

# Article

## Deserving individuals and groups: the post-apartheid state's justification of the shape of South Africa's system of social assistance

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### 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 assistance and social insurance programmes. Legal challenges have forced the state into providing such a defence of its social assistance programmes. In summary, the state justifies the current size and shape of this system 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 social assistance 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.

### Introduction

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. By this they do *not* mean that they are opposed to public education or health care – which are core elements of the South African welfare state – but they are rather raising concerns about South Africa's deep-rooted system of social assistance programmes that

provide means-tested cash transfers to various categories of poor people. Ministers today, as in the past, 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 of 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 per cent to about 3.5 per cent of GDP between 1994 and 2006. No other developing country redistributes as large a share of its GDP through social assistance programmes.<sup>1</sup> Expenditure doubled in real terms (ie taking inflation into account) between 1994 and 2004. In September 2007, more than 12.2 million grants were paid, in a country with a total population of only 48 million people. One in four South Africans was receiving a pension or grant financed out of general taxation. In terms of expenditure and coverage, South Africa already has a remarkable, pro-poor system of social assistance – or 'welfare state', if this is understood in terms of social assistance – albeit one that is not comprehensive in terms of either coverage of the poor or the range of 'risks' against which people are protected. It is precisely because South Africa has such an extensive system of social assistance that government ministers and others so often seem to reduce the welfare state to social assistance alone.

Until recently, the post-apartheid state has avoided giving any justification for the overall size or shape of the social assistance system. This is perhaps unsurprising, for at least two reasons. First, the post-apartheid state is deeply ambivalent about these programmes. Secondly, the post-apartheid governing party (the African National Congress, or ANC) inherited these redistributive and popular programmes but would prefer to take all of the credit for them.<sup>2</sup> Only recently, in 2006, was the state pushed into justifying its social assistance programmes, in an affidavit tabled in court under the name of the Acting Director-General in the Department of Social Development, Coceko Pakade. The immediate impetus to this justification was a legal challenge to the constitutionality of an aspect of the old-age pension system. The underlying impetus came from the constitution, which has been interpreted by the Constitutional Court as requiring that the state provide reasonable justifications for any limitations to policies that give effect to socio-economic rights recognised in the constitution.

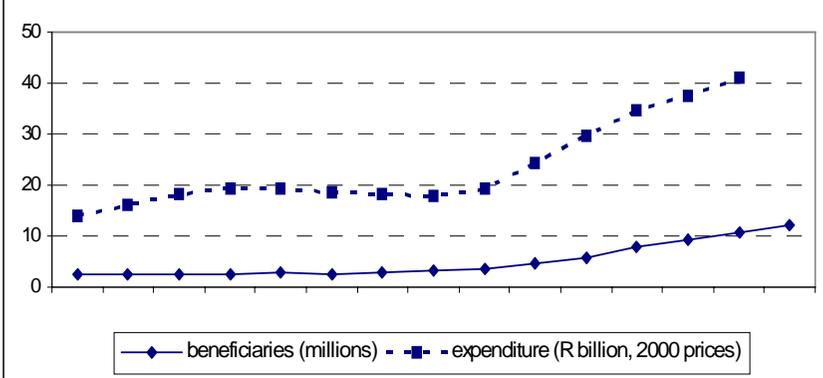
The state chose not to justify the shape of its social assistance system in terms of its inheritance, but rather provided a justification as if it had designed the system from scratch. The justification revolved around a concept of the ‘deserving poor’ that linked desert not simply to need but also to past opportunity, and did so not in terms of individuals’ own histories and situations but to the aggregate characteristics of social groups. Some poor people are deemed undeserving because they are members of social groups that have collectively squandered past opportunities. Not only is this distinctively South African approach to defining the deserving poor conceptually problematic, but the state’s application of it is empirically flawed.

