

Conceptualising the home in law and gender

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SUMMARY

The “home” forms a central part of life and it finds relevance in various other legal spheres. However, for such a central point of reference in law and everyday life, it still remains a somewhat vague notion without any discernible meaning in law. Due to the centrality of the home in law and everyday life, it seems necessary to have a coherent understanding of it. Various legal writers and judgments have acknowledged the underdeveloped nature of home in law and have broadly attempted to give home a space in law. Unfortunately, these interpretations of the home fall short and do not encompass all the positive values of home. This article, therefore, considers how gender factors affect the understanding of home and how the law holds some power to structure and restructure gendered relations which stand in the way of achieving a positive interpretation of the home.

1 Introduction

The “home” forms a central part of life and it finds relevance in various other legal spheres including, but not limited to human rights, laws pertaining to domestic violence, housing and even, to some extent, property law.¹ However, for such a central concept in law and everyday life, it is nevertheless a vague concept without any discernible meaning in law. The South African legal system does not have a legal definition for home, nor does it describe what home entails. Although case law and legislation refer to home, no structured definition is in place.² Due to the centrality of the home in law and everyday life, it seems necessary to

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1 L Fox *Conceptualising home – Theories, laws and policies* (2007) 3.

2 S 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”. S 26(3) of the Constitution reads as follows: “No one may be evicted from their home, or have their home

have a coherent understanding of it. Currie and de Waal recognise this gap in the law and propose 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”.³ Moreover, courts also recognise this gap in the law and broadly define home in a number of instances. In *Port Elizabeth Municipality v Various Occupiers*⁴ (“PE Municipality”) the court recognised 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”. The court recognised the home as the “only relatively secure space of privacy and tranquillity in a turbulent and hostile world.”⁵ Unfortunately, these interpretations of the home fall short and do not encompass all the positive values of home. We cannot protect home as a legal right if we do not have a mindful understanding thereof. Our interpretation of the home starts by taking into consideration all the relevant factors that establish and affect the interpretation thereof with a specific focus on relationships within the home. Thereafter, we focus on the gendered aspects of the home in greater detail, specifically on how conventional conceptions of male and female roles within society affect our understanding of their roles within the home space. We confront these conventional roles and analyse both the positive and negative attributes of how gender impacts our understanding of the home.

In confronting these conventional roles and the hierarchies that exist between them, we specifically draw our attention to how they came about and how they persist. We reflect on certain gendered stereotypes and the dangers of such stereotypes. We argue that these stereotypes are kept in place because they are protected from state interference as a result of the public/private divide. We proceed to argue that the boundaries between the public and private sphere insulate the private sphere from state regulation and leads to the continued subordination of women, who are ordinarily associated with the private sphere in conjunction with the home. The division of the two spheres insulates

2 demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”. S 3(5)(b) and 17(1) of the Housing Act 107 of 1997 (“Housing Act”) speaks of “home ownership” and not “house ownership”. 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”. 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 para 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”.

3 I Currie and J de Waal *The Bill of Rights Handbook* 6th edition (2013) 587.

4 2005 1 SA 217 CC.

5 *PE Municipality* para 17.

dominance and control, and the protection of rights within this private sphere are thus at stake. Finally, we consider how rights conceived as boundaries are detrimental to the protection of rights. Our argument is that rights should rather be conceived in terms of the relations that it intends to regulate and in terms of the relations that inform these rights.

2 Home defined

Broadly, home is a physical location and an emotional construct. Home as a physical location is often defined as a place of safety, peace and security.⁶ This safety being the safety from the harsh pressures of the public sphere. Therefore, the internalised insecurities, inequality and dangerous relations existing within the home are often overlooked. In this sense the meaning of home extends past its physical locality and becomes an emotional construct which consists of security/safety and threat alike. In order to protect people from the dangers initiated within this space of apparent safety and security, one must take a deeper look into what home actually stands for. Furthermore, one must also take a look into what home means to some people and what it should mean to most people. However, without an organised and structured concept of home, there cannot be a legal framework within which to protect the home or the relevant aspects emanating from it.⁷

The difficulty with 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.⁸ It is, furthermore, not a concept that one can easily dilute to simply mean “housing”. Although we demonstrate that housing, to some extent, contributes to the definition of home, it simply does not encapsulate all the elements of what the home is. It is, nevertheless, necessary to consider concepts such as housing in order to further one’s understanding and interpretation of the home. Although we argue that housing and home are separate, they are nonetheless interrelated concepts. The Housing Act, provides that housing, in the form of adequate shelter, is a “basic human need” and that it forms a vital part of the “socio-economic well-being of the nation”.⁹ In this regard, we therefore use housing as a baseline for the interpretation of the home.

However, home holds a deeper and more meaningful value that housing simply cannot capture. Unlike housing, home does not merely consist of tangible meanings. In other words, it is not merely a financial asset or a physical structure. What makes home significant and unique is that it has additional intangible meanings. It is a place of identity which

6 *PE Municipality* para 17.

7 See Fox 3 and 132.

8 S Bowlby *et al* “Doing home: Patriarchy, caring and space” (1997) 20 *Women’s Studies International Forum* 343-350 343.

