

# Gender-based violence ignites the re-emergence of public opinion on the exercise of judicial authority

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## SUMMARY

South Africa is highly celebrated for its commitment to the promotion of human rights. This has also fostered “rights consciousness” among the citizenry which has become of essence for the advancement of the rights of women who had long been in the “legal cold”. However, the significance of the “rights concepts” is marred by the extreme levels of gender-based violence against women. The effect of crimes suffered by women raises questions about South Africa’s post-apartheid system of governance and the promotion of the rule of law, which is founded on human rights. With South Africa’s history, it is assumed that law has the potential to transform societies in ensuring the fulfilment of rights as envisaged in many national, regional and international instruments.

Against this background, this paper focuses on the recent shocking wave of the extreme levels of gender-based violence against women experienced in South Africa with the resultant consequence of the agitation of the public on the independence of the judiciary. Whilst it acknowledges the limitations of the law and the challenges faced by women, it argues against public opinion that seem to wither the democratic character of the state relating to the functioning of the judiciary. It also argues that public opinion waters down the assumption about the capacity of the law in generating social change. In addition, the confidence in the judiciary cannot be replaced by invidious philosophies that appear to compromise the independence of the judiciary as envisaged in the doctrine of separation of powers. The argument advanced herein is limited to the rationality of the calls by further raising a question whether safeguarding independence and impartiality of the judiciary should be outweighed by public outrage on gender-based violence. It also does not profess to provide an expert analysis of the interrelationship between law and social change because of the complexities that exists between these areas. Overall, the paper acknowledges and shares the concerns by the public on the elimination of gender-based violence; however, it refuses the indirect consequence of public opinion on the trampling of judicial authority.

## 1 Introduction

Two decades have passed since South Africa's democratisation in 1994. This period has been characterised by the quest to ensure the full realisation of human rights that are envisaged in the Constitution 1996.<sup>1</sup> It also entailed the development of norms, ethos and standards that have to ensure compliance with the prescripts of the new dawn of democracy. This period is of further significance for the promotion of the rights of women as the most vulnerable group who also had always been out of the "legal comfort".<sup>2</sup> Thus, the continued manifestations of gender inequalities, especially violent crimes that affect all aspects of women's lives have dominated both public and private spaces. The rising tide of inequalities is characterised by protracted violence, domestic and otherwise, exclusion and discrimination, sexual assault, rape, bullying, and murder, emotional and physical abuse including women's limitations in enforcing their rights.<sup>3</sup> The effect of crimes suffered by women raises questions about South Africa's post-apartheid system of governance and the promotion of the rule of law, which is founded on human rights.<sup>4</sup> The system has fostered a strong "rights consciousness" throughout society and the good that is related to their enforcement.<sup>5</sup> The evolution of the "rights concept" is indicative of the state's commitment to develop effective ways that will harness the "rights system" as an operational way of bringing about social change in the promotion of the right to gender equality.

Considering South Africa's history,<sup>6</sup> it cannot be denied that law has the potential to transform societies wherein rights will not only be respected, promoted and protected but also fulfilled.<sup>7</sup> The significance of the law in the construction of societies is derived from many of the international, regional and national legal instruments.<sup>8</sup> In the South African context, the Constitution 1996 is foundational to such construction as it "seeks to establish a society based on democratic values, social justice and fundamental human rights".<sup>9</sup> It is without doubt that the legal paradigm has over decades demonstrated its vision for the social construction of societies.<sup>10</sup>

However, the spate of gender-based violence against women and children that has reached alarming proportions in South Africa has challenged

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1 See Chapter 2 of the Constitution of the Republic of South Africa 1996.

2 See Ngcukaitobi "Let the world know that women were once not 'persons' in the eyes of the law" *Mail and Guardian* 9 August 2018. Available from <https://mg.co.za/article/2018-08-09-let-the-world-know-that-women-were-once-not-persons-in-the-eyes-of-the-law/> accessed 29 March 2020.

3 See Beal "Trickle-down or rising tide? Lessons from mainstreaming gender policy from Colombia and South Africa" 1998 *Social Policy Administration: An International Journal of Policy and Research* 513.

4 See S 1 of the Constitution of the Republic of South Africa 1996.

5 See Hohmann "Visions for social transformation and the invocation of human rights in Mumbai: The struggle for the right to housing" 2010 *Yale Human Rights and Development Journal* 135.

the very same assumptions made about the impact of the oriented rights laws in the construction of societies. Questions are raised and debates ensuing on the strength and significance of the law in contributing to social change. The centrality of the law has become a subject of debate and concern over its efficacy in eliminating the challenges faced by women. Gender based violence undermines many of the fundamental rights of women and the foundations of South Africa's democratic character, which is founded on human dignity, the achievement of equality and advancement of human rights on freedom, non-racialism and non-sexism among others.<sup>11</sup> The country's highly celebrated international standing on human rights protection has been deeply tainted.

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6 See Mahomed DP in *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 (8) BCLR 1015 para 1 as he expressed and acknowledged that:

"for decades, South African history has been dominated by a deep conflict between a minority, which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict, which had begun to traumatise the entire nation." See also Banda "Women, law and human rights in Southern Africa" 2006 *Women and the Politics of Gender in Southern Africa* 13.

7 See S 7(2) of the Constitution of the Republic of South Africa 1996.

8 See Booyen "Twenty years of South African democracy: citizen views of human rights, governance and the political system" 2014 *Freedom House* 1-78. Available from <https://freedomhouse.org/sites/default/files/Twenty%20Years%20of%20South%20African%20Democracy.pdf> (accessed 2020-03-22). See also the instruments such as but not limited to the Universal Declaration of Human Rights 1948, Convention of the Elimination of Racial Discrimination 1965, International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, Convention on the Elimination of Discrimination Against Women 1979, African Charter on Human and Peoples Rights 1981, Southern African Development Community Protocol on Gender and Development 2008, Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000.

