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Socio-Economic Rights and the Challenge of Violence Against Women in South Africa

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SOCIO-ECONOMIC RIGHTS AND THE CHALLENGE OF VIOLENCE AGAINST WOMEN IN SOUTH AFRICA

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Thesis submitted in fulfilment of the requirements for the degree

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Supervisor:

Professor Cathi Albertyn

March 2025

DECLARATION

I declare that this thesis is my own work and that I have not previously submitted it in whole or in part to any university for a degree.

This thesis is up to date as of February 2025.

Coline Bruintjies

15 March 2025

ABSTRACT

This thesis investigates the relationship between substantive equality, gendered socio-economic rights and poor women's vulnerability to violence in South Africa. It identifies gendered poverty and violence against women as enormous challenges that plague South Africa and explores whether better access to the goods and services guaranteed by the right of access to housing and the related services can play a role in addressing these challenges. The following research questions guide my PhD research: How can we better interpret substantive equality to centre the problem of violence against women? What is the relationship between access to the goods and services guaranteed by the right to housing and basic services and women's vulnerability to violence? What relevant laws and policies are in place? and, can greater awareness of the need to address gender inequality and the specific needs and circumstances of women, make legislation and policies, relating to housing and basic services, more responsive to addressing poor women's vulnerability to violence? What is a gendered interpretation of socio-economic rights? and, how can a gendered interpretation, by courts, of the right of access to housing and the accompanying basic services, and applying a gendered perspective to remedies, assist to address violence against women? And finally, what legal strategies are possible to develop these more responsive and gendered rights-based legal frameworks?

This research finds that that one of the ways to address poor women's vulnerability to violence is to better address their poverty and that there is a role for the law and courts in doing this. I specifically argue that better access to the goods and services guaranteed by the right of access to housing and related services can advance substantive equality and help to address poor women's vulnerability to violence. I further demonstrate how gendered interpretations of socio-economic rights and paying attention to the needs and circumstances of women in legislation and policies can assist with this. In addition, I suggest that attention to how lack of proper access to housing and basic services can, itself, enhance women's vulnerability to gender-based violence can, at times, strengthen these socio-economic rights claims. Finally, I argue that specific litigation strategies can be employed to surface the needs and circumstances of poor women and that these strategies can be used to increase the likelihood of socio-economic rights litigation resulting in social change in the lives of poor women in South Africa.

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TABLE OF CONTENTS

DECLARATION 2

ABSTRACT 3

ACKNOWLEDGMENTS 4

TABLE OF CONTENTS 5

CHAPTER 1: INTRODUCTION, BACKGROUND AND CONTEXT

1. Introduction 8

2. Background and South African Context 9

3. International, regional and domestic frameworks for the protection of women's human rights 20

4. Research objective and research questions 35

5. Methodology 36

6. Chapter outlines 40

CHAPTER 2: CONCEPTUAL FRAMEWORKS: SUBSTANTIVE EQUALITY AND GENDERED SOCIO-ECONOMIC RIGHTS

1.Introduction 42

2. Substantive equality 43

3. Substantive equality, gendered socio-economic rights and violence against women 53

4. Conclusion 66

CHAPTER 3 – LEGISLATION AND POLICIES RELATED TO HOUSING AND BASIC SERVICES FOR POOR WOMEN IN URBAN AREAS

1. Introduction 67

2. Overview of regulatory framework for housing 67

3. Housing programmes that can assist poor women in urban areas 70

4. Water and sanitation legislation and policies 93

5. Electricity legislation and policies 97

6. Conclusion 99

CHAPTER 4 – JURISPRUDENCE: TOWARDS A GENDERED INTERPRETATION OF SOCIO-ECONOMIC RIGHTS TO ASSIST IN ADDRESSING VIOLENCE AGAINST WOMEN

1. Introduction 101

2. Socio-economic rights jurisprudence in South Africa – overview, critiques and alternative approaches 102

3. Feminist perspectives on the right of access to housing and basic services jurisprudence 124

4. Equality and socio-economic rights 136

5. Conclusion 141

CHAPTER 5 – USING THE LAW TO BRING ABOUT SOCIAL CHANGE IN THE LIVES OF POOR WOMEN

1. Introduction 143

2. Transformative Constitutionalism 144

3. Socio-economic rights litigation in South Africa and social change 149

4. Strategies to adopt in using law for social change 160

5. Conclusion 178

CHAPTER 6: CONCLUSION

1. Introduction 180

2. Summary of Chapters 180

3. Contribution of research 189

4. Recommendations 190

5. Conclusion 200

BIBLIOGRAPHY 201

CHAPTER 1 – INTRODUCTION, BACKGROUND AND CONTEXT

1. Introduction

> I was hopeless and continued to stay because I had nowhere to go. I informed my friends about the abuse but they could not accommodate me in their house because they were living with their boyfriends. I had no choice but to tolerate the abuse. [. . .]
>
> I am trapped. I need to stay. I won't make it on my own with all the children. I also need the money from him.[1]

These are the words of two women who are survivors of gender-based violence. Their experiences of feeling stuck in abusive relationships because they don't have alternative accommodation put a spotlight on some of the issues that this thesis explores.

The Constitution of South Africa, 1996 lays the foundation for a society based on human dignity, equality and freedom. It includes a range of civil and political rights and socio-economic rights. Yet the lived realities of many people in South Africa are far removed from these aspirations. The overall purpose of my thesis is to examine the intersections between the social ill of violence against women and the protection of socio-economic rights. This is done with the view of establishing whether better access to the goods and services guaranteed by the right of access to housing and basic services (electricity, water and sanitation) can advance substantive equality and help to reduce women's vulnerability to violence. In particular, I interrogate what the role of the law, socio-economic rights and courts is, and might be, in achieving this. I focus on vulnerability to violence of women who live in urban informal settlements. Some challenges which characterize informal settlements include having poor lighting, shared toilet facilities, insufficient access to safe housing, to water and electricity and to safe transport.[2] These factors can all make women more vulnerable to violence.

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[1] N Mpja 'The lived experiences of women on Intimate Partner Violence in a victim support centre in Tshwane, South Africa' 2020 Research study presented in partial fulfilment for the degree Master of Arts, University of the Witwatersrand, 26; and I Slabbert 'Domestic Violence and Poverty: Some Women's Experiences' (2016) 27 *Research on Social Work Practice* 1, 4.

[2] N Abrahams, S Mhlongo, E Chirwa, C Lombard, K Dunkle, S Seedat, A Kengne, B Myers, N Peer, C García-Moreno, and R Jewkes 'Rape survivors in South Africa: analysis of the baseline socio-demographic and health characteristics of a rape cohort' (2020) 13 *Global Health Action* 1, 7.

This research is informed by the South African reality, where poverty, inequality and violence against women stare people in the face every day. Black women in South Africa bear the brunt of this struggle.[3]

This chapter starts with the background and context of my research, where I sketch the problem of poverty, inequality and violence against women in South Africa.

I then trace the history of violence against women as a human rights violation, and set out the international, regional and national legal frameworks. This is followed by my research objective and research questions.

Finally, I set out my methodology and chapter outlines.

2. Background and South African context

South Africa has been described as the most unequal country in the world.[4] The top ten percent of the population 'hold 80.6 percent of financial assets'.[5] Four in ten people in South Africa live in a household with at least one person in receipt of a social grant.[6] In 2020, 32.6% of the population were living below the food poverty line of R624 per person per month and in 2021/22 18.7 million people in South Africa relied on social grants.[7] These statistics mean something particular for the lives of poor women in South Africa. In the below section, the impact of poverty on women will be explored. This will be followed by a discussion of violence against women, and the connection between poverty and women's vulnerability to violence.

2.1 Gendered poverty

'The face of poverty [in South Africa] is still African and female.'[8]

Women bear a significant part of the burden of poverty in South Africa. The unemployment rate among black South Africans is higher than in other population groups and 35.8 % of women are unemployed.[9] Black African women have a higher unemployment rate than other

[3] In this thesis I use the term black in the broad, inclusive sense to refer to Black African, Coloured and Indian people. See: Employment Equity Act 55 of 1998, s 1.
[4] The World Bank *Inequality in Southern Africa: An assessment of the Southern African Customs Union* (2022) 9.
[5] Ibid 3.
[6] Minister in the Presidency for Planning Monitoring and Evaluation 'Development Indicators' (2016) , 25 < https://www.dpme.gov.za/keyfocusareas/outcomesSite/Pages/Development-Indicators.aspx >.
[7] Department of Planning, Monitoring and Evaluation 'Development Indicators Report 2022' 67 and 68 < https://www.dpme.gov.za/publications/Reports%20and%20Other%20Information%20Products/Development%20Indicators%202022.pdf >.
[8] Ibid 27.
[9] Statistics South Africa *Quarterly Labour Force Survey Quarter 2: 2024*, 23 and 26.

race groups.[10] A large portion of women workers in South Africa are in low skilled and low paying jobs.[11] Having either no income or a very low income means that women look to the informal economy to try and sustain themselves and their families. Research has found that the informal economy has the potential to help people to escape extreme poverty.[12]

However, there are different aspects that contribute to a person's experience of poverty, beyond a lack of income. Poverty can be seen as having multiple dimensions, which has been described by Statistics South Africa as follows:

> Multidimensional poverty is made up of several factors that amount to a poor person's experience of deprivation – these can include poor health, lack of education, inadequate living standards, lack of income, disempowerment, lack of decent work and threat from violence.[13]

It has been suggested by research conducted on multidimensional poverty in South Africa, that more women than men live in households that are multidimensionally poor.[14] Women with minor children in their homes are also 'more likely to be unemployed than their male counterparts.'[15] Poverty levels have been found to be higher among black South Africans and among female-headed households.[16] In South Africa, there are clear links between race, gender and poverty. If we are to apply a gendered analysis to poverty, Patel argues that we should understand:

> how other wide-ranging privations of a physical, social, cultural, and economic nature coupled with inequalities in power relations affect women's access to and control of resources and services.[17]

Poverty is not only about income and access to basic services, as seen above. It also affects the ability to access basic goods needed for survival, like food. In a study conducted by Oxfam, it was found that even people who are employed or have casual employment can be food secure

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[10] Ibid 32.
[11] Statistics South Africa *Gender Series Volume 1: Economic Empowerment (2001–2014)* 18.
[12] H Magidimisha and S Gordon 'Profiling South African gender inequality in informal self-employment' (2015) 24 *Journal of Gender Studies* 288.
[13] Statistics South Africa *The South African MPI* (2014) 10.
[14] K Omotoso, J Adesina and O Adewole 'Profiling gendered multidimensional poverty and inequality in post-apartheid South Africa' (2022) 14 *African Journal of Science, Technology, Innovation and Development* 564, 568.
[15] Statistics South Africa *Gender Series Volume 1: Economic Empowerment* (2001–2014) 18, 102.
[16] Statistics South Africa *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) xxii.
[17] L Patel 'Poverty, Gender and Social Protection – Child Support Grants in Soweto, South Africa' (2012) 11 *Journal of Policy Practice* 108.

in the first week of their wages, but often food insecure for the rest of the month.[18] This demonstrates how, even when people are earning wages, these can be so low that basic food needs cannot always be met. Significantly, women generally face hunger more often than men.[19] The food poverty line discussed above refers to 'the amount of money that an individual will need to afford the minimum required daily energy intake'.[20] The lower and upper bound poverty lines are R890 and R1335 respectively.[21] It is worth noting that the amount of the Child Support Grant and Social Relief of Distress Grant are both lower than these poverty lines.[22]

In a study conducted in Limpopo province it was found that people have to travel for one hour to the nearest market and spend R200 on transport.[23] This shows how, in addition to the burden of food insecurity, limited funds available also need to be spent on transport. In such cases households would have to make difficult decisions about how to use the small income that is available. This example also calls attention to the different challenges that people face in rural communities and how geographic location can impact on experiences of poverty. The ability to grow one's own food can help to ease the burden of food insecurity and can provide a source of nutritious food. This is also relevant to poor people in urban contexts, because food can be grown in small sustainable community gardens. However, climate change and limited access to water have had a negative impact on the ability to grow food.[24] 'Food insecurity and hunger destroy human potential, strip away human dignity and foster inequality throughout society.'[25]

The above discussion shows that poverty can be understood in different ways and has many dimensions. When I use the word poor and poverty in this thesis, I am not employing these terms to specifically refer to poverty lines or income in a narrow sense, but more broadly to include its multiple dimensions such as lack of or little income, lack of access to and difficulty in accessing basic goods and services, desperate living conditions, and limited opportunities to participate in society.

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[18] Oxfam 'Hidden hunger in South Africa' (2014) 2.
[19] Ibid 3.
[20] Statistics South Africa *National Poverty Lines 2021* (2021) 3.
[21] Ibid.
[22] The Child Support Grant is R 530 and the Social Relief of Distress Grant is R 370. See: Department of Social Development Increase in respect of Social Grants GN 50381 in GG 2388 of 28 March 2024 and N Sikhakhane 'The R20 increase in Social Relief of Distress grant is a "slap in the face" – #PayTheGrants activist' *Daily Maverick* 14 March 2024 https://www.dailymaverick.co.za/article/2024-03-14-the-r20-increase-in-social-relief-of-distress-grant-is-a-slap-in-the-face-paythegrants-activist/.
[23] Oxfam (note 18 above) 2.
[24] Ibid 4 and 22.
[25] Ibid 32.

Another factor which contributes to women's poverty is that they continue to bear the main responsibility for work in the home, which has an impact on their ability to secure paid work. If there is proper access to basic services, for example clean running water within the home and electricity, this eases the burden on women and will mean that less time will be needed for daily house work.[26] This can also free up time for other activities, like paid employment. The unpaid care work that is mainly done by women 'reinforces gender inequality and limits women's full participation in social life'.[27] Because economic value is not attached to the unpaid work that predominantly women do in the home, this contribution can be invisible.[28]

In addition to women being primarily responsible for care work at home, Pieterse highlights that work done by women in 'caring' professions (for example nursing, cleaning work, domestic work) is also not valued.[29] He argues that '[t]he economic devaluation of women's work often translates into low earnings and restricted career opportunities, meaning that women are often forced to rely on men for support.'[30] I acknowledge that men also do work in 'caring' professions, but these professions are still viewed as 'women's work'. Moreover, women still largely make up these professions and this work continues not to be valued in the same way as other work. The distinctions may not be as clear as they were a few decades ago and people are increasingly challenging stereotypes about the kind of work that women can do, but these realities do still exist.

The gendered nature of care work, both paid and unpaid, is not unique to South Africa. An International Labour Organisation report observes that the 'majority of the care work worldwide is undertaken by unpaid carers, mostly women and girls from socially disadvantaged groups' and '[m]ost care workers are women, frequently migrants and working in the informal economy under poor conditions and for low pay'.[31]

Women also push back against what may be described as traditional gender roles. Historically and in the current South African context women provide for their families financially and do

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[26] Patel (note 17 above) 112.
[27] L Patel 'Walter Friedlander Memorial Lecture on International Social Welfare School of Social Welfare, University of California, Berkeley 04 April 2016 Gender and Social Welfare in South Africa: Lessons from the South' 2016 1, 3.
[28] S Fredman 'Women and poverty – a human rights approach' (2016) 24 *African Journal of International and Comparative Law* 494, 500.
[29] M Pieterse 'Equality in the global village' (2003) 36 *CILSA* 172, 181. Fredman makes a similar point that because domestic work and child care is mostly done for free, paid work of a similar type is undervalued. See: Fredman (note 28 above) 500.
[30] Ibid.
[31] International Labour Organisation (ILO) 'Care work and Care jobs for the future of decent work' 2018, xxvii.

unpaid care work in the home. In an interview with a woman living in a township in Cape Town, the role of women in poor communities was explored:

> women in our communities are the ones who are holding it down in the homes, in the street committees, etc. It is women who are doing the work of holding the black community together, whereas black men still think that those are the roles that they are supposed to play.[32]

This example illustrates how women take ownership of their struggles and work to make life better for themselves, their families and their communities. Despite women generally earning less than men, they still play a significant role in trying to keep their families out of poverty.[33]

2.2 Violence against women

Along with the social ill of poverty, violence against women is another crisis that South Africa faces. In this sub-section, I explain my choice of focus on violence against women; I set out how some women are more vulnerable to violence than others, because of other marginalisation and disadvantage they experience, this includes the connection between poverty and women's vulnerability to violence; I move into a discussion of how violence against women is related to patriarchy and unequal power relations in society; then I show how women are resilient, despite the obstacles in their way.[34]

UN Women defines gender-based violence as referring to:

> [H]armful acts directed at an individual or a group of individuals based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms. The term is primarily used to underscore the fact that structural, gender-based power differentials place women and girls at risk for multiple forms of violence. While women and girls

[32] N Albert 'Township economies and feminist hierarchies: a family conversation between two black feminists from KwaLanga' (2020) 34 *Agenda* 78.
[33] G Brodsky and S Day 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law* 185, 192.
[34] Pandemics are also a reality that can have an impact on poor women's vulnerability to violence. This has been seen with HIV/AIDS and Covid 19 in South Africa. For the purposes of this research I will not explore these impacts. See further: T Meyiwa, C Williamson, T Maseti and G Ntabanyane 'A 20 year review of the policy landscape for gender-based violence in South Africa' (2017) 15 *Gender and Behaviour* 8607; A Gibbs, L Washington, S Willan, N Ntini, T Khumalo, N Mbatha, Y Sikweyiya, N Shai, E Chirwa, M Strauss, G Ferrari and R Jewkes 'The Stepping Stones and Creating Futures intervention to prevent intimate partner violence and HIV-risk behaviours in Durban, South Africa: study protocol for a cluster randomized control trial, and baseline characteristics' (2017) 17 *BMC Public Health* 1; C Nwosu 'Childcare and depression during the coronavirus pandemic in South Africa: A gendered analysis' (2021) 16 *PLoS ONE* 1; and K Amaechi, T Thobejane and R Rasalokwane 'Feminist reflections on the impact of the South African national Covid-19 lockdown on the upsurge of gender-based violence in Mahwelereng township of Limpopo Province, South Africa' (2021) 19 *Gender and Behaviour* 17189.

> suffer disproportionately from GBV, men and boys can also be targeted. The term is also sometimes used to describe targeted violence against LGBTQI+ populations, when referencing violence related to norms of masculinity/femininity and/or gender norms.[35]

My research focuses on violence against women, as a group affected by gender-based violence. This is not to negate the gender-based violence experienced by other vulnerable and marginalised groups, such as children and sexual minorities. References to gender-based violence will include violence against women, but I also specifically use the term violence against women to highlight women's particular experiences of gender-based violence. I recognise that lesbian women and transgender women can experience particular forms of violence which are different to that experienced by heterosexual women.[36] Exploring these unique and specific experiences is beyond the scope of this research. The particular focus of my research is, however, the vulnerability to violence of poor black women in urban informal settlements.

Violence against women can manifest itself in different ways. It can include intimate partner violence; domestic violence; sexual harassment and assault. And it can take different forms such as physical, economic, sexual and emotional abuse.

Violence affects women across various socio-economic backgrounds, races and cultures. Some women may however be more vulnerable than others:

> They include women who are already vulnerable and disadvantaged, including irregular migrant women, victims of displacements and trafficking, sexual minorities, economically dependent women, women with disabilities, informal settlement dwellers and sex workers. This points to the intersectionality of other forms of discrimination and vulnerability in the experience of VAW. Generally, however, younger women and coloured/black women are at higher risk than others in South Africa of experiencing VAW.[37]

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[35] UN Women < https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence >.

[36] Members of the LGBTQIA+ community are another vulnerable group, and are exposed to stigma, prejudice, hate crimes and violence, as a result of their sexual identity. See: K Geldenhuys 'Hate Crimes Against the LGBTQIA+ Community' (2021) *Servamus Community-based Safety & Security Magazine*.

[37] Centre for the Study of Violence and Reconciliation 'Violence Against Women in South Africa: A Country in Crisis' (2017) 12.

In addition, a study conducted by the South African Medical Research Council found that 'women who have experienced recent rape were more likely to be poorly educated and live in informal housing or rural areas'.[38]

I am aware that vulnerability can be defined and understood in different ways and that there are critiques of how the term has been employed. I specifically acknowledge the contribution of Martha Fineman on vulnerability theory.[39] Fineman views vulnerability as 'a universal, inevitable, enduring aspect of the human condition.'[40] For Fineman, vulnerability is connected to the 'developmental stages of the human body: the alternations and variations in competence, ability, and capacity that the human body undergoes over time.'[41] She is critical of using vulnerability to describe some groups as more or less vulnerable, and argues that this can have negative associations and be accompanied by stigma.[42] Fineman argues that the focus should shift from viewing individuals as somehow inadequate towards 'state and social responsibility because it recognises that a deficit in resources often reflects an institutional or societal failing more than an individual one.'[43] The emphasis then is that 'the state has an affirmative obligation not to privilege any group of citizens over others and to actively structure conditions for equality.'[44] Fineman's approach is not completely at odds with the way that I use the term vulnerable and vulnerability in this thesis. My goal is not to blame poor women for their experiences of violence or to frame them as eternal victims. It is to argue that experiences of poverty and lack of proper access to housing and basic services can aggravate the risk of exposure to gender-based violence. I further focus on the obligations of the state and courts to better address conditions of poverty and lack of access to resources, as I do not view these as individual problems but as systemic issues, which this thesis illustrates.

A factor related to poverty, as discussed in the previous sub-section is food security. The connection between household food insecurity and experiences of intimate partner violence was shown in a research study.[45] Limited availability of food can cause tension in households

[38] Abrahams et al (note 2 above) 6.
[39] M Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 2008 *Yale Journal of Law and Feminism* 1.
[40] Ibid 8.
[41] M Fineman 'The Significance of Understanding Vulnerability: Ensuring Individual and Collective Well-Being' (2023) 36 *International Journal for the Semiotics of Law* 1371, 1377.
[42] Fineman (note 39 above) 8.
[43] M Fineman 'Vulnerability and Inevitable Inequality' 2017 *Oslo Law Review* 133, 147.
[44] Fineman (note 39 above) 21.
[45] A Gibbs, R Jewkes, S Willan and L Washington 'Associations between poverty, mental health and substance use, gender power, and intimate partner violence amongst young (18-30) women and men in urban informal settlements in South Africa: A cross-sectional study and structural equation model' (2018) 13 *PLoS ONE* 1, 9.

and lead to disagreements about how resources are allocated.[46] Lack of food has also been found to have 'physiological impacts on individuals, leading to less ability to regulate emotions, further contributing to conflict.'[47] Research conducted in urban informal settlements in eThekwini found that among food insecure young women, all forms of intimate partner violence were common.[48] Poverty has generally been shown to be a direct and indirect driver of intimate partner violence.[49]

Violence against women is about more than acts against individual women, some of whom may be more vulnerable, because of intersecting forms of disadvantage that they face, as shown above. Research has found that the structures which underpin intimate partner violence (IPV), and I would argue also violence against women more broadly, are:

> first, gender inequality in the form of patriarchal privilege and the disempowerment of women, second the normalization, and acceptability, of violence in social relationships, and third poverty. These structural factors individually, and synergistically, drive men's perpetration of IPV and increase women's risk of experiencing IPV.[50]

I am not attempting to argue that violence against women only occurs in situations of poverty, but rather that poverty is an aggravating factor, that can make women more vulnerable to violence, as it is combined with other stressors.

Gender-based violence is thus connected to patriarchy, power imbalances, the way people have been socialised, and economic and structural systems in society. It has been argued that where patriarchal privilege is emphasised, the dominance and control that men exert over women is 'normative, and gender attitudes, norms, roles, values, entitlements and identities flow from this.'[51] Patriarchal privilege exists in South Africa in various communities and locations.

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[46] A Gibbs, K Dunkle, L Ramsoomar, S Willan, N Shai, S Chatterji, R Naved and R Jewkes 'New learnings on drivers of men's physical and/or sexual violence against their female partners, and women's experiences of this, and the implications for prevention interventions' (2020) 13 *Global Health Action* 1, 5.
[47] Ibid.
[48] A Gibbs, K Dunkle, S Willan, N Shai, L Washington and R Jewkes 'Are women's experiences of emotional and economic intimate partner violence associated with HIV-risk behaviour? A cross-sectional analysis of young women in informal settlements in South Africa' (2019) 31 *AIDS Care* 667, 670. See also: Amaechi et al (note 34 above) 17195.
[49] Gibbs et al (note 46 above) 5.
[50] Gibbs et al (note 46 above) 2. See also: T Meyiwa, C Williamson, T Maseti and G Ntabanyane 'A 20 year review of the policy landscape for gender-based violence in South Africa' (2017) 15 *Gender and Behaviour* 8607, 8613, where it is argued that 'Gender-based violence is driven by patriarchal societal norms and unequal power relations.'
[51] Gibbs et al (note 46 above) 3.

Violence against women and other marginalised groups, like children and sexual minorities, is an attempt at an assertion of this patriarchal power and social control of women.[52]

It has been argued that the assertion of power by men over women is also affirmed by hegemonic masculinity.[53] Hegemonic masculinity is described as:

> the local, national and global cultural constructions that legitimise men's power over women in society, and is the idealised formation of masculinity through which all men, and women, construct identities, masculinities and femininities.[54]

Hegemonic masculinities can change over time and are not always the same in different places. Hegemonic masculinities have been associated with 'a heterosexual, wage earning man, who establishes a family and supports them through work'.[55] It is clear that not everyone will either choose or be able to fit this description. Research has suggested that in situations of poverty, and where men are not able to find work and support their families, masculinities are constructed around 'control over women using violence, as well as sex, to achieve forms of respect, which are not attainable through work and establishing families'.[56]

Patriarchal privilege and control of women means something particular for poor black women in South Africa. The inequality and subordination that they experience as a result of their race, gender and class is compounded by, and can make them more vulnerable to, violence. This affects their ability to develop to their full potential.[57] Crenshaw has put forward the compelling argument that racial and sexual subordination are mutually reinforcing and responses to each form of subordination needs to be a response to their combined and compounded form.[58] For Shreya Atrey, intersectionality 'helps understand the structural and dynamic consequences of interaction between multiple forms of disadvantage'.[59] This approach can assist in examining the structural inequality that poor black women in South Africa face and how this relates to

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[52] Amaechi et al (note 34 above) 17194.
[53] K Closson, A Hatcher, Y Sikweyiya, L Washington, S Mkhwanazi, R Jewkes, K Dunkle and A Gibbs 'Gender role conflict and sexual health and relationship practices amongst young men living in urban informal settlements in South Africa' (2020) 22 *Culture, Health and Sexuality* 31, 32.
[54] Ibid 32.
[55] Ibid. See also: R Jewkes, R Morrell, J Hearn, E Lundqvist, D Blackbeard, G Lindegger, M Quayle, Yandisa Sikweyiya and L Gottzén 'Hegemonic masculinity: combining theory and practice in gender interventions' (2015) 17 *Culture, Health & Sexuality* S112.
[56] Ibid 42. See also: A Gibbs et al (note 46 above) 2.
[57] Ibid.
[58] K Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241, 1283. Crenshaw has coined the term intersectionality, which has been extensively used and developed across disciplines over the last few decades. Exploring the various debates around the use and meaning of this concept is beyond the scope of my research.
[59] S Atrey *Intersectional Discrimination* (2019) 33.

their experiences of violence. Nomfundo Ramalekana and Letlhogonolo Mokgoroane cogently argue that intersectionality 'mandates a complex and contextual understanding of the disadvantage that substantive equality seeks to eliminate.'[60] In view of my research focus this underscores the need to consider the lived realities and experiences of poor black women, including vulnerability to violence, when addressing claims related to the right of access to housing and basic services.

The intersection of race, gender and class can be seen as each being 'a dimension of how domination and oppression come to be configured in any social context and for any social actor.'[61] While oppression and disadvantage on these grounds is a global challenge, which may look different in different contexts, in South Africa this manifests in a particular way because of the history of colonialism and apartheid; because the majority of people in our country are black; and because black women in South Africa are disproportionately affected by poverty.[62]

I would like to examine the specific impact of violence on poor women, as suggested by research discussed above, and whether better protection of socio-economic rights, as one of many possible interventions, can help to address one aspect of this challenge. For me, this means looking at the relationship between violence, lack of access to goods and services, and poverty and whether better access to goods and services for poor women can help to prevent their exposure to violence. I am mindful that experiences can be different for poor women in different communities and contexts. Although I am going to focus on women in urban informal settlements, I acknowledge that even here experiences can be complex and layered.

In the midst of the difficulties outlined above, poor women do seek support and show resilience. Research has shown that women who perceive their communities to be supportive are more resilient.[63] Economic and emotional support from a family member has also been shown to play a role in enabling a woman to leave a violent relationship.[64] Women who live in poverty

[60] N Ramalekana & L Mokgoroane 'Intersectionality in the South African Constitution's Equality Clause' 2024 South African Journal on Human Rights 1, 3.
[61] J Dugard and A Sanchez 'Bringing gender and class into the frame: an intersectional analysis of the decoloniality-as-race critique of the use of law for social change' (2021) 32 *Stellenbosch Law Review* 24, 37.
[62] Pumla Gqola has conducted extensive research on gender-based violence in South Africa and its connection to other historical and contemporary forms of violence, and the specific impact that this has on black women. See further: P Gqola *Female Fear Factory* (2021) and P Gqola *Rape: A South African Nightmare* (2015).
[63] M Machisa, N Christofides and R Jewkes 'Social support factors associated with psychological resilience among women survivors of intimate partner violence in Gauteng, South Africa' (2018) 11 *Global Health Action*, 4.
[64] S Willan, N Ntini, A Gibbs and R Jewkes 'Exploring young women's constructions of love and strategies to navigate violent relationships in South African informal settlements' (2019) 21 *Culture, Health & Sexuality,* 1232.

have also started to use the language of rights to protect themselves from some of these risks.[65] This was seen in research conducted in an informal settlement in Kwa-Zulu Natal.[66]

2.3 Violence against women and socio-economic rights

The connection between poverty and violence against women in South Africa has prompted me to undertake this research to explore whether better access to the goods and services guaranteed by the right of access to housing and basic services, can not only assist to alleviate poverty but also in addressing violence. This is informed by the reality that experiences of poverty include difficulty with accessing housing and basic services.

Lack of proper access to housing and basic services can increase poor women's vulnerability to violence in various ways, both inside and outside the home. Many poor women live in informal settlements. As noted above, research suggests that the 'multiple deprivations' which constitute the experience of living in an informal settlement such as informal housing, communal toilet facilities and lack of proper access to electricity, create 'numerous points of vulnerability to gender-based violence'.[67]

Furthermore, poor women can also be vulnerable to violence inside the home. As highlighted above, women carry the bulk of the responsibility for unpaid care work in the home. When a household does not have sufficient water or electricity, these factors can act as stressors and increase tensions in households, which can result in domestic violence.[68] Difficulty in accessing low-cost accommodation means that women in financially dependent relationships have limited options available to them if they want to leave these relationships because of being exposed to violence.[69]

In this section I have painted a picture of what poverty, and women's vulnerability to violence looks like in South Africa. I have illustrated how research suggests that some women are more vulnerable to violence than others, because of intersecting forms of poverty and disadvantage they experience. I have also shown how patriarchy and systemic issues have an impact on violence against women, and especially those living in poverty. Finally, I have introduced the

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[65] M Hunter *Love in the time of AIDS* (2010) 136.
[66] Ibid.
[67] Abrahams et al (note 2 above) 7.
[68] The Coalition Against Water Privatisation (South Africa), the Anti-Privatisation Forum (South Africa) and Public Citizen (USA) 'Nothing for Mahala: the forced installation of prepaid water metres in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa' 2004 *Centre for Civil Society Research Report No. 16*, 1, 10.
[69] N Mpja 'The lived experiences of women on Intimate Partner Violence in a victim support centre in Tshwane, South Africa' 2020 Research study presented in partial fulfilment for the degree Master of Arts, University of the Witwatersrand, 29.

connection between violence against women and access to the goods and services guaranteed by socio-economic rights, which I expand on in different parts of this thesis.

3. International, regional and domestic frameworks for the protection of women's human rights

Though the focus of my research is on South Africa's legal framework, it is necessary to recognise that women's human rights are a pertinent issue on the international human rights agenda and the steps that have been taken in the last few decades to recognise and protect women's rights as human rights.

South Africa has international and regional obligations related to the protection of women's human rights and specifically to protecting women from violence, which are set out below. These include binding treaties and international documents with persuasive value which assist member states in interpreting their obligations. These frameworks allow one to explore the connection between the need to protect women from violence and the enjoyment of socio-economic rights.

In the discussion below I demonstrate that the connection between violence against women and socio-economic rights protection is not sufficiently recognised and made visible in the binding legal frameworks. Where the connection is recognised, it is often done implicitly. Violence against women is linked to gender equality and discrimination, and socio-economic rights are linked to poverty and equality, but there is not sufficient recognition of the role that socio-economic rights can play in assisting to address women's vulnerability to violence. In places, international human rights bodies have made these links through their committee work.

3.1 International human rights framework

International law plays an important role in the South African legal system. International agreements generally become law in South Africa once they are enacted into law by national legislation.[70] When interpreting the bill of rights, courts have an obligation to consider international law.[71] This includes binding and non-binding sources of law.[72] Courts must also

[70] Section 231(4) of the Constitution provides:

> 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

[71] Section 39(1)(b) of the Constitution.

[72] *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

prefer a reasonable interpretation of legislation that is consistent with international law over one which is not.[73]

As the recognition of women's human rights has developed over time, one starts to see connections being drawn between socio-economic rights protection and violence against women. These connections are often indirect and later become more explicit, as will be seen in the discussion below. I am primarily interested in the binding treaties, but I do also show how the non-binding international frameworks have started dealing with these issues.

The main international treaty dealing with the protection of women's human rights is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was ratified by South Africa in 1995.[74] The CEDAW affirms the principle of equality and highlights the disproportionate impact that poverty has on women, in that in situations of poverty they 'have the least access to food, health, education, training and opportunities for employment and other needs.'[75] It also sets out how discrimination against women affects the enjoyment of other rights and freedoms such as the right to participate in political activities; the right to education; the right to work; and the right 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications'.[76] Something that can be seen as a gap in CEDAW is the absence of a direct reference to violence against women as a human rights violation, although as seen below, this was remedied by General Comment No. 19.[77]

In the 1990's the international community started to pay more serious attention to gender-based violence as a violation of international human rights law. This timing is significant for South Africa, as it was also the time of transition to democracy, when the country was negotiating which rights would be protected in its new Constitution. At the World Conference on Human Rights in 1993, the Vienna Declaration and Programme of Action was adopted, and was the first international document to recognise that:

[73] Section 233 of the Constitution.
[74] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 Dec. 1979, G.A. Res 34/180, U.N. GAOR 34th Sess.,Supp.No. 46 U.N. Doc A/34/36, entered into force 3 Sept. 1981), reprinted in 19 I.L.M 33 (1980) (CEDAW).
[75] Ibid preamble.
[76] Ibid articles 7, 10, 11 and 14.
[77] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 19' (29 July 1994) UN Doc HRI/GEN/1/Rev.1.

> Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.[78]

Member states acknowledged 'various forms of discrimination and violence, to which women continue to be exposed all over the world'.[79] The interdependence and inter-relatedness of human rights was also noted.[80] The World Conference stressed 'the importance of working towards the elimination of violence against women in public and private life'.[81]

In the subsequent Declaration on the Elimination of Violence Against Women (DEVAW) in the same year, the UN General Assembly expressed the concern that 'violence against women is an obstacle to the achievement of equality, development and peace'.[82] Importantly the DEVAW confirms that violence against women is a violation of the rights and freedoms of women and impairs their enjoyment of different rights and freedoms.[83] Violence against women is acknowledged to be a manifestation of 'historically unequal power relations between men and women' and that it is a social mechanism 'by which women are forced into a subordinate position compared with men'.[84] This is a huge achievement because it shows that violence against women is about more than acts perpetrated by one individual on another, but rather that it speaks to an unequal balance in power that societal structures reinforce. The DEVAW also expresses the concern that some groups of women, including destitute women, are especially vulnerable to violence.[85] This appears to acknowledge the relationship between poverty and violence, though the connection to socio-economic rights is not evident in this document.

These events were followed by the CEDAW Committee's issuing of General Comment No. 19, in 1994. This Comment is useful in presenting a view of how to understand gender-based violence as an equality violation. Though general comments are not binding, they provide guidance to state parties to assist them in fulfilling their treaty obligations. This general comment states that 'gender-based violence is a form of discrimination that seriously inhibits

[78] UN General Assembly, 'Vienna Declaration and Programme of Action' (12 July 1993) A/CONF.157/23, para 18 POA.
[79] Ibid preamble.
[80] Ibid Part I(5).
[81] Ibid Part II(B)(3)(38).
[82] UN General Assembly, 'Declaration on the Elimination of Violence against Women' (20 December 1993) A/RES/48/104, preamble.
[83] Ibid.
[84] Ibid.
[85] Ibid preamble.

women's ability to enjoy rights and freedoms on a basis of equality with men.'[86] Making an argument that gender-based violence is a form of discrimination against women presents an opportunity to bring discussions on addressing gender-based violence within claims based on the right to equality. The way that gender-based violence affects the ability of women to enjoy other human rights and freedoms, is set out in this general comment.[87] These include the right to life; the right not to be tortured or subject to cruel, inhumane or degrading treatment; the right to liberty and security of person; and the right to equality.[88] General Comment No. 19 also draws links between different articles in CEDAW and how their provisions are connected to gender-based violence.[89] Importantly, it stresses the obligation to provide equal access to health care and how violence against women puts women's health at risk.[90]

The Beijing Declaration and Platform for Action was adopted at the Fourth World Conference on Women in 1995.[91] It affirms that 'women's rights are human rights'.[92] This Declaration expressed the need to:

> Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people'.[93]

This speaks to the intersecting forms of discrimination that women can face.

Critical areas of concern, which are barriers to the fulfilment of women's human rights, are set out in the Platform for Action, along with detailed strategies and actions necessary to address the various areas of concern.[94] These areas of concern include 'the burden of poverty'; inequalities and unequal access to education and health care; violence against women; and 'inequality in economic structures'.[95] Significantly, for my purposes, the Platform for Action recognises that 'low social and economic status of women can be both a cause and a

[86] CEDAW General Comment No. 19 (note 77 above).
[87] Ibid.
[88] Ibid art 7.
[89] CEDAW General Comment No. 19 (note 77 above).
[90] Ibid para 19.
[91] UN General Assembly, 'Beijing Declaration and Platform for Action, Fourth World Conference on Women' (15 September 1995) A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).
[92] Ibid para 14.
[93] Ibid para 32.
[94] Ibid annexure 2.
[95] Ibid annexure 2 para 44.

consequence of violence against women.'[96] This is the first explicit recognition of this, in these international documents. The particular vulnerability of specific groups or categories of women, such as poor women, refugees, migrants, and indigenous women, is also highlighted.[97]

In 2003, the CEDAW Committee had the opportunity to deal with a matter that shed light on the connection between access to temporary housing, in the form of shelter, and gender-based violence in the case of *AT v Hungary*.[98] In this communication, the CEDAW Committee raised a concern about the prevalence of violence against women and girls, and at the lack of shelter available for the immediate protection of those who have experienced domestic violence.[99] Though there was not an in-depth engagement with how socio-economic rights, here in the form of access to temporary housing, was necessary for assisting to address violence against women, the acknowledgment of the need for shelter is important.

CEDAW General Comment No. 35, in 2017, builds on the foundation laid by General Comment No. 19. This general comment explains that:

> the term "gender-based violence against women" is used as a more precise term that makes explicit the gendered causes and impacts of the violence. The term further strengthens the understanding of the violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.[100]

The intersecting forms of discrimination that women experience, how they may be experienced in different ways, and how this can impact on gender-based violence, is highlighted in this general comment.[101] The indivisibility and interdependence of human rights is also emphasised.[102] Recommendations to state parties include that they '[e]xamine gender-neutral laws and policies to ensure that they do not create or perpetuate existing inequalities and repeal

[96] Ibid annexure 2 para 112. This is the first explicit recognition of this connection. For example, in General Comment No.19 it states that 'Poverty and unemployment increase opportunities for trafficking in women.; Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.'
[97] Ibid annexure 2 para 116.
[98] UN Committee on the Elimination of Discrimination Against Women, 'AT v Hungary, Merits' (26 January 2005) CEDAW/C/32/D/2/2003.
[99] Ibid para 9.3
[100] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 35' (14 July 2017) CEDAW/C/GC/35.
[101] Ibid art 12.
[102] Ibid art 15.

or modify them if they do so'.[103] This is an acknowledgment that laws that appear to be gender-neutral can have a disproportionately negative impact on women.

A common thread that emerges in the international normative framework for protecting women's human rights, discussed above, is the systemic nature of violence against women, which extends beyond the particular individuals in a given situation and how violence impacts the ability of women to enjoy other rights and freedoms. The intersection of different factors and how they affect women's disadvantage has started to be recognised. This is a comprehensive framework but the role of socio-economic rights in assisting to address violence against women has not yet been given sufficient depth. More is needed in terms of drawing the connections between violence against women, poverty and socio-economic rights. This is beginning to be seen in the work of the Committee on Economic, Social and Cultural Rights (CESCR).

The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects a range of rights that can arguably assist with addressing some of the underlying conditions that can make women more vulnerable to violence.[104] These include the right to work with, 'women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work'[105]. This speaks to the need to enable women to be economically independent. It also provides for the right to social security and for maternity leave benefits.[106] The ICESCR further recognises the right to an adequate standard of living, 'including adequate food, clothing and housing, and to the continuous improvement of living conditions'.[107] It also includes the right to education, which should enable people 'to participate effectively in a free society'.[108]

In 2005, the CESCR General Comment No. 16, stated that gender-based violence 'inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality' and specifically in relation to housing, state parties are urged to provide access to safe housing for victims of domestic violence.[109] However, this comment does not speak about

[103] Ibid art 29(d).
[104] International Covenant on Economic, Social and Cultural Rights (Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27) 6 ILM 360. This treaty was ratified by South Africa in 2015.
[105] Ibid art 7.
[106] Ibid art 9 and 10.
[107] Ibid art 11.
[108] Ibid art 13.
[109] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)' (11 August 2005) E/C.12/2005/4, para 27. In the CESCR general comments prior to this there has been some acknowledgement of the connection between socio-economic rights and gender-based violence, but not as explicit

socio-economic rights protection as being a part of addressing poor women's vulnerability to violence. There is not yet a full recognition of these connections. Access to safe housing however, while being necessary for survivors of violence, can also serve as protection for women who are vulnerable to gender-based violence.

The CESCR General Comment No. 20 of 2009 confirms that 'non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights.'[110] This is another illustration of the interdependence and inter-relatedness of rights. In examining the need for member states to eliminate discrimination in practice, General Comment No. 20 states that, this:

> requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. [. . .] For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.[111]

This general comment also calls attention to how discrimination can be experienced on a combination of prohibited grounds and that such discrimination 'has a unique and specific impact on individuals and merits particular consideration and remedying.'[112] This presents an opportunity to reflect on how women may be more vulnerable to violence because of discrimination experienced on intersecting grounds of race, gender and socio-economic status. These factors are particularly relevant for the South African context. This general comment however does not make the connection between gender-based violence and the protection of socio-economic rights.

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as General Comment No. 16. For example, in CESCR General Comment No. 13 it states that education can play a role in safeguarding children from sexual exploitation and CESCR General Comment No. 14 provides that there is a need to reduce women's health risks, such as protecting women from domestic violence. See: UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (8 December 1999) E/C.12/1999/10, para 1 and UN Committee on Economic, Social and Cultural Rights 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4, para 21.

[110] UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) E/C.12/GC/20, para 2.

[111] Ibid para 8.

[112] Ibid para 17.

Some other international human rights bodies have also started to examine the intersection between violence against women, poverty and the protection of socio-economic rights. In 2005, the Commission on Human Rights recognised that:

> women, particularly women living in extreme poverty and victims of domestic violence, continue to suffer multiple or aggravated forms of discrimination, inter alia on the grounds of property, as well as from discriminatory treatment in all areas decisive to the attainment of adequate housing.[113]

This calls attention to the connection between poverty, vulnerability to violence, gender discrimination and access to housing. The connection between these factors is exacerbated in a country like South Africa, where poverty and violence against women are critical challenges that need to be dealt with. Significantly, this resolution also emphasises that 'lack of adequate housing can make women more vulnerable to various forms of violence, including domestic violence, and in particular that the lack of housing alternatives may limit many women's ability to leave violent situations.'[114]

In another report, in 2014, the UN Human Rights Council highlighted that women are disproportionately affected by 'economic and social marginalization and poverty'.[115] The disadvantage that women suffer as a result of social and cultural barriers like stereotyping, discrimination and violence, is also highlighted.[116] It further states that a 'structural barrier to women's economic empowerment is the disparate feminization of unpaid care responsibilities.'[117] The report sheds light on the intersectional nature of disadvantage that women can experience and how vulnerability to poverty can be affected by experiences of being 'members of minorities, migrants, girl children, older women, or on account of single parenthood, disabilities or sexual identity.'[118] Notably, on the importance of access to social goods and services in the lives of women, the report states that:

> Secure rights over resources, including property, land, housing, food, water and sanitation, are essential to women's equality and well-being, and to their economic

[113] UN Commission on Human Rights, 'Human Rights Resolution 2005/25: Women's Equal Ownership, Access to and Control over Land and the Equal Rights to Own Property and to Adequate Housing' (15 April 2005) E/CN.4/RES/2005/25, preamble.
[114] Ibid.
[115] UN General Assembly, Human Rights Council 'Report of the Working Group on the issue of discrimination against women in law and in practice' (1 April 2014) A/HRC/26/39, para 8.
[116] Ibid para 16.
[117] Ibid.
[118] Ibid para 24.

