

# The Delayed Release of Imprisoned QARAN Leaders: Procedural Hurdles?

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## The EPMP negotiated agreement

Somalilanders everywhere welcomed recently the announced settlement on 20<sup>th</sup> August 2007 of some of the disputes between the President and the House of Representatives which have been raging almost since the directly elected House took office in October 2005. The settlement which was facilitated by an Eminent Persons Mediation Panel (EPMP) (consisting of famous poets, academics and religious leaders<sup>1</sup>) included the release from prison of the Chairman and the two Deputy Chairmen of **Qaran** political association, **Dr. Mohamed Abdi Gaboose, Mr Mohamed Hashi Elmi and Mr Jamal Aideed**, who were arrested on 28 July 2007 and were sentenced, by a Regional Court on 19 August 2007, to imprisonment of three years and nine months, as well as an automatic disqualification from public office<sup>2</sup> (and, even, from the right to vote) for 5 years.

The EPMP settlement term relating to the QARAN leaders, which was one of the three<sup>3</sup> main terms, was worded as follows:

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<sup>1</sup> The EPMP, which was formally known as “the Committee for the Resolution of Disputes between the National Councils” (i.e the Council of Government and the Houses of Parliament) consisted of the following members:

1. Maxamed Ibraahim Warsame (Hadraawi)
2. Sh. Maxamed Sh. Cumar Dirir
3. Maxamed Xaashi Dhamac (Gaariye)
4. Sh. Ismaaciil Cabdi Hurre
5. Sheekh Yuusuf Aadan Maxamed
6. Maxamed Siciid Gees
7. Prof. Saleebaan Axmed Guuleed
8. Dr. Aadan Yuusuf Abokor
9. Siciid Axmed Maxamuud

<sup>2</sup> Article 102(1) of the 1962 Somali Penal Code states: “..... A sentence of imprisonment for a crime for a term of not less than 3 years shall entail ... disqualification from public office for a period of 5 years....”. Article 101(3) explains that temporary disqualification “shall deprive the convicted person of the capacity to acquire, exercise or enjoy during the period of disqualification rights, offices, services, qualities, titles and honours”. The rights are listed in Clause 2 (a) to (g) of the same Article, and include “the right to vote or to be elected and every other political right” and the rights to hold public office, academic positions, stipend or pensions of the state etc. These provision mirror Articles 32 and 28 of the 1930 Italian Penal Code.

<sup>3</sup> The other two terms were:

1. That the two Guurti nominees for membership of the (Electoral) Commission be re-submitted to the House of Representatives for a vote.
2. That the (2007) Budget be implemented as approved by the House of Representatives.

In Somali:

1. In Golaha Wakiillada marlabaad la horgeeyo labadii Xubnood ee Guurtidu, komiishanka u soo magacowday oo loo Codeeyo.
2. In Miisaaniada loogu dhaqmo sidii Golaha Wakiiladu ku ansixiyeen.

“3. That the three imprisoned politicians be released, their political rights and freedoms be restored and that matters which they raised are considered by others<sup>4</sup> whilst they are free. It is incumbent on them that they must not undertake any campaigns which would harm the public order.”

In Somali:

*“3. in saddexdii siyaasi ee la xidhay la sii daayo, xorriyadoodii siyaasadeedna la siiyo, arrinka ay ku doodayaana lala eego, iyagoo debeda jooga. Waxaa iyagana lagga rabaa inanay gelin abaabul nabadgelyada wax yeela.”*

The House of Representatives promptly fulfilled the settlement term addressed to it (i.e the first of the main three terms, which related to the disputed nominations to the National Electoral Commission<sup>5</sup>) and the EPMP then started expressing their concerns, in public interviews, about the delayed implementation of the terms which the President agreed to fulfil. The widespread concern about the continued imprisonment of the QARAN leaders was manifested in public demonstrations held in Hargeisa and Burao on 12 September 2007, which were promptly condemned by the Government as being illegal and politically motivated.

The EPMP members, in an interview on 7 September 2007, confirmed that they have asked the President to consider ways of releasing the QARAN leaders without the latter submitting requests for a pardon, but in a widely publicised interview, following the demonstrations, the President insisted, on 13 September 2007, that he will agree to a pardon on condition that the three leaders request it formally. The President repeated that he is prepared to pardon them but he knows no other way than for the leaders to petition for clemency. This same view was expressed by the Secretary General of the governing party and, in an unnecessarily confrontational interview, by the Deputy Minister of Justice. The QARAN leaders have already repeatedly stated that they have not committed any crimes and therefore do not seek any pardon, and in any case the Mediation process was conducted between the President and the House of Representatives, which considered the QARAN leaders’ imprisonment as amounting to an issue of conflict between them and the Government.

