8

A delicate dialogue: Courts, the executive and social policy in South Africa

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In South Africa, as well as elsewhere, the image of a delicate balance has often been used to characterise the institution of judicial review in a democracy.* And the imagery is apt. Yet if the focus is solely or even centrally on the judiciary, the balance is itself arguably unbalanced and, to that extent, off-centre (Klaaren 2006).

The focus of this chapter is on the relations between the executive branch and the judicial branch, attempting to privilege neither one. To talk of the executive branch and the judicial branch is of course to use the language of the separation of powers. This is a phrase that actually occurs nowhere directly in the Constitution but denotes a doctrine – the doctrine of separation of powers – that has been read into the Constitution both by the Constitutional Court and, perhaps more importantly for the purposes of this chapter and volume, by the ordinary users of the Constitution in the executive. In terms of this discourse of separation of powers, the limits of the judicial branch are relatively clear (but still not crystal clear) while the limits of the executive branch are a bit more ambiguous. It is easier to know a judge when you see one than to know a member of the executive branch.

More significant than the content of these branches is the purposes that are assumed to lie behind this doctrine of the separation of powers. For some, the purpose of the separation is simply the separation itself. But this understanding of the purpose is unsatisfying. More generally, the main purpose of the separation is usually understood to be a way of countering the overconcentration of power in one location (one branch) of the state. The idea here is that if two branches can counter each other, each will keep the other from growing too powerful. This purpose is indeed part of the doctrine but does not exhaust the purposes that modern theories of constitutional democracy ascribe to the doctrine of the separation of powers. Furthermore, such a purpose might well encourage

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the view of inherent conflict between the judicial branch and the executive branch.

One further purpose that is also articulated for the doctrine of the separation of powers is that of the division of labour. Under this view, the branches are separate not so much to conflict but rather to specialise, each in that way to contribute their special expertise to the working and implementation of the Constitution. In this view, the judges judge and the executive formulates policy and implements – the legislature would then debate and legislate as well as oversee. In this division of labour vision, the separation of powers is less a protection against excessive state power than a channel and filter for its discerning use.

Instead of a view of relationship between the judicial and the executive branch as conflictual, this chapter highlights the delicacy of the dialogue between the two institutions. With the twin emphases of delicacy and dialogue, this chapter thus attempts to add to some of the existing public administration literature on the development of social policy.

The first section surveys two Constitutional Court cases that may serve as examples of the delicate dialogue between the executive and the judiciary. In *Khosa*, the Constitutional Court upheld the constitutional rights of permanent residents to social assistance against the assertions of the national Department of Home Affairs. In *Mashava*, the Constitutional Court found in favour of a manual labourer receiving social assistance but came to this conclusion on a line of legal reasoning different from that taken by the High Court and one more attuned to the national implementation of social assistance and the constitutional requirement of equality.

Khosa

In this case, the Constitutional Court found the limitation of certain welfare benefits to citizens only, and thereby exclusion of permanent residents, to be unconstitutional. In a majority judgment written by Mokgoro J (with Chaskalson CJ, Langa DCJ, Goldstone DCJ, Moseneke J, O'Regan J, and Yacoob J concurring) the court held that where a permanent resident qualified for the receipt of a welfare grant in all other respects bar that of citizenship, to deny him/her the benefit of the grant would be an unreasonable limitation of the right to social security found in section 27 of the Constitution.

This litigation challenged various provisions of the Social Assistance Act 59 of 1992 ('SAA') and was in fact two joined cases. The *Khosa* matter (*Khosa and Others* v *The Minister of Social Development and Others*) challenged section 3(c) of the SAA, which restricted receipt of social grants for the aged to South African citizens only. The case of *Mahlaule and Another* v *The*

Minister of Social Development and Others (the *Mahlaule* matter) challenged sections 4(b)(ii) and 4B(b)(ii) of the SAA, as amended by the Welfare Laws Amendment Act 106 of 1997, which similarly reserved child support grants and care-dependency grants for South African citizens. The cases were heard together in both the High Court and Constitutional Court. After a postponement, and a subsequent failure by the respondents (the Minister of Social Development, the Director-General of Social Development and the MEC for Health and Welfare in the Northern Province) to appear at the hearing, the High Court dealt with the matter as an unopposed application. It declared that the provisions in question were unconstitutional and should be struck out. The effect of the HC judgment was to require that the respondents pay welfare grants to all qualifying residents, irrespective of their citizenship status.

