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DESERVING INDIVIDUALS AND
GROUPS: JUSTIFYING THE SHAPE OF
SOUTH AFRICA'S WELFARE STATE

Jeremy Seekings

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Jeremy Seekings is Professor of Political Studies and Sociology at the University of Cape Town. He has held visiting appointments at Yale and Oxford universities. His books include *Heroes or Villains? Youth Politics in South Africa in the 1980s* (Johannesburg, 1993), *The UDF: A History of the United Democratic Front in South Africa, 1983-2001* (Cape Town, London and Athens, OH, 2000), and *Class, Race and Inequality in South Africa* (co-authored with Nicoli Nattrass, New Haven and London, 2005, and Pietermaritzburg, 2006). From 2001 to 2006 he edited the journal *Social Dynamics*, and is currently co-editor of the *International Journal of Urban and Regional Research*. He is presently conducting research on the politics of welfare state-building in developing countries.

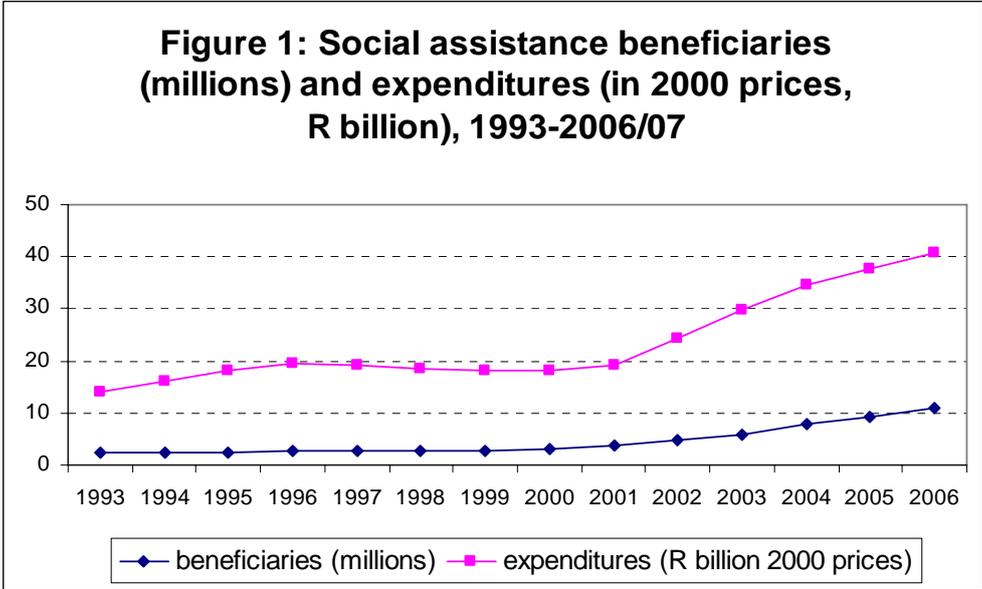
Deserving Individuals and Groups: Justifying the Shape of South Africa's Welfare State

Abstract

The constitution charges the government with the progressive realisation of the right of impoverished citizens to income security. In practice, this means that the government must have a reasonable defence of the current size and shape of its social welfare programmes. Legal challenges have pushed the state into offering such a defence. In summary, the state justifies the current size and shape of the welfare state primarily on the grounds that the state is targeting its scarce resources on the most 'disadvantaged' groups, where disadvantage is defined in terms of past opportunity not of current need. In this view, the public welfare system should help those groups of people who had fewest opportunities to provide for themselves. This argument entails a new version of the distinction between 'deserving' and 'undeserving' poor. The state's application of this argument in recent court papers is flawed empirically, but in making the argument the state has provided a basis for constructive debate on the shape of the welfare state.

