Re KABASINGA ET AL

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00005/2020/CS - RS/INCONST/SPEC 00006/2020/CS– (Mukamulisa, P.J., Cyanzayire, Hitiyaremye, Muhumuza and Rukundakuvuga, J.) February 12, 2021]

Constitution – Criminal law – The criminal law must be clear, plain and unambiguous – It is not the duty of the judge to determine punishable acts, rather it is the duty of the legislator – The law must be written in such a way that everyone can know the limits of what is allowed and prohibited as well the consequences of penalties in order to refrain for committing a crime (predictability) – The punishable act and related penalty are determined by the Law.

Constitution – Fair trial – Mandatory sentencing – The ineffectiveness of the appeal remedy available for the convict in order to benefit the penalty reduction on ground of mitigating circumstances, undermines the principle of fair trial and of independence of the judge to determine an appropriate penalty.

Constitution – Freedom and independence of the judge – Life imprisonment – – In exercising their judicial functions, judges at all times do it in accordance with the law and are independent of any power or authority - – The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the circumstances surrounding the commission of the offence and substantial mitigating circumstances that would have reduced his sentence in case there are any.

Constitution – Due process of law – Limits to freedom of expression – Although a career judge may adjudicate the case disregarding the public opinions, the parties and the public may think that he/she was influenced by those premature publications and comments, which would discredit that decision whereas it is the principle that justice must not only be done, it must manifestly and undoubtedly be seen to be done.

Facts: Kabasinga and Niyomugabo, each petitioned the Supreme Court stating that some articles of Law nº 68/2018 of 08/30/2018 determining offences and penalties in general are contrary to the Constitution of the Republic of Rwanda of 2003 revised in 2015. Their petitions were joined as they manifest common issues.

The petitioners argue that article 92 and paragraph 3 of article 133 of the Law determining offences and penalties in general which they both raised in their petitions, which forbids the judge from reducing the penalty o ground of mitigating circumstances, violate the principle of the right to due process of law and the principle of independence of the judge provided under articles 29 and 151 of the Constitution respectively.

Kabasinga also states that the aforementioned paragraph 4 of article 84 of the Law nº 68/2018 of 08/30/2018, does not indicate the circumstances in which the judge may or may not exempt the penalty to the accomplice when it implicates the offender's spouse or relative up to the fourth (4th) degree, which violates the principle of the right to due process of law. She also stated that the provisions of the Article 271 of Law nº 68/2018 of 08/30/2018 stipulating that any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence, violates also the principle of right to due process of law.

Another article that she identified as contrary to the Constitution is the article 256 of the Law n° 68/2018 of 08/30/2018 determining offenses and penalties in general of which she states to be infringing the freedom of expression. Therefore, it is contrary to article 38 of the Constitution.

Concerning the fact that paragraph 4 of article 84 of the above- stated Law n° 68/2018 of 30/08/2018 does not specify when a judge may or may not exempt a penalty to the accomplice who is the offender's spouse or relative up to the fourth (4^{th}) degree, is inconsistent with the right to due process of law referred to in article 29 of the Constitution. Kabasinga stated that the Legislator did not specify whether these persons would be punished as accomplices or not, this is due to the fact that it provides that the judge may not punish them, implying that he/she may also punish them, and it is not in his/her discretion to determine it.

In addition, the way this article was drafted contradicts the principle that criminal laws must be clear, plain and unambiguous. In case such provisions are confusing, the persons concerned do not know whether they should not aid or abet their spouses or relative up to the fourth (4^{th}) degree. She concluded that it is contrary to article 2, subparagraph one of the aforementioned law, as it offers the judge the room to make a decision that may be arbitrary or in favor of the defendant due to the nature of the Law. For these reasons, she requested the Court to repeal this article or order its amendment by drafting it clearly.

The Government of Rwanda states that article 2, paragraph one, subparagraph 5 of the Law determining offences and penalties in general defines an accomplice as a person having aided the offender in the means of preparing the offence before its commission. This means that the offender 'spouse, who becomes his /her accomplice, as well as relatives up to the fourth (4^{th}) degree, may be punished under article 84 of the aforementioned law. The legislator indicated that the court could exempt accomplices from penalties on basis of circumstances surrounding the commission of the offence. The discretion to determine whether they would be exempted or punished is left to the judge, which is not contrary to Article 29, subparagraph 4 of the Constitution.

Regarding whether the prohibition of penalty reduction based on mitigating circumstances, as provided for under article 92 and paragraph 3 of article 133 of Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, is contrary to articles 29 and 151 of the Constitution, Kabasinga explained that these provisions prevent an offender from enjoying due process of law as he/she may not benefit from penalty reduction even if there are mitigating circumstances. It even deprives him/her of the right to appeal against the sentence when convicted. Therefore, it infringes the defendant's right to due process of law. She went on stating that in those articles the judge's power is limited to determining whether the defendant is convicted because the sentence is provided for by law, which is contrary to article 49 of the Law determining offences and penalties in general that provides the factors taken into account by a judge in determining a penalty. Moreover, it undermines the judge's right to be objective during penalty determination. It also undermines his/her independence for fair trial as it prevents him/her from comparing what would lead him/her to impose less or more serious penalty. Therefore, due to the above grounds, she requests the Supreme Court to declare that both articles are unconstitutional, and order their repeal.

Niyomugabo also states that article 133, paragraph 3 of the aforementioned law provides for mandatory sentencing for the convict of defilement committed against a child under fourteen years of age, regardless of mitigating circumstances, and this deprives the accused the right to due process of law as it bars the judge to exercise his/her independence of reducing the penalty, which

is contrary to the principle that all persons are equal before the law and they are entitled to equal treatment. Therefore, he requested the Court to repeal it.

The Government of Rwanda finds that there is no need to submit on it since the Supreme Court has already set its position in the petition RS/INCONST/SPEC 00003/2019/SC and has given its advisory opinion on other similar issues not included in the petition.

In addition, it was examined whether the provisions of article 271 of Law nº 68/2018 of 30/08/2018 determining offences and penalties in general are contrary to Article 29 of the Constitution. Kabasinga explained that this article includes three acts and each of them constitutes a distinct offense, namely counterfeiting, use and circulation of negotiable instruments. The formulation of the text of this article is likely to prevent the use of negotiable instruments as well as their circulation in Rwanda. It is necessary to make a distinction between the person who circulates them illegally and the one who does so on behalf of his/her company. Among constitutive elements of this offence, the intentional element is lacking.

The Government of Rwanda explained that the text of article 271 is not ambiguous because the counterfeit of negotiable instruments, their use and circulation in any form constitute an offence. This means that the use of negotiable instruments is regulated by law and it is the non-compliance that constitutes the offence provided for under this article. Maintaining that this provision is contrary to Article 29 of the Constitution is not true, because the elements of an offence namely *mens rea, actus reus* and its being punishable by law, must be met in order for a person to be considered as an offender.

Regarding the issue whether article 256 of Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is contrary to Article 38 of the Constitution, Kabasinga stated that the constitutive elements of the offence referred to in this Article consists of publication of opinions with intention to mislead a judge or witnesses; but it does not specify the medium of their publication. It is not clear whether they must be published in the course of trial as the judge does not rely his or her ruling on public, individual or press opinions, rather, he/she relies on elements of evidence and other documents in case file. This means that the judge may not be misled by publications in any form made outside court hearing.

She further states that this article prevents everyone from any declaration or comment on an incident that occurred while pending trial, so that it would not be deemed that he/she intended to mislead the judge while the latter should avoid being misled or relying upon statements from elsewhere other than from the hearing or case file. This Article infringes the media because many criminal acts or offences under prosecution are often covered by the media. This Article would also prevent officials and security agencies from holding media programs to acts likely to be prosecuted in courts, and could even prevent activist groups from publishing and expressing their views for fear of being regard as misleading the judge or witnesses.

The Government of Rwanda avers that Article 256 is not a matter of concern, since an individual who makes a statement about a pending case is not regarded as trying to mislead, unless it is established through prosecution. Consequently, it is not contrary to Article 38 of the Constitution as it does not mention journalists, who normally express their views on pending cases without facing prosecution for trying to mislead a witness or a judge since it not their intent.

Held: 1. The criminal law must be clear, plain, unambiguous and must be written in such a way that everyone can know the limits of what is allowed and prohibited as well the consequences of

penalties in order to refrain for committing a crime (predictability), therefore, paragraph 4 of article 84 of Law nº 68/2018 of 30/08/2018 determining offences and penalties in general infringes the principle that offenses and penalties should be determined by law, and thus, it violates the principle of the right to a fair trial provided for under article 29, subparagraph 4 of the Constitution.

2. The ineffectiveness of the appeal remedy available for the convict in order to benefit the penalty reduction on ground of mitigating circumstances, undermines the principle of fair trial and of independence of the judge to determine an appropriate penalty because in criminal matters the judge is obliged to consider the circumstances surrounding the commission of the offence, the prior record of the offender, on the affected family and on the victim. Therefore, article 133 of the above mentioned law is inconsistent with article 151(5) of the Constitution.

3. The judge is not independent, if during sentencing s/he is obligated to impose a mandatory sentence which is not proportional to the gravity of the crime, the circumstances surrounding the commission of the offence and substantial mitigating circumstances that would have reduced his sentence in case there are any.

4. Although *a* career judge may adjudicate the case disregarding the public opinions, the parties and the public may think that he/she was influenced by those premature publications and comments, which would discredit that decision whereas it is the principle that justice must not only be done, it must manifestly and undoubtedly be seen to be done.

