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Examining Hudud considering valid Islamic authorities in view of Islamic penal code with emphasis on challenges of Article 220

Alireza Millanei[1] *, *Mohammadmehdi Shirazi Moghadam*[2]

[1] *Department of Law, Electronic Branch, Islamic Azad University, Tehran, Iran*

[2] *Department of Law, Electronic Branch, Islamic Azad University, Tehran, Iran*

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ABSTRACT

Objective: Considering the article 220 and its reference to constitutional law that have been enacted for solving the existing shortcoming in legal system comforts with scientific and practical impediments since in one hand, manner of reference to valid introduced authorities is ambiguous, on the other hand there is no possibility to use some of these authorities for jurists. **Methodology:** In addition, many of jurists have not sufficient knowledge to emerged issues. For this reason, if a decree will be found for these issues, many disagreements are established among religious specialists. **Results:** So, the disagreements damage trust foundation of legal system in the society. **Conclusion:** The article examines Hudud considering valid Islamic authorities in view of Islamic penal code with emphasize on legal scholars" opinions and article 220.

1. Introduction

In Islamic law of Sharia, Hudud usually refers to the class of punishments for serious crimes. Hudud are a part of Islamic criminal code that its punishment is performed against ethical actions. The subject of enforcement of Hudud during the occultation of imam Mahdi is a main issue that is various opinions regarding it. On the other hand, some of the jurists are capable to enforce religious Hudud during the occultation of Imam Mahdi and some others believe that Hudud (prescribed punishment) cannot enforced in this time and it should only be enforced by Imam Mahdi.

In Islamic penal code, there are some infringements that create punishments such as highway robbery, illegal sexual intercourse, false accusation of Zina, apostasy, drinking alcohol and theft. The new rule states that if people who have reached maturity but their age is below 18 years do not perceive the performed actions, they will not punish. The issue is a step forward regarding human right framework. The other strength point in new rule is accepting the criminal growth beside the civil affair growth.

The principle of obligation to investigation consist of civil proceedings and in criminal proceeding based on the article 36, punishment based on the decree and its enforcement only is possible by law since no punishment is except in accordance with the law. No punishment except in accordance with the law is a legal rule and that jurist considered them during examining the decree. It should be considered that legislator with assumption of conformity of all rules and obligations with Islamic standards in article 36 focuses on legal penalty. Otherwise, valid Islamic authorities or valid judicial decree is inconsistent with each other and jurists refer to similar cases or statement (Fatwa). Therefore, sovereignty of constitutional law requires that jurists in criminal proceeding refrain from punishment regarding a punishment. In criminal law for prescribing in protection criminal sanction the ideology dominant on man and the concepts such as justice, power, security and freedom is considered. In political systems based on religion, the case of criminal law is affected by religious training. Hudud as one of the crimes are against divine command that have been introduced in Islam with intense criminal reactions. There are some disagreements regarding the determined punishment among Islamic jurists. Crime occurrence and behavior against perpetrator is an inevitable phenomenon. The main classification of crime among jurists is their classification based on the internal and external systems.

* *Corresponding author:* A.millannei@gmail.com
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Prophet Muhammad in some cases commands the kill of persons who have helped the enemies of Muslims, have disturbed the security of the society, did not remain faithful on their treaty with Prophet and have committed an encroachment against divine limits (Hudud). Therefore, the command of prophet for killing them was not terror since terror is done secretly. The actions provided peace and security for Islamic society.one of the main and important section of each law system is enforced the punishments and investigation of crimes and punishment fulfillment. The importance of this section is due to its direct relationship with main interests of the society.it should be considered that existing of an efficient criminal system cause to disturb in social order and security. In addition, excessive violence and non-human behavior and lake of investigation to crime of offences cause to infringe upon the rights of people.

Islamic legal systems have represented a dual system considering the interests and social and individual interests and their ranking. In the criminal system, there are stable and non-changeable punishments under the title of "Hudud and punishment" for stable interest of the society. The changeable punishments have been considered titled as "discretionary correction". The qualities of Islamic punishment enforcements have different dimensions in Shia jurisprudence.

The study describes the issue that punishment of crime in criminal law at article 167 is done by the jurist. In addition, the researcher attempts to investigate the types of applied punishments considering the Islamic Valid Fatwa.

In the study, following objects have been considered:

- Investigating the destructive effects of punishment (Hadd) that cause to fear extensively.
- Preventing the unsuitable punishment enforcements with representing exact definition of the punishments. - Explaining the similarities and differences of punishment in new Islamic penal code and expressing the destructive aspects of these types of punishment for decreasing such actions considering the article 167 of constitutional law.

