

The Need for Feminist Approaches for Housing Cases in South Africa

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Abstract

Although South African courts have handed down progressive judgments concerning the right to access to adequate housing, they have failed to do so from a feminist point of view. The trajectory of housing jurisprudence emanated from a sequence of evictions that occurred in Cape Town and the Johannesburg inner city. This article provides an analysis of four pertinent cases, namely *Grootboom*, *Olivia Road*, *Blue Moonlight* and *Dladla*. A gendered perspective was absent from the arguments before the court and from the court's interrogation and analysis of matters that came before it. This failure was a shortcoming, given the harsh lived realities that affect women who experience eviction based on their race, gender and class. It is against the backdrop of the failures of Constitutional Court cases that lawyers use feminist litigation approaches and courts in housing adjudication.

Keywords

Right to access to adequate housing; evictions; gender; feminist litigation; intersectionality; equality; dignity; freedom and security; privacy; reasonableness; meaningful engagement; progressive realisation.

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1 Introduction

Law is traditionally a male dominated space. The enactment of the *Constitution of the Republic of South Africa*, 1996 gave rise to impartial and egalitarian opportunities for all people, especially to marginalised groups. The Constitutional Court in South Africa was confronted with many cases that dealt with rights to equality and gender. However, gender did not form part of their socio-economic rights jurisprudence.

As a lawyer practising in the field of housing, I have noted a general failure to adopt a gendered focus in litigation strategies. A gendered focus¹ was lacking at all points of consulting with a client community, the drafting of papers and argument in court. This experience triggered an interest in conducting in-depth research into feminist approaches in housing cases in South Africa. This article is a product of the need to understand why this was happening and whether it was possible to conduct the art of "law-doing" differently, to include an expressly gendered focus.

This article interrogates the four pertinent housing cases, namely *Grootboom*,² *Olivia Road*,³ *Blue Moonlight*⁴ and *Dladla*,⁵ to highlight the failures of litigators and the court to view matters from a gendered perspective. In this article, I capture the context-specific nature of the lived realities of women in South Africa. This will be discussed in the context of communities where evictions are prevalent, and their impact on women. Gender, race and class are the intersectional demographics that ought to be looked at by the courts. The intersectional analysis would provide the nuances that face communities and would enrich jurisprudence by providing redress specific to the needs of a community. Finally, the article will provide an analysis of how the courts and litigators have failed to include a feminist perspective, why a gendered lens is useful and how it could be used.

¹ MacKinnon 1983 *Signs* explains that gender is a social construct established by men. To use a gendered focus is to deconstruct the interpretation and views developed through patriarchal perspectives and establish the need for feminist approaches.

² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter the *Grootboom* case).

³ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (hereafter the *Olivia Road* case).

⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited* 2012 2 SA 104 (CC) (hereafter the *Blue Moonlight* case).

⁵ *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) (hereafter the *Dladla* case).

2 The reality of housing in South Africa

The transition from apartheid has directly and significantly impacted on the housing landscape in two of the biggest metropolitan cities in South Africa, namely Johannesburg and Cape Town. The dynamics of the inner city of Johannesburg significantly changed post-apartheid in large part because of the migration of people from rural areas and the outskirts of city centres. The transition in 1994 came with new forms of racial and class segregation.⁶ Due to the urbanisation of Johannesburg, municipalities and urban planners became concerned about the eradication of bad buildings, the removal of unlawful occupants, and transport.⁷ The gentrification of the inner city adversely affected the urban poor, stratifying people according to race and class.⁸

In the Johannesburg inner city, private companies and residents in the inner city fled to the outskirts of the city, creating a divide between the suburbs and the inner city.⁹ The division of communities based on class was based on the stigmatisation of the inner city as being criminal and dilapidated.¹⁰ With the flight of the white community, the further degradation of the inner city was caused by the redirection of money from the inner city into the suburban areas.¹¹ In addition, public/private partnerships reinforced the idea of removing people living in poverty from the inner city. The inner city was retained for business, leisure for tourists and the middle class to an affluent society.¹²

This is evident in the realm of housing rights and the trajectory of housing jurisprudence in South Africa. With the relaxation of influx control and the pass laws,¹³ many Black people migrated from the outskirts of Johannesburg (and from other parts of the country) with the deeply held

⁶ Jurgens, Gnad and Bahr "New Forms of Class and Racial Segregation Ghettos or Ethnic Enclaves?" 56.

⁷ Murray *Taming the Disorderly City* 7.

⁸ Social origin is a listed ground in section 9(3) of the Constitution. See Currie and De Waal *Bill of Rights Handbook* 236, wherein it is stated that social origin refers to "class, clan or family membership". For the purposes of this paper, class refers to poverty-stricken communities.

⁹ Czegledy "Villas of the Highveld" 27.

¹⁰ Czegledy "Villas of the Highveld" 27.

¹¹ Czegledy "Villas of the Highveld" 27.

¹² Murray *Taming the Disorderly City* 7.

