

ESR

REVIEW

Economic and Social Rights in South Africa

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Ensuring rights make real change

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ESR Review

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Editorial

2016 marks two important milestones for the United Nations (UN). The first is the 10th anniversary of General Assembly's founding of the Council on Human Rights in 2006. The second is the 50th anniversary of the ratification of the two covenants that underpin most international human rights law, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Cultural, Economic and Social Rights (ICESCR).

Both were adopted by the UN General Assembly in on 16 December 1966. Along with the Universal Declaration of Human Rights adopted in 1946, they are known collectively as the International Bill of Human Rights.

The United Nations Office of the High Commissioner for Human Rights in consultation with the focal points of the two Committees, namely the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, has planned a year of events and activities to raise awareness of the two Covenants through a campaign entitled *Our Rights, Our Freedoms, Always*. Celebratory activities and events will conclude on 16 December 2016.

This is the first issue of the *ESR Review* in 2016. It includes three feature articles. The first, by Yuri Ramkissoon, reflects on the lessons from the South African Human Rights Commission (SAHRC) on the importance of realising economic and social rights in alleviating poverty and ensuring transformation. The article highlights some of the positive and negative obligations placed on the state by the Bill of Rights and then turns to the lessons learned by the SAHRC over 20 years of data collection on economic and social cultural rights.

Ari Tobi-Aiyemo's feature article explores the myth and reality that encompasses the study of women's and gender issues, which are at times discussed interchangeably. Amidst the socio-cultural diversities in African patriarchal societies, she argues that excluding men's interests by focusing on women's interests alone may not only frustrate attempts at bridging the gender gap but eventually broaden it. Although the causes of the gender gap can be traced to a wide range of issues, ideas, cultural and belief systems, she urges that bridging it is central to societal development and that it goes beyond increasing women's participation to acknowledging men's involvement.

The third feature by Elroy Paulus highlights the Black Sash's Hands Off Our Grants campaign, which was launched in November 2013. The campaign challenges the unlawful, fraudulent and immoral business practices facilitated by the current outsourced SASSA/CPS contract for the national payment of social grants. It was initiated by the Black Sash after receiving hundreds of complaints from beneficiaries about illegal deductions for airtime, electricity and water from their SASSA accounts. Beneficiaries

further testified that money was deducted without their knowledge or informed consent. As a result they experience various financial hardships, including shortages of food and medicines. Many, particularly in rural communities, spend extra money on transport and airtime in an attempt to resolve the issue, often with little success. Among other things, the Black Sash campaign sought to oblige SASSA to in-source the full administration and payment of grants as soon as possible, and to protect the confidential and personal information of beneficiaries. This is aimed at reducing their vulnerability to loan sharks and financial service providers who access these bank accounts in a bid

to profiteer at the expense of the poor.

This issue of the ESR Review also highlights developments at the UN Committee on Economic, Social and Cultural Rights and the African Commission on Human and People's Rights.

We hope you will enjoy it.

Gladys Mirugi-Mukundi, Editor

The importance of realising economic and social rights in alleviating poverty and ensuring transformation

Reflections on the functions of South African Human Rights Commission

Introduction

It is a well-known and often-quoted fact that South Africa has one of the most ground-breaking progressive constitutions in the world. And this might be true, especially in relation to the bold decision to include economic and social rights as justiciable. But over the last decade or so, there has been a growing disjuncture between the rights enshrined in the Constitution (Constitution of the Republic of South Africa Act 108 of 1996) and those enjoyed by the citizens of the country. This has, understandably, led to scepticism about how the Constitution and associated legislation can work for the people of this country. It is essential that domestic law is implemented in a more effective way, not merely to rekindle confidence in the Constitution but to make inroads into the country's staggering levels of poverty and inequality.

In addition, some people do not recognise the benefits of the inclusion of economic and social rights (ESRs) in the Constitution and the positive impact this can have on societal growth and transformation. However, economic growth and development that occurs without associated improvements in peoples' standard of living is unsustainable.

This article looks briefly at some of the positive and negative obligations placed on the state by the Bill of Rights and then turns to the lessons learned by the South African Human Rights Commission (SAHRC) over 20 years of data collection on ESRs.

Negative and positive obligations and the case for economic and social rights

Whether as an initial instrument of transition or as a tool for long-term transformation, the Constitution places negative and positive obligations on the state. Civil and political rights (CPRs) are considered negative in nature, placing negative obligations on the state not to interfere with the rights and freedoms of an individual. Pierre De Vos (1997: 69) explains that 'their implementation is free or at least inexpensive because they merely require the state to refrain from acting'.

ESRs relate to the wellbeing of individuals and their enjoyment of an adequate standard of living, free from monetary or social need or want. It places both negative and positive obligations on the state by defining the basic right and the additional provisions or dimensions that are required for the full realisation of the right. But ESRs, unlike CPRs, require more than just an articulation and monitoring of the law.

While both CPRs and ESRs require state resources to ensure their fulfilment, it is argued that ESRs require a substantially greater investment from the state. In addition, there are various dimensions and caveats to ensuring the full realisation of ESRs. For example, enrolment at school is the basic obligation in relation to the right to education.

More than 21% of South Africans live in extreme poverty and are unable to meet their basic nutritional needs.

To ensure that this right is fulfilled other indicators must be satisfied, such as physical access, provision of quality education and adequate infrastructure. However, although not explicitly stated, CPRs also require positive action by the state in some cases. For example, substantial outlays and on-going funding are required to conduct elections and ensure that they are free and fair.

Further, the positive obligations of the state are the steps that assist in the transformation of society by reducing poverty and inequality. A country with such deep-seated poverty and inequality cannot hope to transform itself adequately through the mere observation of, or respect for, the rights enshrined in the Constitution. Additional protection and fulfilment through positive action is required to enhance peoples' standard of living and ensure that they are able reach their full capacity.

Poverty and economic and social rights

In 1948, the Universal Declaration of Human Rights (UDHR) confirmed that poverty is a human rights issue. Although poverty per se is not expressly mentioned in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights (CESCR) states:

the rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the Covenant, have a direct and immediate bearing upon the eradication of poverty (OHCHR 2001: 1).

Conventional thinking defines poverty according to income levels. However, progressive definitions describe it more extensively to include aspects of deprivation and the lack of a voice or platform. Poverty can thus be explained as 'a denial of capabilities and freedoms to achieve what each individual is capable of' (CESR 2009: 2). In essence we have come to understand that a lack of access to basic services such as sufficient water, decent sanitation and an environment that is not harmful to one's health or wellbeing also constitute a form of poverty. Such limitations are often accompanied by discrimination, exclusion, inequality and unequal power relations. Ultimately, such people are bound by social and economic constraints and lack opportunities to reach their full capability or potential.

The recently adopted Sustainable Development Goals (SDGs) attempt to address the failures of the Millennium Development Goals (MDGs) by ensuring that poverty

and inequality are at the centre of each of the goals and targets. The first goal of the SDGs is to 'end poverty in all forms everywhere,' and in so doing, to ensure that all gender and age disparities are considered. Further goals also acknowledge the link between rights and poverty and attempt to address service delivery from a rights-based approach.

South Africa's National Development Plan (NDP) also acknowledged to develop a focus on ESR. It states:

At the core of [the NDP] is a focus on capabilities; the capabilities of people and of our country and of creating opportunities for both. The capabilities that each person needs to live the life that they desire differs, but must include education and skills, decent accommodation, nutrition, safe communities, social security, transport and job opportunities (NDP 2011: 5).

