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Executive Acquiescence to Constitutional Norms and Judicial Decision-Making in South Africa

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EXECUTIVE ACQUIESCENCE TO CONSTITUTIONAL NORMS AND
JUDICIAL DECISION-MAKING IN SOUTH AFRICA

Andrew Konstant¹ & Shayda Vance²

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| I. INTRODUCTION | |

In 1994, South Africa emerged from under the rule of an oppressive Apartheid state to embrace a new set of principles and values guided by the ideal of constitutionalism.³ The nation adopted a Constitution⁴ designed to propel the country from autocratic rule to a democracy built on egalitarian values. In the spirit of constitutionalism, the South African government's powers are exclusively drawn from the Constitution, and its roles and responsibilities are continuously clarified through judgments of the Constitutional Court (Court). Furthermore, the norms articulated in the Constitution, which the South African state has committed to uphold, are constantly given content through judgments of the Court. Much like the state, the Court's primary interpretative anchor is the Constitution.⁵ In fulfilling its role as the check on the democratic institutions, it is bound exclusively by the perimeters of the Constitution. The result of this remarkable transition is that the Court is placed between the values contained in the Constitution on the one hand, and the values held by the population reflected through the prism of the executive and parliament on the other. While this has

³ See generally, Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SOUTH AFRICAN J. ON HUM. RTS. 31 (1994).

⁴ S. AFR. CONST., 1996.

⁵ *Id.* at § 1.

created a standard to which South Africa is held to, it also serves to remind us of what we have still to achieve.

This paper seeks to deal with instances in which the executive arm of the state fails to adhere to constitutional norms and standards in the implementation of judicial decisions. Several scholars have examined the Court's role in the newly formed constitutional democracy and the non-compliance by the executive with the Court's judgments. Theunis Roux, in attempting to explain the interaction between the South African Constitutional Court and the executive, has generously concluded that the Court's technique in coaxing the executive's adherence to principles elucidated in court judgments consists of a deft use of pragmatism, as well as principle.⁶ In this way, he has argued that the Court has attempted to protect and build its independence from political control by maneuvering through the political circumstances peculiar to South Africa and thus ensuring that its judgments are perceived as effective.⁷ Several other South African scholars have taken a critical view of the Court's reluctance to grant the values in the Constitution their fullest meaning, opining that such reluctance of the Court exemplifies the Court employing avoidance strategies so as not to risk its institutional independence by demanding too much of executive

⁶ THEUNIS ROUX, *THE POLITICS OF PRINCIPLE* 87 (2013). Roux wrote with specific reference to the period of the Constitutional Court that spanned the first ten years of democracy in South Africa, from 1995 to 2005. At its heart, Roux's argues that the Court was able to build and protect its institutional independence during its infancy by employing a strategy across its judgments that involved alternating between producing pragmatic and principled judgments.

⁷ *Id.* at 29.

decision-making.⁸ They argue that the effect of the Court's approach is to water down the intended strength of rights enshrined in the Constitution, thus depriving those in need of substantive justice.⁹

What this paper will attempt to show is that, regardless of how one perceives the Court's strategy with respect to the executive, there have been instances in which the Court has developed a substantive interpretation of constitutional principles, ordered that the executive adhere to those principles, and the executive has not complied. Assuming Roux's paradigm of principle and pragmatism reflects the strategy currently employed by the Court, executive non-compliance may be seen merely as the Court failing to rely on pragmatism where it would have been wise to do so. This paper suggests that the Court's approach towards the executive, while relevant, is not the only factor leading to non-compliance of state actors. Rather, there are other dynamics that influence the extent to which the state has adopted constitutional norms in its behavior.

In reflecting on the instances where a gap has emerged between judgments produced by the courts when interpreting the Constitution and decisions made by the executive in carrying out its administrative duties, focus must shift to the institutional dynamics that govern the decision-making processes of the executive. In doing so, we assume that the manifestation of the normative commitments of the state are entirely dependent on the behavior of what has been termed as "street-level

⁸ Brian Ray, *Evictions, Aspirations and Avoidance*, 5 CONST. CT. REV. 173, 219 (2013); see also David Bilchitz, *Avoidance Remains Avoidance: Is it Desirable in Socio-Economic Rights Cases?*, 5 CONST. CT. REV. 297 (2013).

⁹ See Ray, *supra* note 8, at 175; see generally, Bilchitz, *supra* note 8.

bureaucrats,”¹⁰ or bureaucrats that occupy positions at the public-facing level of administrative bodies, such as police officers, teachers, immigration officials, and recruitment officials.

The question then becomes, what creates a gap between judicial decisions, rooted in the Constitution, and the actions of street-level bureaucrats? The answer to this question is likely complex and multi-faceted. It should begin with the fact that the necessity for bureaucratic leaders to delegate functions to lower level officials carries with it a degree of discretion when carrying out those functions. This inherent discretionary power that accompanies such delegation results in the potential for a gap between the policies girded by constitutional values and the behavior of those individuals on whom such policies rely for implementation. We would postulate that at least two important factors exist that guide the use of administrative discretion and lead to the gap between what ordinary citizens experience when engaging with state actors and the ideal of how the law should be implemented as articulated in court judgments.

The first factor is the divergence between constitutional or legal norms and social norms. In making the arguments that follow in this paper, we have taken the term constitutional norms to represent those norms embodied within the Constitution, otherwise recognized as the rights and principles clearly articulated in the actual text of that document. We define legal norms as those norms created by the judiciary based on their understanding of the

¹⁰ See generally MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (2d ed. 2010).

Constitution. Legal norms give substance and content to constitutional norms. Finally, social norms are norms held by groups within society and guide decision-making of individuals within those groups. They consist of the informal rules that each individual feels obligated to follow and that are enforced through non-legal means that exist within social groups.

As members of society, street-level bureaucrats carry with them the social norms that exist in the communities or social groupings from which they are drawn. Significant literature detailing the value and effects of social norms in guiding behavior suggests that despite the presence of formal controls, such as rules and regulations, social norms play a large role in influencing individual decision-making.¹¹ As a result, the potential exists for street-level bureaucrats to be guided by their social norms more tangibly than by the formal rules that emanate from within their administrative institutions, the Constitution, or the Court.

The second factor on which the implementation of judicial decision-making is contingent is the process of communication of those decisions by the judiciary to the executive and within the executive itself. Poor communication of legal norms ensures that they remain ineffective. Even where judicial decisions seek to merely express the existence of constitutional principles and do not require specific action on the part of state actors, effective communication is necessary for that expression to have any impact on executive behavior.

