

**The Method of Judicial Prosecution Response to
Iranian Women victimized Overseas**

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Abstract

Victimization of women is a widespread and serious issue which is mainly imposed by the dominant biological - psychological, social and cultural structures on women's life; therefore, it is of great importance in criminal law. This is a serious obstacle for the social, scientific and cultural development of women which makes them more vulnerable; and only by reducing and controlling this issue, it is possible to think about women's development, and then according to the main role of women in family and society, it is feasible to think about development of society. In this case, reasonable and thoughtful approaches should be considered as a proper criminal policy. One of these approaches is to remedy the deficient supportive role of law; and as a consequence to promote legal support - not only political support - for victimized women at the international level. In other words, one way to prevent and reduce the victimization of women is to provide protection for this vulnerable group outside their country. In the present paper, according to "Passive Personality Principle", as is accepted by Article 8 of the Islamic Penal Code of 2013, there is a review of the legal process of prosecution response for Iranian women victimized overseas, also, the authors have provides a detailed explanation on the conditions of applying this Article.

Keywords

Victimization of Women, Criminal Justice Support, International Criminal Law, Personality Principle, Victim's Nationality

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Introduction

Providing criminal justice support for victimized women, especially who are overseas, is an inevitable necessity. Since one of the most striking features of the criminal law lies in its domestic aspect, i.e. its rules are limited to the borders of a given country; these rules control the relations of nationals in the geographical borders of the relevant country¹, thus judicial prosecution response to women victimized overseas requires acceptance of a principle that is called “Passive Personality Principle” in the international criminal law. This principle leads to expansion of legislative and judicial jurisdiction of a country over the crimes that are committed against nationals of that country outside of its political authority.² This principle that is also known as the “National Protection Principle” is one of the most controversial principles relevant to determining of penal qualification and always has faced with various opinions of its proponents or opponents among the international and criminal jurists; moreover, there is a difference of opinion among the countries with regard to the acceptance of this principle. Some countries, such as France, Italy, Germany, Belgium, Switzerland, Sweden, Finland, Greece, Romania and Turkey have accepted this principle; however, other countries such as the United States of America and the United Kingdom are considered as the serious opponents of this principle. Although in the recent years, this principle has been applied in United States counter-terrorism efforts.³ It is worth mentioning the U.S. courts have begun to apply the Passive Personality Principle for decades.⁴ The official commentary to Section 402 of Restatement (Third) of The Foreign Relations Law of the United States (“Restatement”) provides that “[t]he principle has

1. M.A.Ardebili, *General Criminal Law*, Vol.1, Mizan Publication, 18th edition, 2007, p.41.

2. H.Poorbafrani, *International Criminal Law*, Jungle Publications, 3rd edition, 2011, p.89.

3. H.M.M.Sadeghi, *International Criminal Law*, Mizan Publication, 2nd edition, 2007, p.27. Also see: H.M.M.Sadeghi, “A Review of the Lockerbie Case from the Viewpoint of International Criminal Law”, *Journal of Judicial Law Views*, No.27, autumn 2002, p.85-94.

4. John G. McCarthy, *The Passive Personality Principle and Its Use in Combating International Terrorism*, *Fordham International Law Journal*, Vol. 13, Issue 3, 1989, Article 3, p.309.

not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials."¹

Both proponents and opponents of this principle set forth some reasons to prove their claims. A summary review of these reasons is provided as the following.

1. Reasons advanced by proponents

1.1. The Protection of Nationals: Protection of nationals is the most important reason that proponents apply to justify this principle. Their justification is that nationality creates a deep and stable relation between the individual and her government, so that the individual expects her government to protect her anytime, anywhere. In other words, government's protection for its nationals, should not be only limited to that country's geographical territory, but also it is one of the nationals right (especially for women) to be protected everywhere by their government. However, sometimes this support doesn't have any criminal aspect and is applied only through the political and consular acts of embassies and consulates of her country in the host country, but sometimes the event is so serious that it requires criminal protection for her. In such cases, national courts of that country should be able legally to protect and provide these individuals criminal justice.