According to Statistics South Africa, over 21% of South Africans live in extreme poverty and are unable to meet their basic nutritional needs. Approximately 37% are unable to afford essential food items and essential non-food items like transport or toiletries. As such, these people or families have to sacrifice one to access the other. The largest proportion of those in poverty in the country, over 53%, are just able to afford both food items and other essentials but do so with under R800 per month (Nicolson 2015).

Impediments to the realisation of economic and social rights

The SAHRC has a mandate in terms of section 184(3) of the Constitution to monitor ESR in South Africa. The Constitution states:

Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.

From submissions made to it over a lengthy period, the SAHRC found a common pattern in impediments to the realisation of ESRs (SAHRC 2012: 17). These include:

- a) The conceptual misunderstanding by the government of its constitutional obligation to progressively realise rights.
- b) The inadequate fulfilment of public participation processes and access to information, which are key elements of a rights-based approach.
- c) The social exclusion of the poor and vulnerable groups.
- d) The disjuncture between legislation and strategic planning and its implementation, which is a result of, *inter alia*, the weak capacity of government departments to deliver on their intended outputs.

Evidence of the above is illustrated clearly in the well-known case of the construction of unenclosed toilets in Makhaza, Khayelitsha in Cape Town. In 2010, the SAHRC received a complaint from the Western Cape branch of the African National Congress Youth League lodged on behalf

of the residents of Makhaza alleging that unenclosed toilets had been installed by the City of Cape Town (CoCT) in the township. In a judgment released on 4 June 2010, the SAHRC found in favour of the complainants that the provision of unenclosed toilets violated the guidelines of the National Housing Code (NHC) and the right to one's dignity. On 23 September 2010, applicants and residents of Makhaza approached the Western Cape High Court for relief by declaring the provision of open toilets a violation of their constitutional rights and to order the CoCT to enclose all 1,316 toilets.

Following an inspection *in loco* in November 2010, the Court immediately concluded that the toilets were failed to meet the requirement of the right to dignity and privacy. In its judgment the Court stated that:

The City's decision to install unenclosed toilets lacked reasonableness and fairness; the decision was unlawful and violated constitutional rights. The legal obligation to reasonably engage the local community in matters relating to the provision of access to adequate housing which includes reasonable access to toilet facilities in order to treat residents with respect and care for their dignity was not taken into account when the City decided to install the unenclosed toilets.

First, the CoCT ignored or chose to selectively interpret policy guidelines that regulate the provision of sanitation facilities. The policy states that the minimum standard for basic sanitation is:

a toilet which is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests (WSA 1997: 8)

Second, the fact that the City of Cape Town saw no issue with erecting unenclosed toilets in a community, particularly one as impoverished as Makhaza, illustrates the complete lack of understanding of a human rights-based approach to service delivery and progressive realisation. 'The provision of unenclosed toilets is the very antithesis of progressive realisation. In all manner of respects, it is dehumanising and represents a form of social closure' (SAHRC 2012: 18).

Third, the city's actions also illustrated the complete lack of consideration for vulnerable or marginalised people or groups such as the disabled, women and older persons.

Realising economic and social rights

When assessing the realisation of ESR it is important to do so in relation to important human rights principles in order to ensure that development and service delivery are empowering and sustainable. Therefore, the SAHRC, like many development agencies and civil society organisations, assessed the realisation of rights against the parameters discussed below.

A human rights-based approach

When seeking to promote, protect and monitor human rights, it is important to analyse and address the underlying systemic issues that lie at the heart of developmental problems, such as poverty, inequality and discrimination.

Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps promote the sustainability of development work, empowering people themselves – especially the most marginalised – to participate in policy formulation and hold accountable those who have a duty to act (OHCHR 2006: 15).

The lack of a human rights-based approach often leads to unsustainable and inappropriate programmes being implemented and to wasteful expenditure, while the alternative leads to a buy-in from the broader public, ownership from both the state and the community, and more effective spending.

Progressive realisation

Progressive realisation 'imposes an obligation to move as expeditiously and effectively as possible toward the full realisation of the right' (CESCR General Comment 3). Progressive realisation should be seen as a:

continuum where the rationale is to start at the minimum socio-economic provision necessary to meet people's basic needs (minimum obligation) to its full realisation of the significant improvement of [people's capabilities] to the extent that they can meaningfully participate in and shape society (SAHRC 2009: 14).

Ultimately, progressive realisation places an obligation on the state to take appropriate measures towards the expeditious, full realisation of all ESRs.

However, the realisation of rights can be hampered (or facilitated) by available resources. The debate on progressive realisation is therefore also defined by the concept of minimum core obligations, which refers to the basic level of service that should be provided immediately, particularly to poor and marginalised people in a country. The CESCR is of the view that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party' (CESCR General Comment 3). The South African Constitutional Court has been reluctant to endorse the minimum core approach developed by the CESCR (see, for example, *Government of Republic of South Africa v Irene Grootboom and Others* and *Minister of Health v Treatment Action Campaign*). However the Court has argued that it 'never dismissed the minimum core approach but had just found itself handicapped by lack of information' (Chowdry 2009: 12).

In realising ESRs, it is important that resource constraints not be used as an excuse for the non-delivery of services, as the state must be seen to be taking steps to realise ESRs. Likewise, retrogressive measures cannot be implemented in the face of resource constraints. It must

also be noted that some ESRs do not require significant resources, while others do require resources but are formulated in such a way as not to be subject to progressive realisation. For example, States parties to the ICESCR have a strict limit of two years to develop a plan of action to ensure the provision of free and compulsory primary education for all (ICESCR Article 14).

Interdependence and indivisibility

It is important to note that despite the resource constraints that a state might experience, all rights are indivisible, interdependent and interrelated. All rights are based on the inherent right to dignity and therefore cannot be placed in any hierarchical order. One right cannot be prioritised over another unless that right was historically neglected and in need of disproportionate attention. For example, the realisation of the right to water is essential to realisation of the right to health, environment, food and education. Sufficient water is required for consumption to maintain one's health and a lack of access to sufficient water will lead to poor health and the inability to enjoy one's right to education – due to poor health and concentration. Further, water is required to take medication, water crops for food, ensure that toilets function adequately and maintain a healthy environment. However, the right to water cannot be considered superior to these other rights as water is also dependent on a clean environment and a functioning sewerage system.

Further, rights are heavily interrelated and interdependent. A single right might act as enabler for another right, or conversely, the lack of access to one right might impact heavily on another. In 1993, the World Conference on Human Rights in Vienna affirmed that 'all human rights are universal, indivisible and interdependent and interrelated' and that 'the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis' (Vienna Declaration and Programme of Action, 1993).

Gender mainstreaming

Gender mainstreaming is integrally linked to the concept of discrimination. The UN Economic and Social Council defines gender mainstreaming as:

the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality (ECOSOC 1997: 2).

Following the global realisation of the disproportionate impact of human rights violations on women and the need to make women's experiences central to all programmes and policies, the UN agree to endorse gender mainstreaming. In 1995, it was agreed at the Fourth World Conference

on Women in Beijing to approve gender mainstreaming as a global strategy for achieving gender equality, which is a primary goal of all economic development.

The SAHRC has attempted to mainstream gender in to all its projects and reports by disaggregating data to ensure that all statistics are presented from a gender perspective and assessing the impacts of rights violations specific on vulnerable groups, inter alia women, non-nationals and people with disabilities.

