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“South Africa punishes illegal xenophobic acts, but Xenophobia itself should be a crime”

By Roger-Claude Liwanga

Xenophobia is a phenomenon as old as humanity, a considerable number of authors have devoted their researches to it and a lot of conferences and congresses have been organized in the world in order to reduce its prevalence globally. From its Greek origin, Xenophobia is derived from the words “Xeno”, meaning stranger or foreigner, and “Phobia”, meaning fear. The word xenophobia therefore means an intense and unreasonable fear or dislike of strangers or people from other countries. This phenomenon of deep dislike of non-nationals by nationals is sometimes the vector agent that leads to criminal situations in society such as: persecution, murder, extermination, rape, enslavement, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of national or international law.

In South Africa, in stark contrast to the humanitarian spirit of the South African Constitution that grants everyone (including foreigners) the rights to equality, human dignity, right to life and right not to be subject to slavery, servitude or forced labor, segments of the South African populace are harboring severe xenophobic sentiments towards foreigners, especially non-nationals from African countries. Perceived as impeding the internal process of reconciliation, reconstruction and nation-building, refugees, asylum seekers and migrants, especially from other African countries are increasingly experiencing human rights abuses simply because they are foreigners.

Although the fact that the consequences of xenophobic sentiments (murder, torture, rape, sexual exploitation...) have been criminalized by the law, xenophobia itself doesn't yet constitute a particular crime in common law; this in accordance with sacrosanct principle *'nullum crimen, nulla poena sine lege'* that means “no crime, no punishment without a previous penal law.”

However, in reality, the problem regarding the penalization of xenophobia ought not to be subject matter in South Africa because the South African Constitution¹ seems to address the phenomenon. Indeed, according to the spirit and letter of the Constitution *no person may unfairly discriminate directly or indirectly against anyone on one or more grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or nationality*². Furthermore, and mostly, the Constitution, being the supreme law, orders the *National legislator to enact to prevent or prohibit unfair discrimination*³. Xenophobia therefore being unfair discrimination, that is, the unreasonable fear or dislike of strangers, compels the National legislator to enact a law that prohibits xenophobia. In other words the National legislator has to criminalize xenophobia as a particular crime in South Africa in order to conform to the prescription of the Constitution.

¹ The Constitution of the Republic of South Africa, 1996, Chapter 2, 9(4).

² Ibidem

³ Ibidem