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A Comparative Critique of Regulating the Personal and the Passive Personality Principles in the Iranian Penal System

by Hassan Poorbafrani and Masoud Zamani



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A Comparative Critique of Regulating the Personal and the Passive Personality Principles in the Iranian Penal System

by Hassan Poorbafrani* and Masoud Zamani**

Table of Contents

I. Introduction	118
II. Definition and Classification of Crimes in the Iranian Penal System	119
III. The Personal Principle: Definition and Limitations	121
IV. Examining the Development of the Personal Principle in the Penal System of Iran.....	125
V. The Passive Personality Principle: Definition and Limitations	129
VI. Conclusion.....	133

Abstract

A brief examination of various criminal jurisprudences in the world reveals that nationality is taken as one of the main bases for extending the judicial jurisdiction of states. In such cases, the jurisdictional bases for prosecution are in turn the personal and the passive personality principles. Yet, despite their widespread acceptance, regulating these two jurisdictional bases has not proven to be an easy task, if only for the encroachments that a wholesale resort to the jurisdictional bases in question may make into the sovereignty of other states. In this regard, the Iranian experience marks out many of the difficulties that law-makers around the world may face, when purporting to legislate on the bases for exercising extra-territorial jurisdiction. Another reason for viewing the Iranian encounter with the personal and the passive personality principles as a case of special interest is the mode in which the Iranian legislature has sought to adjust the application of the jurisdictional bases in question against the requirements of sharia law. By taking these factors into consideration, this essay will map out the successes and failures of the Iranian legislature in conceiving these two jurisdictional bases in the 2013 Code.

* Lecturer of Criminal Law at the University of Isfahan, L.L.B (University of Tehran), L.L.M (Tarbiat Modares University), PhD (Tarbiat Modares University).

** Lecturer of Public International Law (Islamic Azad University of Najafabad), L.L.B (University of Isfahan), L.L.M (University of Nottingham), PhD (University of Nottingham).

I. Introduction

A brief examination of various criminal jurisprudences in the world reveals that nationality is taken as one of the main bases for extending the judicial jurisdiction of states. In principle, the criminal laws of states cannot be applied to a criminal act committed outside their territory. However, a state can reserve for itself the right to assert jurisdiction over a criminal case if its nationals happen to be either the perpetrator of an offence committed abroad or its victims.¹ In such cases, the jurisdictional bases for prosecution are in turn the personal and the passive personality principles. Yet, despite their widespread acceptance, regulating these two jurisdictional bases has not proven to be an easy task. Two issues are at stake here. On one hand, states have sought to recognize the personal and the passive personality principles in their penal codes so as to not tighten their freedom, when they are required to exercise jurisdiction either for keeping their public order or protecting their nationals. On the other hand, it remains true that exercising jurisdiction on the basis of either the personal or the passive personal principle is an exception to the main base of jurisdiction, that is, the territorial principle.² Therefore, drawing precise boundaries for the jurisdictional bases in question becomes a paramount task for law-makers and judges around the world.

The experience of the Islamic Republic of Iran (hereinafter Iran) in regulating the personal and the passive personality principles is very intriguing. Of these two jurisdictional bases, the personal principle used to be considered as the only acceptable ground for prosecuting crimes committed outside Iran. However, the exercise of the personal principle in Iran has undergone some radical transformations in recent years. For example, in the Amended General Penal Code of 1973 (hereinafter the 1973 Code), some primary preconditions had been set out for the application of the personal principle. Yet, after the Islamic Revolution of 1979, except for the presence of the accused in Iran, the preconditions for the exercise of the personal principle were entirely lifted in the course of the three penal bills of 1982, and the Islamic Penal Code of 1991 (hereinafter the 1991 Code).³ In the most recent penal legislation passed by the Iranian Parliament in 2013, another precondition that had been removed in the previous criminal legislations was redeemed to govern the exercise of the personal principle. This was the prohibition of double jeopardy (*infra*).

Another development in the Islamic Penal Code of 2013 (hereinafter the 2013 Code)⁴ is that the passive personality principle has for the first time found a place in the Iranian criminal laws. As will be seen later in this essay, there is a broad spectrum of opinions as to the utility of this

¹ As will be seen later, however, the Anglo-American legal systems have taken a much more nuanced position towards these jurisdictional bases, and do not tend to employ them save for the cases of exceptional nature. HALLEVY GABRIEL, *A Modern Treatise on the Principle of Legality in Criminal Law*, London 2010, at 124.

² See generally STRAUSS ANDREW L., *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, *Harvard International Law Journal* 1995, Vol. 36, at 373.

³ An unofficial English translation of the 1991 Code is available at <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/3200-islamic-penal-code-of-the-islamic-republic-of-iran-book-one-and-book-two.htm>, last accessed 28 December 2015.

⁴ An unofficial English translation of the 2013 Code is available at <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/1000000455-english-translation-of-books-1-and-2-of-the-new-islamic-penal-code.htm>, last accessed 28 December 2015.

jurisdictional base.⁵ However, it is important that the exercise of the passive personality principle shall not be done in an unbridled manner, if only for the encroachments that it may make into the sovereignty of other states. Rather, the application of the passive personality principle must be accompanied by some important constraints. It is this dimension of the passive personality principle that renders its regulation particularly difficult.

In this regard, the Iranian experience marks out many of the difficulties that law-makers around the world may face, when purporting to legislate on the bases for exercising extra-territorial jurisdiction. Another reason for viewing the Iranian encounter with the personal and the passive personality principles as a case of special interest is the mode in which the Iranian legislature has sought to adjust the application of the jurisdictional bases in question against the requirements of sharia law. By taking these factors into consideration and by invoking the conception of the personal and the passive personality principles in the criminal codes of some other states, this essay will map out the successes and failures of the Iranian legislature in conceiving these two jurisdictional bases in the 2013 Code. At the end, it will be concluded that notwithstanding following some progressive milestones, the Iranian legislature is yet to draw precise boundaries for the application of the personal and the passive personality principles, and thus, the conception of these two jurisdictional bases in the 2013 Code is yet to meet the modern standards of penal legislation.

