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The Islamic Concept of Political Crime and the Jury in Iran

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A b s t r a c t

Prior to the Bill Defining 'Political Crimes', passed on January 24, 2016 by the Islamic Consultative Assembly (Iran's Parliament), the term "political offenses" was never defined in Iran legal sphere, as a jurisdiction based on Islamic legal tradition. Although there was no definite and exact definition for political crime; obviously the word means any acts against the law done by the individuals in opposition to the government; with the aim of reform or overthrow of the governing power. The title "political crime" is reflected within the Iran Constitution and some ordinary laws with imposing effects, though no definition is provided for. This article has provided a background of political crime in Islamic legal thought, since it is a necessary step in the process of understanding this phenomenon with regard to Islamic jurisprudence. The following sections are descriptions and analysis of the most relevant features of political crime concept in Iran legal system.

Keywords: Political Crime, Islamic Legal Tradition, Iran Legal System, Islamic jurisprudence

Introduction

The title of political crime, along with political prisoner, as a well-known issue, is brought forth for discussion within the legal literature, especially in the field of human rights law. No need to emphasis that in more repressive regimes, actions such as criticism of government may be regarded as political crimes, so punished severely. Therefore, there are always senses of leniency, thoughtful attention, appeasement; even a sense of respect for the perpetrators of such crime. Despite the fact that political crime as an unlawful act is seen as an action or omission which is prohibited and punishable by law; and the offender is someone who has breached the law by his prohibited act that is punishable under the law; if the descriptive word of "political" is attached to the action against the law and its perpetrator i.e. the crime and the criminal, it is expected to treat the political offender in a different manner to other criminals. Also, under some laws, with a more lenient view, it is provided for distinct arrangements for trial of political offenders, their punishment and associated effects of criminal conviction.

Although there is no definite and exact definition for political crime; obviously the word means any acts against the law done by the individuals in opposition to the government; with the aim of reform or overthrow of the governing power. The title "political crime" is reflected within the Iran Constitution and some ordinary laws with imposing effects, though no definition is provided for. The Constitution of Constitutional period in Iran (Art. 79) stated: "in case of political and press offenses, the jury shall be present at the courts". Under Art. 77, the decision on holding the trial for political crimes in camera shall be taken unanimously by all members of the court.[1]

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1 Article 76 of the Constitution of the Constitutional Period (*Mashrooteh*) states: "*All of trials shall be held in public; except in cases in which open trial leads to disturbance of order or repugnant to chastity; the necessity to hold trial in camera is proclaimed in such cases*". And Article 77 provides on political crime; "*In cases related to political crimes and press offences in which it is appropriate to hold the trial in camera, such a decision shall be taken unanimously by all members of court*".

There was a reference to political offenders under the Extradition Act adopted 1961 which specify the regulations and procedure related to extradition of the criminals; the extradition of political offenders was prohibited under paragraph 2 of Art. 8. Under the Constitution of Islamic Republic of Iran, there is a reference to political crime, with specific provisions similar to the provisions of the Amendment to Constitution of the Constitutional Period. Art. 168 of Iran Constitution, as with Arts. 79 and 77 of the Constitution of the Constitutional Period, provides that "political and press offences shall be tried in public and in the presence of a jury", however, it sets out that the term of political crime shall be define in accordance with Islamic criterion by law. During the past years, there have been vast discussions on the Islamic concept of political crime; therefore to furnish the theoretical/subjective grounds to draft/adopt the relevant legislative act. Finally, on June, 2016, the Political Crime Act was adopted by the Islamic Consultative Assembly. In the present article, the author will discuss the matters related to the ambit of Art. 168, the Jury, political and press offences, also their features under the Constitution. Then, we will consider the Islamic concept of political crime.

A. Political Crime and Its features under the Constitution

Art. 168 states: "Investigation of political and press offenses is conducted openly in the courts of the Ministry of Justice before a jury. The manner and conditions of jury selection and their authorities and the definition of political offenses are defined by the law on the basis of Islamic criteria".