> independence and autonomy […] Furthermore, failure to provide access to housing, food and water has disproportionately burdened women as vulnerable members of communities, as child bearers and as primary carers.[119]

Here one can see how access to basic goods and services guaranteed by socio-economic rights is part of the goal of achieving gender equality. Addressing the disproportionate burden of unpaid care work that women bear, is also a part of working towards substantive gender equality.[120]

Echoing the discussions above, the role of gender-based violence in inhibiting the enjoyment of socio-economic rights is seen in the emphasis on how violence against women can have an adverse impact on women's economic and social potential, for example by affecting their 'access to education, freedom of movement and employment.'[121]

In 2017, the UN Special Rapporteur on Violence Against Women (SRVAW) released a report which deals with the need for shelters and accessible and safe public housing.[122] The SRVAW calls on states to 'provide adequate protection to victims, survivors and potential victims of violence.'[123] The inclusion of potential victims speaks to the role that access to housing can play in the lives of those who are vulnerable to violence. The protection provided by states should include a full range of services such as 'shelters, longer-term housing and protection orders' which should be readily available and accessible to women and girls.[124] This report recognises a clear link between the need for access to housing and assisting to address violence against women.

The work of the CESCR and the other human rights bodies discussed above provides guidance to South Africa on how it can better address poverty and violence against women, by recognising how this these social ills are connected and how addressing them should be a part of working towards achieving substantive gender equality. This can be seen in how the CESCR highlights that gender-based violence inhibits the ability to enjoy economic, social and cultural rights and the need to provide safe housing to those who have been subject to domestic violence. As previously mentioned, the broader role that socio-economic rights protection can

[119] Ibid paras 77 and 79.
[120] I see the links between poverty, socio-economic rights protection and gender-based violence being explicitly drawn in paras 24 and 25.
[121] Ibid para 102.
[122] UN General Assembly, Human Rights Council 'Report of the Special Rapporteur on violence against women, its causes and consequences' (13 June 2017) A/HRC/35/30.
[123] Ibid para 21.
[124] Ibid para 65.

play in assisting to address poor women's vulnerability to violence is however under-recognised, especially in the binding international legal frameworks.

3.2 Regional framework

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Protocol on the Rights of Women in Africa)[125] and the SADC Regional Strategy and Framework of Action for addressing gender-based violence are the main instruments dealing with the protection of women's human rights in the African region. The below discussion shows how these regional instruments draw the connection between poverty and violence against women, in ways that the binding international treaties do not.

South Africa ratified the Protocol on the Rights of Women in Africa in 2004, and has thus agreed to be bound by the obligations imposed by this treaty. It is significant that this protocol specifically includes reference to measures to protect women against violence. Violence against women is defined as:

> [A]ll acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.[126]

There is a clear acknowledgement that violence is not only physical, but can also take the form of sexual, psychological and economic harm, and that these acts can take place in public or in private. This sheds light on the different kinds of harm to which women can be exposed. This protocol also highlights how particular groups of women may be more vulnerable to violence because of the position in which they find themselves. Several provisions address the protection of widows' rights and also protection of elderly women and women with disabilities.[127] Article

[125] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted at 2nd Ordinary Session of Assembly of the AU on 11 July 2003, entered into force 25 November 2005) (Protocol on the Rights of Women in Africa). South Africa ratified this treaty on 17 December 2004. Even before these instruments, in 1997, the SADC Declaration on Gender and Development expressed deep concern about women constituting the majority of the poor and committed to promoting a good quality of life for women and taking measures to prevent violence against women and children. See: SADC Declaration on Gender and Development (signed at Blantyre on 8 September 1997).
[126] Ibid art 1(j).
[127] Ibid articles 20, 22 and 23.

24 is a salient provision of this protocol as it provides for the protection of women in distress. In part, it states that state parties undertake to:

> ensure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs;[128]

This affirms the need for strong protection for the social and economic needs of especially vulnerable and marginalised groups of women. State parties to the protocol undertake to adopt all necessary measures and to provide resources for the full and effective implementation of the rights protected.[129] This shows that states are not only making a political commitment but also a financial commitment to addressing the protection of women's human rights.

A host of other obligations are imposed on state parties. State parties have a duty to eliminate all forms of discrimination against women, a part of this obligation includes integrating a gender perspective in policy decisions and legislation.[130] The protocol goes on to affirm the dignity inherent in human beings and imposes a duty on state parties to implement measures which prohibit the exploitation and degradation of women.[131] The obligation to protect women from all forms of violence is situated within the right to dignity.[132] Importantly, it is also situated within the rights to life, integrity and security of the person.[133] Here one can see how violence against women affects the enjoyment of different rights and freedoms. Obligations imposed on state parties include taking legislative, administrative, social and economic measures to address all forms of violence against women.[134]

State parties also have an obligation to identify the causes and consequences of violence against women and to take appropriate measures to prevent and eliminate this violence.[135] A focus on causes and consequences provides an opportunity to get to the root of the problem and to take a preventative approach, by addressing the conditions that can make women more vulnerable to violence. Under article 10, which protects the right to peace, state parties have the obligation to take measures to 'reduce military expenditure significantly in favour of spending on social

[128] Ibid art 24.
[129] Ibid art 26.
[130] Protocol on the Rights of Women in Africa (note 125 above) art 2.
[131] Ibid art 3.
[132] Ibid.
[133] Ibid art 4.
[134] Ibid.
[135] Ibid.

development in general, and the promotion of women in particular.'[136] This prioritisation of spending on social development and particularly on the promotion of women, is important for dealing with the specificities of the socio-economic impact of violence on women. Article 13 protects economic and social welfare rights. State party obligations under this section include taking measures to 'recognise the economic value of the work of women in the home.'[137] This appears to be a recognition of disproportionate amount of time that women spend on unpaid work, which will have an impact on the time available to spend on paid work and other activities. The protocol also includes the right to food security. State parties must take appropriate measures to 'provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food'.[138] This is a progressive provision which speaks to women being self-sufficient and having the ability to sustain themselves.

The inclusion of social and economic measures speaks to the connection between socio-economic rights protection and violence against women. Though the connection between socio-economic rights protection and violence against women is not explicit in this treaty, it does go further than other treaties in the extent of obligations it imposes on states to protect women from violence and to address poverty. It is the only binding treaty that includes violence against women as a human rights violation, and it makes comprehensive provision for addressing women's poverty and social and economic conditions. Though the link between socio-economic rights and violence against women is not drawn clearly, it is critical for addressing women's poverty and vulnerability to violence, that these provisions are all included in this treaty.

The African regional framework for the protection of women's human rights has recently been strengthened by the adoption of the African Union Convention on Ending Violence against Women and Girls.[139] It declares the right of women and girls 'to be free from all forms of violence, which right is indivisible from and interdependent with other human rights and fundamental freedoms.'[140] This treaty acknowledges the connection between violence against women and girls and inequality and discrimination, and how this can be related to a broad range

[136] Ibid art 10.
[137] Ibid art 13(h).
[138] Ibid art 15.
[139] African Union Convention on Ending Violence against Women and Girls (adopted at the 38th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia in February 2025).
[140] Ibid art 2.

of grounds including socio-economic status.[141] The treaty further lists several protection and support measures that state parties should put in place. These include 'access to safe homes and centres [. . .] for women and girls faced with actual or threat of violence.'[142] The inclusion of access to safe homes shows awareness of the link between access to temporary housing in the form of shelters and the need to protect women and girls from violence.

Turning to the SADC region, gender-based violence has been described as 'among the most severe and widespread human rights violations in Southern Africa.'[143] The SADC Regional Strategy and Framework of Action for addressing gender-based violence (SADC Regional Strategy) sets out how this region plans to combat this social ill.[144] One is urged to understand the definition of violence as 'gender-based' as making reference to this type of violence as existing within a context of women and girls subordinate status in society.[145] Reference is made to global studies which indicate that an estimated one in three women have experienced physical and/or sexual intimate partner violence in their lifetime.[146] Gender-based violence is reinforced by laws, policies and procedures that do not incorporate the specific needs of women.[147] Women's economic dependence on men is also said to heighten their vulnerability to violence.[148] One of the challenges highlighted in state responses to gender-based violence is the provision of places of safety for victims.[149] Here there is a clear link between gender-based violence and socio-economic rights protection, in the form of shelter for victims. In the guidelines for prevention of gender-based violence it states that measures should incorporate a strong focus on gender equality, women's empowerment and the enjoyment of human rights.[150]

This regional framework appears to better draw the connections between violence against women and women's social and economic conditions. It is significant that the Protocol on the Rights of Women in Africa, as a binding treaty, has made these links. This can be contrasted with the international normative framework, where the intersections are mainly recognised in the work of human rights bodies. The way the regional framework draws these connections can

[141] Ibid preamble.
[142] Ibid art 11.
[143] SADC Regional Strategy and Framework of Action for addressing Gender-based Violence (2018) < https://www.unodc.org/documents/southernafrica/Stories/2019/SADC_Regional_Strategy_and_Framework_for_Action_on_GBV_-_FINAL_September_2018_-_ENGLISH_VERSION.pdf > (SADC Regional Strategy) 5.
[144] Ibid.
[145] Ibid 10.
[146] Ibid 11.
[147] Ibid13.
[148] Ibid.
[149] Ibid 14.
[150] Ibid 20.

be seen in: the recognition of how particular groups of women can be more vulnerable to violence; the prioritisation of spending on social development and the promotion of women; the protection of economic and social welfare rights; and by calling attention to how gender-based violence exists within the context of women and girls subordinate status in society and its relation to gender inequality.

3.3 Domestic framework

At a domestic level, the Constitution of South Africa protects a range of rights which can assist in addressing the challenges of violence against women and poverty. These rights are justiciable and can be enforced in a court of law, when it is alleged that a right has been infringed or threatened.[151] Among these are the right to equality, the right to human dignity and the right to freedom and security of the person.[152] The right to equality includes the right to the full and equal enjoyment of all rights and freedoms. Section 9 gives government the authority to take measures to promote the achievement of equality and specifically to protect or advance persons disadvantaged by unfair discrimination.[153] This section prohibits direct and indirect discrimination by the state and individuals on a number of prohibited grounds, including race, gender, and sex. The right to freedom and security of the person includes the right to be free from all forms of violence from public or private sources.[154] The Bill of Rights also includes a range of socio-economic rights including the right of access to housing, health care, food, water, social security, and education.[155] Section 7(2) of the Constitution imposes an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.[156] Sections 26 and 27 impose obligations on the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights.

The rights enshrined in the bill of rights and the corresponding obligations imposed to secure and fulfil these rights provide a strong normative framework for the protection of equality; for the protection of women from violence; and for the enjoyment of socio-economic rights. However, I submit that the intersection between these is under-recognised and will be explored in my thesis. Goldblatt has aptly argued that there would be value in research that considers the

[151] Section 38 of the Constitution.
[152] Sections 9, 10 and 12 of the Constitution.
[153] Ibid section 9(2).
[154] Section 12(1)(c) of the Constitution.
[155] Section 26, 27 and 29 of the Constitution.
[156] Section 7(2) of Constitution provides: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

role of socio-economic rights in addressing gender-based violence.[157] Bonthuys has started this research, by examining the connection between domestic violence and socio-economic rights, and demonstrates the gaps that exist in research related to socio-economic rights and violence against women.[158] Bonthuys has raised the pertinent issue of how women who have the least access to socio-economic goods would depend heavily on men who abuse them for these goods and for this reason specific attention should be paid to the socio-economic rights of these women.[159]

At the level of policy, the links between poverty, the protection of socio-economic rights and violence against women are becoming more explicit. In 2020, the South African government introduced a National Strategic Plan on Gender-based Violence and Femicide (National Strategic Plan), as a part of its attempt to address this critical challenge in South Africa. One of the focus areas of this plan is the creation of economic opportunities for women who are vulnerable to abuse because of poverty.[160] Pillar 5 of the National Strategic Plan is economic power.[161] The five-year outcomes under this pillar include accelerating initiatives that address women's unequal economic and social position, through among other things, access to employment, housing and income generating initiatives; safe workplaces; and strengthened child maintenance and support systems.[162] This appears to acknowledge the systemic nature of gender-based violence and the need to address unequal power relations in society.

The National Strategic Plan also highlights how vulnerability to violence can be aggravated by marginalisation on intersecting grounds including race, poverty, sexual orientation, migrant status and HIV status.[163] It is noteworthy that there is an acknowledgment that structural violence is underpinned by:

> exploitation of labour, undervaluing of unpaid work, under-funded social protection, unequal pay for equal work, inflexible labour policies, the high costs of living, unsafe

[157] B Goldblatt 'Violence against Women in South Africa: Constitutional Responses and Opportunities' in R Dixon and T Roux (eds) *Constitutional Triumphs, Constitutional Disappointments* (2018) 141, 172.
[158] E Bonthuys 'Domestic violence and gendered socio-economic rights: an agenda for research and activism' (2014) 30 *South African Journal on Human Rights* 111. This article is discussed in chapter 2.
[159] Ibid 118.
[160] Interim Steering Committee to respond to the gender-based violence and femicide crisis, National Strategic Plan on Gender-based violence and femicide 2020 < https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf>.
[161] Ibid 19.
[162] Ibid.
[163] Ibid 23.

and unhealthy working environments, inhumane working hours, poor regulation of the minimum wage and precarious jobs impacting particularly on women.[164]

The way these conditions disproportionately impact women must be stressed. These are the kinds of structural issues that must be addressed if one is serious about dealing with violence against women. Though not specifically acknowledged in this document, apart from provisions related to health care and housing, socio-economic rights (as a bundle of rights) do aim to deal with some of these issues.

Responses to violence against women need to involve a whole range of sectors, from psychological support, to health responses, to addressing social norms and values, criminal justice responses and targeted human rights interventions. But, as I will argue in this thesis, they also require better access to a range of goods and services guaranteed by socio-economic rights, as one of many possible interventions to assist in addressing violence against women. Attention also needs to be paid to how part of the goal of achieving substantive equality should include addressing violence against women. Finally, as I will argue, socio-economic rights need to be interpreted in a way that considers the lived realities and experiences of poor women in South Africa.

4. Research objective and research questions

My research objective and research questions flow from my observations of the connection between women's vulnerability to violence and poverty, and the specific impact that this has on women in South Africa. I identify a gap in the research related to the connection between socio-economic rights protection and poor women's vulnerability to violence, both in South Africa and in international human rights law. I want to examine the role that socio-economic rights and the law can play in assisting to address these intersecting challenges.

The overall research objective is as follows: How can better access to the goods and services guaranteed by the constitutional rights of access to housing and basic services (electricity, water and sanitation) advance substantive gender equality and help to address women's vulnerability to violence, and what is the role of law, socio-economic rights and courts in achieving this?

The research questions that flow from this are:

[164] Ibid 23.

a. How can we better interpret substantive equality to centre the problem of violence against women?

b. What is the relationship between access to the goods and services guaranteed by the right to housing and basic services and women's vulnerability to violence?

c. What relevant laws and policies are in place? And, can greater awareness of the need to address gender inequality and the specific needs and circumstances of women, make legislation and policies, relating to housing and basic services, more responsive to addressing poor women's vulnerability to violence?

d. What is a gendered interpretation of socio-economic rights? And, how can a gendered interpretation, by courts, of the right of access to housing and the accompanying basic services, and applying a gendered perspective to remedies, assist to address structural and systemic violence against women?

e. What legal strategies are possible to develop these more responsive and gendered rights-based legal frameworks?

5. Methodology

I use a mixed methods approach in this thesis. I plan to answer my research questions in the following manner:

a. By developing the theoretical frames of substantive equality and gendered socio-economic rights with a view to establishing how violence against women can be understood in terms of these frames. I use the idea of substantive equality as my conceptual framework and am not dealing with the right to equality here. This is done to show its importance for protecting women from violence.

I call attention to how vulnerability to violence against women is connected to the different dimensions of substantive equality and is related to failures in distribution of material resources; failures in recognition; how it is connected to the need to address the substantive conditions that make it difficult for women to live free lives and exercise their full potential; and how it affects their ability to participate in society.

I also show how the protection of socio-economic rights is an important part of the goal of achieving substantive equality. And how these rights are particularly important for women and the need to pay specific attention to the lived realities of women when

interpreting and giving effect to these rights. Finally, I draw specific links between access to the goods and services guaranteed by socio-economic rights and women's vulnerability to violence.

b. By conducting an analysis of selected legislation and policies related to the protection of the right of access to housing and basic services, to examine if adequate attention is given to the specific needs and circumstances of women. I focus specifically on parts of legislation and policies that I view as relevant to the lives of poor women who are living in urban areas and informal settlements, and that can assist in addressing their vulnerability to violence.

c. By conducting an analysis of selected South African judgments on access to housing and basic services to examine whether a gendered lens is present in the courts' interpretation of socio-economic rights and the assessment of government's fulfilment of its obligations. I also examine whether women's vulnerability to violence is considered in access to housing and basic services cases, as part of evaluating the context of the rights violation.

   I mainly focus on key Constitutional Court judgments but also include discussions of high court judgments where I find that they provide a good illustration of how courts can pay attention to the gendered implications of lack of sufficient access to housing and basic services. I also rely on two Constitutional Court judgments on the right to social security to demonstrate how the Court has effectively applied a gendered lens to interpretation of socio-economic rights and how the right to equality can strengthen women's socio-economic rights claims.

d. To further deepen my analysis, I conducted interviews with public interest litigation and non-profit organisations whose work focuses on socio-economic rights and violence against women.

In speaking to public interest litigation organisations, I wanted to understand how decisions are made about framing arguments in socio-economic rights litigation and the challenges faced in socio-economic rights litigation where women are disproportionately affected by the rights violation. I also wanted to find out whether issues of violence against women came up in any of the socio-economic rights cases they dealt with. This is linked to my research questions about gendered interpretation of rights and legal strategies that can assist with developing a more gendered rights-based legal framework.

In speaking to non-profit organisations who provide direct services to survivors of gender-based violence, I wanted to gain insight into the lived experiences of clients of these organisations in relation to the intersection between violence against women and socio-economic rights (this is linked to my question about the relationship between violence against women and the right of access to housing and basic services). I did not interview women survivors of violence directly but rather organisations who are stakeholders and have experience of working with women on these issues.

Before I could conduct these interviews I had to obtain ethics clearance from the university. This involved completing an ethics clearance application, participating in an ethics course and submitting an assignment. On completion of the short course and passing the assignment, I obtained ethics clearance.

I initially reached out to 18 organisations based in Gauteng and the Western Cape. I identified these organisations based on desktop research and word of mouth, and made the decision based on whether their work relates to my research focus. In the end, I conducted 10 interviews. Five of them were public interest litigation organisations and five were non-profit organisations providing services to survivors of violence.

Out of the eight that I did not interview: I received no response to emails and follow up calls to six of them; one organisation responded saying that they do not do work relevant to my research; and one organisation responded saying that they were not available to be interviewed.

After obtaining the informed consent of the interview participants, the interviews were recorded and later transcribed by me. Some interviews were conducted in person and others online via the Zoom platform.[165]

In analysing the interviews, I read through the transcripts and highlighted common recurring themes that I noticed in the different interviews. I grouped the different interview responses together in one document, as they related to different themes. I noted where there were similarities and differences across these themes. I further grouped together recommendations from interviewees related to how to address some of the issues that surfaced in their responses to my questions.

[165] The schedule of interviews, which includes description of organisations, is Annexure A to this thesis.

The findings of the interviews are weaved in throughout this thesis. I refer to the participants as interviewees 1 – 10, to protect their anonymity. These numbers correspond with the interview schedule in Annexure A.

Set questions were posed to the participants but I was also guided by what the participants wanted to share about their work experience as it relates to my research.

The following questions were posed to the organisations who provide shelter and services to survivors of violence:

1. In working with women who have been subject to violence, have you ever found that they also have challenges related to accessing proper housing and basic services (water, sanitation, electricity)?

1.1 if yes, do you see a connection between being able to access these basic goods and services and vulnerability to violence? (this can be a direct or indirect connection)

1.2 if yes, what kind of challenges do women face? And what kind of interventions, based on the experience gained through your work, do you think would be helpful?

1.3 If yes, do you think that better access to these goods and services would be able to help women to exercise agency?

2. Also based on experience you have gained through your work, do you see improved access to housing and basic services, as a part of what is needed to help to reduce vulnerability to violence? Why / why not

And these questions were posed to public interest litigation organisations:

1. Have you had socio-economic rights cases where gender issues or violence against women have been a component of the case?

2. In litigation involving access to housing and basic services, have you had cases where women have been disproportionately affected by the rights violation?

2.1 if yes, how did you discover this? And has this been factored into your arguments?

2.2 if it hasn't been factored into your arguments, why not? Are there specific challenges related calling attention to the impact of socio-economic rights violations on women?

3. How are decisions made about the framing of arguments in socio-economic rights litigation?

4. In framing arguments in socio-economic rights litigation, which impacts on women, is the particular impact on women found to strengthen the rest of the argument?

5. Do you consider a gendered interpretation of rights important or necessary in socio-economic rights litigation? Why/ why not?

6. Do you see a connection between gendered interpretations of rights, substantive equality and the need to protect women from violence?

6. Chapter outlines

This first chapter is the introduction. It sets out my research aims and includes the methodology and research design. It provides the context and background of the research, and includes the international, regional and domestic legal framework for the protection of women's human rights. This includes examining the intersections of violence against women and poverty.

Chapter 2 sets out the key conceptual framework of the research, being substantive equality and the theoretical framework of gendered socio-economic rights. This is done with the view of establishing how violence against women fits into these frames. I show how the multi-dimensional theory of substantive equality applies to violence against women, and argue that addressing violence against women and the protection of socio-economic rights are part of advancing substantive equality.

In chapter 3, I examine selected legislation and policies dealing with access to housing and basic services, which I view as relevant to the lives of poor women in urban areas. I show where they cater to the specific needs and circumstances of women, and where they fail to do so. I argue that paying attention to the specific needs and circumstances of women is necessary to assist in addressing poor women's vulnerability to violence. I also identify gaps in the provision of shelters and longer-term low-cost accommodation for women survivors of gender-based violence.

Then, in chapter 4, I argue that courts should apply a gendered lens when interpreting socio-economic rights and I explain how this can be done. I argue that this is necessary because socio-economic rights protection should meaningfully address the conditions of poor women's lives, and their vulnerability to violence. I provide examples of cases where courts have successfully applied a gendered lens and where they have failed to do so.

Chapter 5 examines the relationship between law and social change. The law and courts cannot address all of society's problems on their own. In this chapter I set out some of the limits of the law in bringing about meaningful change in the lives of poor women and the different impacts that court decisions can have despite these limits. I also argue that there are strategies that can be used to increase the likelihood of socio-economic rights litigation resulting in change in an egalitarian direction for poor women in South Africa.

In Chapter 6, I present the findings of my research and some recommendations based on these findings. I also show the contribution that the research makes.

CHAPTER 2 – CONCEPTUAL FRAMEWORKS: SUBSTANTIVE EQUALITY AND GENDERED SOCIO-ECONOMIC RIGHTS

1. Introduction

Equality is one of the founding values of South Africa's constitutional democracy, and it is a justiciable right. South Africa's Constitution is committed to a vision of substantive equality. This is evident from the wide list of grounds on the basis of which people may not be unfairly discriminated against and in the provisions which allow for positive steps to redress disadvantage. There is an extensive body of literature on substantive equality. This chapter outlines my conceptual frameworks of substantive equality and gendered socio-economic rights and shows how violence against women can be understood in terms of these frames. I argue that realising socio-economic rights and addressing violence against women, form part of the goal of substantive equality. As illustrated in chapter 1, the intersection between these is under-recognised in the international, regional and domestic human rights frameworks.

In section 2, I address the meaning of substantive equality as an overarching principle. For the purposes of showing its relevance to my research, I divide this section into two sub-sections: multi-dimensional substantive equality and substantive equality in South Africa. The first sub-section draws on broader insights into substantive equality and the second sub-section, focuses specifically on substantive equality in the South African context. There is inevitably some overlap in these sub-sections. In this section I demonstrate how the different aspects of substantive equality relate to violence against women.

I then turn to focus on gendered socio-economic rights in section 3. I argue, as others have, that the project of substantive gender equality requires that specific attention is paid to the needs and circumstances of women when interpreting socio-economic rights. In this section, I first show how the protection of socio-economic rights in the Constitution is a part of the goal of achieving substantive equality. I then show why socio-economic rights are particularly important to women and how they relate to women's vulnerability to violence. I contend that the effective protection of socio-economic rights is necessary to assist with addressing violence against women.

2. Substantive equality

2.1 Multi-dimensional substantive equality

Nancy Fraser provides a compelling model for understanding and addressing poverty, social exclusion and inequality.[1] Fraser identifies two interrelated injustices in society - maldistribution and misrecognition - and advances a view of justice as parity of participation.[2] She argues that the following conditions need to be met in order for participatory parity to be possible across the dimensions of distribution and recognition:

> First, the distribution of material resources must be such as to ensure participants' equal capacity for social interaction. This condition precludes economic structures that institutionalise deprivation, exploitation, and gross disparities in wealth, income, labour and leisure time, which prevent some people from participating as on a par with others in social life. Second, the status order must express equal respect for all participants and ensure equal opportunity for achieving social esteem. This condition precludes institutionalised patterns of cultural value that systematically depreciate some categories of people and the qualities associated with them, thus denying them the status of full partners in social interaction. Finally, the political constitution of society must be such as to accord roughly equal political voice to all social actors. This condition rules out electoral decision rules and media structures that systematically deprive some people of their fair chance to influence decisions that affect them.[3]

Here we can see that redistribution, recognition and participation are all requirements for achieving justice.[4] Fraser views redistribution of material resources as an objective condition and the recognition element as an intersubjective condition, both of which are necessary to achieve participatory parity.[5] She explains these conditions as follows:

> The objective condition brings into focus concerns traditionally associated with the theory of distributive justice, especially concerns pertaining to the economic structure of society and to economically defined class differentials. The intersubjective condition brings into focus concerns […] highlighted in the philosophy of recognition, especially

[1] N Fraser 'Social exclusion, global poverty and scales of injustice: rethinking law and poverty in a globalising world' (2011) 3 *Stellenbosch Law Review* 452.
[2] Ibid 455.
[3] Ibid.
[4] Ibid.
[5] N Fraser and A Honneth *Redistribution or Recognition? A political-philosophical exchange* (2003) 36.

concerns pertaining to the status order of society and to culturally defined hierarchies of status.[6]

The need for redistribution can be seen in socio-economic injustices in society. Fraser thus describes exploitation as 'having the fruits of one's labour appropriated for the benefit of others'.[7] This is central to the capitalist system, where working class people earn minimum wage or less and the owners of businesses are able to maximise profits. She further describes economic marginalisation as 'being confined to undesirable or poorly paid work or being denied access to income-generating labour altogether'.[8] Some people may be unemployed for long periods of time or confined to poorly paid work for their entire working life, because of lack of skills or education, and social and economic conditions, which limit options available to them. Finally, she notes that deprivation is 'being denied an adequate material standard of living'.[9] Thus not having access to safe housing, water and sanitation, and basic necessities of life can be seen as a form of deprivation. These kinds of exploitation and deprivation can be witnessed in communities around the world and are a reality for many poor people and poor women, who live in informal settlements in South Africa.[10]

Failures in recognition can be seen in how people are othered because of some aspect of their identity, such as their gender, sexual identity, class or being a minority in some way. And are not afforded equal value, respect and concern. Poor women in South Africa experience multiple layers of misrecognition as a result of their class, gender and race, because the majority of poor people in South Africa are black.

States have adopted different approaches to dealing with issues of redistribution and recognition. For Fraser, responses to these connected injustices can be affirmative or transformative. Transformative responses are linked to socialism, while affirmative approaches are linked to liberal capitalism. An example of an affirmative response to redistribution would be the liberal welfare state, with 'surface reallocations of existing goods to existing groups'.[11] By contrast, a transformative approach to redistribution would involve a 'deep restructuring of relations of production'.[12] With regard to recognition, an affirmative response would involve 'surface reallocations of respect to existing identities of existing groups' and would support

[6] Ibid.
[7] N Fraser *Justice Interruptus: Critical reflections on the "post-socialist" condition* (1997) 13.
[8] Ibid.
[9] Ibid 13.
[10] See further discussion in chapter 1, 10.
[11] Fraser (note 7 above) 27.
[12] Ibid 27.

group differentiation, while a transformative approach would engage in 'deep restructuring of relations of recognition' and destabilize group differentiation.[13]

Though Fraser's writes about justice from a philosophical and political theory perspective her ideas are instructive from a legal or human rights perspective, both as a way to assist in understanding what substantive equality should aim to achieve broadly and specifically what it should mean for the South African context. This is developed in the discussion below.

Building on the model adopted by Fraser, Sandra Fredman has introduced a four-dimensional approach to understanding the meaning of substantive equality.[14] She argues that substantive equality aims to 'redress disadvantage; address stigma, stereotyping, prejudice, and violence; enhance voice and participation; and accommodate difference and achieve structural change.'[15] This locates the right to equality within its social context, and aims to be responsive to those who are 'disadvantaged, demeaned, excluded or ignored.'[16] By highlighting the multiple dimensions of equality she is able to demonstrate the work that the right to equality needs to do for people who find themselves on the margins of society.

This multi-dimensional framework illustrates and draws on different components of the right to equality.[17] For Fredman, the dimension of redressing disadvantage 'bridges the gap between the traditional sphere of anti-discrimination law and distributive equality'.[18] Fredman notes that distributive equality has been regarded as a policy issue and not within the terrain of human rights law.[19] In dealing with disadvantage, Fredman makes the argument that 'disadvantage should encompass more than maldistribution of resources. It needs also to take on board the constraints which power structures impose on individuals because of their status.'[20] It appears as though the dimension of redressing disadvantage has similarities with Fraser's element of redistribution, but is more focused on redressing disadvantage that is connected to a particular status. Fredman emphasises that 'poverty and deprivation are disproportionately concentrated among women and black people.'[21]

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[13] Ibid 27.
[14] S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712.
[15] Ibid 712.
[16] Ibid 713.
[17] Ibid 727.
[18] Fredman (note 14 above) 729.
[19] Ibid.
[20] Ibid.
[21] S Fredman 'Redistribution and Recognition: Reconciling inequalities' (2007) 23 *South African Journal on Human Rights* 214, 215.

Fredman describes disadvantage as 'a deprivation of genuine opportunities to pursue one's own valued choices.'[22] Thinking about people having the opportunity to make free choices, also presents a moment to pause and reflect on the issue of people knowing the choices that are available to them.

The dimension of redressing stigma, stereotyping, humiliation and violence on grounds of a particular status, acknowledges that these can be experienced regardless of relative disadvantage.[23] Addressing stigma and prejudice are related to recognition. The concept of recognition can be seen to refer to 'the central importance of inter-personal affirmation to our sense of who we are.'[24]

This dimension has similarities to dignity but tries to avoid some of its shortcomings.[25] Dignity as a core value in South African constitutional jurisprudence, along with equality, has been examined by Cathi Albertyn and Sandra Fredman who argue that the dominant meaning that has been given to dignity is one of equal concern and respect and the affirmation of self-worth.[26] They suggest that some of the problems with how courts have approached dignity lie in the potential to focus on the individual rather than on patterns of structural inequalities.[27] Rejecting a singular focus on dignity they argue that 'dignity, as stigma and prejudice; and disadvantage, as socio-economic inequality and material deprivation, should be treated as separate equality harms.'[28]

The third dimension is the participative dimension of social inclusion and political voice. Fredman states that 'substantive equality recognizes that individuals are essentially social. To be fully human includes the ability to participate on equal terms in community and society more generally.'[29] One can see how this dimension of substantive equality is also linked to the recognition principle and the humanness that we share in that the inclusion and equal participation of all people in social and political spaces implies that all people will be valued and awarded equal respect in decision making processes.

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[22] Ibid. For Fredman, disadvantage can be both material and social. See: S Fredman 'Women and Poverty - A Human Rights Approach' (2016) 24 *African Journal of International and Comparative Law* 494, 505.
[23] Fredman (note 14 above) 730.
[24] Fredman (note 14 above) 731.
[25] Ibid.
[26] C Albertyn and S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' 2015 *Acta Juridica* 430, 435.
[27] Ibid.
[28] Ibid 436.
[29] Fredman (note 14 above) 732.

Finally, Fredman identifies the fourth aim of substantive equality to be:

> [T]o respect and accommodate difference, removing the detriment but not the difference itself. This in turn means that existing social structures must be changed to accommodate difference, rather than requiring members of out-groups to conform to the dominant norm. Substantive equality is therefore potentially transformative.[30]

From a gendered perspective, the dimension of difference and diversity, would mean for example, a radical change in how labour is divided in the home and the 'male-dominated structure of paid working time.'[31] It also means accommodating other groups that do not "fit into" dominant norms. This would include making spaces more accessible to people with disabilities and accommodating religious and ethnic minorities.[32] This dimension can also affect the distribution of resources as there will be costs involved in making structures and systems more inclusive and accommodating.[33]

Albertyn and Fredman have explored this multi-dimensional approach to equality to show how the different dimensions interact.[34] Using the example of social security programmes, they show how the different dimensions can support each other. Social security schemes which aim to redress disadvantage can also lead to stigma and exclusion; for this reason, they should be designed to 'avoid stigma and enhance participation and social inclusion if they are genuinely to address substantive equality.'[35] In other words, these types of programmes should not only provide necessary social security, but should also provide people with the tools that they need to be able to exercise agency and make free choices about how they live their lives.

2.1.1 Multi-dimensional substantive equality and violence against women

Inequality is both a cause and a consequence of violence against women. Applying the multi-dimensional approach to substantive equality, discussed above, to violence against women enables one to see how this manifests itself in the lives of poor women and how working towards achieving substantive equality can assist to address poor women's vulnerability to violence.

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[30] Fredman (note 14 above) 733.
[31] Albertyn and Fredman (note 26 above) 437.
[32] Fredman (note 14 above) 733.
[33] Fredman (note 14 above) 734.
[34] Albertyn and Fredman (note 26 above) 430.
[35] Ibid 432.

First, in the context of violence against women, the element of distribution, speaks to women's lower economic status, unemployment levels among women, and low wages for women who are employed.[36] It also speaks to the lack of sufficient social protection for women who work in the informal economy, and the lack of value for time spent on unpaid work in the home, which limits the options available in terms of time to spend on paid work. This can affect economic independence and can make it difficult to leave violent relationships. Little or no income makes it difficult to secure housing and basic services, which can mean that women are trapped in abusive relationships with limited alternatives for themselves and their children. Economic dependence can also affect the balance of power in relationships.[37]

The need to redress disadvantage, which is also connected to the element of distribution, can be seen in the material deprivation experienced by poor women in South Africa and the difficulty in accessing basic resources. Basic resources like water and electricity need to be more accessible and affordable, for poor people in general but especially for poor women who live in informal settlements.[38] Gender-based violence can be described as an example of gender specific disadvantage, which reflects 'the absence of fully effective legal systems as well as continued cultural and social power imbalances.'[39] There is a need to remedy these imbalances, not only in social power but also in economic power in order to assist in addressing women's vulnerability to violence.

Second, violence against women is also connected to a failure in recognition, as stigma, blame, prejudice and secondary victimisation can be experienced by survivors of violence. The recognition element can also be seen in how violence affects all women because of their status as women, regardless of their socio-economic background. Poor women however also experience misrecognition by being treated as having less value and worth because of the intersection of their gender and socio-economic status. Poor women can also be treated with disrespect, ignored or not taken seriously when reporting gender-based violence. This demonstrates the complexity involved in misrecognition. The recognition principle can also arguably address violence against protected groups, as this violence is distinctive 'in its negation of the very identity of the victim.'[40] Violence itself can be inflicted to humiliate or

[36] See further discussion on gendered poverty and unemployment levels in chapter 1.
[37] Fredman has argued that lack of access to independent resources can have an effect on women's power and agency within the family. See: Fredman (note 22 above).
[38] See below discussion on the connection between lack of access to basic services and poor women's vulnerability to violence, 59.
[39] S Fredman 'Engendering socio-economic rights' (2009) 25 *South African Journal on Human Rights* 410, 423.
[40] Ibid.

degrade women.[41] For poor women in South Africa, this humiliation and degradation would be compounded by their experiences of racism and sexism.

Acknowledging and valuing time spent on unpaid work in the home, while being connected to the element of distribution, is also connected to the dimension of difference and diversity. There is a need to do more than accommodate difference. One should celebrate the different roles that people occupy and address the structural issues that may disadvantage especially women in specific roles. Work opportunities should be flexible and remuneration decent, so that women can have economic freedom. Again, this would give women alternative choices to staying in abusive relationships.

Violence against women also affects the ability to participate as equals in society. Survivors are often silenced by their partners or family members; afraid to speak out; or not believed or taken seriously by their families or the authorities when they do speak out. Women should be allowed to feel that their voices matter and that they will be heard.

Paying attention to these different dimensions will not only assist in achieving the goal of substantive equality, but also in addressing violence against women. This exercise allows one to examine the causes and particular impact that violence may have on poor women.

2.2 Substantive equality in South Africa

Achieving substantive equality is arguably one of the central goals of South Africa's democratic Constitution. Realising this objective is undoubtedly no easy feat. The concept of transformative constitutionalism coined by Karl Klare, provides a compelling account for understanding the role of the Constitution and its interpretation by courts, in addressing inequality and bringing about meaningful change in society.[42] This concept is described as:

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[43]

[41] Fredman (note 14 above) 730.
[42] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.
[43] Ibid 150.

The link between the idea of transformative constitutionalism and the commitment to substantive equality is evident in the need to bring about meaningful change in society; to address systemic inequalities; and to create a society where all people can participate as equals. Klare argues that the Constitution may be read to be committed to 'large-scale, egalitarian social transformation'.[44] The Constitution has been described as being 'social, redistributive, caring, [and] positive'.[45] This description can be connected to the distributive and recognition elements of Fraser's model of participatory parity and to the Constitution's commitment to substantive equality.

An important part of the project of transformation in South Africa is 'the need to address the distinctive forms of poverty and inequality experienced by women.'[46] Albertyn draws attention to the position of poor African women, who are more likely to live in informal housing, to live in rural areas, and who struggle to access basic services.[47] Poor women also have increased vulnerability to sexual violence.[48] At the same time, Albertyn argues that we should not view women solely as victims of poverty and violence, but recognise that despite all of their obstacles, women can be resourceful and exercise agency.[49] As Herrera and Agoff note, this agency can be supported to enable women to escape violent relationships, and to negotiate within power relations and structures of domination.[50] As argued further below, addressing the different dimensions of substantive equality can equip women to exercise agency and make free choices.

Focusing on the lives of poor women allows one to examine the connection between social and economic inequalities. Social inequalities are said to result in patterns of inclusion and exclusion, where a particular group experiences stigma and marginalisation and another group is affirmed and privileged.[51] This is similar to the recognition component of participatory parity. And economic inequalities can be seen in unequal access to basic needs, opportunities and material resources.[52] These claims 'emphasise economic inclusion, and might also entail a

[44] Ibid 151.
[45] Ibid 153.
[46] C Albertyn 'Gendered transformation in South African jurisprudence: poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 591, 591.
[47] Ibid 593.
[48] Ibid. In chapter 1 I demonstrate the links between poverty and violence against women.
[49] Ibid 594.
[50] C Herrera and M Agoff 'The Intricate Interplay between Victimization and Agency: Reflections on the Experiences of Women Who Face Partner Violence in Mexico' (2018) 8 *Journal of Research in Gender Studies* 49, 51. See further discussion in chapter 1, 9.
[51] C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253, 255.
[52] Ibid.

claim for a (re)distribution of resources'.[53] Here the similarities with the distributive element of participatory parity are evident. The economic inequality experienced by women is influenced by their primary care giving role.[54]

Albertyn argues that a transformatory approach to substantive equality would mean understanding women's disadvantage within the context of systemic inequalities and then to dismantle them 'through new normative interpretations of equality and through remedies that affirm a more egalitarian and flexible set of gender roles, and thus dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo.'[55]

In order to develop a transformative idea of substantive equality, Albertyn builds on the idea of equality of condition and explains how this is different from the liberal egalitarian capabilities approach:

> [I]t focuses less on individuals and more attention on changing the conditions of inequality. Second, it envisages far more fundamental change beyond enabling social inclusion or meeting a minimum threshold of basic needs or sufficiency within the existing system. While this might be immediately important to lift people out of absolute poverty, it cannot be enough. 'Equality of condition' exhorts us to address the political, social and economic conditions, structures, processes and institutions that create and reproduce relations of inequality; that prevent substantive participation and active, meaningful choice between alternatives of similar worth; and that impede substantive freedom and self-determination. The goal of equality and egalitarian projects is to remove systemic barriers to substantive freedom and actively to create conditions of equality, including attention to restructuring relations of equality at individual, institutional and societal inequalities. It is also to take account of the intersectional nature of inequalities in comprehending the problem and identifying its solutions.[56]

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[53] Ibid.
[54] Ibid 592.
[55] Albertyn (note 51 above) 256.
[56] C Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441, 462. See also: ibid 464. See also: C Albertyn '(In)equality and the South African Constitution' (2019) 36 *Development Southern Africa* 751, 758. Here Albertyn further expands on her view of substantive equality. It is seen as a commitment to:

> deeper systemic justice, to redistribution, and dismantling and restructuring social and economic relations that maintained multiple forms of domination and subordination, particularly of race. This understanding of equality recognises the manner in which different groups (in all their complexity) are subject to

We are encouraged to ask ourselves the question – 'what kind of socio-economic conditions are necessary for full human development?'[57]

For Albertyn a transformative perspective on substantive equality would look as follows:

> a more robust approach to redistribution (requiring a greater equality of resources and substantive conditions to enable individuals to pursue their well-being) and recognition of the need to transform structures and institutions to achieve actual "substantive" equality[…]In legal terms, it differs from a more egalitarian liberalism in (at least) the following respects: a deeper understanding of structural disadvantage and the manner in which social and economic inequalities are bound up together; a broader approach to the context (and impact) that are relevant to a legal dispute; a more complex understanding of intersectional discrimination; greater attention to difference and diversity; a concrete reliance on values as constituting an articulated standard for adjudication and thus for forward movement by our society; a more robust role for courts; and a willingness to engage redistribution and to formulate innovative remedies to manage separation of powers issues.[58]

This transformative approach to substantive equality, developed by Albertyn, requires addressing the societal norms and values that contribute to gender inequality, it requires remedying the political, social and economic conditions that reproduce inequality, and it requires removing the barriers that inhibit people from exercising agency and living free lives. From a legal perspective, there is a need to understand how disadvantage manifests in society, the context in which a dispute arises, and the values that should underlie adjudication in a constitutional democracy.

2.2.1 Equality of condition and violence against women

The concept of equality of condition can be applied to understand and address violence against women. Broadly, it calls attention to the systemic nature of violence, as a barrier to freedom. This approach thus provides another opportunity to examine and address violence against women through the lens of substantive gender equality.

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relational and intersecting political, social/cultural, economic and legal inequalities, and affected by different configurations of misrecognition and maldistribution in public and private spheres.

[57] Ibid 759.

[58] Albertyn (note 46 above) 606.

The relationship between equality of condition and violence against women is evident in how social and economic conditions, such as women's subordination and unequal access to resources, contribute to women's experiences of violence and reproduce inequality.

Applying Albertyn's critical perspective on substantive equality to violence against women, would mean engaging with how lack of access to basic goods and services such as housing, water and electricity, can put a strain on households, increase tensions and increase vulnerability to violence. It would also mean examining how the economic position of women can limit the choices available to them, when they have been exposed to violence. Furthermore, structures should be put in place to provide security for women who do informal or part time work. The economic marginalisation of women who live in informal settlements also needs to be addressed. More opportunities and investment need to be brought to informal settlements. Lastly, the economic condition of exploitation requires drastically increasing the minimum wage and closing the pay gap in South Africa. This could contribute towards addressing the gender disadvantage of poor women and reducing their vulnerability to violence.

When considering social inequalities, the lack of compassion and respect afforded to survivors of violence needs to be addressed. Women survivors of violence are often blamed for what has happened or asked what they did wrong, based on harmful myths and stereotypes about appropriate behaviour. The experiences of women should be believed and validated.

Attention also needs to be paid to the particular experiences of women who are poor, black, living in informal settlements or rural areas, immigrants, living with disabilities or any other situation that they may find themselves in, which affects their ability to enjoy their rights.

Both the multi-dimensional approach to substantive equality and equality of condition, discussed above, can be applied to assist in addressing violence against women. As I have illustrated, addressing violence against women should be an integral part of the project of achieving substantive equality in South Africa.