¹³ The *Natives (Urban Areas) Act* 21 of 1923, which was replaced by the *Natives (Urban Areas) Consolidation Act* 25 of 1945, and thereafter the *Black (Natives) Laws Amendment Act* 54 of 1952 regulated the pass laws. The *Black (Natives) Laws Amendment Act* required all Black persons over the age of 16 years to carry a pass when entering an urban area. The pass laws were repealed in 1986.

aspiration of seeking better job opportunities in the economic hub of the country.¹⁴ The above history and more recent landscape of the inner city's spatial planning demonstrate that imposters posing as the owners unlawfully usurped these buildings. Many people who had migrated paid rent to the "new owner" and continued with their daily lives. A few years down the line, the original owner emerged, requesting that the occupiers vacate the property. If they failed to do so, it led to either unlawful evictions or evictions through formal legal eviction proceedings. It was at this stage that legal organisations¹⁵ intervened to ensure that the rights of the occupiers were protected under the law.¹⁶

Similarly in Cape Town, pre-1994 spatial planning of the inner city protected the white elite and removed Black people to the peripheral areas.¹⁷ The removal of people from the inner city not only resulted in the unfortunate escalation of poverty but it prevented any access to natural resources.¹⁸ Post-1994 Cape Town continues to embed racial spatial apartheid in the inner city. Predominantly white areas are located near the scenic areas of Cape Town while the Coloured and Black populations are situated south in peripheral dusty and sandy locations and on the Cape Flats.¹⁹ It bears mention that most of the recent housing jurisprudence has emanated from the abuse of the eviction processes and a lack of planning, especially in the Johannesburg inner city, where the Johannesburg Metropolitan Council failed to take into consideration the impact of evictions on human dignity, privacy, freedom and security, especially for vulnerable women.

South Africa is known for its progressive housing jurisprudence. The Constitution is the supreme law. It provides everyone with the right to adequate housing. It provides that the State and private entities should not impinge on the rights of others. The Constitutional Court has pronounced

¹⁴ Tomlinson *et al Emerging Johannesburg Perspectives on the Postapartheid City* xiii.

¹⁵ A few of the organisations that have acted on behalf of evicted communities include the Legal Resources Centre (LRC), Centre for Applied Legal Studies (CALS), Lawyers for Human Rights and Socio-Economic Rights Institute (SERI).

¹⁶ Wilson 2011 *SAJHR* 131-133. However, these scenarios are common in the inner city and have been brought to the attention of the author in her litigation of evictions.

¹⁷ Watson *Change and Continuity in Spatial Planning*-23.

¹⁸ Watson *Change and Continuity in Spatial Planning* 34.

¹⁹ Watson *Change and Continuity in Spatial Planning* 103. These areas comprise informal settlements on the peripheries of the City. This has been explained in a report: SERI and Steering Group of the South Africa's Ratification Campaign 2018 <https://www.seri-sa.org/index.php/more-news/794-advocacy-seri-makes-a-submission-on-informal-settlement-to-the-un-special-rapporteur-on-the-right-to-housing-28-may-2018>.

on infringements on the rights of women in the realms of customary law, sex work, cohabitation and Muslim marriages, but not in the context of housing.

Section 26 of the Constitution states:

- (a) Everyone has the right to have access to adequate housing.
- (b) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (c) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The regulation of section 26 of the Constitution is set out in the *Prevention of Illegal Eviction From and Unlawful Occupation Act* 19 of 1998 (hereafter the *PIE Act*). The Constitutional Court's formative jurisprudence centred on sections 26(1) and (2) of the Constitution whilst the spate of evictions in the inner city of Johannesburg was ongoing over the last decade.

3 Gender, race and class – why women and housing?

The remnants of apartheid continue to plague the lives of the majority of Black women. In recent statistics released by Statistics South Africa (StatsSA) poverty declined from 66,6 per cent in 2006 to 53,2 per cent in 2011 but increased to 55,5 per cent in 2015. The number of people living in extreme poverty in South Africa increased by 2,8 million, from 11 million in 2011 to 13,8 million in 2015. According to StatsSA, South Africa is the most unequal country in the world. Its Gini coefficient (income inequality) declined from 0,72 in 2006 to 0,68 in 2015. The Black population have the highest income inequality with a Gini coefficient of 0,65 in 2015, increasing from 0,64 in 2006. Income inequality amongst whites declined from 0,56 in 2006 to 0,51 in 2015.²⁰ Post-apartheid poverty persists on a large scale. The reality hidden by the statistics is that the majority of the people living in poverty are women.²¹

The prejudice is three-pronged, based on race, class and gender. McLean and Chenwi, in their article "'A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa",²² explore how the right to adequate housing involves gender. The authors discuss the experiences

²⁰ Stats SA Date Unknown <http://www.statssa.gov.za/?cat=22>

²¹ Chant 2008 *Journal of Development Studies* 167, 168.

²² McLean and Chenwi "'A Woman's Home is Her Castle?'" 128.

of women living in inadequate housing conditions, and especially how better implementation of both international and domestic laws ought to protect them. McLean and Chenwi conclude that to realise women's right to dignity and equality, it is necessary to develop a gendered perspective on the right to adequate housing.²³

The legacy of colonialism and apartheid has resulted in a myriad of competing interests in South African society along lines of race and gender. As a result, this has adversely manifested in the arenas of the non-delivery of essential services (e.g. healthcare, housing, water and sanitation), education, social security, unemployment, children's needs, and the need for the development of infrastructure.²⁴ The trajectory of laws pre-1994 to the present has exacerbated the lived realities of the majority of black women. The *Group Areas Act*,²⁵ which resulted in the migrant labour system, separated families, leaving women as sole nurturers. Most men worked under the migrant worker system that was legislated by the apartheid state. To deal with insubordination and oppression by the authorities, the men unleashed frustration and anger on the women, their wives, sisters and daughters.²⁶ The repercussions of apartheid continue to leave women in a state of vulnerability as many of them continue to face oppression and discrimination in both public and private spaces.