### **The size and shape of social assistance**

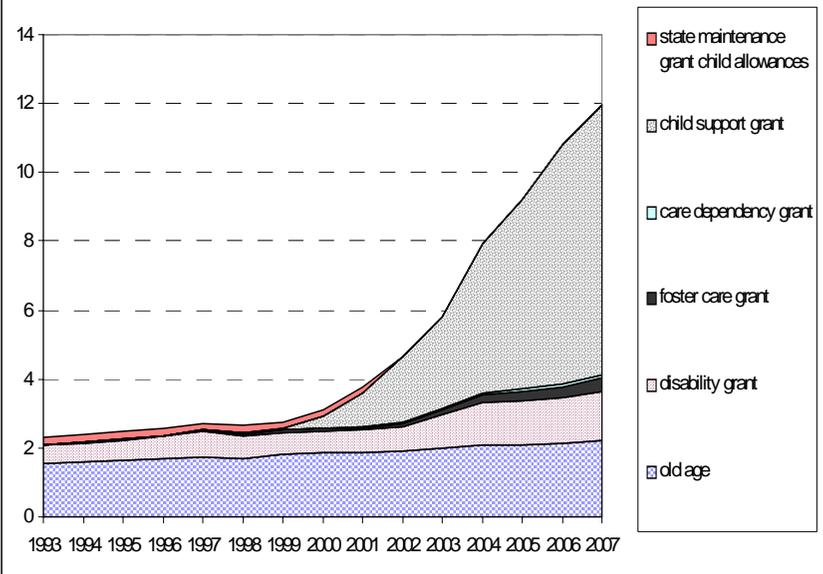
South Africa’s social assistance system originated in the state’s response to poverty among white people in the 1920s and 1930s. Non-contributory old-age pensions were introduced (alongside protected employment) to re-establish a racial income hierarchy (Seekings 2007b). Programmes for the disabled and poor parents (typically, single mothers) followed, and a limited system of contributory unemployment insurance was introduced. This system was partially deracialised in the 1940s (Sagner 2000, Seekings 2000, 2005), but it was not until 1993 that racial discrimination was finally abolished with respect to old-age pensions and only after 1993 was *de facto* access to social assistance entirely deracialised (Seekings 2002).

Total expenditure on social assistance programmes and the total number of beneficiaries changed little during the Mandela presidency in the late 1990s (see Figure 1).<sup>3</sup> Only in the early 2000s did real expenditure and the total number of beneficiaries rise significantly. This recent rise in expenditure has *not* been due to the rising value of benefits. Indeed, the maximum 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), disability and care dependency grants (paid to the disabled and caregivers to disabled children), and the foster care grant (paid to court-recognised foster parents) declined until mid-2003, and then rose to approximately the real value in 1994. The maximum value of pensions and grants relative to GDP *per capita* is still significantly lower than it was in 1994.

**Figure 1: Social assistance beneficiaries (millions) and expenditures (in 2000 prices, R billion, 1993-2006/7**



**Figure 2 Numbers of social assistance beneficiaries, 1993-07, by programme (millions)**



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). The child support grant was introduced at a low level in 1998. Despite gloomy predictions, take-up of the child support grant grew rapidly in the early 2000s. Figure 2 shows that the rising number of total grants paid is almost entirely due to the spectacular rise in the number of child support grants paid out. By September 2007, over 8 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. There was also a more modest growth in the number of disability grants paid, probably due to AIDS (see Natrass 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 11, 12 and 13 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 2002-3, 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 2006-7, old-age pensions only accounted for 37 per cent of all social assistance expenditure, whilst child support grants accounted for 31 per cent and disability grants accounted for 25 per cent. 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 14, 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, Bhorat 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-bodied adults of working age, ie between the ages of 16 (the age at which young people can leave school) and 60 or 65 (the ages at which women and men respectively become eligible for the old-age pension). (The absence of any provision for children aged 14 or 15 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, ie 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 pertains in South Africa. South Africa has the world’s highest unemployment rates, at just under 30 per cent or closer to 40 per cent 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 the 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).<sup>4</sup> 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 per cent 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 per cent 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 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.

