Conference Paper

Workshop on "Constitutional Rights, Judicial Independence and the Transition to Democracy: Twenty Years of South African Constitutionalism"

Executive Acquiescence and the Judiciary's Authoritative Legitimacy

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I INTRODUCTION

In his 2009 piece, Theunis Roux[1] offers a starting point for the discussion of the impact of court rulings on the decision-making of the administration state. Roux begins with the premise, substantiated by social surveys, that the Court does not enjoy popular support, which in turn would suggest that the Court has left itself vulnerable to attacks to its legitimacy. Roux's paper asks the question: faced with a lack of public support, how has the Constitutional Court (Court) maintained a reputation for legally legitimate decision-making without compromising institutional security? By "institutional security" Roux means the capacity of the Court to withstand political attacks to its independence. This includes, but is not confined to, the Court's authoritative legitimacy. In other words, whether or not the executive branch of government acquiesces to particular decisions, with or without a belief that those decisions are correct.

Roux explores this question through a thoughtful analysis of a number of high profile Court judgments. Roux's position is that the Court, through a deft and balanced use of both pragmatic judicial decision-making (at the expense of more principled decisions) and principle (at the expense of opposition from the public and executive), has managed to maintain a healthy working relationship with the executive without compromising its institutional security or legal integrity.

This paper seeks to interrogate Roux's position in light of more recent court judgments that demonstrate non-compliance with judicial decision-making by the executive and expand the discussion to include South African courts in general and their relationship with the executive. In doing so, we hope to challenge Roux's conclusion that the Court, and courts more generally, have not suffered a weakening of authoritative legitimacy, and by extension institutional security, in the process of maintaining a high standard of legally legitimate decision-making. While, for the most part, the executive has refrained from outright attacks on the judiciary, it can

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[1] Theunis Roux, "Principle and pragmatism on the Constitutional Court of South Africa," (2009) 7 *International Journal of Constitutional Law* 106.

be argued that when the executive is ineffective in implementing judgments and orders handed down by the courts, the courts' authoritative legitimacy is undermined.

Non-compliance with judicial-decision making, and therefore the potential for erosion of the courts' authoritative legitimacy, has occurred in pockets, relating to particular branches of the executive and on specific questions of law. It is not the intention of this paper to overstate a decline in the courts' authoritative legitimacy. Rather, we hope to merely demonstrate that executive compliance with judicial decision-making should play a significant role in the assessment of the judiciary's authoritative legitimacy.

A further concern is that the lack of acquiescence to judicial decisions by certain branches of the executive serves as a barrier to the courts' ability to effectively engage in norm creation and, as a result, impacts access to justice for ordinary citizens in a very tangible way, particularly where the executive actors in question are front-line decision-makers, or what we will refer to as "street-level bureaucrats", who adhere to social norms not necessarily consistent with the norms that emerge from the Court's interpretation of the Constitution.

Any form of judicial decision-making directed at public actors, whether constitutional or administrative, deals with a particular administrative, executive or parliamentary act or decision. Despite this particularity, through *stare decisis* and formulation of objective principles and norms, judicial decisions typically aim to affect future decision-making of whichever public body is the subject of the judgment as well act as a repository of principle, or "norms", from which all public bodies should draw in order to guide their behavior and decision-making.

In discussing norm creation by the judiciary directed to the executive, it is important to recognize the hierarchy and structures within the executive branch of government. The response to judicial decisions by senior-level executive actors will in most cases differ from the effect of such decisions on street-level bureaucrats. Depending on the nature of the decision under review, one or both levels of the executive may be addressed by a court's judgment. The way and extent to which the different actors within the executive react to, internalize, and implement judicial decisions is largely shaped by the hierarchy within the executive, the subsequent way in which information is communicated from the point of judgment to the transmission of instruction to street-level bureaucrats within the executive, and the responsibilities that attach to each level of the executive. For example, judicial decision will likely be directed at street-level bureaucrats in cases of deportation and detention of illegal immigrants and incidents of domestic violence as these are most often dealt with by street-level bureaucrats. On the other hand, questions around drafting of legislation and formulation of policy fall within the responsibilities of senior-level executives and therefore their behavior would be the target for any judicial decision.

In the following section, we briefly outline examples of judicial decision-making that have lacked authoritative legitimacy in that the executive has failed to comply with clear instruction from the courts, despite ample opportunity to do so. In part III, we examine executive responses

to judicial norm creation. Part IV discusses the importance of norms in guiding executive behavior and part V looks carefully at the interaction, and in particular forms of communication, between the judiciary and the executive.

II COURT DECISIONS AND EXECUTIVE ACQUIESCENCE

Illegal Detention and Deportation: The Department of Home Affairs

Over the past five years, the Department of Home Affairs (Department) has been notorious in its refusal to comply with court judgments. The Department is tasked with upholding legislation relating to foreigners, including illegal foreigners, and asylum seekers. The Immigration Act is one of the main pieces of legislation governing the Department's actions. The Act allows for immigration officials to detain illegal foreigners pending a determination of their status. However, a person may only remain in detention for more than 48 hours if it has been determined that he or she is an illegal foreigner and is being held pending deportation. Section 34(1) of the Act provides those declared illegal foreigners with procedural safeguards during their detention in order to protect them from unlawful deportation, including the right to request an appeal and to demand a warrant from the court for their detention.

In 2003, Lawyers for Human Rights successfully challenged in the High Court the constitutionality of specific sections of a previous version of the Immigration Act with the effect of giving wide discretion to immigration officials to arrest, detain and deport foreigners without procedural protections.[2] The unconstitutionality of these sections of the Act was upheld by the Constitutional Court in *Lawyers for Human Rights*.[3] In that judgment, the Court confirmed the need for procedural safeguards as stipulated in section 34(1) of the new Immigration Act and found that the absence of similar safeguards in the challenged provision of the Act relating to foreigners not yet in South Africa but at a point of entry was unconstitutional. The Court makes clear that in order to comply with section 36 of the Constitution, which allows for the limitation of rights under certain circumstances, immigration officials must follow procedural safeguards that protect the rights of foreigners attempting to gain entry into the country. In so doing, the Court highlighted the importance of the provisions contained in section 34(1) of the Immigration Act to the constitutionality of immigration procedures.