9 See preamble of the Constitution of the Republic of South Africa 1996.

10 See Winston "Human Rights as Moral Rebellion and Social Construction" 2007 *Journal of Human Rights* 279.

11 See Rafudeen "A South African reflection on the nature of human rights" 2016 *African Human Rights Law Journal* 225.

Consequently, there are calls from the general public and highly placed individuals for the reinstatement of the death penalty, refusal to grant bail to those accused of such crimes, the imposition of stiffer sentences and denial of parole to those sentenced of these horrendous crimes. The President, on many occasions has also weighed in to an extent, one time he had to withdraw from attending the meeting of the United Nations General Assembly in order to address this unfortunate situation, which resulted in South Africa being classified as a country of “shame”.<sup>12</sup>

The calls are also not made in abstract because women are the most vulnerable and their living in both public and private spheres free from fear of violence in the enjoyment of all their fundamental rights is essential for the assumption made in determining the capacity of the law in effecting social change. The post-apartheid South Africa has put in place laws and policies which seek to promote respect for the rights and safety of women and guarantees for their implementation.<sup>13</sup> It then became a model of good governance and human rights protection not only on the African continent but globally. The relentless calls by the South African public for neither the release of the accused persons on bail nor handing down what appears in the eyes of the public as “lighter sentences” for those sentenced of horrendous crimes, is indicative of a country in “distress” over the extreme levels of gender based violence which undermine the equal rights of women.

On the other hand, the calls seem to show resentment against the judiciary. The calls perpetuate the unjustified influence of public opinion on the exercise of judicial authority. The judiciary is vested with judicial authority to apply and interpret the law without fear or favour.<sup>14</sup> The judiciary is endowed with “independence” to ensure certainty in the application of the law. The principle of independence is a basic tenet of a functioning democracy. It seeks to give effect to a just and fair application

12 Kieswetter “I write with a sense of shame: Kieswetter’s letter to SARS staff about gender-based violence” 13 September 2019. Available from <https://www.fin24.com/Opinion/i-write-with-a-sense-of-shame-kieswetters-letter-to-sars-staff-about-gender-based-violence-20190913-2> (accessed 2020-03-21).

13 See but not limited to the Maintenance Act 99 of 1998, Domestic Violence Act 116 of 1998, Recognition of Customary Marriages Act 120 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000.

14 See S 165(1) of the Constitution, which reads as follows.  
 (1)The judicial authority of the Republic is vested in the courts.  
 (2)The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.  
 (3)No person or organ of state may interfere with the functioning of the courts.  
 (4)Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.  
 (5)An order or decision issued by a court binds all persons to whom and organs of state to which it applies.  
 (6)The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

of the law to all people on an equal footing. It is also meant to eliminate any form of arbitrariness that is “camouflaged” as law. The authority that is vested in the courts is marred by public calls that seem to suggest for the courts to succumb to public opinion. The judiciary is accused of favouring those alleged to have committed the crimes instead of their victims. Plethora of issues are raised such as the provision of legal aid if the perpetrators cannot afford the legal representation whilst the victim woman is “left out to dry in the legal cold” without representation considering the challenges on the enforcement of the rights by many of them. The dragging of the investigative process, which is not within the realm of the judiciary, is also put at its doorstep as the one that drags the finalisation of the matters before it.<sup>15</sup>

Against this background, this paper focuses on the recent shocking wave of the extreme levels of gender-based violence against women experienced in South Africa with the resultant consequence of the agitation of the public on the independence of the judiciary. Whilst it acknowledges the limitations of the law and the challenges faced by women, it argues against public opinion that seem to wither the democratic character of the state relating to the functioning of the judiciary. It also argues that public opinion waters down the assumption about the capacity of the law in generating social change. In addition, the confidence in the judiciary cannot be replaced by invidious philosophies that appear to compromise the independence of the judiciary as envisaged in the doctrine of separation of powers. The argument advanced herein is limited to the rationality of the calls by further raising a question whether safeguarding independence and impartiality of the judiciary should be outweighed by public outrage on gender-based violence. It also does not profess to provide an expert analysis of the interrelationship between law and social change because of the complexities that exists between these areas. Overall, the paper acknowledges and shares the concerns by the public on the elimination of gender-based violence; however, it refuses the indirect consequence of public opinion on the trampling of judicial authority.<sup>16</sup>

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15 See Dugard “Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice” 2008 *South African Journal on Human Rights* 214-238. The author points out that in the past the judiciary failed to confront a racially divided South Africa. It was the apartheid judiciary that was able to rationalise a generalised failure to construct socially just rulings by claiming that law was distinct from morality. Today, the judiciary as an institution is found to have to advance transformative justice in critical systemic ways such as but not limited to: improve access to legal representation for the poor. promotion of public interest litigation; and especially, of the record of the Constitutional Court that has further diminished the capacity of the judiciary as an institutional voice for the poor.

16 Ntlama “The deference of judicial authority to the state” 2012 *Obiter Journal* 135.

## 2 Gender based violence ignites fury over the judiciary

### 2 1 South Africa: a country in “distress” over gender-based violence against women

This part provides examples, not exhaustive, of a list of horrendous crimes as reported in various media houses that were committed against women. It is also not an analysis of the cases that have gone and finalised by the courts but highlights them as having caused a stir from the public and directed an unwelcomed focus on the judiciary.

Sachs J in *S v Baloyi*<sup>17</sup> acknowledged the:

“harsh realities of the effects of crime on society and in particular, of the gender-based character of domestic violence because of its ‘hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It *cuts across class, race, culture and geography*, and is all the more pernicious because it is so often concealed and so frequently goes unpunished”,<sup>18</sup> (Author’s emphasis).

