

## The Typology of the Reaction of Islamic Government to Political Crimes

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### Abstract

Political crime is regarded to be a recent term introduced in Iran simultaneously with the Constitutional Revolution (*Mashrooteh*). Despite the fact that the duty to define and the determination of its instances was left to the ordinary law by the constitution, the task was not accomplishing till the law of political crime in 2016 due to various reasons.

The relation between political crime and the tradition of Islamic jurisprudence (*Fiqh*) was considered to be a significant issue after the Islamic Revolution 1979 in Iran and the adoption of the Constitution of Islamic Republic of Iran. Some scholars have ascribed the political crime to the well-known Islamic jurisprudential concepts of Islamic prescribed punishments (*Had/Hudud*) and discretionary punishments (*Ta'zir/Ta'zirat*), while other have opposed to the recognition of political crime through this kind of ascription to the rules of *Hudud* and foreseeable overlapping issues. It appears there can opt a way to recognized the political offence as a crime along with other crimes and as a *Ta'zir* crime through the analysis of the elements of *Hudud* crimes.

**Keywords:** Political crime, Revolt (*Bāqy*), Waging war against God (*Muḥāribah*), Spreading corruption on Earth (Efsad-e fil-Arz), Rights of political opponents, Right to political participation, Exercise of sovereignty.

### Introduction

Along with the “press guilt”, the “political guilt” was separated from other conducts deserving penal reaction by *Mashrooteh* Constitution 1906 (Supplement 1907, Art. 77)<sup>1</sup> which established the today’s differential policy on the political crime/offence. The Constitution, which left the investigation of religious crimes to the just jurists (Supplement 1907, Art. 71), considered only customary crimes within the jurisdiction of the courts of Judiciary (Supplement 1907, Art. 73). This approach has been pursued by the Islamic Republic of Iran’s Constitution in manner of confluence and differentiation but the necessity of being Islamic of law (Art. 5) destroyed the separation of crimes into religious and common. Undoubtedly, the explanation of this term and its differential system still required a detailed account that the constitutional legislator entrusted the ordinary legislative to proceed with the task related to the political crime which was ineffective till 2016, facing with many ups and downs in relation to the press offences.

Though the adoption of an ordinary regulation by the Islamic Consultative Assembly<sup>2</sup> was regarded to be a task prescribed by the Islamic Republic of Iran’s Constitution;<sup>3</sup> and the delay in performing this task was considered to be non-enforcement of a part of constitution, especially with

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<sup>1</sup> The text of *Mashrooteh* Constitution of Iran is available at: <https://fis-iran.org/en/resources/legaldoc/iranconstitution>, For more see: Afary, Janet, *The Iranian Constitutional Revolution, 1906-1911: Grassroots Democracy, Social Democracy, & the Origins of Feminism*, Columbia University Press, 1996.

<sup>2</sup> For more on the political system of Iran, see: M. Mahmood, *The Political System of the Islamic Republic of Iran*, Gyan Publishing House, 2006, pp. 67-76.

<sup>3</sup> The text of the constitution of the Islamic Republic of Iran is available at: <http://www.wipo.int/edocs/lexdocs/laws/en/ir/ir001en.pdf>

regard to the public rights and freedoms, nevertheless the main question relates to the extent to which prescription of a differential system on political crime is deemed to be significant. The other question, with a view to the requirement of observing the Islamic feature of the statutory law, is on the nature of the relation between political crime and the Islamic jurisprudential tradition. Especially that, in an important development, the Islamic Penal Code 2014 explained all the crimes within the framework of Islam (*Shari'a*) by removing the title of deterrent punishments (Art. 18), which, by applying the old Islamic Penal Code 1994 (Arts 16 & 17), to some extent separated the common crimes from the religious crimes.

