



JUDICIAL SYSTEM MONITORING PROGRAMME  
PROGRAMA MONITORIZASAUN SISTEMA JUDISIÁRIU

**Opinion:**

Draft Law on Procedures for Granting of Pardon and Commutation of Sentences

**Addressed to:**

**Committee A of the National Parliament**

**4 October 2023**

## Table of Contents

<b><u>1. Introduction</u></b> .....	<b>3</b>
<b><u>2. History of Pardons and General Observations</u></b> .....	<b>4</b>
<b><u>3. Fundamental principles of the Democratic Rule of Law</u></b> .....	<b>4</b>
<b><u>4. The provisions of paragraph i) of Article 85 of the Timor-Leste Constitution and their interpretation</u></b> .....	<b>5</b>
4.1. <u>Main rules of granting pardons</u> .....	6
4.2. <u>Other relevant rules</u> .....	6
4.3. <u>Pardons are not given for all types of crimes in Brazil</u> .....	6
<b><u>5. Analysis of specific chapters and articles of the draft law</u></b> .....	<b>8</b>
5.1. <u>Chapter II Instructions for Initiative and Decision</u> .....	8
5.2. <u>Article 5 Legitimacy</u> .....	8
5.3. <u>The contents of Articles 5, 6, 7, 8 and 9</u> .....	8
<b><u>6. Articles proposed by JSMP</u></b> .....	<b>9</b>
6.1. <u>Article...Requirements for granting pardons and commuting sentences</u> .....	9
6.2. <u>Article...Crimes that cannot be pardoned</u> .....	9
<b><u>7. Conclusion</u></b> .....	<b>9</b>
<b><u>8. Recommendations</u></b> .....	<b>10</b>



## 1. Introduction

The issue of pardons has been a concern for the State and public in general since the restoration of independence in 2002. There are several legal frameworks in Timor-Leste that deal with this issue.

The provisions of paragraph i) of Article 85 of the Constitution of the Democratic Republic of Timor-Leste state that the State organ who has the power to grant a pardon is the President of the Republic and Article 122 of the Penal Code only states what a pardon is. These provisions do not set out the rules of procedure to grant pardons and commute sentences and this makes it difficult to implement the principles enshrined in the Timor-Leste Constitution. The process of granting pardons and commutation of sentences needs to comply with legal requirements and those people who benefit from this State policy must comply with certain criteria that must be regulated in a law or a decree-law.

Therefore, the existence of Law No. 5/2016 on the Establishment of Procedures for Pardons and Commutation of Sentences is a legal means that can facilitate the implementation or exercise of this competence by the President of the Republic to grant a pardon. The law specifically sets out what is a pardon and commutation of sentence, who deserves to receive a pardon and commutation of sentence, what crimes may and may not be subject to a pardon and commutation of sentence and the procedures for granting a pardon and commutation of sentence.

JSMP has observed that now there is confusion regarding the interpretation of the provisions in paragraph 1) of Article 85 of the Timor-Leste Constitution on the competence of the President of the Republic to grant a pardon and commutation of sentence which is the specific competence of the President of the Republic. There is an interpretation that the granting of a pardon and commutation of a sentence cannot be regulated by law because it is the specific competence of the President of the Republic. This situation has led to members of parliament producing a new draft to revoke Law No. 5/2016 on the procedures for granting a pardon and commutation of sentence.

The same issue emerged during the time of the outgoing President of the Republic who stated that the provisions of Article 3 on the criteria and Article 4 on crimes that cannot be pardoned from Law No. 5/2016 that limit the specific competence of the President of the Republic and the President of the Republic considered these provisions to be unconstitutional because the constitution does not mention the limits of the President of the Republic in granting a pardon and commutation of sentence to prisoners.

In relation to this reality, through this opinion JSMP will provide general commentary about the issue of granting pardons and commutation of sentences and specific commentary on the provisions of paragraph 1) of Article 85 of the Timor-Leste Constitution on the competence of the President of the Republic to grant pardons and also commentary on the new draft law

regarding granting pardons and commutation of sentences, and JSMP will present or propose some articles for this draft law and will also present some recommendations.

## **2. History of Pardons and General Observations**

The State has been concerned about the issue of pardons since 2002. In May 2002, Mr. Kay Rala Xanana Gusmão, as the President of the Republic, prepared a draft law on Pardons and Amnesty. Pardons in the context of this draft law at that time were oriented towards providing pardons to prisoners who committed crimes prior to independence. Even so, this draft law was not passed by the Constituent Assembly.