3. Substantive equality, gendered socio-economic rights and violence against women

In the above section I have shown that addressing violence against women should be a part of the project of achieving substantive equality. The protection of socio-economic rights is also a vital part of working towards achieving the goal of substantive equality. The commitment to

substantive equality is supported by the inclusion of justiciable socio-economic rights and the requirement of positive measures to achieve the realisation of these rights.[59]

Socio-economic rights are particularly important for women. This section shows how socio-economic rights are a part of the goal of substantive equality and why they are especially important for women. I then consider how specific socio-economic rights can be viewed through a gendered lens and how they relate to women's vulnerability to violence.

3.1 Socio-economic rights, substantive equality and gender

There is a connection between substantive equality and access to basic goods and services, which are guaranteed by socio-economic rights in South Africa. Liebenberg highlights how disparities in wealth enable people to accumulate greater economic power and in this way they can exclude others from accessing goods and services, 'which are subject to the market's mechanisms of exchange.'[60] More broadly, Fraser argues that the 'world capitalist system operates to the massive detriment of the global poor'.[61] People who have economic power and resources can pay for goods and services, which have largely become commodified, and poor people struggle to access the basic goods and services needed to live a dignified life. A part of achieving substantive equality means that all people should have access to adequate, and arguably quality, goods and services, regardless of their socio-economic position. Socio-economic rights not only matter for people's quality of life; they also affect people's ability to participate in social, economic and political life. As Fredman argues, socio-economic rights should not only mean access to a bundle of goods but should also facilitate agency and promote equal participation in society.[62]

Global economic realities can have an impact on decisions that governments make about access to basic goods and services. For example, the influence that global role players have on national governments decision making is apparent when the World Bank recommends cost recovery and privatisation which, in turn, encourages governments to adopt policies like prepaid metres as they seek funding and support.[63] The Coalition Against Water Privatisation notes that while the language of cost-recovery, privatisation and pre-paid metres appears to be aimed at

[59] Albertyn (note 56 above) 453.
[60] Ibid 417.
[61] N Fraser *Scales of Injustice: Reimagining political space in a globalizing world* (2008) 89.
[62] S Fredman 'Engendering socio-economic rights' (2009) 25 *South African Journal on Human Rights* 410, 423.
[63] The Coalition Against Water Privatisation (South Africa), the Anti-Privatisation Forum (South Africa) and Public Citizen (USA) 'Nothing for Mahala: the forced installation of prepaid water metres in Stretford, Extension 4, Orange Farm, Johannesburg, South Africa' 2004 *Centre for Civil Society Research Report No. 16*, 1, 3.

increasing efficiency and delivery of services to the poor, in effect it promotes the interests of transnational corporations and their profit motives.[64] Pieterse has pointed out how globalisation can place pressure on developing countries like South Africa. For example, states may need to choose between following dominant economic culture, like neo-liberal economic policy or facing isolation and having access to the global market limited.[65] This pressure should not, however, take away from South Africa's constitutional obligations to advance transformation and substantive equality, which includes access to the basic goods and services guaranteed by socio-economic rights.

Fredman emphasises that to truly address disadvantage for women, socio-economic rights need to reflect the specificities of gender.[66] The way in which men and women require and use the goods and services guaranteed by socio-economic rights can be different. This could be a result of biological differences between men and women and/or the different roles that they play in their families and communities. As has been highlighted elsewhere in this thesis, these roles are often gendered and are influenced by social and economic norms and realities.

Fredman makes a specific argument for infusing socio-economic rights with substantive gender equality.[67] She suggests that, in the context of gender, substantive equality does not only require that women are granted socio-economic rights on equal terms as men, but that it 'entails reshaping socio-economic rights themselves.'[68] I discuss this further below.

If socio-economic rights are to protect women and men equally, then we need to pay attention to the position of women in society. As Goldblatt argues, rights need to be located within the context of women's specific experience and needs.[69] This is essential if rights protection is to be relevant to the lived realities of women and, in the case of socio-economic rights, particularly poor women. Goldblatt further emphasises the need to give feminist content to rights and to engage with women's groups who can spell out their realities and inform state responses.[70] In addition, attention should be given to the manner in which the effective realisation of socio-economic rights can assist to address multiple consequences of poverty and inequality, including gender-based violence.

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[64] Ibid.
[65] M Pieterse 'Equality in the global village' (2003) 36 *CILSA* 172, 176.
[66] Fredman (note 39 above) 416.
[67] Fredman (note 39 above) 410.
[68] Ibid 411.
[69] B Goldblatt 'The right to social security – Addressing women's poverty and disadvantage' (2009) 25 *South African Journal on Human Rights* 442, 446.
[70] Ibid 449.

Applying the work of Fraser to socio-economic rights in the South African context, Liebenberg argues that an independent source of income, via social assistance, can expand 'the set of choices available to [women] and assists in challenging women's subordination within the family and community'.[71] An independent source of income, through a universal income grant, would help to address the distribution aspect of participatory parity, while also dealing with women's subordination, which is a form of misrecognition.[72]

Below, I outline the general connection between socio-economic rights and violence against women and then spell out the intersections between particular socio-economic rights and gender, as well as their connection to violence against women.

3.2 Socio-economic rights and violence against women

The broad connection between the need for effective protection of socio-economic rights and violence against women is evident in the multiple intersections between various socio-economic rights and women's vulnerability to violence, discussed below.

Bonthuys has squarely identified the connection between domestic violence and socio-economic rights.[73] She reminds us of the interdependence of rights and how the protection of safety and security rights for women requires addressing their socio-economic rights, because 'their ability to escape from abusive relationships is often hampered by the socio-economic conditions guaranteed by these rights.'[74] She argues that research which draws links between gender equality and socio-economic rights can be used to oblige government to develop policies which target the causes and consequences of domestic violence.[75]

3.3 The intersection between socio-economic rights, gender and violence against women

Different socio-economic rights can play specific and overlapping roles in assisting to address women's vulnerability to violence. Below I consider rights of access to housing, to basic services, to social security, and access to health care.

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[71] S Liebenberg 'Needs, rights and transformation: adjudicating social rights in South Africa' (2005) 6 *ESR Review* 3, 4.
[72] Ibid.
[73] E Bonthuys 'Domestic violence and gendered socio-economic rights: an agenda for research and activism' (2014) 30 *South African Journal on Human Rights* 111.
[74] Ibid 115.
[75] Bonthuys (note 73 above) 116.

3.3.1 The right of access to housing

Safe, affordable and secure housing is necessary both for women who have been subject to abuse and those who are vulnerable to violence. When examining the right of access to housing, within the international human rights framework, Farha argues that policies and programmes which give effect to this right need to be:

> premised on an understanding of women's material conditions with respect to housing and a consideration of women's overall economic, social, legal, and political position within a given society. Applying substantive equality in the face of a violation of the right to housing will result in the fashioning of remedies that address women's structural disadvantage.[76]

Women's particular needs with respect to access to housing differ depending on their material conditions and their social and economic realities, including the community in which they are situated. This needs to be factored in to how the content of the right of access to housing is understood. If the right to housing is to be effective for women, it is important to pay attention to their specific needs and experiences.[77]

In examining South Africa's housing policy, Chenwi and McLean point out that the emergency housing programme only provides assistance in situations such as homelessness resulting from floods, fires or evictions and it does not meet the housing needs of groups of women who find themselves homeless as a result of domestic violence.[78] This is inadequate, especially as the inability to accommodate themselves and their dependents is a factor which keeps women in violent relationships.[79]

In considering the provision of emergency housing, the Court in *Commando v City of Cape Town* stressed that the failure to allocate resources to emergency housing 'perpetuates inequality and violates its duty to protect the most vulnerable members of society.'[80] This arguably includes poor women who are vulnerable to and are survivors of violence.

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[76] L Farha 'There a Woman in the House - Re/conceiving the Human Right to Housing' (2002) 14 *Canadian Journal of Women and the Law* 118, 124.
[77] Ibid 130.
[78] L Chenwi and K McLean 'A woman's home is her castle? Poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 517, 527. The Emergency Housing Programme is discussed in chapter 3.
[79] Bonthuys (note 73 above) 126.
[80] *Commando v City of Cape Town* 2025 (3) SA 1 (CC) para 83. This judgment is discussed further in chapter 4.

Chenwi and McLean have highlighted the global reality of women being more likely than men to live in extreme poverty and how this puts them at greater risk of forced eviction and the violence that accompanies this.[81] This illustrates on the one hand, a need to provide better support for women who find themselves homeless and, on the other hand, a need to address the systemic and structural issues that make women more vulnerable to poverty and homelessness. In chapter 3 I expand on why housing is particularly important for poor women who are vulnerable to violence, and the challenges that they face in accessing housing.

3.3.2 Basic services

Lack of proper access to basic services, such as water, sanitation and electricity, also has a disproportionate impact on women and can make them more vulnerable to violence.

Women are primarily responsible for collecting water, where running water is not available in the home. Accordingly, to assist women, taps must be brought closer to households and their location must be safe for women and accessible to the disabled.[82] More broadly, water services must be affordable to the poor. In examining the importance of access to water for women, Dugard and Mohlakoana give the example of a situation where the closest water source is one kilometre or more from the home: 'female members of the household are almost three times more likely than male members to collect water, spending an average of 71 minutes per day on this task, and exposing themselves to the risk of attack from animals and humans.'[83] Poor access to water has also been associated with other problems including 'water-related illnesses, food insecurity, lost productivity, and poor school attendance, especially for women and girls.'[84] Women and girls have been shown to carry disproportionate obligations for water provision.[85] Again the specific gendered impacts of poor access to sufficient water is evident.

The burden that lack of proper access to water places on women was confirmed in my interviews. Interviewee 8 described what they have observed through their work:

> With our informal settlements work, we know that, especially water, is a gendered issue. It's a gendered issue in many ways, but the actual labour of collecting water, when you don't have water in your home, becomes work that women have to do for their

[81] Chenwi and McLean (note 78 above) 531.
[82] Ibid.
[83] J Dugard and N Mohlakoana 'More work for women: A rights-based analysis of women's access to basic services in South Africa' (2009) 25 *South African Journal on Human Rights* 546, 562.
[84] R Hall, B Van Koppen and E Van Houweling 'The Human Right to Water: The Importance of Domestic and Productive Water Rights' (2014) 20 *Sci Eng Ethics* 849, 850.
[85] Ibid 855.

> household. Regardless of whether or not they are living with a man and it becomes especially important when they have minor children. Women have less time to find jobs, spend time working because, they are trying to stand in line to get water in a massive informal settlement, where there is probably only one standpipe with running water in it. It also becomes an issue when you talk about toilets. Toilets is one of the biggest hurdles for women. It's a threat to their safety, it's a threat to their health. And when you are on your period, especially a threat to your hygiene.[86]

Research by the Coalition Against Water Privatisation into the installation of prepaid water metres in an under-resourced community in Johannesburg, South Africa presents a further opportunity to examine the gendered aspects of the fulfilment of the right of access to water.[87] This research highlighted that essentials like water are becoming commodities.[88] In addition to this, an increase in privatisation and cost-recovery policies have meant that profits are prioritised above the needs and dignity of people who cannot afford to buy water.[89] The introduction of prepaid water metres adds to this burden, as entire communities of poor people have their water cut off if they cannot pay for it.[90] This places the survival and health needs of individuals and communities at risk[91] and affects the realisation of human rights protected in the South African Constitution and international human rights law.[92] The research also found that women who play a central role in providing for the needs of a household 'have been at the forefront of struggles against the privatisation of water and the introduction of prepaid water meters.'[93]

In examining the disproportionate impact that lack of access to water has on women, the Coalition Against Water Privatisation research further states that:

> Women, in particular, face increased pressures as they are traditionally the caregivers in the household, cleaning, cooking, and taking care of the needs of the sick, the elderly and children. When money is not available for such a basic necessity as water, women often shoulder the responsibility of doing without water or finding alternative sources for it. Lack of ready access to water leads to many problems in the household and

[86] Interview 8.
[87] The Coalition Against Water Privatisation (South Africa) et al (note 63 above) 1.
[88] Ibid 2.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] The Coalition Against Water Privatisation (South Africa) et al (note 63 above) 3.

> community as pressures are brought to bear on social relations generally. For example, tension can arise between a husband and his wife over how limited finances get spent.[94]

This highlights how the lack of availability of water needed for basic survival puts a lot of pressure on social relations and these pressures often have gendered effects, like increases in domestic violence.[95]

This is yet another way in which violence against women overlaps with the ability to enjoy socio-economic rights.

In general, therefore, when there is insufficient access to resources in the home women are more vulnerable to sexual exploitation and gender violence.[96] Where women bear more responsibility for work in the home, they could also be vulnerable to receiving blame when there is no water or electricity, for example, which impacts the ability to make food, wash, clean and so on. Another instance of women's particular vulnerability in relation to access to water, is in a context where water tokens are used and there is not enough money, 'women's attempts to secure cash for water tokens exacerbates tensions within the household and has led to increased problems with domestic violence in houses with prepayment water meters.'[97] Once again one can see the link between the lack of proper enjoyment of a socio-economic right, in this case, access to water and women's vulnerability to violence.

Another basic necessity linked to access to water, is access to proper sanitation. This is particularly necessary for girls and women when they are menstruating.[98] Where proper sanitation is lacking, like for example in informal settlements, this can increase women and girls' risk of exposure to sexual violence.[99] They may need to share sanitation facilities, which may not offer privacy, and may need to walk some distance to access toilets.

Connected to access to water and sanitation, is access to electricity. A factor which affects women's access to electricity is where there are prepaid metres. One of my interviewees shared that '[t]here are communities where there are prepaid metres for electricity and water you know, so if you are financially dependent on your partner and you need to get those services, it becomes a challenge. [. . .] You rely on your partner to purchase these services you know.'[100]

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[94] The Coalition Against Water Privatisation (South Africa) et al (note 63 above) 10.
[95] The Coalition Against Water Privatisation (South Africa) et al (note 63 above) 26.
[96] Dugard and Mohlakoana (note 83 above) 548.
[97] Dugard and Mohlakoana (note 83 above) 565.
[98] Fredman (note 22 above) 504.
[99] Fredman (note 22 above) 497.
[100] Interview 5.

This calls attention to the connection between accessing basic services and being in a financially dependent relationship. Financial dependence can contribute to keeping women in relationships where they are vulnerable to violence.

Unlike the right of access to water, there is no explicit right to electricity in the Constitution. However, Dugard and Mohlakoana argue that this right can be inferred from the right of access to housing.[101] They cite *Grootboom*, in this instance, where the Court said that the state's obligations in relation to housing depends on context and that 'while some may need access to land and no more … some may need access to services such as water, sewage, electricity and roads'.[102] This illustrates that one of the factors relevant to assessing whether the right of access to housing is being fulfilled, is electricity provision.[103] Dugard and Mohlakoana also suggest that the right to electricity can be inferred from environmental rights, specifically the right to an environment that is not harmful to health or well-being and the right to have a protected environment for the benefit of present and future generations.[104] In *Joseph v City of Johannesburg*, however, the Constitutional Court derived the right from local government's constitutional and statutory obligations to provide basic services, which includes the provision of electricity.[105] This obligation on local government was found to provide a public law right to electricity, as a basic municipal service.[106] The significance of having the provision of electricity protected as a right is that this can strengthen women's claims for access to electricity and provide a clear basis for holding the state accountable when access is limited or denied.

Access to adequate water and electricity is still a challenge for many poor South Africans.[107] Dugard and Mohlakoana suggest that their availability, affordability and amount are affected by socio-economic and gender inequality.[108] This affects women's ability to enjoy healthy and dignified lives.[109]

The above discussion demonstrates that access to basic services plays a significant role in the lives of women and that lack of proper access can increase women's vulnerability to violence.

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[101] Dugard and Mohlakoana (note 83 above) 553.
[102] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 37.
[103] Dugard and Mohlakoana (note 83 above) 553.
[104] Dugard and Mohlakoana (note 83 above) 554.
[105] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 40.
[106] Ibid para 47.
[107] Dugard and Mohlakoana (note 83 above) 561.
[108] Ibid.
[109] Ibid.

3.3.3 The right to social security

Social assistance is critical in assisting to address the conditions of poverty faced by people in South Africa broadly and specifically women's experiences of poverty. The system however must be effective. Khan argues that South Africa's social security system, described as unique and revolutionary, is 'increasingly failing to redress injustices and inequities, expand social inclusivity and citizenship, and ensure social and political stability'.[110] He further argues that part of what causes high levels of poverty and inequality is 'rising structural unemployment, poorly remunerated employment, declining quality of basic services, and spatial marginalisation of the poor.'[111] Lack of protection for those in the informal sector and those who are irregularly employed is also a challenge.[112]

We need to pause to reflect on how women are disproportionately affected by the combination of poverty, lack of formal employment and struggles to access basic services. Goldblatt argues for a gendered approach to the right to social security.[113] She suggests that this requires an understanding of 'the labour that women perform and how it has been overlooked in traditional conceptions of work that underlie the right to social security.'[114]

The right to social security has a role to play in addressing women's poverty and disadvantage.[115] The three largest social assistance grants in South Africa are the old age pension, child support grant and the disability grant.[116] Goldblatt highlights the intersection of vulnerability based on race, gender and class, in the South African context:

> We know that women in South Africa are generally poorer that men, have fewer opportunities for employment and earn less than men. They are overwhelmingly responsible for childcare, housework, and care of the sick and aged. Women are also more vulnerable to HIV/AIDS and domestic and sexual violence. Cultural and religious barriers create additional obstacles in women's lives. Of course race is a major factor in South African poverty, as the legacy of apartheid and colonialism has left Africans

[110] F Khan 'Violence, grants, poverty, inequality, unemployment and hope' (2015) 44 *Africa Insight* 14, 16.
[111] Ibid 19.
[112] Ibid.
[113] B Goldblatt 'Gender, poverty and the development of the right to social security' (2014) 10 *International Journal of Law in Context* 460, 460.
[114] Ibid.
[115] Goldblatt (note 69 above) 442.
[116] Ibid.

> disproportionately poorer and more marginalized. Race and gender intersect with class with the result that the largest number of grant recipients is African women.[117]

While grants undoubtedly assist women who are primary caregivers of dependent children and people with disabilities, and women who are of pensionable age, many women are left out. Poor women, who experience layers of vulnerability described in the above paragraph, and don't fall into one of the relevant categories, are excluded from benefiting from social grants. The Social Relief of Distress grant, introduced during the COVID 19 pandemic, partially addresses this gap, but it is a temporary measure.[118]

Brodsky shows the connection between the need for social assistance and poor women's vulnerability to violence while evaluating the Canadian case of *Gosselin v Quebec*:

> The autonomy of poor women is profoundly threatened by a lack of access to adequate social assistance. Being forced to survive without the means to meet basic needs increases women's vulnerability to violence, sexual exploitation, and coercion because it makes them more reliant on relationships with men and simultaneously diminishes their equality in those relationships.[119]

This is also relevant to South Africa and illustrates why access to social grants is especially important for women and for protecting women from vulnerability to violence. The amount of the grant also needs to be sufficient to meet people's basic needs.

3.3.4 The right of access to health care

The right of access to health care has particular significance for women and for gender equality. For biological and reproductive reasons, women have unique health needs. Women's sexual and reproductive health require knowledge of and access to contraceptives and termination of pregnancies, should they choose or need this.[120] Proper maternal health care during and after

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[117] Ibid 443. See also: Goldblatt (note 113 above) 466. Goldblatt highlights that 'women are generally poorer than men and have less power, status and influence both in the home and in society.'

[118] South African government, official information and services *Social relief of distress.* <https://www.gov.za/services/services-residents/social-benefits/social-relief-distress#:~:text=What%20do%20you%20get%3F,extended%20for%20another%20three%20months>.

[119] G Brodsky 'Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance' (2003) 15 *Canadian Journal of Women and the Law* 194, 214.

[120] D Cooper, J Harries, J Moodley, D Constant, R Hodes, Cathy Mathews, Chelsea Morroni and M Hoffman 'Coming of age? Women's sexual and reproductive health after twenty-one years of democracy in South Africa' (2016) 24 *Reproductive Health Matters* 79, 79.

pregnancy is also important for women.[121] Given the extent of the HIV pandemic in South Africa, and with more than half of persons living with HIV being female, access to health care is also important for this reason.[122] Another health concern specific to women is breast and cervical cancer. This also requires affordable and accessible health care. Breast cancer is the most common cancer among women in South Africa.[123] The right of access to health care is important for women for a range of reasons, including those just listed.

The connection between the right of access to health care and gender-based violence has been examined by Gerntholtz and MacLeod.[124] In the context of health, they submit that there have been attempts to tackle the impact of gender-based violence and that this may be able to help strategies in other areas of socio-economic rights.[125] Some of the health risks associated with gender-based violence are femicide, suicide and HIV; fractures, chronic pain, disability; and sexual and reproductive health issues.[126] There are also psychological effects.[127] The authors argue that in South Africa, high levels of gender-based violence coupled with high levels of HIV transmission 'have left women bearing the brunt of the decease.'[128] In discussing the *TAC* case, they make reference to the high profile campaign that was run on the right of access to health care, which was arguably partly located in the context of gender-based violence and HIV.[129] The campaign included public demonstrations, community education and lobbying.[130] Gerntholtz and MacLeod however submit that when the campaign got to the litigation stage, the focus changed to the right of access to health care and equality more broadly and the emphasis on the specificity of women's rights was lost.[131]

Goldblatt submits that in *TAC*, the Court failed to properly grapple with how women were disproportionately affected by the rights violation. She argues that this case potentially undermines women's rights, as the case concerns women's bodies, but attention was not paid to the close link between violence against women and HIV infection.[132] This discussion

[121] Ibid 82.
[122] Ibid 82 and see discussion in chapter 1.
[123] Ibid 83.
[124] L Gerntholtz and J MacLeod 'Gender and socio-economic rights, the case of gender-based violence and health' in M Langford et al (eds) Socio-Economic Rights in South Africa: Symbols Or Substance? (2013) 365, 365.
[125] Ibid.
[126] Gerntholtz and MacLeod (note 124 above) 371.
[127] Ibid.
[128] Gerntholtz and MacLeod (note 124 above) 376.
[129] Gerntholtz and MacLeod (note 124 above) 380.
[130] Gerntholtz and MacLeod (note 124 above) 381.
[131] Gerntholtz and MacLeod (note 124 above) 382.
[132] B Goldblatt 'Social and economic rights to challenge violence against women – examining and extending strategies' (2019) 35 South African Journal on Human Rights 169, 176.

illustrates how women's specific experiences can be silenced or made invisible, even in the context of examining other human rights violations.

3.3.5 How socio-economic rights can assist with addressing violence against women

As I have illustrated above, some of the issues that surface in relation to the connection between socio-economic rights and violence against women are: housing for women fleeing abuse; and lack of social protection in the informal sector.[133] There are also issues around how lack of access to basic goods and services can put extra pressure on households and potential exposure to violence; and health risks associated with gender-based violence. The connection between poverty and violence and the political and economic forces that place women in positions of deepening vulnerability has been unpacked by Goldblatt.[134]

Goldblatt puts forward the idea that socio-economic rights protection can address some of the underlying conditions that expose women to violence. Whereas, criminal justice responses are seen as reactive, a socio-economic rights response can be seen as being proactive.[135] This is arguably the kind of response that we need more of in the context of dealing with the causes of violence against women.

Different strategies are needed to address issues related to the intersection between violence against women and the enjoyment of socio-economic rights. These could include more coordinated work between departments of Human Settlement and Social Development.[136] Targeted welfare grants for survivors of abuse has been put forward as a way of helping women to break out of cycles of violence.[137] In terms of appropriate responses, a comparison has been drawn with the US, where there are compensation funds to fund shelters and services for survivors of domestic violence.[138] An argument is also made for more coordinated services, such as housing, medical care and social grants, as this could be more effective than piecemeal interventions.[139]

I am mindful that there are many demands on the public purse in South Africa, but I submit that more targeted interventions related to socio-economic rights are needed to address violence against women, which people in South Africa are confronted with daily. In chapter 3, for

[133] Ibid 170.
[134] Ibid 172.
[135] Goldblatt (note 132 above) 172.
[136] Bonthuys (note 73 above) 128.
[137] Bonthuys (note 73 above) 130.
[138] Bonthuys (note 73 above) 131.
[139] Bonthuys (note 73 above) 132.

example, I argue that shelter services for survivors of gender-based violence should be better coordinated and properly funded, and that more low-cost longer-term accommodation needs to be available to survivors of violence. Furthermore, in chapter 4, I argue that applying a gendered lens to socio-economic rights interpretation can assist with better outcomes for women and with addressing poor women's vulnerability to violence.

4. Conclusion

In this chapter I have tried to show how part of the project of achieving substantive equality needs to include addressing violence against women. I have called attention to how vulnerability to violence against women is related to failures in distribution of material resources; failures in recognition; how it is connected to the need to address the substantive conditions that make it difficult for women to live free lives and exercise their full potential; and how it affects their ability to participate in society. In chapter 4, I demonstrate how the theory of multi-dimensional substantive equality set out in this chapter can be applied to socio-economic rights cases. I illustrate how this can form part of a contextual analysis, when applying a gendered lens to socio-economic rights interpretation.

I also illustrated how the protection of socio-economic rights is an important part of the goal of achieving substantive equality. And how these rights are particularly important for women and to protect women from violence. The need to pay specific attention to the lived realities of women when interpreting and giving effect to these rights is emphasised. I ended this chapter by drawing links between the right of access to housing and basic services, the right to social security, and the right of access to health care and women's vulnerability to violence.

CHAPTER 3 – LEGISLATION AND POLICIES RELATED TO HOUSING AND BASIC SERVICES FOR POOR WOMEN IN URBAN AREAS

1. Introduction

> I have no place to go when I exit the centre. I am currently in search of employment as the centre gives us time to go and submit our CVs where there are job opportunities. I will need employment to be able to rent a room where I will live with my child after exiting the centre.[1]

This concern expressed by a woman at a Victim Support Centre in Tshwane calls attention to the connection between women's vulnerability to violence and the need for access to accommodation. Here this shelter has provided a safe place for the woman and her child to stay for a limited period of time. Her concern raises the question of whether legislation and policies cater to the medium to long term accommodation needs of poor women who are vulnerable to gender-based violence.

In this chapter I consider selected legislation and policies related to housing and basic services to examine if adequate attention is given to the specific needs and circumstances of women. I do this with a view to showing the extent to which South Africa's legislative and policy framework takes account of poor women, and especially the need to protect these women from violence, and to highlighting the gaps in the regulatory framework. The chapter is divided into the following sections: an overview of the regulatory framework for housing; programmes that can assist poor women in urban areas; water and sanitation legislation and policies; and electricity legislation and policies. I focus specifically on parts of legislation and policies that I view as relevant to the lives of poor women who are living in informal settlements, with an emphasis on their vulnerability to violence.

2. Overview of regulatory framework for housing

At the beginning of South Africa's democracy there were significant changes in housing policy. The new government had to deal with the legacy of apartheid, vast inequalities in access to housing, historical displacement and deprivation of proper access for the majority of people.

[1] N Mpja 'The lived experiences of women on Intimate Partner Violence in a victim support centre in Tshwane, South Africa' 2020 Research study presented in partial fulfilment for the degree Master of Arts, University of the Witwatersrand, 29.

The Reconstruction and Development Programme (RDP) of 1994 is one of the main policy frameworks upon which the new South Africa would be built. The RDP is described as 'an integrated, coherent socio-economic policy framework. It seeks to mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future.'[2] The five major policy programmes of the RDP are: meeting basic needs, developing human resources, building the economy, democratising the state and society, and, implementing the RDP.[3] The core objective of the RDP was to improve the quality of life of especially the poor and marginalised people in society.[4]

The new democratic government was confronted with an enormous housing backlog in 1994. To address this, the RDP aimed to construct one million low-cost houses over five years.[5] To achieve this, it envisioned that subsidies should be made available to assist people with their housing needs.[6] Over time, these targeted different low-income groups and different types of housing. These different kinds of subsidies found their way into the National Housing Code, discussed below. The houses which were built and subsidised by government for low-income households after 1994 are often referred to as RDP houses.

Also in 1994, the White Paper on Housing established a national housing vision for the democratic South Africa.[7] This vision provided that:

> Government strives for the establishment of viable, socially and economically integrated communities, situated in areas allowing convenient access to economic opportunities as well as health, educational and social amenities, within which all South Africa' s people will have access on a progressive basis, to: A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and, potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.[8]

This commitment to make quality and secure housing available to all people in South Africa was strengthened by the inclusion of the right of access to adequate housing in section 26 of the 1996 Constitution.

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[2] Government of South Africa, *Reconstruction and Development Programme* 1994, 4.
[3] Ibid 11.
[4] Ibid 18.
[5] Ibid 26.
[6] Ibid 29.
[7] Department of Housing, *White Paper - A New Housing Policy and Strategy for South Africa*, 1994.
[8] Ibid 19.

In the first ten years of democracy, the main focus was on building single houses, which were often in locations some distance from social and economic activity. This reinforced apartheid spatial planning. In 2004, government introduced the Breaking New Ground Policy in response to changes in the nature of demand for housing for lower-income households. This policy stated that:

> a new plan is required to redirect and enhance existing mechanisms to move towards more responsive and effective delivery. The new human settlements plan reinforces the vision of the Department of Housing, to promote the achievement of a non-racial, integrated society through the development of sustainable human settlements and quality housing.[9]

The new plan aimed to be flexible and responsive to people's needs.[10] It acknowledged that some people may want subsidies to assist with owning their homes and others may be looking for affordable rental accommodation, which is close to work opportunities, schools and clinics.

In addition to the broad policy framework to make housing more affordable and accessible, the primary piece of legislation dealing with the provision of housing is the Housing Act 107 of 1997. Building on the foundation laid by the RDP, the general principles applicable to housing development include to 'give priority to the needs of the poor'.[11] In addition, through housing development, all three spheres of government must address housing inequalities by promoting: 'the process of racial, social, economic and physical integration in urban and rural areas'; 'measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process;' and 'the housing needs of marginalised women and other groups disadvantaged by unfair discrimination'.[12]

The Housing Act also mandates the publication of a National Housing Code, which must contain national housing policy.[13] The National Housing Code, 2009 (National Housing Code) makes detailed provision for different types of subsidies and housing programmes, for urban and rural communities, to make quality access to housing progressively more accessible to more people.[14] In the next section, I focus on programmes relevant to poor urban communities

[9] Department of Human Settlements *Breaking New Ground Policy* 2004, 9.
[10] Ibid 12.
[11] Housing Act s 2(1)(a).
[12] Ibid s 2(1)(e)(iv), (vi) and (x).
[13] Housing Act s 4.
[14] Department of Human Settlements *National Housing Code, 2009, Part 1: Simplified Guide to the National Housing Code.* This is the current housing code. The previous one was published in 2000.

and poor women who are vulnerable to violence. Municipalities, provincial and national government are all given a role to play in the implementation of these different housing programmes.

3. Housing programmes that can assist poor women in urban areas

As I have shown in the first two chapters of this thesis, proper access to housing is particularly important for women. Housing should provide a safe place to which to retreat after being out in the world. Research conducted by Meth and others in Durban, South Africa found that women felt safer in the new houses that they had moved into, compared to the informal dwellings that they lived in before.[15] The new housing had inside toilets and a water source, and women were no longer faced with the 'dense and unplanned layout of shack housing which offers easy refuge for criminals and reduces policing capacities.'[16] This is one example of the importance of housing for women. In addition, housing also needs to be accessible and affordable for especially poor people and poor women in South Africa. The need for safe and affordable housing, in relation to women in abusive relationships, was echoed in my research interviews.

A recurring theme in the interviews I conducted with people working in shelters for abused women was the lack of affordable housing in South Africa. Interviewee 9 highlighted that people who earn minimum wage cannot afford to buy a house nor can they afford to rent.[17] Interviewee 1 described how when people do not have an alternative place to stay, they are less likely to leave an abusive relationship.[18] This interviewee described how 'a lot of times [they] deal with situations where people are finding ways to live with the abuse to ensure they have access to certain basic needs.'[19] Interviewee 6 stated that one of the biggest challenges they have is finding housing for their residents once they leave the shelter. They made the point that if the survivor of violence doesn't have access to housing 'what will happen is she will invariably consider going back to the perpetrator because he has got the housing.'[20] Shelters were described in one of the interviews as 'transient places'.[21] People are usually expected to stay in a shelter for three to six months, but often don't have a place to go after this.[22]

[15] P Meth, S Buthelezi and S Rajasekhar 'Gendered il/legalities of housing formalisation in India and South Africa' (2019) 51 *EPA Economy and Space* 1068, 1077.
[16] Ibid.
[17] Interview 9.
[18] Interview 1.
[19] Ibid.
[20] Interview 6.
[21] Interview 9.
[22] Ibid.

Interviewee 5 also describes how shelters are a temporary solution, to keep people safe for a limited time, and give them an opportunity to get back on their feet.[23] Staying in a shelter is also an adjustment for women and children, as you have to adapt to a new environment, a new schedule, and to sharing a living space with different people. The same sentiment is expressed in interview 3. Another point raised was that some shelters cannot accommodate children or boys, over a certain age. These examples drive home the point that housing policies need to address the specific needs and circumstances of women.

In this section I look at selected parts of the National Housing Code which are relevant to my research. I examine the following programmes of the National Housing Code – the individual subsidies programme, the social housing programme, the institutional subsidies programme and, the community residential units programme. In addition, this section considers temporary forms of housing, including the emergency housing programme under the National Housing Code as well as the Special Needs Housing Policy, and provisions relating to shelters. The sub-section on temporary forms of housing and shelter draws on legislation and policies outside of the Department of Human Settlements. In the section on the provision of shelters, I focus on those aimed at women who are both subject to violence and vulnerable to violence. I end with a sub-section on informal settlements, also governed by the National Housing Code, as this is where many poor people and poor women, who do not have access to other housing, find themselves.

3.1 Ownership and rental housing

The National Housing Code makes provision for various subsidies to assist people to own houses and for different types of rental accommodation for people with low incomes. I limit my discussion to one programme for ownership and three rental programmes because of the role they can play in assisting poor women in urban areas.

3.1.1 Individual Subsidies Programme

The National Housing Code provides for an individual subsidy which aims to provide assistance to people who want to own residential homes.[24] It sets out a list of requirements that applicants must meet in order to qualify for this subsidy. A key requirement is that the household income should be R3500 or less.[25] This evidently caters to low-income households.

[23] Interview 5.
[24] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 3: Individual Subsidies*, 9.
[25] Western Cape government Individual housing subsidy <https://www.westerncape.gov.za/service/individual-housing-subsidy-0#:~:text=Be%20married%2C%20be%20living%20with,ve%20never%20owned%20property%20before.>.

Another requirement is that the applicant must be married or co-habiting, or be single with financial dependents.[26] This benefits single women with children and dependent family members. However, the exclusion of all single people without dependents, whilst operating to exclude both men and women equally, could be seen to affect women disproportionately if we consider their position in society. Women who are single should arguably be able to access these subsidies, which could help them to own their own homes. Owning a home can provide a sense of freedom and independence. It should not depend on being in a relationship or having dependents, a fact that has historically operated to render women unequal and dependent on men. If single women were able to access these subsidies, then poor women might have different choices available to them in escaping poverty and abuse.

Dugard conducted research into what it means for people to own RDP houses (which are government subsidised houses) and found that it gives people a sense of safety, security and freedom.[27] This is significant for women and can help them to exercise agency in escaping violence and securing economic independence. It is especially important for women who may be vulnerable to violence that they can live in a home where they feel safe and free.

There can however also be complexity related to obtaining an RDP house. This became evident in one of my research interviews. Interviewee 5 explained the situation where a woman is in a relationship and both partners put their names on a waiting list for an RDP house together.[28] They stated that:

> If both your names have been captured and then the day comes when government decides that they are building an RDP house, both your names will reflect, you know, in the system. So now the challenge is where the woman is in an abusive relationship and both partners own the property. I've had cases where women have said 'I've worked so hard for this property, I'd rather stay. And hope that he dies'. It's even worse if it's a woman who is financially dependent on the partner. And you know that you won't be able to buy your own property if you leave. Some women would say find a

There are other individual subsidies for people with slightly higher incomes. The Finance Linked Individual Subsidy Programme (FLISP) caters for households with incomes between R3501.00 and R15000-00 per month. See further: Department of Human Settlements *Summary report for implementation evaluation of the Finance Linked Individual Subsidy Programme (FLISP)* 2021. These subsidy programmes are not the focus of my research project.

[26] Ibid 18.

[27] J Dugard 'Staircase or safety net? Examining the meaning and functioning of RDP house ownership among beneficiaries: a case study of Klapmuts, Stellenbosch' (2020) 24 *Law, Democracy and Development* 201, 211.

[28] Interview 5.

> place of safety and they weigh the options and say I'll stay in this place for 3 months or a year, and then what happens afterwards. Will I be able to get another RDP house – no – once you get it once, that's it.[29]

This example illustrates that conditions of poverty and financial dependence can limit choices available to women in terms of access to housing, and make it difficult to leave violent relationships.

3.1.2 Social Housing Programme

The Social Housing Policy of the National Housing Code provides for rental housing to be made available to people with low incomes.[30] This is a useful alternative to owning a house and provides more options for people with low incomes. One of the policy's underlying principles is that, unlike the RDP, this accommodation for low-income people should be close to facilities and opportunities for earning an income.[31] This is important for women, as it may put them in a position to earn a better income and provide a sense of independence, and may be closer to schools, for women who have children.

The Social Housing Policy and Institutional Subsidies Programme (ISP), discussed in the next sub-section, are similar in that they both make it possible for housing institutions to apply for subsidies to provide low-cost rental housing. The difference between these programmes is that:

> The Social Housing Programme is only applicable within restructuring zones but there are other areas that require rental accommodation, such as parts of informal settlements, rural areas and possibly even wealthy suburbs, where the ISP can be used. The ISP has been introduced in order to provide capital grants to social housing institutions, which construct and manage affordable rental units outside of restructuring zones.[32]

Restructuring zones are zones that have been identified by local government for targeted investment.[33] These zones 'are intended to provide geographic focus for accommodation opportunities for low-income people close to facilities, amenities and income generating opportunities'.[34]

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[29] Interview 5.
[30] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 6: Social Housing Policy*, 17.
[31] Ibid 23.
[32] Socio-Economic Rights Institute of South Africa (SERI) 'A Review of Housing Policy and Development in South Africa since 1994' 2010, 52.
[33] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 6: Social Housing Policy*, 19.
[34] Ibid 23.

The positive impact of social housing on the lives of poor women was apparent in focus group discussions, during Sobantu's research conducted with a group of women living in social housing in Gauteng province.[35] In the words of one participant:

> unfortunately my mother passed on without such kind of housing, or even RDP. To her, a house just meant a shack in Diepsloot, where we lived with no electricity, used communal toilets and we could spend days without water. Now, it's different, my perspectives of a house have changed, it means having piped water, electricity and being able to get anywhere you want to because of options of transport. It makes my life easier as a single parent.[36]

Different groups of people could benefit from social housing. One such group includes people who are in urgent need of alternative accommodation.[37] This could be interpreted to include women who are in abusive relationships. It is unfortunate that women in abusive relationships are not a specific category in the Social Housing Programme. Social housing can serve an important purpose for survivors of violence, as it could provide safe, alternative, and affordable accommodation. This idea was articulated in one of the policy related resolutions of the 2021 National Shelter Movement of South Africa (NSMSA) Indaba, which speaks to the allocation of spaces in social housing for survivors of gender-based violence.[38] People who live in informal settlements are another group that could have an option of affordable accommodation through this policy.[39]

One of the organisations that I interviewed were in fact in the process of applying for a social housing subsidy to be used for an affordable housing project. Interviewee 9 described their plan as follows:

> It's going to be a transitional space from us. Once you move here, ok let me give you an example. If you come to us, we make sure that if you do not have the skills, you will get basic skills. [. . .] Once you find your employment, you are also allowed to stay here for a little bit. For financial management, which is very crucial. We want you to move out when you are financially savvy, financially ready. That you can pay your rent

[35] M Sobantu 'Revisiting gender and housing: housing as seen through the eyes of women in social rental housing in Gauteng, South Africa' (2020) 56 *Social Work/Maatskaplike Werk* 63, 71.
[36] Ibid 71.
[37] Social Housing Policy (note 33 above) 30.
[38] National Shelter Movement of South Africa (NSMSA) Indaba report 2021, 23. This was a national conference bringing together different role players in the sector to discuss key issues impacting sheltering for survivors of GBV.
[39] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 6: Social Housing Policy*, 30.

> 3 months in advance, so that you continue the essence of saving. So, God forbid something happens to you, you at least have a 3-month window period where you can rest while you are looking for employment. [. . .] But the moment you move out [of the shelter], it's rent, it's food, it's creche, it's school fees, it's transport, it's a lot of other things, and before you know it, your money is gone. It feels like what, you are working for nothing. And that's why a lot of women end up going back to their abusive spouses because, they feel like, 'if I'm with him, he's going to pay the rent, he's going to pay for the children's school fees, and I might have a little bit of money at the end of the day'. What we then want to do, for those that we know are earning minimum wage, as soon as they transition from here, they can move into an affordable housing space, where instead of paying R3500 somewhere, they can pay R1000. For the same apartment, where they would have paid outside, somewhere else, and we will still give them another year where they can stay, save up more money, continue to upskill themselves, so that they can then try and get another better job. And hopefully get more money and save more and by the time that they move, they know that they are moving and they will never end up in a shelter again. What we don't want is this repeat cycle of someone moving in the shelter and then moving out, and then moving back and then moving out, because life becomes tough and they can't afford it.[40]

This example illustrates the vital role that affordable housing can play in the lives of women, who are transitioning from living in a shelter, where they are provided with a wide range of services, to getting to the point where they are able to live independently and sustain themselves financially.

The social housing policy is however not without its limits. Interviewee 9 explained that part of the funding needs to be provided by the organisation applying for the subsidy; and the organisation has to have an existing structure.[41] The subsidy would be to expand on an existing structure. Many other shelters struggle to fund their existing structures and therefore asking for a subsidy for expansion of the service being offered would be difficult for them.[42]

[40] Interview 9.
[41] Ibid.
[42] Ibid.

The provision of social housing to very poor households faces some challenges given its income thresholds, as well as additional costs associated with maintaining social housing projects. This is described in a Socio-Economic Rights Institute research report as follows:

> most social housing projects cater for those households earning between R3 500 and R7 500 a month, with a small percentage catering for the bottom end of the market (mostly because the subsidy mechanism makes this mandatory). A major deterrent in the provision of social or public housing for the very poor are the ongoing management, operations and maintenance costs. The reluctance of private SHIs to take on the risks associated with very low-income rental housing provision is cause for concern and necessitates a policy rethink by the national department[.] [43]

This concern about unaffordable rental is echoed in Sobantu's research conducted on women's experiences of living in social housing in Gauteng.[44] The gendered nature of poverty, discussed in chapter 1, and the manner in which women are disproportionately affected by multidimensional poverty, means that government needs to find ways to address the problems of access to social housing for people with very low incomes and make more affordable social housing options available to them.

3.1.3 Institutional Subsidies Programme

Another rental housing programme relevant to this thesis is the Institutional Subsidies Programme, also part of the National Housing Code. The main objective of this programme is described as 'to provide capital to housing institutions for the provision and maintenance of affordable rental housing.'[45] Some of the principles of this policy include that '[t]he subsidy is allocated to an approved housing institution to develop and manage rental housing stock', the beneficiaries must qualify for subsidy assistance, and the housing institution 'may not conduct any business activity other than the provision of rental housing.'[46]

Considering that this programme is to provide rental housing for low-income households, shelters who apply for these subsidies may be able to provide a longer-term solution for survivors of violence, who may only be allowed to stay in other shelters for three to six months. A handbook on shelters, prepared by the Centre for the Study of Violence and Reconciliation,

[43] SERI (note 32 above) 56.
[44] Sobantu (note 35 above) 71. Participants in this study raised the concern of rising rentals, which were difficult to pay because most of them are single, have children and occupy low paying jobs.
[45] Department of Human Settlements *National Housing Code 2009, Part 3 volume 6: Institutional Subsidies*, 13.
[46] Department of Human Settlements *National Housing Code 2009, Part 3 volume 6: Institutional Subsidies*, 13, 14.

suggests that the Institutional Subsidies Programme can also be accessed by organisations who provide shelter to abused women.[47] Memela and Muranda demonstrate that this programme has been used by some provinces for special needs housing.[48]

The institutions that apply for these subsidies need to be able to contribute some of their own funding, as they will be required to 'fund the ongoing management and maintenance of the properties out of [their] own resources.'[49] While these subsidies may be a way for NPOs that run shelters to source funding, they would also have to meet the requirements and go through an accreditation process to be recognised as a housing institution. A more direct source of funding or provision of shelters may arguably be less onerous.[50] This is however a good option within the existing framework.

3.1.4 Community Residential Units Programme

The Community Residential Units (CRUs) Programme is also a part of the National Housing Code. It replaces the national hostel redevelopment programme.[51] This programme aims to form a basis for 'stepping or transitioning informal and inadequately housed tenants into the formal housing market'.[52] This is important in terms of filling the gap of people who live in informal housing, which may not have adequate basic services, and are waiting for formal housing, considering the enormous housing backlog in South Africa. One of the principles of the programme is to provide 'a secure, stable rental housing tenure for low-income persons and households'.[53] The target market of the programme includes 'Displaced persons from informal settlement upgrading, eviction processes, etc.'[54] In principle, this housing programme could be an additional low cost housing option for poor women, considering the numerous challenges faced by women living in informal settlements, discussed in section 3.3 below.

