> However, in most instances, the DVA has not been able to regulate these relationships as such because the incidence of domestic violence in South Africa remains one of the highest.<sup>165</sup> Therefore I explore why these rights are ineffective in implementing the change it sought out to achieve, and what alternative approaches are available to regulate abusive relations.

I argue that the ineffectiveness of these rights is because they are viewed as rights which serve as boundaries.<sup>166</sup> In response hereto, I propose that there should rather

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<sup>164</sup> See the Preamble of the DVA.

<sup>165</sup> R Furusa and C Limberg 'Domestic Violence Act: Does it protect?' (2015) *University of Cape Town Final Report* 1—11 2 which provides that South Africa remains one of the countries with the highest incidence of domestic violence worldwide. Also see SA News *Gender based violence on the rise* (2018) available online at <https://www.sanews.gov.za/south-africa/gender-based-violence-rise> (accessed 12 May 2019) and Statistics South Africa 'Statistical release: Victims of crime survey' (2016/17) 1—97 85 which provides that femicide, as well as sexual offences against women, have increased in South Africa between 2015 and 2017.

<sup>166</sup> For example, the boundaries between the public and private sphere – hyperbolised property rights have for instance been implemented in such a way that the right to property has been conflated with

be a conception of rights that routinely directs our attention to relationships (as opposed to boundaries). In other words, there needs to be a reconceptualisation of rights in terms of relations. Rights viewed as relations are essential because the manner in which rights are implemented, shape people's relations.<sup>167</sup> When considering rights in terms of relations, rights can restructure certain relations. It does not necessarily mean that the rights that one has are dependent on the relationships that currently exist (which may be oppressive relationships, especially in the context of domestic violence).<sup>168</sup> A relational approach to rights questions how defining rights in one way, rather than in another, results in structuring relations differently. A relational approach questions how the current interpretation of rights fails to protect women from abuse. It considers how a different approach could promote, rather than undermine, values such as privacy and autonomy.<sup>169</sup> Before discussing why a relational approach to rights can prevent domestic violence, a discussion of why rights, as defined in terms of boundaries, is considered. A discussion on boundaries follows this, and why applying more boundaries would not give the same results as a relational approach.

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holding a protection to the private sphere. In other words, it protects an individual from any public interference, even where such interference may become necessary for instance when the exercise of your property rights violates other rights and other people in relation to your property right.

<sup>167</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 307—308. This includes all relations, not just interpersonal relations but also institutionally – rights can shape intimate relations, relations between strangers and even the relations between the state at large.

<sup>168</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 315. The relational approach does not hold the belief that “the rights one has are contingent on one's relationships.” The relational approach rather means that people should see rights as a means of structuring relationships. I argue that the entire purpose of rights is to structure relationships and that rights have done so in the past and will continue to do so in the future. The purpose of the relational approach is, therefore, to look into the structure of these relations and how rights have contributed to forming them; thereafter to take a step back and to restructure abusive relationships that may exist through the use and power of rights.

<sup>169</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 315.

## 4 5 1 Rights as Boundaries

Why are rights defined in terms of boundaries? Fundamentally rights as boundaries serve as a wall against interference from the collective.<sup>170</sup> In other words, the notion of rights in terms of boundaries limits state involvement in order to protect values such as privacy and autonomy.<sup>171</sup> Liberal theories shape these boundary-induced rights since it focuses squarely on the public/private divide.<sup>172</sup> Liberal feminism (stemming from liberalism) realises that gender inequality exists, but that such inequalities are prevented by affording women and men the same rights within an already existing system. Thus, similar to most feminist agenda's, it strives towards equality and autonomy for women.<sup>173</sup> However, instead of challenging the oppressive systems, it seeks entry into these institutions. Liberalism's core idea is the simultaneous commitment to equality in the public sphere and the maintenance of values such as privacy and autonomy within the private sphere.<sup>174</sup> A liberalist/boundary theory of rights counters private and free on the one hand, collective and coerced on the other. However, these opposing choices misleading and false towards the agenda of achieving autonomy. Instead, there should be consideration for individual autonomy within the collective as proposed by Nedelsky.<sup>175</sup> Liberal feminism recognises the tensions between public and private but preoccupies itself with only one dimension thereof.<sup>176</sup>

Why is such a conception of rights destructive? Firstly, the public/private divide insulates the private sphere from state regulation, based on the assumption that values such as privacy and autonomy are respected in the private sphere. Thereby, it

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<sup>170</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 163.

<sup>171</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 162.

<sup>172</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629.

<sup>173</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629.

<sup>174</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1630 and KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1259.

<sup>175</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 18–19.

<sup>176</sup> That one dimension being the public sphere, since it focuses solely on achieving equality within the public sphere alone, assuming equality within the private. J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 166.

contributes to the subordination of women within the private sphere.<sup>177</sup> The liberal feminist theory is questionable in its ability to sustain equality in both the public *and* private spheres. Although the boundary between public and private may, in some instances, afford women some degree of protection, it does not afford them the same protection as men because it does not address the inequalities existing within the private sphere.<sup>178</sup> In other words, it does not place an equal burden on the public/private spheres of life, and to that extent, it turns a blind eye to the injustices within the private sphere.<sup>179</sup> The boundary language provides for a sphere in which one can act unconstrained by the prohibitions regularly found in the public sphere. The boundary perpetuates violence within the private home.<sup>180</sup>

This public/private dichotomy insulates individual freedom from democratic decision making, and rights become things to be protected, rather than values which should be determined collectively.<sup>181</sup> The divide aims to protect autonomy as a value but subsumes autonomy to the private sphere. However, constructive relationships are necessary for the development of autonomy, not protection against interference.<sup>182</sup> Therefore, there must be a consideration for the relationships foster that autonomy. The boundary metaphor does not seem capable of achieving this. Instead, it draws the attention away from productive relationships which contribute towards the growth of autonomy. It suggests that autonomy is at its optimal point once boundaries are built around the individual, free from any state interference.<sup>183</sup> Since autonomy and privacy are traditionally (in the liberal sense) closely linked to the boundary metaphor, the rejection of the boundary metaphor seems to equate to the rejection of values such as privacy and autonomy. However, this is not the case.<sup>184</sup> Instead, the relational

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<sup>177</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629.

<sup>178</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1632.

<sup>179</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1644.

<sup>180</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 165.

<sup>181</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 166.

<sup>182</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 168.

<sup>183</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 168—169.