The present paper is devoted to reply the second question; meanwhile answering the first question seems indispensable. In this line, first the whys and wherefores of the necessity of the recognition of political crime will be put under consideration in the course of a brief examination of the nature of political crime and its instances, then, this requirement will be re-examined in the Islamic field. Afterwards, the paper will evaluate the status of political crime in the traditional classification of *Hadd* and *Ta'zir*<sup>4</sup> and the possibility of its compatibility with other criminal acts recognized by the Islamic jurisprudence.

### A. The Nature of Political Crime

In case of categorizing the crimes in accordance with their mental and physical elements, there is no comparable and specific conduct in common to political crimes, and no well-defined result is prescribed for their commission. Thus, the scholars and the legislators traditionally have pursued two methods to recognize the political crimes. First, their recognition by their political incentive, as it can be regarded as a part of specific malicious intent of an act. Second, their recognition in accordance with the subject of the crime; which it is regarded to be one of the requirements for the commission of the crime. Beyond a doubt, none of these approaches have led to a situation in which it is necessary to determine, both negatively and positively, the scope of the political crimes' instances within law textbooks and legal literature; also application of this combined method proves ineffectivity of both of those methods. Therefore, some jurisdictions, including Iranian law, have adopted a combined method.

Considering the politics as the realm of power, political crime may be regarded a crime directed at the power which is committed to retain or to undermine the power structure. Hence, government may be deemed as the subject or the victim of political crime; whereas the government itself can be the perpetrator of political crimes in cases that the government officials violate the rights and freedoms of citizens to retain their power. An interpretation that seems to give the Jury Act 1932 (Art. 11) of political guilt. Additionally, if the realization of the objective of undermining/overthrowing of the government or retaining the power in a victorious manner is not considered to be a condition to formation of the crime –which is in fact the case-; undermining/overthrowing the power can only be accounted as the intention or the incentive; therefore, it is not regarded as the subject of the crime or a part of its physical element.

In this manner, political crimes may not be recognized on the basis of its physical element; and often, their recognition is grounded on the incentive or the malicious intention embodied in them. Thus, the political crime is not a specific crime, nevertheless, it is any criminal acts that committed with the intention to undermine or to retain the power. However, each criminal act as such cannot be regarded as a political crime retaining the differential system of the political crimes.

### B. The Reason for Recognition of Political Crime

Inspiring by experience of other countries to erode the ramifications of dictatorship and suffocation, the Constitution took the initiative to protect the freedom of speech and criticizing the performance of the government by resorting to conventional and *Shari'a* concepts such as enjoining good and

<sup>4</sup> For a detailed account of the classification of crimes under Islamic tradition and jurisprudence, generally see: Peters, Rudolph, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge University Press, 2006.

forbidding evil (*Amr bi l-Ma'roof wa Nahi ani l- Munkar*)<sup>5</sup> in order to restrain the formation of tyrannical governments. Also, it is aimed at reducing the oppression by appealing to judicial system. The manifestation of these two objectives is reflected within the differential system governing on political/press offences which is based on the Constitution.

Both *Mashrooteh* and Islamic revolutions in Iran rose up to defeat tyranny and oppression, on the one hand and to design a governmental system in which public political participation and freedoms are enhanced and reinforced, on the other hand. Anyway, alleviating the agonies of the situation which was affecting the culture and the law system of the country was not feasible through the adoption of a single statute. Even the Islamic distinguished jurists who authored famous works in the field of politics, referred to autocracy as the cardinal calamity of the country<sup>6</sup>, therefore they pleaded for the implements to negate the tyranny. The recognition of political crime was anticipated by the support and approbation by the Islamic jurists.

The relation between political crime, and the fundamental freedoms and the right to political participation may indicate the fact that as much as freedoms and participation right are developed and institutionalized, the necessity to address the political crime will be diminished, on contrary, the more the freedoms and participation right are restricted, the more the possible grounds for the commission of political crimes extends.

