A LEGAL HEURISTIC FOR A NATURAL RIGHTS REGIME

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Abstract

This article shows that early Muslim jurists often created rules that had no foundation in the Qur’an or Sunna. Their successors adopted these views as authoritative precedent, but not without further justifying them. Their justificatory reasons reflected background values concerning inherent qualities of the individual and the goods society must uphold in order to give substantive content to their legal determinations. Recourse to these values, whether implicit or explicit, illustrates how Muslim jurists incorporated naturalistic reasoning in their juridical analyses. To prove their implicit naturalism, this article focuses on how Sunnī Muslim jurists primarily from the 2nd/8th-10th/16th centuries used the conceptual heuristic of “rights of God” and “rights of individuals” (huqūq Allāh, huqūq al-‘ibād) as an interpretive mechanism to frame their naturalistic assumptions and apply them in legal analysis to create and distribute rights, duties, and public commitments.

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Introduction

This study focuses on rules of pleading, litigation, and sentencing to show how jurists both conceptualized and balanced the foundations of individual nature and the social good, however defined. The reference to rules of procedure and litigation is especially important for two reasons. First, these rules were often created without reference to Qur’anic or hadith sources. In the absence of scriptural guidelines, early jurists and their successors had to contend with tensions about objectivity, determinacy, and authority that arose when deciding to “create” a rule. Second, procedural rules can provide insight into the underlying substantive values and norms that jurists incorporate when creating a working rule of law system. The conceptually neat divide provided by notions such as substantive and procedural law is overly determinative. As will be illustrated below, the divide obscures the fact that procedural rules often embody substantive values that speak to conceptions of justice, fair play, and due process. Procedural law, like substantive law, inevitably takes into account the needs of individuals and the social good, while providing a mechanism to resolve conflicts justly.

To illustrate how rules of law were often built upon naturalistic assumptions, I will examine debates concerning the rights of God and the rights of individuals or private rights (الحقوق الدينية والحقوق الخاصة). The rights of God capture those interests that serve the public well-being (e.g., order, security). Many jurists held that these rights rid the world of evil (ال🙂النفوس). A right of God represents a public interest upheld by the ruling authority’s imperium and imposes duties on individuals and the governing authorities. A private right attaches to the individual qua individual. Sunnī jurists arguably relied on underlying conceptions of the individual’s nature and expectations as a member of society when creating rules of law. Such expectations might involve the desire to exclusively possess property, to be free from physical injury, or to receive a benefit under a charitable endowment. 2 Fundamentally,

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2. The treatment of حقّ الله/حقّ العباد has serious implications for
the “rights of God” and the “rights of individuals” constitute a legal heuristic that jurists used to ensure that the Sharī‘a as a rule of law system upholds and, when necessary, balances both society’s needs (i.e. the social good) and private interests. This balancing required jurists to inquire into and weigh the interests at stake and determine how they could be satisfied through the legal institution. This proved particularly difficult when the public interest conflicted with the needs of private parties.

Contemporary rights debates illustrate a concern with and interest in the justificatory function of naturalistic foundations. Participants in these debates present competing foundations for rights, e.g. a libertarian conception of the individual divorced from his social commitments, or a communitarian model in which rights are derived from the commitment made to society. These competing models of rights present opposing poles on a spectrum of debate concerning the foundation of rights in relation to the good of society. This is not the place for an extensive review of that debate. Rather, I want to suggest that the determination of a private right in Islamic legal history was beset by conflicts about the nature of and relation between the individual and the social good. I argue that the ḥuqūq Allāh/ḥuqūq al-‘ibād debates manifest an early regime of Islamic natural rights that illustrates the priority of neither the right nor the good,

the debates concerning human rights in the Muslim world. Although the literature on Islam and human rights is vast, that discussion is not at issue in this study. For studies on modern human rights discourses in the Muslim world, see Abdullahi Ahmad An-Na‘im, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Syracuse: Syracuse University Press, 1990), esp. 161-81; Gerald E. Lamp, ed., Justice and Human rights in Islamic Law (Washington, D.C.: International Law Institute, 1997); Ebrahim Moosa, “The Dilemma of Islamic Rights Schemes,” Journal of Law and Religion 15, nos. 1-2 (2001-2002): 185-215. Also, this study shows the intricacies of a non-Western rights tradition that existed prior to the European Enlightenment. However, it is not a comparative study of Western and Islamic rights traditions. Rather, the focus of this study is on the technical legal discussion of this heuristic in Sunni Islamic law.


but rather that the good and the right are symbiotically related. The heuristic is the basis for a natural rights regime in that jurists did not resort to scriptural text to “find” or “discover” rules. Rather, as will be shown below, they relied on implicit naturalistic presumptions about human nature and the social good, framed in terms of the *huqūq Allāh/huqūq al-‘ibād* heuristic, to justify a particular right and its distribution.

Historical Jurisprudence: Defining Terms, Framing Questions, Designing Methods

Before turning to the specific question of the natural rights heuristic in Islamic law, I first want to address how one can frame a study of “natural rights” in Islamic law without committing a historical and/or theoretical anachronism, given the general perception that natural rights are a Christian European intellectual product.

The term *haqq* (pl. *huqūq*) has a complex meaning. Among the definitions advanced by premodern lexicographers, one is that the term *haqq* refers to something incumbent upon one to do (*haqq ‘alayya an af’ala dhātik*). When one says “there is a *haqq* on you to do *X*”...

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5 A detailed discussion of naturalism in general and in Islamic law is beyond the bounds of this article. For discussion on naturalism in Islamic law, see Anver M. Emon, “Natural Law and Natural Rights in Islamic Law,” *Journal of Law and Religion* 20, no. 2 (2004-5): 351-95. For a philosophical account of how the good and the right are linked in contemporary accounts of constitutional goods, see Alan Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004). I would like to thank Alan Brudner for sharing his insights on these issues.


(haqqa ‘alayka an taf’ala), he means that “you are obligated to do X” (wajaba ‘alayka). 10 Certainly haqq refers to a duty, but in whose interest? In some cases, the interest may be a private one, in others it may be a public one. When the interest is private, the term “right” is a suitable definition for the term “haqq”. By using the term “right” to capture the meaning of “haqq” in “haqq al-‘ibād”, I attempt to embrace the complex of interests that an individual qua individual has as a member of society, e.g. freedom from interference (liberty interests) and the capacity to assert an entitlement (claim interests). Consequently, the term haqq signifies both an obligation on one person and a claim of right on another. 11 However, to translate huqūq Allāh as “rights of God” seems inappropriate. Theologically, God does not litigate and is free from any need. Muslim jurists used “huqūq Allāh” to refer to the wellbeing of society that the imām or ruler must uphold in light of his imperium over society. In light of this juristic usage, the phrase “rights of God” is used here as a term of art to represent the social good that must be effectuated by the imām.

In his work on Islamic law and human rights, Ibrahim Abdullah al-Marzouqi relates how the huqūq Allāh/huqūq al-‘ibād distinction can be used to capture both the individual and public interests involved in any rule of law. Rules that uphold purely public interests constitute the huqūq Allāh. Rules that benefit individuals only are private rights or the huqūq al-‘ibād; these involve such things as exclusive entitlements to one’s property, which can be pursued or waived at the right-holder’s discretion. But not all rules can be neatly divided in this fashion. Some rules present mixed interests or rights (huqūq muqaddamā‘a, huqūq mukhtalata), in which both public and private interests are at stake. In some cases, the public component is more significant, and so the private victim may not be able to forgive the wrong by waiving his rights. In other cases, the private component is the significant element, and hence the private individual has the

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discretion to uphold his right or forgive the violation despite the public interest. This mixed category, therefore, contains two subcategories of mixed rights, one in which the right of God is dominant (ghalib), the other in which the individual right is weightier.

In an article devoted to the concepts of huquq Allâh and huquq al-`ibâd, Miriam Hoexter inquires into the relationship between the Ottoman sultanate and the administration of charitable endowments or awqaf (sing. waqf). She writes that the doctrine regulating waqf administration is best understood in the context of the distinction between the rights of God and private rights. In some cases, awqaf were established for purely charitable purposes, e.g. to support a mosque or feed the needy. In other cases, awqaf were founded for the immediate benefit of the founder's family and heirs. But since all awqaf were established in perpetuity, when a family line came to an end, the family waqf would revert to a public, charitable institution. Because of the diverse interests served by these waqf models, jurists argued about how best to empower the trustee to satisfy the purpose of the founder. For instance, Hanafi jurists limited the scope of a waqf administrator’s discretion over the trust property of a family waqf since the named beneficiaries and their interests in the waqf are specific. The determinate interests served by the waqf thereby limited the extent to which the administrator could utilize the trust property for other uses, while also ensuring it would remain profit bearing in perpetuity when it would ultimately become charitable. But if the waqf was purely charitable, like feeding the needy in and around a specific mosque, jurists held that no specific private rights were implicated and they thus allowed the administrator greater discretion in administering the waqf and distributing its income. The more diffuse the rights and interests at stake, the more Hanafi law

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13 On the topic of huquq Allâh and huquq al-`ibâd, see also Kemal Faruki, “Legal Implications for Today of al-Ahkam al-Khamsa (The Five Values),” in Ethics in Islam, ed. Richard G. Hovannisian (Malibu, California: Undena Publications, 1985), 63-72, who writes that the distinction concerns rights and the substantive law. Ebrahim Moosa, “The Dilemma of Islamic Rights Schemes,” 191-3, also writes briefly about this distinction as a basis for an Islamic human rights tradition, but does not engage the details of the tradition. Instead, he argues that the construction of rights is itself a contested discourse.

allowed discretion to the administrator. Hoexter illustrates how the *huqūq Allāh/huqūq al-ʿibād* heuristic was a framing device used by jurists to identify and to balance the complex interests implicated in a given situation.

According to Bernard Weiss, the *huqūq Allāh/huqūq al-ʿibād* distinction concerns the relationship between the individual and the Muslim state. For Weiss, the *huqūq Allāh* represent “public law” and are upheld against individuals by the state. The *huqūq al-ʿibād* are private matters that allow individuals to order their affairs without state interference. Weiss relies on an article by Baber Johansen in which he discusses the relation between individual rights and the state’s responsibility to uphold the public interest, according to *anāf* sources. Johansen states: “What is of interest to me is whether there were certain norms describing the ideal relationship between government and society that were universally acknowledged by Muslim scholars and...
whether these norms tended to strengthen the ‘absolute’ character of moral criticism directed against the rulers.”

In his analysis of Hanafi law, Johansen attempts to determine whether legal norms exist that protect the individual from over-reaching by the ruling authority. One fundamental norm that Johansen identifies is the idea of the individual as a proprietor. According to Johansen, the Hanafi conception of the individual as a figurative proprietor of his liberty and claim interests may be explained by the fact that early Hanafi jurists were tradesmen and merchants living in urban centers. “In developing their system of law they started from the principle of individual responsibility embodied not only in the text of revelation but also in the social and economic life around them. The formation of Hanafite law took place in a society in which private property played a decisive role.” Consequently, Johansen argues, the proprietor “became the prototype of the legal person in Hanafite law”. As Johansen states: “All huqūq al-‘ibād are supposed to be the property of private legal persons who dispose of their claims at their own free will and who decide of their own accord whether they want the authorities to interfere with their conflicts or not.”

At the same time, the political authority or the imām oversees and upholds the claims of God. In cases involving the claims of God, the ruling authority and the individual are not considered equal players. The ruler upholds the public interest; the individual serves it. “In the public sphere they [viz., Hanafi jurists] expect the individual to act as servant of the public interest. Therefore, the private legal person may not derive any personal advantage from his role as a servant.” As an example, Johansen refers to the punishment for theft, the amputation of the thief’s right hand, which is considered to be a claim of God. But the crime of theft may also involve an individual, private claim for compensation. Johansen writes:

The owner of the stolen property can bring the case before the qādi and request punishment of the thief. But if he does so, he forsakes

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18 Ibid., 281.
19 Ibid., 283.
20 Ibid.
21 Ibid., 297.
22 Ibid.
23 Ibid.
24 Ibid., 299.
his claim to financial compensation for his property. Private claims and liabilities cannot be regulated by means of the public punishment [sic]: al-hadd wa’d-damân lâ yaqlami’ân. If the government makes use of its absolute prerogatives, it does not do so in order to secure private advantages to private legal persons. If a ‘claim of God’ is fulfilled, it excludes the fulfillment of any ‘claims of men’ resulting from the same action. The public and the private interest cannot be interchanged. God does not tolerate any sharing of his claims with individual legal persons. This rule is clearly meant as an incentive for the private legal persons to settle their claims privately rather than bring them to court and request justice according to the public law.25

Under Hanafi law, the ruler upholds the public interest (e.g. amputation of the thief) to the exclusion of private interests (e.g. compensation). Johansen suggests that a victim of theft under Hanafi law can either privately negotiate with the alleged thief to obtain compensation or petition a qâdi to enforce the corporal sanction. But the qâdi cannot do both, since the state is permitted to enforce only the rights of God.