<sup>184</sup> See AJ van der Walt *Property and Constitution* (2012) 5 which reads as follows: "Most private law specialists nowadays accept that private ownership is justifiably and inevitably limited by public-interest regulation and therefore would not regard the balancing of private property interests against the public



approach focuses on relations that foster these values. It does not maintain boundaries which draws our mind away from the relationships that form or destruct these values.<sup>185</sup> The Constitution provides the means for considering all relations in respect of certain rights.

No right is absolute, even if it is guaranteed in the Bill of Rights. The Constitution provides for a balancing of the rights in any particular situation. Every right stands in relation to another right. Additionally, that right is held by someone else. Therefore, every right that one person has, is in relation to another person. Therefore, the protection of one right must always be considered within its context. The protection of a right depends on how important it is to uphold that established right for an individual holder, and limiting and regulating that right in as far as it is in the interest of the public.<sup>186</sup> This approach takes on the form of the relational approach; it challenges the boundary approach because it views rights in relation with one another and it considers how the respective rights held by the respective people, affect the relations between the right holders. It challenges the “all-or-nothing” approach to rights and “assumes a more nuanced, contextual character.”<sup>187</sup>

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interest as an unjustified or illegitimate infringement on existing property rights, depending on the factors that are taken into account and the way in which the balancing plays out in practice.” This adds to my point that introducing state involvement does not necessarily result in complete removal of the autonomy in the private sphere, and dependent on the circumstances, this involvement may be necessary for justice, equality and even freedom to prevail.

<sup>185</sup> J Nedelsky ‘Law, boundaries and the bounded self’ (1990) 30 *University of California Press* 178.

<sup>186</sup> AJ van der Walt *Property and Constitution* (2012) 5.

<sup>187</sup> AJ van der Walt *Property and Constitution* (2012) 5. The boundary approach to rights is similar to an “all-or-nothing” approach that van der Walt speaks of. The constitutional approach of van der Walt is more in line with that of the relational approach, which assumes a more nuanced and contextual character. Looking at the rights in relation to one another and recognising that rights are not absolute but subject to their relations in order for fairness allows for equality and justice to prevail. Also see page 154 which further supports my argument that the constitutional approach is more like the relational approach in that the “Constitution requires a shift from the traditional focus of individual rights in discrete objects to a relational or contextual focus on the features or qualities of the overall property holding system and the position of `relationships between individual rights holders in that system”. Here, van der Walt endorses the Constitutional approach as a form of the relational approach, specifically because he moves away from viewing rights in terms of their boundaries and individually, and promotes a shift towards viewing them in terms of relations.

The privacy I refer to, speaks of a sense of autonomy and control that a person has to either allow or disallow access to themselves.<sup>188</sup> The relational approach considers wider relations in the private sphere. The relational approach makes it clear that it is not only rights in the public sphere that structure relations, but also relations within the private sphere which affect the accessibility to the rights afforded within the public sphere. The two spheres are inevitably interrelated and interdependent. Based on the interrelatedness of the two spheres, I argue that the public sphere is not necessarily in opposition to the value of autonomy and that more intimate relations can also negatively affect this value.<sup>189</sup> Further, it comes to show that rights are not always the only way to shift oppressive relations. Although rights do have some influence, they are not the only manner to effect change.<sup>190</sup> Shared community values and

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<sup>188</sup> IM Young *On female body experience "throwing like a girl" and other essays* (2004) 152.

<sup>189</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 321.

<sup>190</sup> See AJ van der Walt *Property and Constitution* (2012) 10—13 in which he discusses the role of the judiciary and the legislature. Van der Walt discusses the tension between the judiciary and the legislature pre-1994 and provides that this tension was seen as a "purely technical matter of statutory interpretation" and that even where it was predominantly a political issue, it was not perceived as such. Pre-1994 the judiciary would wash their hands free from any guilt and plead their helplessness on the basis that they had limited power to resist unwarranted statutory changes because the legislator could always overrule the courts. The tension between the judiciary and the legislator would easily be translated into a technical matter rather than a power struggle between the legislature and judiciary. This was all in the absence of "the constitutional power of judicial review" meaning that the courts "simply never had the authority to enter into a power contest with the legislature". The purpose of including and discussing these paragraphs is to show that rights as ordinarily imposed by the legislature are not always the only means of achieving a shift in oppressive relations. What is further required is a generous interpretation of the rights to allow for this shift by say, the judiciary. Rights alone cannot achieve the shift of oppressive power relations. The courts, alongside with, communities and welfare services have to promote this shift and should not shy away from the legislature. This once again falls into the bounded mindset of matters. In other words, the judiciary and legislature are strictly separated from one another, and yet, another set of abuse of powers come into play, i.e. the legislature has power over the judiciary, and the parliament had power over them both. Instead, they should be on equal footing, i.e. there should be a balance of powers. Therefore, although the legislature does play a large part in making laws which allow for equality to prevail, the executive and judiciary also play a large role in ensuring that these laws are implemented properly through "transformation-orientated" policies. "The success of the transformative process must, therefore, be assessed with reference to statutory, administrative and judicial processes." In other words, rights alone cannot effect change.

responsibility can shift oppressive and abusive relationships.<sup>191</sup> As much as a full and legitimate recognition of rights would be beneficial - especially in the case of the DVA – it would still not result in equality. The problem is not with the legislation, but rather with the actual correct implementation thereof. Despite the appeal of the relational approach,<sup>192</sup> it has not been implemented and applied uniformly. In many instances, courts continue to rely on the “traditional lines of private law argument”<sup>193</sup> and continuously apply the law in terms of boundaries; they often apply stricter boundaries than originally imposed. Prejudice and discrimination continue to exist in conjunction with the legitimate acceptance of rights as applied in terms of the boundary approach. The systemic practices and consciousness in people’s minds will not change. In the case of domestic violence, the shift is not yet complete since men, and even police officials, trivialise the matter and merely brush it aside as a “private matter” with which they should not interfere.<sup>194</sup> Why? Because rights, even though legitimately recognised, are still seen as boundaries, and these boundaries bound our minds from exploring the relations within the structures.

#### **4 5 2 Rights as Relations**

The notion of rights as boundaries recognises the tensions between public and private. However, in order to determine and achieve autonomy, one has to move beyond these boundaries. Therefore, there needs to be something more than a mere replacement

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<sup>191</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 321. Welfare services could provide an easier exit option for women in abusive relations. Welfare support contributes to shifting these perverse power relations by removing the abusive power that one individual has over another by giving the latter a legitimate option to leave and to be safe and secure, and more autonomous. She is no longer trapped and now has a legitimate choice to stay or go.