The non-national or non-ethnic status of gender-based violence was evidenced by the adoption of the United Nations Declaration on the Elimination of Violence Against Women<sup>19</sup> as it defined violence against women as a:

“manifestation of historically unequal power relations between women and men which have led to the domination over and the discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one crucial mechanisms by which women are forced into a subordinate position compared with men.”<sup>20</sup>

Further to the above, article 2 of the Declaration affirms that violence against women should be understood to encompass, but not be limited to:

- a physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- b physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and

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17 *S v Baloyi* 2000 (1) BCLR 86.

18 *S v Baloyi supra* para 11.

19 Proclaimed by UN General Assembly Resolution 48/104 of 20 December 1993. Available from [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21\\_declaration%20elimination%20vaw.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21_declaration%20elimination%20vaw.pdf) (accessed 2020-03-22).

20 UN General Assembly, Declaration on the Elimination of Violence against women, 20 December 1993, A/RES/48/104. Available at <https://www.refworld.org/docid/3b00f25d2c.html> (accessed 2020-03-17).

- intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- c physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.<sup>21</sup>

In the South African context, the spate of gender based violence, which seem to be spiraling out of control, especially, around the highly celebrated month of the bravery of the Women of 1956<sup>22</sup> has taken toll on all structures, societies, spheres and branches of governance. Women are subject to inhumanness, which the law itself cannot describe.<sup>23</sup> The ruthlessness that is experienced by women does not find comfort even within the rights-oriented laws.<sup>24</sup> Sexual assault coupled with rape, murder including mutilation and the burning of women's bodies and burial in shallow graves questions the centrality of the language of rights laws in upholding the rule of law in the promotion of women's rights in South Africa.<sup>25</sup>

South Africa subscribes to many of the international instruments, which are designed to promote equality and non-discrimination. The elimination of gender-based violence is one of the primary goals of ensuring adherence to the prescripts of the community of nations. Going back to 1948 on the adoption of the Universal Declaration of Human Rights, though South Africa at the time did not sign the instrument and abstained because of the apartheid system, the rights framework was consolidated to bring international peace at national level. The international community adopted the universality of rights, which is characterised by their interdependence and indivisibility as they uniformly apply to everyone on an equal footing throughout the world.<sup>26</sup> This also entailed the localisation of the international prescripts of rights

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- 21 See also Art 18(3) of the African Charter on Human and Peoples' Rights, adopted in Nairobi June 27, 1981 and entered into Force October 21, 1986. South Africa signed the Charter in 1995 and ratified it in 1996. The said article obligates the state to "ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".
  - 22 The Women of South Africa had on 9 August 1956 marched to the Union Buildings in Pretoria to claim their independence and freedom against the discriminatory laws of the apartheid government.
  - 23 Mofokeng "Violence against women is blocking development" 21 February 2020. Available from <https://www.project-syndicate.org/commentary/violence-against-women-blocking-development-by-tlaleng-mofokeng-2020-02> accessed 23 March 2020.
  - 24 See Van der Westhuisen J in *Omar v Government of the Republic of South Africa* 2006 (2) BCLR 253 (CC). The judge expressed with discomfort that gender based violence is a "brutality to many of the fundamental rights in the Constitution", para 17.
  - 25 Abrahams, Jewkes, Marins, Matthews, Vetten and Lombard "Mortality of women from intimate partner violence in South Africa: a national epidemiological study" 2009 *Violence and Victims* 546.
  - 26 Mubangizi and Sewpersadh "A human rights based approach to combating public procurement corruption in Africa" 2017 *African Journal of Legal Studies* 66.

into the domestic spheres, which becomes essential in the construction of rights oriented societies.

A synopsis of cases as reported in the media that have caused agitation from the public are highlighted herein. These cases have fueled perceptions about the protection accorded to women and the adequacy of the enforcement mechanisms in the fulfilment of their rights. The cases are but not limited to the case of:

- Ms Ntombizodwa Charlotte Dlamini, a 42-year-old nurse who was shot and killed at her home in Richmond Crest, Durban, after an argument with her husband who then fled the scene and later found with a bullet wound in the chin;
- Ms Nompumelelo Mthembu, a 20-year-old, who died from burn wounds after the father of her two children, Mr Siyabonga Buthelezi, 32 years of age, placed a tyre around her neck and doused her with petrol. On 23 April 2019, the Umthunzini High Court in KwaZulu-Natal sentenced Mr Buthelezi to life imprisonment for the murder;<sup>27</sup>
- Ms Meisie Maisha, an 18-year-old matric pupil, who was found dead with her eyes gouged out at the Soul City informal settlement on the West Rand. Her murder remains unsolved after three men initially arrested were set free;<sup>28</sup>
- The brutal murder of a 19-year-old former University of Cape Town student: Ms Uyinene Mrwetyana left the country bruised and reeling in disbelief over the manner in which the student was murdered. She was not only raped and murdered but her charred body was found in a shallow grave in Khayelitsha, Cape Town. Her alleged killer, Mr Luyanda Botha, a 42 year old man working at the Claremont Post Office after confessing and detailing the manner in which he killed the student was sentenced to three life sentences and extra five years which are to run concurrently by the Western Cape High Court;
- Ms Leighandre “Baby Lee” Jengels, a former boxer of 25 years of age who was shot dead by her ex-boyfriend who happened to be a police officer;
- Ms Lynnette Volschenk of 32 years, whose body parts were found in refuse bags in an apartment block. A suspect was arrested for her murder;
- Ms Meghan Cremer, a showjumper of 30 years of age who was found dead in a shallow grave, reportedly with a rope around her neck. Three people were charged for her murder;<sup>29</sup> and

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27 Somdyala “KZN man gets life in prison for burning his girlfriend to death” *News24.com* 26 April 2019. Available from <https://www.news24.com/SouthAfrica/News/kzn-man-gets-life-in-prison-for-burning-his-girlfriend-to-death-20190426> (accessed 2020-03-24).