Land and property laws further disrespect women by not allowing women to own property.²⁷ Women could not become independent in their own right and therefore were the most affected by poverty. Poverty in South Africa has a gender and racial component.²⁸ Women living in disadvantaged communities do not receive social welfare and are low-income earners. The lack of basic services hinders a woman's ability to overcome poverty.²⁹ This could be the lack of social welfare or access to housing that provides a foundation for stability and independence. This has been explained by Moghadam:

²³ McLean and Chenwi "A Woman's Home is Her Castle?" 155.

²⁴ McLean and Chenwi "A Woman's Home is Her Castle?" 155.

²⁵ *Group Areas Act* 41 of 1950.

²⁶ Crenshaw 1991 *Stan L Rev* 1258.

²⁷ An example of such legislation includes the *Upgrading of Land Tenure Rights Act* 112 of 1991. In the matter of *Rahube v Rahube* 2019 2 SA 54 (CC), the court rendered the *Upgrading of Land Tenure Rights Act* unconstitutional for failing to afford Ms Rahube and women the right to security of tenure. Laws also include provincial codes, implementation of customary and religious laws and practice.

²⁸ Modiri 2015 *PELJ* 224.

²⁹ Razavi 1999 *Development and Change* 417 citing Kehler 2001 *Journal of International Women's Studies* 41.

The feminisation of poverty would...appear to refute the idea that economic development and growth are generally accompanied by a trend towards the diminution of patriarchal gender relations and an advancement in the status of women through improvements in women's capabilities.³⁰

A house sets the foundation for a woman to develop agency and independence in her life. The house must be more than just a home.³¹ This is linked to the securing of professional training on how to find employment and to assist women in developing themselves.³² Marginalised communities still reside on the outskirts of inner cities. The spatial divide as a result of apartheid creates further disadvantages for women living in rural areas or in disadvantaged situations.³³ Motherhood for Black women is different from motherhood for those living in suburbs, queer mothers or Muslim mothers with different beliefs, ethics and goals.³⁴ The role of women would mean different things for different women depending on race, religion and geographical areas. According to the study, at least 43 per cent of Black women find that their role is to be the primary caregiver compared to 24 per cent of Coloured women, 25 per cent of Indian women and 15 per cent of White women.³⁵ A woman's right to dignity is compromised when she is expected to be the "perfect" wife, daughter or sister. From the above exposition, it is clear that the infringement on the dignity of women is experienced as a result of them being poor and living in deplorable conditions.

McLean and Chenwi argue that multiple disadvantages are impacting women's right to housing, which include a lack of security of tenure, domestic violence, child care and nationality.³⁶ The private space for women is contested. Apart from having to care for her family, her experience of domestic violence is an added factor that inhibits a woman's ability to flourish. The lack of housing in South Africa prevents women from leaving the communal home or it would render them homeless. Women afflicted with domestic violence require temporary shelters and accommodation. The accommodation ought to take into account cultural and religious backgrounds and needs. The rights of privacy and freedom and security are impacted by the scourge of domestic violence. Section 7(2) of the

³⁰ Moghadam *Feminisation of Poverty*.

³¹ McLean and Chenwi "A Woman's Home is Her Castle?" 129.

³² McLean and Chenwi "A Woman's Home is Her Castle?" 129 referencing Molyneux 1985 *Feminist Studies* 227, who distinguishes between practical and strategic gender needs.

³³ Parker and Rubin *Motherhood in Johannesburg* 22, 24.

³⁴ Parker and Rubin *Motherhood in Johannesburg* 15.

³⁵ Parker and Rubin *Motherhood in Johannesburg* 25.

³⁶ McLean and Chenwi "A Woman's Home is Her Castle?" 145.

Constitution imposes a positive duty on the state to "respect, protect promote and fulfil the rights in the Bill of Rights". The protection against domestic violence is regulated in the *Domestic Violence Act*,³⁷ which obliges police officials to protect women against domestic violence.³⁸ Meyersfeld argues that the state must intervene in the privacy of the home. However, it must balance the intervention by not intervening in the lives of private individuals but ensure that women are provided with the necessary shelter when a complaint is lodged for domestic violence.³⁹ The ramifications of domestic violence and evictions often leave women in a state of imminent homelessness. In cases of domestic violence, women are left to choose between homelessness and an abusive relationship.⁴⁰ In instances where women are dependent on men for housing, they are thus subjected to further abuse.

The unsecured buildings and insubstantial shelters within buildings increase women's safety risks as they are vulnerable to acts of sexual violence. The law does not always recognise the special needs of women and their vulnerabilities. As a result of the law not considering the unique needs of women, the courts ought to come to the aid of women. Courts have been confronted with several emblematic cases that related to issues affecting women. These cases addressed the legal concepts of substantive equality and dignity and applied them to the lived realities of women. They further augmented jurisprudence, which is the required advancement of gender equality intertwined with race and class, but in certain respects this analysis is equivocal.

The courts have used the *Van Heerden*⁴¹ matter as a basis for developing the notion of substantive equality in gender matters. South African courts

³⁷ *Domestic Violence Act* 116 of 1998.

³⁸ Meyersfeld *Domestic Violence and International Law* 180.

³⁹ Meyersfeld *Domestic Violence and International Law* 180.

⁴⁰ Meyersfeld *Domestic Violence and International Law* 147.

⁴¹ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) (hereafter the *Van Heerden* case). Sachs J elaborates on his reasoning to adopt substantive equality at para 142 of the *Van Heerden* judgment, when he states: "The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers."

have a role to play in curbing the patriarchal practices of society. *Bhe v Magistrate of Khayelitsha*⁴² is one example where the Constitutional Court held that primogeniture was an infringement of section 9(3).⁴³ Langa DCJ stated:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.⁴⁴

Equality jurisprudence in the context of gender has been developed especially in the realm of customary marriages⁴⁵ and Muslim marriages.⁴⁶ The cases of *Jordan*⁴⁷ and *Volks*,⁴⁸ dealing respectively with sex work and the rights of women who have been cohabiting to inherit, have been critiqued for being too conservative, but some commentators have argued that this is so because these matters did not involve the use of the intersectionality perspective. Gendered perspectives have not been adopted in socio-economic rights cases.

