

Contested Legality of Mandatory Minimum Penalties under Rwandan Law

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ABSTRACT

The 2018 penal code contains some provisions with mandatory minimum penalties. Though the Supreme Court declared unconstitutional some mandatory minimum sentence provisions, other similar provisions have not been challenged as unconstitutional. This paper examines whether mandatory minimum penalty provisions under Rwandan law are still applicable and evaluates the effect of the lack of clear guidance on mandatory minimum sentences on fair and equitable justice for all under Rwandan law. This paper outlines the current legislative and judicial positions and various arguments from a review of relevant literature. It discusses the stands of the mandatory minimum penalty with the judge's discretion in sentencing. This paper examines what should be done in Rwanda towards consistent and predictable sentences under Rwandan law.

Keywords: *Mandatory minimum penalties, Sentencing, Fair and equitable justice for all*

I. INTRODUCTION

Mandatory Minimum Sentences are described in academic literature as legislated sentencing floors where the minimum punishment is predetermined by law.¹ Law N^o. 68/2018 of 30/08/2018 determining offences and penalties in general prescribes some offenses with serious penalties and some provisions set the mandatory minimum penalties.² This law was adopted due to parliament being inundated with calls from the Rwandan government for the courts to mete out tougher punishment to prevent prevalent offenses. Therefore, some offences have been provided with serious penalties to discourage offenders. Among those offences are human trafficking, offences against children, offences of gender-based violence, drug trafficking and use, corruption and

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1 Kari Glynes & Elliott Kyle Coody, *Mandatory Minimum Penalties in Canada: Analysis and Annotated Bibliography*, March 2016, p.4, <<https://www.justice.gc.ca/eng/rp-pr/jr/mmp-pmo/mmp-pmo.pdf>>, accessed on 07/07/2022.

2 Article 133 of law n^o 68/2018 of 30/08/2018 determining offences and penalties in general [hereafter will refer as the 2018 penal code] that punish child defilement indicated 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. Article 92 of the 2018 penal code provides punishment for the crime of genocide indicating that 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.

related crimes, economic crimes, crimes against public property, cybercrimes, and others.³ That law also imposes mandatory minimum sentences to minimize the difference between the minimum and maximum sentences. Because there was a big difference between a minimum and a maximum sentence in the law, the perpetrators of the offense could face significantly different penalties, which would undermine fair and equitable justice for all.⁴

Nevertheless, some provisions that determine the mandatory minimum sentences have been declared unconstitutional⁵. Some provisions of Rwandan penal law carrying mandatory minimum sentences were challenged before the Supreme Court which declared them unconstitutional. However, not all relevant provisions were adjudicated: there remain other provisions containing mandatory minimum sentences which, in principle remain applicable. For example, Article 60 of the 2018 Penal Code indicates that in the case where there are mitigating circumstances, (...) fixed-term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed.⁶ This article seeks to examine whether mandatory minimum penalty provisions under Rwandan law are still applicable and evaluates the effect of the lack of clear guidance on mandatory minimum sentences on fair and equitable justice for all under Rwandan law.

This paper is structured into three sections. After the introduction, the first section discusses the mandatory minimum penalty provisions in general and mandatory minimum penalty provisions under Rwandan law. The second section focuses on Rwandan courts' stance on mandatory minimum penalty provisions. The third section outlines the consequences of the lack of clear guidance on the application of mandatory minimum penalty provisions on fair and equitable justice for all under Rwandan law. The paper ends with a conclusion made of a summary and key recommendations.

2. Mandatory Minimum Penalties in Theory and in Practice?

³ Explanatory note on draft law determining offences and penalties in general, 05 Octobre 2018.

⁴ Ibid.

⁵ Re. *KABASINGA*, RS/INCONST/SPEC 00003/2019/SC, December 04, 2019.

⁶ Article 60 of the 2018 penal code provides that “if there are mitigating circumstances, penalties may be reduced as follows: 1° subject to the provisions of Article 107 life imprisonment may be reduced but it cannot be less than twenty-five (25) years; 2° 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 section discusses the mandatory minimum penalty provisions in general and the position of Rwandan courts on mandatory minimum penalty provisions.