28 Sobuwa “Countries femicide list keeps growing” *Sowetan Newspaper* 4 September 2019. Available from <https://www.sowetanlive.co.za/news/south-africa/2019-09-04-countrys-femicide-list-keeps-growing/> (accessed 2020-03-17).

29 Report “South Africa: violence against women like a war – Ramaphosa” 18 September 2019. Available from <https://www.bbc.com/news/world-africa-49739977> (accessed 2020-03-17).

- The murder of a 11-year-old girl, Tiyiselani Rikhotso from Limpopo who was recently found in a nearby-dam with her mutilated body after being reported missing.<sup>30</sup>

The shocking wave of violence has also infiltrated even the institutions of higher learning.<sup>31</sup> These institutions are the breeding ground and the generation of a new crop of rights-oriented, ethically and morally responsible citizens in the upholding of the prescripts of the new dispensation. These institutions are required to produce socially oriented knowledge in addressing the ills experienced by societies.<sup>32</sup> The production of rights-oriented knowledge has become more prudent in giving content to the ideals of the new democracy. The cases, not limited to the following, which were committed at institutions of higher learning, are a great cause of concern:

- Ms Zolile Khumalo, a student at Mangosutu University of Technology of 21 years of age who was shot dead by her ex-boyfriend, Mr Thabani Mzolo in 2018 by using the illegal fire-arm and has also been found guilty and sentenced to life imprisonment on 5 March 2020 at the Durban High Court, and
- Ms Jabulile Nhlapo, a 21-year-old UNISA student who was shot dead at a student residence in Vanderbijlpark, south of Johannesburg, by her ex-lover Lebohlang Mofokeng who is 30 years of age. Mr Mofokeng was sentenced to life imprisonment for the murder. He was also sentenced to five years' imprisonment for theft, four years for possession of a firearm and 18 months for possession of illegal ammunition.

What is striking about the murders is what appears to be the same *modus operandi* where the victim is not only raped and murdered but is also buried in a shallow grave with a burnt or mutilated body. The discomfort experienced by the country in all levels and spheres of society led to the President making an undertaking at the launch of the International Day of No Violence against Women, for the review of the existing laws on criminality and sentencing.<sup>33</sup>

The cases mentioned here are just a tip of the iceberg and have unsettled many people in South Africa. There are also a myriad of factors, which are not the subject of this paper and not a justification for the

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30 Maringa "Ritual killing suspected to be behind 11 year-old's brutal murder in Limpopo" 18 March 2020. Available from <https://www.sabcnews.com/sabcnews/ritual-killing-suspected-after-11-year-olds-brutal-murder/> (accessed 2020-03-20).

31 SaferSpaces "Gender based violence at higher education institutions in South Africa". Available from <https://www.saferspaces.org.za/understand/entry/gender-based-violence-at-higher-education-institutions-in-south-africa1> (accessed 2020-03-20).

32 See Gilchrist "Higher Education as a Human Right" 2018 *Global Studies Law Review* 1.

33 Ramaphosa "Enough is enough: Ramaphosa's speech for 16 Days of Activism for No Violence against Women and Children" 25 November 2019. Available from <https://www.iol.co.za/news/politics/enough-is-enough-ramaphosas-speech-for-16-days-of-activism-for-no-violence-against-women-and-children-37939845> (accessed 2020-03-17).

suffering of women, that could have in one way or another contributed to the subjection of women to the extreme levels of violence from their male counter-parts. What is evident and could be safely said is that women because of their vulnerability, suffered violence for no reason than being women. The contention is informed by the gruesome murder of one woman wherein one would follow suite whilst the country is still reeling in disbelief about how the first woman died at the hands of a man. As expressed by Bosielo JA in *S v Makatu*,<sup>34</sup> the judge concretised the general outcry regarding the effect of the crime on societies, particularly women and held:

“for some time now this country has witnessed an ever-increasing wave in crimes of violence, notably murder and sexual offences. Undoubtedly, these crimes seriously threaten the very social and moral fabric of our society. As a result, our society is seriously fractured. *The majority of our people, particularly the vulnerable and the defenceless which include women, children, the elderly and infirm live under constant fear. It is no exaggeration to say that every living woman or girl in this country is a potential victim of either murder or rape. This is sad because these heinous crimes happen against the backdrop of our new and fledgling constitutional democracy, which promises a better life for all. These crimes have spread across the length and the breadth of our beautiful country like a malignant cancer. They are a serious threat to our nascent democracy. They have to be exterminated with their roots*”,<sup>35</sup> (Author’s emphasis).

Moegoeng CJ in *F v Minister of Safety and Security*<sup>36</sup> shared the same sentiments and held that:

“*[gender based violence] is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children*”,<sup>37</sup> (Author’s emphasis),

With South Africa’s rights consciousness of the citizenry, it remains a mystery that almost everyday day; there are widespread news about a woman that was brutally murdered. Courts are also placed in an

34 *S v Makatu* 2014 (2) SACR 539 quoted in *S v Kusele and Others* Case No: CCS31/2016 (unreported).

35 *S v Makatu supra* para 30. See also Sachs J in *S v Baloyi supra* as he expressed that “domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form”, para 12.

36 *F v Minister of Safety and Security* 2012 (3) BCLR 244 (CC).