9 The preamble of the Housing Act.

makes it form part of a larger socio-cultural unit.¹⁰ In *Government of the Republic of South Africa and Others v Grootboom and Others*¹¹ (“Grootboom”) the court dealt with the definition of adequate housing. The court held that housing consists of more than just “bricks and mortar”,¹² and further that the right to housing includes human dignity,¹³ equality and other human rights and freedoms.¹⁴ In this matter, the court reasoned that when dealing with matters pertaining to evictions and alternative accommodation, everyone must be treated with care, concern and human dignity.¹⁵ Further, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*¹⁶ (“Residents of Joe Slovo”), the court states that dignity is arguably one of the most significant rights, especially in the context of housing.¹⁷ It is evident that there is a link between housing and home, and that housing can be used as a baseline for defining the home since it introduces the other values, such as human dignity, which could easily be used to develop further values of the home. It is, nevertheless, difficult to define home because it is a subjective concept.

However, the difficulty in comprehending a proper understanding of home leads to the justification in the lack of thereof. Efforts should be made to create a meaningful, all-encompassing definition in order to protect the values and rights so closely connected to the meaning thereof. Home is meant to be the foundation of autonomy and identity. Although many of the comforts and tranquillities of home have historically come at the expense of women,¹⁸ home should not be rejected altogether. There should rather be an extension of these positive

10 See Fox 139.

11 2001 1 SA 46 CC.

12 *Grootboom* para 35.

13 The link between housing and dignity has been affirmed on multiple occasions in *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 CC para 29; PE Municipality paras 12, 15, 18 and 41–42; Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, *Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 CC para 16; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 CC paras 75, 119, 173, 218, 231, 329 and 406; *Machele v Mailula* 2010 2 SA 257 CC para 29 and *Daniels v Scribante* 2017 4 SA 341 CC. See also Chaskalson A “Human dignity as a foundational value of our constitutional order” (2000) 16 *SAJHR* 193–205; Sachs A “The judicial enforcement of socio-economic rights” (2003) 56 *Current Legal Problems* 579–601 and Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) 21 *SAJHR* 1–31.

14 *Grootboom* para 1.

15 *PE Municipality* para 29.

16 2010 3 SA 454 CC.

17 *Residents of Joe Slovo* para 75.

18 Here we are 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.

values of the home to everyone, in particular to all women who have historically been oppressed and continue to be oppressed. This may require us to delicately restructure the boundaries preventing accessibility of the positive values of home to everyone.¹⁹

Keeping the private sphere insulated is detrimental when it is a place of hostility and fear. This is to say that relationships enabling the public/private divide are detrimental to the realisation of home. Other relationships that were previously shadowed away, will therefore, need to be brought to light in a way 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.²⁰

Heidegger's philosophy of dwelling presents a good point of departure when 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.²¹ He attaches some form of personhood to a property.²² To dwell means to be at peace and to be kept safe from harm and danger.²³ By investing your time and energy, a house slowly becomes a home where relationships are established, and values such as safety and security are established.²⁴ Similarly, Currie and de Waal also refer to the importance of dwelling in their definition of the home. They define home as being a place where one has the intention to dwell for a substantial amount of time.²⁵ By dwelling, home becomes a projection of identity of the individual and the relationships which form him/her. In 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,²⁶ and the reluctance of the law to intervene in this sphere, results in certain rights being at risk. It maintains any abuse that takes place within this space and upholds patriarchal practices which means that the home is no longer a place of safety and security, but rather a place of toxic relations which the public sphere is complicit to.

The problem with the boundary-creating/maintaining interpretation of the home reveals itself in Heidegger's theory that humans attain dwelling only through building (boundaries). Heidegger abandons the importance of preservation within these boundaries. He contends 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 Heidegger's argument, women therefore do not establish themselves or

19 Positive values, such as safety, privacy and autonomy, will be the foundation of our proposed definition to home.

20 Bowlby 347.

21 See Fox 135.

22 Fox 169.

23 Fox 135.

24 Fox 168.

25 Currie and De Waal 587.

26 Bowlby 343.

their identities.²⁷ Gender is, therefore, an important consideration in defining the home. Without the additional gender consideration, home has the dangerous potential of being exclusive. Although Heidegger's philosophy of dwelling can be used as a starting point when defining home (in the sense that he recognises the relationships between people and places) his contentions that building is to make and that preserving is to make nothing, is problematic and gendered in nature.

3 Gender and the home

Heidegger suggests 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.²⁸ This is certainly a gendered issue which raises some concern. The work done by men to the home, historically and in the current context, generally entails physically building, which is a readily quantifiable concept.²⁹ Whereas women's labour in relation to the home generally entails the preservation thereof. This activity is by its very nature not easily quantifiable. Heidegger contends that the act of preservation is not as valuable to the home as building, and further, that it is merely an activity keeping the structure of the home in its current and constant state. If we prioritise the home as a physical entity, we undermine the value of preservation that is ordinarily an activity exercised by women as the traditional home-makers (in the

27 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.