In accurately describing the scope of this paper, it may be important to briefly describe the subjects and

¹¹ ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORHOODS SETTLE DISPUTES 137-155 (1991).

arguments that may fall within the broader topic of a court's relationship with the executive and the public, but do not fall within the aims of this paper and are thus not dealt with in great detail. First, it may be argued that court judgments have value as an expression of a legal norm.¹² Judgments make normative statements on the law which enter the arena of public discourse. Such a legal norm can then, through various mechanisms external to the direct links between the court and the executive, have an impact on both executive decision-making and the norms adopted by the public.¹³ Rather than enter this debate, this paper seeks to explain the reasons for the instances in which the state, as the addressee of a judgment, is unable (or unwilling) to comply with its order. While the argument can be made that the executive will eventually comply and that therefore legal norms will animate administrative decision-making, such a belief does not explain the reasons for the executive's incapacity to manifest such norms when first ordered to do so.

Second, the gap between judicial decision-making and the executive branch's enforcement can be explained as the product of a country in the midst of a difficult democratic transition. Much like any legal transplant or constitutional borrowing, it simply takes time for norms and standards to internalize and effectively guide behavior.¹⁴ While this may be true, this explanation fails to examine more closely the particular dynamics that exist within the

¹² Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); see generally Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

¹³ See generally Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

¹⁴ ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 117-126 (2006).

executive which allow for a gap between constitutional or legal norms and social norms to influence the implementation of judicial decisions.¹⁵ More importantly, the transitional democracy argument does not clarify how the difference in norms manifests within the administrative state.

The value of a deeper analysis of these dynamics as opposed to simply relying on the notion of transitional democracy is that such an understanding can be used to target and remedy the disjuncture between constitutional norms and executive action that prevent the realization of constitutional goals and ultimately slow the process of transition from Apartheid to the reality the Constitution envisions.

Finally, we concede that non-compliance by administrative agencies with judicial-decision making has only, even if repeatedly, occurred in certain pockets of the bureaucracy. It is not the intention of this paper to overstate a decline in the courts' legitimacy or to suggest that the executive has adopted a general stance of defiance towards judicial decisions. Rather, we hope merely to demonstrate that an assurance of executive compliance with judicial decision-making is subject to the pressure exerted by the

¹⁵ For examples of analysis and case law on the impact of a democratic transition on the executive and its indifferent response to constitutional norms, see STEPHEN PETE, BEHIND THE MASK OF THE RAINBOW NATION: THE LIMITS OF LAW IN POST-APARTHEID SOUTH AFRICA, IN NATION-BUILDING & TRANSFORMATION 169, 185-196 (Catherine Jenkins & Max du Plessis eds. 2014); Clive Plasket, *Administrative Justice and Social Assistance*, 120 SOUTH AFRICAN L. J. 494 (2003); David Dyzenhaus, *The Past and Future of the Rule of Law in South Africa*, 124 SOUTH AFRICAN L. J. 734, 758 (2007); MEC, *Department of Welfare, Eastern Cape v. Kate* 2006 (4) SA 478 (SCA) at para. 5.

social norms adopted by street-level bureaucrats, as well as the methods of communicating constitutional norms between all relevant institutions and individuals responsible for norm creation and implementation.

Ultimately, the lack of acquiescence to judicial decisions by certain branches of the executive serves as a barrier to the courts' ability to engage effectively in norm creation. This in turn impacts access to justice for ordinary citizens in a very tangible way when street-level bureaucrats, who adhere to social norms not necessarily consistent with the constitutional or legal norms, are tasked with decisions intended to implement judicial decisions.

In the following section, we briefly outline examples in which the executive has failed to comply with judicial decisions, despite ample opportunity to do so. These examples aim to demonstrate the way in which such non-compliance significantly impacts access to justice and the subsequent need to develop strategies to remedy the executive's non-compliance. In Part III, we examine the nature of the executive branch and its responses to judicial decisions. Part IV discusses the importance of social norms in guiding executive behavior, and Part V looks carefully at the role of communication between the judiciary and the executive in the effective implementation of judicial decisions.

II. COURT DECISIONS AND EXECUTIVE ACQUIESCENCE

A. 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. In terms of the Immigration

Act, the Department is tasked with upholding legislation relating to foreigners, including illegal foreigners and asylum seekers.¹⁶ 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.¹⁷ 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.¹⁸ Section 34(1) of the Act provides those declared to be 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 challenged the constitutionality of specific sections of a previous version of the Immigration Act that gave wide discretion to immigration officials to arrest, detain, and deport foreigners without procedural protections.¹⁹ The High Court declared these sections unconstitutional and this finding was upheld by the Constitutional Court in *Lawyers for Human Rights*.²⁰ 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,

¹⁶ Immigration Act 13 of 2002 (S. Afr.).

¹⁷ *Id.* § 41.

¹⁸ *Id.* § 34.

¹⁹ *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T).

²⁰ *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) [hereinafter "*Lawyers for Human Rights*"].

was unconstitutional.²¹ 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.²² 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.²³

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)²⁴ heard a case regarding the detention of an illegal foreigner for a period exceeding 30 days without a court warrant, which is one of the safeguards provided for in Section 34(1).²⁵ 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 to justify the detention.²⁶

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

²¹ *Id.* at para 43.

²² *Id.*

²³ *Id.*

²⁴ The Supreme Court of Appeal is the second highest court of appeal in the country, after the Constitutional Court.

²⁵ Immigration Act § 34(1). See *Arse v. Minister of Home Affairs and Others* 2010 (4) SA 544.

²⁶ *Id.* at 552.

court warrant justifying that extension.²⁷ 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.²⁸ 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.²⁹ No evidence was presented to support this assertion.³⁰ The Department argued that under such circumstances, their officers should be granted discretion to extend a foreigner's detention where reasonable or justifiable.³¹

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

²⁷ *Sikuola v. The Minister of Home Affairs* [2012] ZAGPJCH 98.

²⁸ *Id.* at para. 34.

²⁹ See *South African Human Rights Commission and 40 Others and the Minister of Home Affairs: Naledi Pandor and 4 Others* 2014 ZAGPJCH.

³⁰ *Id.* at para. 36.

³¹ *Id.* at para. 40.

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.³²

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.³³ 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."³⁴

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*³⁵ 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.³⁶ 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."³⁷

³² *Id.* at para. 45.

³³ *Id.* at para. 52.

³⁴ *Id.* at para. 44.

³⁵ *Mohamed and Another v. President of the RSA and Others* 2001 ZACC 18; 2001 (3) SA 893 (CC) [hereinafter "*Mohamed*"].

³⁶ *Id.* at para. 60.

³⁷ *Id.* at para. 58.

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.³⁸ The Department, despite the clear holding in *Mohamed*, defended its actions and argued that because the foreign country in this case had refused to provide assurances that the death penalty would not be imposed, the Department had no choice but to deport the illegal foreigner.³⁹ 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.⁴⁰

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.⁴¹ The case concerned the deportation of an Uzbek national, Ms. Mukhamadiva, who arrived at the Cape Town International Airport with a valid visa.⁴² Ms.