II. Definition and Classification of Crimes in the Iranian Penal System

Before we take on the issues of jurisdiction in the Iranian penal system, it is necessary for us to provide a brief introduction to the definitions and classification of offences in the Iranian legal system. The importance of this introduction can better be grasped when one considers that the classification of offences in the Iranian penal system on some occasions runs hand-in-hand with the application of the personal and the passive personality principles. This is a by-product of the important role that sharia plays in conceptualizing different types of offences in the Iranian penal system. In the Islamic law tradition, crimes are generally classified on the basis of the punishments prescribed for them.⁶ In the aftermath of the Islamic Revolution of 1979, legislations on criminal law in Iran have consistently followed this pattern for the classification of offences.⁷ Therefore, the offences enumerated in the 2013 Code have been classified in the following order:

1. Crimes punishable by hadd (hodood)

Article 15 of the 2013 Code has provided a definition for the concept of hadd: “[h]add is a punishment for which the grounds for, type, amount and conditions of execution are specified in holy Sharia”. The hadd crimes are usually considered the most serious religious offences in

⁵ For an international law view of the passive personality principle, *see* RYNGAERT CEDRIC, *Jurisdiction in International Law*, Oxford 2015, at 110.

⁶ TELLENBACH SILVIA, Iran, in: HELLER KEVIN/DUBBER MARKUS D. (Eds.), *The Handbook of Comparative Criminal Law*, Stanford 2011, 320-351, at 321.

⁷ RAHAMI MOHSEN, *Development of Criminal Punishment in the Iranian Post-Revolutionary Penal Code*, *European Journal of Crime, Criminal Law and Criminal Justice* 2005, Vol. 13, 585-602, at 588-589.

the Islamic criminal justice doctrine.⁸ As is evident from the text of Article 15, hadd crimes are enumerated in the Islamic sacred texts (regarding which and whose authority, there are some differences between schools of thought in Islam).

Hadd crimes are largely specified in Book II of the Islamic Penal Code. Such crimes as unlawful sexual intercourse (Article 221), sodomy (Article 233), false accusation of unlawful sexual intercourse against someone else (Article 245), pandering (Article 242), swearing at the prophet (Article 262), consumption of intoxicants (Article 264), theft (Article 267) and corruption on earth (Article 286) are among the most severe hadd crimes. Apart from the crimes specified in the 2013 Code, the Iranian legislature in Article 220 has left the door open for judges to refer to the Islamic books on fiqh (Islamic jurisprudence) to identify other hadd crimes that may have escaped criminalization in the 2013 Code. Needless to say, given the vital importance of the principle of legality in the sphere of criminal law, this is not an acceptable mode of criminal legislation. However, this must be blamed on Article 167 of the Constitution of the Islamic Republic of Iran, which states:

“The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.”⁹

Many different interpretations of this Article have been produced by the legal scholarship in Iran, whose consideration goes beyond the limited space of this essay.¹⁰ However, in short, it must be said that such provisions as Article 220 cannot but be viewed as incompatible with the principle of legality, and as such, signify an area in which the Iranian legislature has fallen short of creating a balance between sharia instructions and the modern imperatives of criminal law.

2. Crimes punishable by qisas

The definition of qisas as provided in Article 16 of the 2013 Code is as follows: “[q]isas is the main punishment for intentional bodily crimes against life, limbs, and abilities which shall be applied in accordance with Book One of this law”. Therefore, the punishment of qisas is rendered when at issue is the infliction of an intentional bodily injury. When it comes to crimes punishable by qisas, two types of crime must be distinguished: crimes punishable by qisas of limb, and those punishable by qisas of life. As regards the latter, the only crime punishable by qisas of life is murder; this literally means the death penalty, whilst ‘qisas of limb’ refers to the retributive infliction of bodily harm on the body of a convict who has committed a crime punishable by qisas of limb.

⁸ PETERS RUDOLPH, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge 2005, at 53.

⁹ An official English translation of the Constitution of the Islamic Republic of Iran is available at <http://www.iranonline.com/iran/iran-info/government/constitution.html>, last accessed 28 December 2015.

¹⁰ For a summary of these debates, see TELLENBACH SILVIA, *Islamic Criminal Law*, in: DUBBER MARKUS D./HÖRNLE TATJANA, *The Oxford Handbook of Criminal Law*, Oxford 2014, 248-268, at 264.

3. Crimes punishable by diya (diyat)

The same crimes susceptible to punishment by qisas can become liable to diyat if done in an unintentional manner. In Article 17, diyat is defined as follows: “[d]iya, whether fixed or unfixed, is monetary amount under holy Sharia which is determined by law and shall be paid for unintentional bodily crimes against life, limbs and abilities or for intentional crimes when for whatever reason qisas is not applicable”.

4. Crimes punishable by ta’zir (ta’zirat)

Generally, any crime not subsumed within the rubric of one of the categories mentioned above must be categorized as a ta’zirat crime (or a crime punishable by ta’zirat). As discerned above, crimes that come under the ambit of hadd, qisas and diyat are very limited in number, and normally signify wrongdoings specified in the sacred religious texts. Article 18 of the 2013 Code defines ta’zirat as:

“a punishment which does not fall under the categories of hadd, qisas, or diyat and is determined by law for commission of prohibited acts under Sharia or violation of state rules. The type, amount, conditions of execution as well as mitigation, suspension, cancellation and other relevant rules of ta’zir crimes shall be determined by law.”