In cases in which the opposition freely criticizes the sovereign and the power is transposed through peaceful mechanisms, there is less exigency for resorting to illegal tools to ground the foundations for public participation in the political filed.

Though the reformist and the legislator have addressed the status of political offenders, but the criterion that justifies the implementation of the differential system or the recognition of political crime may not permit the attendance of every single misdemeanor in the political realm. Thus, the violent crimes like homicide, armed conflict, also, crimes against morality such as rape, or any acts against territorial integrity and national independence including espionage shall not be treated as political crimes under no circumstances; since the freedom of speech/opinion and the right to self-determination at no time can permit the application of a differential system to the crimes such as homicide and rape, even in case these crimes are committed in conformity with the criteria of political crime, and nor can these crimes be recognized under the title of political crime.

Given the fact that the recognition of political crime is considered to be an effort to protect the freedom of speech and the right to political participation, protected under national laws and international instruments, these rights and freedoms are not regarded as unconditional by those laws and instruments; but conditioned to restrictions that are not violable.

### C. Islamic Jurisprudence and Differential Recognition of Political Crime

The trace of political crime as a contemporary term cannot be tracked down in Islamic resources and the tradition descended from the Prophet. Despite the possible compatibility of its instances with the crime titles within the scope of *Hudud* and *Ta'zirat*, the central question relates to the relation between this type of differentiation and Islamic thought. The proper answer should be explored by deliberating the treatment of political opponents by the Prophet.

If the possibility of the freedom of speech and criticism had been restricted during the rule of the Prophet, the situation of political offenders could be regarded as a significant issue; nonetheless the evidence related to the traditional prophetic behavior and sayings, despite its historical era, is considered to be an example of the realization of the freedom of speech and political participation. The theory of consultation<sup>7</sup> and participatory decision-making in collective affairs are regarded to be the invaluable expressions of this manner.

<sup>5</sup> For further elaboration on this Islamic precept, see: Rouhullah Khomeini, *Tahrir Al-Wasilah*, translated by: Dr. Sayyid Ali Reza Naqavi, Institute for Compilation and Publication of Imam Khomeini's Works, 2001, pp. 503-523. & Husain Wahid Khorasani, *Islamic Laws*, Yasin Publication, 2014, pp. 319-320.

<sup>6</sup> Na'ini, Muhammad Hossein, *Tanbih ul-Ommah va Tanzih ul-Millah*, emendation: Vara'i, Javad, Bustan-e ketab, Qom – Iran, 2003.

<sup>7</sup> Montazeri, Hossein-Ali, *Nezam ul-Hokm fi l-Islam*, Sarayi Publication, Qom – Iran, 1996, p. 225.

The treatment of hypocrites (*Munafiqun*) of Medina by the Prophet can be considered as a clear example of the protection of the rights of individuals, even political dissents. Hence, the Islamic jurisprudential titles such as waging war against God (*Muḥāribeh*), which its punishment prescribed by the Holy Qur'an (5:33)<sup>8</sup> have no relations to political activities; since they are violent acts directed at public security.

Non-violent objections such as non-allegiance to the sovereign and violation of the prescribed Islamic precepts face with no severe reactions, except for moral treatments which were in unconformity with the existing practices of that period, even the manner followed by the succeeding Islamic governments<sup>9</sup>.

Today, the recognition of the rights of political opponents is considered to be among the criteria of democratic non-tyrannical governments; hence, in case of accepting the opinion that there existed no exigency to recognize political crime under the tradition of the Prophet and its existing patterns, but the reality of the Islamic countries proves the fact that the acceptance of this human experience by the Islamic governments would lead to serious effects on the expansion of the rights and freedoms of individuals.