The unopposed nature of the lower court litigation bears underlining. It may be the case to some extent that the lack of opposition derives from the lack of competent lawyering by the state and in particular by the state entities at that point the respondents in the case. However, one should not rush to assume incompetent lawyering. A number of other situations are equally consistent with the lack of opposition. The administrative and technical management of the Department of Social Development at the time may have acknowledged that they did not have the requisite technical, legal and fiscal resources (including managerial and overall human resource capacity) to protect the existing institutional arrangements of the state. Such an acknowledgement may have itself flowed from an unwritten rule within the department not to oppose any constitutional challenge or court litigation that would have the effect of exposing limitations on the capacity of the state in the realisation of socio-economic rights. Further, the stance may have been influenced by the placement of the issue within the ideological and public policy debates concerning Growth, Economic and Redistribution (GEAR) macroeconomic policy of the South African government. Indeed, this was also a case involving the National Treasury on behalf of government on an economic and fiscal policy position concerning the extension and expansion of social assistance rights and access to non-permanent residents.

Further, the lack of opposition was also in part the reflection of a *de facto* policy decision by the provincial reaches of the Department of Social Development as well as that of Home Affairs to acquiesce in the provision of social assistance in this situation. Indeed, such a *de facto* policy decision would hardly be surprising, given the long-standing presence of these foreign nationals in this area of the territory of the South African state as well as the severe nature of their welfare needs.

From a purely judicial point of view, the unopposed nature of the litigation also had some significant ramifications. Owing to the unopposed nature of the High Court hearing, the Constitutional Court did not receive reasons for the decision of the court *a quo*. To assist it in the confirmation hearing, the Constitutional Court requested that the respondents, if they wished to oppose the hearing, lodge arguments with the court in this regard. It also requested that, failing this, the Minister of Justice and Constitutional Development appoint counsel to present argument in the matter, as required by the Constitutional Court Complementary Act 13 of 1995. By the time of the date specified in the request, no argument had been lodged by the respondents, and the Minister of Justice and Constitutional Development appeared to have shown no inclination to participate in the proceedings. However, pursuant to a firmly worded letter from the Chief Justice, it transpired that the respondents had decided to oppose the matter after all.

Again, this point in the litigation seems worth commenting upon. Such a letter to a state department from the Chief Justice fits within the policy of the Constitutional Court to engage wherever possible with well-reasoned and well-informed advocacy. Yet the effect of the intervention by the court, and indeed the consequence of the high profile of the cases that reach the Constitutional Court, went and goes beyond the direct effect on the litigation. Here, it seems possible to infer that the profile of the case and the communication of the court had the effect of triggering attention to this matter from the national leadership of the departments concerned as well as the Cabinet. The result was to switch the policy of the government from one of *de facto* support to explicit opposition to the claimants' view of the matters.

In this particular case, the government's opposition certainly did not sway the court. That opposition was expressed in terms of the fiscal consequences of a decision adverse to the position of the government, although, as the court noted, the government did not detail the precise nature and extent of the fiscal consequences. The Constitutional Court confirmed the High Court's finding of unconstitutionality, but instead of declaring the provisions invalid, it ordered that the words 'or permanent resident' be read into the statute to remedy the deficiency.