<sup>192</sup> The relational approach is endorsed by the Constitution and the DVA. Both recognise that no rights are absolute and that the rights are subject to their relationship with other rights. Moreover, as extensively discussed, the DVA is a very comprehensive Act which recognises that domestic relationships consist of a wide range of relations and that domestic violence consists of many forms of violence. Therefore, considering the advanced nature of the Act and what it promotes, it still seems to fail to achieve what it has set out to do. This is not because of the Act itself, but rather the mode of implementation.

<sup>193</sup> AJ van der Walt *Property and Constitution* (2012) 6.

<sup>194</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and law* (2011) 315.

of rights with other rights that serve as boundaries.<sup>195</sup> Rather, a new conception of the tensions between public and private is required, which brings to light the patterns of relationships.<sup>196</sup> The function of boundaries is to structure relationships (in a manner that enables autonomy); however, boundaries do not question which types of relationships are structured. Furthermore, boundaries do not allow for an understanding as to what those structured relationships are, or what they should be.<sup>197</sup>

Rights as boundaries provide a wall for the individual against state interference. This wall provides a sphere (the private sphere) in which a person can, to a great extent, act unconstrained and without the fear of state interference. In other words, boundaries provide a space which often protects violence. This places the focus on inequality within the public sphere rather than on individual autonomy and the source of inequality. There is a need for collective construction of individual rights in a society which simultaneously respects democratic decision making and individual freedom, which at the same time recognises the need to sustain the unavoidable tension between them.<sup>198</sup> Boundary language places the collective and the individual in oppositional separateness. It directs the attention away from the nature of the relationship between the two.<sup>199</sup> Therefore, one of the most significant things that boundaries protect is power. Boundaries provide a metaphorical wall around this power - the power to exercise control within the private sphere. The power to exercise privacy (and by extension autonomy). This power shields people from further external powers. The focus on boundaries instead of relationships that wields power does not allow for an investigation into the consequences power-patterns.<sup>200</sup> Whereas, a relational approach to rights and how they structure relationships, brings to light which relations create this imbalance in power and the complexity of these imbalanced relations.<sup>201</sup>

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<sup>195</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 162.

<sup>196</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 163.

<sup>197</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 170, 175 and 178.

<sup>198</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 166.

<sup>199</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 175.

<sup>200</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 177.

<sup>201</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 318.

In the case of domestic violence (which portrays not only vastly imbalanced power relations, but also a wide net of relations), a relational approach recognises the wide net of relations and restructures destructive relations within which the victim is embedded.<sup>202</sup> A relational approach considers not only intimate parts of a relationship but looks at the wider spectrum. It considers state and non-state relations simultaneously. –It further considers how the law participates in constructing these relations. Whilst all these relations can be shifted by legal rights, it is not the only (or best) way of doing so. For instance, in the case of domestic violence, the DVA implements rights to eliminate violence. The enactment of the DVA assumes a commitment and willingness to restructure. For example, it assumes that there is a willingness to provide shelters in order to make the rights in the DVA a reality. Sadly, this commitment is generally lacking. Although the relational approach will not necessarily provide commitment either, the relational approach places the focus on relationships which make these rights realisable. By doing so, the relational approach realises that there is a need to restructure relations which render these given rights ineffective.<sup>203</sup> A relational approach to rights shifts the oppositional and absolutist quality of rights embedded in the boundary language, whilst still recognising the tensions that exist.<sup>204</sup> It considers rights as relating to a system rather than viewing rights individually. Because the rights of one person affects the rights of another, it is important to consider rights in their context. People do not live alone, so you cannot interpret rights in isolation. The relational approach essentially views rights from a bird's eye view and considers all the rights involved and how they affect one another. It does not look at each right in isolation without consideration of its effects on other

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<sup>202</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 321.

<sup>203</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 316.

<sup>204</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 321. Also see AJ van der Walt *Property and Constitution* (2012) 15 which provides that in the constitutional context (which I argue reflects facets of the relational approach) “we have to reflect upon and reconsider the relationship between the seemingly competing sources of law and decide on a way forward that is in line with the dictates of the Constitution.” In other words, the constitutional context, like the relational context, promotes a shift from the oppositional and absolutist quality of rights as embedded in the boundary language, towards a way that considers the tensions involved but which is more in line with the values and aspirations of the Constitution.

opposing rights.<sup>205</sup> Further, the relational approach invites a constant and consistent analysis of the values in question and requires engagement with relations that foster such values. It determines what form of interpretation of rights, or legal structures, structure relations in the most beneficial way for the values in question.<sup>206</sup>

## 4 6 Relations Restructured

If rights are understood in terms of relations, it brings forth the possibility to determine which relations are destructive, and which are constructive to values such as privacy, security, safety and autonomy. Such values are only made possible by structures of relationships.<sup>207</sup> In other words, a relational approach determines which relations structure the right to a home (being safe, secure and settled in one's identity and the relations that form it). Certain relations take away from this right to the home (not always directly) often indirectly by being complicit to the threat of these values. For instance, it is not solely the violence that occurs between intimate partners within the home that causes a threat to such values, but also the complicity of the state. This complicity contributes to the violence that occurs privately.<sup>208</sup> Therefore, there is a clear need to restructure these detrimental relations and how they undermine these values, into a way that considers alternative relations which are beneficial to them. Many social relationships have constrained and oppressed women, there is thus a need to restructure imbalanced power relations between men and women, alongside a transformation of the social and intimate relations which give rise to the threat of these values. Where some relationships require preservation, others need to be abolished, and if not abolished, at least improved.<sup>209</sup> Relations of inequality and patriarchal conceptions of masculinity is what shapes domestic violence. However, these relations are only understood when seen in the light of broader gender relations

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<sup>205</sup> AJ van der Walt *Property and Constitution* (2012) 130.

<sup>206</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 343.

<sup>207</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 307.

<sup>208</sup> KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1259—1260.

<sup>209</sup> M Friedman 'Autonomy, social disruption, and women' in Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 46.

which society instils.<sup>210</sup> It is therefore critical to understand how masculinity and patriarchy intersect with other hierarchies and state structures and how they affect both men and women.<sup>211</sup> In order to eliminate violence and to ensure that cherished human values are upheld, a serious rearrangement of power relations between men and women is required.<sup>212</sup> This is a rearrangement of how relations are structured, not only from a interpersonal level but from a broader societal level as well.<sup>213</sup> Considering how relations are structured on a societal level, allows one to consider how men are also affected by the inequalities that patriarchal and masculinist ideals enforce.<sup>214</sup> The violence that men force upon women forms part of a much larger pattern of violence which allows intimate violence to occur. The large pattern of violence is part of the danger of how male violence contributes to structuring relations among men and between men and women.<sup>215</sup> Therefore, a serious investigation into how relations are

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<sup>210</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 323.

