

Inadmissibility of Resorting to the Principle of Overriding for Inclusion of Article 167 of Constitution over Penal Lawsuits (Studying the Topic from the Viewpoint of Islamic Jurisprudence Rules and Islamic Penal Code)

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Abstract

Inclusion or lack of inclusion of article 167 in the constitution towards penal lawsuits, has been disputable by lawyers from long time ago. In order to avoid breaching the principle of legality of crime and punishment in the constitution, most lawyers believe that article 167 is allocated by article 36 and it is not included penal lawsuits; but some lawyers by virtue of principle of overruling in Islamic jurisprudence, are going to generalize the concept of the word law to codified and uncodified law (Fiqh) and also place the penal lawsuits in the scope of inclusion of article 167. In this writing, while detailed explanation of the principle of overruling, it is proved that there are not the terms for implementing this principle in articles 167 and 36 from the viewpoints of Islamic jurisprudence. In the following, ignoring this fundamental problem, referring to Fiqh in quadruple punishment has been examined based on Islamic penal code acted 1392; and resorting to the process of legislation in unspecified penalties and also the viewpoints of Imam Khomeini (Peace be upon him) and his practical procedure in law of penalties, it is proved that in this kind of punishments, we can not refer to Fiqh.

Keywords: Article 167 of Constitution; Article 36 of Constitution; Principle of Overruling; Principle of Exclusion; Referring to Fiqh.

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