

Ibirimo/Summary/Sommaire

page/urup.

Gutangaza urubanza N° RS/INCONST/SPEC 00002/ 2018/SC rwaciwe
n'Urukiko rw'Ikirenga ku wa 24/04/2019.....1

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 1

**URUKIKO RW'IKIRENGA RURI I KIGALI, RUHABURANISHIRIZA IKIREGO
GISABA GUKURAHU INGINGO Y'ITEGEKO KUKO INYURANYE
N'ITEGEKO NSHINGA, RUKIJIJE MU RUHAME URUBANZA
N°RS/INCONST/SPEC 00002/ 2018/SC, NONE KU WA 24/04/2019, MU
BURYO BUKURIKIRA:**

HABURANA :

UWATANZE IKIREGO: MUGISHA Richard, mwene GASANA John na MUKAMURENZI Josepha, ubarizwa mu Mudugudu wa Juru, Akagari ka Kamukina, Umurenge wa Kimihurura, Akarere ka Gasabo, Umujyi wa Kigali.

Hari:

Leta y'u Rwanda, ihagarariwe n'Intumwa yayo.

Inshuti z'Urukiko:

- Abagize Umuryango ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda);
- Abagize Impuzamiryango PRO-FEMMES / TWESE HAMWE;
- Abagize Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (School of Law).

Ikiregerwa:

Kwemeza ko ingingo za 136, 138, 139, 154, 233, n'iya 236 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zinyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15, 18 na 38.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 2

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I. IMITERERE Y'URUBANZA

- [1] MUGISHA Richard yatanze ikirego mu Rukiko rw'Ikirenga avuga ko nyuma y'uko hatangajwe mu Igazeti ya Leta Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, yarisomye agasanga ingingo za 136, 138, 139, 154, 233 n'iya 236 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, zinyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, ryo muri 2003 ryavuguruwe mu mwaka wa 2015.
- [2] Ingingo zisabirwa kvanwaho kuko zinyuranyije n'Itegeko Nshinga ni esheshatu (6), ziri mu byiciro bibiri: icyiciro cya mbere kigizwe n'ingingo eshatu (3): iya 154, 233 n'iya 236 z'Itegeko n° 68/2018 ryavuzwe haruguru. Ingingo ya 154 iteganya ko umuntu wese usebya mu ruhame imihango y'idini, ibimenyetso byaryo n'ibikoresho by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha. Iya 233 iteganya ko umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, umwe mu bagize Inteko Ishinga Amategeko mu gihe akora umurimo yatorewe cyangwa biturutse kuri uwo murimo, umwe mu bagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinze umurimo rusange w'igihugu mu gihe akora umurimo ashinzwe cyangwa ari wo biturutseho, aba akoze icyaha. Naho iya 236 igateganya ko umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha. Izi ngingo zinateganya ibihano kuri buri cyaha.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 3

- [3] MUGISHA Richard avuga ko izo ngingo zinyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda, kuko zirengera ababwirwa mu byiciro bimwe hashingiwe ku mirimo bakora, kandi abantu bose bareshya imbere y'amategeko¹. Anavuga ko izo ngingo zibangamiye ubwisanzure bw'Itangazamakuru, ryaba iryandika, ryaba irikoresha ibishushanyo ndetse n'amagambo, buteganywa n'ingingo ya 38 y'Itegeko Nshinga², kuko hashingiwe ku biteganywa n'izo ngingo, Itangazamakuru ritemerewe kugira icyo ritangaza kuri ibyo byiciro by'abayobozi cyangwa amadini mu buryo bwo kunenga ibi n'ibi, kandi icyo ngingo iteganya ko ubwisanzure bw'Itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta.
- [4] icyiciro cya kabiri kigizwe n'ingingo eshatu (3): iya 136 iteganya ko umuntu wese washyingiwe ukorana imibonano mpuzabitsina n'uwo batashyingiranywe, aba akoze icyaha. Iya 138 iteganya ko umuntu ubana nk'umugabo n'umugore n'uwo batashyingiranywe umwe muri bo cyangwa bombi bafite uwo bashyingiranywe, aba akoze icyaha. Naho iya 139 iteganya ko umwe mu bashyingiranywe uta urugo rwe mu gihe kirenze amezi abiri (2) nta mpamvu zikomeye akihunza ibyo ategetswe, aba akoze icyaha. MUGISHA Richard asanga izi ngingo zinyuranye n'ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko Leta ifite inshingano yo gushyiraho amategeko n'inzego bishinzwe kurengera umuryango kugira ngo ugire

¹ Ingingo ya 15 iteganya ko: "Abantu bose bareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe".

² Ingingo ya 38 iteganya ko: "Ubwisanzure bw'Itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imyifatire mbonezabupfura, ukurengera urubiruko n'abana, n'uburenganzira bw'umwengihugu bwo kugira icyubahiriro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko".

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 4

ubwisanzure, nyamara ingingo za 136, 138 n'ya 139 zikaba ziteganyaga igihano cy'igifungo kuri umwe mu bashakanye kandi umuryango udashobora kurengerwa cyangwa ngo ugire ubwisanzure mu gihe umwe mu bawugize yaba afunzwe.

- [5] Intumwa ya Leta Me KABIBI Speciose yatanze inzitizi yo kutakira ikirego cyatanzwe na MUGISHA Richard ku mpamvu z'uko nta nyungu afite zo kugitanga. Ku wa 18/03/2018, Urukiko rwafashe icyemezo kuri icyo nzitizi, rwemeza ko MUGISHA Richard afite inyungu yo gutanga ikirego gisaba kwemeza ko ingingo z'itegeko zinyuranyije n'itegeko Nshinga.
- [6] Urukiko kandi rwemeje ko, kubera uburemere bw'ibibazo bizasuzumwa muri uru rubanza ruburanishwa mu mizi, abantu n'ibigo cyangwa imiryango itegamiye kuri Leta bifuzaga gutanga ibitekerezo muri uru rubanza nk'inshuti z'urukiko (*Amicus Curiae*) kandi babifitiye ubumenyi, babisaba binyujijwe ku Bwanditsi bw'Urukiko rw'Ikirenga bitarenze tariki ya 8/02/2019, bakanatanga inyandiko bifuzaga kugeza ku Rukiko bitarenze tariki ya 28/02/2019.
- [7] Nyuma yo kubona inyandiko zinyuranye z'abashakaga kuba muri uru rubanza nk'inshuti z'urukiko (*Amicus Curiae*) mu rwego rwo gutanga ibitekerezo, Urukiko rwarazisesenguye maze rwemeza ko aba bakurikira aribo bujuje ibisabwa akaba aribo bagomba kwitaba urukiko mu iburanisha ry'uru rubanza nk'inshuti z'urukiko (*Amicus Curiae*), aribo: ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu Itangazamakuru mu Rwanda), Impuzamiryango PRO-FEMMES / TWESE hamwe n' Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (School of Law), maze bakora imyanzuro bagaragaza ibitekerezo ku kirego cya MUGISHA Richard.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 5

- [8] Urubanza rwaburanishijwe ku wa 18/03/2019, MUGISHA Richard yunganiwe na Me KABASINGA Floride na Me NKUNDABARASHI Moïse, Leta ihagarariwe na Me KABIBI Speciose, PRO FEMMES/ TWESE HAMWE ihagarariwe na KANAKUZE Jeanne d’Arc yunganiwe na Me MUNYANKINDI Monique, ARJ ihagarariwe na Me GAKUNZI MUSORE Valery, naho Ishuri ry’Amategeko muri Kaminuza y’u Rwanda rihagarariwe na Denis BIKESHA, Alphonse MUREFU, Yves SEZIRAHIGA, Etienne RUVEBANA.

II. IBIBAZO BIGIZE URUBANZA N’ISESENGURA RYABYO

A. Kumenya niba ingingo ya 136, 138 n’iya 139 z’Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n’ibihano muri rusange zinyuranyije n’ingingo ya 18 y’Itegeko Nshinga rya Repubulika y’u Rwanda.

- [9] MUGISHA Richard avuga ko yatanze ikirego agamije kugaragaza ko ingingo ya 136, 138 n’iya 139 z’Itegeko n° 68/2018 ryavuzwe haruguru zinyuranyije n’ingingo ya 18 y’Itegeko Nshinga rya Repubulika y’u Rwanda, kuko ziteganya igihano cy’igifungo kuri umwe mu bashakanye, wahamijwe icyaha cy’ubusambanyi, ubushoreke cyangwa se guta urugo, kandi umuryango udashobora kurengerwa cyangwa ngo ugire ubwisanzure, umwe mu bawugize afunze. icyakora ko atatanze icyo kirego nk’ushyigikiye imyitwarire ivugwa muri izo ngingo ahubwo ko yagitanze asaba ko harebwa niba iyo myitwarire mibi mu kuyikumira byari bikwiye ko ishyirwa mu mategeko ahana ibyaha.
- [10] Avuga ko ibiteganywa mu ngingo ya 136, 138 n’iya 139 z’Itegeko n° 68/2018 ryavuzwe haruguru, bibangamiye umubano w’abagiranye amasezerano yo

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 6

gushyingirwa uko ari babiri, kuko baba barayakoze bashingiye ku rukundo bafitanye ndetse bakabyara abana, ku buryo inshingano ya mbere yo kubaka ari iya ba nyiri ubwite, kandi igituma bakomeza kubana mu mahoro bisaba ko uwakoshereje undi amusaba imbabazi, bakababarirana bakiyunga.

- [11] MUGISHA Richard akomeza avuga ko ingingo zihana icyaha cy’ubusambanyi, ubushoreke no guta urugo zinyuranyije n’ingingo ya 18 y’Itegeko Nshinga rya Repubulika y’u Rwanda iteganya ko umuryango ariwo shingiro kamere y’imbaga y’abanyarwanda, urengerwa na Leta, ko ingingo yaregeye ziteganya igihano cy’igifungo kuri umwe mu bashyingiranywe uhamijwe icyaha, mu gihe umuryango udashobora kurengerwa umwe mu bawugize afunzwe.
- [12] Akomeza avuga ko ingingo ya 18 y’Itegeko Nshinga igaragaza ko Leta ishyiraho amategeko n’inzego bikwiye mu kurengera umuryango, ariyo mpamvu basanga ibikorwa by’ubusambanyi, ubushoreke no guta urugo kuba byarashyizwe mu mategeko ahana atari uburyo bukwiye mu rwego rwo kurengera umuryango, kuko bifunga iyo nzira yo gusabana imbabazi no kwiyingunga, bityo ntibyubake umuryango ahubwo bigatera ingaruka zitari nziza ku muryango.
- [13] Me KABASINGA Florida avuga ko usibye no kuba ingingo ya 136, 138 n’iya 139 z’Itegeko n° 68/2018 ryavuzwe haruguru, zinyuranyije n’Itegeko Nshinga rya Repubulika y’u Rwanda, zinanyuranyije n’amahame mpuzamahanga ndetse n’imanza zaciwe n’inkiko mpuzamahanga. Asobanura ko koko imyitwarire ivugwa muri izo ngingo atari myiza, ariko bikagengwa n’andi mategeko kuko abahanga mu by’amategeko bavugaga ko amategeko mpanabyaha atari igikoresho cyo gukoresha ahantu hose ku muntu ukoze ikibi.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 7

- [14] Avuga ko kuba ubusambanyi, ubushoreke no guta urugo bidahungabanya rubanda ahubwo bikorerwa uwashakanye n'undi gusa, nta wundi muntu bigiraho ingaruka, dore ko n'itegeko riteganywa ko bihanwa ari uko umwe mu bashakanye areze mugenzi we, ko iyo nta kibazo byamuteye nta wundi muntu ukwiye kubigiraho ikibazo, bikaba bidakwiye ko bishyirwa mu mategeko mpanabyaha. Atanga urugero rw'urubanza rwaciwe n'Urukiko rw'Ikirenga rwa India³, ko muri urwo rubanza hasobanuwe ko kugira ngo igikorwa cyitwe icyaha kigomba kuba kibangamiye rubanda cyangwa sosiyete, kandi ko kugira ngo hashyirweho ibihano mpanabyaha byanze bikunze icyo gikorwa gihanwa gikwiye kuba hari aho cyangiriza rubanda; ariyo mpamvu asanga ibyaha bigaragara mu ngingo ya 136, 138 n'ya 139 z'Itegeko n° 68/2018 ryavuzwe haruguru, kuba ntaho bihuriye na rubanda, ari impamvu ikomeye ituma iyo myitwarire idakwiye kugengwa n'amategeko ahana ibyaha.
- [15] Me NKUNDABARASHI Moïse avuga ko ibiteganywa mu ngingo ya 136, 138 n'ya 139 z'Itegeko n° 68/2018 ryavuzwe haruguru, byagombye kuba mu mategeko mbonezamubano, kuko ingingo ya 2 agace ka 1 y'iryo tegeko rivuzwe, iteganywa ko icyaha ari igihungabanya umutekano w'abantu, mu gihe ibiteganywa n'izo ngingo uko ari eshatu bishingiye ku masezerano y'abantu 2 hagati yabo kuko umwe muri bo ariwe wemerewe gutanga ikirego, kandi ko ingingo ya 18 y'Itegeko Nshinga ivuga ko ubwisanzure bw'umuryango bugomba kurengerwa, kandi bukaba butarengerwa umwe mu bawugize afunzwe, cyane cyane ko nta bushakashatsi bwakozwe ngo bugaragaze ko ufunguwe kubera kimwe muri ibyo byaha abana neza n'uwaru wamureze, ahubwo ko ikigaragara ari uko amakimbirane yiyongera.