Therefore, criminalization of acts punishable by ta’zirat has less to do with the instructions of the holy sources than with the requirements of public order. As a result, this group of crimes can be said to have been created at the discretion of authorities. That said, to raise the satisfaction of the Assembly of Guardians tasked with approving legislations passed by the Iranian legislature on the basis of their compatibility with sharia law, the authors of the Islamic Penal Code made a distinction between two types of ta’zirat: ta’zirat prescribed by sharia law, and ta’zirat not prescribed by sharia law. The former consists of a very limited number of acts admonished and stigmatized in sharia law, such as sexual intercourse with one’s spouse during the fasting hours of Ramadan, for which there is no fixed punishment in sharia law.¹¹ Due to their insignificance and impractical nature, we shall not elaborate on ta’zirat prescribed by sharia law. Having provided a brief introduction to the categorization of offences in the 2013 Code, it is time to embark on the main focus of this essay, and analyse the way in which the personal and the passive personality principles are conceived in the Iranian penal system.

III. The Personal Principle: Definition and Limitations

In the context of criminal law, the personal principle can be defined as extending the judicial jurisdiction of states vis-à-vis crimes committed outside their sovereign territory by nationals (active nationality principle).¹² Articles 6 and 7 of the 2013 Code have accepted this basic definition, and have specified that subject to some limitations, discussed later in this essay, an Iranian national charged with committing a crime abroad can be prosecuted and punished in

¹¹ The Advisory Opinion of the General Legal Bureau of the Islamic Republic of Iran, No. 45, 28/05/92 available only in Persian.

¹² RYNGAERT, *supra* n. 5, at 102.

Iran. Not all states take nationality as the only basis for proceeding with the personal principle. Some states such as Finland, Denmark, Iceland, Liberia, Norway and Sweden go as far as subjecting their residents to the personal principle, too.¹³

According to Iranian laws, in order for the personal principle to apply, an offender must hold Iranian nationality at the time of committing a crime. Therefore, acquiring or abandoning Iranian nationality in the aftermath of committing a crime would not influence the application of the personal principle.¹⁴ This is while the penal laws of some states have seen no problem in establishing jurisdiction over their nationals for crimes committed by them before their naturalization or even after removal of their nationality.¹⁵ Article 113-6 of the French Penal Code takes a rather similar approach and stipulates that the personal principle applies “even if the offender has acquired French nationality after the commission of the offence of which he is accused”.¹⁶ Section 2 of Article 7 of the German Criminal Code is also very similar to its French counterpart.¹⁷

The personal principle is meant to fill the gaps that might otherwise have emerged from an exclusive reliance on the territorial principle. As a result, the application of the personal principle must be adjusted against the backdrop of the territorial principle, and the way this is achieved, is left to the subjective discretion of each state. Accordingly, some states have reserved a broader periphery of preconditions for applying the personal principle, and some have given more freedom to prosecutors and judges to prosecute and try an accused on the basis of the personal principle. All in all, it must be borne in mind that when it comes to the exercise of the personal principle in different jurisdictions, there is no uniform rule engraved in stone. Nonetheless, we briefly mention some of the general rules that, especially in states following the civil law tradition, are more often than not taken to govern the exercise of the personal principle.

1. Seriousness of Crimes

There has been a continuous debate among legal scholars as to whether or not the application of the personal principle must be confined to serious crimes. It has been said that applying the personal principle to non-serious crimes will only lead to the time and resources of the prosecuting state being wasted.¹⁸ This is particularly true when one takes note of the fact that such necessities as the collection of evidence are much more costly in cases concerning the personal principle. It is thus that in some states such as the UK, the application of the personal

¹³ MALANCZUK PETER, *Akehurst's Modern Introduction to International Law*, London 1997, at 111.

¹⁴ KHALEGHI ALI, *Tahavolāt Qanūn Jadid Jazāy Islāmi Dar Mvured Qalamrū Makāni Qavānin Jazāyi* (in Persian), [English: *The Developments of the New Penal Code vis-à-vis the Territorial Scope of Criminal Laws*], *Journal of Criminal Law and Criminology Studies* 2012, Vol. 1, 8-38, at 12. For the Romanization of Persian and Arabic words the authors used the Library of Congress transcription scheme.

¹⁵ FAZEL MUHAMMAD, *Almabādi Al'ameh fi Tashri' Aljazāyi* (in Arabic), [English: *General Principles of Penal Legislation*], Damascus 1976, at 136.

¹⁶ An official English translation of the French Penal Code is available at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>, last accessed 28 December 2015.

¹⁷ An official English translation of the German Criminal Code is available at <http://germanlawarchive.iuscomp.org/?p=752>, last accessed 28 December 2015.

¹⁸ WATSON GEOFFREY R., *Offenders Abroad: the Case for Nationality-Based Criminal Jurisdiction*, *Yale Journal of International Law* 1992, Vol. 17, 41-84, at 70.

principle is confined to a limited number of crimes such as treason, murder and bigamy.¹⁹ In the United States too, there has been a strong reluctance to exercise the personal principle save for crimes of such serious nature as treason.²⁰ Article 113-6 of the French Penal Code implicitly excludes the personal principle from governing the cases of petty offences. Nonetheless, the French Penal Code has expanded the scope of the personal principle to govern misdemeanours. This extensive reading of the personal principle may seem liable to criticism. However, the prosecutorial discretion (*infra*) in France to determine whether to proceed with cases concerning the personal principle may compensate for this loose configuration of the personal principle.