#### D. Political Crime and the System of *Hadd* and *Ta'zir*

The crimes recognized by the Islamic jurisprudence and other crimes are divided on the basis of the physical conduct; also the definition of none of them is based on political motivation, while physical act or specific consequence has not been taken into account for the political crimes. As a result, the full compatibility of political crime with any of the recognized titles such as *Muḥāribeh*, *Bāqy* and *Efsad fi l-arzd* will be negated; since on the one hand, the political crime includes no violent and armed acts, while such acts are the physical elements of the crimes of *Muḥāribeh* and *Bāqy*, with the difference that the former is committed against the persons, whereas latter is perpetrated in opposition to the Islamic sovereign. The crime of *Efsad fi l-arzd* cannot be regarded as a specific title across other ones. The crime of *Muḥāribeh* is defined as the act of taking weapon with the intention to put the people in fear; it is distinct from political crime in two main ways: first, being armed which can lead to violent acts such as murder and assault, second, the unnecessary of being rooted in a political motivation, since the crime of *Muḥāribeh* can be committed with the intention to despoil property of individuals. In cases in which the use of weapon does not lead to physical harm to individuals; and at the same time, along with the main elements of the act done by the perpetrator(s), there exists a political motivation, so it would be feasible to regard this instance of the crime of *Muḥāribeh* as a political crime. In this manner, despite the fact that the political crime and the crime of *Muḥāribeh* are conceptually distinct, but there is the possibility to uncover typical instances. Thereupon, the relation between these two titles would be a total-partial relative sample.

There exist two perspectives on the crime of *Bāqy*; the one that is in accordance with the Holy Quran defines the crime as the occurrence of fight among two Muslim groups that requires the intervention of others to battle with the party that is reluctant to stop the conflict (49:9)<sup>10</sup>. It should be mentioned that within the Islamic jurisprudence, this kind of act is regarded to be an example of fight against the enemies of Islam (*Jihād*)<sup>11</sup>, rather than a criminal issue. The second view introduces the crime of *Bāqy* as the armed confrontation with the Islamic sovereign, and some have regarded them

<sup>8</sup> Indeed, the requital of those who wage war against Allah and His Apostle, and try to cause corruption on the earth, is that they shall be slain or crucified, or shall have their hands and feet cut off from opposite sides, or be banished from the land. That is a disgrace for them in this world, and in the Hereafter, there is a great punishment for them. (Ali Quli Qara'i, *Islamic Pubns Intl*; UK ed. edition, February 16, 2005.)

<sup>9</sup> See: Montazeri, Hossein-Ali, *Derasat un fi Velayat el-Faqih va Fiqh ud-Davlat el-Islamiyyah*, Tafakkor Publication, Qom – Iran, 1988, pp. 785 - 810. & Montazeri, Hossein-Ali, *Didgah-ha*, Qom – Iran, 2002, 453 – 498.

<sup>10</sup> If two groups of the faithful fight one another, make peace between them. But if one party of them aggresses against the other, fight the one which aggresses until it returns to Allah's ordinance. Then, if it returns, make peace between them fairly, and do justice. Indeed, Allah loves the just. (Ali Quli Qara'i, *Islamic Pubns Intl*; UK ed. edition, February 16, 2005.)

<sup>11</sup> al-Hilli, Ja'far bin al-Hassan (Muhaqqiq), *Sharaye' ul-Islam, Isma'iliyan Org.*, Qom – Iran, 1987, p. 83.

among *Taz'irat*<sup>12</sup>, while Islamic Penal Code 2014 (Art. 287) has considered them under the classification of *Hudud*. Armed confrontation in opposition to the Islamic sovereign by a Muslim can be described as the *Bāqy*; consequently, this crime is exclusively considered to be any armed actions against the Islamic government; it is an essential criterion that the crime is perpetrated by a Muslim<sup>13</sup>.

Considering the aforesaid, it can be concluded that the crime of *Bāqy* and the political crime may merely have common examples in which the elements of both crimes are fully concluded. With no doubt, the examples of *Bāqy* which lead to murder, plunder and treason, certainly cannot be regarded as a political crime. As a result, the relation between these two acts is considered to be a total-partial relative sample.