Paragraph 4 of the article 84 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general is inconsistent with article 29, paragraph 4 of the Constitution and has no effect based on the provisions of the article 3 of the Constitution.
The part of the text of article 92 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general reading that: "that cannot be mitigated by any circumstances", is contrary to articles 29 and 151 of the Constitution, and has no effect.
Paragraph 3 of article 133 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general with regard to the part of the text reading that "if child defilement is committed on a child under fourteen years, the penalty is life imprisonment that cannot be mitigated by any circumstances", is contrary to articles 29 and 151 of the Constitution, and has no effect.
Article 257 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with the Constitution;
Article 256 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general is not inconsistent with the Constitution.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 Revised in 2015, in Articles 3, 29, 38 and 151.
Organic Law nº 01/2012/OL of 02/05/2012 instituting the penal code in its Articles 257, 326, 477 and 478
Decree- law nº 21/77 of 18 August 1977 Instituting the Penal Code.
Law nº 68/2018 of 30/08/2018 determining offences and penalties in general, in Articles 2, 3, 49, 84, 92, 133, 256 and 271.
Law nº 48/2017 of 23/09/2017 governing the National Bank of Rwanda, Article 48.
Law nº 15/2004 of 12/6/2004 relating to Evidence and its Production, Article 62.

Law nº 09/2004 of 29/04/2004 relating to the Code of Ethics for the Judiciary, Articles 4 and 5.

Article 7 of the African Charter on Human and Peoples' Rights of 27/06/1981 as ratified by Law nº10/1983 of 01/07/1983 and published in the Official Gazette of the Republic of Rwanda of 01/07/1983.

Articles 10, 15 and 19 of the International Covenant on Civil and Political Rights as ratified by Decree-Law nº 8/75 of 12/02/1975, published in the Official Gazette of the Republic of Rwanda of 1975;

Article 11 of the Universal Declaration of Human Rights as ratified by Rwanda on 18/09/1962.

Cases referred to:

Re Kabasinga, RS/INCONST/SPEC 00003/2019/SC tried by the Supreme Court on 04/12/2019.

R. v. Beauregard, tried by the Supreme Court of Canada.

Cullen v. Toibin tried by the Supreme Court of Ireland.

Kelly v O'Neill41 tried by the Supreme Court of Ireland.

DPP v Independent Newspapers (Irl) Ltd, 42 tried by the Supreme Court of Ireland.

Attorney-General for England and Wales v Times Newspapers Ltd tried by Supreme Court of England.

Worm v. Austria, 29 August 1997, Application 22714/93, 25 EHRR 454, par.50.

The Sunday Times v. United Kingdom, 26 April 1979, Series A No. 30, 14 EHRR 229, par. 63.

Dagenais v. Canadian Broadcasting Corp., Nº 23403, 1994: January 24, 1994, December 8, p.5.

Bridges v. California, 314 US 252 (1941); Pennekamp v. Florida, 328 US 331 (1946); Craig v. Harney 331 US 367 (1946); Wood v. Georgia 370 US 375 (1962).

South Africa Supreme Court of Appeal: The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others (425/2017) [2017] ZASCA 97 (21 June 2017), at para.37.

South Africa Supreme Court of Appeal: Midi Television v Director of Public Prosecutions (Western Cape) 2007 (3) SA 318 (SCA) at para 19.

Nebraska Press Association v. Hugh Stuart: (1976) 427 US 539.

Reliance Petrochemicals v. Proprietor of Indian Express56 tried by Supreme Court of India.

John D. Pennekamp v. State of Florida57 tried by Supreme Court of United States of America.

Notes of legal scholars referred to:

Santerre Christine, Étude franco-canadienne du principe légaliste: le processus qualitatif et interprétatif du texte pénal. In: Revue internationale de droit comparé. Vol. 68 N°4, 2016, p.4.

Canadian Fondation for Children, Youth and the Law c. Canada (Procureur Général), [2004] 1 S.C.R. 76, 2004 SCC 4, Note 14, Par. 16.

R. c. Nova Scotia Pharmaceutical Society, 9 Juillet 1992, nº 22473, p.3-4.

Déc. n° 96-377 DC du 16 juillet 1996, cons. No 3 et s., citée par Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), Cahiers du Conseil Constitutionnel Nº 26 (Dossier la Constitution et le droit Pénal)- Aout 2009, p. 12.

See Mukong v. Cameroon, views adopted by the UN Human Rights Committee on 21 July 1994, No .458/1991, para. 9.7.

SIRACUSA Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 3.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Kabasinga Florida petitioned the Supreme Court to declare that:

a. Paragraph 4 of Article 84, Article 92, paragraph 3 of Article 133 and the Article 271 of Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general are contrary to the Article 29 of the Constitution;

b. Article 92 and paragraph 3 of Article 133 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general are contrary to the Article 151 of the Constitution;

c. Article 256 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general are contrary to the Article 38 of the Constitution;

Her petition was given the docket number RS/INCONST/SPEC 00006/2020/SC.

[2] Niyomugabo Ntakirutimana also petitioned the Supreme Court to declare that paragraph 3 of Article 133 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general is contrary to Articles 29 and 151 of the Constitution. His petition was given the docket number RS/INCONST/SPEC 00006/2020/SC.

[3] Both petitions were joined because of connexity and given the docket number RS/INCONST/SPEC 00005/2020/SC - RS/INCONST/SPEC 00006/2020/SC. The hearing was scheduled on 12/01/2021.

[4] On the foregoing date, a public hearing was held whereby Kabasinga Florida appeared and assisted by Counsel Mugabonabandi Jean Maurice, Niyomugabo Ntakirutimana represented by Counsel Kayirangwa Marie Grâce and Counsel Gabiro David. The Government of Rwanda was represented by Counsel Cyubahiro Fiat together with Counsel Batsinda Aline.

[5] Issues raised by petitioners may be classified into two main categories:

a. The articles challenged by the petitioners that they violate the right to due process of law and the independence of the judge to impose the penalty provided under Articles 9 and 151 of the Constitution respectively;

b. The article challenged by one petitioner contending that it violates the principle of freedom of press and expression provided for by Article 38 of the Constitution.

[6] The first category consists of the following articles:

a. Paragraph 4 of Article 84 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general of which Kabasinga Florida stated to be contrary to Article 29 of the[1] Constitution. Such article relates to the penalty imposed to an accomplice who is the offender's spouse or relative up to fourth (4th) degree.

b. Article 92 and Article 133, paragraph 3 of the aforementioned Law nº 68/2018 of 08/30/2018 of which the petitioners claim to be contrary to Article 29 of the Constitution with respect to deprivation of the right to penalty reduction for any person who commits one of the offenses provided for under these articles, despite mitigating circumstances. They also stated that these Articles are contrary to Article 151 [2]of the Constitution with respect to the independence of the judge to determine the penalty.

   Both Florida and Niyomugabo Ntakirutimana have the petition relating to paragraph 3 of Article 133 in common.

c. Regarding Article 271, Kabasinga Florida stated that it is contrary to Article 29 of the Constitution because it does not indicate the elements constituting the offense of counterfeit, use or circulation of negotiable instruments.

[7] The second category includes the Article 256 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general, which punishes any person who declares his/her opinions with intention to mislead a decision of a judge or witness. Kabasinga Florida stated that this Article is contrary to Article 38 of the Constitution on freedom of press, of expression and of access to information.

[8] The foregoing issues have been examined in this case, according to the respective categories.

II. ANALYSIS OF LEGAL ISSUES

A. The articles impugned by the petitioners on ground of violating the principle of the right to due process of law and the independence of the judge to determine a penalty

A.1. Determination of whether the fact that the paragraph 4 of Article 84 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general, does not indicate the circumstances in which the judge may or may not punish the accomplice who is the offender's spouse or relative up to the fourth (4th) degree, infringes the right to due process of law provided for under Article 29 of the Constitution

a. Kabasinga Florida's arguments

[1] "Everyone has the right to due process of law, which includes the right: 1° ……; 4° not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed. Offences and their penalties are determined by law;
5°……

[2]The judicial system is governed by the following principles: ……. in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority

[9] Kabasinga Florida and her Counsel state that the paragraph 4 of Article 84[3]is contrary to the subparagraph 4 of Article 29 of the Constitution, providing that the offences and their penalties are determined by law. This is based on the following reasons:

a. This paragraph 4 does not indicate when the offender's spouse, who is an accomplice, as well as a relatives up to the fourth (4th) degree are punished. The legislator has not indicated whether these people will be punished as accomplices or not. This is because he/she indicated that the judge may exempt them from penalties, which means he/she may also punish them.

b. This option of punishing them or not is the cause issue because it is contrary to the guiding principles of criminal cases to determine a punishable act by the law. This is likely to affect the administration of justice because paragraph 4 of Article 84 does not indicate in which circumstances the judge must punish or not the persons referred to in this paragraph, as it is not in his/her competence to determine it.

c. The text of this article contradicts the principle that criminal laws must be clear, plain and unambiguous. While they are confusing or ambiguous, they prevent people from accessing due process of law as stated by the Article 84 above, the people involved do not know whether they should avoid being accomplice of their spouses or relatives up to the fourth (4th) degree while they do not know if they can be exempted from penalties or not.

d. The formulation of the text of Article 84, paragraph 4 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general is also contrary to the paragraph one of Article 2 of this Law[4] because it gives latitude of appreciation to the judge, whose decision may be unjust or in favor of the offender.

