

Re MUGISHA

[Rwanda SUPREME COURT — RS/INCONST/SPEC 00002/ 2018/SC (Rugege, P.J., Kayitesi Z, Mutashya, Kayitesi R, Cyanzayire, J.) 24 April 2019]

Constitution – Acts prejudicial to the general interests – A legislator may criminalize some acts and determine the penalty of imprisonment thereof, even though they are related to contracts, this does not impede the offended party to institute a civil claim seeking for damages or the execution of the of the contract.

Constitution – Consequences of imprisonment sentence on the family – The consequences of imprisonment sentence on the family should not be based on as grounds to repeal the provisions laying down that penalty, because imprisonment sentence is imposed in order to deter people from committing crimes, with the purpose of punishing, rehabilitate, and educate.

Constitution – Flourishment of the family – Flourishment of the family does not mean liberty to do whatever anybody wants rather it denotes liberty and security of the family members which cannot be achieved in a family characterized with adultery, concubinage and desertion of the marital home, therefore penalizing these crimes, is neither breaking the family nor encroaching on its flourishment rather, it is preventing what might threaten it – the Constitution of the Republic of Rwanda of 2003 revised in 2015, article 18.

Constitution – Freedom of press and expression – In exercising the freedom of expression a person may express his/her opinion about religious rituals, symbols and religious items and the right to seek, receive and impart information and opinions in the public on religious rituals, symbols and religious items as long as he/she does not act contrary to what is prohibited by Article 38 of the Constitution of the Republic of Rwanda.

Constitution – Withdrawal of a claim of adultery – The offended spouse may at any stage of the proceedings request that the case be terminated when he/she withdraws the complaint – Stopping the proceedings or the execution of the judgement has effects on the co-offender

Constitution – Differentiation among people – Differentiation per se, is not discrimination, or treating people unequally before the law, it can be done upon a reasonable ground to defend persons in the vulnerable category, that ground must be objectively justifiable and legitimate and such differentiation should be proportionate to the purpose to be achieved.

Constitution – Expression of the views and opinions on the actions of the leadership – Freedom of expression, and to impart information on the activities of leaders, stresses the democratic principle of transparency and accountability of the leaders who serve the people

Constitution – Freedom of press and expression – Information or opinions should not necessarily be gratifying to the leadership nor prejudicing some people, rather on the contrary the opinion and views which are not pleasing to the leadership and to some citizens should be tolerated because when there are no diverse opinions, tolerance, broad minded views, democracy is unattainable.

Facts: After the publication of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general in the Official Gazette, Mugisha Richard petitioned the Supreme Court

seeking to declare that articles 233, 236, 136, 138, 154 and 139 of that law infringe articles 15, 18 and 38 of the constitution. He further stated that the articles which he seeks to be repealed are in two categories the first one contains three articles: 154, 233 and 236 and the second has three articles; 136,138 and 139.

The State Attorney raised a preliminary objection of inadmissibility of the petition on the ground that the petitioner has no interest in the petition. On the 18/03/2019 the Court found that he has the interest to petition the court requesting to declare unconstitutional some of the provisions of the law and thus overruled that objection. Because of the importance of the issues in that case the Court requested individuals, institutions or non Governmental organisations with expertise, who would like to give their opinions in the case as Amicus Curiae to apply. The Court examined applications and concluded that the following are the ones who are eligible to appear before the court hearing as amicus curiae: Association Rwandaise Des Journalistes or Rwanda Journalist Association (ARJ), The women's umbrella Organisation- PRO-FEMMES / TWESE HAMWE; and The University of Rwanda -School of Law.

Concerning the provisions the petitioner has in the second category which are 136 providing that any spouse who has sexual intercourse with a person other than his/her spouse, commits an offence,138 which provides that a person who lives as a husband and wife with a person other than his/her spouse while one or both of them are married, commits an offence and that of 139 providing that a spouse who, without serious reasons, deserts his/her marital home for more than two (2) months and evades his/her obligations, commits an offence, the petitioner argues that those provisions infringe on article 18 because they provide for a penalty of imprisonment for one of the spouses convicted of the crime of adultery, concubinage or desertion of the marital home yet a family cannot be protected, nor flourish when one of the spouses is incarcerated, especially that article 18 of the Constitution of the Republic of Rwanda provides that the State puts in place appropriate legislation and organs for the protection of the family, which is the reason why he is of the opinion that incorporating the acts of adultery, concubinage and desertion of the marital home in the Law determining offences and penalties in general is not a reasonable approach to protect a family . He furthermore argues that the provisions of those articles should be incorporated in the civil laws because they originate from the agreement between two people.

The State Attorney argues that there are various acts around the world that are criminalized yet they emanate from contracts moreover those offences of adultery, concubinage and desertion of marital home are bad acts with harmful consequences to the general public, to human dignity, to the national values adhered to by the nationals and such conduct is contrary to the good conduct and good morals which degrade a person, that is the reason the State should intervene in order to prevent and punish such acts.

PRO-FEMMES / TWESE HAMWE argues that those articles should not be repealed as this would result in the perception that adultery, concubinage and desertion of the marital home are legalized acts and this would have effects that would ruin the Rwandan family to the extent that there will no longer be stable families since they will be insecure and article 18 of the Constitution of the Republic of Rwanda mandates the state to protect the family as it is the natural foundation of the Rwandan society

The University of Rwanda - School of Law argues that marriage is premised on the will emanating from love with the purpose to establish a marriage. In case that will or love is no more to the degree that one of the spouses decides to breach the commitment he/she had towards the

other, shouldn't be a matter to refer to criminal courts but rather to civil courts; - the courts with jurisdiction to hear and resolve family cases and moreover punishing adultery, concubinage and desertion of the marital home with imprisonment causes misunderstandings between spouses, leading to the neglect of their duties of upbringing of their children and paying their tuition fees to the extent that the offended spouse is compelled to grant forgiveness.

In respect of the category comprising of article 154, 233 and 236, article 154, provides that any person who publicly defames religious rituals, symbols and religious objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. The petitioner argues that the provisions of this article are not clear to the extent that they may be wrongly applied when prosecuting someone who commits such acts and that it encroaches on the freedom of press and of expression and that of expressing opinions on religions and their functioning, thus, for fear of prosecution, journalists will fear to criticize religions.

The State Attorney contends that, the fact that some of the provisions of that article are ambiguous, does not constitute a ground to repeal the whole law or the article, but rather it should given proper interpretation. The Rwanda Journalist Association (ARJ) argues that this article disregards the people's freedom of religion to the extent that what is provided therein, may deter people from expressing their views on beliefs. Instead, if a person or an organization with legal personality believes that it was defamed by the press or journalist should lodge a civil claim so that it may be accorded justice and damages. On the part of the University of Rwanda - School of Law it is argued that the article is ambiguous since it does not define what religion is, nor does it define where religious rituals are designated to be performed or where they are normally observed, therefore this implies that people would be unjustly treated if this article remains the way it is now. There is a need for a clear definition of what religion is so that even its rituals may be clearly understood.

For article 233 which provides for the offence of humiliating a member of Parliament, Cabinet, security officers or any other person in charge of a public service, the petitioner avers that it infringes on article 15 and 38 of the constitution of the republic of Rwanda because it discriminates among the people it's supposed to protect and prejudices the freedom of press, of expression and of access to information.

The state Attorney argues that article 15 of the Constitution of the Republic provides for the equality before the law, and equal protection of the law, implying that all people should be treated equally whenever they are in the same circumstances, which is the reason why some people are protected by the law because they do certain duties or work in given organs especially that it is the organ or the duties that are protected not the person per se, considering that if that person vacates the office, the successor is protected the same way the predecessor was.

The Rwanda Journalist Association (ARJ) urges that the article mentioned above violates the freedom of press and of expression as it criminalizes the act of publishing any information on the leader's or a public servants' poor leadership because a public servant should not fear to have information published on them if they are really innocent. It further argues that this would shield public servants or other people in charge of public services, who manifest elements of misconduct from any comment or any criticism. The University of Rwanda, School of Law argues that the article does not distinguish between the time when one of the members mentioned in this article is exercising his/her mandate and when the exercise is solely in connection with the

performance of his/her duties, neither does it clarify if the protected persons in this article are any public servants. It also does not define what defamation really means, and for that matter they contend that this article is contrary to the principle of legal certainty.

With regard to article 236 which provides that any person who insults or defames the President of the Republic, commits an offence, the applicant states that this crime could be used as a pretext in violating the freedom of press, especially considering that the crime of defamation is ambiguous. He argues that the article infringes on article 15 of the Constitution since it does not protect people equally by punishing those who insult or defame one person only.

The State Attorney states that the freedom of press is limited by the honor and security of the leader and that besides, the article does not prohibit anybody from publishing anything on the President of the republic, but rather, it prohibits insulting or defaming him/her.

For the Rwanda Journalists Association (ARJ), they also concur that, given the nature of the responsibilities he/she has, the President of the Republic should possess the highest level of discipline. However, publishing information on him/her should not be criminalized. The University of Rwanda, School of Law argues that if those provisions are compared to those provided by article 161 which punishes the crime of Public insult, the crime is penalized when committed in the public, whereas article 236 indicates that this crime is penalized wherever it may be committed, signifying that, even if two people in a secret place insulting each other, one may falsely accuse another of committing that crime, and he/she may be prosecuted for the same. It concludes by remarking that the same grounds that led to the repealing of this crime for other people, should be applied in repealing the crime of defaming the President of the Republic.