³⁸ *Tsebe and Another v. Minister of Home Affairs and Others; Pitsoe v. Minister of Home Affairs and Others* 2012 (1) BCLR 77 (GSJ) at para. 87.

³⁹ *Id.* at para. 89.

⁴⁰ *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*.

⁴¹ *Mukhamadiva v. Director General of Home Affairs and Another* 2011 ZAWCHC 483 [hereinafter "*Mukhamadiva I*"]; *Mukhamadiva v. Director General Department of Home Affairs and Another* 2012 ZAWCHC 337 [hereinafter "*Mukhamadiva II*"].

⁴² *Mukhamadiva I* at para. 1-2.

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 for why Ms. Mukhamadiva should not be permitted to enter the country.⁴³ The Chief Immigration Officer at the Cape Town Airport, Mr. Hans Grobber, received the court order, but was instructed by his superior not to comply.⁴⁴ Mr. Grobber insisted on non-compliance with the court order and refused to speak to the Judge who had issued the order over the phone when asked to do so.⁴⁵ Ms. Mukhamadiva was returned to her home country without a hearing and in violation of the court order.⁴⁶

The issue that was subsequently heard by the High Court was whether or not Mr. Grobber acted in contempt of court by refusing to comply with the court order.⁴⁷ During the proceedings, two reasons for Mr. Grobber'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. Grobber, from obeying that order.⁴⁸ Second, the Head of Immigration for the Western Cape was on record stating that court orders must be served on Parliament leading to Mr. Grobber's misunderstanding as to the nature of court orders and their implementation.⁴⁹

⁴³ *Id.* at paras. 4-5.

⁴⁴ *Id.* at para. 6.

⁴⁵ *Id.* at paras. 6-7.

⁴⁶ *Id.* at paras. 4-5, 9.

⁴⁷ *Id.* at para. 9.

⁴⁸ *Mukhamadiva I* at para. 11.

⁴⁹ *Id.* at para. 12.

Mr. Grobblers' 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."⁵⁰ Thus, while the Court found that Mr. Grobblers 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."⁵¹

In light of clear misinformation circulating within the Department of Home Affairs, Judge Davis proceeded to order the Head of Immigration for the Western Cape to submit a report detailing current procedures, followed by officials served with an urgent order and whether a plan would be adopted to educate immigration officials in how to comply with court orders.⁵²

The report that was subsequently submitted to the Court revealed that the Department's procedures had been based on a misinterpretation of international law.⁵³ This misunderstanding led to the conclusion that immigration officials have no authority in an international airport.⁵⁴ 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.⁵⁵ He makes the judgment

⁵⁰ *Id.* at para. 13.

⁵¹ *Id.* at para. 12.

⁵² *Id.* at para. 14.

⁵³ *Id.* at para. 9.

⁵⁴ *Mukhamadiva I* at paras. 8-9.

⁵⁵ *Id.* at para. 20.

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.”⁵⁶

B. 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. Because they are private, both the scene of the crime and the relationship between victim and abuser are spaces that are traditionally protected from state intervention. As a result, domestic violence is often viewed as a family matter and officials are often reluctant to intervene in that space 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),⁵⁷ 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.”⁵⁸

⁵⁶ *Id.* at para. 21.

⁵⁷ Prevention of Family Violence Act 33 of 1993 (S. Afr.).

⁵⁸ From the explanatory memorandum of the draft Bill, *see* Joanne Fedler, *Lawyering Domestic Violence Through the Prevention of Family Violence Act*

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.⁵⁹

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.⁶⁰ The product of this was the Domestic Violence Act of 1998 (DVA), which, among other things, expanded the definition of a domestic relationship, defined specific acts of violence (including economic ones), and did away with sheriff's fees for service of court orders.⁶¹

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

1993 – *An Evaluation After a Year in Operation*, 112 SOUTH AFRICAN L. J. 231, 237 (1995).

⁵⁹ *Id.* at 238-9.

⁶⁰ Lisa Vetten, *Addressing domestic violence in South Africa: Reflections on strategy and practice*, expert paper for U.N. DIVISION FOR THE ADVANCEMENT OF WOMEN (May 2005), available at: <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf>.

⁶¹ Domestic Violence Act 116 of 1998 (S. Afr.).

protective order but suspend that warrant on condition that the protective order not be violated.⁶² 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.⁶³ 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.”⁶⁴ Read with Section 7(2) of the Constitution,⁶⁵ 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.”⁶⁶

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

⁶² *The State v. Baloyi and Others* 2000 (2) SA 425 (CC) (S.Afr.).

⁶³ *Id.* at paras. 11-13.

⁶⁴ S. AFR. CONST., ch. 2, § 12, cl. 2(c).

⁶⁵ *Id.* ch. 2, § 7, cl. 2 (“The state must respect, protect, promote and fulfill the rights in the Bill of Rights”).

⁶⁶ *Baloyi* at para. 11.

pernicious because it is so often concealed and so frequently goes unpunished.⁶⁷

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. Patterns of systemic sexist behaviour are normalized rather than combatted.⁶⁸

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 state has a duty to protect individuals' rights to be free from private violence. Furthermore, ineffective action by the State and the perpetuation of systemic sexist behavior form part of the harm that the state has a constitutional obligation to protect individuals from.

In 2005, the Court had an opportunity to reiterate the principles set out in *Baloyi* in a nearly-identical challenge to

⁶⁷ *Id.*

⁶⁸ *Id.* at para. 12.

the Domestic Violence Act, in *Omar*.⁶⁹ 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.⁷⁰

With these two judgments, the Constitutional Court effectively removes domestic violence from 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 behavior of street-level bureaucrats, like police officers, tasked with upholding the law.⁷¹

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.⁷² While

⁶⁹ *Omar v. The Government of the Republic of South Africa and Others* 2006 (2) SA 289 (CC) (S. Afr.) [hereinafter "*Omar*"].

⁷⁰ *Id.* at para 18.

⁷¹ Lisa Vetten, *Domestic Violence in South Africa*, INSTITUTE FOR SECURITY STUDIES, Policy Brief No. 71 (2014).

⁷² LISA VETTEN, TERESA LE, ALEXANDRA LEISEGANG & SARAH HAKEN, *THE RIGHT AND THE REAL: A SHADOW REPORT ANALYSING SELECTED*

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.⁷³ The same study revealed that victims were being encouraged to mediate with their abusers, rather than have them arrested.⁷⁴ 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 further action.⁷⁵

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

GOVERNMENT DEPARTMENTS' IMPLEMENTATION OF THE 1998 DOMESTIC VIOLENCE ACT AND 2007 SEXUAL OFFENCES ACT 31 (Christi van der Westhuizen ed., 2010) (citing Lisa Vetten et. al., *"I Have a Problem": Women's Help-Seeking in Acornhoek, Mpumalanga*, TSHWARANANG LEGAL ADVOCACY CENTRE, Research Brief No. 1 (2009)).