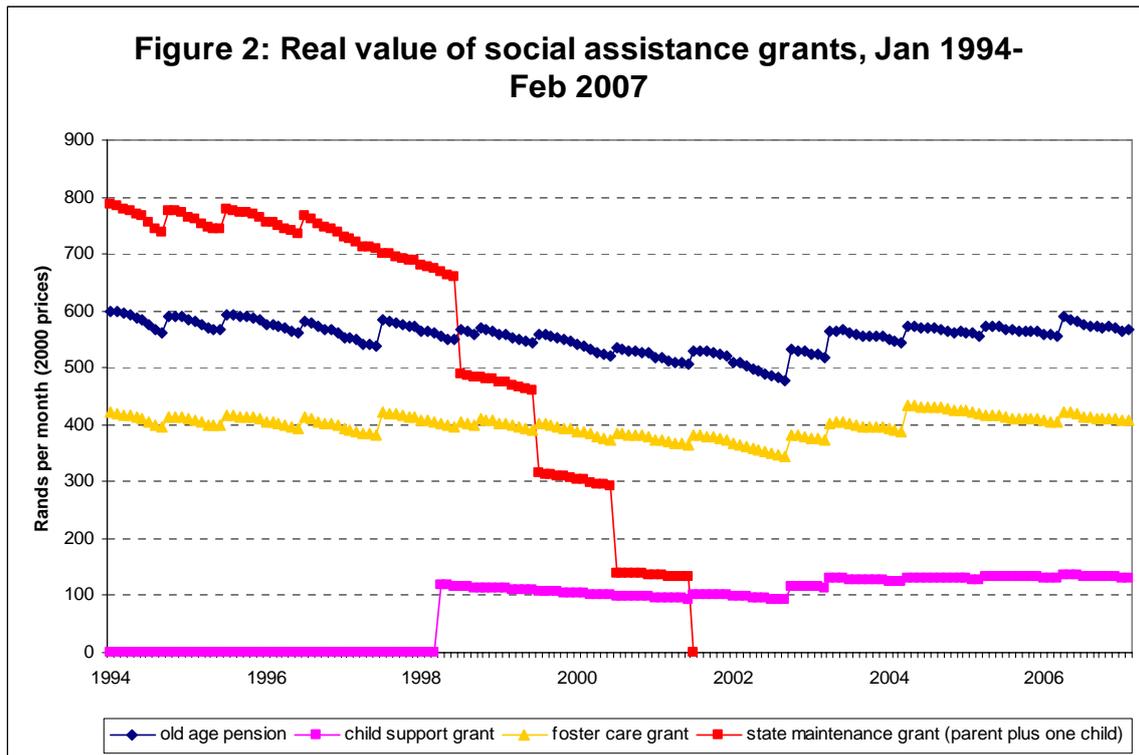
The Size and Shape of the Welfare State

Both in the last years of apartheid and since 1994, South African government ministers have insisted that South Africa does not and should not have a ‘welfare state’. Ministers from the African National Congress (ANC) in post-1994 governments use the same discourse as their predecessors before 1994 in National Party governments. They bemoan both the financial costs of ‘handouts’ and the social and economic costs in terms of the ensuing ‘culture of dependency and entitlement’. They prefer the imagery of the ‘developmental’ state to that of the welfare state, and seek to shift from non-contributory programmes (social assistance) to contributory ones. At the same time, as ANC ministers are quick to point out when it suits them, government spending on these social assistance programmes has grown rapidly, from about 2 percent to about 3.5 percent of GDP between 1994 and 2006. No other developing country redistributes as large a share of its GDP through social assistance programmes.¹ Expenditure doubled in real terms (i.e. taking inflation into account) between 1994 and 2004. By mid-2006, about 11 million grants were being paid each month, in a country with a total population of only 45 million people. One in four South Africans was receiving a pension or grant financed out of general taxation (see Figure 1).² In terms of expenditure and coverage, South Africa already has a remarkable, pro-poor ‘welfare state’, albeit one that is not comprehensive in terms of either coverage of the poor or the range of ‘risks’ against which people are protected.



¹ Expenditure rose in Brazil under the Cardoso and Lula governments, and to a lesser extent in Mexico, but both still lag far behind South Africa in terms of expenditure as a share of GDP.

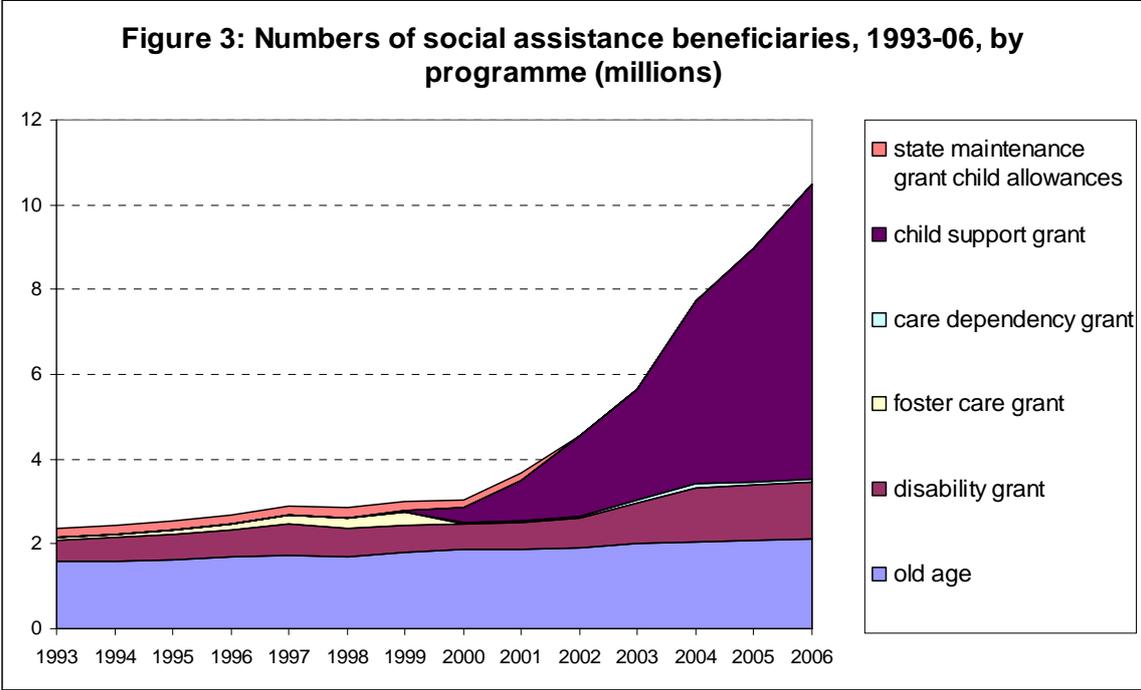
² Figures 1 to 3 are based on data provided by Pakade (2006) and data from various issues of the annual *Budget Review* and *Inter-governmental Fiscal Review*, published by the National Treasury.



Rising expenditure on social assistance has *not* due to the rising value of benefits. Figure 2 shows the maximum value of each of the major grants, in constant (2000) prices. These are the maxima, because the grants are means-tested. Grants have been raised intermittently, declining in value due to inflation in between raises. The real value of the old-age pension (paid to men and women from the ages of 60 and 65 respectively, subject to a means test) declined until mid-2003, and then rose, but is yet to attain its value at the beginning of 1994. The disability and care dependency grants (paid to the disabled and caregivers to disabled children) have been set at the same amount as the old-age pension. The foster care grant (paid to court-recognised foster parents) shows a similar pattern. The real value of the old-age pension and most of the other grants has not changed greatly since 1994. The maximum value of the old-age pension relative to GDP per capita – which has grown steadily – is still significantly lower than it was in 1994.

The exception to the general pattern is the state maintenance grant, which was the old apartheid-era system of financial support for families with poor children. Only available to people outside of the Bantustans, negligible numbers of African people ever received the grant. The Lund Committee recommended that the state maintenance grant, which was generous but reached few poor people, be replaced by a child support grant, which would be much less generous but would therefore be able to reach many more poor people without a massive explosion in total expenditure (South Africa, 1996; Seekings and Natrass, 2005:

362). Figure 2 shows that the child support grant was introduced at a low level in 1998 whilst the state maintenance grant was phased out over three years.



Overall coverage has grown because of rapid growth in one programme and some growth in a second. Figure 3 shows that there was little change in the number or pattern of beneficiaries until 2000. Thereafter there was an extraordinary explosion in the number of beneficiaries, but this was almost entirely due to the growth of child support grants being paid out. The child support grant, although modest in value, very quickly reached ten times the number of children reached by its predecessor, the state maintenance grant. By April 2006, about 7 million child support grants were paid monthly, compared to just 230,000 child allowances under the state maintenance grant at the peak year of 1998. Figure 3 also shows the slow but significant rise in disability grants, due to growing numbers of claimants that is probably the consequence of AIDS (see Nattrass, 2006).

The growth in the number of child support grants being paid out is partly due to rising take-up rates among eligible groups, and partly because of the expanding ambit of eligibility. When the child support grant was introduced, it was limited to children up to (and including) the age of six. From April 2003, children aged seven and eight years became eligible. From April 2004, children aged nine and ten became eligible. And from April 2005, children aged eleven, twelve and thirteen became eligible.