Held: 1. Based on the purpose to be achieved, a legislator may criminalize some acts and determine the penalty of imprisonment thereof, even though they are related to contracts, this does not impede the offended party to institute a civil claim seeking for damages or the execution of the of the contract, therefore for the offences of adultery, concubinage, and desertion of the marital home being related to the contract of marriage does not prevent those acts from being prosecuted as crimes.

2. The consequences of imprisonment sentence on the family should not be based on as grounds to invalidate the provisions laying down that penalty, because imprisonment sentence is imposed in order to deter people from committing crimes, with the purpose of punishing, rehabilitate, and educate. Also these penalties are reasonable and proportional to the crimes thereof.

3. Flourishing of the family does not mean liberty to do whatever anybody wants rather it denotes liberty and security of the family members which cannot be achieved in a family characterized with adultery, concubinage and desertion of the marital home, therefore penalizing these crimes, is neither breaking the family nor encroaching on its ability to flourish rather, it is preventing what might threaten it.

4. The offended spouse may at any stage of the case request that the proceedings be terminated when he/she withdraws the complaint and stopping the proceedings or the execution of the judgement has effects on the co-offender.

5. In exercising the freedom of expression a person may express his/her opinion about religious rituals, symbols and religious items and the right to seek, receive and impart information and

opinions in the public on religious rituals, symbols and religious items as long as he/she does not act contrary to what is prohibited by Article 38 of the Constitution of the Republic of Rwanda.

6. differentiating among people per se, is not discrimination, or treating people unequally before the law, it can be done upon reasonable ground to defend persons in the vulnerable category, that ground must be objectively justifiable and legitimate and such differentiation should be proportionate to the purpose to be achieved.

7. Freedom of expression, and to impart information on the activities of the leadership, stresses the democratic principle of transparency and accountability of the leaders who serve the people.

8. Information or opinions to be disseminated should not necessarily be those gratifying to the leadership nor those which do not displease people, rather on the contrary the opinions and views which do not please the leadership and some of the citizens should be tolerated because when there are no diverse opinions, tolerance, broad minded views, democracy is unattainable.

Petition has merit in part;

Paragraph 3 of article 136 is amended as follows: The offended spouse may at any stage of the case request that the proceedings be terminated when he/she withdraws the complaint and stopping the proceedings or the execution of the judgement has effects on the co-offender;

Paragraph one, two and three of article 136 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general is consistent with article 18 of the Constitution;

Paragraph four and five of article 136 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general are invalid and of no effect;

Article 138 and 139 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general are not inconsistent with article 18 of the Constitution;

Article 154 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general infringes on article 38 of the Constitution, thus is invalid and of no effect;

Article 233 of the Law N°68/2018 of the Law 30/08/2018 determining offences and penalties in general infringes 15 and 38 of the Constitution, thus is invalid and of no effect;

Article 236 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with article 15 and 38 of the Constitution;

Orders that this judgment be published in the official gazette of the republic of Rwanda.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 revised in 2015, article 4,10,15,17,18,38,41,97,98,108

Universal Declaration of Human Rights 1948, article 19

International Covenant on Civil and Political Rights, (ICCPR), article 19

Law N°54/2011 of 14/12/2011 relating to the rights and the protection of the child.

Cases referred to:

Re Uwinkindi, N°RS/INCONST/PEN0005/12/CS rendered by the Supreme Court on 22/02/2013

Joseph Shine v Union of India 2018 SCC Online SC1676 delivered on 27 September, 2018

Joseph Burstyn, Inc. v. Wilson, U.S. Supreme Court ,343 U.S. 495 (1952)

European Court of Human Rights, *Handyside v. United Kingdom*, Judgment of 7 Dec. 1976, Series A N° 24

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UN Working Group on Women’s Human Rights: Report (18 October, 2012)
UN Human Rights Committee, General Comment 34 on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression, July 2011.
Human Rights Committee, General Comment XVIII, Non-discrimination (1989)
United Nations (“UN”) Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (12 September 2011) (“General Comment No. 34”)
UN Human Rights Committee, Communication No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.
Organization for Security and Cooperation in Europe “Defamation and Insult Laws in the OSCE Region: A comparative Study” March 2017.
Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007).
T. Tridimas, *The General principles of EC Law* (OUP, 2nd edn, 206)

Judgment

I. FACTS OF THE CASE

[1] Mugisha Richard submitted an application to the Supreme Court. He contends that, after the Official Gazette published Law N° 68/2018 of 30/08/2018 Determining Offences and Penalties in General, he read it and noticed that Articles 136, 138, 139, 154, 233 and 236 contravene the Constitution of the Republic of Rwanda of 2003 as revised in 2015.

[2] The impugned articles are in two (2) categories. The first category comprises Articles 154, 233 and 236 of Law N° 68/2018. Article 154 states that any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. Article 233 stipulates that any person who, verbally, by gestures or threats, in writing or cartoons, humiliates a member of Parliament when exercising his or her mandate, a member of the Cabinet, security officers or any other person in charge of a public service in the performance of his or her duties or any other activity emanating from his or her duties, commits an offence. Article 236 provides that any person who insults or defames the President of the Republic commits an offence. These articles also set out the penalties for each offence.

[3] Mugisha argues that these articles contravene Article 15 of the Constitution of the Republic of Rwanda on the grounds that they protect persons of given categories on the basis of their duties, even though all persons are equal before the law.¹ He contends that these articles infringe upon the freedom of the press, whether print or audio-visual, as provided in Article 38 of

¹ The article 15 states that “All persons are equal before the law. They are entitled to equal protection of the law.”

the Constitution.² These laws will forbid the press from spreading information concerning those categories of officials or religious associations when criticizing a given issue, whereas the Constitution protects the freedom of press, of expression and of access to information.

[4] The second category includes three (3) articles. The first is Article 136, which provides that any person who has sexual intercourse with a person other than his or her spouse commits an offence. Article 138 stipulates that a person who lives as husband and wife with a person other than his or her spouse, while one or both of them are married, commits an offence. Then Article 139 stipulates that a spouse who, without serious reasons, deserts his or her marital home for more than two (2) months and evades his or her obligations, commits an offence. MUGISHA Richard contends that these articles are contrary to Article 18 of the Constitution of the Republic of Rwanda, which requires that the State put in place appropriate legislation and organs for the protection of the family in order to ensure that it flourishes. This is because Articles 136, 138 and 139 sentence one of the spouses to imprisonment, and a family can neither be protected nor flourish when one of the spouses is imprisoned.

[5] State Attorney Kabibi Speçiose raised an objection. She argued that MUGISHA's claim was inadmissible because he did not have standing to bring the claim. He failed to prove that he had a personal interest in filing the claim or that the articles have detrimental effects on him.

[6] Because of the gravity of the legal issues to be examined in this case, the Court allowed participation of amici curiae. All persons, institutions and non-governmental organizations who had pertinent expertise and desire to intervene as amici curiae could apply for leave to do so through the Supreme Court registry no later than February 2, 2019. They were to submit all documents to the Court no later than February 28, 2019.

[7] After receiving the applications for leave to intervene as amici curiae, the Court examined the applications and found the following entities eligible as amici curiae: Association Rwandaise Des Journalistes or Rwanda Journalists Association (ARJ), the women's umbrella organisation Pro-Femmes/Twese Hamwe and University of Rwanda School of Law. These entities submitted their opinions on MUGISHA's case.

[8] The trial was held on March 18, 2019, and Mugisha Richard was assisted by Advocate Kabasinga Florida and Advocate Nkundabarashi Moïse, whereas State Attorney Kabibi Speçiose represented the Government of Rwanda. The Rwanda Journalists Association (ARJ) was represented by Advocate Gakunzi Musore Valery whereas University of Rwanda School of Law was represented by Bikesho Denis, Murefu Alphonse, Sezirahiga Yves and Ruvebana Etienne.

II. LEGAL ISSUES ARISING IN THE CASE AND THEIR ANALYSIS

² The article 38 states that "Freedom of press, of expression and access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by the law".

a. Whether Articles 136, 138 and 139 of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general contravene Article 18 of the Constitution of the Republic of Rwanda

[9] Mugisha Richard petitions the Court to find that Article 136, 138 and 139 of Law N° 68/2018 contravene Article 18 of the Constitution. These articles prescribe penalties for spouses convicted of adultery, concubinage or desertion of the marital home. He argues that a family can neither be protected nor flourish when one of the spouses is incarcerated. He states that he by no means commends the misconduct addressed in these articles. He only requests the Court to examine whether in a bid to inhibit such delinquency it is reasonable to incorporate these articles in the penal code.

[10] He contends that what is provided in Articles 136, 138 and 139 of Law N° 68/2018 infringes on the relationships of couples who have confessed their vows to be married out of the love they have for each other. Their love results in procreation, and the primary obligation to maintain and sustain the family falls on the two spouses. To create a peaceful spousal relationship, it is necessary for the offending partner to apologise to the offended one and thus the two can reconcile.

[11] Mugisha Richard contends that the articles penalizing the crimes of adultery, concubinage and desertion of the marital home are contrary to Article 18 of Constitution of the Republic of Rwanda which provides that the family, being the natural foundation of the Rwandan society, is protected by the State. The impugned articles prescribe penalties of imprisonment for one of the spouses found guilty. It contravenes the principle that a family cannot be protected when one of the spouses is imprisoned.

[12] He further contends that Article 18 of the Constitution of the Republic of Rwanda requires that the State put in place appropriate legislation and organs for the protection of the family. However, it was argued by applicant that making the acts of adultery, concubinage and desertion of the marital home offences under Penal Code was not the right approach to protecting the family. This approach closes the door on the spouses wishing to ask for forgiveness from each other and to reconcile, and hence does not assist in building but rather harms the family.

