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Research Article

Pardoning of Prisoners Transferred to Puntland and Somaliland (Is There Any Violation Of Law?)

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Abstract: The international transfer of prisoners is a repatriation of own prisoners from foreign countries where they have been sentenced to their home country for serving the unexecuted part of their imprisonment punishment. This is the only modality of international judicial cooperation designed to benefit nationals of the receiving country. Their transfer aims, mostly, at saving them from bad conditions abroad. In addition, accepting countries often try to grant further benefits to their repatriated nationals, first of all, by pardoning them. However, the pardon is a typical but, at the same time, not a popular solution. Any release of transferees, including the conditional and the one based on amnesty, by a given country is likely to prevent foreign countries from transferring its imprisoned nationals prisoners to it. This is why the unreasonable pardoning of transferees may inevitably sacrifice the essential interests of a greater number of other nationals imprisoned abroad (already sentenced or those who will be sentenced in a foreign country). Apart from this tactical issue, the receiving country must, first of all, clarify whether it can legally grant pardon to transferees. This is even a more difficult and controversial issue. It is the subject of this paper.

Keywords: Prisoner, International Judicial Cooperation, Punishment

If there is anything contentious, at all, it is the interaction between the applicable Constitution and international agreements when it comes to international judicial cooperation matters.

1. It is universally accepted that the Constitution has a stronger legal force and prevails over international agreements in cases of conflict between them. However, the Constitution may turn this hierarchy upside down by conceding to certain international agreements at the expense of own provisions. To this end, a special Constitutional rule is needed to empower the applicability of the conflicting international agreements. Otherwise, if no such conceding Constitutional rule exists, solely the Constitution with its stronger legal force shall be applied, while the conflicting international agreements shall be ignored as derogated and inapplicable.

For example, most civil law Constitutions prohibit the extradition of own nationals. At the same time, civil law countries are parties to some international agreements which contemplate the extradition of persons irrespective of their nationality; hence, own nationals may also be extradited under such agreements. To make these agreements applicable also to own nationals and their extradition, the Constitutions of certain civil law countries [e.g. Bulgaria[1], Poland[2], Romania[3], etc.] contain a special provision that own nationals are exceptionally extraditable under international agreements. This special permissive provision of the Constitution excludes the applicability of the general Constitutional prohibition of extraditing own nationals.

Obviously, if the mentioned Constitutions did not contain such a special provision, own nationals shall never be extradited as the allowing international agreements would be derogated and rendered inapplicable by the overriding Constitutional prohibition of extraditing such nationals. Thus, their extradition would inevitably be in violation of law as it would break the Constitution.

[1] Article 25 (4) (ii) of the Bulgarian Constitution.
[2] Article 55 (2) of the Polish Constitution.
[3] Article 19 (2) of the Romanian Constitution.

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2. The international transfer of prisoners is a similar modality of international judicial cooperation (a bit simpler and less developed one). This is why solutions to extradition problems might be used, accordingly, to solve problems of the international transfer of prisoners, especially those dependent on the interaction between the Constitution and international agreements. I suggest making use of the afore-mentioned solutions to extradition problems in the following way.

It is well known that the Constitution of any country allows the pardoning of prisoners, including transferees, and, as explained, it prevails over international agreements in case of conflict between them. This is why even if an applicable international agreement prohibits the pardoning of transferees, the Constitution with its general permission for pardoning would nevertheless prevail unless it contains a special provision, empowering the applicability of the international agreement under which transferees shall not be pardoned. But if the Constitution does not contain such a provision, which is the typical case, no pardoning of a transferee might be in violation of law as the prohibiting international agreement, if any, would be derogated and rendered inapplicable by the overriding Constitutional permission to grant pardon.

No problem of this sort exists in our situation. No applicable international agreement binding Puntland, incl. the already annulled 2011 Memorandum of Understanding with Seychelles, prohibits the pardoning of transferees. Hence, there might be no conflict, at all, between the Constitution and any applicable international agreement on the issue of pardoning. It follows that nothing challenges the applicability of the Constitution and, in particular, the authority of the President to pardon prisoners, incl. transferees. As a result, no pardon of a transferee may constitute a violation of law because of the absence of any international legal prohibition, let alone one supported by the Constitution.