Despite the Court's clear pronouncement on the necessity of procedural safeguards, the Department has repeatedly failed to comply with the procedures contained in section 34(1). In 2010, the Supreme Court of Appeal (SCA) heard a case regarding the detention of an illegal foreigner for a period exceeding 30 days without a court warrant, one of the safeguards provided

[2] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T).
[3] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) (*Lawyers for Human Rights*).

for in section 34(1). The SCA, citing *Lawyers for Human Rights*, made clear the importance of the right not to be detained any longer than necessary without a court warrant justifying the detention.[4]

Two years later, the Department was brought before the High Court for again, amongst other things, detaining a foreigner for a period exceeding 30 days without obtaining a court warrant justifying that extension.[5] The detention was found to be unlawful.

More recently, in August 2014, the Department was again brought before the High Court, this time by the South African Human Rights Commission, for lack of compliance with section 34(1) of the Immigration Act.[6] Despite the fact that the courts have repeatedly found that non-compliance with section 34(1)'s procedural safeguards is unconstitutional, the Department attempted to justify its actions by stating that it is impossible to detain foreigners for less than 120 days pending deportation because foreign embassies routinely fail to cooperate. No evidence was presented to support this assertion. The Department argued that under such circumstances, their officers should be granted discretion to extend a foreigner's detention where reasonable or justifiable.

In a scathing judgment, the High Court found the detention practices of the Department unconstitutional and highlighted the Department's repeated disregard for judicial decision-making:

> "[T]his Court and many other courts all over the country, including the Supreme Court of Appeal, have stated that detention of illegal foreigners for more than 30 days and 120 days without a valid warrant of arrest is unlawful and unconstitutional. In spite of these judicial pronouncements, the respondents still persist in detaining illegal foreigners for more than 30 days and a maximum of 120 days without valid warrants having been issued."[7]

The High Court proceeded to direct the Department to provide the South African Human Rights Commission with regular written reports on all foreign individuals detained in their facilities to ensure compliance with the legislation and court orders. Given the Department's failure to comply in the past, the Court concluded that "[a]n order without continued monitoring and reporting will be ineffective in vindicating the rights of detainees".[8]

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[4] *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (12 March 2010) at 552.
[5] *Sikuola v The Minister of Home Affairs* [2012] ZAGPJCH 98 (18 May 2012).
[6] Id at [34].
[7] *South African Human Rights Commission and 40 Others and the Minister of Home Affairs: Naledi Pandor and 4 Others* [2014] ZAGPJHC (28 August 2014) at [45].
[8] Id at [44].

A similar pattern of non-compliance with judicial decision-making exists in the Department's deportation practices. In 2001, the Constitutional Court held in *Mohamed*[9] that to deport an illegal foreigner to a country where he or she will stand trial and face the death penalty is a violation of that person's constitutional right to life and dignity unless assurances can be made by the foreign country that the death penalty will not be imposed.[10] In that judgment, the Court made clear that to deport an individual to a country where he or she may face the death penalty "ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment."[11]

In 2010, the High Court restated the principle established in *Mohamed* when the Department again decided to deport two foreign nationals who upon deportation would face trial and possible execution.[12] The Department, despite the clear holding in *Mohamed*, defended it's actions and argued that because the foreign country in this case had refused to provide assurances that the death penalty would not been imposed, the Department had no choice but to deport without those assurances. In upholding the High Court's judgment, the Court reiterated its earlier holding, making clear the principle that the government of South Africa may not, under any circumstances or in any capacity, participate in the imposition of the death penalty on any individual.[13]

A stark example of non-compliance with judicial decision-making by the Department can be seen in a pair of judgments handed down by Judge Davis of the Western Cape High Court.[14] The case concerned the deportation of an Uzbek national, Ms Mukhamadiva, who arrived at the Cape Town International Airport with a valid visa. Ms Mukhamadiva was deported before an investigation could be conducted into the legality of her presence in South Africa despite the fact that a court order had been issued instructing the Department officials to appear in court the following day to show cause why Ms Mukhamadiva should not be permitted to enter the country. The Chief Immigration Officer at the Cape Town Airport, Mr Hans Grobbler, received the court order but was instructed by his superior not to comply. Mr Grobbler insisted on non-compliance with the court order and refused to speak to the Judge who had issued the order over the phone

[9] *Mohamed and Another v President of the RSA and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC) (*Mohamed*).
[10] *Mohamed* at [61].
[11] Id at [59].
[12] *Tsebe and Another v Minister of Home Affairs and Others; Pitsoe v Minister of Home Affairs and Others* 2012 (1) BCLR 77 (GSJ).
[13] *Minister of Home Affairs and Others v Tsebe and Others* [2012] ZACC 16; 2012 (5) SA 467 (CC). This is a particularly interesting example as Roux relied on the Court's judgment in *Makwanyane* abolishing the death penalty as an example of successful acquiescence by the executive in the face of overwhelming public opposition. It is interesting to note then that the norm failed to animate the executive's decision making in both *Mohamed* and *Tsebe*.
[14] *Mukhamadiva v Director General of Home Affairs and Another* [2011] ZAWCHC 483 (21 November 2011) (*Mukhamadiva* I) and *Mukhamadiva v Director General Department of Home Affairs and Another* [2012] ZAWCHC 337 (23 October 2012) (*Mukhamadiva II*).

when asked to do so. Ms Mukhamadiva was returned to her country without a hearing and in violation of the court order.

The issue that was subsequently heard by the High Court was whether or not Mr Grobbler acted in contempt of court by refusing to comply with a court order. During the proceedings, two reasons for Mr Grobbler's non-compliance were highlighted by the parties. First, he was told by a superior that an order citing only the Director General and the Minister of Home Affairs prevented an immigration officer, like Mr Grobbler, from obeying that order. Second, the Head of Immigration for the Western Cape was on record stating that court orders must be served on Parliament leading to Mr Grobbler's misunderstanding as to the nature of court orders and their implementation.