The next section demonstrates how the courts and litigators have failed to interrogate housing matters through a feminist lens.

4 The failures of the courts and litigators

The study was conducted in the context of four important housing cases, namely *Grootboom*, *Olivia Road*, *Blue Moonlight* and *Dladla*, each of which built on a trajectory of housing jurisprudence in the country. These matters included the development of principles of socio-economic rights such as the minimum core, reasonableness, progressive realisation, available resources, meaningful engagement, temporary emergency accommodation and the quality thereof. These elements of housing will be discussed with specific reference to the aforementioned cases and how the courts could have better interpreted the elements from a gendered perspective.

⁴² *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) (hereafter the *Bhe* case).

⁴³ *Bhe* para 91.

⁴⁴ *Bhe* para 91.

⁴⁵ *Bhe*; *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

⁴⁶ *Daniels v Campbell* 2004 5 SA 331 (CC); *Hassam v Jacobs* 2010 4 SA 55 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC).

⁴⁷ *S v Jordan* 2002 6 SA 642 (CC).

⁴⁸ *Volks v Robinson* 2005 5 BCLR 446 (CC).

4.1 *Grootboom*

An eviction of 510 children and 390 adults from the informal settlement in Wallacedene, Cape Town resulted in the Constitutional Court's first housing case.⁴⁹ The community instituted an urgent application in the Cape Town High Court which would compel the provincial government to provide shelter for them until they received permanent accommodation. The High Court ordered that in terms of section 28 of the Constitution, the applicants' children were entitled to temporary emergency accommodation. The state appealed the decision to the Constitutional Court but was unsuccessful. The Legal Resources Centre (LRC) intervened on behalf of the Human Rights Commission and the Community Law Centre. The *amicus curiae*'s submissions were based on the principles of international law relating to the realisation of socio-economic rights. The *amici* supported the respondents' arguments relating to the rights of children and the interpretation of section 26.⁵⁰ The Constitutional Court dismissed the children's rights argument but enforced the court's stance on the justiciability of socio-economic rights.⁵¹ The Court averred that children could not be afforded housing without their parents. The allocation of housing to the parents could not be dealt with under section 28 of the Constitution and thus section 26 of the Constitution prevailed.⁵² It also rejected that standard of the minimum core,⁵³ which requires an organ of state to fulfil its obligation to provide its minimum essential needs to a community. The Court stated:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right.⁵⁴

The Court requested that the state act reasonably within its available resources to provide shelter. The Court maintained its independence by not directing how the state should do so. Focussing on the reasonableness of

⁴⁹ The *Grootboom* case.

⁵⁰ *Grootboom* para 71.

⁵¹ *Grootboom* paras 78, 79.

⁵² *Grootboom* paras 78, 79.

⁵³ Bilchitz 2002 *SALJ* 485.

⁵⁴ *Grootboom* para 32.

the policy⁵⁵ and the concept of progressive realisation,⁵⁶ the Court ordered that the state should progressively and within its available resources devise a plan for temporary emergency accommodation, reasonably and within its available resources, to assist those without shelter. The Court also held that the state had failed to take reasonable measures and should provide for housing within its available resources to assist those without shelter.⁵⁷

The Court interpreted the State's policy coherently using the reasonableness test and established a few criteria for reasonableness. A policy should be

comprehensive, balanced and flexible, have sufficient regard for social historic and economic context of poverty and deprivation, take into account the availability of resources, take a phased approach, by including short, medium and long-term plans, allocate responsibilities to all spheres of government, respond with care and concern to the needs of the most desperate and free of bureaucratic inefficiency.⁵⁸

The Court did not provide that the policy should include the rights of women but provided an open and broad element of reasonableness to look at the social and historical background.

Wilson, Dugard and Clarke state that the courts have been and continue to be sensitive to South Africa's historical, social and economic context in housing jurisprudence.⁵⁹ They criticise the requirement that litigants have to advance arguments to gain sympathy rather than to present arguments based on principle.⁶⁰ According to them, the courts have not dealt with socio-economic rights cases robustly enough. The reasonableness test is not sufficient to eradicate poverty and structural inequalities,⁶¹ and it has not assisted with transformative constitutionalism from both the poverty and the gender perspectives.

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

⁵⁵ *Grootboom* paras 42, 44, 64.

⁵⁶ *Grootboom* para 45.

⁵⁷ *Grootboom* para 94.

⁵⁸ *Grootboom* paras 41-43.

⁵⁹ Wilson, Dugard and Clarke 2015 *SAJHR* 502.

⁶⁰ Wilson, Dugard and Clarke 2015 *SAJHR* 502.

⁶¹ Dugard 2008 *SAJHR* 236.

safety and the lack of dignity when she was evicted without any notice and consultation.