There are various views on the crime of *Efsad fi l-Arzd*, some have basically regarded it as the same of the crime of *Muḥāribeh*<sup>14</sup>, other have regarded it as a general category covering other Islamic jurisprudential titles; while a group have taken this as a crime alongside of the other ones<sup>15</sup>; that the Islamic Penal Code 2014 have accepted this view as well (Art. 286)

Apart from the first two views, the latter approach to the political crime will not lead to any conclusions, expect for what was concluded with regard to the crimes of *Muḥāribeh* and *Bāqy*, since on the one side, the commission of the crime of *Efsad-e fil-Arzd* (*Corruption on Earth*) requires no political motivation, while on the other side, some of its instances can be lead to violent actions such as murder which is excluded from the category of political crime. As a consequence, the relation between political crime and *Efsad-e fil-Arzd*, even on the basis of rendering it as a specific crime, will certainly be a total-partial relative sample.

Therefore, the relationship between political crimes and *Hudud* crimes is only imaginable in the form of criminal moral plurality, rather than in a resembling manner.

## Conclusion

The recognition of political crimes serves interests that in a society with a long-standing history of dictatorship can be promising and a sign of development of fundamental rights and freedoms; though in any case, the demand for recognition of political crime inherently proves the existence of a kind of confrontation to political despotism; and its expansion in the society can be associated with the lack of freedom of speech and the right to political participation. Thus, the task of the legislator to recognize political crime entrusted under the Constitution though is regarded to be desirable, but apparently the following methods can be non-criminal choices to make the grounds for participation in the public sphere and exercising the rights of sovereignty by the public: the expansion of the sphere for political critique and the development of participatory mechanisms such as the ones available in direct democracy<sup>16</sup> or the possibility of retaking votes especially the establishment of local decision-making bodies and supporting non-governmental organizations in the public sphere, also increasing the accountability of public officials to people and the judiciary; as well, the compliance with peaceful traditions like resignation of public authorities at the time of widespread discontent or in case of massive wrongs of public administration section, as a result, the rate of political crime may decrease and there would be a clear distinction among the crimes against security, integrity and independence of the country, on the one hand and the political activities and efforts, on the other hand. This transparency will realize security for political activities; as well it will relieve the unjustified political pressure on the judiciary and will lead to improvement of participatory development indicators while maintaining national security.

<sup>12</sup> al-Amili, Muhammad bin Makki (Ash-Shahid ul-Awwal), *Al-Lum'at ud-Dimashqiya*, Dar ut-Turath & Ad-Dar ul- Islamiyyah, Beirut – Lebanon, 1989, vol. 4, p. 136.

<sup>13</sup> Keydari, Muhammad bin Hossein (Qotb ud-din), *Isbah ush-Shi'a bi Misbah ush-Shari'a*, Imam Sadiq Institute, Qom – Iran, 1995, p. 178.

<sup>14</sup> Musavi al-Ardebili, *Fiqh ul-Hudud va t-ta'zirat*, Mufid University Publication, Qom – Iran, 2006, vol. 3, p. 498.

<sup>15</sup> Musavi al-Khomeini, Ruhollah, *Istifta'at*, Islami Publication, Qom – Iran, 2001, vol. 3, p. 56.

<sup>16</sup> See: Jos Verhulst & Arjen Nijeboer, *Direct Democracy: Facts and Arguments about the Introduction of Initiative and Referendum*, Translation: David Calderhead, Correction: Paul Carline, Democracy International: Brussels 2007.

Given the fact of the presence of various ethnic and religious groups and minorities in Iran, there is a pivotal need to provide befitting grounds for participation and coexistence, so individuals who regard the current situation a political obstruction will not tend to the commission of criminal acts and they will freely and actively participate in political sphere and administrating process in the country. As might be expected, the achievement of such a point has been of special sensitivity and at the same time, it requires a great deal of patience.

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