1.1. Background

God in verse 2 of Surat Al- Nur stats: "You shall scourge the fornicatress and fornicator a hundred lashes each, and let no piety for them cause you not to enforce God's judgment, if you believe in God and judgment day; let their torment be witnessed by a party of the believers".

In the verse the main important point is witness by a part of the believers. Among the book decree, Kanz Al-Erfan"s Book by Fazelonly stresses on "the believers as witnesses". He stated that the word of "the believers" is in Quran due to hind the lash enforcement from the look of the infidels. In interpretation of Menhaja al- Sadeqinfi Al- Zam Al- mokhalefin,,s book stated that the witness should be a party of the believers since if the witness is an infidel, the sense prevents him to become a Moslem.

Hassan pour Baferani (2009) stated" punishment against physical integrity of each person constitutes the society; since each person has two spiritual and physical dimensions, punishment against him have been divided into two sections that the researcher examined them (Poor Baferani, 2009).

Sahifeh- ye Imam by Khomeini Imam is like as an encyclopedia of jurisprudence that is very important than the other books in jurisprudence field. The subjects of the book are about usury, possession permit, contracts, mortgage and hoarding laws.

AbbasaliAmidZanjani in his book titled as Political jurisprudence examines the term of security in different cases in viewpoint of jurisprudence. In the book, firstly, the meaning of word" protection" is used instead the term of "security" due to semantic similarity; secondly, a part of authorities in security and political issues is lied in governing provisions due to issues related to political life and security. In this regard, it can be stated that the famous term that is used for jurisprudence studies is definition of "security" used in term of "protection". However, there are many terms related to security such as Jihad, fight, fear, homicide, peace, justice, Hududand punishment. Therefore, the revolution trend of security perception in jurisprudence and examining type of attitudes of jurists to security subject such as protection of religious, protection of life, intellect6 protection, preserving the respect and honoris searched as constituting in Islamic society. Hashemi and Kosha (2001) in a study titled as "studying the conflict between article 167 of the constitutional law and the principle of legality of crimes and punishments" stated that considering the principle of article 36 of constitute and other principles related to the legality, the article 136 consist of criminal actions or only civil actions. They examined the issue from viewpoint of different legal doctors (Hashemi and Kosha, 2001).

Khoeini and Zolfaqari (2011) in their study titled as "legislative gaps and Fatwa execution in Iranian judicial system with consideration of article 167 of the constitutional law" expressed that there are some problems and scientific and practical barriers for executing the article 167 since refer to legal authorities and valid Fatwa is ambiguous in one hand, and in other hand possibility to use some of the authorities do not provided for the jurists. The study examined the problems (Khoeini and Zolfaqari, 2011).

1.2. Theoretical foundation

By studying the Islamic criminal laws and authorities considering the classification bases, it is determined that the aim of Islamic penalty execution not only is for recompensing the offender, but also is for aims of Islamic society such as preserving the interests of the society, correcting the offender's behavior and creating a health Islamic society. In this regard, each Islamic punishment is responsible for meeting the requirements of one or several aims of Islamic legislator. By reflecting in mentioned statement regarding the enforcement of punishment, it was cleared that there is a relationship between execution of criminal law and descent of God's blessing. In addition, it is determined that enforcement of punishments is an undeniable necessity and it should be executed regarding a crim. Any violation and discounts regarding the offender, in fact is a kind of disobedience against Islam.

First section: agreement

The reasons of compatible persons with open enforcement of Hudud and punishment can be summarized as follows:

- Intellectual reason
- The verses of Holy Quran
- Statements of imams and prophets
- Assembly of jurists

1.3. Intellectual reason

Enforcement of Hudud and punishments in major crimes has many benefits in view of reason that some of them consist of:

- Open enforcement of Hudud and punishment in major crimes as a stable social tradition
- increasing the level of social and mental security in people - Punishment of offenders becomes as a lesson for those who have a background to do crime
- Representing the power of system
- Preventing the potential corruption in enforcing the Hudud and punishments

1.4. Holy Quran

Some of the verses in holy Quran indicate the open enforcement of Hudud. One of these verses is verse 2 of Surat Al- Nur :" You shall scourge the fornicates and fornicator a hundred lashes each, and let no piety for them cause you not to enforce God's judgment, if you believe in God and judgment day; let their torment be witnessed by a party of the believers".

