



Investigation of juridical and legal challenges of violation (Bogh'i)

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ABSTRACT

Violation is one governmental jurisprudence issue, which has been investigated by jurists in scope of Jihad. It seems that the reason for considering it in scope of jihad is direct relationship of jihad with political crime. However, jurists and lawyers have not mentioned it explicitly that violation is same political crime and have dispute on it. In other words, it could be mentioned that violation is clear example of political crime and encompasses major part of sentences of political crime. This is because; violation is among considered crimes in Islamic Law and is in direct relationship with order and security in Islamic society. Although violation has been called as "Hodud" in new version of Islamic Penal Code, conditions of the crime have not been referred explicitly. Penitence that has been accepted in field of Hodud and God's Rights has not been considered in Islamic Jurisprudence and Islamic Penal Code. hence, the present study is aimed at investigating different dimensions of the crime and referring to juridical and legal challenges of this issue.

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1. Introduction

Lexical meaning of violation (Bogh'i)

Violation lexically has several meanings as follows:

- Incursion: incursion means everything that has exceeded its limit; meaning overspend of limit of an object or action (Johari, 1990, vol.6, p.2281).
- Quest, along with exceeding limits: this meaning can be considered in same group with absolute violation, since violation is not separated from quest. Everywhere violation is existed, quest is existed too (Ghorshi, 1992 , p.207).

Idiomatic meaning of violation:

Jurists have presented different definitions of this word, which the most important ideas of jurists have been presented in a categorization as follows:

- A group of jurists believe that violation includes oppression against Innocent Imams and have defined it as follows: everyone, who oppresses against Innocent Imams, is oppressor and one has to fight the person. Muslims should fight such people, so that they obey orders of Innocent Imams or be killed same as pagans (Ameli (Shahid Aval), Al-Roza Al-Bahia, p.83; Tabatabayi Haeri, 1998 , p.480).
- Another group of jurists believes that it is oppression against just Imam and has defined it as follows: oppressor is a person, who oppresses against just and fair Imam (Najafi, 1984 , vol.21, p.322; Toosi, 1987 , vol.5, p.335).

However, it should be mentioned that some people that consider violator as oppressor against just imam, believe that just imam for Shiites is same innocent imam. Hence, it could be mentioned that there is no difference between the first and second group in regard with the definition: "the aim by just imam for majority of Shiites is innocent imam and for Sunnis it is absolute caliph and governor" (Toosi, 2008, p.347).

Against the two groups, a third group is existed that believe that oppressors against imam are absolutely oppressors without mentioning the term "just". The group has been mostly formed by Sunni jurists: "a group that oppresses against imam through explaining its reasons and is opposed to the community". According to the definitions, it could be found that most Shiite

jurists believe that this crime is specified to innocent imams: with the idea, question raised here is that can it be mentioned that violation is not existed in time of absence of Imam Zaman? Can it be mentioned that the condition for justice and innocence for imams can prevent occurrence of violation in time of absence of Imam Zaman?

The question can be answered in two manners as follows: first, it could be mentioned that innocence and justice of imam can cause prevention of occurrence of such crime. This answer can't be right, since the crime has been also existed in time of imams too. Second, it could be mentioned that only imams can fight this group. The answer is not also adjusted with absolution of narratives and if it is even adjusted, as philosophy of jihad with oppressions is defending foundation of Islam in the society, it could be mentioned that the necessity makes people to fight oppression sin time of absence of Imam Zaman too.

Documentations of violation

Karim Quran

The Almighty God has mentioned in Hojorat Surah that: "And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly" (Al-Hojorat/ 9).

The precept of this verse is general and sentence of murder has been belonged to violation regardless of limiting certain individual. Interpretation of this verse is as follows: the verse wants to present arranged sentences on violators and it would not be different on behalf of a government on another or on behalf of a group on another one.