Mr Grobbler's reaction to a court order stems from a much larger issue of procedure and compliance with judicial decision-making by the Department. His refusal to speak to a judge over the phone further demonstrates "a clear breakdown between the department and court".[15] Thus, while the Court found that Mr Grobber was not in contempt of court, it noted what appeared to be a "serious lack of education that immigration officials require in order to deal with these difficult questions which could allow them to implement the law and safeguard legal rights."[16]

In light of clear misinformation circulating within the Department of Home Affairs, Davis J proceeded to order the Head of Immigration for the Western Cape to submit a report detailing current procedures to be followed by officials served with an urgent order and whether a plan had or would be adopted to educate immigration officials in how to comply with court orders.[17]

The report that was subsequently submitted to the Court revealed that the Department's procedures had been based on a misinterpretation of international law, which led to the conclusion that immigration officials have no authority to in an international airport.[18] In an advisory judgment, Davis concluded that the report and the Department's procedures are "manifestly flawed" and cannot under either international law or the Constitution "justify the approach to the enforcement of court orders" adopted by the Department.[19] He makes the judgment available to the Department with the objective that adequate policy "reflecting the Department's commitment to the Constitution and the rule of law be followed in the future."[20]

[15] *Mukhamadiva I* at 13.
[16] *Mukhamadiva I* at 12.
[17] *Mukhamadiva I* at 14.
[18] *Mukhamadiva II* at [8]-[9].
[19] *Mukhamadiva II* at [20].
[20] *Mukhamadiva II* at [21]

Attitudes on Domestic Violence: the Domestic Violence Act and compliance

Domestic violence is a particularly complicated area of law to regulate because of the private and intimate nature of the crime. Domestic abuse occurs in the home and the perpetrator is someone close to and often loved by the victim. The scene of the crime and the relationship between victim and abuser are both spaces that are traditionally protected from state intervention. As a result, domestic violence is often viewed as a family matter and officials are reluctant to intervene in that space and to turn what otherwise appears to be a civil matter into a criminal one. The first piece of legislation designed to combat domestic violence in South Africa, the Prevention of Family Violence Act of 1993 (PFVA),[21] reflected the view that domestic violence is, at its core, a family issue in the following explanation of its purpose:

> "The purpose of this draft bill … is to make simpler, shorter and more effective procedure possible. A new, more effective system may contribute to a strategy to deal with domestic violence outside the criminal courts in order to maintain family unity."[22]

It is clear from the above that the intention of the PFVA was, to the extent possible, to keep domestic violence outside of the criminal space. The priority was also to keep families together. This view clearly misunderstands the nature of domestic violence and the need to prioritize the safety of abused women over all else, including family unity. Research has shown that tactics like mediation and counseling designed to bring a victim and batterer back together are detrimental to the victim and very rarely reduce levels of violence.[23]

In 1996, in light of concerns raised regarding the PFVA, the South African Law Commission formed a committee of feminist lawyers and experts in domestic violence in order to make recommendations on amendments to the PFVA.[24] The product of this was the Domestic Violence Act of 1998 (DVA),[25] which, amongst other things, expanded the definition of a domestic relationship, defined specific acts of violence (including economic), and did away with sheriff's fees for service of court orders.

Twelve days before the DVA came into force, the Constitutional Court handed down judgment in a case challenging the legality of provisions of the PFVA (and, by extension, equivalent provisions of the DVA) that allow a court to authorize a warrant of arrest when it issues a

[21] 33 of 1993.
[22] From the explanatory memorandum of the draft Bill, cited in Joanne Fedler, "Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993—An Evaluation After a Year in Operation" (1995) 112 *South African Law Journal* 231 at 237.
[23] Fedler above n22 at 238-9.
[24] Lisa Vetten, "Addressing domestic violence in South Africa: Reflections on strategy and practice," Centre for the Study of Violence and Reconciliation, South Africa (2005) at 3-4.
[25] 116 of 1998.

protection order but suspend that warrant on condition that the protection order not be violated.[26] Justice Sachs, writing for the Court, refers to sections of the Constitution and international treaty obligations that create a duty on the state to deal effectively with domestic violence.[27] Section 12(1)(c) of the Constitution provides that everyone "has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources." Read with section 7(2)[28] of the Constitution, Justice Sachs states, "section 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence."[29]

The Court, in emphasizing the duty of the state to protect individuals from harm from *private* sources, makes clear that the private nature of domestic violence cannot be used to justify inaction by state actors. Earlier in the same paragraph, Sachs writes:

> "All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on our family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished."[30]

Not only can the nature of domestic violence not be used to justify inaction by the state, the Court goes on to comment on the systemic problems of inaction:

> "The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. The also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorization of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patters of systemic sexist behaviour are normalized rather than combatted."[31]

In its discussion of the constitutional principles underlying domestic violence legislation, the Court clarifies the substantive meaning of those constitutional rights and the state's subsequent obligation. In so doing, the Court makes clear that the right to be free from private violence is one that the state has a duty to protect. Furthermore, ineffective action by the State and the perpetuation of systemic sexist behaviour form part of the harm that the state has a constitutional obligation to protect individuals from.

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[26] *The State v Baloyi and Others* 2000 (2) SA 425 (CC) (*Baloyi*).
[27] *Baloyi* at [11]-[13].
[28] Section 7(2) reads: "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."
[29] *Baloyi* at [11].
[30] *Baloyi* at [11].
[31] *Baloyi* at [12].

In 2005, the Court had opportunity to reiterate the principles set out in *Baloyi* in a near-identical challenge to the Domestic Violence Act, *Omar*.[32] Van der Westhuizen, writing for the Court, states:

> "Whereas the privacy of the home and the centrality attributed to intimate relations are valued, privacy and intimacy often provide the opportunity for violence and the justification for non-interference. … It is understandable for the legislature to enact measures that differ from those generally applicable to criminal arrests and prosecutions. It is clear that the Act serves a very important social and legal purpose."[33]

With these two judgments, the Constitutional Court effectively takes domestic violence out of the sphere of private family matters and places it squarely within the ambit of the state's obligation to uphold the Constitution. This shift in the law's treatment of domestic violence has generally not been reflected in the behaviour of street-level bureaucrats, like police officers, tasked with upholding the law.

