

Law, South African Mothers Living in Poverty and the COVID-19 Pandemic

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Abstract

Sometimes being a mother in tough economic times can be a challenge. Socio-economic demands occasioned by the COVID-19 pandemic have been especially cumbersome for mothers already living under conditions of poverty. Since the beginning of 2020 the pandemic has further exacerbated the daily struggles of the poor during periods of economic uncertainty, disease and death. Conscious of this additional socio-economic pressure and to lessen the financial burden carried by mothers living in poverty, the South African state introduced a COVID-19 relief Child Support Grant to assist during this trying period. This article explores the role played by law in poverty discourse where mothers are concerned. It is suggested here that the conceptualisation of poverty in law, at least where mothers are concerned, is limited by law's neglect of the socio-political identity of women as mothers, which is rooted in history. This failure reaffirms that law is implicated in contemporary socio-economic inequalities.

Keywords

Poor motherhood; Child Support Grant; socio-economic rights; poverty alleviation; pandemic; COVID-19.

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1 Introduction

The law is silent in relation to mothers living in poverty, considering the additional strain caused by the COVID-19 pandemic (the pandemic). As a political terrain motherhood has long been a subject of feminist inquiry, thus poor motherhood ought not be marginalised in the human-rights framework on poverty.

Generally, it is women who experience socio-economic inequality that is influenced to a large extent by their reproductive roles and primary caregiving responsibilities. Thus they bear additional (and often sole) responsibilities for their children and other dependants.¹ Women and gender have enjoyed a certain level of analysis and research in most of the literature on the pandemic, but mothering and motherhood, as argued by O'Reilly, has been dismissed and ignored.² Poor motherhood is overlooked in South African scholarship on the adverse effects of the pandemic that include poverty as a subject, even though it has been aggravated by income or employment loss, financial or housing instability and food insecurity, to mention just a few factors. The harmful erasure of the complexity of poor motherhood in law is illuminated here in a brief historical account and a discussion of select Constitutional Court (the Court) decisions. The discussion aims to highlight how this disregard of the mother living in poverty during the pandemic (health/food/house/job insecurity) is now intensified.

1.1 Background

The burdens of poverty fall disproportionately on women and upon analysis produce a complex and diverse picture.³ It is a documented fact that most low-wage earners in South Africa are black women⁴ and some of them are mothers. Moreover, it is mostly black women who receive social grants that help lift households out of extreme poverty. They also perform a variety of informal tasks and subsistence work.⁵ This caregiving role is not often recognised, which means that women devote a disproportionate amount of time and resources to unpaid domestic labour.⁶

South African research on the national lockdown in response to the pandemic has highlighted that social grants are an important source of

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¹ Goldblatt 2014 *VRU* 38.

² O'Reilly 2021 *Journal of the Motherhood Initiative* 7.

³ Albertyn 2011 *Stell LR* 592.

⁴ Albertyn 2011 *Stell LR* 592.

⁵ Albertyn 2011 *Stell LR* 592.

⁶ Albertyn 2011 *Stell LR* 592.

income relief for individuals in low-income households.⁷ Since early 2020 the pandemic has illuminated the dynamic of the gender disparities of poverty, placing poor motherhood in a central position in the South African developmental welfare state. As the seventh human virus COVID-19 was first detected in Wuhan, Hubei province, China, in January 2020, and it has since spread all over the world.⁸ The death toll occasioned by the pandemic is large and its infection rate worldwide is over a million.⁹

It was declared a global pandemic by the World Health Organisation (WHO) on the 11th of March 2020 and even though Africa was the last country expected to be hit by the pandemic, it was also the continent where the virus would have the greatest impact.¹⁰ Since the outbreak in late 2019, countries worldwide were mandated to caution the public to adhere to several care measures including handwashing, wearing face masks, physical distancing, and avoiding mass gatherings and assemblies.¹¹ It was also these responses that were found to have fostered "unintended social consequences of exacerbated poverty, widespread hunger and food insecurity".¹² Moreover, South Africa entered a "hard lockdown" stage in late March 2020, which lasted initially for 3 weeks and was then extended for a further 5 weeks.¹³ It was during this period that the state introduced the concept of "lockdown stages", and since then the country has experienced varied stages of lockdown.¹⁴ Lockdown and staying home were put in place as strategies to flatten the curve and control the transmission of the disease.¹⁵

In a study conducted by Padhan and Prabhees it was discovered that "adverse economic effects [were] due to the COVID-19 pandemic, in addition to fatalities".¹⁶ Further, in an analysis of the South African labour market during the early stages of lockdown it was discovered that the job losses were not uniformly distributed, with African women being more vulnerable along with the youth and the less educated.¹⁷ This disproportion in the demographic statistics had implications for a state that had already been experiencing an economic recession prior to the pandemic.¹⁸ Having in their study identified South Africa as the country with the greatest degree

⁷ Köhler and Bhorat 2020 http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Working_Papers/DPRU%20WP%20202008.pdf 4.

⁸ Ciotti *et al* 2020 *Critical Reviews in Clinical Laboratory Sciences* 365.

⁹ Ciotti *et al* 2020 *Critical Reviews in Clinical Laboratory Sciences* 365.

¹⁰ Lone and Ahmad 2020 *Emerging Microbes and Infections* 1300.

¹¹ Pokrhel and Chhetri 2021 *Higher Education for the Future* 134.

¹² Gittings *et al* 2021 *Global Public Health* 947.

¹³ Ranchhod and Daniels 2021 *South African Journal of Economics* 45.

¹⁴ Ranchhod and Daniels 2021 *South African Journal of Economics* 45.

¹⁵ Gittings *et al* 2021 *Global Public Health* 958.

¹⁶ Padhan and Prabeesh 2021 *Economic and Policy Analysis* 220.

¹⁷ Ranchhod and Daniels 2021 *South African Journal of Economics* 45.