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

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 8

- [16] Akomeza avuga ko kuba ibyo byaha bikomoka ku masezerano yo gushyingirwa, kandi ikirego kikaba kidashobora kwakirwa kidatanzwe n’umwe mu bashakanye, kuko undi wese utari uwo mu bashakanye wavuga ko yabonye umuntu wataye urugo cyangwa yibereye mu nshoreke adashobora gutanga ikirego ngo cyakirwe, ndetse na police ikaba itemerewe, bikaba byumvikanisha ko biba bitakorewe sosiyete, ko bitari mu nyungu rusange.
- [17] Me KABIBI Speciose, Intumwa ya Leta avuga ko ibyo MUGISHA n’abamwunganira bavuga ko ibyo byaha bishingiye ku masezerano bidakwiye kwitwa ibyaha atari byo kuko hari ibikorwa byinshi bifatwa ko ari ibyaha ku isi kandi bishingiye ku masezerano, atanga urugero rw’icyaha cyo kwaka ikitari bwishyurwe, kuko iki cyaha nacyo gishingiye ku masezerano y’ugura n’ugurisha, ubuhemu n’ibindi.
- [18] Avuga ko ibyaha by’ubusambanyi, ubushoreke no guta urugo ari ibikorwa bibi bishobora kugira ingaruka (harmful consequences) kuri rubanda nyamwinshi (public harm), ku gaciro ka muntu, ku ndangagaciro z’igihugu n’abenegihugu bagenderaho; ko ari imyitwarire itandukanye n’imyitwarire myiza, n’imyifatire mbonezabupfura bitesha umuntu agaciro, ariyo mpamvu Leta iba igomba kubyinjiramo mu rwego rwo kubihana no kubikumira.
- [19] KANAKUZE Jeanne d’Arc mu izina ry’Impuzamiryango PRO-FEMMES / TWESE HAMWE, avuga ko ingingo ya 136, iya 138 n’iya 139 z’Itegeko n°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n’ibihano muri rusange, zitakurwaho, kuko byatuma ubusambanyi, ubushoreke no guta urugo bifatwa nkaho byemewe kandi byagira ingaruka zikomeye zisenya umuryango

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 9

nyarwanda ku buryo nta muriyango utekanye wakongera kubaho, kuko uba wavukijwe umudendezo.

[20] Me MUNYANKINDI Monique wunganira PRO-FEMMES / TWESE HAMWE avuga ko ingingo ya 18 y'Itegeko Nshinga iha Leta inshingano yo kurengera umuryango kuko ariwo shingiro kamere ry'imbaga y'Abanyarwanda, ku buryo biri mu nshingano zayo gushyiraho amategeko ahana uwakora ibikorwa bihungabanya umuryango mu buryo ubwo ari bwo bwose, ariyo mpamvu izo ngingo zashyiriweho kubungabunga ubusugire n'ubwisanzure bw'umuryango kuko bimwe mu bikorwa izo ngingo zihana bishobora gukurura amakimbirane mu muriyango bikanaganisha ku isenyuka ryawo ndetse n'impfu za hato na hato.

[21] Denis BIKESHA, Alphonse MUREFU na Yves SEZIRAHIGA, mu izina ry'Ishuri ry'Amategeko rya Kaminuza y'u Rwanda, bavuga ko icyaha nk'uko ingingo ya 2 agace ka 1 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, ari igikorwa kibujijwe n'itegeko cyangwa kwanga gukora igiteganywa n'itegeko, ku buryo bihungabanya umutekano mu bantu (ordre public). Bavuga ko kuba igikorwa kiba kibangamiye umutekano w'abantu ariyo mpamvu Leta ifata iya mbere mu gukurikirana uwabikoze, kuko icyo gikorwa kiba cyahungabanyije inyungu rusange (general interest). Basobanura ko Ubutegetsu Nshingamategeko bugomba kwirinda kurengera mu kugena imyitwarire runaka nk'ihanwa n'amategeko nshinjabyaha mu gihe icyo myitwarire itujuje ibisabwa ngo ibe icyaha; ibyo akaba ari byo byitwa 'overcriminalisation', bishobora kubera umutege abaturage mu gihe bakabayeho barengerwa n'Itegeko.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 10

- [22] Bavuga ko kuba ishyingirwa rishingiye ku bushake bukomoka ku rukundo, bugamije gushinga urugo, mu gihe ubwo bushake cyangwa urukundo bitagihari kugeza aho umwe mu bashakanye afata icyemezo cyo kutubahiriza isezerano yahaye mugenzi we, inkiko nshinyabwaho atarizo zagakwiye gukemura icyo kibazo ahubwo ko cyagakemurwe n'inkiko mbonezamubano kuko ari nazo zahawe inshingano yo kuburanisha cyangwa gukemura ibibazo by'umuryango.
- [23] Bavuga kandi ko guteganya igihano cy'igifungo ku busambanyi, ubushoreke no guta urugo, bituma abagize umuryango batumvikana, ntibite ku nshingano zo kurera abana no kubishyurira amashuri, ku buryo bigera aho uwahemukiwe ahatirwa gutanga imbabazi. Ko rero ibyo bigaragaza ko umuryango utaba urengewe dore ko kugeza ubu nta kigaragaza ko hari uwafunguwe ngo abane neza n'uwo bashyiranywe. Bavuga ko ibyo bitaba bibaye umwihariko w'u Rwanda, kuko mu bihugu byateye imbere nko mu Buhindi, mu Bwongereza, muri Koreya y'Amajyepfo, Afurika y'Epfo, Nigeria na Ghana, ndetse no mu bihugu bya Asia, ubusambanyi bwahoze ari icyaha ubu butakiri cyo ahubwo bufatwa nk'ikosa risanzwe rishobora kuba impamvu y'ubutane n'indishyi z'akababaro.

UKO URUKIKO RUBIBONA

- [24] Ingingo ya 18 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavugururwe mu mwaka wa 2015 iteganya ko: *“Umuryango, ari wo shingiro kamere ry'imbaga y'Abanyarwanda, urengerwa na Leta. Ababyeyi bombi bafite uburenganzira n'inshingano zo kurera abana babo. Leta ishyiraho amategeko*

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 11

n'inzego bikwiye bishinzwe kurengera umuryango, by'umwihariko umwana na nyina, kugira ngo umuryango ugire ubwisanzure."

- [25] Ingingo ya 18 imaze kuvugwa mu gika kibanziriza iki, ikubiyemo ibitekerezo bitatu aribyo kugaragaza umuryango nk'ishingiro ry'umuryango nyarwanda; uburenganzira n'inshingano by'ababyeyi bijyanye no kurera abana, ndetse n'inshingano ya Leta yo kurengera umuryango n'abawugize.
- [26] Ingingo z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zisabirwa kuvanwaho na MUGISHA Richard kuko zaba zinyuranye n'ingingo ya 18 y'Itegeko Nshinga, ni iya 136 iteganya icyaha cy'ubusambanyi, iya 138 iteganya icyaha cy'ubushoreke, n'iya 139 iteganya icyaha cyo guta urugo.
- [27] Ingingo ya 136 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: *Umuntu wese washyingiwe ukorana imibonano mpuzabitsina n'uwo batashyingiranywe, aba akoze icyaha. Iyo abihamijwe n'urukiko ahanishwa igifungo kitari munsi y'amezi atandatu (6) ariko kitarenze umwaka umwe (1). Gukurikirana icyaha cy'ubusambanyi ntibishobora kuba hatareze uwahemukiwe mu bashyingiranywe ku buryo bwemewe n'amategeko. Muri icyo gihe hakurikiranwa uwarezwe n'uwakoranye icyaha na we. Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Icyakora, iyo dosiye yarangiye kuregerwa urukiko cyangwa gufatwaho icyemezo, kwisubiraho ntibihita bihagarika isuzumwa ry'urubanza cyangwa irangiza ryarwo. Umucamanza arabisuzuma akaba yabyemera cyangwa akabyanga akanasobanura impamvu. Iyo umucamanza yemeye ukwisubiraho*

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 12

k'uwahemukiwe, kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no ku wakoranye icyaha n'uregwa”.

[28] Ingingo ya 138 y'Itegeko N°68/2018 ryavuzwe mu gika kibanziriza iki iteganya ko: *“umuntu ubana nk'umugabo n'umugore n'uwo batashyingiranywe umwe muri bo cyangwa bombi bafite uwo bashyingiranywe, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kirenze umwaka umwe (1) ariko kitarenze imyaka ibiri (2)”*. Iya 139 igateganya ko: *“Umwe mu bashyingiranywe uta urugo rwe mu gihe kirenze amezi abiri (2) nta mpamvu zikomeye akihunza ibyo ategetswe, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsi y'amezi atatu (3) ariko kitarenze amezi atandatu (6). Ibihano bivugwa mu gika cya 2 cy'iyi ngingo nibyo bihabwa umugabo utaye umugore we ku bushake, nta mpamvu ikomeye, mu gihe kirenze ukwezi kumwe (1) azi ko atwite. Icyakora, kutabana bitewe n'uko umwe mu bashyingiranywe afashwe nabi ntabwo byitwa guta urugo mu gihe yagiye abimenyesheje ubuyobozi bumwegereye bigakorerwa inyandiko.”*

[29] MUGISHA Richard afata ingingo ziteganya icyaha cy'ubusambanyi, ubushoreke no guta urugo, nk'izinyuranye n'Itegeko Nshinga kuko asanga gukurikirana no guhana ibyo byaha, bisenya umuryango aho kuwubaka kuko umwe mu bawugize aba afunzwe, ko zibangamira ubwisanzure bw'umuryango, ko ibyo byaha bishingiye ku masezerano aba yakozwe n'abantu babiri, bikaba bibangamiye ubwiyunge no kubabarirana hagati y'abashakanye.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 13

a) ***Kuba icyaha cy'ubusambanyi, ubushoreke, guta urugo byaba bishingiye ku masezerano, bikaba bidakwiye kuba ibyaha ahubwo bikaba amakosa mbonezamubano.***

[30] MUGISHA Richard asaba ko ingingo ya 136 iteganya icyaha cy'ubusambanyi, iya 138 iteganya icyaha cy'ubushoreke, n'iya 139 iteganya icyaha cyo guta urugo zavaho kuko asanga zishingiye ku masezerano mbonezamubano ibyo bikorwa bikaba ahubwo bikwiye kugengwa n'amategeko mbonezamubano.

[31] Bitewe n'ikigamijwe, Umushingamategeko ashobora gufata ibikorwa bimwe akagenda ko ari icyaha kandi ko bihanishwa igifungo kabone nubwo byaba bifitanye isano n'amasezerano. Ubusambanyi, ubushoreke no guta urugo biba ibyaha kuko umwe mu babikoze aba afitanye n'undi amasezerano yo gushyingirwa, ariko ibyo ntibyaba impamvu yo kuvuga ko binyuranye n'Itegeko Nshinga kuko ntaho biteganyijwe mu mategeko ko igikorwa gishingiye ku masezerano kitaba icyaha. Icyo izo ngingo zihana ni ubusambanyi, ubushoreke no guta urugo, ntabwo hahanwa igikorwa cyo kwica amasezerano yo gushyingirwa. Ibyo Itegeko Nshinga ritemera mu ngingo yaryo ya 29, 7⁰, ni uko hari uwafungwa bitewe gusa no kutagira ubushobozi bwo kubahiriza inshingano ituruka ku masezerano, kandi siko bimeze ku bikorwa by'ubusambanyi, ubushoreke no guta urugo.

[32] Ibikorwa bitandukanye bifite aho bihurira n'amasezerano itegeko rishobora kugena ko bigize icyaha, rikabigena igihano cy'igifungo. Urugero ni icyaha cy'ubuhemu giteganywa n'ingingo ya 176, icyaha cyo kurigisa ibyafatiriwe bikozwe n'umuntu ushinze kubirinda (ingingo ya 248), kurigisa cyangwa kwangiza ibyatanzweho ingwate (ingingo ya 178) n'ibindi. Kuri ibi bikorwa,

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 14

itegeko rigena ko bikurikiranwa nk'ibyaha. Ibyo kandi ntibibuza abo byangirije kuba bakoresha n'inzira y'imbonezamubano baregera indishyi cyangwa iyubahirizwa ry'amasezerano. Icyangombwa ni uko ibyo byaha byose bifite aho bibangamira inyungu rusange, zikaba zigomba kurengerwa n'itegeko.

[33] Urukiko rusanga kandi amasezerano y'ubushyingiranwe atari amasezerano asanzwe. Ni amasezerano afite umwihariko, akeneye kurindwa na Leta nk'uko biteganywa mu ngingo ya 18 y'Itegeko Nshinga. Niyo mpamvu itegeko rishyiraho uburyo bwemewe bwo gushyingiranwa, Leta ikaba ifite n'uruhare mu mihango ikurikizwa kugira ngo habeho ubushyingiranwe bwemewe n'amategeko. Urukiko rusanga kandi gukurikirana imibanire y'abashyingiranywe bigamije inyungu rusange zigaragara. Uretse gukumira icyahungabanya umutekano n'umudendezo w'abagize umuryango, amategeko ahana ubusambanyi, ubushoreke no guta urugo arengera umutekano n'imibereho myiza y'abana. Nk'uko Itegeko Nshinga ribivuga mu ngingo ya 18, ababyeyi bombi bafite inshingano zo kurera abana babo, iya 19 ikavuga ko umwana wese afite uburenganzira bwo kurengerwa ku buryo bwihariye n'umuryango we, abandi banyarwanda na Leta. Mu gihe rero umwe mu bashyingiranywe ahugiye mu busambanyi, afite ishoreke agomba kwitaho cyangwa agata urugo, byaba bigoye kubahiriza izo nshingano zo kurera abana be uko bikwiye.