<sup>211</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 325.

<sup>212</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 324. I am mindful that violence will never cease to exist in its entirety. However, I am hopeful that the relational approach assist in eradicating a large portion thereof and that it will improve relationships between various parties.

<sup>213</sup> In other words, relations should not be seen in terms of one person holding more power than another. Parties should be placed on an equal footing relative to their circumstances. Meaning that, although party A may, objectively speaking, have more power, party A should not disregard the fact that they rely on party B for their power. Their power is only ever subject to party B and is non-existent without party B. For example, in a work environment, a boss only has power relative to his/her employees. Without his/her employees, their power is rendered obsolete. The employer needs the employee, just as the employee needs the employer. Although one may objectively speaking have more power over the other, he/she must always keep in mind that his/her power is only ever subject to the existence of the other's existence and their willingness to be in that position. One's willingness to be at a specific place is reliant on an environment of respect and one which encourages autonomy. Through that, the employee also holds a certain amount of power. If we view relation in in a way that harbours mutual respect, rather than one party holding all the power, autonomy becomes possible. This analogy serves as an example that patriarchal ideologies are not only practised in the private sphere between domestic partners, but also other wider public spaces. Where patriarchy and masculinity in the form of power relations are practised in these broader spheres, it seems acceptable to do the same in the domestic spheres. Therefore, the project of restricting relations lies much deeper than merely restructuring intimate relations, but it requires the restructuring of larger societal relations which are informed by the masculinist and patriarchal ideals.

<sup>214</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 323.

<sup>215</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 323.

structured, and how rights contribute to this structural arrangement, requires an in-depth consideration in order to restructure relations so that they are beneficial to values such as equality and autonomy.<sup>216</sup>

I argue that these cherished human values, especially autonomy, is made possible by structures of relationships, including intimate relations and wider relations.<sup>217</sup> Autonomy specifically, should not be seen as antithetical to other social values, in fact, most of what we value in our relationships are consistent with the ideals of autonomy, but only if we develop an appropriate social conception of it.<sup>218</sup> Some relations are complicit with larger oppressive structures and constrain the autonomy-realising potential that some relations hold.<sup>219</sup> Therefore, in order to enhance relational autonomy, it is crucial to evaluate all relations which inform the imbalance of power in relationships, and which consequently undermine these values. Only then, will we be able to alter these power-hungry relations in a way that supports values such as autonomy.<sup>220</sup>

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<sup>216</sup> See L Code 'The perversion of autonomy and the subjection of women: Discourses of social advocacy at century's end' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 185. In a like manner, the value of autonomy needs to be reconsidered. It should not have a dichotomous meaning where one has to choose between being autonomous and socially embedded. If autonomy is understood in terms of the connections necessary to develop autonomy, then this too can contribute to restructuring relations. For example, women on welfare will no longer be perceived as failures in meeting a standard of civic self-sufficiency, women seeking childcare as inadequately autonomous in assuming responsibility for their own choices.

<sup>217</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 311.

<sup>218</sup> M Friedman 'Autonomy, social disruption, and women' in Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 41.

<sup>219</sup> L Code 'The perversion of autonomy and the subjection of women: Discourses of social advocacy at century's end' in C Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 182.

<sup>220</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 311.



## 4 7 Conclusion

In this chapter following the work of Jennifer Nedelsky, I argue that autonomy exists because of constructive relations. Autonomy is imperative to all feminist theories. It is a notion that aims at dismantling oppression, subjection and individuality.<sup>221</sup> Jennifer Nedelsky defines autonomy in terms of a relational approach. She defines autonomy as the feeling of comprehension, confidence, dignity, efficacy, respect and a degree of peace and security from oppressive powers.<sup>222</sup> In chapter 3 above, I dedicate some time to investigating how relationships of domestic violence are problematic, especially to the value of autonomy. Domestic violence is an example of how oppressive relationships stand in the way of achieving autonomy. Domestic violence occurs within the scope of relationships specifically and will not cease to exist unless these perverse, oppressive relations are restructured. This involves a restructuring of intimate relations, which contribute to domestic violence, as well as wider public relations which generate such relations.<sup>223</sup> The common problem with domestic violence is that it is hidden. Because it is hidden, it becomes repetitive since it is not subject to any form of punishment. It affects a wide range of relationships and challenges society at every level because society collectively tolerates it.<sup>224</sup> The DVA was therefore introduced as a measure to combat this violence. The DVA is relational in nature because it endeavours to understand the relations behind domestic violence. Therefore, the problem is not the legislation put in place *per se*, but rather with the lack of a systemic, relational analyses.<sup>225</sup> Without a systemic and relational analysis, the root cause of domestic violence remains undiscovered. A relational approach thus seems like a solution because it considers all dimensions of relational structures. It considers how relations are structured, why they are structured in such a way, and attempts to restructure relations that are detrimental to the goal of autonomy.

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<sup>221</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 3.

<sup>222</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 11.

<sup>223</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 307.

<sup>224</sup> *S v Baloyi* 2000 (2) SA 425 (CC) par 11.

<sup>225</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 312.

Current rights formulated in a boundary-language are not optimal in achieving autonomy for women, especially women coming from an abusive home. The principal purpose of rights serving as boundaries is to maintain ideals such as autonomy and privacy through keeping the public and private sphere separate.<sup>226</sup> This separation suggests that autonomy is optimal if boundaries are built around the individual. Liberal theories shape this ideal of autonomy which is committed to obtaining equality within the public sphere, and simultaneously, maintaining privacy in the private sphere.<sup>227</sup> Therefore, it creates a choice between being private and free, or coerced within the collective. It implies that freedom and autonomy can only be found within the private sphere and when the public sphere is kept at bay.<sup>228</sup> Liberal theories subsumes autonomy to the private sphere. This approach does not consider that the private sphere can be detrimental to the goals of autonomy,<sup>229</sup> and this is especially true in the case of domestic violence. Therefore, the main argument is that a new conception of rights is required, one that continually directs our attention to relationships. This new conception allows us to determine how autonomy is established through these relations because autonomy is only made possible through structures of relations. Furthermore, a rejection of boundaries is not a rejection of privacy and autonomy, although it may seem so based on the strong association liberal thought has placed on maintaining boundaries and values like privacy and autonomy. The rejection of boundaries by the relational approach focuses on relations to enhance values such as privacy and autonomy, instead of focusing on boundaries which do not invite inquiry into relations that form them.<sup>230</sup> Boundaries draw the attention away from the real problem: the need for collective construction of individual rights, which simultaneously respects democratic decision-making and individual freedom.<sup>231</sup> Whereas, rights as relations brings to light that it is not always the public sphere that suppresses autonomy. Intimate relations can be oppressive. Shared community values can shift

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<sup>226</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 163.