3. This problem is not a new one. It was discussed a year ago in relation to the policy of Somaliland to massively pardon transferees. As one may remember, on 29 July 2019, the Somaliland President pardoned 19 pirates who had been sentenced in Seychelles and later, transferred to Somaliland [SL]. He referred to his constitutional right to grant pardons under Article 90.5 of the SL Constitution in conjunction with Article 7 (2) of the afore-mentioned Memorandum of Understanding [MoU], which reads: "*The continued enforcement of the sentence after transfer shall be governed by the laws and procedures of the receiving State or Authority*…" Some foreigners disagreed with this act of the SL President. They argued that the President had no right under Article 7 (2) of the MoU to pardon and by pardoning the sentenced pirates, he eventually, violated the MoU[4].

Indeed, one should agree with such a critical evaluation if s/he accepts the European model of regulating the issue. Pursuant to Article 12 (i) of the Convention on the Transfer of Sentenced Persons, "*Each Party may grant pardon … in accordance with its Constitution or other laws*". However, Somalia, including SL, does not adhere to the European international treaties model of using explicit concretizing permission to the administering country for pardoning transferees.

As a Party to the Riyadh Arab Agreement for Judicial Cooperation, Somalia, incl. SL, follows the opposite international treaties model (Arab, British and American; a non-European one, in general). Under it, the lack of any prohibition in the treaty to the receiving country for pardoning is sufficient to open the way to the act of pardoning of any transferee there. Should, however, this country be prevented from pardoning transferees, an explicit disallowing prohibition in this sense is necessary for the respective treaty with the sentencing country. Such necessary disallowing provisions are added to the above-mentioned Article 61 (2) of the 1983 Riyadh Arab Agreement for Judicial Cooperation, also to Article 13 (1) of the British Commonwealth Scheme for the Transfer of Offenders and Article VIII (Sentence 2.1) of the Inter-American Convention on Serving Criminal Sentences Abroad. But, in contrast to all these international agreements, no such disallowing rule exists in the MoU with Seychelles, let alone one supported by a special Constitutional provision which to exclude the applicability of the general Constitutional authorization of the President to pardon prisoners. In view thereof, critics against the SL President seemed unfounded.

Moreover, it is solely the SL state authorities, which are empowered to officially interpret their Constitution and the MoU in such cases. They found that the President granted pardon on the basis of the Constitution and in conformity with the MoU; this MoU expressed and confirmed the Constitutional provision, which establishes the power of the President to pardon the transferees. But even if the SL Constitution were in conflict with the MoU, this MoU cannot prevail over the Constitution. Actually, it would be the other way around, namely: the Constitution would override this MoU. As a result, only the SL Constitution would be applicable to eventually preserve the President's power to grant pardon. Being inapplicable, the MoU cannot be violated.

[4] Somaliland Standard news agency of August 2, 2019; available at: http://somaliland standard.com/ somaliland-bids-farewell-to-19-pirates-from-somalia-after-serving-9-years behind-bards/, accessed on 07 August 2019.

4. The international transfer of prisoners is a modality of international judicial cooperation whereby the receiving country takes charge of the execution of an imprisonment punishment imposed on its national by the sending (sentencing) country[5]. It relinquishes the jurisdiction of the sentencing country's authorities over the execution of the punishment to those of the country of the sentenced person nationality. However, this change never amounts to any transfer of jurisdiction over the criminal case. Even if the national penal law of the receiving country was also applicable to the crime (this is not necessary), for which a given transferee was punished, nevertheless, this country cannot regain and exercise any concurrent jurisdiction over this specific criminal case. The jurisdiction stays with the sending (sentencing) country.

This is why the foreign judgment is adapted to the law of the receiving (executing) country but can never be reviewed by its judiciary[6]. It is reviewable solely by the sentencing country. One cannot find any international agreement under which the receiving (executing) country is also authorized to review the judgment. On the contrary, international agreements expressly establish the monopoly of the sentencing country over this revision. For example, under Article 17.2 of the UN Model Model Agreement on the Transfer of Foreign Prisoners, "*the* sentencing *State has the sole competence for a review of the sentence*". This common principle is embedded in Article VIII (Sentence 1) of the Inter-American Convention on Serving Criminal Sentences Abroad, Article 13 (2) of the British Commonwealth Scheme for the Transfer of Offenders, Article 13 of the European Convention on the Transfer of Sentenced Persons, Article 5 of the Memorandum of Understanding between Somaliland and Seychelles on the Transfer of Sentenced Pirates, etc.