¹⁸ Stats SA Date Unknown <http://www.statssa.gov.za/?cat=22>.

of inequality globally, Carlitz and Makhura averred that "Women were less likely to participate in the formal labour market as compared to men and also experienced higher unemployment (29.6%) compared to men (25.7%) in 2017. Gender inequality is also observable in food security".¹⁹

1.2 Conceptualisations of motherhood

As an emerging researcher with an interest in law and poverty as it affects mothers, I am speaking about poor motherhood, which "is problematic ... so too must be the practice of speaking about others, since it is difficult to distinguish speaking about from speaking for in all cases".²⁰ I also submit that my experiences qualify me to a certain extent, as a mother who struggled at some point without a job, and also had to contend with maternal racial discrimination in the private health care sector. This then allows me a certain amount of authority to speak, informed by my multiple levels of consciousness,²¹ of motherhood that is not fixed but has experienced various shifts. It is this back and forth and my reflections about motherhood that reminded me of Fineman's words that "Mother, however, is an ambiguous symbol – one about which there is contest".²² So, though I have never been a social grant recipient, I have experienced mothering under harsh economic pressure when I had nothing; I am also a working mother who like other similarly situated mothers is "most impacted by the pandemic because it is mothers who are doing the necessary and arduous care work to sustain their families".²³

Society has continually constructed motherhood, giving it different definitions and having different expectations of it, depending on the social, historical, geographic, political, and cultural contexts of particular moments in time.²⁴ Rich's definition of motherhood is dual, firstly as a potential relationship between a woman and her reproduction or children and then as an institution that ensures that such potential remains under male control.²⁵ There are many variations of maternity, specific motherhood experiences and groups of mothers.²⁶ Motherhood includes good mothers, risky mothers, immigrant mothers, black mothers, single mothers, lesbian mothers, abusive mothers, fallen mothers, homosexual couples mothering adopted children, to mention but a few.²⁷ The good mother in Western societies is represented by "normalcy as a white, cisgender,

¹⁹ Carlitz and Makhura 2021 *World Development* 7.

²⁰ Alcoff 1992 *Cultural Critique* 9.

²¹ Wing 1990 *Berkeley Women's LJ* 182.

²² Fineman 1992 *U Miami L Rev* 654.

²³ O'Reilly 2021 *Journal of the Motherhood Initiative* 12.

²⁴ O'Reilly 21st *Century Motherhood* 32.

²⁵ Rich *Of Woman Born* 2.

²⁶ Fierheller 2022 *Journal of the Motherhood Initiative* 218.

²⁷ Stevens 2015 *Ilha do Desterro* 96.

heteronormative, married, middle-class, educated, and able-bodied woman. A 'good' mother is feminine, calm, and patient"²⁸ and as there are good mothers, there are also poor, working-class mothers.²⁹ In South Africa, mothers living in poverty are mostly black and receive the social welfare grant. South Africa also happens to have the world's largest and most generous welfare programme.³⁰

Motherhood is not only a "colonized concept" according to Fineman,³¹ but Roberts also describes it as racist and patriarchal.³² Racist colonialism and apartheid shaped gendered citizenship differently for black and white mothers in South Africa. Swart's articulation of Afrikaans nationalism and its role in shaping Afrikaner motherhood states that "their case for active citizenship, the *volksmoeders* rebelled in a time of both imperial and colonial questioning of the category of 'citizen'".³³ According to Walker, two dominant themes occupied the political significance of motherhood in South African feminist literature; "that of 'collusion with patriarchy' and 'difference' in black and white women's constructions of motherhood".³⁴ Both themes have been suggested to be limited in that the former privileged the political discourse of identity and practice whereas the latter overlooked certain overlapping meanings and cultural commonalities between black and white South African women.³⁵ Motherhood, like sexuality, as Roberts suggested, plays a critical role in women's subordination.³⁶

1.3 The pandemic and the response by the South African state

The total shutdown in March 2020 resulted in a number of low wage earning and unemployed families not only losing their jobs but going hungry too. Financial relief, limited as it was, was made available by the state to mothers living in poverty during the pandemic, intensifies the urgency of motherhood in poverty discourse. It is not solely the duty of the state to ensure that poverty-stricken communities receive state intervention occasioned by the pandemic and economic distress; the law is similarly situated. The state's gendered response towards poverty illuminated the reality of poverty and the fact that it hits mothers living in poverty the worst. Mothers in

²⁸ Fierheller 2022 *Journal of the Motherhood Initiative* 218.

²⁹ Stevens 2015 *Ilha do Desterro* 96.

³⁰ Hassim 2006 *Gender and Social Policy in a Global Context* 109.

³¹ Fineman 1991 *Duke LJ* 289 labelled motherhood a colonised concept, stating that: "When one considers the relationship between motherhood and patriarchy, it seems that motherhood has always been, and continues to be, a colonized concept - an event physically practised and experienced by women but occupied and defined, given content and value, by the core concepts of patriarchal ideology".

³² Roberts 1992 *Am U J Gender Soc Pol'y & L* 3.

³³ Swart 2007 *African Historical Review* 43.

³⁴ Walker 1995 *JSAS* 417.

³⁵ Walker 1995 *JSAS* 417.