The arguments and reasoning of the Constitutional Court are worth exploring since they demonstrate the court's willingness (in cases the court deems it appropriate to do so) to delve into relatively clearly demarcated questions of economics and fiscal policy. In *Khosa*, the applicants contended that the restriction of grant monies to permanent residents constituted infringements on their rights to social security (s 27), equality (s 9), life (s 11), dignity (s 10) and, in respect of the children involved, the children's rights

found in section 28. The Constitutional Court judgment focused primarily on the right to social security, and its implication for the rights to equality and dignity. It held that since the wording of the right included 'everyone', in the absence of clear indications to the contrary it could not be assumed that access should be limited to citizens only.

The court examined the reasonableness of the legislation creating the limitation. It unambiguously stated that, in analysing reasonableness, the court's role was not to examine whether more favourable measures could have been taken, or whether money could have been better spent. Its only role was to assess whether the measures actually taken were reasonable. The court went on to support executive efforts by describing the importance of giving social grants as part of the government poverty-combating strategy, and protecting human dignity by provision for basic needs. However, it then balanced this support with a finding that the differentiation between citizen and permanent resident was unfair discrimination. It held that the argument that the deprivation was only temporary, to be relieved once the residents received citizenship, was not sufficient justification for deprivation during the period of 'permanent resident' status. All who had made homes in South Africa should be entitled to receive social grants. It held further that although there was a paucity of information available to estimate the actual added cost of including permanent residents as grant receivers, the government should have supplied the court with the information, and even using the upper limit of the vague estimate supplied, the actual extra cost would not exceed 2 per cent of the amount being paid at the time of the judgment. The fact that the applicants were a vulnerable group in society and hence would suffer grave consequences from exclusion, that the exclusion would place extra financial burden on their families and communities, that permanent residents also contributed to the welfare system through the payment of taxes, and the fact that denial of the right to social security would inevitably lead to the infringement of other basic rights, all influenced the court's finding that the discrimination was unfair.

The court ultimately found that the impacts on the lives and dignity of the applicants far outweighed the financial impacts on the state's budget. Implicitly, then, the court's finding was also that the impacts on the lives and dignity outweighed any potential inhibition by the court about intruding into executive territory.

The minority judgment by Ngcobo J (with Madala J concurring), found that the limitation of the right to social security was justifiable because it was neither absolute nor permanent. In a judgment far more deferential to the right of the executive to make such decisions, the court noted the considerations necessary for the executive to consider when allocating grants:

the unavailability of sufficient resources, the need for immigrants to be self-sufficient, and the need to discourage immigration motivated by availability of welfare. Ngcobo J also stated firmly that the decision in question was one of policy, and was therefore clearly within the domain of the executive. He stated (para 128): 'Policy-makers have the expertise necessary to present a reasonable prediction about future social conditions. That is precisely the kind of work that policymakers are supposed to do. Unless there is evidence to the contrary, courts should be slow to reject reasonable estimates made by policymakers.'

Mashava

The applicant in *Mashava* was a manual labourer with a relatively low level of education. He was rendered unable to continue working as a result of a motor accident that resulted in fractures in both his hands. He was hence entitled to a disability grant in terms of the Social Assistance Act 59 of 1992 (SAA). After applying for a disability grant in October 2000, and various attempts to receive his grant, he began to receive payments in January 2002 but was not paid the full amount of arrears owed to him.

Bringing the matter to the High Court, Mashava attacked the ability of the (Northern Province) provincial government to properly administer disability grants. He claimed that had the administration of the SAA not been assigned to the provincial government, he would have been paid in a reasonable period and received full arrears. He won in the High Court. At the Constitutional Court, therefore, the issue was whether to confirm the declaration of invalidity, made in the High Court, of a presidential proclamation (Proclamation 7 of 1996) that assigned the administration of the SAA to the provincial government. The assignment was allegedly made in terms of section 235 of the Interim Constitution, which allowed executive power exercised in terms of a law in force before the commencement of the Interim Constitution to be assigned to the provincial government.

The applicant's argument supporting the claim of unconstitutionality was divided into three independent parts, which might be called the 'in force argument', the 'Schedule 6 argument' and the 'Section 126(3) argument'.