The implementation of this programme has however faced some criticism. Research conducted by Xulu-Gama at the KwaMasha CRU's in Durban, found that this accommodation still carries

[47] Centre for the Study of Violence and Reconciliation 'Expanding abused women's access to housing – Handbook for shelter workers and domestic violence organisations' 2007, 14.
[48] S Memela and T Muranda 'Creating an Enabling Environment for the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Housing Needs Policy and Programme (SHNP, 2015)' (2018) 19 *ESR Review* 5, 7.
[49] Department of Human Settlements *National Housing Code 2009, Part 3 volume 6: Institutional Subsidies*, 16.
[50] Challenges related to funding of shelters is discussed further below.
[51] SERI (note 32 above) 57.
[52] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 6: Community Residential Units*, para 1.6
[53] Ibid para 4.1 (d).
[54] Ibid para 5.1 (b).

the history and the complexity of the hostel system which it aims to upgrade and transform.[55] Historically this specific hostel was characterised by political, tribal and gender-based violence.[56] Xulu-Gama found that these CRU's are still plagued by a combination of different forms of violence.[57] It further emerged from this research that women 'viewed the CRUs as a men's' place' and did not always feel comfortable living there.[58] If CRU's are to be a safe and affordable housing option for poor women, the concerns of women living in these spaces need to be listened to and addressed.

3.2 Temporary forms of housing and shelter

There are various policies and programmes, across different government departments, that provide for temporary housing and shelter for different groups of people. The Emergency Housing Programme of the National Housing Code makes provision for temporary forms of housing, whilst a Special Needs Housing Policy, which caters for particular groups of vulnerable people, is in the process of implementation by government. In addition, there are fragmentary, under-developed and under-funded policies and programmes on shelters and second stage housing. These policies and programmes are all relevant for women who have survived abuse or may be vulnerable to violence. Two other pieces of legislation which have provisions of relevance to the need for shelter for women and the vulnerability of women when there is a threat of losing a home are the Domestic Violence Act 116 of 1998 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). In the last part of this section, I highlight relevant provisions of these Acts which relate to shelter and accommodation for women.

3.2.1 Emergency Housing Programme

The Emergency Housing Programme provides one form of temporary accommodation. An earlier version of the emergency housing programme was formulated after the Constitutional Court judgment of *Government of the Republic of South Africa v Grootboom* which found the state to have failed in its obligations in terms of section 26 of the Constitution, in that its housing policy did not provide relief for people in desperate need.[59]

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[55] N Xulu-Gama 'Violence and insecurity at the KwaMashu hostel in Kwazulu-Natal' (2017) 30 *Acta Criminologica: Southern African Journal of Criminology* 1, 2.
[56] Ibid 5.
[57] Ibid 5.
[58] Ibid 6.
[59] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) is discussed in detail in chapter 4. The earlier programme was part of the previous National Housing Code, which was updated to be in keeping

The current programme aims to assist people who find themselves in situations where they are left homeless and destitute.[60] People may find themselves in these situations because of natural disasters or if 'their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction'.[61] The scope of this programme is to provide temporary assistance.[62] The cost of certain basic services, including water, sanitation and street lighting, can be funded under this programme for three years.[63] The emergency housing programme applies to a range of circumstances, including where people:

> Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents; …
>
> Are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences; …
>
> Live in conditions that pose immediate threats to life, health and safety and require emergency assistance.[64]

It appears from the way the emergency housing policy has been described and framed that it was mainly intended for situations of emergency which arise from natural disasters and evictions.[65] On a broad interpretation of the policy provisions, however, it can be argued that this programme could apply to people who find themselves in emergency situations because of abusive domestic circumstances, as these could be described as conditions which pose immediate threats to life and safety. Yet it is not explicit that this programme will cover situations of domestic violence and I have not found evidence of it being used for this purpose. The temporary nature of this programme also casts doubt on whether it would be a sustainable solution for people who have been subject to abuse.

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with the Breaking New Ground Policy. See: Request for Comments on the Draft White Paper for Human Settlements GN 4206 in GG 49895 of 18 December 2023, 13.

[60] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 4: Emergency Housing Programme*, 9.

[61] Ibid.

[62] Ibid 13.

[63] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 4: Emergency Housing Programme*, 18.

[64] Ibid 15.

[65] Department of Human Settlements *National Housing Policy and Subsidy Programmes – Simplified Guide to the National Housing Code*, 9.

However, when one looks at the considerations for funding of the Emergency Housing Programme, it states that assistance provided should be 'an initial phase towards a permanent housing solution.'[66] This aspect would address the reservations I raise about the temporary nature of this programme. Bonthuys has suggested that emergency domestic violence shelters could be incorporated within the Emergency Housing Programme.[67] Like the programmes discussed above, this programme could be an option for women who are vulnerable to violence. That being said, if government implements a Special Needs Housing Policy that caters for survivors of violence and provides more support and resources for shelters, as discussed below, these would be more targeted interventions to address the specific housing needs of women who are vulnerable to violence.

3.2.2 Special Needs Housing Policy

More than ten years ago civil society and different government departments started discussions about the creation of a Special Needs Housing Policy. This policy aims to provide for people who have specific housing needs and who are vulnerable because of different circumstances, including orphans, older people, survivors of gender-based violence, people with disabilities, and homeless and destitute people.[68] It is important that the national housing framework caters to these specific needs and it is significant that survivors of domestic abuse are included in the framework. Here one can see a clear link between access to housing and the need to address vulnerability to violence. As early as 2012, a report on developing a framework for the Special Needs Housing Policy, emphasised that '[w]omen leave abusive husbands in their homes when they escape abuse. These women need homes once they leave temporary or emergency housing…'[69] I tried to obtain an update from people in civil society and government about the Special Needs Housing policy, but my attempts were unsuccessful.

Interviewee 6 also highlighted the need for housing for women once they leave the shelter:

> [I]t all boils down to the fact that often, the vast majority of the time, the perpetrator not only holds the purse strings but he is also the person who would have a lease on housing, or would be the owner of the housing that they have lived in before. So, in

[66] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 4: Emergency Housing Programme*, 31.
[67] E Bonthuys 'Domestic violence and gendered socio-economic rights: an agenda for research and activism' (2014) 30 *South African Journal on Human Rights* 111.
[68] Dullah Omar Institute, University of the Western Cape – Webinar on Special Needs Housing Policy: Progress and Status, 28 July 2022.
[69] Community Law Centre – University of the Western Cape Special Needs Housing Policy Framework in South Africa Workshop Report Cape Town 28 June 2012, 13.

> trying to reintegrate her into the community, what we have to do is make sure that she has access to safe housing once she leaves the shelter. Now that is an ongoing challenge. Women who come into shelters quite often do not have a high level of education, they quite often, in fact the vast majority of the time they don't have employment. Trying to procure housing for them post shelter is a challenge. It also relates to trying to craft a comprehensive safety plan with them.[70]

This quote demonstrates the gap in longer term accommodation options for women when they exit shelters. A gap which the Special Needs Housing Policy could fill.

A 2021 Indaba report of the NSMSA stated that there is a need for fast tracking the Special Needs Housing Policy.[71] It notes further that this policy would provide assistance to shelters for abused women in the following ways:

> it will make funding available from the Department of Human Settlements, Water and Sanitation for the purchase of a building which an NPO can run as a shelter and the operational funding will be sourced from the Department of Social Development. The alignment of these departmental processes will be key to the finalization of this policy.[72]

It is important that the different relevant departments work together to finalise the implementation of this policy, as it will provide a framework for more coordinated provision of shelter and longer-term accommodation to people with special needs, which includes survivors of gender-based violence.

An example can be taken from Australia, which has a Housing Australia Future Fund Act 79 of 2023, which makes provision for a funding mechanism to address acute housing needs, including those of women.[73] The Act also aims to provide support to 'increase the availability of social housing and affordable housing'.[74] A similar specific funding mechanism for Special Needs Housing in South Africa, could potentially benefit poor women who are vulnerable to violence. This housing should also consider the specific needs and circumstances of women, including whether they have children that need to be accommodated with them. The requirements for accessing special needs housing should also be inclusive and not unduly onerous on women. For example, it should not only be available to women who have filed for

[70] Interview 6.
[71] NSMSA Indaba report 2021, 11.
[72] NSMSA Indaba report 2021, 11.
[73] Section 2A.
[74] Ibid.

a protection order or laid a criminal charge. It should also be more broadly available to women who have been subject to or are living in fear of abuse. The location of this housing is also a relevant factor. In *Commando v City of Cape Town*, the Court stressed that 'for people who live in circumstances of extreme vulnerability, location may be an important or essential component of adequate housing, without which, they will be denied their most basic needs as they will not be able to access employment, healthcare and education for their children.'[75] I would argue that this applies to survivors of gender-based violence as they do live in circumstances of extreme vulnerability.

3.2.3 Shelters for survivors of gender-based violence

There appears to be a gap in terms of comprehensive policies and in the provision of shelters for abused women. Shelters are often run by NPOs, who may receive subsidies or some funding from government. The Department of Social Development is the lead department with regard to coordinating shelters. In 2001, it put in place minimum standards on shelters for abused women.[76] A shelter is defined as 'a residential facility providing short-term intervention for women and children in crises.'[77] Requirements for shelters include that they be registered with the Department of Social Development and that they are linked to an accredited organisation.[78] This is an important way of trying to ensure that shelters provide quality services.

The Department of Social Development, being the lead department in the Victim Empowerment Programme, released national policy guidelines for victim empowerment, in 2014. One aspect of this broad programme is the provision of shelters.[79] The rationale for this policy is explained as follows:

> Services to counteract victimisation are currently offered by a variety of role players, both governmental and non-governmental. However, services are inadequate, and victims do not access the same services throughout the country. Services are inequitable especially in poor communities and rural areas. The disintegrated and uncoordinated approach to service delivery within and across sectors contributes to secondary victimisation.[80]

[75] *Commando v City of Cape Town* 2025 (3) SA 1 (CC) para 103. This judgment is discussed further in chapter 4.
[76] Department of Social Development, *Minimum standards on shelters for abused women*, 2001.
[77] Ibid 5.
[78] Ibid 5,6.
[79] Department of Social Development *National Policy Guidelines for Victim Empowerment* 2014.
[80] Ibid 5.

These policy guidelines target specific groups because of their particular vulnerability. These include women, victims of domestic violence, victims of sexual assault and rape, abused children, and abused people with disabilities.[81] One of the strategic objectives of the policy is to 'manage the development of sustainable best practice models in service delivery and ensure that the scope and quality of services for victims of crime and violence is increased.'[82] This is important in the context of what I have highlighted regarding lack of sufficient shelters for survivors of violence. The list of services and supporting policies which still need to be provided and developed, includes '[d]eveloping a strategy for shelters for women and their children who are victims of domestic violence;' and '[e]stablishing shelters for victims of domestic violence.'[83] Again this appears to be an acknowledgment by government that more needs to be done. The policy guidelines further state that in partnership with government, civil society should '[p]lay a major role in advocating for victims' rights and providing services to victims'.[84] Government should arguably take up more responsibility here. Civil society already provides many of the services, and need more support from government. For example, specific legislation could place clear obligations on the state to fund shelters for survivors of violence and allocate specific parts of its budget for such purpose. The roles of different state departments should also be clearly demarcated and carefully coordinated.

Between 2014 and 2020 there is no evidence of the development of a clear strategy for shelters by the Department of Social Development.

In 2020, the National Strategic Plan on Gender-based Violence and Femicide was published. This plan aims to provide a 'multi-sectoral, coherent strategic policy and programming framework' to respond to the crisis of gender-based violence and femicide in South Africa.[85] Part of this plan recognises the need for and value of shelters:

> The value of shelters is demonstrated in the 2018 study that found that in addition to providing women with emergency accommodation, shelters met women's basic needs, provided physical and psychological safety, meeting much needed care and support for

[81] Ibid 10, 11.
[82] Ibid 14.
[83] Ibid.
[84] Ibid 21.
[85] Interim Steering Committee to respond to the gender-based violence and femicide crisis, National Strategic Plan on Gender-based violence and femicide 2020 < https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf>, 16.

women and their children. The study found that 75% of those who left the shelter were living free of their abusers.[86]

The Plan further makes several commitments in respect of shelters. A part of the emergency response action plan includes 'making public buildings available for sheltering and interim housing arrangements for survivors in consultation with CSOs.'[87] This demonstrates an awareness of the need and gap in terms of provision of shelter for survivors of violence. One of the outcomes of the strategic plan, is to put shelters and interim housing in place.[88] This intervention is to be led by the Department of Social Development and the Department of Human Settlements.[89]

The Plan has led to some progress in the provision of shelters. A reflective report on the first two years of the National Strategic Plan, provides that '136 shelters exist across the country' and of these 117 are funded by the Department of Social Development.[90] The report further states that '[t]welve buildings have been renovated and handed over to DSD for shelters and interim housing.'[91] This indicates that steps are being taken by the state to address the need for shelters.

Funding however remains a major challenge for shelters in South Africa, as seen in the discussion of recommendations in chapter 6. This problem persists despite government's general acknowledgement of the importance of shelters for survivors of gender-based violence, as shown above. As noted in a NSMSA policy document in 2017, 'there is no legislation at present that places a direct duty on a government department to fund shelters for victims of gender-based violence.'[92] This is a glaring gap in the legislative framework. In 2018, Vetten argued that 'DSD's current policy of not funding services in full, places shelters in the position of either providing inadequate services or expending a great deal of effort in raising funds elsewhere.'[93] In this context, the National Strategic Plan's attention to funding is welcome: its

[86] Ibid 31.
[87] Ibid 51. This is contained in pillar four, on response, care and healing. The Emergency Response Action Plan was developed after the 2018 Presidential Summit on Gender-based Violence and Femicide, and forms part of the National Strategic Plan on Gender-based Violence and Femicide.
[88] Ibid 77.
[89] Ibid.
[90] Minister in the Presidency for Women, Youth and Persons with Disabilities, Reflective report on the implementation of the South African National Strategic Plan on Gender-based Violence and Femicide May 2020 – September 2022, 30.
[91] Ibid 30.
[92] NSMSA Policy Brief No.1 September 2017 'Shelter services to domestic violence victims – policy approaches to strengthening state responses', 11.
[93] L Vetten 'What is rightfully due? Costing the operations of domestic violence shelters Research Report 2018' Hlanganisa Institute for Development South Africa, 28.

action plan includes 'providing funding to NGOs that provide direct services to victims and survivors'.[94]

A year after the introduction of the plan, the need for funding of shelters was reiterated in a 2021 Commission for Gender Equality report on shelters. This report included recommendations to National Treasury that it, together with the Department of Social Development, 'must develop a standardised shelter funding procedure' and 'must provide for the standardised and adequate resourcing of shelters nationally.'[95] However, progress remains limited. This prompts one to ask, who will suffer as a result of this – survivors of violence.

Not only does the Department of Social Development and Department of Human Settlements have a role to play in the provision of shelters, but also the Department of Public Works and Infrastructure. Following the 2018 Presidential Summit against Gender-based Violence and Femicide, the Department of Public Works and Infrastructure committed to allocating unoccupied government properties to be used as shelters.[96] In December 2019, it handed over five unoccupied properties in Gauteng to be used for survivors of gender-based violence and, in March 2020, handed over six properties in the Western Cape.[97] The provincial departments of social development then have to manage the properties and appoint NGOs to run the shelters.[98] In providing feedback to the Commission for Gender Equality, in its process of monitoring shelters in South Africa, the Department of Public Works stated that '54 buildings have being identified in all provinces' for the purpose of being allocated as shelters.[99] This is no doubt a good initiative by the Department of Public Works and Infrastructure, however it should only be the beginning. As noted above, there needs to be a well-coordinated programme and policy in place for the provision of shelters, as well as funding to support them.[100]

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[94] National Strategic Plan on GBV (note 85 above) 51.
[95] Commission for Gender Equality *Progress Report on the state of shelters in South Africa* 2021, 42.
[96] SA News, 'Public Works hands over building for GBV victims' 8 December 2022 https://www.sanews.gov.za/south-africa/public-works-hands-over-building-gbv-victims.
[97] Speech, Minister Patricia de Lille: Handover of shelter for gender-based violence victims, <https://www.gov.za/speeches/minister-patricia-de-lille-handover-shelter-gender-based-violence-victims-8-dec-2022-0000 >. As recently as May 2025, the Department of Public Works handed over 10 properties in Mpumalanga to be used as GBV shelters. See: Speech, Minister Dean Macpherson: Minister Dean Macpherson hands over properties for GBV shelters in Mpumalanga 19 May 2025 < https://www.gov.za/news/media-statements/minister-dean-macpherson-hands-over-properties-gbv-shelters-mpumalanga-19-may >.
[98] Ibid.
[99] Commission for Gender Equality *Progress Report on the state of shelters in South Africa* 2021, 46.
[100] The use of government buildings as shelters is not without challenges. Most people in South Africa should remember the tragic fire at a building in Albert street, Johannesburg in August 2023, that claimed 76 lives. During the days of apartheid this building was used as a pass office as a part of the influx control laws of the time. It was later converted and in 1994 opened as a women's shelter. In 2003, Usindiso Ministries took over the running of this shelter from the state. After years, the shelter faced financial problems and closed. At the time of the fire the

3.2.4 Second stage housing

As emphasised above, shelters are only a temporary solution to be safe from abuse. After spending three to six months in a shelter, women often have little choice but to return to living with their abusers. Therefore second stage housing is crucial.

The minimum standards on shelters also address second stage housing, stating that:

> Second stage housing should reflect an independent living in preparation for the emancipation of the woman. Women living in such housing should be linked to community programmes e.g. economic empowerment programmes, skills development, capacity building, life skills (e.g. self-defence) literacy programmes, etc. If programmes are manned at the second stage housing, women that have been returned to their houses should also be linked to the programmes.[101]

It is clear from this that a holistic service needs to be provided for survivors of violence and that much more support is needed than spending a few weeks or months in a shelter. The NSMSA stresses the need for more second stage housing.[102]

However, this is no explicit and workable policy on the provision of such housing. In its absence, the effective implementation of the Special Needs Housing Policy could assist in fulfilling the need for more second stage housing. In addition, making specific provision for survivors of gender-based violence in social housing and institutional subsidy programmes, as discussed above, could also serve as second stage housing.

3.2.5 Domestic Violence Act

The Domestic Violence Act does not specifically deal with housing nor basic services, but it does address shelters. This is relevant to my research project because of how important shelter is not only for survivors of domestic violence, but also for women who may be vulnerable to violence. The Act's preamble recognises that 'domestic violence is a serious social evil' and that South Africa has international obligations to end violence against women and children.[103]

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building was occupied by various people living in unsafe conditions in informal structures. See further: M Kgosiemang 'Intersectionality of Space and Gender: The Case of Usindiso Ministries Women's Shelter' 2015 Research Report, University of the Witwatersrand and Michelle Banda 'From safe haven to hijacked den – Marshalltown fire inquiry hears of building horrors as confessed arsonist appears in court' 1 February 2024 <https://www.dailymaverick.co.za/article/2024-02-01-case-against-self-confessed-marshalltown-arsonist-postponed-as-inquiry-hears-of-usindiso-building-horrors/>. These buildings should not be allowed to be neglected in this way.

[101] Minimum standards on shelters for abused women (note 76 above) 8.

[102] NSMSA Policy Brief No.1 (note 92 above) 5 and NSMSA Indaba report 2021, 22.

[103] Domestic Violence Act, preamble. The Domestic Violence Act, as amended by the Domestic Violence Amendment Act 14 of 2021, provides a broad definition of a domestic relationship and of domestic violence –

This can be seen as an acknowledgment of the disproportionate impact that domestic violence specifically, and gender-based violence more broadly, has on women and children.

Section 2 of the Domestic Violence Act imposes a duty on a member of the South African Police Service to assist complainants and inform them of their rights.[104] Significantly, this includes 'assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment'.[105] The Domestic Violence Amendment Act 14 of 2021 (Amendment Act) strengthens this duty by requiring the complainant to be provided with a list of shelters.[106] It further makes provision for directives issued to provide for numerous things

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'domestic relationship' means a relationship between a complainant and a respondent in any of the following ways:
(a) They are or were married to each other, including marriage according to any law, custom or religion;
(b) they (whether they are of the same or of the 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;
(c) 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);
(d) they are family members related by consanguinity, affinity or adoption;
(e) 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
(f) they are persons in a close relationship that share or shared the same residence;
'domestic violence' means-
(a) physical abuse;
(b) sexual abuse;
(c) emotional, verbal or psychological abuse;
(d) economic abuse;
(e) intimidation;
(f) harassment;
(fA) sexual harassment;
(fB) related person abuse;
(g) spiritual abuse;
(h) damage to property;
(hA) elder abuse;
(hB) coercive behaviour;
(hC) controlling behaviour;
(hD) to expose a child to domestic violence;
(i) entry into the complainant's-
(i) permanent or temporary residence without their consent, where the parties do not share the same residence; or
(ii) workplace or place of study, without their consent, where the parties do not share the same workplace or place of study; or
(j) any other behaviour of an intimidating, threatening, abusive, degrading, offensive or humiliating nature towards a complainant,
where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant;
These broad definitions are helpful to women and other people who may find themselves vulnerable to domestic violence. It recognises that domestic relationships can take many different forms and that domestic violence can manifest in many ways beyond physical abuse, which people may historically or traditionally have associated with violence.

[104] Ibid s 2.

[105] Ibid s 2(a).

[106] Domestic Violence Amendment Act s 3(3)(b)(i).

including, designation of accredited shelters.[107] Directives must be issued by the 'Directors-General: Health, Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies' to functionaries and other relevant persons who have to deal with domestic violence.[108] National Instruction 7, published in terms of the Domestic Violence Act, also places a duty on a member of the South African Police Service to assist a complainant to find suitable shelter.[109]

These provisions on shelters are critical because survivors of violence need a safe place to stay, not only to recover after being subject to domestic violence, but also so that they can be kept safe from further violence. It is worth noting that the definition of domestic violence includes conduct that 'inspires the reasonable belief that harm may be caused to the complainant'.[110] In this instance, safe shelter could play an important role in protecting someone who is vulnerable to exposure to violence. Despite comprehensive provisions related to shelters, a NSMSA policy brief argues that '[w]hile legislation makes provision for victims of domestic violence to be referred to a shelter, the state has relinquished responsibility for adequately funding shelters. This must be addressed within a legislative/ policy framework.'[111]

In making protection orders in terms of the Domestic Violence Act, a court's powers include ordering the payment of emergency monetary relief by the respondent.[112] The definition of emergency monetary relief includes 'relocation and accommodation expenses'.[113] This provision is another illustration of the connection between access to safe housing and vulnerability to violence.

3.2.6 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

The PIE Act deals with the procedure that needs to be followed before people can be evicted from their homes. This is crucial because everyone has the right of access to housing and because of how many people of colour were displaced and forcibly removed from their homes during apartheid. The preamble of PIE states that 'special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women,

[107] Ibid s 18 B(2)(f) and (g).
[108] Ibid s 18 B.
[109] National Commissioner of the South African Police Service *National Instruction 7/1999*, published under GN 207 in GG 28581 of 3 March 2006, s 8.
[110] Domestic Violence Act s 1.
[111] NSMSA Policy Brief No. 1 (note 92 above) 11.
[112] Ibid s 7(4).
[113] Domestic Violence Act s 1.

and that it should be recognised that the needs of those groups should be considered'.[114] The acknowledgment of the particular needs of women-headed households demonstrates how legislation that relates to housing should show awareness of the needs and circumstances of women. Section 4(6) then stipulates that courts need to consider all relevant circumstances in eviction proceedings, including the needs of women-headed households.[115] Section 4(7) contains the same consideration.[116] The obligation to consider the needs and rights of women-headed households in deciding whether it is just and equitable to order an eviction, calls attention to the particular impact that an eviction can have on vulnerable groups including women-headed households. In chapter 4 I discuss the protections offered by evictions jurisprudence and their significance for poor women.[117]

3.3 Informal settlements

In 2022, there were over 2 700 informal settlements in South Africa, which are mainly found on land unsuitable for living.[118] Driving about any major city in South Africa, you are bound to see at least one informal settlement. 'Informal settlements typically can be identified on the basis of the following characteristics - Illegality and informality; Inappropriate locations; Restricted public and private sector investment; Poverty and vulnerability; and Social stress.'[119] I would add to this list, lack of proper access to basic services. The Statistics South Africa general household survey for 2022 found that 83,2% of households live in formal dwellings and 12,3% lived in informal dwellings.[120] In 2017, male-headed households constituted 62,8% of informal dwellings and female headed households 37,2%. However, by 2021, these figures changed to 56,1% (male-headed) and 43,9% (female-headed) respectively,[121] thus demonstrating an increase in the percentage of female-headed households in informal dwellings.

In the interviews conducted for this thesis, part of the findings were that a lack of affordable accommodation can lead women to live in informal settlements. Lack of affordable

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[114] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, preamble. In chapter 4, I examine some of the jurisprudence that has developed, following the PIE Act, and show how the Constitutional Court has provided guidance on how this Act should be interpreted and understood.
[115] Ibid s 4(6).
[116] Ibid s 4(7).
[117] Chapter 4, 121.
[118] South African government official information and services, *Human settlements* <https://www.gov.za/about-sa/humansettlements>.
[119] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 4: Upgrading Informal Settlement*, 16.
[120] Statistics South Africa, *General Household Survey 2022*, 30.
[121] Statistics South Africa, *Gender Series 2017 – 2022*, 54.

accommodation can be seen as a form of structural exclusion from access to housing. Interviewee 3 described how people may make the decision to live in an informal settlement because one does not have to pay rent there.[122] While this is not true in every situation, it is often a reason why people turn to informality. She further noted that the reality of living in an informal settlement is that you will occupy a very small space and your home will have little to no security, in terms of locking doors and burglar bars.[123] In addition, there is often limited street lighting and people have to deal with other social ills like selling alcohol or drugs to make a living.[124] All of these factors combined, can increase women's vulnerability to violence.[125]

The National Housing Code includes an Upgrading of Informal Settlements Programme.[126] This programme addresses some of the concerns highlighted above about living in informal settlements. It makes provision for interim services to address immediate needs, while permanent services are not yet available.[127] For example, the provision of interim sanitation facilities, where these are communal or shared facilities, must include '[w]here possible, communal and shared toilets must be provided with lighting, or users provided with torches.'[128] The provision of lighting should arguably be a standard requirement. It is not sufficient that this only be provided 'where possible' when we consider the enormous challenge of violence in society and the particular vulnerability of women and girls. Communal facilities should further provide 'separate toilet blocks for men and women with separate entries' and 'separate washing cubicles for men and women'.[129] These requirements are important from a safety perspective. One of the challenges faced by local government in the provision of basic services in informal settlements is lack of secure tenure, because secure tenure is one of the requirements for 'provision of services in their jurisdiction'.[130] Unfortunately upgrading of informal settlement programmes are not always readily implemented. Local and provincial governments

[122] Interview 3.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 4: Upgrading Informal Settlement.*
[127] Ibid 13.
[128] Department of Water and Sanitation *National Norms and Standards for Domestic Water and Sanitation Services* GN 982 in GG 41100 of 8 September 2017 s 7(1).
[129] Ibid.
[130] Department of Water and Sanitation *National sanitation policy* 2016, 12.

often chose to focus on formal housing development rather than incremental upgrading of informal settlements.[131]

The reality for people living in informal settlements can differ significantly from the standard that has been set for informal settlement upgrading. Research conducted by Schmiegel in Khayelitsha, Cape Town, which specifically focused on access to water, found that:

> The communal taps are not maintained, and are often unhygienic and polluted with dirt. Their design and location make them inaccessible for vulnerable groups. It is not safe to collect water at night as their location is not visible and criminal attacks happen often. Also, in the case of a fire in the shacks, the communal taps provide insufficient water to extinguish the fire.[132]

Women, children and people with disabilities are often included in groups considered to be vulnerable. In this case study one can see a direct link between accessing water, here from a communal tap, and vulnerability to violence.[133]

The problem of lack of proper access to basic services was echoed in Meth's research conducted in Durban, South Africa.[134] Here she found that:

> within the informal settlement the only municipal services provided were the occasional external communal standpipes to access water and infrequently spaced communal pit latrine toilets. These always necessitated walking some distance from one's home to make use of these services, a reality which is particularly problematic for women and children at night, and which is compounded by the lack of street or passage-way lighting and also the vigorous growth of vegetation.[135]

Meth recounts a sad experience, shared in her study, that refers to an extract from someone's diary which states: 'In the past week a child was raped… She is only 4 years old. Their neighbour … raped the child. Her mother left her inside the house. She ensured that all the

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[131] Socio-Economic Rights Institute of South Africa (SERI) 'Informal Settlements and Human Rights in South Africa' 2018, 23.
[132] L Schmiegel 'SDG6: Access to Clean, Safe Water: A Case Study of Khayelitsha Township, Cape Town' (2021) 22 *ESR Review* 16, 18.
[133] For further examples of women's vulnerability to violence in informal settlements see: M Ngwazi and R Bhagwan 'Insights into the socio-economic plight of single mothers in an informal settlement in eThekwini, KwaZulu-Natal' (2024) 13 *African Journal of Gender, Society and Development* 163 and L Nadvi 'Gender approaches to poverty reduction in informal settlements in South Africa: Some perspectives from the Social Movements Indaba – KZN' (2009) 81 *Agenda: Empowering Women for Gender Equity* 80.
[134] P Meth 'Informal housing, gender, crime and violence: the role of design in urban South Africa' (2017) 57 *Brit J Criminol* 402.
[135] Ibid 415.

windows were closed and went to the lavatory. He saw that she was left by herself and entered to rape her.'[136] This shows that not only can women be vulnerable when they need to walk some distance to use the toilet, but the girls that are left at home can also be vulnerable.

The structure of informal dwellings also poses security concerns, especially for women. Meth's Durban study found that:

> Many households are inhabited by women only, a common feature of informal settlements and they spoke of their utter fear of break-ins, and subsequent rape and murder. This fear is compounded by the relatively poor security features of their informal homes, particularly their locks, the presence, or more commonly, the absence of burglar guards and/or a fence surrounding the property. The lack of security features contributed towards the hyper-permeability of the housing.[137]

From this example, it is further evident that women can be vulnerable to violence not only outside their homes, when they need to use communal taps or toilets, but also inside their homes, because of the permeability of the structure of the house. In another research study, also conducted in Durban, South Africa, Meth et al similarly found that 'Women and children were particularly vulnerable to rape, exacerbated by the dense and unplanned layout of shack housing which offers easy refuge for criminals and reduces policing capacities.'[138]

There are also other safety concerns for women living in informal settlements. There is often insufficient lighting outside. This means that it can be dangerous to travel early in the morning or in the evening.[139] It has also been found that there is a connection between domestic violence and living in informal housing and that this is fuelled by 'the stresses of spatial constraints and lack of privacy suffered in informal housing.'[140]

The challenges faced by women who live in informal settlements were confirmed in my interviews. Interviewee 5 explained how lack of electricity in an informal settlement makes women more vulnerable to violence.[141] They also described the situation of someone they know who has to collect water from a communal tap:

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[136] Ibid.
[137] Meth (note 134 above) 413.
[138] Meth et al (note 15 above) 1077.
[139] Meth (note 134 above) 416.
[140] Meth et al (note 15 above) 1079.
[141] Interview 5.

> She wakes up at around 4am to go to the water tank so that she can start collecting water, before other people come, because the queue is long. She has also indicated that there are some women in her area who have been raped trying to get water. It's in that context wherein women become vulnerable, because of lack of these services. [. . .]
>
> They get a communal tap where they get water and it's on a first come first serve basis. So that's why she has to wake up in the morning to get water because, just in case you wake up late, and the queue is already long and people are having buckets and buckets, chances are, by the time you are say no.40 in the queue, by the time it gets to you, there may not be water in that tank. So hence people, women in particular, I have given that example, she wakes up at 4am because she wants to get water first.[142]

This example illustrates how lack of proper access to water burdens women especially and how having to walk to collect water from a communal tap can make women vulnerable to violence.[143]

Overall, therefore, lack of proper access to these basic services of electricity, water and sanitation, as discussed elsewhere in this thesis, can make women more vulnerable to violence.

4. Water and sanitation legislation and policies

An integral part of having access to housing is having access to basic services. These basic services include water, sanitation and electricity. The way women and men use these services can be different. As I have highlighted elsewhere in this thesis, in many households in South Africa, women bear the lion's share of the responsibility for cooking, cleaning, washing, and doing other daily chores, which require water and energy.[144] In addition, where there is lack of proper sanitation facilities in the home, and people have to use communal toilets, women and girls are at increased risk of vulnerability to violence.[145]

Section 27 of the Constitution protects the rights of access to health care services, sufficient food and water and social security.[146] The Water Services Act 108 of 1997 provides for 'the right of access to basic water supply and the right to basic sanitation necessary to secure

[142] Ibid.
[143] In chapter 2, I refer to a research study conducted by the Coalition Against Water Privatisation and discuss the gendered impacts of lack of proper access to water and how this can be a stressor in families and can lead to conflict. It is worth noting that lack of proper access to water can increase tensions within the home and can make women more vulnerable to violence outside of the home, when they have to walk long distances to collect water.
[144] See discussion in chapter 1, 12.
[145] See discussion above, 91.
[146] Constitution of South Africa s 27.

sufficient water and an environment not harmful to human health or well-being'.[147] In addition, the National Water Act 36 of 1998 aims to look after the nation's water resources taking account of the need to meet 'the basic human needs of present and future generations', 'promoting equitable access to water', and 'redressing the results of past racial and gender discrimination'.[148] The Water Services Act also provides for the establishment of norms and standards for tariffs, which must consider various factors including 'social equity'.[149]

While national legislation sets the framework and standards, the delivery of water and sanitation falls to local government.[150] This is set out in the Local Government Municipal Systems Act 32 of 2000 whose preamble aspires 'to empower municipalities to move progressively towards the social and economic upliftment of communities and the provision of basic services to all our people, and specifically the poor and the disadvantaged.'[151] This Act articulates the general duty on municipalities to 'ensure that all members of the local community have access to at least the minimum level of basic municipal services.'[152] These municipal services must also be 'equitable and accessible.'[153] The Act further makes provision for service tariffs. In relation to poor households they must have 'access to at least basic services through (i) tariffs that cover only operating and maintenance costs, (ii) special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of service; or (iii) any other direct or indirect method of subsidisation of tariffs for poor households.'[154] All of these provisions are important from the perspective of imposing obligations on government to make basic services more accessible and affordable to poor communities.

Considering that many poor people cannot afford tariffs, provisions related to subsidisation of tariffs are critical. A notable aspect of making the supply of water and sanitation more affordable and accessible is the provision of a free basic supply. The amount of a free basic supply has been contested over time and implemented in different ways across the nine provinces of South Africa. In *Mazibuko v City of Johannesburg* the courts had to deal with a challenge to the constitutionality of the amount of water allocated by the City as a part of the

[147] Water Services Act s 2(a).
[148] National Water Act s 2.
[149] Water Services Act s 10(3)(b).
[150] According to section 156(1)(a) of the Constitution, a municipality has executive authority over local government matters listed in Part B of Schedule 4 of the Constitution. This includes water and sanitation services.
[151] Local Government Municipal Systems Act, preamble.
[152] Local Government Municipal Systems Act s 73(1)(c).
[153] Local Government Municipal Systems Act s 73(2)(a).
[154] Local Government Municipal Systems Act s 74(2)(c).

free water policy and the constitutionality of the prepayment water system.[155] At the time of *Mazibuko* an earlier set of regulations was in place, namely the Compulsory National Standards and Measures to Conserve Water.[156]

Over time, national norms and standards have been reviewed and revised. In 2017, the current National Norms and Standards for Domestic Water and Sanitation Services (National Norms and Standards) were introduced. They make provision for the supply of different levels of water services, including basic water supply services and free basic water supply services for indigent people.[157] An amount of 25 litres per person per day is to be provided for free to registered indigent households.[158]

There has however been a lack of uniformity in how municipalities target poor households for the provision of a free basic water supply.[159] This can have adverse implications for poor people and poor women living in South Africa. For example, in 2017, the City of Johannesburg moved from a policy of providing a universal free basic water allocation, to requiring indigent households to register in order to receive free basic water.[160] The effect of this policy has been 'significantly reduced access to water for hundreds of thousands of households that are poor but not registered.'[161]

One of the principles underpinning the National Norms and Standards is 'equity to ensure access for all'.[162] In setting out how vital it is to provide everyone with access to water, the National Norms and Standards acknowledge that '[w]omen not only need access to water for reliable and safe domestic use (drinking, childcare, cooking, cleaning and washing), they also need access to water for agriculture, home construction and income-generating activities (bread-baking, hair dressing, etc).'[163] This is a good way of spotlighting the particular needs of women as they relate to water usage. The National Norms and Standards also make specific

[155] This case is discussed in detail in chapter 4 of this thesis.
[156] Department of Water Affairs and Forestry *Compulsory National Standards and Measures to Conserve Water* GN R509 in GG 22355 of 8 June 2001.
[157] Department of Water and Sanitation *National Norms and Standards for Domestic Water and Sanitation Services* GN 982 in GG 41100 of 8 September 2017.
[158] Ibid para 5.2.3.
[159] Socio-economic Rights Institute of South Africa 'Turning off the tap' Working Paper No.3 2018, 31.
[160] Ibid 5.
[161] Ibid 6.
[162] Department of Water and Sanitation *National Norms and Standards for Domestic Water and Sanitation Services* GN 982 in GG 41100 of 8 September 2017, principle 3(1).
[163] Ibid Annexure B.

provision for menstruation in the provision of interim sanitation services and in basic and free sanitation services.[164]

The aim of the various levels of services is 'the progressive realisation of universal access to safe water'.[165] There is an acknowledgement in the national sanitation policy that access to basic services is not yet a reality for all.[166] The National Norms and Standards further define what basic sanitation and basic water supply should entail:

> Basic sanitation services
>
> Goal: People access at least a pleasant, safe, reliable and well-maintained improved toilet and hand washing facility in within [sic] their yard.
>
> (1) A water services authority must ensure that human excreta is safely contained at all times, throughout the service chain:
>
> (a) Each household must have uninterrupted access to an adequate, appropriate, sanitation facility; and
>
> (b) Households should be supported with knowledge and any other relevant resources to take responsibility for the correct and consistent use of the sanitation service, including but not limited to the toilet facility.
>
> Basic water supply services
>
> (1) A minimum volume of 6000 litres (or 25 litre per person per day) of potable water shall be made available to a household per month.
>
> (2) The water provided shall comply with the SANS 241 quality standards.
>
> (3) The access/delivery point shall be at least a yard connection.
>
> (4) The water shall be made available for at least 350 days per year, and not interrupted for longer than 48 consecutive hours.[167]

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[164] Ibid paras 7.1(3)(c) and 7.2(6)(d).
[165] Ibid para 5.
[166] Department of Water and Sanitation *National sanitation policy 2016*, 2. An example of how lack of access to basic services affects poor communities and poor women came before the courts in *Beja v Premier of the Western Cape* [2011] 3 All SA 401 (WCC). Here the Western Cape High Court dealt with a constitutional challenge related to the provision of unenclosed toilets in the Makhaza informal settlement. This case is also discussed in chapter 4.
[167] Department of Water and Sanitation *National Norms and Standards for Domestic Water and Sanitation Services* GN 982 in GG 41100 of 8 September 2017, paras 7.2 (1) and 5.2.2 (1)-(4).

This basic standard is not a reality for many people who live in informal settlements in South Africa. As was seen in the discussion of informal settlements above, people who live in informal settlements often have to share toilet facilities and may need to walk away from their home to the nearest toilet.[168] This could pose a particular risk for women and girls, who may be exposed to violence, when walking to the toilet. Using the toilet is also a private activity and shared sanitation facilities may pose a risk. As far as water is concerned, it may seem fair to allocate a standard basic amount of water that applies to everyone. However, women may be disproportionately affected by lack of access to sufficient water, as it has been shown that women carry the main responsibility for work in the home.[169] Activities such as cooking, bathing children, and doing laundry, often fall on women. Insufficient water could place additional stress and pressure on households and on poor women. I am mindful that it would not be easy to pay specific attention to the needs and circumstances of women in the decision-making process of water allocations, but I submit that this is necessary. Furthermore, the example of making provision for menstruation, shown above, proves that this can be done. Attention is also drawn to the need to be aware of inequalities in access of different groups in the implementation of sanitation projects.[170] More of this is arguably needed.

In situations where emergency sanitation services are provided, they also need to be safe and secure for vulnerable groups including women, children and people with disabilities.[171]

5. Electricity legislation and policies

The Electricity Regulation Act 4 of 2006 provides the legislative framework for regulation of electricity supply in South Africa and for related matters.[172] One of the objects of the Act is to 'facilitate universal access to electricity'.[173] Government also has a free basic electricity policy, which allocates a free basic amount of electricity to poor households every month.[174] The rationale for the allocation is explained as follows:

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[168] N Abrahams, S Mhlongo, E Chirwa, C Lombard, K Dunkle, S Seedat, A Kengne, B Myers, N Peer, C García-Moreno, and R Jewkes 'Rape survivors in South Africa: analysis of the baseline socio-demographic and health characteristics of a rape cohort' (2020) 13 *Global Health Action* 1, 7.

[169] L Patel 'Poverty, Gender and Social Protection – Child Support Grants in Soweto, South Africa' (2012) 11 *Journal of Policy Practice* 108, 112.

[170] Department of Water and Sanitation *National sanitation policy* 2016, 33.

[171] Department of Water and Sanitation *National Norms and Standards for Domestic Water and Sanitation Services* GN 982 in GG 41100 of 8 September 2017 para 8(13).

[172] Electricity Regulation Act, preamble.

[173] Ibid s 2(d).

[174] Department of Minerals and Energy *Free Basic Electricity Policy* 2003.

> Recognizing that conventionally, the average poor household does not consume more than 50 kwh of electricity per month, the allocation of free basic electricity is set at 50 kwh, based on the utility that poor households could derive from that amount of energy. We also recognise that this benefit can be increased through the efficient utilization of energy and savings interventions for the same amount of energy.[175]

This free basic allocation is important for poor households, as electricity is needed for daily activities like cooking and cleaning, and alternative sources of energy may not be safe to use. As has been discussed in earlier chapters in this thesis, in many households in South Africa there is a sexual division of labour, and women carry most of the responsibility for cooking, cleaning and other household chores.[176] While the free basic allocation is welcomed, it is not always enough to meet the energy needs of poor households. Poor women often cannot afford to buy electricity, after they have used the free basic allocation.[177] Research by Masekela and Semenya showed that 'females were mostly affected by energy poverty, as they were left with the responsibility of ensuring that the household did not run out of energy for the entire month.'[178] Their study further highlighted that 'access to basic services is only one part of the problem; the affordability of basic services is a socio-economic issue that needs to be addressed.'[179]

The free basic allocation helps to make electricity accessible to more people, especially people living in poverty, but in addition to this, electricity also needs to be affordable, as people need to buy electricity once their household has finished using the free basic allocation. In determining this allocation the state should also pay attention to how women can be disproportionately affected by lack of sufficient electricity supply.

Lack of proper access to electricity can have a number of adverse effects on poor households and communities, and specifically on poor women. Fiil-Flynn's research conducted in Soweto, Johannesburg found that, in situations where electricity is cut off:

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[175] Ibid 5. The National Energy Regulator of South Africa has approved a new National Free Basic Electricity rate of 194.40c/kWh for the 2024/25 municipal financial year. See: Business Tech 'Free electricity changes for South Africa coming' 4 June 2024 < https://businesstech.co.za/news/energy/775174/free-electricity-changes-for-south-africa-coming/>.

[176] See again discussion in chapter 1, 12.

[177] K Odeku 'The impact of electricity tariff increase on indigent women in South Africa' (2019) 17 *Gender and Behaviour* 14138, 14143. See also: M Fiil-Flynn 'The electricity crisis in Soweto' 2001 Municipal Services Project occasional papers No.4, 8.

[178] M Masekela and K Semenya 'Factors influencing the use of firewood post-electrification in rural South Africa: The case of Ga-Malahlela village' (2021) 32 *Journal of Energy in Southern Africa* 24, 30.

[179] Ibid 37. See also: Fiil-Flynn (note 177 above) 1.

> The health and safety implications of these cut-offs are serious, especially for women and children, with respondents complaining of spoiled food, increased workloads for women, loss of productivity in small shops, increases in domestic violence and a range of other concerns.[180]

This is yet another example of the connection between lack of access to basic services and women's vulnerability to violence.

For all these reasons, paying attention to the needs and circumstances of women in the formulation of policies, like the allocation of free basic electricity, is not only important because the lived experiences of men and women are different, and they often play different roles in the home, but also because of added pressure that lack of electricity and other basic services can place on households, including increases in domestic violence. Fiil-Flynn's research also puts forward the argument that the positive benefits of universal electricity coverage, including gender equity, should be incorporated into 'more holistic analysis of how they price electricity for the poor.'[181]

6. Conclusion

In this chapter I have provided an overview of the main legislation and policies that are relevant to my research focus. The protection of the rights of access to housing and basic services and the legislative and policy provisions providing free basic services are critical for poor people in South Africa. In addition to the provision of subsidies and free services, housing and basic services also need to be accessible and affordable for poor people and poor women in particular.