2. Double Criminality

The act for prosecuting for which the personal principle is invoked must have been criminalized both in the *lex loci delicti* (the law of the place of commission of the crime) and in the place of its prosecution and trial. Absent this requirement, the personal principle cannot be relied upon in that, in such cases, neither the public order of where the crime is committed nor that of the perpetrator's state of origin will be affected. In fact, if we accept that the rationale behind exercising the personal principle is to prevent criminals from escaping punishment, it would then be absurd to prosecute and try a person for an act not criminalized in the place it is committed.²¹ As a result, the principle of double criminality has found widespread acceptance as a precondition for applying the personal principle.²²

The principle of double criminality also figures in the penal codes of many states. For example, Article 7 of the Swiss Criminal Code,²³ Section 12 of Norway's General Penal Code²⁴ and Section 7 of the German Criminal Code point to the application of the personal principle only when the act committed outside their territory is criminalized therein. The French Penal Code accepts this precondition only with regard to misdemeanours. Accordingly, when it comes to felonies, the French Penal Code applies in an "exclusive and unconditional"²⁵ manner. On the first encounter, this formulation of Article 113-6 may seem rather strange in its partial deviation from the principle of double criminality. Yet, this provision reveals an important fact, that double criminality cannot be considered an absolute principle.²⁶ On some occasions, states would rather give priority to their own penal laws, not least because they may consider their own formulations as regards the questions of criminalization and penalization better positioned to meet the requirements of their own public morals. That said, however, it cannot

¹⁹ MALANCZUK, *supra* n. 13, at 111.

²⁰ WATSON, *supra* n. 18, at 40.

²¹ FAZEL, *supra* n. 15, at 138.

²² MULLAN GRAINNE, The Concept of Double Criminality in the Context of Extra Territorial Crimes, *Criminal Law Review* 1997, 17-29.

²³ An unofficial English translation of the Swiss Criminal Code is available at <https://www.admin.ch/opc/en/classified-compilation/19370083/201501010000/311.0.pdf>, last accessed 28 December 2015.

²⁴ An official English translation of Norway's Penal Code is available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf, last accessed 28 December 2015.

²⁵ TRIPONEL ANNA, Comparative Corporate Responsibility in the United States and France for Human Rights Violations Abroad, in: MORRIS ANDREW P./ESTREICHER SAMUEL (Eds.), *Global Labor and Employment Law for the Practicing Lawyer*, The Hague 2010, 59-158, at 102.

²⁶ For a detailed discussion of the French law in this regard, see STEFANI GASTON/LEVASSEUR GEORGES/BOULOC BERNARD, *Droit pénal général*, Paris 2000, at 154.

be denied that the French conception of the personal principle is excessively broad, and therefore, open to criticism.

3. The Prohibition of Double Jeopardy (*ne bis in idem*)

For the purposes of applying the personal principle, observing the prohibition of double jeopardy is of utmost importance. It is fair to say that today the prohibition of double jeopardy has become more of a human rights principle than a principle of criminal law. So much so, that many human rights instruments have echoed this principle in one way or another.²⁷ For example, Article 14(7) of the ICCPR states that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and procedure of each country”.²⁸ Of course, it must be noted that the principle of double jeopardy does not prohibit the resumption of a trial or a retrial ordered by a court of higher hierarchy.²⁹

4. The Return of the Accused to his Country of Origin

Some states such as Iran view the presence of the accused in their territory as a precondition for exercising jurisdiction on the basis of the personal principle. This does not hold true for the French Penal Code, which permits trials in absentia in cases concerning the personal principle. Proceeding with prosecutions and trials without the presence of the accused definitely flies against the human rights requirement of fair trial. Notably, the use of trials in absentia is mostly allowed in countries that follow the civil law tradition.³⁰

5. Victim's Complaint

Article 113-8 of the French Penal Code stipulates that the prosecution of misdemeanours under Article 113-7 can only be initiated “at the behest of the public prosecutor [which] must be preceded by a complaint made by the victim, or his successor, or by an official accusation made by the authority where the offence was committed”. This precondition can significantly prevent an overload of prosecutions. This is notwithstanding the fact that in some penal systems such as Iran, most offences are considered public crimes, whose prosecution is not necessarily triggered by a private complaint.

As was seen above, according to Article 113-8, “the behest of the public prosecutor” is a must for the prosecution of misdemeanours on the basis of the personal principle. To the extent that the authors of this essay have examined the penal codes of other states, it seems that the French Penal Code is rather unique in employing the element of prosecutorial discretion as a precondition for proceeding with the prosecution of misdemeanours.

²⁷ For a discussion of different dimensions to the prohibition of double jeopardy, see CRYER ROBERT ET AL., *An Introduction to International Criminal Law and Procedure*, New York 2010, at 80–82.

²⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, at 171.

²⁹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

³⁰ *Prisoners Abroad (Factsheet), Trials in Absentia* (2007) at 9.

The prosecutorial discretion in proceeding with the cases of misdemeanours committed abroad can preclude the unnecessary cases from being raised in the French penal system, and at the same time, this precondition can compensate for the lack of the condition of the presence of the accused in the French territory. For in such cases, the prosecutor can decide not to initiate prosecution following its discretionary determination that the presence of the accused is necessary in order for prosecution to take place.

IV. Examining the Development of the Personal Principle in the Penal System of Iran

Prior to the Islamic Revolution, Article 3(H) of the 1973 Code had set out five preconditions for the application of the personal principle in criminal courts: 1) the personal principle applies to offences for which the maximum punishment exceeds one year; 2) the act must be punishable under the laws of the country where it is committed; 3) the accused must not have been tried and exonerated in the country where he committed his crime, or in the case of his conviction, he has not either in part or in total served his sentence; 4) according to the laws of Iran, or the country in which the offence has been committed, there must be no cause for waiving the prosecution or abolishing the punishment for the accused. To these preconditions must be added the presence of the accused within the sovereign borders of Iran mentioned at the beginning of Article 3(H). It goes without saying that the content of Article 3(H) signified a restrictive formulation for the application of the personal principle, which was extremely compatible with the general principles of criminal law, such as the prohibition of double jeopardy and double criminality. However, in the aftermath of the Islamic Revolution of 1979, this standard configuration was replaced by a very expansive version of the personal principle. Accordingly, Article 7 of the 1991 Code stated that “[i]n addition to the cases mentioned in articles 5 and 6, any Iranian who commits a crime outside Iran and is found in Iran shall be punished in accordance with the criminal laws of the Islamic Republic of Iran”. As can be seen, of all the preconditions stipulated in the 1973 Code, the only one that found a place in the 1991 Code was the presence of the accused. This loose formulation of the application of the personal principle was criticized by some Iranian scholars.³¹ The result was that in 2013, the Iranian legislature revised the standards governing the personal principle, and imposed other prerequisites upon its application. According to Article 7 of the 2013 Code:

“any Iranian national who commits a crime outside Iran and is found in, or extradited to, Iran shall be prosecuted and punished in accordance with the laws of the Islamic Republic of Iran, provided that:

- a) The committed conduct is deemed an offense under the law of the Islamic Republic of Iran.

