

## Concept Regulation on the Transfer Sentenced Persons Between Countries in Indonesia: An Initial Step

Fabiatul Rahmat<sup>1\*</sup>, Moh. Muhibbin<sup>2</sup> Budi Parmono<sup>3</sup>

Article	Abstract
<p><b>Keywords:</b> Concept Regulation; Transfer Sentenced Person; Crimes Across State Borders.</p> <p><b>Article History</b> Received: Jul 22, 2024; Reviewed: Sep 12, 2024; Accepted: Oct 03, 2024; Published: Oct 10, 2024.</p>	<p>In the international context, the transfer of sentence persons is regulated in the general international standards in handling cross-border crime issues as outlined in the 2000 Palermo Convention (United Nations Convention Against Transnational Organized Crime) which Indonesia passed into law through Law Number 5 of 2009 concerning the Ratification of the United Nations Convention Against Transnational Organized Crime, in which member states are allowed to make agreements in handling crime through extradition agreements, mutual legal assistance in criminal matters, and transfer of sentence persons. Legal regulation on the transfer of prisoners between countries (Transfer Sentenced Person (TSP)) is important for Indonesia in order to reform and social rehabilitation for prisoners, so that imprisonment is used to ensure, as far as possible, the reintegration of prisoners in society after release so that they can live a law-abiding and independent life. The need for the state to establish a regulation in the form of a law on the transfer of prisoners between countries (TSP), is intended to create legal certainty, so that cooperation carried out with other countries either as a country requested by Indonesia or vice versa (as a requesting country) has a legal basis that provides restrictions on what is in accordance with the concept of the purpose and politics of punishment law in Indonesia.</p>



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### Introduction

Basically, a person who is in the territory of a country must automatically be subject to the provisions that apply within the territory of the country. However, while foreign nationals are subject to the laws of the country they are in, they remain under the protection of their home country (LaFave, 2010). When a citizen of one country is in

<sup>1,2,3</sup> Faculty of Law, Universitas Islam Malang, Indonesia

\* **Correspondence:** Fabiatul Rahmat, Faculty of Law, Universitas Islam Malang, Jl. Mayjen Haryono No. 193, Dinoyo, Kec. Lowokwaru, Malang City, East Java, Indonesia. E-mail: [fabitulrahmat47@gmail.com](mailto:fabitulrahmat47@gmail.com)

the territory of another, the home country of that person cannot easily provide protection to him or her. The country of origin certainly cannot be at will in interacting with its citizens. This is due to the sovereignty of other countries that should not be violated by the country of origin of the person, even though it is in order to provide protection for its citizens.

Criminal justice policies that prioritize imprisonment as a criminal sanction in many countries have resulted in increased overcrowding in prisons. Courts in many countries are now more likely to sentence offenders to prison and impose longer sentences than they did a decade ago (Saputra, 2021). Non-violent offenders who have committed minor crimes are increasingly likely to be imprisoned, rather than being dealt with through warnings, fines, suspended sentences, or restorative justice measures. Community-based non-custodial alternatives are often ignored in favor of deprivation of liberty. Such factors often underlie the transfer of prisoners between countries or Transfer Sentenced Person (TSP).

TSP aims to uphold human rights, as it provides an opportunity for prisoners to continue their remaining sentences in their home country. This is similar to rehabilitation which serves to improve the reputation of prisoners. Rehabilitation of prisoners aims to prevent the recurrence of violations. Several literatures state that the majority of the prison system budget is usually used to improve security, safety, and order, with an inadequate amount for investment in prisoner rehabilitation. This challenge is exacerbated as prisons become more crowded. The high rate of recidivism by former prisoners is a challenge.

On the other hand, it contributes to increasing prison sentences and overcrowding in prisons, making the Transfer of Sentenced Person TSP necessary to reduce prison populations by transferring prisoners to serve their remaining sentences in their home countries. The remaining sentence can be converted in the country of origin in consideration of upholding human rights. However, such conversion is not regulated under international human rights sentencing rules.

The absence of a legal umbrella in Indonesia that regulates the process of transferring prisoners is an obstacle in following up offers of cooperation from other countries in the form of international prisoner transfers. Meanwhile, Indonesia itself has a great interest considering that currently there are many Indonesian citizens who are sentenced and are serving their sentences abroad. For this reason, the existence of a legal umbrella in the TSP process can be seen as an urgent matter in order to provide

comprehensive legal protection for Indonesian citizens who are serving their sentences in Indonesia and Indonesian citizens who are serving their sentences abroad.