In this verse, enforcement of divine Hudud have been interpreted to God's religious that represents that stability and endurance of divine religion in the society depends on the enforcement of Islamic Hudud and punishments. In addition, applying the kindness and useless affection regarding the offenders is against the Islamic law (Falah & Chali Baboli).

Imam Khomeini in Al- Tahrir Al- Vasileh"s book expressed that "when a jurist wants to administrate the prescribed punishment (Hadd) on somebody, it is worthy that he manifests the issue to people" (Khomeini).

The verse in interpretation of Shia have been expressed that it is necessary to come three believers or more than three persons in order to observe the torment. Some other believes that at least two persons should be come to see the torment. In philosophy of open enforcement of Hudud, the interpreters of Shia believe that "the aim only is not to take a lesson by offender, but also the aim is that his punishment serves an example for others. Sunni commentators express that it is necessary for a group of believers to come in enforcement of Hadd while the jurists agree that presence of a group of believers is recommended and it is not indispensable (Rohani Mogqadam).

1.5. Saying (traditions) of Imams and prophets

With an overview on many saying and traditions narrated by several authorities that is about enforcement quality, it is proved that practical lifestyle of prophet and Imam Ali on open enforcement of a part of Hudud such as adultery is so that they commanded a herald to inform people regarding the issue before enforcing the Hadd. As Kolleini on Furu Al- Kafi"s book stated that "a woman confessed her adultery four times near Imam Ali, and then he commanded a herald to inform people for seeing the Hadd enforcement (Koleini, 1983).

The famous story of enforcement of Hadd on Maaz by command of Prophet Muhammad when people saw him proves that open enforcement of Hadd is a part of Islamic Hudud. What is understand from the traditions regarding the quality of Hadd enforcement is that open execution of Hadd is a part of Hudud that is used in presence of people (Hur ameli, 1980).

1.6. Assembly

Considering the verse 2 of surat Al- Nur and traditions narrated by several authorities and intellectual reasons that are for necessity of open enforcement of at least a part of Hudud and punishment, all agree on necessity of them. As FazelLankarani on Tafsil Al- shariah"s book expressed against Sheikh Tosi regarding the presence of a group of believers during enforcement of Hadd (Lankarani, 1985)

1.7. Opponents

Among the jurists nobody generally opposed to the enforcement of Hadd but based on some reasons, some of them against with open enforcement of Hadd. The reasons are divided into two types: The principle of licensees: it means a reason should be on confirmation of licenses for open enforcement of Hadd. It is obvious that presence of some verses and traditions and reason about license in open enforcement of some of Hudud and punishment express the principle of licenses.

Negative reactions regarding open enforcement of Hudud and punishment: negative reactions regarding open enforcement of Hudud and punishments can be summarized as follows:

- Representing a violent face of Islam to world
- Islamic countries are accused of human rights violent - To hurt the hearts of people by observing execution or heavy punishment of offenders
- Creating an aversion of all people against Islamic system of Iran

In order to reject the reasons, it should be stated that firstly, open enforcement of Hudud and punishments at- least in some of the major crimes during the history and in all countries have been established as a stable tradition and it shows the rationality of it; secondly, considering the verses of Holy Quran, traditions, practical lifestyle of Prophets and Imams and intellectual reasons that all express the open enforcement of Hudud and punishment it cannot be resisted against all the reasons.

1.8. Exclusion of article 167 against penal action

Based on the theory, article 167 does not consist of penal action but also it allocates to civil case. Principle 36 and the other principles that indicate the legitimate of punishment and Hudud cause to allocate the article 167, although it can be referred to a penal action for compensating a damage arising from a crime (Goldozian, 2006).

Some of the advocates of the theory argue that: "the main principle of necessity to investigation only consists of civil case and in penal case, a decree should be enforced by court and law based on the article 36 because no punishment is excepting in accordance with the law. No punishment except in accordance with the law is a legal rule and jurist considered them during examining the decree. It should be considered that legislator with assumption of conformity of all rules and obligations with Islamic standards in article 36 focuses on legal penalty. Otherwise, valid Islamic authorities or valid judicial decree is inconsistent with each other; and jurists refer to similar cases or statement (Fatwa). Therefore, sovereignty of constitutional law requires that jurists in criminal proceeding refrain from punishment regarding a punishment." (Hashemi, 1996)

It can be concluded from mentioned points that the theory discusses about contrarily of article 167 with the principle of legality: article 36 of constitute has accepted the legality of punishment. If article 167 consists of penal case, its requirement is contravention of it with legality of punishments that is a foundation of legality of punishment. Many of jurists have expressed the legality of punishment and crimes (article 36) asthe main reason of their opposition with inclusion of article 167 regarding penal case (Katozian, 2006).