Even though there was no specific legal framework to grant pardons, in May 2008 the President of the Republic Dr. Jose Ramos Horta granted pardons to 94 prisoners. These 94 prisoners included Jony Marques who was a militia leader involved in crimes of homicide committed against nuns and rape committed in Lautem District after the referendum in 1999.

The act to exercise the power to grant these pardons was controversial because the President chose to ignore the recommendations of the Minister of Justice, Lucia Lobato, who requested for the President not to grant pardons to certain convicted persons. The Ministry of Justice presented a list of approximately 100 prisoners with the suggestion that they deserved to receive a reduction in sentence. Unfortunately the President did not accept this recommendation. In August 2010, via Presidential Decree No. 31/2010, the President of the Republic granted pardons to 26 prisoners who were convicted by the courts after they were found guilty of committing crimes of attacking the President of the Republic and the Prime Minister in 2008. Then on 30 August 2014, the President of the Republic Taur Matan Ruak exercised his competence based on the Constitution to grant pardons to 5 prisoners/convicted persons. There was a strong response to these pardons, and heated debate at all levels of society, because many people did not agree with the President in this case, for granting pardons to convicted persons involved in a case of sexual violence against a minor (incest) and a case of corruption.

The practice of granting pardons and exercising the competence of the President of the Republic has caused public concern, and JSMP itself is concerned. Therefore starting in 2007 JSMP has provided advocacy on the issue of pardons to regulate the criteria to avoid pardons being granted arbitrarily. JSMP's advocacy started with a meeting with an advisor to the President of the Republic, writing a submission report on pardons to the Ministry of Justice and a meeting with the Heads of the Parliamentary Benches. Then in 2016 the National Parliament produced Law No. 5/2016 on Procedures for Pardons and Commutation of Sentences.

## **3. Fundamental principles of the Democratic Rule of Law**

Based on the Democratic Rule of Law “**THERE IS NO ABSOLUTE POWER**” for the public authorities of the State and “**NO ABSOLUTE FREEDOMS**”, including “**CERTAIN FUNDAMENTAL RIGHTS**” of citizens, therefor there are “**RESTRITIVE LAWS**” as set out in the provisions of Article 24 of the Timor-Leste Constitution to regulate and limit the exercise of public powers and also to regulate and limit the fundamental rights and freedoms to ensure



that there are no violations of fundamental rights and freedoms that are protected by the Constitution and the law.

For example Law No. 1/2006 regulates and limits the fundamental rights and freedoms on assembly and demonstration<sup>1</sup> and Law No. 5/2014 regulates and limits the freedom of expression and communication<sup>2</sup>. Therefore, the power of State organs needs to be regulated and limited to avoid practices that are oriented towards abuse of power and result in a dictatorial regime.

#### **4. The provisions of paragraph i) of Article 85 of the Timor-Leste Constitution and their interpretation**

This paragraph states that *“It is exclusively incumbent upon the President of the Republic to grant pardons and commute sentences after consultation with the Government”*. This exclusive competence means that the exercise of this competence cannot be shared, delegated or substituted to another person or organ. For example, legislative competence or law making is the exclusive competence of the National Parliament. This competence cannot be shared, delegated or substituted to another organ. Therefore, legislative instruments that are produced by other organs cannot be called “LAWS”, and are only called laws when they are produced by the National Parliament.

Even though the principles in the Constitution set out the competence of the National Parliament in paragraph 1) of Article 95, in the exercise of this competence it is necessary to create subsidiary laws to regulate this law making process as set out in the provisions in Chapter I on Ordinary Legislative Procedures, Chapter II on Special Legislative Procedures and Chapter III on Legislative Authorisations from Title V on Proceedings in Law No. 15/2009 on Rules of Procedure of the National Parliament<sup>3</sup>.

The intention of creating this subsidiary law is to facilitate the exercise of this specific or exclusive competence of the National Parliament to make laws so that it can be implemented properly and effectively. Also the intention of Law No. 5/2016 is to facilitate the process of granting pardons and commutation of sentences, not to create injustice for other parties and not to disadvantage the State, and not to prohibit the President of the Republic from exercising his competence. The Constitution sets out the general principles only, therefore, it is necessary to create subsidiary laws so that it can be implemented properly and avoid confusion and failures and even worse to prevent the use of constitutional competences in an abusive manner or to give rise to absolute power.