The pattern of expenditures has also changed, although less dramatically than the changing numbers of beneficiaries. Total expenditure has risen because of rising expenditure on child support and disability grants. In 2002-03, old-age pensions counted for more than one-half of all social assistance (and it was therefore still the case that ‘the single most important instrument of redistribution via the budget is the old-age pension’ (Seekings and Natrass, 2005: 360)). But by 2006-07, old-age pensions only accounted for 37 percent of all social assistance expenditure, whilst child support grants accounted for 31 percent and disability grants accounted for 25 percent. The government’s projections envisage that the old-age pension will remain the largest single programme in terms of cost, at least until the age of eligibility for the child support grant is raised above fourteen, but it does not dominate the social assistance system in the way that it did for the whole of the twentieth century.

Social assistance programmes mitigate significantly poverty among groups of deserving poor – the elderly, the disabled, and children – and among their dependents more broadly (Samson, 2002; Borat, 2003). The three categories of deserving poor comprise people who cannot work on the grounds of either age or disability. The social assistance system makes no provision for able-adults of working age, i.e. between the ages of sixteen (the age at which young people can leave school) and sixty or sixty-five (the ages at which women and men respectively become eligible for the old-age pension). (The absence of any provision for children aged fourteen or fifteen is the starkest anomaly in the design of the social assistance system.) Many adults of working age benefit indirectly from social assistance programmes in that they are the dependents of the recipients of the grants. The state has chosen to focus its efforts on poor adults of working age on public works programmes, which are supposed to provide the poor with the ‘dignity of work’.

The design of the social assistance system – including public works programmes – reflects a classic ‘northern’ conception of desert, i.e. the conception that underlies the design of welfare states in most of the global North. Those poor who are unable to work should be assisted, but those of working age must go out and earn a living (or be dependent on a breadwinner, for example through marriage). This design makes sense if two conditions are met. First, unemployment must be low, whether through Keynesian macro-economic policies, active labour market policies or American-style growth of low-wage employment. Secondly, working people can insure themselves against the risk of short-term unemployment or joblessness because of poor health through contributory welfare programmes. A third condition is of a lesser importance: Enough working people provide for their own retirement through contributory pension schemes that the cost of paying pensions is sustainable.

None of these conditions pertain to South Africa. South Africa has the world's highest unemployment rates, at just under 30 percent or closer to 40 percent depending on the choice of definition (with the 'expanded' definition being more appropriate in the South African context). South Africa has a very unevenly developed contributory welfare system that provides little insurance against risk for most working people. And very few working people receive a significant pension after retirement from the contributory pension schemes. The results are that the long-term unemployed in South Africa generally receive no financial support from state or any formal scheme, and most people on retirement are dependent on the state's tax-funded old-age pension.

Non-contributory, tax-financed social assistance programmes are the first distinctive feature of South Africa's welfare system. The second distinctive feature is its peculiar contributory welfare system. Unlike most middle-income countries in the South – such as Brazil or Argentina – South Africa has a minimal system of formal social insurance. There is no direct legal obligation of employees in even the formal sector to contribute to retirement funds or medical aid schemes. Social insurance is limited primarily to unemployment insurance through the Unemployment Insurance Fund (UIF).³ Formal sector employers and employees, including agricultural and domestic employers/workers, are required to contribute to the UIF. But total benefits paid by the UIF amount to well under 1 percent of GDP, and only reach a small proportion of the unemployed because only former contributors are eligible for benefits (and only for a short period).

But the absence of any major formal social insurance does not mean there is no contributory welfare system, nor that the state plays no part in it. 'Private sector' pension and provident funds pay out in benefits each year almost double what the state pays out through its social assistance programmes. These funds provide massive benefits in the event of unemployment to formal sector employees at risk, and retirement benefits to those formal sector employees who reach retirement age without having had to withdraw their benefits prematurely (Van der Merwe, 2004; South Africa, 2007). In total, these funds pay out in benefits each year the equivalent of about 5 percent of GDP, or considerably more than the social assistance system. Describing these funds as 'private sector' funds obscures two respects in which the state is very involved. First, the largest fund – the million-member Government Employees' Pension Fund – is for government employees, funded largely by the government. Secondly, membership of pension and provident funds is mandatory for employees in many sectors or industries, because the state extends across entire industries or sectors the agreements reached between employers and trade unions through

³ The Compensation Fund also insures employees against occupational disease, and the Road Accident Fund insures all South Africans against road accidents wrongfully caused by third parties.

collective bargaining. All employees in the mining industry, for example, are required to be members of either the old Mine Employees Pension Fund or the newer Mineworkers Provident Fund. South Africa thus has a substantial system of semi-social insurance, which provides a range of benefits to formal sector employees. But this semi-social insurance system provides no benefits to those poor adults whose participation in the formal sector is intermittent or short-lived or non-existent.

Both the social assistance and semi-social insurance sides of the welfare state are subject to political pressure, but the politics of each is distinct. The government's most recent proposed reforms of the contributory system (South Africa, 2007) will probably prompt serious dispute. Whilst there is a lack of research on South Africa's contributory welfare system, and the politics thereof, this paper concentrates on the social assistance system. The contributory system provides for people who, by definition, are or were employed and were or are relatively privileged. In contemporary South Africa, it is the social assistance system that is the part of the welfare state aimed at the poor, and is therefore subject to constitutional review.

Pressures for Change in Public Welfare

There is a rich comparative literature on welfare state-building and the politics of welfare state retrenchment (see Hicks and Esping-Andersen, 2006, for a review). The two dominant, and not mutually exclusive approaches, emphasise political institutions and class struggles respectively. The institutionalist approach is most compelling as an explanation of the case of the USA, where constitutional checks and balances have served as a check on the growth of the welfare state. Even in the USA, however, explanations rooted in class struggle have become more compelling, with attention being paid to the politics of coalition-building between diverse classes (including employers themselves, as well as middle and working classes). In South Africa, as in most of the global South, the history of welfare state-building has been one primarily of reforms from above, by elites concerned to co-opt or pacify particular constituencies of beneficiaries. South Africa's centralized political institutions have facilitated reform, and continue to do so. But the impetus to reform has generally been internal to the state itself.