Neither Hoexter’s nor Johansen’s representation of specific Hanafi doctrine in light of the huqûq Allâh/huqûq al-‘ibâd distinction is in question here. I focus instead on how Muslim jurists utilized the huqûq Allâh/huqûq al-‘ibâd heuristic across legal issues and across the Sunni madhâhib in order to illustrate that, in their arguments and rationales for certain rules, the jurists engaged in naturalistic reasoning about the individual and the social good. By comparing the four Sunni schools, I depart from the methodology of scholars who focus on one or two schools of law. Chafik Chehata emphasized that the legal schools are to be considered as “many Muslim laws” (plusieurs droits musulmans), each of which presents a unique and integrated tradition in terms of terminology and spirit.26 Furthermore, the doctrine of each legal school reflects the social conditions in which it arose. By emphasizing the uniqueness of the school and its attachment to social context, Chehata held that each legal school is essentially empirical (essentiellement empirique) and has its own internal logic (logique interne).27

Legal theorists and historians have addressed the relationship

25 Ibid.
27 Ibid., at 47.
between empirical conditions and the law. For instance, legal anthropologist Lawrence Rosen suggests that a qādī’s legal decision is a result of cultural conditions surrounding the judge, rather than of legal doctrines that are binding on judicial reasoning.28 Furthermore, as noted above, Johansen argues that the dominance of trade and commerce as a profession among Ḥanafī jurists may have contributed to the development of the proprietor paradigm in Ḥanafī law. I do not doubt that the notion of the individual as a proprietor is a fundamental value underlying Islamic legal traditions, Ḥanafī or otherwise. And I have little qualm with the idea that social structures like kinship and property may have contributed to the development of legal doctrine. But one can also argue that the social context of Ḥanafī jurists in a city like Nishapur was not different from that of their Mālikī, Shāfī’ī, and Ḥanbalī neighbors in the same city. Certainly social history may help explain why certain laws arose at certain times. But social conditions are not dispositive of legal outcomes. Nor do they alone explain why jurists would use an interpretive heuristic concerning the rights of God and private rights to reach often conflicting conclusions on the same points of law.

The theoretical significance of the haqq Allāh/haqq al-ʿibād distinction, I argue, is best understood in light of a context peculiar to jurists, namely the context of legal arguments, reasoning, and analysis. Certainly jurists were embedded in a social context; but they were also products of a specific legal education and training. This legal context gave them a language and conceptual grammar that serve as a window to their understanding of the legal enterprise itself.

Ibn Rushd (Averroes) (d. 595/1198) used the haqq Allāh/haqq al-ʿibād distinction to explain the Sunnī legal debates on redress for theft (sariqa). In a case of theft in which the stolen property is destroyed, Sunnī jurists asked whether the defendant must compensate (ghurm) the victim in addition to suffering amputation. According to Ibn Rushd, the Shāfī’īs required the defendant to compensate the victim and suffer amputation. The Ḥanafīs said that compensation is not required when the defendant’s hand is amputated. The Mālikīs

28 For instance, Lawrence Rosen suggests that Islamic law is part of larger umbrella of cultural and social norms that reflect an underlying social context and thereby affect judicial outcomes. Lawrence Rosen, The Anthropology of Justice (Cambridge: Cambridge University Press, 1989); idem, The Justice of Islam (Oxford: Oxford University Press, 2000).
held that if the defendant is wealthy enough to compensate the victim without hardship, he should do so; otherwise he is not liable. Importantly, jurists who allowed both compensation and corporal punishment held that theft involves both the right of God and the right of individuals: each right demands satisfaction. The Ḥanafs recognized that both rights are implicated in the mixed category of theft. But they relied on a ḥadīth from the Prophet that rejects a defendant’s compensatory liability when he suffers amputation, suggesting that the corporal sanction excludes the right to compensation.\textsuperscript{29} By acknowledging the private interest in theft, all Sunnī legal schools recognized proprietorship as a value. But they gave it different weight and significance. The question is how best to understand this difference, and its implications on the theoretical significance of the ḥuqūq Allāh/ḥuqūq al-ʿibād distinction.

By comparing how jurists of the four Sunnī schools used the ḥuqūq Allāh/ḥuqūq al-ʿibād distinction to reason about certain rules of law, I will illustrate how the jurists utilized naturalistic premises of the individual and the social good to justify and substantiate their interpretive products. The method of analysis focuses on the reasoning jurists used to justify their positions and distinguish them from others, a practice common in legal sources. Whether one looks to Ḣaḥīfah treatises or large encyclopedias of fiqh such as al-Māwardi’s al-Ḥāfi al-Kabīr or Ibn Qudāma’s al-Mughni, one finds that Muslim jurists of one school knew the doctrines of the others. Throughout these works, jurists argued for the view of their respective schools, in part by comparing and contrasting it to the views of other schools. The textual and doctrinal references embedded in their legal arguments illustrate that when jurists argued for rules of law, they did so in light of a legal context of learning, reading, and analysis.\textsuperscript{30} As individuals, they were certainly products of their social context; but as jurists, they were products of an intellectual tradition that they engaged and debated, whether in oral disputation (Ḥuṣūṣ) or written text (e.g.


fuṣūḥ). I argue that to examine Islamic legal doctrine by focusing on one or two legal schools without reference to the others does not adequately capture how Sunnī Muslim jurists understood their roles as trained specialists in the law who were capable of using analytic methods to derive rules of law.

Notably, this study can be faulted for its silence on the specific substantive content of the underlying values supporting the jurists’ analyses. Terms like the “good” or “the nature of individuals”, as used below, are historically thin since they do not describe a particular set of values embraced by a specific Muslim jurist. From a theoretical perspective, however, they are philosophically thick because they illustrate the analytic method by which Muslim jurists utilized naturalistic values when they determined rules of law.

To elaborate on the intricacies of the ḥuqūq Allāh and ḥuqūq al-ʿibād concepts, I will focus on the treatment of certain ḥudūd crimes. According to the Ḥanafīs, the ḥudūd crimes are those for which the violator is subjected to a “fixed punishment required to satisfy a right of God” (ʿugūba muqaddara ṭūjūba ṣagān li Allāh). A ḥadd (pl. ḥudūd) is something that obstructs someone’s path, like a border or boundary. The crimes are called ḥudūd because they are meant to deter people from engaging in certain behaviors.

Muslim jurists disagreed over which crimes involve a ḥadd penalty.33

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Nevertheless, the conceptual categories of *huqūq Allāh* and *huqūq al-ʾibād* figure prominently in discussions of three *ḥadīd* crimes: false accusation of *zina* (*qadhf*), theft (*sariqa*), and banditry (*qatāʾ al-taʿrīq*). By investigating these three areas of law, I will show that the *huqūq Allāh/huqūq al-ʾibād* heuristic allowed jurists to derive rules of law in terms of naturalistic values about the individual and the social good.

**Defining/Balancing the Right and the Good: False Accusation of Illicit Sexual Relations (Qadhf)**

The punishment for *qadhf* is set forth in Q. 24:4-5: “And [concerning] those who level a charge against chaste women and do not bring four witnesses, whip them eighty lashes and do not accept their testimony ever, for they are corrupt; except for those who repent thereafter and act righteously. Indeed God is forgiving and merciful.” Qurʾān exegetes explained that this verse applies specifically to a false accusation of *zina*. Although there was some debate concerning the circumstances in which this verse was revealed, jurists agreed that...
the perpetrator is punished with eighty lashes and nothing more. However, they hotly contested whether the punishment is intended to uphold a right of God or a private right. To answer this question, the jurists deliberated on technical rules relating to pleading requirements and the rights of the victim in the litigation process.

Much of the debate about the purpose of the punishment concerns the good that it satisfies. On the one hand, lashing deters people from engaging in slander, which upholds a public interest in dignity as a social value; on the other hand, it effects retribution for an attack on one’s personal dignity and honor, thus vindicating a private interest. Certainly, both public and private interests are upheld by this punishment. However, if one primarily focuses on the deterrent effect of the punishment and its effort to rid the world of evil, one will likely view the punishment of qadhf as primarily satisfying a right of God. In fact, many jurists held that underlying the ḥudūd crimes in general is the need for deterrent (ẓa‘f or inzi‘ār) to uphold social welfare, which suggested to them that what is at stake in the punishment is mostly a right of God. Consequently, most jurists who believed that


37 One exception to this is the situation in which one confesses to fornicating with a specific woman. If the woman denies the charge, an issue of slander consequently arises which may entail some financial liability on the defendant. For a discussion of this issue, see below.

the *qadhf* punishment supports the public good through deterrence held that the punishment primarily embodies a right of God that must be vindicated, even at the expense of personal interests. For instance the Hanafi jurist Badr al-Din al-Ayni (d. 855/1451) said that the *qadhf* punishment benefits the public interest because, through its deterrent effect, it rids the world of corruption (*ikhla*ṣ al-ʿalam `an al-fasād). In this sense, the punishment invokes a right of God since it does not pertain to any one person, but is in the general interests of society. It maximizes social good by deterring people from an evil that may adversely affect the common welfare.

A private right, on the other hand, focuses on the interests of the individual. In the case of a false accusation of *zina*, one interest at stake is the victim’s dignity and honor (*`idda*). If one principally understands the punishment of *qadhf* as vindicating a person’s honor and dignity, one will likely consider the right at stake to be a personal right—a *haqq al-`abd*. In fact, the Shafiʿi jurist and judge al-Mawardi (d. 450/1058) said that honor is something integral to each person, like his physical well-being and property. “What is invoked in the case of [injuries to our] physical well-being and property are the rights of people, and so too in the case of [injuries to our] dignity.” Jurists recognized that *qadhf* implicates both a right of God and a private right. But whether they emphasized the impact of *qadhf* on

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the public or personal interest depends on how one understands the primary purpose of the punishment.

The debate about whether the ḥadd of qadḥf involves mostly a right of God or a private right played out in the determination of premodern pleading and litigation schemes. The right of the plaintiff to initiate his case, to have it prosecuted, and ultimately to waive redress depends on which interests are upheld by the punishment. The more that qadḥf reflects a right of God or the social good, the less discretion the individual claimant will have to prosecute his case and the more the political authority will play a dominant role in vindicating the wrong in the interest of the public good. If, on the other hand, an individual right is mostly at issue, the plaintiff will have greater flexibility in whether and how he presses his claim against the defendant.

Jurists of the four Sunnī schools of law raised these pleading and litigation questions, and in their answers they balanced competing values to create rules of law that satisfied the needs of individuals and the social good, however defined. Five issues commonly debated by jurists illustrate how they balanced private and public interests in a qadḥf case to create a regime of rights and social commitments.

1) Must the plaintiff petition the authorities for redress? Suppose defendant D falsely accuses plaintiff P, and P never brings a petition for redress. But W1 and W2 witnessed the qadḥf. Can the imām or ruling authority prosecute D on the testimony of W1 and W2 without a petition from P? Suppose the interest at stake is a right of God and P must petition. If P chooses not to petition, does that mean P can effectively negate a right of God? If rights of God are supposed to benefit society, does the requirement to petition unduly empower P with the authority to undermine social wellbeing if he chooses not to petition? Alternatively, if the right underlying the punishment vindicates individual interests, can the state prosecute D without P’s presence or petition? What if P is embarrassed by the situation and wants the case to disappear to protect his already assaulted honor? If at stake is a private right, P should have the right to decide if the case will proceed or not. As will be suggested below, Sunnī jurists used the petitioning requirement to resolve a conflict between values.

2) Can P forgive (ʾafw) D for the infraction, or, in other words, can he waive his right to redress? Again, if qadḥf invokes a right of
God, should P have this power? If the rights of God are for the public benefit, can an individual be so empowered to undermine the public welfare by choosing to waive prosecution?

3) Can P’s right be inherited? If P does not petition the ruling authority to prosecute D for the infraction and subsequently dies, can P’s heirs inherit the claim and prosecute D on P’s behalf? Whether the right is heritable or not will depend again on whether at stake is mostly a right of God or a private right. If the interest is understood to be a personal right, one is more likely to render the right to petition heritable.

4) Suppose D confesses to falsely accusing P of committing fornication, but subsequently recants his confession. Does D’s recantation undermine P’s claim for retribution? Is D’s confession, in other words, still valid? If one considers the hadd of qadhf to invoke a private right, the confession is still good and no recantation is allowed. P’s dignity has been assaulted and a confession by D implicates the very real interests of P. But if the interest underlying the punishment is a public one, then as will be discussed below, the retraction creates ambiguity over whether an infraction exists and hadd liability drops.

5) Can P waive his rights to be free from attacks on his dignity? The typical hypothetical involves P telling D to slander him. If D subsequently slanders P, is D still liable for committing qadhf or not? The answer to this question will again turn on how one understands the interest at stake and the policy implications on the overall good of society and the needs of the individual.

Concerning each issue, the jurists consistently returned to the underlying purposes of qadhf and the issue of whether it predominantly preserves the interests of society or the individual. As will be illustrated below, jurists of the four Sunnī schools of law agreed that inherent in qadhf is a private right. No one denied that a personal interest to protect one’s honor is fundamental to understanding the punishment for qadhf. However, the question remains whether or not there is also a certain degree to which qadhf invokes a right of God.\(^\text{42}\) The more one finds a right of God in qadhf, the less one will empower the individual through the law in ways that may undermine the public interests reflected in the punishment. To put it differently,

at the heart of the contest over qadhf is a debate about the scope of people’s entitlement to the protection of dignity while living in a society that requires of them certain commitments to the social good. The foundations of both individual nature and the social good are implicated in this debate. The debate on balancing these competing foundations centers on whether and to what extent the underlying punishment is intended to further a general social good that people are obligated to uphold, or a personal right specific to the individual, without reference, significant or otherwise, to larger questions of the common good.