AS it is apparent, Art. 168 deals clearly with two crimes, also sets out specific and defined arrangements to investigate those crimes. Three specifications have been stated for these two crimes; i.e. the political offence and the press one:

a) Investigation of such crimes is conducted in public. Open trial is absolutely stipulated for investigating those crimes under Art. 165 of the Constitution, except for specific cases in which the court may decide to conduct the trial in camera. Art. 165 reads; "Trials are held openly and the presence of the public is not banned, unless the court determines that their openness contradicts public chastity or public order; or if, in private disputes, the parties involved request that the court not be open…". However, such a clause is repeated with emphasis in Art. 168 on Press and Political Crimes, it seems that the clause and limitation set in Art. 165 are not applied for press and political crimes, therefore in any cases, the trial shall be held in open. Such a conception is derived from the statements by some Parliamentary representatives during the Session on Final Review of the Constitution.

b) Investigations of these crimes shall be held in court of justice, i.e. the trial shall not be held in specialized courts such as military ones. The emphasis on this clause and its stipulation are mainly due to the concerns regarding the treatment of political offenders by the former regime; under which the trial of the opposition figures and the opponents of the regime were held in military courts with excessive sternness.

c) The trial shall be held in the presence of the jury.

As was stipulated under the Constitution of Constitutional period, the criminal proceedings of press and political offences are held in the presence of the Jury (Art. 79 of Amendment of the Constitution).

It seems that the term "press offences" was known and it meant the crimes committed through publishing in the press; also, apparently, there were any ambiguity to define or to determine its scope; but the term "political crime" was known in brief, for example, the opponents of the former regime, acting as political activists and labeled as criminals or accused, were regarded as political offenders or defendants. At the same time, as it was stipulated under the Constitution that all regulations were to be based on Islamic criteria, there was no clear picture of political crime for the MPs of the Constitution Assembly. Also it was unclear the issues related to the status of jury, its composition, selection, function, the way it operates, and its conformity with Islamic criteria; therefore, those issues were discussed by the MPs with doubt. Hence, the tasks relating to administrative aspects of Art. 168, inclusive of defining political offenses, composition and selection of jury members had been devolved to ordinary laws: then the law providing a clear definition of political offences, jury and its duties was passed according to Islamic criteria. It is obvious that none of these two terms have directly an equivalent in Islamic history; also, they are not mentioned in the legal and Islamic juridical criteria and principles, both have been derived from Foreign Laws.

B. The Jury, Concept, Status and its Final Place in Iran Legal System

The term 'Jury' has been defined in English language as the following: "A Group of laymen summoned to assist a court by deciding a disputed issue of fact on evidence heard".[2]

The origin of modern jury usage is essentially traceable to old law of England; also, during the Great revolution in France, the jury was introduced in French judicial system as a symbol of democracy, especially with its wide use in political offences and serious crimes. Then, through the conquest of some other countries during the Napoleonic era, the concept of jury was introduced, but gradually it became obsolete in French legal system and some other European countries, while it developed within United States of America.

Among European countries, alongside the Federal High Court, the presence of Juri in criminal proceedings is provided under the Constitution of the Swiss Confederation.[3]

There are wide controversial debates on advantages and disadvantages of the jury. The jury is considered as one of the fundamental basis of a democratic society. As members of jury are not legal experts, their participation in judicial process and their views as the members of society can transfer the public attitude and conscience, also they are not bound to follow strictly the text of law, therefore they can furnish the way to finding the facts, so, individuals' rights and freedoms is better secured especially in cases of political and press offences.