In general, nothing has been mentioned about imam in the holly verse that is basis of "violation"; although any kind of fight and dispute in outside is on presence of imam or a governor, who leads warriors and organizes their actions. Necessarily, presence of imam is condition for "existence", not incumbency. It means that without imam, it is impossible to remove oppressions. Hence, selecting imam is necessary and existence of imam is also a condition for incumbency, so that till the time that imam is not

existed, the sentence of incumbency of removing oppression would not be existed too (Montazeri, 1989, vol.6).

However, there are some disputes among commentators on reference of the verse for legality of violation. Some commentators believe that this verse is not evidence for oppressions.

Tradition

In addition to verses of Quran, which have introduced violation as a general sentence and believe that it is not specified to oppression on innocent imam, some narratives have been also mentioned in this field that can depict existence of violation in time of absence of Imam Zaman. Although these narratives help discrimination of examples of violation to some extent, referring to these narratives here is because of removing ambiguities of definition of violation. However, through presenting exact definition of violation, its examples would be discriminated to some extent too.

Prophet Mohammad has mentioned to Imam Ali that: "Oh Ali! Almighty God has ordered Muslims for jihad in oppressions after me; so that jihad and fight against pagans has been regarded as a necessity. I asked: Oh Prophet! What oppression is necessary for fight? Prophet said: oppression of a group and tribe, who testify unity of God and my prophecy. They are opposed to my tradition and cause jape in my religion. I said: Oh Prophet of God! Why we should fight them when they testify on unity of God and your prophecy? Prophet said: this is because; they are separated from my religion and believe in killing my family" (Horr Ameli, 1989, p.82).

The news is not specified to oppressor on imam: "by this time, it includes oppressors in religion and opponents to Mojtabid, who change divine sentences clearly" (Hosseini Ruhani, 1992, vol.13, p.111).

In a document from Imam Sadegh, it has been quoted that: "murder is in two types: one of them is atonement of guilt and sin and another one is martyrdom and killing for God. Fight is also in two types: fighting against pagans and fighting oppressors until the time that they select obedience" (Horr Ameli, 1989, vol.15, p.29).

In addition, many words of Imam Ali in Nahj Al-Blaghe refer to necessity of fight against oppressors in Islamic government with no limitation; meaning that they should be suppressed, when the conditions are provided.

Imam Ali has mentioned basis and reason for fighting against violators in statement no.172 as follows: after entrance to Basreh, they attacked to my ambassador and treasury of Muslims and people of Basreh. They excruciated a group of them and killed another group (Nahj Al-balaghe).

He has also stated in verse 173 about characteristics of Islamic leader in time of oppression as follows: "Oh people! The most competent people for caliphate are those, who are most powerful in realization of the government and are most wise people in regard with orders of God, so that if an oppressor began to oppression, he/she can be returned to right and if he/she refused, one should fight against him/her".

Hence, due to statements of Imam, sentence of oppressors has been cleared after him and in presence of oppressors and competent leader with characteristics stated by Imam Ali, there would be no need for presence of innocent imam in a manner that jurists have stated.

Therefore, due to the mentioned narratives, it could be found that violation is not specified to oppression on innocent imams and the expression of the narratives is general and it can encompass all issues in regard with interpretation of the verse. The philosophy of jihad with oppressors is defending Islamic government and oppressor is the person, who is just and aware of Islam issues and is leader of the government.

Moreover, if we accept that the mentioned issues are not specified to innocent imams, in field of general sentences, oppression can be considered for representative of Imam Zaman too. This is because; if jurists can't encounter oppressions in time of absence of Imam Zaman and punish them based on Islamic principles, they would

make collapse of foundation of Islamic justice and would cause disorganization in Islamic system (Mar'ashi, 1994, p.67).

One of the issues in the current legal system is that desirable separation has not been considered in regard with three criminal expressions of violation, war and prostitution. Articles 183 and 189 of Islamic Penal Code are related to crime of war and prostitution and the output of these articles is that the two titles are for describing a single concept and have been applied in same concept in law. However, one issue that has been predicted in new law is separation of three issues of war, prostitution and violation.