28 L Chenwi and K McLean "A woman's home is her castle?" – Poor women and housing inadequacy in South Africa" (2009) 25 *SAJHR* 517-545 518. See also Bowlby 346.

29 The physicality and material nature of building makes it readily quantifiable. Purchasing material and physical things to build a structure which can be seen and touched makes it easier to quantify. This can be likened to men who work and who are the breadwinners of a certain household. They bring in a certain amount of income which is readily quantifiable. Women, who earn substantially less than men generally, or who often do not make an income at all working from home or being home-makers are in a position where what they do is not as readily quantifiable and, on that basis, is of lesser value simply because it cannot easily be compared to what men do and contribute. See E Bonthuys and C Albertyn (eds) *Gender, law and justice* (2007) 9 which discusses the earning potential of women compared to men.

sense of preservation) especially if one considers 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.³⁰ Man builds for the very purpose to make himself a home, while women's role is to "be the home by being at home."³¹ She is an object within his home – an object of his self-reflection.³² Women are expected to serve and nurture the family unit for the unit's growth and development but her contributions are not valued.³³ The activities of cooking, cleaning and home-making in the home (which is closely associated with the private sphere), are ordinarily activities that have been assigned to women. When this work is compared to that of the man, who financially supports the family and provides the material resources, that Heidegger speaks of, within the home (thus being able to control these resources) the "women's work" is regarded as inferior.³⁴ Our observation is thus that, these familial ideals often result in the invisibility of women, not only within the public sphere but in the private home sphere as well. In this sense, the private sphere merely becomes the support system which enables the public sphere to function optimally.³⁵ The activities generally performed by women in the private sphere are seen as inferior in contrast to the more important, and stressful task of providing for the family, which is often performed by men, thus confirming the superior status of men.

Young demonstrates how disadvantaged women are by Heidegger's approach:

"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 it is still very much a man's world."³⁶

Despite Heidegger's contentions that to preserve and nurture is to make nothing, and further, that identity is only established through building, the activities of homemaking and preservation, which are largely executed by women, hold more value than given credit for.

30 Fox 369.

31 Young 129.

32 Young 128-30.

33 Fox 369.

34 Bonthuys and Albertyn 19. See also 201-202 7.3.2 *The sexual division of labour* which provides that the differences in the work performed by men and women in the family and in the wider economy can be referred to as the sexual division in labour. It is further stated that: "Women are frequently paid less than men in the workplace and are employed in low-paid areas like the service sector, caring professions and cleaning work. This reflects the repetitive and undervalued work like childcare, cleaning and cooking which women do in the home. Men's work, both in the household and in the marketplace, tends to carry more status."

35 Bonthuys and Albertyn 203.

36 Fox 369.

Homemaking and preservation means to arrange the material resources in such a way that it comes to display an extension of the self.³⁷ In other words, it is a way in which to present and establish your identity. Therefore, we argue that although building is a means of establishing one's identity, it is not the only means to do so. Preservation and homemaking are also methods one can use to establish their identity. The difference between the terms – building and preservation – is that “building” breaks the continuity of history whereas “preservation” allows for that history to recur. History is undeniably a part of an individual's identity. Therefore, preservation and homemaking support the emergence and continuous existence of one's identity through taking considerate care of an individual's history. Moreover, the activities of preservation are largely gender-specific: just as men tend to dominate the building world, women tend to dominate the world of preservation and homemaking,³⁸ albeit roles that have historically been assigned to them. Equally as the acts of building are world-making, so is preservation and homemaking. In fact, preservation is not only world-making, but it provides value and meaning to the world that is being made.³⁹

Bringing our argument back to the importance of establishing an understanding of home in law, we argue that home holds that unique quality necessary to establish relationships between person and place which gives personhood to property – it has the so-called “x-factor”. Home considers other aspects, such as gender, which housing and property often neglect.⁴⁰ For instance, as mentioned, the concept of home largely revolves around the family unit and an expected image of what a family is. To put it differently, gender roles and familial relations are central to home as a concept.⁴¹ Home is often associated as a place suitable for families,⁴² which is further associated as a place of safety, security, privacy and comfort.⁴³ Family is considered as the embodiment of the private sphere,⁴⁴ the private sphere is additionally closely associated with the home and therefore, the home and family are consequently closely connected. There is an underlying assumption that

37 Young 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.

38 Young 144.

39 Young 145.

40 Fox 24.

41 Bowlby 344.

42 This is very much dependent on how one would go about defining family and how one sees a family unit. If home is associated with the heteronormative ideals of a family, then a home absent of such cannot be considered a home. It is, therefore, important to be gender and context sensitive when defining the home and one needs to consider the various ways in which families are formed which includes female headed households.