<sup>227</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1630.

<sup>228</sup> J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 14.

<sup>229</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629.

<sup>230</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 178.

<sup>231</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 166.

these oppressive relations.<sup>232</sup> Rights as relations recognises the tension between the public and private spheres, but instead of keeping them separate, tries to reconcile them.<sup>233</sup> I argue that there needs to be more than a mere replacement of rights with other rights, which serve as boundaries – there needs to be a complete transformation of rights in terms of relations. Since rights structure relations, and since relations structure autonomy, it would be beneficial to the achievement of autonomy, to view rights as relations. With a relational view on rights, it would be easy to establish which rights are constructive, and which rights are destructive to the goal of autonomy. Therefore, instead of blindly accepting destructive relations, and focusing on building more boundaries in order to protect a false conception of autonomy, a relational approach restructures destructive relations into constructive ones.

Part of the destructive relations that contribute to the prevalence of violence has been the dichotomous relationship between the public and private spheres. The divide insulates the private sphere from regulation, even when such regulation is necessary. This insulation leads to the continued force and subordination of women in the private sphere.<sup>234</sup> The divide threatens her autonomy simply because state involvement seems more threatening than the violence she endures in the home.<sup>235</sup> However, this theory only holds when the state itself upholds patriarchal powers and norms. Therefore, the relational approach calls for a need to restructure state involvement in a way that is not threatening to her autonomy. The relational approach does not invite more state involvement, but rather a different form of state involvement.<sup>236</sup> This different form of state involvement will be achieved when underlying structures in the public sphere are restructured in such a way that it informs values within the private sphere. In other words, we require a restructuring of the values in the public sphere which enhance patriarchal practices to ones which celebrate autonomy as understood

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<sup>232</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 321.

<sup>233</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press* 163.

<sup>234</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1629. Also see KD Bailey 'Criminal law lost in translation: Domestic violence, "the personal is political," and the criminal justice system' (2010) 100 *The Journal of Criminal Law & Criminology* 1261. Also see SR Bassadien and T Hochfield 'Across the public/private boundary: Contextualising domestic violence in South Africa' (2005) 66 *Agenda: Empowering Women for Gender Equality* 12.

<sup>235</sup> TE Higgins 'Why feminists can't (or shouldn't) be liberals' (2004) 72 *Fordham Law Review* 1631.

<sup>236</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 337.

in relational terms.<sup>237</sup> This does not equate to more state involvement. It results in the correct application and practice of state involvement which merely upholds already-existing rights. It results in the state applying its duties in the manner that mandates change. The principal purpose of the public/private divide is to ensure that autonomy is protected. However, such a divide has proven to be ineffective in ensuring autonomy. Often the divide protects the violence that occurs within the walls of the private sphere, instead of autonomy. It results in violence within the walls of the private sphere which are being protected, instead of autonomy. The fundamental question should not be how to maintain and build more boundaries, but rather how to advance autonomy between these boundaries. However, in order to advance autonomy, we first and foremost need an adequate understanding of autonomy.

For the longest time, autonomy has been rooted in liberal theories of individualism and independence. The liberal theory values independence over all other values, especially those arising from interdependence.<sup>238</sup> This understanding of autonomy associates the private sphere with autonomy and therefore promotes the public/private divide in order to ensure that autonomy remains protected within the sphere that promotes it.<sup>239</sup> Protection of the private sphere often leaves patriarchal power intact and fails to realise the effect that fear has on choice. Therefore, I propose a new conception of autonomy: relational autonomy. Relational autonomy considers the embeddedness of people in their relations with others and how these relations shape a person. Relational autonomy challenges liberal theories of autonomy.

Relational autonomy incorporates the human experience of embeddedness in their relations, both good and bad. It analyses oppressive relations and how they impede the full realisation of autonomy. It investigates social norms and institutions which are detrimental to the value of autonomy and considers methods of restructuring these destructive norms. Because people are fundamentally social beings, embedded in a

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<sup>237</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 356–357.

<sup>238</sup> C Mackenzie and N Stoljar *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (2000) 6.

<sup>239</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 118 and J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 12.

social world, they can only develop their autonomy through social interactions.<sup>240</sup> It is, therefore, necessary to consider these social interactions and how they contribute to the development of autonomy. Liberal theories do not consider constitutive connections between people and groups of people. Relational autonomy does not negate the possibility of autonomy simply because a relationship of dependency or interdependency exists. Instead, it uses the constitutive connections as a means to develop autonomy. Because rights regulate relations, I looked into how rights, as understood in one way, contribute to the realisation of autonomy, and how to improve this through a relational understanding of rights.

For a long time, rights have been accepted in terms of boundaries. In other words, rights are seen as individual rights, protected in a hierarchical order, where one right is deemed worthier of protection than other rights. These boundary-induced conceptions of rights are shaped by liberal theories which not only focus on the protection of one individual right at a time but also on the protection of the public/private divide.<sup>241</sup> However, it must be borne in the mind that no right stands in isolation. Every right stands in relation to another right, and because people hold rights, every person stands in relation to another person. Therefore, every right must be considered within its relational context. When considering rights in a relational context, it challenges the boundary approach to rights because it enables the understanding of rights in relation to others rather than in isolation. It challenges the “all-or-nothing” approach to rights and “assumes a more nuanced, contextual character.”<sup>242</sup> Where the purpose of these boundary induced rights is to protect people through the regulation of relationships, boundaries do not question which types of relationships are structured by its boundaries. Boundaries do not allow for an understanding as to what these structured relations are or what they should be. A relational interpretation of rights considers all rights within their specific relational context and thus shifts the oppositional and absolutist quality of rights embedded in

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<sup>240</sup> M Friedman ‘Autonomy, social disruption, and women’ in Mackenzie and N Stoljar (eds) *Relational autonomy relational perspectives on autonomy, agency, and the social self* (2000) 40.

<sup>241</sup> TE Higgins ‘Why feminists can’t (or shouldn’t) be liberals’ (2004) 72 *Fordham Law Review* 1629.