37 *F v Minister of Safety and Security supra* para 56.

untenable situation with the impatient public over the judicial processes in dealing with horrendous crimes against women.<sup>38</sup>

### 3 Gender based violence fuels the re-emergency of public opinion on the functioning of the judiciary

#### 3.1 Public opinion implanting doubts on the significance of the independence of the judiciary

Following the abolishment of the death penalty in *S v Makwanyane*<sup>39</sup> with the huge outcry for its retention for serious crimes from the public, the case of *S v Pistorius*<sup>40</sup> saw the re-ignition of public opinion on the functioning of the judiciary. Mr Pistorius shot and killed his girlfriend in the early hours of the morning at his home. Without a detailed analysis of the case, his conviction and a six-year sentence by the Gauteng High Court, which was overturned by the Supreme Court of Appeal to 13 years,<sup>41</sup> caused an uproar and agitation from the public. Mr Pistorius happened to be an international athlete and competed in international events such as the Olympics. His sentencing was reduced to the distinction between the rich and the poor where, as alleged, those who can afford legal representation can “easily buy justice”.<sup>42</sup> Public opinion seemed to have subsided until the recent wave of horrendous crimes against women, which left many reeling in disbelief about the gruesome crimes against women.

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38 Bosielo JA in *S v Makatu supra* para 31 quoted in *S v Shangase* Case No CCD: 33/16 [2017] ZAKZDHC 27 shared the frustration of the court over the increasing levels of gender based violence when the judge held that:

“there is a huge and countrywide outcry by citizens, civic organisations, NGO’s, politicians, religious leaders and people across the racial, class and cultural divide about these crimes which have become a scourge. There is hardly a day that passes without a report of any of these crimes in the media, it be print or electronic. The Legislature responded to the public outcry with, amongst others the Criminal Law Amendment Act 105 of 1997, which singled out these crimes that are a threat to our wellbeing and welfare, for very severe sentences, the main objective being to punish offenders effectively and in appropriate cases, to remove those who are a danger to society from our midst, circumstances permitting either for life or long term imprisonment. In addition, the national Government declared the period from 15 November to 10 December, popularly known as 16 days of activism to be a nationwide campaign to promote a culture and ethos of no violence against women and children. I regret to state that everyday media reports and statistics from the South African Police Services (SAPS) and the National Prosecuting Authority 12 (NPA) seem to suggest that, despite all these gallant efforts by Government, we are not winning the battle against these crimes”.

39 *S v Makwanyane* 1995 (6) BCLR 665 (CC).

40 *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793.

41 See *Director of Public Prosecutions, Gauteng v Pistorius* [2018] 1 All SA 336 (SCA).

42 Campbell-Gilliers “Can money buy justice in SA?” 12 September 2014. Available from <https://ewn.co.za/2014/09/15/Can-money-buy-justice-in-SA> (accessed 2020-03-24).

On many occasions, with the foundations laid in the *Makwanyane* judgment, the judiciary has made pronouncements regarding the influence of the public on its functioning.<sup>43</sup> The newly established Constitutional Court made it explicit that the public has a limited influence on the performance of the functions of the courts. At the time, the democracy was still in its infancy and there was an existing need to interpret and develop the jurisprudence of the courts within the context of the rights framework. The intense calls for the imposition of stiffer sentence diverts the primary purpose of constitutional adjudication, which is founded on the Constitution.

The recent judgment of the Ugandan Constitutional Court in *Uganda Law Society vs Attorney General*<sup>44</sup> is of direct relevance to the argument herein that the judicial authority is derived from the Constitution to the exclusion of the public. The court contextualised the significance of the Constitution and held that:

- the Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law inconsistent with it is invalid to the extent of its inconsistencies.
- the entire Constitution must be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of Harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written constitution.
- in determining the constitutionality of the legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either the effect animated by or the object the legislation intends to achieve.
- all provisions bearing a particular issue should be considered together to give effect to the purpose of the instrument.
- where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary meaning.
- where the language of the constitution or a statute ought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it.
- the words of the written Constitution prevail over all unwritten conventions, precedents and practices.
- the history of the country and legislative authority of the Constitution is also relevant and useful guide to Constitutional interpretation.<sup>45</sup>

It is in this vein that South African Constitutional Court in the *Omar*<sup>46</sup> judgment grounded the enforcement of the fundamental rights of women against violent crimes and “extended the responsibility to the courts in the performance of their function in ensuring the elimination of

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43 *S v Makatu supra* para 32.

44 *Uganda Law Society vs Attorney General* Constitutional Court Petition 52 of 2017 [2020] UGCC 4 (10 March 2020).

45 See *Uganda Law Society vs Attorney General supra* paras 5-20.

46 *Omar v Government of the Republic of South Africa supra*.

gender based violence or threat thereof”.<sup>47</sup> The court further cited with approval Moegoeng CJ in *F v Minister of Safety and Security* that:

“it follows without more that the state, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. *Courts, too, are bound by the Bill of Rights. When they perform their functions, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. They must acknowledge the policy-drenched nature of the common law rules of vicarious liability, that it is the courts that have in the past fashioned and favoured them, and that now the rules must be applied through the prism of constitutional norms*”,<sup>48</sup> (Author’s emphasis).

It is evident from *F* that courts are vested with judicial review because of the “limitation of the public in determining what it would believe to be an appropriate punishment for the imposition of sentence for extreme crimes [such as gender based violence]”.<sup>49</sup> The Court in *Makwanyane* further held that:

“if public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the [Constitution]. [Similarly], the issue of [constitutional adjudication] cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected”.<sup>50</sup>

Hence, Abebe<sup>51</sup> rejects the influence of public opinion as an “illegibly heir” in constitutional adjudication by highlighting a myriad of factors such as but not limited to the following:

- courts should not attach determinative value to public opinion.
- the democratic justification for considering public opinion should be rejected based on the very reasons that created judicial review:

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47 *Omar v Government of the Republic of South Africa supra* in *F v Minister of Safety and Security supra* para 34.

48 *F v Minister of Safety and Security supra* para 57.

49 *S v Makwanyane supra* para 87.

50 *S v Makwanyane supra* para 88.