Conversely, the opponents have objected that the involvement of lay inexperienced people, without sufficient legal knowledge, may lead to situations in which some jury members express their opinion on legal issues at their discretion, not on legal knowledge and expertise, therefore administration of justice may become complicated and arduous.[4]

However, in the process of adopting Art. 168 of Constitution, some of the MPs were of opinion that establishing and presence of the jury has no religious basis, other thought that its Islamic equivalent can be found in Islam history, they said although there is no trace of the term "jury" in the record of Islamic debates, but its content exists in the Islamic juridical foundations. By the Islamic juridical foundations, it means the practice mentioned about the judging manners in Islamic juridical books; according to those books, it is religiously rewarding that the judge invite a group of scholars and wise people to be present at the court room and to hear the trial, to give him the advisory opinion to protect the judge from errors in reasoning and judgment. The distinguished author of "*al-sharaye*", *Mohaghegh Helli*, wrote on the religiously rewarding aspect of judging manners as follows:

و يحضر من اهل العلم من يشهد حكمه فان اخطأ نبّهوه، لانّ المصيب عندنا و احد و يخاوضهم فيما يستبهم من المسائل النظرية، لتقع الفتوای مقررة

"The judge may invite a group of scholars to be present at the trial, in case he makes a mistake, they will inform him, and the judge discusses the ambiguous points with them and to make efforts to establish the proper Fatwa".[5]

Unlike the Western notion of the jury, composed of lay people that facilitate comprehending the facts, in Islamic tradition, the jury is composed of scholars; hence *Shahid Sani*, in "*Masalek*",[6] stated that the jury shall be composed of *Mojtahedin* –Islamic Jurists- while the judge is not bound to follow their opinion. Their opinion is only of advisory aspect. The only Islamic intellectual, who regards taking action on their opinion obligatory, was *Ibn-e-Joneid*.[7] The phrase quoted from him is as follows:

'لا بأس ان يشاور الحاكم غيره فی ما اشتبه عليه من الاحكام فان اخبروه بنصّ او سنة او اجماع خفی عليه عمل به'

It is not wrong for a judge to consult with others on the matters with which he is in confusion, if they make him aware of a religious narrative or consensus that he was unaware of, he will take it as granted.

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2 David M. Walker, *The Oxford Companion to Law*, Clarendon Press, 2001, p. 686.

3 Federal Constitution of the Swiss Confederation of 18 April 1999, para. 2 of Arts. 106 and 112.

4 Hossein Mehrpour, *A Concise of Constitutional Law*, Second Ed., 2010, p. 389 and Jaffar Boushehri, First Vol., 2011, pp. 30-31. ???

5 Mohaqeq Helli, *Sharāʾiʿ al-Islām fī masāʾil al-ḥalāl wa l-ḥarām*, Esteghlal Pub, Tehran, Vol. 4, p. 865.

6 Shahid Sani, *Masalek al-Afham Ela Tanqih Sharaye al-Islam*, Moearef Islami Institution Publishing House, First Ed., 1997, Vol. 13, p. 372.

7 *Masalek*, p. 374.

After the Islamic Revolution, and before the adoption of the Constitution, the new Press Law was adopted in August 1979; under which it is provided that the trial of press offences shall be held in the presence of the jury. Under the Press Law, the jury is composed of 14 members from different classes of the society. Under Press Law, Art. 38, after the trial and the formal termination of proceedings, the jury members declare their opinion on two points:

a) Is the defendant guilty?

b) Will be the defendant entitled to commutation of sentence, if he is found guilty?

If the jury reaches a conclusion that the accused is guilty, the act will be conformed to the law by the court and the sentence will be determined. Derived from the law, in principle, the opinion of the jury on guiltiness or innocence of the defendant, also his entitlement to commutation of sentence is final and the court shall conform to it. Under Art. 168, as mentioned before, the manner to choose Jury members and their powers are set out in confirmation with Islamic criteria by the Constitution which was passed after the adoption of the Press Law in November, 1979, despite this fact, the Press Law of 1985 was silent on this matter, under its Art. 34 it stated only: "The offences committed by the press are investigated in competent court in the presence of the jury". Since a special arrangement for the jury was not provided, when it came to establish the jury, the arrangement provided in the Press Law of 1979 was regarded as a basis for the action, therefore, the selection of Jury members and their powers are determined under the said law.