1. The Petition Condition (mutālaba)

Among Sunnī jurists, Shāfi‘īs held qadhf to be primarily a ḥaqq al-'ābd or an individual right. This is in large part reflected in their requirement that plaintiffs petition for the punishment of qadhf before the political authority carries it out. In other words, they did not permit a case to be prosecuted if there were only two witnesses who observed the false accusation and testified before a court. The imām could not apply this punishment until the injured party first raised the issue and voiced his desire for redress. For jurists such as al-Māwardī, the petition requirement underscores the fact that a personal right is primarily at issue since otherwise no petition would be required and the ruling authority could prosecute on its own initiative. Other Shāfi‘ī jurists such as Yahyā b. Sharaf al-Nawawī (d. 676/1277) recognized that qadhf invokes both a private right and a right of God, but is mostly a private right. For instance, the punishment for qadhf is eighty lashes for a free person. But if the perpetrator is a slave, the punishment is halved. For al-Nawawī, from the perspective of the victim it does not matter whether the perpetrator is free or a slave. What matters is that the victim’s right...
has been violated. Arguably, the reason the punishment for slaves is halved is that God has an interest in the relationship between punishment and social status. This suggested to al-Nawawī that qadhf does not simply reflect a private right but also exhibits a degree of public interest values. Nevertheless, he argued that despite qadhf being a mixed right, it mostly (ghālib) involved a private right, and therefore the victim must file a petition and can waive the violation if he so chooses. 46

Hanbalī jurists adopted the same position as the Shāfi‘īs. Abū Ishāq Ibn Muflih (d. 884/1479) stated that the clear and popular view (al-a‘law wa‘l-asbhar) among the schools is that the interest at stake is private since redress can be waived by the victim. 47 Both Ibn Qudāma (d. 620/1223) and Abū al-Ḥasan al-Mardāwī (d. 885/1480) wrote that a petition is required to redress the right, which, both agreed, is a private right. 48 Maḥṣūr b. Yūnis al-Bahūtī (also al-Buhūtī) (d. 1051/1641) added that the petition must remain in force until the punishment is carried out. In other words, a waiver ('afw) after an initial petition but before the punishment will negate a petition for redress. 49 The case of qadhf differs, for instance, from the case of zinā. According to Ibn Qudāma, no petition is required in a case of zinā because the penalty involves purely a right of God. In other words, the ruling authority can raise the case sua sponte against anyone who has engaged in illicit sex. The interest underlying the

46 Al-Nawawī, Rawdat al-Tālībīn wa‘l-Umdat al-Mufīn, 3rd ed. (Beirut: al-Maktab al-İslāmī, 1991), 10:106-7. For other Shāfi‘ī jurists who considered the hadd of qadhf to invoke a right of man and required a petition for redress, see al-Shūrāzī (d. 476/1083), al-Muhaddithī fī Fiqh al-İmām al-Shāfi‘ī, ed. Zakariyā al-Amtrā (Beirut: Dār al-Kutub al-İmniyā, 1995), 3:349; Rāzī (d. 620/1220), al-Tafsīr al-Kabīr, 8:327. Ibn Rushd al-Ḥaḍrī remarked that for the Shāfi‘īs, even if the victim petitions the authority for the hadd, he can still decide to forgive and waive the offense thereafter. Ibn Rushd, Bidāyat al-Muḥtahād, 2:647-8. As will be discussed below, the issue of waiver ('afw) is another element in the debate on whether the right at stake is a right of God or a right of man.


49 Bahūtī, Kashshāf al-Qa‘īrī, 6:134. Interestingly, Abū ‘Abd Allāh Ibn Muflih (d. 763/1362) wrote that even those who held that the hadd of qadhf is a right of God still required that the victim file a petition. Abū ‘Abd Allāh Ibn Muflih, Furtī, 6:96. As will be illustrated below, this is the Hanafī position.
punishment, he argued, does not invoke any private interests and instead upholds the common good. Notably, the later Shafi’i jurist ‘Ali b. ‘Ali al-Shahramallisi (d. 1087/1676) stated that a husband has a right against a man who has illicit sex with his wife, although he did not explain the available redress. What this illustrates, however, is how one’s view of the interests at stake—whether individual or social—contributes to one’s recognition and distribution of rights and entitlements.

The Maliki position perhaps best reflects the underlying tension over whether qadhf invokes a public interest or a private one. Generally, Maliki jurists argued that qadhf presents a mixed interest, both a right of God and a personal right are implicated. Because of this position, Maliki jurists like Abū Bakr Ibn al-'Arabī (d. 543/1148) held that redress for qadhf is contingent on the victim filing a petition. The political authority can carry out punishment of the crime only if a petition (mutālaho) has been filed. But because the Malikīs attempted to take a middle position, they also imposed limitations on the plaintiff in order to effectuate the interests underlying the ḥaqq Allāh component of the crime. Specifically, before the plaintiff petitions the ruling authority, the interest is a private right, and therefore the victim has the right to petition for redress or waive his rights. However, once the plaintiff petitions for redress he can no longer waive his rights. After the petition reaches the governing authority, the right transforms from being a personal right to a public right of God, and as such the ruling authority must carry out the prosecution and the hadd. In this case, the public interest inherent in qadhf is weighted once government institutions are involved. The public interest in this crime is further illustrated by the fact that Malikīs granted others standing to file a petition. For instance, suppose two witnesses who observed the qadhf filed a claim with the political authority. According to the Shafi’ī al-Māwardī, this procedural option

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50 Ibn Qudāma, Mughāl, 8:284-5.
is allowed by the Mālikīs. In this case, the Mālikīs did not require a petition by the victim and instead granted standing to others to bring the case; but they gave the victim the right to dissolve the case after it reached the courts. For the Mālikīs, this approach balances the public interest in fighting a social evil, and the private rights to privacy and dignity that are involved in a public prosecution. In other words, the public evil is great enough to grant witnesses the standing to bring a claim, but it is not so extensive as to deny the victim the right to shield (ṣirā) himself from further embarrassment by a public proceeding brought by others.

Among the Hanafīs, the dominant view was that ḥadīth represents a ḥaqq Allāh. This was the position held by Abū Ḥanīfah, who required the victim to file a petition and did not allow the claimant to waive the claim. The latter requirement manifested the commitment that the interest underlying ḥadīth is a right of God. But the fact that Abū Ḥanīfah required a petition seemed to confuse jurists of other schools, who felt that the Hanafī logic was inconsistent.

For instance, Shāfi‘ī jurists such as al-Qaffāl and al-Māwardī referred to the early Successor (tābi‘) al-Ḥasan al-Ṯaṣrī (d. 110/728), who argued that ḥadīth involves a pure ḥaqq Allāh, and as such no petition by the victim is required. It seems that for al-Ṯaṣrī, the evil at issue is a public evil and the victim is not the only one who has the right to press the claim. This example is not meant to confuse al-Ṯaṣrī’s position with that of the Hanafī madhhab. Rather it illustrates that the juristic search for rational coherence in legal doctrine went beyond bringing social context to bear on the law. As the Mālikī Ibn Rushd al-Jadd stated, since the Hanafīs demanded that the punishment for ḥadīth be applied without any discretionary determinations by the victim, it follows that the political authority upholds the ḥadd when brought by any member of the public. To suggest that the claim could rise and fall on the basis of a claimant’s

55 Ibn Rushd (al-Jadd), Bayān, 16:290.
58 Qaffāl, Ḥiyya, 8:40; Māwardī, Ḥādīth, 11:9.
59 Ibn Rushd (al-Jadd), Bayān, 16:290.
petition would render the interest at issue a private right and not a right of God; alternatively it would allow a right of God to fall for reasons of a private and personal nature.

Abū Ḥanīfa’s petition requirement presents a difficult compromise between the tensions underlying the private and public nature of the act of slander. Furthermore, later Ḥanafīs such as Ibn Nujaym (d. 970/1563) required the victim to be present when the actual punishment is inflicted.60 To regard qadhf as satisfying a public good but to require the victim to petition and be present at the punishment seems confusing at first blush. In fact, the Andalusian jurist Ibn Ḥazm noted that the Ḥanafi position is contradictory because it calls the interest a right of God but requires a petition.61

The Ḥanafi jurist, al-Ḵasānī (d. 587/1191), recognizing this potential contradiction, argued that the petition requirement does not vitiate the fact that at stake is a right of God. Rather, the requirement is purely procedural and does not affect the substantively public nature of the interest at stake.62 Notably, Abū Ḥanīfa’s disciple Abū Yūsuf (d. 182/797) disagreed with his teacher and held that qadhf invokes a mixed interest or right (huqūq mushtarak). Consequently he required the victim to file a petition, and even allowed the victim to waive his claim, but only before the case reached the political authority.63

The above discussion on the petition condition in qadhf cases illustrates that Muslim jurists were doing more than specifying technical issues of litigation procedure. Arguably, early jurists and their successors created rules of law without reference to scripture, using a legal heuristic that allowed them to balance competing private and public interests in a value like dignity. They did not expressly define what they meant by dignity. But the way they used the huqūq Allāh/huqūq al-‘ibād heuristic to reason to and about the petition rule suggests that they used the heuristic and their discretion within the law to manifest a normative commitment to a sense of dignity, however defined.

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61 Ibn Ḥazm, Muḥallā, 12:256.
63 Qaffāl, Ḥiṣba, 8:40; Māwardī, Ḥiṣba, 11:9. The Ḥanafi jurist al-Sarakhsī suggests that Abū Ḥanīfa’s other disciple, Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) also held the view ascribed to Abū Yūsuf. Sarakhsī, Mabsūṭ, 9:107.
2. Waiver of Rights (‘afw)

The idea that one can waive his rights to redress for having been wrongfully accused of zinā is captured by the term ‘afw, which literally signifies forgiveness. The question that jurists debated is whether such forgiveness is possible. If one considers the punishment for qadhf to invoke a private right, one will likely grant the individual discretion to waive his rights. But if one believes the interest at stake to be a predominantly public right or a right of God, one generally will not allow the victim to waive redress.

Shafi’i and Hanbali jurists, who held that qadhf involves a private right, allowed the victim to waive his right to redress at any stage in the litigation process. Consequently, a victim can waive his remedy both before and after he petitions the legal authority to grant him satisfaction. The Hanbali jurist al-Bahūtī further explained: as a condition for exacting the punishment for qadhf, the victim not only must petition the ruling authority for redress, but also the petition must remain in effect until the punishment is carried out and there should be no waiver during the process.

Mālikī jurists attempted to strike a balance between the competing public and private interests implicated in waiving redress for qadhf. If they granted the victim the right to waive redress, they turned the punishment for qadhf into an individual right and entitlement. But if they denied the right to waive, they rendered the punishment a public matter or right of God. Because they tried to balance both elements, the Mālikis were unwilling to choose one or the other option, seeking

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64 Lane, Arabic-English Lexicon, 2:2094.
65 On the Shafi’is see Ghazālī, Wasīṭ, 4:131-2; Māwardī, Ḥāfez, 11:9; Nawawī, Rawda, 10:106-7; Qāfīl, Ḥilya, 8:40; Ṣadr, al-Tafsīr al-Kabīr, 8:327; Shūrāzī, al-Muḥaddithah, 3:349; Ibn Rushd (al-Ḥāfīẓ), Bidāya, 2:647-8; Ibn Ḥazm, Ṭabāla, 12:255. On the Hanbalis see Ibn Qudāma, Maghribī, 8:217; Abū Ishāq Ibn Muḥīḥ, Muḥallā, 9:84; Abū ‘Abd Allah Ibn Muḥīḥ, Faṣūr, 6:96; Bahūtī, Kaṣṣāf al-Qanāʾ, 6:134; Mardāwī, Insāf, 10:185; Ibn Ḥazm, Muḥallā, 12:255.
67 Bahūtī, Kaṣṣāf al-Qanāʾ, 6:134.
to adhere to a middle position. Before the case reaches the political authority, Mālikī jurists considered the interest at stake a purely private right. As such, the victim can forgo satisfaction of his rights. However, once the victim petitions the ruling authority for redress, he can no longer waive redress. The right transforms from a purely private right to a public right, and the ruling authority is responsible to prosecute and to exact the requisite punishment, if necessary. However, as noted above, the Mālikīs allowed the possibility that someone other than the victim might petition the ruling authority to redress an instance of qadhf. Because of this, they had to contend with the possibility that witnesses may petition the case even though the victim wishes to shield himself from a further public spectacle. Consequently, in these circumstances the Mālikīs permitted the victim to waive his rights after the claim reaches the legal authority for the sake of avoiding (sibt) further public attention. The transformation of the right from a private one to a right of God suggests that Mālikī jurists recognized that so long as a case has not been brought to the ruling authority, it remains a purely personal affair to be handled and dealt with by the parties themselves. But once it becomes the subject of a legal petition, qadhf transforms into a public wrong and must be addressed by the ruling authority. Interestingly, Ibn Rushd al-Jadd (d. 520/1126) and his grandson, Ibn Rushd al-Ḥafid, related an alternative minority Mālikī view that granted the victim an unrestricted option to waive his rights. This minority Mālikī view parallels the Shāfī‘ī position. Nevertheless, both Ibn Rushd the grandfather and the grandson also articulated the dominant Mālikī view noted above. Separating these two Mālikī positions, said the grandson, is whether the right is a haqq Allāh or a haqq al-nās. If it is a pure right of God, there can be no waiver. The public good upheld by the ruling authority through its imperium cannot be undermined by an individual preference. If it is an individual

68 Māwardi, Ḥāsī, 11:9-10, wrote that the Mālikīs considered the hadd crime of qadhf to invoke the mixed rights (al-huqūq al-mushtaraqa) of God and the victim.


right, the victim has the right to waive. But if it is a mixed right, the right to waive depends on whether the controversy has reached the political authority. In other words, as Ibn Rushd al-Hafid remarked, those who adopt the mixed interest position “prioritize the right of the imâm” (ghallaba haqq al-imâm) as a turning point on the issue of waiver. Notably, the Mālikis were criticized for their middle position. In particular, the Zāhiri Ibn Hazm posed a question concerning the exceptional case of an unwilling plaintiff: how can waiver be allowed once the case reaches the public authority? If the matter becomes a right of God once it is brought to the ruling authority, allowing a victim to defeat the proceedings because he wants to avoid negative publicity lacks conceptual coherence.

The Hanafīs, as noted, argued that qadhf invokes a haqq Allāh. While they required a petition to initiate the case, they argued that the petition is simply a procedural condition for fulfilling the right and does not detract from the right being God’s. Concerning waiver, however, the Hanafīs were adamant that no waiver is permitted.

Regardless of whether a petition has been issued, the victim cannot waive redress for the wrong committed. His interest is not the only one that has been injured; the public weal has been violated as well. As such, there is a public interest in ensuring that qadhf does not occur. An individual cannot put his own interests above those of society. Of course, since the Hanafīs required the victim to petition the court for redress, a plaintiff can waive de facto, despite the Hanafī prohibition against any waiver de jure. Notably, not all Hanafīs agreed with this position. In particular, Abū Yūsuf did allow waiver. However, this is not surprising given his view that the interest at stake is mixed.

