In search of judicial impact: A consideration of concepts and methodologies

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1 Introduction

The courts in South Africa have the potential to play an important role in securing the democratic and equal society that is envisaged in the Constitution. Armed with the Bill of Rights, their adjudication of disputes provides an opportunity for them to influence both policy and administrative decision-making. This is because although the courts usually exercise their powers in relation to individual disputes, the resulting judgments often have broader implications for administrative decision-making. Given that government in effect takes place through a myriad of individual decisions and administrative actions, if such judgments are implemented widely they can incrementally assist in steering the on-going transformation of the public administration and contribute to the evolving rights-based jurisprudence.

Yet despite the importance of this role, very little is known about whether the courts have had an effect on policy and bureaucratic decision-making in practice.[1] In consequence we generally do not know whether the courts are fulfilling the role that is envisaged for them in the Constitution because we are unable to answer a number of fundamental questions about their impact. For example, are the

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[1]The beginnings of interest in judicial impact assessment are suggested by articles such as Roux 'Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court' (2004) 20 *SAJHR* 511 and Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *SAJHR* 278. However, to the best of the author's knowledge, the first attempt to undertake a broader judicial impact study in South Africa is Hall *The impact of judicial control on the public administration of the environment: 1995 to 2007* PhD thesis (UCT) (2011).

courts successful in holding officials accountable? Do officials take judgments seriously? If so, do they implement those judgments? If not, why not?

Providing answers to these questions is not a simple task. The small but growing body of judicial impact studies which assess such issues have not yet resulted in a generally accepted theory on how judicial impact studies should be undertaken, nor is there a unified approach regarding what impacts are assessed, how impact is established or which underlying theoretical approach is optimal.[2]

The aim of this article is to explore some of the key conceptual and methodological issues that are involved in researching judicial impact. As a point of departure, the second part of this article discusses the concept of impact by considering two questions, that is: what is impact, and can it be measured? The third part of the article considers different methodological approaches. It highlights the strengths and weaknesses of the positivist and interpretivist theoretical approaches which have underpinned most impact studies to date and discusses how the use of a combined approach can offer new insights for our understanding of the reception of judicial direction by bureaucrats. That analysis is followed in the fourth part of the article by a discussion on a key limitation in the scope of existing judicial impact studies and suggests how and why future research can make a contribution to enhancing the influence of the courts. Finally, concluding remarks are made in the last section of the article.

2 The concept of impact

Studies on the influence of the courts attract researchers from different disciplines. This multidisciplinary interest in the topic is valuable as it can result in a multi-dimensional richness in our understanding of responses to the courts that is not present in many other areas of legal research. Notwithstanding this, the various disciplines undertake impact studies for different reasons and the answers that are being sought may accordingly differ. It is therefore important to understand the 'platform of departure' for any impact research. In this regard one of the first challenges that arise in designing judicial impact studies is identifying what is meant by impact and how it should be assessed. The discussion below sets out some of the considerations that have a bearing on resolving that challenge.

2.1 What does 'impact' mean?

At a broad level, all impact studies are concerned with understanding the influence that courts have on political, judicial, bureaucratic or social behaviour. In other words, they consider the extent to which the authority of the courts is

[2]Hertogh and Halliday 'Judicial review and bureaucratic impact in future research' in Hertogh and Simon (eds) *Judicial review and bureaucratic impact* (2004) 269.

accepted. Nonetheless, and as noted previously, a review of the relatively small body of literature shows that there is no common approach to the specific 'impact' which is assessed. The meaning ascribed to impact in any study is significant as it guides researchers toward a preference for a methodological approach.

The scope for divergent approaches arises from the latitude which is created by the definition of 'impact', as well as the objective of each study. With regard to the former, the dictionary defines 'impact' as *'a marked effect or influence'*.[3] Whilst all judicial impact studies entail a consideration of the courts' effect or influence, they do not necessarily all consider the same types of effect or influence.

For present purposes, impact studies can be divided into two categories.[4] The first are those studies – primarily undertaken in North America – that assess the extent to which the courts are effective agents of social change (policy studies). The second category relates to studies – primarily conducted in the United Kingdom – which investigate whether judicial review is an effective tool for controlling the exercise of government power (administrative studies). The distinction is significant because the parameters of the impact that are assessed in the two categories differ.

