The lawfulness of the decision of the Court of Appeal setting aside a statutory minimum mandatory sentence

By Yves Sezirahiga*

Abstract

In February 2020, the Rwandan Court of Appeal (CoA) set aside a provision of the penal code prohibiting judges from meting out punishments below the minimum set by the law. In doing so, CoA held that that provision should not be applied because it is contrary to the principles of fair trial and independence of the judiciary. CoA opined that its judgment in this case was in line with the spirit of the Supreme Court's decisions, in the Kabasinga cases, which found articles 92 and 133(3) and (5) of the penal code, setting life imprisonment as a compulsory penalty in case of conviction, inconsistent with Articles 29 (on the Right to due process of law) and 151 (on the principles of the judicial system) of the Constitution of the Republic of Rwanda of 2003 revised in 2015. From the period that decision of CoA was taken, some judges in various courts in Rwanda drew inspiration from it by increasingly their prudence in the imposition of statutory mandatory minimum sentences set by law.

It is against this background that the present article seeks to analyse whether CoA's decision to set aside Article 60 (2º) of the penal code of Rwanda was in conformity with the principle of the rule of law.

At the core of the argument put forward in this article, is the argument that statutory provisions containing mandatory minimum sentences, not yet declared unconstitutional by the Supreme Court may still be applied as long as they are not (yet) abrogated through appropriate procedures provided by the law.

Keywords: Rule of law, minimum mandatory sentence, judicial discretion, judicial independence, constitutionality.

1. Introduction

In 2018, Rwanda Parliament enacted the law Nº68/2018 of 30/08/2018 determining offences and penalties in general (hereinafter the Penal Code of Rwanda) which determines offences, the types

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of punishment (e.g., fines, imprisonment) that the courts may impose for a specific offence and the range of imprisonment or pecuniary sentences that may be imposed for any given offence.

Article 49 of the penal code that lays out the factors to be considered by judges in determining an appropriate sentence, remains the cornerstone of the sentencing legal framework. Among the factors listed in the law are '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.'

Notwithstanding the above legal provision, Article 60(2) of the same law explicitly provides that 'if there are mitigating circumstances, (….) a fixed- term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed.' This results in what is known as statutory mandatory minimum sentences, which confine the discretion of the judges within legislative boundaries that set maximum and minimum penalties.

As stated by Warner, K. et' al.,[1]

> 'A *mandatory minimum sentence* is created when Parliament specifies the minimum type of sentence or more commonly, the type and length of sentence that courts *must* impose for a particular offence or offences or for a particular offence if certain conditions are met.'

In Rwanda, the mandatory minimum sentences have received a great deal of attention after the petition of Me Kabasinga Florida, a senior Rwandan lawyer[2] to the Supreme Court to declare provisions setting a compulsory life imprisonment penalty in case of conviction, namely articles 92[3] and 133 paragraphs 3 and 5[4] of the Penal Code of Rwanda unconstitutional.[5]

On the strength of the Supreme Court Decisions in the Kabasinga Cases, the CoA in a subsequent case that reached it by way of appeal, reduced the penalty of 25 years imposed by the lower court

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[1] Kate Warner, Caroline Spiranovic, Arie Freiberg and Julia Davis, 'Mandatory sentencing? Use [with] discretion', (2018), 43(4), Alternative Law Journal, 289–294, https://doi.org/10.1177/1037969X18793967, accessed on 31 November 2022.

[2] See her short biography on https://www.linkedin.com/in/florida-kabasinga-26a71b244/?originalSubdomain=rw , consulted on 23 august 2022.

[3] Article 92 of the penal code reads, "Any person who commits any of the acts referred to under Article 91 of this Law commits an offense. Upon conviction, he/she is liable to the penalty of life imprisonment that cannot be mitigated by any circumstances".

[4] Article 133 paragraphs 3 and 5 of the Penal Code read, "Any person who commits any of the sex related acts listed below on a child, commits an offence: … (3) If child defilement is committed on a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances. … (5) If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances."