<sup>242</sup> AJ van der Walt *Property and Constitution* (2012) 5.

the boundary language.<sup>243</sup> The relational interpretation of rights views rights as relating to a system and invites a constant analysis of the values affected by each right. The relational interpretation of rights invites the possibility to restructure oppressive relations into constructive ones who give meaning to the value of autonomy. It is only through a restructuring of relations that violence will be eradicated and in which the meaning and value of autonomy will arise.

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<sup>243</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 321. Also see AJ van der Walt *Property and Constitution* (2012) 15.

## Conclusion

Defining home is particularly challenging when it is defined in terms of violence and oppression of women. It is even more challenging to reclaim home if it is defined in these terms. I have therefore sought out to define home outside of its boundedness - in terms of a space which does not equate to the confinement of women, but rather their autonomy. However, in order to define home as a space of safety, security, privacy and autonomy, and further reclaiming it as such, there needs to be a deep restructuring not only on how we perceive home, but also on how we perceive the law that shapes and secures these perverse relations which give rise to a harmful understanding of home.

Furthermore, it is even more challenging to protect home when there is no legal definition of it. It is crucial to define home in law because home “carries critical liberating potential because it expresses uniquely human values”.<sup>1</sup> These human values such as safety, security and privacy, contribute to determining a person’s identity and autonomy. In this regard *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>2</sup> (*‘Grootboom’*) grounded the connection between housing rights and human dignity. This connection was confirmed in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*<sup>3</sup> (*‘Residents of Joe Slovo Community’*) and the matter *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*<sup>4</sup> (*‘Blue Moonlight Properties’*) In *Grootboom* the court held that values such as human dignity, freedom and equality

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<sup>1</sup> IM Young *On female body experience: “throwing like a girl” and other essays* (2005) 124.

<sup>2</sup> 2001 (1) SA 46 (CC).

<sup>3</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) par 75 which provided that the inherent dignity of a person is very significant in the housing context.

<sup>4</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 3 All SA 471 (SCA).

are embedded in housing rights.<sup>5</sup> Therefore, I used housing rights as a means to define home.

Section 26 of the Constitution provides that everyone has a right to access to adequate housing. It further provides that the state must take reasonable legislative and other measures to realise that right.<sup>6</sup> Finally, section 26(3) provides that no-one may be evicted from their home. Therefore, if the principals of subsidiarity, a single system of law and constitutional supremacy are applied, one can see that section 26 should be read and understood in its entirety. Therefore, adequate housing must, to some extent mean home. Based on section 26(2) of the Constitution, the state has a positive obligation to provide access to adequate housing. In other words, if the right of access to adequate housing is threatened in any way, the state has an obligation to “take reasonable legislative and other measures” to ensure that this right is protected. I argue that domestic violence threatens the right to adequate housing. Therefore, if the state neglects to act against it, the right to access to adequate housing is negated, and the state fails in fulfilling its duties. Especially when there are Acts in place, giving organs of state the power to interfere in cases of domestic violence. Therefore, if the state neglects to act against it, they are not taking all “reasonable legislative” measures to ensure the right to access to adequate housing is protected. The Housing Act gives effect to section 26 of the Constitution. However, it does not define adequate housing. Therefore, I turn to judicial authority to find a definition for adequate housing in order to define adequate home(ing).

In *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>7</sup> (*Grootboom*) the court dealt with the definition of adequate housing. The judgment confirms that housing consists of more than just “bricks and mortar”.<sup>8</sup> Further, in *Port*

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<sup>5</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) par 46. Also see part 2.2 of this dissertation which deals with section 26 of the Constitution and how although “house” and “home” are separate concepts, they are at the very least interrelated.

Although they are not the same concepts, housing assists in determining what home may mean.

<sup>6</sup> Section 26 of the Constitution.

<sup>7</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

<sup>8</sup> 2001 (1) SA 46 (CC).



*Elizabeth Municipality v Various Occupiers*<sup>9</sup> ('PE Municipality') the court defines home as "more than just a shelter" and as a place of "personal intimacy" and "family security". In the matter of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*<sup>10</sup> ('Residents of Joe Slovo'), the court states that dignity is arguably one of the most significant rights, especially in the context of housing. In support of this, the judgment in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*<sup>11</sup> ('Blue Moonlight Properties'), the court expresses its concern that the City undermined the occupiers' right to dignity. Adequate housing is therefore not a right unto its own. It is a right that is connected with other rights such as human dignity,<sup>12</sup> safety and security<sup>13</sup> and privacy.<sup>14</sup> Moreover, housing is a gendered concept, and a gender-neutral approach cannot address the vulnerabilities women face. Violence against women has a particular closeness to women's experience of adequate housing; it not only affects their current living arrangements but it also their ability to leave the abusive household in addition to other impediments that limit their freedom of movement.<sup>15</sup> Therefore, rights such as privacy and human dignity are crucial factors for adequate housing. If these rights are not protected, the right to access to adequate housing is compromised. Often organs of state find it challenging to protect these rights because it requires crossing the boundary between public and private. For this reason, I discuss property rights because property rights are symbolic of boundaries and boundedness. In order to find home in a property theory of law, it is necessary to move away from the dominant metaphor of rights as boundaries, which property rights symbolises, towards a conception of rights as relationships.<sup>16</sup>

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<sup>9</sup> 2005 (1) SA 217 (CC).

<sup>10</sup> 2010 (3) SA 454 (CC).

<sup>11</sup> 2012 (2) SA 104 (CC).

<sup>12</sup> Section 10 of the Constitution.

<sup>13</sup> Section 12 of the Constitution provides for the right to freedom and security, which includes the rights to be free from all forms of violence, publicly or privately inflicted.

<sup>14</sup> Section 14 of the Constitution provides that everyone has the right to privacy.

<sup>15</sup> Westendorp I *Women and housing: Gender makes a difference* (2007) 53.

<sup>16</sup> J Nedelsky 'Violence against women: Challenges to the liberal state and relational feminism' (1996) 38 *American Society for Political and Legal Philosophy* 454—497 465.