In studies which consider the ability of the courts to influence social policy, or to act as a catalyst for social change, the impact of a milestone judgment or line of judgments on a particular issue is typically considered. For example, there are numerous studies which consider the influence of the courts on prison reform or school desegregation.[5] Because these studies are issue-specific, they tell us something about the influence of courts on those issues in question. This is usually achieved by reference to the policy changes which occur, or do not occur, in response to the selected judgment. In the context of these studies, Becker and Feeley's proposal that impact means 'all policy related consequences of a decision' makes sense.[6] One potential drawback of considering impacts in this

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[3] *South African concise Oxford dictionary* (2002).

[4] Judicial impact studies which fall outside these two categories include Hartshorne *et al* '"Caparo under fire": A study into the effects upon the Fire Service of liability in negligence' (2000) 63/4 *The Modern LR* 502 which considers the impact of delictual liability on the fire services and Spriggs 'The Supreme Court and federal administrative agencies: A resource-based theory and analysis of judicial impact' (1996) 40/4 *American Journal of Political Science* 1122 which discusses judgments in the context of government's allocation of financial resources.

[5] See Ekland-Olson and Martin 'Organizational compliance with court-ordered reform' (1998) 22 *Law and Society Review* 359; Duncombe and Strausman 'The impact of courts on the decision to expand jail capacity' 1993 *Administration and Society* 267*;* Chilton *Prisons under the gavel: The Federal Court takeover of Georgia prisons* (1991); Wasby *The impact of the United States Supreme Court* (1970) and Rosenberg *The hollow hope: Can courts bring about social change?* (1991).

[6] Becker and Feeley *The impact of Supreme Court decisions* (1973) (2nd ed) 212 as quoted in Riddell *Legal mobilization and policy change: The impact of legal mobilization on official minority-language education policy outside Quebec* Doctoral dissertation, (McGill University) (2002) 13 at 10 and McCann *Rights at work* (1994) who undertook a study on employment rights.

way, as Rosenberg points out, is that the parameters of these studies are relatively narrow and the results seldom lend themselves to extrapolations about the general relationship between the courts and the bureaucracy.[7]

Many administrative studies, on the other hand, seek to understand whether legal mechanisms, such as judicial review, are effective in influencing bureaucratic behaviour. These studies assess responses to a range of judgments involving judicial review in respect of a particular topic, such as homeless law.[8] Although they are based on a specific topic, the topic provides an anchor for the study rather than being part of the primary purpose. As their emphasis is on understanding the court's influence on daily administrative practice, the meaning of 'impact' in these studies does not fit comfortably with the visible policy consequences contemplated by Becker and Feeley. 'Impact' in these studies is more accurately interpreted as meaning subsequent administrative responses to related decision-making or administrative processes.

The different objectives of undertaking social or administrative studies have a direct bearing on the meaning which is ascribed to impact in those studies. Because there is an overarching commonality of purpose in the studies, there is of course an overlap between the categories. However it is the focus on policy or administrative law as the case may be which leads to varying meanings. Administrative studies, for example, may be confined to studying administrative or bureaucratic responses or, in other words, impacts on bureaucratic behaviour. On the other hand if the purpose of the study is to understand the courts' impact on social issues, it is usually relevant to consider responses from (or impacts on) a range of affected parties, including politicians, bureaucrats and affected members of the public.[9]

For completeness on the discussion regarding that nature of impacts, it is noted that impacts can also be considered from the perspective of whether they are primary impacts or secondary impacts. Primary impacts refer to the type of impacts which are discussed above. Secondary impacts on the other hand relate to effects, or consequences, which are a step removed from the objective of the

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[7] Rosenberg 'Hollow hopes and other aspirations: A reply to Feeley and McCann' (1992) 17 *Law and Social Inquiry* 762.