One of the applications for interstate transfer of prisoners by Schapelle Corby in 2005, Corby, an Australian citizen convicted by an Indonesian court, could not be processed because there was no legal instrument for interstate transfer of prisoners in Indonesia. In addition, several countries have proposed cooperation between countries (Bilateral) (Lathifah & Harto, 2015). More and more friendly countries have offered to establish Treaty on TSP cooperation with Indonesia but have not been able to respond, including Malaysia, Thailand, China/Hong Kong, the Philippines, France, Nigeria, Iran, India, Bulgaria, Romania, Brazil, Australia, and Syria. Requests from friendly countries need to be considered positively in an effort to maintain bilateral relations that have been going well and are mutually beneficial. Until now, Indonesia has not been able to respond to requests from friendly countries due to the absence of national legislation regarding the Treaty on TSP (Afriansyah, 2015).

In the international context, the transfer of sentence persons is regulated in the general international standards in handling cross-border crime issues as outlined in the 2000 Palermo Convention (United Nations Convention Against Transnational Organized Crime) which Indonesia passed into law through Law Number 5 of 2009 concerning the Ratification of the United Nations Convention Against Transnational Organized Crime, in which member states are allowed to make agreements in handling crime through extradition agreements, mutual legal assistance in criminal matters, and transfer of sentence persons (Ahmadi, et.al., 2023).

Indonesia can use the instrument of international legal cooperation in the TSP or the benefit of Indonesia, especially in order to provide legal protection for Indonesian citizens who are sentenced abroad (Sahati & Alam, 2020). That there is a condition of legal vacuum in Indonesia related to the transfer of prisoners between countries, so in this paper, the author offers an ideal concept of regulating the transfer of prisoners between countries which will be comprehensively discussed in this paper. Based on the description above, the author will discuss in this article the first is the urgency of legal arrangements on the transfer of prisoners between countries TSP to be applied in Indonesia. Furthermore, this discussion will be continued on the discussion of the description of the ideal conception of legal arrangements governing the TSPs between countries.

## Method

Legal research is a scientific activity, which is based on certain methods, systematics and thoughts, which aims to study one or several certain legal symptoms, by analyzing them. The type of research used is normative legal research, because the scope of the research is to conduct legal studies in a regulated manner that is always framed by legal doctrines. According to Peter Mahmud Marzuki, normative legal research is a process for finding legal rules, legal principles and legal doctrines in order to answer the legal issues at hand. In simple terms, normative legal research or normative juridical research is library legal research conducted by examining library materials or secondary data. So that this research will be carried out using legal provisions in force in Indonesia, both primary legal materials and secondary legal materials and also using the opinions of experts in the field of law, especially those related to research issues. This research is also supported by a normative approach by examining library materials by studying and analyzing theories, concepts and regulations related to the problem (Marzuki, 2017).

## Discussion

### 1. Urgency of legal regulation on the transfer of prisoners between countries (Transfer Sentenced Person)

According to data from the Ministry of Home Affairs (Kementerian Dalam Negeri/Kemendagri), the population of Indonesia in 2024 reached 281.603.800 people. Of that number, 207.889.876 people were registered as citizens who were required to have identity card (Ulya & Rastika, 2024). According to the Ministry of Foreign Affairs, until now there has been no specific scientific study on the total number of Indonesians Abroad (MILN)/Diaspora Indonesians spread throughout the world.

Data from the Indonesian Ministry of Foreign Affairs in 2024 showed that there were 165 cases of Indonesian citizens sentenced to death abroad. Of that number, the country with the most cases of Indonesian citizens sentenced to death was Malaysia. The cases in which most Indonesian citizens were sentenced to death were related to drug trafficking, and there were also cases of those threatened with the death penalty for murder. In detail, 155 people were in Malaysia, one in Vietnam, and 3 people each in Saudi Arabia and Laos. The majority of them were said to have migrant worker status. A total of 51 other Indonesian citizens in Malaysia were freed from the threat of the death penalty due to legal reforms in Malaysia last year (Wawan, 2024).