⁷³ CLAUDIA LOPES, DIANNE MASSAWE & MPIWA MANGUIRO, CRIMINAL JUSTICE RESPONSES TO DOMESTIC VIOLENCE: ASSESSING THE IMPLEMENTATION OF THE DOMESTIC VIOLENCE ACT IN GAUTENG 58 (Kailash Bhana ed., 2013), available at <http://za.boell.org/sites/default/files/uploads/2013/10/criminaljusticeresponses-assessingimplimentationofdvaingauteng.pdf>.

⁷⁴ *Id.* at 5.

⁷⁵ Lisa Vetten, Francoi van Jaarsveld, Phineas Riba & Lindiwe Makhunga, *Implementing the Domestic Violence Act in Acornhoek, Mpumalanga*, TSHWARANANG LEGAL ADVOCACY CENTRE, Research Brief No. 2, at 3 (2009).

based in Johannesburg. Through her work, she has observed a tendency 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 4 a.m. 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.⁷⁶

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-habitate 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.⁷⁷ In one instance, a prosecutor assigned to a case of domestic assault

⁷⁶ Interview (Mar. 4, 2014).

⁷⁷ Lisa Vetten, *Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice*, UN DIVISION FOR THE ADVANCEMENT OF WOMEN, Expert Group Meeting Paper prepared for “Violence Against Women: Good Practices in Combating and Eliminating Violence against Women,” at 10 (2005).

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.⁷⁸

C. 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.⁷⁹ 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.⁸⁰ 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.⁸¹

⁷⁸ These anecdotes are based on the personal experiences and notes of one of the authors.

⁷⁹ *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC) (S. Afr.).

⁸⁰ *S.A. Security Forces Union v. Surgeon General* Case No. 18683/07 (2008) at 1-2.

⁸¹ *Id.* at 4-6; *South Africa's Military Gets New HIV Policy*, IRINNEWS (Jan. 26, 2010), available at <http://www.irinnews.org/report/87879/south-africa-military-gets-new-hiv-policy>.

On September 29, 2014, the High Court handed down judgment in a case challenging SANDF's continued practice of discrimination against persons living with HIV.⁸² The High Court found that, despite the new employment policies, SANDF's behavior was no different from the policy that was declared unconstitutional six years earlier.⁸³ SANDF's justification for its behavior 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.⁸⁴ 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."⁸⁵ The above statement demonstrates a fundamental misunderstanding of the role of judicial decision-making and its relationship to the functions of the executive arm of government.

D. 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

⁸² *Andisiwe Dwenga and Others v. Surgeon-General of the South African Military Health Service and Others* 2014 ZAGPPHC 727 (GNP) (S. Afr.).

⁸³ *Id.* at para. 8.

⁸⁴ *Id.* at para. 10.

⁸⁵ *Id.* at para. 14.

specialized national crime-fighting unit, and replaced it with the Directorate of Priority Crime Investigation (DPCI).⁸⁶ In 2011, the Constitutional Court held in *Glenister* that the newly established DPCI was not sufficiently independent to pass constitutional muster.⁸⁷ 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.⁸⁸

The executive responded to the Court's order with the South African Police Service Amendment Act,⁸⁹ which was then challenged for non-compliance with the constitutional requirement for independence as outlined by the Court in *Glenister*.⁹⁰ 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.⁹¹

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

⁸⁶ *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC) at paras. 1-2 [hereinafter "*Glenister*"].

⁸⁷ *Id.* at paras. 163, 248.

⁸⁸ *Id.* at para. 251.

⁸⁹ South African Police Service Amendment Act 10 of 2012 (S. Afr.).

⁹⁰ *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) (S. Afr.) [hereinafter "*Helen Suzman Foundation*"].

⁹¹ *Id.* at para. 123.

the dissonance between the Court's initial ruling and the executive's implementation of that holding, an example is illustrative.

In *Glenister*, the Court listed aspects of the laws governing the DPCI that compromised its independence.⁹² 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 out their duties vigorously."⁹³

The DSO, unlike the new specialized unit, was governed by laws that provided for special removal procedures for 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."⁹⁴ 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.⁹⁵ In *Glenister*, the Court uses the DSO legislation to demonstrate employment security, citing a provision, which states that a deputy may be removed from office only by the President, "on grounds of

⁹² *Glenister*, at paras. 218-222.

⁹³ *Id.* at para. 222.

⁹⁴ *Id.* at para. 226.

⁹⁵ *Helen Suzman Foundation*, at paras. 68-72.

misconduct, continued ill-health or incapacity, or if he or she is no longer a fit and proper person to hold the office.”⁹⁶ Section 17DA(2)(a) of the Amendment Act lists verbatim the above grounds on which a Head or Deputy Head of the DPCI can be suspended or removed from office.⁹⁷ However, the following subsections allow for the Minister to suspend a Head or Deputy Head without a hearing and without pay.⁹⁸

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 intentional or not 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-making to create substantial impact on the country’s structures and laws.

III. EXECUTIVE RESPONSE TO JUDICIAL NORM CREATION

The above examples clearly illustrate a divide between the judiciary’s construction of constitutional principles and decisions of the administrative state. Presently, the South African judiciary has remained independent and has not been subjected to overt and aggressive attacks. However, as Roux rightly suggests, a court’s institutional independence is composed of more than

⁹⁶ *Glenister*, at para. 225.

⁹⁷ South African Police Service Act 68 of 1995, § 17DA(2)(a).

⁹⁸ *Id.* at §§ 17DA(2)(a)-(e).

just the absence of direct attacks from the executive.⁹⁹ The effective carrying out of the judiciary's role in ensuring that all branches of government are held to the precepts of the Constitution is also contingent on acquiescence to its judgments. The examples above demonstrate that the approach the judiciary has adopted to build and protect its independence, while perhaps successful in avoiding direct attacks, has not necessarily led to acquiescence of the executive. Simply put, if the executive simply ignores or only half-heartedly implements court judgments, this undermines institutional independence, or at best renders it, and the Court, less relevant, 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.¹⁰⁰ It is made up of diverse activities that produce a multiplicity of decisions before a final decision is made which can be judicially reviewed. 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. They may do so directly through a clear court order targeting the behavior of a particular public body or actor. A decision may also indirectly influence executive behavior through the legal norms that emerge from a judgment. Any form of

⁹⁹ ROUX, *supra* note 6, at 87.

¹⁰⁰ SIMON HALLIDAY, JUDICIAL REVIEW AND COMPLIANCE WITH ADMINISTRATIVE LAW 41 (2004).