³¹ POORBAFRANI HASSAN, *Barresi Tatbiqi Onsor Tab'iat Dar Tos'h Qalamrū Makāni Hoqūq Jazā* (in Persian) [English: A Comparative Study of the Role of Nationality in Expanding the Territorial Scope of Criminal Codes], in: SAFAEI SEYED HUSSAIN (Ed.), *Tā'molāti Dar Hoqūq Tatbiqi* (in Persian) [English: General Thoughts on Comparative Law], Tehran 2007, 345-360, at 350.

- b) If the committed crime is punishable by ta'zir, the accused person is not tried and acquitted in the place of the commission of the crime, or in the case of conviction the punishment is not, wholly or partly, carried out against him.
- c) According to Iranian laws there is no basis for removal or discontinuation of prosecution or discontinuation or cancellation of execution of the punishment."

At first blush, when compared to the 1991 Code, it seems that three other prerequisites have been added to that of the presence of the accused in the 2013 Code, namely, the prohibition of double jeopardy, double criminality and the existence of a legal basis for initiating a prosecution according to Iranian laws. Nevertheless, a closer examination of Article 7 reveals that it is only the precondition of double jeopardy that comes to govern the application of the personal principle in the criminal jurisprudence of Iran. This calls for an illustration of these three preconditions as they appear in the 2013 Code.

1. The Precondition of Double Criminality

As a general rule, when penal codes of different states mention the term 'offence', they mean the particular mode in which it is defined, characterized and criminalized by their own national laws. This is because the domestic penal codes mean to protect the functioning values of the country in which they operate. The Iranian Penal Codes are no exception in this regard. Thus, the concept of 'crime' in the clause 'any Iranian national who commits a crime outside Iran' as manifested at the beginning of Article 7 generally refers to an act recognized as such in the context of the Iranian national laws. The problem is that this standard reading of Article 7 renders redundant the precondition imposed by Article 7(a): "the committed conduct is deemed an offense under the law of the Islamic Republic of Iran". Obviously, it is neither reasonable nor acceptable to prosecute and try a person for an act not deemed an offence within the jurisdiction of Iran. Reasonably, the criminal laws of many states support the principle of double criminality, which implies that prosecuting an act requires its criminalization where it is committed as well as where it stands trial. Therefore, Article 7(a) states the obvious, and as such, no weight can be assigned to its content.

However, one may say that it is possible to interpret Article 7 in a different way, and it can be argued that its opening phrase epitomizes the criminality of an act in the place where it is committed. If read in this light, Article 7(a) can no longer be considered redundant and becomes an implicit articulation of the principle of double criminality. In other words, if an Iranian national commits a criminal act in a foreign jurisdiction, the Iranian courts can have jurisdiction over trying the accused, provided that his act is deemed to be criminal in Iran. However, it seems that this interpretation is also ridden with serious problems. Firstly, if one pays attention to Article 8(b) of the 2013 Code, the natural conclusion is that the Iranian law-makers had not committed Article 7(a) to hint at the principle of double criminality. According to Article 8(b), "[i]n the case of crimes punishable by ta'zir, the committed conduct is deemed an offense under the law of the Islamic Republic of Iran and the law of the place of the commission".

The Assembly of Guardians, whose task is to monitor the compatibility of the parliamentary enactments with sharia law and to provide interpretative guidelines for the state's laws, has discerned that the general application of Article 8(b) contradicts the Islamic prescriptions on punishments,³² although it has not identified such contradiction for Article 7(a). Secondly, it would be generally very bizarre if one were to interpret the phrase 'the committed conduct' in Article 7(a) to mean an act criminalized in the penal laws of foreign states. As mentioned above, this is not an acceptable form of authoring or interpreting penal codes.

In any case, it seems that selecting each of the interpretations discussed above can create unresolvable problems. If choosing the first interpretation, one cannot fail to arrive at the conclusion that Article 7(a) is redundant in its entirety. At the same time, the second interpretation signifies a deviation from the standard way in which the penal codes of different states are authored. Yet, it must be noted that the second interpretation accommodates the standards of international criminal law in a better fashion. Therefore, it seems necessary to amend Article 7(a), and rewrite it in a way that resembles Article 8(b), and this will be discussed below.

2. The Principle of Double Jeopardy

The inclusion of double jeopardy is the only uncontroversial development built into the 2013 Code as regards the personal principle.³³ Double jeopardy has become an important safeguard for protecting the rights of individuals in the field of international human rights.³⁴ According to this principle, respecting fairness and justice requires that an accused be held judicially responsible for an illegal action only once. Article 7(b) posits that "[i]f the committed crime is punishable by ta'zir, the accused person is not tried and acquitted in the place of the commission of the crime, or in the case of conviction the punishment is not, wholly or partly, carried out against him". As a result, if an Iranian national commits a crime outside Iran, and is subjected to trial and punishment there, he cannot be tried and punished in Iran again. However, if he has not served punishment either in part or in total, it is possible to bring him before an Iranian court on another occasion. Obviously, in a scenario where the sentence of a convict is only partly carried out, it will not be the Iranian judiciary's responsibility to carry out the unexecuted part of the sentence. Rather, in these cases, the Iranian judiciary must establish a new trial for the accused to be tried in accordance with Iranian criminal laws. This is because, save for some exceptional cases such as the international agreements on the transfer of persons sentenced to terms of imprisonment in foreign countries, states do not execute the sentences of those convicted in foreign jurisdictions.³⁵ However, an Iranian judge can reduce the punishment of those who have served part of their sentence abroad by invoking the diminutive factors of punishment articulated in Article 22 of the Islamic Penal Code of 2013.