[10] Kabasinga Florida and her counsel further pray the Court to repeal this Article for being contrary to the Constitution; and if necessary, the Court may order its amendment to make it clear.

b. Opinions of State attorneys

[11] The State attorneys state that the statement by petitioner lacks merits for the following reasons:

[3] The Article 84 of the Law no 68/2018 OF 08/30/2018 determining offenses and penalties in general stipulates that: The co-offender incurs the same penalties as the offender.
The accomplice does not incur the same penalties as the offender except where:
the law provides otherwise;
2 º the judge, in his/her discretion, finds that the accomplice's responsibility in the commission of the offence is the same as or greater than that of the principal offender.
The accomplice may be prosecuted even if the criminal action cannot be instituted against the offender due to reasons particularly specific to the offender such as death, insanity or his/her being unidentified.
However, when a person referred to in items 5 d), 5 e) and 5 f) of Article 2 of this Law is the offender's spouse or relative up to the fourth (4th) degree, the court may exempt him/her from the penalties prescribed for the accomplice.
[4] offence: an act or omission that breaches public order and which is punishable by law;

a. The Article 2, paragraph one, subparagraph 5º of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general describes an[5] accomplice. In view of this article, a person is considered as an accomplice when there exists an offender and an act punishable by the law. Whoever having aided the offender in the means of preparing the offence is an accomplice.

b. According to this definition, the offender's spouse as well as relatives up to the fourth (4th) degree who becomes his /her accomplice, may be punished as provided for under the Article 84 of the above law. The legislator indicated that the court could exempt accomplices from penalties depending on the circumstances surrounding the commission of the offence. The discretion to determine whether they will be exempted or punished is left to the judge, and this is not contrary to Article 29, subparagraph 4 of the Constitution.

DETERMINATION OF THE COURT

[12] The Article 84 of the aforementioned Law nº 68/2018 of 08/30/2018 provides for the punishment modality of the accomplice; it provides the exception in the event of the offender's spouse or relative up to the fourth (4th) degree. The paragraph states that: However, when a person referred to in items 5 d), 5 e) and 5 f) of Article 2 of this Law is the offender's spouse or relative up to the fourth (4th) degree, the court may exempt him/her from the penalties prescribed for the accomplice.

[13] Persons referred to in items 5 d), 5 e) and 5 f) of Article 2 of this Law are the following:

d. A person who harbours an offender or a co-offender or an accomplice to make it impossible to find or arrest him/her, helps him/her hide or escape or provides him/her with a hiding place or facilitates him/her to conceal objects used or intended for use in the commission of an offence;

e. A person, who knowingly, conceals an object or other equipment used or intended for use in the commission of an offence;

f. A person who steals, conceals or deliberately destroys in any way objects that may be used in offence investigation, discovery of evidence or punishment of offenders;

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[5]Accomplice**:** a person having aided the offender in the means of preparing the offence through any of the following acts;

a) a person who, by means of remuneration, promise, threat, abuse of authority or power has caused an offence or given instructions for the commission thereof;
b) a person who knowingly aids or abets the offender in the means of preparing, facilitating or committing the offence or incites the offender;
c) a person who causes another to commit an offence by uttering speeches, inciting cries or threats in a place where more than two (2) persons gather, or by means of writings, books or other printed texts that are purchased or distributed free of charge or displayed in public places, posters or notices visible to the public;
d) a person who harbours an offender or a co-offender or an accomplice to make it impossible to find or arrest him/her, helps him/her hide or escape or provides him/her with a hiding place or facilitates him/her to conceal objects used or intended for use in the commission of an offence;
e) a person, who knowingly, conceals an object or other equipment used or intended for use in the commission of an offence;
f) a person who steals, conceals or deliberately destroys in any way objects that may be used in offence investigation, discovery of evidence or punishment of offenders;

[14] The provisions of paragraph 4 of the Article 84 implies that a person who commits one of the acts referred to in points 5 d), 5 e) and 5 f) of aforementioned Article 2 is the offender's spouse or relative up to the fourth (4th) degree may be punished or exempted from the penalties. Kabasinga Florida's petition to the Court is that the legislator has not clearly enlightened the judge about under what circumstances he/she must or must not punish the accomplice provided for under paragraph 4 of Article 84. She indicates that it infringes the principle that criminal law provisions must be clear, plain and unambiguous. It is likely to violate the right to due process of law provided for under Article 29 of the Constitution, especially in paragraph 4.

[15] For addressing this petition initiated to the Court by Kabasinga Florida, it is necessary to examine whether the provisions of paragraph 4 of Article 84 mentioned above are not clear in such a way that they infringe the right to due process of law provided for under paragraph 4 of the Article 29 of the Constitution.

[16] The statement "the court may exempt him/her from the penalties" prescribed for the accomplice, used in paragraph 4 of Article 84, are interpreted as granting the judge the competence to punish and exempt them from penalties. However, the article does not indicate under which circumstances such power should be exercised. This situation can lead to different penalties for two offenders of the same offences before two different judges, whereby one may be punished while the other may not because the judge has the discretion to determine his/her *standard of appreciation* whether the act constituting the offence is punishable or exemptible from penalty. Is this amounting to the contravention of the principle according to which no punishment without law provided for under paragraph 4 of the Article 29 of the Constitution?

[17] The first paragraph of Article 3 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general reads that no one can be held guilty of an offence because of any act or omission, which did not constitute an offence under national or international law at the time when it was committed. The provisions of this paragraph are in accordance with the general principle of law which provides that there must be no crime or punishment except in accordance with fixed, predetermined law (*Nullum crimen, nulla poena, sine lege = principe de la légalité des infractions et des peines*). This principle is found in various international conventions, especially those ratified by Rwanda.

[18] Article 11(2) of the Universal Declaration of Human Rights, ratified by Rwanda on 09/18/1962 is similar to Article 3 of Law nº 68/2018 of 08/30/2018 mentioned in previous paragraph[6]. It is also similar to Article 15(1) of the International Covenant on Civil and Political Rights ratified by Rwanda under Law nº 8/75 of February 6, 1975 and published in the Official Gazette of the Republic in the same year[7], as well as Article 7(2) of the [8] (*African Charter on Human and Peoples' Rights*) ratified by Rwanda under Law nº 10/1983 of 01/07/1983 and published in the Official Gazette of the Republic on 01/07/1983.

[6]No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.
[7] No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.…….
[8] No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed.

[19] The principle provided for under Article 3 of Law nº 68/2018 of 30/08/2018, as well as in the aforementioned international conventions, is similar to that provided for under paragraph 4 ofArticle 29 of the Constitution; and constitutes one of the elements of the right to due process of law. This principle, which prohibits the conviction of any person for acts that are not provided for as offenses under the law, has been clarified by Legal scholars and various courts.

[20] Legal scholar Bertrand de Lamy explains that the principle that offenses and penalties should be determined by law rests on two particularly solid foundations: the law is the only one that has the legitimacy to establish the right to punish, and to avoid arbitrariness and to guarantee equality in the face of repression by warning everyone of the limits of what is permitted and prohibited (*Le principe légaliste, ainsi affirmé, repose sur deux fondements particulièrement solides: l'un, politique, tenant à la souveraineté de la loi, expression de la volonté générale, et qui, seule, a la légitimité permettant d'asseoir le droit de punir; l'autre, plus philosophique, fait de la légalité criminelle le moyen d'assurer la mise en œuvre du libre arbitre, d'éviter l'arbitraire et de garantir l'égalité devant la répression en avertissant chacun des frontières du permis et de l'interdit)*[9].

[21] Legal scholar Christine Santerre explains that, the principle of legality of offenses and penalties requires the law to determine offense and its all elements, which means an act constituting an offence and related penalty. (*Ce principe de la légalité des délits et des peines suborne l'existence d'une infraction à un texte de loi, lequel doit prévoir l'ensemble des composantes de celle-ci, c'est-à-dire la conduite prohibée et la peine*)[10]. She also explains the said principle lies on two foundations: the first aims to provide citizens with a reasonable warning about prohibited acts and of the penal consequences in the event of non-compliance with the law. The second is to limit the discretionary power of law enforcement officials and to prevent vague texts from leaving the courts with wide room of interpretation. (*Deux fondements de ce principe **:** le premier vise à formuler au citoyen un avertissement raisonnable afin qu'il soit avisé des conduites proscrites et des conséquences pénales en cas du non-respect de la loi. La clarté et la précision du texte de loi exigées par le principe légaliste assurent ainsi au justiciable une juste connaissance des interdits pénaux. Le second fondement vise à limiter le pouvoir discrétionnaire des personnes chargées de l'application de la loi. Il s'agit d'éviter que des textes flous laissent aux tribunaux un vaste pouvoir d'interprétation)*[11].

[22] In the same context, the Supreme Court of Canada has ruled that an unclear provision of Law prevents the citizen from realizing that he/she is venturing into an area where he/she may be subject ot criminal sanctions. Moreover, it prevents law enforcement officals and judges from determining whether an offence has been committed. It also raises concerns that law enforcement officials shall have unlimited power (*Une règle de droit imprécise empêche le citoyen de se rendre compte qu'il s'aventure sur un terrain où il s'expose à des sanctions pénales. De même, elle complique la tâche des responsables de son application et des juges lorsqu'ils sont appelés à*

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[9] Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), Dérives et évolution du principe de la légalité en droit pénal français : contribution à l'étude des sources du droit pénal français par Diffusion numérique: 4 mars 2010, nº2 (https://id.erudit.org/iderudit/039334ar)

[10] Santerre Christine, Étude franco-canadienne du principe légaliste: le processus qualitatif et interprétatif du texte pénal. In: Revue internationale de droit comparé. Vol. 68 N°4, 2016, p.4.

[11] Ibid., p.6-7.

déterminer si un crime a été commis. Elle suscite également la crainte que les responsables de son application disposent d'un pouvoir discrétionnaire trop grand)[12].

[23] The Court also clarified that the fact that the criminal laws must be clear is based on the principle that the public must know in advance what is prohibited, and that the discretionary power of law enforcement officials has its limits. The law is determined to be unconstitutional if it is not clear enough that no one can understand what it means based on the principles of legal interpretation. ***(****La théorie de l'imprécision repose sur la primauté du droit, en particulier sur les principes voulant que les citoyens soient raisonnablement prévenus et que le pouvoir discrétionnaire en matière d'application de la loi soit limité. L'avertissement raisonnable aux citoyens comporte un aspect formel - la connaissance même du texte – et un aspect de fond - la conscience qu'une certaine conduite est assujettie à des restrictions légales. … La théorie de l'imprécision peut donc se résumer par la proposition suivante: une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire, c'est-à-dire pour trancher quant à sa signification à la suite d'une analyse raisonnée appliquant des critères juridiques)*[13].