³⁶ Roberts 1992 *Am U J Gender Soc Pol'y & L* 3.

contemporary South African society remain the main or primary caregivers to children and thus assume the bulk of the responsibilities that come with caring for children.³⁷ According to Mackett, women have been more affected by the pandemic than men as a result of the slowdown in economic activity and restrictions on their movement.³⁸ Women perform the bulk of domestic work and tend to be the primary caregivers, and the number of female-headed households is on the increase.³⁹

State President Cyril Ramaphosa introduced a Child Support Grant of R300 initially in May 2020, with a further R500 that became effective from June until October 2020⁴⁰ to supplement the Child Support Grant. This was in response to an increase in poverty and food insecurity during the pandemic. The *Social Assistance Act*⁴¹ is legislation that validates this constitutional foundation as among the policies underpinning strong formal "commitments to gender equality, as social rights and gender equality have both been conceived as integral to citizenship in democratic South Africa".⁴² South Africa's social assistance welfare programme is thus underpinned by a strong constitutional rights framework.⁴³

The roots of South African law on social welfare are found in English welfare policy. It was this policy that strongly influenced the emerging social assistance laws, which were a response to the growing poverty amongst whites.⁴⁴ The introduction of apartheid after the National Party came to power in 1948 saw an increase in the racialisation of the welfare system.⁴⁵ Africans were the fewest beneficiaries of the system until democracy was finally achieved in South Africa in 1994.⁴⁶ After 1994 the state was faced with the task of deracialising and reforming the welfare system to meet the policy objectives of what was termed "developmental social welfare".⁴⁷ Since 1994 the state's distributive-justice role has been extended to include those who have been excluded from the economy, through the implementation of the state's black economic empowerment and social welfare policies.⁴⁸

³⁷ Goldblatt 2014 *VRU* 23.

³⁸ Mackett 2021 *African Safety Promotion* 2.

³⁹ Goldblatt 2014 *VRU* 23.

⁴⁰ Wills *et al* 2020 <https://cramsury.org/wp-content/uploads/2020/07/Wills-household-resource-flows-and-food-poverty-during-South-Africa%E2%80%99s-lockdown-2.pdf>.

⁴¹ *Social Assistance Act* 59 of 1992.

⁴² Hassim 2006 *Gender and Social Policy in a Global Context* 109.

⁴³ Goldblatt 2014 *VRU* 22.

⁴⁴ Goldblatt 2014 *VRU* 24.

⁴⁵ Goldblatt 2014 *VRU* 24.

⁴⁶ Goldblatt 2014 *VRU* 24.

⁴⁷ Goldblatt 2014 *VRU* 24.

⁴⁸ Helmrich 2014 *APPLJ* 85.

A study conducted by Wills *et al* indicates that "large groups of households are experiencing tremendous hardship as a direct result of the lockdown".⁴⁹ Though South Africa is described as an upper-middle-income developing country, it is still grappling with high levels of inequality of income and wealth.⁵⁰ According to qualitative research carried out on the impact of the lockdown, 15% indicated that children were going hungry, and that the suspension of the national school nutrition programme that had reached 9.6 million children before the pandemic was also a causative factor.⁵¹

Food shortages are an indicator of poverty, and for families who received the Child Support Grant that benefitted 12.5 million children,⁵² the additional support that the state provided during lockdown proved to be a major financial boost. It ought to be mentioned that 40% of households are headed by women only.⁵³ According to the latest statistics, about 62.1% of children in South Africa are multidimensionally poor.⁵⁴ Due to their status of dependence, children experience poverty differently from adults, usually having no power to make decisions regarding their day-to-day lives.⁵⁵ The power to make decisions usually rests with child caregivers, who are mostly the children's mothers. The statistics indicate that most poor families in South Africa are matriarchal in nature.⁵⁶ The traditional approach to poverty is usually of a financial nature and a child is identified as poor if he or she lives in a household whose expenditure is below a given poverty line. To understand poverty as a contemporary problem affecting mothers adversely post-1994, a summary of the legal rules that support racial capitalism and the survival of an imbalance in the market economy is given below.

2. Tracing the Beginnings to the Present

2.1 *Roman-Dutch law and the political economy of slavery*

Motherhood, as feminists have long argued, plays a significant role in socio-economic exclusion. In legal systems in which the ideology of white supremacy shaped legal rules, motherhood interconnected with law in ways

⁴⁹ Wills *et al* 2020 <https://cramsurvey.org/wp-content/uploads/2020/07/Wills-household-resource-flows-and-food-poverty-during-South-Africa%E2%80%99s-lockdown-2.pdf> 2.

⁵⁰ Goldblatt 2014 *VRU* 22.

⁵¹ Wills *et al* 2020 <https://cramsurvey.org/wp-content/uploads/2020/07/Wills-household-resource-flows-and-food-poverty-during-South-Africa%E2%80%99s-lockdown-2.pdf> 22.

⁵² Wills *et al* 2020 <https://cramsurvey.org/wp-content/uploads/2020/07/Wills-household-resource-flows-and-food-poverty-during-South-Africa%E2%80%99s-lockdown-2.pdf> 20.

⁵³ Stats SA Date Unknown <http://www.statssa.gov.za/?cat=22>.

⁵⁴ Stats SA Date Unknown <http://www.statssa.gov.za/?cat=22>.

⁵⁵ Stats SA Date Unknown <http://www.statssa.gov.za/?cat=22>.

⁵⁶ Stats SA Date Unknown <http://www.statssa.gov.za/?cat=22>.

that systematically supported a racist and patriarchal capitalist economy.⁵⁷ Its imperial encounters ensured that South Africa acquired a hybrid legal system consisting of indigenous customary practices and the adoption of Roman-Dutch and English law. Poor motherhood as a social identity pertains to group membership in historical social formations with particular family systems and productive systems, which also affect their content, power and meaning.⁵⁸ Each period of socio-economic history since 1652 in South Africa effected its own system of the subordination of women arising out of class, race and gender.⁵⁹