Moreover, nowadays, the acceptance of this principle is necessary more than ever, since on one hand, a large number of population of a country have emigrated to other countries and have settled there for various reasons, such as work opportunities, better life, education and so on, and on the other hand, the dramatic growth of tourism in recent decades, for reasons like facility of travel between the various countries, more income and free time, decreasing of the retirement age and etc., has led to a situation in which a significant number of people can travel to different countries during a year, this fact, in turn, can make them more vulnerable to victimization overseas, because, undoubtedly, in the tourism areas, there are individuals who abuse this situation and commit crimes against tourists (especially women). Tourist

1. Restatement [Third] of the Foreign Relations Law of the United States, § 402 cmt. g

women might be victims of different crimes including, assault and battery, theft, fraud, rape, sexual assault, etc.¹

There are clear reasons that justify why these people are victims of these crimes more than local people. They usually bring a lot of cash and jewellery with themselves, so thieves are able to sell them easier after the theft. They might be victim of money changers and counterfeiters because they are not familiar enough with common currency of the host country. For taking full advantage of time and facilities, they usually stay out late and maybe even go to the places and sites that are considered unsafe for the local people and through this, commitment of crimes like rape and assault against them becomes very easy. Meanwhile, they often don't have enough time and patience to prosecute crimes; or even reporting them.²

Another point is that this principle can also be applied in cases of "Crimes against Family". For instance, one of the crimes against family is "misrepresentation in marriage" that in laws of most countries has been criminally sanctioned. Suppose a woman out of her country is willing to marry a man under his misrepresentation; according to this supposition, this woman is victim of "misrepresentation in marriage", and if her government had accepted the Passive Personality Principle, it can take legal action to support her.

1.2. Illogical duality in acceptance of Personality Principle: Generally, Personality Principle is based on individuals' nationality; the term nationality usually refers to the offender (Active Personality Principle) and sometimes refers to the victim (Passive Personality Principle). Now, if we have accepted the first type of this principle, but not the second type, there will be a duality and contradiction that is not defensible; since a person who has committed a crime abroad is obligated to respond to judicial system of her country and will be subject to sentence, so a victim should be able to refer to her country's judicial system to be supported by her country when

1. For example see: J.Allen,"Crimes against International Tourists", Crime and Justice Bulletin, No.43, January 1999, p.2. And P.Bruno & Z.Hambly, "Tourism and Crime: A Research Agenda", Crime Prevention and Community Safety, Vol.1, No.2, 1999, p.27.

2. H.M.M.Sadeghi, "Tourism and Crime", Journal of Judicial Law Views, No.13, 14, Spring and Summer 1378 (1999), p.153.

she is victimized of a crime abroad. Hence, we should accept none of these principles or we should accept both of them, because the basis of these two principles is the individuals' nationality and it is not logical to distinguish between the acceptances of these two principles.

1.3. Impunity: Assume that a national of a country, commits a crime in that country against a foreigner. In this case, the offender's government may not be willing to her prosecution and trial. Also if a foreigner commits a crime against another foreigner in the territory of a third country, such a problem will occur, because in this case there is also a probability that neither the offender's government nor the State on the territory of which the conduct in question occurred is willing to prosecute this crime (at least by a thorough and fair prosecution), because although the public order in the country where the crime was committed, has been disturbed, but in terms of public opinion, there may be no obligation for prosecution and extradition of the offender. On the other hand, also the offender's country does not benefit from sentencing its national, because the crime is not committed in its territory and therefore extradition of the offender is not considered very important. So, by these assumptions, the victim's country is the country that will benefit the most from sentencing the offender. According to this, it is necessary for this country to have the jurisdiction for prosecuting the crime so that the offender withstands the penalty.

2. Reasons advanced by opponents

2.1. A sign of Distrust: unlike the "Active Personality Principle" that indicates the cooperation of states in the international arena; the "Passive Personality Principle" indicates the distrust of a government towards the judicial system of the foreign country to support foreigners. Because of this, some countries such as Netherlands have viewed this principle with pessimism and have only accepted it in very limited cases.¹

Proponents' responses: countries which have accepted the "Passive Personality Principle", mainly have applied it in circumstances that the offender has not been tried by the competent court, so that the individual who has gone on trial and has been punished by the country where the crime was committed (or even the offender's country), the offender surely has a

1. H.M.M.Sadeghi, International Criminal Court, Dadgostar Publications, 4th edition, Winter 1388 (2010), p.71.

right not to be punished twice (a case similar to Double jeopardy, a procedural defence). For example, article 113-9 of the French Penal Code of 1992, provides that in cases mentioned in article 113-6 (Active Personality Principle) and article 113-7 (Passive Personality Principle), anybody who can prove that she has been tried for the same crimes overseas and has born her punishment or her sentence has barred by statute, shall not be prosecuted. In fact, this means that the Passive Personality Principle is secondary compared to the Territorial Principle and even in some cases compared to the Active Personality Principle. But when the offender has not been prosecuted and tried neither by her own government nor by the government of the country where the crime was committed, the necessity of preventing of none punishment – that is one of the main purposes of international criminal law – will require the victim's government to prosecute the committed crime on behalf of its nationals.