As the article 4 has been emphasized, Holy Quran, traditions and jurisprudence authorities can be as references for jurists in codification. Leader of Moslems society has the authority for enforcement of Hudud and jurists by leader‟s permission can investigate the criminal affairs (Habibzadeh, 1998). Therefore, oppositions of some jurists with inclusion of article 167 regarding penal case is not due to their oppositions with Islamic law, but also it is due to the fact that religious commandments are compiled by legislative power under the supervision of Governor of Islam.

1.9. decree (Fatwa) and authoritative authorities in legal order

Adherents of the attitudes believe that constitutional law has set Fatwa and Valid Islamic authorities in legal order based on the article 167, therefor; there is no incompatibility with the legality of punishment. The source of the attitude originates from the judicial theory of supreme council that have been issued regarding the interpretation of article 289 in reform act of criminal procedure act. Based on the mentioned commotion's theory, criminal courts cannot refuse to investigate the crime on the pretext of silence, brevity and conflict of law. So it is necessary that the court accept the responsibility regarding punishment of offenders. It seems that reference of court to authoritative authorities of Islamic law in order to recognize that the issue is a crime or not in view of Islamic Shariaand to issue the sentence (decree) to the punishment based on the legal authorities is no objection on it because it is no contrary with inserted provisions in the article of penal code and also the provisions of article 36 of constitutional law of Islamic republic of Iran. Each action and abundance of action that is considered as a crime in view of legislators, the accuser is considered as an offender based on the article 289, and he/she should be punished according to the law (Kalantari, 1996).

1.10. The problems and barriers to enforce the article 167 of constitutional law

1- The article 167 of constitution law has been enacted for establishing equilibrium that can compensate the drawbacks of legislation but if the drawbacks are not determined, it will affect a converse performance. Analysis of the principle have been attracted the attentions of some of the lawyers. Some of them consider it as a The first point is reference to Islamic authenticate authorities which is necessary, although the aim of the source have not been determined whether the aim is four dimensions of authorities or Shia scholars‟ books. In Islamic system, Quran, traditions and intellect are main authorities of inference that referral to them provides the access to the actual sentence.

2- The manner of referral is ambiguous. In fact, the problem is appeared by two forms: firstly, if a jurist is a clergy (religious law expert), conformity to his option is unlawful. On the other hand, he cannot refuse to issue the vote since is considered as the cases of silence or infringement. Secondly, if the jurist is not a clergy, in fact, he will be an imitator. So, how he refers to the authenticate authorities?

3- The third ambiguity is existence of disagreement among jurists‟ votes. Presence of different authenticate Fatwa is undeniable.

4- Unconditional enforcement regarding provisions of article 167 without considering to the generality of the principle causes the referral of people to the court of justice as a results it decreases the reliance on judicial system.

5- Ambiguity in the context of the article especially solving the ambiguity since the article itself has some ambiguities, so how can the jurist solve the problem?

1.11. Examining some of the practical problems during the reference to the authorities and Fatwa

In the history of Shia jurisprudence, practice of religious jurisprudence is used as a tool for coordinating the general Islamic laws with the requirements and it is except the main duty that is eliciting the inferences of legislators from its authorities (Feiz, 1986)

The manner of inference has a direct relationship with two elements of time and place (practice of religious jurisprudence). However, it can be possible to investigate the role of practice of religious jurisprudence in two forms: Firstly, Practice of religious jurisprudence is an ability to deduce the provisions from its authorities; secondly, Practice of religious jurisprudence is a tool to conform a decree to general laws.

Analysis of idea regarding problem solving and administrative

barriers of principle 167 of constitutional law

1.12. Theory according to spirit of laws

Before creating an attitude as an independent variable, it should be stated that some of the jurists expressed the article 3 of civil procedure code as a referring method that was imposed on the jurist by the legislators. After the attitude, the theory of "law spirit" was expressed in Iran as a scientific theory in legal system (Katozian, 2006). In new laws of Iran, the term of "law spirit" has not been defined, however, the issue has been considered in law before

Iranian revolution. The purpose of law spirit is the intention of the legislator that has been introduced for a long time among experts of Muslim law. When it was predicted in law that an issue has some similar features and characters with point at issue, the jurist can extent the mentioned decree to the issue according the law spirit. In order to understand the intention of the legislator, some ways have been proposed as follows:

A) Comprehensive consideration to all rules.