43 Fox 177.

44 Bonthuys and Albertyn 170 and 203.

families are spaces of emotional intimacy and high moral standards.⁴⁵ This assumption presents some potential dangers, which we have highlighted above, and often leads to the justification of non-interference. Furthermore, there are expected images of family units, which usually follow heteronormative ideals.⁴⁶ If one interprets home in this light, it is a site for the creation and maintenance of patriarchal practices in what appears to be natural and ordinary.⁴⁷

In these heteronormative ideals of family units, women are confined to the private sphere to care for and to maintain the household. This role is their deemed “natural role” in a heteronormative and patriarchal society. The private sphere is further, an expected place of unselfish and caring behaviour – behaviour which benefits the unit as a whole. However, we argue that this is not the case. Women, who form part of this unit, do not necessarily benefit to the extent of the other members. There is often an expectation that women should place their families’ interests and needs before their own.⁴⁸ Women become invisible within their home and their actions which benefit the entire family unit are undermined and under-appreciated. The division of labour which is assumed within the home, for example that the man is the head of the household and that the women must cook, clean and take on maternal roles, is particularly burdensome on women who additionally work for a living.⁴⁹ This, once again, supports the argument that the private sphere is merely a support system that enables the public sphere to function optimally.⁵⁰ When women serve men within the private sphere, men can function optimally within the public sphere. Whereas women are confined to the private sphere, men are contrastingly commonly associated with the more “uncaring” public sphere.⁵¹ The public sphere is ordinarily associated with freedom and individualism and often celebrates looking out for your own interests and needs above others, which is not the case in the private sphere.

Men build in order to establish their identity and to project a reflection of their identity outwards into the public,⁵² allowing men to have external relationships in the public sphere. External relationships,

45 Bonthuys and Albertyn 170 and 204.

46 Bowlby 344.

47 Bowlby 345.

48 Bonthuys and Albertyn 170 and 203.

49 Bonthuys and Albertyn 170 and 202 further refers to Cock et al *Child Care and the Working Mother: A Sociological Investigation of a Sample of Urban African Women* (1984) 3-8 and provides that in South Africa, full-time motherhood is not possible for most urban African women who have to support themselves and their dependants or supplement their husband’s income. Family law rules which assume that women remain at home to care for their children disadvantage working mothers, who can never match up to the idealised standards of care, while rules which assume that men provide all of the household income are also unrealistic.

50 Bonthuys and Albertyn 170 and 203.

51 Bowlby 345.

52 Young 128.

therefore, have an impact on the interpretation of a home. The boundaries between the public and private sphere affect the understanding of a home and often maintain oppressive gender norms in both the public and private spheres.⁵³ The public sphere is ordinarily associated with “male” values such as rationality and objectivity, whereas the private sphere is ordinarily associated with “female” values such as irrationality and subjectivity.⁵⁴ The “male” values in the public sphere have been assigned a higher value than that of the “female” values within the private sphere. Furthermore, the fact that these two notions, which are accompanied by further oppositional pairs (i.e. rationality/irrationality and objectivity/subjectivity) are placed on opposite sides of the spectrum, does not allow for any reconciliation between them, thus maintaining the hierarchy and maintaining the patriarchy. The dichotomies between these oppositional pairs and the threats that they pose to each other are illusory and misleading. There does not need to be a choice of one above the other and one can in fact reconcile the two to be mutually beneficial.⁵⁵ In a space where man builds to make himself a home and to project a reflection of himself outwards and 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 in fact, left homeless.⁵⁶

If the public sphere is thought of as the male’s domain (which is inherently considered to be more significant than the private sphere) and men project a reflection of their identities outwards through the means of building, giving them a dominant space within the public sphere, male dominance in the public sphere supports patriarchy in the private sphere. This patriarchy gives men the power to prevail over women in the private sphere, especially since these men are potentially oppressed themselves within the public sphere, such as in the working environment and with the burdensome heteronormative expectation of them to solely support their entire family unit.⁵⁷ This creates a need to release any pent-up anger, generated in the public sphere, within the private sphere. It is an attempt to “balance the scales” in order to feel more empowered within their own private domain – within their space. Therefore, in order to address the power relations between men and women within the private sphere, there would need to be a change of power relations within the public sphere.⁵⁸

53 Bowlby 347.

54 Bonthuys and Albertyn 202.

55 See in general J Nedelsky “Reconceiving autonomy: Sources, thoughts and possibilities” (1989) 1 *Yale Journal of Law and Feminism* 7–36.

56 Young 130.

57 Fox 361.

58 Bonthuys and Albertyn 21.

Feminists have argued that private power is the principal threat to women's equality and autonomy.⁵⁹ Women have suffered from this oppression within the home long before the boundaries were somewhat disintegrated allowing women into the public sphere and affording them the same protection as men.⁶⁰ If the boundaries between the public and private spheres persist, patriarchal gender roles within the home will persist.⁶¹ 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, we argue that since home holds such core positive values, it would be misguided to reject these values entirely.⁶² Home "expresses uniquely human values" and provides us with a fixed identity.⁶³ Home carries positive and meaningful values such as preservation, safety, individuation and privacy.⁶⁴ We argue that it is possible to conceptualise an idea of home as supporting individual subjectivity of the person, where the subject is understood as partial, fluid and shifting, in relations of reciprocal support.⁶⁵ If men and women alike took part in acts of preservation, for instance, women would no longer be seen as the material subjectivities of men. A relationship of support, equality and dignity would exist.⁶⁶ In these circumstances, it is worthwhile to consider the various relationships that exist both within the public and the private sphere and how they affect one another. A deeper understanding of these relations will contribute to a more comprehensive understanding of the home and how these relations ultimately shape a realisation of the home.