2.1. Mandatory minimum penalties in general

Courts are guided in their imposition of sentences through legislation, mainly due to the inclusion of the objectives and principles of sentencing which are enunciated therein. This includes, *inter alia*, deterrence; the civic responsibility to safeguard society from offenders through justifiable and appropriate sentences, with due regard for both perpetrators and victims, and uppermost, punishment befitting the gravity of the offence.⁷ Mandatory penalties are designed to eliminate judicial discretion in choosing among various punishment options, under the assumption that judges are too lenient and that offenders are therefore neither generally deterred from committing a crime nor incapacitated through long incarceration.⁸

A mandatory penalty is defined as the establishment by the legislature of a set penalty for a specific criminal offence.⁹ It refers to circumstances where the legislature prescribes a minimum and maximum penalty for an offence”.¹⁰ A mandatory minimum penalty is considered to be a sentence with a lower limit, that the court cannot go below while imposing a sentence for a given offense. Criminal offenses must exist either in the criminal code or in another piece of legislation.

Several arguments have been advanced in favor of mandatory minimum penalties. According to their advocates, mandatory minimums both deter and incapacitate offenders. Concerning deterrence, mandatory minimum sentences are sometimes justified as sending an unmistakable message to criminals. The certain, predictable, and harsh sentences forewarn offenders of the consequences of their behavior upon apprehension and conviction.¹¹ Proponents contend that mandatory minimums also incapacitate the most incorrigible criminals and thereby prevent them

⁷ Nesor JJ, *Reformation of Sentencing in South Africa* (2001), p.86.,

<<https://journals.co.za/doi/epdf/10.10520/EJC28681>>, accessed on 21/10/2022.

⁸ CANDACE MCCOY, *sentencing: Mandatory and Mandatory Minimum Sentences*,

<<https://www.encyclopedia.com/law/legal-and-political-magazines/sentencing-mandatory-and-mandatory-minimum-sentences>>, accessed on 22/06/2022.

⁹ Terblanche SS, and Mackenzie G, “Mandatory Sentences in South Africa: Lessons for Australia?” 2008, *Australian and New Zealand Journal of Criminology* 41(3) (402).

¹⁰ *Ibidem*.

¹¹ Erik Luna, *Mandatory Minimums*,

p.127, <https://law.asu.edu/sites/default/files/pdf/academy_for_justice/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf>, accessed on 21/10/2022.

from committing a crime.¹² Rather than eliminating a judge's ability to assess a proportionate sentence, mandatory minimums set a stable sentencing range for an offence, permitting citizens to understand in advance the severity of the consequences that attend the commission of that offence, regardless of the individual offender's particular degree of responsibility.¹³ Judges who ignore or otherwise circumvent mandatory minimums act contrary to the office that they have sworn to uphold. Ignoring mandatory minimums is no more acceptable than would be ignoring mandatory maximums.¹⁴

However, opponents assert that mandatory minimum sentence provisions are an attempt by Parliament to curb judicial discretion. They argued that mandatory minimum sentences are unconstitutional because they aggregate all of the sentencing power in the legislative and executive branches and deny judges sentencing discretion in violation of the separation of powers doctrine.¹⁵ Mandatory sentences also deny the judge's discretion in setting the appropriate sentence.¹⁶

2.2. Mandatory minimum penalty provisions under Rwandan law

Rwandan laws declare both minimum and maximum penalties for every offense. The mandatory minimum penalties were included in Rwandan criminal law since the Penal Code of 1977. For example, in the case of mitigating factors, capital punishment could be reduced but not below five (5) years; life imprisonment could be reduced but not below two years.¹⁷ The imprisonment period of twenty or beyond twenty years could be reduced, but it cannot be less than one year of imprisonment. That law established a large bracket between a maximum and a minimum sentence and gave a big margin of appreciation for the court in awarding a penalty in case of mitigating

¹² Ibid

¹³ **Lincoln Caylor and Gannon G. Beaulne, A Defence of Mandatory Minimum Sentences, May 2014,** <<https://www.macdonaldlaurier.ca/files/pdf/MLIMandatoryMinimumSentences-final.pdf>, >accessed 19/10/2022.

¹⁴ Ibid

¹⁵ Kieran Riley, *Trial by the legislature: why statutory mandatory minimum sentences violate the separation of powers doctrine*, Public Interest Law Journal, [Vol. 19:285 2010], p. 286. <<https://www.bu.edu/pilj/files/2015/09/19-2RileyNote.pdf>,> accessed 19/10/2022.

¹⁶ Ibid, p. 303.