---

<sup>1</sup> The details of this law can be accessed at:

[https://www.mj.gov.tl/jornal/public/docs/2006/traducao/Traducao\\_Lei\\_de\\_Manifestacao\\_e\\_Reuniao.pdf](https://www.mj.gov.tl/jornal/public/docs/2006/traducao/Traducao_Lei_de_Manifestacao_e_Reuniao.pdf)

<sup>2</sup> The details of this law can be accessed at:

[https://www.mj.gov.tl/jornal/public/docs/2014/traducao/Traducao\\_Lei\\_Comunicacao\\_Social.pdf](https://www.mj.gov.tl/jornal/public/docs/2014/traducao/Traducao_Lei_Comunicacao_Social.pdf)

<sup>3</sup> Detailed information about the Rules of Procedure of the National Parliament can be accessed at:

[https://www.mj.gov.tl/jornal/public/docs/2009/serie\\_1/serie1\\_no40.pdf](https://www.mj.gov.tl/jornal/public/docs/2009/serie_1/serie1_no40.pdf)

The provisions of paragraph i) of Article 85 of the Timor-Leste Constitution don't just mention that the President of the Republic can grant pardons and commute sentences, because it also mentions "*after consultation with the Government*". This means that before the President of the Republic exercises this competence, he needs to first consult the Government. The phrase 'consultation with the government' is very general and abstract. What consultation with the Government? Does the President of the Republic request a meeting with the Government to hear the thoughts of the Government about the pardon, or does the Government present its thoughts about the prisoners or families or their legal representatives who have submitted their request for a pardon or to have their sentence commuted by the President of the Republic? To resolve this ambiguity and confusion, it is necessary to create a regulation as a guideline for the process of granting pardons and commuting sentences.

#### **4.1. Main rules of granting pardons**

- 1) The person who is to receive the pardon must have a FINAL DECISION in his or her case.
- 2) The person to receive the pardon or commutation of sentence MUST HAVE PARTIALLY SERVED THE SENTENCE, if the sentence has not been partially served, then the pardon or commutation cannot be applied.
- 3) The persons serving these sentences do not include penalties such as fines and penalties restricting their rights.

#### **4.2. Other relevant rules**

- 1) Good behaviour whilst partially serving the sentence;
- 2) Are not subject to proceedings in another criminal case;
- 3) The person is categorised as suffering a physical or mental disability, and based on a medical certificate cannot serve the sentence;
- 4) The person suffers a serious illness and cannot recover in the short term;
- 5) A mother with a small child where prison does not have the facilities to support her to access her basic rights;
- 6) A person of advanced age who does not have the physical capacity to serve the entire sentence.

Therefore, pardons are not to be given arbitrarily to all people in prison or for all types of crimes. There are some criminal cases that do not fulfil the criteria for a pardon or commutation of sentence as set out in the provisions of Article 4, Law No. 5/2016. These types of crimes really disadvantage the State and seriously disadvantage the lives of other people.

#### **4.3. Pardons are not given for all types of crimes in Brazil**

For example in Brazil, pardons are not given for all types of crimes and there are rules about granting pardons to ensure that those people who are to benefit from a pardon and commutation of sentence actually fulfil the legal requirements. This means that these rules limit the specific competence of the President of the Republic to grant pardons and commute sentences or he does not have absolute power in this context.

The regulations in Brazil place limits, that pardons cannot be granted for ordinary crimes such as domestic violence, not just for major crimes such as terrorism, money laundering, drugs, etc, as set out in the provisions of Article 4, Law No. 5/2016.

*“Art. 7 The pardons granted on the occasion of the Christmas celebrations in accordance with the provisions in this Decree **do not include the following crimes:***

*I – crimes deemed to be heinous or of a similar nature, in accordance with the provisions in Law No. 8.072 of 25 July 1990 ([Lei nº 8.072, de 25 de julho de 1990](#));*

*II – crimes committed by means of a serious threat or violence against a person or involving domestic and family violence against the spouse;*

*III – crimes provided in:*

*a) [Law No. 9.455, 7 April 1997](#);*

*b) [Law No. 9.613, 3 March 1998](#);*

*c) [Law No. 11.340, 7 August 2006](#);*

*d) [Law No. 12.850, 2 August 2013](#); and*

*e) [Law No. 13.260, 16 March 2016](#);” ([DECREE NO. 11.302, 22 DECEMBER 2022](#))<sup>4</sup>”*

In Brazil there is a specific law on the types of crimes and it lists the laws set out in Article 7 of this Decree that are not subject to a pardon or commutation of sentence (*detailed information is available in the attachment*). JSMP has attached these laws as references as it is necessary to create specific and appropriate rules to regulate the process of granting pardons and commutation of sentences and also to limit the competence of the President of the Republic so that pardons and commutation of sentences cannot be done arbitrarily for all types of crimes. Also, to prove that by regulating and limiting the specific competence of the President of the Republic there is no conflict with the Constitution, or this is not unconstitutional.