When dealing with the opposing property rights and home-ing rights, it is necessary to “break away from a purely legalistic approach” and to consider external influences such as “morality, fairness, social values and implications and circumstances”.<sup>17</sup> Therefore, moving beyond merely replacing property rights with other rights which also fundamentally serve as boundaries.<sup>18</sup> It is necessary to move away from the technical flow that usually arises from the provisions of property rights.<sup>19</sup> The matter of *PE Municipality* provides that courts must “infuse elements of grace and compassion into the formal structures of the law” to balance the opposing interests involved - which promotes a “caring society based on good neighbourliness and shared concern” since we are not islands unto ourselves.<sup>20</sup> Other rights and interests such as equality, human dignity, peace and security must be taken into account since they all form part of the Bill of Rights and the holistic image which the Constitution is promoting.<sup>21</sup> Through infusing “elements of grace and compassion” and by taking other rights and interests into account, defining home becomes an easy task. Home is a physical location and an emotional construct. Home is a place of safety, peace, privacy, security and autonomy. Therefore, home should not be rejected. Although the comforts and tranquillity of home may historically have come at women’s expense, these positive values should instead be extended to everyone by reclaiming home, which carries these positive values.

Unfortunately, certain relationships threaten these values that constitute home. Domestic violence is the most extreme form of oppression of women, and it predominantly occurs within the home (hence “domestic” violence). Domestic violence threatens safety, peace, privacy, security and autonomy. Domestic violence makes home a site for fear and unequal, oppressive relations, it takes away from the ideal of a safe home. These abusive relationships can skew one’s understanding and feeling of the home. Domestic violence completely violates the right to a home because

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<sup>17</sup> *PE Municipality* par 33.

<sup>18</sup> J Nedelsky *Law’s relations: A relational theory of self, autonomy, and the law* (2011) 162.

<sup>19</sup> *PE Municipality* par 35.

<sup>20</sup> *PE Municipality* par 37.

<sup>21</sup> L Fox *Conceptualising home theories, laws and policies* (2006) 362. See also AJ van der Walt *Property and Constitution* (2012) 123 who provides that the broad constitutional context will affect the development of the notion of property law.

concepts of safety, security, peace, privacy and dignity are disregarded. To the extent that home is an extension of one's identity, an interference with the right to a home results in an interference with autonomy and the ability to develop individual identity as well. Usually, home is a place to which one can retreat from the dangers of the outside world, and it is deeply concerning when one's biggest source of fear is one's home. Privacy, as an aspect of home and autonomy, is therefore threatened. Privacy is not the same as the private sphere. Privacy is determined in line with autonomy. Therefore, to threaten someone's privacy would mean to threaten their autonomous identity.

The DVA was enacted to eliminate domestic violence.<sup>22</sup> It is an extensive and all-inclusive Act. It considers a wide range of relationships in which domestic violence occurs. It does not limit it to relationships within the domestic sphere.<sup>23</sup> It further does not consider physical violence as the only form of violence and broadens horizons in this regard.<sup>24</sup> However, these abusive relations continue to exist despite its enactment. Privacy should be seen as a right afforded to individuals, not a way to justify the non-interference of male-dominated power with the home. If we insist on privacy as a value to all individuals, the extent to which women deserve privacy within the home and do not have it becomes evident.<sup>25</sup>

I explore why these abusive relations continue to exist despite the enactment of the DVA. I further look into how they are detrimental not only to determining a positive meaning of the home but also how they are detrimental to women's autonomy. The DVA acknowledges that domestic violence occurs in a wide range of domestic relationships. Further, domestic relations cover a wide range of relations.<sup>26</sup> However, the prevalence of domestic violence is not because the Act is insufficient, but instead because of the private/public dichotomy and the need to restructure relations. Many organs of state are reluctant to interfere with domestic violence because of the

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<sup>22</sup> Preamble of the DVA states that it is the purpose of the Act to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide and to convey that the State is committed to the elimination of domestic violence.

<sup>23</sup> See the definition of a "domestic relationship" in section 1 of the DVA.

<sup>24</sup> See the definition of "domestic violence" in section 1 of the DVA.

<sup>25</sup> IM Young *On female body experience: "Throwing like a girl" and other essays* (2005) 153.

<sup>26</sup> See the definition of "domestic violence" in section 1 of the DVA.

public/private divide.<sup>27</sup> However, when organs of state do not intercept, they become complicit in the subordination of women. Their complicity suggests that women are not worthy of protection. Therefore, the deeply ingrained public/private dichotomy is detrimental to the safety of women and their autonomy. In the case of domestic violence, many women do not have a choice. They either stay and endure the violence or leave and potentially face homelessness.<sup>28</sup> Although the DVA gives courts the power to prohibit the abuser from entering the shared residence of the complainant,<sup>29</sup> they are reluctant to remove the abuser from the home because he is usually the legal owner of the property. In these cases especially, the state must assist victims because they are entirely reliant on authorities and organisations that can provide them with a home. However, although the victim's autonomy is already gravely threatened, organs of state usually threaten it even more. This time their autonomy is not threatened by an intimate partner, but by the very institutions put in place to protect them. There is a strong belief that certain people in need of welfare are deserving whilst others are not.<sup>30</sup> This theory should be discarded, and organs of state should treat every situation sensitively and, on a case-by-case basis, to ensure the safety of the victims regardless of their background and preconceived notions that exist.<sup>31</sup> Meaningful engagement will reinforce her autonomy which was threatened in her most intimate and sensitive space. Although a dependency relationship exists, if powers are not abused, it will reinforce her lost autonomy.

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<sup>27</sup> Section 239 of the Constitution reads as follows:

“organ of state” means

- (a) Any department of state or administration in the national, provincial or local sphere of government; or
- (b) Any other functionary or institution –
  - (i) exercising power or performing a function in terms of the Constitution or a provincial constitution or
  - (ii) exercising public power or performing a public function in terms of any legislation but does not include a court or judicial officer.’

<sup>28</sup> See part 3 5 1, which discusses the economic vulnerabilities of women.

<sup>29</sup> Section 7(1) (c)—(e) of the Domestic Violence Act 116 of 1998.

<sup>30</sup> T Ross ‘The rhetoric of poverty: Their immorality, our helplessness’ (1991) 79 *Georgetown LJ* 1499—1547 1505.

<sup>31</sup> G Muller ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) *Stellenbosch Law Review* 756.

Therefore, in order for the goals of the DVA to be met, intimate and wider relations require restructuring. This requires a systemic or relational analysis of these relations which give rise to domestic violence. A relational analysis considers how certain relations are structured and why they are structured in such a manner. Therefore, it has the potential to restructure destructive relations. As a start, rights largely determine how relations are structured. However, when rights are determined in terms of boundaries, they are not constructive to the optimal achievement of women's autonomy. The purpose of determining rights in terms of boundaries is to maintain the ideals of autonomy; however, it results in the opposite effect. Rights, as determined in terms of boundaries, has largely separated the public and private spheres,<sup>32</sup> even when the public sphere must involve itself in order to combat violence that occurs privately. This rights theory has been shaped in terms of liberal theories of autonomy.

