

Personal Qualification Principle based on the nationality of the victim in Iran`s Penal Laws

Ramin Ghasemi

M.A student of Law, Sanandaj Branch, Islamic Azad University, Sanandaj, Iran

Farzad Parsa*

Department of Law, University of Kurdistan, Sanandaj, Iran

*Corresponding Author

Abstract

Personal qualification principle is one of the most important principles of extra-territorial qualifications which the country of the respective criminal or victim's country regards the rights of investigating crimes outside the country relying on the nationality factor. In Iran`s penal laws, prior to establishing punishment law of 2014 only personal qualification law was accepted based on the criminal`s nationality, with no attention to some important principles of international punishment laws. Fortunately with the establishment of 2014 law, significant steps were taken to match personal qualification law with the accepted principles in international punishment laws. One of these evolutions we can point to acceptance of disallowing retrial and the qualification based on the nationality of the victim. However, we observe some shortcomings in this law such as rejection of disallowing retrial principle in religious crimes, which is due to avoidance of the legislator in going against principles and standards of Islam. While in this writing, after explaining strong and weak points of law 2014 through library method and analytical-explanatory method, we explain new laws regarding qualification based on the nationality of the victim based on international documents.

Keywords: Personal qualification law, nationality of the victim, Islamic punishment law, Retrial.

Introduction

One of the major characteristics of penal laws is them being inlands. However, this does not mean that a country is not qualified to assess some of the crimes that are committed outside its jurisdiction. Various countries in cases the committed crimes outside their jurisdiction are performed by or against their citizens, or are against their vital and political interests, or are instances of international crimes, consider themselves penal qualified. Qualification principle based on nationality of the victim has always risen criticism and exploration of penal and international lawyers. Those who are for and against the qualification principle have separately presented their reasons. But the main basis of this qualification, which is “supporting citizens” and in other words “supporting the marred interests of the government”. This has persuaded so many countries to accept the mentioned qualification. On the other hand, this qualification has an intimidation and prevention aspect and can prevent the occurrence of a good number of crimes against a government`s citizens.

Iran`s approach in a close to a century legislation, was the rejection of this qualification except for exceptions. But the Iranian legislator has accepted the qualification principle based on the nationality of the victim in article 8 of Islamic Penal law of 2014. Therefore, after close to 100 years of no penal support of Iranian citizens in international grounds, the mention qualification was presented in Iran`s penal law. Therefore, Iran`s judicial system does not only have the “right”, but the duty to provide penal support for the Iranian victims outside the country. Hence, legislator considers the “penal” support of the Iranian citizens outside the country who are victims judicial system`s duty, in addition to “political support” of the citizens which is the duty of diplomatic system (Foreign affair ministry). Albeit, it must be made certain that this support is utilized in a positive way and do not merely lead to an unreasonable increase in files mass in Iran`s courts. In this respect, sufficient attention to “disallowance of doubled trial and punishment” is necessary.

Problem Statement of the Research

Principle of qualification based on the nationality of the victim is one of principles of qualification of applying penal regulations outside territories which like principle of personal qualification, its foundation is nationality. This principle can be defined as the expansion of legislative and judicial qualification of a country in comparison compared to the crimes that are committed against its citizens outside its territory.

Committed crimes against a country`s citizens can be committed by another citizen or strangers. In the first scenario, the trustworthy principle can be personal qualification principle. However, countries that have accepted the principle of qualification based on the nationality of the victim, consider the same principle applicable, as supporting a country`s harmed citizens is of greater necessity than defending its criminal citizens. In addition, in comparison to the personal

qualification principle, principle based on qualification of the victim requires more severe application of rules and regulations regarding the accused. For instance in France`s laws, there is “mutual culpability” for applying the personal qualification principle. But this condition does not exist in principle based on the nationality of the victim. However, the countries that have not accepted this principle, such as Egypt, Syria, and Lebanon, and Iran, personal qualification principle is the applicable one. Hence, due to lack of the principle of qualification based on nationality of the victim, discussion the application of this or that is cancelled.

Iran`s approach in a close to a century legislation is the rejection of this kind of qualification based except for exceptions. But the Iranian legislator in the article 8 of 2014 law accepted qualification based on the nationality of the victim. Therefore after one hundred years of no penal support for Iranian citizens on international grounds, the mentioned qualification was presented in Iran`s penal laws.

Research Questions

- 1- How is Iran`s regulations regarding personal qualification based on the nationality of the victim before and after Islamic Penal laws?
- 2- Does the principle of qualification based on the nationality of the victim have the same advantages as other qualification principles?

Research Hypotheses

- 1- It seems that Iran`s laws regarding personal qualification based on the nationality of the victim has a better condition after the new Islamic punishment regulation.
- 2- We can subject the application of this principle by Islamic government courts to conditions such as the importance of the committed crime, mutual culpability, and no attendance.
- 3- Principle of qualification based on the nationality of the victim does not have the same advantages as other qualification principles.