The Constitution of Brazil also grants specific competence to the President of the Republic to grant pardons and commutation of sentences.

*“Art. 84. It is an exclusive competence of the President of the Republic:*

*XII – to grant pardons and to commute sentences, if necessary after having consulted the relevant bodies established by law<sup>5</sup>”.*

Therefore, in the context of Timor-Leste, when the President of the Republic exercises his competence to grant a pardon only based on general and abstract principles enshrined in the Constitution and his own conviction, this can lead to injustice, discrimination, and the potential for the misuse of constitutional power or the excessive use of this power, and ignoring recommendations from the Government, and not actually adhering to the principles of the democratic rule of law and other general principles enshrined in the Constitution and international laws that have been ratified by Timor-Leste and undermining the justice sector that is still vulnerable.

<sup>4</sup> Detailed information about this Decree is available at: <https://www.direitohd.com/dec11302>

<sup>5</sup> The Constitution of Brazil can be accessed at:

<https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/CF.pdf>

## 5. Analysis of specific chapters and articles of the draft law

### 5.1. ~~Chapter II Instructions for Initiative Handling the Procedure and Decision~~

Based on JSMP's observation and analysis, the contents of this chapter on the process for making requests and handling the procedure, do not really match the title of this chapter. Therefore JSMP proposes the following title:

**“Chapter II Process of Granting Pardons and Commutation of Sentences”**

### 5.2. Article 5 Legitimacy

Based on JSMP's observations and analysis, the title of this article is not really appropriate or doesn't really match the contents. The contents don't actually talk about legitimacy, however they talk about who can make a request for a pardon and commutation of sentence. Where do the people mentioned in this article get the legitimacy to make this request? Therefore, an appropriate title for this article is as follows:

**“Article 5 Making a request”**

### 5.3. The contents of Articles 5, 6, 7, 8 and 9

Based on JSMP observations and thoughts, if the contents of the provisions in the articles of Chapter II are examined carefully, this process **“IS ILLOGICAL”**. This is because:

- The provisions of Article 6 on initiative and Article 7 on the handling of the procedure also grant the right to the President of the Republic to initiate the granting of a pardon before there is a request for a pardon from the parties that need it. The pardon in a political context is an acquired right or a right that is granted in the law, and those who receive it are beneficiaries. Actually the President of the Republic is only given competence in the Constitution and the law to grant pardons and commute sentences, not to initiate this process.
- The initiative comes from the President of the Republic and the case is handled by the Office of the President, and when this is done it is only then handed over to the Government to decide on the granting of a pardon as set out in Article 8. How come the handling of the case is done by the Office of the President if the Directorate for Prisons is under the Ministry of Justice and the Ministry of Justice knows a lot more about the convicted person than the Office of the President? The President of the Republic has the competence to grant pardons and to commute sentences, but how does the Office of the President handle the case and present it to the Government to decide on the granting of pardons and commutation of sentences? Would the President of the Republic reject the granting of a pardon and commutation of sentence as set out in the provisions of Article 9 if the process was carried out by the Office of the President itself?

Based on these reasons, JSMP recommends that the process for granting pardons maintains the contents of Article 6 - 10 of Law No. 5/2016, and accordingly that it eliminates the provisions of b) and c) of paragraph 1) Article 5 of this draft law on foreign Heads of State and representatives or heads of accredited diplomatic missions in Timor-Leste. The laws of Timor-Leste do not give





such entities the right to submit requests for the granting of pardons or the commutation of sentences. Those powers are granted to such legal representatives in their own countries.

## 6. Articles proposed by JSMP

Based on the reasons and references presented by JSMP above in this opinion, JSMP would like to propose some articles to be included in this draft law.