[34] Ibivuzwe mu gika kibanziriza iki bijyanye kandi n'ikibazo cyo gusesagura umutungo w'urugo ukaba wakoreshwa mu nyungu zitari iz'umuryango, ujya mu kwinezeza no kunezeza uwo bafatanije mu bikorwa by'ubusambanyi n'ubushoreke ndetse no kubatunga aho bibaye ngombwa. Ibi ntibitanga ubwisanzure, umudendezo n'iterambere ry'umuryango; kandi iyo umuryango

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 15

utamerewe neza, bigira ingaruka ku iterambere ry'Igihugu. Umutungo usesagurwa wakabaye ushorwa mu bikorwa bifitiye umuryango akamaro.

[35] Ku bivugwa na MUGISHA Richard ko ingingo z'Itegeko zihana icyaha cy'ubusambanyi, ubushoreke no guta urugo zitageze ku ntego yatumye zishyirwaho bitewe nuko ubutane bushingiye kuri ibyo bikorwa bugenda bwi Yongera, ko ndetse ingengo y'imari ikoreshe mu gukurikirana ibyo byaha yakoreshe mu bindi bikorwa biteza imbere ubutabera, uru Rukiko rurasanga izi nenge zidafite ishingiro kuko atagaragaza ko ubusambanyi, ubushoreke no guta urugo bidakumirwa uko bikwiye. Nk'uko bisanzwe bizwi muri politiki yo guhana, gukumira icyaha (deterrence) ni imwe mu ntego zo guhana ariko ntabwo ariyo yonyine kuko hari n'izindi ntego nko kubuza kwihorera, no kugorora uwakoze icyaha. Icyakorwa ni ukongera imbaraga mu ngamba zo gukumira ntabwo ari ukuvanaho itegeko.

[36] Ku bijyanye no kuba hari ibihugu binyuranye byakuyeho icyaha cy'ubusambanyi hakaba hari byinshi aho ubushoreke no guta urugo bitigeze biba icyaha, Urukiko rusanga ibyo bitaba impamvu yo gukura ibyo byaha mw'itegeko rihana ibyaha mu Rwanda. Hari nk'igihugu cy'Ubuhande, South Korea, Ghana n'ibindi bidahana ubusambanyi ariko hakaba n'ibindi byinshi bibuhana. Buri gihugu kigira umuco n'indangagaciro byacyo cyimakaza, hakaba n'izindi kitemera. Mu Rwanda ubusambanyi, ubushoreke no guta urugo ntabwo ari imico cyangwa indangagaciro zaruranze kuva kera. Ahubwo n'ababikora babikora rwihishwa kuko bazi ko umuryango nyarwanda utabishyigikiye.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 16

- [37] Habagaho kwahukana kw'umugore agataha iwabo aho avuka kugaragaza ko hari ibitagenda iwe, ko umugabo atamufashe neza bikazarangira umugabo aje kumucyura agatanga inka yo kwemererwa kumucyura. Ntibyafatwaga nko guta urugo ahubwo byabaga uburyo bwo kugarura imibanire myiza mu rugo. Ni nayo mpamvu mu itegeko hari "exception" ku cyaha cyo guta urugo aho ingingo ya 139 agace ka 4 ivuga ngo: *"Icyakora kutabana bitewe n'uko umwe mu bashyingiranywe afashwe nabi ntabwo byitwa guta urugo mu gihe yagiye abimenyesheje ubuyobozi bumwegereye bigakorerwa inyandiko."*
- [38] Indi mpamvu ituma u Rwanda rutakwihutira guhindura itegeko kuri ibi byaha, ni uko nta mahame mpuzamahanga rinyuranije nayo. Mu mwaka wa 2012, Itsinda⁴ ry'Akanama k'Umuryango w'Abibumye gashinzwe iby'Uburenganzira bwa Muntu, ryasabye ibihugu kudafata ubusambanyi nk'icyaha kuko risanga bibangamiye uburenganzira bw'abagore. Mu bisobanuro byatanze n'iryo tsinda risaba ibyo, ni uko amategeko yo mu bihugu byinshi ateganya icyaha cy'ubusambanyi ku bagore gusa, ko nta mugabo ukora icyaha cy'ubusambanyi, ndetse ahandi hahanwa abagore gusa abagabo ntibahanwe cyangwa amategeko agateganya ibihano bitandukanye. Urukiko rurasanga icyo kibazo kitari mu Rwanda kuko umugabo cyangwa umugore, buri wese ashobora gukurikiranwaho icyaha cy'ubusambanyi ndetse n'igihano kuri icyo cyaha, ni kimwe hatitawe ku gitsina cy'ugomba guhanwa, bivuze ko nta vangura riri mu mategeko akoreshwa mu gukurikirana no guhana icyaha cy'ubusambanyi, ubushoreke no guta urugo.

⁴ UN Working Group on Women's Human Rights: Report (18 October, 2012), available at: <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&Lang>

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 17

[39] Impamvu zatanzwe n'Akanama k'Umuryango w'Abibumbye wavuzwe mu gika kibanziriza iki ni zimwe mu mpamvu zashingiweho mu rubanza rwa **Joseph Shine V. Union of India** rwaciwe n'Urukiko rw'Ikirenga rwo mu Buhinde, MUGISHA asaba ko rwaba ikitegererezo, rugashingirwaho havanwaho ingingo ihana ubusambanyi nk'uko byakozwe muri urwo rubanza. Ingingo ya 497 y'Itegeko rihana ibyaha mu gihugu cy'u Buhinde yahanaga icyaha cy'ubusambanyi ku mugabo wahamijwe kuba yaragize imibonano mpuzabitsina n'umugore washyingiwe (married woman). Umugore ntiyashoboraga guhanwa nk'uwakoze icyaha cyangwa nk'umufatanya cyaha. Umugabo wahemukiwe niwe wenyine washoboraga gutanga ikirego, umugore wahemukiwe nta burenganzira yari afite bwo kurega. Urukiko rurasanga koko muri urwo rubanza ingingo ihana icyaha cy'ubusambanyi yaravanyweho, ariko ku mpamvu zitandukanye n'izishingirwaho na MUGISHA. Urukiko rw'Ikirenga rwo muri icyo gihugu rwasanze itareshyeshya abantu imbere y'amategeko, igaragaramo ivangura rishingiye ku gitsina kandi ibangamiye ubwisanzure bwa muntu, bikaba byari binyuranije n'ingingo za 14, 15 na 21 z'Itegeko Nshinga ryo mu Buhinde n'amahame mpuzamahanga ku burenganzira bwa muntu.⁵ Izo mpamvu ntaho zihuriye n'izitangwa na MUGISHA asaba ko Urukiko rwakuraho icyaha cy'ubusambanyi.

[40] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga kuba **icyaha cy'ubusambanyi, ubushoreke, no guta urugo byaba bishingiye ku masezerano, atari impamvu yatuma bidakurikiranwa ngo bihanwe nk'ibyaha.**

⁵ Joseph Shine v Union of India 2018 SCC Online SC1676 delivered on 27 September, 2018

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 18

b) Gusenya umuryango no kubangamira ubwisanzure bwawo mu mwanya wo kuwurengera

[41] Ingingo ya 23 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ivuga ko: *"Ibihano by'iremezo bihabwa abantu ku giti cyabo ni ibi bikurikira: **igifungo** [...]"*. Iyi ngingo igaragaza igifungo nka kimwe mu bihano byemewe mu mategeko y'u Rwanda.

[42] Umwe mu bagize umuryango (umugabo cyangwa umugore) wahamwe n'icyaha cy'ubusambanyi, icyaha cy'ubushoreke cyangwa icyaha cyo guta urugo, ashobora guhanishwa igifungo. Nk'uko MUGISHA abivuga, gufunga umwe mu bagize umuryango bishobora kuwugiraho ingaruka zitandukanye. Urukiko rusanga ariko, uko gufungwa k'umwe mu bagize umuryango wahamwe na kimwe mu byaha byavuzwe haruguru, byafatwa nk'igihano ku cyaha cyakozwe, igifungo kikaba cyemewe nka kimwe mu bihano byemewe mu mategeko y'u Rwanda nk'uko byasobanuwe mu gika kibanziriza iki.

[43] Muri rusange, igihano cy'igifungo kigira ingaruka k'uwagihawe no ku muryango we. Urukiko rusanga ariko, nta mwihariko uhari ku muryango w'uwahamwe n'icyaha cy'ubusambanyi, ubushoreke no guta urugo agahanishwa gufungwa ku buryo byaba impamvu yo kuvanaho ingingo z'itegeko ziteganya ibyo byaha. Ingaruka z'igifungo ku muryango ni zimwe hatitawe ku cyaha cyatumye gitangwa. Ndetse na MUGISHA watanze ikirego, akaba atarigeze agaragaza cyangwa ngo avuge ko ingaruka zituruka ku gifungo gihanishwa uwahamwe n'icyaha cy'ubusambanyi, ubushoreke no guta urugo zitandukanye, n'izaterwa n'uwahamwe n'ibindi byaha nk'ubujura, ubwicanyi, gusambanya abana n'ibindi.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 19

[44] Urukiko rusanga ruramutse rwemeje ko ingingo ziteganya icyaha cy'ubusambanyi, ubushoreke no guta urugo zinyuranye n'Itegeko Nshinga kuko umwe mu bagize umuryango ahanishwa igifungo iyo yahamwe n'ibyo byaha, byaba bivuze ko n'izindi ngingo ziteganya igihano cy'igifungo hatitawe ku cyaha, zavaho kuko nk'uko byavuzwe harugu, igihano cy'igifungo kigira ingaruka zitandukanye ku muryango w'uwahamwe n'icyaha (nko kuba ari we watangaga ibitunga umuryango, igisebo ku bana, igisebo k'uwo bashakanye, n'izindi). Ingaruka z'igihano cy'igifungo ku muryango ntizikwiye gushingirwaho havanwaho ingingo ziteganya icyo gihano, kuko igihano cy'igifungo gitangwa hagamijwe gutanga urugero rutuma abantu batishora mu byaha, kigamije guhana, kugorora no kwigisha. Urukiko kandi rusanga ibihano kuri ibi byaha biri mu rugero, kuko bidakabije mu buremere ugereraniye n'ibyaha bireba (proportionality).

[45] Ikindi kibazo cyavuzweho mw'iburanisha ry'uru rubanza, n'icy'ubwisanzure bw'umuryango mu ngingo ya 18 y'Itegeko Nshinga bishatse kuvuga. MUGISHA n'abamwunganira bavuga ko umuryango utagira ubwisanzure igihe umwe mu bashakanye afunze kubera icyaha cy'ubusambanyi, ubushoreke cyangwa guta urugo. Ubwisanzure ntabwo ari ugukora icyo buri wese ashaka. Ingingo ya 18 ivuga ko *“Leta ishyiraho amategeko n'inzego bikwiye bishinzwe kurengera umuryango, by'umwihariko umwana na nyina, kugira ngo umuryango ugire ubwisanzure.”* Amagambo 'kugira ngo umuryango ugire ubwisanzure' byumvikanisha umudendeko n'umutekano w'abagize umuryango. Mu cyongereza amagambo akoreshwa ni **“to flourish”** bisobanuye kugera ku ntego yiyemeje (**to succeed**), kwiteza imbere (**to prosper, to grow**). Ibi byose ntibishobora kugerwaho n'umuryango uhora mu

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 20

makimbirane no kutabana neza bikunze kuba mu ngo zirimwo ibibazo by'ubusambanyi, ubushoreke cyangwa guta urugo. Ariko no mu kinyarwanda gisanzwe niko bishobora kumvikana. Inkoranyamagambo y'ikinyarwanda ivuga ko 'kwisanzura' ari 'kuba uri ahantu umerewe neza nta mbogamizi'.⁶ Ahari amakimbirane mu rugo, kurwana no gushyamirana bitewe no gucana inyuma cyangwa guta urugo, nta bwisanzure bwaharangwa.

[46] Nk'uko PRO FEMME/TWESE HAMWE ibivuga, ubusambanyi, ubushoreke no guta urugo bitera umwuka mubi mu rugo bishobora kuvamo n'impfu za hato na hato. Hanatanzwe ingero z'impfu zatewe n'ubusambanyi, ubushoreke no guta urugo zirimwo abishe abo bashakanye n'abiyahuye kubera kutihanganira iyo myitwarire inyuranyije n'amategeko, ikaba inanyuranyije n'umuco nyarwanda harimwo kubana mu mahoro mu muryango. Urukiko rusanga guhana ibi byaha atari ugusenya no kubangamira ubwisanzure bw'umuryango ahubwo ari ugukumira icyabuhungabanya.

[47] Ubusambanyi n'ubushoreke bishobora kuvamo kubyara abana hanze y'ubushyingiranwe bigatera amakimbirane hagati y'abashakanye, hagati y'abahemukiwe n'ababahemukiye batari abo bashakanye, ndetse no hagati y'abana bavukiye mu bushyingiranwe n'abavukiye hanze yabwo. Ibi binyuranije na politiki y'Igihugu cy'u Rwanda yo kuboneza urubyaro bikaba bitanahuje n'Itegeko Nshinga mu ngingo yaryo ya 17, igika cya kabiri, iteganya ko ugushyingiranwa k'umugabo umwe n'umugore umwe gukorewe mu butegetsi bwa Leta ari ko kwemewe. Biri mu nyungu rusange ko haba amategeko akumira bene uko kubyara hagati y'abatarashyingiranywe, akanakumira ingaruka zabyo.

