

A Critical Examination of the Fiqhi Foundations of Article 189 of the Islamic Penal Code

Faramarz Fakhremaani¹, Morteza Rahimi²

1. PhD Student in Jurisprudence and Foundations of Islamic Law, Department of Islamic Jurisprudence and Law, Faculty of Theology and Islamic Studies, Shiraz University, Shiraz, Iran. Email: faramarz.fakhremaani@hafez.shirazu.ac.ir

2. Corresponding Author, Associate Professor, Department of Islamic Jurisprudence and Law, Faculty of Theology and Islamic Studies, Shiraz University, Shiraz, Iran. Email: mrahimi@shirazu.ac.ir

Article Info

Article type:
Research Article

Article history:

Received

06 August 2024

Received in revised form

03 September 2024

Accepted

09 October 2024

Available online

22 June 2026

Keywords:

exclusive hudūd,
mixed hudūd,
private rights,
testimony upon testimony

ABSTRACT

Article 189 of the Islamic Penal Code explicitly provides that offenses punishable by hadd or ta'zīr may not be proved by testimony upon testimony. The provision clearly reflects the well-known Imami view, which also excludes secondary testimony in certain mixed hudūd such as qadhāf and theft. Imami jurists nevertheless agree that purely divine rights are not established by testimony upon testimony, whereas purely private rights may be so established. Because the competing positions have materially different legal effects, this article asks which hudūd and ta'zīr offenses as such may properly be proved through secondary testimony. Employing a descriptive-analytical and ijtihād-based method, it critically and carefully assesses the arguments for categorical exclusion and categorical acceptance. The study concludes that testimony upon testimony should therefore be accepted wherever the matter falls within private rights, whether the claim concerns the private-right component of a mixed hadd or a ta'zīr arising from violation of an individual right. It should remain firmly excluded for purely divine hudūd. Article 189 should therefore be amended accordingly to replace its undifferentiated prohibition with a rights-based distinction.

Cite this article: Fakhremaani, F., & Rahimi, M. (2026). A critical examination of the fiqhi foundations of Article 189 of the Islamic Penal Code. *Studies of Islamic Jurisprudence and Basis of Law*, 20(1), 263-286. <https://doi.org/10.22034/fvh.2025.19173.2008>



© Author(s) retain the copyright. Publisher: Al-Mustafa International University.
DOI: <https://doi.org/10.22034/fvh.2025.19173.2008>

Introduction

Testimony upon testimony, sometimes called secondary testimony, occurs when a witness reports before the court the testimony previously given to that witness by an original witness. Articles 188 to 190 of the Islamic Penal Code recognize the device but Article 189 excludes it for all ḥadd and taʿzīr offenses while permitting it for qīṣās, diya, and financial liability. The rule is uncontroversial for purely divine ḥudūd such as zinā and liwāt, but it becomes difficult in mixed offenses such as qadhḥ and theft and in taʿzīr offenses grounded in violations of private rights. The undifferentiated statutory formula may therefore suppress proof of rights that Imami jurisprudence otherwise protects.

Methodology

The research is descriptive-analytical, library-based, and juristic in orientation. It reconstructs the principal Imami positions, examines the reports and claimed consensuses on which they rely, and evaluates arguments drawn from the principle of darʿ, the lenient construction of ḥudūd, general evidentiary reports, and the distinction between divine and private rights. The statutory rule is then assessed against the resulting fiqhi classification.

Literature Review

Classical works discuss secondary testimony mainly within the law of evidence and often address mixed ḥudūd only incidentally. Modern writing usually repeats either the famous categorical exclusion or the statutory wording without isolating the private-right component of the dispute. Some jurists accept secondary testimony in qadhḥ or theft, while others assimilate every ḥadd and even every taʿzīr to a purely divine sanction. The literature has thus not produced a sufficiently precise criterion for legislation.

Findings

The presumption in favor of admissibility is supported by general evidentiary principles and by reports recognizing testimony upon testimony. Exclusion requires a specific and persuasive proof. The arguments for excluding it from all ḥudūd do not justify extending the exception to the private-right dimensions of mixed offenses. Conversely, the arguments for unrestricted acceptance cannot overcome the special caution governing purely divine ḥudūd. A coherent solution is therefore rights-based: secondary testimony is admissible for every claim whose legally protected substance belongs to persons, including the private component of qadhḥ, theft-related claims, and taʿzīr offenses based on injury to private rights.

Discussion

The proposed distinction separates proof of a private entitlement from imposition of a divine sanction. In a mixed offense, the same facts may generate

different legal consequences, and the evidence admissible for one consequence need not automatically establish the other. Courts can therefore accept testimony upon testimony to vindicate the claimant's private right while retaining stricter proof for the exclusively divine component. This approach better reflects the composite nature of mixed ḥudūd and avoids sacrificing individual rights to an overbroad evidentiary exception.

Conclusion

Article 189 is too categorical. Testimony upon testimony should remain inadmissible in purely divine ḥudūd, but it should be admissible wherever the subject matter is a private right, including private-right components of mixed ḥudūd and ta'zīr offenses arising from violation of individual rights. The legislature should amend the provision or add an express exception adopting this criterion. Such a reform would preserve the caution demanded in divine sanctions while aligning positive law with the evidentiary protection of private rights in Imami fiqh.

Declarations

Author Contributions: Faramarz Fakhremaani collected and analyzed the sources and prepared the initial draft. Morteza Rahimi supervised the research, critically reviewed the arguments, and revised the final text.

Data Availability Statement: Not applicable.

Acknowledgements: No acknowledgement was declared.

Ethical Considerations: The authors observed the ethical principles governing the conduct and publication of scientific research.

Funding: This research received no specific grant from public, commercial, or not-for-profit funding bodies.

Conflict of Interest: The authors declared no conflict of interest.

Declaration of Generative AI and AI-assisted Technologies: The authors declared that no artificial intelligence was used in the writing process.