### 6.1. Article....Requirements for granting pardons and commuting sentences

Pardons and commuting of sentences may only be granted:

1. Where custodial sentences and security measures are definitive, having the force of *res judicata*. (Maintain the provisions of paragraph 1) Article 4, Law No. 5/2016)
2. When at least 1/3 of the actual duration of the custodial sentence or security measure was served.
3. To those who have shown good behaviour while serving at least 1/3 of their custodial sentence as certified by the head of their respective prison.
4. To those suffering from a permanent physical or mental disability that prevents them from serving the rest of their custodial sentence.
5. To those who have a child or children under the age of 12 and where their status as prisoners prevents them from providing adequate care to such child or children.
6. To those above the age of 70 whose physical condition prevents them from serving the remaining part of their custodial sentences.

### 6.2. Article...Crimes that cannot be pardoned

Regarding the contents of this article, JSMP suggests that the contents of Article 4 of Law No. 5/2016 be maintained. However, some types of crimes should be included in those that cannot be granted a pardon, as is the case in Brazil.

## 7. Conclusion

JSMP has observed that the draft law on the procedures for granting of pardons that was proposed by the Members of Parliament to the National Parliament does not yet reflect the reality on the ground nor does it address the issues relating to the granting of pardons as described previously in this opinion.

The problem that has emerged in the community is not an issue of the procedure for granting pardons, however it is a more substantial issue of what crimes should be subject to a pardon, and what basis and circumstances, and who deserves to be granted a pardon. We can use the Brazil Law on Pardons as a reference.

## 8. Recommendations

Based on the results of observations on the reality and analysis of the draft law, JSMP recommends to the National Parliament, particularly Committee A, as follows:

- 1) The Law on Pardons should include the following elements:
  - a. Confirm that the normal mechanism to regulate sentences is already established in the Penal Code and the Criminal Procedure Code;
  - b. This law needs to confirm that the normal mechanism for making a decision on a sentence, including the parole period, the transfer and rehabilitation program, takes place in the courts and adheres to the Penal Code and Criminal Procedure Code;
  - c. Pardons (total removal and reduction of sentence or substitution of sentence) can only be considered and recommended to the President if the criminal justice process has been completed and the outcome of the justice process is unjust or for reasons of humanitarianism such as health conditions, age, family condition, good behaviour;
  - d. There should always be the presumption that the sentence imposed by the court is appropriate and has value and there needs to be a clear reason to decide to remove the decision to punish a person that has already been imposed by the court.
- 2) Clearly define the term 'pardon' in this draft law and clarify that this law is not related to amnesty. It is important that this law has clear definitions to define the limits of exercising the power to grant a pardon and the description between the power of the President and the power of the Parliament to grant amnesty.
- 3) Confirm that pardons can only be granted after the trial process has been concluded or a final decision has been rendered and the convicted person has served a portion of the sentence.
- 4) Clearly define that a pardon or reduction of sentence can only be granted based on individual consideration on the advantages of each case.
- 5) Clarify the obligations of the President to consult with the Government; the President has the obligation to engage in consultation, as set out in Article 85(i) an effective consultation process needs to be clarified and established. This process needs to include a discussion between the President and the Ministry of Justice about the advantages for each individual who applies for a pardon. If the President pays no attention to the recommendations of the Council of Ministers, then the President should be required to provide written reasons that outline the basis or grounds for his decision.
- 6) Define the types of offences that deserve pardons, that also include the duration of the sentence that has already been served (e.g. 1/3 of the sentence) and the health conditions, age (aged 70 and above), family condition (young children who are dependent on their mother, etc.)
- 7) Create exceptions that pardons do not apply for fines and restrictions of rights.
- 8) Request for the Parliament to possibly exclude types of crimes that are not subject to pardons, namely:
  - a) Crime involving sexual offences; such as the sexual abuse of a child and incest



- b) Crimes against the public interest such as corruption (this is important to find out all appropriate and legitimate ways to prevent the potential for crimes of corruption that continue to flourish in Timor-Leste)
  - c) Transnational crimes; such as drugs, human trafficking, money laundering and terrorism
  - d) Crimes against humanity, slavery and genocide.
- 9) JSMP recommends for the process of granting a pardon or any form used by the President must also have the option of reducing the sentence gradually, not to completely remove the prison sentence, which has been the practice to date. This will further strengthen the belief of the people in justice institutions and limit interpretations and the public perception that justice is only applied against the common people and of the role of judicial institutions.

Dili, 04 October 2023

A handwritten signature in blue ink, appearing to read 'Ana Paula Marçal'.

Ana Paula Marçal  
Executive Director