In a 2006 study in one locality in Mpumalanga, only 6.7% of cases of domestic violence that were reported to the police, courts or hospitals made it into official police statistics as only 63 of these women pressed charges.[34] While this could simply be the result of women choosing not to press criminal charges against their partners, a more recent study in Gauteng found that only 8% of victims interviewed were informed by the police that they could press criminal charges against their abusers.[35] The same study revealed that victims were being encouraged to mediate with their abusers rather than have them arrested.[36] Another study in Mpumalanga found that in 14% of reported cases of domestic violence, families were left to settle the matter themselves, and in 14.5% the police simply warned the perpetrator without taking the matter further.[37]

The above reports demonstrate a continued pattern by the police of treating domestic violence as a family matter that should be resolved privately without state intervention and certainly without involvement of the criminal justice system. One of the co-authors of this paper (Vance) interacts with victims of domestic violence in her capacity as a legal advisor at Lawyers against Abuse, a non-profit organization based in Johannesburg. Through her work, she has observed a tendency

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[32] *Omar v The Government of the Republic of South Africa and Others* 2006 (2) SA 289 (CC) (*Omar*).
[33] Id at [18].
[34] Lisa Vetten, Teresa Le, Alexandra Leisegang and Sarah Haken, *The Right and the Real: A Shadow Report Analysing Selected Government Departments' Implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act (2010)* at 31.
[35] Lopes, C., Massawe, D. and Mangwiro, M. (2013) Johannesburg: Heinrich Böll Foundation and Tshwaranang Legal Advocacy Centre to End Violence Against Women, *Criminal Justice Responses to Domestic Violence: Assessing the Implementation of the Domestic Violence Act in Gauteng* at 58.
[36] Id at 5.
[37] Lisa Vetten, Francoi van Jaarsveld, Phineas Riba and Lindiwe Makhunga, *Implementing the Domestic Violence Act in Acornhoek, Mpumalanga*, February 2009 at 3.

on the part of state actors to shy away from legal remedies to domestic violence. One woman, after having been physically dragged and threatened by her partner, recounted the following:

> "When the police arrived I informed them that I wanted to leave the [perpetrator] and take my children with me. The police responded by saying that I should attempt to solve the matter, and that I could leave, but because it was already 4am it would be best if I let the children stay with the [perpetrator] for the remainder of the night and that I could return later that day to fetch them."[38]

The police clearly failed to view the above situation as one in which the woman was in severe danger for her life and where a legal remedy would be appropriate. The fact that the police suggested that the children should be left with the abusive partner further demonstrates their perception of this incident of violence as one that should not prevent the victim from returning to co-habitat with her abuser. Similar attitudes can be found with other street-level bureaucrats charged with implementing the Domestic Violence Act, such as prosecutors and Magistrates. In one instance, a prosecutor assigned to a case of domestic assualt leading to the near-death of the victim informed Vance that he "felt sorry for the respondent" as it was "clear that he only did what he did because he loves his wife (the victim)". In another case, a Magistrate sentenced a man accused of assaulting his wife to a 5 year suspended sentence. His reasoning for suspending the sentence was that this issue should have been resolved by the respective families of the parties and in his judgment he urged the families to come together to create unity between the victim and abuser.

HIV Discrimination in Employment: South African National Defense Force

In 2001, the Court had occasion to make a definitive pronouncement on the unconstitutionality of employment discrimination against persons living with HIV.[39] The South African National Defense Force (SANDF) nevertheless had adopted and continued to employ a complete ban on the recruitment of people living with HIV. This policy was challenged in 2008 in the High Court, which issued an order directing SANDF to amend its hiring and recruitment policies to comply with the Constitution. SANDF, in accordance with the court order, amended its policies to prohibit discrimination on the basis of HIV positive status.

On 29 September 2014, the High Court handed down judgment in a case challenging SANDF's continued practice of discrimination against persons living with HIV.[40] The High Court found that, despite the new employment policies, SANDF's behaviour was no different from the policy that was declared unconstitutional six years earlier.[41] SANDF's justification for its behaviour

[38] Consultation on 4 March 2014.
[39] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).
[40] *Andisiwe Dwenga and Others v Surgeon-General of the South African Military Health Service and Others* [2014] ZAGPPHC 727 (26 September 2014) *(SANDF)*.
[41] Id at [8].

was that over the six years since the court order, it had been receiving an overwhelming number of applications and was forced to therefore create a system by which to eliminate potential applicants. In defending its actions, SANDF asserted the following:

> "It is submitted that there are circumstances which justify the departure from the strict *ipsissima verba* of the order and that the respondents were entitled to apply their interpretation of the order, particularly in view of the changed circumstances that have presented themselves".[42]

The above statement demonstrates a fundamental misunderstanding of the role of judicial decision-making and its relationship to the functioning of the executive arm of government.

Failure to incorporate constitutional principles in law-making: the concept of independence

In 2009, in a highly controversial move, the President of South Africa signed into law legislation effectively disbanding the Directorate of Special Operations (DPO), a specialized national crime-fighting unit, and replaced it with the Directorate of Priority Crime Investigation (DPCI).[43] In 2011, the Constitutional Court held in *Glenister* that the newly established DPCI was not sufficiently independent to pass constitutional muster.[44] The Court suspended the declaration of unconstitutionality for a period of 18 months in order to give the executive the opportunity to remedy the defect.[45]

The executive responded to the Court's order with the South African Police Service Amendment Act,[46] which was then challenged for non-compliance with the constitutional requirement for independence as outlined by the Court in *Glenister*. The case is currently before the Constitutional Court on appeal from the High Court, which found some, but not all, of the challenged provisions of the Amended Act unconstitutional.[47]

There is nothing to suggest that in proposing the Amendment Act, the government intentionally included provisions that compromised the independence of the judiciary. At best, what it does suggest is a failure to fully understand the underlying principle of independence as outlined by the Constitutional Court. There is no need, for the purposes of this paper, to discuss each challenged provision of the Amendment Act. However, to demonstrate the dissonance between the Court's initial ruling and the executive's implementation of that holding, an example is illustrative.

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[42] Id at [14].
[43] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (*Glenister*) at [1]-[2].
[44] Id at [163], [248].
[45] Id at [251].
[46] 10 of 2012.
[47] *Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of South Africa and Others* [2014] 1 All SA 671 (WCC).

In *Glenister*, the Court listed aspects of the laws governing the DPCI that compromised its independence. Amongst those was the lack of employment security:

> "[T]he members of the new Directorate enjoy no specially entrenched employment security. … In our view, adequate independence requires special measures entrenching their employment security to enable them to carry our their duties vigorously."[48]

The DSO, unlike the new specialized unit, was governed by laws that provided for special removal procedures to their members, which in turn provided special protection that "served to reduce the possibility that an individual member could be threatened – or could feel threatened – with removal for failing to yield to pressure in a politically unpopular investigation or prosecution."[49] The clear underlying purpose of these protections is to minimize the possibility that a member of the unit could be compromised, thereby impacting the integrity and efficacy of the entire office.