¹⁷ Article 83 du décret-loi N° 21/77 code pénal, 18 aout 1977 prévoit que « *S'il existe des circonstances atténuantes, les peines seront modifiées ou réduites ainsi qu'il suit : - la peine de mort sera remplacée par une peine d'emprisonnement qui ne sera pas inférieure à cinq ans; - la peine d'emprisonnement à perpétuité sera remplacée par une peine d'emprisonnement temporaire qui ne sera pas inférieure à deux ans; - la peine d'emprisonnement temporaire de cinq à vingt ans ou supérieure à vingt ans pourra être réduite jusqu'à la peine d'emprisonnement d'un an. Dans tous ces cas, une amende de cent mille francs au maximum pourra être adjointe à la peine d'emprisonnement, ainsi que la dégradation civique et l'interdiction de séjour ou l'obligation de séjour.* »

factors. That big margin of appreciation for the court was still maintained in the revised Penal Code of 2012.¹⁸

The same spirit is reflected in the Criminal Procedure Law of 2013¹⁹, which states that when the accused candidly pleads guilty to the offense, (...) the judge seized of the case may reduce the penalties to half (½) of the applicable penalties. If the accused is sentenced to life imprisonment, the penalty may be reduced to twenty (20) years of imprisonment. That code was giving a big margin of appreciation to the court in determining the appropriate sentences in case there is a mitigating factor.

Nevertheless, the executive organ realized that there was a big difference between a minimum and a maximum sentence. Perpetrators of certain offenses could face significantly different penalties, which would undermine fair and equitable justice for all.²⁰ Hence, the adopted new Penal Code of 2018 imposes mandatory minimum sentences with a small margin separating the minimum and maximum sentences.²¹ That law increased penalties for some offenses were punished from five years in the 2012 penal code to life imprisonment in the 2018 penal code.²²

3. Rwandan courts' case law on mandatory minimum penalty provisions

¹⁸ Article 78 Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, *Official Gazette n° Special of 14 June 2012.* "If there are mitigating circumstances, the reduction of penalties shall be as follows: 1° life imprisonment or life imprisonment with special provisions is replaced by a penalty of imprisonment of not less than ten (10) years; 2° a penalty of imprisonment of ten (10) years to twenty five (25) years may be reduced up to a term of imprisonment of five (5) years; 3° a penalty of imprisonment of more than five (5) years, but less than ten (10) years may be reduced up to a term of imprisonment of one (1) year; 4° a penalty of imprisonment of six (6) months to five (5) years may be reduced up to a term of imprisonment of two (2) months; 5° a penalty of imprisonment of less than six (6) months may be suspended."

¹⁹ Article 35 of the Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, *Official Gazette n° 27 of 08/07/2013.*

²⁰ Explanatory note on draft law determining offences and penalties in general, 05 Octobre 2018.

²¹ The variation between minimum and maximum is a term of imprisonment of one (1) year to three (3) years, a term of imprisonment of not less than one (1) year and not more than two (2) years, a term of imprisonment of not less than five (5) years and not more than seven (7) years, a term of imprisonment of not less than ten (10) years and not more than fifteen (15) years. A term of imprisonment of not less than three (3) years and not more than five (5) years, a term of imprisonment of not less than twenty (20) years and not more than twenty-five (25) years, etc.

²² For example, carrying out acts related to the use of narcotic drugs or psychotropic substances, the 2012 penal code provides for any person who, unlawfully, makes, transforms, imports, or sells narcotic drugs and psychotropic substances within the country, a term of imprisonment of three (3) years to five (5) years and a fine of five hundred thousand (500,000) to five million (5,000,000) Rwandan francs. While the 2018 penal code provides for Any person who, unlawfully produces, transforms, transports, stores, gives to another, or who sells narcotic drugs and psychotropic substances a life imprisonment and a fine of more than twenty (20.000.000 FRW) million Rwandan francs and not more than thirty million (FRW 30,000,000) Rwandan francs.

3.1. Challenged provisions of the 2018 penal code as unconstitutional

The Rwandan constitution indicates that the authentic interpretation of the law is entrusted to the Supreme Court.²³ This sub-section discusses some cases of the supreme court that declared unconstitutional almost all the provisions in the 2018 penal code that provide for life imprisonment as a mandatory minimum sentence for certain crimes.²⁴

The principle of due process, outlined in article 29 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015, has been the basis of challenging various provisions of the 2018 penal code that provide for life imprisonment as a mandatory minimum sentence for certain crimes.²⁵ In the first case, the petitioner requested the Supreme Court to declare unconstitutional Article 133, paragraph five of the 2018 penal code which provides that:

"[...] If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances.

A second petition to the Supreme Court related to article 92 of the 2018 penal code, which states that:

"Any person who commits any of the acts referred to under Article 91 of this Law²⁶ that defines a crime commits an offense. Upon conviction, he/she is liable to the penalty of life imprisonment that cannot be mitigated by any circumstances. "

The petitioner argued that these provisions infringe on Article 29 and 151 of the Constitution of the Republic of Rwanda because it violates the right to a fair trial and undermines the independence of the judge in sentencing. The major arguments in those cases were that:

²³ Article 96 of the constitution of the Republic of Rwanda of 2003 was revised in 2015.