[13] Advocate Kabasinga Florida argues that Articles 136, 138 and 139 of Law N° 68/2018 contravene not only the Constitution of the Republic of Rwanda but also the international principles and precedents of international courts. She concedes that, certainly the conduct featured in these articles is not commendable; nonetheless, she urges that such conduct should be governed by other laws. As some legal scholars have argued, it is not appropriate to apply criminal laws to every person who has committed a reprehensible act.

[14] She proceeds to contend that, considering that adultery, concubinage and desertion of the marital home only affect one's spouse and do not prejudice the public, and that only an affected spouse can bring a complaint to initiate prosecution, it is not reasonable to address these acts in the Penal Code. She notes a case that was decided by the Supreme Court of India³ where the Court expounded that, for an act to be called a crime it should be prejudicing the public or

³ PETITION (CRIMINAL) N° 194 OF 2017, Joseph Shine v. Union of India.

society, and that penal sanctions should only be enacted if an act prejudices the public. Therefore, in her opinion, the fact that the crimes envisaged in Articles 136, 138 and 139 of Law N° 68/2018 are not committed against the public constitutes a substantial ground not to include these articles in the penal code.

[15] Advocate Nkundabarashi Moïse argues that the conduct punished by Articles 136, 138 and 139 of Law N° 68/2018 should be dealt with as civil wrongs, because Article 2:1° of the aforementioned law defines “offence” as an act or omission that breaches public order, whereas the provisions of the three (3) impugned articles are predicated on the agreement between two people and only one of them is eligible to lodge a complaint. Furthermore, Article 18 of the Constitution states that the freedom of the family shall be protected, which is impractical if one of the spouses is incarcerated. He especially notes that no research has been conducted to show that a discharged spouse who was convicted of one of the crimes in question enjoys a good relationship with the offended spouse. Instead, their relationship manifestly deteriorates.

[16] He further emphasizes that, since those crimes stem from the marriage contract, only an aggrieved spouse can lodge a complaint and no other person who has witnessed the crimes can do so. Moreover, the police are not allowed to intervene in these cases, which further indicates that these crimes are not committed against society and thus prosecuting them is not in the public interest.

[17] State Attorney Kabibi Speçiose contends that the assertions of Mugisha and his counsels that the aforementioned crimes stem from the marriage contract and thus should not be criminalized is immaterial. She argues that there are various acts around the world that are criminalized though they emanate from contracts. She cites the crimes of the non-payment of bills, breach of trust and many other examples, all of which result from contracts.

[18] State Attorney Kabibi Speçiose maintains that the crimes of adultery, concubinage and desertion of the marital home are harmful to the general public, human dignity, and Rwandan values. Such conduct is contrary to good conduct and good morals and degrades a person, hence the government should intervene to prevent and punish it.

[19] Kanakuze Jeanne d’Arc representing the umbrella organization Pro-Femmes/Twese Hamwe argues that Articles 136, 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general should not be repealed as this would result in the perception that adultery, concubinage and desertion of the marital home are legalized acts. This would ruin the Rwandan family to the extent that a safe family will cease to exist since it is deprived of its security.

[20] Advocate Munyankindi Monique, who assisted umbrella organization Pro-Femmes/Twese Hamwe, contends that Article 18 of the Constitution mandates the State to protect the family as it is the natural foundation of the Rwandan society, to the point that the State has the duty to enact laws that penalize any person who commits acts that threaten the family in any way. This accounts for the reason behind enacting the articles in dispute—to preserve the sovereignty and freedom of the family, since the acts punished by those articles can incite conflicts in the family, leading to its ruin and sporadic deaths.

[21] Mr. Bikesha Denis, Mr. Murefu Alphonse and Mr. Sezirahiga Yves representing the University of Rwanda School of Law argue that a crime is an act or omission that breaches the public order, as Article 2:1^o of Law N^o 68/2018 provides. Pre-emptive intervention of the state is only justified for acts that threaten the public order and undermine the general interest. Furthermore, they urge that the Legislature should be extra cautious not to over-criminalize by punishing conduct that does not comprise of elements of a crime; otherwise the law may harm the people it is supposed to protect.

[22] They contend that marriage is premised on the will, emanating from love, to establish a marriage. If the will or love diminishes to the degree that one of the spouses decides to breach the commitment he or she has made to the other, the matter should be referred to civil courts who have the jurisdiction to hear family cases instead of criminal courts.

[23] They further maintain that, providing a penalty of imprisonment for adultery, concubinage and desertion of the marital home generates conflicts between spouses, leads to problems in the upbringing of children, and makes paying the children's tuition fees more difficult. Thus, the family is in no way protected. Most importantly, there is no proof that any spouse, after being discharged from prison, can live harmoniously with the offended spouse. In India, England, South Korea, South Africa, Nigeria, Ghana and some other countries, adultery was once criminalized but today it is only an ordinary civil wrong that may be a basis for damages and/ or lead to a divorce.

THE FINDING OF THE COURT

[24] Article 18 of the Constitution provides that: "The family, being the natural foundation of the Rwandan society, is protected by the State. Both parents have the right and responsibility to raise their children. The State puts in place appropriate legislation and organs for the protection of the family, particularly the child and mother, in order to ensure that the family flourishes."

[25] Article 18 comprises three principles: the family is the natural foundation of the Rwandan society, both parents have the rights and responsibilities to raise their children, and the State has the responsibility to protect family members.

[26] Mugisha Richard argues that three articles in Law N^o 68/2018 of 30/08/2018 determining offences and penalties in general contravene Article 18 of the Constitution of the Republic of Rwanda: Article 136 on adultery, Article 138 on concubinage and Article 139 on the desertion of the marital home.

[27] Article 136 of Law N^o 68/2018 of 30/08/2018 determining offences and penalties in general provides that: "Any spouse who has sexual intercourse with a person other than his/her spouse, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than six (6) months and not more than one (1) year. The prosecution of adultery is initiated only upon complaint of the offended spouse. In that case, the prosecution is initiated against the accused spouse and the co-offender. The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint. However, if the matter is already brought before court or if a decision thereon has been taken, retraction does not stop the consideration of the case or the execution of the judgement. The

judge considers the case after which he/she can accept or refuse such a retraction upon justification. If a judge accepts the retraction of the offended spouse, stopping the proceedings or the execution of the judgement has effects on the co-offender.”

[28] Article 138 of Law N° 68/2018 of 30/08/2018 provides that: “A person who lives as a husband and wife with a person other than his/her spouse while one or both of them are married, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of more than one (1) year and not more than two (2) years. Article 139 stipulates that: A spouse who, without serious reasons, deserts his/her marital home for more than two (2) months and evades his/her obligations, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than three (3) months and not more than six (6) months. Penalties referred to in Paragraph 2 of this Article also apply to a husband who, willfully and without serious reasons, deserts his wife for more than one (1) month knowing that she is pregnant. However, separation following mistreatment of one of the spouses is not considered as desertion of the marital home when he/she has informed the nearest local administration and a record relating thereto has been drawn.”

[29] Mugisha Richard argues the articles providing penalties for adultery, concubinage and desertion of the marital home contravene the Constitution of the Republic of Rwanda. He maintains that prosecuting and punishing these crimes and imprisoning one of the spouses infringes on the flourishing of the family and break it down instead of building it up. He further argues that those crimes are based on a marriage contract between two people. These articles therefore hamper reconciliation and forgiveness between the spouses.

1. Whether the crimes of adultery, concubinage and desertion of the marital home are premised on contracts and are thus not fit to be crimes but rather civil faults

[30] Mugisha Richard is petitioning the Court to repeal Article 136 on adultery, Article 138 on concubinage and Article 139 on desertion of the marital home, since they are premised on civil contracts and should thus be governed by civil laws.

[31] A legislator may criminalize and punish acts even if they are related to contracts. In cases of adultery, concubinage and desertion of the marital home, the offending spouse is bound by a marriage contract, but penalizing these acts does not contravene the Constitution of the Republic of Rwanda since the Constitution does not forbid criminalizing contractual acts. What these articles penalize is adultery, concubinage and desertion of the marital home, not the breaching of the marriage contract per se. Article 29:7° of the Constitution prohibits imprisoning a person on the grounds of inability to fulfil a contractual obligation, yet this is not the nature of the laws against adultery, concubinage and desertion of the marital home.

[32] The law may criminalize certain contractual acts and impose the penalty of imprisonment for these acts. For instance, Article 176 criminalises breach of trust, Article 248 criminalises intentional embezzlement of seized or confiscated property, and Article 178 criminalises embezzlement or destruction of a mortgaged property. The law requires these acts be prosecuted, but the offended party can also institute a civil claim seeking damages or performance of the contract. The underpinning fact is that all these crimes infringe on the public interest, which the law should protect.

[33] The Court is convinced that the marriage contract is not an ordinary contract. It is an exceptional contract calling for the state's protection as provided in Article 18 of the Constitution of the Republic. It is on this ground that the law lays down the marriage celebration procedures in which the State is involved in recognizing a marriage. The Court also believes that monitoring the relationship of married couples is in the public interest. Punishing adultery, concubinage and desertion of the marital home not only prevents threats that might jeopardize family members' security and flourishing, but also protect children's safety and wellbeing. As provided in Article 18 of the Constitution of the Republic, both parents have the responsibility to raise their children. Article 19 of the same law states that every child has the right to specific mechanisms of protection by his or her family, other Rwandans and the State. If a spouse is busy committing adultery or attending to a concubine, or if the spouse deserts the marital home, it would be practically difficult to fulfil the responsibility of raising his or her children as required.