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71 Ibn Rushd al-Hafid, Bidāya, 2:648. Notably, Ibn Rushd seemed to think that the right at stake is predominantly a private right.
72 Ibid.
73 Ibn Ḥazm, Muḥallā, 12:255.
76 Qaffāl, Ḥilya, 8:40; Māwardi, Ḥāwā‘, 11:9; Ibn Ḥazm, Muḥallā, 12:254-5.
3. Heritability of the Right (irth)

Besides the two issues discussed above, jurists addressed three subsidiary issues to further elaborate on their understanding of qadhf and the values it upholds: (a) the heritability of the victim’s claim for imposing hadd liability, (b) the effect of recanting one’s confession of qadhf, and (c) a hypothetical concerning an implied waiver of rights by the claimant. These issues are subsidiary in the sense that not all jurists surveyed here addressed them. Nonetheless, the topics are discussed here because they shed further light on the manner in which jurists contended with the significance of qadhf in light of their concepts of individual nature and the social good.

Can a victim’s right to redress be inherited by his heirs? Yes it can, according to the Shāfī’is, who addressed the issue of heritability using two hypotheticals. For instance, the Shāfī’i al-Māwardī wrote that if a deceased person is falsely accused of zinā, the victim’s child inherits the victim’s right and can press for the punishment against the slanderer. But what if the qadhf is perpetrated during the victim’s life, and the victim dies thereafter without the punishment for the offense having been carried out? For the Shāfī’is, the right is still heritable and the child can press for the punishment. Al-Māwardī held that the child can inherit the rights of parents who have been falsely accused. The only question is whether the child inherits one right or two. Suppose, for instance, someone calls out to another, “O son of two [who committed] zinā’. For al-Māwardī, this is a crime against the two parents, not against the child. If the parents are alive, they have the right individually to petition for the punishment against the defendant. If they waive their rights, the child inherits no cause of action. But if they are dead, the child inherits the rights of the parents and is competent to issue a petition for the hadd. The question for al-Māwardī, however, is whether the child can press for two rights or just one. In other words, in a single utterance the...

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77 Another issue about which jurists wrote is whether a cause of action lies with a son whose father has falsely accused him. The issue turns on whether the bond of kinship (qarāha) between father and son undermines the existence of a right to redress. See ‘Aynī, Bināya, 6:367; Ibn Hazm, Muhallā, 12:254; Ibn Qudāma, Maqāmāt, 3:219; Qafāl, Hīya, 8:34; Shārāzī, Muḥadhdhab, 3:346.

78 Māwardī, Ḥāṣṣ, 13:259. For the same Shāfī’i view, see Rāzī, al-Tafsīr al-Kabīr, 8:327. For others reporting this as the Shāfī’i position, see Marghnānī, Ḥadīya, 1:402; ‘Aynī, Bināya, 6:371.
defendant falsely accuses both the mother and the father. According to an early view (al-qadim) attributed to al-Shāfi‘ī, the child can press only for a single infliction of punishment since there was a single instance of slander. According to a later view (al-jadid), the child can press for two punishments. Consequently, if he forgives one he can still file a petition for the second. 

The Ḥanbalis generally acknowledged that the heritability of the right to press for punishment for qadhf depends on whether or not the victim was alive when accused and on the procedural posture of the case. If the victim was alive when falsely accused, the Ḥanbalis distinguished between whether or not a petition is filed. If the victim petitions for the punishment, but dies before it is inflicted, the heirs inherit the cause of action. But if no petition is filed, liability for the criminal penalty drops and the heirs inherit nothing. If the victim was dead when falsely accused, the Ḥanbalis generally asserted that the heirs inherit the right to press for hadd liability.

Mālikī jurists also held that the right to seek punishment for qadhf is heritable. In the case of a dead person who is falsely accused, Ibn al-Qāsim (d. 191/806) is reported to have held that the deceased’s heirs, e.g. his children, grandchildren and parents, can press for the right since the false accusation is an “injury that necessarily affects them.” If the deceased victim has no heirs and no kin, liability for the punishment drops. If the victim is alive when he is falsely accused, but dies before the punishment is applied, Ibn al-Qāsim allowed the victim’s son to press for the punishment; indeed he even allowed the victim to bequeath his right to petition for the punishment in the event he has no heir. If the victim bequeaths the right, the legatee has no option to forgive the perpetrator of his liability for the hadd.

The Hanafis did not hold the right to seek punishment for qadhf to be heritable. For them, the question of heritability returns to the more fundamental question of whether the right at stake is a right of God or a private right. When the false accusation occurs after

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79 Ibid., at 13:259-260.
80 Abū Ishāq Ibn Mufliḥ, Muhādīf, 9:97; Mardawiḥ, Iṣāf, 10:200.
82 Sahnūn, Mudawwana, 6:220. See also, Mawwāq, Tūj, 8:412.
83 Sahnūn, Mudawwana, 6:220. See also Mawwāq, Tūj, 8:412.
84 Mawwāq, Tūj, 8:412.
the victim’s death, there is no right to be inherited. Rather, the heir can petition for the punishment for qadhf not as an inherited right from the victim but as a personal right stemming from the fact that the heir’s own dignity has been attacked. Where the victim is falsely accused and dies thereafter, the Ḥanafis argued that since the interest at stake is a right of God and not a private right, it is not the kind of interest that can be personally devised or otherwise inherited.85

Badr al-Dīn al-ʿAynī explained that the interest at stake involves both an individual right to protect one’s dignity (ṣiyānat al-ʿird) and the right of God to rid the world of evil.86 No right of God can be inherited; rather the political authority upholds rights of God in the interests of the public and as such the rights at stake are not personal. Rights of God do not disappear simply because the individual in question has died. They persevere and are upheld by the political authority—assuming a petition has been filed. Consequently, to the extent that a private right is implicated, it dissolves with the death of the individual.87 What this means is that any personal right stemming from qadhf falls with the victim’s death and any public right to punish qadhf remains vested with the public authority. But with the victim dead, there is no one to file a petition for redress. Therefore, if someone is falsely accused and dies before the penalty for qadhf is applied, the ḥadd liability will fall for the Ḥanafis. But God’s right does not fall, even if it is not litigated, due to the absence of necessary procedural requirements. As indicated above, the Ḥanafis considered the petition to be a procedural requirement to satisfy the administrative conditions for redressing a ḥaqq Allāh. Without it, the public right cannot be satisfied. Furthermore, the victim’s right to redress is not the only personal right at stake in this situation. If there is no petition, then the victim’s redress fails but the defendant’s rights to be accused and challenged prevails. In the end, although it may seem that a private right is negated by the death of the victim, in fact a different private right is upheld.88

85 Māwardī, Hāšī, 13:259.
86 ʿAynī, Bināyā, 6:371.
87 Ibid.
88 Ibid., at 6:372. Sarakhsī, Mabsūt, 9:113, argued that where the victim of the qadhf is either absent or dead, no ḥadd liability exists since a condition of applying the punishment is to have the complaining party present.
4. Confession (iqrāṣ) and Retraction (rujū')

When discussing the punishment for zinā and qadhf, jurists sometimes posed a hypothetical about the effect of a confession and subsequent retraction on one’s liability. In such cases, the confession is the only evidence against the defendant. The jurists asked: does the recantation of a confession affect the victim’s redress of his right under a qadhf analysis? The answer generally turned on whether the confession concerns a crime that affects personal interests or public interests.

In their discussion of zinā and confessions, jurists included the story of Mā’iz b. Mālik al-Aslamī, a Companion of the Prophet who confessed to Muhammad on four separate occasions of committing adultery. The Prophet accepted his confession as proof of his crime and ordered that he be stoned to death. When the first stone hit him, Mā’iz fled. But he was pursued and ultimately killed. When the Prophet learned of what happened, he is reported to have said, “Had you only let him be. Perhaps he would have repented and God would have forgiven him.”

Ma’iz’s flight was tantamount to a retraction of his confession. Because of this tradition, the jurists generally argued that one may recant a confession of zinā and avoid penal liability. In this case, a pure ḥaqq Allāh is involved, and where the zinā is established only by a confession, ambiguity (shubba) arises once the confession is recanted. Because there is no one to oppose the defendant in this case, the resulting ambiguity causes the hadd to fall.

The issue of shubha or ambiguity is an important point to consider.

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According to traditions from Muhammad and his Companions, the punishments for the hudud crimes must not be applied where doubt exists about the facts of the matter. In one hadith, Muhammad says: “Avoid applying the hudud where you find [a reason].” Ibn Abi Shayba (d. 235/850) related a tradition transmitted from the Companion Ibn Mas‘ud, which states: “If the application of the hudud is in doubt for you, avoid it.” In his work on legal principles (al-qawḍād al-fiqhīyyā), Jalāl al-Dīn al-Suyūṭī (d. 911/1517) related a tradition in which Muhammad says, “Do not apply the hudud where there is ambiguity” (idrā‘i al-hudud bi‘l-shubuhā). Jurists used these traditions to articulate a general principle (qā‘iḍa) concerning the application of the hudud, namely, that one must avoid the hudud penalties where ambiguity exists.

The Shafi‘i al-Baghwā (d. 510/1117) illustrated the effect of recanting a confession for zinā and qadhf in more complex cases. Suppose a man commits zinā with a woman and confesses to his crime, while the woman denies it entirely. In this case, the man has committed an act of zinā, as well as an act of qadhf by accusing a woman of zinā without sufficient evidence. Consequently, he is liable to the punishments for both zinā and qadhf, while the woman is not liable to any punishment. But if the man retracts his confession, the punishment for fornication will fall but not that for qadhf. The retraction is valid as to God’s right because it creates ambiguity about the occurrence of zinā, but the woman’s right to petition for qadhf liability remains intact. Her tangible interest in dignity has been implicated by the confession. If a subsequent retraction could undermine the defendant’s liability for qadhf, the woman’s dignity would remain vulnerable to repeated allegations and she would have no recourse.

96 Baghwā, Tahdīḥ, 7:336. In another hypothetical, suppose the man confes-
The Shafi'i al-Mawardi offered a more conceptual approach to the tension at play in the matter of confessions and their retraction. He stated that all rights of God fall where there is ambiguity, whereas private rights are not so undermined. He added that pure rights of God include the hudud offenses such as zina, apostasy, and consumption of alcohol. A confession (iqra') to these acts is sufficient to establish liability. But because they are purely rights of God, the confessor can retract his confession and negate his liability because of the doctrine of shubha. If liability also is established by witness testimony (shahada), the effect on liability of the recantation depends on whether the defendant confessed before or after the witness testimony was given. According to al-Mawardi, the preferred position is that if the confession precedes the witness testimony, a recantation will negate liability for a pure right of God. In this case, the witness testimony is redundant to the confession and is treated as such (matraha). If the witnesses presented their evidence prior to any confession, any subsequent recantation will not negate liability for a right of God.

Pure individual rights, according to al-Mawardi, include qadhf and rights arising out of qisas liability (lex talionis). In his view, if someone confesses to committing such an act, no subsequent recantation will undermine the defendant’s liability. The confession invokes the specific rights of the victim, and to deny liability because of a recantation is to deny the victim redress for an injury he suffers in fact. In the case of qadhf, the only way that liability can be negated is if the victim admits that the alleged accuser has truthfully accused him. In that case, the defendant’s liability falls, not because of any recantation, but because he has been rehabilitated by the right-holder (sahib al-haqq).

As for mixed rights, these involve cases in which both a right of God and a personal right are implicated, e.g. theft (saraqa), when
amputation vindicates a pure right of God, and compensation satisfies a pure private right. 101 Suppose a case of theft is proven only on the basis of the thief’s confession. What happens if the thief recants? In this case, the defendant’s liability to compensate the victim remains. However, there is debate as to whether the punishment of amputation falls. Some said that since amputation is a distinct and distinguishable punishment, it must fall because it reflects a pure right of God. 102 Others argued that because it is intimately associated with an individual right that is not affected by a retraction, corporal liability for theft remains. 103

This analysis illustrates how jurists treated the effectiveness of recanting a confession in general and of qadhf in particular. Most argued that because qadhf involves a private right at least to some degree, recanting a confession does not completely undermine a slanderer’s liability. The Hanbali Ibn Qudāma, for instance, said that upholding liability despite a retraction is in part why qadhf invokes a private right. 104 The later Hanbali al-Bahūṭī likewise argued that one cannot recant a confession for qadhf, whereas one can recant where the infraction concerns a right of God. 105 Even Hanafi scholars, who emphasized that the hadd of qadhf involves a right of God, argued that no recanting is acceptable for qadhf. For instance, both al-Sarakhsī (d. 483/1090) and al-Marghīnānī wrote that qadhf is not a pure right of God. The victim has rights that are implicated in a case of qadhf. 106 With respect to a pure right of God, no one has a specific litigable interest to challenge the defendant. But in the case of qadhf there is someone to contest the matter and challenge the recantation. Because the victim can uphold the veracity of the confession and rebuff the retraction, Hanafis denied any effect to the recanting of a confession for qadhf. 107 In other words, the nature of the right at stake and the parties involved allowed al-Sarakhsī and al-Marghīnānī the flexibility to balance and emphasize the private element involved in a crime that Hanafis considered to be predominantly a right of God.