[24] The Constitutional Court of France has also ruled that the legislator must explain the offences in a clear and plain manner, so that no unfounded decisions are made (…. *qu'il en résulte la nécessité pour le législateur de définir les infractions en termes suffisamment clairs et précis pour exclure l'arbitraire)*[14]**.**

[25] It also explained that the legislator should draft the law in such a way as to enable the judge, to whom the principle of legality imposes a strict interpretation of the criminal law, to give a ruling free from any criticism of being arbitrary. (*Le législateur doit rédiger la loi « dans des conditions qui permettent au juge, auquel le principe de légalité impose d'interpréter strictement la loi pénale, de se prononcer sans que son appréciation puisse encourir la critique d'arbitraire)*[15]**.**

[26] According to the explanations provided by the Legal scholars and decisions of the various courts on the principle of legality of offenses and penalties, provided under Article 29, paragraph 4 of the Constitution, the following main concepts are highlighted:

a. Offences and their penalties are determined by law;

b. It is not the responsibility of the judge to determine the punishable acts, but it is the responsibility of the legislator;

c. The criminal law must be drafted in a clear and unambiguous manner to avoid blatantly baseless decisions, and to avoid arbitrariness;

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[12] Canadian Fondation for Children, Youth and the Law c. Canada (Procureur Général), [2004] 1 S.C.R. 76, 2004 SCC 4, Note 14, Par. 16.

[13] R. c. Nova Scotia Pharmaceutical Society, 9 Juillet 1992, no 22473, p.3-4.

[14] Cons. const., 20 janv. 1981, n° 80-127 DC. Lire en ligne: (https://www.doctrine.fr/d/CONSTIT/1981/CONSTEXT000017665953)**.**

[15] Déc. n° 96-377 DC du 16 juillet 1996, cons. N° 3 et s., citée par Bertrand de Lamy (Professeur de Droit à L'Université de Toulouse I), Cahiers du Conseil Constitutionnel N° 26 (Dossier la Constitution et le droit Pénal)-Aout 2009, p. 12.

d. The law must be drafted in such a way to warn everyone of what is permitted and prohibited as well as the penalties in the event he/she commits a prohibited act for predictability.

[27] After a comparative analysis of the foregoing explanations and the provisions of paragraph 4 of Article 84 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general, the Court notes that:

a. This article provides that the judge may decide to exempt the accomplice who is the offender's spouse or relative up to the fourth (4th) degree without specifying their punishable actions that may lead to their punishment and actions that may lead to their exemption from penalty.

b. The fact that the law does not determine punishable acts, gives the judge the latitude to determine the reasons to punish or exempt any person whereas it is not in his/her responsibilities but of the legislator.

c. This situation can also lead different judges to impose different penalty to offenders of the same offense because the law did not explicitly and unambiguously explain the person who will be punished or exempted from penalty.

d. the persons referred to in paragraph 4 of Article 84 cannot know in advance the prohibited act as provided under the law because it is left in the discretion of the judge.

[28] In view of the foregoing elucidations, the Court notes that paragraph 4 of the Article 84 of Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general is contrary to the principle of legality of offences and their penalties. Therefore, it infringes the principle of right to due process of law provided for under paragraph 4 of Article 29 of the Constitution. The Court finds this paragraph without effects according to the provisions of Article 3 of the Constitution.

[29] Considering the background of this Article, it is obvious that the Decree-Law nº 21/77 of August 18, 1977 Instituting the Penal Code that was amended by the Organic Law nº 01/2012/OL of 05/02/2012 instituting the Penal Code, Article 257 provided that whoever will have knowingly concealed a person whom he/she knew to have committed a felony or a misdemeanor or whom he/she knew is wanted by prosecution or who will have obstructed his/her arrest or search or will have helped him/her to hide or flee, shall be punished as an accomplice to the offense being prosecuted. This Article also provided that the spouse, relatives or in-laws of the offender, up to the fourth (4th) degree, are exempt from these provisions. This Article was later modified by the Organic Law nº 01/2012/OL of 02/05/2012 instituting the Penal Code, in its Article 478. This Article read that: In the cases provided under Article 477[16] of this Organic Law, the Court may discharge from punishment a spouse, parents or relatives of the offender up to the fourth degree of relationship.

[16] Any person, other than the offender or accomplice who:
1° knowingly conceals objects or tools that are used or intended to be used to commit a felony or a misdemeanor related to public security, or objects, materials or documents obtained through such felony or misdemeanor;
2° destroys, withdraws, conceals or knowingly alters any documents used in the investigation of a felony or a misdemeanor, proof gathering or punishing those who commit offences against public security; shall be liable to the penalty applicable to the offence of concealment provided under Article 326 of this Organic Law.

[30] In the course of the amendment of of 2018 of the Penal Code, this Article has not changed much. According to the copy, in the possession of the Court, of the Broadcast Program by the staff member of the Rwandan Law Reform Commission on the draft law of 2018 determining offenses and penalties in general amending Organic Law n° 01/2012/OL of 02/05/2012 Instituting the Penal Code, it was explained that the new element in this draft law was that the offender's spouse is not always exempted from penalty if he/she has been an accomplice of his/her spouse. This document says that he/she is only exempted from penalty when the offender did not reveal it to him/her (perhaps he/she meant "he/she hid it from him/her"), he/she concealed stolen goods or destroyed the necessary evidence to serve in the prosecution of an offence committed by his/her spouse. In other instances, (a person who, by means of remuneration, has caused an offence, provides equipment intended for use in the commission of an offence, incites the commission of offence, causes another to commit an offence by uttering speeches), the offender's spouse who is an accomplice is not exempted. The acts described by this document subjected to exemption are also found in paragraphs 5 d), 5 e) and 5 f) referred to in paragraph 2 of this Case, Article 2 of the Law n° 68/2018 of 30/08/2018 stated above; but the provisions of that Article in the amended law remained unchanged. The content of this document is also similar to the provisions of the penal codes of different countries such as Vanuatu[17], State of Nevada[18], Cameroon among others[19].

The Court notes that, if the content of this document corroborate the provisions of paragraph 4 of the Article 84, it should have been clearly drafted.

[31] The Court advises that paragraph 4 of Article 84 be well drafted to clearly indicate the purpose of the legislator and be aligned with the provisions of paragraph 4 of the Article 29 of the Constitution.

A.2. Whether the prohibition of penalty reduction according to mitigating circumstances as provided under Articles 92 and 133, paragraph 3 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, is contrary to Articles 29 and 151 of the Constitution.

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[17] Art.34. Accessory after the fact:
(1) An accessory after the fact shall mean a person who, knowing or having reasonable cause to suspect that another person has committed a criminal offence, shelters such person or his accomplice from arrest or investigation, or has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purpose of committing the offence.
(2) Subsection (1) shall have no application to any ascendant, descendant, sibling or the spouse of the person sheltered.
(3) An accessory after the fact shall be punished as a principal offender.

[18] NRS 195.030 Accessories:
1. Every person who is not the spouse or domestic partner of the offender and who, after the commission of a felony, destroys or conceals, or aids in the destruction or concealment of, material evidence, or harbors or conceals such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony.
2. Every person who is not the spouse, domestic partner, brother or sister, parent or grandparent, child or grandchild of the offender, who, after the commission of a gross misdemeanor, harbors, conceals or aids such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a gross misdemeanor or is liable to arrest, is an accessory to the gross misdemeanor……...

[19] SECTION 100: Accessory after the Fact:
(1) An accessory after the fact shall mean a person who after the commission of a felony or misdemeanor shelters an offender or his accessories from arrest or from Investigation, or who has custody of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence.
(2) This Section shall not apply as between husband and wife.

a. Kabasinga Florida's arguments

[32] Kabasinga Florida and her counsel state that Article 92 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general[20], and paragraph 3 of Article 133 of this Law[21] are contrary to Articles 29 and 151 of the Constitution for the following reasons:

a. These two articles are contrary to Article 29 because they violate the right to due process of law for a person convicted of the crime of genocide or defilement against a child under the age of fourteen (14) in the event that he/she cannot benefit from penalty reduction, despite the mitigating circumstances.

b. The person convicted of an offense provided under one of these articles is deprived of the right to penalty reduction despite mitigating circumstances, as well as the right to appeal against the decision. Accordingly, it violates the right of the defendant to due process of law which starts from the investigation until the conviction and penalty imposition.

c. The fact that a person is denied one of the aforementioned procedures, he/she is denied justice by the law that should have protected him/her. This was upheld by the Supreme Court after having considered opinions legal scholars and precedents from other jurisdictions which have ruled on the same issue by stating that: "It is the finding of the Court notes that in criminal matters, the right to due process of law begins with investigation and prosecution stages, hearing and penalty imposition for the offenses provided for under criminal laws. It means that the matters relating to the examination of mitigating circumstances and penalties for the hearing stage must also respect the principles of right to due process of law".

d. The reading of the first paragraph, article 49 of the Law nº 68/2018 of 08/08/2018 determining the offenses and the penalties in general indicates the factors taken into account by a judge in determining the penalty[22], to the extent that any contradiction with them implies contradiction with the elements of right to due process of law with respect to imposition of penalty.

e. The analysis of Articles 92 and 133, reveals that the judge's power is limited to determining whether the defendant is guilty because the penalty is determined by law, which is contrary to Article 49 of the Law determining offences and penalties in general providing the factors taken into account by a judge in determining a penalty much as these offenses provided for under both articles are grave and deserve severe penalties, there are often mitigating Circumstances likely to lead to penalty reduction in favor of offender,

f. Although the country is committed to the prevention and the fight against genocide, in the event where the offence is committed either by a Rwandan or foreigner and surrenders himself/herself to justice or undertakes to facilitate investigation to identify unknown conspirators, he/she can benefit the penalty reduction for his/her contribution to justice.