Public participation

Participation means ensuring that national stakeholders have genuine ownership and control over development processes in all phases of the programming cycle: assessment, analysis, planning, implementation, monitoring and evaluation (OHCHR 2006). The right to participate in the conduct of public affairs is protected by the UDHR and the African Charter on Human and Peoples' Rights.

However, participation does not encompass merely the right to vote or the right to the dissemination of information from decision makers. It must ensure that processes are transparent, information is shared and communities are engaged and encouraged to participate in decision-making processes. It also means that an enabling environment is built to allow for debate, and, if necessary, disagreement with state decisions, including lawful protest against these decisions.

It is important to note that participation does not occur at a static point in a decision-making or programme implementation process. Participation occurs during the lifecycle of a project and beyond. It should include engagement on items such as policy choices, budget allocation and spending and monitoring or accountability. Participation must also involve all relevant stakeholders, those that might be affected directly or indirectly, despite prevailing cultural and societal norms. For example, woman must be included equally, and in some cases to a greater extent, despite potential prevailing patriarchal norms. The SAHRC has found engaging with communities in informal settlements to be easy and productive. Generally people are not content with being passive recipients of services, particularly those from impoverished communities. They prefer to be involved and assist where necessary. Engagement at this level is not entirely effortless due to the different groups of people that must be involved but is highly rewarding in terms of ensuring sustainable projects.

Accurate statistics

In conducting this research, whether on an annual or every three years, and whether via questionnaires, interviews or public hearings, the SAHRC constantly encountered problems with obtaining timely, accurate data. Data presented via all data collection methods were out-dated, incomplete and in some cases conflicting. Further, most information provided by state departments is not human rights-based. This means that while the state believes that a right is being reasonably realised, all facets of that right might not be.

The development of indicators can go a long way in ensuring that states and civil society organisations have an accurate picture of the state of service delivery from various angles. On budgeting, we are aware that at least two of the seven ESRs get a huge slice of the allocation pie annually (i.e. health and education) and the other rights also have substantial budgets. The essential undertaking in this respect is for these budgets to be allocated optimally to different line items and sub-units and then utilised efficiently.

A final word on litigation

In the absence of implementation and enforcement legislation, policies and plans, and after all recourse avenues have been exhausted, litigation is an option for communities and civil society organisations. Although a lengthy and expensive option, there has been some success at the Constitutional Court in relation to housing but limited success in relation to other ESRs. However, courts must be

more progressive in their judgments relating to ESRs. De Vos (1997: 74) explains:

In the absence of clear precedent to support them, judges often shy away from formulating new or innovative legal rules and principles. This, I believe, is the result of the deep-seated positivism prevalent in the legal fraternity in South Africa that dictates that judges are not the “makers of law,” but merely the “adjudicators of law”.

Courts have the ability to greatly progress transformative constitutionalism in this country and in the absence of excellent state regulation, must be encouraged to do so for the best interests of the majority of people in South Africa.

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References

Beja and Others v Premier of the Western Cape and Others (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011).

Chowdhury, J. 2009. Judicial adherence to a minimum core approach to socio-economic rights – A comparative perspective. Conference paper, Cornell Law School. Available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_clacp.

De Vos, P. 1997. Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution. *South African Journal of Human Rights*, 13 S. 67.

Nicolson, G. 2015. South Africa: Where 12 million live in extreme poverty. *Daily Maverick*, 3 February. Available at <http://www.dailymaverick.co.za/article/2015-02-03-south-africa-where-12-million-live-in-extreme-poverty/#.VvvL6dJg7IV>.

Office of the High Commissioner for Human Rights. 2006. Frequently asked questions on a human right-based approach to development cooperation. United Nations, New York. Available at <http://www.ohchr.org/documents/publications/faqs.pdf>.

Republic of South Africa. 1997. Water Services Act No. 108. Available at <https://www.dwa.gov.za/IO/Docs/a108-97.pdf>.

SAHRC. 2012. Section 184(3) report: Transforming society, securing rights, restoring dignity. Available at [http://www.sahrc.org.za/home/21/files/Section%20184\(3\)%20Report.pdf](http://www.sahrc.org.za/home/21/files/Section%20184(3)%20Report.pdf).

SAHRC. 2009. Section 184(3) report. Available at <http://www.sahrc.org.za/home/21/files/7th%20ESR%20chapter%201%20to%203.pdf>.

UNCESCR. 2002. UN Committee on Economic, Social and Cultural Rights: Report on the twenty-fifth, twenty-sixth and twenty-seventh sessions (23 April–11 May 2001, 13–31 August 2001, 12–30 November 2001), 6 June 2002, E/2002/22; E/C.12/2001/17. Available at <http://www.ohchr.org/documents/publications/faqs.pdf>.

UNCESCR. 1990. General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December. E/1991/23.

UN General Assembly. 1993. Vienna Declaration and Programme of Action, 12 July. A/CONF.157/23. Available at <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

UN Women Generic Mandates. 1997. Available at <http://www.un.org/womenwatch/osagi/intergovernmentalmandates.htm>.

Bridging the gender gap

Myth or reality?

Introduction

Internationally, advancing gender equality and eradicating all forms of sexual discrimination are priority objectives. The concerted efforts that are being made to bridge the gender gap have focused on all forms of discrimination, but especially against women, while giving them leverage to level up to their male counterparts in opportunities for self-actualization. This is often termed women's empowerment.

At best, attempts by largely patrilineal societies to bridge the gender gap, especially in Africa, have been selective, opportunistic and contradictory. These attempts tend to disregard evidence of severe discrimination against men in certain respects, which may eventually have ripple effects against the efforts towards women's empowerment. Although recent research shows men are making strides to be incorporated into the gender agenda, there is minimal progress as their focus is imprecise. Thus, the unequal and wavering attempts at bridging the gender gap become a menace to democratic development as the scale of seeming equality is unequal, tilting in favour of the female gender.

This article does not decry women's empowerment, nor does it condemn the various attempts at eliminating discrimination against women, a gender to which the writer proudly belongs. The point here is that the focus on women's interests alone may frustrate attempts to bridge the gender gap and indeed, may eventually widen it. This article thus attempts to define the concept of the gender gap and the phrase 'bridging the gender gap' so as to contextualize the aim and explain the impending dilemma. This will reveal whether current national, regional and international efforts at bridging the gender gap are myth or reality, especially given the socio-cultural diversities in African patriarchal societies. In concluding this writer puts forward what is considered a pragmatic approach to curtailing the interminable gender inequality quandary, as it cannot be totally resolved.

Bridging the gender gap

A gender gap, by definition, is a disproportionate difference or disparity between the sexes (Gender gap/wikigender). It is also defined as the differences between women and men, especially as reflected in social, political, intellectual, cultural, or economic attainments or attitudes (Dictionary.com).

In this article the gender gap is viewed simply as a gulf of inequality and imbalance between the sexes. Bridging the gender gap can be thus seen as an attempt to balance

the interests and needs of women and men, with equal treatment and consideration.

There is no doubt that the traditional lifestyle of most African communities favours a strict, gender-based division of labour and social separation of sexes. Historically, there have been specific kinds of gender apartheid for separate activities within the social, economic, political, religious and cultural spheres. Thus, various theories have been propounded to consider the many and varied means by which sexual discrimination and inequality is rooted in the law; however from a somewhat biased but yet considerable feminists' perspective.