51 Abebe “Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa” 2012 *The American Journal of Comparative Law* 603.

- to restrict the outcomes of the majoritarian process whether exercised through representatives or directly by the people.
- the consequentialist justification for considering public opinion should be abandoned as well, for the simple reason that there is no guarantee that public opinion is well-informed and that it is fickle.
- besides, judges are unlikely to have good information about the content or grounds of public views.
- furthermore, judicial reliance on public opinion may contradict the principles of legal certainty and predictability, which are the essential tenets of the rule of law.
- lack of information as to public opinion, personal bias, potential consequences, and the possibility of breeding strategic public behavior to influence judicial decisions, all militate against judicial reliance on public opinion.
- the potential impact of the strategic behavior is significant given the influence of organized interest groups, which may easily mobilise support for their views and capture the democratic process to advance their own interests at the expense of the common good.
- reliance on public opinion rather than the constitution would substitute the supremacy of the constitution with the majoritarian supremacy, which contradicts the very purpose of human rights protecting vulnerable individuals and groups, whether of majority or minority from abuse by an individual, government or public at large.
- public opinion should be ignored when constitutions are adopted with an explicit transformative and ambitious ethos to ensure a decisive break with certain social and government traditions and practices as in the case of the South African Constitution.<sup>52</sup>

Ntlama AJ in *S v Shangase*<sup>53</sup> acknowledged that public “interests” and not “opinion” had always been considered by the judiciary on sentencing of the alleged accused convicted of a crime. The judge noted the already existing jurisprudence, which developed principles that considered public opinion. For example, the application and interpretation of the law is not taken in abstract, as the courts must first individualise the crime and the sentence to fit the crime. Secondly, to take the interests of the offender into account and lastly interests of the society.<sup>54</sup> The three-tier factors captures the rights framework as they consider the interests of all in the judicial law-making process.<sup>55</sup> Public opinion falls within this domain and it becomes of concern that the public would dictate to the courts on the sentence to be imposed in the exercise of the judicial function.

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52 Abebe 2012 *The American Journal of Comparative Law* 611.

53 *S v Shangase supra*.

54 See for example, *S v Selebi* [2010] ZAGPHJHC 58 para 25 in *S v Kusele supra*.

55 See Du Plessis “Between apology and utopia: the Constitutional Court and public opinion” 2002 *South African Journal on Human Rights* 18. See also Satchwell J in *S v Muller* (2SH98/2005) [2006] ZAGPHC 51 para 12 as the

The judicial approach undertaken in post-apartheid South Africa is one characterised by the rights framework, which was not the case in the past.<sup>56</sup> Of particular importance is the limitation of the authority of the judiciary not to do what is referred to as “overreach”. The laws to be interpreted are prescribed by the legislature, which is carrying the law-making function of the Republic. It is not for the courts to go beyond what is prescribed by law. The judiciary must exercise its discretion within the context of prescribed laws. The judge can deviate from the prescribed minimum sentence if “substantial and compelling circumstances” exist.<sup>57</sup> The deviation must be clearly put on record and delivered in a public court. In *S v Abrahams*,<sup>58</sup> the court emphasised that the judiciary should:

“not merely pay lip service to the intention of the legislature that prescribed periods of imprisonment which have to be taken to ordinarily appropriate when crimes of the specified kind are committed as the provisions of the Act create a legislative standard that weighs upon the exercise of the sentencing court’s discretion.”<sup>59</sup>

From *Abrahams*, it is evident that the courts are required to give content to the constitutional structure of the Republic, which is designed along the doctrine of separation of powers. The doctrine is the central feature of the new dawn of democracy. It is characterised by the institutional, personal and functional divisions of government authority into legislative, executive and judicial branches of the state. Ngcobo J in *Doctors for Life*<sup>60</sup> judgment contextualised the essence of the doctrine and held that:

“the constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle

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judge acknowledged the parliamentary debates on the introduction of the Bill on the Sentencing Act 105 of 1997 that:

firstly, there is a public demand for more stringent punishment for convicted offenders.  
secondly, the introduction of the minimum sentences will help to restore confidence in the ability of the criminal justice system to protect the public against crime.  
thirdly, the introduction of a minimum sentence confirms the government’s policy - and I hope this is the view of the parliament - which aims to curb the increasing crime rate and to protect the community against criminals. ....  
fifthly, and most importantly, these provisions relating minimum sentences are designed to ensure that our courts are able to deal effectively in terms of sentencing, with the kinds of serious crimes which we have witnessed in our country and which our people unfortunately will experience.

56 The past was designed to humiliate and the enforcement of punitive measures, especially for black South Africans.

57 See *Tafeni v S* 2016 (2) SACR 720 (WCC).

58 *S v Abrahams* 2002 (1) SACR 116 (SCA)

59 *S v Abrahams supra* at para 25 quoted in *S v Muller supra*.

60 *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

'has important consequences for the way in which and the institutions by which power can be exercised'. *Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution*,<sup>61</sup> (Author's emphasis).

The doctrine developed in the *Uganda Law Society* judgment is of direct relevance to the argument made herein and the approach by Ngcobo J in *Doctors for Life* that it should not be flouted and clouded, which in our instance, by public opinion. Although there is no rigid separation of powers in both countries (South Africa and Uganda) as endorsed in their respective Constitutions,<sup>62</sup> separation is embedded in the independence of the judiciary.<sup>63</sup> The independence of the courts was simplified as the "capacity to perform their constitutional function free from actual or apparent interference by and to the extent that it is constitutionally possible free from actual or apparent dependence upon any person or institutions, including in particular the executive arm of government over which they do not exercise control".<sup>64</sup> This means that it is only the courts that "are bestowed with capacity to maintain the rule of law and to serve as being custodians of justice and not the public. Secondly, independence is not an end in itself but is intended to protect the rights and freedoms of the individuals to be determined by an independent and impartial judge and founded on the principles of the doctrine of the rule of law".<sup>65</sup> The courts are therefore not "only axiomatic, [but] the genius of [the] government that they must be independent, unfettered and free from directives, influences, or interference from extraneous source".<sup>66</sup>

61 *Doctors for Life International v Speaker of the National Assembly supra* para 37.