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 the 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 as act as a repository of principle and legal norms from which all public bodies should draw in order to guide their behavior and decision-making.¹⁰¹ These values are part of the courts' process of norm creation and should then permeate all executive decision-making.¹⁰²

Public bodies or actors to which judgments are directed can be categorized as either senior-level executives or street-level bureaucrats.¹⁰³ This is predicated on the Weberian conception of bureaucracy in which the bureaucracy is divided into individual decision-makers, who are situated at different levels of a hierarchy.¹⁰⁴ However, we depart from the classic Weberian conception in that directives issued from one level of the hierarchy to the next

¹⁰¹ H. Campbell Black, *The Principle of Stare Decisis*, 34 THE AMERICAN L. REG. 745 (1886).

¹⁰² Frank I. Michelman, *The Constitution, social rights, and liberal political justification*, 1 INT'L J. CONST. L. 13, 13-14 (2003).

¹⁰³ 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 JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 76, 80 (Marc Hertogh & Simon Halliday ed. 2004).

¹⁰⁴ See generally FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 196-204 (H. H. Gerth & C. W. Mills ed. 1946); see also Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 739-746 (1984).

are not necessarily carried out accurately and faithfully,¹⁰⁵ as evidenced by the examples in Section II.

Within this model, the specific category of bureaucratic decision-makers responsible for the implementation of executive policy is street-level bureaucrats.¹⁰⁶ These include decision-makers in public institutions, such as schools, police, welfare departments, environmental agencies and various other administrative agencies, as well as government departments. Lipsky argues that the public policy that is developed by senior 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.¹⁰⁷

Therefore, if bureaucracies are, to a certain extent, “at the mercy of lower participants,”¹⁰⁸ 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 the decision-making of street-level bureaucrats.¹⁰⁹ It is easy to imagine that disagreement with the formal constraints that they face in the form of policy prescriptions would

¹⁰⁵ See FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra* note 104, at 196-204.

¹⁰⁶ LIPSKY, *supra* note 10, at 25.

¹⁰⁷ *Id.* at 17.

¹⁰⁸ David Mechanic, *Sources of Power of Lower Participants in Complex Organizations*, 7 ADMIN. SCI. Q. 349, 351 (1962).

¹⁰⁹ See LIPSKY, *supra* note 10, at 16.

contribute to a less than whole-hearted compliance with those policies.

Another factor is the need to develop coping mechanisms.¹¹⁰ At the core of Lipsky's argument is the assertion that the inherent circumstances of the tasks faced by street-level bureaucrats give rise to pragmatic solutions that often deviate from stated policy, rules, and regulations, and are tacitly accepted by their seniors as a necessity to ensure that a task is completed.¹¹¹ These coping mechanisms are the responses that street-level bureaucrats develop to deal with challenges that result from inadequate resources, few controls, indeterminate objectives, and discouraging circumstances.¹¹² 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.¹¹³ 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.¹¹⁴

¹¹⁰ *Id.* at 17.

¹¹¹ *Id.* at 18.

¹¹² *Id.* at 82.

¹¹³ For more recent descriptions of the discretion available to street-level bureaucrats, see generally Tony Evans & John Harris, *Street Level Bureaucracy, Social Work and the (Exaggerated) Death of Discretion*, 34 BR. J. SOC. WORK 871, 872-880 (2004); Ian Taylor & Josie Kelly, *Professionals, Discretion and Public Sector Reform in UK: Revisiting Lipsky*, 19 INT'L J. PUB. SECTOR MGMT. 629, 629-640 (2006).

¹¹⁴ LIPSKY, *supra* note 10, at 82-83.

Within the discretionary space afforded to street-level bureaucrats, 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 cases where the social norms held by street-level bureaucrats diverge from the legal norms underlying policy, these assumptions and prejudices are more likely to manifest themselves in the decisions taken. For instance, a xenophobic state actor tasked with the granting of asylum to foreigners may be more likely to deviate from policies related to the treatment of asylum seekers than if his views aligned with the legal norms underlying those policies. Similarly, a police officer investigating an incident of domestic violence, who believes that male dominance in the home is the norm, may allow this belief to influence his decision-making and perhaps lead to a less than thorough investigation.

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 a large portion of society.¹¹⁵

¹¹⁵ We suggest that the relevant norms in question are homophobia, sexism, racism, xenophobia, and persistent stigmas regarding HIV/AIDS. See CATHY ALBERTYN, RIGHTS AT WORK: THE TRANSITION TO CONSTITUTIONAL DEMOCRACY AND WOMEN IN SOUTH AFRICA, IN NATION-BUILDING & TRANSFORMATION 91, 103-112 (Catherine Jenkins & Max du Plessis ed. 2014) (a historical account of patriarchy that was embedded in South African culture and tradition and its persistence despite legal interventions); see also D. Skinner & S. Mfecane, *Stigma, Discrimination*

As mentioned above, the increased and inevitable discretion that breeds the various coping mechanisms used by street-level bureaucrats 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 that 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.¹¹⁶ Similarly, if street-level bureaucrats internalized these same principles, instances of inequality or injustice arising from their decisions and behavior would be reduced.¹¹⁷

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

and the Implications for People Living with HIV/AIDS in South Africa, 1 J. OF SOC. ASPECTS OF HIV/AIDS 157 (2004); see also JONATHAN CRUSH, INTERNATIONAL MIGRATION: THE DARK SIDE OF DEMOCRACY: MIGRATION, XENOPHOBIA AND HUMAN RIGHTS IN SOUTH AFRICA 103 (2001); Carol Adjai & Gabriella Lazaridis, *Migration, Xenophobia, and New Racism in Post-Apartheid South Africa*, 1 INT'L J. OF SOC. SCI. STUD. 192 (2013).

¹¹⁶ See United Nations Development Programme, Human Development Report 11-28, 99-124 (1995); see also generally Susan M. Okin, *A clash of basic rights? Women's Human Rights, Identity Formation and Cultural Difference* (1995) (unpublished manuscript).

¹¹⁷ 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*, 99 COLUM. L. REV. 739 (1999). In the administrative context, see Simon Halliday, *Institutional Racism in Bureaucratic Decision-Making: A Case Study in the Administration of Homelessness Law*, 27 J. L. & SOC. 449 (2000).

for employment.¹¹⁸ 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 behavior.¹¹⁹ SANDF's actions clearly demonstrate the impact on access to justice of a divergence between judicially created norms and social 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.¹²⁰ In other words, social norms infiltrate the decision-making of all individuals to varying degrees, regardless of the context in which the decisions are made. Likewise, it has been argued that social norms may operate so strongly that they can, at times, guide behavior at the expense of applicable legal rules.¹²¹ This claim has been made quite convincingly in the legal realist movement,¹²²

¹¹⁸ *Andisiwe Dwenga and Others*, 2014 ZAGPPHC at para 10.