2.2. Growing number of cases in domestic courts: Growing number of cases in domestic courts is one of the results of acceptance and application of the Passive Personality Principle. In other words, nowadays, in situations that judicial systems are trying to reduce the heavy caseloads that go before their courts, the acceptance of this principle can lead to intolerable heavy caseloads and in fact can have an inverse effect.

Proponents' responses: First, this criticism can be relevant in other principles of criminal jurisdiction - except Territorial Principle which is outside this consideration. While nobody has rejected these principles because of this criticism and also nobody has ruled them out entirely. Second, countries that has accepted this principle and adopted it into their criminal law, can apply it only in cases of "important crimes" against their nationals; and in this way they can reduce the scope of this principle in order to prevent from increasing the number of cases in their courts. For instance, in Belgium, the Passive Personality Principle has been accepted on a limited scale according to the act of 12 July 1984, that doesn't involve the misdemeanours.

2.3. Probability of an unfair trial: Another opponents' reasons is the probability of injustice against the defendant during the proceedings; this means that with acceptance of the jurisdiction, since the judge has the same nationality as the victim, it is always likely that the judge pronounce his opinion against the defendant who is a foreign national, by mental prejudices and by animosity, and some injustices will be done against the defendant

deliberately. Also these injustices may be involuntary and unintended, since basically proceeding of these crimes committed overseas is difficult and expensive. In such cases, the judge is not in the scene where the crime was committed and it is not possible for him to go there. Sometimes the judge tries a murder case while the corpse is not available, and doesn't have any access to the expert who has examined the corpse. Usually, witnesses aren't living in his jurisdiction and also it is difficult for court to do investigation.¹ As a result, with acceptance of this principle, there is always a taint of intentional or unintentional injustice against the defendant.

Proponents' responses: This criticism will be relevant in other determinant principles of criminal jurisdiction, especially the Active Personality Principle. While no one has ever questioned the validity of the Active Personality Principle for this reason, yet; since these problems can be resolved by using various methods, such as using letter rogatory and also drawing up bilateral or multilateral judicial cooperation agreements. Additionally, there is always a probability in the Active Personality Principle that the judge may conciliate with defendant who is his compatriot and overlooks her crime, as a result, blemishes the justice by doing this. Moreover, this criticism can be true in domestic courts and anywhere that the judge is townsman or classmate, ... with the defendant or the victim; whereas no one will reject the jurisdiction of domestic courts according to above reasons, since the judge is required to follow the law and then consequently is required to follow justice and issues like being compatriot, townsman, ... should not affect his judgment or in other words his justice.

2.4. Inefficiency: Opponents argue that this principle doesn't have enough practical efficiency, and its acceptance or non-acceptance doesn't differ much; because in most situations the victim's government doesn't have any access to the defendant so that the government can punish her. On the other hand, only executing of a formal trial (if there is no penalty with it), cannot relieve the victim or her family, and such an ineffective trial cannot be considered an actual support from the nationals; because justice most not only be done, it must be manifestly seen to be done.

1. A.Khaleghi, Essays on International Criminal Law, The SD Institute of Law Research & Study, 2 edition, 1390 (2011), p.41.

Proponents' answers: Countries that accept this principle, in order to make it more effective, can apply it provided some conditions such as extradition of the offender or at least when the offender is found in territory of victim's country in order to be able to convict her and also execute the punishments. For example, article 5 of Switzerland Criminal Code approved in 1937, applying this principle is considered provided that the offender is found in Switzerland or because of committing this crime is extradited to Switzerland.

3. The Approach of Iranian Legal System towards the Passive Personality Principle

Generally, prior to the adoption of the new Islamic Penal Code of 2013, the approach Iranian legal system was based on non-acceptance of the Passive Personality Principle, except in some cases (including Civil Aviation Act and the Act concerning Islamic Republic of Iran's Accession to the International Convention against the Taking of Hostages). But Iranian legislator, after nearly one century of legislation, for the first time, accepted this jurisdiction, under the article 8 of the new Islamic Penal Code.