According to Connell (1985), the scope of a social theory of gender cannot be easily defined, but practically, it can be defined by the reach of a network of arguments generated by feminism. It is a popular feminist belief that law is by definition patriarchal as many doctrinal areas of the law are fundamentally structured around men's perspectives and experiences; women are thus almost universally less socially privileged than men. There is thus an unequal power relationship that grants men political and economic dominance over women, not merely within the household, but also in employment and other socio-political spheres of life.

Accordingly, gender inequalities in many aspects of the substantive law have long been evident to feminist scholars. Ironically, feminism has itself contributed to the creation of a wider variety of masculinities in contemporary societies. Barnett (1997) believes that western feminism, with its insistence on the extension of legal rights to ensure gender equality, misunderstands the feminist concerns of the third world. However, this writer believes that these concerns, which diverge even among feminists, further amplify the gender gap especially in Africa, where patriarchy thrives, unfortunately so!

Correspondingly, there is a growing field of men's studies, also known as masculinity studies. Masculinity is a relatively new concept to the field of gender. As a concept it is not equivalent to the notion of 'men'; rather, masculinities poses questions about men and their own relationship with patriarchal power. Connell (2005) explains that 'masculinities' is about the position of men in a gender order and the patterns of practice by which people (both men and women, though predominantly men) engage that position. Thus, as unpopular as this may sound, there are propositions on the flipside of the feminists' argument, which see men as a gender in need of equal attention and protection in the gender structure.

Therefore, even though nature has bequeathed the sexes with their distinct psychographic make-ups, the trend has been to preach for a society not fractured by gender differences.

Why the gender gap?

The gender gap can be traced to a wide range of issues, ideas, cultures and belief systems. However, this writer categorizes three reasons as to why the gender gap exists. They are:

1. The Divine Hypothesis, which proposes that the gender gap results from underlying sexual differences based on godly attributes inherent in both male and female. Numerous religions, including Christianity and Islam, believe that a woman is created secondary and inferior to a man, hence the need to make her his subordinate. Concerning the man, it is believed that he as head of the home should forfeit or waive his rights for the woman, whom God created as 'the weaker vessel'.
2. The Natural Hypothesis, which suggests that the gap results from the innate anatomies of men and women. This has to do with the belief that a woman's biological components are basically weak, fragile and dependent on men. Conversely men, due to their strong biological make-up, are able to take care of themselves and as such do not require extra care or indulging. Roseberry and Ross (2014: 6) expressed that women are genetically programmed to prioritize personal relationships and caring while men are genetically programmed to seek material wealth and leadership to ensure their desirability as mates and to affirm their masculinity.
3. The Social Hypothesis, which sees the gender gap as emanating from individual idiosyncrasy and experience. Based on a person's societal beliefs, lifestyle or character, he or she makes choices that may be misunderstood and interpreted as discriminatory. It is not an issue of natural requirement but one of social convenience that leads some men and women to make choices that may be interpreted as lacking in equality. For instance, women often choose the lower paying fields of employment that give them time to care for their families, while men choose more challenging jobs that inevitably attract more wages. There is also the patriarchal mind-set that has so long existed in the minds of both men and women that it becomes difficult to separate them from it. So their choices are based on such preconceptions.

All three hypotheses play significant roles in creating the gender gap, although the magnitude of their effects differ in frustrating efforts at bridging it, especially as the gender gap is not only a product of male dominance but also an outcome of female manoeuvring.

The dilemma

In recent times, there has been growing interest in the study of women and gender issues across the world. More often than not, women's issues and gender issues are discussed interchangeably. Hence, discourse on gender discrimination focuses on the exploitation of women by men and by society. As a result, there is an emergent concern as to whether the existing legal framework is still considerate of men, especially as various data and practices indicate that discriminatory practices, in most parts of Africa, are

exclusively against women. Increasingly, research groups all over the world discuss bridging the gender gap as if it is tantamount to women's empowerment and women's liberation. Thus, the age-old aphorism; 'it is a man's world' is fast fading, as most of the studies on gender have incorporated women's liberation into the development agenda as the principal way to ensure equality of the sexes. That is why the sexual inequality gap continues to expand because the emphasis on bridging it focuses only on women's empowerment rather than on equality of both sexes.

The gender issue has a strong hold on development as it was one of the primary initiatives behind the Millennium Development Goals (Global Monitoring Report, 2007) and the Sustainable Development Goals (United Nations, 2015). Therefore, bridging the gender gap is central to societal development because the relations between men and women are a very important part of the way any society organizes itself. This disparity between the sexes has introduced a primary challenge to development in Africa today. It seems nothing has been more bothersome and complicated to the developmental policies of various African countries than the concern of bridging the antediluvian gender gap.

Hence the concern that the pursuit of women's empowerment has overlooked the interests of men and, if caution is not applied, it will gradually deny the masculine gender a place in the development policies of governments all over Africa. And this would result in dire catalytic consequences in societal development. So of what benefit would democratic development be amidst inequality?

The significance of bridging the gender gap on national, regional and global development is unequivocal. Clearly, where the gender gap widens, development is smothered and frustrated. Consequently, institutions and governments in Africa may continue to go round and round in circles pursuing an aimless course and ending up at a mirage in assessing whether gender gaps can be bridged using the current models. Therefore this writer reiterates that while the women are being empowered, men are being marginalized and abandoned and the attempt to bridge the gender gap becomes favourable to only the female gender. This opinion harmonizes with Benatar's view that in most societies, men and boys face several specific and serious forms of wrongful discrimination, and that these are not only injustices in their own right, but also contribute to discrimination against women (Benatar, 2012).

For instance, in the labour sector, women are often treated with more empathy than their male counterparts with respect to the gravity or nature of work apportioned and also on health/medical matters such as casual and maternity leave because they are seen as fragile, weak and dependent. This view is supported by the 2008 judgment of an Orange County superior court in a class action lawsuit filed on behalf of California men, who were denied free air travel during Club Med's 2003 Ladies Fly Free' promotion (*Alfred Rava v. Club Med Sales Case No. 03CC09858*).

In addition, women attract mercy from the criminal justice system more than men do. African women are be-

Bridging the gender gap is not a call for women's empowerment alone.

lied to be too docile to be criminally minded. For example, fewer women than men receive sentences of capital punishment while the statistics of female perpetrators and male perpetrators makes the evidence of bias quite obvious (Shatz et al, 2011). Regarding the crime of sexual assault, truth be told! although women are the primary victims of sexual violence, men are also victims in this area (Abodunrin et al, 2014). Nevertheless, in most African countries, Nigeria for example, the male sexual assault victim does not attract the same sympathy from society and the criminal justice system as the female victim does, even if the circumstances are graver with the former. Instead, they are mocked as weak and fragile, which is why most men, according to Oladapo et al (2011), keep silent and such cases are seldom reported. Nor is the possibility of male rape acknowledged under the penal laws of most African countries.

Bridging the gender gap is not a call for women's empowerment alone. It is a wake-up call for all and sundry to realize that the gender gap, which has resulted in a diminishing state of democratic developmental, is also as a result of the strings of separate and diverse concepts by feminists, amongst themselves, on one hand, and masculinists on the other hand. Although the issue of discrimination against men is not yet as prominent as discrimination against women, there is no assurance that 'men's empowerment' will not make headlines in the near future. The signs are already imminent. In fact, this writer foresees future rebellion from men, on one hand, and developmental stagnation or retardation, on the other, which are both bad news for democratic development. It is a concluding view that such energetic and dexterous attempts by the global community to bridge the gender gap may eventually become a wild-goose chase.