The Amendment Act uses language from the judgment but, according to the High Court, fails to meet the intent expressed therein. In *Glenister*, the Court uses the DSO legislation to demonstrate employment security, citing a provision that states that a deputy may be removed from office only by the President, "on grounds of misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office." Section 17DA(2)(a) of the Amended Act lists the above grounds verbatim on which a Head or Deputy Head of the DPCI can be suspended or removed from office. However, the following subsections make provision for the Minister to suspend a Head or Deputy Head without a hearing and without pay.

The use of exact language in the Amendment Act suggests that the Executive referred to *Glenister* in drafting the new laws but failed to realize the underlying intent of the Court to ensure independence of a specialized anti-corruption unit. The result, whether or not intentional on the part of the executive, is to undermine the Court's authoritative legitimacy when a clear order and judgment of the Court fails to be incorporated into the government's decision-making, which in turn impedes the ability of judicial decision to create substantial impact on the country's structures and laws.

III EXECUTIVE RESPONSE TO JUDICIAL NORM CREATION

The above examples suggest that the relationship between the courts and the executive is far more complex than that posited by Roux. Roux rightly suggests that a court's institutional security is contingent on more than the absence of direct attacks from the executive.

[48] *Glenister* at [222].
[49] *Glenister* at [226].

Authoritative legitimacy, being the degree to which the executive acquiesces to court judgments, is another important component of a court's institutional security. The examples above demonstrate that a court's ability to avoid direct attacks from the executive by virtue of its deft use of principle and pragmatism is not necessarily sufficient to achieving institutional security. Simply put, if the executive simply ignores or only half-heartedly implements court judgments, this undermines institutional security regardless of whether an overt attack on the court has been made.

To fully understand the way in which judicial decisions are incorporated into the work of the executive, it is important to recognize that the executive is highly complex.[50] It is made up of diverse activities that produce a multiplicity of decisions before a final decision is made which can be judicially reviewed.[51] Likewise, there exist a complex set of processes, activities and dynamics that occur in response to a judgment of a court. It is on these processes and dynamics that the prospects for the accurate and faithful implementation of a judicial decision rest.

Furthermore, judicial decisions can influence executive decision making both directly and indirectly. Directly through a clear order intended for a particular public body or actor. Indirectly through the constitutional values that emerge from a judgment. These values are part of the courts' process of norm creation and should be incorporated into the manner in which the executive operates.

As noted above, public bodies or actors to which judgments are directed can be categorized as either senior-level executives or street-level bureaucrats.[52] This is predicated on the Weberian conception of bureaucracy in which the bureaucracy is divided into individual decision-makers, which are situated at different levels of a hierarchy.[53] However, we depart from the classic Weberian conception in that directives issued from one level of the hierarchy to the next are not necessarily carried out accurately and faithfully.[54]

Within this model, street-level bureaucrats include decision-makers in public institutions such as schools, police, welfare departments, environmental agencies and various other administrative agencies and government departments. Lipsky argues that public policy developed by senior

[50] Simon Halliday *Judicial Review and Compliance with Administrative Law* (2004) at 41.
[51] Keith Hawkins (ed) *The Uses of Discretion* (1992).
[52] This same distinction is alluded to in Bradley C. Canon "Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches" in Marc Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) at fn16 at 80.
[53] H. H. Gerth and C. W. Mills (eds) *From Max Weber: Essays in Sociology* 1946. *See also* Terry Moe The New Economics of Organization *American Journal of Political Science* Vol. 28, No. 4 (Nov., 1984) at 739-77.
[54] H. H. Gerth and C. W. Mills (eds) *From Max Weber: Essays in Sociology* 1946.

members of the executive or parliament is typically different from that which is experienced by the public when engaging with street-level bureaucrats tasked with implementing that policy.[55]

At the core of Lipsky's argument is that the inherent circumstances of the task faced by street-level bureaucrats makes them incredibly difficult to manage. He goes so far as to claim that deviations from stated policy, rules, and regulations are tacitly accepted by those who hold street-level bureaucrats accountable as pragmatic solutions that ensure that a task is completed.[56] These pragmatic solutions are required by street-level bureaucrats due to the unpredictability of the individuals, facts, and needs faced. Given this complexity and variety in the circumstances in which street-level bureaucrats are required to operate, Lipsky concludes that prescribed responses are not only inappropriate but impossible, which means that discretion is inevitable.[57]

The question is therefore, if bureaucracies are indeed, to a certain extent, "at the mercy of lower participants"[58], what factors actually guide decision-making of street-level bureaucrats? What reference points are used when interpreting the directives issued by their superiors and the legislation that governs their operation?

Disagreement over a policy or the interpretation of governing legislation is one clear factor that guides decision-making of street-level bureaucrats. Another factor is the need to develop coping mechanisms.[59] These are the responses that street-level bureaucrats initiate to deal with challenges that result from inadequate resources, few controls, indeterminate objectives, and discouraging circumstances.[60] These coping mechanisms manifest in three forms: the use of routines and stereotyping, the modification of the scope of their duty in order to bridge the gap between objectives and resources, and the modification of perceptions of clients to bridge the gap between objectives and accomplishments.[61]

There exists a complex mesh of incentives and norms that influence the manner in which decisions at this level are made, including decisions regarding the construction of coping mechanisms. On the one hand, as agents of their superiors, street-level bureaucrats are subject to certain mechanisms designed to align their incentives with those of their superiors. On the other hand, street-level bureaucrats are subject to their own normative assumptions. In certain policy areas, these assumptions and prejudices can manifest far more acutely than in others. For

[55] Michael Lipsky *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (2010) at 17.
[56] Id at 18.
[57] For more recent descriptions of the discretion available to street-level bureaucrats, see Evans, Harris "Street Level Bureaucracy, Social Work and the (Exaggerated) Death of Discretion" (2004) *British Journal of Social Work* 34: 871 and Taylor & Kelly "Professionals, Discretion and Public Sector Reform in UK: Revisiting Lipsky" (2006) 19 *International Journal of Public Sector Management* 629.
[58] D Mechanic "Sources of Power of Lower participants in complex organizations" *Administrative Science Quarterly* (1962) at 349.
[59] See Lipsky above n55.
[60] Id at 82.
[61] Id 82-3.

instance, a state actor tasked with the granting of asylum to foreigners, or the investigation of an incident of domestic violence may have his prejudices regarding foreigners or woman influence his decision-making far more than in other administrative capacities. As such, there is the potential in these cases for a conflict between implementing a policy imbued with a constitutional norm, and whatever social norms a particular decision-maker may have already internalized.