¹¹⁹ *Id.*

¹²⁰ See Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 908 (1996); see also John Helliwell, Shun Wang & Jinwen Xu, *How Durable are Social Norms? Immigrant Trust and Generosity in 132 Countries*, NAT'L BUREAU OF ECON. RES., Working Paper No. 19855 (1981).

¹²¹ See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (Mike Aronson ed. 1991); see generally Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

¹²² See Karl N. Llewellyn, *What Price Contract? – An Essay in Perspective*, 40 YALE L. J. 704, 712–14 (1931); see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 35 n.6 (Robert Stevens et al. eds., 1973).

law and society literature,¹²³ and organizational economics.¹²⁴ In fact, studies have shown an inverse relationship between the enforcement of law and the social norms that exist within a community.¹²⁵ 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 individuals that deviate from a social norm, such as guilt or shame,¹²⁶ are a more effective motivational force for adherence than legal sanctions or sanctions imposed by an entity external to the community. These sanctions provide an enforcement mechanism which results in a community's negative reaction to a transgressor's actions.

The question is then what role social norms play in guiding executive action in the implementation of judicial decisions. In exploring this question, we do not attempt to argue the extent to which judicial decisions can change social norms. Rather, we simply accept that, with respect to the social norms held by the broader public, the intention of court judgments is to perform an expressive function.¹²⁷ By that we mean that judgments are statements on what is good

¹²³ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55, 62 n.7 (1963); see generally Mark H. Van Pelt, Symposium, *Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461 (1985).

¹²⁴ Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* (Aug. 3, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2443427>.

¹²⁵ *Id.*

¹²⁶ Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369 (1999).

¹²⁷ See Sunstein, *supra* note 120, at 903.

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, one should assume that an important purpose of the judgment is to alter the behavior of the executive. Thus, there is the potential for conflicts to arise between the judgment and social norms held by the bureaucrats to whom the judgment is addressed.

The judiciary is, through the mechanism of review (whether constitutional or administrative), involved in the process of constituting and propounding legal norms. However, in using as its reference point a value-laden constitution, these legal norms set a normative standard to which both the state and society are called to comply with. 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 legal norm. These legal norms then either stand in contrast to or confirm social norms already held by all or a portion of society.

The difficulty with the judiciary's position is that the values in the Constitution, which form the reference point for all adjudication, are themselves contested concepts. Principles such as "equality" and "dignity" can have varied interpretations and a general consensus from all members of society can be neither assumed nor expected.¹²⁸ For example,

¹²⁸ This point was famously made in W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y. 167 (1955-1956); the concept of contested norms within society was explored in Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983).

and with reference to the cases discussed in Section II, the essence of the meaning of gender equality that emerges in *Baloyi*, the imperative to treat foreigners with dignity and respect in *Lawyers for Human Rights*, and the importance of carrying out governmental tasks free of favor and corruption in *Glenister*, all find their roots in the Constitution. However, the meaning of these norms varies widely across social groupings. Given the normative plurality that emerges, it is not difficult to imagine that a gap may emerge between the manner in which courts understand these norms and the manner in which these norms are interpreted in different social groupings.

We would argue that social norms can translate themselves into state action in two ways: a direct and an indirect method. The direct method exists simply by product of the fact that bureaucrats are members of society. Thus, the sets of norms adopted by this community of bureaucrats 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.

The important question is, therefore, what explains the instances in which bureaucrats are not effectively constrained by laws or court judgments? The answer, under the direct method, has been persuasively argued by Lipsky: street-level bureaucrats constitute a community and are strongly influenced by the norms prevalent in that community, often more than they are influenced by those created by the judiciary.¹²⁹ In fact, the process of social norms manifesting themselves as cognitive tools, such as

¹²⁹ LIPSKY, *supra* note 10, at 19.

stereotyping through which people perceive and understand the world around them, can be so insidious that it often occurs without our awareness.¹³⁰ In this way, discriminatory beliefs and ideas are absorbed unconsciously by individuals who find themselves in bureaucratic positions wielding discretion in the making of administrative decisions.¹³¹

A useful example of the relative inadequacy of external controls of street-level bureaucrats is *Somali Association*.¹³² 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.¹³³ In carrying out the SAPS policy, policemen closed 600 businesses, many with valid licenses, confiscated equipment and stock, and arrested traders and their employees.¹³⁴ The policemen further told traders that foreigners are not permitted to operate businesses in South Africa and that the foreigners, who were predominantly Somali and Ethiopian traders, should leave the municipality.¹³⁵ The SCA described instances of xenophobic pressure being exerted by local business forums before this policy was adopted, which ostensibly contributed to the manner in which the police carried out the policy.¹³⁶ These

¹³⁰ *Id.* at 115.

¹³¹ For an articulation of the notion of the unconscious adoption of discriminatory beliefs, see Charles R. Lawrence III, *The Id, the Ego, and the Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹³² *Somali Assoc. of S. Afr. v. Limpopo Dep’t of Econ. Dev., Env’t. and Tourism* 2014 (143) SA 1 (CC) (S. Afr.).

¹³³ *Id.* at para. 4.

¹³⁴ *Id.*

¹³⁵ *Id.* at para. 4.

¹³⁶ *Id.* at paras. 11-18.

actions were taken despite the fact that the policy's objective was the removal of *unlicensed* businesses and many of the businesses targeted possessed valid licenses.¹³⁷

As a final example, in *Baloyi* and *Omar*, the Court effectively removed domestic violence from the sphere of private family matters and placed it squarely within the ambit of the state's obligation to uphold the Constitution.¹³⁸ In so doing, the Court created legal norms regarding perceptions of victims of domestic violence and appropriate responses to violence in the home. As displayed above, the legal norms created by the Court have had little impact on the behavior of street-level bureaucrats, like police officers, in their treatment of victims of domestic violence.

In some ways, the tension between social and legal norms and its impact on the effective implementation of judicial decisions in South Africa can be analogized to the circumstances under which international law, and particularly international human rights law, operates. The perpetual concern with international law is the need to create incentives for states to comply with international norms in the absence of any mechanisms designed to coerce or enforce compliance. One argument pioneered by Harold Koh is that a lack of compliance may partly, or wholly, be based on the divide between international law norms and the domestic norms (social, legal, or constitutional) that exist in the recalcitrant state.¹³⁹ Quite simply, when such norms diverge, international law becomes less effective in guiding

¹³⁷ *Id.* at para. 19.

¹³⁸ *Baloyi*, at para. 11; *Omar*, at para. 18.

¹³⁹ Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999)

state behavior.¹⁴⁰ Koh then posits that greater compliance could be achieved if international norms were better internalized within the state.¹⁴¹

Turning back to South Africa, where effective police enforcement is influenced by social norms adopted by police officers, a similar internalization of legal and constitutional norms would lead to better compliance with judicial decisions. This is not to say that all street-level bureaucrats must come to agree with the substance of legal norms. Rather, they must internalize the necessity of compliance with these legal norms, even when they conflict with social norms.