### **A procedural hurdle?**

It has been over a month since the mediation agreement was announced, and despite the President’s agreement that the QARAN leaders will be released, they are still in jail in Mandhera prison. Whatever the reasons for the delay in the release of the QARAN leaders are, the President’s expressed difficulties appear to be based on the procedural issue as to how the release should be effected. Both the President<sup>6</sup> and his Deputy Justice Minister stated that there is no other “legal” way that the release could be done other than through a formal request for a pardon, whilst the EPMP and QARAN leaders argue that as the release

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<sup>4</sup> Including, presumably, the Government.

<sup>5</sup> The House re-considered on 27 August 2007 the two Guurti nominees and rejected them again, and then considered their replacements on 3 September 2007 and endorsed their appointments with an overwhelming majority.

<sup>6</sup> For example, the President, in his BBC interview on 13 September 2007, stated that he knew no other way to release of the QARAN leaders unless they applied for a pardon (presumably under Article 255 of the CPC, above)

has been agreed in principle, all that it needs is for the President to implement it by a decree. The President and his advisers appear to be relying on the procedural Article 255 of the 1963 Somali Criminal Procedure (CPC) which deals only with individual pardons requested by convicted prisoners and which states as follows:

“Measures relating to Pardon & Conditional Release

1. An appeal for pardon or for conditional release shall be addressed to the President of the Republic and sent to the Attorney General. The appeal shall be signed:
  - a) by the convicted person,
  - b) by a descendant, ascendant or spouse of the convicted person.
2. Pardon or conditional release shall be granted by decree of the President of the Republic, having heard the Minister of Grace & Justice and the Attorney General.
3. In so far as possible, the provisions of Article 254<sup>7</sup> shall apply with regard to the implementation of the decree.”

As explained further below, neither indult, which is a type of impersonal “pardon” applying to all persons in a specific category, nor amnesty are covered by this procedural article, which is aimed at specific “personal” requests for pardons. In any case, amnesty is much wider than pardon in that it can cover not only persons convicted by courts, but also persons who have not even been charged with an offence.

Given the agreement, in principle, for the release of the QARAN leaders, I explore below the options, other than the Article 255 of the CPC route, which are open to the President if, as he has repeatedly stated, he still minded to fulfil his widely publicised declaration to release the imprisoned QARAN leaders.

### **Somaliland presidential powers**

Other than Article 90(5)<sup>8</sup> of the Somaliland Constitution which gives the President the power to exercise pardon and amnesty (*cafis iyo saamaxaadda*, in Somali), no other laws dealing with this matter have been passed by the Somaliland parliament. To understand the range of these powers, therefore, one needs to examine the provisions of the Somali Penal Code (1962) and the Somali Criminal Procedure Code (1963) which are both still in use in the Republic of Somaliland and which were the statutes<sup>9</sup> used in the case mounted against the the QARAN leaders. In turn, both of these Codes were linked to the 1960 Somali Republic

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<sup>7</sup> This Article confirms that after the offence and punishment becomes extinct (as a result of a pardon), the court shall declare it so.

<sup>8</sup> “Article 90: The Powers of the President

The President is the Head of the nation and the state, and is the symbol of the unity of the citizens of the Republic of Somaliland. He is responsible for the care of the nation’s resources, the protection of the peace, the advancement of the society and the proper conduct of the administration of the state. In order to fulfil these responsibilities, the President shall have following powers:

.....

5. Without prejudice to the principles of just retaliation (Qisas) and the limits under Islamic Sharia, **the exercise of pardon and amnesty**, and the grant of political asylum after consultation with the appropriate bodies.”

<sup>9</sup> The charges against the three leaders were laid under Articles 231, 505 and 510 of the Penal Code.

Constitution<sup>10</sup> and an examination of all the three, as well international comparisons, will shed some light on the definition and legal effects of the concepts of “pardon and amnesty” in current Somaliland law.

