



RIGHT TO LIBERTY AT RISK

Constitutional Council chancels violation of the Constitution of the Republic in relation to pre-trial detention time limits

- Legislative reform in Mozambique has always been a pressing and necessary matter due to the fact that much of the national legislation has been inherited from the colonial period ¹ and is no longer adjusted to the reality of current times.



¹ Com a independência nacional, a Constituição da República de 1975, estabelecia, o artigo 71, que toda a legislação colonial que não fosse contrária a Constituição mantinha-se em vigor.



It is on this basis that in recent years there has been a legislative movement aimed at reforming a number of national legislative sectors, such as the approval of a new Commercial Code, Family Law and Succession Law.

In the wake of this legislative reform movement, the new Criminal Code² and Criminal Procedure³ have been approved. These reform processes have always been the target of harsh criticism, which has led to specific changes in recent legislation.

It was with this in mind that the Mozambican Bar Association (OAM) led a movement to file with the Constitutional Council an action for successive review of the constitutionality of some provisions contained in the new Criminal Procedure Code, particularly the provisions relating to the time limits for pre-trial detention. The approved Code of Criminal Procedure does not establish the time limits for pre-trial detention from the moment of indictment until the conviction decision in first instance and from the conviction decision until *res judicata*. Such omission of time limits constitutes a violation of the Constitution⁴, as it allows a citizen to be im-

prisoned indefinitely, violating the fundamental right to freedom⁵.

The Constitutional Council came, by Ruling⁶ of June 17, to consider that these rules are not unconstitutional because the maximum period of pre-trial detention is equal to the period of conviction.

We cannot find this understanding valid since the Constitutional Council confuses the execution of the sentence with preventive detention. Preventive detention is a provisional instrument that should be applied reasonably. The penalty, on the other hand, constitutes a sanction imposed on a certain person for the commission of a crime and consists of the deprivation of liberty.

Preventive detention cannot be used to anticipate the execution of the sentence, in disrespect of the principle of presumption of innocence, which is enshrined in our fundamental law⁷.

Furthermore, the criminal process, in the current model, is composed of the following phases: investigation⁸, preliminary hearing⁹, trial¹⁰ and appeal. However, in the enunciation of numbers 1, 4 and 5 of article 256 of the Code of Criminal Procedure, the legislator established deadlines

² Lei no 24/2019, de 24 de Dezembro.

³ Lei no 25/2020, de 26 de Dezembro, revista pontualmente pela lei no 18/2020, de 23 de Dezembro.

⁴ Artigos 61 e 64 do Código de Processo Penal.

⁵ Artigo 59 da Constituição da República

⁶ Acórdão no 03/CC/2022

⁷ Número 2 do artigo 59 da Constituição da República.

⁸ Artigos 307 e seguintes do Código de Processo Penal.

⁹ Artigo 332 do Código de Processo Penal.

¹⁰ Artigos 414 e 415 do Código de Processo Penal.

for the duration of pre-trial detention¹¹, that cover only the phases of investigation, preliminary hearing and appeal.

Thus, if there is no legally established deadline, citizens are at the mercy of the discretion of the judge, whether in first instance or on appeal, on whom depends the impression of procedural

speed necessary to not keep the citizen imprisoned without charge for long periods of time.

Moreover, knowing the procedural slowness typical of the Mozambican courts, it is certain that depending on this, many citizens will be unfair preventively imprisoned, in a clear violation of the fundamental right to freedom.

¹¹ Por regra, de 4 meses, podendo ser agravada para 6 e 10 meses, nos casos de criminalidade violenta ou altamente organizada, ou quando se proceder por crime punível com pena de prisão de máximo superior a 8 anos.



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