First, the applicant argued that the SAA was not 'in force' prior to the commencement of the IC, and hence its administration could not be lawfully assigned to the province in terms of section 235 of the Interim Constitution. The outcome of this argument revolved around legislative interpretation, which would require a more detailed discussion of the evidence before the court and of the reasoning of the court than is possible here. The decision of the High Court revolved largely around this argument. The court found that the SAA was not in force, and hence its administration could not be

assigned. The Constitutional Court overturned this finding. Instead, it found for the applicant based on the success of the argument discussed below. In general, arguments based on legislative interpretation may be said to be based on evidence that is largely within the control and knowledge of the executive. It is often state policy professionals (if not the state lawyers) who are most in command of the ins and outs and the residue of shifting policy rationales that accompany many of the legislative instruments on the South African statute books. There will of course be exceptions to this general observation. But the reversal of the lower court decision on other grounds than this one would at least appear to be consistent with this general observation.

The second argument made in the High Court was the 'Schedule 6' argument. In order to satisfy sections 235(6) and (8) of the Interim Constitution, it was necessary that the subject matter of the law to be assigned fell under one of the functional areas listed in Schedule 6. The functional area in question was 'welfare services'. The applicant contended that the SAA did not fall within this functional area because it dealt with 'welfare', but not 'welfare services'. This was thus a straightforward textual argument. In a textual argument, the rationale is one of pure language – that certain words mean certain ideas or concepts and the matter ends there. There is no or little appreciation of the fluidity of governance or the institutional context inherent within a constitutional democracy. The High Court judge, in deciding whether a 'welfare service' constituted a service, looked at the ordinary meanings of both 'welfare' and 'service' and ruled (without reasoning very deeply) that welfare services did indeed fall under Schedule 6. The Constitutional Court elected not to decide on this matter, and instead assumed the SAA did indeed fall within the ambit of Schedule 6. While the Constitutional Court is of course final (and is often both final and appellate), apart from that position within the judicial hierarchy there is not much that can be said to lend objective superiority to the textual interpretative powers of the court. Reasonable courts can differ on the interpretation of words and often do.

The final argument, the 'Section 126(3)' argument, is the significant one here. Section 235 of the IC excluded the possibility of the president assigning a law where the matter was one of those referred to in sections 126(3)(a) to (e). The applicant contended that the SAA was one of the matters referred to in 126(3)(a) and (b) – a matter that could not be effectively regulated by the provincial legislature, or one that required regulation by uniform norms and standards, i.e. at a national level, for effective performance. During argument it was also suggested that the SAA may also have regulated section 126(3)(c) matters – those in which it was necessary to set minimum standards across the nation for the rendering of public services.

Here, the High Court did not function as well, in narrow judicial terms, as it did on the first two arguments. Without supplying any reasoning, the court found that the SAA was indeed a section 126(3) matter as argued by the applicant. The court found it unnecessary to give reasons since it had already ruled that the SAA was not 'in force' at the necessary time. However, the court did note (para 17) that if the assignment was valid, the result would be a 'patchwork of social assistance ... that differed materially from province to province', and this would be both unconstitutional and impractical.

Not known for its sparse reasoning, the Constitutional Court certainly did not give this argument short shrift. In order to decide this issue, the Constitutional Court conducted an analysis of the SAA to determine its purpose, subject matter and effect. The SAA was a consolidating piece of legislation, bringing together statutes dealing with the payment of various grants to people in need, and welfare organisations looking after such people. The applicant submitted that the 'piecemeal approach to the SAA and the ... "sorry saga" of the payment of social grants under the SAA' (para 46) indicated that its administration required control at a national level. In opposition, the respondents drew the court's attention to India, in which the states had exclusive legislative competence, and Canada, where there was dual competence in such matters, subject to a provincial override. The respondents further argued that in South Africa's constitutional system, which balanced centralised government and federalism, it was necessary that provinces be allowed to legislate separately (and hence potentially differently) on the issue. However, Van der Westhuizen J firmly dismissed the contentions of the respondents, stating that the argument failed to account for South Africa's political, social and economic history.