²⁴ Article 92, 133 al 3 & 5 of law n°68/2018 of 30/08/2018 determining offences and penalties in general, "...Upon conviction, he/she is liable to the penalty of life imprisonment that cannot be mitigated by any circumstances. If child defilement is committed on a child under fourteen (14) years, the penalty is life imprisonment that cannot be mitigated by any circumstances. If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances." *Re. Kabasinga*, RS/INCONST/SPEC 00003/2019/SC, December 04, 2019] and *Re. Kabasinga and others*, RS/INCONST/SPEC 00005/2020/CS - RS/INCONST/SPEC 00006/2020/CS, of 12 February 2020.

²⁵ *Ibid.*

²⁶ Article 91 of the 2018 penal code defines the crime of genocide: "*The crime of genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, whether in time of peace or in time of war:*

1° killing members of the group;

2° causing serious bodily or mental harm to members of the group;

3° deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

4° imposing measures intended to prevent births within the group;

5° forcibly transferring children of the group to another group."

"The mandatory sentencing is contrary to the principle of due process of law set out in article 29 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015, the convict cannot appeal the sentence, and the appellate judge cannot change it as it is mandatory."

It has been argued that in a criminal case while sentencing the convict, the judge is obliged to consider how the crime was committed, the conduct and welfare of the offender, the society in which it was committed, and the victim.²⁷

Based on those arguments, the Supreme Court declared that Article 92²⁸ and Article 133, particularly paragraphs three²⁹ and five³⁰ of the 2018 penal code are therefore without effect.³¹ The supreme court decided that some of the provisions that set the mandatory minimum penalties were in violation of due process and independence of the judges, and relevant constitutional principles.³² Those provisions that have been declared unconstitutional by the Supreme Court settled a precedent that should be followed by other lower courts.

3.2. Non-adjudicated provisions with mandatory minimum penalties

The main issue that remains unresolved is related to the application and interpretation of other provisions under the 2018 penal code that carry mandatory minimum penalties that have not (yet) been declared unconstitutional. For example, Article 60 of the 2018 penal code provides that if

²⁷ Article 49 of the 2018 penal code indicates that *"a judge determines a penalty according to the gravity, consequences of, and motive for committing the offence, the offender's prior record and personal situation, and the circumstances surrounding the commission of the offence."*

²⁸ Article 92 of the 2018 penal code indicates that *"Any person who commits any of the acts referred to under Article 91 of this Law commits an offence. Upon conviction, he/she is liable to the penalty of life imprisonment that cannot be mitigated by any circumstances"*.

²⁹ Article 133 paragraph 2 of the 2018 penal code indicates 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."*

³⁰ Article 133 paragraph 3 of the 2018 penal code indicates that *"If child defilement is followed by cohabitation as husband and wife, the penalty is life imprisonment that cannot be mitigated by any circumstances"*.

³¹ *Re. Kabasinga*, RS/INCONST/SPEC 00003/2019/SC, December 04, 2019] and *Re. Kabasinga and others*, RS/INCONST/SPEC 00005/2020/CS-RS/INCONST/SPEC 00006/2020/CS, of 12 February 2020. *Re. Kabasinga and others'* case, RS/INCONST/SPEC 00005/2020/CS - RS/INCONST/SPEC 00006/2020/CS,

³² *Re. KABASINGA*, the supreme court concluded that *"in exercising their judicial functions, judges at all times do it following 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, how it was committed, and mitigating circumstances that would have reduced his sentence in case there are any."* *Re KABASINGA*, RS/INCONST/SPEC 00003/2019/SC, December 04, 2019.

there are mitigating circumstances, a penalty may be reduced but shall not be less than the minimum penalty provided by the law³³.

The Supreme Court noted that the legislator had decided that if there is a mitigating circumstance, the penalties may be reduced but shall not be less than the minimum penalty provided for the offence committed. It was the opinion of the Supreme Court that it would be reasonable if the range between the minimum and the maximum penalty was large, putting more emphasis on reducing the minimum penalty.