[8] Examples include Halliday *Judicial review and compliance with administrative law* (2004); Creyke and McMillan 'The operation of judicial review in Australia' in Hertogh and Halliday (eds) (n 2) at 161; Sunkin and Pick 'The changing impact of judicial review: The Independent Review Service of the Social Fund' (2001) Winter *Public Law* 736; Machin and Richardson 'Judicial review and tribunal decision-making: A study of the Mental Health Review Tribunal' (2000) *Public Law* 494; Koenig and Kise 'Beginning to understanding the sources of influence on the management of local government' (1996) 6 *Journal of Public Administration Research and Theory* 443 and Cooper 'Local government legal consciousness in the shadow of juridification' (1995) 22/4 *Journal of Law and Society* 506.

[9] See, eg, Johnson and Canon *Judicial policies: Implementation and impact* (1984) which sets out research findings based on studying the actions between five groups, namely, the Supreme Court, the lower courts, the bureaucracy, affected individuals and others who are indirectly affected.

judgment.[10] For example, Riddell explains that a secondary impact may be that the crime rate increases in response to a series of liberal judgments.[11] An assessment of secondary impacts can no doubt add value and further dimension to certain studies. However, given the difficulty in defining impact and in measuring impact (discussed below) most studies do not include an assessment of secondary impacts. In fact Riddell suggests that a study of secondary impacts is not preferable as it would 'overburden the concept of "impact"'.[12]

2.2 *Measuring impact – measuring the impossible?*

In addition to the difficulties concerning the nature of the impact to be assessed, a second equally challenging question presents itself – can impact be measured?

Researchers to date have adopted different indicators to the measurement of impact. For example, in their study on the efficacy of judicial review in Australia, Creyke and McMillan analysed the number of times that a department changed its decision after judicial review proceedings were decided in favour of the applicant.[13] By contrast, Machin and Richardson considered, amongst other factors, observable compliance and how many times particular judgments were referred to in mental health review tribunal proceedings.[14] The majority of studies, particularly policy studies, evaluate the extent to which there is compliance with a judgment.

For many researchers, however, there is a high level of discomfort regarding the defensibility of approaches to impact measurement. For instance Krislov states that:

> Even conceptually, the problem of impact measurement presents grave difficulties hardly resolved by the usual efforts at studying the immediate aftermath of some dramatic event or decision. (Even the most careful study cannot establish whether alleged changes were not merely coincidentally but actually consequentially related).[15]

Krislov's comment shows that a great deal of thought needs to be given to 'measurement methodologies' before claims of impact can be made. Rosenberg provides a pragmatic point of departure. He states that:

> the mechanisms or links of influence must be clearly specified … then, second, the kind of evidence that would substantiate them must be presented … [then] other possible explanations for change must be explored and evaluated.[16]

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[10]Canon 'Courts and policy: Compliance, implementation, and impact' in Gates and Johnson (eds) *American courts: A critical assessment* (1991) as cited in Riddell (n 6) and Levine 'Methodological concerns in studying Supreme Court efficacy' (1970) 4 *Law and Society Review* 583.
[11]See Riddell (n 6) at 13.
[12]*Id* 12.
[13]See Creyke and McMillan (n 8) 168.
[14]See Machin and Richardson (n 8) 500.
[15]Krislov *The Supreme Court and political freedom* (1970) 5/1 *Law and Society Review* 44 as quoted in Wasby (n 5) 166.
[16]See Rosenberg *The hollow hope: Can courts bring about social change?* (n 5) 108-109.

In terms of Rosenberg's approach, measuring impact should start with an analysis of the 'before' and 'after' – an analysis which may be difficult where the 'before' is unknown. For impact studies that analyse the effect of the courts on social policy, Lempert suggests that this can be addressed through the use of his rival hypotheses theory.[17]

Notwithstanding this, it is Rosenberg's third requirement that *'other possible explanations for change must be explored and evaluated'* which especially plagues attempts to establish impact. Judgments do not exist in a policy or social vacuum and receptivity to court rulings is accordingly affected by numerous factors in practice. These factors arise from different sources, including the conduct of the court; the attributes of the decision-makers who must give effect to the judgments and the pressures which are exerted by the decision-making environment. Many of these factors have been identified in the literature on judicial impact studies. Wasby, for instance, lists 33 hypotheses which argue that the type and number of cases, clarity of the judgment and the extent to which the ruling is controversial influence responses.[18] Halliday on the other hand notes that a lack of knowledge or legal conscientiousness on the part of decision-makers inhibits judicial impact.[19] Research conducted on the decision-making environment by Duncombe and Strausman, and Lo *et al* points to factors such as the effects of resource constraints[20] and Hall's research suggests that contextual settings and the nature of the decision itself may have an effect on receptivity.[21]