One of the Government's efforts to protect Indonesian citizens is stated in the Preamble of the 1945 Constitution in the 4th paragraph which contains the Government protecting the entire Indonesian nation and all Indonesian blood spills, advancing public welfare, educating the nation's life and participating in implementing world order based on independence, eternal peace and social justice (Wahid & Rafiqi, 2022). The government's protection of Indonesian citizens covers all fields, including legal, social, economic, cultural, and health sectors. Some of the protection of Indonesian citizens and migrant workers abroad is associated with the laws and regulations in force in Indonesia, namely:

- 1) Law of the Republic of Indonesia Number 13 of 2003 concerning Employment;
- 2) Law of the Republic of Indonesia Number 21 of 2007 concerning the Eradication of Trafficking in Persons;
- 3) Law of the Republic of Indonesia Number 18 of 2017 concerning Protection of Indonesian Migrant Workers;
- 4) National Agency for Placement and Protection of Indonesian Migrant Workers hereinafter abbreviated as UNTOC Abroad;
- 5) Minister of Foreign Affairs Regulation Number 4 of 2008 concerning Citizen Services;
- 6) Decree of the Minister of Labor Number 260 of 2015 concerning the Termination and Prohibition of Placement of Migrant Workers with Individual Users in Middle Eastern Countries.

Indonesia through Law Number 5 of 2009 has ratified the ratification of the UNTOC, which regulates several important international cooperation such as extradition, transfer of prisoners, mutual legal assistance, joint investigation, cooperation in conducting special investigation techniques, transfer of criminal proceedings. In terms of the transfer of prisoners regulated in UNTOC article 17, it still does not provide a description of the mechanism of transfer of prisoners, the arrangement is only in the form of recommendations for the form of cooperation that needs to be done to make bilateral or multilateral agreements or legislation within the state party. Technical references that are often used in the international transfer of prisoners are the Convention on the TSPs (1983) between the Council of Europe countries and the Schengen Convention (Title III Chapter V) (1990).

The UN Convention Against Corruption was adopted by the UN General Assembly in its resolution No. 58/4 of October 31, 2003, and opened for signature in Merida Mexico from November 9 to 11, 2003. The Convention has been signed by 116

countries and ratified by more than 15 countries. This Convention was preceded by two leading conventions issued by the Organization of Council of Europe (OCOE) countries, namely, the Criminal Law Convention on Corruption, which has been in force since July 1, 2002, and the Civil Law Convention on Corruption, which became effective on November 1, 2003 and has been ratified by 21 (twenty-one) EU countries. In addition, countries that are members of the African Union have produced an Africa Union Convention on Preventing and Combating Corruption, which was established in Addis Ababa on September 18-19, 2002. In March 2006, the government ratified the 2003 United Nations Convention Against Corruption (KMK, 2003) with Law No. 7 of 2006 on the Ratification of the United Nation Convention Against Corruption.

The 2003 UN Convention (UNCAC, 2003) is a treaty-based crime that prioritizes the principles of sovereign equality, national integrity and non-intervention (see Article 4). This provision reflects that the implementation of this convention by each state party must not violate the aforementioned principles (Kesiranon, 2023). For example, in the Indonesian government's efforts to return assets from corruption in Indonesia and Singapore and from other countries, diplomatic channels should be taken first before direct enforcement through the Attorney General's Office or the Police because of the complexity of the legal issues of returning these assets. The provisions of Article 4 above are very relevant to the provisions on international cooperation (Chapter IV) in the UN Convention which regulates various forms of international cooperation. The new forms of international cooperation from the 2003 PBS Convention are, "TSP" (Article 45), and "Transfer of Criminal Proceeding" (TCP) (Article 47). According to Romly, Article 45 regarding TSP is a non-mandatory provision ("may consider"), and Article 47 is a mandatory provision ("shall consider").

The absence of a legal umbrella in Indonesia that regulates the process of transferring prisoners is an obstacle in following up offers of cooperation from other countries in the form of international prisoner transfers as discussed in the previous chapter. For this reason, the next discussion will explain the principle of regulating the International Transfer of Prisoners with the approach of the 1945 Constitution of the Republic of Indonesia as a Fundamental norm which becomes the principle and umbrella. Law Number 22 of 2022 on Corrections (Dachak, 2021). Contains the correctional philosophy adopted by the correctional system in Indonesia, namely Social Integration, where the development of prisoners must actively involve the community and as far as possible bring lawbreakers closer to community life.



In this law, prisoners are not only objects but also subjects who are no different from other human beings who at any time can make mistakes or mistakes that can be subject to punishment, so they do not have to be eradicated. What must be eradicated are factors that can cause prisoners to do things that are against the law, decency, religion, or other social obligations that can be subject to punishment. Criminalization is an effort to make convicts or juvenile offenders regret their actions, and return them to become good citizens, obey the law, uphold moral, social and religious values, so as to achieve a safe, orderly and peaceful community life (Valerian, 2021).