The reasonable range between the minimum and maximum penalty would enable the court to determine a penalty according to the gravity, consequences of, and motive for committing the offence, the offender's prior record and personal situation, and the circumstances surrounding the commission of the offence to be correctly applied.³⁴ When the minimum mandatory penalty, which is heavy, is provided for, it means that a defendant does not benefit from any mitigating factors. That awarded penalty does not also serve justice in general.³⁵

Given the above, the Supreme Court recommended the adoption of a punitive policy informed by research that harmonizes international sentencing principles with special issues in Rwandan society.³⁶ In that punitive policy, a judge should be accorded the liberty to impose a sentence in consideration of the severity of the offence, its effects, the reasons that occasioned the commission of the offence, the offender's prior record, and personal situation, and the circumstances surrounding the commission of the offence.³⁷ It is worth indicating that a criminal justice policy has been adopted by the Rwandan Cabinet.³⁸ That policy recommends the review of the criminal procedure and penal laws with the aim to: (...) introduce comprehensive sentencing guidelines by

³³ Article 60 of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general states that “*if there are mitigating circumstances, penalties may be reduced as follows: 1° subject to the provisions of article 107 life imprisonment may be reduced but it cannot be less than twenty-five (25) years; 2° a fixed-term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed.*”

³⁴ Article 49 of Law N°68/2018 of 30/08/2018 determining offences and penalties in general.

³⁵ Paragraph 45, *Re. Kabasinga*, RS//INCONST/SPEC 00003/2019/SC, December 04, 2019.

³⁶ Paragraph 48, *Re. Kabasinga*, RS//INCONST/SPEC 00003/2019/SC, December 04, 2019.

³⁷ *Ibid.*

³⁸ Cabinet resolution of September 08th 2022, paragraph,

<<https://www.primature.gov.rw/index.php?elD=dumpFile&t=f&f=53347&token=1ddf897755c0a44075b8fe3688e839b5de40eb48>>, accessed on 20/10/2022.

the Supreme Court to enhance judicial discretion for judges in appreciating aggravating or mitigating circumstances.³⁹ The policy is silent on the fate of the mandatory minimum penalties.

Legislative power in Rwanda is vested in a Parliament⁴⁰ and Parliament debates and passes laws.⁴¹ In exercising their judicial functions, judges at all times are expected to abide by the law. The authentic interpretation of laws is done by the Supreme Court.⁴² Once a provision of the law in force has not been declared unconstitutional by the Supreme Court, it is still valid. The next paragraph examines the judicial interpretation and application of provisions under the 2018 penal code that indicate the mandatory minimum penalties.

3.3. The court interpretation of mandatory minimum penalties provisions

The criminal law principle of the legality of offenses and penalties⁴³ is one of the basic principles set out under the 2018 penal code. Under that code, criminal law provisions cannot be interpreted broadly, they must be construed strictly. Courts are prohibited from making judgments by analogy.⁴⁴ No penalty may be reduced except in cases and under circumstances provided by law.⁴⁵ The fact that article 60 of the criminal law⁴⁶ has not (yet) been declared unconstitutional by any given court, makes it still valid.

Therefore, pronouncing a penalty below the mandatory minimum sentence provided in relevant criminal law provisions is to act contrary to the law. Some judges strictly apply the law and once there are mitigating circumstances, they punish the offender with the minimum penalties set under Article 60 of the 2018 Penal Code.⁴⁷

However, other judges while interpreting the mandatory minimum sentences extended their interpretation of the argument outlined in the ruling of the Supreme Court that declared

³⁹ MINIJUST, Criminal Justice Policy, September, 2022, p.18.

⁴⁰ Article 64 the constitution of the republic of Rwanda of 2003 revised in 2015.

⁴¹ Ibid.

⁴² Article 96 the constitution of the republic of Rwanda of 2003 revised in 2015.

⁴³ Article 3 of the 2018 penal code indicates that no offence is punished by a penalty that was not provided for by law before the offence was committed.

⁴⁴ Article 4 of the 2018 penal code

⁴⁵ Article 48 of the 2018 penal code

⁴⁶ Article 60 of the 2018 penal code indicates that *“If there are mitigating circumstances, penalties may be reduced as follows: 1^o subject to the provisions of Article 107 life imprisonment may be reduced but it cannot be less than twenty-five (25) years; 2^o a fixed-term imprisonment or a fine may be reduced but it cannot be less than the minimum sentence provided for the offence committed.”*

⁴⁷ Paragraph 12 and 13 of *MP v MIHIGO Ramazani Alias Osama*, RPA 00713/2018/HC/RWG, 30/06/2020.

unconstitutional some provisions requiring mandatory penalties and concluded that the court can go below the mandatory minimum sentences when mitigating factors exist.⁴⁸