The relevance of external factors is clearly illustrated by Duncombe and Straussman who identified several factors, in addition to court orders, which influenced responses. In their study on the expansion of jails in the United States of America they conclude that whilst judgments have an impact, other 'jail-specific factors, such as the level of overcrowding, and the age of the facility, have an independent impact on expansion that may be stronger than the mere presence of a court order'.[22]

A failure to recognise other factors that may influence the behaviour which follows a judgment, can therefore result in inaccurate findings, particularly where the general relationship between the courts and a bureaucracy, as opposed to social impacts, are the focus of a study. While many of these factors may be obvious, others will be less tangible and harder to assess. With regards to the

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[17] Lempert 'Strategies of research design in the legal impact study: The control of the plausible rival hypotheses' (1966) 1 *Law and Society Review* 111.
[18] See Wasby (n 5) 246-251.
[19] See Halliday (n 8).
[20] See Duncombe and Strausman (n 5) and Wing-Hung Lo *et al* 'Effective regulations with little effect? The antecedents of the perceptions of environmental officials on enforcement effectiveness in China' (2006) 38/3 *Environmental Management* 388.
[21] See Hall (n 1).
[22] Duncombe and Strausman (n 5) 276.

latter, just one example could be the frequency of litigation on the same issue – does this result in a higher or more hostile cumulative impact? Another may be the overall experience that officials have with the courts. If, for example, a department has a high success rate, does this make them more willing to accept a negative judgment? Yet other factors may relate to media coverage or community opinion.

Whilst the relevance of external factors must be accepted, it must also be accepted that the consideration of every conceivable external factor in a judicial impact study is impractical. In view of this the findings of most judicial impact studies need to be qualified. However, apart from the problem of excluding external factors for reasons of practicality, the indicators that are used to assess impact themselves suffer from limitations. In this regard it will be recalled that compliance with a judgment or judgments is the most frequently used indicator. If one considers the use of compliance as an indicator, the difficulties become apparent.

Wasby, for example, points out that compliance may not always mean that the courts have had an impact, as the affected party may have intended to follow that route before the judgment was handed down. He also points out that a focus on compliance limits the assessment to a single element of impact.[23] In this regard, compliance tells us whether a judgment was given effect to, but generally does not yield information regarding the range of reactions that occur in response to a judgment or prevailing attitudes to the courts. For example, a compliance approach does not lend itself to explorations of perfectly permissible efforts by officials to test judgments that they disagree with through an appeal process or their attempts to change the outcome of a judgment. This is important because a key purpose of judicial impact assessments ought to be determining measures to enhance impact and, by implication, conduct which increasingly reflects constitutional objectives. Achieving that purpose requires an understanding of the factors that facilitate or militate against impact.

Another observation which Wasby makes is that time is a factor that ought to be considered in the measurement of impact.[24] This is because in the ordinary course of implementation practices, there may be a delay between a judgment being handed down and its implementation. A delayed response is not the same as non-compliance.

Apart from the concerns raised by Wasby there are other challenges in using compliance as an indicator. Firstly, compliance indicators cannot measure the effect of judgments which confirm existing approaches. The effect in these instances may be, for example, to increase confidence resulting in more use of an administrative approach or an increased willingness to approach the courts to

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[23] *Id* 46.
[24] *Id* 55.

resolve disputes. Secondly, the point of departure of the compliance approach is that there ought to be full implementation of a judgment.[25] It is trite that the courts have a particular authority which must be respected. However, it also needs to be borne in mind that judges are individuals who are called on to make a decision in a dispute based on the arguments which are presented to them. In consequence judgments may at times be vague, resulting in difficulties for determining what impact they ought to have or what would constitute compliance. A judgment may also conflict with directions provided by another judgment on the same issue. In such instances, compliance with one judgment will generally result in non-compliance with the other. In the worst case scenario, a judgment may simply be incorrect, a situation which is contemplated by the appeal system. For these reasons total compliance with all administrative judgments all of the time is described by Halliday as 'a ludicrous notion of judicial review's potential influence'.[26]