62 See Art 128 of the Uganda Constitution 1995 which provides that:  
 (1) in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.  
 (2) no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.  
 (3) all organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.  
 (4) a person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.  
 (5) the administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.  
 (6) the judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.  
 (7) the salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.  
 (8) the office of the Chief Justice, Deputy Chief Justice, Principal Judge, a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall not be abolished when there is a substantive holder of that office.

and S 165 of the South African Constitution.

63 *Uganda Law Society v Attorney General supra*, 21.

64 *Uganda Law Society v Attorney General supra* 26.

65 *Uganda Law Society v Attorney General supra* 26.

66 *Uganda Law Society v Attorney General supra* 31.

Hence, it is worth to reiterate that public opinion “could not compel the courts to depend upon the vagaries of invidious philosophies in the performance of their duties”.<sup>67</sup> As similarly expressed by the court in *S v Makatu* that:

“our courts which are an important partner in the fight against crime cannot be seen to be supine and unmoved by such crimes. Our courts must accept their enormous responsibility of protecting society by imposing appropriate sentences for such crimes. It is through imposing appropriate sentences that the courts can, *without pandering to the whims of the public* send a clear and unequivocal message that there is no room for criminals in our society. This in turn will have the salutary effect of engendering and enhancing the confidence of the public in the judicial system. Inevitably, this will serve to bolster respect for the rule of law in the country”,<sup>68</sup> (Author’s emphasis).

With the independence of the judiciary, the frustration and anger towards the courts over gender-based violence is misdirected. The judiciary is the last line of defence in the protection of fundamental rights for all. Both the legislative and executive arms should withstand the worst of public agitation because the former designs laws whilst the latter ensures effective measures are in place for their enforcement. The calls from the public tilt the scales against the principle of independence and have the great potential to trample the authority that is vested in the courts. Any undue influence on the manner in which the judiciary exercises its authority is not in line with the ideals of the new dispensation. Both the executive and the legislature are required to ensure the independence of the judiciary. Equally, the President should not succumb to public pressure and compromise the independence of the judiciary. “Independence” captures transparency in the functioning of the judiciary by requiring judgments, including the reasons upon which they are based, to be made in public. This context renders public opinion on the functioning of the judiciary unwarranted.

Public opinion does not only compromise the principle of independence and doctrine of separation of powers but the development of the core content of a “right” which the court may frame within a particular approach. For example, the courts are required to develop a set of values and principles, which in the context of the argument in this paper, is the assumption about the role of the rights-oriented law in effecting social change. The rights-oriented law is a cornerstone of good governance and democracy, which entrenches accountability from all in addressing the scourge of gender-based violence against women. The essence of the law in effecting social change is not about the adoption and existence of the laws but their effective implementation in order to determine their impact.<sup>69</sup> It is of further concern that law seem to be

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67 *Uganda Law Society v Attorney General supra* 31.

68 *S v Makatu supra* para 32.

69 Kaarhus, Tor, Hellum and Ikdahl “Women’s land rights in Tanzania and South Africa: a human rights based perspective on formalization” 2011 *Forum for Development Studies* 456.

clouded by public opinion, which limits the determination of its effects in constructing social change in the elimination of gender-based violence. Does this, therefore, mean law has a limited role in regulating human behaviour?<sup>70</sup>

#### 4 Public opinion distracts the envisaged purpose on law and social change

As noted above, this is not an expert analysis of the intersection of law and social change. However, it highlights the importance of the law in effecting social change.

In the past, the system of apartheid had dire consequences for the integration of the law in effecting social change as Madala<sup>71</sup> expresses it as follows:

“the practice of the law and fundamental human rights were on one side of the system. A decline in the moral fibre of society and a collapse of social values were on the other side. The system of apartheid created a society in which the majority came to regard the courts, judges, and the administration of justice with suspicion and anger. In the eyes of the oppressed, the system came to represent an enforcement of injustice and a denial of protection. Society reached a stage where it was ready to defy and disobey the law and, in fact, did so. The judiciary, in general, was unable to resolve the impasse. It did not have the option to review and reverse unjust laws; rather, the courts and all the other institutions had to implement and administer such laws. In the nature of things, because that power had not been consented to or mandated by the great majority of the people over which it was exercised, rule had to be by force; thus, draconian laws and measures were unleashed on the people.”<sup>72</sup>

This history is significant in determining the imperatives of the new dawn of democracy. The quest for the determination of the law in effecting social change is unique for South Africa because the post-apartheid period has seen the required reforms in both law and ethos of the society. These changes were informed by South Africa’s past, which saw the law that lagged behind socio-political, legal and cultural changes running the risk of losing legitimacy in the evolution of human rights for all. On the other hand, the law-making process was also informed by the alertness of the lawmakers in seeing the pressing need for societal changes. The changes, whether through law or societal reforms were shaped and founded by the Constitution, which, for the first time in South Africa’s history were inclusive of everyone, including the women who

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70 See Mwambene and Kruse “The thin edge of the wedge: *ukuthwala*, alienation and consent” 2017 *South African Journal on Human Rights* 25.

71 Madala “Rule under apartheid and the fledgling democracy in post-apartheid South Africa” 2000 *North Carolina Journal of International Law and Commercial Regulation* 743.

72 Madala 2000 *North Carolina Journal of International Law and Commercial Regulation* 748.

had long been in the “legal cold”. The Constitutional Court in *Makwanyane* endorsed the contention and held that:

“in all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. *Without law, society cannot exist. Without law, individuals in society have no rights.* The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and ... the power of the State to impose sanctions on those who break the law cannot be doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly... However, the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly, they should not; and equally clearly, those who engage in violent crime should be met with the full rigour of the law. The question is whether [public opinion] for [the commission of horrendous crimes against women] can legitimately be made part of that law”,<sup>73</sup> (Author’s emphasis).