### **Pressures for justification**

Justifications for the design or shape of social assistance programmes – or of the welfare state more generally – will generally be driven by demands for the extension of the system and the defence of its limits. It might be expected that, in a representative democracy, the governing party would be pushed to account for the design of the system by opposition parties competing for the votes of excluded poor citizens. In South Africa, however, welfare reform is not a major electoral issue. The ANC is surely wary of alienating its voters by retrenching welfare programmes, but the party'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 civil society. In the early 2000s, non-government organisations 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 this issue is 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 (Matisonn and Seekings 2003).

After more than a decade in office, the ANC-led government has not offered or embraced a clear vision for the social assistance system. The ANC's basic ambivalence was expressed 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). Ever since the ANC and government have sought to balance an emphasis on 'developmental' welfare with a commitment to a 'comprehensive' welfare system. 'Developmental' welfare – entailing the provision of the poor with skills and opportunities so that they could support themselves – was given

expression in the 1997 White Paper on Social Welfare (South Africa 1997), the subsequent renaming of the Department of Welfare as the Department of Social Development, and a series of subsequent documents (South Africa 2006, ANC 2007, see also Meth 2004). But both the RDP and the 1997 White Paper referred to the need for a ‘comprehensive’ welfare system, without specifying what this would entail. In 2000, government appointed a Committee of Inquiry into a Comprehensive System of Social Security for South Africa, chaired by Vivienne Taylor. The Taylor Committee’s central recommendation for making the welfare system comprehensive was the introduction of a modest ‘basic income grant’, on a phased basis and conditional on administrative efficacy (South Africa 2002, see Seekings 2002, Standing and Samson 2003, Makino 2004). The ANC leadership and government, however, have responded negatively and stalled the proposal of a basic income grant. The social assistance system remains neither developmental nor comprehensive.

Given the weak salience of social assistance in the political arena, the impetus to justification has come from elsewhere. 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.

It was only in 2003 that the first major cases concerning social assistance reached the Constitutional Court. Both cases were brought by Mozambicans who were permanent residents in South Africa and challenged the ineligibility of certain non-citizens for social assistance. 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 2003b: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 mid-2007, there was 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 emphasised 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 recognised 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 65 to 60 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 (Pakade 2006:118). As the population ages, so the cost of old-age pensions rises – as South Africa's National Treasury warns. 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 2002:91), 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**

Desert – ie what someone deserves to get or should get – can be based on any one of several possible criteria (see Pojman and McLeod 1999). A meritocratic approach would emphasise success or achievement (as in 'she deserves a high income because she is an outstanding singer'). A variant of this might see desert in terms of status or rank (as in 'he deserves a high income because he is white'). A Kantian approach emphasises intention (as in 'a good person deserves to be happy' or, conversely, 'a bad person deserves to be poor'). The Anglo-American insistence that the idle or indolent poor (or paupers) are undeserving is a variant of this Kantian approach (as is, arguably, Marx's labour theory of value). Rawls articulated a third approach, rooted in skepticism about free will and responsibility, that held that people do not 'deserve' their talents or abilities, including the ability to make an effort. The concept of 'social citizenship', according to Rawls, is a version of this Rawlsian approach.

All three concepts of desert are combined in the tradition of Anglo-American poor laws: inequality of outcome is justified on the basis of achievement; the idle and lazy are discriminated against in the welfare system; but even the idle are not excluded entirely from social citizenship. The design of South Africa's social assistance system in the early twentieth century reflected the first two criteria only. Social assistance was provided for poor white and coloured people (and later Indian and African people also)

if they were deserving, because they were unable to work. Able-bodied white men who were willing to work were deemed to deserve publicly-funded employment on public works programmes or sheltered employment. But there was no income guarantee even for white men and women, nor was there any provision at all for able-bodied African adults, whether idle or not. The post-apartheid constitution went beyond this tradition in enshrining what appears to be a right to income security, regardless of individual achievement, intention or effort. The constitution thus drives a needs-based conception of desert: citizens (and perhaps certain non-citizens also) have a right to the resources that enable them to satisfy basic needs.<sup>5</sup>

The state's justification of the shape of social assistance, in the *Roberts* case (Pakade 2006), focuses on the choices the state claims to have made in order to fulfill its constitutional obligations. 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*, ie 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*, ie 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. (Pakade 2006:22-3; 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 (Pakade 2006:24-25).