The correctional system is organized in order to form prisoners to become fully human, realize mistakes, improve themselves, and not repeat criminal acts so that they can be accepted back by the community, can actively participate in development, and can live reasonably as good and responsible citizens (Aswar & Yasin, 2021). The correctional system functions to prepare prisoners to be able to integrate healthily with society, so that they can play a role as free and responsible members of society. This law distinguishes between convicts and prisoners, a convict is someone who is sentenced based on a court decision that has obtained permanent legal force while a prisoner is a convict who is serving a sentence of loss of freedom in a correctional facility. Although the transfer of prisoners has been regulated, the regulation still does not regulate the transfer of prisoners internationally or between countries. Therefore, there is still a legal vacuum in the regulation of the technical implementation of international prisoner transfers (Wahid, 2023).

In addition, talking about prisoners, cannot always be separated from the name of the punishment process in the form of rehabilitation. rehabilitation is an offender mentioned in every international instrument dealing with the TSP. However, rehabilitation is not a blank canvas-theories and research on the reintegration of an offender form a consistent framework in which the meaning and content have been outlined. Theories on the purpose of punishment approach it from three perspectives. The first sees punishment as retribution; offenders are punished for violating the norm (Cavadino dan Dignan, 2002). Retributive sanctions are crime-centered, and punishment has an inherent moral value, rather than attempting deterrence. The second perspective sees punishment as an instrument to achieve rehabilitation or deterrence. Punishment aims to achieve either specific (inhibiting recidivism of individual offenders) or general deterrence (prevention). The purpose of punishment is intended to have the desired effect in the future. This perspective is offender-centered, as more information is needed about an offender and the possible effects punishment may have on them.

The third perspective is a hybrid of the first two, sentences should have future effects, but should be limited by proportionality. In the second and third perspectives, the rehabilitation of an offender is of paramount importance, and attention to the future that characterizes rehabilitation is incorporated into sanctions. The primordial goal of rehabilitation is crime prevention. Punishment should affect the personality or behavior of offenders in such a way that it becomes less likely that they will commit crimes in the future. An orientation towards change has always been central to theories involving rehabilitation, and has been developed over the years. At first rehabilitation was seen as the psychological transformation that an offender must undergo during a prison sentence. Later, attention centered on the evolving therapeutic approach, which postulated that offenders should be "cured". And later, crime was no longer seen as an individual pathology, but as a product of learned behavior, and rehabilitation was considered to compensate for one's socialization errors.

The most recent evolution in thinking centers on the rights of offenders, and emphasizes their right to education and assistance, and to withholding standard accommodations that create a physical or mental environment compatible with social reintegration. In the punishment phase there must also be room for subjectivity in decisions about the length and type of sanctions. The length and type of sanction should as far as possible be tailored to the cause of the particular crime, and to help a person refrain from committing future crimes. From a rehabilitation perspective, the subsidiarity of prison sentences is crucial, as prison sentences are considered counterproductive (apart from exceptional cases) and a way of reinforcing criminal dispositions rather than inhibiting them. Priority should be given to alternative sanctions and measures (Saputra, 2021).

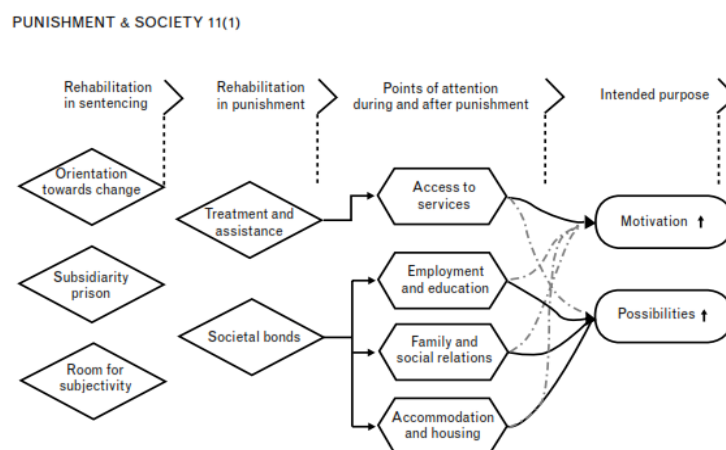
The rehabilitation perspective presupposes that it is possible to examine the individual causes of crime and incite positive change by using appropriate interventions. Future criminal behavior is influenced by factors related to the cognition of the offender on the one hand, and the circumstances of the offender on the other (Akbar, 2017). The intervention chosen when focusing on rehabilitation is, therefore, the care, assistance and stimulation of societal ties. Using a rehabilitation perspective thus implies that the criminal justice system opens doors for treatment and assistance, in order to reduce the risk of recidivism. Individual treatment and assistance programs, targeting addiction or psychological problems, seek to increase motivation or readiness to change. American, Canadian and European authors have found that treatment programs successfully lower recidivism rates when they target criminogenic factors (Bernfeld, 2002).