CONCLUSIONS

When it comes to the granting pardon to transferees, the following four situations might be distinguished:

First, the international transfer of prisoners was not carried out on the basis of any international agreement (e.g. from Iran to Somalia last year). It was a non-treaty based transfer. In this situation, no legal provision may prevent the President of the receiving country from pardoning transferees. Promises, given by him, to desist from pardoning them have only moral value. He cannot validly abandon his Constitutional authority to pardon prisoners. In this situation, no pardoning of transferees may constitute any violation of law. It can be only bad policy.

Second, the international transfer of prisoners was carried out on the basis of any international agreement but this agreement does not prohibit the pardoning of transferees (as in the case with Somaliland and Puntland). In this situation, no pardoning of transferees may constitute any violation of law either. Again, promises and/or declarations not to pardon have only moral value.

Third, the international transfer of prisoners was carried out on the basis of an international agreement. This agreement prohibits the pardoning of transferees but the Constitution of the receiving country does not contain a provision empowering this prohibition. In this situation, the Constitutional permission to pardon any prisoners would derogate with its stronger legal force the prohibition in the international agreement of pardoning transferees. Hence, there might be no violation of law in case of the pardoning of some transferee.

Yet, the receiving country's authorities should, at least, be politically and morally restricted in granting pardon to the transferees. If these authorities are not restricted, at all, there would be no explanation as to why they have signed an agreement (technically applicable or not) which prohibits them from pardoning such persons.

Fourth, the international transfer of prisoners was carried out on the basis of an international agreement. This agreement prohibits the pardoning of transferees and, at the same time, the Constitution of the receiving country contains a special provision empowering this prohibition in the agreement (one can hardly such a Constitution, though). In this situation only, such a special empowering Constitutional provision would exclude the applicability of the general Constitutional permission/authorization of the President to pardon prisoners. Hence, if the President pardons a transferee,

[5] It is worth emphasizing that according to Point 20 (2) of the Explanatory Report to the Convention on the Transfer of Sentenced Persons [Council of Europe, 1983], "It is not necessary for the person concerned to be a national of only the administering State. The Contracting States may decide to apply the convention, when appropriate, in cases of double or multiple nationalities even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is, therefore, free to refuse a requested transfer if it concerns one of its nationals".

[6] See Articles 237-244 of the Somali Criminal Procedure Code for this revision.

he would break the applicable prohibition in the international agreement in conjunction with the special empowering provision of the Constitution.

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APPENDIX:

Puntland parliamentarians debate over prisoners convicted of piracy offences
The members of the Puntland House of Representatives, who met at the 23rd Session of the 46th Session of the House of Representatives in Garowe, discussed the legal status of pirate prisoners in Puntland. After the debate, the speaker and lawmakers agreed to invite the Attorney General, minister of justice, religious affairs and constitution to answer questions on the prisoners' crimes on July 25, 2020.
https://www.idilnews.com/2020/07/22/baarlamaanka-puntland-oo-u-qareemaya-maxaabiista-dambiyadda-burcad-badeedka-u-xiran-video/

Puntland State Parliament sets pirates free
The Puntland state parliament today repealed legislation allowing to imprison pirates since 2013 at the central prison in Garowe, the capital of Puntland state. The parliament also nullified an agreement between Puntland and Seychelles on piracy and set up a committee to secure the release of the prisoners.
https://www.somalidispatch.com/latest-news/puntland-state-parliament-sets-pirates-free/

Puntland Attorney General calls holding pirate prisoners in Puntland prisons illegal
Puntland Attorney General Mohamud Hassan Aw Osman on Saturday briefed the Puntland House of Representatives on the situation of pirate prisoners in Puntland prisons. He said in his report that the agreement to the transfer prisoners to Puntland from Seychelles was illegal as it violated the Puntland Constitution.
https://puntlandpost.net/2020/07/26/https-puntlandpost-net-2020-07-26-xeer-ilaaliyaha-guud-ee-puntland-oo-sharci-darro-ku-tilmaamay-maxaabiista-burcadnimada-ugu-xiran-xabsiyada-puntland/