[34] The preceding paragraph has stated that if the offending spouse indulges in sensual activities and concubinage with a paramour, that spouse will squander the family property, thus harming the family's interest. Furthermore, the spouse will not be able to fulfil the responsibility of taking care of the children where necessary. For these reasons, adultery, concubinage and desertion of the marital home will harm the freedom, security and prosperity of the family. Furthermore, when the family is not stable, the development of the nation is automatically affected. The wasted property could have been invested in profitable activities for the family.

[35] Mugisha Richard argues that divorces due to adultery, concubinage and desertion of the marital home are steadily surging, which suggests that penalizing these acts does not deter couples from divorcing; therefore, the articles in dispute fall short of the purpose of protecting marriage. He also argues that the national budget allocated to the prosecution of these crimes can be channelled to other activities that could advance justice. The Court finds these arguments immaterial, because Mugisha Richard has failed to demonstrate how adultery, concubinage and desertion of the marital home are not reasonably deterred. Furthermore, according to theories of punishment, deterrence is one but not the only purpose of punishment, since there are other purposes like discouraging revenge or retaliation and rehabilitating the offender. The best way forward is not repealing the law, but rather putting more effort in strategies for prevention.

[36] The fact that many countries have either decriminalized or have never criminalized adultery, concubinage, and desertion of the marital home is not a ground to remove these crimes from the Rwandan Penal Law. India, South Africa, Korea, Ghana and many other countries decriminalized adultery, but there are also many other countries that penalize adultery. Each country has unique culture and values it upholds or does not uphold. Adultery, concubinage and desertion of the marital home have never been Rwandan values. Even those who engage in such acts do it covertly because they know they are not supported by Rwandan society.

[37] In Rwandan culture, if a woman separates from her husband and returns to her parents' home, it is a sign that there is misunderstanding at her own home and that her husband is mistreating her. This would be remedied when the husband goes to her home, gives a cow to her family as a fine and brings back his wife. This is not construed as desertion of the marital home. Instead, it is a cultural mechanism of restoring a good relationship at home. This is the rationale behind the "exception" to the crime of desertion of the marital home provided in Article 139, Paragraph 4: "However, separation following mistreatment of one of the spouses is not

considered as desertion of the marital home when he/she has informed the nearest local administration and a record relating thereto has been drawn.”

[38] Another reason why Rwanda should not rush to amend the law on these crimes is that the law does not contradict any international principles. In 2012, a U.N. Working Group on Human Rights recommended that countries decriminalize adultery because it believed that this infringed on women’s rights. The Working Group’s motivation is that in many countries, the crime of adultery is applicable to women only, and men cannot legally commit adultery. In some countries, only women are penalized, and men are excused. Some other countries provide different penalties for men and women. Such practice does not exist in Rwanda, since men and women may be equally prosecuted for adultery and the same penalty applies regardless of gender. There is no discrimination in the applicable laws in deterring and punishing adultery, concubinage and desertion of the marital home.

[39] The grounds advanced by the U.N. Working Group on Human Rights were echoed in *Joseph Shine v. Union of India*, a case from the Supreme Court of India. MUGISHA asks this Court to repeal the articles in dispute as was done in *Joseph Shine*. Article 497 of the Indian Penal Code penalized only a man who had sexual intercourse with a married woman. A woman would not be penalized as either an offender or co-offender. Only the offended man could institute a claim, whereas an offended woman had no right to lodge a claim. The article was undeniably repealed in that case but on grounds different from those advanced by MUGISHA. The Indian Supreme Court found that the article in question did not offer equal protection of the law, manifested sexual discrimination, and encroached on the freedom of the people; hence, it contravened Articles 14, 15 and 21 of the Constitution of India and international human rights principles. These grounds are totally different from those tendered by MUGISHA requesting to decriminalize the crime of adultery in Rwanda.

[40] For these reasons, the Court finds that the fact that crimes of adultery, concubinage and desertion of the marital home emanate from contract does not justify waiving the prosecution and subsequent punishment thereof as crimes.

2. Breaking down the family and encroaching on its freedom instead of protecting it

[41] Article 23 of Law N^o 68/2018 of 30/08/2018 determining offences and penalties in general states: “*Principal penalties applicable to natural persons are the following: **imprisonment** [...]*” This Article shows that imprisonment is one form of legal punishment under Rwandan law.

[42] The spouse who is found guilty of the crime of adultery, concubinage or desertion of the marital home may be sentenced to a penalty of imprisonment. Mugisha asserts that imprisoning one of the spouses may be detrimental to the family in various ways. However, the Court finds that imprisoning one of the spouses convicted of these crimes should be envisaged as penalizing the committed crime itself, especially considering imprisonment is one of the penalties prescribed under Rwandan law as expounded in the preceding paragraph.

[43] Imprisonment inevitably affects the offender and his or her family. However, the Court is convinced that the family of the offender convicted of adultery, concubinage or desertion of the marital home should not be given exceptional treatment to the degree that the laws in question be

omitted from the penal code. The effects of imprisonment on the family are the same regardless of the crime that occasions it. Moreover, Mugisha has not advanced or proven that the consequences emanating from imprisonment for these crimes are different from those occasioned by imprisonment for other crimes like theft, murder, defilement and more.

[44] If this Court were to hold that the laws on the crimes of adultery, concubinage and desertion of the marital home are unconstitutional because of the imprisonment sentence, it would categorically suggest that other criminal laws providing for imprisonment, regardless of the nature of the crime, should be repealed. Imprisonment has diverse ramifications for the family of the offender, such as suffering humiliation and reproach. However, the consequences of a penalty on a family are no grounds to repeal the prescription of that penalty. Imprisonment not only cautions people not to commit crimes, but also serves the functions of punishment, rehabilitation and education. It is the opinion of this Court that the penalties for the crimes in question are reasonable and proportional to the crimes.

[45] The other controversy is the interpretation of the phrase “freedom of the family” as provided in Article 18 of the Constitution. Mugisha and his counsel contend that a family cannot flourish if one of the spouses is incarcerated for adultery, concubinage or desertion of the marital home. However, flourishing does not mean the liberty to do whatever one wants. Article 18 states that: “*The State puts in place appropriate legislation and organs for the protection of the family, particularly the child and mother, in order to ensure that the family flourishes.*” The phrase “in order to ensure that the family flourishes” conveys the importance of the flourishing and security of the family members. In the English version of this Article, the words used are “to flourish” which means to “succeed, to prosper or to grow”. A family cannot achieve any of these goals if it is always in conflict, especially if the family relationship is affected by adultery, concubinage, or desertion of the marital home. The Kinyarwanda Dictionary suggests the same. It defines “Kwisanzura”, which means “to flourish”, as to live in a comfortable environment with no obstacles. If a family has conflicts, fights and altercations caused by infidelity or desertion of the marital home, it cannot flourish.

[46] As argued by Pro Femme/Twese Hamwe, adultery, concubinage and desertion of the marital home breed sour relationships in the family that might in extreme circumstances even result in deaths. Pro Femme/Twese Hamwe recounted instances of deaths precipitated by adultery, concubinage, and desertion of marital home. These examples involved people killing their spouses or committing suicide because they could not tolerate such unbecoming conduct that contravenes both the law and the Rwandan culture of family harmony. Therefore, this Court holds that penalizing these crimes neither breaks up the family nor encroaches on its flourishing; rather it deters that which might threaten the family.

[47] Adultery and concubinage may also result in the birth of children outside the marital union. This breeds conflict between married partners, between the offended spouse and the paramours, and even among the children. This is contrary to the Rwandan policy of family planning and also contrary to the Constitution, which in Article 17, paragraph 2, states: “*A civil monogamous marriage between a man and a woman is the only recognized marital union.*” Therefore, it is in the public interest that there be laws that prevent such extramarital births and the likely effects thereof.

[48] As expounded in the preceding paragraphs, the fact that Law N°68/2018 of 30/08/2018 criminalizes adultery, concubinage and desertion of the marital home, and even lays down the penalties thereof, should not be construed as damaging the family. After all, imprisonment is not imposed only for the crimes discussed herein, but also for other crimes; it is a lawful penalty under Rwandan law, and it is imposed with the purpose to both punish and deter. There is no reason to construe the application of this legal penalty to the crimes of adultery, concubinage and desertion of the marital home as infringing on the flourishing of the family. Of course, imprisonment for any crime necessarily encroaches on the flourishing of the one convicted, but here there is no exceptional negative impact on the family as a whole.

3. Impeding reconciliation and forgiveness between the spouses

[49] Another argument advanced by Mugisha Richard in moving the Court to repeal Article 136 (providing for the crime of adultery), Article 138 (providing for the crime of concubinage), and Article 139 (providing for the crime of desertion of the marital home) is that these provisions impede reconciliation and forgiveness between spouses.

[50] Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states that the prosecution of the crimes mentioned in the preceding paragraph can only be initiated upon complaint of the offended spouse. Article 140 makes the same provision for concubinage and desertion of the marital home. It is the finding of this Court that, given that the prosecution of these three crimes is inevitably preceded by the lodging of a claim by an offended spouse, the law does not deprive the spouses of any wished-for time of reunion and forgiveness; no prosecution for the crime of adultery would take place without the complaint of one of the spouses.