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, ie 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.

The emphasis on past disadvantage can be viewed in either of two ways. First, it could be understood as saying that people who have not been disadvantaged are undeserving, ie as a rejection of the more universalist claims of social citizenship. People who had opportunities to provide for themselves, but did not avail themselves of these opportunities, do not deserve tax-funded assistance in time of consequent need. Alternatively, it could be viewed as a means of ordering claimants on public largesse. Poor but previously advantaged people might be deserving, but they are less deserving than poor and previously disadvantaged people, and the state should prioritise the latter over the former. It is not clear which of these interpretations is the basis of the state's justification of the social assistance system.

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 realisation of the right to appropriate social assistance of those who are unable to support themselves and their dependents' (Pakade 2006: 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. (Pakade 2006:27)

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) (Pakade 2006:34, 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’ (Pakade 2006:5).

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’ (Pakade 2006:88,

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. (Pakade 2006:120)

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 (Pakade 2006:136). 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 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 categorisation 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 (Pakade 2006:43), 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 R18,000 pa provides a reasonably good approximation of the actual means-test income threshold of R20,232 pa for unmarried people. Using this measure, 20 per cent of African men aged 60-64 and a negligible proportion of similarly-aged African women are means-ineligible for the old-age pension. The effect of separating out these means-ineligible 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 per cent of African women aged 60-64 received no education, compared to 33 per cent 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 per cent (whilst only 14 per cent of means-ineligible 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-ineligible elderly people is big.

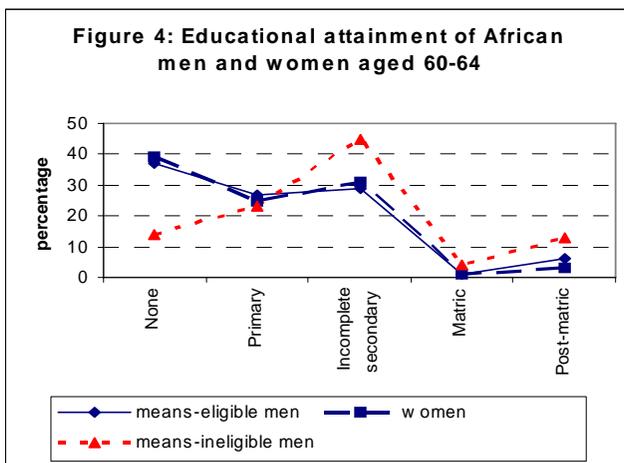
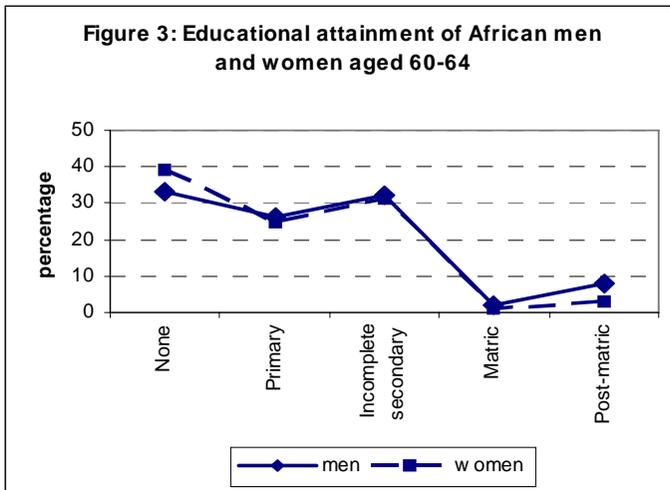
**Table 1: Educational attainment of African men and women aged 60-64**

Education level	All African men (%)	Means-eligible African men (%)	Means-ineligible 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 3 and 4. Figure 3 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 4 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-ineligible African men is far to the right.