59 TE Higgins "Why feminists can't (or shouldn't) be liberals" (2004) 72 *Fordham Law Review* 1629-1641 1631.

60 *Ibid* 1631. Also see Bonthuys and Albertyn 83-90 which firstly deals with "equality as sameness" i.e. to treat women and men in an identical manner. Equality as sameness was initially beneficial to women when claiming access to the public sphere of politics. This is a form of formal equality. Unfortunately, this is not necessarily as beneficial to women as originally thought because it simply compares women to men without considering any deeper inequalities that exist socially, culturally or religiously. In order for women to benefit to the same extent as men, various contexts and perspectives should be kept in mind. If equality as difference is considered, we move away from a form of formal equality to a form of substantive equality. Formal equality sees differences as a form of discrimination whereas, substantive equality embraces these differences and changes the law so that it benefits persons equally. The application of formal equality may seem neutral but, in truth it embodies the interests and experiences of the socially and economically privileged and it exacerbates inequality of those who are not socially and economically privileged.

61 Bowlby 345.

62 Young 123.

63 Young 124.

64 Young 125.

65 Young 130.

66 Young 145.

4 The public/private dichotomy

In our observations above we reflect on how the home embodies gender. There are certain conventional associations of the feminine and the private sphere on the one hand, and the masculine and the public sphere, on the other hand. Despite these typical associations, men are nonetheless regarded as the household heads.⁶⁷ This is particularly highlighted when the public sphere places expectations on the man to financially support his family. This financial support is valued in a higher regard than any other acts performed by women within the private sphere and therefore, allows a hierarchical power relation to exist and persist. This power relation exists and is based on financial value and results in the commodification of an individual's worth based on their financial and other quantifiable contributions rather than what they can contribute by any other means. In basing a person's value according to their net worth, one ends up objectifying a person and this is especially true for women. Women end up being seen or valued as "objects" that can be controlled because they have less financial power to control. These associations endorse patriarchy in both the public and private spheres and together with norms of masculinity and femininity justify and maintain patriarchy. Patriarchy places women in a subordinate position to men, not only in the public sphere, but specifically within the private sphere. Patriarchal norms and values, therefore, ultimately result in gender-based violence within the home, which should be a place of safety and security.⁶⁸ The public/private dichotomy maintains patriarchy by insulating the private sphere from state regulation which leads to the continuous subordination of women within it.⁶⁹ When we view the public and private sphere as entirely oppositional, it has a very negative impact on women within the private sphere. We argue that the contrasting elements of the dichotomy are not necessarily inherently opposed and that they can fall on a continuum between the public and the private so that they are mutually beneficial to one another. Maintaining the stark boundary between them obscures their relationship with each other and the relations that exist within each of them. This boundary views public interference as undesirable and unnecessary and prevents legal intrusion into the private sphere, even when it is necessary such as in cases of domestic violence.⁷⁰ The boundary prevents any legal regulation of unequal and abusive power relations within the private sphere and is thus complicit to "private" gender oppression. The complicit behaviour of the public sphere not only

67 Bonthuys and Albertyn 203.

68 Bonthuys and Albertyn 20.

69 Higgins 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* 1255–1300 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* 4–15 12.

70 Bonthuys and Albertyn 29–30.

maintains oppression but exacerbates it because the person in power understands that they are free from any regulation and, even if their actions are regulated, it will not necessarily be taken seriously. The public sphere is often unwilling to interrogate the private sphere and the private sphere remains bounded by a concern with conventional ideals of family, sexuality and relationships.⁷¹ The same argument applies to the dichotomy between autonomy and dependency – they are not inherently opposed.

We argue that home is the foundation of autonomy and therefore, the dichotomies of the public/private and dependency/autonomy remove the victim's autonomy, security and safety, and threaten home as a right.⁷² The private sphere is often protected because the law aims to protect autonomy which is associated with the private sphere. Protection of autonomy, by insulating the private sphere, often has the opposite effect – endangering autonomy. When the state withholds its willingness to regulate the private sphere, it assumes that society is experiencing over-regulation and that it will be removing all choice and individual autonomy.⁷³ However, the state has a duty to protect the vulnerable,⁷⁴ regardless of whether they find themselves in the public or private spheres. The presumption that these vulnerable persons have free choice and autonomy, thus justifying non-interference, is incorrect. Men and women do not enter relationships on an equal footing. They enter intimate relationships from different social positions and therefore, hold different measures of bargaining power. Gender inequalities, therefore, result in the lack of freedom of choice and the lack of autonomy and the state's decision not to interfere, only aggravates that. The law's reluctance to intervene allows inequalities to perpetuate by allowing the person in power to remain out of reach of regulation by the law.⁷⁵

If we uphold the boundaries between the elements, it seems as if the elements are inherent qualities rather than aspects of relationships between the elements which we compare. Despite the high value set on

71 We expand on the unwillingness of the public sphere to interrogate the private sphere further on in this article by analysing the decisions in *Volks NO v Robinson* 2005 5 BCLR 446 CC and *S v Baloyi* 2000 2 SA 425 CC.