Eventually, under the amendment of Press Law in 2000, the powers of the jury members was determined and limited to the extent of advisory opinion, in fact the Islamic criteria and principles are observed. Article 43 of the amended Press Law (Note (1)) states: "After the jury declares its opinion on guiltiness or the innocence of the accused, the court shall decide and according to the law, the judgment will be made".

Therefore, the Islamic Jurisprudence (*Fiqh*) was applied as Islamic criteria to set out the limit and powers of the jury in the amended law of 2000, although there was no certain jurisprudential order to select the members of the jury so the members are selected on the customary basis.

C. Political crime and its Islamic definition

Apart from the jury concept, political crime is another term provided in Article 168 of the Constitution to be defined under Islamic criteria by the law. Naturally, there is no certain record and status for the term "political Crime" in Islamic regulations and jurisprudential principles. Within the western Society, the political crime is perhaps the oldest and most recurring of all crime-types.[8] Mainly, many writers define it as a criminal activity committed for ideological purposes;[9] although, no statute or treaty has so far tried to define what constitutes a political offence.[10] In Western literature, the term is used specifically in connection with extradition of the criminals.[11] In this context, the exemption of political offender is applied, i.e. when a political offender would be put on trial or punished on account on his "race, religion, nationality or political opinion",[12] he shall not be extradited.[13]

As mentioned in the above section, in principle, the act committed for political purposes or motivations against the government is defined as political crime, and its exact definition and elements

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8 Stephen Schafer, Criminology: the Concept of Political Criminal, *The Journal of Criminal Law, Criminology and Police Science*, 1971, p. 380.

9 Frank E. Hagan, *Introduction to Criminology: Theories, Methods, and Criminal Behavior*, SAGE, 2009, p. 376.

10 Geoff Gilbert, *Responding to International Crime*, Martinus Nijhoff Publishers, 2006, p. 202.

11 The following passage is mentioned in "Oxford Companion to Law" under the title of "Political Offence": "The right of one state to claim the extradition of an offender against its laws, who has taken refuge in another country, suffers exception in the case of political offences, but this concept is an indefinite and no authoritatively defined".

12 Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, S. Exac. Doc. 17, 99th Cong., 2nd Sess. 15 (1985).

13 Petersen, Antje C. (1992) "Extradition and the Political Offense Exception in the Suppression of Terrorism", *Indiana Law Journal*: Vol. 67: Iss. 3, Article 6, p. 773.

remain in shadowy vacuum of law. In Iran, the concept of political crime had been familiar with during its long history. There were some references to this term and its ramifications in the Constitution of the Constitutional Period (*Mashrooteh*, i.e. Persian Constitutional Revolution) Articles 77 and 79. Also Extradition Act of 1960, Para. (2) Art. 8 prohibited extradition of political offenders; though no definition was provided in any laws. The only law from which some examples of the political offence can be inferred is the Single Article of the legislative bill on "Elimination of the Effects of Political Convictions" adopted on 28 March 1979 by the Revolution Council. It states: "The Conviction of all those who were convicted by final verdict as acting against national security or insulting the monarch or opposition to constitutional monarchy and other political charges as of January 26, 1979, shall be ineffective and all previous effects of such a conviction will be halted". It appears that the lawmaker had regarded opposition to the government and monarchy or other related acts as instances of Political crime within the ambit of this law.

During the Session on Final Review of the Constitution, when Article 168 was under examination and the term "political crime" was brought forth for discussion, some were of the opinion that "the term is vague and the nature of the political crime is unclear"; it was to be defined by ordinary laws. So far, due to the necessity for detection its Islamic aspect and/or reaching an Islamic concept, such a law has not been adopted. The main drawback is that the legislator must define as act as a political crime that on one hand, the act is a criminal act and punishable, on the other hand, it shall be of the characteristic of the political crime so the process for its investigation, the manner to deal with the accused and its effects would be different from other crimes, also, such a difference in behaviour shall be justified by the Sharia.