2.1.1 *Tracing the beginnings*

Inequality, we are told, is not incidental or temporary in nature; it is historically produced and sustained.⁶⁰ Maart asserts that white domination and its ideology of white supremacy require a gender analysis that takes "the broader context of understanding the historical and contemporary construction"⁶¹ of power relations into account. Law was instrumental in supporting an inferior positioning of black mothers during the political economy of slavery.⁶² Unlike France and England, for example, South Africa like the United States had what has since been labelled as "womb law",⁶³ according to which the child follows the mother. During slavery black women performed the backbreaking labour that all enslaved people had to do.⁶⁴ Slavery, underpinned by the ideology of white supremacist sexual imperialism, further extracted from them another form of "work": reproducing the slave workforce by giving birth and serving as forced sexual labour to countless men of all races.⁶⁵ According to Davis "the political economy of slavery systematically expropriated black women's sexuality and reproductive capacity for white pleasure and profit".⁶⁶ Abrahams also referred to an imperialist gaze that started in the European scientific discoveries of the brown woman in the Western Cape, describing this period as one of fascination with Khoisan women's most intimate parts, characterised by an interest in sexual accessibility.⁶⁷

Roman-Dutch law *res intra commercium* and *partus sequitur ventrem* were legal rules that enabled elite white men to extract forced and reproductive

⁵⁷ Davis "'Sexual Economy' of American Slavery" 105.

⁵⁸ Walker 1995 *JSAS* 419.

⁵⁹ Bozzoli 1983 *JSAS* 149.

⁶⁰ Katiyatiya *Substantive Equality* 5.

⁶¹ Maart 2013 *Frank Talk* 10.

⁶² Davis "'Sexual Economy' of American Slavery" 105.

⁶³ Roxbury Latin School 2020 <https://www.roxburylatin.org/2020/04/29/dr-zine-magubane-smith-scholar-on-race-and-gender>.

⁶⁴ Davis "'Sexual Economy' of American Slavery" 105.

⁶⁵ Davis "'Sexual Economy' of American Slavery" 105.

⁶⁶ Davis "'Sexual Economy' of American Slavery" 105.

⁶⁷ Abrahams 1997 *Agenda* 41.

labour from enslaved women.⁶⁸ The two rules reveal the role of law and the markets in seizing enslaved women's intimate lives and converting the private relations of sex and reproduction into political and economic relations.⁶⁹ *Res intra commercium* is a legal rule that applies in our law and denotes which things can be the subject of ownership or of other real rights by private persons.⁷⁰ The Khoisan who lived in the province which is now called the Western Cape were determined by this rule to lack the status of legal personhood and were treated as things/property. It was therefore the practice to alienate and mortgage them.⁷¹

Through another legal rule, *partus sequitur ventrem*, the law operated systematically to convert black reproductive capacity into capital creation.⁷² According to this legal rule, the child follows the mother, which meant that *inboekelingskap*⁷³ created economic value during this economic boom and that the offspring of those relationships indeed followed the mother and were slaves at birth. Systemic economic marginalisation was further perpetuated when South Africa became a republic in 1901. The mines demanded cheap African labour, and this made the demand for new methods of control and repression necessary.⁷⁴ The *Natives Land Act 27 of 1913* is one piece of legislation that sustained political and economic power structures that put colonists in a privileged and entrenched position,⁷⁵ which in turn had adverse effects on black women.

This law was by no means the only law that maintained the economic exploitation and subordination of black people during this time, but its legacy has had far-reaching consequences. Through this law, the state forced the majority of black males off the land and into the labour market, thus creating a cheap and docile migrant labour force in South African mines.⁷⁶ Thus women's productive labour and unpaid care work in the reserves had to contribute to household subsistence in rural areas in ways that subsidised the low wages paid on the mines and in urban areas.⁷⁷ This Act linked the politics and economics of land and labour and of spatial and economic development in a way that has shaped the socio-economic landscape ever since.⁷⁸

⁶⁸ Davis "'Sexual Economy' of American Slavery" 105.

⁶⁹ Davis "'Sexual Economy' of American Slavery" 105.

⁷⁰ Hutchison *et al Wille's Principles of South African Law* 249-250.

⁷¹ Terreblanche *History of Inequality* 156.

⁷² Davis "'Sexual Economy' of American Slavery" 105.

⁷³ Terreblanche *History of Inequality* 156.

⁷⁴ Terreblanche *History of Inequality* 12.

⁷⁵ Philip 2014 *LDD* 5.

⁷⁶ Philip 2014 *LDD* 5.

⁷⁷ Philip 2014 *LDD* 5.

⁷⁸ Philip 2014 *LDD* 5.

The apartheid government established and stringently enforced its pass laws, thereby ensuring a constant supply of workers to farms. By 1939 farms had become a source of cheap (black) labour for mines and factories.⁷⁹ The state was lobbied to apply Chapter IV of the *Native Trust and Land Act*, 1936, to exercise control over unemployed "natives in location" and they also revised the recruitment of native labour for mines and all public works.⁸⁰ Although legislative changes resulted in farm owners benefitting, these legislative demands for stricter enforcement of influx-control regulations failed.⁸¹ In the Western Cape, in particular, packhouse owners had developed new packing methods which required less skilled workers, so they employed unskilled coloured women (and girls) to replace white women.⁸² Furthermore, South Africa was experiencing slow economic growth and a series of economic recessions during this time.⁸³

The traditional family structure established at this stage played a significant part in the impoverishment of women. This kind of migrant labour system, facilitated by apartheid laws and policies of racial segregation after 1948, marks one of the most remarkable in the shaping of the relationship between the state, and women. Black men were forced to find work in mines and on farms, whereas some black women remained at home while others worked as cheap labour on farms and as domestic workers.⁸⁴ Women were domesticated to execute unpaid work, and this separation of spheres reinforced the sexual division of labour under racist patriarchal capitalism. The absence of black men for long periods of time left the household economy in the hands of the women.

Through domesticity, black women were relegated to the home, a private realm, whereas men by leaving home were seen as fit to take their place in the public space of work and power.⁸⁵ A period of segregation existed between 1910 and 1948, during which women in the villages still assumed the burden of maintaining the domestic economy and assuming duties that had previously been performed by men.⁸⁶ On the other hand, white women were employed in the manufacturing sector as low-wage earners.⁸⁷ Domesticity was justified by the prevailing natural differences between men and women. This historical account explains the complexity and configuration of poor motherhood from slavery to apartheid's racial

⁷⁹ Hunter and Hodgson 2017 CCR 289.