[5] Re. KABASINGA ET AL, RS/INCONST/SPEC 00006/2020/CS, RLR V.4-2021, Judgment of 2021-02-12, para. 1 and Re. KABASINGA, Supreme Court, RS/INCONST/SPEC 00003/2019/SC, RLR - V.2 – 2020.

against Mr. Nzafashwanimana Jean De Dieu[6] to 10 years' imprisonment, a penalty which is below the minimum sentence provided by the law for the offence of which he was convicted. In reducing this penalty below the statutory minimum, the CoA held that Article 60 (2º) of the penal code should not be applied because it is contrary to the principles of fair trial and independence of the judiciary.[7]

Against this background, the purpose of this article is not to assess whether the statutory minimum sentence indeed unduly restrict a judge's ability to appropriately weigh the factors that play a role in a crime situation. It is rather about the legality of the CoA's decision in setting aside a provision of written law.

The specific research question under discussion here is whether the procedure through which the minimum mandatory penalty set under article 60 (2º) of the penal code of Rwanda (i.e., by the legislature) was disregarded by the CoA is lawful.

To meet the research objectives, a legal dogmatic research method was employed. Application of this method involved a critical analysis of the Supreme Court's decisions in Kabasinga Cases and that of the CoA in Nzafashwanimana's case. An in-depth analysis of these cases necessarily implies an engagement with the existing literature on the question of the impact of minimum mandatory sentences to the judicial function and court decision's legality. Therefore, to assess the legality of the CoA decision in NZAFASHWANIMANA's case, the analysis of the relevant primary sources is accompanied by an exploration of the secondary sources that describe, interpret, analyse and process primary sources.

Therefore, given that limiting judicial discretion is one of the key purposes of mandatory minimum sentences, and this purpose was stated to be among the important considerations of the CoA decision setting aside Article 60 (2º) of the penal code, it is important to understand the meaning of mandatory minimum penalties (II) and how sentences are regulated in Rwanda. Importantly, before discussing how the CoA erred in the interpretation and application of the Supreme Court's decisions on *Nzafashwanimana* case (V), a thorough discussion of the role of the Judiciary and

[6] Mr. NZAFASHWANIMANA Jean de Dieu, being 25 years of age, was convicted of child defilement against a 16 year old girl and sentenced to 25 years of imprisonment by the Intermediate Court of Musanze (RP 00318/2017/TGI/MUS) and subsequently by the High Court, detached chamber of Musanze (RPS 00013/2018/HC/MUS).[6] Aggrieved by the High Court decision, Mr. NZAFASHWANIMANA appealed before the Court of Appeal and changed the plea of guilty which he had put forward before the two court levels below the CoA to one of guilty and by means of the appeal challenged for a reduced sentence.

[7] *Prosecutor vs NSAFASHWANIMANA Jean De Dieu*, Court of Appeal, RPAA/00032/2019/CA, 28/02/2020, paras. 16-19, unpublished.

Parliament in sentencing (IV) is provided in order to understand the foundation of my position that is emphasized in the conclusion.

2. Mandatory minimum sentences

A mandatory minimum sentence imposes a minimum length of imprisonment or a minimum fine on a convicted offender.[8]

Much has been said[9] about the effects of mandatory minimum sentences on the discretionary power of the judges. Even though, as mentioned above, a substantive discussion on whether mandatory minimum sentences interfere with the judicial discretionary power to impose punishment is not the main focus of this article, it is noteworthy to recognize that the opponents[10] of mandatory minimum sentences are of the view that such sentences eliminate judicial discretion, do not permit individual circumstances to be taken into account, and are thus unfair sentences. Opponents sometimes argue that by their nature, mandatory minimum sentences are set by the legislator and not reviewable by the courts and thus they interfere with the court's jurisdiction. Kieran Riley contends that,[11]

> Statutory mandatory minimum sentences allow the legislature to improperly use its power to establish definitive punishment for crimes, improperly grant the executive branch broad authority to impose that punishment, and relegate the role of the judiciary to bureaucratic affirmation of the process. For this reason, such statutes violate the separation of powers doctrine and should be abolished.
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> (...)

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[8] Hemmens, C. and Ruibin Lu, 'Recent Legal Developments', (2016) 41(4), Criminal Justice Review, 531.