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[20]Any person who commits any of the acts referred to under Article 91 of this Law (definition of crime of genocide) commits an offense. Upon conviction, he/she is liable to the penalty of life imprisonment that cannot be mitigated by any circumstances.

[21] If child defilement is committed on a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances.

[22] A judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence.

The genocide crime is committed in dissimulation such a way that it is difficult to find witnesses, which is easy for the judge to discover the truth.

g. Although it is obviously inexcusable for many people about the offense of defilement committed against a child under fourteen (14) years, even the judge responsible for the ruling on such cases understands their gravity. Thus, it is not appropriate to ignore that there may be circumstances surrounding the commission of the offense which may reduce its gravity such that the offender benefits penalty reduction in the court's discretion.

h. Moreover, these provisions undermine the judge's independence to be objective in imposing the penalty. They also undermine his/her independence for fair trial as they prevent him/her from comparing what would lead him/her to impose less or more severe penalty. Giving the judge the discretion over the conviction or acquittal of the accused and at the same time preventing him/her from imposing the appropriate penalty for the acts committed amounts to depriving him/her of the independence and denying the parties of their right to due process of law.

i. The forgoing articles also impede the independence of the judge provided under Articles 4 and 5 of the Law nº 09/2004 of 04/29/2004 relating to the Code of Ethics for the Judiciary[23]. This was underlined by the Supreme Court in judgement nº RS/INCONST/SPEC 00003/2019/SC, paragraph 35, stating that: "The principle of the independence of judge in the exercise of his/her functions is related to the independence of the judiciary. It's considered as the judge's freedom to hear and adjudicate according to the procedure and manner prescribed by law and do so independently without any external pressure from public institutions or from others".

j. The independence of the judge was also explained in the judgement R. v. Beauregard, rendered by the Supreme Court of Canada as follows: « *The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court; no outsider, be it Government, pressure group, individual or even another judge should interfere, or attempt to interfere, with the way in which a judge conducts a case and makes a decision*".

[33] Based on the above reasons, Kabasinga Florida requests the Supreme Court to declare Article 92 and Article 133, paragraph 3 contrary to the Constitution and order their repeal.

b. Niyomugabo Ntakirutimana's arguments

[34] Niyomugabo Ntakirutimana and his legal counsel contend that the fact that Article 133, paragraph 3 of the above law that provides for mandatory sentence for defilement committed against a child under fourteen (14) years, despite the existence of mitigating circumstances, deprives the offender of the right to due process of law provided for by Article 29 of the Constitution in connection to his case at the Court of Appeal. They allege that courts cannot reduce his/her penalty in connection to his case relating to defilement committed on a child under fourteen (14) years, because the judge is barred by paragraph 3 of Article 133.

[23] A judge shall be independent in the exercise of his or her judicial functions. A judge shall independently examine matters before him or her and take decisions without any external pressure. In cases before court, a judge shall guard against any attempts to influence his or her decisions other than those made through the ordinary procedure provided for by the law. A judge is bound to decide cases in accordance with the law.

[35] Niyomugabo Ntakirutimana and his legal counsel further state that this Article should be repealed because it does not grant to the judge the latitude to reduce the penalty and it is contrary to the principle of equality before and protection of the law. Their additional statements are similar to those reiterated by Kabasinga Florida.

c. Opinions of State attorneys

[36] The State attorneys find that there is no need for comment because the Supreme Court has set its position in the case RS/INCONST/SPEC 00003/2019/SC paragraphs 39[24] and 40[25], and has given its advisory opinion with respect to other similar issues not included in the petition.

DETERMINATION OF THE COURT

[37] The Court notes that the same legal issue was examined in the judgement RS/INCONST/SPEC00003/2019/SC tried on 04/12/2019, from the petition initiated to the Court by Kabasinga Florida requesting for a declaration that paragraph 4 of the Article 133 relating to child defilement followed by cohabitation as husband and wife is contrary to articles 29 and 151 of the Constitution. The only difference is that Kabasinga Florida and Niyomugabo Ntakirutimana seized the Court against paragraph 3 of Article 133, and Article 92 with respect to Kabasinga Florida. However, both petitions are similar and consist of the fact that such provisions are contrary to the principle of the right to due process of law and the independence of judge in determining the penalty.

[38] In regard to that case, the Court found out t the provisions of Article 133 of the Law n° 68/2018 of 30/08/2018 providing that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances to be contrary to one of the principles of the right to due process of law reading that a judge determines a penalty according to the gravity, consequences of, and the motive for committing the offence, the offender's prior record and personal situation and the circumstances surrounding the commission of the offence. Therefore, it declares that it is contrary to Article 29 of the Constitution.

[39] The Court also found the provisions of Article 133 of the Law n° 68/2018 of 30/08/2018 stipulating that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances, to be contrary to article 151(5) of the Constitution which provides that in exercising their judicial functions, judges are independent because they are not allowed to be motivated by mitigating circumstances in determining appropriate penalty".

[24] Paragraph 39: "According to the explanations mentioned in the precedent paragraph, the provisions of article 133 of the Law no 68/2018 of 30/08/2018 stipulating that if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances, are contrary to article 151.5 of the Constitution which provides that in exercising their judicial functions, judges are independent because they are not allowed to be motivated by mitigating circumstances in determining appropriate penalty ".
Paragraph 40: "There are other articles which determine the penalties which are not subject to reduction, but the Court has not yet given its position because they are not seized. The State may examine these articles if their rectification is necessary to be harmonized with the content of this judgement".

[40] The Court motivated in paragraph 40 of that case that there are other articles which determine mandatory sentences of which the Court cannot pronounce itself over them given that they have not been part of the subject matter of the case It issued an advisory opinion that the government would consider if their rectification is necessary to harmonize them with the ruling of the said judgement. The Court finds that Article 92 of Law nº 68/2018 of 30/08/2018, its text reading that: "that cannot be mitigated by any circumstances"; and paragraph 3 of Article 133providing that if defilement is committed against a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances, are part of the provisions mentioned in paragraph 40 of judgement RS/INCONST/SPEC00003/2019/SC. Accordingly, the Court finds that the parts of such provisions are also contrary to the principles of the right to due process of law and the independence of judge in determining penalty on the basis of the holdings set out in the judgement RS/INCONST/SPEC 00003/2019/SC which should not be reexamined due to their similarities. Therefore, they are contrary to Articles 29 and 151 of the Constitution.

[41] The Court recalls the advisory opinion given in the judgement RS/INCONST/SPEC00003/2019/SC delivery on 04/12/2019 according to which the government would consider other articles determining mandatory penalties over which the court did not pronounce itself because they have not been part of the subject matter of the case in order to be harmonized with the position set by that judgment.

A.3. Whether the provisions of Article 271 of Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general reading that "any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence", are contrary to Article 29 of the Constitution

a. KABASINGA Florida's arguments

[42] Kabasinga Florida and her Counsel tabled the following arguments:

a. Article 271[26] of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general includes three acts and each of them constitutes a distinct offense. These include the counterfeiting, use and circulation of negotiable instruments.

b. The first act of counterfeit is undisputable on ground that counterfeiting of any form of document constitutes an offence. Only the remain o acts are drafted in such a manner as to contravene the constitution given that the only use of negotiable instruments does not constitute an offence. The legislator should have therefore made distinction between users of counterfeited negotiable instruments willingly and those who use them lawfully.

c. The formulation of the text of this article seems to forbid the use of negotiable instruments as well as their circulation in Rwanda. It is necessary to make a distinction between the person who circulates them illegally and the one who do so on behalf of his/her company. In addition, among the elements constituting the offense, the intentional element is lacking (intention to harm). The different opinions of legal scholars indicate that for there to be qualified as an offense, the offender must act with intention to harm or to do the

[26] "Any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence. Upon conviction, he/she is liable to imprisonment for a term of not less than three (3) years and not more than five (5) years and a fine of two (2) to ten (10) times of the value of the counterfeited amount".

illegal acts with the aim of breaching public order with the knowledge that his/her act harms the victim, which is qualified as specific intent.

d. In accordance with the first paragraph of article 2 of the above Law nº 68/2018 of 08/30/2018, the legislator must, during the classification of the offense, indicate the act constituting the offense. This article provides that the offense is an act or omission that breaches public order;

e. Article 271 of the Law nº 68/2018 of 08/30/2018 violates Article 29 of the Constitution because the court cannot render a fair trial as long as it is not indicate how such acts constituting the offense breach public order.

[43] In respect of the foregoing reasons, Kabasinga Florida requests the Court to declare Article 271 of the Law nº 68/2018 of 08/30/2018 determining offences and penalties in general inconsistent with Article 29 of the constitution and consider its repeal from Rwanda legislation or its rectification.

b. Opinions of State attorneys

[44] The State attorneys contend that there is no drafting flaw in Article 271 of Law nº 68/2018 of 08/30/2018 for the following reasons:

a. Counterfeit, use or circulation of negotiable instruments, by any means, constitute an offence. The use of negotiable insruments is regulated by law and it is the non-compliance that constitutes the offense provided for under Article 271 of the above law. The lawful use and circulation of negotiable instruments should not be criminalized.

b. Article 48 of the Law nº 48/2017 of 23/09/2017 governing the National Bank of Rwanda, stipulates that National Bank of Rwanda participates in the issuing and distribution of Treasury securities, which is not done by a natural person. The person who allows himself to do so commits an offense against the public under Article 271 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general.

c. The allegation that this provision is contrary to Article 29 of the Constitution is unfounded, because the elements constituting the offense, in particular the premeditation and the commission of the act, which is punishable by law, must be met in order to consider the suspect as the offender. Thus, the allegation that the offense provided for by Article 271 lacks intentional element is unfounded because the person who counterfeits, uses or circulates negotiable instruments, does it intentionally.