Given that the street-level bureaucrats are not political appointees and need not display political fealty to any particular ideology, their norms most likely proportionately reflect those of society.[62] As mentioned above, the increased and inevitable discretion that breeds the various coping mechanisms used by street-level administrators allows for these coping mechanisms to, in part, be shaped by the social norms that guide their behavior. As a result, what becomes relevant are the set of norms society has adopted. If societal norms reflected principles such as equality of the sexes and the eradication of prejudice, it is safe to assume that instances of inequality would be reduced.[63] Similarly, if street-level bureaucrats internalized these same principles, instances of inequality arising from their decisions would be reduced.[64]

Take for example the decision of SANDF to employ discriminatory hiring practices in the face of a clear directive by the court to refrain from such discrimination. In that case, SANDF identified in its arguments a challenge to its function, namely, an overwhelming number of applications for employment. Its reaction to this challenge was to develop a coping mechanism: the practice of discriminating against persons with HIV in hiring. It perceived the court order as subject to deviation in order to justify its behaviour. SANDF's actions also suggest a divergence between judicially created norms and pre-existing societal norms on the treatment of persons living with HIV.

IV THE IMPORTANCE OF NORMS

Social norms play an important role in the decision-making of members of society, regardless of their professional context.[65] Social norms and the mechanisms through which they are enforced

[62] We suggest that the relevant norms in question are homophobia, sexism, racism, xenophobia and persistent stigmas regarding HIV/AIDS.
[63] See United Nations Development Programme, Human Development Report 1995, at 11-28, 99-124 (1995) and Susan M. Okin, A clash of basic rights? Women's Human Rights, Identity Formation and Cultural Difference (1995) (unpublished manuscript).
[64] This argument has been made in the context of judicial decision-making, see Timothy E. Lin "Social Norms and Judicial Decision-making: Examining the Role of Narratives in Same-sex adoption cases" (1999) 99 *Columbia Law Review* 739. In the administrative context, see Simon Halliday "Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law" (2000) 27 *Journal of Law and Society* 449.
[65] On this, see Cass Sunstein "Social Norms and Social Roles" (1996) 96 *Columbia Law Review* 903 at 908. See also J Helliwell, Shun Wang and Jinwen Xu "How durable are social norms? Immigrant trust and generosity" NBER Working Paper.

are arguably far more influential in guiding social behavior than laws, rules and legal sanctions.[66] This claim has been made quite convincingly in the legal realist movement,[67] law and society literature,[68] and organizational economics.[69] In fact, studies have shown an inverse relationship between the enforcement of law and the social norms that exist within a community. In other words, where the law conflicts with social norms, the enforcement of the law declines substantially.

One explanation for this phenomenon is that the sanctions applied by a community on those that deviate from a social norm, such as guilt or shame,[70] are a more effective motivational force for adherence than legal sanctions or sanctions imposed by an entity external to the community.

The question is then what role judicial decisions play with regard to social norms. In exploring this question, we do not attempt to examine the extent to which judicial decisions can change social norms. Rather, we simply accept that the intention of law, and in particular court judgments, is to perform an expressive function.[71] Judgments are statements on what is good and bad and through the articulation and promulgation of these statements, courts attempt to influence existing norms and behavior of those to whom a judgment is addressed. In the context of this paper, the courts are addressing the executive. As such, we conceptualize a court's effort in this regard as one half of a dialogue between the court and the state.

The judiciary is, through the mechanism of review, whether constitutional or administrative, involved in the process of constituting and propounding social norms that are compliant with the Constitution, with the intention that such norms alter the behavior of those to whom the courts are addressing. When courts are confronted with a review of government action, whether directly with reference to a right enshrined in the Bill of Rights, or indirectly through the mechanism of administrative law, it is giving content to and creating a norm. This is the process of giving content to the rights enshrined in the Constitution, including section 33 and PAJA[72] through which it is realized.

It is however, important to note that courts rely on mechanisms that reside within the executive in order to sanction deviations from its norms. Ultimately, the police, sheriffs and other

[66] See Eric Posner "The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action" (1996) 63 *The University of Chicago Law Review* 133.
[67] See Karl N. Llewellyn "What Price Contract? – An Essay in Perspective" (1931) 40 *Yale Law Journal* 704 at 712 – 714 and William Twining *Karl Llewellyn and the Realist Movement* (1973) at 35-6.
[68] Stewart Macaulay "Non-Contractual Relations in Business: A Preliminary study" 28 American Society Review 55, at 62 – 67 (1963) and Symposium, "Law, Private Governance and Continuing Relationships" (1985) *Wisconsin Law Review* 461.
[69] Daron Acemoglu and Matthew O. Jackson "Social Norms and the Enforcement of Laws" (2014) (unpublished manuscript) available at http://ssrn.com/abstract=2443427.
[70] Posner and Rasmusen "Creating and Enforcing Norms, with Special Reference to Sanctions" (1999) 19 *International Review of Law and Economics* 369.
[71] See Sunstein above n65 at 903
[72] Promotion of Administrative Justice Act 3 of 2000.

accountability measures used to enforce judicially created norms are controlled by the executive. Therefore, without coercive means available, the courts rely exclusively on their authoritative legitimacy when directing norms at the executive.

However, as displayed by Lipsky, street-level bureaucrats constitute a community and are guided by the norms prevalent in that community more than they are by those created by the judiciary. Furthermore, the norms adopted by this community often proportionately represent those of the communities from which the members are drawn. As a result, where judicially created norms conflict with societal norms, they often also conflict with norms directing the behavior of street-level bureaucrats.