Whilst the Arabic versions of the words “cafis iyo saamaxaad” are practically interchangeable, there would have been no need for the inclusion of both words in the Somaliland Constitution if they both meant the same. The fact that the two words have been used, and, in the light of the existing Somali law still in force in Somaliland, there are two concepts, which can be translated as “pardon” and “amnesty” that the Constitution is addressing. If that is not the case, and the Somaliland President has the power<sup>11</sup> to “pardon” only, but not the power to grant “amnesty”, then the Somaliland Parliament will have to assume that power, which incidentally, in the 1960 Constitution laid with National Assembly<sup>12</sup>, although the latter could delegate it by law to the President, whilst the President was given the power to exercise “pardon”<sup>13</sup>. It should be noted, however that in presidential systems, like the US, where the Constitution<sup>14</sup> does not mention “amnesty”, the power to pardon has been interpreted as including the power to grant amnesty<sup>15</sup> by presidential proclamation.

Broadly, as set out by a US court "Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness"<sup>16</sup>. Amnesty usually applies to offences whilst pardon applies to specific persons, or in the form of indult, to all persons in a specific category. Also in some countries, including the Somali Republic of 1960-69, amnesty traditionally required a law

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<sup>10</sup> It is no accident that many provisions of the “democratic” Somali Republic 1960 Constitution have been reflected in the Somaliland Constitution.

<sup>11</sup> In view of Somaliland’s history of dictatorial government (during the 70s and 80s) which the preamble to the Constitution points out, Article 90, lists the powers of the President and limits them to those given to him by the Constitution and other laws. This therefore re-emphasises that Somaliland’s presidential powers are based on the constitution and the law and not on a general prerogative or stewardship power. The preamble is a guide to the interpretation of the constitution and its call for vigilance against dictatorship means that the powers of the Presidency and the executive have to be interpreted narrowly and strictly within the provisions of the constitution and the laws. Note also that even the emergency and war making powers of the President are also circumscribed in Article 92.

<sup>12</sup> See Article 64 of the Somali Republic Constitution 1960:

“Amnesty and Indult

1. The power of granting amnesty and indult may be delegated to the President of the Republic by a law approved by the Assembly, by a two-third majority of the deputies.
2. Amnesty and indult may not be granted in respect of offences committed after the presentation of the draft law on the delegation of powers.”

<sup>13</sup> Article 75 of the Somali Republic Constitution 1960:

“Powers and Duties

The President of the Republic shall exercise the functions conferred upon him by the Constitution and by law, in the legislative, executive and judicial fields. In addition, he shall:

.....

c) grant pardon and commute sentences;”

<sup>14</sup> The US Constitution (Article II, S.2) uses the phrase “reprieves and pardons for offenses against the US except in cases of impeachment”, but this has been held to include full pardon, conditional pardon, commutation, remission, and reprieve.

<sup>15</sup> President Carter, for example, proclaimed that all persons convicted of certain offences under the Selective Service Act were to be unconditionally pardoned, and all pending cases closed.

<sup>16</sup> *State v. Blalock*, 61 N.C. (Phil. Law) 242, 247 (1867).

passed by parliament, but some of Presidential systems (e.g the new Eastern European constitutions) assign both powers to the President<sup>17</sup>.

Following the Somali Republic Constitution and replicating, word for word, the Italian Penal Code (the Rocco Code), the 1962 Somali Penal Code deals with pardon and amnesty separately. Pardons are dealt with by Article 149 of the Penal Code which refers to “indult and pardon”, the effect of which is that it

“shall constitute condonation, wholly or in part, of the punishment imposed or shall commute it to another punishment...”

“Indult” is a form of a “general pardon” which applies to all persons in a specific category, and hence is impersonal, whilst a “pardon” applies to a specific person, but neither extinguishes linked accessory penalties. A pardon (or an indult) under Article 149 of the Code, therefore, remits only in whole or in part the main punishment imposed (prison or fine etc), but UNLESS the decree provides it explicitly, it does not stop the accessory punishments, such as interdiction (disqualification) from public office, to which the QARAN leaders have been sentenced under the automatic, and in the light of modern human rights law, obsolete provision of Article 102(1)<sup>18</sup> of the Penal Code.

Amnesty is dealt with in the Somali Penal Code under Article 144. Unlike pardons, amnesty extinguishes the offence, as well as the punishment, including any linked accessory penalties, such as interdiction (disqualification) from public office. Amnesty is not just confined to cover criminal charges brought or to criminal convictions in respect of an offence, but it also covers the likely commission of the offence itself. Amnesty is often used for “political” offences and for securing reconciliation and peace.