[9] Caylor, Lincoln and Gannon G. Beaulne, 'Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences,' (2014) MacDonald-Laurier Institute May, 3; Berger, Benjamin L.. 'A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson', (2009), The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 47; Mallett, Sean J. "Judicial discretion in sentencing: a justice system that is no longer just?" (2015) 46 (2) Victoria University of Wellington Law Review; Geraldine Mackenzie, 'Achieving Consistency in Sentencing: Moving to Best Practice?", (2002) 22 UQLJ 74; Andrew Ashworth, 'Sentencing and Criminal Justice', 2005) 4th ed., Cambridge University Press, Cambridge; Warren Young "Sentencing Reform in New Zealand: A Proposal to Establish a Sentencing Council" in Arie Freiberg and Karen Gelb (eds),'Penal Populism, Sentencing Councils and Sentencing Policy', (2008) Willan Publishing, Devon, 179; Michael Tonry, "Setting sentencing policy through guidelines" in Sue Rex and Michael Tonry, 'Reform and Punishment: The Future of Sentencing', (2002)Willan Publishing, New York, 75; Mark Andrew Shaw, "Consistency versus Discretion--A Matter of Judgment? Hessell v R and Judicial Sentencing Guidelines", (2011) (LLB(Hons) research paper, Victoria University of Wellington

[10] William W. Schwarzer, 'Judicial Discretion in Sentencing', (1991) 3 Federal Sentencing Reporter, 340-341; Kieran Riley, Trial By Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine, 19 B.U. PUB. INT. L.J. 285, 302 (2010); Charles W. Ostrom; Brian J. Ostrom; Matthew Kleiman, Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing, October 2003, NCJ Number, 364.

[11] Kieran Riley, 'Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine', (2010) 19 B.U. PUB. INT. L.J. 285, 302-3.

> Mandatory minimum sentences prohibit the judiciary from fully conducting one of its basic tasks: weighing the evidence in individual cases in order to produce just outcomes.

The same conclusion was reached by Erik Luna who emphasized that,

> Mandatory sentencing laws are not only unfair—they distort the legal framework. In particular, mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors, who may pre-set punishment through creative investigative and charging practices. [12]

Emphasizing on the importance of judicial discretion to just retribution, Cowdery argued that,

> The modern historical objective of sentencing in our system is to make the punishment fit the crime and the criminal. It is not possible for the relevant sentencing considerations to be identified accurately and comprehensively in advance of the offending (as Parliament would have to do in order to be able to fix just sentences in legislation). There must be left scope for discretion, to be exercised in a judicial fashion (and not arbitrarily or capriciously). The alternative is not justice.[13]

In contrast, the proponents[14] of statutory minimum sentence provisions consider them as not only deterring offenders from committing the specified serious offences but also protecting against possible disparities in sentencing. Those in favour of mandatory sentencing argue that offenders are rational beings who will desist from engaging in crime if the consequences of the conduct are sufficiently severe. Deterrence, then, also relies on notions that the offender is able to understand that certain conduct constitutes a crime, which will carry a penalty.

Talking about protection against possible disparities in sentencing, it is unfortunate to note that since the CoA decision to strike down Article 60 (2) of the penal code, there are disparities in sentencing to the extent that some judges reduced a penalty of 20 years' imprisonment to 5 years with suspension of the latter. For instance, the case of NZERI Jean de Dieu whose punishment of

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[12] Erik Luna, 'Mandatory Minimums', (2017) 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 117, 133.
[13] Nicholas Cowdery QC, 'Some aspects of Sentencing', (Speech delivered at Legal Studies Association Conference, 23 March 2007, Sydney), 17.
[14] M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 Criminal Law Journal 21, 22; J McGuire, 'Deterrence in Sentencing: Handle with Care', (2005) 79 Australian Law Journal 448, 449; M Bagaric 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 Criminal Law Journal 21, 32

20 years imprisonment issued by the Intermediate Court of Gasabo[15] for child defilement was reduced to 5 years suspended for 5 years by the High Court of Kigali.[16]

In another case of child defilement, the CoA reduced a penalty of 20 years imprisonment previously issued against Mererwaneza Valens by the High Court of Nyanza to 10 years imprisonment.[17] It should be noted that in sentencing Mererwaneza Valens to the 20 years' imprisonment, the High Court of Nyanza based its judgement on Article 60(2) of the penal code after confirming that Mererwaneza Valens should benefit from mitigating circumstances.