Defining Theoretical Basics

Defining qualification and its types

One of the important and fundamental discussions in international penal laws, which since before led to the inclusion of this field in internal penal laws, is the issue of determining the spatial jurisdiction of the penalty and the application of qualification.

Qualification in lexical meaning is competence and in colloquial term is “authority and merit in places and affairs that regulations have determined”.

While qualification in penal laws is referred to competence and the authority of a judicial authority in assessing and deciding about a penal issue which is inferred to him by applying the regulation that have the qualification to determine the fate the issue.

Penal qualification is presented in international penal laws when at least one external factor such as crime scene, nationality of the perpetrator or the victim or the threatened interests are present in the crime of qualification issue.

An appropriate definition for the qualification term in international penal laws is “competence and the capacity of applying penal regulations of a country in assessing the crimes that are committed inside and outside of the country.”

First Discussion-Types of qualification in terms of applicant`s position

We live in a world that is divided to separate territorial unites, which all of the consciously defend their independence and governance.

As each penal system is a representative of its government`s governance, therefore it can freely and without consideration of other countries in its territory boundaries attempt to legislate regulations and employ any measure that he deems necessary to keep peace and safety.

On the other hand, based on countries equality principle, each country is due to officially recognizes other countries similar right and avoid intervening in their internal affairs and limits his country`s ruling qualification boundaries to his own government. In fact, each judicial system has territory which outside of it, a country is stripped of any administrative measures.

Penal qualification is necessary to put any criminal on trial. In international punishment laws they have divided qualification into three main categories of legislative, Judicial, and administrative in a general classification.

First Clause-legislative qualification

They speak of regulations administrative domain in place in legislative qualification. In fact, it addresses the legislators` legislation authority boundaries and it seeks and answers for the question whether it can expand legislative boundaries outside of its governance territory?

Second Clause-judicial qualification

Although legislative qualification in its general sense is possessing sufficient and necessary legal conditions to hold a trial and announcing conviction, it is not limited to his governance boundaries. It is possible that an Iranian judge investigates a crime that is committed outside but is in country`s courts qualification based on regulations. In spite of this, legislative qualification is talked of in international penal law territory in authority and competence of the courts of a country to assess claims that a foreign factor is involved. Therefore, legislative qualification of a is related to a country`s courts power to hold a trial in cases when a foreign factor is involved.

Third Clause- administrative qualification

Administrative qualification is related to a government's competence to take measures inside its territory. Since governments are independent from each other and each of them rules their own territory, agents of a government will not be able to fulfill their duties in other governments (in case of clear dissatisfaction of the host government), and cannot administer his country's regulations in another ground.

In truth, applying penal regulations is not against authority of foreign governments in cases that practices of citizens that have committed a crime outside a country, as a country's police pursues and trials a criminal inside a country, which is ascertained when the foreign government agrees to the retraction of the criminal.

It must be noted that the prohibition of administering foreign penal rulings is not an obstacle for applying a country's penal regulations regarding the crimes that are committed outside its jurisdiction, since what is discussed in international penal laws is the potential application of power.

Fortunately in recent decades we have witnessed positive changes regarding creditability of foreign rulings and in many countries, including Iran, agreements regarding the application of foreign rulings have been signed.

Also another case that other country's penal regulations are creditable is when a country's citizen outside its territory does a practice which is a crime in its own country but not in the country where the crime is committed. Here the accuser will not be judged and punished in his country based on "mutual culpability principle".

Fourth Clause-legislative and administrative qualification connectivity

An important case in this issue is stating that administrative qualification gives the possibility of assessment and legislative qualification gives the possibility of application of the established regulations to the courts of the mentioned countries. These two qualifications are two sides of the same coin in a way that each retains the other.

Although penal qualification is not dividable, in international penal laws administrative qualification follows legislative qualification. This means that when a government has the legislative qualification regarding committed crimes in and outside its governance territory, its courts will be qualified to assess such crimes.

Therefore, each country without considering his interests and benefits and without paying attention to foreign penal regulations determines territory of its courts and regulations qualification.

Second Discussion-types of qualification in terms of locative territory

Penal regulations are divided into two groups of penal regulations application qualification inside governance territory (homeland qualification principle) and regulations application qualification outside governance territory (meta-land qualification principle) in terms of locative territory.