³² The interpretive guidelines of the Assembly of Guardians is available at <http://www.shora-gc.ir/Portal/Home/>, last accessed 28 December 2015.

³³ RAHMDEL MANSOUR, The "*ne bis in idem*" rule in Iranian Criminal Law, *Journal of Financial Crimes* 2004, Vol. 11, 277-281, at 277.

³⁴ KIRBY MICHAEL, Carroll, Double Jeopardy and International Human Rights Law, *Criminal Law Journal* 2003, Vol. 27, 231-276, at 269.

³⁵ CRYER, *supra* n. 27, at 105.

However, the principle of double jeopardy in the Iranian courts is respected only insofar as its application relates to ta'zirat, whose specific cases and punishments are not prescribed in sharia law. Hence, when at issue are offences of the kind susceptible to such types of punishments as hodood, qisas and diyat, and ta'zirat prescribed by sharia law, Article 7(2) cannot generally be applied. This means, for example, if an Iranian national accused of murder is tried and punished in England, he can be subjected to another trial and punishment in Iran for the same crime upon his return to Iran, since his crime is punishable by qisas. Needless to say, this cannot be deemed acceptable either from the vantage point of penal law standards or those of international human rights law. However, this unacceptable delimitation of the prohibition of double jeopardy signifies a more serious problem within the genus of criminal laws in Iran. That is to say, in the wake of the Islamic Revolution of 1979, a constant preoccupation of the legislature in Iran has been to strike a balance between the modern standards of penal law codification and the imperatives of Islamic criminal law. Yet on many occasions, this balance has easily been lost, and as a result, shallow rules have emerged.³⁶ The blame cannot here be solely put on the Iranian legislature, because the Parliament is compelled to pass laws that meet the Islamic standards as identified by the Guardian Council. More often than not, the Guardian Council applies a strict scrutiny test to the parliamentary drafts, and in the case of detecting an area of incompatibility, returns the said drafts to the Parliament for reconsideration. The Guardian Council exercised a controversially harsh standard of review to the 2013 Code.³⁷

3. The Existence of a Legal Basis for Prosecution

As was mentioned above, Article 7(c) stated that “[a]ccording to Iranian laws there is no basis for removal or discontinuation of prosecution or discontinuation or cancellation of execution of the punishment”. Much in the same way as Article 7(a), this section also states the obvious, and its inclusion in the 2013 Code seems to have served no purpose. Obviously, the criminal courts in Iran are bound to follow the Iranian penal laws, and there is no need to emphasize this simple fact of prosecution and criminal adjudication any further. Interestingly, unlike Article 7(a), it is impossible to devise a reading of Article 7(c) that would give meaning and utility to its content.

This unusual way of legislating the issue of personal jurisdiction is very telling in that it shows that the question of prerequisites for the application of personal jurisdiction in Iran has long been neglected, and now that the Iranian law-makers have come to address this issue, they have created conceptual chaos in formulating the contours of the personal principle. Furthermore, the 2013 Code has clearly not established sufficient preconditions for the application of the personal principle. For example, the Code in question has not made any distinction between different types of offences for the purposes of applying the personal

³⁶ In the larger context of the Iranian criminal justice system, some Iranian scholars have argued that reaching a balanced position with regard to both sharia law and modern standards of criminal justice is an impossible project, since these two regimes are incompatible in nature. In this regard, SANEI writes: “we have a constructed image of sharia law, and have not but entrapped ourselves within the walls of this image, which we have mistaken for the sharia proper”, SANEI P., *Hoqūq Jazāye Omūmi* (in Persian) [English: General Criminal Law], Tehran 2003, at 22.

³⁷ TAVANA MOHAMMAD H., Three Decades of Islamic Criminal Law Legislation in Iran: Legislative History Analysis with Emphasis on the Amendments of the 2013 Islamic Penal Code, *Electronic Journal of Islamic and Middle Eastern Law* 2014, Vol. 2, 24-38, at 29.

principle. The principle of double criminality is totally neglected, and the prohibition of double jeopardy has only been partly accepted. Unfortunately, the authors of the 2013 Code did not avail themselves to other states' experience of criminal legislation, and chose not to include the two preconditions of victim's complaint and the behest of the public prosecutor as they appear in the French Penal Code. Importantly, these two preconditions do not seem to have been at odds with the dictates of sharia law.

V. The Passive Personality Principle: Definition and Limitations

The application of the passive personality principle also results in an extension of the legislative and jurisdiction of states vis-à-vis crimes committed outside their sovereign territory. The judicial invocation of this principle has not been devoid of criticism.³⁸ However, notwithstanding these criticisms, the passive personality principle has secured a place in the criminal laws of many states such as France, Germany, Brazil, Greece, Turkey and Mexico.³⁹ Notably, most of the preconditions and limitations governing the exercise of the personal principle also usually come to regulate the application of the passive personality principle.

As was said above, the application of the passive personality principle cannot be done in an unfettered manner. For example, Section 5 of the Criminal Code of Finland has limited the application of the passive personality principle to offences "punishable by imprisonment for more than six months".⁴⁰ Section 7 of the German Criminal Code puts an emphasis on the prerequisite of the double criminality for applying the passive personality principle, and the French Penal Code has excluded petty offences from the application of the passive personality principle, and confines the exercise of this jurisdictional base to felonies and misdemeanours punishable by imprisonment. Apart from the exclusion of petty offences, Articles 113-8 and 113-9 have added other preconditions for the exercise of the passive personality principle in France. Article 113-8 holds that

"[i]n the cases set out under articles 113-6 and 113-7, the prosecution of misdemeanors may only be instigated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim or his successor, or by an official accusation made by the authority of the country where the offence was committed."