In view of the difficulties of using compliance as an indicator, Wasby commented that it might be that 'we can isolate impact effectively only where there is direct and obvious (visible) resistance to a court decision, and that the only impact we can study precisely is clear non-compliance'.[27] The result is that there is no accepted approach to the *precise* measurement of impact, and most findings on impact must be qualified.

It is beyond the scope of this article to resolve the conundrum. However, it is suggested that where the objective of a particular study is to explore receptivity to judgments, the way in which judgments have influenced behaviour and the extent to which officials respect the role of the courts, precise measurement of impact is not necessary to achieve that objective. In such instances a qualitative perspective on whether the court has some effect on officials may yield the required insights. For example, in the author's research the following general propositions were used:

(i) if there is no institutional knowledge of judgments, there is no widespread organisational impact;
(ii) if there is limited individual knowledge of judgments, there may be localised impact;
(iii) if there is knowledge of judgments and there is no change or consequence that can be identified, or defiance is identified, then there is either neutral or negative impact; and
(iv) if there is knowledge of judgments, and some form of influence or response related to judgments is identified, there is positive impact.

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[25] *Id* 43.
[26] See Halliday (n 8) 16. Note that concerns regarding the adoption of compliance as an indicator of impact do not imply that compliance indicators have no place in impact measurement. Rather, it is argued that compliance should be considered as *an* indicator, rather than *the* indicator.
[27] See Wasby (n 5) 35-36.

Framing questions in this more open-ended way allows a range of responses to be considered. For example responses which may be identified for the purposes of points (iii) and (iv) are set out in the table below.

Table 1 Potential Responses to Judgments

Positive / Lawful Responses	Negative Responses	Other Responses
• Law reform • Policy change • Decision-making changes consistent with judicial requirements • Administrative responses • Institutional changes • Delayed responses, ie, a 'think twice' approach is applied to subsequent decisions • Improvement in quality of decision-making • Appeals	• Law reform • Policy change (or no policy change) • No change to decision-making • Administrative responses • Institutional changes • Creative compliance ie there is formal compliance but the intent of the judgment is not given effect to • No change as a result of defiance	• Misdirected response through misinterpretation • No change as a result of lack of knowledge • No change as a result of inertia

In addition, such a qualitative approach reduces the need to identify precise cause and effect relationships because officials' articulation of responses and formal evidence – to the extent that it exists – is sufficient to tell us something about the courts' influence on behaviour and why officials respond as they do. For example, it was possible in the author's research to make findings such as 'impact is currently limited to a minority of judgments and judgments not involving the departments have made no impression on officials' and 'the absence of a systemised approach to the management of judgments has resulted in responses often being unevenly implemented amongst officials'.[28]

3 Underlying approaches to judicial impact studies

Apart from differing views on the concept of impact, judicial impact studies have also been underpinned by diverging theoretical approaches. Most studies have been based on positivist theory or interpretative theory. The preference for using either approach appears to have been influenced by the academic discipline of

[28]See Hall (n 1) 287.

the researcher and the focus of the study. Most legally-orientated researchers who conducted administrative studies adopted a positivist approach; whereas many social scientists have opted for an interpretative approach to their policy studies.[29] The discussion below describes the key considerations and constraints which emerge when adopting either methodology.

3.1 Positivist approaches

Proponents of the positivist approach aim to objectively establish patterns and causal relationships between judgments and government responses.[30] The focus of positivist-based studies is therefore on determining whether judgments have an impact by comparing the approach of government before and after a judicial decision. Impact is therefore only established when a clear causal link between the judgment and the actions of the bureaucracy is demonstrated. Positivist studies are accordingly referred to as being 'top-down' or 'court-centred' as the point of departure for the research is the identification of one or more judgments which are used to determine a benchmark against which impact can be assessed.