In international penal laws we are witnessing the shortcomings of homeland qualification principle regarding its orientation toward not punishing criminals. Therefore, countries in order to expand their penal qualification determined world to justify this measure. These aspects include: crime committed in homeland territory of that country, citizenship of the accused or the victim, or the relation of the crime in a fundamental way with the country's vital interests. Although in some cases we witness some regulations in the international field which prohibit governments from applying penal qualification regarding some individuals or require them to establish this qualification regarding the committer of some crimes which have occurred outside homeland territory, all of these cases require a clear sentence. Since basically there is not a general or universal principle in international regulations. In these situations each country has the right to arrange penal qualification with the condition of observing the principle of "not interfering with the affairs of other countries" and determine the extent of its applicability territory.

In determining this territory the legislator is satisfied with determining the territory of regulations and courts qualifications, and due to the direct relationship of the governance with punishment application right and the prohibition of foreign penal regulations application by national court, legislator's method in international penal laws is different from the common method in private international penal laws.

In international penal laws is not after determining the ruling regulation and solving qualification's conflict, but legislator determined penal regulations applicability territory in location and the territory of national courts qualification in this field and does not consider regulation qualification and foreign courts.

Basically Governments expand their qualification based on four basics which include:

- A- Expansion of qualification based on the crime scene (Homeland Territory)
- B- Expansion of qualification based on the national of the accuser or the accused (personal qualification)
- C- Expansion of quality relative to crimes that are committed outside a country and are against its vital and fundamental interests. (real qualification)
- D- Expansion of qualification relative to international crimes without considering location, committer, or the victim. (Global qualification)

First clause-homeland qualification principles

This is the most important and the main principle in determining penal qualification And is compatible with counties governance principle. As a result government`s qualification to assess a crime is determined through the location of the whole or part of the crime. This principle is confirmed by Eternal Court of international justice in Lotus lawsuit, which is considered to have fundamental importance in every law system. This has separated the homeland qualification into two groups in its own way. Personal or case homeland qualification principle and generic or objective homeland qualification are sometimes referred to as “Comprising factors hypothesis” and “effect hypothesis”. Based on the first principle, a government has the qualification to assess a crime which all or part of the crime has occurred in its territory, including, ground, aerial, and naval. Based on the second principle, a country has the qualification to assess a crime which its consequence or effect has occurred in its territory boundaries.

In Iran`s laws in addition to personal homeland qualification principle, which is supported by the stated in article 3 of Islamic punishment, objective homeland qualification has received attention in the recent article 4. Article 4 of Islamic punishment points that:

When part of a crime is committed inside Iran and its objective effect appears outside Iran`s governance territory, or part of the crime is committed inside or outside Iran and its effect appears inside Iran, it is as if the crime is committed inside Iran.

It seems that the crime scene of the associate is the place where a person has taken his measures. Unless we can trial the effect on intendant from associate due to association, and consequently the associate that has taken measures outside Iran with the intendant that has committed a crime inside Iran, baded on the article 4 of Islamic penal regulations inside Iran.

Second Clause-meta-land principle

Application of meta-land principle comes from two bases:

- a) First base is based on nationality and objective relation. In a way that the country of the accused or the accuser considers its penal regulations applicable to them outside its governance territory. If its citizens commit a crime outside of the country, based on personal qualification, and if a crime is committed against their citizen outside of the country, based on the personal qualification based on nationality of the victim pursues criminals.
- b) Second base which is a case base, based on severity and nature of the committed crimes, countries consider themselves qualified to assess.
This basic is the source of two types of qualification
 - 1- Real qualification principle
 - 2- Global qualification principle

In real qualification although the crime is committed outside a country's governance territory (Jurisdiction), but it has directly harmed its vital and fundamental interests. Global qualification cases are the crimes that disturb international discipline.

What is important to mention here is that the expansion of penal regulations to outside a country's jurisdiction does not mean an intervention in their governance. These principles not only are not prohibited in international laws but also accepted and this shows no violation of other countries' jurisdiction.

A) Personal qualification principle

One of the complementary solutions to resolve violation of homeland qualification is personal qualification principle. Its subject is the expansion of legislative and administrative qualification committed against or by the citizen of a country. This expansion of qualification does not violate countries independence, since the potential application of internal regulations outside a country's borders is considered not its practical application.

If principle's basis is based on criminal's nationality, the mentioned principle is "active nationality", and if based on the victim's nationality, its "passive nationality".

Countries motivation to trial their citizens in another country's land, is non-recovering them.

And as a result its preventing punishment for those who have returned themselves to utilize the citizens non-recovering principle. In this situation the mentioned principle can prevent the punishment void which is due to citizens non-recovering and obligates the citizens to observe the rules and regulations of their residence country.

Another form of this qualification is personal qualification based on the nationality of the victim. This qualification is due to the necessity of supporting the citizens residing outside a country and lack of trust in the assessment of foreign countries (in crimes that have high significance) which are applicable by courts of the victim.

B) Real qualification

Although committed crimes inside jurisdiction and outside of it (which are committed by or against citizens), are assessed and pursued with homeland qualification and personal qualification principle, sometimes we witness such important and severe crimes by foreigners or the citizens of our country outside of the country which can affect a country's authority and independence. Based on this real qualification principle was accepted by international penal laws.