In the above-mentioned cases, courts used the CoA interpretation of the Supreme Court's rulings in Kabasinga cases[18] as a ground in reaching those sentences, as it will be discussed later.

3. Offences under Rwandan Criminal Justice

Offences in Rwanda are classified, according to their gravity, as either felonies,[19] misdemeanours[20] or petty offences[21]. Both fixed-term imprisonment and pecuniary penalties or fines have the minimum and the maximum mandatory penalties set by the legislator. For instance, for offences classified as felonies, some are punishable from 20 to 25 years, 15 to 20 years, and others from 10 to 15 years, 5 to 10 years or 5 to 7 years. For those qualified as misdemeanours, some are as well punishable from 3 to 5 years, and others from 2 to 3 years, 1 to 2 years, 6 months to 1 or 2 years.

When the above-mentioned penalties are considered in line with Article 60 (2º) of Law Nº. 68/2018 of 30/08/2018 determining offences and penalties in general, which provides that 'If there are mitigating circumstances (…) a fixed-term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed'[22], the range of appreciation left to the judges (or Court) is small and thus restricts to a certain level the discretionary power of the judges in imposing punishment against the convict.

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[15] Prosecutor vs. NZERI Jean de Dieu, Intermediate Court of Gasabo, RP 00151/2019/GSABO, Judgement of 12/02/2020.
[16] Prosecutor vs. NZERI Jean de Dieu, High Court of Kigali, RPA 00388/2020/HC/KIG, Judgement of 17/03/2022
[17] Prosecutor vs. MERERWANEZA Valens, RPAA 00042/2020/CA, Judgement of 31/01/2022, paras. 33 and 35.
[18] See Ibid, para. 32 and Prosecutor vs. NZERI Jean de Dieu, *supra,* note 16, para. 11.
[19] Article 17 of the Penal Code: "A felony is an offence punishable under the law by a principal penalty of imprisonment for a term of more than five (5) years or by life imprisonment."
[20] Article 18 of the Penal Code: "A misdemeanour is an offence punishable under the law by a principal penalty of imprisonment for a term of not less than six (6) months and not more than five (5) years."
[21] Article 19 of the Penal Code: "A petty offence is an offence punishable under the law only by a principal penalty of imprisonment for a term of less than six (6) months, a fine or the penalty of community service."
[22] Law Nº68/2018 of 30/08/2018 determining offences and penalties in general, *Official Gazette no. Special* of 27/09/2018, Article 60 (2º) hereinafter article 60 (2º) of the penal Code of Rwanda.

Specifically, the margin of appreciation left to a judge in imposing a punishment on a convict is, for instance between five (5) years and two (2) years for some felonies, and between six (6) months and one (1) up to two (2) years for misdemeanours.

Hence, setting aside Article 60 paragraph 2 of the Penal Code on the basis that it is contrary to the principles of fair trial and independence of the judiciary raises the question of the function of the legislature and judicial powers when it comes to the definition of the crimes and related punishment and to the imposition of punishment. It should be further emphasized that this article is not proposing the restraining of the discretion of judges in considering the circumstances of each case for purposes of making an appropriately informed sentence. Nor is it advocating that judges should generally be permitted to usurp the legislature's legislative supremacy, which is universally recognised to varying degrees in different parts of the world.[23] This paper is rather an analysis of situations where ordinary courts other than the supreme courts might be permitted to decide on the constitutionality of provisions of written laws, the consequences of such decisions, and the designated court to make such decisions.

4. The role of judges and legislators in sentencing

As a matter of legal principles, the definition of crime and its punishment is exclusively a public policy concern of the legislator. The legislator is the one who defines wrongful acts or omissions and related punishments and is also the one who regulates how those punishments should be imposed.