⁸⁰ Hunter and Hodgson 2017 CCR 289.

⁸¹ Hunter and Hodgson 2017 CCR 289.

⁸² Hunter and Hodgson 2017 CCR 289.

⁸³ Hunter and Hodgson 2017 CCR 289.

⁸⁴ Hunter and Hodgson 2017 CCR 299.

⁸⁵ Hunter and Hodgson 2017 CCR 299.

⁸⁶ Baderoon 2014 *Cambridge Journal of Postcolonial Literary Inquiry* 3.

⁸⁷ Hunter and Hodgson 2017 CCR 289.

capitalism in South Africa and implicates law in the subjection of South African women in that period.

2.2 Mothers, socio-economic rights and the Constitutional Court

My next discussion focusses on poverty and motherhood in law after 1994. The law's response to poverty post-1994 where mothers are concerned appears to be oblivious to the above long-standing relationship between motherhood and the law. Despite the role of the law in enabling the exploitation of black women's labour power, the terror of material poverty which symbolises a history of oppression and degradation,⁸⁸ the courts appear to be reluctant to address this socio-economic gap. The Constitution's potential to alleviate poverty has been questioned by Sibanda, who claims that South Africa's constitutional discourse on poverty engagement appears to be mainly confined to and mediated through rights discourses.⁸⁹ In line with Sibanda's questioning of the discourse on constitutionalism and rights poverty, what I discuss next are select decisions of the Court where women as mothers and poverty are interlinked. I draw on postmodern feminist discourse influenced by Foucault on law's power, as a discourse that makes scientific truth claims and "positions law on a hierarchy of knowledges which allows for the disqualification of 'subjugated knowledges' and hence gives rise to the power of law."⁹⁰

A patriarchal ideology where poverty and motherhood are concerned is pernicious, particularly under a gender- and race-blind neoliberal South African Constitution.⁹¹ Such a neoliberal conceptualisation of poverty has an exclusionary impulse that gives the impression that there exists "an altogether comfortable relationship with poverty"⁹² as long as it affects only a certain group. The objective/neutrality standard frequently erases the nexus between poverty and motherhood as this link is often overlooked and is usually contained and neutralised.⁹³

In the following rights-claim cases the Court has not fully grasped and critically assessed the meanings attached to motherhood and its link to poverty. The Courts' rights discourse on poverty does not recognise women, let alone women as mothers, and the challenges motherhood sometimes poses. In the words of legal scholar Liebenberg:

Among the key aims of the Constitution is to improve the quality of life of all citizens and free the potential of each person. This constitutional concern with the socio-economic wellbeing of people is especially evident in the

⁸⁸ Austin and Schneider 2001 *New Eng L Rev* 10.

⁸⁹ Sibanda 2011 *Stell LR* 482.

⁹⁰ Smart 1990 *Journal of Law and Society* 196.

⁹¹ Modiri 2012 *SAJHR* 436.

⁹² Cammett 2014 *Boston College Journal of Law and Social Justice* 236.

⁹³ Fineman 1992 *U Miami L Rev* 655.

entrenchment of a wide range of justiciable socio-economic rights in the Bill of Rights.⁹⁴

2.2.1 South African law after 1994

2.2.1.1 Rights: women, mothers and parenthood

The non-recognition of women in poverty discourse removes mothers as legal subjects from socio-economic rights disputes. Since apartheid there has been a shift where the claims of mothers living in poverty are "transfigured in the legal language ... into the degendered components of the neutered institution of 'parenthood'".⁹⁵ I take it for granted that in these cases before the Court, some women were indeed mothers – even if not all of them. The justiciability of socio-economic rights appears to be gender- and race-blind, despite the statistical figures on poverty to the contrary. For example, the women in *Government of South Africa v Grootboom* (*Grootboom*) were political agents who had asserted their rights claim as a show of resistance against imperial, colonial, and apartheid policies and laws that denied them their citizenship and land ownership not only as women but also as mothers.⁹⁶ Yacoob J stated that:

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them ... People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated ... They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.⁹⁷

This judgment puts a spotlight on the justiciability of the right to shelter – a situation occasioned by poverty that disproportionately affects women. The lack of shelter places an additional burden on those with child-rearing responsibilities. Recently there has been emerging scholarship concerned with the woman question in South African law and, specifically, the way that Court have erased women's existence in socio-economic rights decisions.⁹⁸

Sujee suggests that even though South African courts have made progressive judgments on the right to access to adequate housing, from a feminist point of view they have failed.⁹⁹ Invisibility means erasure, and for women living in poverty, the Court's jurisprudence on socio-economic rights excludes their rights claims not only as women but sometimes as mothers. While there is plenty of terminology characterising a culture of poverty in

⁹⁴ Liebenberg 2002 *LDD* 159.

⁹⁵ Fineman 1992 *U Miami L Rev* 655.

⁹⁶ Hunter and Hodgson 2017 *CCR* 301.

⁹⁷ *Government of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*) [3].

⁹⁸ Hunter and Hodgson 2017 *CCR* 301.

⁹⁹ Sujee 2021 *PELJ* 1.

Grootboom and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited (Blue Moonlight)* women are seen only as numbers, categorised under the general term of parents in the family structure but never as mothers in need.