[51] Aside from the fact that these crimes are prosecuted only when the offended spouse initiates the claim in court, the law also allows the offended spouse to request that the proceedings be terminated at any stage of the proceedings if the complainant withdraws the complaint. This shows that the field for reconciliation and forgiveness between spouses is broad; if the offended partner and the defendant were not able to reconcile before the prosecution commences, they are still allowed to do so during the court hearings. The fact that the case was able to proceed through prosecution to the sentencing stage means that the parties were unable to reconcile because of other reasons but not because the law prevented them from doing so.

[52] For most crimes, the offended party normally has no prerogative to initiate the prosecution or terminate it at any stage of procedure. Moreover, reconciliation and forgiveness between the offender and the offended does not halt the prosecution of the crime (for instance, a victim of rape or child sexual harassment may reconcile with the perpetrator, but the prosecution continues). It is therefore in the finding of the Court that the provisions of the law on the crime of adultery, concubinage and desertion of the marital home do not contradict the objective of forgiveness in the family. Nevertheless, the Court notes that some paragraphs of these Articles do impede reconciliation and forgiveness between spouses. It is again in the finding of this court that, regarding the prosecution of the crimes of adultery, concubinage and desertion of the marital home, there are two different paragraphs in each of Articles 136 and 140 which may contradict each other.

[53] As provided by Articles 136 and 140 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, prosecution of the crimes of adultery, concubinage and desertion of the marital home can only be initiated upon complaint by the offended spouse. The same Articles give the offended spouse authority to terminate the proceedings at any stage of procedure if he or she retracts and withdraws the complaint. However, if the matter has already been brought before the court, or if a decision in the matter has been made, the offended spouse no longer has the prerogative to terminate the proceedings without the approval of a judge.

[54] According to Article 136, paragraph 4, of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, if the matter has already been brought before the court, or if a decision thereon has been made, retraction does not stop the consideration of the case or the execution of the judgement. The judge considers the case after which he or she can accept or refuse such a retraction with justification. The same allowance is made in the last paragraph of Article 140, which concerns the prosecution of the crimes of concubinage and desertion of the marital home. Within these two paragraphs, it is manifestly clear that the judge may, even if requested by the offended spouse, refuse to terminate the proceedings.

[55] The first paragraphs of both Articles 136 and 140 give the offended spouse who wishes to terminate the proceedings the prerogative to do so, but the second paragraphs shift this discretion to the judge who may refuse to allow the termination. This Court therefore finds that the second paragraph encroaches on the right of the offended spouse who wishes to terminate the proceedings for reasons of his or her own. Thus, paragraphs 4 and 5 of Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general serve no purpose and should be repealed. If the offended spouse was given the authority to terminate the proceedings, he or she should be able to freely do so without any hindrance. With regard to stopping the proceedings or the execution of the judgement that has effects on the co-offender, this provision can be incorporated in paragraph 3 of the same Article so as not to create a gap in the law.

[56] For the reasons expounded herein, it is in the finding of the Supreme Court that Articles 136, 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution of the Republic. They envisage adultery, concubinage and desertion of the marital home as crimes punishable by imprisonment, but they do not threaten the flourishing of the family nor lead to its ruin. Furthermore, the way these crimes are prosecuted does not impede reconciliation and forgiveness between the spouses, save paragraphs 4 and 5 of Article 136. The Court finds that these Articles implement the state mandate of protecting the family.

b. Whether Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general, providing for the crime of public defamation of religious rituals, contravenes Article 38 of the Constitution of the Republic on the freedom of press, of expression and of access to information

[57] Mugisha Richard argues that Article 154 provides that any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. He proceeds to argue that the provisions of this Article are not explicit enough, which may result in its misapplication and the

unjust prosecution of one who has committed such an act. He further argues that it encroaches on the freedom of press and of expression.

[58] Advocate Nkundabarashi Moïse and Advocate Kabasinga Florida representing Mugisha Richard argue that Article 154 is likely to infringe on the press's freedom of expression with regard to religions and their functioning, as, for fear of prosecution under this law, journalists will fear to criticize religions.

[59] State Attorney Kabibi Speçiose contends that, even if some of the stipulations of Article 154 are ambiguous, this does not constitute ground to repeal the whole law or article. Rather, it should be interpreted that the crimes featured in this article do not concern journalists only, since the laws uses the phrase: “**Any person...**”

[60] Advocate Musore Gakunzi Valery representing Rwanda Journalists Association (ARJ) argues that Article 154 disregards the people's freedom of religion to the degree that its provisions may discourage people from airing their views on the beliefs of others. He presents to the Court two schools of thought: first, freedom of expression constitutes the backbone of democracy and should be fostered; and second, freedom of religion should be protected in an exceptional way, even from freedom of expression.

[61] Musore Gakunzi proceeds to contend that defamation of religious rituals targets the religion itself and its foundational beliefs, but is distinct from defaming a religious leader him or herself. Thus, since rights and freedoms belong to a person and not to a religion per se, there is no need to criminalize public defamation of religious rituals when freedom of expression is being exercised. He argues that enacting criminal laws against a journalist who has published an article or has expressed his or her constructive opinions would interfere with the functioning of the press in general and is contrary to Article 38 of the Constitution. If a person or an organization with legal standing believes that it has been defamed by the press or a journalist, the person or organization can lodge a claim to seek justice and damages in civil courts.

[62] Bikisha Denis, Ruvebana Etienne and Sezirahiga Yves, representing University of Rwanda School of Law, argue that Article 154 is ambiguous since it does not define what religion really is, nor does it define where religious rituals are designated to be performed or where they are normally observed. This suggests that leaving the Article in its current state would be unjust, as there should a clear definition of religion and its rituals. If the constituent elements of a crime are vague, the principle of legal certainty holds that the act must be treated as no crime, for no one shall be held guilty of any criminal offence on account of any act or omission which is not clearly defined by law as a crime.

[63] Article 38 of the Constitution of the Republic of Rwanda states: “Freedom of press, of expression and of access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law.”

[64] Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states: “Any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than fifteen (15) days but less than three (3) months and a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 2,000,000) or only one of the penalties.”

[65] Article 38 of the Constitution establishes the principle that the freedom of press, of expression and of access to information are recognized and guaranteed by the State. It also lays down another principle: there are some essential values that shall not be prejudiced by these freedoms. A clear definition of the freedom of press, of expression and of access to information is found in Article 19 of the Universal Declaration of Human Rights of 1948: “*This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”⁴ The same sentiment is expressed in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁵ Given that freedom of press, of expression and of access to information are recognized by the Constitution of the Republic of Rwanda, anything that prejudices these freedoms—including laws—is categorically contrary to the Constitution.

[66] In exercising the freedoms protected by Article 38 of the Constitution, a person may express his or her opinion about religious rituals, symbols and religious cult objects. Also, a person has the right to seek, receive and impart information and opinions in the public about religious rituals, symbols and religious cult objects and may criticize these without fear, even to the displeasure of those in power, as long as he or she does not act contrary to those essential values the Article 38 protects.

[67] Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general punishes the act of public defamation of religious rituals, symbols and religious cult objects. It also states that defamation may be in the form of actions, words, signs, writings or gestures. Based on its language, the Court notes that this Article prejudices the right to seek, receive and impart information and opinions in the public concerning religious rituals, symbols and religious cult objects, because any person wishing to criticise any religion would fear that he or she would be prosecuted for committing the crime of defamation. As stressed above, the freedom of press, of expression and of access to information are recognized by the Constitution and should not be prejudiced by anything.

[68] The freedom of press, of expression and of access to information regarding religious rituals, symbols and religious cult objects should not be impeded by the prosecution of any person who would like to comment on a religion. The importance of the freedom to criticise religion was articulated by the U.N. Human Rights Committee who stated in 2011 that it is not

⁴ Rwanda ratified and adopted it on 18/09/1962

⁵ International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. And Rwanda adopted it on 12/02/1975 (see the decree law N° 8/75 of 12/02/1975, official gazette n° 5 of 01/03/1975)

appropriate for any country to prohibit religious dissent or prosecute those who criticize religious leaders or beliefs of the religion.

[69] The U.N. committee expressed its concern in these words: “Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith”.⁶

[70] In 2007, in order to preserve the freedom of press and of access to information, the Parliamentary Assembly of the Council of Europe adopted a resolution requesting the decriminalisation of blasphemy in the domestic laws of the member states. The resolution reads: “*The Assembly recommends that the Committee of Ministers ensure that national law and practice are reviewed in order to decriminalize blasphemy as an insult to a religion [...]*”⁷

[71] Many member states of that organization have hitherto removed from their laws the crime of blasphemy.⁸ Numerous countries from other continents have done so as well. For example, in North America, Canada officially repealed its blasphemy law in December 2018, whereas in the United States of America, blasphemy was never criminalized at all. In the view of this Court, Rwanda can and should follow the example of other countries by repealing the articles penalizing blasphemy in order to protect the freedom of expression, of the press and access to information. Criminalizing blasphemy is a tool used by governments wishing to protect their state religion. But Rwanda, as provided in Article 4 of the Constitution of the Republic, is a secular state.⁹

[72] As Rwanda has no state religion, it is not appropriate for the State to enact laws penalizing those who publicly defame religious rituals. This would not be in the public interest but only in the interest of a particular religion. Anyone offended by another person’s speech or expression on his or her religion should file a civil case on the matter. As was articulated in the case of *Joseph Burstyn, Inc. v. Wilson* decided by the Supreme Court of the United States of America, it is not for the government to protect religious beliefs from any attack, whether through publications, speeches or motion pictures. The court in *Burstyn* expressed its stance on this matter in these words: “It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious’ doctrine, whether they appear in publications, speeches or motion pictures.”¹⁰

⁶ UN Human Rights Committee, General Comment 34 on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression. Paragraph 48. July 2011.