B) Attention to term of "opposite" concept: when an existing solution in legal text has an exception aspect; it can be used from an opposite decree based on the opposite term in obvious term (Madani, 1998).

C) Attention to the term of "concurrent": if the reason of decree is stronger than reason of decree in logics, the jurist can understand the purpose of the legislator.

D) Attention to the preliminaries of adoption of the law: examining the steps that a law follows since the proposal to adoption of this law can be as a suitable way to recognize the intention of the legislator.

If the legislator considers the special authorities in codification of some of legal decrees, referring to them can be a main key for recognizing the spirit of law.

1.13. Opposition of principle 167 with the accepted principles a rules in religious jurisprudent

Assuming the inclusion of principle 167 regarding penal case, referring of jurist to the valid Islamic authorities does not mean that the legislator accepts liberal interpretation but also during the reference to the valid authorities and Fatwa, the restrictive interpretation should be considered. So, the consequence of this case will be innocence of the accuser. Therefore, it can be stated that if criminalization based on the article 167 have not opposite with legality in the issue; it surely is inconsistence with principle of precaution and stopping in judicial doubt (Hashemi and Kosha, 2001).

2. Materials and methods

Type of method in this article is analytical- descriptive.

2.1. Instrument and collection the data

Library method and articles, books and authenticate websites have been used in the study.

2.2. Data analysis

By studying the articles, ideas and attitudes in this regard, examination and analysis of the subject have been conducted. In addition, by useful and coherent deductions from analyses and existence attitudes, the subject of the study has been studied.

3. Discussion and results

It should be stated that in Iranian legal system, the main important legal authorities are positive law. Positive laws are man- made law that specify an action. Therefore, the jurist should strive to find the law of each claim in civil codes but since Islamic laws and principles is considered as indigenous rights, the constitutional law permits to the jurists that can refer to Islamic authenticate authorities or Fatwa when there is no law in a case. It should be considered that although reference to the idea of Islamic jurists is equal to the idea of law doctrine, it should not be assured on it completely. The problems and barriers that there are in reference of the principles led the legislator to present some comment regarding them. Studying the theory of law spirit showed what is considered frequently is the law. It means spirit of law is the same concept of law. Regarding the objection excreted on mentioned theory, the moderation-oriented theory has been proposed. The results of applying of the provision regarding the theory are as follows:

A) By restrictive interpretation of Jurist's term, article 167 of constitutional law is not executed in administrative office and judicial authorities are responsible for applying it.

B) Restrictive interpretation of the article 167 of constitutional law causes to non-applying the article in the penal case.

C) Interpretation of principle 167 with second and forth principle of constitution law not only cases to allocate the Valid Islamic authorities to the jurists, but also causes to authenticate the holy Book, intellect and Gathering.

D) To put into order, the referential of jurists to Islamic Valid Fatwa by applying the rule of referential to these Fatwa that is an effective step into judicial precedent.

E) The principle is based on the legality of Iranian legal system and referential to the Fatwa is an exception case, so, when the legal text is available, referential to the authorities and Fatwa is inappropriate.

F) Where there does not exist a law applicable to the case at issue, the court of justice is bound to settle the case in accordance with the spirit and the purport of the existing laws and established usages considering to the case at issue.

G) Iran constitutional law says under the principle of 167 that if the judge does not find the judgment of the action he renders the order according to the valid Islamic authorities or valid judicial decree on a point of religious jurisprudence.

H) Judge never is able to abstain from voting under the pretext of the silence or deficiency, brevity or conflict of laws.

I) If the votes of Supreme Court solve the problem, the jurist cannot apply the principle 167.

Purport of the contract which is concluded between Iran state and foreign states is under the law, so it frees form want the jurist from referential to valid authorities or Fatwa.

4. Conclusion

Considering the principle of 167 regarding the term of "valid Fatwa (valid judicial decree)" have some ambiguities, it may cause to issue the invalid vote; as a result, is not to the justice system interest and individual rights of the accuser unless the legislator or Guardian council in interpretation of the term that is many possibilities represents a specific meaning.

It can be stated that considering the article 220 of Islamic penal code of principle 167 of Iranian constitutional law, the referring is against the principle of legality of punishmet.in addition, if the judge does not find the judgment of the action he renders the order according to the valid Islamic authorities or valid judicial decree on a point of religious jurisprudence.

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