Moreover, it is within the legislator's jurisdiction to determine the seriousness of the wrongful act or omission and the legislator does so by setting the maximum and the minimum punishment for each crime. In other words, only the legislator defines the overall sentencing framework by setting both the maximum and minimum penalties for offences and determining the structures of sentencing,

Arguably, as Hutton puts it,

[23] Andrew Clapham, Human Rights: A very Short Introduction, (2007) Oxford University Press, at p. 1: "…the judges cannot strike down laws as incompatible with human rights; (While) Parliament (in the United Kingdom) retains complete sovereignty over which laws to pass or repeal ... this is not the case in other countries with an entrenched constitution, such as the United States or South Africa (and we would add Rwanda), where constitutional rights may rank supreme.

> There is a common misconception that judges have sole authority over sentencing decisions; this is never the case even in those jurisdictions where judges exercise very wide discretion. Sentencing always takes place within a legally authorised structure.[24]

It is therefore within his prerogative that the Rwandan legislator required, in Article 49 of the Penal Code of Rwanda, a judge to determine:

> 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.

In the second paragraph of the same article, the legislator added,

> In the event of concurrence of grounds for judgment, the judge must consider the following while imposing a penalty: 1º aggravating circumstances; 2º mitigating circumstances.

In addition to the above-mentioned provisions on factors to be considered in determining the appropriate sentence, the Rwandan legislator set a sentencing yardstick in Article 60 (2º) of the Penal Code, to be used by Judges when imposing sentences to convicted offenders in order to promote consistency in sentencing and public confidence in the Rwandan criminal justice system.

What is, therefore, indubitably clear about Article 60 (2º) of the penal code is that it falls in between the exercise of discretion by individual judges and the overall framework drawn up by Parliament, by providing further guidance to judges on levels of seriousness within an offence type and how that translates into sentence types and lengths.

It was in that context that the former Lord Chief Justice of the United Kingdom, Rt Hon Lord Phillips of Worth Matravers, in his lecture, 'Who decides the sentence? pointed out that,

> The primary way that Parliament influences the sentence is by making statutory provisions that restrict the discretion of the judge as to what sentence to impose. The most obvious example is that when a new offence is introduced by statute, the statute will normally specify the maximum sentence that the judge can impose. In this way, Parliament

[24] Hutton, N. 'Institutional Mechanisms for incorporating the public', in Frieburg A., and Gelb K. (eds), *Penal Populism, Sentencing Councils and Sentencing Policy*, (2008) Willan Publishing, Devon, 208.

> indicates its view of the relative gravity of the offence and the judges have regard to this when imposing individual sentences.[25]

Against this background, it is important to therefore emphasise that it is a judicial function to ensure that the criminal provisions adopted by the legislator and promulgated by the executive, are implemented fairly and in accordance with the law.[26]

It is commonly acknowledged that the rule of law entails a state governed by the law where no one is above the law and no one is outlawed'. Evidently, 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'.

In addition to the above provision, Article 47 of the Penal Code stipulates explicitly that '[T]he court decides a case in accordance with the provisions of law and must state the basis of its decision.'[27] Similarly, Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, considered to be the law of all procedures (*Droit commun de la procédure*), its article 9 emphasizes that,

> A judge adjudicates a case on the basis of relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine.[28]

In light of the above-mentioned provisions, it should be recognized that the ability of a judge to exercise discretion finds its genesis in the constitutional doctrine of the separation of powers and is an aspect of judicial independence.[29] The latter is not only one of the key pillars[30] of the rule of law but also the foundation of a democratic society. Hence, as stressed by Dariusz Zawistowski