For example, in the case of *Prosecution v. Bahati Françoise*, the suspect was charged with carrying out acts related to the use of narcotic drugs or psychotropic substances, especially selling narcotic drugs and psychotropic substances (Cannabis). In the case of severe narcotic drugs, she faced life in prison and a fine of more than twenty (20.000.000) million Rwandan francs, but no more than thirty million (30,000,000) Rwandan francs. The suspect pleaded guilty and the intermediate court, after assessing all the evidence, found her guilty and considered pleading guilty as a mitigating circumstance. Therefore, instead of being punished with life imprisonment, it was found that she should be punished with 25 years of imprisonment and a fine of twenty-one million according to Article 60 of the 2018 penal code.⁴⁹ *Bahati Françoise*, who was not happy with the intermediate court decision, appealed to the high court due to being given heavy punishment. The High Court upheld the intermediate court's decision as it was taken in conformity with the law.⁵⁰

However, in the Court of Appeal, *Bahati Françoise*, who was dissatisfied with the given sentence of 25 years in prison upheld by the High Court even though she pleaded guilty since her arrest up to the High Court, the court of appeal concluded that the High Court has the authority to reduce the penalties following the principle of proportionality of offenses and penalties.

Therefore, the Court of Appeal based on *Re Kabasinga*⁵¹ and *Re Kabasinga and others*⁵² concluded that Article 60 paragraph 1 of the 2018 penal code limits the judges to reducing life imprisonment to less than twenty-five years of imprisonment when there are mitigating circumstances, which cannot be used as it is contrary to the due process principle and the independence of the judiciary. Based on those arguments, the Court of Appeal punished the offender with ten years of imprisonment and a fine of five million. In that case, the court of appeal ignored the mandatory sentences provided under Article 60 paragraph 1 of the 2018 penal code.

⁴⁸ *MP v Bahati Françoise*, RPA 01257/20219/HC/KIG, 30/06/2020.

⁴⁹ Paragraph 15, *MP v Bahati Françoise*, RP 00282/2019/TGI/NYGE, 16/04/2019.

⁵⁰ *MP v Bahati Françoise*, RPA 01257/20219/HC/KIG, 30/06/2020.

⁵¹ RS/INCONST/SPEC 00003/2019/SC of 4/12/2019

⁵² RS/INCONST/SPEC 00005/2020/CS-RS/INCONST/SPEC 00006/2020/CS, 12/2/2020

The position of the court of appeal on mandatory minimum sentences has been recently published in the Court of Appeal compilation of precedent. That position clearly states that when the court finds that there are mitigating factors that may push the judges to reduce up to a sentence that is below the mandatory minimum sentences provided for by the law and the judge found that the margin set between maximum and minimum is small, the judge may reduce the penalties and give the penalties that are below to the mandatory minimum sentences in the consideration of the gravity of the offenses and its consequences.⁵³

3.4. The impact of mandatory minimum penalty provisions

As it is reflected under the explanatory note of the Bill of criminal code of 2018, which became the 2018 penal code, the executive and legislature powers in setting the mandatory minimum penalties were convinced that the inclusion of such provisions in the 2018 penal code would have a big impact on the reduction of crime generally or in the curbing of the specifically targeted offences.⁵⁴

As discussed in the previous sections, some mandatory minimum penalties under the 2018 penal code were declared unconstitutional. No empirical research has been conducted on the impact of mandatory minimum penalty provisions that have been in place since the adoption of the Penal code in 2018. It is difficult to find substantive evidence on whether the legislation has had any deterrent effect or even that it has reduced crime.⁵⁵

While initiating the 2018 penal code, the executive argued that the same law imposed the minimum mandatory penalties to minimize the difference between a minimum and a maximum sentence and eliminate inconsistent and widely diverging sentencing practices. As it was pointed out in the explanatory notes, there was a big difference between a minimum and a maximum sentence, the perpetrators of the offense could face significantly different penalties, which would undermine fair and equitable justice for all.⁵⁶

⁵³ *MP V BENIMANA Jean Pierre*, RPAA 00038/2021/CA, 23/09/2022, The court of appeal compilation of precedent, Vol 2, September 2022.

⁵⁴ Explanatory note on draft law determining offences and penalties in general, 05 Octobre 2018.

⁵⁵ NPPA, *National Public Prosecution Authority annual report 2019 - 2020*, p. 23. For example, concerning child defilement, the National Public Prosecution Authority reported that child defilement cases have increased from 1,819 cases in 2013 to 3,793 cases in June 2020.

⁵⁶ Explanatory note on draft law determining offences and penalties in general, 05 Octobre 2018.