A useful example of the relative inadequacy of external controls of street-level bureaucrats is *Somali Association*.[73] The South African Police Service (SAPS) in Limpopo initiated a policy called "Operation Hardstick" to close businesses in Limpopo that were operating without requisite permits. In carrying out the SAPS policy, policemen closed 600 businesses, many with proper licenses, confiscated equipment and stock, and arrested traders and their employees. The policemen further told traders that foreigners are not permitted to operate businesses in South Africa and that the foreigners (predominantly Somali and Ethiopian traders) should leave the municipality.[74] The SCA described instances of xenophobic pressure being exerted by local business forums before this policy was adopted and which ostensibly contributed to the manner in which the police carried out the policy.[75] These actions were taken despite the policy objectives being the removal of unlicensed business and the fact that many of the businesses targeted possessed valid licenses.

Another example is the Constitutional Court's pronouncement in *Baloyi* and *Omar* on domestic violence as a crime that cannot be confined to the intimate family space but rather must be dealt with by state actors as part of their obligation to uphold the constitution. With these cases, the Court created norms, embedded in constitutional principles, regarding perceptions of victims of domestic violence and appropriate responses to violence in the home. Despite this, the norms created by the Court have not trickled down to substantially impact street-level bureaucrats like police officers in their treatment of victims of domestic violence as demonstrated above.

As a further example, with the two judgments in *Baloyi* and *Omar*, the Court effectively takes domestic violence out of the sphere of private family matters and places it squarely within the ambit of the State's obligation to uphold the Constitution. In so doing, the Court is creating social norms regarding perceptions of victims of domestic violence and appropriate responses to violence in the home. Despite this, the norms created by the Court have not trickled down to

[73] *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143.
[74] Id at [4].
[75] Id at [11]-[18].

substantially impact front-line bureaucrats like police officers in their treatment of victims of domestic violence.

It is important to acknowledge that social norms do not play the exclusive determinative factor in how executive decisions are made and their influence depends in large part on the level of discretion an individual street-level bureaucrat has in his or her decision-making. Poor implementation of judicially created norms may also be a function of the manner in which judicial decisions are communicated from the courts to street-level bureaucrats. Therefore a closer look at the interactions between the judiciary and the executive, and between higher and lower level executives, is relevant to any discussion of the effect of judicial decision-making on the executive.

V INTERACTION BETWEEN INSTITUTIONS

It is important to understand the process of executive decision-making in order to identify possible reasons for why judicially constructed norms do not filter down to effect the behaviour of street-level bureaucrats. Unfortunately, there has been limited research in this area,[76] however brave efforts have been made to describe in theory the path that judicial norms take within the executive. Hertogh[77] and Canon[78] have created similar models of administrative decision-making that are instructive. The model describes the process of administrative decision-making in three phases: *information*, *transformation* and *processing*. In our view, these phases are all subject to the manner in which each level and institution involved communicates with one another.

Information

Information is the process of certain individuals, most often senior-level executives, within the bureaucracy understanding the content of a judicial decision. This involves interpretation and extraction of the principles from the judgment. This process ranges in complexity. On the one hand, the department to whom the judgment is addressed will likely need only to understand and follow the order of the court without interrogating in great detail the court's reasoning. On the other hand, state actors who's duties fall within the ambit of a judgment but are not directly cited in the legal proceeding that gave rise to the matter will have to extrapolate a general principle from the reasoning in the judgment and apply it to the distinct context in which they find themselves. This may be a decidedly more complex task.

[76] K Hawkins *Law as a Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002).
[77] Marc Hertogh "Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands" (2001) 23 *Law and Policy* 47.
[78] Canon above n52.

In this respect it is important to understand the role of the form of communication between the two arms of government. As mentioned above, this communication takes place primarily by means of a judgment. As a result, if the judgment is poorly written, reasoned or difficult to comprehend, the manner in which it is implemented by senior-level executives tasked with understanding it, will vary widely.[79]

Transformation

Once senior-level executives believe that a judgment calls for behavioral change, they must decide what change should take place. This then forms a crucial stage for determining the judgment's impact. The impact of a judicial decision is arguably hampered by the degree to which the status quo is entrenched within the bureaucracy. If executive decision-makers are overly attached to the current norms, they may prove reluctant to change behaviors or procedures to better align with constitutional values constructed by a court. It is this desire to maintain the status quo that may explain the executive's tendency to appeal decisions of lower courts requiring a change in behavior to the appellate courts as was done by the Department of Home Affairs in the context of detention and deportation procedures.

A reason for the executive's attachment to the status quo could be the desire to avoid the costs involved with altering administrative behavior. Other reasons could be that a judgment forces a divergence from the agency's primary objectives or limits the domain over which the agency may exercise power.

Another possibility is that an agency may disagree with a court's interpretation of its empowering statute. Given the agency's expertise in the subject-matter of its work, a doctrine of deference much like that found in the United States could prove useful in mediating conflicting interpretations.[80] Unfortunately, South African jurisprudence has yet to develop a rigorous doctrine of deference with respect to interpretation of law by administrative agencies.[81]

Processing

This stage involves the potential reactions from within the agency to the proposed change in the administrative process in light of the judgment. As mentioned above, a change in policy in response to a court judgment will typically occur at senior levels of the administrative agency as, for example, occurred in the developing of rules governing an anti-corruption unit.[82] However, as the directive containing the change in policy begins to move down the administrative

[79] See Antony N. Allott *The Limits of Law* (1980) London: Butterworth; Richard M. Johnson *The Dynamics of Compliance: Supreme Court Decision-making from a New Perspective* Northwestern University Press and Stephen L. Wasby *The Impact of the United States Supreme Court: Some Perspectives* Dorsey Press.
[80] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*).
[81] Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 South African Law Journal 484; See also Cora Hoexter *Administrative Law* (2010).
[82] See discussion above in Part II.

hierarchy, it may encounter resistance. SANDF's failure to comply with constitutional hiring policies created in response to a court order is an example of resistance within an agency to policies created by senior level executives. This resistance manifests in defensive mechanisms that allow bureaucrats to avoid the application of the change. These mechanisms may include exploiting the inability of the court to monitor implementation by obscuring the decision-making process or creating and then exploiting a technicality in the law that justifies the avoidance.

The motivation to adopt these defensive mechanisms, especially at street-level, may be that bureaucrats have become attached to the coping mechanisms that they have developed and, even in the face of demands from their superiors, may be reluctant to abandon those tools. Alternatively, a failure in implementation of a judgment may come as a result of a clash between judicial norm-creation and existing societal norms.