The indirect method is through the political pressure created by groups in society that reflect social norms and wish to have those norms manifested in administrative decision-making. The state's need to respond to those groups is obviously contingent on the political power wielded by the groups. When such norms are held by a politically powerful bloc, they may become more influential than social norms held by society more generally because of the clear intent of these groups to impact government behavior. Where a divergence exists between social norms and the behavior of the bureaucracy, political pressure should in theory encourage government compliance with social norms. While the purpose of this paper is not to engage too deeply in what is the much larger and well-traversed subject of aligning government interests with

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also Charles K. Whitehead, *What's your sign? – International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 703 (2005-2006); see also ANDRE T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 9 (Dedi Feldman et al. ed. 2008).

social norms, it is sufficient to rely on the notion of democratic constitutionalism, which encapsulates the application of such political pressure. Through various non-legal means, social groups seek to influence the content of constitutional law and in this way translate political power into executive action.¹⁴² This indirect process of norms percolating upwards from social groups is, however, not the focus of this paper because it requires the existence of a mobilized and active citizenry in order to present a sufficiently powerful and recognizable political bloc. In the normative issues that arise in the examples presented in Section II, there is no clear evidence of any such political movement to which the executive was responding. More relevant to these particular examples is the direct manner in which norms infiltrate administrative decision-making through the actions of street-level bureaucrats.

It is important to note that the ability of social norms to negatively impact the implementation of court judgments does not suggest that those judgments are therefore without value. There is inherent value in the expression of a higher standard to which the Constitution expects individuals in society and the state to behave. Such expressions enter the arena of public thought and are important features of a social discourse that plays a role in the transformation of society. However, this should not detract from the need for court judgments to be effective. In order to understand how court judgments can be ineffective, one needs to understand

¹⁴² For a detailed expression of the notion of democratic constitutionalism, see Robert C. Post & Reva B. Siegal, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

the role that social norms play in the executive decision-making process.

It is important to acknowledge that social norms are not determinative of how executive decisions are made. 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 legal 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 and will be explored in the next section.

V. INTERACTION BETWEEN INSTITUTIONS

It is important to understand the process of executive decision-making in order to identify possible reasons why judicially-constructed norms do not filter down to affect the behavior of street-level bureaucrats. While there has been limited research in this area,¹⁴³ efforts have been made to describe, in theory, the path that judicial norms take within the executive. Hertogh¹⁴⁴ and Canon¹⁴⁵ have each created similar models of administrative decision-making that are instructive. Our description below relies primarily on Hertogh's model. That model describes the process of

¹⁴³ See generally KEITH HAWKINS, *LAW AS A LAST RESORT: PROSECUTION DECISION-MAKING IN A REGULATORY AGENCY* (2003).

¹⁴⁴ Marc Hertogh, *Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands*, 23 L. & POL'Y. 47 (2001).

¹⁴⁵ Canon, *supra* note 103, at 80 n.16.

administrative decision-making in three phases: *information*, *transformation*, and *processing*. In our view, these phases are all subject to the manner in which each institution and level within the executive communicates with one another.

A. INFORMATION

The information phase is the process of relevant individuals within the government, most often senior-level executives, coming to understand the content of a judicial decision.¹⁴⁶ This involves interpretation and extraction of principles and guidance or orders from the judgment.¹⁴⁷ 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 whose 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.

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

¹⁴⁶ See Hertogh, *supra* note 144, at 58.

¹⁴⁷ *Id.*

senior-level executives tasked with understanding it will vary.¹⁴⁸

B. TRANSFORMATION

Once senior-level executives believe that a judgment calls for behavioral change, they must decide what change should take place.¹⁴⁹ 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 legal norms 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, 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 in 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.

¹⁴⁸ See generally ANTONY N. ALLOTT, *THE LIMITS OF LAW* (1980); RICHARD M. JOHNSON, *THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION-MAKING FROM A NEW PERSPECTIVE* (1967); STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1970).

¹⁴⁹ See Hertogh, *supra* note 144, at 58.

Given the agency's expertise on the subject-matter of its work, a doctrine of deference with respect to agencies' interpretation of the law, much like that found in the United States, could prove useful in mediating conflicting interpretations.¹⁵⁰ In creating a mechanism which would limit opportunities for the judiciary and agencies to explicitly disagree on the interpretation of the law, agencies would be permitted to make reasonable decisions. Unfortunately, South African jurisprudence has yet to develop a rigorous doctrine comparable to *Chevron*.¹⁵¹ However, even where agencies are afforded deference, their decisions must conform to the normative requirements of the Constitution.¹⁵² As such, deference would be not able to excuse the administrative decisions described in Section II.

C. PROCESSING

This stage involves the potential reactions from within the agency to the proposed change in the administrative process in order to conform with the judgment.¹⁵³ 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, what occurred in the developing of rules governing an anti-corruption unit.¹⁵⁴ However, as the directive containing the

¹⁵⁰ *Chevron U.S., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁵¹ Cora Hoexter, *The Future of Judicial Review in South African Administrative Law*, 117 SOUTH AFRICAN L. J. 484 (2000); see generally CORA HOEXTER, *ADMINISTRATIVE LAW IN SOUTH AFRICA* (2d ed. 2010).

¹⁵² Dennis Davis, *To Defer and When? Administrative Law and Constitutional Democracy*, 23 ACTA JURIDICA 23 (2006).

¹⁵³ See Hertogh, *supra* note 144, at 58.

¹⁵⁴ See discussion *infra* § II.

change in policy begins to move down the administrative 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 through which bureaucrats attempt 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 avoidance techniques, 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 legal norms and existing societal norms.

D. 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, the lower courts, and the general public. This communication most often comes in the form of a judgment. 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. Here, the method of communication is typically

“soft law,” which includes rules, regulations, and guidelines developed by senior-level executives.¹⁵⁵ The effectiveness of reception, understanding, and, to a large extent, compliance rests on the quality of communication at each level.¹⁵⁶

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.¹⁵⁷ 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.

An example demonstrating the need for clarity in judgments is *Walele*.¹⁵⁸ The Constitutional 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.¹⁵⁹ The

¹⁵⁵ L. Sossin, *The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 129 (Marc M. Hertogh & Simon S. Halliday ed. 2004).

¹⁵⁶ See D. S. VAN METER & 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).

¹⁵⁷ Lawrence Baum, *Implementation of Judicial Decisions, An Organizational Analysis*, 4 AM. POL. Q. 86, 92 (1976).

¹⁵⁸ *Walele v. City of Cape Town* 2008 (11) SA 1 (CC) (S. Afr.) [hereinafter “*Walele*”].