In the *Dladla v City of Johannesburg (Dladla)* judgment women in socio-economic rights claims were given recognition, but even then motherhood's link with conditions of poverty was ignored. The judgment was delivered by Mhlantla J and was a continuation of *Blue Moonlight*. The occupiers this time had following a Court order been moved to a shelter. Were it not for the intervention of the Centre for Applied Legal Studies (CALS) as a friend of the Court, most likely there would have been no mention of women:

CALS submits that international law is also concerned with the impact of housing on women. In particular, 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. 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.¹⁰⁰

In *Dladla* motherhood emerged as either a caregiver/familial structure, but even then the Court never connected motherhood to poverty as a distinct form of socio-economic inequality:

... separation 'felt like a divorce'. At night, women would bear the duty of taking care of the children, as girls and boys under the age of 16 had to stay with their mothers [own emphasis]. Boys older than 16 stayed with their fathers. This perpetuated gender stereotypes.¹⁰¹

Gender-neutral terms (people, parents, everyone) are silencing in these cases. As Hunter and Hodgson explained, this lack of a gendered analysis positions women as neutral applicants or at worst "victims and dependents" or "vessels of reproduction".¹⁰² What I also find particularly problematic with this decision is the fact that poor motherhood is not only non-existent, but "woman" is also juxtaposed against "man", which in my view is reductive, rendering the Court's comparison of gender roles redundant. The Court's symmetrical approach becomes dismal and undermines its own role in what should be a critique of gender in the construction of race and class disparities.

2.2.1.2 Mothers in socio-economic rights disputes

The Courts' jurisprudence on gender equality where motherhood is concerned was established in *Hugo v President RSA (Hugo)*. Though not

¹⁰⁰ *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) (hereafter *Dladla*) para 29.

¹⁰¹ *Dladla* para 12.

¹⁰² Hunter and Hodgson 2017 CCR 298.

dealing with socio-economic rights, this case happened to be the first judgment specifically on motherhood and mothering that the Court had to decide on after 1994. Kriegler J's minority judgment argued that mothers are no longer the natural caregivers of children, labelling this as prejudice/male chauvinism in the eyes of the law, opting for parenthood instead. This logic would undoubtedly be found lacking as its articulation overlooks the interconnectedness of the power dynamics of class, gender and race, which often make black motherhood realistically harsh due to the effects of slavery and colonisation, and their consequences in contemporary society.¹⁰³ However, despite its collusion with patriarchal reasoning on motherhood, *Hugo* happened to be the initial and most likely the only decision to interrogate at length motherhood at the level of gender equality. The Court showed its awareness of gender disparities in its legal reasoning, though its emphasis on "parenthood" was totalising.

Motherhood in poverty rights discourse was put under scrutiny in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development (Khosa)*. As transformative as it was in the context of social assistance welfare, this decision contained connotations of the stereotyping of black and immigrant motherhood. While I acknowledge the lengths the Court went to in this case to ensure the development of a social welfare system that is inclusive on the grounds of nationality, I also submit that this decision contains within it underlying tones of the problematic black motherhood. The problematic black mother is degendered within parenthood. But the overwhelming numbers of non-South African mothers receiving the child support grant – as opposed to other non-South African social welfare grant recipients – leaves little to the imagination of the "parent" in the judgment. She is a black immigrant mother who is not only poverty-stricken but is equally bad for the state. Framed in neutral legal language, the mother's state of vulnerability here is explained in such terms as to represent a "problem" that the legal system needs to solve – an African motherhood that is problematic for both lawmakers and the state.

The paternalistic phrasing in the judgment suggests problematic and/or bad motherhood: "The policy of the Act is to admit only those who are self-sufficient and will not be a burden on the state",¹⁰⁴ "... considered necessary to control applicants by excluding those who may become a burden on the state".¹⁰⁵ The repetitive use of "financial burden on the state", even though it is recognised as a legitimate concern, is disturbing. The wording of the legal text has the potential to reaffirm the stereotypes associated with immigrant mothers facing poverty and the impact this has on policy-making

¹⁰³ Stevens 2015 *Ilha do Desterro* 93.

¹⁰⁴ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) (hereafter *Khosa*) para 132.

¹⁰⁵ *Khosa* para 58.

decisions. The fact that certain immigrant women living in poverty are mothers is taken for granted and dismissed as an unfortunate fact of life. Motherhood assumed to be a biological/natural fact and those not complying with the good mother ideology are perceived as a nuisance.

2.2.1.3 Law, the spread of disease and mothers living in poverty

Poor motherhood and access to healthcare were central in *Minister of Health v Treatment Action Campaign (No 1) (TAC)*.¹⁰⁶ It can be understood as ground-breaking when law intersects with epidemiology and poverty. The facts of the *TAC* judgment are briefly that in 2002, the Constitutional Court had to consider an appeal aimed at reversing an order of the High Court against the government, led by the then state president, Thabo Mbeki. It centred on the perceived shortcomings of government's response to an aspect of the HIV/AIDS challenge. The High Court had ruled that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically, the finding was that government had acted unreasonably in (a) refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated, and (b) not setting out a timeframe for a programme to prevent the mother-to-child transmission of HIV.¹⁰⁷

In *TAC* mothers living in poverty constituted "the cause as well as the effect"¹⁰⁸ of the HIV pandemic. Certain groups had been scientifically and medically identified as engaging in risky behaviours: "youth who inject drugs (PWID); lack of access to HIV testing, condomless sex, and multiple sex partners among young men who have sex with men (MSM); and high and overlapping risk behaviours among young sex workers".¹⁰⁹ Unlike these groups, the realisation of the association of mothers living in poverty with the spread of HIV/AIDS set in motion the granting of "universal" access to antiretroviral treatment (ART) ... for treating people living with HIV and achieving epidemic control".¹¹⁰ The term used in this instance was "mother", as against the situation in *Hugo*, where the term "parenthood" was central. Kriegler J stated that "Constitutionally the starting point is that parents are parents".¹¹¹ The privileging of the sexual affiliation of parenthood as an organising principle where motherhood is concerned¹¹² lost its appeal in *TAC*. The stress on mother-to-child transmission resulted in the

¹⁰⁶ Albertyn 2011 *Stell LR* 599.