⁶ Bizimana Simon na Kayumba Charles, *Inkoranyamagambo Iciriritse*, 2010 p. 410.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 21

[48] Nk'uko bisobanuwe mu bika bibanziriza iki, kuba Itegeko N°68/2018 ryo ku wa 30/08/2018 rifata ubusambanyi, ubushoreke no guta urugo nk'ibyaha ndetse rikanagena igihano cy'igifungo kuri buri cyaha, ntibikwiye gufatwa nkaho ari ugusenya umuryango kuko igihano cy'igifungo giteganyijwe ku byaha bivugwa muri iyi ngingo, ndetse no ku bindi byaha, cyemewe n'amategeko kandi gitangwa hagamijwe guhana no gukumira. Kuba ubusambanyi, ubushoreke no guta urugo byaragizwe ibyaha, ntibigomba gufatwa nk'ibibangamiye ubwisanzure bw'umuryango, kuko nk'uko byasobanuwe, kuba uhamwe n'icyo cyaha ashobora guhanishwa igifungo, bizitira ubwisanzure bwe ariko ku mpamvu zumvikana kandi bigamije gukumira ihungabanya ry'umuryango.

c) Kubangamira ubwiye no kubabarirana hagati y'abashakanye

[49] Indi impamvu itangwa na MUGISHA Richard asaba ko ingingo ya 136 iteganya icyaha cy'ubusambanyi, iya 138 iteganya icyaha cy'ubushoreke, n'iya 139 iteganya icyaha cyo guta urugo zivaho, ni uko asanga zibangamira ubwiye no kubabarirana hagati y'abashakanye.

[50] Ingingo ya 136 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, iteganya ko gukurikirana ibyaha byavuzwe mu gika kibanziriza iki, bidashobora kuba hatareze uwahemukiwe mu bashyingiranywe. Kuba gukurikirana ibi byaha **bigomba** kubanzirizwa n'uko uwahemukiwe atanga ikirego, Urukiko rusanga bitanga umwanya wo kuba abashyingiranywe bakwiyunga, cyangwa se uwakorewe icyaha akababarira uwakimukoreye, icyo gihe ntihabeho ikurikiranacyaha.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 22

- [51] Uretse no kuba ibyo byaha bikurikiranwa ari uko yabanje gutanga ikirego, uwahemukiwe amategako amwemerera gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Ibi bigaragaza ko inzira y'ubwiyunge no kubabarirana yagutse hagati y'uwakorewe icyaha n'uregwa kugikora kuko niba batiyunze cyangwa batababariranye mbere y'ikurikiranacyaha, bemerewe kubikora n'urubanza rwaratangiye. Kuba urubanza rushobora gukomeza kugeza no guhanwa k'umwe mu bashyingiranywe, byerekana ko ubwiyunge no kubabarirana hagati yabo biba byanze biturutse ku zindi mpamvu zitandukanye, ariko urubuga rwo kubikora amategako yararuteganyije.
- [52] Ku bindi byaha byinshi, nta bubasha uwakorewe icyaha agira bwo gutangiza ikurikiranacyaha no guhagarikisha urubanza aho rwaba rugeze hose. Ndetse n'ubwiyunge no kubabarirana hagati y'uwa koze icyaha n'uwa gukorewe, iyo byabayeho ntibihagarika ikurikiranacyaha, urugero gufata ku ngufu cyangwa ihohotera ry'umwana rishingiye ku gitsina. Urukiko rurasanga ahubwo uko itegeko riteganywa gukurikirana icyaha cy'ubusambanyi, icyaha cy'ubushoreke, n'icyo guta urugo bitanyuraniye no kubabarirana mu muryango. Icyakora, Urukiko rusanga hari ibika by'ingingo ya 136, iya 138 n'iya 139 bibangamiye ubwiyunge no kubabarirana hagati y'abashakanye. Urukiko rusanga ku bijyanye n'ikurikirana ry'icyaha cy'ubusambanyi, icy'ubushoreke n'icyo guta urugo, hariho ibice bibiri binyuranye bishobora no kuvuguruzanya.
- [53] Nk'uko biteganywa n'ingingo ya 136 n'iya 140 z'itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganywa ibyaha n'ibihano muri rusange, gukurikirana icyaha cy'ubusambanyi, icy'ubushoreke n'icyo guta urugo ntibishobora kuba hatareze uwahemukiwe mu bashyingiranywe. Izo ngingo ziha ububasha kandi

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 23

uwahemukiwe bwo gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Nubwo izi ngingo zemerera uwahemukiwe guhagarika urubanza aho rwaba rugeze hose, iyo dosiye yarangiye kuregerwa urukiko cyangwa gufatwaho icyemezo, uwahemukiwe ntaba agifite ububasha busesuye bwo guhagarikisha urubanza.

[54] Nk'uko biteganywa n'ingingo ya 136, igika cya kane y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iyo dosiye yarangiye kuregerwa urukiko cyangwa gufatwaho icyemezo, kwisubiraho ntibihita bihagarika isuzumwa ry'urubanza cyangwa irangiza ryarwo. Umucamanza arabisuzuma akaba yabyemera cyangwa akabyanga akanasobanura impamvu. Ibikubiye mu gika cya kane cy'ingingo ya 136, bisa neza n'ibikubiye mu gika cya nyuma cy'ingingo ya 140 irebana n'ikurikirana ry'icyaha cy'ubushoreke n'icyo guta urugo. Muri ibi bika byombi, bigaragara ko umucamanza ashobora kwanga guhagarikisha urubanza bisabwe n'uwahemukiwe.

[55] Igice cya mbere giha uburenganzira busesuye uwahemukiwe mu bashyingiranywe ushaka guhagarikisha ikurikiranacyaha, igice cya kabiri cyimurira ubwo bubasha ku mucamanza ushobora no kubyangira nk'uko itegeko ribimuhera ububasha. Urukiko rurasanga ariko icyo gice cya kabiri kibangamiye uburenganzira bw'uwahemukiwe mu bashakanye ushaka guhagarika ikurikirana ry'urubanza ku mpamvu we yihitiyemo. Bityo, icyo gika cya kane cy'ingingo ya 136, y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, kikaba kigomba kuvaho kuko nta mpamvu yo kubaho kwacyo. Niba uwahemukiwe yarahawe ububasha bwo guhagarika ikurikiranacyaha, yabikora mu bwisanzure ntakimuzitira. Igika cya

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 24

gatanu cy'iyi ngingo nacyo kigaruka ku birebana no kuba Umucamanza yakwemerera uwahemukiwe ko yahagarika ikurikirana ry'urubanza, cyavaho kuko gishingiye ku gika cya kane cyavanyweho. Ibirebana no kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no ku wakoranye icyaha n'uregwa, bikajya ku gika cya gatatu, mu rwego rwo kugira ngo hadasigara icyuho mu itegeko.

[56] Urukiko rw'Ikirenga, rushingiye ku bisobanuro byatanze mu bika bibanziriza, rusanga ingingo ya 136, 138, 139 z'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, zitanyuranye n'ingingo ya 18 y'Itegeko Nshinga. Nk'uko byasobanuwe, zifata ubusambanyi, ubushoreke, no guta urugo nk'ibyaha bihanishwa igifungo, ariko bikaba bitabangamiye ubwisanzure bw'umuryango, nta n'ubwo bigira ingaruka zo kuwusanya. Uburyo kandi ibyo byaha bikurikiranwamo, ntibubangamiye ubwiye no gusabana imbabazi hagati y'abashakanye uretse mu gace ka kane n'aka gatanu tw'ingingo ya 136. Urukiko rusanga izi ngingo zishyira mu bikorwa inshingano ya Leta yo kurengera umuryango.

B. Kumenya niba ingingo ya 154 y'Itegeko riteganya ibyaha n'ibihano muri rusange iteganya icyaha cyo gusebya mu ruhamu imihango y'idini, inyuranyije n'ingingo ya 38 y'Itegeko Nshinga yerekeye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

[57] MUGISHA Richard avugako ingingo ya 154, iteganya ko umuntu wese usebya mu ruhamu imihango y'idini, ibimenyetso byaryo n'ibikoreshe by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 25

cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha. Ko rero ibiteganywa n'iyi ngingo bidasobanutse neza ku buryo ishobora gukoreshwa nabi mu gukurikirana uwakoze ibyo bikorwa kandi ko bibangamira uburenganzira bw'itangazamakuru no kugaragaza ibitekerezo.

[58] Me NKUNDABARASHI Moïse na Me KABASINGA Florida, bunganira MUGISHA Richard, bavuga ko ingingo ya 154 ishobora kubangamira ubwisanzure bw'itangazamakuru, no gutanga ibitekerezo ku madini n'imikorere yayo, abanyamakuru bagatinya kugira icyo bavuga ku madini kugira ngo badakurikiranwa.

[59] Me KABIBI Speciose nk'Intumwa ya Leta, avuga ko kuba bimwe mu biri mu ngingo ya 154 bidasobanutse atari impamvu yatuma itegeko cyangwa iyo ngingo yose ivaho, ahubwo ko ryasobanurwa (interpretation), kandi ko ibyaha bivugwa muri iyo ngingo bitareba abanyamakuru gusa, kuko itegeko rivuga "...umuntu wese...".

[60] Me MUSORE GAKUNZI VALERY uhagarariye ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda) avuga ko ingingo ya 154, yirengagiza uburenganzira bw'abantu ku myemerere y'abantu, ku buryo ibyo iteganywa byatuma abantu badatanga ibitekerezo ku myemerere y'abantu. Avuga ko hari abumva ubwisanzure bwo kugaragaza ibitekerezo bugomba gutezwa imbere kubera ko ari ishingiro rya demokarasi, ariko hakaba n'abandi bumva ko n'ubwisanzure mu myemerere bugomba kurindwa mu buryo bwihariye butavogerwa n'ubwisanzure bwo kugaragaza ibitekerezo.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 26

[61] Akomeza avuga ko gusebya imihango y'idini bireba idini muri rusange n'imyizerere yaryo, ko atari ugusebya umuntu ku giti cye mu cyubahiro cye, bityo, kubera ko uburenganzira n'ubwisanzure ari iby'umuntu atari iby'idini, akaba nta mpamvu yatuma gusebya mu ruhame imihango y'idini biba icyaha mu gihe hubahirijwe ishyirwa mu bikorwa ry'ubwisanzure mu kugaragaza ibitekerezo. Avuga ko gushyiraho amategeko ahana ku munyamakuru watangaje inkuru cyangwa wagaragaje ibitekerezo bye byubaka, byaba ari ukwivanga mu mikorere y'itangazamakuru muri rusange, kandi ibyo binyuranyije n'ingingo ya 38 y'Itegeko Nshinga rya Repubulika y'u Rwanda, ahubwo ko umuntu cyangwa umuryango ufite ubuzima gatozi, wakumva ko itangazamakuru cyangwa umunyamakuru yamuharabitse, yakwiyambaza inzira y'imbonezamubano kugira ngo arenganurwe ahabwa indishyi.

[62] Denis BIKESHA, RUVEBANA na Yves SEZIRAHIGA, mu izina ry'Ishuri ryigisha Amategeko muri Kaminuza y'u Rwanda, bavuga ko ibiteganywa n'ingingo ya 154 bidasobanutse neza, kuko icyo ngingo idasobanura idini icyo aricyo ndetse n'aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa aho ariho, bikumvikanisha ko abantu barengana mu gihe iyi ngingo yaguma uko iri ubu, kuko hagombye gusobanurwa icyo idini aricyo kugira ngo n'imihango yaryo ibe yasobanuka. Ko rero icyo ibigize icyaha bidasobanutse igikorwa gifatwa nk'aho atari icyaha, ihame rya '*legal certainty*' rikubiye mu ihame ry'uko ntawe uhanirwa igikorwa kitari icyaha rikaba rigomba kubahirizwa.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 27

UKO URUKIKO RUBIBONA

- [63] Ingingo ya 38 y'Itegeko Nshinga igira iti: *“ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imyifatire mbonezabupfura, ukurengera urubyiruko n'abana, n'uburenganzira bw'umwenegihugu bwo kugira icyubahiro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko”*.
- [64] Ingingo ya 154 y'Itegeko N°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: *“umuntu wese usebya mu ruhame imihango y'idini, ibimenyetso byaryo n'ibikoresho by'imihango yaryo akoresheje ibikorwa, amagambo, ibimenyetso, inyandiko, amarenga cyangwa ibikangisho abigiriye aho imihango y'idini igenewe gukorerwa cyangwa isanzwe ikorerwa, aba akoze icyaha.Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsi y'iminsi cumi n'itanu (15) ariko kitageze ku mezi atatu (3) n'ihazabu y'amafaranga y'u Rwanda atari munsi y'ibihumbi ijana (100.000 FRW) ariko atarenze ibihumbi magana abiri (200.000 FRW) cyangwa kimwe gusa muri ibyo bihano”*.
- [65] Ingingo ya 38 y'Itegeko Nshinga yavuzwe haruguru ishyiraho ihame ry'uko ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta. Ishyiraho n'irindi hame ry'uko ubwo bwisanzure hari ibyo butagomba kubangamira. Ibigize ihame ry'ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 28

n’ubwo guhabwa amakuru bigaragara mu ngingo ya 19 y’Itangazo Mpuzamahanga ku Burenganzira bwa Muntu ryo 1948 (*Universal Declaration of Human Rights*)⁷, iyo ngingo iteganya ibi bikurikira: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*”. Bivuze ko ubwisanzure bwo kugaragaza ibitekerezo bugizwe no gutanga ibitekerezo ntacyo umuntu yikanga, n’uburenganzira bwo gushaka, kubona no gukwirakwiza amakuru n’ibitekerezo aho ariho hose. Ibi bihura kandi n’ibivugwa n’ingingo ya 19 y’Amasezerano Mpuzamahanga ku Burenganzira mu by’Imbonezamubano na Politiki⁸. Bitewe n’uko ubwisanzure bw’itangazamakuru, ubwo kugaragaza ibitekerezo n’ubwo guhabwa amakuru bwemewe n’Itegeko Nshinga, icyo aricyo cyose harimo n’itegeko cyangwa ingingo yaryo, cyabubangamira kiba kinyuranyije naryo.