As was remarked earlier in this essay, this procedural precondition bestows a prosecutorial discretion upon the public prosecutor by which to block the entry of unnecessary and insignificant cases into the French criminal justice system on the basis of either the personal or the passive personality principle.

³⁸ The *Lotus Case* (1927), PCIJ, Ser A, No.10.

³⁹ SØRENSEN MAX, *Manual of Public International Law*, New York 1968, at 368.

⁴⁰ An unofficial English translation of the Penal Code of Finland is available at <http://www.refworld.org/docid/3ae6b5614.html>, last accessed 28 December 2015.

Also, Article 113-9 refers to the principle of double jeopardy and prohibits the prosecution and punishment of those already tried and sentenced in foreign jurisdictions, and finally, in a similar manner to the practice of personal jurisdiction, the French Penal Code has not viewed the presence of an accused person in the French territory as a must for exercising the passive personality principle. However, as was discussed earlier, this deficiency can be compensated by the prosecutorial discretion in initiating a prosecution. Notwithstanding the prosecutorial discretion, the French conception of the passive personality principle has been criticized for providing “jurisdiction to the broadest extent possible under the passive personality principle”.⁴¹ Of course, this criticism seems justified when one considers that the requirement of double criminality is also absent in Article 113-9. In the United States, one sees a much narrower construction of the passive personality principle. Before the 1970s, the passive personality principle had been granted no place in the criminal laws of the United States.⁴² However, subsequent to joining treaties on terrorism, some new laws were enacted to incorporate the passive personality principle into the criminal jurisprudence of the United States.⁴³ Undoubtedly, the formulation of the passive personality principle in the United States signifies the narrow end of the spectrum when compared to the manner conceived in the French Penal Code.

1. The Passive Personality Principle in the 2013 Code

The 2013 Code must be considered the first textual base in the context of the Iranian criminal laws to give effect to the passive personality principle. According to Article 8 of this code:

“When a non-Iranian person outside Iran commits a crime other than those mentioned in previous articles against an Iranian person or the Iranian State and is found in, or extradited to, Iran, his crime shall be dealt with in accordance with the criminal laws of the Islamic Republic of Iran, provided that:

- a) in the case of crimes punishable by ta’zir, the accused person is not tried and acquitted in the place of commission of the crime, or in the case of conviction, the punishment is not, wholly or partly, carried out against him;
- b) in the case of crimes punishable by ta’zir, the committed conduct is deemed an offence under the law of the Islamic Republic of Iran and the law of the place of the commission.”

The following will scrutinize the strengths and flaws of the conception of the passive personality in the Islamic Penal Code of 2013.

⁴¹ MCCARTHY JOHN G., *The Passive Personality Principle and Its Use in Combating Terrorism*, *Fordham International Law Journal* 1989, Vol. 13, 298-327, at 314.

⁴² LOWENFELD ANDREAS F., *U.S. Law Enforcement Abroad: The Constitution and International Law*, *American Journal of International Law* 1989, Vol. 83, 880-893, at 887.

⁴³ WATSON GEOFFREY R., *The Passive Personality Principle*, *Texas International Law Journal* 1993, Vol. 28, 1-46, at 3.

Unlike the chaotic formulation of the personality principle, the passive personality principle in Article 8 of the 2013 Code takes a more coherent shape. As a result, the limitations reserved for the application of the passive personality principle make a much clearer appearance in Article 8. As is clear from the text of Article 8, these limitations are: 1) the prohibition of trials in absentia; 2) the prohibition of double jeopardy; and 3) the requirement of double criminality. Especially with regard to the requirement of double criminality in Article 8, the drafters of the 2013 Code have employed a precise language pre-empting any misunderstanding of this requirement, which, as was examined above, is missing in Article 7(a).

Another strength of Article 8 lies in its use of the opening phrase “a non-Iranian person”. Two important points immediately come to mind as regards this choice of language. Firstly, the invocation of the term ‘person’ instead of ‘individual’ reveals that other types of legal entities (such as corporations) can also be deemed to be responsible for committing offences, thereby being brought before a trial on the basis of the passive personality principle. The second point is that the reach of the passive personality principle cannot be stretched to include Iranian offenders committing offences outside the Iranian borders, as this must come under the ambit of the personality principle. Excluding the Iranian nationals from the scope of Article 8 must be commended, since if an Iranian national falls victim to the crimes of another Iranian outside the sovereign borders of Iran, the personal principle can better protect the rights of the Iranian victim, not least because there are fewer constraints put on the exercise of the personal principle. Of course, this is not a general formula, and based on their particular conception of jurisdictional bases, states can choose to apply the passive personality principle when both the offender and the victim hold their nationality.

Of particular relevance in this regard is the way the French Penal Code has conceived the passive personality principle. According to the French Penal Code, the passive personality principle applies to the cases where both victims and offenders in extra-territorial scenarios are French. However, it has rightly been argued that the French Penal Code takes too generous an approach towards the passive personality principle.⁴⁴ Also, Article 8 employs the term “an Iranian person” to describe the victims of crimes committed abroad subject to the passive personality principle, which moves one to conclude that the application of this jurisdictional base is not confined to natural persons. Rather, the application of the passive personality principle must cover other legal entities as well. This is a more precise description of the victims of crimes committed abroad in comparison to the penal codes of other states. For example, Article 7(1) of the German Penal Code states that “German criminal law shall apply to offences committed abroad against a German, if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction”. Here, one can rightly ask if the term ‘a German’ encompasses legal entities as well as natural persons.