One of the most comprehensive early studies which followed the positivist approach is Rosenberg's,[31] whose work sparked a debate about the limitations of the positivist approach. Critics of the positivist approach such as Feeley and McCann, argue that the court-centred approach is flawed. McCann perceives a key weakness of the court-centred approach to be that it assumes that causality is initiated by the courts.[32] He argues that causality is in fact initiated by litigants and that judgments are a response to social struggle or a dispute, and not the source of causation.

A second criticism of the approach is raised by Feeley. In his review of Rosenberg's book, Feeley comments that the court-centred approach is vulnerable to the 'gap problem'.[33] He argues that where the formulation of the goal of a judgment is misinterpreted and exaggerated, the judgment may appear to have less impact. This occurs where the benchmark against which government action is measured is higher than it ought to be. Feeley illustrates his point by reference to Rosenberg's analysis of the well-known judgment of *Brown v Board of Education* (*Brown*).[34] He contends that the objective of the judgment was to remove the legal sanctioning of desegregation in schools, as opposed to securing actual integration at schools. In view of this, Feeley argues that Rosenberg's

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[29]Hertogh and Halliday 'Introduction' in Hertogh and Halliday (eds) (n 2) 1.
[30]Sunkin 'Conceptual issues in researching the impact of judicial review on government bureaucracies' in Hertogh and Halliday (eds) (n 2) 64-68.
[31]See Rosenberg (n 5).
[32]This criticism is explained by McCann in 'Reform litigation on trial' (1992) 17 *Law and Social Inquiry* 731.
[33]Feeley 'Hollow hopes, flypaper, and metaphors' (1992) 17 *Law and Social Inquiry* 745 at 748.
[34]347 *US* 483 (1954).

approach to measuring the impact of the decision by determining the percentage of black children attending mixed-race schools is not appropriate when assessing whether legal segregation had been addressed. He concludes that this flaw may have resulted in an interpretation that the impact of the judgment was less than it would have been had the goal been correctly identified.[35]

McCann and Sunkin also argue that the objective approach of establishing causal relationships between judgments and government responses ignores the range of factors that may contribute to the impact of a judgment.[36] If the example of *Brown* is used to illustrate this argument, a reliance on the percentage of black and white children attending mixed-race schools to determine impact would not be appropriate because other factors, such as geographic location and the desire of parents to take up the right afforded to them by the courts, may result in a different interpretation of the extent of the impact.[37]

The limitations of the positivist theory, insofar as it fails to take into account the range of factors that may influence the responses of government to a judgment, are merited. This limitation is particularly relevant where the intention of the study is to move beyond examining compliance to understanding why there is, or is not, an impact. It will also impede the effective identification of solutions for improving impact.

Notwithstanding this it is not accepted that the use of a court-centred approach is completely flawed. Where the objective of a study is to understand how government responds to the courts and their judgments in general, the use of a court-centred approach provides a useful entry for understanding what government needs to respond to. In addition, judgments provide a particular insight as to how officials make administrative decisions on a daily basis. This is an insight which is not often revealed by other methods and judgments accordingly offer some indication of the extent to which constitutional values have penetrated operational activities of the public administration. In the context of an emerging democracy like South Africa, judicial oversight assumes a particular significance and its effectiveness merits attention. Focusing impact studies on an assessment of a range of empirical experiences without an emphasis on judgments is unlikely to provide a clear enough framework for assessing the extent to which impacts have occurred.

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[35]Garrow supports Feeley's views on the basis that Rosenberg failed to take social responses and comments from community leaders into account. See Garrow 'Hopelessly hollow history: Revisionist devaluing of *Brown v Board of Education*' (1994) 80 *Virginia LR* 151.

[36]See McCann (n 32) 731 and Sunkin (n 36) 68.

[37]See Rosenberg's response to these criticisms in 'Hollow hopes and other aspirations: A reply to Feeley and McCann' (n 7).