This continues to be the case today. Welfare reform is not a major electoral issue. The ANC is surely wary of alienating its voters by retrenching welfare programmes, but the ANC's entrenched electoral dominance means that it faces little immediate electoral incentive to expand the welfare system. South Africa is, in this respect, very different to many other countries, including Brazil,

Mexico and South Korea, where there have been and are strong electoral pressures to expand the social welfare system. Nor, in South Africa, is there much pressure from outside the electoral system. In the early 2000s, non-government organizations led by the Congress of South African Trade Unions (COSATU) called for a basic income grant (see chapters in Standing and Samson, 2003; also Makino, 2004). But the issue of much less importance to COSATU than many other issues. The unions exert some influence through the ANC Alliance, especially during the current leadership struggle, but they are unlikely to throw much effort into the expansion of social assistance (Matisson and Seekings, 2003).

The absence of strong pressures is the reason why, despite growth in both expenditures and the numbers of beneficiaries, ANC-led governments have introduced no fundamentally new social assistance programmes since 1994. The post-apartheid welfare state comprises programmes that were introduced in the early twentieth century. The three key programmes – old-age pensions, disability grants, and support for poor families with children – were introduced not by the post-apartheid state, nor even by the apartheid state, but by the *pre*-apartheid state, prior to 1948. The growth of the welfare state in terms of expenditure and beneficiaries, especially in the 1980s and early 1990s, and then again in the early 2000s, entailed rising expenditures on existing programmes rather than the introduction of new programmes.⁴ Even the much-vaunted introduction of child support grants in the late 1990s was, in reality, simply a reform – certainly, an important and pro-poor reform – of an existing programme.

The attitude towards social assistance within the ANC leadership and government has, for the most part, been one mixed ambivalence and hostility. This was clear even in the Reconstruction and Development Programme (RDP), which served as the ANC's election manifesto in 1994. The ANC promised voters 'a better life for all', but this would explicitly *not* be based on social assistance primarily. 'Although a much stronger welfare system is needed to support all of the vulnerable, the old, the disabled and the sick who currently live in poverty, a system of "handouts" for the unemployed should be avoided' (ANC, 1994: 18). The emphasis should rather be developmental, i.e. on providing the poor with skills and opportunities so that they could support themselves. This developmental approach to social welfare was given expression in the 1997 White Paper on Social Development (South Africa, 1997), and the subsequent renaming of the Department of Welfare as the Department of Social Development. The priority attached to a developmental approach, and an aversion to the 'welfare state', continues to dominate

⁴ Both scholars (such as Case and Deaton, 199x) and the post-1994 government (e.g. Manuel, 1999; South Africa, 2003) have mistakenly claimed that pro-poor welfare spending only became significant after 1994.

government and ANC documents (South Africa, 2006; ANC, 2007; see also Meth, 2005).

But the government and ANC have to maintain some balance between a developmental approach and calls for a ‘comprehensive’ welfare system. Both the RDP and the 1997 White Paper referred to the need for a ‘comprehensive’ welfare system. In 2000, government appointed Committee of Inquiry into a Comprehensive System of Social Security for South Africa, chaired by Vivienne Taylor. The Taylor Committee’s central recommendation was that a modest ‘basic income grant’ be introduced, on a phased basis and conditional on administrative efficacy (South Africa, 2002; see Seekings, 2002; Standing and Samson, 2003; Makino, 2004). The Taylor Committee’s arguments for the basic income grant were framed in large part in terms of the South African constitution, which has turned out to be a – and perhaps the – major source of pressure on the government.

The South African constitution includes a bold vision of the public welfare system. Section 27 specifies that:

- (1) Everyone has the right to have access to ... (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

The Constitutional Court has generally interpreted its constitutional role not so much in terms of direct interference with the policy-making powers of the executive and legislature, but in promoting a culture of justification, through requiring that the executive justify its policies (in terms of its constitutional obligations). Under pressure to justify why some citizens are deemed eligible for social assistance and others not, the post-apartheid state has slowly moved towards an explicit account of the size and shape of the social assistance system.

Initial State Responses to Legal Challenge

The first cases involving social or economic rights that came before the constitutional court focused on access to public health or housing. It was only in 2003 that the first major case concerning social assistance reached the court. In 2003, the Constitutional Court heard arguments on two cases challenging the ineligibility of certain non-citizens for social assistance. Both cases were brought by Mozambicans who were permanent residents in South Africa. The applicants in the first case – Louis Khosa and two others – would have been

eligible for the old-age pension except that they were not South African citizens. Saleta Mahlaule and her co-applicant in the second case would have been eligible for the child support grant and care dependency grant had they been South African citizens. The state conceded that the mothers (or care-givers) of children who are South African citizens – such as Mahlaule – should not be denied access to child-support grants, even if they were not South African citizens themselves. But the state argued that it was reasonable to discriminate against Khosa and other non-citizens with respect to the old-age pensions, given that resources were constrained and citizens should be prioritised. In 2004, two members of the court found in favour of the state, but seven found against it. Justice Mokgoro's majority judgement emphasised the constitutional commitment to building 'a caring society'. Non-citizens who had been allowed into the country and given permanent resident status should not be abandoned 'to destitution if they fall upon hard times' and – as in the case of the elderly and children – are unable to earn a living for themselves. The state should not force them into 'relationships of dependency upon families, friends and the community in which they live' (Mokgoro, 2004: 41, 48).

In defending the logic of social assistance provision in *Khosa* and *Mahlaule*, the state emphasised strongly the size or cost of the system. It argued that expenditure had risen and coverage expanded (as shown in Figure 1 above), and suggested that this amounted to the fulfilment of its constitutional obligations. The irony is that the state resisted a legal case for expanding expenditure (by, at most, R0.7m) at the same time as it congratulated itself on expanding expenditure in the past (by many times this sum). The state said nothing about the shape of the system (Kruger, 2003; Madonsela, 2003).

At much the same time, however, the state was beginning to develop elsewhere an argument about the shape of the system as it expanded. When it announced the extension of the child support grant beyond the age of six, the Department of Social Development noted that 'Constitutional Court rulings have made it clear that Government needs to take into account the urgent needs of the most vulnerable. This implies a targeted, and in this instance, phased approach to the extension of access to Government services (grants) to ensure equitable extension' (South Africa, 2003: 1). Implicitly, the expansion of the welfare state should be 'equitable', in terms of targeting the 'most vulnerable'. In 2006, the Department of Social Development's Strategic Plan (South Africa, 2006) committed the department to developing a 'costed plan for progressive access to social assistance' by September 2006. This promised to explain the logic of the welfare state, and of its prospective expansion. But, as of early 2007, there is no sign in public of any such plan.