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[25] Lord Phillips of Worth Matravers, "Who decides the sentence?", Prisoners' Education Trust Annual Lecture, 14 October 2008.
[26] See Constitution of the Republic of Rwanda of 2003 revised in 2015, *Official Gazette n° Special* of 24/12/2015, article 151(5°) hereinafter the Constitution of Rwanda; Penal Code of Rwanda, article 47 and Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure *Official Gazette nº Special* of 29/04/2018, article 9, hereinafter Civil procedure law.
[27] See article 47 of the penal Code of Rwanda.
[28] See article 9 of the Civil Procedure law.
[29] Mackin *v.* New Brunswick (Minister of Justice), 2002 SCC 13 at para 35, [2002] 1 SCR 405, citing Provincial Court Judges Assn (Manitoba) *v* Manitoba (Minister of Justice) [1997] 3 SCR 3 at para 130, 150 DLR (4th) 577.
[30] Szeplaki- Nagy, « protection of independance : statutory and material protections », in AHUCAF, the independence of the justice, decree of the 2nd congress of the association of the high jurisdiction of Appeal for countries sharing the usage of French, Dakars, Dakar – 7 and 8 November 2007, p.115

'For the rule of law to apply, it requires the duty to submit to the law to be recognized by all the citizens and all the organs of state, irrespective of their nature'.[31]

Similarly, it is the view of the former Chief Justice of Australia[32], Garfield Barwick in Palling v Corfield that;

> The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute.[33]

Therefore, as it has been argued convincingly by Caylor and Beaulne:

> Judges who ignore the rule of law and seek to make decisions according to their personal views of justice in the face of clear legislation to the contrary assault the justice system and offend the duties of their office.[34]

Hence, it needs to be stressed that the essence of the judicial functions lies in the administration and enforcement of laws passed by the legislator. Thus, the judge's ability to respond to the individual case takes place only within the range of influence that his or her decision can have and according to the framework set by the legislator.

In light of the above, it is well established that the primary obligation of a court construing a statute is to give effect to the intention of the legislator to be ascertained from the words used by Parliament in the statute. Simply, the core function of the legislative branch is to enact laws whereas that of the judicial branch is to *interpret and apply* [emphasis added] those laws.

The analysis below, demonstrates how the process by which judges set aside Article 60 Para. 2 of the Penal Code in the Nzafashwanimana case was unlawful. Judges not only acted (and some continue to act) contrary to the office that they have sworn to uphold[35], but also erred in the interpretation and application of the Supreme Court ruling in the Kabasinga cases.

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[31] Dariusz Zawistowski, "The Independence of the Courts and Judicial Independence from the European Union Law Perspective", (2016) *Ruch Prawniczy Ekonomiczny I Sojologiczny* 7, 7.
[32] The Rt Hon Sir Garfield Edward John Barwick (1903–1997) was Chief Justice of the High Court from 27 April 1964 to 11 February 1981.
[33] Palling v Corfield (1970) 123 CLR 52, at 58.
[34] Caylor, Lincoln and Gannon G. Beaulne. "Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences," (2014) MacDonald-Laurier Institute, 3.
[35] Article 151 (5°) of the Constitution of Rwanda.

5. Erroneous interpretation and application of the Supreme court decisions

As mentioned above, mandatory minimum sentences came into the spotlight after the two Supreme Court decisions which, successively, declared articles 133 (5)[36], 92 and 133(3)[37] of the Penal Code unconstitutional. In its first decision, the Supreme Court declared Article 133 (5) inconsistent with Articles 29 (on the right to due process of law) and 151 (on the principles of the judicial system) of the Constitution of the Republic of Rwanda of 2003 revised in 2015.[38] Article 133(5) of the penal code stipulated that: "if child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances",

Likewise, in a new petition of Kabasinga and Niyomugabo Ntakirutimana, the Supreme Court found articles 92 and 133(3)[39] of the Penal Code to be as well inconsistent with articles 29 and 151 of the Constitution for similar reasons.

In her second petition, she argued that the above-mentioned articles of the Penal Code of Rwanda were contrary to articles 29 and 151 of the Constitution as they both violate the right to due process of law of individuals convicted of the crime of genocide or defilement against a child under the age of fourteen (14), and defilement followed with cohabitation because they cannot benefit from the reduction of penalty even when there are mitigating circumstances.[40] She argued that individuals convicted of the offences under these articles are not only deprived of their right to appeal against the decision but also of their right to due process of law which starts from the investigation until the conviction and penalty imposition.[41]