There are a number of subsidies and low-cost housing options that can assist poor women with securing affordable and safe housing including the individual subsidies programme, social housing policy and the institutional subsidies programme. Organisations that provide shelter can use the latter two programmes to apply for subsidies to make longer term accommodation available to survivors of gender-based violence.

As I have shown above, some legislation and policies do show an awareness of the particular needs of women, which is laudable. However, there are gaps that need to be addressed. One of the major gaps is the provision of shelter for abused women and of affordable accommodation for women when they leave shelters. Another serious gap is the provision of basic services in

[180] Fiil-Flynn (note 177 above) 2.
[181] Fiil-Flynn (note 177 above) 3.

informal settlements. Above I have demonstrated how these conditions can make women more vulnerable to violence.

Attention should also be paid to where there is a disconnect between the provisions of law and policies and the lived realities of people in different communities in South Africa. This disconnect is highlighted in some of the cases that have come before the courts. The analysis of selected cases in the next chapter, will show how litigation has attempted to close some of these gaps.

CHAPTER 4 – JURISPRUDENCE: TOWARDS A GENDERED INTERPRETATION OF SOCIO-ECONOMIC RIGHTS TO ASSIST IN ADDRESSING VIOLENCE AGAINST WOMEN

1. Introduction

The inclusion of socio-economic rights in the Constitution, as emphasised elsewhere in this thesis, is a part of the vision of achieving substantive equality, and of transforming South Africa into a place where the human dignity, equality and freedom of all people is respected and protected. Though the responsibility of transformation falls mainly on government, courts do have an important role to play in interpreting and enforcing the Constitution.[1] I view better interpretations of socio-economic rights as necessary to achieve better outcomes and access to the goods and services guaranteed by socio-economic rights for the largely poor communities and poor women who rely on them.

This chapter starts with an introduction to socio-economic rights jurisprudence in South Africa, setting out the main principles that have been laid down by the Constitutional Court regarding how the right of access to housing and basic services should be interpreted, and how the state's fulfilment of its obligations should be assessed. What have been seen as gains and limits in the jurisprudence are also discussed, as well as the debates that exist. I then propose how socio-economic rights can be better interpreted to enhance their capacity to make a real difference in the lives of people who rely on them.

Following this discussion, I set out how to apply a gendered lens to socio-economic rights interpretation and suggest why it is important to do so. By applying a gendered lens, I mean that when interpreting socio-economic rights, courts should consider how circumstances related to how men and women access and use the goods and services guaranteed by these rights can be different, because their needs and realities are different. This is as a result of a combination of factors such as social and economic conditions, the environment in which people live, and different gender norms and roles that people play in the home and society. It is necessary to apply a gendered lens so that socio-economic rights protection can properly respond to the lived realities of the poor women who depend on them, including poor women's vulnerability to violence. I argue that applying a gendered lens is not only necessary to ensure

[1] C Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441, 454.

that outcomes of socio-economic rights litigation assist to provide better access to the goods and services guaranteed by the rights but also to assist with addressing poor women's vulnerability to violence. For example, better access to water and sanitation could reduce the need for women to walk long distances to fetch water or to use communal toilets, which could put them at risk of exposure to violence. More affordable access to housing could also mean that women have more options available to them, if they want to leave an abusive relationship.

I then go on to examine selected cases through a gendered lens, to show how courts sometimes fail to pay attention to the circumstances of women when assessing a socio-economic rights violation; also showing where this has been done well.

In the final section of this chapter, I consider how the value of and right to equality can strengthen socio-economic rights claims of women and the outcomes of decisions. I show an example of how this has been done well and where the courts have missed an opportunity to do this.

2. Socio-economic rights jurisprudence in South Africa – overview, critiques and alternative approaches

2.1 Introduction

The justiciable socio-economic rights in the Constitution are often lauded by people in South Africa and around the world. Courts play an important role in evaluating whether the state is performing its obligations in relation to the protections afforded by socio-economic rights and in helping to understand what the different socio-economic rights mean. However, there have been different responses to how courts have dealt with socio-economic rights cases. Some aspects of the jurisprudence have been celebrated, while other aspects have been criticised for not doing enough to protect the claimants whose socio-economic rights are infringed.

I align myself with the views that courts could do more to advance the interests of poor people in socio-economic rights cases. Courts can play a greater role in assisting to address poverty, inequality and disadvantage, as will be shown below.

This section examines how socio-economic rights jurisprudence in South Africa has developed, how aspects of the jurisprudence have been critiqued, and how courts can interpret socio-economic rights in a way that will enhance their capacity to make more of a difference to the lived realities of the largely poor communities that rely on them.

2.2 Socio-economic rights jurisprudence – an overview

In this section, I discuss some of the key themes that have emerged from the Constitutional Court's socio-economic rights jurisprudence, and show how the Constitutional Court has developed the standard of reasonableness in evaluating whether the state has fulfilled its obligations. This involves many procedural safeguards, as well as some substantive considerations, such as examining the context, and the underlying values and purpose of rights. I also set out how the Court has responded to arguments related to a minimum core obligation for socio-economic rights. I include this discussion because minimum core would have been a more direct way to bring substantive considerations into socio-economic rights interpretation. It is also supported by international law and South Africa has now ratified the ICESCR. In this section I chose to discuss *Government of the Republic of South Africa v Grootboom*[2] and *Mazibuko v City of Johannesburg*[3] because they deal with access to housing and water, which align with the focus of this thesis of women's access to housing and basic services, and they set out the foundational principles of South Africa's socio-economic rights jurisprudence.

2.2.1 Government of the Republic of South Africa v Grootboom

The case of *Government of the Republic of South Africa v Grootboom*[4] dealt with the eviction of a few hundred people from their informal homes, which were situated on privately owned land.[5] The eviction would leave the respondents homeless.[6] The respondents had lived in appalling conditions in Wallacedene informal settlement, before they had settled on the privately owned land.[7] Many of them were on waiting lists for low-cost housing.[8]

Grootboom laid the foundation for how socio-economic rights should be interpreted in South Africa. The key themes that emerged from this case are (i) the need to pay attention to context when interpreting rights, (ii) the role of the purpose and values that underlie rights, and (iii) the standard of reasonableness in evaluating whether the state has fulfilled its obligations. I deal with each in turn below.

The Constitutional Court examined the provisions of section 26 and section 28(1)(c) of the Constitution. This discussion will focus on the Court's section 26 analysis.

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[2] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
[3] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (*Mazibuko* Constitutional Court).
[4] *Grootboom* (note 2 above).
[5] Ibid para 4.
[6] Ibid para 4.
[7] Ibid paras 7 and 8.
[8] Ibid para 8.

First, the Court set out how we should go about the interpretation exercise, when determining what a right means. Rights should be interpreted in their context:

> Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.[9]

Interpreting rights in their social and historical context is a noteworthy point; it authorises courts to consider the lived realities and conditions of the people whose rights are being infringed. This is especially useful when examining the particular impact of a socio-economic rights violation on women, as will be seen later in this chapter. However, despite *Grootboom* having laid the foundation for a contextual analysis, Wilson and Dugard have argued that courts following *Grootboom* have generally 'failed to engage with any contextual standards against which state action may be assessed'.[10]

Secondly, the Court affirmed the purpose and values that underlie the protection of socio-economic rights:

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential [. . .]
>
> The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.[11]

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[9] Ibid para 22.
[10] S Wilson and J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011) 3 *Stellenbosch Law Review* 664, 666.
[11] *Grootboom* (note 2 above) para 23 and 44.

It is important that the Court draws the connection between the protection of socio-economic rights and the advancement of race and gender equality, as critical components of substantive equality, which are part of the values that these rights give life to.

Despite recognising the significance of the values and purpose underlying rights, the Court does not interrogate how these values and purpose relate to the applicant's lack of access to adequate housing.

Finally, *Grootboom* established that the standard against which government's fulfilment of its socio-economic rights obligations should be measured is reasonableness. It provided a number of factors to be considered in the assessment of whether a particular policy or programme is reasonable: a reasonable programme must 'clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.'[12] Programmes and policies 'must be reasonable both in their conception and their implementation'[13]; 'a programme that excludes a significant segment of society cannot be said to be reasonable'[14]; programmes also need to be continuously reviewed.[15] Then in identifying what is arguably a substantive criterion of reasonableness, the Court stated that:

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.[16]

In other words, legislation, policies and programmes that give effect to socio-economic rights must substantively include those in desperate situations.

In choosing reasonableness as the primary criterion for determining a socio-economic rights violation, the Court rejected the argument that this should be determined in relation to the

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[12] *Grootboom* (note 2 above) para 39.
[13] Ibid para 42.
[14] Ibid para 43.
[15] Ibid.
[16] *Grootboom* (note 2 above) para 44. Liebenberg has argued that reasonableness review 'provides the courts with a flexible and context-sensitive tool for adjudicating positive socio-economic rights claims' but that courts have not applied it adequately in cases where people have been deprived of basic needs. See: S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1, 22. Liebenberg further argues that the burden of proof gives litigants the difficult task of showing that government programmes are unreasonable. Pillay has argued that this reasonableness model is similar to that used in administrative law which 'focuses more on procedure than on substance'. See: A Pillay 'In defence of reasonableness: giving effect to socio-economic rights' (2007) 8 *ESR Review* 3, 3.

minimum core content of the right. The amici had submitted that such a minimum core obligation should be central to the determination, establishing a minimum threshold of protection that should be respected by the state. They argued that 'all the respondents, including those of the adult respondents without children, were entitled to shelter by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution.'[17]

The idea of a minimum core was developed in international law and was articulated by the Committee on Economic, Social and Cultural Right's, General Comment No.3 in 1990.[18] It is explained as follows:

> 10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant.[19]

The Court declined the invitation to include minimum core in its jurisprudence. In particular, it explained the difficulty, in its view, that would exist in determining the minimum core of the right of access to housing, indirectly suggesting that this lay outside the competence and capacity of the courts.[20] Instead of addressing minimum core obligations, the Court stated that the real question is to determine 'whether the measures taken by the state to realise the right afforded by section 26 are reasonable'.[21] However, it also left the door open by stating that the minimum core may sometimes be able to help in the evaluation of reasonableness.[22]

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[17] *Grootboom* (note 2 above) para 18.
[18] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990) E/1991/23.
[19] Ibid para 10.
[20] *Grootboom* (note 2 above) para 32.
[21] Ibid para 33.
[22] Ibid. In later cases the Court makes it clear that minimum core obligations are not self-standing rights in South African law. This is seen particularly in *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (*TAC*). See: *TAC* paras 34 – 39.

While shortcomings of the *Grootboom* decision have been highlighted, as will be seen in the discussion below, the outcome has been lauded by many.[23] In applying the standard of reasonableness, which it had set out, to the facts before it, the Court found that:

> The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focused on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[24]

It is clear from this that for a government programme to meet the standard of reasonableness, it must cater to the needs of the most desperate people in society. As noted above this is welcome insofar as it potentially constitutes a more substantive part of the reasonableness enquiry.[25]

The Court is nevertheless sensitive to separation of powers considerations. While providing that part of the budget should be allocated to those in desperate need of housing, it leaves it to the state to determine how this is done.

In conclusion, the Court held that:

> the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier.[26]

The standard of reasonableness developed through the socio-economic rights cases that followed *Grootboom*.[27] Seven years after *Grootboom*, *Mazibuko v City of Johannesburg* dealt with the right of access to water.[28] Below I give a general overview of this case. Later I show

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[23] See for example: S Budlender, G Marcus and N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' 2014 The Atlantic Philanthropies; J Dugard and M Langford 'Art or science? synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *South African Journal on Human Rights* 39.
[24] *Grootboom* (note 2 above) para 66.
[25] Wilson and Dugard (note 10 above) 668.
[26] *Grootboom* (note 2 above) para 69.
[27] See for example: *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC); and *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).
[28] *Mazibuko v City of Johannesburg* [2008] 4 All SA 471 (W) *(Mazibuko* High Court*).*

how the High Court judgment provides a good example of how courts can highlight the particular impact that the lack of access to sufficient water has on women, as this relates to the context of the rights violation.

2.2.2 Mazibuko v City of Johannesburg

Mazibuko dealt with a challenge to government's water regulations and policies.[29] In 2001, the City of Johannesburg and Johannesburg Water Pty Ltd agreed to provide 6 kilolitres of free water to households per month.[30] For the residents of Phiri, this free water allocation was to be dispensed by a prepaid water meter system.[31] This meant that once the free allocation was used up, the water would automatically cut off and then the affected household would have to buy water credits.[32] The decision to introduce prepaid meters was informed by the old water piping system which was losing water for the City.[33] The applicants were all residents of Phiri. The residents of Phiri were 'mainly poor, uneducated, unemployed and ravaged by HIV/ AIDS. Each account holder in the township ha[d] more than one household in his/her stand. Those who [were] employed earn[ed] about R1 100,00 per household per month.'[34] The applicants challenged the constitutionality of the amount of water allocated under the free water policy and the constitutionality of the prepayment water system.[35]

The introduction of the prepaid water system was challenged on a number of grounds including the principle of legality, the state's duty to take reasonable measures to ensure the realisation of a right, the right to equality, prohibition of discrimination, and procedural fairness.[36]

After evaluating the evidence before it, the High Court found that '[t]he respondents' provision of 25 litres per person per day is unreasonable. It appears that the respondents are able to provide 50 litres per person per day without restraining its capacity on water and its financial resources.'[37] In conclusion, the Court declared the prepaid system used in Phiri to be unconstitutional and ordered that the free basic water supply should be increased to 50 litres per person per day.[38]

[29] Ibid para 2.
[30] Ibid para 3.
[31] Ibid.
[32] Ibid.
[33] Ibid para 4.
[34] Ibid para 5.
[35] Ibid para 9.
[36] *Mazibuko* High Court (note 28 above) para 71.
[37] Ibid para 181.
[38] Ibid para 183.

This case was taken on appeal to the Supreme Court of Appeal and then to the Constitutional Court. The Constitutional Court evaluated the state's obligations in relation to the right to have access to sufficient water.[39] The Court acknowledged the inequality that exists in South Africa in terms of accessing water.[40] In examining the nature of the state's positive obligations as they relate to the fulfilment of socio-economic rights, the Court referred to the *Grootboom* and *Minister of Health v Treatment Action Campaign* cases.[41] The Court stated that section 27(1)(b) and 27(2) of the Constitution require 'the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.'[42] The Court further provided that 'the fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately.'[43] Focusing on the role of socio-economic rights, the Court emphasised that:

> Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.[44]

The Court highlighted the importance of context in the evaluation of whether measures adopted by the state are reasonable.[45] However, it held that the legislature and the executive are 'best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.'[46]

This Court added a significant additional factor to the question of evaluating reasonableness, namely, whether government policy is flexible, and is continually reviewed and refined.[47] This was central to its determination that the City's water policy and its policy for indigent households was reasonable as it 'has been under constant review and has now been revised'.[48]

[39] *Mazibuko* Constitutional Court (note 3 above).
[40] Ibid para 2.
[41] Ibid para 48.
[42] Ibid para 50.
[43] Ibid para 58.
[44] Ibid para 59.
[45] Ibid para 60.
[46] Ibid para 61.
[47] *Mazibuko* Constitutional Court (note 3 above) para 95.
[48] Ibid para 40.

A notable contribution of this decision is that it summarised the parameters of courts enforcement of socio-economic rights as follows:

> If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom,* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No* 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.[49]

In evaluating the applicants' arguments regarding the proposed amount of free basic water allocation, the position of the Court was that this argument must fail for the same reasons that the minimum core obligation was rejected by the Constitutional Court.[50] It stated that rights need to be realised progressively and that 'what the right requires will vary over time and context'.[51] The Court further opined that 'ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.'[52] The Constitutional Court concluded that 'neither the Free Basic Water policy nor the introduction of pre-paid water meters in Phiri as a result of Operation Gcin'amanzi constitute a breach of section 27 of the Constitution.'[53] It set aside the orders of the High Court and the Supreme Court of Appeal.

2.3 Critiques of socio-economic rights jurisprudence

While I have acknowledged the positive aspects of South Africa's socio-economic rights jurisprudence above, in this section I demonstrate how courts have not done enough to protect the socio-economic rights of those who contend that their rights have been violated.

[49] Ibid para 67.
[50] Ibid para 56.
[51] Ibid para 60.
[52] Ibid para 61.
[53] Ibid para 169.

2.3.1 Failure to adopt the minimum core obligation

The early failure of the Constitutional Court to adopt the minimum core approach has been subject to substantial criticism. Bilchitz argues that the standard of reasonableness is not enough to 'provide the content necessary to adjudicate cases based on socio-economic rights.'[54] He further argues that one first needs to understand the content of the right and then courts should move on to examine whether the state has taken reasonable measures to fulfil the right in light of that defined content.[55]

In responding to the Court's concerns about adopting the minimum core, Liebenberg contends that:

> properly conceived, the minimum core obligation is neither an absolute duty nor a rigid standard. Rather, it establishes a high threshold of justification when a deprivation of essential levels of socio-economic goods and services is at issue. The state is required to show that it has exhausted all available methods, and that its resources are 'demonstrably inadequate' to meeting those needs. This raises the central importance of justification in ensuring the strong protection of socio-economic rights.[56]

This can be linked to the need for courts to hold the state accountable to its obligations and for the state to answer for when people are being deprived of basic goods and services necessary to lead a dignified life.

In arguing for the importance of recognising a minimum core obligation in relation to socio-economic rights, Bilchitz states that:

> there are interests that people have in socio-economic goods that are more urgent than other interests. The right in s 27(1) expresses what a person is entitled to. In interpreting what people are entitled to, we must consider the reasons for the recognition of a particular right. There are two important interests that ss 26 and 27 of the Constitution protect. The first is at a minimum the very basic interest people have in survival and the socio-economic goods required to survive. The second is the interest people have

[54] D Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1, 9.
[55] Ibid.
[56] S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1, 18.

> in being provided with the conditions that enable them to pursue their own projects and to live a good life by their own lights.[57]

This statement stresses that there are certain basic goods and services that people need to live, and that conditions need to be conducive to being able to live with dignity.

While I view the failure to adopt the minimum core approach as a missed opportunity to bring more substantive content into the reasonableness enquiry, I argue that the current jurisprudence can be strengthened through a more contextual analysis, a greater focus on the substance of socio-economic rights, and applying a gendered lens, as shown below in section 3. In section 2.5 below I discuss how Liebenberg, Wilson, Dugard and others have demonstrated how more substantive considerations can be incorporated into the reasonableness enquiry.

2.3.2 Showing undue deference to other branches of government

In socio-economic rights cases courts often grapple with the doctrine of separation of powers, and how far they can go in making findings that may have policy and financial implications for the other branches of government. The approach of the Court in *Grootboom* was deferential to the other branches of government, in some ways.[58] Echoing critiques of the Court's rejection of minimum core, Davis argues that '[t]he Court refused even to engage with the contours of the rights, thereby leaving as vague as possible the determination of the anchor point from which reasonable conduct can be determined.'[59]

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[57] Bilchitz (note 54 above) 11. Bilchitz has further argued that:

> Recognizing the role of the Constitutional Court in defining general principles allows us to see how such a court can determine the content of a minimum core obligation. Thus, the role of the court in this respect would be to set the general standard that must be met in order for the state to comply with its minimum core obligation. An example would be for the court to hold that every person in South Africa must have access to accommodation that involves, at least, protection from the elements in sanitary conditions with access to basic services, such as toilets and running water. The setting of this general standard, however, still raises significant questions as to the measures that will be adopted to realize it in particular cases: protection from the elements could involve the provision of tents or the provision of corrugated, galvanized iron such that people could build their own shacks. The Constitution allows the legislature and executive some leeway in deciding exactly what measures are to be taken to realize the right. A determination must be made of whether the measures taken by the government are reasonable in light of the general obligations that are imposed upon it by the right. But the reasonableness of the particular measures, it is submitted, must be assessed against the general principles that the court interprets as defining the content of the right.

See: D Bilchitz 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 119 *South African Law Journal* 484, 488.

[58] D Davis 'Adjudicating the socio-economic rights in the South African Constitution: towards 'deference lite'?' (2006) 22 *South African Journal on Human Rights* 301, 312.

[59] Ibid.

Many scholars have argued that the Constitutional Court decision in *Mazibuko* is disappointing for, among other reasons, arguably showing too much deference to the other branches of government. Brand has picked up on this.[60] He contends that:

> we have seen this expression of deference in *Mazibuko*, with the court there again declining at all to determine the content of the right to have access to sufficient water - that is, declining to engage with that issue at all - on the argument that this is an exercise best and properly left to the legislature and executive.[61]

This description of a failure to deal with the content of the right of access to water, also speaks to how the requirement of reasonableness review often focuses on the procedural aspects of a socio-economic rights violation.[62]

Pieterse has convincingly argued that courts are obliged to give content to socio-economic rights through constitutional interpretation.[63] This should be seen as 'courts assisting other branches of government to establish the precise content of their obligations'.[64] Viewed in this way, courts would not be second guessing the responsibility of the legislature and executive but rather supporting them in the fulfilment of their socio-economic rights obligations. In discussing arguments related to courts deferring to the legislature and executive in matters related to policy and budgets, Pieterse makes the point that 'a matter does not become one of policy or of budgeting merely because it requires that policy or budgetary evidence be scrutinised'.[65]

2.3.3 Paying insufficient attention to context and impact

Courts have often not considered context and impact in a meaningful way, or at all, when interpreting socio-economic rights, even though *Grootboom* provides the authority to do this. Again, the Constitutional Court decision in *Mazibuko* is a telling example. The Court failed to properly consider the specific context and circumstances of the Phiri community, including the levels of poverty, low incomes and large households, and the disproportionate impact that a lack of proper access to water had on them. These factors ought to have weighed strongly in

[60] D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stellenbosch Law Review* 614, 619.
[61] Ibid.
[62] Ibid. Brand discusses how the reasonableness test is formulated in procedural terms.
[63] M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383, 406.
[64] Ibid 406.
[65] Ibid 408.

the assessment of whether the state acted reasonably in fulfilment of its obligations. Wilson and Dugard argue that:

> uncontested contextual evidence of the urgent and intense distress caused by the claimants' lack of access to sufficient water was virtually ignored in preference to a generalised superficial examination of state policy.[66]

This failure to properly deal with the context and lived realities of the claimants is also important to the arguments made in the next section about applying a gendered lens in socio-economic rights cases. Examining the context in which a socio-economic rights violation occurs allows courts to interrogate how lack of proper access to a good or service guaranteed by socio-economic rights affects the lives of specific groups of people or communities, and their ability to flourish and have their inherent dignity respected. Focusing on the impact of the rights violation allows courts to see what lack of proper access means for the daily lives of complainants and can assist courts to provide remedies that address these consequences.

Before focusing on how to develop and apply a gendered lens, I turn to eviction jurisprudence, which follows a slightly different trajectory to the courts' evaluation of the reasonableness of positive measures.

2.4 Eviction jurisprudence

Many of the cases dealing with the right of access to housing are eviction cases. As has been shown elsewhere in this thesis, women are often particularly vulnerable in situations of eviction and for this reason, the protections offered by the law are especially relevant for them.[67] Evictions take place in terms of section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), discussed in chapter 3. The jurisprudence of the Constitutional Court has resulted in two key developments in the area of evictions, namely, the requirement of meaningful engagement between parties to a dispute and the consideration of alternative accommodation when an eviction order is sought. I discuss four Constitutional Court cases in this section, which illustrate these developments.

[66] Wilson and Dugard (note 10 above) 667.
[67] See discussion in chapter 2, 58.

2.4.1 Port Elizabeth Municipality v Various Occupiers – establishing the principle of meaningful engagement

Port Elizabeth Municipality v Various Occupiers is one of the main eviction cases, which established the principle of meaningful engagement.[68] This case dealt with about 68 people, including children, who lived in shacks on privately owned land.[69] The occupiers had been living on the property for up to eight years and most of them 'had come there after being evicted from other land'.[70] The occupiers were willing to leave the property 'if they were given reasonable notice and provided with suitable alternative land on to which they could move.'[71]

The matter started in the High Court, where the occupants were ordered to vacate the land.[72] On appeal to the Supreme Court of Appeal it was held that:

> the important consideration in the present case was the availability of suitable alternative land. This was so because of the length of time that the occupiers had occupied the land, and, more importantly, because the eviction order was not sought by the owners of the property but by an organ of state on the owners' behalf. The SCA held that given that on the papers it was unclear whether Walmer was land owned by the Municipality or privately owned, the High Court should not have granted the order sought without assurance that the occupiers would have some measure of security of tenure at Walmer. It accordingly upheld the appeal and set aside the eviction order.[73]

The Municipality then took this decision on appeal to the Constitutional Court. A critical part of the evaluation of the PIE Act was the history and context of how this legislation came to be, as well as how black people were forcibly removed from land and forced to live in locations designated to different racial groups under colonialism and apartheid.[74] Dispossession was a terrible reality for black people in South Africa. Section 26 of the Constitution and the related legislation were adopted to deal with the injustices of the past, especially as they related to struggles around secure tenure in land for black people.[75]

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[68] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[69] Ibid para 1.
[70] Ibid para 2.
[71] Ibid.
[72] Ibid para 4.
[73] Ibid para 5.
[74] Ibid para 9.
[75] Ibid para 10.

The recurring theme of the need for constitutional values to infuse the court's interpretation of constitutional rights is also seen in this case. In its evaluation of the right's violation, the Court stated that '[a]s with all determination about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom.'[76] Developing this, the Court highlighted the importance of having a place to call home:

> Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.[77]

It is worth noting that a home can have a particular meaning, especially for poor people, who experience layers of oppression and disadvantage in society. Because poor people often find themselves on the margins of society and experience different kinds of disadvantage every day, having a place to call home is especially important, hopefully it provides a safe space to find shelter from a world that is not kind to poor people.

The Court further noted that in eviction proceedings, a balance needs to be struck between competing rights and interests. The property rights of owners are to be weighed against the rights of access to housing and not to be unlawfully evicted of occupiers. The function of the courts is to find the balance between the claims of owners and occupiers in a way that is just and considers all the relevant circumstances.[78] The Court expanded on the requirements of the PIE Act. In examining the different factors to consider in eviction proceedings, the Court provided that '[t]he degree of emergency or desperation of people who have sought a spot on which to erect their shelters, would always have to be considered.'[79] The Court highlighted the

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[76] Ibid para 15.
[77] Ibid para 17.
[78] Ibid para 23. In evaluating *PE Municipality*, Liebenberg and Strauss state that:

> The PE Municipality judgement confirmed that property rights are not absolute and that a reconciliation must be sought between the constitutionally protected rights of landowners and the equally important right of people to have access to adequate housing (para. 19). It also elaborated on the state's duty to provide alternative accommodation to unlawful occupiers facing eviction. The case established that although there is no unqualified constitutional duty on local authorities to prevent homelessness, considerations of justice and equity require that a court be reluctant to grant an eviction order against 'relatively settled occupiers' unless it is satisfied that 'a reasonable alternative is available, even if only as an interim measure' (para. 28)

See: S Liebenberg and M Strauss 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' (2014) 13 *Planning Theory* 428, 435.
[79] *PE Municipality* (note 68 above) para 26.

consideration of alternative accommodation and stated that here 'it is important that the actual situation of the persons concerned be taken account of.'[80] This is also a substantive aspect of the enquiry. The Court further set out that another factor to consider in deciding whether an eviction would be just and equitable is the 'particular vulnerability of occupiers referred to in section 4 [of PIE] (the elderly, children, disabled persons and households headed by women).'[81]

In considering the role of courts in addressing systemic injustices, the Court stated that:

> The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.[82]

Though this statement is made in the context of eviction proceedings, it arguably applies to the role that courts can play more broadly, in addressing systemic injustices and unfairness in socio-economic rights cases.

The Court built on the requirements of the PIE Act and established the need for mediation and meaningful engagement between parties:

> the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.[83]

This requirement shows the connection between procedural and substantive aspects of justice and how they should complement each other. The Court stated that 'absent special circumstances it would not ordinarily be just and equitable to order eviction if proper

[80] *PE Municipality* (note 68 above) para 29. Dugard describes as transformative the way the Court recognised that where an eviction will result in homelessness and where people have been occupying land for a long time, an eviction should only be granted if alternative accommodation is provided. See: J Dugard 'Testing the transformative premise of the South African Constitutional Court: A comparison of High Courts, Supreme Court of Appeal and Constitutional Court socio-economic rights decisions, 1994–2015' (2016) 20 *The International Journal of Human Rights* 1132, 1135.
[81] *PE Municipality* (note 68 above) para 30.
[82] Ibid para 38.
[83] Ibid para 39.

discussions, and where appropriate, mediation, have not been attempted.'[84] This is an important new requirement set out by the Constitutional Court in this matter.

In conclusion the Court found that:

> in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.[85]

This illustrates how courts can pay attention to the specific context and circumstances of litigants, the challenges they face and their particular vulnerability, as well as whether a municipality has taken proper account of this through meaningful engagement, in deciding whether an eviction order would be just and equitable.

2.4.2 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg – expanding on the meaning of meaningful engagement

Following *PE Municipality*, the Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* provided more details for how the concept of meaningful engagement should be understood.[86] In this matter more than 400 occupiers of two inner city buildings in Johannesburg applied for leave to appeal against a decision of the Supreme Court of Appeal, which ordered their eviction.[87] This case raised the question of 'whether the City had made reasonable provision for housing for those thousands of people who were said to be living in desperate conditions in the inner city.'[88]

Two days after the Constitutional Court hearing, the Court ordered that the parties engage meaningfully with each other on certain issues.[89] In setting out the reasons for the engagement order, the Court referred to *PE Municipality* and how courts should encourage parties to engage

[84] Ibid para 43.
[85] Ibid para 59.
[86] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).
[87] Ibid para 1.
[88] Ibid para 3.
[89] Ibid para 5.

with each other to find solutions to problems.[90] The Court listed some of the objectives of meaningful engagement, as needing to determine:

> (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and, (e) when and how the city could or would fulfil these obligations.[91]

This exercise, particularly looking at the consequences of the eviction for occupiers, is a way of focusing on the context of the people who will be affected by the potential rights violation, here the right of access to housing. In explaining the importance of the need for meaningful engagement with people, before trying to evict them from their homes, the Court referred to the obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights' and specifically mentioned the rights to life and human dignity.[92] Again, as was seen in *Grootboom*, the interconnectedness and interdependence of rights is evident here. The Court further emphasised that the 'larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement.'[93] In conclusion, the orders of the Supreme Court of Appeal and High Court were set aside.[94]

2.4.3 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd – expanding the obligation to provide alternative accommodation

Another significant development in evictions is that the state's obligation to provide alternative accommodation applies not only when evicting people from state owned land but also when people are evicted from privately owned land. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* the Court had to decide if it would be just and equitable to evict 86 people from the respondent's property, and whether there was an obligation on the City to provide alternative accommodation if the eviction were granted.[95] The Court found that '[t]o the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner.'[96]

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[90] Ibid para 12.
[91] Ibid para 14.
[92] Ibid para 16.
[93] Ibid para 19.
[94] Ibid para 54.
[95] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 1.
[96] Ibid para 95.

The City's housing policy was held to be unconstitutional to the extent that it excluded occupiers of privately owned land from consideration for temporary accommodation.[97] Finally, the City was ordered to provide temporary accommodation to the occupiers who were to be evicted.[98]

2.4.4 Commando v City of Cape Town – location of temporary accommodation

In the recent case of *Commando v City of Cape Town*[99] the Court had to decide whether the 'duty of a municipality to provide temporary emergency housing extends to making temporary emergency housing available at a specific location.'[100] This is a critical issue because when people are evicted they can be uprooted and relocated far from work, school and other amenities. In this case, the City of Cape Town had provided temporary accommodation 15 km from the applicant's residences.[101] The crux of this matter was whether the City acted reasonably in how it determined the location of the temporary emergency accommodation offered to the applicants and 'in excluding temporary emergency accommodation entirely as a housing option in the inner city.'[102] This is in the context of growing gentrification and the inner city becoming increasingly unaffordable to live in. After analysing the applicable law and evaluating the evidence, the Court found the City of Cape Town's implementation of the National Housing Programme unconstitutional.[103] It is unconstitutional because, among other reasons, it 'declines to consider providing Temporary Emergency Accommodation in the inner city on a blanket basis without considering the circumstances of individuals.'[104]

This judgment makes a significant contribution to what the right of access to housing means in South Africa, in the context of dealing with the legacy of spatial apartheid that is still visible. This is especially critical for poor people and poor women who live on the outskirts of cities and have to travel long distances to work and school.

2.4.5 Reflections on eviction jurisprudence

The eviction jurisprudence of the courts has generally been well received. Together with the PIE Act and the provisions of section 26(3) of the Constitution, it provides strong protection for people who may face eviction. Dugard commends the Constitutional Court decision in

[97] Ibid para 95.
[98] Ibid para 104.
[99] *Commando v City of Cape Town* 2025 (3) SA 1 (CC).
[100] Ibid para 2.
[101] Ibid.
[102] Ibid para 28.
[103] Ibid para 116.
[104] Ibid.

Occupiers of 51 Olivia Road as being a transformative one.[105] She argues that 'the requirement in its interim engagement order for the government to meaningfully engage occupiers regarding alternative accommodation – has been widely celebrated as a progressive way to afford protection to those facing eviction while not subsuming the policy choices of the government.'[106] This is a good way of addressing the concerns around separation of powers, or showing deference to other branches of government in socio-economic rights cases. In discussing this case, Liebenberg and Strauss state that '[t]his judgement illustrates the significance of the principle of participatory, deliberative democracy in resolving conflicts involving different constitutional rights.'[107] It is especially important that poor and vulnerable people who are often the complainants in socio-economic rights cases, have the opportunity to participate in finding solutions, where their rights have been violated. In addition to this, the experiences of women within these poor and vulnerable groups should be heard. This is part of applying a gendered lens, discussed in the next section, and connected to the litigation strategy of organisation of clients, discussed in chapter 5.

The extension of the obligation to provide alternative accommodation to evictions from privately owned landed further illustrates that the need for housing for especially poor and vulnerable communities is being taken seriously.

2.5 Approaches to interpreting socio-economic rights that can help to better address poverty and inequality

Different approaches may help courts to better protect the socio-economic rights of the largely poor communities who rely on them. Courts have been criticised for not doing enough to play their role in the transformation of society and in addressing structural issues of poverty and disadvantage. This is largely related to them not attaching enough weight to the substantive aspects of the reasonableness enquiry, including the purpose and underlying values of socio-economic rights, and the context and circumstances of those whose rights have been violated. Though there has been some resistance to this, as shown in the critiques above, there is value in continuing to nudge the courts in this direction, as this may result in incremental changes in individual cases. The social, political and economic context in South Africa has also changed over time. Where there are systemic failures in the relevant sections of the state's ability to

[105] Dugard (note 80 above) 1139.
[106] Ibid.
[107] Liebenberg and Strauss (note 78 above) 437.

fulfil its obligations, the courts must step in to protect the socio-economic rights of the poor and vulnerable people who rely on them.

2.5.1 Interests and underlying purpose and values of rights

One alternative approach is to focus more on the interests that a right aims to protect and the purpose of that right. Liebenberg has made a strong argument for developing reasonableness review 'to ensure a more substantive engagement with the purposes and underlying values of socio-economic rights.'[108] She argues that the courts should 'make a conscious effort to develop the normative content of the various socio-economic rights [. . .] by considering the purposes and values which the rights seek to promote in the light of their historical and current socio-economic context.'[109] This approach allows for the purpose and underlying value of rights to be linked to the context in which the rights violation has taken place.

Wilson and Dugard argue that '[t]he Court's role is to identify the purposes underlying the specific rights in the form of the interests they seek to protect and advance [. . .] that is exactly what litigants come to courts for - in the hope that the court will assign their interests a measure of legal recognition.'[110] Many of the claimants in socio-economic rights cases are poor people who have an interest in having proper access to the goods and services guaranteed by socio-economic rights, which are necessary conditions for respect of their inherent human dignity.

This approach grounds the relevant right in the context of the interests it should protect 'while at the same time allowing the Court the necessary flexibility to assess whether or not the state has acted reasonably in response to those interests.'[111] They further argue that 'the interests driving the complaint - and the experiences of poverty and deprivation upon which they are based - are almost never properly defined and taken seriously.'[112] The proposed approach is more substantive than the current approach taken by courts, which is largely focused on procedural justice, with some substantive components.

2.5.2 Bringing more substantive considerations into the reasonableness enquiry

The reasonableness standard contains many procedural safeguards which assist in holding the state accountable to their socio-economic rights obligations. While this is necessary, it is not enough. The more substantive aspects of interpreting the content of socio-economic rights and

[108] S Liebenberg *Socio-Economic Rights. Adjudication under a Transformative Constitution* (2010) 179.
[109] Ibid 180.
[110] Wilson and Dugard (note 10 above) 670.
[111] Ibid 673.
[112] Ibid.

whether steps taken government are reasonable, such as the purpose and values underlying rights, the context of the complainant, and the impact of the rights violation, are often underused. There are different ways to focus on the more substantive aspects of the reasonableness enquiry.

The approach of developmental reasonableness has been suggested by Williams.[113] She develops this in the context of evaluating the *Mazibuko* decision. Her proposed approach is described as follows:

> The elaboration of reasonableness would be based on the transformative aspirations of the South African Constitution and the Constitutional Court's equality jurisprudence, with the central focus on redistribution. Most importantly, this would move the nature of the adjudication from a static application of bright-line legal standards to facts towards a more fact-sensitive, consideration of all conflicting considerations relevant to the case. Thus, in evaluating the socio-economic right in question – here water – a developmental meaning would take into account the Harksen factors (such as the position of the applicants, the history of the deprivation, and the importance of the right), the resources available and the needs of surrounding communities, with due regard for Parliament and other duly constituted policymakers.[114]

This approach 'can provide a basis for assessing whether the challenged policy is moving in the direction of the equality envisioned in the South African Constitution, central to which is redistributive justice.'[115] Similarities can be drawn between this approach and approaches such as applying an equality lens to assessing the socio-economic rights violations, and also paying more attention to context.

According to Liebenberg and Goldblatt, a jurisprudence on reasonableness that integrates a substantive equality perspective would include:

> (a) The historical and current social context in which the claimant group is situated. (b) The impact of the denial of access to the relevant socio-economic resource or service on this group…(c) The nature of the resource or service to which access is sought. Is it

[113] L Williams 'The justiciability of water rights: Mazibuko v. City of Johannesburg' (2010) 18 *Willamette Journal of International Law and Dispute Resolution* 211, 252.
[114] Ibid 252.
[115] Ibid.

accepted as a basic social need in South African law, comparative and international law?[116]

Considering these different factors, when assessing whether a socio-economic right has been violated, is a productive way of bringing a more substantive perspective into the reasonableness enquiry.

Giving more attention to the circumstances and context of the people who seek to have their socio-economic rights fulfilled; focusing more on the purpose and interests behind the rights protection; and looking at the particular impact of the rights violation on the people whose rights have been violated, can help courts to interpret socio-economic rights in ways that better respond to people's lived realities and assist with ensuring better access to the goods and services guaranteed by these rights. As will be seen below, these factors are also relevant to applying a gendered perspective to socio-economic rights interpretation.

The discussion in this section has shown how the standard of reasonableness review has developed largely to evaluate the state's conduct in fulfilling its socio-economic rights obligations. Though a big part of this involves looking at procedural issues such as whether the state has a plan; how the plan is being implemented; whether it is regularly reviewed; and holding government accountable for its responsibilities, it can also involve a consideration of context and the underlying values and purpose of rights. In the area of evictions, which make up a significant part of the right to housing cases, the need for parties to engage meaningfully with each other where rights may be affected and the provision of alternative accommodation, has also been examined. As demonstrated above, courts have often not paid sufficient attention to the substantive aspects of the reasonableness enquiry such as looking at the context of the rights violation and how it affects those in desperate situations. Finally, this section set out how socio-economic rights can be better interpreted to protect the needs of people who rely on them.

3. Feminist perspectives on the right of access to housing and basic services jurisprudence

In this section I set out how a feminist approach to socio-economic rights can be developed. I then examine selected cases, including some of those outlined above, from a feminist perspective, showing how courts have sometimes failed to pay enough attention to the particular circumstances of women; and examples of where they have done this well. When

[116] S Liebenberg and B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335, 358.

referring to a feminist perspective, I draw on Bartlett's description of 'feminist in a broad sense that encompasses a self-consciously critical stance towards the existing order with respect to the various ways it affects women "as women"'.[117] My aim is not to essentialise women's experiences nor to reinforce stereotypes, but to critically engage with whether the needs and realities of women are centred in socio-economic rights interpretation.

Using a gendered lens is necessary for socio-economic rights protection to more meaningfully address the conditions of poverty and inequality that poor women who rely on them face; and it is necessary to assist in addressing poor women's vulnerability to violence. As argued elsewhere in this thesis, better access to the goods and services guaranteed by socio-economic rights can assist in addressing poor women's vulnerability to violence and, showing the context and impact of lack of access to these goods and services, which can include vulnerability to violence could, in certain cases, strengthen socio-economic rights claims.

3.1 How to apply a gendered lens in the interpretation of socio-economic rights

Applying a gendered lens to socio-economic rights interpretation means interpreting rights in a way that shows an awareness that women and men experience life differently. This is largely because of social constructs around gender, the different roles occupied in society and what is often expected of women and men respectively. In addition to this, women's experiences are often made invisible or ignored. These different realities affect the ability to access and enjoy the goods and services guaranteed by the right of access to housing and related services.

Katharine Bartlett provides insightful guidelines for how the experiences of women can be brought to the surface in legal matters, through employing feminist legal methods.[118] Feminists are encouraged to ask 'the woman question'. Bartlett explains what it means to ask the woman question in law:

> In law, asking the woman question means examining how the law fails to take into account the experiences and values that seems more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may not be nonneutral in a general sense, but also 'male' in a specific sense.[119]

[117] K Bartlett 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829, 833.
[118] Ibid.
[119] Ibid 837.

Asking the woman question aims to uncover disadvantage based on gender.[120]

I propose that drawing on Bartlett's approach of asking the woman question, and bringing more substantive considerations into the reasonableness enquiry, as discussed above, can assist in applying a gendered lens to the interpretation of socio-economic rights.

This would mean examining the circumstances and context of women litigants, the impact of a particular rights violation on them, and how they are affected by the lack of access to housing and basic services. It would also mean considering the need to promote racial and gender equality, as part of the underlying purpose and values of rights. It would further require looking at the experiences of women and the intersecting disadvantage that they can face, for example, on grounds of socio-economic status, race and gender. For example, the racial disadvantage that a poor black woman experiences will affect how she experiences gender and socio-economic disadvantage. These experiences are layered.

In considering the context of the complainants when applying a gendered lens to interpretation of socio-economic rights, the theory of multi-dimensional substantive equality, as discussed in chapter 2, can assist.[121] This rich contextual analysis, using multidimensional substantive equality, includes considering conditions that can make poor women vulnerable to violence.

Using a claim related to the right of access to housing as an example, with regard to the element of distribution, one would have to ask if the woman applicant is unemployed or in a low paying job.[122] One would also need to ask how much time she spends on work in the home. These realities can affect a woman's financial resources and ability to pay for accommodation; her ability to maintain a home; and the choices that may be available to her if she wants to leave an abusive relationship.

Acknowledging and valuing time spent on unpaid work in the home, while being connected to the element of distribution, is also connected to the dimension of difference and diversity. There is a need to do more than accommodate difference. We should also value the different roles that women occupy. Courts need to ask what structural issues may disadvantage women in specific roles. This is further connected to the element of recognition as it is often women

[120] Ibid 846.

[121] See also: N Fraser 'Social exclusion, global poverty and scales of injustice: rethinking law and poverty in a globalising world' (2011) 3 *Stellenbosch Law Review* 452; S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712; and, C Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441, 462.

[122] In chapter 1, I discuss the gendered nature of poverty.

who do this unpaid work, and these roles are not always respected. Poor black women would experience different kinds of misrecognition in these roles.

The ability of women to participate in decision making structures in their communities, related to the provision of low-cost housing, also needs to be considered. This is because, when leadership structures are patriarchal, women are often invisible or not given the opportunity to be heard in consultation processes and decisions that affect them.

Further there should be an examination of the actual social and economic conditions of women. This assessment would also include any power imbalances in relationships, as a result of gendered roles, financial dependence and earnings and how this can make women more vulnerable to violence. Lack of access to basic resources can also act as stressors in households and lead to increased tensions, which could result in violence.[123]

Finally, different women will have different experiences which need to be acknowledged. The intersecting forms of disadvantage that women face should be taken into account in applying a gendered lens to socio-economic rights. The largely poor, black women who seek to claim their socio-economic rights, will have unique experiences that are affected by the class, race and gender disadvantage that they face.

Below I show where courts have failed to use these tools to apply a gendered lens in socio-economic rights cases, and then provide a few examples of how courts have applied a gendered lens, which demonstrates the possibilities that exist for making the experiences of women more visible in socio-economic rights cases.