The Court's inclusion of the gender disparity was captured simply in paragraph 23 of its judgment that:

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.⁶²

4.2 Olivia Road

The buildings in the inner city of Johannesburg occupied by people are in a dilapidated and deplorable condition. The condition varies from building to building but in general, most of the buildings have poor lighting produced by illegal electricity connections or no electricity at all. There are no water and sanitation facilities, which exacerbates health risks and safety. In 2006 the City implemented the "City's Regeneration Strategy",⁶³ which sought to eradicate all "bad buildings" in the city. However, the campaign resulted in the eviction of people residing in the buildings without the use of the *PIE Act* and thus without due process as provided for in the Act. As a result, the community residing in the San Jose building challenged the decision of the Supreme Court of Appeal, which granted the eviction provided that the City would provide temporary emergency accommodation.⁶⁴

The matter involved the eviction of 400 people living in the Johannesburg inner city at 51 Olivia Road. The City of Johannesburg Metropolitan Municipality (the City) justified the eviction of the occupiers by stating that the building was "unsafe and unhealthy"⁶⁵ and in terms of section 12(6) of the *National Building Regulations and Building Standards Act*,⁶⁶ it had an obligation to protect the well-being of people, including the occupants. The occupants challenged the constitutionality of the *National Building Regulations and Building Standards Act*. They argued that the City could not use the *National Building Regulations and Building Standards Act* to evict on the basis that it conflicts with section 26(3) of the Constitution in

⁶² *Grootboom* para 23.

⁶³ *Olivia Road* para 19.

⁶⁴ *Olivia Road* para 2.

⁶⁵ *Olivia Road* para 1.

⁶⁶ *National Building Regulations and Building Standards Act* 103 of 1977.

that people are protected from arbitrary evictions.⁶⁷ The Constitutional Court granted an interim order that the parties should meaningfully engage on the conditions of the building and the possibility of obtaining alternative accommodation for the occupiers.⁶⁸ Sandra Liebenberg is of the view that even though our courts ordered meaningful engagement, government and other stakeholders still have much to do to ensure the process is followed through.⁶⁹

The Constitutional Court held that a court should consider whether there has been meaningful engagement before granting an order for eviction.⁷⁰ It further found that even though the City has an obligation to ensure that buildings are safe, it must consider the potential homelessness of people before it seeks an eviction order. The court declared section 12(6) of the *National Building Regulations and Building Standards Act* to be inconsistent with the Constitution as it criminalised the occupation of the building after a notice to vacate was served but without a court order.⁷¹ The Constitutional Court found that it is the City's constitutional obligation to meaningfully engage with occupants. The Court provided guidance on meaningful engagement and emphasised the importance of meaningful engagement in mass evictions.⁷²

It further stated that meaningful engagement is paramount for a court to consider when deciding whether it is just and equitable to evict. It stated:

[M]oreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account

⁶⁷ Kennedy and Barnes 2007 <https://collections.concourt.org.za/bitstream/handle/20.500.12144/3316/Applicants27%20Heads%20of%20Argument-10483.pdf?sequence=27&isAllowed=y> paras 167-170.

⁶⁸ *Olivia Road* para 14. The Court provided the following factors to consider: "(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."

⁶⁹ Liebenberg 2012 *AHRLJ*.

⁷⁰ *Olivia Road* paras 9-11, wherein the Court used the authorities of both its judgments in *Grootboom* and *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

⁷¹ *Olivia Road* paras 47-51, 54(5) and (6).

⁷² *Olivia Road* para 19 where the Court stated "[the] larger the number of people to be affected by the eviction, the greater the need for structured, constructive and careful engagement."

of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejection order.⁷³

However, the judgment failed to acknowledge the impact of the unsafe and unhealthy building on women. Meaningful engagement is important for the State to identify the appropriate temporary emergency accommodation for affected evictees. It is through a process that determines the demographics of the occupiers affected that the appropriate temporary emergency accommodation could be provided. The information that is required includes the numbers of families, households, children and women. The needs of people would vary if you have disabled people and the elderly. Ancillary issues would include that the temporary emergency accommodation must be situated in a place that has public transport, is easily accessible, and has clinics, schools and social amenities.

4.3 Blue Moonlight

Over time, the nature of evictions changed from the state as owner seeking eviction to that of mainly private owners who purchased buildings in the inner city and who sought vacant possession of the buildings. The role of the state in the eviction matters instituted by private owners developed jurisprudence to ensure that the State's obligations remained. In *Blue Moonlight* the Constitutional Court enforced the municipality's obligation to provide temporary emergency accommodation to people evicted by a private owner.⁷⁴ The *Blue Moonlight* matter concerned approximately 120 occupiers residing at 7 Saratoga Avenue in Bertrams, Johannesburg. The issues dealt with by the Court included the joinder of the City of Johannesburg.⁷⁵ The occupiers argued that the City had a constitutional obligation to provide all people facing eviction with temporary emergency accommodation. The High Court found that the City had an obligation to report to the court on the steps it had taken to engage with the occupiers and further to explain to the court the possibilities of providing the occupiers with temporary emergency accommodation. The Supreme Court of Appeal found in favour of the occupants. The City appealed the decision to the Constitutional Court.

⁷³ *Olivia Road* para 21.

⁷⁴ *Blue Moonlight; Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Limited* 2012 2 SA 337 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Limited* 2012 4 BCLR 382 (CC).

⁷⁵ *Blue Moonlight* paras 42-45.

The issues that the Court were confronted with and had to adjudicate were threefold: what were the constitutional obligations of the Municipality in an eviction matter instituted by a private owner; the constitutionality of Chapter 12 of the *National Housing Code*;⁷⁶ and, whether it was just and equitable to evict unlawful occupiers given the particular circumstances.