It was to take another court case to push the state – through the Department of Social Development – to set out for the first time a fuller statement of the logic of the welfare system. The application in *Roberts and Others vs the Minister of Social Development and Others* (henceforth *Roberts*) was filed in May 2006. The four applicants were men aged between 62 and 64 years, who were too young to be eligible for an old-age pension, although women of the same age were eligible. All four lived in the formerly coloured group area of Gelvandale, in Port Elizabeth. Christian Roberts, the first applicant, had been unemployed for more than ten years, but his family did receive other grants (his wife received an old-age pension, and they received a child foster grant for one of their grandchildren). Nonetheless, Roberts said, ‘My wife and I struggle to live a decent life and some days close to the day of her next grant payment, the family goes hungry. Our dignity is impaired by this life-style of poverty...’ The second applicant, Neville Whitebooi, was even more atypical of poor men of his age. He had retired from his job as a machine operator at the age of 60, in part due to poor health. After 27 years of employment, he had received a pension payout of about R120,000, and unemployment benefits for a short period. He spent his pension payout on settling debts, improving his house, and meeting daily living expenses. Now he had no cash income. The applicants argued that their exclusion from eligibility for an old-age pension simply on the grounds of gender was unconstitutional. Roberts stated that he was ‘a black South African’ who had been subject to discriminatory laws and policies. He emphasized that he had been compelled to leave school early because he had to take over the role of breadwinner when his father took ill. In his view, he had not been more privileged than women of his age who were now eligible for the old-age pension.

The state’s argument in *Roberts* covered both the *size* and the *shape* of the social assistance system. The size, according to the state, is limited by resource constraints, which are recognized as salient in the South African constitution. Any extension of social assistance would require additional expenditure. Reducing the age of eligibility for the old-age pension for men, from sixty-five to sixty years, would cost an estimated R3.3 billion (including administrative costs) (Pakade, 2006: 104). Even without any reform of the existing social assistance system, expenditures would rise, for example on foster care and related grants because of HIV/AIDS (*ibid*: 118). As the population ages, so the cost of old-age pensions rises – as Simkins (2005) has shown in work for the National Treasury, leading him and the National Treasury to conclude that the present social assistance system is unsustainable. But the state has not set out any rationale explaining what is an appropriate total sum of public expenditure on social assistance, or what precisely are the costs of raising further the share of GDP or of government expenditure transferred to the poor through social assistance. Critics suggest that there is scope for increased expenditure (Samson,

2002), but there is no easy way of resolving debates over the optimal or correct level of public expenditure. Of more immediate importance is the very low likelihood that the Constitutional Court would comment on the total sum spent. In terms of the Constitutional Court, the state's justification of the size of the social assistance system is much less important than its justification of its shape.

Disadvantage and Desert

The shape of social assistance is – according to the state (Pakade, 2006) – the result of choices made by the government in fulfilling its constitutional obligations, in terms of identifying groups that are especially deserving of public assistance. The basic conceptual framework is not set out explicitly or clearly, but it seems to entail five key elements. The first three of these set out a normative framework. First, the welfare state should be designed on the basis of *desert*, i.e. of how deserving is any particular applicant. Secondly, desert should not be defined simply in terms of individual need (through a means test, for example) but rather in terms of previous *disadvantage*, i.e. whether any person or category of persons had an equitable opportunity to provide for themselves. In the state's view, the means test alone is an insufficient measure of desert. Thirdly, disadvantage either (a) should be defined or (b) can only be defined in terms of membership of a *group* of people who experienced common disadvantage.

‘The distinctiveness of social assistance lies in its emphasis of risks and vulnerability as the main factors behind poverty and deprivation. In formulating social assistance strategies, it is incumbent upon the state to identify the key risks affecting *groups of people*, and the policy interventions which could help such *groups* prevent, ameliorate, or cope with the materialization of these risks.’ (*ibid*: 22-3; emphasis added)

The elderly, for example, are regarded as a deserving group because they are disadvantaged by the worsening opportunities for employment and worsening health associated with old age. They also remain disadvantaged because of the disadvantages experienced in the past, which restricted their ability to provide themselves for their retirement (*ibid*: 24-25).

The final two elements of the state's conceptual framework concern how the normative framework is translated into practice. Fourthly, the state claims that it is currently assessing and identifying correctly which are the most deserving groups in society. Fifth, the state claims that the disadvantage experienced by groups can be demonstrated empirically using quantitative data from surveys and censuses, i.e. through the statistical profiling of groups. In summary, the

state argues that it is justified in using its scarce resources in targeting its social assistance programmes on the basis of the statistical profiling of groups and their respective relative disadvantage and desert.

This framework was elaborated – and applied – in the specific context of the *Roberts* case. Opposing the extension of social assistance to cover men aged 60-64, the state argued that this group of men was not deserving because they are not or have not been sufficiently disadvantaged. Elderly men are not or have not been as disadvantaged as elderly women. The Department of Social Development claimed that it allocates resources in light of ‘the Constitutional and policy commitment to achieving gender equality, which includes improving women’s position relative to that of men. ... Policy which targets society’s most vulnerable, at least as a starting point, corresponds to the obligation placed on the state, within its available resources, to achieve the progressive realization of the right to appropriate social assistance of those who are unable to support themselves and their dependents’ (*ibid*: 26-7).

‘It is my respectful contention that elderly poor women are in many respects among South Africa’s most vulnerable groups. Their current situation and the opportunities open to them reflect their years of living in a racist and sexist society. Their circumstances today reflect the effects of the structural conditions that underpin long-term poverty dynamics: asset poverty, employment vulnerability, and subjection to unequal social power relations. ... [T]he old age pension is a measure designed to protect such women, as well as one which contributes to the constitutional goal of achieving equality to ensure their full and equal enjoyment of all rights.’ (*ibid*: 27)

The state does not provide any indication as to what are the other ‘most vulnerable groups’ in South Africa. They presumably include children and the disabled, but no evidence is presented that allows for an ordering of the disadvantage experienced by different people or ‘groups’ of people.

What the state does provide is detailed empirical data purporting to show that elderly women (typically or on average) ‘are *substantially* disadvantaged in comparison to men’ (of the same age) (*ibid*: 34, emphasis added), in terms of a long series of indicators. These include education and functional literacy, past and present employment, whether or not they are the reported ‘household head’, marital status (with women being very much more likely to be widowed, whilst men are much more likely to be married), responsibility for unpaid household work (which limits labour force participation), health, and access to housing and services. The state concluded that ‘a rational relationship exists between the differentiation made in the legislation, and the relative need of elderly men and women for social assistance’ (*ibid*: 5).