The court stressed the need to consider the constitutional requirement of equality when deciding the issue. Historical inequalities both racially and geographically had to be taken into account when considering distribution of social assistance benefits. To pay different amounts of social assistance to those living in different areas would have the effect of dividing South Africa into favoured and disfavoured areas, and this would offend the dignity of those receiving less. For this reason, the SAA was a matter that fell under both section 126(3)(a) and (c) since it was a matter that could not be effectively regulated by provincial legislation, and one in which it was necessary to set minimum standards across the nation for the rendering of public services. It was also one that required uniform norms and standards for effective performance (and so was effectively a section 126(3)(b) matter also). The court held that 'effective performance' required fairness and equality in the distribution of social assistance, and to achieve this there needed to be central oversight.

In overturning the president's proclamation, the court made a point of noting that the court should only evaluate the appropriateness of the assignment *at the time* when it was made. It held that caution should be applied to ensure that it did not adopt a view with the benefit of hindsight that the president did not possess. Arguably, this caution demonstrates a concern by the court to exhibit and indeed to exercise deference to the executive.

Van der Westhuizen J also noted (para 55) that 'the present inquiry does of course not deal with judicial review of the President's decision to assign the administration of the SAA ... The test is an objective one, namely whether section 126(3) is applicable to the SAA.'

In addressing the question of whether different aspects of the SAA could fall both inside and outside the ambit of section 126(3), the court took the view that budgeting allocation and distribution decisions could be separated from decisions related to practical delivery. The delivery decisions could well require attention at a localised level. But the court found in this case that most of the SAA dealt with availability of funds. There was nothing to distinguish between provisions which did and did not fall under section 126(3). Hence the whole of the SAA fell under section 126(3) and the applicant succeeded on this ground.

And so? The South African take on political resource allocation

In an early and perceptive article, Theunis Roux (2003) set out to explain how, in a new democracy, the Constitutional Court had managed to make some rather bold strides into budgeting territory traditionally understood as being that of the executive, while simultaneously maintaining its own legitimacy. From Roux's viewpoint, there are two preliminary conditions that have allowed the court its bold action. First, the fact that the judges of the Constitutional Court are appointed by a body (the Judicial Services Commission) controlled by the majority party in government gives them a certain amount of power to check actions of the executive effectively. Secondly, the jurisdictional provisions in the Constitution are framed broadly enough to force the court to accept jurisdiction over controversial cases. This implies that the Constitutional Court judges must use rhetorical skills to 'both avoid deciding issues that might bring it into conflict with the political branches, and to take on politically useful issues that might not present themselves for decision again' (Roux 2003: 95). To do this, Roux argues that the court has adopted a process of exploiting 'discretionary gaps' available in the cases that have come before it. Such gaps are textual passages in the Constitution (and other laws) that come before the court where the court is able to choose to delineate at least two or more possible legal interpretations. It has done this by defining itself as the legitimator

of the government's social transformation project. This approach has proven successful because it has allowed the court to take a pragmatic 'middle path' – strongly acknowledging the transformative intentions and difficulties faced by the executive, whilst simultaneously imposing its will in areas where it feels it is necessary. Its firm respect for the role of the executive and clear statements of support in judgments have enabled the court to quell possible 'separation of powers' tensions, and hence make large strides into the budget arena without loss of legitimacy.

