



JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL

JUSTICE UPDATE
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LEGAL PERSPECTIVES ON CLEMENCY

Background

On 23 April 2008, the President of the Republic made a speech before members of parliament, stating that he would pardon more than eighty convicted prisoners as part of the 20 May restoration of independence celebrations. This statement caused much debate and divided opinion. Both positive and negative responses issued from a number of circles, including members of parliament, civil society, religious leaders, politicians, academics and the general public.

JSMP has noted the variety of arguments presented. Some have examined the adherence to institutional processes and others have looked at the issue from political and historical perspectives.

Much of the attention was focused on the fact that the President indicated from the outset that he planned to grant a pardon to Rogerio Tiago Lobato. Having been found by the court to be one of the main authors of the 2006 crisis, Lobato was convicted on manslaughter and weapons distribution charges and is serving a seven and a half year term of imprisonment.

Adding to the controversy, the Minister of Justice reportedly asked the President not to grant a pardon to Rogerio Lobato because of concerns over the degree to which he has been collaborating with the authorities during his extended medical leave in Malaysia.

The government, through the Ministry of Justice, appears to have put forward a more conservative option, presenting the President's office with a list of approximately one hundred convicted prisoners with the suggestion that some reduction of sentence may be merited. Whilst this represents a far more modest plan, it must still be noted that of the inmates recommended for consideration, only seventeen have served half or more of their respective sentences.

As publicly stated by the Minister of Justice on 19 May, it is the government's position that the listed prisoners might be entitled to a reduction in sentence of perhaps a few months, depending on their crimes. For example, in cases of domestic violence and rape, the government proposed a reduction of two

months only, in order to make clear the gravity of such gender-based offences. For other crimes a reduction up to six months was proposed.

Ultimately, the President decided not to pursue the suggestion put to him by government, opting for a more radical gesture. On May 19 the government gazette announced that ninety-four prisoners had be given clemency according to five annexed categories. The categories relate to the sentence issued by the court, the length of time served and seemingly the type of crime committed. The degree of clemency granted varies from full pardon to minor reductions in sentence, the only condition being an unspecified assessment of good behaviour.

The terms of the decree state that prisoners sentenced to less than five years detention and who have served one quarter of their sentence shall receive a full pardon – according to the annexed lists, ten convicts are eligible. The next clause indicates that those named prisoners sentenced to less than eight years detention and who have served one quarter of their sentence are eligible to have their sentences halved. Rogerio Lobato and others convicted of serious crimes are given as fitting into this category. Translations of the Portuguese original indicate that the remaining categories provide commutations of one third the sentence, or a flat two years off remaining jail time.

The calculations of time served by which listed prisoners have been assigned to these categories is open to dispute. Despite the apparent claim of the Decree that Rogerio Lobato has served one quarter of his sentence, various counts put him at only five months of a seven and a half year term. Only by dubiously counting periods of pre-sentence custody, and also the period of medical leave currently enjoyed, can a total be reached that accords with the Decree's stipulations.

As well as the anticipated extension of clemency to Rogerio Lobato, all those remaining in jail who were sentenced for human rights abuses under the Special Panel for Serious Crimes process stand to benefit. These nine include militia commander Joni Marques and others responsible for Lospalos clergy killings in 1999, as well as those convicted for their role in the infamous Passabe massacre.

This act of clemency was enshrined in Presidential Decree 53 of 2008, which has immediate effect of law. There remains, however, a great deal of confusion over the application of this gesture, from government and even the President himself. Public statements have been made by the President, notably in relation to the sentence reduction to be enjoyed by Rogerio Lobato, that do not align with the detail of the decree itself. Certain key figures, such as the head of the prisons directorate, are seemingly yet to receive any instruction on how this order may be effected. Meanwhile, debate continues as to its legal soundness.

Legal Basis and Other Determining Factors

Article 85(i) of the national Constitution states “*[it] is exclusively incumbent upon the President of the Republic...to grant pardons and commute sentences after consultation with the Government*”. This suggests that the President is bound to hear, if not to heed, advice from government as was in fact offered. Unlike other jurisdictions where there often exists an unlegislated convention that the political executive ordinarily acts on such counsel, arguably no such obligation can be said to operate in Timor-Leste.