The data on the disadvantage faced by elderly women (as a group) relative to elderly men (as a group), drawn from censuses, surveys and secondary studies, are not incorrect. But aspects of the interpretation of these data are open to question. Whether the data indicate ‘substantial’ relative disadvantage depends on how ‘substantial’ is to be defined, as sometimes the gender differences are small, sometimes large. Other measures might be selected which show that men are in certain respects more disadvantaged than women. Most obviously, men suffer from worse health and die (on average) at a much younger age. Nonetheless, as the affidavit states with reference to household chores, it is clearly the case that ‘the present generation of elderly women are in most cases experiencing the effects of a lifetime of unpaid labour’ at the same time as being disadvantaged right now in terms of access to paid employment opportunities and so on. On average, elderly women have not and do not face the same opportunities as men to provide for themselves in their old age.

The state’s conclusion to this survey of data is that elderly women ‘are *substantially* more vulnerable than comparable men’ (*ibid*: 88, emphasis added). Giving the pension to women aged 60-64 but not men of the same age helps to give women resources that men have from other sources.

‘... the provision of the old age pension to women aged from 60 to 64 diminishes the inequality between such women and comparable men, and between such women and all other persons aged above 65 who are eligible for social assistance. The legislative differentiation has been maintained to provide social assistance to the most vulnerable group of elderly persons, whose vulnerability is the result of historical and societal unfair discrimination.’ (*ibid*: 120)

The state noted that the first applicant, unlike most women of his age, had been employed for much of his life, and had even benefited from private pension and unemployment benefits (*ibid*: 136). More importantly, the state argued, the various hardships experienced by the first applicant were much more common among elderly women than among elderly men. Gender-based targeting was, therefore, appropriate.

An Empirical Critique

The key weakness in the state’s framework – and its application in the *Roberts* case – is whether grouping diverse people into just two categories, ‘men’ and ‘women’, is a defensible way of assessing disadvantage, need and desert. In the *Khosa* case, the Constitutional Court accepted that ‘it is necessary to differentiate people between people and groups of people in society by classification in order for the state to allocate rights, duties, immunities,

privileges, benefits or even disadvantages’. But ‘those classifications must satisfy the constitutional requirement of “reasonableness” ... [and] differentiation, if it is to pass constitutional muster, must not be arbitrary or irrational ...’ (Mokgoro, 2004: 33).

The state’s argument rests on the comparison between the statistical profile of elderly men and elderly women (and to some men and women of all ages) in terms of need and (especially) past ‘disadvantage’. This is an inappropriate comparison. The appropriate comparison is not between elderly men and women in general, but rather between those elderly men and women whose individual means fall below the level set in the means test. Discrimination against men is reasonable, in terms of the state’s proposed framework of linking desert to disadvantage, if the elderly men whose incomes are below the means test income threshold are more advantaged than elderly women with similarly low incomes. But the state reports that almost one in three men between the ages of 60 and 64 have earnings or assets that would render them means-ineligible for an old-age pension if the current provisions for women were replicated for men (Pakade, 2006: 103). These men need to be excluded from the comparative analysis of disadvantage, as would the few women of the same age who are means-ineligible for the pension. Including means-ineligible men and women serves to distort the relative mean values for earnings, education, participation in the labour market in the past (especially the recent past), and so on.

The state attempted to get around this problem in *Roberts* by presenting data on the characteristics not only of men and women in the 60-64 age group, but also for *African* men and women in this age group on the grounds that racial categorization is a proxy for low income. The state does not discuss whether or not the use of race is indeed a good proxy for low income. Insofar as the proportion of African men in this age group with earnings that make them means-ineligible is larger than the equivalent proportion of African women, and especially if higher income African men earn more than higher income African women, then even this ‘proxy group’ data will be a poor guide to the actual disadvantage of the poor. The state itself concedes that almost one-third of African men in the 60-64 year-old age group but almost no African women of this age have employment (*ibid*: 43, Table 6), suggesting that the state’s ‘proxy group’ might not be a very good one. Men with jobs are not only less needy, but also probably less ‘disadvantaged’ than jobless men of the same age.

A more precise specification of means-eligible men and women produces a rather different picture of the relative ‘disadvantage’ of elderly men and women. The 2005 General Household Survey (GHS) recorded earnings and income data in terms of broad income brackets, but combining the brackets up to a R18,000