72 This does not mean that home as a concept should be rejected in its entirety because it is often identified as 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 intrusion by an intimate partner. The home definition therefore no longer applies, and the justification used to support non-interference by the public is invalid since *home* as a concept no longer stands.

73 B Goldblatt "Regulating domestic partnerships – a necessary step in the development of South African family law" (2003) *South African Law Journal* 610–628 615–616.

74 Goldblatt 615–616.

75 Goldblatt 615–616.

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 the justification for non-interference.⁷⁶ Although state regulation may be threatening to some, insulating dominance and control is detrimental to internal relations. The control that men exercise in the private sphere is often accompanied by domestic violence or at least, the threat thereof.⁷⁷ In these circumstances specifically, it becomes less threatening if organs of state regulate these relations rather than excluding them in their entirety.⁷⁸ In fact, the protection of the private sphere, rather than the person within that sphere, may exacerbate the violence. In other words, the public/private divide facilitates the violation of home[ing] rights. Upholding the barrier between the public and private sphere insulates women within the private sphere and hides them from public scrutiny, which consequently makes them invisible to the laws that are put in place to protect them and making them more vulnerable to abuse.⁷⁹

Bowlby, Gregory and McKie state that:

“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.”⁸⁰

Any effort to challenge or question these boundaries usually comes with its own challenges, since it threatens the power imbalances that have been put in place by these very boundaries. Romanticising the home implicitly suggests that the outside world should be feared, whereas often even the home is the source of fear for many women.⁸¹ If women are expected to confine themselves to 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 are perhaps a privilege to have, but certainly should not be. The values that emerge from home should not be rejected because they are viewed as privileges, instead, these values should be accessible to everyone because they are basic human values.⁸² These values broadly consist of safety, individuation, privacy and preservation.⁸³

A basic human right, such as safety, seems to be a benefit which is enjoyed only by people beyond the advantages of most. Safety should be a space where one can retreat to from the harsh pressures and violence of the outside world. However, violence for many women, seems to

76 *S v Baloyi* 2000 2 SA 425 CC para 16.

77 *Bonthuys and Albertyn* 199.

78 *Higgins* 1631.

79 *Fox* 367.

80 *Bowlby* 347.

81 *Fox* 367.

82 *Young* 146.

83 *Young* 151.

originate within the home – within the space, which is meant to be a source of safety and comfort.⁸⁴ Furthermore, privacy, another basic human right, is often abused and used as a justification for the public sphere to turn a blind eye to the violence that occurs within the home, this in turn, compromises the safety of many women. The private sphere has often confined and excluded women on the basis that it wishes to protect privacy within the private sphere,⁸⁵ but the privacy I refer to rather relates more closely to autonomy.⁸⁶ Feminists often reject privacy as a value because it has been used as a tool to justify the non-interference of the private space in which the violence occurs. Instead, we should maintain the idea that privacy is a value which should be extended to all *individuals* – not specifically to the family unit or the private sphere.⁸⁷ If privacy is viewed in this manner, it is apparent that women deserve privacy within the private sphere and public sphere, but do not have it in either.⁸⁸ Alongside privacy is 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 the private sphere.

The distinct divide between the public and private spheres, and the walls (literally and figuratively) 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, protects privilege.⁸⁹ 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 personal and the political, but one which makes the political possible. Bell expresses that the home can, in fact, be a site of resistance where the personal becomes political.⁹⁰ 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.⁹¹ Home is a space which anchors and secures identity.

5 How the law affects relations

The legal rights that the law provides, have the purpose of protecting and enforcing our basic needs 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 any power they may have. Legal rights

84 Young 151.

85 This argument is supported in *S v Baloyi*.

86 Young 152.

87 Young 153.

88 Young 153.

89 Young 149.

90 Young 146.

91 Young 149.

which have been implemented reflect social relations with the objective to address any inequalities.⁹² Legal rights provide society with a sense of safety and security that if your rights have been violated, action will be taken to restore them. Rights are, therefore, an extension of the value that each human life holds. Although the law plays a vital part in shifting public norms which address inequalities, the “private” sphere often remains unaffected. It is challenging, even for legal rights, to remove any social, cultural or religious perceptions. Because of these challenges, legal rights are often poorly implemented.⁹³ The law is, therefore, limited in its ability to affect change. We briefly explore how the law has challenged or failed to challenge the *status quo*.

We consider how legal rights are viewed as rights which serve as boundaries and argue that rights should be seen in terms of the relations that form them and which they form. The law should implement legal rights in a manner that addresses social relations.⁹⁴ Stated differently, we need to reconceptualise rights in terms of relations, because the manner in which rights are implemented, shape people’s relations.⁹⁵ If legal rights are viewed in this light, one can start to restructure any harmful relations. A relational approach to rights investigates how defining rights in one way, rather than another, results in structuring relations differently.⁹⁶

Fundamentally, rights which are viewed in terms of boundaries prevent interference from the collective.⁹⁷ Boundaries limit state involvement with the idea to protect values such as privacy and autonomy.⁹⁸ A bounded interpretation of rights is illustrated in the matter of *Volks NO v Robins*⁹⁹ (“Robinson”). This matter dealt with a claim for spousal maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (“Spouses Act”). However, the respondent was not married to the deceased, she was, however, in a permanent life

92 Bonthuys and Albertyn 5.

93 Bonthuys and Albertyn 6.

94 Bonthuys and Albertyn 5.

95 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 and the private sphere at large.