3.2 Examples of where courts and litigants have failed to apply a gendered lens

Courts have sometimes failed to apply a gendered lens by failing to pay sufficient attention to the specific context of poor women. It is not enough to look at the broad context of the group of people who are claiming that their rights have been infringed. The specific contexts of subgroups of vulnerable people need to be surfaced. Though *Grootboom* focused on the poor as a vulnerable group, the court failed to highlight the specific circumstances and special needs of sub-classes of poor people such as 'those with physical disabilities, those with HIV/AIDS, those incarcerated by the state, women, and children.'[124] Chenwi and McLean suggest that

[123] This is discussed in chapter 2, 59.

[124] L Chenwi and K McLean 'A woman's home is her castle? Poor women and housing inadequacy in South Africa' (2009) 25 *South African Journal on Human Rights* 517, 523. See also: B Goldblatt 'Social and economic rights to challenge violence against women – examining and extending strategies' (2019) 35 *South African Journal on Human Rights* 169, 174.

more work is needed in outlining the specific needs of women and other vulnerable groups to address the disadvantage faced by them.[125] This would translate into a better contextual analysis, which is part of applying a gendered lens to socio-economic rights.

The Constitutional Court in *Mazibuko* also did not pay attention to the specific needs and circumstances of the women applicants, as part of evaluating the context of the rights violation. The gendered nature of the claims of poor women to improved access to water was not appreciated.[126] This is an aspect of the context that should have been considered. Women's vulnerability to violence in situations where they have lack of access to sufficient water was also not factored into the Court's evaluation.

It is not only the responsibility of the courts to apply a gendered perspective. In the context of *Mazibuko*, Nankan argues that the parties could have brought a gendered perspective to this matter. They contend that '[g]rounding the reality of leading applicants who are women, that they bear the greater disproportionate burden of water collection and management, with the need to scrutinize policy for potential gendered impacts would be a start. This includes amicus curiae interventions that are explicitly gendered.'[127] This is similar to other arguments made in this chapter about how courts can be guided by how parties frame matters and the role that litigants have in advancing a gendered perspective.

Sujee has interrogated the lack of a gendered lens from the perspective of arguments made by the parties in *Grootboom*:

> The arguments advanced by the parties did not raise the issue of gender. The starting point here should have been that the lead applicant was a woman. Ms Irene Grootboom could have provided the perfect narrative of a poor Black woman living in an informal settlement, her challenges, which would include the lack of adequate water and sanitation, the risk to her safety and the lack of dignity when she was evicted without any notice and consultation.[128]

Addressing the rights violation from a gender perspective provides a way to surface other concerns affecting women's lived realities, such as their vulnerability to violence. In Ms

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[125] Ibid.
[126] L Gerntholtz and J MacLeod 'Gender and socio-economic rights, the case of gender-based violence and health' in M Langford et al (eds) *Socio-Economic Rights in South Africa: Symbols Or Substance?* (2013) 365, 367.
[127] S Nankan 'Bridging the Gender Participatory Gap in Water and Sanitation Rights Adjudication' (2022) 14 *Journal of Human Rights Practice* 305, 322.
[128] Z Sujee 'The need for feminist approaches for housing cases in South Africa' (2021) 24 *PER / PELJ* 1, 11.

Grootboom's situation, her context would include that she is a poor black woman living in an informal settlement. Interrogating this reality, would allow courts to consider the impact of lack of proper housing and basic services on her, including how this lack of access can make poor women vulnerable to violence.

3.3 Examples of where courts and litigants applied a gendered perspective

3.3.1 Paying attention to the context and impact of the rights violation on women

More than fifteen years after the *Grootboom* decision, with numerous judgments in-between, came *Dladla v City of Johannesburg,* another case that dealt with the right of access to housing, in this case alternative accommodation after an eviction.[129] I have chosen to discuss this case because of how the amicus made specific submissions to the court on the impact of the rights violation on women, including their vulnerability to violence.

The applicants were living in temporary accommodation provided by the City after an eviction order.[130] The constitutionality of certain rules related to living in the shelter (temporary accommodation) was challenged in this matter.[131] The rules that were challenged provided as follows:

> The lockout rule required that the applicants be out of the Shelter between 08h00 and 17h30 every day and return by 20h00, or face the prospect of not being allowed to enter the Shelter. The family separation rule prohibited men and women from living together through the provision of single-sex dormitories. It also separated children from their caregiver depending on their age.[132]

The effect of these rules were that heterosexual couples were separated and women would have to take care of children at night because 'girls and boys under the age of 16 had to stay with their mothers.'[133] The lockout rule also meant that '[t]hose who were unemployed were rendered vulnerable to violence as they had to wait outside or spend time in parks during the day.'[134]

Dladla is a good example of how the parties before the court can call attention to the particular impact of a socio-economic rights violation on women. In *Dladla*, the first amicus made

[129] *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC).
[130] Ibid para 1.
[131] Ibid para 3.
[132] Ibid.
[133] Ibid para 12.
[134] Ibid para 13.

submissions on the impact of inadequate housing on women, including their vulnerability to gender-based violence.[135] They submitted that 'women's access to adequate housing is critical to their enjoyment of other human rights, and a gendered perspective must be adopted in order to give effect to women's right to adequate housing.'[136] This argument is relevant to how one should apply a gendered lens when interpreting socio-economic rights. Their argument was set out as follows:

> Because women are primarily responsible for taking care of the home, they are particularly vulnerable to gender-based violence outside the home, and adequate housing is necessary for their social empowerment. CALS concludes that the lockout and family separation rules are coercive and demeaning, and that they disproportionately affect women, as women are burdened by any disruptions in family life caused by the rules. The rules, therefore, violate international human rights law in a number of ways.[137]

After evaluating the evidence, the Constitutional Court found that the rules infringed the rights to dignity; freedom and security of the person; and privacy.[138] Disappointingly the Court did not address the gendered impacts of lack of proper access to housing.

This is highlighted by Sujee's examination of the decision in *Dladla*. She highlights how despite arguments made by the amicus on challenges faced by women as a result of lack of proper access to housing, 'the Court failed to mention the limitations experienced by women.'[139] This is an example of how courts can make the experiences of women invisible. As Sujee argues, *Dladla* presented an opportunity for the court 'to add a gendered perspective to the jurisprudence on the right to adequate housing', which it did not do.[140] This shows that courts are not always willing to examine the context and impact of a socio-economic rights violation on women, even where arguments to this effect have been presented to them. The resistance to applying a gendered lens should not deter litigants from making these arguments, as it may prompt a court to consider a different approach in the future.

In contrast to *Dladla*, the High Court judgment in *Mazibuko* is a good example of how courts can apply a gendered lens in the assessment of a socio-economic rights violation. In assessing

[135] *Dladla* (note 129 above) para 29.
[136] Ibid para 29.
[137] Ibid.
[138] *Dladla* (note 129 above) para 54.
[139] Sujee (note 128 above) 20.
[140] Ibid 21.

the reasonableness of the prepayment meters, the High Court highlighted the disproportionate impact that lack of access to water has on women. It stated that:

> South Africa is a patriarchal society. Many domestic chores are performed by women. Many households in poor black areas are headed by women. Phiri Township is no exception. It is understandable therefore that the first applicant travelled 3 kilometers to access water on behalf of her household. In this context it seems to me that the prepayment meters discriminate against women unfairly because of their sex. Discrimination on the basis of sex is outlawed. It is unconstitutional and unlawful.[141]

This is an apt example of how a court has applied a gendered lens in assessing whether there has been a violation of a socio-economic right. It did this by focusing on the particular effect that lack of access to water, in this case, has on women, given their circumstances and lived realities. And by considering the context of litigants in its evaluation of the matter before it.

The High Court also examined the particular circumstances of the community of Phiri, in assessing whether the amount of free water allocated was reasonable. These realities include the burden of poverty and HIV/AIDS. In evaluating the expert evidence, the impact of HIV on women was highlighted:

> In general terms in South Africa women carry a disproportionate HIV related burden. This is because women are more susceptible to HIV infection, more vulnerable to sexual pressure and they are often the primary care-givers to PLWHA.[142]

This statement is in the context of people living with HIV needing more water for daily activities, and people caring for people living with HIV also needing better access to water.[143] Here looking at the context also allowed for the links between poverty, HIV/AIDS, lack of sufficient water and women's vulnerability to violence to be identified.

In conclusion, the High Court found that the provision of 25 litres per person per day was unreasonable, and ordered the City to provide a free basic water supply of 50 litres per person per day.[144] Though this was later overturned on appeal, it is still a good illustration of how courts can apply a gendered lens by considering the context of the women applicants and the impact that the socio-economic rights infringement has on them.

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[141] *Mazibuko* High Court (note 28 above) para 159.
[142] Ibid para 173.
[143] Ibid.
[144] Ibid para 181.

Another good example of applying a gendered lens when assessing a socio-economic rights violation is the High Court case of *Beja v Premier of the Western Cape*.[145] This case examined the context and impact of lack of proper sanitation on women and shows the possibilities that exist for how courts can take the impact of socio-economic rights violations on poor women seriously. It also illustrates how reference to women's vulnerability to violence can strengthen a socio-economic rights claim, and how remedying the violation can reduce women's vulnerability to violence.

This matter related to the provision of unenclosed toilets in the Makhaza informal settlement, in the Western Cape.[146] The applicants argued that this violated a number of rights including the rights to equality, human dignity, freedom and security of the person, and the right of access to housing.[147]

In setting out the background facts, the Court described an incident that happened to the first applicant:

> One evening in April 2010, Mrs Beja, the first applicant, a 76 years old female, used one of the unenclosed toilets to relieve herself covering herself with a blanket. Once she relieved herself she got up and started approaching her dwelling when she was attacked and stabbed. She received medical treatment for the injuries sustained.[148]

This is an important way of calling attention to the context and circumstances of the applicant, who in this case is a female. Here one can see the particular impact of the socio-economic rights violation on a woman.

The Court did an in loco inspection of the site. Among its observations were that the communal toilets were in a bad state, were dirty and underserviced.[149] Some residents lived far from the nearest toilets and the area had no street lights.[150]

In addressing one of the arguments raised by the respondents, that the parties had agreed that the applicants would enclose the toilets themselves, the Court found a number of flaws in this alleged agreement. The Court highlighted that the requirement of reasonableness, in section 26(2) of the Constitution, includes that a programme must take account of 'the needs of the

[145] *Beja v Premier of the Western Cape* [2011] 3 All SA 401 (WCC).
[146] Ibid para 7.
[147] Ibid.
[148] Ibid para 23.
[149] *Beja* (note 145 above) para 30.
[150] Ibid para 30.

most vulnerable and desperate.'[151] Again the Court drew attention to the particular impact that this rights violation had on women:

> The City failed to take into consideration the gender impact on women and girls both in terms of different biological needs as well as their vulnerability to higher levels of gender-based violence. All of these are to be considered as a violation of fundamental rights of human beings and cannot be waived by the agreements, as alleged here.[152]

This paragraph shows the link between women's vulnerability to violence, violation of human rights and lack of access to basic services. In examining whether there has been a violation of constitutional rights, the Court quoted from an affidavit of a female resident of one of the areas where there are communal toilets:

> When it is time for me to relieve myself, I walk to my sister's house in the upgraded Makhaza section and the walk takes me twenty minutes. I can only embark on this walk when nature calls during the day. At night I have to make do with whatever is available whether it is a carrier bag or any other container to relieve myself.[153]

This is another important way of calling attention to the specific context of women, in assessing whether there has been a violation of a socio-economic right, as well as the impact of lack of proper sanitation on women. It should not be the case that a basic human need, such as going to the toilet, places poor women at risk in this way.

After assessing all the evidence, the Court found that the provision of unenclosed toilets violated the rights to dignity, freedom and security of the person, privacy, environmental rights, the right of access to housing, and the right of access to health care, food, water and social security.[154] The inter-relatedness and interconnectedness of different rights can be seen in the number of rights that were found to be violated in this case. This decision demonstrates how applying a gendered lens can contribute to a positive outcome.

[151] Ibid para 102.
[152] Ibid.
[153] Ibid para 136.
[154] Ibid para 150.

3.3.2 Examining the intersecting forms of disadvantage that women face when interpreting socio-economic rights

Mahlangu v Minister of Labour[155] dealt with the right to social security, and is discussed in this section to illustrate how the Constitutional Court has applied a gendered lens to socio-economic rights interpretation by examining the intersecting forms of disadvantage that poor, black women in South Africa experience and how this affects their rights. This intersectional approach is linked to the idea of paying more attention to context as it allowed for a critical examination of the specific context of the women litigants and the disproportionate impact the legislative exclusion had on them.

In this case the Court had to decide on the constitutionality of a section of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), which excluded domestic workers from the definition of employee for the purpose of receiving compensation in terms of COIDA.[156] The facts giving rise to this matter were that Ms Mahlangu was employed as a domestic worker in a private house hold and 'drowned in her employer's pool in the course of executing her duties.'[157] Ms Mahlangu's daughter, the first applicant, was financially dependent on her mother and sought compensation in terms of COIDA, after her death.[158] The Constitutional Court was asked to confirm the declaration of invalidity of the impugned provision, made by the High Court.

The applicants and amici argued that the exclusion of domestic workers from the benefits of COIDA amounted to indirect discrimination on the grounds of race and gender, because domestic workers are predominantly black women.[159] The provision was challenged on the basis that it violates not only the right to equality, but also the right to dignity and the right to social security. After examining South Africa's international law obligations, the majority

[155] *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC). Another case that is a good example of how courts can take into consideration intersecting forms of disadvantage that people face in South Africa is *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC). Here the court found that discrimination on the grounds of poverty amounts to unfair discrimination. In examining evidence related to allocation of police resources, it noted that ''[i]t is a well-known fact that for historical reasons poorer Black people tend to live in informal settlement characterised by lower levels of service provision.' Unfortunately, in this case, despite arguments presented by amicus on the specific disadvantage faced by poor women, the court stated that it appreciated the contribution of the amicus to the proceedings but that discrimination challenges were brought on the ground of race and poverty and not gender. The findings related to the intersecting disadvantage on the grounds of race and poverty are welcomed, but it is disappointing that the specific gender disadvantage was not appreciated.
[156] Ibid para 6.
[157] Ibid para 7.
[158] Ibid para 8.
[159] *Mahlangu* (note 155 above) para 18.

judgment found that the international law instruments discussed 'would regard benefits in terms of COIDA as a component of the fundamental right to social security.'[160]

In assessing the reasonableness of excluding domestic workers from COIDA, the Court held that:

> In considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds. To allow this form of state-sanctioned inequity goes against the values of our newly constituted society namely human dignity, the achievement of equality and ubuntu. To exclude this category of individuals from the social security scheme established by COIDA is manifestly unreasonable.[161]

This paragraph calls attention to how vulnerability experienced by some groups of people can be aggravated by intersecting forms of oppression and disadvantage, and how the values of human dignity and equality implore society to address this. It also strengthens and adds nuance to the substantive requirement of making provision for those in desperate need, established in *Grootboom*. This relates back to my earlier argument about courts needing to apply more of the substantive aspects of the reasonableness enquiry.

The Court stressed the importance of applying an intersectionality approach as a legal tool and how this can advance substantive equality.[162] An intersectionality approach requires:

> that courts examine the nature and context of the individual or group at issue, their history, as well as the social and legal history of society's treatment of that group. Thus, this Court is required to consider the particular history of social security in South Africa, as it relates to domestic workers. Furthermore, this Court must consider the historical disadvantage that Black women have faced as a group.[163]

Evaluating a socio-economic rights violation in this intersectional way could help to make rights protection more relevant to the lived realities of people whose rights have been violated. This approach allows a contextual evaluation that looks at the intersecting identities of the claimants and how this affects the disadvantage that they experience, and it provides evidence

[160] Ibid para 41.
[161] Ibid para 65.
[162] Ibid para 79.
[163] Ibid para 95.

supporting the criterion of desperate need. Atrey provides a compelling exposition of how different identities intersect and result in distinct forms of disadvantage.[164] This disadvantage 'is not defined by isolated or stray incidents but by its systemic or structural nature'.[165] For the purposes of this thesis, the distinct forms of disadvantage that poor black women in South Africa face, must be factored in when courts are interpreting socio-economic rights, to assist with providing better access to the goods and services guaranteed by these rights and to alleviate their experiences of gender-based violence.

Applying an intersectional approach contributed to the Court's conclusion that the exclusion of domestic workers from COIDA was unreasonable and led the Court to find the impugned section of COIDA constitutionally invalid.[166]

Though violence against women was not a factor in this case, extending social protection, as happened here, assists in addressing poverty and as I have argued throughout this thesis, addressing women's poverty through socio-economic rights protection is part of what is needed to address poor women's vulnerability to violence.

4. Equality and socio-economic rights

The right to equality and the value of equality can be used to strengthen socio-economic rights claims and outcomes of decisions. Equality is one of the underlying values of the Constitution. This can be emphasised more when courts apply a gendered lens to interpreting socio-economic rights, by drawing on the purpose and values that underlie the protection of rights. Where the right to equality is violated it can also enhance a socio-economic rights argument, and add more weight to a claim that the state's action is unreasonable.

As discussed in chapter 2, South Africa is committed to a vision of substantive equality. Albertyn sets out the characteristics of substantive equality, taken from Constitutional Court jurisprudence, that give it transformative potential, as:

> an emphasis on understanding inequality within its social and historic context; a primary concern with the impact of the alleged inequality on the complainant; a recognition of difference as a positive feature of society; and attention to the purpose

[164] S Atrey *Intersectional Discrimination* (2019) 41.
[165] Ibid.
[166] *Mahlangu* (note 155 above) para 131.

of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systemic subordination or disadvantage.[167]

Attention is drawn to the principles of anti-subordination and anti-disadvantage, as an important part of the work of achieving transformative ends.[168]

Another way that equality claims can strengthen socio-economic rights claims is through viewing gender-based violence as a form of discrimination. As discussed in chapter 1, this has developed in international law, through the work of the CEDAW Committee. Gender-based violence is described as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'[169] Applying this to socio-economic rights, courts would need to consider how violence against women affects women's ability to access and enjoy housing and basic services. The focus of my thesis however is how better socio-economic rights protection can assist with addressing poor women's vulnerability to violence.

4.1 An example of how the right to and value of equality can strengthen a socio-economic rights claim

Khosa v Minister of Social Development, dealt with the right to social security.[170] Here the Court drew strong connections showing the importance of the protection of socio-economic rights for building a society based on human dignity, freedom and equality.

Although it does not deal with gender equality, *Khosa* provides a useful illustration of how the right to and value of equality can be used to support and strengthen an argument related to socio-economic rights.[171] This case dealt with a challenge to the constitutionality of sections of the Social Assistance Act 59 of 1992 (then applicable), which reserved certain social grants for South African citizens.[172] It was argued that the right to social security is conferred on everyone and the impugned provision unfairly discriminates against permanent residents.[173]

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[167] C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253, 258.
[168] Ibid 260.
[169] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 19' (29 July 1994) UN Doc HRI/GEN/1/Rev.1.
[170] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).
[171] Ibid.
[172] Ibid para 1.
[173] Ibid para 39.

In evaluating the approach to be taken to socio-economic rights claims, the Court highlighted how these rights are closely linked to the founding values of the Constitution, human dignity, equality and freedom.[174] The value of equality is seen to be implicit in socio-economic rights being available to 'everyone', as per the wording of sections 26 and 27 of the Constitution.[175] The Court embarked on the reasonableness enquiry as set out in the other socio-economic rights cases discussed above. The Court found that 'when the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights' they also have to be considered in the evaluation of reasonableness.[176] The Court further explained that, in this case, the social security scheme put in place to fulfil the state's section 27 obligations also raised the issue of unfair discrimination.[177] It was stressed that 'if the means chosen by the legislature to give effect to the state's positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account.'[178] The Court later provided that the right to social assistance is conferred on everyone and the exclusion of permanent residents from this protection directly implicates the right to equality.[179]

This presents an opportunity to bring arguments related to equality into a court's assessment of whether the fulfilment of a socio-economic rights obligation meets the requirement of reasonableness. In this case, the value of equality and the right to equality were relied upon in the assessment of whether section 27 had been violated. This case, however, dealt with the exclusion of a minority group from existing protection provided by the state, and extended protection to this group. It wasn't an assessment of whether the content of the provision of social assistance was reasonable. But it does provide room for bringing arguments related to equality, including gender equality, into socio-economic rights cases.[180] There is value in doing this, despite that the finding could sometimes be made on the basis of equality alone. Naming the specific socio-economic rights violation and its impact on women makes it visible. It also gives guidelines to the state on how to pay attention to needs and circumstances of poor women and the impact of lack of access, in formulating policies and legislation.

[174] Ibid para 40.
[175] Ibid para 42.
[176] Ibid para 44.
[177] Ibid.
[178] Ibid para 45.
[179] Ibid para 49.
[180] After the evaluation of whether section 27 was violated the court proceeded to look at whether the exclusion of permanent residents constituted unfair discrimination in terms of section 9. This will not be discussed here, as it is not the focus of this thesis.

In discussing the purpose of providing for the right of access to social security, the Court's position is that:

> The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.[181]

It is clear that the protection of socio-economic rights is a vital part of building a society where the inherent dignity of every person is respected and everyone can experience freedom and equality.

This case is a good example of how the right to equality and socio-economic rights can support and reinforce each other. The Court may not have dealt specifically with women's particular needs, but did make some progressive statements.[182] Goldblatt argues that if the right to equality is used with the right to social security, this might make the court more willing to require increased government spending on social security.[183] It can encourage courts to be more rigorous in holding the state to its socio-economic obligations, if they can see how protecting these rights is connected to other rights and to the underlying values of the Constitution. Again, we can see how calling attention to the interconnectedness of rights could potentially strengthen women's socio-economic rights claims.

Goldblatt argues that the right to social security needs greater exploration by feminists and that we should have a vision of something more inclusive and transformatory.[184] This would entail not only focusing on material needs but also on the dignity and choices available to women; and, should also be involved in 'subverting existing gender responsibilities such as care of children, the elderly and the ill.'[185] This is similar to using a multi-dimensional substantive equality approach in applying a gendered lens to socio-economic rights, discussed above.

Khosa has also been used to illustrate how socio-economic disadvantage is in itself an assault on a person's humanity, here the consequences of exclusion were found to be not only socio-

[181] Ibid para 52.
[182] B Goldblatt 'The right to social security – Addressing women's poverty and disadvantage' (2009) 25 *South African Journal on Human Rights* 442, 454.
[183] Ibid 457.
[184] Ibid 466.
[185] Ibid.

economic but also had a stigmatizing effect.[186] The way in which socio-economic rights in our constitution are qualified, but the right to equality is immediately realisable, is highlighted by Fredman, for this reason equality claims could arguably strengthen socio-economic rights claims.[187] Though Fredman here is focusing on right to equality arguments, it is clear from *Khosa*, as discussed above, that where the right to equality is violated, that is also to be taken into account in the assessment of whether the state has acted reasonably in fulfilling its socio-economic rights obligations.

4.2 Where courts have missed an opportunity to use equality to strengthen the interpretation of socio-economic rights

The Constitutional Court in *Mazibuko* could have considered how the value of substantive equality is implicated by the lack of access to water, however it failed to do so. Liebenberg shows how the Court could have viewed some of the issues in *Mazibuko* through an equality lens:

> [I]t could be argued that the water scheme introduced by the City of Johannesburg failed to display equal concern for the Phiri residents by not taking into account how a limited free basic water supply combined with the pre-paid water meter impacted particularly harshly on them, given their social and economic realities. This included the prevalence of larger households than the average on which the free basic supply was calculated, the depth of poverty in the community, and the high HIV/AIDS burden it carried.[188]

The disproportionately negative impact that a lack of sufficient water has on women, who fulfil the majority of caring roles, could arguably also be included in this assessment and thus strengthen the claim.[189] These factors are all relevant to the reasonableness review. They form part of examining the context and impact of a socio-economic rights violation, and of considering the value of equality, as one of the underlying values of rights protection.

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[186] S Fredman 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) 3 *Stellenbosch Law Review* 566, 579.
[187] Ibid 585. See further: S Liebenberg 'Toward an equality promoting interpretation of socio-economic rights in South Africa' (2015) 2 *South African Law Journal* 411, 415.
[188] Ibid 431.
[189] Ibid 432. See also: B Goldblatt 'Social and economic rights to challenge violence against women – examining and extending strategies' (2019) 35 *South African Journal on Human Rights* 169, 175.

Albertyn has also examined how the Constitutional Court's approach to the equality analysis in *Mazibuko* was limited.[190] She states that:

> The equality analysis is brief. The comparative nature of equality, context and impact are all present, but narrowly defined. The equality question is defined as a comparison of the impact of policy provisions that address payment rates and consequences. The nature of disadvantage is not poverty, but race (poverty is not a permitted, prohibited ground). Gender was not argued, and is absent. The long-term remedial aspects of the policy in relation to overcoming apartheid inequalities are broadly stated, thus justifying differential policies as a form of substantive equality. The context is thus the nature and purpose of the policy in relation to scarce water, rather than the actual conditions of poor people's (and women's) lives in a situation of insufficient water.[191]

The Constitutional Court could have paid more attention to the particular impact of lack of access to sufficient water on women. Above it is shown how the High Court did this. Applying a gendered lens could have strengthened the arguments that the state's policy was unreasonable.

Even if, after an evaluation of the different factors, a court does not find the state's actions / policies unreasonable, it is still critical from a symbolic and advocacy perspective that the needs and circumstances of women are brought to the surface in socio-economic rights cases, and are not left invisible and on the margins. This could also contribute to a change in approach in some cases.

Courts are also guided by the arguments presented by the parties before them. In the applicant's submissions in the Constitutional Court, they did argue that the right to equality was violated, but the focus was on racial equality and the difference between rich and poor people.[192]

5. Conclusion

This chapter started with an overview of the Constitutional Court's socio-economic rights jurisprudence. This is followed by a critique of aspects of the jurisprudence; and then proposes

[190] C Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 591, 608.
[191] Ibid 608.
[192] *Mazibuko v City of Johannesburg* Applicant's Submissions in Constitutional Court, para 301.

different approaches which can assist with interpreting socio-economic rights in a way that better addresses the poverty and disadvantage experienced by the people who rely on them.

The suggested approaches are also helpful for developing an approach to socio-economic rights that addresses the specific needs and circumstances of poor women. The next section sets out how a gendered lens can be applied to socio-economic rights interpretation, and why this is important for women in general and for women's vulnerability to violence in particular. I argue that courts can apply a gendered lens by examining the context of women litigants, the impact of the rights violation, the underlying values and purpose of rights, and by paying attention to the intersecting forms of disadvantage that women can face. The theory of multi-dimensional substantive equality is applied to violence against women, as part of examining the context of women litigants. I then provide examples of where courts have failed to pay attention to the disproportionate impact that a rights violation has on women; and also examples of where they have done well in bringing women's issues to the surface, including poor women's vulnerability to violence. My key goal has been to illustrate that applying a gendered lens is important to better protect the socio-economic rights of women, but as this chapter has shown, applying a gendered lens can also strengthen the interpretation of socio-economic rights more broadly.

Finally, I showed how the value of and right to equality can be used to strengthen women's socio-economic rights claims. I provide examples of where the courts have used equality as a part of its evaluation of whether the state has complied with its socio-economic rights obligations; and where the courts have missed the opportunity to do this well.

CHAPTER 5 – USING THE LAW TO BRING ABOUT SOCIAL CHANGE IN THE LIVES OF POOR WOMEN

1. Introduction

The complex relationship between law, socio-economic rights litigation, and social change is the focus of this chapter. This chapter is necessary because, throughout this thesis I examine how the law and courts can better protect the socio-economic rights of women, but this happens within a specific legal, social and political context. This influences the kinds of change and impacts that can result, and the conditions that may increase the likelihood of bringing about meaningful change in the lives of poor women. I specifically examine the limits of using the law or courts to bring about social change, and what can and has been achieved despite these limits. In this chapter I aim to address these issues from the perspective of the role of socio-economic rights litigation in the lives of poor women in South Africa. I note that the experiences of women are largely absent in the literature on using law for social change and aim to centre these experiences to explore how litigation can better assist to address the conditions of poverty, disadvantage and vulnerability to violence of women in South Africa.

I start by setting out the broad debates about what transformative constitutionalism means in South Africa and the extent to which it has achieved or started to achieve its goals. I do this because I view transformative constitutionalism as providing the framework for working towards social change in South Africa. This is followed by a section that examines the literature and debates on socio-economic rights litigation in South Africa: the limits of what it can do in bringing about social change, and the different impacts that litigation can have, despite its limits. I then examine how litigation can be used in conjunction with other strategies to bring about social change, and finally turn to analysing how litigation can be better done to increase the likelihood of successful cases and for litigation to thus result in positive change in the lives of poor women who seek to protect their socio-economic rights.

When I refer to social change in this chapter, I mean change in an egalitarian direction, that improves the social and economic conditions of the people who come to court to protect their socio-economic rights, and change more broadly in the conditions of lives of poor communities, who are largely the ones who lack proper access to the goods and services guaranteed by socio-economic rights. In this respect, I view changes in law, policies, attitudes and approaches of the state which move closer to the realisation of socio-economic rights, as a

part of social change.[1] This relates to the different kinds of impacts that decisions can have, which will be discussed later in this chapter.

2. Transformative constitutionalism

The concept of transformative constitutionalism was briefly discussed in chapter 2 in the context of the evaluation of substantive equality in South Africa. This concept was coined by Karl Klare, who describes it as:

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[2]

As is evident in this quote, there is a direct link between the idea or project of transformative constitutionalism and social change in South Africa. The project of transformative constitutionalism is thus one of the ways in which the law, and especially the courts, can be used to move towards a more egalitarian society. The courts are not expected to do this on their own, and it would not be possible for courts to achieve this alone. The legislature and the executive also have important roles to play in this process.[3]

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[1] The Atlantic Philanthropies, an international foundation, which supported strategic public interest litigation in South Africa between 1994 and 2013, commissioned a research report (the Atlantic Philanthropies report) examining the relationship between public interest litigation and social change in South Africa.
The Atlantic Philanthropies report looks at the different ways that litigation can be used for social change, including by conservative groups. It states that:

> There is nothing necessarily progressive or egalitarian inherent in a culture of rights. The US experience demonstrates that courts and the language of rights can be even more effective at preventing transformation than assisting it. The formalism of South Africa's legal tradition and the incremental common law heritage of judges mean that courts are often also quite conservative.

This is a good reminder for those who seek to use law for social change that different interest groups can do this, and just as some organisations try to use the law for progressive change others may use it with more conservative agendas. See: S Budlender, G Marcus and N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' 2014 The Atlantic Philanthropies.
This report is a revised and expanded version of an earlier report released in 2008. See: G Marcus and S Budlender 'A strategic evaluation of public interest litigation in South Africa' 2008 The Atlantic Philanthropies.

[2] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.

[3] The role of courts in this process is also related to the participatory element of South Africa's democracy, discussed below.

For Pius Langa, a former Chief Justice of the Constitutional Court, 'the core idea of transformative constitutionalism [is] that we must change.'[4] Langa highlights that this must involve all three branches of government:

> Widespread transformation of economic and social conditions is beyond the powers of the courts alone. Only when our judicial commitment is coupled with legislative reform and appropriate executive action can the vast disparities that continue to exist in South Africa be eradicated.[5]

Langa describes transformation as 'a social and an economic revolution.'[6] Langa views the economic aspect of transformative constitutionalism as the need to provide equitable services to all and 'the levelling of the economic playing fields that were so drastically skewed by the apartheid system.'[7]

The socio-economic rights enshrined in the Constitution are thus also a part of economic transformation. When I refer to economic transformation, building on Langa's definition, I mean, the provision of quality basic services to all people in South Africa and a disrupting of the unequal distribution of economic resources.

Transformative constitutionalism has been viewed and interpreted in different ways. Brickhill and Van Leeve have explained their understanding of the concept as follows:

> Transformative constitutionalism envisages a meaningful improvement in the material conditions of people's lives together with real change in legal culture. The content and implementation of transformative constitutionalism, therefore, cannot be considered in the abstract, but must be informed by actual socio-economic conditions.[8]

This is a helpful way of understanding transformative constitutionalism as not only requiring material changes in people's lives, but also needing to be informed by the lived realities of the people whose social and economic conditions it aims to change for the better. When South Africa became a democracy there was a hope that the new constitutional framework would enable a decline in poverty and inequality.[9] Unfortunately the social and economic conditions

[4] P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 351, 352.
[5] Ibid 358.
[6] Ibid 352.
[7] Ibid.
[8] J Brickhill and Y Van Leeve 'Transformative constitutionalism – Guiding light or empty slogan?' 2015 *Acta Juridica* 141, 143.
[9] Ibid 144.

of the lives of many people in South Africa are still characterised by poverty and inequality. Legislative and policy measures that have been introduced to give effect to socio-economic rights 'have not succeeded in providing access to a comprehensive and reliable set of entitlements of a decent quality'.[10] The growing failure of the state to provide adequate access to the goods and services guaranteed by socio-economic economic rights is part of the reason that courts need to be consistently vigilant and assist in ensuring that the constitutional promise of these rights is being progressively realised.

However, the courts' role in economic transformation has also been limited by their interpretation of socio-economic rights. For example, Brickhill and Van Leeve argue that:

> The Constitutional Court's rejection of the minimum core approach to socio-economic rights is not fatal to the prospects of the Constitution playing a role in economic transformation. But it does mean that the role of the courts in economic transformation is different, and less direct, from what it may have been. Had the courts endorsed a minimum core approach, it would have fallen to the judiciary to determine the core content of each right and to enforce the provision of that core. Instead, although socio-economic rights are fully justiciable, the courts play only a partial role in determining the content of those rights. The executive and the legislature, through policy and law-making, play primary roles in giving content to socio-economic rights; and the courts appear to be increasingly deferential towards these primary roles.[11]

A discussion of the Constitutional Court's rejection of arguments made for a minimum core obligation in socio-economic rights cases can be found in chapter 4.[12] Though the Court does seem to have limited its role in economic transformation by having not accepted the minimum core obligation, apart from saying that it could be relevant to the evaluation of reasonableness, its role, as defined above, should not be discounted. The exact nature of this role and the different kinds of impacts of socio-economic rights decisions are explored in the next section of this chapter.

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[10] S Liebenberg 'Social Rights and Transformation in South Africa: Three Frames' (2015) 31 *South African Journal on Human Rights* 446, 451.

[11] Brickhill and Van Leeve (note 8 above) 150.

[12] Chapter 4, 105. The concept of a minimum core obligation in socio-economic rights cases comes from the Committee on Economic, Social and Cultural Rights, General Comment No.3.

Gender transformation should be an integral part of transformative constitutionalism. Albertyn has convincingly argued that 'the need to address the distinctive forms of poverty and inequality experienced by women' is central to the transformative project.[13]

The idea of transformative constitutionalism has not been free from criticism. Over and above criticism of the interpretation and enforcement of the Constitution, which I agree with, such as the socio-economic rights jurisprudence discussed in this chapter and in chapter 4, several writers have challenged the Constitution itself as incapable of enabling transformative constitutionalism.

Sibanda views the Constitution, and the idea of transformative constitutionalism, as being birthed in the compromises that were made when South Africa's constitutional democracy was being negotiated.[14] Sibanda further argues that it is not clear what the nature of the change envisioned by transformative constitutionalism is.[15] In critiquing transformative constitutionalism, Sibanda asks:

> what, beyond a theoretical commitment to human rights, constitutional values, as well as a law driven and court-centric framework of social and political change, does transformative constitutionalism offer in terms of disruptive redistributive and reparatory ideas, measures and strategies to address South Africa's sustained and deepening inequalities?[16]

However, a careful reading of transformative constitutionalism, as for example by Langa discussed above, makes it clear that it is a project that requires work from all three branches of government and not only the judiciary. The question remains, however, whether and how courts are able to act in a transformative way and what different kinds of impacts court decisions can have.

The constitutional project has been further criticized for not properly undoing the structures of apartheid and for failing to bring about fundamental change to the lives of the majority of poor, black people. Madlingozi has argued that 'post-1994 constitutional rearrangements are transforming society in ways that do not instantiate a fundamental rupture with the inherited,

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[13] C Albertyn 'Gendered transformation in South African jurisprudence: poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 591, 591.
[14] S Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, Democracy and Development* 384, 386.
[15] Ibid 387.
[16] Ibid 390.

sedimented and bifurcated social configuration.'[17] While this criticism is valid and change is coming about too slowly for the majority of poor people in South Africa, I do view the constitutional project as an attempt to break away from South Africa's oppressive and racist past, and to move in a more egalitarian direction. Furthermore, Dugard and Sanchez have shown how many decolonial scholars focus on race and leave out gender and class, as sites of oppression and disadvantage.[18] They convincingly argue that to remedy injustice 'any analysis of the constitutional order and the power dynamics must challenge the tendency to privilege an abstract and unitary voice of the oppressed as merely black.'[19] In further pushing back against critiques of decolonial scholars that the Constitution was simply a colonial imposition, Hassim uses gender equality as an example, to illustrate how grassroots women's movements played a fundamental role in the final inclusion of gender equality in the Constitution, and how this happened after years of activism and community mobilizing.[20]

I agree with criticism of how the Constitution has been interpreted and enforced thus far, and that the Court has not played a significant role in economic transformation, but contrary to the views expressed by Sibanda, Madlingozi and others, I do view the Constitution and constitutional interpretation as being capable of achieving the goals of transformative constitutionalism. Applying a gendered lens to socio-economic rights interpretation, which can be done using the authority of existing jurisprudence, and paying attention to the specific needs and circumstances of women in litigation and formulating policies, can assist in achieving these goals.

In this section I have sketched a brief overview of how transformative constitutionalism has been understood and interpreted. What is evident is that the judiciary, with the legislature and executive, should work together with the authority given to them by the Constitution to bring about meaningful change in the lives of people in South Africa, the majority of whom are still poor and for whom the promises of a society which respects and protects human dignity, equality and freedom still seems far off. Furthermore, this project should include bringing about transformation in the lives of poor women. In the following section, I examine what one can realistically expect from socio-economic rights litigation.

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[17] T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the antiblack economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123, 125.
[18] J Dugard and A Sanchez 'Bringing gender and class into the frame: an intersectional analysis of the decoloniality-as-race critique of the use of law for social change' (2021) 32 *Stellenbosch Law Review* 24, 25.
[19] Ibid 29.
[20] S Hassim 'Decolonising equality: the radical roots of the gender equality clause in the South African constitution' (2018) 34 *South African Journal on Human Rights* 342.

3. Socio-economic rights litigation in South Africa and social change

3.1 Introduction

As I have pointed out in other parts of this thesis, the justiciable socio-economic rights in the Constitution are tied to the project of transformation and the goal of substantive equality. There has been ongoing debate around socio-economic rights litigation in South Africa and its role in bringing about tangible change in the lives of the people who come to court in the hope of improving their material conditions. Though the experiences of poor women have not been centred in these debates, these are necessary for grappling with the role of socio-economic rights in the lives of poor women and in assisting to address their vulnerability to violence.

In this section, I first discuss the limits of what courts can do in socio-economic rights cases, and then examine the different kinds of impacts that court decisions can have and how socio-economic rights cases can have a broader impact beyond the litigants before the court, despite their limits. Brickhill has developed a compelling way of analysing the relationship between public interest litigation and social change.[21] He makes a distinction between 'the practice-based theory of how to do public interest litigation; and the analytical theory of social change that focuses on its impact and value.'[22] I discuss the latter here. In section 4 of this chapter, I focus on *how* public interest litigation can be done to better protect women's socio-economic rights and to help to address poor women's vulnerability to violence.

3.2 Limits of what courts can or are willing to do in socio-economic rights cases

The decision of the Constitutional Court in *Mazibuko*, discussed in chapter 4, was viewed as disappointing by many.[23] However, as argued in the Atlantic Philanthropies report: 'litigation is not generally a reliable means to obtain direct large-scale and radical policy change such as reversing the privatisation of the provision of basic services.'[24] This echoes concerns often raised about separation of powers and it not being institutionally appropriate for courts to make economic and policy choices, which tend to be polycentric decisions. In these instances, the judiciary will tend to defer to the legislature and the executive. Indeed, Brinks et al suggest that courts are mindful of their role in constitutional democracies:

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[21] J Brickhill 'Public interest alchemy: combining art and science to litigate for social change' 2014 *SSRN Electronic Journal* 1.
[22] Ibid 3.
[23] Chapter 4, 128.
[24] Atlantic Philanthropies report (note 1 above) 64.

> Courts, then, rather than always embracing open-ended (or limited) understandings of the rights in question, respond differently in different contexts, partly in response to state capacity and political tolerance for the claims being asserted, and partly out of preexisting understandings of the proper judicial role.[25]

The context in which a rights claim arises, the way that a claim is asserted, and the state's response to the alleged socio-economic rights violation are all relevant to the decision that a court will make. Litigation does not happen in a vacuum. Young provides a convincing argument that courts serve as catalysts for government action.[26] She argues that they provide different types of review offering a 'principled yet highly contextual resolution to the challenges of adjudicating constitutional economic and social rights.'[27] Thus courts respond to different political and institutional contexts when they adjudicate socio-economic rights.[28]

Furthermore, courts are aware that there are many demands on the state's purse and that resources are not endless. This is especially so in a developing country like South Africa. The state has to make difficult policy choices about how its limited resources are spent. Nevertheless, courts should hold the state accountable for these choices and to the fulfilment of its socio-economic rights obligations. The state must answer for the legislation and policies that are put in place to fulfil socio-economic rights and for where it is not achieving what it ought to achieve in realising socio-economic rights.

The recent case of *Thubakgale v Ekurhuleni Metropolitan Municipality* is a particularly disappointing example of the limits of what courts can and will do in terms of securing access to housing for poor and vulnerable people in South Africa.[29] This case raised the question of what effective remedy the court can grant when the state has persistently failed to realise the right of access to housing, and whether an award of constitutional damages is appropriate.[30] The salient facts of the case are that each of the applicants had been granted a state housing subsidy, but were not given possession and ownership of the houses constructed with that subsidy.[31] It eventually transpired that the Municipality had unlawfully given possession of the

[25] D Brinks, V Gauri and K Shen 'Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular' (2015) 11 *Annual Review of Law and Social Science* 289, 297.
[26] K Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8 *International Journal of Constitutional Law* 385, 387.
[27] Ibid 387. Young describes different types of review by courts as deferential, conversational, experimentalist, managerial and peremptory.
[28] Ibid 420.
[29] *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC).
[30] Ibid para 2.
[31] Ibid para 13.

houses to other people.[32] The applicants took the Municipality to court to compel them to provide the houses allocated to the applicants; the respondents appealed only the date of implementation of the order to provide houses; the respondents later applied for an extension of the deadline provided by the Supreme Court of Appeal; the applicants then filed a counter-application for constitutional damages.[33] After being unsuccessful in the Supreme Court of Appeal, the applicants appealed to the Constitutional Court.[34]

After considerable delays in the applicants' attempts to realise their right of access to housing, and with the applicants being no closer to securing housing, the Constitutional Court had to grapple with the issues before it.[35] In evaluating the purpose of socio-economic rights, the Court argued that the framers of the Constitution 'opted for progressive access under the control of the Legislature and the Executive, to the exclusion of the Judiciary.'[36] After referring to *Mazibuko* and the role of courts in socio-economic rights cases, the Court stated that:

> A proper reading of *Mazibuko* reveals that in the context of socio-economic rights, the role played by the Judiciary in enforcing those rights differs from the role it plays in respect of other rights. In the context of socio-economic rights, the mere adoption of reasonable legislative and other measures gives content to those rights.[37]

This limited understanding of the content and purpose of socio-economic rights and the role of courts in socio-economic rights cases can be contrasted with earlier judgments that set out the purpose of socio-economic rights in light of the democratic values of freedom, human dignity and equality and the role of the courts in holding government accountable for reasonable measures.[38] Thus, when courts assess whether measures taken by the state to fulfil socio-economic rights are reasonable, they are giving some content to those rights, in interpreting what the fulfilment of those rights should entail.

The Court dismissed the appeal.[39] The majority judgment of Jafta J reasoned that the right of access to housing was vindicated by the earlier court order which directed the Municipality to provide the applicants with houses, and that damages had been sought in addition to the houses

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[32] Ibid para 14.
[33] Ibid paras 18, 21, 22 and 23.
[34] Ibid para 26.
[35] Ibid para 29.
[36] Ibid para 164.
[37] Ibid para 166.
[38] See: *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).
[39] *Thubakgale* (note 29 above) para 195.

to which they were entitled.[40] Jafta J also opined that the applicants had various other remedies available to them such as contempt of court proceedings and eviction of occupiers from their houses.[41]

The effect of this order is that the Constitutional Court did not assist the applicants in securing housing, nor did it award them constitutional damages, despite them having been recipients of housing subsidies and thus clearly entitled to claim their houses from the state. This is arguably a retrogressive step in the Court's jurisprudence and a disappointing outcome for poor people, and poor women in particular, as it demonstrates the limits of how far courts may be willing to go to ensure that they have access to housing. The applicants turned to the courts after extensive engagement with the state yielded no results. The courts were thus their last hope of vindicating their rights. With the state's persistent non-compliance with the order to provide the applicants with houses, constitutional damages was the only remedy on which the applicants could realistically rely. This case illustrates that courts are not always able to provide effective remedies when socio-economic rights have been violated.