Even though it is a well-known historical fact that women have been more disadvantaged by customary practices in Africa, there are unrecorded facts of discrimination against men as well and it is only fair that no matter how minor or unpopular, such facts should be considered along with the concerns of women in attempts at bridging the gender gap. Take domestic violence, for instance, which is often seen as a female victim/male perpetrator offence. There is evidence from other countries (United States, Hong Kong) with basic statistics that demonstrate this is a fallacy. Gone are the days when the victims of domestic violence were undoubtedly all women. Now, more men than before are being abused by their wives or partners, even in Africa, but due to the superior role men have assumed traditionally they are less likely to report cases of domestic violence so as to be perceived as strong and dependable (Adebayo, 2014).

In Hong Kong there are reported cases of men being victims of domestic violence and there is a refuge for abused men (Cheung, M et al, 2009). Facing squarely the reality of domestic violence against men, the California Court of Appeals ruled that:

We find the gender-based classifications in the challenged statutes that provide programs for victims of domestic violence violate equal protection.....We reform the affected statutes by invalidating the exemption of males and extending the statutory benefits to men, whom the Legislature improperly excluded (*Woods v. Shewry, Co56072*).

Hopefully someday the judicial systems in Africa will adopt this procedure. So we may as well nip in the bud the various attempts at bridging the gender gap by addressing the silent concerns of the male folk simultaneously with that of the women. These include discrimination in employment and industry, prejudices in family and relationship disputes, biased persecutions in violence and sexual assault offences etc. Gender equality should be considered as a human issue and not just a women's issue. Therefore, as the discourse on women empowerment is on-going, there should be a contemplation of similar 'minor' issues men experience that may not necessarily be recorded but which occur on a frequent basis. We should ensure it is not a case of affirmative action where men are blamed for the willful decisions of the women to tag along a preferred lane.

It is pertinent to reiterate at this point that this writer is not saying that the feminist movement for women's empowerment/equal representation has gone too far. No! Nor is the writer criticizing women's liberation, which of bridging is just a fraction of the whole agenda. Practically speaking? The whole gist is like having a daughter and a son who are both entitled to respective rights, which the daughter has been denied for so long, and then in attempting to rectify the wrong to appease and compensate her, the parent(s) take measures that further accentuates the gap between both sexes which ends up depriving the son in subtle and obscure ways of the same rights. This would be like robbing Peter to pay Paul, by accruing deservable rights to women on one hand while denying the men same rights, under the guise of 'bridging the gender gap'. Thus the pursuit of women's empowerment should be addressed by due consideration for the concerns of men with the collective aim of reaching equilibrium in gender interests.

As is already obvious, this paper opines that previous and on-going attempts by organizations and governments in Africa at bridging the gender gap are myth and not reality. However, there may be real possibilities amidst the myth. Sexual inequality has over the years found its way into the bloodstreams and veins of men and women alike, and like cancer, it has eaten deep into African society. Any attempt to deal with it requires transcending mere cosmetic measures. In other words, the dilemma here is the near impracticality of bridging the gender gap. Nonetheless, it is workable. It is the writer's firm belief in 'meritocratic equality' as the recipe for confronting the problems of gender inequality in African societies that motivated this write-up.

Accordingly, bridging the gender gap goes beyond increasing women's participation and acknowledging men's involvement. Rather, it means bringing the experience, knowledge and interests of men and women to bear in the development agenda. This approach addresses the fact that the needs and concerns of women and men must be integrated enough in developmental policies and laws, so as to present equal rights, opportunities and entitlements to both men and women.

In concluding, the following words expressed by the World Economic Forum are highly recommended to national and regional developmental strategies at bridging the gender gap.

Our aim is to focus on whether the gap between women and men in the chosen indicators has declined, rather than whether women are "winning" the "battle of the sexes" (Global Gender Gap Index, 2015).

This supports the point made in this paper that there is need for an all-encompassing re-think, re-appraisal and re-definition of the concept of gender. A forward-looking strategy that seeks to provide both a theoretical and prac-

tical understanding of the gender gap needs to be generated. Hence the reasons for categorizing a particular practice as discriminatory, or as gender biased, should hinge on the level of biological, emotional, physical and psychological strength of the particular gender involved, as this is tantamount to the legal mandate of equal treatment – which is both a systemic norm and a specific legal doctrine where likes are treated as likes and unlikes. Accordingly both sexes should be defined as such by their mutual unlikeness. Bridging the gender gap should have a ball-park effect on society. It cannot be one-sided; otherwise the attempts at bridging it would be mythical and unreal.

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References

- Abodunrin, O.L. *et al*, 2014. Assessment of prevalence and forms of violence against married men in Olorunda local government of Osun state, Nigeria. Available at <http://www.academereseearchjournals.org/journal/ijsbs>
- Adebayo, A.A. 2014. Domestic Violence against men: Balancing the gender issues in Nigeria. Available at article.sapub.org/pdf/10.5923.j.sociology.20140401.03.pdf.
- Barnett, H. 1997. *Sourcebook on feminist jurisprudence*. Great Britain: Cavendish Publishing Ltd.
- Benatar, D. 2012. *The second sexism: Discrimination against men and boys*. United Kingdom: Wiley-Blackwell.
- Cheung, M., Leung, P. and Tsui, V. 2009. Asian male domestic violence victims: Services exclusive for men. *Journal of Family Violence*, 24(7): 447–462.
- Connell, R.W. 2005. *Masculinities*. United Kingdom: Polity Press. Available at www.raewynconnell.net/p/masculinities_20.html.
- Egbo, B. 2000. *Gender, literacy and life chances in subs-Saharan Africa*. Canada: Multilingual Matters Ltd. Available at <https://books.google.com/books?isbn=1853594644>.
- Fine, C. 2011. Delusions of gender: How our minds, society and neurosexism create difference. Available at <https://books.google.com/books?isbn=0393340244>.
- Kevane, M. 2004. *Women and development in Africa. How gender works*. London: Lynn Reinner Publishers Inc. Available at <https://books.google.com/books?isbn=1588262383>.
- Kimmel, M.S., Hearn, J. and Connell, R.W. eds., 2004. *Handbook of studies on men and masculinities*. Sage Publications.
- Momsen, J. 2009. *Gender and development*. New York: Routledge.
- O'Brien, J.M (ed). 2014. The Oxford encyclopaedia of the Bible and gender studies. Available at <https://books.google.com/books?isbn=019983699X>.
- Organisation for Economic Co-operation and Development (OECD). 2010. *Atlas of gender and development: How social norms affect gender equality in non-OECD countries*. OECD Publishing, Paris.
- Oladepo, O. et al. 2011. Factors influencing gender based violence among men and women in selected states in Nigeria. Available at www.bioline.org.br/pdf?rh11054.
- Porter, F & Sweetman, C. 2005. *Mainstreaming gender in development: A critical review*. United Kingdom: Oxfam GB.
- Roseberry, L & Ross, J. 2014. Bridging the gender gap: Seven principles for achieving gender balance. Available at <https://books.google.com/books?isbn=0191028266>.
- Schacht, S.P & Ewin, D.W. 2004. Feminism with men: Bridging the gender gap. Available at <https://books.google.com/books?isbn=0742541703>.
- Tobi, A. 2008. Bridging the gender gap: Myth or reality? LLM thesis, University of Lagos, Nigeria.
- World Bank and International Monetary Fund. 2007. Global monitoring report: Confronting the challenges of gender equality and fragile states. Available at <https://books.google.com/books?isbn=0821369768>.
- World Economic Forum. 2015. Global gender gap index. Available at <http://www3.weforum.org/docs/GGGR2015/cover.pdf>.