The three criminal subjects have been mentioned in 10 articles from 280 to 289 of two 8 and 9 seasons of the act. A definition of war presented by law is in fact same traditional definition of jurists about war. They have presented also another definition for violation and hence, it is necessary for investigating juridical and legal challenges of the discussion to define violation in terms of law and to present its differences with similar crimes and especially war, so that the mentioned subject can be cleared.

Legal discrimination of violation

Article 287: a group, who oppresses against foundation of Islamic Republic of Iran, would be violator and oppressor if it has used weapon and members of the group would be sentenced for death penalty.

Article 288: when members of oppressor group are accused before using weapons and if the organization is existed, they would be sentenced to third degree imprisonment and if its organization and centralization is removed, the sentence would be 5th degree imprisonment.

It seems that:

Existed problem with the article is that applied words in content of the article are complicated and interpretable and some words such as wide, broad, acute and similar expressions in law may be interpreted in special form. However, while facing heavy crime such as corruption in the earth and death penalty, legal definition of such crime should be completely clear. Hence, article 287 has mentioned that everyone, who oppresses against foundation of Islamic Republic of Iran using weapons, is oppressor and would be sentenced to death penalty.

Legal definition of violation

Some lawyers have considered violation as political crime and have defined it as follows: political crime is a kind of crime that would be formed for fighting against establishments and manner of running Islamic Government (Ali Abadi, 1/103).

Existing differences and challenges in legal and juridical definition of violation:

Firstly in regard with juridical definition, religion is one of the elements for realization of political crime. Hence, it is necessary in this definition for the crime to be against Islamic governor, since oppression against non-Islamic governor can't be considered in juridical definition of violation and can't be example of political crime. In addition, oppressors, who have oppressed against Islamic just governor, should be Muslim and should have religious incentive, since if they are pagans, they should be treated based on sentences for pagans. Secondly, contrary to legal definition of political crime that may be realized with oppression of group or individual, in juridical definition of oppression it is necessary and political crime can't be realized through oppression of a person or incursion of an individual under the title of political crime (Mar'ashi, 7, 1997).

Involved elements in realization of violation

In regard with realization of any kind of crime, special elements and principles are required that crime has been realized if all of them are provided. Violation is not also an exception and hence, for purpose of becoming familiar to this issue, elements of violation would be mentioned in short as follows:

1- Muslim religion of violators:

One of the elements that jurists and lawyers have mentioned for realization of crime of violation is necessity of being Muslim for

oppressors. Hence, if oppressors against Islamic governor taken action for oppression are non-Muslim, they would be war pagans. If so, specific sentences for war would be executed for them (Jamili, 1979, 1/100).

2- Having sufficient power

Another principle of realization of violation is having sufficient power. Many Shiite jurists believe that oppressors should have force for realization of this crime, since if they have not power, for them the mentioned crime can be regarded among ordinary crimes (Toosi, 2008, 7/267; Ibn Edris Helli, 15/2).

3- Team oppression

However, some jurists believe that violation can be realized with individual oppression too (Allame Helli, 2/983 and Ameli, 1983, 407/2). They have also referred to event of terrorism of Imam Ali by Ibn Muljam; although many jurists believe that Shiite or Sunni religion of oppression is one of the conditions and elements involved in realization of violation (Toosi, 2008, 7/267; Helli, 154/1).

4- Legitimacy of system and dominant justice

Another required element for realization of violation is legitimacy of dominant system and Islamic governor, since if the dominant system is illegal and governor is an oppressor person, the crime is not violation, but also ordinary people should be encouraged for oppression against it and also public movements should be empowered (Toosi, 1416, 5/335; Jamili, 1979, 154). Once in presence of Imam Ali, a discussion was began on sect "Harvarie", which was a group of Khawarij, and Imam said that: if they have oppressed against just imam, one should fight them and if they oppressed against oppressor governor, one should fight them, since they have good reason for their action (Horr Ameli, 11/60).