Above, I considered the limits of what courts can or will do to bring about social change, in relation to the separation of powers and how the courts view or understand their role in a democracy. I now discuss the limits of what courts can do from a completely different perspective.

Court decisions can set standards and they can rigorously hold government accountable for the fulfilment of its socio-economic rights obligations. What they cannot do is change people's perceptions and attitudes, especially when these are rooted in systemic inequalities and arise from patriarchy or racism.

Some of my interviewees noted how social norms related to patriarchy and traditional gender roles can affect women's vulnerability to gender-based violence.[42] While courts can apply a gendered lens to socio-economic rights interpretation, as I argue in chapter 4, they cannot change the way patriarchy manifests itself in poor communities in South Africa. It will require systemic change, political will, grassroots mobilisation and interdisciplinary interventions to begin to address these deep-rooted issues.

[40] Ibid para 163.
[41] Ibid para 193.
[42] Interview 1 and interview 3.

Patriarchal attitudes are deeply embedded in all communities in South Africa, including poor communities. Interviewee 1 urged people to 'have a changed attitude around women, around gender roles, [and] around what we can and can't want for ourselves'.[43] She stressed that some women do not realise that the work they do in the home and caring for children, is also a contribution to the household.[44] Interviewee 3 stated that patriarchal norms persist and that '[e]ven women have grown up to think or know that men can exert aggressive power. And to maybe think it's normal to expect that to happen and not know how to deal with it best.'[45] This could also relate to how people have been socialised and how violent behaviour has been normalised. While the law and courts can advance substantive gender equality by paying attention to the specific needs and circumstances of women and by applying a gendered lens in socio-economic rights interpretation, as this thesis argues is necessary, this may not always align with people's attitudes and beliefs around patriarchy and the subjugation of women.

In the discussion at 4.3.2 below, it is evident how this can affect litigation strategies to increase the likelihood of litigation resulting in social change in the lives of poor women. Some of my interviewees highlighted how patriarchal leadership structures in communities can make it difficult to consult with women in the client group to ensure that their experiences make their way into the court papers.

As demonstrated in the above discussion, the limits of what courts can do in socio-economic rights cases, relate firstly to how they view their role in a democracy in relation to the separation of powers and other considerations. Secondly, there are external limits, like societal issues and patriarchy, that affect the kinds of change that court decisions can bring about.

3.3 Broader effects of socio-economic rights cases

Despite the disappointing outcome of the *Thubakgale* case discussed above, socio-economic rights cases can and have had different kinds of impacts or effects. Langford provides a useful definition of impact:

> Impact constitutes the total influence or effect of a decision: the result may be greater than mere implementation of the court order or net negative due to unintended

[43] Interview 1.
[44] This is similar to discussions throughout this thesis about caring roles not being valued in the same way that paid work is valued.
[45] Interview 3.

> consequences. Litigation is an institutional and social process that may trigger additional material, political and symbolic effects.[46]

There are various ways to measure or assess impacts and effects. Rodriguez-Franco and Rodriguez-Garavito classify effects as direct and indirect.[47] For authors who focus on direct effects 'they apply a strict causality test to measure the impact of judicial interventions: a judgment is effective if it has produced an observable change in the conduct of those it directly targets'.[48] From the perspective of indirect effects, the law is seen to result in social transformation 'also when they produce indirect transformations in social relations or when they alter social actors' perceptions and legitimize the litigants' worldview.'[49] Focusing on direct effects is similar to looking at the material impacts of a decision, and indirect effects are similar to political impacts, as will be seen in the discussion below.

Despite the limits of *Mazibuko* discussed above and in chapter 4, some of what unfolded as the court case proceeded has been viewed as indirect benefits or effects of the case. One such benefit was described as follows – '[t]he threat of an adverse order from the litigation made the City more responsive to such efforts than it otherwise would have been, and made the expansion of the indigent persons and social benefits programmes politically possible.'[50]

Brickhill has strongly argued that impacts can be divided into three categories: legal, material and political.[51] These categories are explained as follows:

> Legal impact denotes effects on the law itself, including policies that determine legal rights and obligations, and on legal culture. Material impact consists of effects on conduct, provision of goods or resources and payment of money. On this conception, material impacts would include: changes to the conduct or practice of the state or private persons (including cessation of conduct); the delivery of social goods; and payment of damages or compensation. Political impacts do not affect the legal rights of persons or their material conditions of life, at least not directly. Instead, they are concerned with the power associated with ideas, people and institutions. This category

[46] M Langford 'The impact of public interest litigation: the case of socio-economic rights' (2021) 27 *Australian Journal of Human Rights* 505, 508.
[47] D Rodriguez-Franco and C Rodriguez-Garavito 'Courts, Strategic Litigation, and Social Change' in Conrado Hübner Mendes ed *The Oxford Handbook of Constitutional Law in Latin America* (2022) 444, 449.
[48] Ibid.
[49] Ibid.
[50] Atlantic report (note 1 above) 66.
[51] J Brickhill 'Strategic litigation in South Africa: understanding and evaluating impact' 2021 DPhil thesis, University of Oxford, 68.

> of impacts would include 'agenda change', a shift in priorities of the state, expanding democratic space, creating greater rights awareness, a shift in discourse, increasing dialogue or shutting it down, increased community mobilisation, or shifting the balance of power in relations between parties.[52]

Political impacts can be seen as related to participatory democracy. In *Doctors for Life International v Speaker of the National Assembly*[53], the Court articulated the notion of participatory democracy, stating that '[c]ommitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated.'[54] The work of courts is accordingly part of the process of ensuring that democracy is not only representative but also participatory.[55]

Examples of these different kinds of impacts will be shown below. These examples illustrate that cases can have broader effects which go beyond the particular court order that was granted. In certain cases, these broader impacts can also be seen as contributing to social change, whether the actual decision was favourable to the applicants before the court or not.

Research conducted with public interest organisations in South Africa found that impact can be evaluated by examining different sites of impact.[56] One such site of impact: obtaining a positive outcome for individuals or groups, is similar to considering the material impacts of a decision, in that one examines the actual change to the lives of people, such as whether they have gained access to social goods as a result of the litigation.[57]

Dugard and Langford speak about the material impacts resulting from the *Mazibuko* litigation – '[t]hese impacts include the fact that, as a direct result of the politicisation surrounding the litigation, the City raised the amount of FBW it provides to the poorest households in Johannesburg to 50 litres per person per day (the amount the applicants asked for).'[58] This is a

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[52] Ibid.
[53] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).
[54] Ibid para 111.
[55] G Budlender 'People's power and the courts - Bram Fischer memorial lecture, 2011' (2011) 27 *South African Journal on Human Rights* 582, 587.
[56] These are described as 'obtaining a positive outcome for particular individuals and groups; changes to law and policy; institutional changes; symbolic and discursive changes; expanding democratic space; and, strengthening the public interest law sector.' See: Socio-Economic Rights Institute of South Africa 'Public interest legal services in South Africa' 2015, 57.
[57] Ibid.
[58] J Dugard and M Langford 'Art or science? synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *South African Journal on Human Rights* 39, 58.

significant change that came about as a result of this litigation, and it would help some of the poorest and most vulnerable people in the city, including poor women. There was also a delay in installation of prepaid water metres in other parts of South Africa, and some municipalities decided not to install prepaid metres.[59]

An example of a legal impact of a decision is seen in *Grootboom*. This judgment is examined in detail in chapter 4.[60] A few years after the decision, government put in place an emergency relief housing policy, which was later followed by an emergency housing programme, as a part of the National Housing Code.[61] This legal impact can be seen as a significant gain for people who find themselves in desperate situations, without access to housing.

Joseph v City of Johannesburg, discussed in chapter 2, also illustrates how a case can have impacts that stretch beyond the court decision.[62] This case was seen to result in broader positive change, despite it not resulting in tangible change for the applicants.[63] A legal impact of *Joseph* is that access to electricity was viewed as a rights issue.[64] This is a significant legal effect because there is no right of access to electricity in the bill of rights, as there is a right of access to housing, water, and food etc.

In addition to this, *Grootboom* and *Joseph* had broader political impacts. *Grootboom* had a ripple effect on other housing and evictions cases by strengthening the ability of other communities to resist evictions.[65] This relates to Brickhill's factors of expanding democratic space and increasing community mobilisation. Further broader impacts of *Grootboom* are that – '[t]he community avoided further eviction, improved access to basic services, gained eventually access to permanent housing, [. . .] developed the jurisprudential foundation for socio-economic rights litigation, and helped slow a pattern of large-scale evictions.'[66]

The Atlantic Philanthropies report described one of the broader outcomes of *Joseph*, as it related to a subsequent access to electricity case, as follows:

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[59] Ibid 59.
[60] Chapter 4, 103. The failure of the court to adopt the minimum core obligation as it relates to socio-economic rights can arguably be seen as one of the limits in the ability of courts to bring about social change.
[61] Atlantic Philanthropies report (note 1 above) 45.
[62] Chapter 2, 61. *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).
[63] The applicants won their case but, by the time the matter reached the Constitutional Court, the electrical wiring of the building had been stolen, meaning that it would be very expensive to reconnect the electricity, and neither the City nor the owner was willing to cover this expense. See: Dugard and Langford (note 58 above) 46.
[64] Dugard and Langford (note 58 above) 59.
[65] Dugard and Langford (note 58 above) 61.
[66] Langford (note 46 above) 520.

> This case involved a block of 420 flats in Soweto, housing many vulnerable people. Eskom had disconnected the electricity supply due to non-payment. When the disconnection was challenged on the basis of the *Joseph* decision, the matter was settled by agreement and an order was issued in terms of which: the electricity supply had to be reconnected; and, Eskom had to engage with each applicant separately to conclude individual agreements regarding electricity supply.[67]

Finally, another broader outcome of *Joseph*, is explained by Dugard and Langford as follows:

> Moreover, *Joseph* publicised systemic problems with the City's billing, thereby raising awareness of the links between service delivery and municipal governance. There has also been a wide-reaching material change in that the City of Johannesburg can no longer disconnect tenants' electricity supply without notice.[68]

These are meaningful changes, especially in the lives of poor people who often struggle to access basic goods and services. Better access to electricity will also help poor women in particular, as this thesis has highlighted the gendered implications of lack of access to electricity.[69]

An example of the multiple, direct and indirect effects of a judgment, can be found in comparative law. The Colombian case of T-025 of 2004, a landmark decision of the Colombian Constitutional Court,[70] concerned internally displaced people (IDP) who faced numerous challenges including 'poverty, discrimination, and loss of livelihood and of community' and violence.[71] This case is also an example of the gendered impacts of a case related to socio-economic rights. As described by Rodriguez-Garavito:

> In this decision, the CCC [Constitutional Court of Colombia] declared that the humanitarian emergency caused by forced displacement constituted an "unconstitutional state of affairs" that is, a massive human rights violation associated with systemic failures in state action. As the complaints that reached the court from all corners of the country showed, there was no serious and coordinated state policy for

[67] Atlantic report (note 1 above) 70.
[68] Dugard and Langford (note 58 above) 60.
[69] Chapter 2, 60 and chapter 3, 99.
[70] *Sentencia T-025/04, Abel Antonio Jaramillo y otros vs. Red de Solidaridad Social y otros*, T-025/04, Colombia: Corte Constitucional, 22 January 2004.
[71] J Lemaitre and K Bergtora Sandvik 'Shifting Frames, Vanishing Resources, and Dangerous Political Opportunities: Legal Mobilization among Displaced Women in Colombia' (2015) 49 *Law and Society Review* 5, 6.

> offering emergency aid to IDPs, nor was there reliable information on the number of IDPs or the conditions they were facing. Moreover, the budget allocated to the issue was clearly insufficient. To eradicate the root causes behind this state of affairs, the court ordered a series of structural measures that as we will see, spawned a lengthy implementation and follow-up process that continues today.[72]

In short, the case concerned massive rights violations and systemic failures by the state to address the conditions of IDP. In addition, there was no co-ordinated policy and budget in place to remedy the crisis. In response to the untenable situation, the Court made a series of structural orders which resulted in a lengthy implementation phase.

As Rodriguez-Franco and Rodriguez-Garavito argue, the Court used socio-economic rights to prompt government into action.[73] Despite uneven results, the judgment nevertheless secured a number of practical effects. First, there were improvements in access to education and health care for internally displaced persons, although the fulfilment of other socio-economic rights was not satisfactory.[74] Second, government budget allocations to internally displaced people increased significantly as a result of T-025.[75] 'The 2014 national budget for IDP programmes, albeit still insufficient, was almost ten times that of 2004.'[76] Third, there was a rise in mobilisation of internally displaced women fighting for their rights, as discussed below.[77]

The follow up process resulting from the structural orders given in this case paid particular attention to categories of displaced people whose gender, age or ethnicity may compound the impact of their displacement. Lemaitre and Sandvik describe the monitoring process in the following way:

> Decision T-025 did not close the case. Instead the Court issued specific orders (known as Autos) and oversaw compliance through public hearings and follow-up reports until such a time when it considers the government actions have managed to put an end to the unconstitutional state of affairs. As part of its continued vigilance, the Court has issued Autos that have both judicialized humanitarian policies and, under the rubric of a "differential approach," delivered remedies that are explicitly sensitive to gender,

[72] Rodriguez-Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America' (2011) 89 *Texas Law Review* 1669, 1670.
[73] Rodriguez-Franco and Rodriguez-Garavito (note 47 above) 451.
[74] Rodriguez-Garavito (note 72 above) 1687.
[75] Rodriguez-Franco and Rodriguez-Garavito (note 47 above) 451.
[76] Ibid.
[77] Lemaitre and Bergtora Sandvik (note 71 above) 7.

> ethnicity, age, and physical and mental capacity. In Auto 092 of 2008, one of the follow-up decisions to T-025, the Constitutional Court found that the government had failed to adopt policies that addressed the disparate impact of displacement on women. The Auto also granted individual protection orders to 600 women across the country, including specific monetary awards categorized as humanitarian aid.[78]

The way the Court oversaw compliance with its orders, provided remedies that are sensitive to gender and other grounds of disadvantage, and provided individual protection to women, is significant. Here one can see how the follow up necessitated by the structural orders allowed the Court to notice and then address the disproportionate impact that a rights violation can have on vulnerable groups, including women. For the purposes of my research, it is significant that the issues faced by displaced women could be brought to the surface in this way. By providing gender sensitive remedies and by highlighting the disproportionate impact of displacement on women, the Court was applying a gendered lens, as I argue for in chapter 4.

This follow up decision also had indirect effects beyond the court order. Lemaitre and Bergtora Sandvik explain that though there was poor implementation of this decision, it motivated 'women's grassroots organizing', it gave women access to the Colombian Constitutional Court that they did not have before, and it 'created the opportunity to frame the interests of internally displaced women as violations of fundamental rights—not only in light of the humanitarian emergency but also in light of what the Court called "women's special vulnerabilities."'[79] For poor people, and poor women especially to be able to use the language of rights to protect their interests is important because it provides another platform for their voices to be heard by those in power, and to hold them accountable to their obligations.

4. Strategies to adopt in using law for social change

4.1 Introduction

As noted by Brickhill, some of the literature on law and social change has focused on the 'how' of public interest litigation. In this section I examine these different strategies that can be used in socio-economic rights litigation to maximise the chances of success and for outcomes to make an impact in people's lives. First, I look at strategies that might be combined with public interest litigation to enhance its success and then I discuss the litigation strategies themselves.

[78] Lemaitre and Bergtora Sandvik (note 71 above) 18.
[79] Lemaitre and Bergtora Sandvik (note 71 above) 19.

I focus specifically on how public interest litigation can be conducted to better protect women's socio-economic rights and to assist in addressing poor women's vulnerability to violence.

4.2 Strategies to combine with litigation to bring about social change

The Atlantic Philanthropies report proposes that different strategies should be used in combination with litigation in order to achieve as much success as possible in bringing about social change.[80] The strategies identified are:

> conducting public information campaigns to raise rights awareness; providing advice and assistance outside of litigation to assist people in claiming their rights; and making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.[81]

The *Minister of Health v Treatment Action Campaign*[82] case has been used as an example of a success story, where litigation, paired with a number of other strategies, resulted in tangible change in the lives of those whose rights had been infringed. The Atlantic Philanthropies report explained that:

> For the TAC, litigation both emerges from and feeds back into a social context. Resort to litigation is not exclusive of other strategies. Litigation can also help catalyse mobilisation and assist public education on contested issues, as well as bring about direct relief to individuals or classes of applicants. Thus, between August and December 2001, the TAC engaged in intensive public mobilisation, attracting enormous support and media interest.[83]

Here one can see how litigation should not be removed from the lived realities of the people whose rights it seeks to vindicate. This should include and centre the lived experiences of women in the client group. It is also necessary to pair litigation with community mobilisation, public education and to draw the attention of the media.

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[80] Atlantic report (note 1 above) 3.

[81] One is reminded that litigation should be coupled with political activism as a part of a 'broader social change strategy'. Ibid 23.

[82] *TAC* (note 22 above).

[83] Atlantic report (note 1 above) 52. It is worth noting that in the *TAC* case, as far as separation of powers considerations go, there were not significant financial implications in extending the role out of medicine to prevent mother to child transmission of HIV/AIDS, because this medication had already been made available to the state. See: *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 49.

Equal Education v Minister of Basic Education is another example of how litigation combined with other strategies can bring about social change.[84] The case related to the provision of meals for learners under the National School Nutrition Programme (NSNP) during the COVID 19 pandemic. The challenge with the NSNP arose at the start of the pandemic when schools were closed and learners who were dependent on this programme for a daily meal were no longer able to access one. In this matter, Equal Education was able to collect evidence from around South Africa, because of mobilisation through its membership network; they were also able to gather personal experiences of learners and parents; in addition to this, they ran a large public awareness campaign; and, involved the media in publishing the stories of the learners.[85] These strategies combined with litigation resulted in material impact in the lives of learners through the resumption of the roll out of the NSNP and learners across South Africa receiving a daily meal again.[86]

4.3 How socio-economic rights litigation can be better done to bring about change in the lives of poor women

In addition to different strategies needing to be paired with litigation, the Atlantic Philanthropies report identifies seven factors that can maximise the likelihood of public interest litigation succeeding. These are: 'proper organisation of clients; overall long-term strategy; co-ordination and information sharing; timing; research; characterisation; and follow-up.'[87] Brickhill has added an eighth factor: technical capacity, litigation skills, drafting and oral argument.[88] Neither of these pay attention to gender. To begin to fill that gap, below I discuss what a gendered approach to some of these factors might be, and include some of my research findings. Albertyn has argued that 'choices about legal arguments, in terms of content and approach, characterisation of the case, rights arguments, and remedies' are all relevant to achieving gender transformation.[89]

[84] *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).
[85] F Veriava and N Ally 'Legal mobilisation for education in the time of Covid-19' (2021) 37 *South African Journal on Human Rights* 230, 239.
[86] Ibid 243.
[87] Atlantic report (note 1 above) 110.
[88] Brickhill (note 21 above) 15.
[89] C Albertyn 'Gendered transformation in South African jurisprudence: poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 591, 598.

4.3.1 Timing

The Atlantic Philanthropies report states that correct timing is vital if litigation is to have a meaningful effect.[90] The climate should be right, and the relevant evidence secured.[91] Dugard and Langford critique some of the factors set out in the Atlantic Philanthropies report. They argue that public interest litigation does have a role to play in bringing about a more equal society in South Africa, but that more factors should be taken into consideration[92]

In responding to the criterion of timing set out in the report, Dugard and Langford ask:

> When, for example, is the timing right for poor people to get a better deal in South Africa? How long should people call for acceptable living conditions including access to adequate housing and basic services before it is the right time to litigate? [. . .] At which point do we acknowledge that political processes, particularly as relating to rights that depend on local government delivery, are systemically failing?[93]

These are important questions to think about. When one reflects on the utility of public interest litigation and how best it should be done, it is necessary to be constantly mindful of the realities and often desperate conditions of the people, and specifically for my research purposes poor women, who are turning to courts to vindicate their rights. It would be difficult to have a box ticking exercise on 'how to do public interest litigation'. While the strategies and factors set out in the Atlantic Philanthropies report are useful, they should be considered in the context of the changing realities and conditions of people who come to courts to assert their rights. In the lives of poor women, these conditions include how lack of access to housing and basic services can make them vulnerable to violence.

4.3.2 Proper organisation of clients

The Atlantic Philanthropies report emphasises that clients should be actively involved in the litigation process and that while lawyers often see things from a legal perspective, clients 'want to see an impact on their lives or those of their constituencies.'[94] Missing from the report are the gender dimensions of organising clients. In line with my arguments, in chapter 4, for

[90] Atlantic report (note 1 above) 119.
[91] Ibid.
[92] Dugard and Langford (note 58 above) 63. Brickhill argues that Dugard and Langford, and the Atlantic report are speaking at cross purposes because the Atlantic report is primarily concerned with 'how best to conduct public interest litigation, Dugard and Langford's critique and proposed 'expanded model' are about why public interest litigation should be used.' See: J Brickhill (note 21 above) 2.
[93] Ibid 49.
[94] Atlantic Philanthropies report (note 1 above) 114.

applying a gendered lens in rights interpretation, this starts at the point of consultation with clients. Lawyers should be intentional about consulting with the women in their client group to hear their views and experiences related to lack of proper access to housing and basic services.

This was confirmed in my interviews. A strategy that interviewee 2 views as important, is to get as much information as possible from the community in the consultation phase.[95] Interviewee 2 noted that 'sometimes women keep quiet and they will not speak to you until you have an individual consultation with them.'[96] This hesitance to speak can be related to whether the community is a patriarchal one.[97] She also shared how her position as a woman made it possible for her to pick up on these issues – 'I think maybe because I am a woman and I was aware of this, as an attorney. I am aware of the adverse impact. I kind of probed for the information and to get exactly what the community are faced with.'[98]

The information gathered after numerous consultations is then put into the court papers.[99] This illustrates how a litigant's positionality can have an impact on a particular case and its focus, i.e. whether it focuses on the particular experiences of women in the community or client group, or not. Interviewee 10 also stated that they make a point of speaking to the women separately if they need to or they 'make it clear to the clients that [they] need to give the full picture to the court, about how the violations are taking place and how it impacts on women particularly.'[100] Trying to choose women as the main deponents in a case is a strategy employed by interviewee 8's organisation, because that is a way to turn the focus to the gender issues in a matter.[101] The organisation that interviewee 4 works for has 'gendered impact' as a particular focus of their organisation. This means that they always focus on the gender issues that come out of a particular case.[102]

These are examples of the different ways that organisations can be intentional about focusing on the gendered dimensions of lack of proper access to housing and basic services.

At the same time, the experience of my interviewees shows that this can be a difficult task. Interviewee 8 explained that their organisation often represents a large client group, facing an eviction, and because they are representing a whole group of people, it can be difficult to call

[95] Interview 2.
[96] Ibid.
[97] Ibid.
[98] Interview 2.
[99] Ibid.
[100] Interview 10.
[101] Interview 8.
[102] Interview 4.

attention to issues of gender-based violence within that group.[103] This possible tension was set out as follows:

> [O]ne of the things that become challenging is that we need to remain cognisant of the fact that we are their legal representatives, we're not taking sides between people who are all part of our client group. And the issue with gender-based violence or any kind of disputes, it doesn't even have to be violence, just disputes between people within the same client group, as their legal representative, it's important to have some kind of professional distance from that. Because the minute you create a conflict of interest, about who you are representing or what kind of legal action needs to be taken, you have created a problem for your relationship with the whole client group. So, navigating that is probably one of the biggest obstacles to addressing gender-based violence. Because that is something that happens behind closed doors with people that we also represent.[104]

This last sentence illustrates how violence against women can be hidden or made invisible, especially intimate partner violence because it happens 'behind closed doors'. When there are different rights violations that need to be addressed violence against women can easily be overlooked. Nevertheless, as I argue throughout this thesis, providing better access to the goods and services guaranteed by the right of access to housing and related services, can simultaneously assist with addressing women's poverty and vulnerability to violence.

Another challenge related to calling attention to the particular impact of the rights violation on women is if there is a patriarchal leadership structure in a community.[105] Interviewee 8 described this challenge as follows:

> If it's a good solid leadership structure, you'll have a much easier time and if there's women on that leadership structure, it's much easier to talk about or have a gendered perspective. If it's an all-male, very patriarchal leadership structure, you could have a completely different experience. So, I think it's important to say that every case could be slightly different when it comes to that.[106]

[103] Interview 8.
[104] Ibid.
[105] Ibid.
[106] Interview 8.

It is interesting to note how the identity of the representatives of the client community can have an impact on whether the voices of the women in that community are heard. Interviewee 4 also stated that in the context of an eviction process, the women who were affected did not always participate in the consultation process.[107] A similar challenge was pointed out by interviewee 10, of how women's voices are often not present in consultations with clients. They stated that:

> We sometimes have clients where the committee only consists of men. We have had clients who are in rural places or clients who are under traditional authority, where the people that you are talking to are just men. And it may be seen as disrespectful to say – where are the women. Can we talk to the women? We've heard you guys. Look I can't recall a specific instance where a man, whether it was a representative of a traditional authority, point out said no you cannot talk to the women. But it's commonly known that it's the men who will be addressed or the men who will be addressing the lawyers. I recall a particular visit, I think it was to Limpopo, where we were talking just to the men. The women were sitting on the sides and didn't participate much. In a nutshell, although it is not explicitly said, it seems to be culturally accepted that the women won't say anything. I haven't been in a situation where a man has explicitly said to me, no you can't talk to the women or the women have nothing to say.[108]

The way in which women's voices can be excluded in a subtle manner, for example, how women are described as sitting on the sides, in this interviewee's account, arguably makes it even more important to bring this reality to the surface. If the exclusion of women is normalised or socially accepted, this may continue indefinitely without being challenged.

4.3.3 Research

Related to the need to consult with women in the client group, is the factor of research needed for litigation. Research should be conducted on how lack of access to housing and basic services can mean different things for men and women, because of different roles they play in their homes and communities, and different expectations related to traditional gender norms. This is necessary so that the specific impact of lack of access to housing and basic services on women can be included in the court papers. In enquiring about the impact of lack of access to housing and basic services, women should be sensitively asked about whether they have been vulnerable to or exposed to violence as a result of this lack of access.

[107] Interview 4.
[108] Interview 10.

4.3.4 Characterisation

From a gender perspective the characterisation of a case is also important. Arguably women should be central to the characterisation of a case, especially as poor black women usually experience the lack of access to housing and basic services more deeply, given their position in society and their gender roles. Cases about the right of access to housing and basic services should not only show how women are affected by the rights violations, but should also show how the issues relate to the right to and value of equality, and other rights that may be relevant to women's lives.

Interviewee 2 stressed the interconnectedness and interdependence of rights.[109] Using an example of a case where the main issue relates to the right of access to housing, interviewee 2 explained that:

> [I]t goes not only on the infringement of that right, whether it is housing, water or sanitation, it needs to be looked at as a woman's role in society and in her community and in her household. And how that relates to the rights infringement. For example, in housing, if it's a woman headed household, what does this mean? She is firstly a breadwinner, secondly, she's looking after kids, she's a primary caregiver, then you have no home. You look at the multiple rights infringements. You can't just look at it from the right of access to housing, it should be infused with other rights. Equality, dignity, privacy, freedom and security, you can take it further to an environment, depending on the nature of the case. I think that's what we fail to realise as lawyers and adjudicators in these matters. On a socio-political level a woman does play a completely different role to a man. I think it's also that when you have a socio-economic rights case all of that is not taken into account and that is why we need to bring it into account. To find a remedy that would assist her particularly. To secure and realise all of those rights. And not necessarily just the right of access to housing.[110]

This approach can also be related to the discussions in chapter 4 of this thesis, on paying particular attention to context, when assessing whether a rights violation has taken place, as a part of applying a gendered interpretation to socio-economic rights. Context includes looking at the role that a woman plays in her family and her community, and the combination of rights

[109] The interrelatedness and interdependence of human rights can be seen in the normative international and regional human rights frameworks examined in chapter 1. It is also highlighted in the *Grootboom* case in chapter 4.
[110] Interview 2.

that could be infringed by the violation. The lived circumstances of men and women are different, and this is affected by the way they occupy different spaces. These realities need to be taken into account.

Some public interest organisations are intentional about applying this type of intersectional and gendered approach in their work. Interviewee 10 stated that their organisation has specific pillars that guide their work. One of these pillars is 'taking an intersectional and gendered approach to human rights violations,' this means that in deciding on possible cases to take on, they ask 'how does this violation impact on women particularly? And so, through [their] papers, through [their] relief, [they] will try to highlight that.'[111] A similar sentiment was expressed by interviewee 7. One of the principles of their organisation is that across their departments, when they are involved in litigation, they look at whether there are gender issues involved.[112]

Calling attention to the specific needs and interests of women where the right of access to housing or basic services is violated is not without challenges. One of the challenges, highlighted by interviewee 2, was that often the focus is on the broader issue and the impact on women is seen as being ancillary.[113] For example, if it is an eviction matter, the focus would be on securing housing for the clients and the particular impact of the lack of proper access to housing on women, is ancillary to the main issue.

In addition to certain strategies being employed to increase the likelihood of public interest litigation resulting in social change, this litigation should also be conducted in a way that surfaces the needs and circumstances of those whose rights are to be protected. In the context of my research focus, this would be poor women who lack access to housing and basic services. Public interest litigators need to listen carefully to their experiences in the process of preparing to litigate.[114] As Budlender argues 'lawyers need to find ways of working which empower their clients, and thereby deepen democracy, rather than disempowering their clients.'[115]

4.4 The need for favourable court orders to be formulated and implemented

Central to the ability of litigation to result in positive change in the lives of poor women, are the type of remedies that litigants ask for. For court orders to result in some kind of change,

[111] Interview 10.
[112] Interview 7.
[113] Interview 2.
[114] Budlender (note 55 above) 593.
[115] Ibid.

they need to be properly implemented. Often the state is responsible for implementing orders in socio-economic rights cases. In many cases they can be relied upon to do this, but at times this can be more difficult. In some cases there is hostility from the state towards public interest litigation.[116] Reasons for failure to implement orders can also include inattentiveness, incompetence and intransigence.[117] Further challenges related to implementation can be caused by 'institutional dysfunction and political blockages'.[118]

The multiple concerns that can arise related to whether a particular order will be implemented, based on the facts of a case, will determine the type of remedy sought. Rodriguez-Franco and Rodriguez-Garavito distinguish between strong, weak and moderate remedies.[119] They describe them as follows:

> Whereas strong remedies involve precise, outcome-oriented orders, weak remedies tend to leave implementation entirely in the hands of government agencies. Moderate remedies, in turn, outline procedures and broad goals, as well as criteria and deadlines for assessing progress, but leave decisions on means and policies to government.[120]

In the South African context, strong remedies seem attractive from the perspective of wanting court orders to result in real change in people's lives, as well as when there is evidence of incapacity within the state. Weak remedies may be effective in cases where courts are confident that the state will implement the order. Moderate remedies however seem like a good middle ground, to ensure compliance and respect for the separation of powers and showing a level of deference to the other branches of government. Ultimately however, as argued by Roach and Budlender, the appropriate remedy will depend on the circumstances and what is needed to ensure that the Constitution is complied with.[121]

Without stepping on the toes of other branches of government, courts can provide a platform for various parties to make genuine attempts to address socio-economic rights violations. Courts might not have all the resources to find solutions to difficult problems but they can 'provoke and moderate a dialogue among public authorities and civil society actors on these issues. By calling on not only government officials but also a wide variety of actors with

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[116] Atlantic report (note 1 above) 22.
[117] K Roach and G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable' (2005) 122 *South African Law Journal* 325, 327.
[118] H Taylor 'Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation' (2019) 9 *Constitutional Court Review* 247, 252.
[119] Rodriguez-Franco and Rodriguez-Garavito (note 47 above) 447.
[120] Ibid 447.
[121] Roach and Budlender (note 117 above) 351.

relevant knowledge (eg. Academic experts), dialogic courts may promote a collaborative search for solutions.'[122] The extent to which courts can do this through the remedies they give will be seen in the discussion below.

The Constitution gives courts broad powers in terms of remedies that can be ordered. When deciding constitutional matters, courts have the power to declare law or conduct inconsistent with the Constitution invalid and to make any order that is just and equitable.[123] Early in South Africa's democracy the Constitutional Court provided guidelines for courts to understand their responsibility as related to remedies. In *Fose v Minister of Safety and Security* the Court established that:

> In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.[124]

It is evident from this passage that remedies need to be effective and that courts should be creative in crafting remedies, where the vindication of rights requires this.

In this section, I consider a few remedies that I view as important for assisting in bringing about change in the lives of poor women who are trying to vindicate their socio-economic rights. I discuss the following remedies: declaratory orders, structural interdicts, meaningful engagement, and constitutional damages.

4.4.1 Declaratory order

Firstly, courts often give declaratory orders or a declaration of rights. Declaratory relief confirms the fact of the rights infringement.[125] This is a necessary first step, as it is evidence that the state has not fulfilled its constitutional obligations, as far as the relevant rights are concerned, and can prompt them into action. I refer to the state because litigation seeking to

[122] Rodriguez-Franco and Rodriguez-Garavito (note 47 above) 456.
[123] Section 172 of the Constitution.
[124] *Fose v Minister of Safety and Security* 1997 (3) SA 786 para 69.
[125] *Thubakgale* (note 29 above) para 63.

protect socio-economic rights is usually instituted against the state. In instances where the court can rely on the state to comply with its order, declarations of invalidity are usually enough.[126] They can also be suspended, to give the state the opportunity to remedy the infringement themselves.[127] Declaratory orders, that name the various rights of women that have been violated, can send a strong message about the specific impact of lack of access to housing and basic services on women, and how it affects other rights and values, such as gender equality. This can prompt the state to take more proactive steps to address the multiple forms of disadvantage that poor women experience.

4.4.2 Structural interdict

In addition to declaratory relief, structural orders can play a central role in strengthening the implementation of socio-economic rights obligations. They can involve reporting back to the court on progress in implementing an order, fact-finding, and different aspects related to enforcing an order.[128] Structural interdicts may be necessary to secure compliance with a court order, where declaratory orders or other forms of relief have not been complied with.[129]

In the context of discussing litigation related to the right to education, Veriava and Ally explain how structural interdicts can be an effective tool for civil society to hold the state accountable for the implementation of court orders.[130] In *Equal Education*, discussed above, a structural order was sought 'requiring the respondents to submit to the court a plan and programme and then to file regular reports detailing progress on the steps taken to implement the NSNP [National School Nutrition Programme]'.[131] Obtaining a structural order assisted the litigants in the following way: 'Through responding to the DBE's reports under the structural order, the organisations were able to develop insights into the rolling out of the NSNP and make recommendations in an attempt at solution-orientated engagement with government.'[132] This is a helpful way of monitoring whether the changes that litigation aims to achieve are being implemented. Veriava and Ally further argue that:

> legal mobilisation by a social movement is arguably particularly conducive to structural orders as this model is suited, through its nationwide and grassroots structures and

[126] Roach and Budlender (note 117 above) 346.
[127] R Maphosa 'Are judicial monitoring institutions a legitimate remedy for addressing systemic socioeconomic rights violations?' (2020) 36 *South African Journal on Human Rights* 362, 365.
[128] Brickhill (note 51 above) 214.
[129] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 129.
[130] Veriava and Ally (note 85 above) 242.
[131] Ibid.
[132] Ibid 243.

networks, to gather the information that is necessary to build a case and to monitor when the order is being implemented.[133]

Structural orders may be easier to obtain when there is a clear obligation on government and they are not fulfilling it, as can be seen in the NSNP. Here the state was not properly implementing its own programme. It may be more difficult in cases related to access to housing or basic services, where the scope and content of the right is being challenged. Structural orders can however be formulated in ways that are sensitive to separation of powers concerns. Budlender suggests that '[t]he most effective sort of structural remedy orders the government to say what it proposes to do to remedy the breach, thus leaving important operational and policy choices in the hands of the government.'[134] This enables courts to hold the state accountable without prescribing how a breach needs to be remedied. These orders can facilitate a dialogue between the different parties and the court, and strengthen the accountability and participatory aspects of South Africa's constitutional democracy.[135]

The Supreme Court of Appeal has confirmed that structural orders can also be made against functionaries of the state, and that this promotes accountability and does not infringe the separation of powers.[136] It affirmed that:

> the decisive consideration is the principle of public accountability. It is a founding value of the Constitution and central to our constitutional culture. In terms of s 152(1)(a) of the Constitution the objects of local government include to provide accountable government for local communities [. . .] Section 195(1)(f) of the Constitution specifically states that public administration must be accountable.[137]

However, structural orders in South Africa have seldom referred to gender or women. I now consider comparative examples from Colombia and India where structural orders were used effectively in cases related to women's socio-economic rights.

The Colombian case, T-025, discussed above in the context of broader impacts of court decisions, is a good example of how structural orders can be used to hold a state accountable

[133] Ibid 244.
[134] Budlender (note 55 above) 592.
[135] G Budlender 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8 *ESR Review* 9, 11.
[136] *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] 2 All SA 251 (SCA) para 26. In this case, despite numerous follow ups, the City of Johannesburg had been dragging its heels in providing alternative accommodation, as ordered by the court, for people who were to be evicted from their homes. See also: *Hlophe v City of Johannesburg Metropolitan Municipality* 2013 (4) SA 212 (GSJ).
[137] Ibid para 25.

and to monitor the implementation of a court order to see if it is resulting in tangible change in the lives of the people, and especially women, whose rights were violated. T-025 had a strong monitoring process.[138] It had 'twenty follow-up public hearings involving a wide array of governmental and non-governmental actors, as well as 289 follow-up decisions.'[139]

As highlighted in the discussion in section 3.3 above, the process following the structural orders in this case paid specific attention to women and other vulnerable groups, who were disproportionately impacted by the displacement.

Rodriguez-Garavito explains that the court order was multi-faceted: it imposed an obligation on the state to formulate a plan 'to tackle the IDPs' humanitarian emergency and to overcome the unconstitutional state of affairs'; it also required that a budget be drawn up for the implementation of the plan; and the state had to ensure protection of at least the basic rights including food, education and housing.[140] The importance of having a mechanism to follow up on cases is expressed as follows by Brinks et al:

> In short, in many of the most important social rights cases, we see protracted follow-up campaigns, the primary goal of which is to secure compliance with, and to expand upon, a judgment or right that has already been secured. Where this is not present, the rights often remain unrealized.[141]

Again, this emphasises the practical effects of obtaining relief in the form of a structural order and how follow-up helps to ensure that the court order is properly implemented and results in positive change in the lives of those who approached the court for assistance.

A second example from India provides lessons for how to use the courts for meaningful change in women's lives. In *Milun Saryajani, Through its Editor v Pune Municipal Commissioner* the applicants sought a direction from the Court that the respondent 'provide and maintain latrines, privies and urinals and other similar conveniences for the women walking on the streets, in Pune, at appropriate and convenient locations'.[142] The Court later allowed the amendment of the petition to include all municipal corporations in the state of Maharashtra as respondents.[143] Because of the important issues raised in this matter, interim directions were given a year before

[138] Rodriguez-Franco and Rodriguez-Garavito (note 47 above) 455.
[139] Ibid.
[140] Ibid 1682.
[141] Brinks et al (note 25 above) 302.
[142] *Milun Saryajani Through Editor Geetali Vinayak Mandakini v Pune Municipal Commissioner*, Pune Public Interest Litigation No. 98 of 2011 (2015) (High Court of Bombay decision) para 1.
[143] Ibid.

the decision, directing every municipal corporation to 'evolve its own Scheme for providing facilities of clean toilets/washrooms for the benefit of women walking on the streets'.[144] NGO's working with women also had to be allowed to participate in the development of these schemes.[145] The municipal corporations had to submit affidavits responding to the interim directions given.[146] These interim directions are a good example of how courts can provide oversight of the implementation of their orders. Ordering the participation of local NGO's is also a welcome part of the directions as it allowed communities affected by the intervention to be consulted. The people who stood to benefit from this order were clearly a vulnerable group, being women who walk on the streets, be it to work or to take children to school, or for various other reasons.

In its final judgment, the Court emphasised the issues of health and 'the rights of women to have public toilets at various places in a clean and hygienic condition.'[147] The Court also made the connection between human dignity and the rights to proper sanitation and hygienic conditions:

> No human being can live with dignity unless there are facilities to maintain basic hygiene. The right conferred by Article 21 cannot be meaningful if facilities of clean toilets and hygienic toilets are not provided to a woman walking on streets. She needs these facilities at public places like Railway Stations, Bus Stands, Banks, Public Offices like State Government Offices/Municipal Offices. Thus, what flows from Article 47 of the Constitution of India and the provisions of the Maharashtra Municipal 5 (2003) 7 SCC 389 SQ Pathan 15/88 pil.98.11.doc Corporation Act and Mumbai Municipal Corporation Act, is that, public health is of paramount importance and that it is the duty of the State and the Corporations to ensure that public latrines, urinals and similar conveniences are constructed, maintained and kept in a hygienic condition.[148]

The Court further looked at the wide range of negative impacts that lack of sufficient public toilets has for women who walk on the streets.[149] After examining all the relevant factors the Court found that:

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[144] Ibid para 2.
[145] Ibid.
[146] Ibid.
[147] Ibid para 3.
[148] Ibid para 7.
[149] Ibid para 8.

> Considering the foregoing paragraphs, what emerges is that women have the right to have safe and clean toilets at all convenient places, which in a way impacts their right to live with human dignity. One of the paramount duty of the State and the Corporations is to improve public health by providing toilets for women at all convenient places.[150]

In conclusion, the Court gave a detailed order, which included detailed requirements for building the required toilets, such as they should be provided where they are needed the most; the locations should be practical, accessible and safe; and, toilets should have regular electricity supply and adequate water.[151] Importantly, respondents were also ordered to file compliance reports:

> 52. All the Municipal Corporations shall file their first compliance report before 8th March, 2016. The report shall set out the details of the Scheme formulated by the Corporations, and the steps taken pursuant to the same. The affidavit shall also set out the steps taken to revamp the existing toilets.
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> 53. The matter to be listed on 8th March, 2016 under the caption "for directions".[152]

This allows the court to provide oversight over the implementation of its order and it is a way to hold the state accountable to its obligations.

These comparative examples illustrate how structural interdicts can be used to bring about change in women's lives, through ensuring that orders are properly implemented and by allowing the women affected by the rights violations to participate in follow up processes flowing from the structural orders.

4.4.3 Meaningful engagement

Another remedy which has proven to be useful in socio-economic rights cases, is an order for meaningful engagement. This remedy has been used especially in eviction matters. As discussed in chapter 4:

> one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.[153]

[150] Ibid para 44.
[151] Ibid para 50.
[152] Ibid paras 52 and 53.
[153] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39 and chapter 4, 115.

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg,*[154] building on the foundation laid by *Port Elizabeth Municipality v Various Occupiers*, the Court ordered that the parties should meaningfully engage on certain issues.[155] The significant results of such an order in this case, were described by Budlender:

> Both sides knew that they had to engage seriously, for two reasons. First, it had been clear at the hearing that neither side enjoyed a decisive advantage in the argument. The ultimate outcome was therefore uncertain. Second, they knew that the Court was looking over their shoulder: their conduct in the engagement would be reported to the Court, and the Court would have regard to that conduct in deciding what order it should ultimately make. The parties did reach agreement. The agreement made explicit and meticulous provision for measures aimed at rendering the properties safer and more habitable on an interim basis. The City undertook to provide all occupiers with alternative accommodation in identified and well-located buildings. The agreement defined the nature and standard of the occupation to be provided, and determined the way in which the rent would be calculated.[156]

This type of order can arguably help to level the playing fields between parties who, for the most part would have unequal bargaining power. As private owners of property or the state versus often poor and vulnerable people who stand to be evicted. Such engagement could also ensure that the lived realities of evictees are taken into account in the agreement. Within groups of evictees there may also be different power dynamics. Mahomedy has examined the link between power and the different interests at play in an engagement process, and argues that specific groups, like women, may request certain things based on their social context.[157] The specific interests of women and other groups should be taken into account.

This is especially important from the perspective of applying a gendered lens in socio-economic rights interpretation, considering the particularly harsh impact that evictions have on women.[158] Though these orders have been used in eviction proceedings, there is nothing to stop them from being crafted to use in other socio-economic rights cases. The parties taking this

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[154] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).
[155] This case is also discussed in chapter 4, 118.
[156] Budlender (note 55 above) 591.
[157] S Mahomedy 'The potential of meaningful engagement in realising socio-economic rights: Addressing quality concerns' 2019 LLM Thesis Stellenbosch University, 123.
[158] See discussion in chapter 2, 58.

engagement seriously demonstrates that it is not merely a box ticking exercise, to show that there has been consultation.

Meaningful engagement is also be connected to the litigation strategy of proper organisation of clients discussed in 4.3.2 above. In orders for meaningful engagement provision should be made for consultations with women in the client group to ensure that their experiences are considered and that remedies are crafted to meet their specific needs. Consulting with women in the client group will also allow the respondents, often the state in socio-economic rights cases, to better understand and respond to the needs and interests of women, including the need to be protected from violence, when they are formulating policies and addressing socio-economic rights violations.