The Constitutional Court's analysis upheld the appeal and decided that the City should provide temporary emergency accommodation to people facing evictions. In its analysis, the court had to decide whether the municipality had a constitutional obligation to provide temporary emergency accommodation to evictees when a private owner sought the eviction. The Court started its analysis by using section 26 of the Constitution and the *Housing Act*.⁷⁷ Section 9 of the *Housing Act* includes the functions of government in the context of housing, the obligations of National, Provincial and local government,⁷⁸ the financial structures and departments to source housing projects⁷⁹ and the termination of housing schemes.⁸⁰ The *Housing Act*, which seeks to protect housing development, makes provision for further policy to materialise the vision of the Act. Section 9 of the *Housing Act* is the foundation on which the *National Housing Code*⁸¹ was drafted. It fails to consider the plight of women in housing situations and to address the lack of housing options and security of title of the marginalised.

The *Housing Act* is the only piece of legislation that regulates social housing and housing development. The former United Nations Special Rapporteur for Housing has critiqued states for not promulgating legislation protecting vulnerable groups.⁸² In the South African context, the *Housing Act* has not made any provisions for incorporating a gender-responsive budget in the financial management of housing schemes. He further recommended that special attention must be given to women experiencing domestic violence and the housing programmes must be revised to include low-income rental housing to ensure the security of tenure for tenants and finally to cater for

⁷⁶ Department of Human Settlements *National Housing Code, 2009* (the *National Housing Code, 2009*).

⁷⁷ *Housing Act 107 of 1997* (the *Housing Act*).

⁷⁸ Part 3, 4 and 5 of the *Housing Act*.

⁷⁹ Part 6 of the *Housing Act*.

⁸⁰ Part 7 of the *Housing Act*.

⁸¹ *National Housing Code, 2009*.

⁸² *United Nations Human Rights Council Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Miloon Kothari UN Doc A/HRC/7/16* (2008) para 9.

special needs housing.⁸³ The Constitutional Court correctly used the only legislative framework it could for the purpose of the analysis without having to incorporate gender. The gaps identified by the former Special Rapporteur were not enhanced or interpreted to include a gendered perspective in the *Housing Act*. The litigation and judgment were progressive, regardless of the narrow focus on the municipality's obligations.

The Constitutional Court also declared the City's Emergency Housing Policy unconstitutional as it did not include eviction as a situation in which emergency housing was to be provided.⁸⁴ The court may have found that the policy was unconstitutional, but it is clear from the papers that the litigants failed to raise the issue that policy considerations have to include gender. The Constitutional Court's analysis of the constitutionality of the policy was a general statement that a policy ought to consider all persons facing eviction. It stated, "The City's housing policy is unconstitutional to the extent that it excludes the occupiers and others similarly evicted from consideration for temporary accommodation."⁸⁵

Chenwi and McLean state that the City's emergency housing policy ought to take into account gender components. In their discussion of policy engagement they assess that even though the state has made efforts to incorporate gender in its policy, it still has shortcomings and challenges.⁸⁶ Further, they are of the view that despite the existence of legislation and policy protecting a person's right to housing, there are gaps in it based on gender.⁸⁷ Chenwi concludes in her article that South African jurisprudence and legislation are progressive but South Africa must look to African jurisprudence to augment its laws and jurisprudence for gender inclusivity.⁸⁸

⁸³ *United Nations Human Rights Council Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Miloon Kothari UN Doc A/HRC/7/16 (2008) para 40.*

⁸⁴ *Blue Moonlight* para 95.

⁸⁵ *Blue Moonlight* para 95.

⁸⁶ McLean and Chenwi "A Woman's Home is Her Castle?" 140.

⁸⁷ McLean and Chenwi "A Woman's Home is Her Castle?" 140.

⁸⁸ Chenwi 2013 *LDD* 347. Also see the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003), which entered into force in 2005, which South Africa has ratified, and which specifically guarantees the rights of women to adequate housing. The Protocol further guarantees every woman respect for her life and the integrity and security of her person, and requires State parties to adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection from all forms of violence. Article 18 further states that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."

The court in *Blue Moonlight* had to decide whether it was just and equitable to evict the unlawful occupiers. In its enquiry, the Constitutional Court acknowledged its obligation to consider women-headed households and the listed vulnerable groups under section 4(7) of the *PIE Act*. In its decision, when considering if the City ought to redraft its policy, it did not probe into whether or not policy should consider gender and whether it should include gendered participation and a gendered focus. It mentioned in its analysis the importance of considering personal circumstances when deciding whether it was just and equitable to evict. The Constitutional Court stated that

[A]ffected individuals may include children, elderly people, people with disability or women-headed households, for whom the need for housing is particularly great or for whom homelessness would result in particularly disastrous consequences. Individuals may have a range of incomes – some may be able to afford subsidised housing while others may be completely destitute. In the present case, the occupiers have a myriad of personal circumstances to be taken into account in considering their eligibility for housing.⁸⁹

The *Blue Moonlight* judgment led to a different view of policy development in eviction matters. The Constitutional Court should have emphasised the importance of having policy drafted in consultation with women. This would have been novel and nuanced in that the Court, without overstepping the doctrine of the separation powers, would have made a statement about the importance of having women as a part of policymaking.⁹⁰ This notion is supported by Farha:

Women's housing inequality is exacerbated by their exclusion from policy development with respect to housing ... by customary practices that are sometimes enforced by law, which prevent women from inheriting land and housing.⁹¹

The policy is important to establish transformation, but ultimately there has to be an implementation of those policies.

4.4 *Dladla*

In the aftermath of *Blue Moonlight*, the City resorted to providing temporary emergency accommodation at the Ekuthuleni Shelter to residents who could not afford rental accommodation ranging between R600 and R1 000 per

⁸⁹ *Blue Moonlight* para 92.

⁹⁰ McLean and Chenwi "A Woman's Home is Her Castle?" 128.