The granting of pardons and commutation of sentences is not regulated by any current law, and remains exclusively a constitutional issue. The use of these two distinct terms (indicated in the Portuguese by the words ‘indultar’ and ‘comutar’ respectively) is of note. Whilst it places considerable power in the President’s hands, it also makes clear a suite of options that may be seen as presupposing review on the merits of each case.

In several nations, it is common for the President to grant a measure of clemency on days of national importance. In Indonesia, for example, a reduction in sentence, referred to as a remission, may be granted to prisoners who have nonetheless, in some prior way, served the nation. This approach, as exemplified in the Indonesian Presidential Decree 174 of 1999, may be seen as relevant in light of comments by the President about the reputedly vital actions of the Lobato family during the struggle for Timorese independence.

It is necessary to distinguish these specifically Presidential clemency measures from comparable Parliamentary powers. Whilst the Presidential may expunge liability for a crime by pardon, or order a discount of sentence by commutation, the power of amnesty lies with Parliament.

Under Article 95.3(g) of the national Constitution, it is incumbent upon this institution alone to consider the wholesale forgiveness of crimes such that perpetrators are exempted from prosecution. This amnesty power, with which the soon-to-conclude Truth and Friendship Commission is worryingly invested, is not in play with this Presidential order. The analogous means of pardons and commutations do, however, carry significant legal (and moral) weight, and as such this authority ought always to be exercised prudently.

Without convention or regulation to constrain the President’s constitutional powers, it is his prerogative to grant pardons or commutations as he sees fit. The grounds upon which such clemency might be considered appropriate are, in the current context, a matter of politics rather than law, and appear to privilege highly subjective historical perspectives over juridical concerns.

Conclusion

Whilst there is undeniably a Presidential prerogative to issue pardons and commutations of sentence, there is yet no framework for its proper exercise. Though a draft law on the granting of pardons and amnesties was approved by the National Parliament in June 2007, the broad powers to prevent prosecution for crimes at international law that were envisioned under this Bill were challenged on constitutional grounds and returned for review.

Whilst the amnesty provisions of that draft law were certainly contentious enough to have merited a veto, this has meant that there is still no formal check on the President's recourse to sentencing revision. Whilst the constitution requires that such power be used after consultation with government, it is unclear what this might mean, especially given the President's seeming disregard for ministry advice on this occasion.

In other jurisdictions, pardons and commutations may be granted where there has been some defect of process, or where the legal constraints have produced a sentence felt to be disproportionate to the harm done. Whilst there is no legal merit in speculating on the President's motives, his public statements indicate an intention to encourage, by these acts of clemency, a 'culture of forgiveness.' This is notably distinct from recognized legal rationales for sentence review.

It is impossible to avoid the political dimension to this gesture. The President may believe that Timor-Leste will benefit from setting aside the injustices of the past. Without debating the truth of this position, JSMP contends there are other, contesting values worthy of political consideration.

Timor's justice sector is still the subject of reconstruction, and though fragile, its institutions play a fundamental role in promoting the rule of law in this young democracy. Desirable as it might be to shape the historical narrative of the country, care must be taken to ensure this does not jeopardize efforts to ensure fair and consistent application of laws. Wholesale adjustment of sentences, involving a high proportion of the country's prison population, by implication throws into doubt the validity of judicial arbitration at first instance.

Such an approach has clear emotive, as well as procedural, ramifications. To the degree personal sentiment has the demonstrated ability to spill into collective violence, this demands attention. Where the perception exists that perpetrators of atrocity may evade justice, attempts to maintain order and security falter. Anger at a seeming disrespect to victims may find indirect modes of expression. Accordingly, leaders must evaluate carefully the effect of their engagements with

the legal sector lest they endanger Timor's unsteady peace. Loss of confidence in state agency makes the difficult endeavour of development even more fraught.

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