4.4.4 Constitutional damages

Finally, I consider the remedy of constitutional damages. This remedy was briefly mentioned in the discussion of *Thubakgale* above. Constitutional damages have been described as – 'damages due to the breach of a constitutionally entrenched right.'[159] In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[160] the Court had to determine what an appropriate remedy would be, in circumstances where property rights had to be balanced with the right of access to housing, and agreed with the Supreme Court of Appeal's order of constitutional damages.[161] Briefly, Modderklip was a privately owned farm situated next to a township in Benoni on the East Rand.[162] As the township started getting crowded, people moved onto Modderklip farm.[163] In time there came to be some 18 000 people occupying the land.[164] After some back and forth between Modderklip and the City, about who was responsible for evicting the occupiers, and after attempting different methods of removing them, Modderklip instituted eviction proceedings.[165]

An eviction order was granted and not complied with.[166] The sheriff informed Modderklip that 'she would have to engage a security firm to assist her in carrying out the evictions and therefore insisted on a deposit of R1,8 million to secure the costs of the evictions.'[167]

[159] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 20.
[160] Ibid.
[161] Ibid para 68.
[162] Ibid para 3.
[163] Ibid.
[164] Ibid para 6.
[165] Ibid para 7.
[166] Ibid para 8.
[167] Ibid para 9.

Modderklip would not pay this amount and decided to approach the President for assistance, but this was unsuccessful.[168] Furthermore, the police would not enforce the eviction order because it was considered a private civil matter.[169] Confronted with a situation, where they had an eviction order which they could not enforce, Modderklip approached the Court seeking an order that the state enforce the eviction.[170] It relied on its property rights, the right to equality, and the occupiers right of access to housing.[171] In the High Court, the state was ordered 'to present a comprehensive plan to the Court and to the other parties indicating the steps it would take to implement the court order.'[172] On appeal, the Supreme Court of Appeal agreed that the rights to property and access to housing had been infringed.[173] The respondents were ordered to pay damages in respect of the land occupied, and the residents were given permission to occupy the land until the state made alternative land available to them.[174]

The matter eventually found its way to the Constitutional Court. The Constitutional Court evaluated the state's obligations in terms of section 34 of the Constitution, and how they relate to the rule of law.[175] It found that the state has the obligation 'to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.'[176] The Court emphasised the magnitude of the problem faced by Modderklip in this case, with an eviction order that could not be enforced, as thousands of people would have nowhere to go, and the state had not provided alternative accommodation.[177] The circumstances here were described as 'extraordinary'.[178] The Court found that section 34 placed an obligation on the state to take steps to ensure that Modderklip is provided with effective relief.[179] In conclusion, the Court found that 'in all the circumstances the award of compensation made by the Supreme Court of Appeal was the most appropriate remedy for this case.'[180]

The award of constitutional damages was a creative way to deal with the problem presented. It enabled vulnerable occupiers, who would have been left homeless, to remain on the land

[168] Ibid.
[169] Ibid.
[170] Ibid para 11.
[171] Ibid.
[172] Ibid para 16.
[173] Ibid para 18.
[174] Ibid para 21.
[175] Ibid para 39.
[176] Ibid para 43.
[177] Ibid para 45.
[178] Ibid para 47.
[179] Ibid para 51.
[180] Ibid para 65.

occupied, while waiting for alternative accommodation, and it compensated Modderklip for the violation of its property rights. It is however evident, from the discussion of *Thubakgale* above, that courts will not easily award this remedy. It is also disappointing that the judgment of Jafta J opined that constitutional damages may not be awarded to enforce socio-economic rights.[181] Jafta J was not in the majority on this specific point, therefore courts may continue to award constitutional damages, where it is viewed as an effective remedy in a particular case.

Constitutional damages could be an important remedy for women, when other options are limited, given their special vulnerability in eviction situations, as highlighted in other parts of this thesis.[182] Constitutional damages could also be relevant to women's socio-economic rights more broadly, for instance, for women survivors of violence, when safe alternative accommodation is not readily available to women constitutional damages could assist women to secure accommodation in such desperate circumstances. This could either be in the form of constitutional damages paid to women to enable them to rent accommodation, or constitutional damages to property owners, to allow women to occupy their property. This can also be a flexible remedy which could give women the freedom to live close to work, schools and other amenities.

5. Conclusion

In this chapter I attempted to show that courts have an important role to play in bringing about meaningful change in the lives of poor people and poor women who are not enjoying the protections afforded by socio-economic rights. I acknowledge that there are limits to how far courts can go and that the legislature and executive also have critical roles to play. I have shown that transformative constitutionalism places a duty on all three branches of government to work together to change the social and economic conditions of people, and poor women, in South Africa in an egalitarian direction. I have highlighted the limits in the ability of courts to bring about social change, and the different impacts that decisions can have despite these limits. I have also discussed how litigation should be used in combination with other strategies to bring about tangible change in the lives of people who come to courts to vindicate their rights. I have shown how litigation can be conducted in a way that increases the likelihood of it resulting in social change in the lives of poor women. This includes consulting with the women in a client group to ensure that their lived experiences form part of the court papers, conducting research

[181] *Thubakgale* (note 29 above) para 121.
[182] Chapter 2, 58, chapter 3, 88 and chapter 4, 121.

on the impact of lack of housing and basic services on women, and centring the context and experiences of poor black women in the characterisation of a case. Finally, I have argued that remedies are a vital part of the strategies to employ in better conducting socio-economic rights litigation, and that the implementation of orders should include the participation of women.

CHAPTER 6 – CONCLUSION

1. Introduction

When one combines the legacy of colonialism and apartheid with patriarchy, sexism, racism, capitalism, endemic violence, and growing poverty and inequality in South Africa, the situation for many poor black women is dire at best. This thesis does not aim to solve all of these deeply complex and difficult issues. What this thesis does, is argue that one of the ways to address poor women's vulnerability to violence is to better address their poverty and that there is a role for the law and courts in doing this. I specifically argue that better access to the goods and services guaranteed by the right of access to housing and related services can advance substantive equality and help to address poor women's vulnerability to violence. I further demonstrate how gendered interpretations of socio-economic rights and paying attention to the needs and circumstances of women in legislation and policies can assist with this. In addition, I suggest that evidence of how lack of proper access to housing and basic services enhances women's vulnerability to gender-based violence can, at times, be used to strengthen their socio-economic rights claims.

This chapter starts with a summary of the arguments that I have made throughout this thesis to meet my research objective and answer my research questions. I then highlight the contribution that this research makes. Finally, I set out recommendations, based on some of the research findings.

2. Summary of chapters

Below I summarise the arguments made in the different chapters of this thesis and show how I answered the different research questions.

Chapter 1 sets out the background and context of my research. In this chapter I begin to answer the research question of the relationship between access to the goods and services guaranteed by the right to housing and basic services and women's vulnerability to violence. I highlight that too many people in South Africa are battling poverty every day and argue that this has particular consequences for women. The gendered nature of poverty in South Africa affects the ability of women to access housing and basic services, and informs the reality that many women lack proper access to these goods and services. Women's poverty is evidenced by higher unemployment rates among women and a large portion of women occupying low skilled and

low paying jobs.[1] I further argue that another reality that contributes towards women's poverty is that they continue to bear the bulk of responsibility for work in the home, which takes away from time that can be spent on paid work.

Along with poverty, violence against women is another social ill that plagues South Africa. I argue that women across different race, class and cultural groups can be vulnerable to gender-based violence, but some women may be more vulnerable than others because of the nature of the disadvantage they experience. For example, women who live in poverty, women who are economically dependent on their partners and women who live in informal settlements are already disadvantaged and vulnerable.[2] Gender-based violence adds another layer to their vulnerability. In this chapter I demonstrate how poverty deepens women's vulnerability to violence.

Violence against women can be attributed to more than conflict or tension between individuals. It relates to systemic issues such as gender inequality, patriarchy, and the normalisation of violence in society.[3] I argue that the way these systemic issues manifest themselves in the lives of poor women is another illustration of how poverty can make women more vulnerable to violence.

For example, violence against women and other vulnerable groups is also an attempt to assert power and control.[4] Hegemonic masculinity affirms the assertion of power by men over women.[5] This has been associated with a heterosexual man, who works and is able to support their family.[6] Where people live in poverty and men cannot find work and support their families, research has suggested that masculinities are constructed around controlling women through violence and sex 'to achieve forms of respect, which are not attainable through work and establishing families'.[7]

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[1] Chapter 1, 10.
[2] Centre for the Study of Violence and Reconciliation 'Violence Against Women in South Africa: A Country in Crisis' (2017) 12.
[3] A Gibbs, K Dunkle, L Ramsoomar, S Willan, N Shai, S Chatterji, R Naved and R Jewkes 'New learnings on drivers of men's physical and/or sexual violence against their female partners, and women's experiences of this, and the implications for prevention interventions' (2020) 13 *Global Health Action* 1, 2.
[4] K Amaechi, T Thobejane and R Rasalokwane 'Feminist reflections on the impact of the South African national Covid-19 lockdown on the upsurge of gender-based violence in Mahwelereng township of Limpopo Province, South Africa' (2021) 19 *Gender and Behaviour* 17189, 17194.
[5] K Closson, A Hatcher, Y Sikweyiya, L Washington, S Mkhwanazi, R Jewkes, K Dunkle and A Gibbs 'Gender role conflict and sexual health and relationship practices amongst young men living in urban informal settlements in South Africa' (2020) 22 *Culture, Health and Sexuality* 31, 32.
[6] Ibid.
[7] Ibid 42.

In general, the exerting of patriarchal privilege, power and control over women reveals itself in particular ways in the lives of poor women in South Africa. Conditions of poverty place many stressors on people's lives and make women more vulnerable to violence.

Having argued that poverty makes women more vulnerable to violence, I propose that addressing women's poverty will assist in addressing their vulnerability to violence. An aspect of the experience of poverty is lack of proper access to the goods and services guaranteed by the right of access to housing and basic services.

Following the foundation laid in chapter 1, chapter 2 sets out my conceptual frames of substantive equality and gendered socio-economic rights, and shows how violence against women can be understood in terms of these frames.

This chapter first speaks to the research question of how substantive equality can be better interpreted to centre the problem of violence against women.

Using Fraser's model of redistribution and recognition, I show how substantive equality needs to address both these elements of justice. I then draw on the work of Fredman and Albertyn on substantive equality from a legal perspective and apply a multidimensional understanding of substantive equality to violence against women.

In the context of violence against women, I argue that, the element of distribution, speaks to women's lower economic status, the lack of sufficient social protection for women who work in the informal economy, and the lack of value for time spent on unpaid work in the home, which limits the options available in terms of time to spend on paid work. This can contribute to economic dependence and can make it difficult to leave violent relationships. The need to redress disadvantage, also connected to the element of distribution, can be seen in the material deprivation experienced by poor women in South Africa and the difficulty in accessing basic resources, which in turn renders them vulnerable to violence.

Violence against women is also connected to failures in recognition, which can be seen in stigma and secondary victimisation experienced by survivors of violence. The recognition element can also be seen in how violence affects all women because of their status as women, regardless of their race, culture or socio-economic background.

Acknowledging and valuing time spent on unpaid work in the home, while being connected to the element of distribution, is also connected to the dimension of difference and diversity. I argue that there is a need to do more than accommodate difference. We should also value the

different roles that people occupy and address the structural issues that may disadvantage especially women in specific roles. I further argue that work opportunities should be flexible and remuneration decent, so that women can have economic freedom and more choices in terms of leaving abusive relationships.

Finally, violence against women affects the ability to participate as equals in society: the participatory element of substantive equality. Survivors are often silenced by their partners or family members; afraid to speak out; or not believed or taken seriously by their families or the authorities when they do speak out. Women should be allowed to feel that they can speak without fear, that their voices matter and that they will be heard.

In this chapter I argue that violence against women can be viewed from the perspective of these various dimensions of substantive equality and that addressing violence against women is an integral part of advancing substantive equality.

I then consider the connection between socio-economic rights, violence against women and substantive equality. I argue that the inclusion of socio-economic rights in the Constitution and its proper implementation is also integral to achieving substantive equality. I go on to suggest that these rights are particularly important for women and for assisting to address their vulnerability to violence.

A part of achieving substantive equality means that all people should have access to adequate and quality goods and services, guaranteed by socio-economic rights, regardless of their socio-economic position. Lack of access to these goods and services will also impact differently on women and men because their lived experiences are different and they often occupy different roles in the home and society. The protection of socio-economic rights needs to be informed by these realities.

At the same time, there is significant evidence that lack of proper access to housing and basic services can also make women more vulnerable to violence. This means that addressing socio-economic rights can help address violence against women, and advance substantive equality.

Insofar as the fulfilment of socio-economic rights are primarily the responsibility of the executive and legislature, it is important to see what policies and laws are in place to address these, especially as they relate to violence against women. Indeed, numerous pieces of legislation and policies aim to give effect to the right of access to housing and the related services. In chapter 3, I examined a few of these, focusing on those that are relevant to the lives

of poor women who live in informal settlements, and evaluate whether they consider the specific needs and circumstances of women and the need to protect women from violence. In particular, I focus on the availability of shelters and longer-term accommodation options for women escaping violence, as well as the position of women in informal settlements, who might be especially vulnerable to violence.

The Housing Act 107 of 1997 is the main piece of legislation dealing with the provision of housing. Its general principles include to 'give priority to the needs of the poor'.[8] The housing needs of marginalised women must also be promoted.[9] The National Housing Code contains comprehensive programmes for different types of housing. Various subsidies are available for people with low incomes to own or rent accommodation. Despite this, many of my interview participants, who provide shelter and services to survivors of violence, find that securing affordable accommodation is an enormous challenge.

Many women stay in or return to abusive relationships after spending time in a shelter because they don't have an alternative place to stay. This makes them vulnerable to further violence. What makes things more difficult is that shelters are often under-funded and struggle to provide services to survivors. I argue that funding for shelters in South Africa needs to be better coordinated and that government needs to provide more support to non-profit organisations who provide sheltering and other services. I also argue that existing low-cost rental housing programmes should make specific provision for women survivors of violence and that the Special Needs Housing Policy should be implemented.

In addition, many poor people who do not have access to formal housing live in informal settlements. Unfortunately, there is a big gap between the standard set by Upgrading of Informal Settlements Programme and the reality of living in an informal settlement. Life in an informal settlement is often characterised by occupying a small space, with little to no security; using communal toilets and taps; and, limited street lighting.[10] These factors can all increase poor women's vulnerability to violence.

When policies are formulated for the provision of free basic water and electricity supply, in deciding the amount of these allocations, policy makers should take into account the lived

[8] Housing Act s 2(1)(a).
[9] Ibid s 2(1)(e)(x).
[10] Interview 3.

realities of poor women who rely on these services, and how lack of proper access can make them vulnerable to violence.

In the context of insufficient or inadequate state action to realise socio-economic rights, courts in South Africa have had to grapple with challenges to, and gaps in the implementation of, legislation and policies, which exist to protect the rights to housing and basic services. Although not many cases get to court, the way in which socio-economic rights are interpreted can have an impact on poor women's access to the goods and services guaranteed by these rights. In chapter 4, I argue that courts should apply a gendered lens when interpreting socio-economic rights. I propose that this is an approach that can be used to increase the likelihood of socio-economic rights protection significantly improving the social and economic conditions of poor women's lives and to assist in addressing their vulnerability to violence. Admittedly, there may be other approaches that can be employed, but I contend that applying a gendered lens is a strategic way to surface and take account of the needs and circumstances of poor women, when adjudicating socio-economic rights.

Applying a gendered lens to socio-economic rights interpretation means interpreting rights in a way that shows an awareness of women and men's different lived experiences. These experiences are often informed by social constructs around gender, the different roles occupied in society and what is often expected of women and men respectively. These different realities affect the ability to access and enjoy the goods and services guaranteed by the right of access to housing and related services, and the impact of lack of access.

I argue that a gendered lens can be applied by drawing on Bartlett's approach of asking the woman question, and bringing more substantive considerations into the reasonableness enquiry developed by the Constitutional Court to assess whether the state is fulfilling its socio-economic obligations. I acknowledge that courts have been resistant to relying on the substantive aspects of the reasonableness enquiry but argue that growing poverty, inequality and violence against women, as well as signs of the state not making significant inroads on these issues, should provide the impetus to do this.

Applying a gendered lens means examining the circumstances and context of women litigants, and how they are affected by the lack of access to housing and basic services (the impact of the right's violation). It would also mean considering the need to promote racial and gender equality, which form part of the underlying purpose and values of rights, and paying attention

to the intersecting forms of disadvantage that women can face, for example on grounds of socio-economic status, race and gender.

I propose that the theory of multi-dimensional substantive equality, developed in chapter 2, can be usefully applied in examining the particular context of women. Another example of a claim, related to access to housing, could be a woman, who is a survivor of gender-based violence, arguing that longer-term low-cost rental accommodation should be made available to her and other women in her situation.

In conducting a contextual analysis, when considering the element of distribution, one would have to ask if she is unemployed or in a low paying job, and how much time she spends on caring work in the home.[11] These realities can affect her financial resources, time available for paid work, her ability to maintain a home, and the choices that may be available to her if she wants to leave an abusive relationship.

Acknowledging and valuing time spent on unpaid work in the home, while being connected to the element of distribution, is also connected to the dimension of difference and diversity. The different roles that women occupy should not only be accommodated but also valued. Courts need to ask what structural issues may disadvantage women in specific roles. This is further connected to the element of recognition as it is often women who do this unpaid work, and these roles are not always respected. Poor black women would experience different kinds of misrecognition in these roles.

On participatory parity, her ability to participate in decision making structures in her community when they engage with the state on the provision of affordable housing, also needs to be considered. This is because, when leadership structures are patriarchal, women are often made invisible or not given the opportunity to be heard in decisions that affect them.

Further, there should be an examination of her social and economic conditions. This assessment would include any power imbalances in her current or past relationship, as a result of gendered roles, financial dependence and earnings, and how this could affect asserting power or control over her and make her more vulnerable to violence.

Finally, women will have different and unique experiences which need to be acknowledged. The intersecting forms of disadvantage that women face, will affect their ability to access

[11] In chapter 1, I discuss the gendered nature of poverty.

housing and basic services, and should be taken into account in applying a gendered lens to socio-economic rights.

I provide examples from cases which illustrate where courts have done a good job of applying a gendered lens and where they have failed to do so. I also show how the right to and value of equality can be used to strengthen women's socio-economic rights claims.

While most of this thesis focuses on how the law and courts can better protect women's rights of access to housing and basic services, and how this is also important for addressing poor women's vulnerability to violence, the law cannot solve social and structural problems on its own. In the final substantive chapter of this thesis, I examine: the limits of using law to bring about social change, the different kinds of impacts that court decisions can have, and strategies that can be used to increase the likelihood of litigation resulting in positive change in the lives of poor women who seek to protect their socio-economic rights.

In addressing the limits of the law, I show that the judiciary is mindful of the separation of powers, and how it understands its role in a constitutional democracy. Accordingly, it will often defer to the legislature and executive in decisions that have far reaching economic and policy implications. In some instances, I argue that the judiciary is too deferential to the other branches of government.

I further contend that there are limits to what the law can do to change social norms, attitudes and beliefs related to systemic issues such as patriarchy and gender roles which can result in the oppression and subjugation of women.

I go on to argue that, despite these limits, court decisions can have impacts not only for litigants before the court but also beyond the particular outcome of a case. These effects can be direct or indirect. Drawing on Brickhill, I show how decisions can have different kinds of impacts which can be legal, material and political.[12] Examples from cases are used to illustrate the different kinds of effects and impacts that a decision can have. This is important for the argument of this thesis because it illustrates the potential that exists for using public interest litigation to bring about social change in the lives of poor women.

Finally, I set out strategies that can be used in socio-economic rights litigation to maximise the chances of success and for outcomes to make an impact in poor women's lives. I focus

[12] J Brickhill 'Strategic litigation in South Africa: understanding and evaluating impact' 2021 DPhil thesis, University of Oxford, 68.

specifically on how public interest litigation can be conducted to better protect women's socio-economic rights in ways that might assist in addressing poor women's vulnerability to violence. I build on the factors suggested in the Atlantic Philanthropies report and show how these should contain a gendered dimension.[13] Firstly, the factor of proper organisation of clients should also include a gender dimension. Developing the arguments I make in chapter 4, for applying a gendered lens in socio-economic rights interpretation, I argue that this starts at the point of consultation with clients. Lawyers should be intentional about consulting with the women in their client group to hear their views and experiences related to lack of proper access to housing and basic services. Related to the need to consult with women in the client group, I build on the factor of research needed for litigation. Research should be conducted on how lack of access to housing and basic services can mean different things for men and women, because of different roles they play in their homes and communities, and different expectations related to traditional gender norms. While studying the impact of lack of access to housing and basic services on women, researchers should also ask about women's experiences of vulnerability to violence. From a gender perspective the characterisation of a case is also important. Cases about the right of access to housing and basic services, should also show how the issues relate to the right to and value of equality, and other rights that may be relevant to the lives of poor women. The experiences of poor women should be central to the characterisation of a case.

For court decisions to result in meaningful change in people's lives, court orders need to be well formulated and implemented. The final part of chapter 5 examines the types of remedies that can help to ensure the protection of poor women's socio-economic rights. For example, the follow up process flowing from a structural order can provide for specific attention to be paid to the implementation of the order from the perspective of poor women. Orders for meaningful engagement can also require that women in the affected group are involved in the consultation process.

I argue that, through the remedies it grants, courts can create the conditions for various parties to make genuine attempts to address socio-economic rights violations, and can increase the likelihood of socio-economic rights litigation resulting in social change in the lives of poor women in South Africa.

[13] S Budlender, G Marcus and N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' 2014 The Atlantic Philanthropies, 110.

3. Contribution of research

My thesis makes the following contributions to research and to possible litigation: I demonstrate how the theory of multi-dimensional substantive equality can be applied to violence against women; I identify the gaps in the legislative and policy provisions related to shelter and longer-term accommodation for women who are survivors of and vulnerable to violence, and propose that there is room for litigation in relation to the Special Needs Housing Policy; I argue that there is a need to apply a gendered lens in socio-economic rights interpretation both to improve poor women's access to the goods and services guaranteed by these rights and to assist in addressing their vulnerability to violence; and finally, I contend that paying attention to women's experiences is missing in legal strategies that aim to increase the likelihood of public interest litigation resulting in social change.

3.1 The application of multi-dimensional substantive equality to violence against women

This thesis interrogates how part of the goal of achieving substantive equality in South Africa should include addressing violence against women. Building on the work of Fraser, Fredman and Albertyn, I illustrate how the different dimensions of substantive equality apply to violence against women in South Africa. I argue that addressing violence against women is connected to issues of distribution of material resources, recognition, the ability to participate as equals in society, and to the social and economic conditions of women's lives.

3.2 Legislative and policy gaps in accommodation for women who are vulnerable to violence

In relation to the legislative and policy framework in South Africa, this thesis identifies the gaps in the provisions related to shelter and longer-term accommodation for women who are survivors of and vulnerable to violence. I find that provisions on shelters are not well coordinated and that shelters are terribly underfunded. I further argue that specific provision should be made for women survivors of gender-based violence, as a vulnerable group, in existing low-cost rental housing programmes. Finally, I contend that the Special Needs Housing Policy should be urgently implemented, to assist in addressing the gap in low-cost accommodation for women. This could be the basis for possible litigation.

3.3 The need to apply a gendered lens in socio-economic rights interpretation

Though there is a developed body of literature which argues for more substantive interpretations of socio-economic rights, I strengthen the argument by making a case for applying a gendered lens to socio-economic rights using multi-dimensional substantive equality as a tool. I argue that this is necessary for rights protection to more meaningfully

address the material conditions of poor women's lives. I contend that it is part of ensuring better access to the goods and services guaranteed by socio-economic rights and for helping to address poor women's vulnerability to violence. I further argue that where women's vulnerability to violence is part of the context and factored into a socio-economic rights claim, it can strengthen this claim. This approach is also critical from a symbolic perspective as it implores lawyers and judges to listen to and centre the experiences of poor women in socio-economic rights cases and to carefully engage with how lack of proper access to housing and basic services impacts their lives.

3.4 Litigation strategies for using law to bring about social change in the lives of poor women

Building on my arguments for applying a gendered lens and drawing on the Atlantic Philanthropies report, the work of Brickhill and the outcomes of my interviews, I develop strategies that can be used to increase the likelihood of socio-economic rights litigation making a difference in the lives of poor women. I argue that lawyers should be intentional about consulting with the women in their client group to hear their experiences related to the impact of lack of proper access to housing and basic services. I further argue that research should be conducted on how lack of access to housing and basic services can mean different things for men and women, so that the specific impact of lack of access to housing and basic services on women can be included in the court papers. Finally, I contend that women should be central to the characterisation of a case, especially as poor black women usually experience the lack of access to housing and basic services more deeply, given their position in society.

4. Recommendations

A number of recommendations emerge from different parts of my research. The first set of recommendations discussed below are related to my findings on the legislative and policy gaps in provision of accommodation for women who are vulnerable to violence. This is followed by recommendations to address my findings on the need for a gendered approach in socio-economic rights litigation to help to address poor women's vulnerability to violence.

4.1 Closing the legislative, policy and implementation gaps in accommodation for women survivors of gender-based violence

Throughout the interviews conducted as part of my research and in the relevant literature, it has been evident that women find it difficult to secure affordable accommodation. This is especially true for poor women who are vulnerable to violence. Shelters are a temporary option,

usually for about three to six months. Following this, women often return to live in a home with their abuser because they do not have alternative accommodation options.[14] As has been explored in chapter 3, there is a Special Needs Housing policy, which would cater for vulnerable groups, including survivors of gender-based violence, but this policy is yet to be implemented. It is not clear what the reasons are for the delay in the implementation of this policy, which the state has been in discussion with civil society about for years. The implementation of this policy needs to become a serious priority. This was stressed by one of my interview participants. They highlight that this policy has been in discussion for a long time and acknowledge that a lot of work needs to be done by various departments including the Department of Social Development and Department of Public Works, in order for this policy to be implemented.[15] They state that the implementation of this policy will go a long way to assist with the major challenge of helping women to find accommodation once they leave the shelter.[16] In determining who can access accommodation in terms of this policy, the requirements should be broad and inclusive. Women who fear or have been threatened with violence should be able to access safe housing, regardless of whether they have obtained a domestic violence interdict or laid a criminal charge. Women who have children should be able to stay in this accommodation with their children. Where there are income thresholds, it should be considered that poverty is multidimensional and relates to more than an individuals income.

In terms of funding for special needs housing, a specific budget line item should be allocated to this. It should not, for example, be in a general pool of funds allocated to the Department of Social Development for vulnerable groups. Responsibilities should also be clearly allocated to various departments detailing who is responsible for different aspects of special needs housing, for example, the housing units themselves, maintenance of these units, and support services that should be available.

In addition to the urgent need to address longer term affordable accommodation for women, more funding and support needs to be provided to existing shelters. The crisis regarding lack of proper funding for shelters is discussed in chapter 3. It has also been disturbing to note news headlines regarding withdrawing of funding for shelters.[17] More funding should not only be

[14] Interview 6.
[15] Ibid.
[16] Ibid.
[17] T Metelerkamp 'Western Cape NPOs sound alarm on impacts of social development budget cuts on the vulnerable' 1 April 2024 <https://www.dailymaverick.co.za/article/2024-04-01-western-cape-npos-sound-alarm-on-impacts-of-social-development-budget-cuts-on-the-vulnerable/> ; D Steyn 'Gauteng government pays shelters after receiving letter of demand' 12 April 2024 <https://groundup.org.za/article/gauteng-government-

provided for the shelters themselves, but also for the holistic services offered to women at these shelters.

Some of my interview participants described the range of services they provide and the importance thereof. Interviewee 1 describes that their shelter not only provides legal and psycho-social support but they also have:

> skills development programmes, and that answers the question of what will I do without this individual. It allows us to empower women in a way that is practical. Because once we've taken you out of the shelter and you've gotten the counselling you need, you've got your protection order, your maintenance, what happens? How do you rebuild your life. The partnerships that we have in terms of the skills development side, I think they are one of the most powerful tools we have in terms of restoring survivors back to themselves, to a place where they feel self-reliant and confident. Some of those things would be as simple as driving schools, or beauty courses, or baking, whatever type of area speaks to you. I think that is the approach we have found thus far to be most effective. And it's because we are capacitated in a way that allows us to do that.[18]

Providing women with skills not only can assist with building their confidence, but could also make it possible for them to earn an income and be self-reliant, as the interviewee says. This could help them to pay for low-cost accommodation, where it is available, as an alternative to moving back into a house with an abusive partner.

Interviewee 9 also stated that they provide their residents with skills training, which includes computer training, and they assist residents who want to go back to school or further their education.[19] This will help to put them in a better position to find employment, to be able to pay rent and to support themselves, once they leave the shelter.

These examples illustrate the vital services that shelters provide in assisting women survivors of violence, and why the state should be doing more to support them.

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pays-gbv-shelters-after-receiving-letter-demand/> ; M Mafata 'Gauteng's shelter system is "broken" because of state incompetence' 3 May 2024 <https://groundup.org.za/article/shelters-unable-to-house-gbv-victims-struggle-to-find-placement-elsewhere-amid-funding-crisis-in-gauteng/>.

[18] Ibid.

[19] Interview 9.

Social housing subsidies and institutional housing subsidies are existing programmes under the National Housing Code which are and can be used to provide longer term low-cost rental accommodation to women survivors of violence. This should be done in a more structured way.

In examining housing needs in South Africa, the social housing policy lists categories of people with different housing needs. These include households where people are in need of urgent alternative accommodation and people with special housing needs.[20] Women who are vulnerable to violence would arguably fall into both of these categories. Interestingly, survivors of gender-based violence are not listed in the examples of people with special housing needs, though they have been included in this group elsewhere.[21] This programme could explicitly make provision for vulnerable women and children. Organisations that provide services and shelters to survivors of violence should also be assisted to obtain accreditation as social housing institutions. This will enable them to provide longer-term low-cost accommodation to survivors of violence.

The same applies with institutional housing subsidies. These subsidies can also be used to provide low-cost accommodation to women survivors and women who are vulnerable to violence. As explained in chapter 3, institutional housing operates similarly to social housing, the difference being that social housing programmes are run within designated restructuring zones.[22] Subsidies under this programme are given to housing institutions to provide affordable rental housing. These institutions need to meet certain requirements, including being legal entities under relevant legislation.[23] Shelters that are interested in providing much needed longer-term accommodation through this programme should be assisted in the process of becoming accredited as housing institutions. The list of who will be assisted by the programme includes people classified as aged and people classified as disabled.[24] Survivors of gender-based violence should also be included as a category of people who can be insisted by this programme, given the lack of affordable accommodation available for this group of vulnerable people.

As I have highlighted throughout this thesis, in addition to better access to affordable accommodation, poor women also need better access to basic services. This is especially the

[20] Department of Human Settlements *National Housing Code, 2009, Part 3 volume 6: Social Housing Policy*, 30.
[21] Dullah Omar Institute, University of the Western Cape – Webinar on Special Needs Housing Policy: Progress and Status, 28 July 2022.
[22] See discussion: chapter 3, 73.
[23] Department of Human Settlements *National Housing Code 2009, Part 3 volume 6: Institutional Subsidies*, 14.
[24] Ibid 19.

case for women who live in informal settlements. One of my interview participants suggested that for people living in informal settlements more JoJo tanks should be provided to ensure access to adequate water.[25] This is linked to the reality discussed elsewhere, that it is predominantly women who have to wake up early in the morning to go and fetch water. If more tanks are made available, this could decrease the distance and time that women have to walk to fetch water. This could also make them less vulnerable to attacks, when walking to fetch water in the early hours of the morning. This would be a temporary solution because, ultimately, the goal should be for people to have taps at their homes. More communal toilets should also be provided in places where people are sharing toilets. These should be safe and hygienic, and there should be proper lighting inside and around these toilets.

4.2 How to advance a gendered approach to socio-economic rights litigation to address violence against women

Ultimately law students become lawyers and judges. For this reason, legal education and ongoing judicial education has a critical role to play in shaping how lawyers engage with the interpretation of socio-economic rights and how this relates to the lived realities and context of poor women in South Africa.

4.2.1 Legal education

In chapters 4 and 5, I argue that courts and litigants should apply a gendered lens when interpreting socio-economic rights. This involves bringing more substantive considerations into the reasonableness enquiry, such as paying attention to the specific context of women litigants and asking the woman question, as developed by Katherine Bartlett.[26] This is necessary for socio-economic rights protection to make a meaningful difference in the lives of poor women, to ensure that they have better access to the goods and services guaranteed by the right of access to housing and the related services, and to assist in addressing poor women's vulnerability to violence.

The way judges and lawyers interpret and apply the law can be influenced by what and how they learn about the law. This makes legal education relevant to applying a gendered interpretation to socio-economic rights. The content of legal education today must undoubtedly be informed by the new constitutional democracy. It is a part of transformative constitutionalism, discussed in chapter 5. Different authors have provided guidance on what

[25] Interview 5.
[26] See discussion: chapter 4, 125.

legal education should look like in South Africa's constitutional democracy. For Langa, legal education should teach students to critically engage with the values of the Constitution:

> We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of the authority. No longer can we responsibly turn out law graduates who are unable to critically engage with the values of the Constitution and who are unwilling to implement those values in all corners of their practices. A truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education. It requires that we regard law as part of the social fabric and teach law students to see it as such. They should see law for what it is, as an instrument that was used to oppress in the past, but that has that immense power and capacity to transform our society.[27]

This is a far cry from formalist understandings of law.[28] In as much as the law was used to prop up the oppressive apartheid system, it now must be used to advance the values of constitutional democracy which includes racial and gender equality. Law schools should not superficially include this in their curriculums, but encourage students to think critically about how these values can be advanced in the interpretation and development of the law and how law affects the material conditions of women's lives. Students should also be given the opportunity to engage with how laws which appear to be neutral can have a disproportionately negative impact on women and specifically poor women, and can ignore or erase their experiences. These learning opportunities should not only be found in subjects like constitutional law or human rights, but also in areas such as contract law, property law and commercial law.

Legal education should surface how the law relates to what is happening in different communities. Van Marle proposes that '[t]he complex relationship between the university and the community, between the ivory tower and the city should be raised at the very least.'[29] This is part of applying a contextual analysis to the interpretation of rights broadly, and specifically paying attention to the context and circumstances of women litigants in socio-economic rights cases, and how they are impacted by lack of access to housing and basic services.

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[27] P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 351, 356.
[28] In a 2014 article, Van Marle attributes a continuance of formalist approaches to law to lack of sufficient transformation in legal education. See: K Van Marle 'Reflections on legacy, complicity, and legal education' (2014) 46 *Acta Academica* 196, 204.
[29] Ibid 212.

Legal education has the potential to shape how the role of the law in society is viewed. It provides an opportunity to encourage students to interrogate how the law and courts can assist in concretising the promises of the Constitution. This includes the promises of socio-economic rights and the need for the protection of these rights to pay attention to the needs and circumstances of women. Van Marle convincingly argues that 'actual changes in socio-economic circumstances can come only if there is a re-thinking of, and shift in, how we view law; we can do law differently and achieve different outcomes with it only if we view and think about it and teach it differently.'[30] From the perspective of women's socio-economic rights, students at the undergraduate level should already start to grapple with what lack of access to housing and basic services, for example, means in the lives of poor women and other marginalised groups. Students should not only start to engage with these issues at a post-graduate level.

Law teachers can have different understandings of the value of law for society, and this can impact what they teach and how they teach.[31] For Bezuidenhout and Karels, they can be divided into: the peddlers of precedent- who honour the positive law; the skill builders- who focus on skills as a commodity for practising law; and the socially conscious knowledge generator- who acknowledges that legal education should include characteristics of 'formalism, functionalism, realism, and social justice'.[32] It is important that teachers of law, while instilling the doctrinal aspects of law and teaching the necessary practical skills, also provide an opportunity for students to consider how the law should advance the values of the Constitution. This should include an examination of how the law responds to the lived realities of the poor and marginalised women in South Africa, for many of whom the Constitution is no more than a piece of paper.

Some academics have expressed criticism of legal education in South Africa. Modiri highlights how many senior academics received their training under the apartheid system and have been influenced by this legal culture and formalist view of law.[33] The disconnect between the new constitutional order and the economic, social and other realities inherited from colonialism and apartheid are sometimes underappreciated.[34]

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[30] K Van Marle 'Hold onto critical jurisprudence' (2019) 23 *Law, Democracy & Development* 202, 215.
[31] I Bezuidenhout and M Karels 'Legal educators – the peddler of precedent, the skill builder and the socially conscious knowledge generator' (2014) 3 *Acta Academica* 40, 42.
[32] Ibid 47.
[33] J Modiri 'The time and space of critical legal pedagogy' (2016) 3 *Stellenbosch Law Review* 507, 507.
[34] Ibid 508.

Similar to arguments made by Sibanda and Madlingozi, mentioned in chapter 5, Modiri is also critical of the constitutional project and its ability to deal with persistent inequality and poverty in South Africa.[35] Modiri argues that a contestation about the spirit and content of the Constitution should be at the heart of legal education.[36] While I would argue that legal education needs to show how the law is relevant to the lived realities of people in society and women specifically, how it should help to meaningfully address poverty and inequality, and how it can reinforce structural inequality and exclusion, this can be done within the constitutional framework. Students should be given the opportunity to think critically about the law and its role in society.

4.2.2 Judicial training

With the advent of South Africa's constitutional democracy adjudicators had to start thinking differently about how they interpret and develop the law, and the role of law in society. This is a part of the goal of transformative constitutionalism and of building a society where the human dignity, freedom and equality of all people is respected and protected.

The South African Judicial Education Institute (SAJEI) provides continuing judicial education to judges and magistrates. This includes training on social context and diversity.[37] The below recommendations can add nuance and be incorporated into the training offered by the SAJEI.

1994 brought about a change in the political and legal system in South Africa. Langa argues that there needs to be an acceptance of the relationship between politics and law.[38] This is a relationship that should be acknowledged, if not embraced, and definitely not ignored by adjudicators. As has been pointed out in the context of legal education above, many adjudicators also would have been educated and practised law under the apartheid system.[39] Under this legal culture, as Davis argues, 'law was presented as neutral and objective. The reality that law invariably expresses a particular politics and enforces a singular conception of society would rarely have formed even a small part of the dominant legal education in South Africa.'[40] For this reason, judicial training should prepare adjudicators for working in a constitutional democracy. Judicial training should show judges how to critically examine

[35] Ibid 515.
[36] Ibid 516.
[37] See SAJEI website for information on their training schedules: <https://sajei.org.za/index.php/training-schedules/> .
[38] Langa (note 27 above) 353.
[39] D Davis 'Judicial education in a transformative context' (2018) 1 *South African Judicial Education Journal* 25, 26.
[40] Ibid.

'existing legal concepts and their reconstruction in the light of the normative framework of the Constitution.'[41] This would include how oppressed and marginalised groups, such as poor black women, can be excluded from protection or made invisible, whether explicitly or implicitly.

Another aspect of adjudicating in South Africa today, is that it is a relatively young democracy, where not only do the contours of rights still need to be developed, judges also need to 'determine the scope and limit of these rights.'[42] This is no easy feat. Adjudicators therefore need to be trained not only to develop rights in line with the values in the Constitution, but also to consider these values when interpreting the scope and limits of rights. This would include considering the values of racial and gender equality when interpreting socio-economic rights.

As a part of advancing the values of the Constitution in decision making, adjudicators also need to be aware of the social context in which they are adjudicating. This is important if judgments are to make a different in the lives of people whose rights have been violated. Dambuza makes a strong case for judicial social context education.[43] This refers to the theory that 'judging is grounded in the human condition and the society in which it takes place.'[44] In this way adjudication should be able to respond to the needs of society. This requires that adjudicators have a sense of what is happening in the 'in the daily lives of the people who appear before them.'[45] In the context of socio-economic rights litigation, I have argued that rights are not always interpreted in a way that brings about meaningful change in the lives of litigants and for my research purposes poor women litigants. Understanding the lived realities of poor women litigants, would include the context of high levels of gender-based violence in South Africa and the impact that lack of proper access to housing and basic services can have on poor women's vulnerability to violence. The reasoning and outcomes of socio-economic rights decisions should be sensitive to these realities.

The background and personal experiences of adjudicators also form part of the social context in which adjudication happens. While adjudicators must act independently and impartially

[41] Ibid 28.
[42] E Cameron 'The transition to democracy: constitutional norms and constitutional reasoning in legal and judicial practice' (2019) 2 *South African Judicial Education Journal* 1, 16.
[43] N Dambuza 'Judicial social context education in South Africa' (2018) 1 *South African Judicial Education Journal* 39, 39. Though adjudicators do receive judicial training, this should be an ongoing endeavour, as social context is not static.
[44] Ibid.
[45] Ibid 47.

when interpreting and applying the law, they do not stop being people, with backgrounds and experiences, when they become judges. This is aptly explained by Langa:

> We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.[46]

Adjudicators should acknowledge that their positionality, experiences and world views enter their court rooms with them. This makes reasons and justifications for decisions not only in terms of legal principles, but also the values that underlie the Constitution, especially necessary. Adjudicators cannot hide behind 'the cloak of judicial impartiality'.[47] This does not mean that that a judge's race, gender, or class will ultimately lead to a particular outcome but rather acknowledges 'the subconscious influence of one's life experience in the adjudicative process'.[48]

One of my interviewees raised a concern about how adjudicators are not always aware of the context of the women complainants before them. They gave an example of when they assist someone to apply for a protection order, 'they are usually reluctant to evict the man because they will tell you, these people are married you know, and even worse if they are married in community of property. They say no but we can't kick out the other party because he is also entitled to that space. And then women are forced to move out because the man cannot be kicked out.'[49] My interviewee argued that despite the man often being the abuser, the woman has to leave and find alternative accommodation. Complainants are presented with another hurdle and told that they should get an eviction order, if they want the man to move out.[50] Interviewee 5 states that the justice system 'must be more friendly to victims of violence' and that there is a need to sensitize different role players including magistrates, police officers and

[46] Langa (note 27 above) 353.
[47] Dambuza (note 43 above) 45.
[48] M Madlanga 'Judging according to personal attributes, outlook on life and life experience: any practical value?' (2018) 1 *South African Judicial Education Journal* 48, 60.
[49] Interview 5.
[50] Ibid.

clerks of the court.[51] These factors are all relevant to adjudicators understanding the social context in which they are adjudicating.

Having a diverse bench and bringing social context into decision making processes will help to ensure that diverse experiences are surfaced, and can help judgments to speak to the needs of poor women and communities whose rights have been violated.

Though South Africa is now a constitutional democracy and the values of the Constitution ought to permeate all aspects of the law and society, patriarchy, racism and sexism still exist. A male adjudicator's perspective and experiences will be different to a female adjudicator. For this reason, male adjudicators need to truly listen to female litigants.[52] This is related to the argument for applying a gendered lens in socio-economic rights litigation presented in chapter 4, and specifically to examining the context and experiences of women litigants.

5. Conclusion

In this thesis I have illustrated how better access to the goods and services guaranteed by the right of access to housing and the related services of water, sanitation and electricity, can help to advance substantive equality and assist in addressing poor women's vulnerability to violence. I have argued that addressing violence against women needs to be part of working towards substantive equality in South Africa. I have also shown how the protection of socio-economic rights is part of working towards achieving substantive gender equality and addressing violence against women, and that paying to attention to how lack of proper access to housing and basic services can make women more vulnerable to violence can strengthen socio-economic rights claims. I have further highlighted how legislation and policies which give effect to the right to housing and basic services at times pay attention to the specific needs and circumstances of poor women, but that there are also gaps to be addressed. In addition, I have argued that courts and litigants need to apply a gendered lens, both in interpretation of socio-economic rights and in preparing for litigation. This is necessary to better protect poor women's socio-economic rights and to assist in addressing their vulnerability to violence. Finally, although there are limits to what the law can do to bring about social change, I develop strategies that can be used to increase the likelihood of socio-economic rights litigation resulting in change in an egalitarian direction, in the lives of poor women in South Africa.

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[51] Ibid.
[52] M Madlanga 'A feminist perspective to judgment writing' (2020) 3 *South African Judicial Education Journal* 41, 55.

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ANNEXURE A

Schedule of Interviews

Interview	**Description of organisation**	**Date and place**
Interview 1	Non-profit organisation providing shelter and services to survivors of gender-based violence	31.10.2022 - Johannesburg
Interview 2	Public interest litigation organisation	2.11.2022 – online via Zoom
Interview 3	Non-profit organisation providing shelter and services to survivors of gender-based violence	3.11.2022 – online via Zoom
Interview 4	Public interest litigation organisation	3.11.2022 - Johannesburg
Interview 5	Non-profit organisation providing services to survivors of gender-based violence	4.11.2022 – online via Zoom
Interview 6	Non-profit organisation providing shelter and services to survivors of gender-based violence	23.11.2022 – online via Zoom
Interview 7	Public interest litigation organisation	13.2.2023 – online via Zoom
Interview 8	Public interest litigation organisation	15.2.2023 – Johannesburg

Interview 9	Non-profit organisation providing shelter and services to survivors of gender-based violence	22.2.2023 – Johannesburg
Interview 10	Public interest litigation organisation	2.3.2023 – online via Zoom