In the following section, some of the necessary conditions for applying this article are explained.

The Conditions for Application of Article 8

1. Offender

According to Article 8, the offender should necessarily be a "non-Iranian person". In consequence, when an Iranian citizen commits a crime against another Iranian citizen outside of Iran's territory, she will be subject to Active Personality Principle; not Passive Personality Principle.

Moreover, according to the general term "Person" in this article, the offender can be either a natural person or a legal person. Thus, if a non-Iranian legal entity, such as a foreign company, commits a crime against an Iranian citizen, the Passive Personality Principle will be applicable.

2. The place of the commission of a criminal offense

Obviously, the crime scene should be out of Iranian territory in order to make this principle of jurisdiction applicable, because if the crime occurs in Iranian territory, it will fall under Territorial Principle (Article 3).

It should be mentioned that when some parts of the crime had been committed in Iran and another part of it had been committed out of Iran, it would be like it had been committed in Iran (Article 4).

3. Victim

The victim also should necessarily be an “Iranian person”, because obviously “Nationals Protection Principle” which is the most important basis for acceptance of this kind of jurisdiction, will be applicable only if the victim is a citizen of the government asserting its jurisdiction. However, the question is that the status of nationality in which time would be relevant?

In this case, the following assumptions seem possible:

First possibility is that the victim is of Iranian nationality; both at the time of the alleged commission of a crime and also during the proceedings. In this situation, there is no doubt about the applicability of the Passive Personality Principle. The second possibility is that the victim is of Iranian nationality at the time of the alleged commission of a crime; but after commission of the crime, and before the beginning of the proceedings, has obtained nationality of another state. In this case, also it seems that the government of Iran has the jurisdiction to begin prosecution, since when the crime was committed and the victim has needed support, she was an Iranian national. The third possibility is that when the crime was committed while a foreign national is the victim of a crime, but after commission of the crime, and before the beginning of the proceedings, has obtained Iranian nationality. It seems that in this case, domestic courts of Iran do not enjoy jurisdiction, because firstly, when the crime was committed and the victim had needed support, her nationality hasn't been associated with the Iranian government yet, so in this case Iran's support from her is not justifiable. Secondly, the acceptance of this may be subject to abuse, since there is always a probability that if someone became a victim of a crime out of her country and her government has not accepted this principle, she will obtain a nationality of a country that has accepted this jurisdiction. Therefore, the criteria of nationality in this principle refers to the time of the commission of the crime, and in respect of the former crime, obtaining a new nationality is ineffective.

Other point is that if an Iranian has another nationality at the same time (such as Iranian-French) and becomes a victim of a crime in a third country (e.g. Turkey), can Iran support her? The answer is that as from the Iranian law perspective such a person – irrespective of her dual nationality – is still an Iranian, so she can have criminal support from Iranian government, because article 8 mentions only being an Iranian victim – without considering her probable other nationality.

4. Presence of the offender in Iran

In Article 8, the application of the Passive Personality Principle depends on finding the offender in Iran's jurisdiction or her extradition to Iran. This will lead to this situation: if the offender hasn't been found yet in Iran or at least there are no evidence of her presence in Iran, Iranian courts will have no jurisdiction to prosecute or even to investigate; since doing a criminal investigation is conditional upon the existence of jurisdiction in any given judicial system, and in our case, there is not such a jurisdiction before the presence of the offender in Iran.

Conclusion

The application of Passive Personality Principle is considered to be essential by the states, especially in the cases related to judicial prosecution response to women, and generally nationals victimized overseas. In addition, this government's action, or in better words, legal protection of women at international level, will be of deterrent effect and will prevent commission of more crimes against this vulnerable group in future. In fact, by acceptance of this principle, states will take a preventive approach and thereby will be able to reduce crime rate committed against the victimized women overseas.

The further insight derived from the findings of this paper is that Iranian legal approach - during almost one century of legislation - has generally been based on non-acceptance of this principle, except in some certain cases. But Iranian legislator has accepted this principle with some conditions, in Article 8 of the Islamic Penal Code, as adopted in 2013. Therefore, hereafter, in addition to providing "Political Protection" for nationals as a duty of Iranian diplomatic system, "Legal Protection" is also a duty of Iranian judicial system. However, it must be ensured that this protection has done in a positive direction and doesn't merely increase the caseloads in the courts of Iran. In this context, it is very necessary to pay enough attention to the prohibition of double jeopardy principle.

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