101 Ibid.
102 Ibid.
103 Ibid.
104 Ibn Qudāma, Maqāṣid, 8:217.
105 Bahūṭī, Kadhshāf al-Qudūf, 6:134.
106 Marghīnānī, Hidāya, 1:402; Sarakhsī, Mabsūṭ, 9:110.
107 Sarakhsī, Mabsūṭ, 9:110; Marghīnānī, Hidāya, 1:402
5. Implied Waiver of Rights

The final legal question concerning qadhf centers on a hypothetical that illustrates how some jurists conceived of and defined the respective claims underlying qadhf. The hypothetical concerns plaintiff P telling defendant D to slander him. Suppose D complies and slanders P. The question the jurists asked is whether D should be punished for committing qadhf. The Ḥanbali ʿAbū ʿAbd Allāh Ibn Mufliḥ (d. 763/1362) and the Shafiʿi al-Qaffāl al-Shāshī (d. 507/1114) said that there are two possibilities. One option is to apply the discretionary punishment of taṣžīr, the other is to apply the full hadd of qadhf.108 In either case D will be punished. Notably, both jurists provided their conclusions without any explanation, but both recognized that at stake was a private right that must be vindicated. The earlier Shafiʿi jurist al-Shārāzi (d. 476/1083) said that those who denied liability held that the right belongs to P and that his right for redress fell when he gave D permission to falsely accuse him.109 Those upholding liability did so because the disgrace and indignity attaches to P’s kin (al-ʿār yalhaqu biʾl-ʿashirā). P does not fully possess the right to invite a slander against him except with permission from his larger kin community.110

Concluding Note on Qadhf

This analysis of the debates on qadhf among the four Sunnī schools of law suggests that background concepts like dignity, however defined, affected how jurists constructed rules of law. If the dignity underlying qadhf primarily invokes individual interests, jurists endorse rules that empower the victim, such as requiring a petition, and allowing waiver and heritability of the right. On the other hand, if one holds that the dignity underlying qadhf relates to the social good, one would likely argue that a petition by the victim is not always needed to bring the claim to the governing authorities, that the victim cannot waive redress of his rights, and that the right to petition for the defendant’s punishment is not heritable.111 What is more, even if the

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108 ʿAbū ʿAbd Allāh Ibn Mufliḥ, Furūʿ, 6:96; Qaffāl, Ḥiṣba, 8:40-1.
109 Shārāzi, Muhadhdhab, 3:349.
110 Ibid.
111 For this conceptual summary, see Qurṭubī, Jāmiʿ, 12:118-19.
right is considered a private one, it may not necessarily be a right wholly possessed by the individual, but may implicate the interests of his kin group.

This debate is not simply a technical question of pleading and practice. Rather, the rules of pleading and practice are the legal means for manifesting fundamental juristic commitments to the value of dignity as it reflected the nature of individuals and the social good. Is the general good of dignity a public one that the ruling authority must vindicate, even at the expense of an individual’s desire to avoid further public scandal? If so, then it is reasonable to extend standing to redress the crime to persons other than just the victim. The rule on standing, immersed within the larger debate on huqūq Allāh/huqūq al-‘ibād, arguably promotes a vision of society. However, if the interest is viewed as a private right, again it seems reasonable to require the victim to petition for redress. Without a petition, the political authority is not empowered to right the wrong. This position suggests that the basic value of dignity predominantly attaches to the individual and cannot be redressed except with his express desire and intent. What seems clear is that jurists used the huqūq Allāh/huqūq al-‘ibād heuristic to craft legal rules that manifested their understanding and commitment to the value of dignity in light of its significance for individuals and society at large.

Corrective/Distributive Concerns About the Right and the Good: Theft (Sariqa)

In qaddhīf cases, the debate concerns the relative weight of the mixed interests underlying the single liability of eighty lashes. Theft or sariqa also presents a mixed rights case, but of a different type. Theft involves two separate punishments: a right of God (i.e. amputation of the right hand) and a private right to compensation (ghurum or dāmān) where the stolen property is consumed or otherwise destroyed. Jurists debated whether the single underlying act of theft may result in two separate liabilities or just one.

The corporal punishment for theft is established by the Qurʾān, ḥadīth, and historical narratives about Muḥammad. Q. 5:38 states: “Regarding the male and female thieves, cut their hands as punishment for what they did as a warning from God.” The ḥadīth literature also contains traditions in which Muḥammad condemns the thief and defines some of the elements of the crime. Like the Qurʾānic
verse, the *ahadīth* require amputation of the thief’s hand although they differ over the requisite minimum amount (*nisāb*) the thief must steal in order to be subjected to the punishment of amputation.\(^{112}\)

Amputation for theft invokes a pure right of God that the ruling authority must redress, regardless of the victim’s later wishes. This point is illustrated by a story about a Companion of Muḥammad, ʿAlāʾ b. ʿUmayya, who brought a complaint against a defendant for stealing a garment. ʿAlāʾ spent part of a day circumambulating the Kaʿba and praying, after which he rolled up his cloak and used it as a pillow to take a nap. While he was asleep, a man came and took the cloak from under him. ʿAlāʾ took the man to Muḥammad, accusing him of stealing his garment. The man confessed to the crime and Muḥammad sentenced him to have his hand amputated. At that moment, ʿAlāʾ said that he did not want the thief to suffer punishment and instead let him have the garment. The Prophet replied, “If only you had decided this before you brought him to me.” The thief’s hand was then amputated.\(^{113}\) In another tradition, Muḥammad is reported to have said: “Excuse the ḥadid among yourselves, but whatever ḥadd [claim] reaches me must be fulfilled.”\(^{114}\)

In other words, at a certain point, a *ḥadd* punishment like amputation for theft must be satisfied without discretion regardless of the later wishes of the victim.

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The Petition Requirement

Jurists of the four Sunnī schools disagreed whether the victim of theft must institute an action.\textsuperscript{115} While Shāfī‘ī, Hanbālī, and Hanaﬁ jurists required the victim to file a petition to seek redress, the Mālikīs used the petitioning requirement as a legal means to balance the victim’s right to privately settle his own interests with the ruler’s need to uphold order and security as part of the public good.

Shāfī‘ī jurists such as al-Māwardī and al-Nawawī held that mere testimony of witnesses cannot justify punishment for theft, although confession by the thief is sufficient.\textsuperscript{116} They illustrated this point by posing a hypothetical. Suppose the victim is absent (ghā’ib), and the defendant does not confess, but there are sufficient witnesses to prove the crime of theft. In this case, al-Māwardī wrote that the defendant cannot be punished on the mere testimony of the witnesses. Rather, liability for sariqā arises only once the victim is present and makes a claim against the defendant.\textsuperscript{117} Arguably, al-Māwardī required a live and actual controversy to ensure that a victim exists who wishes to press his claim. Al-Nawawī addressed the same hypothetical and argued that the defendant is not punished because implicit in the punishment of theft is not only a right of God but also a private one.\textsuperscript{118}

\textsuperscript{115} Importantly, jurists held that the petition for the crime of theft is not a claim by the victim to have the hadd imposed on his behalf. The hadd is a right of God to which the claimant is not entitled. Rather, as the jurists argued, the claimant’s petition is for his property. His rights extend to his property only, and the responsibility to apply the hadd falls upon the state as a right of God. Ibn Qudāma, Ṭabāqāt, 8:217; Ibn Nujaym, al-Bahr al-Radd, 5:105; Ibn al-Dawayyān, Manār al-Sabili, 3:271.

\textsuperscript{116} Māwardī, Ḥawāwī, 13:332; Nawawī, Rawda, 10:144, 148. See also Shirbīnī, Niḥayat al-Mabā‘īj, 7:463. Notably, al-Māwardī wrote that if the thief confesses to his crime and then recants, only hadd liability is negated, but not the liability to compensate the owner for his property, since that involves a private right and cannot fall with the withdrawal of the confession. Māwardī, Ḥawāwī, 13:332. Al-Māwardī specifically focused on confessions and their role in establishing liability without a petition issued by the victim. See for instance, Māwardī, Ḥawāwī, 13:337, where he writes that in the event of confessions by both a thief and a fornicator, the punishments for the respective haddāt are to be applied, even if there is no complaining party. See also Nawawī, Rawda, 10:144.

\textsuperscript{117} Māwardī, Ḥawāwī, 13:336. Notably, this is not the case in the event that someone commits zu‘ā. There is no complaining party that must necessarily issue a petition. Al-Māwardī argued that this is due in part to the fact that the hadd of zu‘ā involves a pure right of God, whereas the crime of theft also involves a private right. Māwardī, Ḥawāwī, 13:337.
right that is “legislated to protect one’s property.” Consequently, the victim’s presence is required to ensure that his rights have been violated in actual fact. This is not to say that the political authority or imām is powerless. The witness testimony raises concerns about violations of the public interest, and therefore the imām can imprison the alleged thief on the basis of the former’s jurisdiction to uphold the public interest. But given the severity of the corporal punishment for theft, the ruling authority cannot amputate the defendant’s hand until the victim comes forward to verify that he indeed has a claim. If the victim never comes forward, the defendant does not suffer any further punishment, hadd or otherwise. Furthermore, to ensure proper legal procedure and the protection of the defendant’s interests, al-Nawawī required that in any case involving amputation for theft, the victim must be present at the punishment. Even if the thief confesses his crime, the victim must still be present, both to ensure that a claim exists and to protect the defendant from his own mistake of fact. Suppose the defendant confesses to stealing the property but made a mistake or misunderstood the victim’s ownership claims. Or suppose the victim wants to act mercifully toward the defendant by giving him the property. Having the victim present at the litigation and penal phases of the trial protects the defendant’s interests and allows the victim to act benevolently if he so wishes.

The Ḥanbalī jurists Ibn Qudāma and al-Bahūṭī required a petition even in cases in which the thief confesses (iqrār) or there are two male witnesses to the crime. They argued that one cannot know for sure whether or not the alleged thief was simply borrowing the property with the owner’s prior permission. Perhaps the thief confesses to sariqa, but the owner petitions for redress of a different crime. In other words, without the petition there is ambiguity (shubha) as to the nature of the wrong; where there is ambiguity, hadd liability is dropped. Hanafī jurists such as al-Marghīnānī and Ibn Nujaym argued

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118 Nawawī, Rawda, 10:148.
119 Ibid. For this same example, see also Qaffāl, Hīya, 8:71-3, who held that one must wait for the victim to be present before applying the punishment for the hadd crime. Furthermore, he said that if the victim is not too distant, then the defendant is imprisoned. But if he is traveling in a far off region, then the defendant is not imprisoned.
that before a defendant’s hand can be amputated for committing theft, a complaining party must first seek redress. They required an adversarial claim against the alleged thief in order to establish beyond a doubt that an actual controversy (munāza‘a) exists. In fact, the role of the plaintiff in the litigation process is so important that if witnesses testify to the crime of theft, but the victim is absent, the witness testimony is not accepted. Where the victim is absent, the most the ruling authority can do is imprison the defendant on the basis of the testimony.

But suppose the thief confesses to the crime. Al-Kasānī acknowledged that there is some debate as to whether the victim must still petition to hold the defendant liable. Abū Ḥanīfa and al-Shaybānī (d. 189/805) reportedly held that the victim must make a claim and be present in such a case. If he is absent, no hadd liability exists. However, Abū Yūsuf held that a petition or claim is not necessary in the event the thief confesses. The difference between these positions is based on whether or not sufficient “ambiguity” exists to negate hadd liability if the victim is absent. Al-Kasānī posed the following hypothetical: suppose someone confesses to fornicating with a woman, but the woman is absent. In this case, hadd liability exists based on his confession. If the woman were present and challenged his confession, only then would ambiguity arise to undermine hadd liability. If liability were dropped because she was not present after his confession, it would be because of the doubt about the existence of ambiguity (shubhah shubha), not actual ambiguity. But the woman’s absence is not a basis for denying zinā liability. Al-Kasānī held that competing understandings of what counts as sufficient ambiguity accounts for the two Hanafi positions in the case of the absent victim of theft. If the victim is present, he may challenge the thief’s confession, and thereby create actual ambiguity in the matter and negate hadd liability. This is why Abū Ḥanīfa and al-Shaybānī required a petition to exist even in the event of a confession. Without the victim petitioning the case, the possibility of ambiguity exists; this was sufficient for Abū

idem, Mughni, 8:284-5; al-Bahūtī, Kashshāf al-Qinā’, 6:185. See also Mardāwī, Insāf, 10:251.

122 Marghinānī, Ḥidāya, 1:418.
123 There is some disagreement on when al-Shaybānī died, some suggesting that he died two years earlier. E. Chaumont, EF, s.v. “al-Shaybānī”.

Hanifa and al-Shaybani to deny hadd liability for theft, but not for Abū Yūsuf. For al-Kāsānī, however, the petition is required not because of the actual existence or mere possibility of ambiguity. Rather, the claimant must be present as a procedural requirement to litigate the case before the judiciary. Without it, no case exists and the ruling authority is unable to provide relief.

The Mālikīs once again seemed interested in balancing individual and social interests. On the one hand, theft violates the victim’s ownership interest. On the other hand, it presents a challenge to the public protection of property relations. Mālikī jurists recognized that rules governing theft cases, such as petitioning, must balance rights of God and private rights. Consequently, the Mālikīs did not require the victim to petition for the case. Even without a petition, a thief could be subjected to amputation for theft on the basis of either his own confession or the testimony of two upright male witnesses. For instance, Saḥnūn asked Ibn al-Qāsim about the case in which the victim is absent and two witnesses testify against an alleged thief in front of a judge. Although Ibn al-Qāsim never knew Mālik to amputate the thief under these circumstances, he nonetheless said that the imām has the power to hear the witnesses and thereby try the case. He based this decision on an earlier precedent from Mālik concerning a case of illicit sexual relations. Someone asked Mālik about a group that witnessed a man commit zinā. Mālik responded that the imām should ask the witnesses what they saw and determine whether it is sufficient to support the requisite punishment. According to Ibn al-Qāsim, Mālik’s decision in a zinā case provides a solution to the question about theft. If witnesses observe the theft and the amount stolen is sufficient to justify amputation, then “even though there may be in the theft some factor for which amputation is not required,” the imām can hear the case and pass judgment on the alleged offender. In other words, even though theft presents certain factual ambiguities not present in zinā cases, Ibn al-Qāsim allowed the ruling authority to prosecute an alleged thief.