According to this principle, the country that is harmed due to a committed crime outside its borders will have the qualification to assess the crime. In applying this qualification countries apply qualification based on nature and the effects of committed crime, not the crime scene or nationality. This principle due to supporting society's interests is also called "supportive

principle". The reason for accepting such qualification is the countries indifference to the damages that some crimes inflict on the public discipline of other countries.

Many countries do not accept "prohibition of retrial" and "mutual culpability" regarding these crimes and even with the administration of punishment in the location of the crime they attempt to reassess. Because they believe that when the issue is country's interests and benefits, providing these provisions is even superior to clear international laws principles.

C) Global qualification

Some crimes are so severe that which committing them disturbs not only the discipline of the crime scene but also tarnishes the conscious of international societies beyond borders and demands retribution from those criminals.

Global qualification principle is predicted to prevent these criminals from going on without punishment and its purpose is that no place in the world be a haven to prevent pursue or punishment of such criminals.

According to global qualification principle, Countries consider themselves qualified to assess crimes in special cases without considering in which country the crime is committed or what is the nationality of the criminal or the victim.

Global qualification is founded on the concept that some countries are considered harmed against certain crimes and to defend global interests they have the qualification to trial and punish the committers of such crimes.

This type of qualification for national courts at first was a subsidiary to piracy. But after some time these crimes are divided into two groups of intrinsic and contractual international crimes.

Second group are the crimes that are reflected in the laws of other countries according to governments contractual commitments, and global conventions.

Global qualification has two narrow and broad concepts in assessing, trialing, and punishing international crimes.

In its narrow concept which is also called conditional global qualification, the condition of applying global qualification is the presence of the committer of the crime in the lands of that country.

In addition to the narrow concept of global qualification, there is a broad interpretation of this qualification, which is called absolute qualification. Based on this concept, some governments have the right and qualification to pursue, assess, and trial of some criminals without considering where the mentioned crime is committed, against who, and without considering the nationality of the criminal, even when he is not present in the land of the trial holder. The mentioned qualification is of value when the government of the land of the crime scene, or the government of the country where the criminal is, or the government of the criminal citizen does not trial the criminal for any reason.

Conclusion

Today considering the broad domain and method of some of the criminal activities and the inability of homeland qualification in addressing these crimes, meta-land qualification principle (real and global personal qualification) was introduced to international penal laws. Since these principles have subsidiary and complementary aspect and are to solve the issue of violating homeland qualification, they are almost accepted by every country.

Since application of penal regulations is considered as the most aspect of applying authority, in applying these qualification we must abide certain conditions such as non-prior assessment, importance of the committed crime, and mutual culpability. Personal qualification principle is one of three types of meta-land principle. The subject of this qualification which is based on nationality is the expansion of legislative and administrative qualification of a country regarding the committed crimes by or against its citizens outside the country. Therefore, qualification is sometimes based on nationality of the criminal to maintain public discipline and to heal tarnished complexion of the criminal's country, and sometimes it is based on the nationality of the victim to support the harmed citizens. Although personal qualification based on the nationality of the victim has always received criticism and exploration from penal lawyers as the most challenging principle of meta-land qualification, in the end the main basis of this principle (supporting the citizens) and its indirect effect on preventing crimes against citizens of governments, forced the countries to accept the mentioned qualification.

Although new penal regulations have taken steps to align this qualification with international penal laws, still some criticisms and recommendations can be made. Current regulation, same as the previous one, have accepted conditions such as presence of the accused in the victim citizen's country, crime without action in Iran occurred at the crime scene, but the main evolution of the principle is the acceptance of prohibition of retrial sentenced crimes.

Due to this regulation, with the occurrence of a crime in Iran, an acquired right appears for Iran, and in case of the departure of the criminal from Iran authority of Islamic Republic of Iran still is in effect.

Personal qualification principle is one that due to it, regulations and courts of a country become qualified to assess a crime, which has some aspects. The principle is related to penal qualification of a government regarding the committed crimes outside the country by its citizens, and one of its aspects is correct qualification regarding the committed crimes outside the country against its citizens.

One of the outcomes of the research in relation to the personal qualification which is considered, is no criminal be punished twice for a single crime, which is referred to as prohibition of extra trial. This principle must be observed in regulations in sentenced crimes.

One of the innovations of Islamic penal regulations in comparison to former regulations is that in former regulations personal qualification principle is not predicted as negative or passive, with the condition of trialing an accused is finding or returning of him to Iran. In addition, there must be a mutual criminology regarding this principle, in a way that the committed crime or behavior both in Iran`s regulations and due to the regulations of the location of the crime, criminology is performed.

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