96 Nedelsky 315. The relational approach does not hold the belief that “the rights one has are contingent on one’s relationships.” It 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.

97 J Nedelsky “Law, boundaries and the bounded self” (1990) 30 *University of California Press* 162-189 163.

98 Nedelsky 162.

99 2005 5 BCLR 446 CC.

partnership with the deceased. They were in a monogamous permanent life relationship for over 16 years and shared family responsibilities like that of a married couple. The respondent sought an order declaring that she was entitled to spousal maintenance in terms of section 2(1) of the Spouses Act. Alternatively, she sought an order that section 1 of the Spouses Act was unconstitutional and invalid on the basis that it violated section 9 (the right to equality) and 10 (the right to human dignity) of the Constitution of the Republic of South Africa, 1996.¹⁰⁰

Section 1 of the Spouses Act defines “survivor” as “the surviving spouse in a marriage dissolved by death”¹⁰¹ and consequently excludes people in permanent life partnerships. In this specific matter, the two majority judgments, by Skweyiya J and Ncgobo J, held that the Act was not unconstitutional on the basis that the distinction between married and unmarried people needs to be considered in the larger context of rights and obligations of marriage. Skweyiya J held that whilst there is a legal “reciprocal duty of support” between married couples, this duty does not legally arise for cohabitants.¹⁰² The court was unwilling to interfere with the private affairs of the parties, although one could argue that it was necessary and in fact invited. The court was bound by conventional ideals of family and marital relations.

Sachs J, in his minority judgment, exposed the notion that not all people who cohabit necessarily have the choice to get married and, therefore, to have the legal consequences of marriage attached to their relationship. He further reflected on the inferior role that women ordinarily hold in society and how that affects their ability to make choices in a relationship, and held that often, women bear the legal consequences of their male partner’s choice not to get married.¹⁰³ Sachs J further held that the context of a relationship must be considered rather than simply referring to the status of the relationship based on a piece of paper – being a marriage certificate. In many instances, cohabitation relationships reflect the nature and reciprocal duty of support of a marriage whereas marriages sometimes are merely an empty shell of a relationship. He refers to Goldblatt¹⁰⁴ who asserts that one should consider families in terms of the functions that they perform, rather than defining the relationship based on a marriage certificate.¹⁰⁵ If one considers the relationship from this perspective, it becomes clear that it would be unfair to make the distinction between unmarried and married women. The surviving spouse who is in an “empty shell marriage” will have a claim, whereas the survivor of a legitimate, caring and committed life partnership would be left destitute.¹⁰⁶ Although, in some instances it may be challenging to prove that such relationships reflect the nature of

100 *Robinson* para 3-11.

101 S 1 of the Spouses Act 27 of 1990.

102 *Robinson* paras 56, 70 and 97.

103 *Robinson* paras 154–162.

104 Goldblatt 617.

105 *Robinson* para 171.

106 *Robinson* para 162.

marriage, we are not unable to overcome these issues. Such difficulties do not justify the continuation of unfair treatment or the lack of development in the law.¹⁰⁷ In the main judgment, Skweyiya J acknowledges the vulnerable position of women and that they often do not have a choice in many relationships. Nevertheless, the majority held that this did not relate to the issue in question and that the vulnerability of women as survivors in cohabitation relationships, is due to the lack of regulation to protect these women.¹⁰⁸ The majority judgment further recognises that there are many ways to regulate and protect these rights, but maintains that it is up to the legislature to make provision for this – the court passes the buck to the legislature. I argue that this is as a result of formal judicial reasoning and the insufficient application of the court's equality jurisprudence.¹⁰⁹

The majority judgment is problematic in that it does not appreciate the extent of the complicity of the law in upholding boundaries and thus, upholding harmful power structures and relations. Sachs J believes that this compartmentalised and decontextualised line of thought, which has been demonstrated in the majority judgment, prevents realisation and implementation of substantive equality.¹¹⁰ Courts should fully utilise their ability to consider and analyse the context and impact that its implementation and development of the law (or lack thereof) has on persons when making judgments. In this matter, the court was able to identify the contextual disadvantages that women in cohabitation relationships find themselves in but was unable to alter this position. This complicity reinforces gender inequalities that the law aims to dismantle.¹¹¹

We reflect on the High Court (Cape Provincial Division) decision which also refers to Goldblatt's article mentioned above, in which she observes the following:

"Courts may say, in response to heterosexual cohabitants, that they choose not to marry and cannot ask for assistance from the courts once they exercise this choice. One response to this is that a "choice" must be understood contextually. In South Africa, gender inequality, disempowerment of women, poverty and ignorance of the law all contribute towards removing real choice from many people, especially poor women."¹¹²

107 *Robinson* paras 230–232. We make a similar argument in relation to the home. The difficulties in defining and finding a space for law in home, does not justify the exclusion thereof, especially since it carries so many valuable aspects that should be extended to everyone. The difficulties that exist should be considered when preparing and developing the law, in order to make the law pertaining thereto, more accessible to everyone, especially to the vulnerable.