[66] Mu gukoresha uburenganzira buvuzwe mu gika kibanziriza iki, umuntu ashobora gutanga ibitekerezo ku mihango y’idini, ibimenyetso, n’ibikoresho by’imihango yaryo. Ndetse umuntu akaba anafite uburenganzira bwo gushaka, kubona no gukwirakwiza amakuru n’ibitekerezo mu ruhame birebana n’imihango y’idini, ibimenyetso, n’ibikoresho by’imihango y’idini akaba yanabinenga mu buryo bushobora kudashimisha ababishinzwe, ntacyo yikanga, apfa kudakora ibibujijwe n’ingingo ya 38 y’Itegeko Nshinga yavuzwe haruguru.

⁷ U Rwanda rwayashyizeho umukono kandi ruyemeza ku wa 18/09/1962

⁸ International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. U Rwanda ruyemeza ku wa 12/02/1975 (reba Itegeko Teka No 8/75 ryo ku wa 12/02/1975, Igazeti ya Leta n° 5 of 01/03/1975

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 29

[67] Itegeko N°68/2018 ryo ku wa 30/08/2018 mu ngingo yaryo ya 154, rihana igikorwa cyo gusebya mu ruhame imihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo. Rinavuga ko gusebanya bishobora kuba byabaye mu bikorwa, mu magambo, ryakoresheje ibimenyetso, inyandiko n'amarenga. Urukiko rukurikije ibyanditswe mu ngingo ya 154, rusanga bibangamira uburenganzira bwo gushaka, kubona no gukwirakwiza amakuru, kugaragaza no gutanga ibitekerezo mu ruhame birebana n'imihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo kuko uwashaka kubikora, yakwikanga ko yakurikiranwaho icyaha cyo gusebya giteganywa n'ingingo ya 154, kandi nk'uko byibukijwe hejuru ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe n'Itegeko Nshinga, ntibugomba kubangamirwa n'icyo aricyo cyose.

[68] Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ku birebana n'imihango y'idini, ibimenyetso, n'ibikoresho by'imihango yaryo, ntibugomba kuzitirwa no gukurikirana ushatse kugira icyo avuga ku idini. Ibi kandi ni nabyo byasabwe n'Akanama k'Uburenganzira bwa Muntu mu Muryango w'Abibumbye, (**UN Human Rights Committee**) muri 2011, kasobanuye ibirebana n'ubwisanzure bwo kugaragaza ibitekerezo, kageze ku birebana n'amadini, kavuga ko bidakwiye kubuza cyangwa guhana abanenga abayobozi b'amadini cyangwa abanenga imyizerere y'idini.

[69] Ako kanama kabivuze muri aya magambo: *“Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as*

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 30

such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another or religious believers over non-believers. **Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith⁹.**

[70] Mu rwego rwo gusigasira uburenganzira bw'itangazamakuru n'ubwo guhabwa makuru, mu mwaka wa 2007 Inteko Ishinga Amategeko y'Umuryango w'Ibihugu by'Iburayi (***Parliamentary Assembly of the Council of Europe***) yatoye umwanzuro usaba ko guhana uwagize icyo avuga, uwanenze ku buryo bifatwa nko gutuka ibishingiye ku myizerere y'abantu (***blasphemy***) byavanwa mu mategeko ahana y'ibihugu bigize uwo muryango. Uwo mwanzuro ugira uti: *"The Assembly recommends that the Committee of Ministers ensure that national law and practice are reviewed in order to decriminalise blasphemy as an insult to a religion [...]"*¹⁰.

[71] Ibihugu byinshi byo muri uwo Muryango¹¹ bimaze kuvana mu mategeko ahana yabyo, ingingo ihana gutuka cyangwa kunenga ibishingiye ku myizerere n'idini. Uretse ibihugu byo kuri uwo mugabane, n'ibyo mu yindi migabane nabyo byagiye bivanaho bene izo ngingo. Nko muri Amerika ya ruguru, Canada yavanyeho iyo ngingo ku mugaragaro mu kwa 12 kwa 2018, naho muri Leta Zunze Ubumwe z'Amerika gutuka no kunenga ibishingiye ku myizerere n'idini ntibyigeze bifatwa nk'icyaha gihanwa n'amategeko muri icyo gihugu. Urukiko

⁹UN Human Rights Committee, General Comment 34 on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression. Paragraph 48. July 2011.

¹⁰ Recommendation 1805 (2007) of the Parliamentary Assembly of the Council of Europe

¹¹ Sweden muri 1970, Norway muri 2015, Netherlands muri 2014, Iceland muri 2015, Malta muri 2016, n'ibindi.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 31

rurasanga kvanaho ingingo zihana gusebya no kunenga ibirebana n'idini mu bihugu bitandukanye byanashoboka mu Rwanda narwo rukavana ingingo nk'iyo mu itegeko rihana, mu rwego rwo kurengera uburenganzira ku mitekerereze, ubw'itangazamakuru no guhabwa amakuru. Guhana igikorwa gisebya cyangwa kinenga ibirebana n'idini byiganje cyane cyane mu bihugu bifite Leta ishingiyeye ku idini (***State religion***) kandi Leta y'u Rwanda ntishingiyeye ku idini nk'uko biteganywa n'ingingo ya 4 y'Itegeko Nshinga rya Repubulika y'u Rwanda¹².

[72] Leta ntiyari ikwiye kuba ishyiraho amategeko ahana abashebeje imyizerere y'idini kuko muri rusange nta nyungu bifitiye rubanda uretse gusa kuri ayo madini. Ubifiteho ikibazo yabikurikirana mu rubanza mbonezamubano. Nk'uko byemejwe mu rubanza ***Joseph Burstyn, Inc. v. Wilson***, rwaciwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, Leta ntifite inshingano zo kurinda ibyabangamira imyemerere y'amadini binyuze mu byatangajwe ku mugaragaro, mu mvugo cyangwa mu mashusho. Rwabisobanuye muri aya magambo: ***"It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches or motion pictures"***¹³.

[73] Urukiko rw'Ikirenga ruherereye ku bisobanuro bitanzwe mu bika bibanziriza iki, rusanga ingingo ya 154 y'Itegeko riteganyaye ibyaha n'ibihano muri rusange ifata gusebya mu ruhamwe imihango y'idini, inyuranyije n'ingingo ya 38 y'Itegeko Nshinga kuko ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

¹² Iyo ngingo ivuga ko: "Leta y'u Rwanda ni Repubulika yigenga, ifite ubusugire, ishingiyeye kuri demokarasi, igamije guteza imbere Abanyarwanda **kandi ntishingiyeye ku idini** [...]".

¹³ U.S. Supreme Court, **Joseph Burstyn, Inc. v. Wilson**, 343 U.S. 495 (1952)

[74] MUGISHA Richard avuga ko ingingo ya 233 inyuranyije n’itegeko Nshinga mu ngingo zaryo za 15 na 38 kuko ivangura harebwe abo irengera kandi ko ibangamiye ubwisanzure bwo gutangaza amakuru, kuyatara no gutanga ibitekerezo. Avuga kandi ko adashyigikiye gusebanya cyangwa gukoza isoni umuntu uwo ariwe wese, ahubwo ko icyo yifuza ari uko byavanwa mu mategeko nshinjabyaha kuko hari izindi nzira zo kurenganura uwasebejwe cyangwa uwatutswe ziri mu mategeko arengera abanyamakuru, aho uwarenganyijwe ashobora kuregera inkiko z’imbenezamubano asaba indishyi.

[75] Me NKUNDABARASHI Moïse na Me KABASINGA Florida, bunganira MUGISHA Richard, bavuga ko hari amasezerano atandukanye u Rwanda rwasinye avuga ko umuntu wese afite uburenganzira bwo gutanga ibitekerezo uko bimeze kose mu gihe atabangamiye isura nziza y’abandi. Bavuga ko hari ibyazitira uburenganzira bwo gutanga ibitekerezo no gutara amakuru, ariko ko ingingo ya 233 ntaho ihurira n’ibyo byo kuzitira uburenganzira biteganyijwe mu masezerano mpuzamahanga kuko ubona muri rusange ibuzabaturage ndetse n’itangazamakuru gutanga ibitekerezo binenga abayobozi bavugwa muri icyo ngingo.

[76] Me KABIBI Speciose, Intumwa ya Leta, avuga ko ibiteganywa n’ingingo ya 233 bitabangamiye ubwisanzure n’uburenganzira bw’abanyamakuru kuko ubwisanzure bwabo budakwiye kubangamira undi munyarwanda. Avuga ko

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 33

ingingo ya 15 y'Itegeko Nshinga ivuga ibintu 2 ari byo kureshya imbere y'amategeko (***equality before the law***) no kurengerwa n'amategeko mu buryo bungana (***equal protection of the law***), bivuze ko abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe, ariyo mpamvu hari abarengerwa kubera ko bari mu mirimo runaka cyangwa inzego runaka, ko rero ibyo bitavuze ko batarengerwa kimwe n'abandi, cyane cyane ko ikirengerwa ari umurimo cyangwa urwego atari umuntu, kuko iyo avuye kuri uwo murimo, uwugiyeho arengerwa nk'uwari uwuriho.

[77] Asobanura ko kuba abantu bafatwa mu buryo ubu n'ubu kubera ibyiciro barimo bitavuga ko bibangamiye ihame ry'uko abantu bareshya imbere y'amategeko, ahubwo ko ikibazo cyaba ari uko hari abari mu cyiciro kimwe batarengerwa kimwe cyangwa ntibafatwe kimwe kandi mu buryo bumwe. Ko rero kuba hari ibyiciro by'abantu cyangwa abakozi bitandukanye hagomba kuba n'amategeko agenga ibyo byiciro mu buryo bwihariye agenga imiterere n'imigendekere ya buri cyiciro.

[78] Me MUSORE GAKUNZI VALERY uhagarariye ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda) avuga ko mu mategeko agenga itangazamakuru harimo ingingo ziteganya uburyo uburenganzira bukoreshwa, uburyo abanyamakuru bagenzurwa hagendewe kugira ngo icyubahiro cy'umuntu kitangizwa, ndetse n'umunyamakuru wabirenzeho akaba yashyikirizwa inkiko mbonezamubano.

[79] Asobanura ko ingingo ya 233 ibuza ubwisanzure bw'Itangazamakuru n'ubwo gutanga ibitekerezo kubera ko ituma umunyamakuru wakwandika inkuru ku miyoborere itari myiza ku muyobozi cyangwa undi wese ushinzwe umurimo

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 34

rusange byakwitwa icyaha. Avuga ko umuntu ufite umurimo rusange atareka kwandikwaho niba ntacyo yikeka, kandi ko Itangazamakuru mu rwego rwo kurwanya ikorehwa nabi ry'umutungo wa Leta nta kundi byakorwa hatabayeho kuvuga amakuru aba yabonetse mu buryo amategako yemera n'ubwo byaba bibangamiye inyungu bwite z'abanditsweho. Avuga ko ingingo ya 233 ituma abantu baba bakekwaho imyitwarire mibi idakwiye kuranga abakozi ba Leta cyangwa abashinzwe umurimo rusange, batagira icyo bavugwaho cyangwa bandikwaho.

[80] Asobanura ko ingingo ya 233 igaruka ku kintu gikomeye cyane cy'ibishushanyo, kuko gushushanya umuntu ubwabyo atari ikibazo kandi ko bikorwa mu nyungu rusange, ku buryo uwakumva yasebejwe yabiregera mu nkiko mbonezamubano asaba indishyi z'akababaro, kuko gufunga umuntu ngo yasebeje undi icyubahiro cye aba atagisubijwe, ahubwo ko yagisubizwa aregeye indishyi ku makosa yakorewe (action civile).

[81] Denis BIKESHA, RUVEBANA na Yves SEZIRAHIGA, bavuga ko ingingo ya 233 idasobanura itandukaniro hagati y'igihe umwe mu bavugwa muri iyo ngingo akora umurimo rusange n'igihe biturutse kuri uwo murimo, ko kandi idasobanura niba abarindwa muri iyo ngingo ari abakozi ba Leta bose aho bava bakagera, ndetse ko itanasobanura icyo gukoza isoni bisobanuye, ariyo mpamvu bavuga ko iyi ngingo inyuranya n'ihame ry'uko amategako ahana agomba kuba asobanutse (principle of legal certainty).