There are no published procedures for the grant of pardon or amnesty by the Somaliland Presidents, but in the last few years both Presidents Egal and Rayale have exercised this power in connection with:

1. Individual pardons.
2. Indults or general pardons to groups of prisoners, sometimes, during Eid<sup>19</sup>, in which case, there were no pre-condition that the individual prisoners submit petitions under Article 255 of the CPC.
3. Amnesty<sup>20</sup> in respect of, for example, those Somaliland persons who attended the Arta Somalian Conference although there was an understandable condition

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<sup>17</sup> An example is the Moldova Constitution.

<sup>18</sup> See footnote 2 above for the details of Article 102. Automatic blanket denial of voting rights to convicted persons have been held to be contrary to modern human rights – see, for example the the Canadian Supreme Court case of *Sauve v. Chief Electoral Officer of Canada* (1995) 132 DLR (4th) 136, and the ECHR decision of *Hirst v. United Kingdom (No.2)* of March 2004.

<sup>19</sup> One of the last “indult” presidential decrees was on 09/02/2003 when 368 prisoners were offered an indult, with the decree specifically excluding persons convicted of various listed offences.

<sup>20</sup> One other main example of an amnesty in Somaliland, which predated the Constitution, is the one agreed between the Somaliland communities at the Burao 1991 Grand Conference.

that such persons must first return to Somaliland and request the amnesty formally, as an indication of their allegiance to Somaliland.

In practice, it is the only the first category of individual or personal pardons that the procedures for petitions under Article 255 of the CPC is relevant.

### **The procedural alternatives to an Article 255 (CPC) pardon**

In short, unless President Rayale and his legal advisers believe that he has no power to grant an “amnesty”, in which case this power will now lie with the Parliament, there are two alternatives to individual and personal pardons and these are a general pardon (indult) or an amnesty.

QARAN’s case does have many of the hallmarks of an issue that is suitable for an amnesty, (or failing that a general pardon). The case:

- concerns a national political and constitutional issue, which was accepted as such by the House of Representatives and explains why it ended up being seen as part of the subjects of dispute between the House of Representatives and the President;
- involves problems based on fundamental political rights and freedoms, the resolution of which are crucial to the onward advance of democracy in Somaliland;
- raises issues which go beyond QARAN and also affect the other declared political associations<sup>21</sup> and those waiting in the wings, which are vying for possible participation in the forthcoming local elections in December 2007; and
- is likely to affect public order and peace if the continued imprisonment of the QARAN leaders lasts and the underlying issues remain unresolved.

An amnesty which covers not just the QARAN leaders, but also all those who were engaged in setting up the new political associations declared this year readiness for the local government elections in December 2007 will ensure that a line is drawn under what has happened so far and will, as set out in the EPMP agreement then allow time for a serious national discussion the constitutional position in respect of the issues raised by QARAN and others and the other new associations that have, so far, been declared.

Should the President and his legal advisers feel that he has no power to issue an amnesty, the same result can be achieved by the a presidential decree providing an indult (general pardon) in the same format, but adding, for the avoidance of doubt, that the indult also includes all accessory penalties imposed in any relevant conviction. The draft presidential decree (set out in the attached appendix in Somali) therefore includes references to both an amnesty and an indult, as a belt and braces approach which has indeed been the approach adopted in an “indult” presidential decree on Eid 2003, on which this draft is based. This draft presidential decree covers:

- a) only the new political associations declared so far during 2007; and

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<sup>21</sup> QARAN was declared on 5 April 2007. Although it is not clear how substantive their support was, a political association called Badbaado was declared on 27 June 2007 and another one called Gude Gude was declared on 25 July 2007.

- b) is confined to any possible offences, charges or convictions under the Penal Code (and not civil matters) relating to all aspects of the formation, organisation, meetings, assembly, publicity etc of the new political associations in 2007 and up to the date of the amnesty/general pardon decree;
- c) makes clear, for the avoidance of doubt, that all the accessory penalties of anyone convicted by court in respect of this matter, as well as the main punishment, are covered by decree;
- d) exhorts all such associations, persons to safeguard the public order, as agreed in the EPMP agreement; and
- e) comes into effect on the date of its signature by the President.