Roux uses four case examples to illustrate the court's exploitation of 'discretionary gaps'. In *Grootboom*, the court found a loophole in the application of international law that allowed it to avoid giving the interpretation of the right in question (housing) a 'minimum core' content. Instead, the court chose to analyse the reasonableness of government policy on housing – creating its own standard of review, unconstrained by international law. This resulted in a far less harsh budgetary implication. In the case of *Walker*, the court was fortunately presented with the opportunity to split its decision. It affirmed the policy of cross-subsidisation of water and electricity tariffs, and thereby performed its role of social transformation project legitimator, while simultaneously condemning the selected enforcement of debt as unconstitutional. Again, the court had struck a balance between protecting its institutional legitimacy and enforcing the Constitution. The cases of *Premier, Mpumalanga* and *Ed-U-College* highlighted the potential for the court's definition of 'administrative action' to allow it to encroach too far into executive budgeting territory. In interpreting the right to procedural fairness, the court in *Premier, Mpumalanga* initially underlined the need to allow the executive to make efficient and prompt decisions, but immediately thereafter balanced this with the parties' right to be heard. In doing so, it outlined for itself both a passive and an active role to allow it to operate properly alongside elected government. Similarly to *Premier, Mpumalanga,* the court in *Ed-U-College* attempted to find balance between efficiency and the need for procedural rights. In both cases the court found that government action unjustifiably infringed on the applicants' rights, but not before it had very carefully acknowledged the important and difficult role that the executive had to play.

Overall, Roux's approach (summarised neatly in his conclusion) is that while the need for the executive to have overall control over budgeting considerations remains fundamental, it is essential that Constitutional Courts intrude on this to the extent that their input is supportive of the social transformation project of the government. While he is not using the terminology, Roux can be seen as calling for this particular balance (within the overarching framework of the Constitution) between an executive in control and a judiciary ensuring that the

particular directions and actions of that executive continue to move the nation towards social transformation. The delicacy in his approach may be understood to refer as much to the fine-grained nature of the judicial task as to the specific nature of the balance between the branches of government.

In a broadly similar approach, Kenneth Creamer attempts to provide a practical 'methodology for rights-based government planning, budgeting and oversight' (2004: 221). Creamer proposes the use of the 'reasonableness' standard, as developed in socio-economic constitutional litigation, at a budgeting (i.e. executive) level. He suggests that the 'reasonableness' test be used as a framework that government departments may use to evaluate their own performance. Creamer discusses in some detail what each characteristic of reasonableness may mean in the context of policy evaluation. For instance, one aspect of reasonableness developed in socio-economic rights jurisprudence is an inquiry into whether a policy caters for vulnerable groups. He then suggests that executive organs apply this aspect (and the other aspects of reasonableness) when evaluating the success, in terms of realisation of rights, of government programmes as reflected in the budget. Essentially the inquiry is the same as that which the Constitutional Court would undertake in evaluating a piece of legislation or policy, but Creamer suggests it be applied at an executive level – by the executive itself – to determine whether it is fulfilling its constitutional obligation to realise rights progressively.

While more focused on the executive than Roux's, the argument by Creamer remains acutely aware of the need for a judicial role – and one justified not solely in terms of accountability but also in terms of contribution to a substantive policy dialogue. In Creamer's view, since 'government budgeting has come to be regarded as an instrument through which a range of social and economic objectives may be achieved', government policy must continue to be challenged in order to achieve 'a more integrated and purposive approach to rights-based governance' (Creamer 2004: 231). Benefits of this would include creation of a culture of proactive rather than reactive activity in realising socio-economic rights, and the avoidance of 'budgetary shocks' created by court intervention. Indeed, Creamer's approach, by paralleling the ideal executive approach with the ideal judicial approach, is arguably more thoroughgoing in its delicacy than Roux's.

Beyond providing further examples of both the delicate and the dialogical nature of the judicial and executive branch relationship, consideration of the *Khosa* and *Mashava* cases can add several nuances to the literature on this topic as presented here. First, as demonstrated particularly but not exclusively in *Khosa*, the provincial and national dynamic cannot be discounted. It may indeed often be the case that a particular policy debate would be stillborn if only the national

or only the provincial tier of government was participating in a debate. Instead, as can be read from the institution of the National Council of Provinces, the debate that may occur between these tiers can be a healthy and productive one. The debate between these tiers may – at least in the best of circumstances – demonstrate dynamism and reveal or showcase innovations that may contribute significantly to constitutional social policy. And without the judiciary to spark or defend that national–provincial dynamic, some of those debates would not occur. In *Khosa*, it was arguably the judiciary that brought the national tier of government into a particular policy debate. Were it not for the court, this policy debate might well have been stifled and the governmental position might well have continued more in the form of a provincial-level *de facto* stance than a considered and reasoned executive policy. Second, as demonstrated most clearly in the *Mashava* matter, even the Constitutional Court may be seen to be picking its interpretative battles and to be avoiding those where it commands only equal or even less than equal interpretative resources than those of other courts or of executive departments.