⁷ Recommendation 1805 (2007) of the Parliamentary Assembly of the Council of Europe

⁸ Sweden in 1970, Norway in 2015, Netherlands in 2014, Iceland in 2015, Malta in 2016, and others.

⁹ That Article states: “Rwandan State is an independent, sovereign, democratic, social and secular Republic [...]”

¹⁰ U.S. Supreme Court, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)

[73] In light of the arguments expounded above, the Supreme Court acknowledges that Article 154 of the law determining offences and penalties in general defines public defamation of religious rituals as a crime. The Court finds, however, that this is contrary to Article 38 of the Constitution, since it prejudices the freedom of press, of expression and of access to information.

c. Whether Article 233 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 15 and Article 38 of the Constitution of the Republic of Rwanda

[74] Mugisha Richard contends that Article 233 is contrary to Article 15 and Article 38 of the Constitution because it discriminates among the people it is meant to protect, and because it prejudices the freedom of press, of expression and of access to information. He further contends that, while he does not approve of defamation or humiliation of anybody, his prayer to the Court is the removal of these Articles from the penal code, as there are other methods appropriate for defending the victims of defamation or insults (such as the provision in the media law whereby the offended party may initiate a claim for damages in civil court).

[75] Advocate Nkundabarashi Moïse and Advocate Kabasinga Florida, representing MUGISHA Richard, point out that there are multiple international conventions ratified by Rwanda that provide that all people have the right to express their views whatever they may be, as long as they do not prejudice the good reputations of others. While they concede that these international instruments provide limits on the freedom of expression in the service of other rights, they maintain that Article 233 has nothing to do with protecting these rights; rather, it generally prohibits both the press and the citizens from criticizing the leaders mentioned in the law.

[76] State Attorney Kabibi Speçiose responds that the stipulations of Article 233 do not prejudice the freedom and the rights of journalists, given that their freedoms are limited by respect for the freedom and the rights of other Rwandans. She contends that Article 15 of the Constitution of the Republic advances two relevant and notable points: equality before the law and equal protection of the law, both of which imply that all people should be treated equally whenever they are in the same circumstances. By this reasoning, some people are protected by the law not because they are fundamentally different from others, but because they are fulfilling certain duties or performing work in government organs. Thus, it is not the case that people are protected unequally, as the protection attaches not to a group of people per se, but to a certain set of offices. If a national leader or other covered person vacates his or her office, the legal protection passes on to his or her successor.

[77] State Attorney Kabibi proceeds to argue that the unequal treatment of people based on the categories to which they belong does not equal violation of the principle of equality before the law. On the contrary, what equality before the law guards against is the unequal treatment or protection of people **in the same category**. Thus, if there are different categories of people or staff, there should also be different laws governing those categories and the specific nature and functioning of the work they do.

[78] Advocate Musore Gakunzi Valery, representing Rwanda Journalists Association (ARJ) urges the Court to remember that in the media law, there are already provisions determining how

rights are exercised and how journalists are monitored, which ensures that they do not violate the human dignity. A journalist who acts contrary to these provisions will face justice in civil court.

[79] Advocate Musore Gakunzi Valery proceeds by arguing that Article 233 violates the freedom of press and of expression as it criminalizes the act of publishing information on the poor performance of leaders or public servants. A public servant should not fear to have information on their activities published if they are really innocent of wrongdoing. Moreover, there is no way to combat the mismanagement of government property without publishing legally procured information on the officials' actions, even if it is detrimental to the officials whose information is published. He argues that Article 233 protects public servants and other people in charge of public services even when they manifest misconduct. At such time these officials should not be protected from any comment or criticism.

[80] Next, Advocate Musore Gakunzi Valery addresses the issue of cartoons. He contends that drawing someone in cartoons is not itself injurious, that it is ordinarily done in the public interest, and that if anyone feels defamed, he or she should lodge a complaint seeking civil damages in the court. Imprisoning a person on grounds of defamation does not restore a victim's dignity, and granting appropriate civil damages is better suited to the goal of making the victim whole.

[81] Bikeshya Denis, Ruvebana Etienne and Sezirahiga Yves further contend that Article 233 does not distinguish between the time at which one of the members featured in that article is "exercising his/her mandate" and when the exercise is solely "in connection with the performance of his/her duties", nor does it elucidate whether the persons protected by this Article include all public servants. It also does not define what defamation really means. For these reasons, they argue that this article is contrary to the principle of legal certainty.

[82] The attorneys proceeds to contend that Article 233 is ambiguous on the grounds that among the people it protects, there is the category of "any other person in charge of a public service". However, determining who is considered "any other person in charge of a public service" is problematic, given that not all public services are provided by public servants, since there are some private persons who provide services that are important to the general public. Furthermore, the law refers to a person "when exercising his/her mandate," but what is the extent of such exercise? Would a public servant be protected if humiliated while en route to their workplace during a long commute? Would travelling to the workplace be in exercise of official duties, and thus within the ambit of what is penalized by the law? They further contend that the act of humiliation is itself difficult to define since it is subjectively determined and depends on the victim's own perception of what is humiliating. Since this Article is ambiguous, yet laws should in principle be certain, the Article is fundamentally flawed and interferes with the freedom of expression.

[83] They next contend that this Article is flawed in that it intends to protect one group of people—the public servants—and this is contrary to the principles of equal protection and equality before the law. According to their interpretation of the Article, public servants are hereby protected in the exercise of their mandate, but similar employees from private institutions are left out. They contend that the Article's explicit mention of leaders, security officers and "any other person in charge of a public service", insinuates that if any other person not featured

in the article (for instance, a private entrepreneur) is defamed, the defamation shall not constitute a crime. This, they maintain, is contrary to the principle of equality before the law; the Article discriminates among groups of people based on their duties.

THE FINDING OF THE COURT

i. Whether Article 233 violates equal protection

[84] Article 15 of the Constitution of the Republic states: “All persons are equal before the law. They are entitled to equal protection of the law.”

[85] Article 233 of Law N^o 68/2018 of 30/08/2018 determining offences and penalties in general states: “Any person who, verbally, by gestures or threats, in writings or cartoons, humiliates **a member of Parliament when exercising his/her mandate, a member of the Cabinet, security officers or any other person in charge of a public service in the performance or in connection with the performance of his/her duties, commits an offence** [...]”

[86] Mugisha Richard asks the Court to repeal Article 233 on the grounds that it treats people unequally under the law by protecting only one category of people—public servants—and thus is contrary to Article 15 of the Constitution of the Republic of Rwanda. He is also of the view that Article 233 is contrary to Article 38 of the Constitution since it violates the freedom of press, of expression and of access to information.

[87] The title of Article 233 is: “*Humiliation of national authorities and persons in charge of public service*”. As made clear by this title, the Article’s intent is to punish persons who humiliate those in the category of national leaders and persons in charge of public service. However, the Article is silent on the humiliation of persons outside these categories. This connotes that any person who does not fall in the specified categories cannot be protected through the procedures laid down in the penal laws if they are humiliated, since under Rwanda law, humiliation is a crime only when the offended is a national authority or a person in charge of public service.

[88] The scope of Article 233 is manifestly based on a category of people and the duties they perform. The Court believes that there is no justification for the enactment of a provision of this kind which criminalizes an act when committed against a certain category of people exercising certain duties, and permits the same act to be committed against others. Such a difference is unjustified, especially since there are people outside the group mentioned in Article 233, be they in the private sector or non-governmental organizations, whose positions might also make them targets of humiliation to the prejudice of their dignity. Yet, in such cases the offender would not be prosecuted under this law.

[89] Laws that differentiate between groups of people are not discriminatory per se. Distinctions can be reasonably made to defend persons in a vulnerable category. That is the

reason why many laws specifically protect women and children.¹¹ Where such a distinction is drawn, the legitimate objective should be manifestly clear to everybody, and the method used to achieve the legitimate objective should be proportionate to its end.

[90] The State Attorney argues that the meaning of Article 15 of the Constitution of the Republic of Rwanda is that people should be treated equally when they are in the same circumstances, but if they are not, there are reasons they might justly be treated unequally. True as this reasoning is, with regard to this case, no reasonable and indispensable argument has been tendered to justify the special protection of the categories of public servants in question. State Attorney KABIBI Speçiose argues that the national leaders and other public servants mentioned in Article 233 are exceptional persons such as vulnerable persons protected by other laws, but she does not demonstrate to the Court how they are vulnerable.

[91] Another issue, raised by amicus curiae, the University of Rwanda School of Law, is that Article 233 does not sufficiently indicate who is protected by it, whether it refers to all public servants, or only the national leadership. The Article speaks of a member of Parliament, a member of the Cabinet, security officers or “any other person in charge of a public service”. It could be said that this protection covers all public servants against humiliation, a large group with no exceptionality to justify its special protection beyond that of others who do not work for the state. Furthermore, it is not clear in the law what it means to humiliate a person “in the exercise of his/her duty or in connection with the performance of his/her duties”. This may confuse people who might not know when they risk committing such a crime. Such laws are contrary to the principle of legal certainty. This is well expounded by the legal scholar Tridimas, who wrote “the principle of legal certainty and legitimate expectation provides an important assertion of the rule of law that those subject to the law must know what the law is so as to plan their action accordingly”.¹²

[92] Upon considering the arguments tendered by the parties,, the Court finds that Article 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 15 of the Constitution of the Republic of Rwanda, which provides that all persons are equal before the law and are entitled to equal protection of the law. As elucidated above, Article 233 treats people differently and does not protect them equally.

ii. Whether Article 233 unjustly limits the freedom of press, of expression and of access to information

[93] Article 38 of the Constitution of the Republic of Rwanda provides that “[f]reedom of press, of expression and of access to information are recognized and guaranteed by the State”. Article 233 of the of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general provides that any person who, “verbally, by gestures or threats, or in writings or cartoons”, humiliates a national leader or other person in charge of a public service, commits an offence.

