State liability in the murder of five inmates by a prison guard in Zambezia

● As is generally known, in the Republic of Mozambique the right to life is a fundamental right enshrined in the Constitution of the Republic[1], which, in its content, also determines that in the Mozambican legal system there is no death penalty[2].

Número 1 do artigo 40.º da Constituição da República.
2 Número 2 do artigo 40.º da Constituição da República.

This provision is in line with the international human rights instruments that Mozambique has ratified throughout its history as a State based on the rule of law, namely the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, as provided for in Article 43 of the Constitution of the Republic.

As with any State governed by the rule of law, as a result of the provisions of article 3, in conjunction with the provisions of article 11(e), all of the Constitution of the Republic, the Mozambican State assumes itself as the main guarantor of the human and fundamental rights of its citizens, which is in line with the three primary or traditional purposes of the State, namely the guarantee of justice, security and the social, economic and cultural well-being of all citizens.

As a general rule, as a result of the principle of universality and equality[1], all citizens fully enjoy their fundamental rights provided for in the Constitution of the Republic. However, prisoners, as Mozambican citizens detained or imprisoned in a penitentiary establishment, either in preventive detention or as a result of serving a prison sentence, have some of their fundamental rights restricted, inherent to the meaning of the sentence and the specific requirements of its execution[2].

The right to life, provided in Article 40 of the Constitution of the Republic, is part of those fundamental rights that the prisoner who is in a penitentiary establishment should not be deprived of, because its deprivation or limitation would never be inherent to the meaning of the conviction nor to the specific requirements of their execution, so it is up to the State the obligation, within the prison establishment, the prisoner enjoy this fundamental right, according to paragraph b) of paragraph 1 of Article 3 of Law No. 3/2013 of January 16[3].

In the case that occurred last June 13, in the District of Milange, Zambézia Province, in which a prison guard shot seven inmates, five of whom lost their lives, this is a serious violation of fundamental rights. The prison guard, who in his functions represents the State and therefore must ensure the safety of prisoners, trampled on the right to life of these prisoners, perhaps because he considered that they, as such, could be deprived of this right, in flagrant violation of the provisions of paragraphs a) and b) of Article 19 of Law No. 3/2013 of January 16.

About this violation, the Mozambican State has responsibilities in the framework of its compensation for the damages or losses it caused to the citizens who suffered or to their families, because as established in paragraph 2 of Article 58 of the CRM, "[the] State is responsible for damages caused by illegal acts of its agents, in the exercise of their functions (...)", conferring compensation for such damages caused by the violation of their fundamental rights [4].

There is no doubt of this State liability insofar as there was, at the time of the occurrence of the fact, no proportionality between the prisoners' intention to escape from the prison establishment and the mechanism used by the prison guard to abort that intention, in contrast to that provided in article 16/2 of Law no. 3/2013, of 16 January.

The news advanced by the newspaper A Carta de Moçambique[5] states that the prison where the incident occurred was designed for 40 prisoners, and that on the date of the occurrence there were close to 280 prisoners detained there, an act that represents a serious violation of the provisions of the Law establishing the National Penitentiary Service, since it is difficult to imagine that 280 prisoners confined in an establishment designed for 40 prisoners were living in basic human conditions adjustable to the principle of human dignity, provided for in that law [6] and the Constitution of the Republic.

Such a situation does not make the penitentiary establishment a place of individual rehabilitation aimed at ensuring their reintegration, but a place of true subjection to inhuman living conditions, in total contrast to the standards provided for in the criminal law, as well as in human rights instruments assumed by the Republic of Mozambique.

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[1] Número 1 do artigo 40.º da Constituição da República.
[2] Número 2 do artigo 40.º da Constituição da República.
[3] artigo 35.º da Constituição da República.
[4] Número 3 do artigo 61.º da Constituição da República.
[5] Lei que cria o Serviço Nacional Penitenciário (SERNAP).
[6] Vide, também, artigo 13.º da Lei n.º 14/2011, de 10 de Agosto.
[7] https://cartamz.com/index.php/politica/item/11017-carta-ao-leitor-inquerito-sobre-um-assassinio-de-estado-em-milange-termos-de-referencia-para-a-ministra-helena-kida, com consulta no dia 21 de Junho de 2022.
[8] Vide artigo 11º, als. a) e b) da Lei n.º 3/2013, de 16 de Janeiro.

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