Fighting the erosion of the gains made by the State

Insights from the Black Sash Hands Off Our Grants Campaign

This is an account of, and an attempt at some insights into, the challenges and ongoing vulnerability of the thousands (if not hundreds of thousands) of disputed, unlawful, unauthorised and sometimes fraudulent deductions from the SASSA bank accounts of beneficiaries of social grants in South Africa. Since 2013, the Black Sash and other civil society partners have been inundated with a range of disputed deductions, including airtime, electricity and loans. Deductions have also been made for water in a municipality that has no water meters. Untold hardships have been caused to countless households by this travesty of justice.

The Black Sash Hands Off Our Grants Campaign was spearheaded by the Black Sash and SASSA beneficiaries and includes organisations such as the Consortium for Refugees and Migrants in South Africa, the Association of Community-Based Offices of South Africa (ACAOSA), the Right2Know Campaign, Section 27, the Equal Education Law Centre, Trust for Community Outreach and Education, the Dullah Omar Institute at the University of the Western Cape, the Social Justice Coalition and the Cape Metro. All of these organisations refused to remain silent about the hardship and struggles of poor and vulnerable people affected by these unauthorised and often fraudulent deductions. The campaign against illegal deductions from social grants recently culminated at the Constitutional Court.

The Black Sash and partner CSOs remain committed to stop these deductions and work towards recourse for those who have been, and continue to be, robbed and denied justice.

Campaign demands

The Black Sash and its campaign partners find the disputed and other deductions from social grants beneficiaries unacceptable, unlawful and immoral. We explain why below. Despite the fact that lenders and service providers continue to break the law, it has been our experience that most staff of SASSA and its outsourced service provider Cash Paymaster Services (CPS)/Net1 assume and infer that beneficiaries have no right to recourse. At the launch of the Campaign, demands included:

- That the Minister of Social Development should intervene decisively to stop the escalation of unauthorised, undocumented and unlawful deductions from the bank

accounts of social grant beneficiaries.

- That the Minister of Social Development should amend the Social Assistance Act to criminalise the use of social assistance grants as collateral by lenders and to stop the sale of credit and other products using the bank accounts of grant beneficiaries. Simultaneously, we demanded that Parliament amends the National Credit Act and related legislation so that social assistance grants are not considered as collateral for credit.
- That the Minister of Social Development and SASSA should immediately make arrangements to in-source social assistance grants. We believe this is necessary to protect government's social security mandate and ensure the effective and secure implementation of legislation, policies and systems.
- As a short term measure, we requested that the South African Reserve Bank, which has the powers to act in the public interest, should issue a written directive in terms of Section 12 of the National Payment Systems Act (1998), to stop the Payment Association of South Africa (PASA), BankServ and Grindrod from debiting bank accounts into which social grants are paid.
- That the Minister of Social Development, SASSA and third parties should be held responsible for providing recourse and compensation for these deductions.
- That the Minister of Social Development should establish the long overdue Inspectorate for Social Assistance as intended by the Social Assistance Act of 2003 to 'ensure the maintenance of the integrity of the social assistance framework and system' and to conduct appropriate investigations.

Several of these demands have been addressed, albeit very slowly and through drawn out and unnecessary legal and advocacy processes.

Campaign timeline in a nutshell

August 2011

- Meeting between CEO of SASSA and senior representatives of the Black Sash. It took almost two years for these demands and concerns to develop traction and elicit formal responses. Meanwhile, deductions continued.

April 2012–2013

A flyer titled 'You and Your Rights: Lawful Deductions from Your Grants' was developed in workshops with our partners, including advice offices, and was distributed widely. The flyer summarises the Social Assistance Act and the manner in which grant payments must be managed by SASSA and service providers such as CPS.

From October 2012

We started collecting evidence of debit deductions from SASSA grant beneficiaries using a standard questionnaire template that was revised several times. We began working with a range of partners including the Legal Resources Centre, Katolieke Ontwikkeling Oranjerivier, the Black Sash Community Monitoring and Advocacy Project and other partners in the Limpopo, Free State and Eastern Cape provinces. Evidence shows 'loan' deductions being made from social grants. The loans are from a large variety of micro lenders including companies affiliated to CPS/Net1. The evidence also shows that many of the loans are not authorised, as they are required to be by law.

19 June 2013

A meeting was held with the SASSA CEO and the LRC to discuss the unprecedented large-scale deductions from social grants by money lenders, as well as CPS's practice of selling airtime to grant beneficiaries. SASSA undertook to address these concerns and close the loopholes in the existing service-level agreement. To date this has not been done.

October and November 2013

Black Sash launched the 'Stop SASSA-CPS Debits Campaign' and sought support from a range of strategic partners. We have to date received support and endorsement from the Treatment Action Campaign, Section 27, UCT Community Legal Services, the Dullah Omar Institute at UWC, the Parliamentary Liaison Office and ACAOSA.

4 November 2013

An urgent request was sent to the Reserve Bank of South Africa to act in the public interest and issue a written directive in terms of Section 12 of the National Payment Systems Act (1998) to demand that PASA, BankServ and Grindrod immediately refrain from implementing debits from the bank accounts into which social grants are paid by CPS.

29 November 2013–April 2014

The Constitutional Court ruled in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others vs Chief Executive Officer of the South African Social Security Agency and Others* that the SASSA/CPS tender was constitutionally invalid. The court held that SASSA did not give due regard to the importance of black economic empowerment in procurement and was procedurally unfair in aspects of the tender process due to vagueness and uncertainty in a bidders' notice. It declared the decision to award the tender to CPS constitutionally invalid.

However, the Court said that it would be a serious disruption to stop the payment of social grants if the tender was set aside and accordingly, it suspended the declaration of invalidity pending the determination of a just and equitable remedy.

October 2014

Black Sash and partners also 'tendered' in the reissued bid directive issued by the Constitutional Court in order to get details of bids and monitor whether the re-tendering process addressed all the requirements of the Constitutional Court judgment. This was our first attempt at this form of activism.

March 2015

The Constitutional Court gave SASSA seven months to award a new contract for the payment of social welfare grants. This was after the Black Sash was accepted as *amicus curiae* (friend of the court).

March 2015–current

CPS chose not to tender again. The CEO of SASSA announced that as there was no successful bidder, CPS could continue till March 2017 when its five-year contract, based on the invalid tender, comes to an end.

Net1 (the holding company of CPS) also announced the launch of a product that would not be encumbered by government requirements. This was later revealed as the EasyPay (Green Card) that mainly targets indebted Sassa beneficiaries for repeated loans at high interest rates and administrative charges.

The latest development has been an amendments to the regulations that allows for a funeral scheme deduction. See <http://www.blacksash.org.za/index.php/media-and-publications/black-sash-submissions/1672-black-sash-submission-to-the-department-of-social-development-on-the-draft-amendments-to-the-social-security-act-saa-regulation-26a-2016>.

The ongoing urgency for drastic intervention and for the exercise of political will

In March 2015, a Special Assignment expose titled 'Grant Grabs' was televised on SABC. It documented in detail the extent of disputed deductions from SASSA beneficiaries for airtime, electricity and loans in several provinces across South Africa.