108 *Robinson* paras 164–165.

109 Bonthuys and Albertyn 112.

110 *Robinson* paras 162 and 163.

111 *Robinson* para 163.

112 *Robinson v Volks* 2004 6 SA 288 C 297.

Unfortunately, the Constitutional Court judgment was unwilling to interrogate the private sphere to determine the issue and therefore, deferred the matter to the legislature.¹¹³ The court left private matters within the private sphere with the aim of protecting privacy and “freedom of choice” and justified its non-interference on this basis, leaving the victim in a very vulnerable position. The court was bounded by a concern with conventional ideas of family, sexuality and relationships. This boundary language creates a sphere in which one can act unconstrained by the prohibitions regularly found in the public sphere. The boundary perception of rights perpetuates the structural nature of patriarchy which can only be challenged by public interventions in the private sphere.¹¹⁴

The boundary theory of rights evidently creates binary notions of the public/private spheres which counter free and private on the one hand, collective and coerced on the other. However, these binary notions are misleading, and we argue that they do not sit exactly on oppositional ends of the spectrum. A boundary theory of rights limits the continuum between the two spheres. Furthermore, the boundary theory draws the focus away from constructive relations and suggests that rights are most fully protected when boundaries are in place and the individual is free from any state interference.¹¹⁵ The relational approach to rights, on the other hand, places its focus on relations which foster the values that emanate from the home. The Constitution itself adopts a relational approach to rights in that it provides a balancing act of the rights in question. 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. Accordingly, 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.¹¹⁶ This approach 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.”¹¹⁷ The relational approach invites a constant and consistent analysis of the values in question and requires engagement with relations

113 *Robinson* para 67.

114 *Bonthuys and Albertyn* 21.

115 *Nedelsky* 168–169.

116 *AJ van der Walt Property and Constitution* (2012) 5.

117 *Van der Walt* 5. The boundary approach to rights is similar to an “all-or-nothing” approach that Van der Walt refers to. The constitutional approach that Van der Walt refers to 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 akin to the relational approach in that the “Constitution requires a shift from the traditional focus

that foster such values. It determines what form of interpretation of rights and what form of legal structures, structure relations in the most beneficial way for the values in question.¹¹⁸

Fortunately, other cases have taken on this approach such as *S v Baloyi*¹¹⁹ (“*Baloyi*”). In this matter, the court understood that when private relations are perverted and harmful to the victim, public interference becomes necessary. The court held that all crime affects society and specifically referred to domestic violence which frequently goes unpunished and challenges society at every level.¹²⁰ The court considered the effects and the relations between the public sphere and the private sphere. The court considered how the ineffectiveness of the system intensifies the subordination and helplessness of victims and which sends a message to the whole of society.¹²¹ It does not see this as only affecting the public or the private sphere separately but considers the relatedness of the two spheres and how attitudes and relations in the public sphere are often complicit to the dangers in the private sphere. The public sphere cannot and should not protect abusive relations within the private sphere despite the high value placed on the privacy of the home and the centrality attributed to intimate relations because it provides an opportunity for violations and the justification for non-interference. The involvement of the courts in the private sphere represents an extension of the law into an area where lawlessness has long been sustained by notions of patriarchy and indicates that an organised society will not sit idly by in the face of any relational abuse within this sphere.¹²²

6 Conclusion

The lack 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,¹²³ there is uncertainty as to what is being protected. It has been argued that home should be rejected as a concept worthy of protection because it comes at the expense of women. In this regard, defining home is particularly challenging if it is defined in terms of violence and the oppression of women. It is even more challenging to reclaim home if it

117 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.

118 Nedelsky 343.

119 *S v Baloyi* 2000 2 SA 425 CC.

120 *Baloyi* para 12.

121 *Baloyi* para 12.

122 *Baloyi* paras 16–18.

123 See note 2 above.

is defined in these terms. Home should, therefore, be defined outside of its boundedness – in terms of a space which does not equate to the confinement of women, but rather their autonomy.

We have argued that we should not simply reject home. Instead, there needs to be a deep restructuring not only on how we perceive home but also on how we perceive the law that shapes, secures and preserves these relations which gives rise to a harmful understanding of home. If these destructive relations can be transformed, the positive features of the home will come to light. It is then 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”.¹²⁴ In order to achieve this, one needs to look beyond the private sphere, into the public sphere. 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 thereof. Therefore, we need to restructure not only internal private relationships but also those external relationships affecting private relationships negatively. The public and the private spheres are not inherently opposed. They fall on a continuum between one another and they can be mutually beneficial to each other if applied correctly. The boundary language has been problematic in that it has led to the confinement of women and the protection of patriarchal norms. The public sphere, however, does have and should have the power to deeply restructure these power imbalances, as was illustrated in the matter of *S v Baloyi*. The sphere is, therefore, a useful tool in restructuring relations and promoting real transformation.

124 Young 130.