Apart from the customary aspect, recognition of such a subject is difficult and it seems that a few acts may be regarded as a political crime, from the viewpoint of the Sharia; the problem is more difficult and complicated. Some try to find an Islamic background for the notion of political crime by resorting to the concept of "Revolt"; in fact, the term "revolt" is used in the holy Quran and in practice, it was applied during the reign of Imam Ali (peace be upon him) and his administration. May the notion of "revolt" be used as the Islamic concept of the political crime; then based on such a concept; the term can be defined from its Islamic aspect. For the time being, we consider the definition of "Revolt" from the viewpoint of Islamic jurisprudence; also its related commandments.

D. The Definition of Revolt in Islamic Jurisprudence and Its Conformity or Non-conformity with the term "Political Crime"

In the *Masalek Al-Afham, Shahid* Sani stated on the meaning of "Revolt" that: "The lexical definition of Revolt refers to exceeding the limit, oppression, hegemony and to ask forcefully for something"; and within the Islamic jurists' practice, it means "to disobey the righteous Imam (الخروج عن طاعة الامام العادل). Perhaps the Islamic juridical meaning of the Revolt can be considered as a similar notion to the current term of political crime; since as was mentioned previously, though there is no clear precise definition of the term, it can be defined as opposition to the government and the ruling power, also acting against the law with the anti-governmental intention. It should be mention that the legal consequences cited for the commitment of the political crime is not appropriate for the revolt crime; since in the case of political crime, a sense of leniency, thoughtful attention and appeasement is expected toward the political offenders; whereas in the case of revolt, the Islamic jurisprudence directs to fight back the revolter who has disobeyed the righteous Imam.

The distinguished author of "*al-sharaye*", *Mohaghegh Helli* has stated that: "it is obligatory to fight whom that has disobeyed the righteous Imam upon the order of the Imam (يجب قتال من خرج على امام عادل اذا نذب اليه الامام). The term of Revolt and its related command are derived from the sacred text of Quran. In the Verse 9 of *Surah Al-Hujurrat*, Allah states: "And if two parties among the believers fall to fighting, then make peace between them both. But if one of them outrages against the other, then fight you (all) against the one that which outrages till it complies with the command of Allah. Then if it complies, then make reconciliation between them justly, and be equitable. Verily, Allah loves those who are the equitable" (وَ إِن طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِن بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِن فَاءتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَ أَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ).

Muhammad Hasan al-Najafi, the renowned author of *Jawahir al-kalam fi sharh shara'i' al-islam*,[14] has stated that "five writs are deduced from this celestial verse:

"1- The revolters are believers (it means they are not disbelievers), since Allah has called them "believers".

2- The obligation to fight against the revolters.

3- The obligation to fight to achieve the goal and to end the revolt.

4- The prohibition of prisoner taking and ransom demand.

5- The permission to fight against anyone who obstructs achieving the claimed right."

The manner of inference of such results from this celestial verse is almost clear, it can be inferred from the expression "two parties among the believers" that the main goal to fight against the revolters is to compel them comply with the command of Allah and to restrain rebellion; then make reconciliation between them justly upon equity and fairness.

The well-known instances of revolts during the ruling of Imam Ali (peace be upon him) and the foundation of inferring the related commands are as follows: the Covenant-breakers (*Nakethin*) or the companions of the Jamal (the Battle of the Camel, sometimes called the Battle of Jamal); the Oppressors (*Qastein*) that deviated from the correct road and believed in the falsehood (*Moaviah* Companions) and the Deviants (*Mareqin*) that rebelled and abandon Imam (Deviants-*Khawarej*).

Under Islamic juridical commands, fighting against the Revolt is obligatory similar to the disbelievers, with the difference that the prisoners taken from the revolters will not be killed and their fugitives will not be pursued, except in the cases that the revolt has a command center.