The most effective individual treatment programs are those that target dynamic factors directly related to offending, such as social attitudes, problem-solving competencies and substance abuse. High-risk offenders benefit the most from such programs. Interventions in the community have better outcomes than in prison, but the most important factor is that the intensity and length of treatment must be tailored to the needs and risk profile of the offender. Therefore, prison treatment requires that a variety of treatment options be made available, to take into account the diversity of the offender profile. Finally, offenders' social ties must be established, maintained or restored to improve their chances of reintegration. Social ties are an important aspect of rehabilitation; addressing social problems is generally not enough to ensure a person stops offending, but it is a necessary condition (Abdulloev et.al, 2020).

Hirschi considers societal bonds to be the most important deterrent force against offending. Subsequent effects research confirms that the absence of prosocial social bonds is related to offending. Having a partner (or, more broadly, a good family relationship) and being in good employment brings a reduction in criminal behavior. It may be difficult for offenders to establish strong social ties, but when such ties have been established, the chances of their life course will change drastically, and positive change begins. Social ties, in particular employment and relationships with family, should therefore be given sufficient attention during and after sentencing. Alternative sanctions or the magistrate's verdict model are obvious ways in which societal bonds can be maintained. This can be seen in the diagram below (Wree, et.al. 2009):

**Diagram 1. Rehabilitation in the Criminal Justice System**



In general, prisoner transfers are positive. The goal is to move prisoners to a place where they will return after being convicted. Transfers refer to the immediate rehabilitation of the offender into the community during their sentence. If an alternative sanction is imposed under the Supervision Convention, then the offender has already

served his sentence in the community. For example in Europe, in the case of a prison sentence under the European Transfer Convention. When serving a sentence in their home country, their experience is objectively and subjectively reduced.

Under the Convention, Supervision of the execution of the sentence can be carried out by the country in whose territory the offender has established their residence. Also, within the Framework Decision on supervision, it is possible to forward the judgment to the country where the sentenced person lawfully and habitually resides (if the offender has returned or wishes to return to it) The 1983 CoE Transfer Convention only allows the transfer of prisoners to their country of origin. Although the text of the convention mentions the term 'national', states ratifying the convention are left with the freedom to define this term for the purposes of the convention. EU member states reached an agreement to define nationals as those who have permanent residence in the country. Also in the new Framework Decision, the transfer is limited to the state of nationality in which the sentenced person resides or who will be deported once they are released from the enforcement of the sentence (Mirwanto & Kartiko, 2020). Nevertheless, in article 4(c) a waiver provision has been included that allows transfer to a country where the sentenced person resides and has been legally residing continuously for at least five years and will retain the right of permanent residence. In this case, the consent of the executing state is required.

Thus, transfers can be used as an instrument in migration policy, in cases where crimes have been committed by illegal migrants, but they can also acquire a symbolic function as an expressive form of crime control exporting foreigners who have committed crimes in the country of punishment after the court has given its decision. Adapted forms of transfer (under the Framework Decision) have been presented in some quarters as an effective new method of deterring foreign criminals and being tough on crime. These developments may reflect the changing relationship between the 'community' and the 'offender', which has led to the need for reintegration, protection and specialization (Sitepu, 2021).

## **2. Conceptions of Ideal Legal Arrangements in the Establishment of Legal Regulations on the Transfer of Prisoners Between Countries (Transfer Sentenced Person)**

The spirit of the TSP is the upholding of human rights and the reduction of confinement to the basic rights of citizens. When relying on the application of the principles stated in the Tokyo Rules, the Convention on the Rights of the Child, the UN

Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), these international treaties according to the United Nations Office on Drugs and Crime (UNODC) (article 47) encourage the development of sentencing policies to move towards depenalization and decriminalization in appropriate cases;