A similar issue has come to the surface with regard to Article 7 of the Swiss Criminal Code, where the application of the passive personality principle is conditioned upon the victims being ‘Swiss’. In both Switzerland and Germany, a lengthy debate has ensued over whether corporate entities must be considered as being within the meaning of ‘German’ or ‘Swiss’ for

⁴⁴ For a more detailed analysis of the French law in this regard, see CAFRITZ ERIC/TENE OMER, Article 113-7 of the French Penal Code: The Passive Personality Principle, *Columbia Journal of Transnational Law* 2003, Vol. 41, 285-599, at 587-588.

the purposes of exercising the passive personality principle.⁴⁵ This is while the drafters of the 2013 Code have avoided the hassle of this question by coining a clear terminology.

2. Flaws of Article 8

On close scrutiny, one can also detect some flaws in the text of Article 8, for example, where it speaks of committing a crime “against the Iranian state”, since one wonders to what end this phrase has found an expression in Article 8. The unfortunate appearance of this phrase is both redundant and harmful, since if it means to allude to the protective principle, Article 5 of the code in question had already done that job, and there was no need to repeat this principle in a place dedicated to another jurisdictional base. This misplacement of the phrase “against the Iranian state” is also harmful, because it may confuse one as to the application of the protective principle. The exercise of the protective principle is not normally governed by as many constraints as the personal and the passive personality principles. Indeed, states prefer to save a free reign for themselves when it comes to prosecuting crimes giving rise to the protective principle. This is due to the fact that the protective principle targets crimes endangering the vital interests of states, which in turn, moves these entities to make no compromise on the exercise of this principle.⁴⁶ As a result, the sudden use of the phrase “against the Iranian state” may mislead one to conclude that the exercise of the protective principle is limited by the same preconditions as those governing the passive personality principle.

Another weakness of Article 8 is its peculiar invocation of the prohibition of double jeopardy. While stating the prohibition of double jeopardy, Article 8(a) puts the condition of the accused not having been tried and acquitted *in the place of commission of the crime*. Here, one may legitimately ask: what if an accused is tried and acquitted in a forum other than the place of commission of the crime? Of course, the scope of the prohibition of double jeopardy cannot be considered as limited such as to only govern situations where an accused is tried in the place where his alleged crimes are committed. Suppose a French citizen commits a crime against an Iranian national in France and he is tried for that same crime in Lebanon, and serves his punishment wholly or partly therein. Given this, would it be reasonable for an Iranian court to proceed with his trial and conviction by invoking Article 8(a) and on the basis that he is not tried, convicted or acquitted in France. This would vigorously slap common sense, and fly against any known principle of fairness and justice in the sphere of penal law. Yet, an overzealous textual reading of Article 8(a) leaves the door open for prosecuting those already convicted or acquitted in the judicial forums of countries other than the place of commission of crimes.

Another defect of the conception of the passive personality principle in Article 8 lies in reserving such limitations as the prohibition of double jeopardy and the principle of double criminality only “for crimes punishable by ta’zir”. Therefore, these preconditions cannot regulate the exercise of the passive personality principle for crimes punishable by hodood, qisas and diyat. Of course, this unfortunate jurisdictional expansion has far-reaching implications, being not only confined to the passive personality principle in Iran, but also

⁴⁵ ECHLE REGULA, *The Passive Personality Principle and the General Principle of Ne Bis In Idem*, *Utrecht Law Review* 2013, Vol. 9, 56-67, at 61.

⁴⁶ CASSESE ANTONIO (Ed.), *The Oxford Companion to International Criminal Justice*, Oxford 2009, at 274.

governing the application of the personal principle as well. From the perspective of the general principles of penal law, such an approach is utterly unacceptable, and violates the most elementary principles of fair trial as recognized in the domains of penal law and international human rights law. What is more, the drafters of the 2013 Code have excluded ta'zir offences prescribed by sharia law from the limitations set out in Article 8. As was explained above, such deviations from the international standards of criminal justice take their cue from law-makers' failure to strike a balance between the modern imperatives of criminal justice and those of sharia law.

VI. Conclusion

It is not uncommon for states (especially those belonging to the civil law tradition) to resort to the personal and the passive personality principles to exercise extra-territorial jurisdiction over crimes committed outside their sovereign borders. However, an unhinged practice of these two jurisdictional bases can clash with the principle of sovereignty, and at the same time, undermine the highly respected maxims of criminal law. Therefore, any nationality-based claim to jurisdiction must be predicated upon meeting some pre-determined requirements. For better or worse, due to the diverse approach of states to these requirements, it is not always easy to stipulate a uniform list for them. Yet, such prohibitive principles such as double criminality and double jeopardy can be taken as a minimum yardstick for constraining the exercise of the personal and the passive personality principles. Against this background, the Iranian encounter with the personal and the passive personality principles as manifested in the 2013 Code is neither a success nor a complete failure. It is not a failure because compared to its predecessors, the 2013 Code at least on the surface acknowledges the existence of some preconditions governing the personal principle, and for the first time in the aftermath of the 1979 Revolution, purports to regulate the passive personality principle. Nonetheless, the formulation these two jurisdictional bases are configured in the 2013 Code is punctuated by some conspicuous fallacies.

It was seen above that as regards to the personal principle, Article 7 had been formulated in so strange a form as to render all preconditions other than the prohibition of double jeopardy totally meaningless. This is while the appearance of Article 7 moves one to think that the Iranian law-makers had actually intended to set out some other preconditions for the exercise of the personal principle. However, the chaotic conceptual architecture of Article 7 fails to drive its intended result home.

Furthermore, the preconditions governing the personal and the passive personality principles are entirely lifted when it comes to the crimes punishable by hodood, qisas and diyat. It is true that when compared to the crimes punishable by ta'zirat, these categories of crimes signify a much smaller group. Still, it is not acceptable for the 2013 Code to ignore some of the most primary rules of criminal justice, such as the precondition of double jeopardy. As was argued above, extra-territorial jurisdiction represents an area in which the legislature is yet to render compatible the dictates of sharia law with the modern standards of criminal justice.