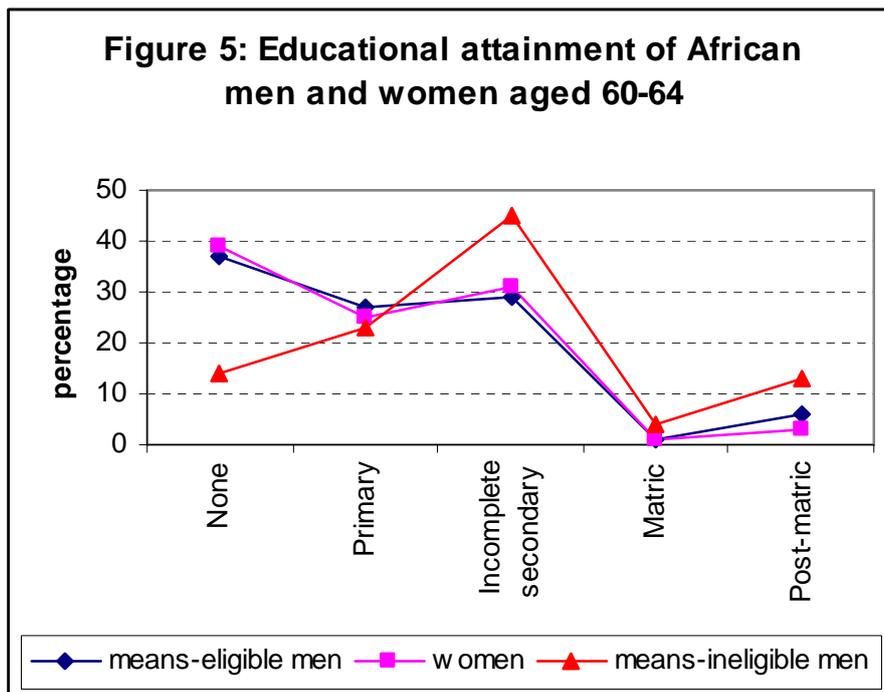
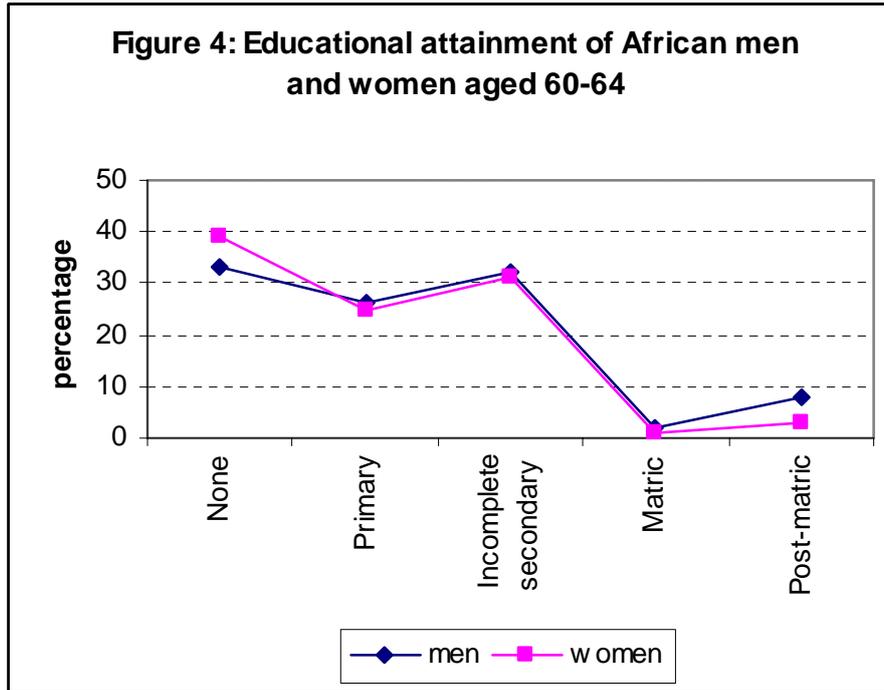
p.a. provides a reasonably good approximation of the actual means-test income threshold of R20,232 p.a. for unmarried people. Using this measure, 20 percent of African men aged 60-64 and a negligible proportion of similarly-aged African women are means-eligible for the old-age pension. The effect of separating out these means-eligible men is clear if we look at data on education, which are arguably the more important data for the state's argument about the relative disadvantage of elderly women as a group. The GHS data show that 39 percent of African women aged 60-64 received no education, compared to 33 percent of African men of the same age. This is the kind of evidence presented by the state to show that women were or are disadvantaged. But the proportion of means-eligible African men aged 60-64 who had no education was 37 percent (whilst only 14 percent of means-eligible African men had no education). In other words, the difference between the educational backgrounds of means-eligible African men and women is insignificant (2 percentage points), whilst the difference between means-eligible elderly people and means-eligible elderly people is big.

Table 1: Educational attainment of African men and women aged 60-64

Education level	All African men (%)	Means-eligible African men (%)	Means-eligible African men (%)	All African women (%)
None	33	37	14	39
Primary	26	27	23	25
Incomplete secondary	32	29	45	31
Matric	2	1	4	1
Post-matric	8	6	13	3
Total	100	100	100	100

Source: 2005 GHS data, my calculations. Note that some totals do not come to exactly 100 because of rounding errors.

The distribution of disadvantage – using education as the measure of disadvantage – is shown in Table 1 and Figures 4 and 5. Figure 4 shows the distribution as the state presents it in *Roberts*: the distribution for African men is (marginally) to the right of the distribution for African women, indicating relative advantage. Figure 5 shows the distribution using the more precise specification of means-eligibility. The distributions for means-eligible African men and women are almost indistinguishable, whilst the distribution for means-eligible African men is far to the right.



Figures 4 and 5 also show starkly another problem with the state’s arguments. If disadvantage is measured in terms of schooling, then there are many men who are currently excluded from the old-age pension who have *less* schooling than many of the women who currently receive the pension. The 37 percent of means-eligible African men aged 60-64 with *no* schooling are more disadvantaged than the 61 percent of African women with *some* schooling.

This analysis can be repeated for almost every measure of disadvantage that the state discusses in *Roberts* (Seekings, 2006). There is insufficient basis in survey and census data for characterizing means-eligible African men aged 60-64 as being any less disadvantaged than African women of the same age.

The underlying argument that the state makes in *Roberts* is that some groups of people faced better opportunities to provide for their old-age, and that these advantages make them less deserving of social assistance. This can be illustrated in terms of descriptions of typical members of the supposedly advantaged and disadvantaged groups. A man, born in the rural Eastern Cape around 1940, who received little or no schooling, spent much of his adult life working for low wages on intermittent migrant contracts down the gold-mines, was lucky enough not to die or be injured in a rockfall or contract a severe case of a mining-related disease, remitted much of his wage back to his family in the Eastern Cape, was retrenched in the 1980s, and was unable to find any further employment and spent the past fifteen years unemployed, is deemed advantaged, and hence undeserving.⁵ A woman, born at the same time and the same place, had the same schooling, but never left the Eastern Cape; she never had the same opportunity to work down a gold-mine and relied on the remittances sent by her husband, supplemented by her own irregular earnings from occasional low-wage employment in the area; she is deemed disadvantaged and hence deserving. Distinguishing between the disadvantages experienced by men and women like these appears to be as normatively bankrupt as it is empirically difficult.

Social Benefits and Desert

The state employs a second argument in *Roberts* that moves in a different direction. The state declares that old-age pensions have both an immediate objective – ‘to alleviate hardship among older people’ – and a broader objective to help to tackle aggregate poverty, in that elderly pensioners support many other poor people in their households (Pakade, 2006: 24-6). Data are presented showing that elderly women are much more likely than elderly men to care actively for grandchildren, and thus subsidise them out of the pension. Elderly women spend money in more poverty-reducing ways than elderly men, and probably ‘bear the brunt of care-giving in respect of both household members who are ill and orphaned children’ (*ibid*: 61-4, 84). ‘To the extent that the old age pension must be understood in terms of a transfer to households, and not only elderly individuals’, then paying pensions to elderly women but not men is reasonable in that women are more likely to spend pension income in ways that

⁵ Note that Christian Roberts himself, and his co-applicants in *Roberts*, were not typical of the ‘group’ of means-eligible men aged 60-64.

benefit poor dependents, such that the pension serves not just as a ‘safety-net for the poorest and most vulnerable people in our society’ but also as a ‘trampoline that enables many people in these households to jump over the barriers of economic and social exclusion’, as the Minister of Social Development is quoted as saying (*ibid*: 90).