### **Final comments**

I have heard yet no substantive reasons why the agreed release of the QARAN leaders should not be implemented, and I have addressed the Article 255 CPC point in this article. It is my fervent hope, and that of many Somalilanders, that the delays in the already agreed release of the QARAN leaders have indeed been due to procedural issues only and that the goodwill shown by the President and the House in reaching the EPMP agreement, in the first place, will hopefully come through. The nation (and those of us living abroad) was elated by the successful conclusion of the EPMP agreement on 20 August 2007, which came after the so many false previous dawns promised by the “turxaan-bixin” exercise in 2005 and would urge the President not to let this specific EPMP agreement term fall by the wayside. Whatever political concerns there may be about other EPMP terms relating to the 2007 budget and other constitutional issues, this one concerns the liberties of three citizens who have already been in prison since July 2007. As their release has already been agreed, in principle, surely arguments about procedural matters should not continue to delay their release, especially in this month of Ramadan.

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### **APPENDIX: DRAFT Presidential Decree based on Previous “General” Pardon Decrees**

#### **Madaxweynaha Jamhuuriyadda Somaliland:**

- Markuu arkay: Qodobka 90aad, xubintiisa 5aad ee Distoorka Jamhuuriyadda Somaliland oo ku saabsan awoodaha Madaxweynaha ee Cafiska iyo Samaaxaada;
- Markuu arkay: Qodobka Qodobka 149aad ee Xeerka Ciqaabta Guud oo ku saabsan Cafiska Guud iyo kan gaarka iyo Qodobka 144aad ee Xeerka Ciqaabta Guud ee Ku saabsan Saamaxaada (Amnesty);
- Markuu aqbalay: Soojeedintii uu ka aqbalay Gudida Dhexdhexaadinta Golayaasha Qaranka;
- Markuu tixgeliyey: In ay haboon tahay in la sameeyo saamaxaad ama cafis guud si loo afjaro arrimihii muranku ka jiray;

Markuu go'aansady: In ay ay waqtigan xasaasiga ah, talaabadani ay maslaxada guud ee wadanaka iyo umudda faai'do u tahay

### **Wuxuu soo saaray Xeerkan:**

#### Qodobka 1aad

Madaxweynaha Jamhuuriyadda Somaliland wuxu Saamaxaad iyo Cafis Guud u fidiyey dhamaan cid kasta oo lagu eedeeyey dembi ku xusan Xeerka Ciqaabta Guud, ama lagu xukumay ciqaab ku saleysan dembi caynkaas, oo ku saabsan sameynta, abaabulka, shirarka, dhaqdhaqaaqa, hadaladda, qoraalada iyo hawlaha la xidhiidha ururada siyaasada ee cusub ee jiritaankooda lagaga dhawaaqay wadanka sanadkan 2007.

#### Qodobka 2aad

Saamaxaadan iyo Cafiskan Guud:

1. wuxuu ku eg yahay wax allaahe wixii dacdo eh ee ku saabsan arrimaha ku xusan Qodobka 1aad ee dhacay ka hor maalinta uu Xeerkani dhanqangalay;
2. mana saamaynayo xuquuqaha madaniga ah ee dadweynaha ee la xidhiidha arrimaha kus xusan Qodobka 1aad ee Xeerkan.

#### Qodobka 3aad

Si shaki looga saaro (for the avoidance of doubt), Samaxaadan iyo Cafiskan Guud, sida ku xusan Qodobka 144aad ee Xeerka Ciqaabta Guud, way tirtireysa dhamaan dembiga iyo ciqaabta guud ee ku xusan Qodobka 90aad ee Xeerka Ciqaabta Guud iyo ciqaabta gaarka ah ee wahilisa eek u xusan Qodobada 92/93 ee Xeerka Ciqaabta Guud, ee lagu xukumay qof kasta oo ka mid ah dadka ku xusan Qodobka 1aad ee Xeerkan.

#### Qodobka 4aad

Waxa dhamaan dadka Samaxaadan iyo Cafiskan Guud loo fidiyey la xasuusinaya in ay ilaaliyaan xasilloonida guud iyo nabadgelyada.

#### Qodobka 5aad

Xeerkani wuxu hirgelayaa marka uu saxeexo Madaxweynuhu, waana in ay Saamaxaadan iyo Cafiskan Guud fuliyaan isla markiiba Xeer-ilaaliyaha Guud, Taliyeyaasha Xabsiyada iyo Booliiska iyo Garsoorayaasha Maxkamadaha ee ku haboon.