DETERMINATION OF THE COURT

[45] The first sentence of Article 271 of the Law nº 68/2018 of 08/30/2018 reads that: any person who counterfeits, uses or circulates, by any means, negotiable instruments, commits an offence.

[46] Kabasinga Florida states that the reading of this provision, suggests that the legislator did not make distinction between users of counterfeited negotiable instruments with full knowledge and those who use them in accordance with the law.

[47] This article is placed in the section one of the fourth Chapter of the Law nº 68/2018 of 08/30/2018, entitled "counterfeit and falsification of monetary symbols". The title of the Chapter IV is "offences against public credibility" whereas the title of the Article 271 is "counterfeit, use or circulation of negotiable instruments". The comparative analysis these titles and the text of the first sentence of the Article 271 implies that the legislator intended to criminalize the counterfeit, use or circulation of negotiable instruments. Therefore, the legislator should not include in the punishable acts, the lawful use and circulation of negotiable instruments.

[48] The Court considered the formulation of the provisions punishing similar offense in other countries and found that there are legal instruments clearly indicating that the punishable act consists of the counterfeiting, use and circulation of negotiable instruments. These countries are Burkina Faso[27], Gabon[28], Senegal[29], Ivory Coast [30](in all these countries, there is a provision that punishes any person who counterfeits, and another distinct provision punishing the use or circulation of negotiable instruments, and the latter provision is concern in this case).

[49] The Court notes that the issue raised by Kabasiga Florida in relation to the Article 271 of the law nº 68/2018 of 30/08/2018 determining offenses and penalties in general should not be considered in the context of unconstitutionality, on the contrary, it would be a formulation related issue which could be rectified to make it more clear. Therefore, the Court finds that this Article is not contrary to Article 29 of the Constitution. Rather, the Court recommends in the event of law revision, this provision should be articulated in a way that is clear enough for readers.

B. With regard to Article alleged by Kabasinga Florida to violate the freedom of press, of expression and of access to information.

a. Whether Article 256 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general is contrary to Article 38 of the Constitution;

a. Kabasinga Florida's arguments

[50] Kabasinga Florida and her counsel state that Article 256 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general is unconstitutional for the following reasons:

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[27] Article 253, al 1 code pénal de 1996:
Est puni des peines prévues aux articles 250, 251 et 252, selon les distinctions qui y sont portées, quiconque participe à l'émission, l'utilisation, l'exposition, la distribution, l'importation de signes monétaires contrefaits, falsifiés, altérés ou colorés ».

[28] Art. 230 code penal de 2019:
« Quiconque aura contrefait, falsifié, altéré ou détruit des billets de banque ou pièces de monnaie ayant cours légal au Gabon, ou participé à l'émission ou à l'exposition desdites pièces ou billets contrefaits, falsifiés ou altérés ou à leur introduction sur le territoire gabonais, sera puni de la réclusion criminelle à perpétuité ».

[29] Article 120, al. 1 code penal de 1965:
« Quiconque aura participé à l'émission, l'utilisation, l'exposition, la distribution, l'importation ou l'exportation de signes monétaires contrefaits, falsifiés, altérés ou colorés sera puni des peines prévues aux articles ci-dessus, selon les distinctions qui y sont portées ».

[30] Article 293-2, al. 1 code penal de 1981:
Est passible des peines prévues ci-dessus selon les distinctions susvisées, celui qui participe à l'émission, l'utilisation, l'exposition, la distribution, l'importation ou l'exportation des signes monétaires contrefaits, falsifiés, altérés ou colorés ».

a. The acts constituting an offense provided for by Article 256 consist of the publication of opinions with intention to mislead a judge or witnesses, but it does not specify the medium of their publication. It is not clear whether they must be published in the course of trial as the judge does not rely his/her ruling on public individual or press opinions, rather, he/she relies on elements of evidence and other documents in the case file. As a matter of principle, the judge cannot rule the cases on the basis of his/her personal knowledge it; be it the information he/she learned from reading or heard from the media, which entails that he/she cannot be misled by opinions published by any means outside court hearing.

b. Article 151, 5 of the Constitution provides that in exercising their judicial functions, judges at all times do it in accordance with the law and are independent from any power or authority, thus, even the citizen cannot exercise influence over him/her.

c. Regarding the fact that the publication of opinions may mislead the witness, it is impossible considering the definition of testimonial evidence provided for by Article 62 of the Law n^{o} 15/2004 of 12/06/2004 relating to Evidence and its Production. This Article reads that testimonial evidence consists of statements made in court by an individual regarding what he/she personally saw or heard that is relevant to the subject matter of the trial. Thus, , the legislator has no reason to fear that a person would consider and produce the statements from the public or radio broadcasts as testimonial evidence in the trial.

d. Preventing people from expressing their opinions in media or broadcasts about what happened would be violating freedom of press, of expression and of access to information provided under the Article 38 of the Constitution.

e. Article 256 of the aforementioned law prevents everyone from any declaration or comment on an incident that occurred while pending trial, so that it would not be deemed that he/she intended to mislead the judge while the latter should avoid being misled or relying upon statements from elsewhere other than from the hearing or case file.

f. This Article impedes the media because many acts constituting an offence or prosecuted in courts are often covered by the media. The journalist who publishes an article on an issue pending trial may have limited freedom to do so as long as he/she is not in a position to determine which information is likely to mislead the judge or witness.

g. This Article would also prevent officials and security agencies from holding media programs related to acts likely to be prosecuted in courts, and could even prevent activist's groups from publishing and expressing their views for fear of being regarded as misleading the judge or witnesses.

h. The fact that a citizen may express his/her opinion on matters pending trial or the media stance thereon which ever form it may take cannot influence the judge or the witness's position; and the statements of third parties should not necessarily corroborate the court's decision or the witness statements. The petitioner gives as an example of the case that was aired in media and of which people expressed different opinions, whereby the press reported that a group of girls assault their colleague with intent to kill her and mutilate her genitals. However, nowhere in the trial was it found that this girl had undergone genital mutilation.

[51] Based on the foregoing reasons, Kabasinga Florida and her counsel note that Article 256 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general is contrary to Article 38 of the Constitution and they request that it be repealed from Rwanda penal code.

b. Opinions of State attorneys

[52] The State attorneys state that Article 256 of the Law nº 68/2018 of 30/08/2018 is not a matter of concern, since an individual who makes a statement about a pending case is not regarded as trying to mislead, unless it is established through prosecution.

[53] They allege that there is no contradiction with Article 38 of the Constitution as it does not mention journalists, who normally express their views on pending cases without facing prosecution for trying to mislead a witness or a judge since it is not their intent. The example of the trial relating to the group of girls who assaulted their colleague for which various speculations were broadcast, shows that the aforementioned Article 256 does not contradict Article 38 of the Constitution since the false information disseminated by journalists was not considered to mislead the judge or witnesses, especially that it was not the purpose.

DETERMINATION OF THE COURT

[54] The Article 256 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general provides that Any person who declares his/her opinions with intention to mislead witnesses or a decision of a judge before the case is determined, commits an offence. Upon conviction, is liable to imprisonment for a term of one (1) year to two (2) years and a fine of one million Rwandan francs (1,000,000 Frw) to two million Rwandan francs (2,000,000 Frw).

[55] The offense provided for under this article mentioned above is one of the offenses listed in Section 5 of Chapter 3 of the Law nº 68/2018 of 08/30/2018 on obstruction to good administration of justice. Offenses relating to obstruction to good administration of justice are qualified differently depending on the country. In common law system countries [31], there is a concept known as *contempt of court* present in Rwandan legislation even though it has a different term. It is described in three categories:

> a. Contempt's of court, including behavior that hinders the good conduct of the hearing, obstruct good administration of justice. [*contempt in the face of the court (contempt in facie curiae), which comprises conduct that deliberately disrupts or obstructs* court proceedings

[31] In common law jurisdictions, contempt of court has traditionally been classified as either in facie curiae (in front of the court) or ex facie curiae (outside the court). Examples include yelling in the court room, publishing matters which may prejudice the right to a fair trial ("trial by media"), or criticisms of courts or judges which may undermine public confidence in the judicial system ("scandalizing the court") ……
The common law doctrine of contempt of court does not exist in civil law jurisdictions in such a broad, encompassing sense, but there are undoubtedly functional equivalents, particularly in matters relating to freedom of expression; Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized international mandates, London, United Kingdom, 29-30 November 2000, p 1-2 (https://www.article19.org/data/files/pdfs/publications/freedom-of-expression-and-internet-regulation.pdf).

and is prejudicial to the course of justice)][32]. These can be considered as contempt of court offenses set out in the Article 80 of the Law nº 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.

b. Offenses relating to scandalizing the court, making or publishing untrue allegations about a court or judge that would undermine public confidence in the judiciary[33]. Such offenses are found in the Law nº 68/2018 of 08/30/2018, in subsection titled: discrediting Judiciary and committing violence against personnel in judicial organs.

c. Offenses related to obstruction to good administration of justice through sub judice contempt[34], publishing prejudicial material about pending court proceedings that would interfere with the administration of justice[35]. The provision of Article 256 of the Law nº 68/2018 of 08/30/2018 is similar to what is stated in this subsection.

[56] Following these general explanations, the Court will examine whether the provision of the aforementioned Article 256 infringes the freedom of expression provided for by Article 38 of the Constitution. This Article states that: 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.