Drawing from *Makwanyane*, under the new dispensation, “law” became an overarching framework to protect the rights for all. It is also reinforced by principles of constitutionalism, the rule of law, democracy, separation of powers, accountability and, but not limited to, judicial independence.<sup>74</sup> It also reinforces the interrelationship that exists between law and individuals in the regulation of human behaviour. In turn, the regulation envisages the construction of a system where law has an impact and serves as a determinant for the development of socially oriented rights laws in eliminating the scourge of gender-based violence against women. Considering the effect of violent crimes against women, the new form of agitation is for the state to adhere to the prescripts of the new dawn of democracy in ensuring the construction of a truly democratic dispensation. The capacity of the law to effect the needed reforms in securing the equal treatment and benefit for all<sup>75</sup> in order to

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73 *S v Makwanyane supra* para 118.

74 Currie and De Waal, *Bill of Rights Handbook* (2013).

75 See S 9 of the Constitution which reads as follows:

- (1) everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

address the indirect consequence of insensitive laws and the weak mechanisms in their enforcement has caused outrage from the public.<sup>76</sup>

Gender-based violence weakens the assumption made about the centrality of the law in ensuring the evolution of the equal status of women to live in crime-free societies. On the other hand, for the courts to exercise their authority without being subject to unnecessary pressure by the public. With an effective system of law, endorses the assumption made herein that law will be central and a determinant of the construction of societies in effecting social change. Women would also be empowered and occupy their rightful place and contribute to the advancement of the right to gender equality. The courts would also be better placed as agents of developing jurisprudence that will intersect the interpretation of the law for socio-legal objectives. Madala expresses the same sentiments and points out that “in a credible democracy it became important that a body be vested with the power to blow the whistle when parameters of a constitutional covenant were transgressed ... and *that could only be the judiciary. The judiciary alone would have the final power to decide whether the impugned enactment or provision had transgressed the constitutional guarantee*”.<sup>77</sup>

It is worth to reiterate that the argument herein is “not blind” to the challenges faced by women as evidenced by the irritation of the public. Generally, law is limited in its capacity because it appears to “swing like a pendulum” over people’s heads in order for them to fear the “mighty of the law” instead of the “self-consciousness” in viewing it as a measure that is designed to effect social change. Criticism is laid against the law, that it is designed to reflect and reinforce the privilege and interests of the powerful as evidenced by public opinion, traceable to Mr Pistorius case.

South Africa is highly acclaimed as a beacon of hope in the area of legal frameworks that are designed to advance the protection of human rights. The acclamation takes into account that combating gender-based violence that has an indirect consequence for the functioning of the judiciary requires the non-interference in the exercise of such authority. Further, the public confidence on the exercise of judicial authority should not be built on public opinion on the sentences to be imposed against the commission of horrendous crimes. It is not for the public to build confidence but for the judiciary in upholding both its personal and institutional independence in the exercise of its authority. In addition, notwithstanding the celebrated status, South Africa need to draw comparative lessons from other jurisdictions on measures adopted on the eradication of gender-based violence. As noted above, violence

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76 Francke “South Africa in a crisis of violence against women, says President” *The Guardian*, 6 September 2019. Available from <https://www.theguardian.com/world/2019/sep/06/south-africa-faces-national-crisis-of-violence-against-women-says-president> (accessed 2020-03-10).

77 Madala 2000 *North Carolina Journal of International Law and Commercial Regulation* 756 (Author’s emphasis).

against women knows no boundaries and it is for the state to build capacity of its institutions in the formulation and the enforcement of the rights-laws that are designed to promote gender equality in minimising the risk of “public barking” on the judiciary. In addition, to develop a comprehensive plan for human rights education for the general public relating to the functioning of the different branches of government. Further, to strengthen good governance and build capacity in all structures, spheres and branches in the consolidation of the hard-fought democracy. Long before the attainment of democracy, civil society had been at the forefront in advocating for women’s liberation from the bondages of oppression as evidenced by the Women of 1956. Hence, it is still prudent that civil society has to, through campaigns, activism, education; training and networking play a key role in the fight against gender-based violence.<sup>78</sup>

## 5 Conclusion

The cases highlighted herein are indicative of the brutality that has been meted against women and in turn caused an uproar from the members of the public who then directed their frustration on the judiciary. The incessant calls for the reinstatement of the death penalty are misguided and will not solve this problem. The death penalty is a symptom of a culture of violence not a solution to it, and there is no credible evidence that it has a greater deterrent effect on crime than a prison term.<sup>79</sup> The government would do better to channel its resources to ensure the effective administration of justice through proper investigations into incidences of gender-based violence and fair trials for those accused of the crimes.<sup>80</sup> Hence, the assumption of the law as the language of effecting social change because gender based violence affect many of the fundamental rights of women. It also waters down the argument about the assumption of the law as an effective measure for social change. It also creates a “hype” from the public, which intrudes into the domain of the judiciary, and undermine the very foundations of the structural principles of the new dawn of democracy.

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78 Mubangizi and Sewpersadh 2017 *African Journal of Legal Studies* 67.

79 Zlotnick “The Death Penalty and Public Opinion” Seminar 4, Paper presented at the Centre for the Study of Violence and Reconciliation. Available from <https://www.csvr.org.za/publications/1382-the-death-penalty-and-public-opinion> (accessed 2020-03-24).

80 See commentary by Hobden “The death penalty is not a solution to violence against women” 3 September 2019 The Daily Vox Team. Available from <https://www.thedailyvox.co.za/the-death-penalty-is-not-the-solution-to-violence-against-women/> (accessed 2020-03-29).