However, the interpretation and application of mandatory minimum penalties provisions have, if anything, worsened the disparities and inconsistencies that prevail concerning the offences targeted by the law. There are some cases in which judges have found room to depart from prescribed minimum mandatory penalties.⁵⁷ Among the target, offenses were child defilement and carrying out acts related to the use of narcotic drugs or psychotropic substances. About carrying out acts related to the use of narcotic drugs or psychotropic substances offenses, some offenders who have been charged with selling cannabis with mitigating circumstances have been given 25 years of imprisonment⁵⁸ as a penalty, while others have been handed 10 years of imprisonment.⁵⁹ Similarly, regarding child defilement, some offenders have been sentenced to twenty years of imprisonment⁶⁰ while others were handed five years of imprisonment.⁶¹

4. Interpretation and application of mandatory minimum penalties provisions

The legality of mandatory minimum sentencing provisions that have not been declared unconstitutional remains contested. It is worth indicating that rendered judgments interpreting article 60 of 2018 criminal law have been published under the Rwanda Law Report.⁶² Therefore, that interpretation has a binding or authoritative force.⁶³

It is recognized that the risk of disparity may be greater under the sentencing system without a mandatory minimum sentence or in the system where there is a big margin between minimum sentence and maximum sentence. It is in this context that this paper proposes measures to control this risk. In Rwanda, there were complaints over many disparities in punishments for similar offences.⁶⁴

⁵⁷ *MP v NZERI Jean de Dieu*, RPA 00388/2020/HC/KIG, 17/03/2022. Paragraph 44 of *MP v Bahati Françoise*, RPAA 00031/2021/CA, 28/10/2021.

⁵⁸ *MP v. AKAYEZU*, RPAA 00111/2021/CA, Court of Appeal, 22/07/2022.

⁵⁹ Paragraph 44 of *MP v Bahati Françoise*, RPAA 00031/2021/CA, 28/10/2021; *MPV UWAMAHORO Françoise*, RPAA 00029/2021/CA, Court of Appeal, 5/11/2021.

⁶⁰ *MP v. RWATAMBUGA*, RPAA 00018/2020/CA, 20 /05/2022.

⁶¹ *MP v NZERI Jean de Dieu*, RPA 00388/2020/HC/KIG, 17/03/2022.

⁶² The court of appeal compilation of precedent, Vol 2, September 2022.

⁶³ Article 9 of Chief Justice instruction n° 001/2021 of 15 mars 2021 regulating the publication of cases law in Rwanda law report, <https://www.judiciary.gov.rw/fileadmin/Publications/Laws/3 - Amabwiriza_CJ - lbyegeranyo.pdf>, accessed on 19/10/2022.

⁶⁴ ROBERT MBARAGA, Courts plan new sentencing guidelines for uniformity, EAST AFRICAN, <<https://www.theeastafrican.co.ke/tea/rwanda-today/news/courts-plan-new-sentencing-guidelines-for-uniformity-1374532>>, accessed on 20/10/2022.

There is nothing wrong with minimum mandatory sentences in itself. Rwanda commits itself to building a State governed by the rule of law, (...).⁶⁵ Mandatory minimums set a stable sentencing range for an offence, permitting citizens to understand in advance the severity of the consequences that attend the commission of that offence, regardless of the individual offender's particular degree of responsibility.

The justiciable must know what the law is in advance so that they can govern their conduct accordingly. Thus, mandatory minimums promote proportionality and the rule of law insofar as they set a strict sentencing range commensurate with the range of possible moral culpability for a given offence and, therefore, render sentencing for that offence more certain, accessible, intelligible, clear, and predictable.⁶⁶ This goes in line with the principle of legality and the guiding principle of penalty reduction set under Rwandan law.⁶⁷ The court should be bounded by the penalties set in criminal law. This goes in line with the constitutional principle that indicates that in exercising their judicial functions, judges at all times do it by the law and are independent of any power or authority.⁶⁸

However, the margin set between maximum and mandatory minimum sentences should be big enough to enable the court to tailor the sentence to an offender's unique circumstances. This goes in line with the requirement Article 49 of the 2018 penal code that provides 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.

Whatever the choice of the decision-makers in the revision of sentence provisions, there is a need to prevent the disparity of the penalties that may result from the taken path. The sentencing guidelines are the most effective and just way of controlling and structuring judicial discretion in sentencing.⁶⁹ It is the system used in many countries in East Africa to reduce the opportunity for

⁶⁵ Article 10 Rwanda's Constitution of 2003 with Amendments through 2015.

⁶⁶ **Lincoln Caylor and Gannon G. Beaulne**, A Defence of Mandatory Minimum Sentences, **May 2014**, <<https://www.macdonaldlaurier.ca/files/pdf/MLIMandatoryMinimumSentences-final.pdf>> , accessed on 19/10/2022.

⁶⁷ Article 3 of the 2018 penal code and article 48 indicate that No penalty may be reduced except in cases and under circumstances provided by law.

⁶⁸ Article 151 of Rwanda's Constitution of 2003 with Amendments through 2015.