¹⁵⁹ *Walele*, at para. 90.

majority judgment of the SCA in *True Motives* disagreed with the majority held view in *Walele*.¹⁶⁰ When confronted with the argument that *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 were not legally binding for the purposes of *True Motives*.¹⁶¹ Furthermore, the SCA argued that the relevant portions of the judgment were wrong.¹⁶² A particularly telling remark by the SCA when justifying its departure from *Walele* is that certain paragraphs “of *Walele* [are], at best, ambiguous”¹⁶³ and “with respect, wrong.”¹⁶⁴ In a recent judgment, the Constitutional Court held predictably that the statements made in *Walele* were not *obiter* and therefore constituted binding precedent for all lower courts, including the SCA.¹⁶⁵

Communication through judgments is also important in ensuring that the judgment is implemented as intended at the street-level. At the second level of communication, the formal manifestations of this communication are rules, regulations, 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

¹⁶⁰ *True Motives 84 (pty.) Ltd. v. Madhi and Others* 2009 (4) SA 1 (CC) at para. 35 (S. Afr.) [hereinafter “*True Motives*”].

¹⁶¹ *Id.* at paras. 100-106.

¹⁶² *Id.* at para. 35.

¹⁶³ *Id.* at para. 33.

¹⁶⁴ *Id.* at para. 35.

¹⁶⁵ *Turnbull-Jackson v. Hibiscus Court Mun. and Others* 2014 (24) SA 1 (CC) at para. 71 (S. Afr.).

dealt with by the Constitutional Court in *Dawood*,¹⁶⁶ 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 Constitutional 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.¹⁶⁷

Unfortunately, the Constitutional Court neglected to grapple with several issues. First, while the Court correctly concedes that discretion will always be present,¹⁶⁸ it appears to assume a rather simple relationship between rules and discretion. The judgment defines this relationship as that between two inversely correlated factors. Therefore, the more there is of one, the less there is of the other. Rules, however, are complex instruments and their impact on discretion is often unknown. It is difficult, and some would argue impossible, to predict how bureaucrats will react to rules or what consequences may result from the promulgation of rules. In order to deal with this reality, jurisdictions such as the United States have created rigorous rule-making procedures¹⁶⁹ and agencies for the review of proposed rules.¹⁷⁰ Again, these steps have not been taken to

¹⁶⁶ *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas v. Minister of Home Affairs and Others* 2000 (3) SA 1 (CC) (S. Afr.) [hereinafter "*Dawood*"].

¹⁶⁷ *Id.* at para. 54.

¹⁶⁸ Keith Hawkins, *Using Legal Discretion*, in *USES OF DISCRETION* 35 (Keith Hawkins ed. 1992).

¹⁶⁹ Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000) [hereinafter "*APA*"].

¹⁷⁰ Office of Information and Regulatory Affairs [hereinafter "*OIRA*"].

the same extent in South Africa.¹⁷¹ Ultimately, without the necessary processes to assess and revise, rules may be counterproductive to efficient decision-making by street-level bureaucrats.¹⁷²

Second, *Dawood* assumes that parliament is the best entity for the development of rules.¹⁷³ 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.¹⁷⁴ While this may be true in theory, this position could potentially create a rather absurd result in the instances illustrated in Section II. If agency leaders are provided with the opportunity to create rules based on their understanding of a court judgment and that understanding could be mistaken or be guided by extra-legal concerns, the rules that would emanate from that agency would themselves fail to accord with legal norms. Ultimately, the adequate implementation of the judgment still rests on the understanding and acceptance of the judgment by the agency leaders. However, what agency rules would provide is a clear signal of what the agency understands the legal and constitutional norms to be. Such rules provide the opportunity to test such understandings through judicial review and correct any flaws that may exist. Nevertheless, as illustrated above, this is not a complete solution. Decisions of street-level bureaucrats may be impervious to any formal constraint, including agency rules.

¹⁷¹ HOEXTER, *supra* note 151, at 102-106.

¹⁷² See LIPSKY, *supra* note 10, at 15.

¹⁷³ *Dawood*, at para. 48.

¹⁷⁴ D. GALLIGAN, THE NATURE AND FUNCTION OF POLICIES WITHIN DISCRETIONARY POWER, PUBLIC LAW 332 (J.A.G. Griffith ed.1976).

It is important to note that understanding the transmission of legal norms through the executive is important in aiding good-faith efforts by bureaucrats to abide by legal norms. If there is an overwhelming belief that legal norms should be adhered to, despite social norms personally held by individual executive decision-makers, an understanding of the way in which decisions-makers discern legal norms becomes valuable.¹⁷⁵ However, institutional dynamics only help to a point. When legal or constitutional and social norms conflict sharply and there is no overriding influence to abide by the legal or constitutional norm, then the likelihood exists that social norms will dictate the outcome of administrative decision-making.

VI. CONCLUSION

South Africa's transition from Apartheid to democracy was carefully orchestrated to avoid further conflict and oppression from the state. At the core of this transition was the creation of a new Constitution and the inauguration of a Constitutional Court specifically tasked with its promotion and protection. Given the nation's history, the Constitution embodied more than rights and principles, it strove to create a vision for a new South Africa; one we recognize has not yet been achieved but that the government has been tasked with developing. In the process of creating this new South Africa, the courts continually refine the nation's understanding of our Constitution and the appropriate implementation of its principles through

¹⁷⁵ This has been termed in law and economics literature the "rule-of-law norm." See Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. OF L. & ECON. 715 (2008).

their judgments and orders. Despite the careful thought and great effort that has gone into the Constitution and subsequent judicial decisions, the reality for many South Africans remains divorced from the principles enshrined in the Constitution.

In this paper we propose that a significant cause of this rift is the behavior of street-level bureaucrats who, acting with an inevitable degree of discretion, have the power to make decisions that either remain faithful to constitutional principles reflected in judicial decisions or diverge from them substantially. We suggest that the behavior of street-level bureaucrats can be better understood, and hopefully corrected, through a careful examination of two factors: the influence of social norms on individuals, as well as the interactions between and within government agencies. If legal norms hope to take precedence over social norms in the behavior of street-level bureaucrats, the gap between legal and social norms must be addressed. The means with which to address this gap, whether by influencing societal norms or creating stronger incentives to comply with legal norms, is beyond the scope of this paper and will likely vary across the country and subject matter. This paper seeks to begin the process by identifying the sites that require further study and from which we hope solutions may emerge. With regard to interactions between institutions, clarity in court judgments and the effective transmission of such orders requires both clarity in the judgments themselves and the development of effective rules that can be judicially reviewed.

Though aspects of the vision of a new South Africa remain unfulfilled, the foundation for higher standards of conduct for both the government and society has been set through the creation of a forward-looking Constitution. Through careful reflection on our current reality and a

willingness to change in order to move forward, significant steps can be made towards achieving that vision.