[57] In this regard, on the basis of various documents, it will be examined whether the principle of freedom of expression is an *absolute* principle or whether it is a principle with limitations, what are they and are how they are defined by other courts and law scholars. Finally, it will be examined whether or not such limitations apply to the provisions of Article 256 of the Law nº 68/2018 of 08/30/2018.

[58] The principle of freedom of expression has been reiterated by various international conventions ratified and domesticated by Rwanda, especially article 19 of the International Covenant on Civil and Political Rights[36].

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[32] Law Reform Commission of Ireland, Contempt of Court and other Offences and Torts Involving the Administration of justice, 2016, p. 11 (https://www.lawreform.ie/news/issues-paper-on-contempt-of-court-and-other-offences-and-torts-involving-the-administration-of-justice.644.html)

[33] Law Reform Commission of Ireland, Contempt of Court and Other Offences and Torts Involving the Administration of Justice, op. cit, p. 11.

[34] Sub judice contempt", or contempt in connection with pending proceedings, relates to publications concerning pending proceedings that are intended to interfere with the administration of justice"; Ibid., p. 11.

[35]Ibid., p. 11.

[36] Art. 19:

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. 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;

For the protection of national security or of public order (ordre public), or of public health or morals**.**

[59] According to Articles 38 of the Constitution and 19 of the International Covenant on Civil and Political Rights, the freedom of expression is not an absolute principle; it has limitations. The Article 38 of the Constitution indicates the rights that this principle must not violate and further states that the conditions for exercising and respecting such freedoms are determined by law. Article 19,3 of the International Covenant on Civil and Political Rights stipulates that freedom of expression entails duties and responsibilities and it may therefore be subject to certain restrictions provided by law and are necessary for the respect of the rights of others.

[60] Based on this International Convention, subjecting freedom of expression to restrictions must be provided by law for the purposes of fulfilling one of the objectives specified in Article 19 (3), and it must be necessary for the protection of such purpose (*Under the ICCPR, restrictions must meet a strict three-part test*[37]*. First, the interference must be provided for by law. Second, the interference must pursue one of the legitimate aims listed in Article 19 (3). Third, the interference must be necessary to secure that aim).* This was also reaffirmed by the Siracusa Principles on limitations and exceptions for the provisions of the International Covenant on Civil and Political Rights, in its article 10 *(Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation…… pursues a legitimate aim, and is proportionate to that aim)*[38]

[61] The "rights of others" referred to in Article 1 9(3) (a) undoubtedly includes rights linked to the administration of justice, such as the right to a fair trial and the presumption of innocence[39].

[62] Matters regarding restrictions to which freedom of expression is subjected in the context of protecting rights related to the right to due process of law had been defined by the various courts as follows:

> a. in the case Cullen v. Toibin rendered by the Supreme Court of Ireland, it has been ruled that freedom of expression under the Irish Constitution is not an absolute principle. It may not be respected in the context of protecting the right to due process of law. In addition, this ruling explains that articles published in the course of trial may compromise the right to a fair trial; and for this reason it may be necessary to limit freedom of expression in order to protect it and promote due process of law (*The right to freedom of expression is also protected by Article 40.6.1° of the Constitution of Ireland. This right is not absolute, however, and is subject to limitation. For example, the right may be restricted so as to uphold the right to a fair trial of an accused person and to protect the administration of justice. In cases where a prejudicial publication has been made, this clearly has the potential to impede an accused person's right to a fair trial. Therefore, it may be necessary to restrict the right to freedom of expression so as to protect the right to a fair trial and to maintain the administration of justice. Freedom of the press can, however, only be restricted where this is necessary for the administration of justice)*[40].

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[37] See Mukong v. Cameroon, views adopted by the UN Human Rights Committee on 21 July 1994, Nº.458/1991, para. 9.7.

[38] Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 3.

[39] SIRACUSA Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

[40] Cullen v Toibín [1984] ILRM 577 at 582, refered to in Contempt of Court and Other Offences and Torts involving the Administration of Justice, op. cit., p. 53.

b. In the judgement of Kelly v O'Neill[41] rendered by the Supreme Court of Ireland, the court explained that the protection of freedom of expression is not absolute and may be subject to limitations on cases related to obstruction to good administration of justice, which applies to cases of contempt. (*the court stated that the protection of freedom of expression is not absolute and may, ..., be subject to limitation in line with public order and the common good, which applies to cases concerning contempt*).

c. In addition, in the case DPP v Independent Newspapers (Irl) Ltd,[42] tried by this Court, it was clarified that in the cases for sub judice contempt is to determine whether the material published was intended to interfere with the good administration of justice or create the perception of such interference *(the Supreme Court (Dunne J) explained that the test for sub judice contempt is whether the material published was intended to interfere with the administration of justice, or created the perception of such interference)*. Further, in the case *Attorney-General for England and Wales v Times Newspapers Ltd* rendered by the Court of Appeal of England, it was clarified that judgments relating to offenses of contempt of the good administration of justice consist of the prevention of media litigation; the media should not broadcast about ongoing trials in a way that would mislead witnesses or judges (*Sub judice contempt developed as another means to protect the administration of justice, by preventing a "trial by media". The media should not attempt to "prejudge" the issues in a certain case in a way that would influence would-be witnesses or jurors*)[43].

d. In the case of Worm v. Austria[44], the European Court of Human Rights clarified that the violation of freedom of expression was necessary in order to protect the right to due process of law and maintain public confidence in the administration of justice (*the interference with freedom of expression was "necessary in a democratic society" in order to protect the right to a fair trial and to maintain public confidence in the administration of justice……*).

e. In the case of Sunday Times v. United Kingdom[45]. The European Court of Human Rights had also clarified that *If the issues arising in litigation are ventilated in such a way to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts.*

f. The Court of Appeal of New Zealand, in the case of Gisborne Herald Co. Ltd. v. Solicitor General[46], had explained that when freedom of expression and the right to a fair trial cannot be fully guaranteed, the appropriate measure to be taken is to limit freedom of the press to ensure a fair trial (…*The present rule is that, where on conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial***).**

g. The Supreme Court of Canada had explained that the decision to ban the publication of an article can be taken when it is necessary in the context of preventing the blatant and

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[41] 1999] IESC 81, [2000] 1 IR 354, at 374.

[42] [2005] IEHC 353, [2006] 1 IR 366, at paragraph 34.

[43] Attorney-General for England and Wales v Times Newspapers Ltd [1974] AC 273 at 300; refered to in Contempt of Court and Other Offences and Torts involving the Administration of Justice, op. cit, p. 52.

[44] 29 August 1997, Application 22714/93, 25 EHRR 454, par.50.

[45]The Sunday Times v. United Kingdom, 26 April 1979, Series A No. 30, 14 EHRR 229, par. 63.

[46] [1995] 3 NZLR 563; refered to in Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized international mandates, o. cit., p. 10.

substantial obstruction to good conduct of the judgement, and that this decision must prevent the more severe risk than the deleterious effects it may have on the people affected by the decision (…. *A publication ban should only be ordered when:*

(a) Such ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to freedom of expression of those affected by the ban)[47].

h. In the United States, the power to punish the interference in the good administration of justice by using dissenting opinions is rarely used. The general rule is that a publication can only be punished for contempt if there is a blatant and serious danger to the administration of justice (*the power of the courts to punish for contempt by publication is extremely limited. The general rule is that a publication cannot be punished for contempt unless there is a "clear and present danger" to the administration of justice*[48]*. The test requires that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished)*[49].

Apart from the United States and Canada, there are other countries which have declared that for a prosecution for contempt of the administration of justice to occur, the content of published articles must constitute the blatant and serious obstruction of the process of the judgement. Those countries are England and Wales (*the test for sub judice contempt in section 2(2) of the Contempt of Court Act 1981 is that there is "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced"); New Zealand (the test for "publication" is whether there is a "real risk" that the publication will interfere with the right to a fair trial*[50]); and *South Africa (the Supreme Court of Appeal held that "a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice may occur if the publication takes place)*[51].

[63] Among the provisions of the Constitution and the International Conventions as well as the positions of the jurisdictions taken especially in relation to the admissible limitations with regard to the freedom of expression, the following key conclusions are implied:

a. Freedom of expression is not an absolute principle; it has limits;

b. Limitations on freedom of expression must be determined by law;

c. The restriction of freedom of expression must be necessary for the respect of the rights of others, and with a legitimate aim; Among the rights of others identified as one of the

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[47] Dagenais v. Canadian Broadcasting Corp., Nº 23403, 1994: January 24, 1994, December 8, P.5.
[48] Bridges v. California, 314 US 252 (1941); Pennekamp v. Florida, 328 US 331 (1946)
Craig v. Harney 331 US 367 (1946); Wood v. Georgia 370 US 375 (1962).
[49] Bridges v. California, Ibid., p. 263.
[50] New Zealand Law Commission, Issues Paper on Contempt in Modern New Zealand (IP36 2014) at paragraph 4.9 (https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP36.pdf).
[51] South Africa Supreme Court of Appeal: The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others (425/2017) [2017] ZASCA 97 (21 June 2017), at para.37; and South Africa Supreme Court of Appeal: *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA) at para 19.

legitimate aims, includes the right to due process of law which includes the right to a fair trial;

d. It must be necessary to achieve this goal;

e. The limitations on freedom of expression must be necessary in order to promote public confidence for the administration of justice;

f. Not all publications over ongoing trial are subject to prosecution. It becomes necessary to prosecute contempt of the good administration of justice in order to guarantee the right to a fair trial, when the publications constitute a blatant and substantial obstruction to the conduct of trial.