3.2 Interpretivist approaches

Contrary to the positivists, interpretivists believe that the influence of judgments cannot be understood unless the context within which they are handed down is analysed.[38] Interpretivist-based studies accordingly adopt a so-called 'bottom-up' approach which focuses on understanding the experiences of people, mostly outside of the judiciary, who are engaged in a conflict involving societal relationships.[39]

Studies that are based on an interpretivist approach therefore attempt to establish how a range of factors influence a social struggle and intrepretivists derive findings and causal links from research based on the experiences of key role-players. The consideration of judgments may be one element in such studies, but is usually not pivotal.

As with the positivist approach, the use of the interpretivist approach is subject to criticism. In commenting on McCann's use of the interpretivist approach, Rosenberg raises a concern that the validity of McCann's findings cannot be confirmed and that the study does not adequately explain the significance of the court to the outcome.[40] Riddell raises another concern. He states that '[b]y emphasizing context and contingency, interpretivist studies are limited in developing explanations or predictions that may be put to use in other settings'.[41] Riddell's concern is echoed by Halliday who notes that since the primary focus of interpretivist studies is to derive meaning from the experiences of people, as opposed to directly establishing impact, judgments are not the focus of the study. In view of this, he states that '[i]f one's aim is to explore the complex ways in which meaning is achieved and the overlapping contexts in which social action is performed, then the "impact" of judicial review simply cannot be captured'.[42]

Halliday's observation is supported. The interpretivist approach has resulted in useful insights regarding the understanding of particular conflicts, such as prison reform in the United States of America.[43] However, where the purpose of a study concerns a broader enquiry as to whether judgments impact on government decision-making, a strict adherence to the approach is unlikely to provide a clear result because the norms that ought to have resulted in an impact, are not necessarily established.

Notwithstanding these criticisms, there are benefits of adopting the approach. In particular, the consideration of factors which influence the reception of case law provides a basis for knowledge that is not obtained through the positivist approach. This knowledge is necessary to gain a more in-depth understanding of

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[38]See Sunkin (n 30) 68.
[39]See Feeley (n 33) 731.
[40]Rosenberg 'Positivism, interpretivism, and the study of law' (1996) *Law and Social Inquiry* 446.
[41]See Riddell (n 6) 26.
[42]See Hertogh and Halliday (n 2) 275
[43]See, eg, Chilton (n 4).

impact and to provide informed suggestions regarding changes to existing institutional arrangements and practices.

3.3 Alternative approaches

The inadequacies of both the positivist and interpretivist approaches are captured by Rosenberg's comment that '[w]hile McCann (and others) find my approach too much on the positivist side, I find his approach too much on the interpretivist side'.[44] Some writers like Riddell attempt to avoid the challenges posed by the two approaches by adopting a new institution methodology. Others, recognising that both approaches have limitations and yet have much to offer, suggest that the two approaches need not be mutually exclusive.[45] For example, Hertogh and Halliday state that:

> ... the basic methodological approach for future research [means] that interdisciplinary, a combination of approaches and some level of methodological pluralism, is required to undertake a comprehensive enquiry about judicial review and its impact on bureaucracies.[46]

In his own research Halliday adopted an approach which relied on aspects of both the positivist and interpretivist theory and accordingly describes himself as an interpretivist conducting a court-centred research project.[47] Whilst the point of departure for his study was based on judgments, he adopted an interpretivist approach to assessing the factors that influenced housing departments' approaches to routine decision-making.

The primary purpose of Halliday's study was to provide a framework which can be used for researching the effectiveness of judicial review as a regulatory mechanism for governmental decision-making. By adopting a combined approach, Halliday was able to establish how decisions are made in practice, and the interrelationship between judicial review and other influences. He was accordingly able to test five hypotheses regarding the conditions that are required for impact and to provide some explanation of the barriers to acceptance of judgments.

Halliday's work illustrates that the use of a combined approach to judicial impact studies is an effective methodology for clarifying the reasons behind objective findings. The combined approach accordingly yields an additional dimension to the knowledge which is required to understand the courts' impact.