[82] Bavuga ko iyi ngingo iteje urujijo kuko mu bantu irengera harimo "umuntu wese ushinze umurimo rusange w'Igihugu", kandi kumenya uyu muntu uwo ariwe bigoye kuko abakozi bose ba Leta badashinzwe umurimo rusange dore ko no

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 35

mu bikorera harimo abakora imirimo ifitiye abaturage akamaro. Bavuga kandi ko itegeko rivuga igihe umuntu ari mu kazi, hakibazwa mu gihe yaba ari mu nzira agiye gukorera kure ariko ataragera ku kazi umuntu akamukoza isoni byaba byo bitari mu byo itegeko rihana, hakibazwa kandi n'ukuntu umuntu yakozwa isoni n'umurimo ashinzwe. Ndetse ko n'igikorwa cyo gukoza isoni ubwacyo kigoye gusobanura kuko gishingiye ahanini ku buryo uwagikorewe agifata-niba kimukoza isoni cyangwa kitazimukoza (subjectively determined). Bityo kuba iyi ngingo idasobanutse kandi ihame ari uko amategeko ahana agomba kuba asobanutse, ikaba ifatwa nk'aho itariho mu mategeko ahana, cyane cyane ko ibangamiye ihame ryo kwishyira no kwizana mu gutanga ibitekerezo (*freedom of expression*).

[83] Bakomeza bavuga ko ibiteganyijwe muri iyi ngingo bigaragaza ko igamije kurengera igice kimwe cy'abantu bakora mu nzego za Leta, ibyo bikaba binyuranye n'ihame ry'uko abantu bose bangana imbere y'amategeko kandi itegeko rigomba kubarengera kimwe. Basobanura ko iyo bayisesenguye basanga irengera igice kimwe cy'abantu, abakozi ba Leta bari mu mirimo yabo, ariko abandi bari mu mirimo yabo bwite, nk'abayobozi bibigo byigenga, ntibarengere. Bavuga ko kuba ivuga gusa abayobozi, abashinzwe umutekano cyangwa undi wese ushinze umurimo rusange w'Igihugu, bivuze ko undi wese utari muri abo (abakozi bikorera), igikorwa gikoza isoni kimukorewe atari icyaha, ariyo mpamvu bavuga ko inyuranyije n'ihame ry'uko abantu bareshya imbere y'amategeko kandi barengerwa ku buryo bumwe, bikumvikanisha ko hari ukuvangura abantu hashingiwe ku cyo bakora.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 36

UKO URUKIKO RUBIBONA

a) Kuba ingingo ya 233 yaba itarengera abantu mu buryo bumwe

[84] Ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko:
“Abantu bose barareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe”.

[85] Ingingo ya 233 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: *“Umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, umwe mu bagize Inteko Ishinga Amategeko mu gihe akora umurimo yatorewe cyangwa biturutse kuri uwo murimo, umwe mu bagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinzwe umurimo rusange w'igihugu mu gihe akora umurimo ashinzwe cyangwa ari wo biturutseho, aba akoze icyaha [...]*”.

[86] MUGISHA Richard asaba ko ingingo ya 233 yavaho kuko asanga idafata abantu ku buryo bumwe, kandi ko irengera abantu bamwe babarizwa mu mirimo ya Leta, bityo ko inyuranye n'Itegeko Nshinga mu ngingo yaryo ya 15. Asanga kandi ingingo ya 233 inyuranye n'ingingo 38 y'Itegeko Nshinga kuko yaba ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

[87] Umutwe w'ingingo ya 233 wanditse mu buryo bukurikira: ***“Gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange w'igihugu”***. Nk'uko byanditse muri uyu mutwe, iyi ngingo igamije guhana abakoza isoni abari mu cyiciro cy'abayobozi b'igihugu n'abashinzwe umurimo rusange w'igihugu, ikaba ntacyo ivuga ku gukoza isoni abatari muri ibyo byiciro. Bivuze ko undi

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 37

muntu utari muri iki cyiciro, aramutse akojejwe isoni, adashobora kurengerwa binyuze mu nzira y'amategeko mpanabyaha kuko gukoza isoni biba icyaha mu mategeko y'u Rwanda, bishingiye gusa ku kuba uwakorewe icyaha ari mu cyiciro cy'abayobozi b'igihugu n'abashinzwe umurimo rusange w'igihugu.

[88] Ingingo ya 233 igaragara nk'ishingiye ku cyiciro cy'abantu bitewe n'umurimo bakora. Urukiko rurasanga ariko nta mpamvu yo gushyiraho ingingo nk'iyi yatuma igikorwa kimwe kiba icyaha ku bantu bamwe bitewe n'uko cyakorewe abari mu mirimo iyi n'iyi, nyamara ntikibe icyaha ku bandi. Iryo tandukaniro ntabwo ari ngombwa, cyane ko nubwo umuntu yaba abarizwa mu bakozi bavugwa mu ngingo ya 233, hari n'abandi iyo ngingo itavuga baba abikorera, abakorera ibigo n'imiryango bidashamikiye kuri Leta, nabo bashobora gukozwa isoni bikangiza icyubahiro cyabo bitewe n'imyanya barimo, ariko ababikoze ntibakurikiranwe bitewe n'imiterere y'itegeko.

[89] Gutandukanya abantu ubwabyo ntabwo ari ivangura cyangwa kutareshyeshya abantu imbere y'amategeko. Bishobora gukorwa iyo hari impamvu igaragara irengera abari mu cyiciro cy'abanyanteye nke. Niyo impamvu akenshi amategeko arengera mu buryo bwihariye abagore n'abana.¹⁴ Impamvu yabyo igomba kuba igaragarira buri wese (objective justification or legitimate objective) kandi bikaba biri mu rugero urebye uburyo bwakoreshejwe kugera ku ntego cyangwa ikigamijwe.

[90] Intumwa ya Leta ivuga ko icyo ingingo ya 15 y'Itegeko Nshinga ishatse kuvuga ari uko abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe ko ariko iyo

¹⁴ Urugero n'itegeko no. 54/2011 ryo kuwa 14/12/2011 ryerekeye uburenganzira bw'umwana n'uburyo bwo kumurinda no kumurengera. N'ingingo ya 10 agace ka 4 y'Itegeko Nshinga iteganya ko "abagore bagira nibura mirongo itatu ku ijana (30%) by'inyanya mu nzego zifatirwamo ibyemezo".

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 38

batari mu bihe bimwe hari impamvu badafatwa kimwe. Ibyo nibyo, nyamara ku bijyanye n'uru rubanza ntihagaragajwe impamvu ifatika kandi ya ngombwa ituma ibyiciro by'imirimo ya Leta bivugwa bikwiye kurengerwa mu buryo bwihariye. Icyo Me KABIBI Speçiose avuga n'uko ngo abayobozi n'abandi bavugwa mu ngingo ya 233 bafite umwihariko nka 'vulnerable group' ariko akaba atashoboye gusobanura neza uburyo bari 'vulnerable'.

- [91] Ikindi kigaragara, nk'uko byavuzwe n'Inshuti y'Urukiko, Kaminuza y'u Rwanda Ishami ry'Amategeko, n'uko ingingo ya 233 idasobanura neza urebwa nayo; niba ari abakorera Leta bose cyangwa ari abakozi bo mu nzego zo hejuru gusa. Ingingo ivuga umwe mu bagize Inteko Ishinga Amategeko, umwe mu bagize Guverinoma, abashinzwe umutekano ikongeraho "undi wese ushinze umurimo rusange w'Igihugu". Ibi bikaba bisa n'aho bishatse kuvuga abakora imirimo ya Leta bose, akaba ari nta mwihariko watuma barengerwa kuruta abandi bantu badakorera Leta. Ntibinasobanutse icyo gukoza isoni umuntu mu kazi ke cyangwa bishingiye ku kazi akora bishatse kuvuga. Ibi byatera urujijo abantu ntibamenye neza igihe bashobora kugwa muri icyo cyaha. Bene ayo mategeko anyuranije n'ihame ry'uko amategeko ahana agomba kuba asobanutse, n'ibikorwa bigize icyaha bikaba bisobanutse (principle of legal certainty). Ibi bisobanurwa neza n'umuhanga mu by'amategeko Tridimas aho avuga ati: *"the principle of legal certainty and legitimate expectation provides an important assertion of the rule of law that those subject to the law must know what the law is so as to plan their action accordingly."*¹⁵

- [92] Urukiko rushingiye ku bisobanuro bitanzwe mu bika bibanziriza iki, rusanga ingingo ya 233 y'itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha

¹⁵ T. Tridimas, The General principles of EC Law (OUP, 2nd edn, 2006)

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 39

n'ibihano muri rusange inyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 15 iteganya ko abantu bose bareshya imbere y'amategeko, ko itegeko ribarengera ku buryo bumwe, kuko iyo ngingo ya 233 ifata abantu mu buryo butandukanye kandi ikaba itabarengera ku buryo bumwe nk'uko byasobanuwe hejuru.

b) Kuba ingingo ya 233 yaba ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru

[93] Nk'uko biteganywa n'ingingo ya 38 y'Itegeko Nshinga, ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buremewe kandi bwubahirizwa na Leta. Ku rundi ruhande, ingingo ya 233 y'itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, iteganya ko umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, abayobozi b'igihugu n'abashinzwe umurimo rusange w'igihugu bavugwa muri iyo ngingo aba akoze icyaha.

[94] Ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira bwa Muntu (*Universal Declaration of Human Rights*)¹⁶, isobanura ibigize uburenganzira ku gutanga ibitekerezo n'uburenganzira ku makuru. Ibivuga muri aya magambo: “everyone has the right to freedom of opinion and expression; **this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers**”.

¹⁶ U Rwanda rwashyize umukono kuri ayo masezerano ku wa 18/09/1963

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 40

[95] Ibirebana n'ubwo burenganzira biteganywa kandi n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki¹⁷. Iyo ngingo ibivuga mu buryo bukurikira:

- *Everyone shall have the right to hold opinions without interference.*
- *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - a) *For respect of the rights or reputations of others;*
 - b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

[96] Nkuko biri mu ngingo za 19 z'Amasezerano yavuzwe mu bika bibiri bibanziriza iki, umuntu wese afite uburenganzira bwo kugaragaza ibitekerezo ntacyo yikanga. Ubwisanzure bwo kugaragaza ibitekerezo bugizwe no gushaka no guhabwa amakuru, kugaragaza ibitekerezo byose nta nkomyi binyuze mu bitangazamakuru bikoresha amajwi, ibyandika n'ibikoresha ubundi buryo bwose. Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki, yo yongeraho ko ubwo burenganzira buzitirwa no kubahiriza uburenganzira bw'abandi, n'umutekano w'igihugu n'ituze rya rubanda.

¹⁷ International Covenant on Civil and Political Rights, (ICCPR), entry into force on 23/03/1976. U Rwanda ruyemeza ku wa 12/02/1975 (reba Itegeko Teko No 8/75 ryo ku wa 12/02/1975, Igazeti ya Leta n° 5 of 01/03/1975

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 41

- [97] Urukiko rusanga, ingingo ihana gukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, ibangamiye ubwo bwisanzure kuko hari uwatinya ko aramutse agaragaje ibitekerezo uko abyumva cyangwa agatangaza amakuru ku bikorwa n'abagize Inteko Ishinga Amategeko, abagize Guverinoma, abashinzwe umutekano cyangwa undi wese ushinze umurimo rusange w'Igihugu, yakurikiranwaho icyaha cyo gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu baramutse batishimiye ibyo bitekerezo cyangwa amakuru. Ubwisanzure bwo kugaragaza ibitekerezo, ubwo gutangaza no guhabwa amakuru ku bikorwa n'abayobozi b'igihugu n'abashinzwe umurimo rusange w'Igihugu bavugwa mu ngingo ya 233, ntibukwiye kubangamirwa no kwikanga ko ibyo umuntu yabavugaho cyangwa yabatangazaho byafatwa nko kubakoza isoni.
- [98] Ubwisanzure mu kugaragaza ibitekerezo no gutangaza amakuru ku bikorwa n'abayobozi, bushimangira ihame rya demokarasi ryo gukorera mu mucyo no kubazwa inshingano ku byo abayobozi bakorera abaturage. Ibi biri mu byavuzwe n'Akanama k'Umuryango w'Abibumbye gashinzwe uburenganzira bwa Muntu. Ako kanama kabivuze muri aya magambo: ***“freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights¹⁸”***.
- [99] Ingingo ya 4 y'Itegeko Nshinga iteganya ko Leta y'u Rwanda ari Repubulika yigenga, ifite ubusugire, **ishingiye kuri demokarasi** igamije guteza imbere Abanyarwanda kandi ntishingiye ku idini. Iyo ngingo ikomeza ivuga ko ihame

¹⁸ United Nations (“UN”) Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (12 September 2011) (“General Comment No. 34”), par. 3.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 42

shingiro rya Repubulika y'u Rwanda ari: «Ubutegetsu bw'Abanyarwanda, butangwa n'Abanyarwanda kandi bukorera Abanyarwanda ». Ubwisanzure bwo kugaragaza ibitekerezo ni rimwe mu mahame ya Leta igendera kuri demokarasi. Ubwisanzure bwo kugaragaza ibitekerezo ntibugomba kugira abo bugarukiraho. Ibi bihura kandi n'ibyavuzwe n'Urukiko rushinzwe Uburenganzira bwa Muntu mu muryango w'Ibihugu by'Uburayi (**European Court of Human Rights**) mu rubanza Handyside v. United Kingdom muri aya magambo: *"Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"¹⁹".* Ibi bivuze ko amakuru cyangwa ibitekerezo bitagomba kuba ari ibishimisha ubuyobozi cyangwa bidafite abo bibangamiye; ahubwo ibitanogeye ubutegetsu na bamwe mu baturage bikwiye kwemerwa. Iyo ibitekerezo by'ingeri nyinshi, ubworoherane no gutekereza byagutse bidahari, demokarasi iba idashoboka. Niyo mpamvu ingingo ihana gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange w'igihugu, igomba gufatwa ko ibangamiye iryo hame ry'ubwisanzure bwo gutanga ibitekerezo mu gihugu kiyemeje kugendera kuri demokarasi.