The significance of Ibn al-Qāsim’s legal move is better understood by contrasting it to the Shafi‘i al-Nawawi’s views on petitioning in zinā and theft cases. Al-Nawawi required the victim of theft to be

125 Ibn Rushd al-Jadd, Mugaddimāt, 3:220.
126 Saḥnūn, Mudawwana, 6:265.
present at the litigation and penal phases of the trial against the alleged thief. These requirements afford the victim the opportunity to challenge the defendant’s confession or act benevolently. In other words, confrontation ensures that a live controversy exists without ambiguity, and that the defendant’s rights to procedural justice are respected. This is different from *zinā*, where there is no need for a complaining party to be present (four witnesses are all that is required) given the nature of the act. Either the witnesses saw the parties engage in a sex act or they did not. In the case of theft, however, mere witness testimony may not capture all the relevant facts of the case, which may be known only to the victim. To protect the alleged thief, more than mere testimony is required.\(^\text{127}\)

Although Ibn al-Qāsim recognized the possible ambiguity in witness testimony in theft cases, it seems the public interest in the crime of theft outweighed those concerns.

For instance, suppose a thief is brought to the *sulṭān* by a member of the public while the owner of the stolen property is absent: can the thief suffer amputation? Ibn al-Qāsim related a story in which Mālik was asked about a man who lived in Syria but had property in Egypt. Someone stole his property in Egypt, and sufficient evidence was presented to the court to show that the thief stole the property furtively. The thief alleged that the owner of the property sent him to fetch the property.\(^\text{128}\) For Mālik, despite the ambiguity arising from the owner’s absence and the defendant’s allegation, the evidence presented was sufficient to justify amputating the thief’s hand. The court has no obligation to seek the testimony of the actual owner miles away in Damascus. In fact, when asked whether it would make a difference if the owner corroborated the thief’s statement, Mālik replied that there is no need to consider (*lā yanzūru*) the owner’s views.\(^\text{129}\) This is not to suggest that Mālik would ignore the owner’s testimony. Rather, the question put to Mālik is “what if the owner


\(^{129}\) Ibid.
were asked...” (fa-in su’ilâ).\textsuperscript{130} The use of the passive tense raises ambiguity about who is asking. Arguably, the issue here is not about an owner actually testifying, since that would undermine the underlying fact pattern. Rather, the issue is whether the court, as fact finder, has a burden to engage in fact finding, in addition to assessing the testimony before it. In other words, if the owner is in Syria, the thief is in Egypt, and the existing evidence is sufficient to find liability, the court does not have the burden to seek out the owner and wait for his testimony. The right of the imâm is such that the court can pursue the matter in the public interest, despite the ambiguity that may work to the defendant’s disadvantage.

In another example, Mâlik was asked about a person who was caught at night bringing out some goods from A’s residence. The accused said that he was sent by A to his house to get the items for A. Mâlik would consider the matter (an yanzura fi dhâli’ik), i.e. he would engage in fact finding. If it is known (yu’rafu) that the accused is sufficiently dedicated to the owner to make his statement possible, he is not subjected to amputation. However, if there is no such foundation for ambiguity, the accused’s statement is not accepted and he must suffer amputation.\textsuperscript{131} Again the passive tense, which hides the active agent, seems to be used here to raise questions about the burden of the imâm to justly sentence a defendant accused of theft.

A further and final example will emphasize that at issue in the Mâlikî petitioning discussion is a question of balancing private and public interests in terms of the demands imposed on the ruling authority’s judicial institution as fact finder and legal enforcer. Suppose someone steals from another, but the victim waives his right to redress. However, someone else brings the thief to the attention of the governing authorities for prosecution. In this case, the thief will suffer amputation despite the fact that the victim waived redress.\textsuperscript{132} Arguably, because of the public nature of the crime, and the role of the judicial institution in mediating the transformation of a right from the private to the public sphere, once a hadd case is presented to the ruling authority, it cannot ignore it. The victim’s waiver, therefore, is of no import given that the case has already come to

\textsuperscript{130} Ibid.
\textsuperscript{131} Ibid., at 6:267.
\textsuperscript{132} Ibid.
court. Once a theft case comes to court, the nature of the right converts from being purely private to being public in light of the role of the ruler to effectuate the good.

This is not to suggest that the Mālikīs provided no discretion to the victim to redress his rights privately. Certainly the victim can petition the ruling authority on his own if he wishes. But he can also engage in private, informal redress. The Mālikīs allow the victim to make private arrangements with the thief and thereby avoid public prosecution. For instance, suppose the victim plans to petition the ruling authority for redress but the thief asks him to settle the matter in order to avoid involving the īmām. In this case, both parties may reach an agreement (āl-sulḥ). Suppose, however, that they get into a disagreement thereafter, and the victim petitions the court for redress. In this instance, the ruling authority will provide redress to the victim by amputating the thief’s hand. But the thief may seek redress against the victim for reimbursement of what he provided as consideration for the private settlement. Where the private agreement was made in order to avoid resorting to the governing authorities, the thief can demand reimbursement on condition that the property he gave as consideration was not part of the property stolen from the victim.\(^\text{133}\)

This analysis suggests that although the Mālikīs respected the victim’s right to engage in private redress, once the case reaches the political authority, the private right component of theft is transformed into a public right issue, thereby emphasizing the role of the ruling authority and its institutions to satisfy the public good. Even if the victim waives redress, someone else can press charges and the thief will suffer amputation.\(^\text{134}\) As Abū Zayd al-Qayrawānī related: “There is no intercession (lā yushfā) for the thief when he appears before the īmām or his retinue.”\(^\text{135}\) He related that Ibn al-Qāsim stated: “Prior to reaching [the political authority] there is wide latitude (jā'ātāt) whether that [wrong] is not known or widely acknowledged. Where it is known and has negative consequences for the public, avoiding intercession for the thief is more pleasing to me.”\(^\text{136}\) Individual discretion is therefore acknowledged, but only to

\(^{133}\) Abū Zayd al-Qayrawānī, al-Nawādir wa'l-Ẓiyādit, ed. Muhammad Ḥajjī (Beirut: Dār al-Gharb al- İslāmī, 1999), 14:455-56.

\(^{134}\) Ibīd., at 14:460.

\(^{135}\) Ibīd., at 14:459.

\(^{136}\) Ibīd.
a limited extent. Certainly the private victim can waive redress and engage in settlement negotiations without involving the governing authority and its punitive mechanisms. But for the Mālikīs, theft involves a public harm serious enough that they not only expanded standing, but also limited the judiciary’s burden of fact finding so as to facilitate prosecution, even though in similar situations jurists of other schools hesitated to impose amputation because of concerns over factual ambiguity.

**The Mixed Rights and Liabilities of Theft**

Jurists contending with the mixed interests entailed by a case of theft debated whether one should be subjected to the double liability scheme of amputation and compensatory liability.

Generally the four Sunnī schools of law agreed that if a thief retains possession of the stolen goods, he is subjected to amputation and must return the stolen property to its owner. The property remaining in the defendant’s possession was never considered to transmute into his own property; thus returning it does not constitute a second liability since it poses no hardship to the defendant’s financial interests. Jurists disagreed, however, over the situation in which the stolen property no longer exists, is consumed, or is otherwise destroyed. In such cases, is the thief liable to both amputation and compensation, or must the victim choose one liability over the other? Compensation in this instance was viewed as a second punishment, since the defendant’s financial interests are sacrificed for the victim’s benefit.

The Shāfī‘īs and the Hanbalis agreed that the thief, once found guilty, is subjected to both amputation and compensation if the property in question has been consumed or otherwise destroyed. Their argument rests on the fact that two interests are at stake in the crime of theft and both need to be vindicated. Satisfying the public

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interest does not negate satisfaction of the private right. Rather, both can be redressed together. For instance, the Shafi'i jurist al-Baghawi held that the punishment of amputation fulfills the right of God, which is reflected by the violation of the sanctity of Shar'i (li-hatt'i hurmat al-shari'). Compensation, on the other hand, is a private right and is required because of the destruction of the owner's property (li-shli'ah malihi). Satisfying one interest does not negate the other. 138 Likewise, the Hanbal jurist Ibn Qudama argued that both a right of God and a personal right are at stake in the crime of theft. For Ibn Qudama, if the stolen property remains in the thief's possession, he is required to return it. "Compensation is required if it is destroyed... Amputation and compensation constitute two rights that are required for the two right holders (li-musta NOIqayn) [i.e. God and the victim], so it is permissible to unite both of them." 139 "To negate one because of the other would jeopardize the public interest in deterring theft

138 Baghawi, Tahdhib, 7:387. For other Shafi'i jurists holding the general Shafi'i position that both rights must be satisfied, see Ghazalli, Wasil, 4:145, who held that if the thief cannot return the property, he owes compensation (dommin); Mawardi, Has', 13:342, asserted that the corporal punishment for theft does not negate the individual right to compensation; Raz', al-Tafsir al-Kabir, 4:355, indicated that the hadd of God does not negate or restrain one from satisfying private rights; Shirazi, Muhaddib, 5:365, held that if the thief destroys the property, he must pay compensation in fulfillment of the private rights; Qifil, Hilaya, 9:77, said that if the property is destroyed, the defendant is subject to both amputation and compensation; Shirazi, Mughni al-Muhtaj, 5:494, wrote that amputation is in fulfillment of the right of God, while compensation satisfies the private individual right, and one does not negate the other. For jurists of other schools who represented this position as the Shafi'i view, see Ibn al-Araibi, Kitiab al-Qhasas, 3:1027; 'Ayni, Bina'ya, 7:70; Ibn Rushd al-Hafid, Bidaya, 2:662-3; Kasani, Bad'at, 9:340; Marginani, Hilaya, 1:419; Qurtub, Jami', 6:108; Sarakhsi, Mabsut, 9:156.
139 Ibn Qudama, Mughni, 8:271. See also, Ibn Qudama, Kafi, 4:84, who said that compensation fulfills the private right and the Qur'anic punishment for the hadd satisfies the right of God. For other Hanbal jurists who held the same view, see Abu Ishaq Ibn Muflih, Mubdi', 9:143, who wrote that compensation and amputation are united under the cause of action for theft. Both reflect rights to which someone (i.e. God and the victim) is entitled. See also Abu 'Abd Allah Ibn Muflih, Farid, 6:135-6, for whom corporal punishment for the hadd of theft and the liability for compensation coexist in the same cause of action; Majd al-Din b. Taymiyya, al-Muharrar fi al-Fiqh al-salih Muhaddib al-Imam Ahmad b. Hanbal, ed. Muhammad Hasan Muhammad Ismail and Ahmad Mahruq Ja'far Salih, 2 vols. (Beirut: Dar al-Kutub al-Ilmiyya, 1999), 2:319, wrote that the defendant is liable both to compensate the victim and undergo amputation; Mardawi, Insaf, 10:254, said that the thief must either return the property or compensate the victim, while also being subject to hadd liability...
through hadd liability, and the individual’s security in his possession and ownership.

The Mālikīs were concerned that where the property in question is destroyed, the defendant may suffer two punishments for a single underlying offense. Not wanting to penalize the defendant twice for stealing, they struck a balance between a dual and single liability scheme. They argued that a thief is subjected to amputation but his liability to compensate depends on whether he is capable of paying the amount to the victim. If the defendant suffers from economic hardship between the time he steals the property and the time his hand is amputated, he is not liable to pay compensation. If, however, he is wealthy enough to afford to compensate the victim, he must do so. But if he was impoverished between the time of the theft and the amputation but becomes wealthy thereafter, he is still not liable for compensation. The economic hardship from the time of the infraction to the penal phase negates any and all liability to remunerate the victim.140 

To explain the Mālikī view, the jurist and qādī Ibn Rushd al-Jadd reasoned that to impose liability where there is economic hardship is to impose two punishments (uqābatān) on the defendant, namely amputation of his hand and ongoing financial liability (itbā’ dhimmatihi). This runs counter to the Qur’ānic verse on theft, he argued, which specifies only one punishment against the thief, namely amputation. Where the thief is wealthy enough to compensate the victim, it is as if his own property becomes the stolen property itself, which he must return to the victim.141 Using
this legal fiction, Ibn Rushd asserted that the thief is not penalized twice.

The Hanafis, like the other schools, held that where the stolen property remains with the thief, his right hand is amputated and he must return the property. Unlike the other schools, the Hanafis argued that if the stolen property is destroyed, the thief is not subjected to both amputation and compensation. Instead, the thief is liable to amputation or compensatory liability. They based their position on a hadith in which Muhammad is reported to have said: “An owner of stolen property is not compensated if the hadd is applied to [the thief].” Jurists of the four Sunni schools debated the authenticity of this hadith. For instance, the Maliki Ibn Rushd al-Hafid and the Hanbali Ibn Qudama were skeptical of its authenticity.