In this hard-hitting documentary, the former CEO of the SAHRC, Kayum Ahmed, stated:

For Net1's CEO to argue that people are free of mind has a fundamental misunderstanding of how poor and marginalised people are affected by the legacy of apartheid, a lack of education, by the social circumstances and conditions. So to argue that people are now part and parcel of a banking system as if everything they have gone through in the past...is fundamentally flawed...and this attitude reflects a sense of arrogance and lack of understanding of how poor people operate in South Africa (SABC 2015).

A lot has happened both before and since then. To best understand Ahmed's statement, it is best to start in February 2012.

Understanding SASSA's role and mandate – and the Pandora's Box it opened

SASSA was established in terms of Act No 9 of 2004. It is legally responsible to:

- administer social assistance in terms of the Social Security Act of 2004 and perform any function delegated to it under the Act;
- collect, collate, maintain and administer such information as is necessary for the payment of social security, as well as for the central reconciliation and management of payment of transfer funds, in a national database of all applicants for and beneficiaries of social assistance;
- establish a compliance and fraud mechanism to ensure that the integrity of the social security system is maintained;
- promote and protect the human dignity of applicants for and beneficiaries of social security; and
- protect confidential information held by the Agency as contemplated in Section 16.

Furthermore, the Regulations for the Social Assistance Act 13 of 2004 (26A Regulation 2 Notice R591 of 2009) govern the circumstances under which deductions may be made directly from social assistance grants):

- The Agency may allow deductions for funeral insurance or [a funeral] scheme to be made directly from a social grant where the beneficiary of the social grant requests such deduction in writing from the Agency.
- Subject to the provisions of sub regulation (1), the Agency may only allow deductions to be made directly from a social grant where the insurance company requiring such deduction or to whom the money resulting from the deduction is paid, is a financial services provider as defined in section 1 of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002) and authorised to act as a financial services provider in terms of section 7 of that Act.
- Notwithstanding the provisions of sub-regulation (1), the Agency may only authorize one deduction for funeral insurance or for a funeral scheme not exceeding ten percent (10%) of the value of the beneficiary's social grant.

In a media statement in October 2013, the Black Sash warned that 'a Pandora's Box of greed has been opened that SASSA alone cannot close' and raised deep concern that 'the continued erosion of government social grants by immoral and unlawful business practices of SASSA's contractor, Cash Paymaster Services (CPS), together with its holding company, Net1' was allowed to take place. There is abundant evidence that the microlending industry, including many subsidiaries of Net1, are debiting bank accounts of grant beneficiaries in a manner that is increasingly frenzied and often unauthorised, leaving families with vastly reduced monthly incomes.

The statement by the Social Development Minister, Bathabile Dlamini, in September 2014 was the first public acknowledgement by government that things are seri-

ously wrong. However, we must state that this crisis is not new to the Department or to SASSA. It has been raised as a concern for months and government is aware of the desperate calls to the Black Sash Helpline, to the LRC and to community advice offices across South Africa, and of the evidence submitted by community monitors.

Ongoing violations of the Social Assistance Act, the Constitution and related legislation

The first founding provision in our Constitution is 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. It is also clear in Chapter 2 of the Bill of Rights, which enshrines 'the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom,' further charging the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

It is our considered view that several laws and these fundamental precepts have been seriously violated for a protracted period of time. Specifically, the Constitution is clear about our right of access to health care, food, water and social security. It states that if people are 'unable to support themselves and their dependants,' they have the right of access to 'appropriate social assistance'. It also requires that the State 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

Violations of the Social Assistance Act are related to restrictions on the transfer of rights and payments of social assistance. The Act states that grant 'may not be transferred, ceded, pledged or in any other way encumbered or disposed of unless the Minister on good grounds in writing consents thereto.' It specifically states that the functions of SASSA includes 'the promotion and protection of the human dignity of applicants for and beneficiaries of social security,' and 'the protection of confidential information held by the Agency'.

The Minister agreed:

The Team found evidence of other financial institutions that may be linked to Net1 holdings which is a holding company of CPS that offer financial products including micro-loans to grant beneficiaries. The deductions associated with these products are then deducted via EFT payment system within the national payment system. These practices are in contravention of the Social Assistance Act, Regulations of the Social Assistance Act and the SASSA Act. The legislation allows for the social grants not be burdened or ceded and allows for one deduction not exceeding 10 percent for funeral insurance only. Furthermore, the contract compels CPS to protect the confidential information of grant beneficiaries, including biometric data gathered during re-registration in 2012 (IOL News, 2014).

The Ministerial Task Team

Several attempts were made by the Black Sash in late 2013 to raise the phenomenon of unlawful deductions with the Minister of Social Development, Bathabile Dlamini.

A meeting was finally granted on Budget Day, February 2014. The Black Sash and its partners raised their concerns with Minister Dlamini, the Department of Social Development and SASSA. On the same day we were informed that we were part of a Ministerial Task Team. Minister Dlamini issued a statement to this effect: 'Based on the growing number of complaints from social grant recipients made directly to me and those submitted to NGOs, I appointed a Ministerial Task Team (MTT) in February 2014'.

The Team is made up of representatives of Black Sash, ACAOSA, other civil society partners, the Department of Social Development and SASSA. It was mandated to explore the nature of the deductions, provide recommendations to stop them, and ways to ensure that grant recipients had access to appropriate recourse. In her statement, the Minister says that the

growing national phenomenon of unlawful and immoral debit deductions is unacceptable in the sense that while some of these deductions may be technically legal, they remain immoral as they serve to rob the poor from the resources that we as South Africans provide for them, to meet their basic needs (Dlamini, 2014).

After serious consideration, the Black Sash agreed to be part of the Ministerial Task Team since it enabled leverage that it could not possibly exercise on its own. It did so, however, under three conditions:

1. that it will not receive any funds from government;
2. that it will maintain its independence and advocacy voice; and
3. that it deems all deliberations public unless reasonably indicated otherwise.

It has therefore been able to keep the public abreast of developments in this regard, on its website, and otherwise.

What the Minister of Social Development instructed

In response to the Task Team's first report, Minister Dlamini wrote in a press statement in September 2014 :

As the responsible Minister, I accept all the recommendations made by the MTT, some of which are detailed below. The Ministry of Social Development, the affected government departments and civil society will work together to realise the following:

- design and implementation of a SASSA-owned and controlled recourse system in place to ensure that unlawful and immoral debit deductions are stopped and refunded with interest and bank charges, and where necessary backdated to 2012.
- SASSA and DSD will ensure that CPS, which according to the Constitutional Court judgment is performing a state function through the payment of social grants, complies with all the relevant legislation and regulations. This will include measures that will restrict third party creditor access to the social grant bank account.
- The payment systems must be designed in such a manner that social grant beneficiaries' bank accounts are off limits to creditors.