5- Oppression against innocent imam or Islamic governor

However, appearance of words of some jurists is that violation is specified to oppression against innocent imam and won't include incursion against non-innocent Islamic governor (Tabatabayi, 1993, 4/615; Ameli, 1998, 1/223). However, due to existed evidences in this field, it should be mentioned that existing evidences include oppression against just imam; although they may not be innocent. Prophet Mohammad has stated that: every one, who oppresses against us using weapons, is not our friend (Ahsayi, 1983, 1/147). It is clear that the term "against us" is general and includes every Islamic governor; whether the governor is Prophet, innocent imam or his special minister. Hence, some jurists have confirmed this issue and have stated that: all people oppressed against imam and his minister is violator (Kashef Al-Ghata, 2001, 367).

One of the reasons for the theory that violation is specified to time of presence of Imams is generality of juridical governorship.

Ayatollah Seyyed Hassan Mar'ashi has mentioned in regard with this issue that there is no difference between innocent imam and Islamic just governor as follows:

In addition, if we accept that the mentioned issues are not specified to innocent imams, in field of general sentences, oppression can be considered for representative of Imam Zaman too. This is because; if jurists can't encounter oppressions in time of absence of Imam Zaman and punish them based on Islamic principles, they would make collapse of foundation of Islamic justice and would cause disorganization in Islamic system (Mar'ashi, 1994, p.66).

Difference between violation and war

In some cases, the two subjects have been combined and in regard with violation and political crime, sentence of war would be issued and executed. The two subjects are different from each other and are separated in terms of nature and subject.

1- Violation is rise up against the government and is same political crime; although war is rise up against people and security of the society and can be regarded as public and social crime.

2- In regard with violation, the element for being a team is a condition and agents involved in it are known as "Ghiah" (disobedient group). However, in war being in a group can't be a condition and just a person can cause criminal action with weapon

and destroy security and order of the society. This kind of action can be regarded as war.

3- In regard with war, element of using weapon and threatening with cold and hot weapon is a condition; although violation and political crime can be realized even without weapon and in form of verbal opposition and rise up.

4- In regard with war, the element of making public fear in the society is a condition, although the condition is not existed in violation and political crime. Without causing fear among people through peaceful manners and just through creating pessimism among people to the government and governors through different manners can be also realized.

5- Violation and political crime can be formed based on a thought and belief; although ambiguously and through having political and religious motivations. However, war is out of element of thought and belief. It would be realized just through having incentives of materialism, using power and even sometimes with no reasonable goal. Warriors have been named sometimes in narratives as "Man Sell Seifa"; meaning that everyone, who use any kind of weapon and makes people frightened in public places and make the places insecure.

6- Political crime: although apparently or in view of involved agents it would be done for purpose of defending rights and freedom of people against power and government, war threatens directly rights, freedom and peace of poor and vulnerable people.

7- The subject of violation and political crime and war are presented in basic rights of people; although in political crime, mitigation of punishment of political criminals and observance of their rights by the government is encompassed in field of basic rights of people and preservation of their freedom. However, in regard with war, intensification of punishment of warriors and oppressors and acute behavior with them by the government can be considered in limit of preservation of rights and security and freedom of people. Hence, liberalists and liberal and democratic societies are usually adherents of observance of rights of accused people and political criminals and suppression of fiend people. In regard with war, the principle is intensification of punishment and prevention and lack of freedom; although in political crimes, the basis is freedom and mitigation of punishment.

8- In regard with war, the principle is turpitude of warriors and collapse of them; although in political crime the principle is on basis of freedom of thought and expression and preservation of rights of political criminals.

9- In regard with war, while beginning commitment of crime, the conscript would be punished; although practically it may not lead to other crimes such as murder and depredation; although in political crimes, it would not be considered in domain of punishment until the time that it has not resulted in a criminal action that is regarded as crime in law.

10- In war, it is necessary for the government to prosecute warriors and fight them if required and suppress them and creates security; although in regard with violation and political crime, prosecution and fighting them is not allowed; unless they have taken action for fight and collapse. In this regard, Imam Ali has stated to oppressors of his government as follows: I would never fight you; unless you take weapons and began war and create corruption in the society.

11- In period of war, oppressors and warriors are equal and both of them would be killed. However, after war the oppressors would be absolved like Imam Ali, who behaved enemies after Jamal War; although warriors would not be included in absolve and war punishment would be executed for them.