In support of her argument, she emphasized that contrary to Article 49 of the Penal Code of Rwanda which provides the factors to be taken into consideration by a judge in the determination of appropriate penalty, Article 92 and paragraphs 3 and 5 of Article 133 of the Penal Code of Rwanda limit the judge's power [or independence] to determine whether the accused is guilty since the penalty is determined by law. She stated that,

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[36] Re. KABASINGA, Supreme Court, RS/INCONST/SPEC 00003/2019/SC, RLR - V.2 – 2020.
[37] Re. KABASINGA ET AL, Supreme Court, RS/INCONST/SPEC 00006/2020/CS, RLR V.4-2021.
[38] Article 29 and 151 of the Constitution of Rwanda deals with the right to due process of law and the principles of the judicial system.
[39] Re. KABASINGA ET AL, Supreme Court, RS/INCONST/SPEC 00006/2020/CS, RLR V.4-2021.
[40] Ibid., para. 33.
[41] Ibid., para. 33 b.

> 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 the offences provided for under both articles are grave and deserve severe penalties, there are often mitigating circumstances likely to lead to penalty reduction in favour of the offender.[42]

In its ruling, the Supreme Court sustained Kabasinga's argumentation and declared articles 92 and 133 paragraphs 3 and 5 of the Penal Code of Rwanda contrary to the principle of the right to due process of law and the independence of judges in determining the penalty. Specifically, the Supreme Court found those articles contrary to articles 29 and 151(5) of the Constitution.

The Supreme Court ruling was primarily based on the fact that mandatory sentences in legislation remove the ability of judges to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors. In other words, for the Supreme Court, not allowing judges to weigh, on the basis of the mitigating and aggravating factors before them, results in unjust, harsh and disproportionate sentences which undermine the rule of law.

Nevertheless, as the Supreme Court was not petitioned for the issue of mandatory minimum sentences provided in other various articles, it recalled its advisory opinion[43] to the Government of Rwanda to consider 'if their rectification is necessary to harmonize them with the ruling of the said judgment.'[44] Such advisory opinion was issued after specifying that it cannot pronounce itself over other provisions with mandatory minimum sentences as they have not been part of the subject matter of the petition.

Subsequent to the Supreme Court decisions,[45] the CoA opined that if the reasoning in the KABASINGA cases was applied to Article 60 (2º) of the penal code of Rwanda, it too should be considered unconstitutional on the same basis and therefore set aside. Having ruled so, the CoA reduced Nzafashwanimana's sentence from 25 years to 10 years imprisonment.

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[42] Ibid., para.32 e.
[43] Advisory opinion made in the ruling of the first petition of KABASINGA, case number RS/INCONST/SPEC 00003/2019/SC.
[44] Ibid., para. 40.
[45] Re. KABASINGA, Supreme Court, RS/INCONST/SPEC 00003/2019/SC, RLR - V.2 – 2020 and Re. KABASINGA ET AL, Supreme Court, RS/INCONST/SPEC 00006/2020/CS, RLR V.4-2021.

Specifically, the CoA in Nzafashwanimana's case[46] held that since article 60 (2º) of the penal Code which prevents the Court from issuing a penalty below twenty (20) years of imprisonment even in the face of mitigating circumstances, should not be applied because it is contrary to the principles of fair trial and independence of the judiciary as confirmed by the Supreme Court'.'[47] In reaching this conclusion, the CoA argued that,

> 'Regarding where the law provides for minimum and maximum penalties, the Court [CoA] finds that the Supreme Court found that not reducing the minimum penalties provided for by the law would only be justified when the range between the minimum and maximum penalties is long; instead, when the range is small, it obviously prevents the judge from matching the penalty with the crime committed, the interests of the victim, the public and the defendant, that is why in relation to this case, Article 60, paragraph one, section two of Law Nº. 68/2018 of 30/08/2018 which provides for crimes and punishments in general, prevents the Court from issuing a penalty below twenty (20) years of imprisonment when there is a mitigating circumstance, should not be applied because it is contrary to the principles of fair trial and independence of the judiciary as confirmed by the Supreme Court in the above case.'[48]

It is questionable whether the CoA has jurisdiction to set aside Article 60 Para. 2 of the Penal Code, particularly where the Supreme Court refrained from declaring articles with minimum mandatory sentence contrary to the constitution and preferred to issue an advisory opinion for the reasons explained above.