[64] Following the comparative analysis of the main opinions and the provisions of Article 256 of Law nº 68/2018 of 30/08/2018 determining offences and penalties in general, in the context of determining whether or not it is affected by the restrictions on freedom of expression, the Court notes that:

a. Article 256 of the Law nº 68/2018 of 08/30/2018 provides for restrictions on freedom of expression if these opinions intend to mislead witnesses or a decision of a judge before the case is determined.

b. A person who publishes opinions with the intention to mislead witnesses or a decision of a judge before the case is determined, is considered to have the intention to obstruct the good administration of justice and the right to a fair trial.

c. Obstruction of the good administration of justice and the right to a fair trial is one of the legitimate reasons that may lead to the need of limiting the freedom of expression.

Nevertheless, the court, notes that not all the opinions expressed in relation to the current trial must be prosecuted on the basis of this provision, because for this to happen, it must be indicated that the publisher had intention of misleading and that the publications manifestly and seriously undermine the smooth conduct of the trial.

[65] Regarding the statements of Kabasinga Florida that the judge rules based on the content of the file and that he/she cannot therefore be misled as a result of publications by any means, the court will examine this question based decided cases on the same matter. Some courts have indicated that a judge cannot be misled by publications while others concluded otherwise.

[66] The judgements establishing that the judge cannot be misled by the publications include:

a. The judgement rendered by the High Court of England, Vine Products Ltd. v. MacKenzie & Co. Ltd[52], it ruled that professional judges participate in sufficient training to such an extent that they cannot be misled, during deliberation, by publications relating to the trial (*It has generally been accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing [a prejudging of the issues] to influence them in deciding the case*).

[52] 1965] 3 All ER 58, refered to in Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized international mandates, op. cit., p. 11.

b. The case *Akinrinsola* v. *Attorney-General of Anambra State*[53] tried by the court of Nigeria ruled that a statement that was regarded as contempt in the smooth administration of justice in case involving non-professional judges, it would rarely be contempt in a trial by judge-alone (*a statement that was regarded as contempt in a jury trial would rarely be contempt in a trial by judge-alone).*

c. the case Nebraska Press Association v. Hugh Stuart[54], where the Supreme Court of the United States of America has ruled that the decision by the jury of the first juridiction of banning publication of media publications on the case pending in the courts because it is susceptible to the influence non-professionals is ill-founded(*the American Supreme Court vacated a prior-restraint order passed by the trial Judge in a multiple murder case while that case was pending, on the ground that the view of the trial Judge that Jurors are likely to be influenced by the press publications, was speculative).*

d. The case Attorney General v. BBC[55] rendered by the Court of Appeal in England where the judge had observed that professionally trained Judges are not easily influenced by publications (*Lord Denning in the Court of Appeal had observed that professionally trained Judges are not easily influenced by publications*).

[67] Judgments establishing that judge may be influenced by publications include:

a. The case Reliance Petrochemicals v. Proprietor of Indian Express[56] rendered by the Supreme Court in India and ruled that there is no distinction between the professional and a non-professional judge with regard to being misled by publications made on the pending trial (*No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges).*

b. Explanations of Justice Frankfurter (concurrent opinion) during the case of *John D. Pennekamp v. State of Florida*[57] tried by the Supreme Court of the United States of America:

- *The Judiciary could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court*.
- No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. (*No Judge fit to be one is likely to be influenced*

[53] (1980) 2 NCR 17, refered to in Background Paper on Freedom of Expression and Contempt of Court for the Internationnal Seminar Promoting Freedom of Expression with three specialized International Mandates p.11.
[54] Nebraska Press Association v. Hugh Stuart: (1976) 427 US 539.
[55] Attorney General v. BBC: 1981 A.C 303 (HL), p.312
[56] Reliance Petrochemicals v. Proprietor of Indian Express : 1988(4) SCC 592.
[57] John D. Pennekamp v. State of Florida (1946) 328 US 331.

consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function - indispensable in a free society - that in a particular controversy pending before a court and waiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence Judges and Jurors".

c. In the case of Attorney General v. BBC: *1981 A*.C 303 (HL)[58] Aforementioned, Lord Dilhorne dissented the opinion of Lord Denning that no Judge will be influenced in his Judgment by anything said by the media, but that no one is able to entirely get rid of what he/she has seen, heard or read that are likely to influence him/her unconsciously (*It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it).*

[68] The statements of the Justice Frankfurter and Lord Dilhorne have been echoed by some law reform commissions which added that criminalization of contempt of the good administration of justice is also intended to protect the public perception in relation to impartiality for decisions made by judges:

a. The New South Wales Law Reform Commission in Australia had clarified that the judge can be subconsciously influenced – by what he/she has seen, heard or read-, and that it is essential to prevent the problem that the public would believe that the judge is biased (first, it is always possible that a Judicial officer may be subconsciously influenced; and secondly**,** it is just as important to protect the public perception of Judges' impartiality as to protect against risk of bias)[59].

b. The Law Reform Commission of Canada had also explained that *while Judges may generally be impervious to influence, the possibility of such influence could not be ruled*

[58] Attorney General v. BBC*: 1981 A*.C 303 (HL), p. 335

[59] The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on 'Contempt by Publication, https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Other-Publications/Discussion-Papers/DP43, para

out altogether, and that in the case of Judicial officers, the sub-judice rule served an important function of protecting public perception of impartiality)[60].

[69] The above reasons were reiterated by *The UN Special Rapporteur on Freedom of Expression and Opinion*) on the case of Ms. Bernadette and Mr. Michael McKevitt who fought for the independence of Ireland. The media reported that they are linked to the bomb explosion that killed around 29 people even before police's interrogated them. The UN Special Rapporteur had indicated that what was broadcast by the media had created a situation where no one is willing to tolerate the possibility that Bernadette and Michael McKevitt are innocent. This had led them to believe that if they are prosecuted, they have no hope of getting a fair trial. *(….In the case of Bernadette and Michael McKevitt, the media have created a situation where almost no one in Ireland is prepared to countenance the possibility that they may be innocent……They create such certainty of their guilt in the minds of the public that, if these persons are even actually charged and tried, they have no hope of obtaining a fair trial*)[61].

[70] What particularly concerns misleading witnesses was said in the case of Attorney General v. Mirror Newspapers (*The premature publication of evidence may have a tendency to influence the evidence of witnesses or potential witnesses*)[62]**.**

[71] In the previous judgments and documents, three main schools of thought are evident. The first school advances that the professional judge cannot be misled by the publications made outside the hearing; while the second allleges that it is possible. The third declare that even if, in general, the judge can ignore broadcasts made during deliberation, but they are likely to influence him/her unconsciously. In addition, there is the problem that people who have watched or listened to these broadcasts may suspect that they have influenced them, which can lead them to discredit any decision and thus affect the good administration of justice. This Court concurs with the third school of thought.

[72] Therefore, a career judge must adjudicate in a manner that he/she deems appropriate based on trial statements and on the content of the case file, regardless of what he/she has seen or heard. However, the judge is a human being all the same and by nature what goes into his/her intellect can influence his/her thinking unconsciously. Even though the judge can generally ignore broadcasts made during his/her deliberations, litigants and the public may suspect that he/she was influenced leading to discredit any decision to be made. And moreover, as stated by the Law Reform Commission of New South Wales (Australia)[63] on the basis of the principle established in the judgment R v. Sussex Justices: Exparte McCarthy: 1924 (1) KB 256 which is still applicable, "Justice should not only be done, it should manifestly and undoubtedly be seen to be done".

[73] It is therefore in the finding of the Court that based on the provisions of laws, international conventions ratified by Rwanda, as well as all elucidations, especially based on decided cases, the

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[60] Canadian Law Reform Commission, Contempt of Court: Offences against Administration of Justice {Working Paper 20, 1977, p 42-43} and Report 17 (1982) at p 30), cited by Law Commission of India, 20 Report on trial by media, free speech and fair trial under criminal procedure code 1973, August 2006, p.57 (https://lawcommissionofindia.nic.in/reports/rep200.pdf).

[61] Cited by Law Commission of India, 20 Report on trial by media, Free speech and Fair trial under Criminal procedure code 1973, August 2006, p. 12 & 13.

[62] Attorney General v Mirror Newspapers Ltd [1980] 1 NSWLR 374; Refered to in civil Trials Bench Book, Contempt Generally(https://www.judcom.nsw.gov.au/publications/benchbks/civil/contempt_generally.html#p10-0360

[63] The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on 'Contempt by Publication', p.70.

provisions of Article 256 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general are acceptable restrictions with a legitimate aim on the principle of freedom of expression and thus do not infringe this principle. Therefore, it is not contrary to Article 38 of the Constitution.

III. DECISION OF THE COURT

[74] Hereby declares with merit in part the petition initiated by Kabasinga Florida.

[75] Hereby declares with merit the petition initiated by Niyomugabo Ntakirutimana.

[76] Hereby declares paragraph 4 of the Article 84 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general contrary to Articles 29, paragraph 4 of the Constitution; and without effect based on the provisions of Article 3 of the Constitution.

[77] Hereby declares part of the text of Article 92 of the Law nº 68/2018 of 08/30/2018 determining offenses and penalties in general reading that: "that cannot be mitigated by any circumstances", contrary to Articles 29 and 151 of the Constitution and without effect.

[78] Hereby declares paragraph 3 of the Article 133 of the Law nº 68/2018 of 30/08/2018 determining offenses and penalties in general, with regardto the part of the text reading that "if child defilement is committed on a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances", contrary to Articles 29 and 151 of the Constitution, and without effect.

[79] Declares Article 256 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general not inconsistent with the Constitution;

[80] Declares Article 256 of the Law nº 68/2018 of 30/08/2018 determining offences and penalties in general not inconsistent with the Constitution;

[81] Hereby orders the publication of this case in the Official Gazette of the Republic of Rwanda.