- 1) Decriminalization is the removal of conduct or activity from the scope of criminal law. Decriminalization can include the imposition of sanctions of a different type (administrative) or the removal of all sanctions. Other (non-criminal) laws can then regulate the behavior or activities that have been legalized. Depenalization: A relaxation of the criminal sanctions demanded by law for a particular offense or offenses;
- 2) Individualize punishment, taking into account the background of the offender and the circumstances of the offense;
- 3) Balance the need to punish the offender and protect society with the need to facilitate rehabilitation and thereby deter reoffending;
- 4) Offer a range of punishments in the law to allow the courts to exercise flexibility in sentencing;
- 5) Take into account the special circumstances of women offenders, including mitigating factors and their caring responsibilities, and give preference to non-custodial measures and sanctions rather than imprisonment, and
- 6) Provide a separate framework for the punishment of children, within the juvenile justice system, which avoids the institutionalization of children to the maximum extent possible, giving preference to alternatives that assist the development and rehabilitation of children in conflict with the law.

However, the discussion on the transfer of prisoners contains a misalignment of terminology that causes confusion. The confusion of terminology that causes confusion is the types of penalties that States impose on individuals who may be subject to the agreement. In practice, the main focus of transfer of convicted persons is on prison sentences or other measures involving deprivation of liberty (detention).

This is also the focus of the Model Agreement on the Transfer of Foreign Prisoners, which, as the name suggests, deals with prisoners and not other convicted persons. The question remains, however, about the place of non-custodial sentences in international transfer arrangements. Individual instruments vary significantly in this regard. In the Convention on the Transfer of Sentenced Persons (hereinafter referred to as the

"European Convention" In Article 1 paragraph a states, "punishment" refers to "any penalty or measure involving deprivation of liberty ordered by a court for a limited or indefinite period for a criminal offense".

This definition appears to exclude Laws that are implemented primarily in the community. In contrast, the Inter-American Convention on Serving Foreign Criminal Sentences, has a broader scope for the definition of "punishment". In the Inter-American Convention Article 2 paragraph 3, the term punishment includes a final court decision "imposing, as punishment for a criminal offense, imprisonment or a term of parole, probation, or other form of supervision without imprisonment". In the European Union, these notions of punishment can and should be distinguished. Consequently, two framework decisions were adopted by the Council of the European Union in 2008: framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing penalties or custodial measures involving deprivation of liberty for the purpose of their enforcement in Europe and framework decision 2008/947/JHA on the application of the principle of mutual recognition to court judgments and sentencing decisions with a view to supervision probation and alternative sanctions.

Therefore, the interpretation of punishment may also be done for people who are sanctioned to perform community service to be transferred. If you want to do so, you can do so by accessing specific instruments. In the European context, for example, such an instrument is the European Convention on the Supervision of Offenders Gradually or Conditionally Punished. However, the Convention has been accessed by a select number of countries and has proved very difficult to implement in practice. It may be more valuable for States, therefore, to develop bilateral agreements to deal with the transfer of persons on non-custodial sentences or where community service sanctions have been imposed. Currently community service sanctions are not yet regulated in the Indonesian penal system. But it has been included in the draft Criminal Code that will be passed.

With respect to penalties to be executed under this treaty, the transferee state shall retain exclusive jurisdiction regarding the judgments of its courts, the penalties imposed by them, and any procedures for the revision, modification or annulment of judgments and penalties pronounced by its courts. the transferee state, upon being notified of any revision, modification or annulment of such judgments or penalties, shall give effect to such measure. Each Party shall ensure that prisoners give their consent to transfer voluntarily and with knowledge of the consequences. The sending State shall permit an

official designated by the receiving State to personally verify before transferring the consent of prisoners to transfer according to their wishes and to ensure that prisoners agree voluntarily to the transfer and are fully aware of the consequences of the transfer. If one of the parties undertakes the transfer of prisoners through another jurisdiction for transit, the requesting state shall facilitate the transit. The state intending to carry out the transfer shall notify the requesting state before the transfer.

## Conclusion

Legal arrangements on the transfer of prisoners between countries are important for Indonesia in order to carry out reform and social rehabilitation for prisoners, so that imprisonment is used to ensure, as far as possible, the reintegration of prisoners in society after release so that they can lead law-abiding and independent lives. Therefore, TSP is offered as a model for moral, spiritual, social and health improvement, so that TSP is carried out with consideration Rehabilitation, Resocialization and Reintegration, Humanitarian issues, Law enforcement; International cooperation and relations. The concept of ideal legal arrangements in the establishment of legal regulations on the transfer of prisoners between countries TSP is to regulate the definition, cooperation, general principles and dispute resolution.

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