The author of Jawahir[15] has stated in this regard that "it is permissible to kill the wounded, the fugitive and the prisoners of war taken from the revolters group, those who have a command center to gather there, but if they do not have a base, the purpose of war with them is to scatter them, therefore their fugitives will not be pursued, their wounded and prisoners of war will not be killed" (و من كان من اهل البغى لهم فئة يرجع اليها جاز الاجهاز على جريحهم و اتباع مدبرهم و قتل اسيرهم و من لم يكن لهم فئة فالقصد بمحاربتهم تفريق كلمتهم فلا يتبع لهم مدبر و لا يجهز على جرح و لا يقتل لهم ماسور).

Imam Ali (peace be upon him) acted in this manner during the Battle of Camel and the Battle of *Siffin*; in fact his practice and conduct during those battles is regarded as the basis for the reaction toward the issue of Revolt. However, with regard to revolters and rebels against the righteous Imam, the Islamic juridical command that was derived from Imam Ali's conduct in the Battles of Camel, *Siffin* and *Nahrawan*, is as follows: As long as the opponents of Imam (government) have not taken up arms, their opposition is not regarded as a crime, but in case of taking up arms, fighting and committing murder, looting and destruction, it is obligatory to fight against them. The aforesaid command is inferred from the conduct of Imam Ali (peace be upon him) and his cited statement about the opponent of his ruling.

It is cited that during Imam Ali's oration at a mosque, a man shouted that: Apart from the commandment of Allah, no ruling is accepted (لا حكم الا لله), the slogan of the *Khawarej* (Deviants). Imam stated: "a right word from which a wrong intention and meaning is inferred from (كلمة حق اريد بها الباطل). Then, the Imam addressed the man and his aligned group that: "you have three rights over us as long as you are part of us and not separated completely, you are not banned from entering to Allah's mosque for prayers and God's worship, and you are not deprived from your shares in Public House of Wealth (Bayt al-mal); and we will not start fighting with you" (لكم علينا ثلاث لا نمنعكم مساجد الله ان تذكروا فيها اسم الله و لا نبدؤكم بقتال و لا نمنعكم الفيئ ما دامت أيديكم معنا). In Islamic jurisprudence, the terms of Revolt, Revolters and fighting against them are compared with the battle against disbelievers (*Kofar*) and polytheists (*Moshrekin*), the differences among them with regard to the battle against the revolters and the disbelievers are as follows:

1- It is not allowed to captivate the Revolters' women and children.

2- Their property will not be seized by the victorious army, including their movable and immovable assets.

3- In principle, if they are captivated, they will be released.

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[14] Muhammad Hasan al-Najafi (Sahib Jawahir or the author of Jawahir), *Jawāhir al-kalām fī sharḥ sharā'i' al-'islām*, 1984, Vol. 22, Islamic Publication Institute, Qom, p. 555.

[15] Ibid, p. 564.

It can be considered that what was stated in the Islamic jurisprudence regarding the Revolt and its related commands, do not correspond with what is set forth nowadays for discussion under the title of "political crime".

Conclusion

Lastly, to sum up in conclusion of the brief discussion, it can be remarked that political crime does not have a clear meaning in Islamic sphere; however, if its customary meaning becomes clear, also some of its ramifications are considered; then it leads to the conclusion that this notion would not be contrary to the Sharia prescribed commands, it cannot be considered against Islam; so there is no need to find a special term for it within Islamic foundations. For the purpose of complying with Art. 168, it also can be stated that if a legal scientific definition of the term is propounded in accordance with Islamic Texts and definitive commandments, it can be regarded as an Islamic notion. Regarding the customary and legal notion of the political crime, the only category of the offenses which can be covered under the term of political crime, are those committed in order to oppose and to defy the government, and on account of violations and non-compliance with legal requirements, they are considered to be crime, so no other criminal titles defined under the law applies to them. From this perspective, the scope of political crime is very limited which includes some acts such as assembly and peaceful demonstrations without legal authorization etc., however in democratic systems; certainly, it is not acceptable to prohibit such acts under the law and determining punishment for such acts.

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