4 Expanding the framework of research

The focus of judicial impact studies to date has mainly been concerned with

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[44] Rosenberg 'Hollow hopes and other aspirations: A reply to Feeley and McCann' (n 7) 455.
[45] See McCann (n 32) 743.
[46] See Hertogh and Halliday (n 2) 277.
[47] See Halliday (n 8) 10.

determining whether courts generate an impact. Although the underlying, or sometimes explicit, implication of these studies is that certain barriers exist to the optimal reception of judicial direction, they do not explore what is required to remove such barriers in any detail. In other words the studies largely assess the *status quo* and stop short of analysing what is required to enhance impact. This is an important gap because, in the absence of providing decision-makers with an understanding of how to address existing deficiencies, the insights which are offered by existing research are unlikely to meaningfully advance the impact of the courts or contribute to the strengthening of democratic architectures.

There is accordingly a need to expand the research agenda beyond an assessment phase to an implementation phase which includes empirical investigations of methods for enhancing impact. The outcome of such research could potentially make a significant and pragmatic contribution to enhancing the courts' influence on bureaucratic decision-making because, as Zander and Zander point out in their study of transformational phenomena:

> Transformation happens less by arguing cogently for something new than by generating active, ongoing practices that shift a culture's experience of the basis for reality.[48]

It may not be possible to incorporate implementation requirements in impact studies that aim to understand the contribution of the courts to a particular area of policy change because such studies are issue-based and relate to atypical situations. Their findings are therefore often not capable of replication. However, research on ways to enhance impact in practice ought to be viable for impact studies that have an underlying purpose of understanding the efficacy of administrative law because the interest of the researcher is focused, not so much on the substantive issues emerging from judgments, but on the efficacy of the courts as an accountability mechanism.

In this regard, even though there is no definitive model for impact studies there is arguably sufficient existing research to begin designing and testing practical interventions. In some instances departments themselves may initiate interventions which can be used as a basis for study. For example, in the author's research it was noted both that lack of awareness of judgments amongst officials was a barrier to impact and that the national Department of Environmental Affairs has recently implemented several measures that are aimed at improving officials' awareness of judgments such as the drafting briefing notes on judgments which are distributed to environmental management inspectors. Documents such as these can be used by researchers to investigate the extent to which they actually contribute to improving knowledge and the removal of the identified barrier.

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[48]Zander and Zander *The art of possibility* (2000) 4.

Where departments have not initiated such steps there are several obstacles which face the researcher. Foremost among these is that researchers will require access to, and the co-operation of, the department in question. In addition some barriers lend themselves to 'implementation' research more than others. For example, where knowledge is identified as being a significant barrier to the reception of judicial guidance, there is a large body of literature on knowledge management and communication that can be drawn on to identify appropriate means for addressing such deficiencies. However, where factors such as political pressure and influence are identified as being significant barriers it will usually be difficult for the researcher to have any control over the implementation of suggested solutions.

5 Conclusion

At the beginning of this article it was pointed out that there is much that is not known about the influence of the courts' on policy and bureaucratic behaviour in South Africa. This is an important gap in existing knowledge as it means that there is little understanding of whether the courts' role in the democratic architecture, which is founded on the rule of law and separation of powers, is working as intended. Furthermore, the absence of this knowledge hampers the ability to assess and design intervention measures that may be necessary to address any deficiencies.

Judicial impact studies can contribute to filling that gap and to improving our knowledge and understanding of the courts' contribution to rights-based governance. For example, where judicial impact studies attempt to penetrate bureaucratic thinking and responses to judicial direction they provide an opportunity to understand, not only officials' acceptance of the democratic architecture, but also the alignment between the myriad of administrative decisions and the spirit and substance of the law as interpreted by the courts. In addition, if studies are conducted over longer time periods, or repeated, they can be used as barometers for monitoring whether democratic governance is increasing or decreasing.

Notwithstanding the need for more impact research, the discussion above illustrates that there are a number of complex and often unresolved conceptual and methodological issues involved in such research. In order for future research to navigate through these issues successfully, it is therefore critical that it be underpinned by carefully considered methodological choices at the outset if the intended objectives are to be achieved. In addition the research agenda needs to be expanded to include considerations of how the findings of judicial impact studies can be used to improve the realisation of the courts' role in practice. Although wrestling with these challenges may result in judicial impact studies suffering from deficiencies in the short-term, methodological obstacles coupled with the clear need for such studies ought to invite further, not less, research.