¹⁰⁷ *Minister of Health v Treatment Action Campaign (No 1)* 2002 5 SA 703 (CC) (hereafter *TAC*) para 2.

¹⁰⁸ Fineman 1991 *Duke LJ* 274.

¹⁰⁹ Kteily-Hawa *et al* 2022 *PLoS ONE* 1.

¹¹⁰ Myburgh *et al* 2021 *Health Policy and Planning* 923.

¹¹¹ *Hugo v President of the Republic of South Africa* 1997 4 SA 1 (CC) para 85.

¹¹² Fineman 1991 *Duke LJ* 290.

identification of poor motherhood as a potential hazard consequential to the spread of the pandemic, as articulated in the decision:

The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential.¹¹³

The mothers became the object of scrutiny as to how well they shielded their children from the dangers posed by their pregnant bodies, and children became the targets of surveillance medicine.¹¹⁴ The sexual bond of parenthood lost its significance where disease and its spread, reproduction and sexuality were concerned.

Further, *TAC* not only brought the right to health to the fore, but it also gave "power of the human right to health in improving health generally".¹¹⁵ Motherhood denied women as mothers representation and voice in the public sphere, racist nationalist regimes could manipulate motherhood in ways that defined motherhood as having important public dimensions.¹¹⁶ The state had refused to extend treatment to certain sites, a point the Court rejected, stating that:

The result of this refusal and this failure is the mother-to-child transmission of HIV in situations where this was both predictable and avoidable. This conduct of the government is irrational, in breach of the Bill of Rights, and contrary to the values and principles prescribed for public administration in section 195 of the Constitution. Furthermore, government conduct is in breach of its international obligations as contained in a number of conventions that it has both signed and ratified.¹¹⁷

In compliance with international obligations, the Court gave compelling reasons through the rights framework to arrive at its decision. But this also meant that certain rights affecting mothers living in poverty conditions (the rights to privacy, dignity and equality) were encroached upon. Further, the focus on the needy and diseased mothers directed attention away from structural explanations for poverty and mobilised ideologies of "rescue", while pointing away from addressing the causes of the *malaise*.¹¹⁸ This then limited law's part in the understanding of mothers living in poverty (as pandemics affect them, their families and communities at large) and the cause and spread of pathogens as a national concern.

Poor health is one of several factors included in multidimensional poverty¹¹⁹ and the rapid spread of the pandemic in 2020 was likely to be risky for South

¹¹³ *TAC* para 78.

¹¹⁴ Frederick 2015 *Sociology of Health and Illness* 1129.

¹¹⁵ Annas 2003 *New England Journal of Medicine* 750.

¹¹⁶ Magubane "Attitudes Towards Feminism" 1015.

¹¹⁷ *TAC* paras 22.13 and 22.14.

¹¹⁸ Briggs 2003 *Gender and History* 180.

¹¹⁹ Mabaso *et al* 2019 *International Journal for Equity in Health* 1.

Africa. The *TAC* judgment was taken almost two decades ago. Yet surveys dating back only two years indicate that women who also happen to be mothers living in poverty are still more susceptible than others to HIV/AIDS. South Africa still carries the largest share of the global HIV burden. As of 2020 approximately 7.8 million people are living with HIV, which is estimated to be 13% of the total population.¹²⁰ In the numerous HIV surveys carried out nationally, black Africans and especially women had higher overall HIV prevalence than other groups.¹²¹ Poverty is cited as an overarching factor that increases the disparity associated with HIV prevalence between genders and among race groups, owing to the historical and current socio-economic inequality in South Africa.¹²²

The following were listed as some of the health burdens expected to soar with the advent of the pandemic and to impact on poor motherhood adversely: an increase in malnutrition; mortality due to HIV and TB as a consequence of the disruption of treatment programmes; disruption of vaccination programmes with possible associated disease outbreaks; disruption of maternal and infant care, resulting in increased mother and infant mortality; outbreaks of infectious diseases associated with poverty, malnutrition, and the disruption of vaccination; and reduced life expectancy at birth.¹²³ The recent pandemic therefore could not have arrived at a worse possible time as poor motherhood still faced a pre-existing pandemic (HIV/AIDS) whilst simultaneously grappling with socio-economic challenges.

Secondly, as a sexually transmitted disease the HIV epidemic carries stigma that in this case are further complicated by the interplay of the stigma related to poverty, sexuality, reproduction and gender. While mothers living in poverty might experience the shame of stigmatisation due to their health status and are viewed by their community as incapable, stigma and deviance are not fixed, mutually exclusive categories.¹²⁴ As mothers who lack socio-economic resources and do not conform to a socially constructed ideology of good mothers, this makes them "bad mothers".¹²⁵ Such mothers are more likely to experience surveillance and judgmental attitudes and¹²⁶ certain forms of blaming for their own children's shortcomings and broader social problems such as poverty and the spread of disease.

Lastly, *TAC* illustrates the Court's limited understanding of "colonial medicalization of African sexuality ... to have given insight or subverted

¹²⁰ Broadbent, Combrink and Smart 2020 *Global Epidemiology* 1.

¹²¹ Mabaso *et al* 2019 *International Journal for Equity in Health* 1.

¹²² Mabaso *et al* 2019 *International Journal for Equity in Health* 2.

¹²³ Broadbent, Combrink and Smart 2020 *Global Epidemiology* 3.

¹²⁴ Frederick 2015 *Sociology of Health and Illness* 1129.

¹²⁵ Kuri and Fierheller 2022 *Journal of the Motherhood Initiative* 20.