[100] Ubwisanzure mu kugaragaza ibitekerezo, gutara no gutangaza amakuru, bugomba gukoreshwa nta bikangisho, nta gutoteza. Akanama gashinzwe uburenganzira bwa Muntu (**United Nations Human Rights Committee**) [UNHRC]

¹⁹ European Court of Human Rights, Handyside v. United Kingdom, Judgment of 7 Dec. 1976, Series A no. 24

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 43

kemeje ko gutesha umutwe, gukanga, gufunga, gucira urubanza no gufunga umuntu azira ibitekerezo afite, binyuranyije n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki yavuzwe haruguru. Kabivuze muri aya magambo: *"The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19²⁰".* Urukiko rusanga kuba ingingo ya 233 iteganya igihano cy'igifungo k'uwakoza isoni abayobozi b'igihugu, abashinzwe umutekano n'abashinzwe umurimo rusange w'igihugu bavugwa muri iyo ngingo, byatuma abantu badatanga ibitekerezo mu bwisanzure kandi bibangamira uburenganzira bwo gusesengura no gutangaza amakuru ku bikorwa n'abo bayobozi.

[101] Urukiko ruherereye ku bisobanuro bitanzwe mu bika bibanziriza iki, rurasanga ingingo ya 233 y'itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, iteganya ko umuntu wese ukoza isoni mu magambo, mu bimenyetso cyangwa ibikangisho, inyandiko cyangwa ibishushanyo, abayobozi b'igihugu n'abashinzwe umurimo rusange w'igihugu bavugwa muri iyo ngingo, inyuranyije n'ingingo ya 38 y'Itegeko Nshinga iteganya ko ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru bwemewe kandi bwubahirizwa na Leta. Kuko nk'uko byasobanuwe, ingingo ya 233 ituma abantu badakoresha ubwo bwisanzure kuko baba batinya ko mu gihe hari icyo bavuga cyangwa batangaza ku bantu bavugwa mu ngingo ya 233, bakurikiranwaho icyaha cyo gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange.

²⁰ Communication No. 414/1990, Mika Miha v. Equatorial Guinea, Views adopted on 8 July 1994

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 44

D. Kumenya niba ingingo ya 236 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranyije n'ingingo ya 15 n'iya 38 z'Itegeko Nshinga rya Repubulika y'u Rwanda.

[102] MUGISHA Richard avuga ko ingingo ya 236 igateganya ko umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha, mu gihe icyo cyaha gishobora kuba urwitwazo mu kubangamira ubwisanzure bw'abanyamakuru, cyane cyane ko icyaha cyo gusebanya kidasobanutse neza. Anavuga ko ingingo ya 236 inyuranye n'ingingo ya 15 y'Itegeko Nshinga kuko itarengera abantu mu buryo bumwe kuko ihana abatuka cyangwa bagasebya umuntu umwe gusa.

[103] Me KABIBI Speçiose nk'Intumwa ya Leta, avuga ko ingingo ya 236 idateganya ibyaha byakorwa n'abanyamakuru ahubwo ko ivuga ibyaha bishobora gukorwa n'umuntu uwariwe wese, ko muri icyo ngingo ntaho bavugaga ko bireba umunyamakuru. Avugaga ko ubwisanzure bw'umunyamakuru bugomba kugarukira aho icyubahiriro cy'umuyobozi gitangirira, n'umutekano we, kandi ko ingingo ya 236 itabwira kwandikira kuri Perezida wa Repubulika ahubwo ibwira kumusebya cyangwa kumutuka.

[104] Me MUSORE GAKUNZI VALERY uhagarariye ARJ (Ihuriro ry'Abanyamakuru n'abandi bakora mu itangazamakuru mu Rwanda) avugaga ko nabo bemera ko Perezida wa Repubulika kubera inshingano agira agomba kugira imyitwarire irenze abantu bose, ariko ko icyamwandikwaho kitagombye kuba icyaha mu rwego rwo kubahiriza ihame rya 'accountability'. Ko rero kuba icyaha cyo gusebanya cyaravuye mu mategeko ahana, kitagombye kugaruka kuri Perezida wa Repubulika gusa, kuko ingingo ya 161 ihana umuntu wese utuka

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 45

undi, ko rero kuvuga ko umunyamakuru yanditse kuri Perezida wa Repubulika amusebya, byaba ari nko kuvuga ko ntawemerewe kumwandikaho.

[105] Denis BIKESHA, RUVEBANA na Yves SEZIRAHIGA, bavuga ko ingingo ya 236 irebana n'icyaha cyo gutuka cyangwa gusebya Perezida wa Repubulika, iyo ibiyivugwamo bihujwe n'ibiteganywa n'ingingo ya 161 ihana icyaha cyo gutukana, usanga icyaha cyo gutukana gihanwa iyo gikozwe mu ruhame, mu gihe ku birebana n'ingingo ya 236 yumvikanisha ko aho icyo cyaha cyakorerwa hose, bivuze ko niyo abantu 2 baba biherereye, umwe atukana n'undi, yamubeshyera ko yakoze icyo cyaha akagikurikiranwaho.

[106] Basobanura ko ingingo ya 236 irebana n'icyaha cyo gusebya Perezida wa Repubulika kandi icyaha cyo gusebya cyaravanywe mu mategeko ahana ku bandi bantu, ariyo mpamvu basanga impamvu zatumye icyo cyaha gikurwaho ku bantu bose, zakoresheye no kuri Perezida wa Repubulika kugira ngo hubahirizwe ihame ryo kwishyira no kwizana mu gutanga ibitekerezo harimo n'ubwisanzure bw'itangazamakuru, cyane cyane ko icyo cyaha cyavanywemo kubera ko gusebya bitari bisobanutse neza. Ko rero ibiteganywa n'ingingo ya 236 binyuranye n'ihame riteganywa n'ingingo ya 15 y'itegeko Nshinga iteganya ko abantu bagomba kurengerwa n'itegeko ku buryo bumwe.

Uko Urukiko rubibona

[107] Ingingo ya 15 y'itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko: *“Abantu bose barareshya imbere y'amategeko. Itegeko ribarengera ku buryo bumwe”*. Iya 38 yaryo igateganya ibi bikurikira: *“Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru*

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 46

buremewe kandi bwubahirizwa na Leta. Ubwisanzure bwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru ntibugomba kubangamira ituze rusange rya rubanda n'imyifatire mbonezabupfura, ukurengera urubyiruko n'abana, n'uburenganzira bw'umwenegihugu bwo kugira icyubahiro n'agaciro, ubwo kutagira uwivanga mu mibereho ye bwite n'iy'umuryango we. Uko ubwo bwisanzure bukoreshwa n'iyubahirizwa ryabwo biteganywa n'amategeko".

[108] Iya 236 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange iteganya ko: *"Umuntu wese utuka cyangwa usebya Perezida wa Repubulika, aba akoze icyaha. Iyo abihamijwe n'urukiko, ahanishwa igifungo kitari munsu y'imyaka itanu (5) ariko itarenze imyaka irindwi (7) n'ihazabu y'amafaranga y'u Rwanda arenze miliyoni eshanu (5.000.000 FRW) ariko atarenze miliyoni zirindwi (7.000.000 FRW)".*

a) Kuba ingingo ya 236 yaba itarengera abantu ku buryo bumwe

[109] Ingingo ya 236 iteganya ko gutuka cyangwa gusebya Perezida wa Repubulika ari icyaha, uwo gihamye ahanishwa igifungo kitari munsu y'imyaka itanu (5) ariko itarenze imyaka irindwi (7) n'ihazabu y'amafaranga y'u Rwanda arenze miliyoni eshanu (5.000.000FRW) ariko atarenze miliyoni zirindwi (7.000.000 FRW). Nubwo iyi ingingo ihana uwatutse Perezida wa Repubulika, hari n'indi ingingo y'Itegeko n° 68/2018 ryo ku wa 30/08/2018, ihana umuntu wese utuka undi mu ruhame.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 47

[110] Ingingo ya 161 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 iteganya ko:
“Umuntu wese utuka undi mu ruhame aba akoze icyaha. Iyo abihamijwe n’urukiko, ahanishwa igifungo kitari munsi y’iminsi cumi n’itanu (15) ariko kitarenze amezi abiri (2); ihazabu y’amafaranga y’u Rwanda atari munsi y’ibihumbi ijana (100.000 FRW) ariko atarenze ibihumbi magana abiri (200.000 FRW); imirimo y’inyungu rusange mu gihe kitarenze iminsi cumi n’itanu (15) cyangwa kimwe gusa muri ibyo bihano. [...]”. Ingingo ya 161 n’iya 236, zavuzwe mu bika bibanziriza iki, zombi zifata gutukana nk’icyaha. Urukiko rusanga ibyo MUGISHA Richard avuga ko ingingo ya 236 irengera Perezida wa Repubulika gusa, ataribyo kuko nk’uko bigaragara mu ngingo ya 161, umuntu wese utuka undi mu ruhame aba akoze icyaha. Muri rusange, gutukana ni icyaha hatitawe ku wabikorewe.

[111] Urukiko rurasanga ariko hari itandukaniro rishingiye ku bihano hagati y’ingingo zivugwa ko gutukana ari icyaha. Utuka undi mu ruhame ahanishwa igifungo kitari munsi y’iminsi cumi n’itanu (15) ariko kitarenze amezi abiri (2); ihazabu y’amafaranga y’u Rwanda atari munsi y’ibihumbi ijana (100.000 FRW) ariko atarenze ibihumbi magana abiri (200.000 FRW); utuka Perezida wa Repubulika ahanishwa igifungo kitari munsi y’imyaka itanu (5) ariko itarenze imyaka irindwi (7) n’ihazabu y’amafaranga y’u Rwanda arenze miliyoni eshanu (5.000.000 FRW) ariko atarenze miliyoni zirindwi (7.000.000 FRW).

[112] Ibihano bitangwa ku cyaha cyo gutukana bivugwa mu gika kibanziriza iki, biratandukanye. Umwihariko ku gihano ku cyaha cyo gutuka cyangwa gusebya Perezida wa Repubulika, ni uko ari kinini ugereraniye n’ibindi bihano biteganywa ku watutse abandirwa. Ariko, Urukiko ntirwasuzuma niba ingingo ya 236 yavanwaho bitewe n’uko iteganya ibihano bitandukanye n’ibiteganywa

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 48

n'izindi ngingo zihana gutukana kuko ibyo bitaregewe ndetse ntibyanaburanyweho. Urukiko rusanga ariko iryo tandukaniro ku ngano y'ibihano rigomba kugabanywa, igihano giteganywa ku watutse Perezida wa Repubulika kikaba kiri mu gaciro (proportionate). Urukiko rurasaba inzego zibishinzwe kwita kuri iki kibazo.

[113] Ikindi gitandukanya ingingo ya 236 n'iya 161, n'uko ihana usebya Perezida wa Repubulika. Gusebya Perezida wa Repubulika no gusebya Abakuru b'ibihugu by'amahanga cyangwa ababihagarariye cyangwa abahagarariye imiryango mpuzamahanga mu Rwanda²¹ nibyo byonyine bihanwa mu Rwanda. Gusebya abandi uretse abo bamaze kuvugwa si icyaha, ahubwo uwasebejwe ashobora gutanga ikirego cyo gusaba indishyi. Urukiko rusanga rero ku birebana n'ingingo ya 236 yaregewe, agace kayo karebana n'icyaha cyo gusebanya, itandukanya gusebya Perezida wa Repubulika n'abandi bantu basigaye. Urukiko rusanga ariko, iryo tandukaniro atari ikibazo, kuko rifite icyo rishingiyeho, aricyo urwego rwa Perezida wa Repubulika.

[114] Nk'uko byemejwe n'uru Rukiko, mu rubanza N°RS/INCONST/PEN0005/12/CS rwa UWINKINDI Jean rwaciwe ku wa 22/02/2013, gushyira abantu mu byiciro ntabwo ari ukubavangura cyane cyane iyo ibyo byiciro byashyizweho hagamijwe kugera ku ntego yumvikana, igaragarira buri wese, ishingiyeye ku mategeko kandi ibyashyingiweho bikaba bifite ireme mu nyungu rusange. Uru Rukiko rwibukije ko ibyo byanavuzwe n'Akanama k'Umuryango w'Abibumbye gashinzwe Uburenganzira bwa Muntu (United Nations Human Rights Committee) mu mwanzuro kafashe mu nama yako ya 37, aho kagize kati: *“finally, the committee observes that not*

²¹ Reba ingingo ya 218 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 49

every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant²². Aha, Urukiko ruragaragaza niba hari impamvu zumvikana zatuma gusebya Perezida wa Repubilika byaba icyaha, ariko gusebya abandi ntibibe icyaha.