¹¹ Take the examples of Law N° 54/2011 Of 14/12/2011, Relating to The Rights and The Protection of the Child, and Article 10 part 4 of the Constitution of the Republic, which provides for “women occupying at least thirty percent (30%) of positions in decision-making organs.”

¹² T. Tridimas, *The General Principles of EC Law* (OUP, 2nd ed., 206).

[94] Article 19 of the Universal Declaration of Human Rights¹³ defines freedom of expression and access to information in the following words: “[e]veryone has the right to freedom of opinion and expression; **this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.**”

[95] These rights are also provided in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)¹⁴, in the following words:

Everyone shall have the right to hold opinions without interference.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

[96] As stipulated in Article 19 of the international convention mentioned in the preceding paragraphs, all people have the right to express their opinions without interference or fear. Freedom of expression encompasses seeking and receiving information and expressing one’s opinions without interference, whether orally, in writing, or through any other medium of one’s choice. The International Covenant on Civil and Political Rights (ICCPR) stresses that these rights are restricted by the respect for the rights and reputations of others and by the exigencies of national security, public order (*ordre public*), and public health or morals.

[97] This Court finds that the Article penalizing humiliation, either verbally, by gestures or threats, or in writings or cartoons, violates constitutionally protected freedoms, since someone may fear that if he or she expresses his or her opinion by publishing an article criticizing a member of Parliament, a member of the Cabinet, security officers or any other person in charge of a public service, he or she risks prosecution if the criticised leader is not pleased with the opinion or information. Freedom of press, of expression and of access to information about the activities of national leaders and any other person covered by Article 233 should not in any circumstance be prejudiced by the fear that an opinion critical of a leader shall be construed as humiliation.

[98] Freedom of expression, and the freedom to impart information on the activities of national leaders, underscores the democratic principle of transparency and accountability by the leaders who serve the people. This was the sentiment expressed by the U.N. Human Rights Committee when it wrote: “***freedom of expression is a necessary condition for the realization***

¹³ Rwanda ratified this agreement on 18/09/1963.

¹⁴ International Covenant on Civil and Political Rights (ICCPR).

of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”¹⁵

[99] Article 4 of the Constitution of the Republic of Rwanda states: “The Rwandan State is an independent, sovereign, democratic, social and secular Republic.” The same Article proceeds: “The founding principle of the Republic of Rwanda is ‘Government of Rwandans, by Rwandans and for Rwandans’”. Freedom of expression is one of the principles of any democratic state and should not be restricted for certain people. A similar view was expressed by the European Court of Human Rights in the case *Handyside v. United Kingdom* in the following words: “**Freedom of expression constitutes one of the essential foundations** of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.¹⁶ This suggests that opinions or information need not gratify those in power to merit protection. On the contrary, ideas of those critical of both the administration and some of the citizens should be allowed to be brought to light. When there are no diverse opinions, tolerance, “thinking big”, and even democracy become unrealistic. That is the reason that the Article penalizing humiliation of national leaders and person in charge of a public service should be understood to violate the principle of freedom of expression in a democratic country.

[100] Freedom of expression and the freedom to seek and impart information should be exercised without threats or harassment. The U.N. Human Rights Committee has adopted the position that “*intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19*”.¹⁷ Therefore, the Court finds that the fact that Article 233 provides for the imprisonment of anyone who humiliates national leaders, security officers and persons in charge of a public service would hamper people from expressing their views freely; therefore, the Article violates the right to critically examine and disseminate information on the conduct of those leaders.

[101] The Court further finds that Article 233 of the Law N^o 68/2018 of 30/08/2018 determining offences and penalties in general, which provides that “[a]ny person who, verbally, by gestures or threats, in writings or cartoons, humiliates national authorities and persons in charge of public service mentioned in this Article”, is contrary to Article 38 of the Constitution of the Republic of Rwanda. This Article states: “Freedom of press, of expression and of access to information are recognized and guaranteed by the State.” As expounded above, Article 233 impedes people from exercising those freedoms, since people may fear that if they criticize or publish any information about the people protected under Article 233, they will be prosecuted for humiliating national leaders and persons in charge of public service.

¹⁵ United Nations (“UN”) Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (12 September 2011) (“General Comment No. 34”), par. 3.

¹⁶ European Court of Human Rights, *Handyside v. United Kingdom*, Judgement of 7 Dec. 1976, Series A no. 24.

¹⁷ Communication No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994.

iv. Whether Article 236 of the of Law N°68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Articles 15 and 38 of the Constitution of the Republic of Rwanda

[102] Richard Mugisha avers that Article 236 which provides that any person who insults or defames the President of the Republic, commits an offence, may be used as a pretext for interfering with the freedom of press, considering that the crime of defamation is itself unclear. He further argues that Article 236 is contrary to Article 15 of the Constitution since it does not protect people equally because it punishes only those who insult or defame one particular person.

[103] State Attorney Kabibi Speçiose’s position is that Article 236 does not cover the crimes likely to be committed by journalists only, but rather by all people, and that it is nowhere provided in the Article that it specifically concerns journalists. She contends that the freedom of press is limited by the honour and security of the leader. Besides, Article 236 does not prevent the press from publishing anything on the President of the Republic; rather, it prohibits only insulting or defaming him or her.

[104] Advocate Musore Gakunzi Valery, representing the Rwanda Journalists Association (ARJ) concurs that given the nature of his or her responsibilities, the President of the Republic should receive the highest level of respect. However, publishing information on him or her must not be criminalized, because such a law would undermine the principle of accountability. Accordingly, the fact that the crime of general defamation is omitted from the penal code means also that it should not be retained only in the case of the President of the Republic, especially since Article 161 already punishes whoever insults another person. Therefore, to assert that writing about the President of the Republic is synonymous with insulting him or her is to insinuate that no one is allowed to publish anything about the President of the Republic.

[105] Bikisha Denis, Ruvebana Etienne and Sezirahiga Yves argue that Article 236 addresses the crime of insults or defamation against the President of the Republic. Whereas Article 161 punishes the crime of insult only if it is committed in public, Article 236 penalizes insults against the President wherever they may occur. Were such protection extended to the general public, any person might falsely accuse another of insulting him or her in private and in a secret place and that person may be prosecuted for the same.

[106] They proceed to contend that Article 236 concerns defaming only the President of the Republic, a crime that was omitted from the penal code for other people on the grounds that it was ambiguous and a threat to freedom of expression and freedom of press. They argue that Article 236 is contrary to the principle set out in Article 15 of the Constitution of the Republic, which states that “[a]ll persons are equal before the law, and they are entitled to equal protection of the law”, and the same grounds that occasioned the repealing of this crime for other people should be applied in repealing the crime of defaming the President of the Republic.

THE FINDING OF THE COURT

[107] Article 15 of the Constitution of the Republic of Rwanda states: “All persons are equal before the law. They are entitled to equal protection of the law.” Article 38 of the same law states: “Freedom of press, of expression and of access to information are recognised and

guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law.”

[108] Article 236 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general states: “Any person who insults or defames the President of the Republic, commits an offence. Upon conviction, he/she is liable to a term [of] imprisonment of not less than five (5) years and not more than seven (7) years and a fine of more than five million (FRW 5,000,000) Rwandan francs and not more than seven million (FRW 7,000,000) Rwandan francs.”

a. Whether Article 236 violates equal protection

[109] Article 236 provides that insulting or defaming the President of the Republic is a crime punishable by imprisonment up to five (5) years and a fine of up to seven million Rwandan francs (FRW 7,000,000). Much as this Article penalizes a person who insults the President of the Republic, there is another provision of Law N° 68/2018 of 30/08/2018 which penalizes public insult of any person.

[110] Article 161 of Law N° 68/2018 of 30/08/2018 states: “Any person who publicly insults another person, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than fifteen (15) days and not more than two (2) months; a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 200,000); community service for a period of not more than fifteen (15) days or only one of these penalties. [...]” . Both Articles 161 and 236 envisage insulting as a crime. The Court is persuaded to believe that Mugisha Richard’s argument that Article 236 only protects the President of the Republic is immaterial, on the basis that, according to Article 161, any person who publicly insults another person commits an offence. Hence, insulting is a crime, regardless of who the victim is.

[111] However, the Court finds that there is a disparity between the penalties imposed by the two Articles that criminalize insulting. He who publicly insults another person shall be liable to an imprisonment term of not less than fifteen (15) days and not more than two (2) months; a fine of not less than one hundred thousand Rwandan francs (FRW 100,000) and not more than two hundred thousand Rwandan francs (FRW 200,000); whereas he who insults the President of the Republic shall be liable to a term of imprisonment of not less than five (5) years and not more than seven (7) years and a fine of more than five million (FRW 5,000,000) Rwandan francs and not more than seven million (FRW 7,000,000) Rwandan francs.

[112] These penalties are clearly different. The penalties for the crime of insulting the President of the Republic is heavier compared to those for the crime of insulting other people. The Court cannot determine whether Article 236 should be repealed just because it provides for penalties different from those provided in Article 161, since this matter is not the subject matter of the case and thus it was not argued by the parties. Nonetheless, the Court is convinced that this difference in penalties should be narrowed so that the penalties for one who insults the president of the Republic is proportionate to the gravity of the crime. Therefore, the Court hereby requests the competent organs to attend to this matter.