⁶⁹ Leslie T. Wilkins and others, sentencing 'guideline structuring, judicial discretion report on the feasibility study, <<https://www.ojp.gov/pdffiles1/Digitization/38269NCJRS.pdf>,> accessed on 20/10/2022.

disparity.⁷⁰ The nature of guidelines is not the same as legislative rules binding a court. To do so would infringe the whole philosophy of Article 49 of the law determining offences and penalties in general, which requires the court to consider the gravity of the offence and the circumstances of the offender. Sentencing guidelines are primarily concerned with the gravity of the offence and under the proposed system, a judge will have better information on the offender's circumstances. The judge will then be entitled, in the interests of rehabilitation, to give a sentence that assists that rehabilitation rather than one which reflects the gravity of the offence. This is often called an individualized sentence, and it will usually be based on one or other alternatives to imprisonment.

5. Conclusion

As decided in *Re. Kabasinga* cases, some provisions that indicate mandatory minimum penalties have been declared unconstitutional. The Supreme Court established that some mandatory minimum penalties examined are contrary to the principle of due process of law outlined in Article 29 of the Constitution of the Republic of Rwanda of 2003 as revised in 2015, and 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, how it was committed, and mitigating circumstances that would have reduced his sentence in case there were any.⁷¹

Though the Supreme Court was responding to the specific provisions. The interpretation of those Supreme Court cases by some court of appeal judges suggests that they can go below the minimum when there are mitigating circumstances.

The position of the court of appeal on mandatory minimum sentences clearly states that when the court finds that there are mitigating factors that may push the judges to reduce up to a sentence that is below the mandatory minimum sentences provided for by the law and the judge found that the margin set between maximum and minimum is small, the judge may reduce the

⁷⁰ The constitution (sentencing guidelines for courts of Judicature) (Practice) directions, 2013 from Uganda, <<https://www.jlos.go.ug/index.php/Document-centre/sentencing-guidelines/264-sentencing-guidelines/file>>, accessed on 21/06/2022. Sentencing guidelines for Kenya, <<http://kenyalaw.org/kl/fileadmin/pdfdownloads/SentencingGuidelines.pdf>>, accessed on 21/06/2021. Tanzania Sentencing manual for judicial officers, <https://media.tanzlii.org/files/guidelines/2021-12/tanzania-sentencing-manual-final_0.pdf>, accessed on 21/06/2022.

⁷¹ *The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 151.*

penalties and give the penalties that are below to the mandatory minimum sentences in the consideration of the gravity of the offenses and its consequences.⁷²

In consideration of the cases analysed in this paper, there is a need to harmonize the recent precedent on the fate of the mandatory minimum sentence with the provisions that regulate the mandatory minimum penalties under the 2018 penal code. In revisiting the criminal laws, policymakers should consider holistically the principle of rule of law, the principle of legality enriched under Rwandan criminal law with the judge's discretion power to individualize a sentence and proportionality of sentences principles. The Courts are guided in their imposition of sentences through legislation. The position on the mandatory minimum penalties should be reflected in enacted legislation by the parliament to represent the will of the people. The court should be bound by the penalties set in criminal law. This goes in line with the constitutional principle that indicates that in exercising their judicial functions, judges at all times do it by the law and are independent of any power or authority.⁷³

One of the recommendations to consider while revising some mandatory minimum sentences provisions that are still in force in the 2018 penal code, the courts should be left with a large margin of appreciation in imposing penalties. However, this large margin of appreciation of penalties may lead to a disparity in sentences. That is why it was recommended in criminal justice policy, the review of the criminal procedure and penal laws with the aim to: (...) introduce comprehensive sentencing guidelines by the Supreme Court to enhance judicial discretion for judges in appreciating aggravating or mitigating circumstances.⁷⁴

The resulting guidelines will be advisory to sentencing judges. Sentencing judges will then have the discretion during sentencing hearings to review and weigh all pertinent facts. If sentencing judges depart from the advisory guidelines, they will make a record of their reasons for doing so that can be reviewed by appellate judges for reasonableness. This would allow for individuality in sentencing, give credence to the research undertaken by the supreme court, decrease the problem

⁷² *MP V BENIMANA Jean Pierre*, RPAA 00038/2021/CA, 23/09/2022, The court of appeal compilation of precedent, Vol.2, September 2022.

⁷³ Article 151 of Rwanda's Constitution of 2003 with Amendments through 2015.

⁷⁴ MINIJUST, *Criminal Justice Policy*, September, 2022, p.18.

of lopsided and unjust criminal punishments, and bring criminal sentencing law into accordance with the separation of powers doctrine and the Rwandan Constitution.

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