⁹¹ Farha 2002 *Can J Women & L* 121-122.

month at the MBV Building.⁹² The Shelter was managed by the Metropolitan Evangelical Services, a non-profit organisation with which the City contracted in implementing its obligation. The Shelter imposed a set of rules on its residents. The rules included gender-segregated rooms and daytime lock-outs.⁹³ The Shelter operated on a "managed-care model" to ensure that its residents attained a position of independence during their stay. The applicants argued that the City had acted unreasonably by imposing these rules on the residents.

The arguments of the Centre for Applied Legal Studies (CALs) were centred on the impacts of the conditions on women. They further used international instruments to frame the legal protection of women when interpreting section 26 and in the application of the reasonableness test. In their written submission, CALs stated the following:

Given their detrimental and discriminatory impact on women, the Ekuthuleni shelter rules are, we submit, unreasonable within the meaning of s 26(2) of the Constitution. The result is that the City has failed to comply with its obligation under s 26(2) of the Constitution in the implementation of its temporary accommodation programme at Ekuthuleni.⁹⁴

The courts had to grapple with whether the residents living in temporary accommodation were protected under the rights to adequate housing, the right to dignity, privacy, freedom and security. The Court further interrogated whether the rules infringed the right to privacy and freedom and security. The City contended that the residents were living in temporary accommodation, which precluded them from the protection of their fundamental rights. The Court further interrogated the question of whether temporary emergency accommodation, which constituted a shelter, amounted to a home.⁹⁵ The Constitutional Court affirmed that everyone has rights at every moment regardless of where they are.⁹⁶

The City failed to realise that every person needs to relax after a hard day of work and to enjoy the peace and warmth of a home. The infliction of the rules on the residents was an infringement of the residents' rights to dignity and privacy. The right to family life had to be interpreted and respected to appreciate that the City was being unreasonable in its policymaking. The

⁹² Kennedy, Wilson and Stubbs 2014 http://seri-sa.org/images/Daldla_Heads_final_final_5_May_2014.pdf para 23.

⁹³ *Dladla* para 16.

⁹⁴ Webber 2016 <https://collections.concourt.org.za/bitstream/handle/20.500.12144/3871/First%20Amicus%20Curiae%20Heads%20of%20Argument26087.pdf?sequence=20&isAllowed=y> para 26.

⁹⁵ *Dladla* para 43.

⁹⁶ *Dladla* para 44.

right to family life may not be explicit but our courts have dealt with the right, drawing from international instruments. O'Regan J discussed the right to family life in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*.⁹⁷

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the 'natural' and 'fundamental' unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.⁹⁸

Interpreting the right to housing implicates the right to family life. A house ought to be a place for the enjoyment of families. There is no explicit right to family life, but the courts have interpreted family life to be an important societal norm that is part and parcel of the right to dignity.⁹⁹ The Constitutional Court stated in *Dladla* that:

The right to dignity includes the right to family life. This right in turn consists of the right to marry and the right to raise a family. The family separation rule creates a vast chasm – between parents and children, between partners and between siblings – where there should be only intimacy and love. As the High Court notes, the family separation rule erodes the basic associative privileges that inhere in and form the basis of the family. Therefore, in so many ways, the lockout and family separation rules limit the dignity of the applicants.¹⁰⁰

The case also highlights the intersectionality of health, sanitation, safety and privacy in a woman's rights to adequate housing. The violation of the rights was highlighted by Mhlantla J. who found, on behalf of the majority, that the lockout rule infringed the rights to privacy, freedom and security. She stated the following concerning the right to privacy:

It is even more obvious that the lockout and family separation rules impair the right to privacy set out in section 14 of the Constitution. The fact that the applicants are forced out onto the street during the day means *ipso facto* they do not have privacy for the duration thereof. The right is given effect only if the

⁹⁷ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) (hereafter the *Dawood* case).

⁹⁸ *Dawood* para 31.

⁹⁹ See *Dawood*.

¹⁰⁰ *Dladla* para 49.

applicants have a place they can call their own to which they can retreat at any time. The lockout rule destroys their ability to avail themselves of such solitude. One would think that people who have been evicted from their homes in which they had some privacy would be provided a substitute with a measure of the same. They were not.¹⁰¹

This paragraph is evidence that the City's plan and policy on temporary emergency accommodation had not protected the applicants' rights to privacy. The Court did not interpret this aspect from the perspective of gender, however, particularly how the lack of privacy especially impacted women.

The Court expanded on its analysis of the lockout rule, finding that it was an infringement of one's freedom and security. It stated:

Finally, the impugned rules limit the right to freedom and security of the person. It goes without saying that they restrict the movements of the applicants in critical respects. As the applicants have complained, they could not go about their business because the lockout rule prevented them from accessing the Shelter during the day and barred them from entry after 20h00. Because parents could not visit their children and partners of different sexes could not stay with each other, the family separation rule materially affected the movements of the applicants within the Shelter as well. The lockout rule also endangered the applicants. In particular, the lockout rule exposed the applicants to the vagaries of street life both during the day and at night. Several of the applicants have been assaulted. According to the applicants' submissions, one applicant was even stabbed after he was denied entry at night. After a long work shift, or a painful medical procedure, the applicants would also have nowhere to rest and would be forced to suffer on the street after curfew. The City did not dispute these facts, which illustrate the impact of the impugned rules on the applicants.¹⁰²

It is worth noting that both men and women were subject to infringements of their rights. However, how does the infringement of the right to freedom and security impact a woman? Despite CALS' arguments on the prevalence of sexual violence in Johannesburg, and the challenges faced by women because of the lack of adequate housing,¹⁰³ the Court failed to mention the limitations experienced by women.