[113] Another difference between Article 236 and 161 is that Article 236, applying only to the President of the Republic, criminalises not only insult but also defamation. Defaming the President of the Republic, foreign heads of states or the representatives of foreign countries or international organizations while they are in Rwanda are the only acts of defamation penalized with criminal sanctions in Rwanda. Humiliating leaders other than those mentioned in this paragraph is not a crime; instead, a person who is humiliated may lodge a claim seeking damages. It is thus in the finding of the Court that, concerning the impugned Article 236, particularly the paragraph on the crime of humiliation, a distinction is made between defaming the President of the Republic and any other person. The Court finds that this disparity is valid, as it is based on the unique position of the President of the Republic.

[114] The Supreme Court held in the Uwinkindi case (N° RS/INCONST/PEN0005/12/CS), which was decided on 22/02/2013, that legal distinctions between classes of people are not discriminatory when the differentiation intends to achieve a goal that is valid, licit and clear to everyone, and when the rationale for the distinction serves the public interest. The Court recalls that a similar view was expressed by the U.N. Human Rights Committee in its resolution adopted at the Thirty-Seventh Session of the Human Rights Committee with the following words: *“finally, the committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant”*.¹⁸ Following this reasoning, the Court acknowledges that there are grounds that may justify the criminalization of defaming the President of the Republic while holding a different standard for the defamation of other people.

[115] The Constitution of the Republic of Rwanda grants the President of the Republic diverse responsibilities, chief among them being the following:

- The President of the Republic is the Head of State. (Article 98)
- The President of the Republic is the defender of the Constitution and the guarantor of national unity. (Article 98)
- The President of the Republic ensures the continuity of the State, the independence and sovereignty of the country, and respect for international treaties. (Article 98)
- Executive Power is vested in the President of the Republic and in the Cabinet. (Article 97)
- The President of the Republic is the Commander-in-Chief of the Rwanda Defence Force. (Article 108)
- The President of the Republic represents Rwanda in its foreign relations. He or she may also designate his or her representative. (Article 111)
- The president also has a legislative role as he or she adopts laws and is vested with the authority to enact presidential decrees.

[116] As the head of state, the President of the Republic ensures, preserves and represents the unity of the nation. Defaming the president would adversely affect this unity if people give credence to disparaging and untrue publications about him or her. Thus, any person who would

¹⁸ Human Rights Committee, General Comment XVIII, Non-discrimination (1989), www.unhcr.org/refworld/type.

like to publish anything about the President of the Republic should meticulously and diligently ensure the truth of any statements so as not to publish allegations that would mislead the public.

[117] The Constitution of the Republic provides for many procedures that are manifestly different for the President of the Republic from those for other national appointed or elected leaders. These include procedures for appointment, removal from office, prosecution (in case he or she commits a crime) and immunity. The uniqueness of the President's office is only compounded by the immense responsibilities explained above. It is in the finding of this Court that the President of the Republic is so distinctive that establishing special laws protecting or governing him or her is reasonable and material. Therefore, the fact that Article 236 envisages defamation as a crime when perpetrated against the President of the Republic and not a crime against other persons accords with the singularity of the President's responsibilities. Article 236 is thus valid and material.

b. Whether Article 236 violates the freedom of press, expression and access to information

[118] The foregoing paragraphs analyse whether punishing defamation of the national authorities and persons in charge of public service violates the freedom of press, expression and access to information. The rights to express, seek and impart information are important rights that should not be prejudiced unduly. Freedom of press, expression and access to information are provided in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). In its General Comment Number 34 which expounds more on this topic, the Human Rights Committee (the Committee) requested that the state parties to the Convention decriminalize defamation, and declared that any sentence of imprisonment is not proportional to the crime: "*States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.*"¹⁹ The second part of this provision denotes that decriminalization of defamation of the President of the Republic has not yet become an international principle. It is thus that the U.N. Committee suggested that laws criminalizing defamation should be abolished while allowing that, in cases where they are still in application, they should be applied diligently and only in serious cases.

[119] The Court finds that there is a difference between defaming the President of the Republic and defaming other people. Even the effects of defamation on the two categories of people are different. When defamation is committed against other people, the offended can seek damages by lodging a civil case in the court. The number and the gravity of presidential responsibilities attract many opinions and much coverage in the press. Therefore, if insulting or defaming the President of the Republic were not prosecuted as a crime, he or she would be forced to resort to civil procedures to obtain redress for every instance of defamation. The Court is of the stance that it would impede the president's responsibilities and the respect due to his or her office if the

¹⁹ U.N. Human Rights Committee, General Comment 34, on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression, Paragraph 47, July 2011.

president were forced to divert attention from his or her heavy responsibilities and divert attention to seeking justice.

[120] The fact that insulting or defaming the President of the Republic is a crime should be understood as protecting his or her responsibilities and the people he or she represents, rather than as a violation of the freedom of press, expression and access to information. For this reason, everyone should be diligent when sharing opinions and imparting information, in order to not unnecessarily insult, defame or humiliate anyone. Insulting and humiliating any person, let alone the President of the Republic, is not appropriate. Nevertheless, prosecuting a person accused of insulting and defaming the President of the Republic should not be a hasty matter. It must be examined and determined with care that the matter is manifestly a serious case before the prosecution initiates a case before the court. In case the accused is before the court, the prosecution should prove beyond reasonable doubt that all the elements of the crime are fulfilled, as with any other criminal case.²⁰

[121] Article 41 of the Constitution of the Republic states: “In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people’s rights and freedoms, as well as public morals, public order and social welfare which generally characterize a democratic society.” According to this Article, in exercising his or her rights and freedoms, every person is restricted by the law which intends to preserve matters like **public morals** and **public order**. The Court notes that the existence of an article that penalizes whoever defames the President of the Republic serves to protect the public order, given that the president represents the public.

[122] Laws criminalizing insult or defamation of the President of the Republic are not exclusive to Rwanda. Various states that adhere to democratic principles have, among their laws, provisions that penalize whoever insults the nation’s head of state. These countries include, inter alia, Germany, Greece, Iceland, Italy, Netherlands, Portugal, Spain and Sweden. Nonetheless, in all these countries, as reported by the Organization for Security and Cooperation in Europe, both the minimum and maximum penalties for such an offense are less than those provided in Article 236.²¹

[123] Following the reasoning expounded in the preceding paragraphs, the Court finds that criminalizing defaming and insulting the President of the Republic does not in any way violate the freedom of press, expression and access to information. The uniqueness of the President’s responsibilities merits special protection.

General Conclusion

[124] In light of the findings above on each legal issue in this case, this Court finds that paragraphs 1 and 2 of Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and

²⁰This serves to remind us that the burden of proof in criminal cases is different from the one in civil ones. In criminal matters, the standard of the burden of proof is high, as there should be no reasonable doubt. In civil matters, by contrast, only a preponderance of the evidence is required, or what one may call “the balance of probabilities”.

²¹Organization for Security and Cooperation in Europe “Defamation and Insult Laws in the OSCE Region: A Comparative Study” March 2017.

penalties in general are not contrary to Article 18 of the Constitution of the Republic of Rwanda. As expounded, penalizing adultery does not violate the flourishing of the family. Rather, the law intends to protect the family.

[125] As elucidated above, the last two paragraphs of the same Article do not grant full discretion to the offended spouse to terminate the proceedings at any stage of the procedure. The Court finds that the last two paragraphs should be repealed and the third paragraph should be amended as follows: “[...] *The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint. Stopping the proceedings or the execution of the judgement has effects on the co-offender.*”

[126] The Court finds that Articles 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general do not contravene Article 18 of the Constitution. As expounded, penalizing those crimes does not endanger the flourishing of the family.

[127] The Court finds that Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 38 of the Constitution since it violates the freedom of press, expression and access to information.

[128] The Court finds that Article 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Articles 15 and 38 of the Constitution of the Republic of Rwanda. Article 233 does not equally protect the people and it violates the freedom of press, expression and access to information.

[129] The Court finds that Article 236 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to Articles 15 and 38 of the Constitution of the Republic of Rwanda as alleged because of the unique presidential responsibilities that accord him or her the prerogative of being protected by the laws in an exclusive manner.

III. THE CONCLUSION

As a result, this Court makes the following declarations and orders:

[130] Declares that the petition lodged by MUGISHA Richard seeking the order to declare that Articles 136, 138, 139, 154 and 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are contrary to the Constitution of the Republic, especially Articles 15, 18, and 38 of the Constitution, succeeds in part.

[131] Declares that paragraphs 1, 2 and 3 of Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution.

[132] Declares that paragraph 3 of Article 136 is hereby reframed in the following manner: “The offended spouse may at any stage of the procedure request that the proceedings be terminated when he/she retracts and withdraws the complaint. Stopping the proceedings or the execution of the judgement has effects on the co-offender.”

[133] Declares that paragraphs 4 and 5 of Article 136 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are invalid and of no effect.

[134] Declares that Articles 138 and 139 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general are not contrary to Article 18 of the Constitution.

[135] Declares that Article 154 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 38 of the Constitution and thus is hereby repealed.

[136] Declares that Article 233 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Articles 15 and 38 of the Constitution. This Article is hereby repealed.

[137] Declares that Article 236 of Law N° 68/2018 of 30/08/2018 determining offences and penalties in general is not contrary to Articles 15 and 38 of the Constitution.

[138] Orders that this judgment be published in the official gazette of the Republic of Rwanda.