Communication

In our view, a central theme that runs through the three processes above is *communication*. This is so prevalent that the three phases become less distinct than initially suggested. At the first level of communication, the court is primarily communicating with the administrative agency, lower courts, and the general public. At the second level of communication, senior-level executives communicate their interpretation of the court's judgment in the form of altered policies to street-level bureaucrats. The effectiveness of reception, understanding and, to a large extent, compliance, rests on the quality of communication at each level.[83]

The communication between the court and senior-level executives occurs through the judgment. Between the senior and street-level executives, the method of communication is typically "soft law" which includes rules, regulation and guidelines developed by senior-level executives.[84]

At the first level of communication, an example from the Constitutional Court offers a compelling argument for greater attention to clarity in the penning of judicial reasoning. A lack of clarity in a judgment can provide a recalcitrant state (or lower court judges) the opportunity to justify non-acquiescence.[85] In our view, a clear and unambiguous judgment does as much to limit this likelihood as it does to limit the possibility of confusion in good faith efforts to abide by the ruling.

[83] D. S Van Meter and C. E Van Horn "The policy implementation process: intergovernmental relations and social policies" Presented at the Annual Meeting of the American Political Science Association, Chicago (1974) at 44-7.
[84] L. Sossin "The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada" in MarcM Hertogh and SimonS Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004).
[85] Lawrence Baum "Implementation of Judicial Decisions, An Organizational Analysis" (1976) 4 *American Politics Quarterly* at 92.

An example demonstrating the need for clarity in judgments is *Walele.*[86] The Court's majority judgment in *Walele* held that a local authority cannot approve building plans, even should they comply with the requirements articulated in the legislation governing buildings standards, unless it is satisfied that the proposed building will not disfigure the area in which it is built or "derogate the value" of surrounding property. The majority judgment of the SCA in *True Motives* disagreed with the majority held view in *Walele*. When confronted with the argument that the interpretation of the obligation of the local authority explicated in *Walele* stood as precedent and governed the facts in *True Motives*, the SCA argued that the portion of the judgment in which the relevant passages resided were *obiter* and therefore not legally binding for the purposes of *True Motives.* Furthermore, the SCA argued that the relevant portions of the judgment were wrong. A particularly telling remark by the SCA when justifying its departure from *Walele* is that certain paragraphs "of Walele [are], at best, ambiguous"[87] and "with respect, wrong."[88] In a recent judgment, the Court held predictably that the statements made by the Court in *Walele* were not *obiter* and therefore constituted binding precedent for all lower courts including the SCA.[89]

Communication through judgments is also important in ensuring that the judgment is implemented as intended by the judiciary at street-level. The formal manifestations of this communication are rules, regulation and guidelines (hereinafter collectively referred to as *rules*). However, given the inevitable existence of discretion at the street-level, this raises the interesting relationship between rules and discretion. The matter was dealt with by the Court in *Dawood*,[90] where skepticism of wide and unregulated discretion was expressed. As a solution to the presence of discretion, which resulted in the violation of a Constitutional right, the Court ordered that, when faced with wide discretion, parliament must draft rules and guidelines that better articulate the manner in which administrative agencies should implement legislation.

Unfortunately, the Court neglected to grapple with several issues: i) the inevitability of discretion despite the presence of rules; and ii) the superior competence of the administrative agency in developing appropriate rules to govern its own behavior.

The first concern calls into question the general effectiveness of rules as a mode of communication directed at the street-level bureaucrats. Briefly, the operation of rules requires both interpretation and application and in doing both a great deal of discretion exists. [91] As a

[86] *Walele v City of Cape Town and Others* (CCT 64/07) [2008] ZACC 11; 2008 (6) SA 129 (CC).
[87] *True Motives 84 (Pty) Ltd v Madhi and Others* 2009 (4) SA 153 (SCA) (*True Motives*) at [33].
[88] Id at [35].
[89] *Turnbull-Jackson v Hibiscus Court Municipality and Others* (CCT 104/13) [2014] ZACC 24 (11 September 2014) at [71].
[90] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936 (7 June 2000).
[91] Keith Hawkins "*Using Legal Discretion" in* Keith Hawkins (ed) *Uses of Discretion* (1992) at 35.

result, in general the presence of rules does little limit discretion, which, in the case of street-level bureaucrats allows for the development of coping mechanisms by street-level bureaucrats. Furthermore, rules may be counterproductive to efficient decision making by street-level bureaucrats.[92]

The second issue begs the question of which entity is best suited for the production of rules. Typically, arguments relating to the effective operation of administrative agencies suggest that the agency itself should formulate rules or guidelines that govern its own operation.[93] This position could potentially create a rather absurd result. If agency leaders are provided the opportunity to create rules based on their understanding of a court judgment, the adequate implementation of the judgment still rests on the understanding and acceptance of the judgment by agency leader. To avoid this, one would have to accept a less efficient administrative agency with the benefit of an agency that abides by the rule of law.

VI CONCLUSION

This paper aimed to interrogate the relationship between the judiciary and the executive and, more specifically, look carefully at the way in which judicial decision-making interacts with state actors. Based on the response of the executive to several recent judicial decisions, we conclude that a tension exists between the need to uphold the rule of law and societal norms that impact on executive actor's behaviour. Much has been written on the tension between South Africa's high constitutional standards in upholding socio-economic rights and practical restraints faced by the executive in realizing those rights on the ground. In the context of socio-economic rights, the interaction between courts and the state is seen as a dialogue, one which will lead to a solution that balanced the need to uphold the Constitution with the realities faced by a still new and developing democracy. Similarly, in examining the reaction of the executive to judicial decision-making we observe a dialogue, one between societal norms grounded in values inconsistent with the Constitution and judicially created norms borne out of constitutional principles. This ongoing dialogue is manifested through regular instances of executive non-compliance with judicial decision-making, a phenomenon that undermines the authoritative legitimacy of the courts and likely effects its institutional security. However, as with the judicial-executive dialogue on socio-economic rights, the tension with regard to compliance with judicial decisions is part of a larger process to bring South African state institutions in line with constitutional norms through a process that recognizes the context in which these institutions exist.

[92] See Lipsky above n15 at 15.
[93] D Galligan "The nature and function of policies within discretionary power" (1976) Public Law 332.