This line of argument is hazardous for the state. First, having emphasized the *benefits* to the elderly of living with kin, the state now emphasises the *costs* in terms of ‘pension sharing’ for the support of pensioners’ dependents. More fundamentally, is the disadvantaged ‘group’ that is being targeted through old-age pensions to women aged 60-64 the women themselves or the women *and their dependents*? The logic of the state’s case would require that the state provides some analysis of the disadvantage as well as the need experienced by people who are dependent on women aged 60-64 relative to the need and disadvantage experienced by people who are (or would be) dependent on men aged 60-64. The state provides no such analysis or evidence. It would seem that the state is unable to resist citing the poverty-reducing effects of giving pensions to women, even if this evidence sits poorly with the overall logic of the state’s defence of its policies.

Normative and Empirical Justifications of Desert

In post-apartheid South Africa, three major arguments have been put forward to justify the present or desired shape of social assistance programmes. The first, enshrined (with conditions) in the constitution, is that citizens (and, the Constitutional Court found, permanent residents) have a *right* to income security. This is an argument about social citizenship and – in the South African constitution – dignity. It is an argument that quickly leads to proposals for a basic income grant. The second argument is instrumental, and concerns the mitigation of poverty, whether for the good of the poor themselves or of society (perhaps because poverty is bad for democracy, as the ANC itself noted in the RDP (ANC, 1994: 4)). Social assistance programmes should be assessed in terms of their efficiency in reducing poverty. Van der Berg and Bredenkamp (2002) advocated the raising of the age limit on child-support grants on the basis of the poverty-reducing effects. The state’s secondary argument in *Roberts* is a version of this general argument. The state’s primary argument in *Roberts* is an example of the third general kind of argument: that some people, or groups of people, are more deserving than others because they faced (or face) worse opportunities to provide for themselves, i.e. they were (or are) relatively disadvantaged.

The third kind of argument has a long pedigree, and is morally defensible, but it is strange to find it used uncritically in the context of the post-apartheid South African welfare system. It is strange because the post-apartheid state is using this argument to justify a welfare system that it inherited, and was designed in the 1920s and 1930s, in very different circumstances. Both the design of the 'post-apartheid' welfare state and the justification of this (as put forward by the state in *Roberts*) are in fact *pre*-apartheid ones! By 1939, the welfare state provided for the deserving (white and coloured) poor because the elderly, disabled and single-mothers were the only (white and coloured) people who were unable to support themselves through work. The state provided employment opportunities to unskilled, unemployed (white and coloured) men on the railways and through public works programmes. In the early 2000s, the context is rather different. Between four and eight million people are unemployed and only a tiny proportion of these have been given the opportunity to work through public works programmes or other job creation schemes. Some of the unemployed, especially unskilled men in their 50s or early 60s, are probably 'unemployable' (Bhorat, 2000).

The South African public shares a conception of the 'deserving' and 'undeserving' poor. But the public is more discerning than the state. Surveys in Cape Town show that the elderly and sick are considered to be most deserving. But the unemployed are sometimes considered deserving: those who are unemployed through no fault of their own are considered deserving, whilst those who bear some responsibility for their unemployment (for example, because they lost their jobs due to dishonesty or unpunctuality) (Seekings, 2005, 2007).

The state, unlike the public, has the responsibility of justifying precisely and clearly where it draws the line in terms of coverage by the social assistance system. Justifying the exclusion of the non-poor – i.e. people who would not satisfy the existing means-test for an old-age pension – is easy. Justifying the exclusion of poor people is harder. In *Roberts*, the state accepts that the constitution requires it to realize progressively the right to income security, but argues that this should be done on 'a holistic rather than a piecemeal basis' (Pakade, 2006: 124). If the basis of desert is to be disadvantage, then the state needs to conduct a general analysis of the distribution of need and disadvantage among different sections of the population. Social assistance would then be extended to cover first those South Africans who are the most needy and disadvantaged of the various people currently excluded from social assistance. But there is no evidence that the South African state has begun to dissect how deserving are different groups of unemployed adults. The current shape of the welfare state has *not* been justified in terms of an adequate analysis of need and disadvantage.

A holistic analysis would require three key components. First, it would require an analysis of need: *who* is poor, i.e. what are the most appropriate groups for the categorization of poor people? Secondly, it would require an analysis of disadvantage: are there historical factors explaining why poor groups of people are poor? Evidence suggests that the factors that would need to be taken into account would include: the lack of *skills* (including, perhaps, linguistic competence) and credentials; the lack of *social capital*, i.e. the connections that are crucial to obtaining employment (and which are likely to be related to geographical location also); *employment histories*; *age*; and perhaps *gender*. These factors will often correlate with *location*. (The real effects of race are likely to be mediated through the lack of skills and social capital, together with employment histories). Thirdly, it would require an ordering of groups on the basis of need and disadvantage.

If a basic income grant is rejected, then social assistance can only be extended through targeting specified groups. Some of the factors causing disadvantage are not suitable for categorizing people into groups for the purpose of targeted social assistance. For example, the administrative costs of assessing employment histories or social capital would be prohibitive, and there would be undesirable disincentives if education was used as a criterion. Age, however, is clearly appropriate. It is likely that a large number of men aged between 60 and 64 would be identified as both needy and disadvantaged. Unlike young men, they have no realistic prospect of ever finding employment; for them, unemployment is transitory only in the sense that they will cease to be unemployed when they finally become eligible for an old-age pension. It is also likely that many men and women above the age of 50 would rank high in any ordering of disadvantage and need. These are compelling arguments for reducing the age of eligibility for the old-age pension, whilst retaining the means-test, for both men and women. Age is not the only appropriate criterion, however. Given that disadvantage might correlate also with location, there might be grounds for having a lower age of eligibility for the old-age pension in some areas than others.

Conclusion

In its response to *Roberts*, the state offers a justification of gender and age discrimination in the old-age pension based on combination of conceptual and empirical claims. The state argues, using survey and census data, that elderly women are disadvantaged relative to elderly men, and this means that gender discrimination is an appropriate supplement to the means-test in assessing whether particular individuals count as deserving poor. The state's justification entails normative and methodological components. The normative interpretation

on what makes some poor people ‘deserving’ is defensible, but should be debated. By presenting an argument, the state has provided the basis for such a debate. The empirical methodology is also important, although the state itself applied it poorly in the specific context of *Roberts*. This methodology might, and probably should, be applied to the overall shape of the welfare state.

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