The Shafi’i al-Mawardi stated that in the time of the biblical Jacob, thieves simply compensated their victims for their crimes. He argued that the Qur’an abrogated that earlier law, and the hadith merely corroborates that fact. Even the Hanafi jurist Badr al-Din al-‘Ayni

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143 Kasaani, Baday’, 9:340. Sarakhsi, Mabsut, 9:156, held that punishment for the hadd is the only liability provided for in the Qur’an and the hadith negates liability for compensation. Marghinani, Hidaya, 1:419, found no liability for compensation if the property is consumed (mustahhab). ‘Ayni, Binaya, 7:71, related that the Hanafis disagreed if compensation is negated only when the property is consumed (istiblak) or also when it is destroyed (halak). Abū Yūsuf dropped liability for compensation in both cases, whereas al-Shaybāni required compensation where there has been consumption, but not full and total destruction. For jurists of other schools who represented the Hanafi view as not requiring compensation where the property is destroyed, see Baghawi, Tahdib, 7:386-7; Ghazali, Wasit, 4:145; Ibn Qudama, Mughni, 8:271; Ibn Rushd, Bidaya, 2:662-3; Ibn al-‘Arabi, Kitab al-Qabas, 3:1027-20; Mawardi, Hauz, 13:342; Qaffal, Hidya, 8:70; Razi, al-Tafsir al-Kabir, 4:335; Shurbi, Mughni al-Mubtadi, 3:494.
144 Suyuti, Sharh Sunan al-Nasai, 3:93; Ibn Rushd, Bidaya, 2:662. See also Mawardi, Hauz, 13:184, who cited a different version of the hadith in which the Prophet is reported to have said, “If the thief is amputated, there is no liability for compensation” (isthā quita al-sāriq fa-lā gharm). For this version, see also Kasaani, Baday’, 9:341. ‘Ayni, Binaya, 7:71 cited yet a third version of the hadith, which states: “There is no liability for compensation on the thief after his right hand has been amputated” (la gharm ‘alā al-sāriq bi-dhu mà quit’at yaminahu). For other versions of this tradition, see also Daraquti, Sunan al-Daraqutni, 3:129-30. Notably, ‘Ayni said that this tradition occurs in the collections of both al-Nasai and al-Daraqutni. ‘Ayni, Binaya, 7:71.
145 Ibn Rushd, Bidaya, 2:662-663; Ibn Qudama, Mughni, 8:271.
146 Mawardi, Hauz, 13:184. For the Hanbali Abū Ishāq Ibn Muflih (d.
conceded that the *hadith* is *mursal.* Nevertheless, Ḥanafī jurists said that the Qur’ān requires only one punishment. For them, to impose liability for compensation in addition to the amputation not only contravenes the Qur’ānic stipulation of a single punishment, but also violates the *hadith* that asserts that no compensation is due from a thief who has suffered amputation.

Alternatively, the Ḥanafīs argued that where the thief has compensated the victim, he does not suffer amputation. According to the Ḥanafīs, where the thief has paid compensation, doubt arises as to whether a wrong has been committed. In other words, with the payment of compensation comes ambiguity over the existence of an ongoing wrong. Because of that doubt, the thief cannot suffer amputation for the theft. As noted, jurists held that where there is ambiguity, the *hadd* punishments are not applied. Compensation prior to amputation raises sufficient *shubha* for the Ḥanafīs to negate corporal penalty for theft.

The Ḥanafī jurist al-Kāsānī explained the Ḥanafī position in greater detail. He indicated that at stake in the crime of theft are both the right of God and private rights. Where the stolen goods remain in the thief’s hand, the thief must return them to the owner in fulfillment of the private right, while suffering the amputation satisfies the right of God. But a problem arises when the property has been destroyed. He wrote that the Qur’ānic verse stipulates amputation as the only punishment for theft, using the word “*jazā*” to refer to the punishment. He argued that the term “*jazā*” linguistically refers to the completion or sufficiency of an act (*kifaya*). Consequently if the thief must also pay compensation in addition to suffering the amputation, how can the Qur’ān speak of amputation as full satisfaction for the crime of theft? If amputation were only part of the punishment meted out to the thief, the Qur’ānic use of the term

804/1401), the *hadith* means that no one should be compensated for amputating a thief’s hand (*i.e.* *ujrat al-qātā*). Abū Ishāq Ibn Mufliḥ, *Mubād‘,* 9:144.

147 Ṭayyib, *Bad‘ya,* 7:71. A *mursal* *hadith* is one in which one link in the chain of transmission is missing. According to Juynboll, a *mursal* tradition is one in which between the Prophet and the Successor is a Companion who is missing in the narrative chain. G.H.A. Juynboll, *EF,* s.v. Mursal.


151 Ibid., 9:340.
“jazā” in the verse would be incorrect. Furthermore, al-Kāsānī presented two rational arguments for the Ḥanafi position. First, if the thief is required to compensate the victim for his property, then after all financial wrongs have been righted, any subsequent amputation no longer vindicates an ongoing violation of a right. Second, liability for compensation arises from the fact that the thief steals property that is inviolable (maʿṣūm) because it belongs to someone else based on his right. But “the right to compensation in the case of theft is no longer inviolable as a right of the owner because of the effect of amputation.” In other words, amputation undermines the sanctity of the victim’s compensatory right. The sanctity of one’s property rights is therefore not absolute. Rather, there are various instances in which the law vitiates one’s private property interests for the sake of different goods. For instance, al-Kāsānī suggested that in some cases the theft in question may benefit from ambiguity about its permissibility (fa-tatamkkanu fī ḥiṣb ṣahabat al-ibāḥa). This point reflects the view that certain thefts are not punished by amputation, but in fact are forgiven, such as when a thief steals from the public treasury or certain foodstuffs. In these cases, even the amputation for theft is negated despite the property being stolen. Al-Kāsānī’s point is that ownership rights do not always prevail in light of other considerations that the law must take into account. Consequently, the law can balance interests so that when corporal liability for theft exists, the obligation to compensate may nevertheless fall. This balancing of interests takes into account the rights of the owner, the public interest in deterring theft, and the rights of defendants not to suffer a double penalty. The only exception to this rule of single liability arises when the stolen goods remain in the thief’s possession.

152 Ibid., 9:340-1.
153 Ibid., 9:342.
154 Ibid.
155 Ibid.
156 See, for example, Marghinānī, Ḥidāyat, 1:408-12.
157 Kāsānī, Badāʾiʿ, 9:342.
The meaning of ḥirāba, also called qatā’ al-ṭarīq, has been the subject of considerable debate and discussion. The present study is not focused on defining ḥirāba. Instead of asking what ḥirāba is, or how it has been defined and utilized both legally and historically, I focus on what rights and liabilities are invoked when ḥirāba occurs. When a defendant engages in ḥirāba, and is thereafter apprehended by the authorities, the Sunnī legal tradition provides varying redress depending on the interests at stake, whether public or private. The question that often arises in discussions of ḥirāba is how does the law recognize and prioritize these different interests, especially in those situations in which the liabilities entailed by, for instance, a ḥaqq al-ʿabd conflict with those entailed by a ḥaqq Allāh. The crime of ḥirāba not only raises questions about the different rights at stake, but also forces one to contend with how to justify weighing and prioritizing rights when they come into conflict.

Q. 5:33-4 provide the scriptural foundation for criminalizing ḥirāba:

The punishment for those who fight God and His prophet and cause corruption in the land is execution, or crucifixion or amputating their hands and feet from opposite sides, or banishment. That is their shame in this world and for them in the hereafter is a great punishment. Except for those who repent before you overpower them (išla alladhiyana 'aṣba min gabra an taqdir 'alayhim). Know that God is forgiving and merciful.

Central to this analysis is how Muslim jurists balanced the different interests at play in instances of ḥirāba. In other words, assuming that the crime of ḥirāba (however defined) has occurred, how does one balance the rights of God and the rights of individuals, especially when there is a conflict between them.


159 The historical context for this verse is a matter of dispute among many, Abou El Fadl, Rebellion and Violence, 49-51; Ibn al-ʿArabī, Akbām al-Qurʾān, 2:594-5. For treatments of the crime of ḥirāba, see Abou El Fadl, Rebellion and Violence, 47-60; ‘Abd al-Qādir ʿAwda, al-Tashrī al-Jūnūt al-Islāmī, 14th ed. (Beirut: Mu’assasat al-Risāla, 2000), 2:638-70.
The Effect of Repentance on Liability

The jurists of the four Sunni schools surveyed here generally held that if bandits repent of their crimes prior to being captured, the punishments listed in the hiraba verse satisfying the rights of God will fall. This position is based on Q. 5:34, which states that those who repent prior to capture are forgiven any liability for punishment. What is meant by “repentance” is a matter of dispute among the jurists. However, for the purpose of this study, the question is not about what counts as repentance but rather what happens to the bandits’ liability if they repent before being captured, however repentance is defined.

The Shafi’is generally argued that the rights of God are forgiven but private rights are not, as only the right holder can waive his rights. For instance, the Shafi’i jurists al-Muzani (d. 264/878) and al-Mawardi held that with repentance each right of God falls but the rights of individuals do not dissolve. To clarify matters, al-Mawardi provided a list of possible outcomes. In the case of repentance, either (1) all rights of God and individuals fall, (2) all of God’s rights fall, as do all private rights except those which relate to injury or death, or (3) the hadd Allah fall, but private rights concerning property and death/injury do not. The Shafi’is, according to al-Mawardi, adopted the third view. Al-Shirazi, who also considered repentance to negate hiraba penal liability, was concerned about the situation in which the bandit also engages in theft (sariqa). Is he subjected to the punishment for theft despite his repentance for committing hiraba? One view holds that since he presumably stole sufficient property to deserve amputation for theft, he loses his right hand. Theft is a distinct crime separate from hiraba and is therefore treated differently. The other view is that there is no liability for hiraba or any other hadd offense committed during the banditry. For instance, al-Qaffal al-Shashi held that a bandit’s repentance prior to capture negates liability for hiraba and all other hadd offenses committed during the banditry. Private rights, nonetheless, must still be redressed.

161 Mawardi, Husein, 13:369-70.
162 Shirazi, Mahadhdhab, 3:368.
163 Qaffal, Hilya, 8:89. See also Ghazali, Wasith, 4:149; Razi, al-Tafsir al-Kabir, 4:348.
Like the Shafi’is, the Hanbalis argued that if the bandit repents prior to capture, the rights of God fall but private rights, such as qisas and compensation, do not.164 Liability for committing other hadd crimes in the course of haraba may fall with repentance as well, except for the crime of qadhif, which involves a private right.165 Abū Ishāq Ibn Muflih, however, upheld liability for other hadd offenses perpetrated during the act of banditry, such as fornication and consumption of alcohol, since the verses that prohibit those acts are of general application and contain no exception clauses. Consequently, if a muharib engages in zina during his banditry and repents before capture, he is still liable for the punishment of zina. Furthermore, the penitent muharib remains liable for violating private rights unless they are waived by the right holder.166 In other words, for Hanbalis like Abū Ishāq Ibn Muflih the punishments in the haraba verse will drop if the bandit repents prior to capture. Whether liability for other hadd offenses committed in the course of banditry will drop is a matter of debate among Hanbalis. What is clear, however, is that even if all hadd liability drops, liability for private rights remains unless the right holder waives his right.167

The Malikis adopted a position similar to that of the Shafi’is and Hanbalis: the muharib who repents prior to capture is not subjected to the penalties for haraba, but is required to compensate the victims for injuries sustained.168 Saḥnūn (d. 240/854) related the view that if a muharib falsely accuses someone of zina (i.e. qadhif) during his banditry

164 Ibn Qudāma, Mughni, 8:295; idem., Kāfi, 4:70; Bahūti, Kashshaf al-Qinā, 6:195; Abū ‘Abd Allāh Ibn Muflih, Fara, 6:139, related this view from the Hanbalis but noted that some argued that even private rights will fall if no financial hardship is imposed on the right holder.

165 Ibn Qudāma, Mughni, 8:295; idem, Kāfi, 4:70. See also Ibn Taymiyya, Muharrar, 2:291-2, who held that repentance prior to capture of the muharib will negate the hadd, as will repentance for consuming alcohol, stealing, and fornication, if done prior to a finding of liability.

166 Abū Ishāq Ibn Muflih, Mubdi, 9:151-2. See also Mardawi, Insif, 10:262-3, holding that repentance before capture will save the muharib from hadd liability, but that whether one’s repentance for other hadid crimes (such as consumption of alcohol, fornication and theft) committed during banditry will negate liability is debated among the Hanbalis.

167 Mardawi, Insif, 10:262-3, relates the debate among the Hanbalis on the continuing liability for other hadid offenses if there is repentance prior to an establishment of liability.

168 Saḥnūn, Mushawwana, 6:300; Mawwāq, Tāj, 8:432; Ibn al-Jallāb al-Baṣrī, Tāfṣīr, 2:233; Khurashi, Ḥāshiya, 8:339.
but repents prior to capture, *hadd* liability falls for *hirāba* but not for *qaddif*. If he kills someone during the banditry, *hadd* liability drops for *hirāba* if he repents prior to capture, but he may still be executed to satisfy the individual right of *qiṣāṣ* or *lex talionis*. Ibn Rushd al-Jadd, who noted alternative views on the effect of repentance in a *hirāba* prosecution, nonetheless represented the Mālikī position as holding that only the *hadd* punishments specified in the *hirāba* verse fall with repentance, while all other *huqūq Alāh* and *huqūq al-nās* remain intact. Ibn Rushd al-Jadd, *Muqaddimät*, 3:235-6; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:671. However Ibn al-ʿArabī (d. 543/1148) indicated that the Mālikī view was that a person’s right to property interests remains valid only in the event the bandit has property from which he can pay his debts. The right to *qiṣāṣ* retribution also remains intact. Ibn al-ʿArabī, *Abkām al-Qur’ān*, 2:603-4. Mawwāq (d. 897/1491) held that even if the bandits are impoverished, they are still liable for any debts they owe pursuant to the individual rights they violated during the banditry. Mawwāq, *Tāj*, 8:432.

The Ḥanafi view parallels the views of other schools. In the event of repentance prior to capture, *hadd* liability for *hirāba* drops while all private rights are preserved. Badr al-Dīn al-ʿAynī explained this rule by invoking a hypothetical scenario. Supposing a bandit steals property during the act of banditry, al-ʿAynī asked how the bandit manifests his repentance. He argued that repentance arises once the property has been returned.172 The bandit might repent one thousand times verbally (*alf marra bi-lisānāhī*), but without returning the property he is still in violation of someone’s rights. Consequently, if he returns the property to its owner prior to being captured, the *hadd* penalties drop. This is because once the property has been returned, there is no claim by another. In other words there is no live controversy. He wrote: “The *hadd* punishment cannot be applied except with a claim by the property owner. His opposition disappears once the property is returned before the [banditry] case is taken to the political authorities. As such, the *hadd* of *hirāba* falls” as would the *hadd* for the offense of theft. Any remaining individual rights can be litigated and petitioned by individuals.