Figures 3 and 4 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 per cent of means-eligible African men aged 60-64 with *no* schooling are more disadvantaged than the 61 per cent 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 characterising 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 15 years unemployed, is deemed advantaged, and hence undeserving.<sup>6</sup> 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’ (Pakade 2006: 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 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 (Pakade 2006: 90).

This line of argument is hazardous for the state. First, having emphasised 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.

### **Conclusion: normative and empirical justifications of desert**

A conception of desert in terms of group-based disadvantage is distinctively South African, and clearly links to discourses of advantage and disadvantage in other spheres of life. In most contexts, it seems little more than a euphemism for racial classification. Thus historically disadvantaged institutions (such as universities) are those which were established for black South Africans, black people are historically disadvantaged even if they spent their entire schooling careers at elite private schools, and white people are historically advantaged even if they are orphans who were passed from foster home to foster home. Applied to the shape of the social assistance system, however, it is an approach that distinguishes between poor, black South Africans. And, most curiously, it is an approach that distinguishes between poor South Africans in ways that justify a set of distinctions inherited from the past, and which themselves were based not on any conception of disadvantage but on one of effort. The obvious question, therefore, is whether the discourse of disadvantage is simply being grafted onto a system of discrimination structured around other criteria that seem less defensible under the shiny new constitution.

The challenge facing the contemporary state is how to justify the exclusion of the unemployed from social assistance programmes; justifying the exclusion of the non-poor is easy. In the early 2000s, only a tiny proportion of the four to eight million unemployed 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 seems to consider that some of these unemployed people are deserving. Surveys in Cape Town show that the elderly and sick are considered to be most deserving, but people who are unemployed through no fault of their own are also considered deserving. Those who bear some responsibility for their unemployment, for example because they lost their jobs due to dishonesty or unpunctuality, are not considered deserving (Seekings 2007c, 2007d).

In *Roberts*, the state accepts that the constitution requires it to realise 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, ie what are the most appropriate groups for the categorisation 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*, ie 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 categorising 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 in others.

### Postscript

In late 2007 the South African state abandoned its opposition to providing pensions to impoverished men aged 60–65. The 2008 Social Assistance Amendment Act provides for means-tested old-age pensions to be extended to men below the age of 65. Men aged 63 and 64 qualify in 2008, men aged 61 and 62 will qualify in 2009, and from 2010 men as well as women will be eligible for the pension from the age of 60 (subject to the means test). In a press statement (August 10, 2008), the Minister of Social Development (Zola Skweyiya) said that this reform would contribute ‘substantially to the fight against poverty’.

### Notes

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. The Minister of Finance (Trevor Manuel) implied in Parliament that black South Africans never received old-age pensions under apartheid (*Hansard*, February 11, 1999: col.2,042). The government’s *Towards a Ten-Year Review* document (produced by the presidency in 2003) claims that it was only after 1994 that the government removed racial discrimination in old-age pension benefits (South Africa, 2003a: 17–18). Both claims are false.
3. Figures 1 and 2 are based on data provided by Pakade (2006), data from various issues of the annual *Budget Review* and *Inter-governmental Fiscal Review* (published by the National Treasury) and recent data from the South African Social Security Agency.
4. 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.
5. My conception of needs here is limited. See Hamilton (2003) for a full discussion of needs and especially the position of needs in rights-based polities.
6. Note that Christian Roberts himself, and his co-applicants in *Roberts*, were not typical of the ‘group’ of means-eligible men aged 60–64.

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