The Supreme Court of Appeal in *Dladla* failed to consider any of the rights-based analyses advanced by the parties. The Court delivered a disappointing judgment that failed to consider the living conditions of the residents. The use of the international landscape and its relevance to gender and reasonableness were found to be "trite" and no in-depth

¹⁰¹ *Dladla* para 51.

¹⁰² *Dladla* para 52.

¹⁰³ *Dladla* para 29.

analysis was given.¹⁰⁴ The residents appealed the matter to the Constitutional Court and in December 2017 the Court ruled on the constitutionality of the rules. Although all the judges concurred that the rules were unconstitutional, the judgments varied in their reasoning. The judgments did not deal with the impacts of the rules on women. The majority judgment found that the rules infringed one's right to dignity, privacy, freedom and security. Despite the first *amicus curiae* arguing that the City's obligation to provide adequate housing is constituted in section 26(2), and that the imposition of the rules rendered the City's conduct unreasonable,¹⁰⁵ the majority judgment failed to interrogate the City's obligations in terms of section 26(2) of the Constitution and in particular the reasonableness argument.

The minority judgment written by Cameron J, and concurred with by Froneman J and Khampepe J agreed with the majority but supplied a different analysis and reasoning. The minority found that the City's obligation to provide temporary emergency accommodation was embedded in section 26(2) and that the infringement of the right was unreasonable. It stated:

[T]he correct position is surely that, when government provides temporary housing in fulfilment of a court order, section 26(2) and its reasonableness criterion govern the way in which it does so ...¹⁰⁶

However, they did not adopt the reasonableness argument of CALS. CALS had assisted the court to establish the reasonableness argument, but all three courts lost the opportunity to add a gendered perspective to the jurisprudence on the right to adequate housing. The judgment is a case in point that reaffirms that the courts are unresponsive to gender arguments despite the submissions of *amicus curiae* to that effect. The *Dladla* case could have been the turning point in the Constitutional Court's jurisprudence that would have added issues of gender to its reasoning.

The *Dladla* case dealt with blatant infringements on the right to dignity, privacy and safety. The conditions imposed on those who accepted the shelter adversely impacted the rights of women. The applicants (the residents) argued that the infringements had occurred in terms of sections 10, 12 and 14 of the Constitution. The judgment ought to have considered

¹⁰⁴ *Dladla* para 23.

¹⁰⁵ Webber 2016 <https://collections.concourt.org.za/bitstream/handle/20.500.12144/3871/First%20Amicus%20Curiae%20Heads%20of%20Argument26087.pdf?sequence=20&isAllowed=y> para 29.

¹⁰⁶ *Dladla* para 68.

the submission of the *amicus curiae* (CALs) emphasising the need for a more gendered focus using the interdependent rights-based argument and international and regional instruments arguing that a reasonable outcome should incorporate a gendered interpretation. CALs used the social worker report and the statistics that they adduced in the High Court to illustrate the adverse impacts of the living conditions on women especially.¹⁰⁷ The case had the potential to ensure that women residents were given basic, adequate shelter.

The arguments of the *amicus curiae* complemented those of the applicants, and together they were able to provide structured and robust arguments on the intersectional rights to adequate housing. The *Dladla* case was the beginning of how litigation ought to be focussed on gender and that the impact of rights violations on women ought to be a consideration in litigation strategies.

5 Conclusion

This article has acknowledged the patriarchal nature of the law. It has examined and validated that the impact of rights violations against women in both litigation and jurisprudence has been sorely lacking in our constitutional democracy. It examined the lived realities of women living in South Africa. It concludes that there is a triple disadvantage based on gender, race and class. The article discusses the courts' approaches in dealing with lived realities of women and it is evident that there is a gender gap in socio-economic rights cases.

It is against the backdrop of economic and gender disparities that inflict our society, impacts upon human rights and bears relevance to public interest litigation and developing jurisprudence. The issues that face South Africa are based on race, gender and class are vast. The challenge with formulating litigation strategies is preeminent to incorporate a platform for women to have their voices heard and more importantly to have their rights protected and enforced.

¹⁰⁷ Webber 2016 <https://collections.concourt.org.za/bitstream/handle/20.500.12144/3871/First%20Amicus%20Curiae%20Heads%20of%20Argument26087.pdf?sequence=20&isAllowed=y> paras 15-27.

The analysis concludes that the judgments in cases of *Grootboom*,¹⁰⁸ *Occupiers of 51 Olivia Road*,¹⁰⁹ *Blue Moonlight*¹¹⁰ and *Dladla*¹¹¹ have failed to include a gendered focus and ought to have done so.¹¹² The Constitutional Court missed an opportunity in ensuring that the rights of women were catered for developing concepts in housing litigation, which included reasonableness, available resources, progressive realisation, meaningful engagement and the provision of temporary emergency accommodation. The frequent use of gendered analysis and argument would have ultimately reached a point that the remedy would take into account women's lived realities to ensure dignity through improved quality of life.

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¹⁰⁸ See *Grootboom*.

¹⁰⁹ See *Olivia Road*.

¹¹⁰ See *Blue Moonlight*.

¹¹¹ See *Dladla*.

¹¹² See case analysis above.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
CALS	Centre for Applied Legal Studies
Can J Women & L	Canadian Law Journal of Women and Law
LDD	Law, Democracy and Development
LRC	Legal Resources Centre
PELJ	Potchefstroom Electronic Law Journal
PIE Act	Prevention of Illegal Eviction From and Unlawful Occupation Act 19 of 1998
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SERI	Socio-Economic Rights Institute
StatsSA	Statistics South Africa
Stan L Rev	Stanford Law Review