Nevertheless, we argue that judges in the Nzafashwanimana ruling wrongly assumed that the reasoning of the Supreme Court in the Kabasinga Cases gave them jurisdiction/or grounds to set aside (or disregard) Article 60 paragraph 2 of the Penal Code:

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[46] See Supra note 7.

[47] My humble translation of: '*ibuza Urukiko gutanga igihano kiri munsi y'igifungo cy'imyaka makumyabiri (20) mu gihe hari impamvu nyoroshyacyaha idakwiye gukoreshwa kuko inyuranye n'amahame y'ubutabera buboneye n'ubwigenge bw'umucamanza nk'uko byemejwe n'urukiko rw'ikirenga mu rubanza rwavuzwe haruguru*.'

[48] My humble translation of: '*Kubijyanye n'aho itegeko ryateganyije ibihano bito (minimum) n'ibiri hejuru (maximum), Urukiko rurasanga Urukiko rw'ikirenga rwarasanze kutagabanya ibihano bito biteganyijwe n'itegeko byagira inshingiro gusa iyo intera iri hagati y'igihano gito n'ikiri hejuru ari ndende, naho mu gihe intera ari nto, ubwabyo bibuza umucamanza guhuza igihano n'icyaha cyakozwe, inyungu z'uwahohotowe, iza rubanda n'izu'uregwa, ariyo mpamvu ku bijyanye n'uru rubanza, ingingo ya 60, igika cya mbere, agace ka kabiri k'itegeko n 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ibuza Urukiko kujya munsi y'igifungo cy'imyaka makumyabiri (20) mu gihe hari impamvu nyoroshyacyaha idakwiye gukoreshwa kuko inyuranye n'amahame y'ubutabera buboneye n'ubwigenge bw'umucamanza nk'uko byemejwe n'urukiko rw'ikirenga mu rubanza rwavuzwe haruguru*.'

It is our view that by issuing an advisory opinion to the government of Rwanda, the Supreme Court itself recognized its incapacity to rule on articles that were not formally part of the petitions. This is an indication that the Supreme Court could not adjudicate more than it has been asked to, and thus avoided to violate the *ultra petita rule*.

Moreover, as provided in Article 72 of Law N°. 30/2018 of 02/06/2018 determining the jurisdiction of courts[49] only the Supreme Court has the power to examine and confirm the petitions seeking to declare a law unconstitutional, and only its rulings in that regard have a binding effect. In this respect, no doubt that such competence of the Supreme Court cannot be executed by any other organ of the judiciary as seems to have been the case in the *Nzafashwanimana* case.

Therefore, it is our conviction that, in absence of a formal Supreme Court decision declaring Article 60 (2º) of the Penal Code of Rwanda unconstitutional, this article still has its full application. The CoA in *Nzafashwanimana* case and other similar decisions that followed the same reasoning are legally baseless and violate the respect of the rule of law. It is hereby appropriate to cite words expressed by Lord Denning, "If tribunals were at liberty to exceed their jurisdiction without any check ...., the rule of law would be at an end'.[50]

4. Conclusion

Even though the legislature and the judiciary are mandated to protect the rights of the citizen, undoubtedly, it is within the legislative legitimate jurisdiction to enact and define crime and its punishment, including setting statutory mandatory minimum and maximum sentences. Courts have equally the power to invalidate legislation that is inconsistent with the Constitution, but as we argued setting aside a provision because it is contrary to the constitution should be done in respect of the law by a competent court, the Supreme Court in the case of Rwanda.

As indicated earlier, contrary to the articles set aside by the Supreme Court, Article 60 (2º) of the penal code of Rwanda does not completely eliminate judicial discretion, it rather regulates it by way of setting sentencing yardsticks.

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[50] R v Medical Appeal Tribunal; Ex parte Gilmore [1957] 1 QB 574 at 586.

Notwithstanding the general acceptance of judicial discretion, it is our contention that it is dangerous and detrimental when a court or judge departs from the clarity of a text of law while imposing punishment, only because he/she disagrees with the text of the law.

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