12- In regard with war, escaped people and injured parties would be prosecuted and accused by soldiers; although injured parties in violation and political crime and those, who submit their weapons while fight, would not be prosecuted and accused.

13- If criminal and political criminal has repented; whether before or after accusing him, he could be forgiven. However, if the warrior has repented before domination on him, it would be

accepted; although after domination, his repent would not be accepted and his punishment would not be null and void. According to Quran: "warriors would be punished using one of the four determined punishments; unless he has repented before accusing him. if so, his repent would be accepted and his punishment would be null and void; although after accusing him, neither Had nor nemesis and compensation would be null and void. Imam has also confirmed this issue and this subject has been described in Islamic Penal Code similarly."

14- In Islam and Quran, certain punishment has not been determined and predicted for violation. Judge can handle such case and issue sentence according to his personal opinion and base on committed crime or forgive him. However, in Quran 4 kinds of punishment have been determined for warriors and the most acute punishment has been confirmed for it. The punishment includes death penalty in any kind that is determined by the governor such as hanging, cutting hand and foot and proscription from residential place. Judge is responsible for executing one of the mentioned penalties in competent form and based on committed crime. In addition to these punishments, if warriors have committed other crimes such as murder, mayhem, theft and similar crimes, he should compensate them too. Hence, such criminal would be also sentenced to death penalty or cutting organs or pay back of theft property and loss compensation. As the mentioned four punishments are divine Hodud and public rights, they could be cancelled with the consent of owners of right. However, compensative punishment can be cancelled with consent of owners of right because of being private. Majid Quran has stated after announcement of these punishments that the punishment is just for worldly penalty and these criminals, who destroy peace and safety of the society, would have harder torture in the hereafter world.

It seems that:

Prediction of violation by the legislator is a proper action, since violation is naturally different from war. War is against security and violation is a crime against the government.

Violation encompasses only subject of heist uprising and its penalty is also death penalty; meaning that legislator has presented clearer definition and has confirmed that the crime should be surely heist and should be against foundation and basis of the regime and government. However, in articles 287 and 288 that have considered the subject of violation, there is an ambiguity, since article 287 has mentioned that if a group has taken action in order to conduct heist uprising, the group would be sentenced for death penalty, if it has applied weapons. Here, the question raised is that using weapons by members is considered or using it by the group is considered? As in article 288 it has been mentioned that when members of oppressor group are accused before fighting and using weapons their punishment is not death penalty, through combining the two articles it could be mentioned that there are two conditions for applying death penalty: first, the group has used weapon by itself and second, members of group have used weapons too. However, it could be mentioned that the subject has not been sometimes observed in Islamic Penal Code about war and has stated for example that if group has used weapon, all adherents of group are also warriors. In fact, when the discussion is on heist uprising, it means that the group has practically applied weapon and has not announced that the group has entered heist phase. However, separating violation in the current Islamic Penal Code has been a good action.

In addition, it seems that there are some differences between violation and political crime:

If the aim by political crime is absolutely a crime that is generally against the government, it could be mentioned that some crimes such as violation is one example of political crime. However, today in law of different countries and different international conventions, one of the accepted principles is that in political crime weapon and violence should not be applied by the criminal. As according to legal definition, in both violation and war using

weapon is existed, the two crimes are among exceptions of political crime and no one of them are not political crime based on the current interpretation; unless, as it was mentioned a general definition has been presented for political crime and any kind of action has been regarded as political crime. Under such conditions, different actions such as violation one can consider the crime included in this category.

According to the study, it could be mentioned that:

The subject of war, violation and political crime are not different issues, but also they are mutual issues. In terms of subject and sentence and punishments they are significantly different from each other and the subjects should not be combined with each other in the legislation system or in judicial cases. However, in judicial lawsuits, sentences of war have been spread to some examples of violation and political crime, which in some cases have been spread even to thousands people. Hence, to all of them title of war has been allocated and sentences for warriors would be executed on these criminals.

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