In order to attain autonomy, a coherent understanding must be determined. Liberal theory provides that autonomy is rooted in individualism.<sup>33</sup> Liberal theories are committed to obtaining equality within the public sphere whilst simultaneously maintaining privacy within the private sphere. Liberal theories provide an individualistic, atomistic definition for autonomy. This individualistic theory identifies autonomy with the private sphere and being private. Therefore, it keeps the public sphere at arms-length in order to maintain privacy and autonomy in the private sphere. However, the problem with this form of privacy is that it subsumes privacy with the private sphere. Whereas privacy should be associated with the individual and their ability to exercise individual decision-making.<sup>34</sup> The primary problem in equating privacy to the private sphere is that it ends up providing "both the opportunity for violence and the justification for non-interference."<sup>35</sup> This is particularly problematic in cases of domestic violence. Furthermore, equating privacy with the private sphere introduces a false choice between being private and autonomous or coerced by the

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<sup>32</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press Journals* 163.

<sup>33</sup> C Mackenzie and N Stoljar *Relational autonomy: feminist perspectives on autonomy, agency, and the social self* (2000) 5.

<sup>34</sup> IM Young *On female body experience: "throwing like a girl" and other essays* (2004) 152.

<sup>35</sup> *S v Baloyi* (2000) SA 425 (CC) par 16.

collective.<sup>36</sup> Therefore, there should rather be an understanding of autonomy as relational – relational with others because certain relationships contribute to the realisation of autonomy.<sup>37</sup> Although liberal theory recognises the existence of gender inequality, it merely reforms rights within the existing oppressive system, instead of altering the oppressive system. A relational understanding of autonomy views autonomy in terms of the relations that form it. It incorporates the human experience of embeddedness in relations and challenges the oppressive relations. Unlike the liberal theory of autonomy, it does not seek entry into an oppressive system; it challenges this system. It does not consider relatedness and dependency to result in the inverse of autonomy necessarily.<sup>38</sup> It considers how the collective contributes to the achievement of autonomy. Therefore, the relational theory of autonomy recognises how welfare could be beneficial to a victim's autonomy. Interdependence is not necessarily antithetical to the goals of autonomy. Essentially, welfare systems cannot exist without welfare recipients, and they are thus dependent on each other's existence. The relational theory of autonomy thus views these relations as constructive to the ideals of autonomy, but only if powers are not abused, and parties engage meaningfully with one another. In order to advance the ideals of relational autonomy, rights cannot be determined in terms of boundaries and should be considered in relational terms instead.<sup>39</sup>

Rights as boundaries dichotomise the private and the public sphere. This dichotomy insulates private violence and contributes to the oppression of victims. Boundaries draw the attention away from the need for collective construction of individual rights.<sup>40</sup> What is required is something more than merely replacing rights with other rights which fundamentally serve as boundaries; instead, there should be a complete transformation on how to interpret rights. What is required is a complete transformation as to how rights are interpreted. There should be a conception of rights

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<sup>36</sup> J Keller 'Autonomy, relationality and feminist ethics' (1997) 12 *Hypatia* 152—164 155.

<sup>37</sup> J Keller 'Autonomy, relationality and feminist ethics' (1997) 12 *Hypatia* 155—156.

<sup>38</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 124.

<sup>39</sup> Rights structure relations between parties, therefore rights are used in order to realise meaningful relationships which give rise to autonomy.

<sup>40</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press Journals* 166.

that routinely directs our attention to relationships in order to determine how to establish autonomy through relations, instead of achieving autonomy in isolation. Rights as relations move beyond the boundaries. Relational rights acknowledge the tensions between the public and private spheres. However, instead of separating them, it attempts to reconcile these tensions.<sup>41</sup> If rights serve the purpose to structure relations and relations realise autonomy, it seems plausible, in the interest of achieving autonomy to view rights in terms of relations. The relational approach invites constructive relationships to develop autonomy and thus shifts the oppositional and absolutist quality of rights as embedded in the boundary approach. Relational rights can, therefore, structure relations that are truly beneficial to achieving autonomy. It challenges the authority and justice of the processes by which the law is created and by which the law creates.<sup>42</sup>

Home is ultimately a physical location and an emotional construct.<sup>43</sup> Home embraces basic human values such as safety and security, peace, privacy and autonomy. However, domestic violence threatens these values of home and thus threatens autonomy as a basic human value. Sadly, domestic violence is insulated and kept away from state regulation in the hopes of, ironically, protecting privacy and autonomy by keeping it within the private sphere. Insulating domestic violence occurs because privacy and autonomy have largely been equated to the private sphere in terms of liberal theories. Therefore, intrusion into the private sphere results in threats to autonomy and privacy. Ultimately, a boundary between public and private is created for the safe keeping of these values which constitute home. However, this is simply because liberal theories define these values. Liberal theory equates autonomy with independence and does not appreciate how relations contribute to the realisation of autonomy. Liberal theories see relations as antithetical to the goals of autonomy. However, in order to truly protect autonomy, especially in cases of domestic violence, we need to move outside of the boundaries created and realise autonomy in terms of constructive relations. In other words, where state regulation may be necessary to

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<sup>41</sup> J Nedelsky 'Law, boundaries and the bounded self' (1990) 30 *University of California Press Journals* 163.

<sup>42</sup> C Albiston 'Feminism in relation' (2002) 17 *Wisconsin Women's Law Journal* 6.

<sup>43</sup> S Bowlby 'Doing home: Patriarchy, Caring and Space' (1997) 20 *Women's Studies International Forum* 343.

combat domestic violence, state involvement should not be a threat to autonomy, but rather a means of advancing it, but only if powers are not further being abused and are respected. Relational theory changes the nature of state involvement from invasive to an application of equal law enforcement which is cognisant of relations which threaten inequality and autonomy.<sup>44</sup> This form of state involvement can assist victims stripped of their autonomy in what is meant to be their most intimate and safe space. One needs to see that relations of dependency and interdependency do not simply negate autonomy. By redefining autonomy in terms of relations, it becomes easier to protect it because it is not limited to independence and the private sphere. When redefining autonomy in terms of relations and protecting it as such, we reclaim autonomy as an ideal and simultaneously reclaim home. By reclaiming autonomy in terms of relations, we reclaim the emotional feeling of being at home.

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<sup>44</sup> J Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (2011) 360.



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