The negotiation and renegotiation of the national and provincial line show the delicacy of the dialogue between the courts and the executive. The delicacy here lies in an appreciation that the line of national and provincial is a fundamentally political line and one subject to change. Likewise, the power of the Constitutional Court as an apex court to choose its preferred mode of interpretative engagement – and its arguably healthy respect for the executive in doing so – demonstrates an appreciation for continued conversation. The dialogue here is one between appreciative judges and amenable executives, sharing their views of the way forward in this particular constitutional democracy. Indeed, this sort of delicate dialogue is, and should be, fundamental to the sustainability of the project of South African constitutional democracy. The alternative of tone-deaf judges and blinkered officials will not suffice to achieve the promise of the Bill of Rights for all who live in South Africa.

Conclusion

The lessons to be learned from this chapter must be in principle applicable to members of both the executive and the judicial branches. Still, the opposite poles of the delicate dialogue concept will be the focus in each of the two branches. Public officials in the executive branch, it would appear, should focus on the dialogue notion. It is only good management practice to recognise that the courts in particular and the law in general are not merely a constraint to be avoided but rather a set of practices to negotiated and engaged with. It may not be the most natural executive mode – the mode of dialogue, of speaking with a view to listening and being listened to – but has demonstrable value.

Members of the judicial branch, it would appear, should focus on the delicacy of the dialogue. It is only good adjudication practice to recognise that administrators in particular and the executive in general are not to be assumed incompetent or devious or incorrect. While judges are often quite – well – judgmental, there are times when this must be set aside and a focus on the delicacy of the dialogue is crucial. In these instance, the goal is to carry through on the precarious attempt to foster inter-branch dialogue.

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9

State models, capacity and economic policy in modern South Africa

John M. Luiz

Seventeen years after the advent of democracy South Africa is still very much a society in transition, but what it is transforming into is still not entirely clear either in practice or in aspiration. Transitions by their very nature are periods of instability, especially when these entail both political and economic change, as in the South African experience. The country moved from being a non-democratic, closed and isolated political economy based upon a system of racial estates to one that is democratic and that has liberalised economically and integrated into the global economy at a fairly rapid pace. However, challenges remain and these manifest themselves most prominently in stubbornly high levels of poverty, unemployment and inequality. This has led to serious debate about the nature of South African society, its economic system and the relationship between state, society and business. Even within the ruling party, the African National Congress (ANC), there have been robust disagreements about these issues, almost leading on occasion to the fragmentation of the party.

This essay will look at one of the most overarching questions that face South Africa – specifically the character of the future state that is expected to deliver on both the economic and social fronts. Two models in particular have been put forward as frameworks, namely the Scandinavian welfare state and the East Asian developmental state. Their attraction is obvious given their successes during the course of the twentieth century, but it is problematic that these are promoted without real interrogation of their histories and how and why they were constructed, or without taking cognisance of the challenges that the state faces in South Africa and our economic trade-offs. We will therefore investigate the feasibility and desirability of these state models in the context of capacity constraints. The chapter is divided into three broad sections. The first section covers the changing economic policy frameworks after 1994, moving from the RDP to GEAR and ASGISA. It will discuss the motivation for each of these, what was achieved and what was not, and the challenges that remain. It will also assess where South Africa is at present and what sort of state will be required to deliver on the high expectations. The second section will focus on the two models of states that have been put forward by the ruling party over