¹²⁶ Kuri and Fierheller 2022 *Journal of the Motherhood Initiative* 20.

imperial, colonial and apartheid valorisation of African bodies and sexualities that became focal points for justifying and legitimising the fundamental objectives of colonialism".¹²⁷ South Africa has a tainted history in its sexual regulation of black femininity, motivated in law by medical discourse that saw the black body as a carrier of contagious disease, which was often blamed for the spread of disease.¹²⁸ The obsolete *Contagious Diseases Act* of 1864 was partly aimed at policing feminine black subjectivities in its protection of the respect and dignity of respectable women.¹²⁹ The focus of this law was the spread of disease, where African female sexuality was deemed a site of contagion.¹³⁰ Feminist writers on black female sexuality have described such a view of sexuality as unspeakable – an empty space that is ever-visible and invisible.¹³¹

This then makes this judgment essentialist in approach, in its representation of African sexuality through its primary reliance on medical, disease control, reproduction, and sexuality in capitalist conditions¹³² such as those in South Africa. Moreover, this judgment follows in the tradition of the baseline of sexuality research in the field of public health in Africa that is found in the colonial medicalisation of black women.¹³³ The *TAC* judgment treats mothers with HIV/AIDS living in poverty as vessels; it upholds a "scientific" prejudice about women's bodies and their reproductive role that was imported to Africa.¹³⁴ As Tamale suggested:

The main focusses of public health researchers during the colonial era were disease, pregnancy prevention and curbing sexual excesses and perversions. The narrow approach meant that the research by biomedical experts, epidemiologists and demographers ignored (and in the main still ignores) sexual wellness and issues of eroticism and desire, leading to limited theoretical framings of African sexualities.¹³⁵

With the announcement of the social relief and support package, there was also the issue of the preparedness of the healthcare system. The hospitals were in fact already overwhelmed with pre-existing challenges in the delivery of healthcare services.¹³⁶ Another challenge was the fact that food parcels were diverted through corruption at local government level.¹³⁷ System failures also made the collection of grants difficult, months after their introduction, and the adjustment of the top-up to the Child Support Grant to

¹²⁷ Tamale "Researching and Theorizing Sexualities" 24.

¹²⁸ Thusi 2015 *Fordham Int'l LJ* 243.

¹²⁹ Thusi 2015 *Fordham Int'l LJ* 221.

¹³⁰ Thusi 2015 *Fordham Int'l LJ* 222.

¹³¹ Hammonds "Towards a Genealogy of Black Female Sexuality" 170.

¹³² Tamale "Researching and Theorizing Sexualities" 24.

¹³³ Tamale "Researching and Theorizing Sexualities" 24.

¹³⁴ Abrahams 1997 *Agenda* 37.

¹³⁵ Tamale "Researching and Theorizing Sexualities" 25.

¹³⁶ Mbunge 2020 *Diabetes and Metabolic Syndrome* 1812.

¹³⁷ Broadbent, Combrink and Smart 2020 *Global Epidemiology* 3.

apply per caregiver and not per child was disastrous in its effect.¹³⁸ These shortcomings in the system have potential health impacts and are putting a strain on poor motherhood already stretched to breaking point.

3 Conclusion

The jurisprudence established by the Court on equality and socio-economic rights where women as mothers are concerned, certainly makes one question law's responsiveness and understand feminists' questioning of the usefulness of law in changing women's lives.¹³⁹ The pandemic has undoubtedly compounded the existing anxiety for mothers living in poverty, and the law's neglect of a gender-sensitive understanding of poor motherhood is highly likely to continue to prevail during the current pandemic. Perhaps the courts need to be more gender-aware in their reasoning and decisions on socio-economic rights disputes concerning women and mothers. This in my view could possibly be the first step towards the recognition of poor motherhood and its socio-economic challenges, including health care.

These reflections do not negate the perception that some very significant milestones have been passed in law since 1994. The fact that after the *TAC* decision medicine prices were reduced, countless deaths were averted, and additional resources were made available in the public health system to those living in poverty¹⁴⁰ is commendable. In *Khosa*, though not specifically mentioning *ubuntu*, the judgment's humanitarian legal reasoning is also lauded.¹⁴¹ So too were the state's initial actions against the pandemic in 2020, which were internationally praised as decisive and brave.¹⁴² Although the response by the Court was positive in the *Khosa* and *TAC* decisions, much work still needs to be done to understand and address the problems associated with poverty. The state's role during the pandemic is also commended as it cannot be denied that it did a great deal for needy families. The women experiencing socio-economic pressures and anxieties should thus be given more platforms to voice their discontent in the fight against poverty, as women and as mothers. This will require joint efforts between the state, social movements, the legal system, the courts and feminist activists. This would make the legal process less intimidating and burdensome for women.

¹³⁸ Broadbent, Combrink and Smart 2020 *Global Epidemiology* 3.

¹³⁹ Rosenbury 2018 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834664 2.

¹⁴⁰ Heywood 2009 *Journal of Human Rights Practice* 14.

¹⁴¹ See Bohler-Muller 2007 *Obiter* 594: "Although, as mentioned, Mokgoro does not use the word *ubuntu* in this case, her insistence that everyone is responsible for ensuring the well-being of persons within their community appears to reflect such thinking."

¹⁴² Broadbent, Combrink and Smart 2020 *Global Epidemiology* 2.

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List of Abbreviations

AIDS	Acquired Immunodeficiency Syndrome
Am U J Gender Soc Pol'y & L	American University Journal of Gender, Social Policy and the Law
APPLJ	African Public Procurement Law Journal
Berkeley Women's LJ	Berkeley Women's Law Journal
CCR	Constitutional Court Review
COVID-19	Coronavirus Disease of 2019
Duke LJ	Duke Law Journal
Fordham Int'l LJ	Fordham International Law Journal,
HIV	Human Immunodeficiency Virus
JSAS	Journal of Southern African Studies
LDD	Law, Democracy and Development
New Eng L Rev	New England Law Review
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights

Stats SA

Stell LR

TAC

U Miami L Rev

VRU

Statistics South Africa

Stellenbosch Law Review

Treatment Action Campaign

University of Miami Law Review

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