- DSD and SASSA block and reverse with immediate effect any debit deductions for Umoya Manje services, loans and any other financial service providers other than legal 26A deductions.
- DSD, South African Reserve Bank, the Competition Commission and the National Treasury need to scrutinize the imminent Grindrod Bank/ Bidvest sale and intervene decisively if necessary, to protect the 10 million social grant beneficiaries' bank accounts from further unlawful and immoral debit deductions and abuse of their confidential information.
- We will engage with the South African Reserve Bank to issue a Directive in terms of Section 12 of the National Payment System Act, in the public interest, to protect the SASSA bank accounts and confidential information of grant recipients.
- DSD will strengthen the Social Assistance Act Regulations, and related legislation to stop the use of social grants as collateral for loans and hold reckless lenders to account. DSD and SASSA as the mandate carriers for social security will work collaboratively with the Department of Trade and Industry, the National Credit Regulator, and other government departments and public entities, to enforce the changed legislation.
- We will also move speedily to establish the Inspectorate for Social Assistance as envisaged in the Social Assistance Act of 2004.
- The Ministerial Task Team will continue to monitor and ensure the implementation of the recommendations by the respective parties and to report periodically on progress against targets. As Government we have both a legislative and moral duty to take action against those who feed ruthlessly on the vulnerability of the poor.

The struggle for recourse and administrative justice

SASSA system not working

The following example aptly describes this struggle in detail. As at January 2016, an 88-year-old resident of Nyanga, Cape Town, had had over R2,400 deducted from his pension since April 2015 for a loan he says he never made. He spent over R500 on transport to different Sassa offices to have the monthly deductions of R307 stopped. He usually receives a R1,440 old-age grant.

I was sent to SASSA offices in Gugulethu, Lansdowne and Durbanville. None of them could help me. I was told in Bellville to fill out a form and they will investigate my case. I then went to the Cape Town office. There I was told I need to go to FinBank.

He said he was forced to make a loan in order to make payments.

If I get that money back, I can pay this loan and I can finally fix my windows before winter....I used a lot of money to investigate what happened. I really need that money. I'm getting old now and it's not safe in my area anymore. I need that money to fix my house.

According to Western Cape Black Sash Regional Manager Colleen Ryan, it is commendable that SASSA [Western Cape] was taking steps to assist beneficiaries, but the system for recourse was not working.

We sit on the ministerial task team, so we took Mr Bani's case to show just how the dispute resolution mechanism was not working for beneficiaries. The system is fraught with many problems.

What is described here is but one of hundreds of examples the Black Sash has seen, and thousands that it knows of. In October last year, SASSA implemented a new system it claimed would assist beneficiaries to resolve disputes for unauthorised deductions and refund their money. After much effort, we can report that Mr. Bani's money was refunded.

Next steps

Since the start of this Campaign, emerging evidence from case studies we have documented and some that were presented during the Task Team working sessions revealed that 'Big Sharks in suits are now in the tank', with almost unrestricted access to funds in the bank accounts of grant beneficiaries. Loan sharks that lend money illegally to SASSA beneficiaries and others have in fact been relegated to the outskirts of this frenzied behaviour. This is in opposition to one of the intended outcomes of the new payment system, which was to protect social grant recipi-

ents from the predatory practises of loan sharks and other illegal acts of lending money.

Many social grant beneficiaries have struggled, and continue to struggle with very little success, to secure recourse. Disputes lodged with the bank and the service provider take months to resolve. Debit deductions for loans are in most instances disputed by CPS officials. They often claim that loans were granted using biometric data. Also, promises to refund deducted amounts are often not kept and many beneficiaries are kept waiting for their money, as was the case with Mr. Bani.

Elroy Paulus is the National Advocacy Manager at Black Sash, a human rights organisation that advocates for social justice in South Africa.

For more information see: www.blacksash.org.za/index.php/sash-in-action/stop-sassa-cps-debits-campaign.

See also *GroundUp* series, Spotlight on social grants. <http://www.groundup.org.za/spotlight-social-grants/> .

References

Dlamini, B. Minister of Social Development. 2014. Media statement on the occasion of the media briefing on unauthorised deductions. Thursday 11 September 2014. Available at http://www.dsd.gov.za/index.php?option=com_content&task=view&id=625&Itemid=106

IOL News. 11 September 2014. Dlamini warns of 'sharks in suits'. Available at <http://www.iol.co.za/news/politics/dlamini-warns-of-sharks-in-suits-1749637>

Maragele, Barbara. 2016. Sassa system to refund unauthorised debits 'not working'. *GroundUp*, 19 Jan.

SABS, March 2015. Special Assignment: 'Grant Grabs'.

S4, SASSA Act 9 of 2004.

Constitution of the Republic of South Africa, Act 108 of 1996

United Nations Committee on Economic, Social and Cultural Rights considers reports of Canada, Kenya and Namibia

During its 57th Session from 22 February to 4 March 2016, the Committee on Economic, Social and Cultural Rights considered the periodic reports of Canada, Kenya and Namibia, on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICESCR is a multilateral treaty adopted by the UN General Assembly on 16 December 1966, which has been in force from 3 January 1976. The CESCR is a body of human rights experts tasked with monitoring the implementation of the Covenant. It consists of 18 independent human rights experts, elected for four-year terms, with half the members elected every two years

All States Parties to the ICESCR are obliged to submit regular reports on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The CESCR examines each report and addresses its concerns and recommendations to the State party in the form of 'concluding observations'. The findings cover how the State is doing with regard to implementing the ICESCR, detailing

positive developments, main areas of concern and recommendations for action.

The CESCR considered Canada's the sixth periodic report. Canada acceded to the ICESCR in 19 May 1976. The CESCR also considered the combined second to fifth periodic reports of Kenya, which ratified the ICESCR on 1 May 1972. Namibia ratified the ICESCR on 28 November 1994 and submitted its initial report.

None of the three countries have either signed or ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). This is a side-agreement to the ICESCR that allows its parties to recognise the competence of the CESCR to consider complaints from individuals. The Optional Protocol was adopted by the UN General Assembly on 10 December 2008 and entered into force on 5 May 2013. The CESCR urged the governments of Canada, Kenya and Namibia to consider ratifying the Optional Protocol.

For more information:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1012&Lang=en

African Commission on Human and People's Rights Campaign for the decriminalization of abortion in Africa

In compliance with its mandate to promote and protect the rights set out in the African Charter on Human and People's Rights and the Maputo Protocol, the African Commission on Human and People's Rights (ACHPR) on 18 January 2016, launched a continental campaign for the decriminalization of abortion in Africa.

This was a follow-up to the March 2015 communique on accountability for women's reproductive health and rights by the ACHPR. One of the commitments made under the communique was to commence a continental campaign on decriminalization of abortion in Africa.

The campaign is informed by the reality that unsafe abortion is a gross violation of human rights and that it constitutes a serious public health concern. According to statistics in a 2012 World Health Organization report, an estimated over 40 million abortions occurred worldwide in 2008. The report further noted that 22 million unsafe abortions occurred globally; of these, 6.2 million or 29%

happened in Africa. It is also notable that five million disabilities directly linked to unsafe abortion were reported in that year.

Africa and the world are still lagging behind. Despite laudable regional and global legal framework and commitments in the form of declarations, affirmations and statements on sexual and reproductive health rights, the human rights of women and girls in Africa have not been secured. This is partly because most African states have maintained punitive domestic laws that criminalize the right to safe abortion.

This campaign hopes to leverage off the 2016 African Union Year of Human Rights with a particular focus on the rights of women, and the General Comment on article 14(1)(a)(b)(c) and (2)(c) of the Maputo Protocol adopted by the African Commission.

For the statement of Commissioner Lucy Asuagbor during the launch of the campaign, January 2016, see <http://www.acdhrs.org/wp-content/uploads/2016/01/Comm-Asuagbor-statement-at-GIMAC-Launch-Revised.pdf>