[115] Itegeko Nshinga rya Repubilika y'u Rwanda rigaragaza ko Perezida wa Repubilika afite inshingano zitandukanye, iz'ingenzi muri zo ni izi zikurikira:

- Ni we Mukuru w'Igihugu (ingingo ya 98)
- Ashinzwe kurinda Itegeko Nshinga no kubumbatira ubumwe bw'Abanyarwanda (ingingo ya 98)
- Yishingira ko Leta ikomeza kubaho, ubwigenge n'ubusugire bw'Igihugu no kubahiriza amasezerano mpuzamahanga (ingingo ya 98)
- Ashinzwe Ubutegetsi Nyubahirizategeko (ingingo ya 97)
- Ni Umugaba w'Ikirenga w'Ingabo z'u Rwanda (ingingo ya 108)
- Ahagararira u Rwanda mu mibanire yarwo n'amahanga (ingingo ya 111)
- Afite uruhare mu ishyirwaho ry'amategeko (legislative role). Ashyira umukono ku mategeko kandi akaba anafite ububasha bwo gushyiraho Itegeko Teka, n'Iteka rya Perezida.

[116] Nk'Umukuru w'Igihugu, Perezida wa Repubilika niwe wishingira, agasigasira ubumwe bw'abenegihugu, akaba n'ishusho (symbol) yabwo; kumusebya byagira ingaruka kuri ubwo bumwe, kuko bishobora gutuma abantu bacikamo ibice biturutse ku byamutangajweho bidafite ukuri. Ushaka kugira icyo atangaza cyangwa anenga kirebana na Perezida wa Repubilika, agomba kwitonda kugira ngo adatangaza ibimusebya bishobora kuyobya rubanda.

²² Human Rights Committee, General Comment XVIII, Non-discrimination (1989), www.unhcr.org/refworld/type

[117] Ishyirwaho rye, ivanwaho rye, uko ashobora gukurikiranwa aramutse akoze icyaha, ubudahangarwa afite nk'uko biteganywa n'Itegeko Nshinga bitandukanye n'iby'abandi bayobozi mu Gihugu baba abatorwa cyangwa abashyirwaho. Ibi, byiyongereyeho inshingano afite nk'uko zavuzwe mu gika kibanziriza iki, Urukiko rusanga Perezida wa Repubulika yihariye, ku buryo no gushyiraho amategeko yihariye kuri we, yaba amurengera cyangwa amugenga atandukanye n'areba abandi, byumvikana kandi bifite ishingiro. Bityo rero, kuba ingingo ya 236 ifata gusebya Perezida wa Repubulika nk'icyaha, ariko ntibibe icyaha ku wasebya undi muntu, Urukiko rusanga bishingiye ku mwihariko w'inshingano afite kandi bifite ireme.

b) Kuba ingingo 236 yaba izitira ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

[118] Nk'uko byavuzwe mu bika byo hejuru hasesengurwa niba guhana gukoza isoni abayobozi b'igihugu n'abashinzwe umurimo rusange bibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru, kugaragaza ibitekerezo, guhabwa no gutangaza amakuru ntibikwiye kubangamirwa n'icyo ari cyo cyose. Ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru buteganywa n'ingingo ya 19 y'Amasezerano Mpuzamahanga ku Burenganzira mu by'Imbonezamubano na Politiki (ICCPR). Mu mwanzuro wako wa 34 usobanura ibijyanye n'iyi ngingo, Akanama k'Umuryango w'Abibumbye gashinzwe Uburenganzira bwa Muntu, kasabye ibihugu byasinye ayo masezerano ko gusebya bitaba icyaha, kanavuga ko n'igihano cyo gufungwa kitajyanye n'icyo cyaha. Kabivuze muri aya magambo: “*States parties should*

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 51

*consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the **most serious of cases** and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others²³“.* Ni ukuvuga ko kivanaho icyaha cyo gusebya Umukuru w'Igihugu bitaraba ihame ku rwego mpuzamahanga. Nk'uko byasabwe n'Akanama kavugwa muri iki gika, amategeko ahana gusebya yavaho, ariko igihe agikoreshwa akaba yakorehwa ku bihe bikomeye (serious cases) kandi bikaba bigomba kwitonderwa.

[119] Urukiko rusanga hari itandukaniro ku gusebya Perezida wa Repubulika no gusebya abandi bantu. Ndetse n'ingaruka byagira kuri ibyo byiciro byombi ziratanganywe. Gusebya iyo byakorewe abandi bantu, abo byakorewe bashobora kwifashisha inzira y'imbonezamubano bakaregera guhabwa indishyi. Ubwinshi n'uburemere bw'inshingano za Perezida wa Repubulika nk'uko zavuzwe, butuma hatangwa ibitekerezo byinshi bijyanye n'izo nshingano, ndetse hakabaho no gushaka no gutangaza amakuru ajyanye nazo. Mu gihe gutuka cyangwa gusebya Perezida wa Repubulika, byaba bitabaye icyaha gikurikiranwa n'Ubushinjacyaha, byasaba ko yiyambaza inzira y'imbonezamubano kugira ngo arenganurwe. Urukiko rusanga ibyo byabangamira akazi ke, n'igitinyiro gikwiriye Umukuru w'Igihugu, nko kuba yahugira mu gushaka uko arenganurwa, kandi nk'uko byavuzwe, afite inshingano ziremereye zimusaba kwitaho.

²³ **UN Human Rights Committee**, General Comment 34, on the International Covenant on Civil and Political Rights, concerning freedoms of opinion and expression. Paragraph 47. July 2011.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 52

[120] Gutuka cyangwa gusebya Perezida wa Repubulika kuba ari icyaha, bigomba kureberwa mu kurengera inshingano afite n'abo ahagarariye kurusha kubifata nk'ibyabangamira ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru. Urukiko rusanga buri wese agomba gushishoza, mu gutanga ibitekerezo, gushaka no gutanganza amakuru, akabikora ntawe atutse cyangwa ashebeje kuko nk'uko na MUGISHA Richard yabigarutseho, uretse na Perezida wa Repubulika, gutuka no gusebya umuntu wese ntibikwiye. Ariko kandi gukurikirana ukekwa gusebya Perezida wa Repubulika ntibikwiye kwihutirwa; bikwiye gusuzumanwa ubushishozi bikagaragara ko ari ibintu bikomeye, 'serious case', mbere y'uko ubushinjacyaha buregera urukiko. Igihe ukekwa ashikirijwe urukiko, ubushinjacyaha bugomba kugaragaza ko ibigize icyaha byuzuye nta gushidikanya (proof beyond reasonable doubt) nk'uko bimeze no mu zindi manza nshinjabyaha.²⁴

[121] Ingingo ya 41 y'Itegeko Nshinga iteganya ko: *"mu gukoresha uburenganzira n'ubwisanzure, buri wese azitirwa gusa n'itegeko rigamije kwemera no kubahiriza uburenganzira n'ubwisanzure by'abandi ndetse **n'imyitwarire iboneye, ituze rusange rya rubanda** n'imibereho myiza muri rusange biranga Igihugu kigendera kuri demokarasi"*. Nk'uko bikubiye muri iyi ngingo, mu gukoresha ubwisanzure buri wese azitirwa n'itegeko rifite icyo rigamije nk'imyitwarire iboneye n'ituze rusange bya rubanda. Urukiko rusanga kuba hari ingingo y'itegeko ihana usebya Perezida wa Repubulika, biri muri uwo

²⁴ Aha hakwibutswa ko inshingano yo kugaragaza ibimenyetso mu manza nshinjabyaha itandukanye n'iyi mu manza mbonezamubano. Mu manza nshinjabyaha urugero ruri hejuru ku buryo nta gushidikanya kugaragara, mu manza mbonezamubano urwo rugero rukaba ari ukugaragaza ko ushyize ku munzani ukugaragaza ko afite ibimenyetso bigaragaza ukuri kurusha undi ariwe utsinda (on a balance of probabilities).

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 53

murongo wo kurengera ituze rusange hagendewe ku kuba ahagarariye rubanda (abaturage bose).

[122] Kuba gutuka cyangwa gusebya Perezida wa Repubulika ari icyaha, si umwihariko w'u Rwanda. Ibihugu bitandukanye bizwi ko bigendera ku mahame ya demokarasi, bifite mu mategeko yabyo, ingingo zihana utuka cyangwa usebya Perezida, cyangwa undi wese ufatwa nk'Umukuru w'Igihugu, bitewe n'imitegekere ya buri gihugu. Ibyo bihugu ni nka Germany, Greece, Iceland, Italy, Netherlands, Portugal, Spain, Sweden n'ibindi. Ariko muri ibi bihugu, nk'uko bigaragazwa n'inyandiko ya Organization for Security and Cooperation in Europe, ibihano bitoya (minimum) n'ibinini (maximum) ku Mukuru w'Igihugu biri muni y'ibiteganywa mu ngingo ya 236.²⁵

[123] Kubera impamvu zisobanuwe mu bika bibanziriza iki, Urukiko rurasanga kugira icyaha gutuka cyangwa gusebya Perezida wa Repubulika, bitabangamira ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru biturutse ku mwihariko w'inshingano afite.

Umwanzuro rusange

[124] Urukiko rw'Ikirenga, ruhereye ku bisobanuro rwatanze kuri buri ngingo, rusanga ingingo ya 136, igika cya mbere, icya kabiri n'icya gatatu y'Itegeko n°68/2018 ryo ku wa 30/08/2018 riteganyaga ibyaha n'ibihano muri rusange itanyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 18. Nk'uko byasobanuwe,

²⁵ Organization for Security and Cooperation in Europe "Defamation and Insult Laws in the OSCE Region: A comparative Study" March 2017.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 54

guhana ubusambanyi ntibibangamiye ubwisanzure bw'umuryango ahubwo bigamiye kuwurengera.

[125] Nk'uko byasobanuwe hejuru, ibika bibiri bya nyuma ntibitanga ubwisanzure busesuye ku wakorewe icyaha, bwo guhagarikisha urubanza aho rwaba rugeze hose, kuko Umucamanza ashobora kubyangwa. Urukiko rusanga ibyo bika byombi bya nyuma byavaho, ahubwo igika cya gatatu kikuzuzwa, kikandikwa mu buryo bukurikira: “[...] ***Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no ku wakoranye icyaha n'uregwa***”.

[126] Urukiko rusanga ingingo ya 138 n'ya 139 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zitanyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 18. Nk'uko byasobanuwe, guhana ibyo byaha ntibibangamiye ubwisanzure bw'umuryango.

[127] Urukiko rusanga kandi ingingo ya 154 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranije n'ingingo ya 38 y'Itegeko Nshinga kuko ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

[128] Urukiko rusanga ingingo ya 233 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranije n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15, na 38. Ingingo ya 233, ntirengera abantu mu buryo bumwe kandi ibangamiye ubwisanzure bw'itangazamakuru, ubwo kugaragaza ibitekerezo n'ubwo guhabwa amakuru.

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 55

[129] Urukiko rusanga ingingo ya 236 y'Itegeko n°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuraniye n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15 na 38 nk'uko byaregewe, kuko inshingano za Perezida wa Repubulika zimuha umwihariko wo kuba hajyaho amategeko amurengera ku buryo bwihariye. Ariko rusanga ibihano biteganyijwe muri iyo ngingo biremereye bikaba bikwiye gusuzumwa n'inzego zibishinzwe.

III. ICYEMEZO CY'URUKIKO

[130] Rwemeje ko ikirego cyatanzwe na MUGISHA Richard gisaba kwemeza ko ingingo za 136, 138, 139, 154, 233, n'iya 236 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zinyuraniye n'Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo zaryo za 15, 18 na 38, gifite ishingiro kuri bimwe.

[131] Rwemeje ko ingingo ya 136, igika cya mbere, icya kabiri n'icya gatatu y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'ingingo ya 18 y'Itegeko Nshinga.

[132] Rwemeje ko igika cya gatatu cy'ingingo ya 136 cyandikwa mu buryo bukurikira: "Uwahemukiwe ashobora gusaba guhagarika ikurikirana ry'urubanza, aho rwaba rugeze hose, iyo yisubiyeho akareka ikirego cye. Kureka urubanza cyangwa irangiza ryarwo bigira ingaruka no ku wakoranye icyaha n'uregwa".

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 56

- [133] Rwemeje ko igika cya kane n'icya gatanu by'ingingo ya 136 y'Itegeko n°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange bivanyweho.
- [134] Rwemeje ko ingingo ya 138, n'iya 139 z'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange zitanyuranyije n'ingingo ya 18 y'Itegeko Nshinga.
- [135] Rwemeje ko ingingo ya 154 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange, inyuranije n'ingingo ya 38 y'Itegeko Nshinga, bityo iyo ingingo ikaba ivanyweho.
- [136] Rwemeje ko ingingo ya 233 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange inyuranije n'ingingo ya 15 n'iya 38 y'Itegeko Nshinga, bityo iyo ingingo ikaba ivanyweho.
- [137] Rwemeje ko ingingo ya 236 y'Itegeko n° 68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange itanyuranyije n'ingingo ya 15 n'iya 38 y'Itegeko Nshinga.
- [138] Rutegetse ko uru rubanza rutangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda.

RUKIJWE RUTYO KANDI RUSOMEWE MU RUHAME NONE KUWA 24/04/2019.

**Sé
Sam RUGEGE
Perezida**

URUBANZA N° RS/INCONST/SPEC 00002/2018/SC URUPAPURO RWA 57

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