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170 Ibn Rushd al-Jadd, *Mugaddimāt*, 3:235-6; Ibn Rushd al-Ḥafīd, *Bidāya*, 2:671. However Ibn al-ʿArabī (d. 543/1148) indicated that the Mālikī view was that a person’s right to property interests remains valid only in the event the bandit has property from which he can pay his debts. The right to *qiṣāṣ* retribution also remains intact. Ibn al-ʿArabī, *Abkām al-Qur’ān*, 2:603-4. Mawwāq (d. 897/1491) held that even if the bandits are impoverished, they are still liable for any debts they owe pursuant to the individual rights they violated during the banditry. Mawwāq, *Tāj*, 8:432.
171 Kāsānī, *Badaʾī*, 9:374; Marghinānī, *Hidāya*, 1:422; See, for instance, Māwardī, *Ḥārī, 13370, who represents this as the Ḥanafi position.
174 Ibid.
175 Ibid.
Conflict of Rights Schemes

Muslim jurists recognized that in the case of a हिराबा prosecution in which individual rights are affected, a conflict may arise between the demands of a right of God and a private right. They faced the challenge of resolving these conflicts in a way that effectively maintains conceptual coherence with their views concerning qadhf and sariqa. As will be shown below, the Şafi’is and Hanbalis often emphasized private rights over rights of God; the Mālikis attempted to strike a balance between the two sets of rights; and the Hanafis prioritized the rights of God over private rights. The consistent patterns of preference across legal schools and across legal issues suggests that in using the हूज़ाq अल्लाह/हूज़ाq al-‘ibād heuristic to designate public and private realms of the law, jurists incorporated and relied on competing background values to substantiate and justify their legal analysis.

Underlying the debate on conflicts of rights schemes in हिराबा cases is an understanding of the purpose and nature of the two categories of rights. The Ḥanafi Badr al-Dīn al-‘Aynī said that the rights of God uphold the grandeur of God, while the rights of people protect specific interests in particular benefits and in preventing harm from befalling the individual. Specifically, he wrote: “The right of God… is what [God] seeks in order to protect His interests in a way that is appropriate to His grandeur.”\(^\text{176}\) Private rights, on the other hand, “are what one seeks in order to protect one’s interests in a way that is appropriate for him, namely pursuant to one’s nature of seeking benefit and repelling harm from himself” (kaumnuhu nāfi’ fi ḥaqiqihi dāfi’ li-l-darar ‘anhu).\(^\text{177}\) Certainly, the idea that God needs to protect His interests is problematic for those who believe God to be beyond such needs. This is why the Mālikī jurist Ibn al-‘Arabī, for instance, said that the crime of हिराबा does not actually impede God’s interests. The हिराबा verse (Q. 5:33) reads in part: “The punishment for those who fight against God and His Prophet and cause corruption in the land…” Ibn al-‘Arabī considered it impossible that God could be injured by highway robbery or banditry. Consequently, to violate “God’s right” by engaging in हिराबा means that the bandits fight against the agents

\(^{176}\) Ibid., at 6:281.

\(^{177}\) Ibid. (emphasis added).
of God (awliyā’ Allāh), or in other words the agents of stability, order, and social cohesion. Although Ibn al-‘Arabī recognized that the hirāba verse invokes God’s interests, what is at stake is arguably something rooted in the social dimensions of a polity struggling for the common good.

As noted, the Ḥanbalīs and Shāfīʿīs were keen on upholding private rights. Although less inclined to sacrifice a private right in favor of a right of God, they could not simply ignore the public interests upheld by the rights of God. For instance, the Ḥanbalī jurist Abū Ishāq Ibn Muḥīḥ wrote that individual rights must be satisfied, even if the rights of God are not. Private rights cannot be forgiven by the ruling authority because they are premised on conditions of scarcity (dayq) and paucity (shabḥ), and as such cannot be ignored without causing the individual to suffer. He stated that “the rights of people cannot fall except by the right holder’s consent because they are built on scarcity and paucity (mabnī’ al-ḥamām‘ al-taḥqīq wa-l-shābḥ), unlike the right of God. That [is what] determines the distinction between the two [sets of rights].”

In other words, individuals are less able to bear or spread the cost of injury than is the public at large. The Ḥanbalī jurist al-Bahūtī felt similarly about private rights because they speak to very real needs amidst scarce resources (al-mabnī’ al-ḥamām‘ al-mashābḥa) that limit effective loss spreading.

The Shāfīʿī jurist al-Nawawī also recognized the economics of protecting private rights. For instance, he asked whether the punishment for qadhf should be carried out on someone who is ill. Some said that the victim should be asked whether he wants to wait or not, while others argued that the defendant should be whipped whether or not his illness subsides, because the victim’s right is premised on scarcity (huqūq al-‘idamī mabnīyya’ al-ḥamām‘). The Shāfīʿī al-Ghazālī, writing a century and a half earlier, argued that in the case of hirāba,

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181 Nawawī, Rawaḍa, 10:101. See also the Shāfīʿī scholar al-Shirbīnī (d. 977/1570) who said that private rights take priority over God’s rights because the individual’s need for redress is more compelling than God’s since the individual is less capable of spreading the cost due to his limited resources (al-ʿadīl fit ṭumān ḥaqiqī tāʾalā wa-ḥaqiq al-‘adāmī taḥqīl al-thānī li-kawsī mabnīyyan ‘alā al-taḥqīq). Shirbīnī, Nihāyat al-Muḥīṭ ilā Shurḥ al-Muḥājir, 3rd ed. (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1992), 8:7.
the preferred option is to satisfy both the rights of God and private rights. But he acknowledged, as will be demonstrated below, that private rights take priority when there is a conflict. For instance, suppose someone (1) is liable to the *hoqq Allāh* for banditry and must have his right hand and left foot amputated, and (2) is also liable for violating a private right by cutting off someone’s right hand, and is thereby condemned to have his own right hand amputated pursuant to *qīsās* liability. A conflict exists between what the right of God requires and what the private right demands through the victim’s entitlement to *qīsās* or retribution for his right hand. Al-Ghazālī held that one should amputate the defendant’s right hand in satisfaction of the private *qīsās* right, while amputating the left foot to fulfill the right of God under *ḥirāba*. The private right, in other words, takes priority.¹⁸²

The issue of scarcity is significant for Shāfī‘ī and Ḥanbalī jurists dealing with conflicts of rights in a case of *ḥirāba*. Scarcity speaks to the fact that individuals are less able to bear and spread the cost of their injuries than the public at large. Rights of God can be forgiven according to the Shāfī‘īs and Ḥanbalīs not only because God is beyond such needs, but also because the public interest is so diffuse that the cost of violating a right of God is evenly distributed across society and less burdensome to individuals.

Not all legal schools, however, held that private rights need to be satisfied in all cases. The Mālikīs, for instance, argued that if the punishment for *ḥirāba* is applied, then at least in the case of stolen property, the bandit must compensate the victim if it is easy for him to do so. If not, then liability for compensation falls and the victim’s private rights are sacrificed. According to al-Mawwāq (d. 897/1491), if bandits take property and are captured before they repent, the punishment for *ḥirāba* must be applied. If the punished bandits are sufficiently wealthy, they must also compensate the victims. Al-Mawwāq noted that the bandits must have been independently wealthy from the day they took the property. Otherwise they are not liable for compensating the victims of theft. Hence, only the rights of God are satisfied at the expense of private rights.¹⁸³ The Mālikī al-Khurashi (d. 1101/1690) held that bandits must restore any property taken by them or their associates during their criminal act, whether

¹⁸² Ghazālī, *Waṣīl*, 4:150.
or not they repent prior to capture. However, if they are corporally punished for ḥirāba, they must provide compensation for the property stolen on condition that they can do so without hardship. In other words, the plaintiff’s right is upheld, but only to a certain extent, pursuant to a Mālikī balancing of interests.

The Ḥanafīs also had problems vindicating private rights if they conflicted with the rights of God. For instance, al-Sarakhsi argued that if bandits kill someone, the punishment for ḥirāba is applied, but the victims cannot press for their rights under qisās. Rather, for al-Sarakhsi, only the punishments in the ḥirāba verse are meted out to the bandits. The victims cannot waive redress for the ḥirāba penalty because the crime is a right of God, but they are unable to press for any individual rights to compensation for injuries sustained. He added that the right to compensation for injuries falls once the punishment for ḥirāba is applied. If, however, ḥadd liability drops for some reason, such as the bandit’s repentance, then and only then can the individual pursue his private claims. This follows the Ḥanafī doctrine on theft. If the defendant’s hand is amputated, he is not liable for compensating his victim. But where ḥadd liability falls, the private right of compensation arises and can be litigated. For al-Marghinānī, if the bandit steals property and injures someone, his hand and leg are amputated from opposite ends, to satisfy the right of God implicit in the crime of ḥirāba, and any individual right of action falls completely. He stated: “When the ḥadd is required as a ḥaqq for God, the individual’s right to protect his inviolability falls, just as [his right] to the inviolability of [his] property [falls].” In other words, the Ḥanafīs did not allow a bandit to be liable for both the rights of God and private rights. According to Badr al-Dīn al-‘Aynī, commenting on al-Marghinānī’s work, liability for ḥirāba punishment and liability for compensation cannot coexist (lā yajtami‘ān). One must fulfill the right of God through application of the ḥadd penalty, and any residual individual rights cannot be redressed.

184 Khurashi, Ḥāshiyā, 8:339.
185 Sarakhsi, Mabsūt, 9:196.
186 Ibid., at 9:199.
187 Marghinānī, Ḥidāya, 1:422. See also the Ḥanafī Kāsānī (d. 587/1191), Ḍawā‘i‘, 9:374, who held that when a bandit kills and steals property, while also causing injuries to others, private rights to retaliation under qisās for the injuries are folded into the ḥadd penalty for banditry (fa-yadkhulu fihī al-ẓawā‘i‘ah).
Whereas the Ḥanafīs and Mālikīs were willing to negate liability for private rights in specific circumstances, in part to protect defendants from multiple liabilities, the Shāfīʿīs and Ḥanbalīs were not. Although the Shāfīʿīs and Ḥanbalīs did not allow the huqūq Allāh to negate the huqūq al-nās, they still recognized that when both rights conflict, a proper balance of interests is still necessary. They could not simply ignore the public welfare reflected in the rights of God. Consequently, we find specifically articulated conflict of rights schemes in Shāfīʿī and Ḥanbalī sources; no parallels were found in Mālikī or Ḥanafi sources other than what is discussed above.

The Shāfīʿīs generally argued that if satisfying a private right conflicts with upholding a right of God, the former takes priority. For example, al-Māwardī provided two examples of such a conflict. First, suppose someone is subject to execution for both apostasy (a right of God) and killing someone (a private right). Second, suppose someone is liable to having his right hand amputated for theft (a right of God), and for cutting off another’s right hand (a private right). In both cases, the private right of qiṣṣā takes priority over the right of God.

However, while articulating this view as a general default position, Shāfīʿī jurists still balanced interests to elicit what they arguably considered the most just outcome with respect to both sets of rights. While favoring individual rights, they could not always ignore public interests. For instance, al-Māwardī conveyed another balancing scheme held by some to reach a just result when enforcing both the rights of God and individual rights. First, if the private right involves property interests and the right of God involves amputation or execution, the private rights should be enforced first and take priority. Second, if no execution or amputation is involved under either a private right or right of God, the right of God should be

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189 Interestingly, Ibn Ḥazm, Muballāh, 12:289-90, notes that the Ḥanafīs and Mālikīs prioritized private rights over the rights of God in various areas of the law, but that in the area of ḥirādha, they reversed themselves. While Ibn Ḥazm criticizes them for their inconsistency, he seems to favor prioritizing the rights of God over individual rights generally.

190 See for instance Shirbīnī, Muḥtiʿ al-Maḥtiʿ, 5:505-6; idem, Niḥayat al-Maḥtiʿ, 8:7.

satisfied first. Both of these rules concern the order of satisfying rights, but do not involve the defeat of any right. Third, if both rights involve the same sort of punishment, the private right is still prioritized, but pursuant to a first-in-time rule.\footnote{Ibid.}

To illustrate how the scheme works, al-Māwardī presents the following example. Suppose someone steals property. This crime demands amputation to satisfy the right of God and compensation to vindicate the private right. According to the conflicts proposal, the first option should be used; the victim should be compensated for his loss before the defendant’s hand is amputated. Now suppose a virgin fornicates (\textit{zinā}) and steals property. In this case, the punishment for \textit{zinā} involves lashes; theft demands compensation for the private right and amputation for the right of God. Here, the second option would hold that the punishment for \textit{zinā} should be applied first before satisfying the private right. Thereafter the victim can be compensated for his loss, and finally the defendant suffers amputation. Further, suppose someone amputates his victim’s right hand and commits theft in the context of banditry. The punishment for stealing in an act of banditry is amputation of the right hand and left foot (a right of God). But amputating the right hand is required for the \textit{qiṣāṣ} liability arising out of the personal injury sustained by the victim (a private right). When the defendant’s right hand is amputated, is it in satisfaction of an individual right or a right of God? If the right of God is satisfied, the victim’s right to retaliation falls. But if the individual’s right is satisfied, God’s right falls.\footnote{This proposal does not seem to consider that the right hand can be amputated to satisfy both rights.} The solution is that if the bandit amputated his victim’s hand first and stole second, satisfying the private \textit{qiṣāṣ} right is prioritized and the defendant suffers no additional amputation for stealing (i.e. the right of God). But if the bandit steals first and amputates the victim’s hand second, the private \textit{qiṣāṣ} right is still prioritized but the right of God does not fall. The defendant loses his right hand to redress the victim’s private right; and he loses his left hand and right foot to satisfy the right of God. The point is that in both cases, the private right is applied first. Whether it excludes a right of God or not depends on a first-in-time rule. This result both upholds private rights while satisfying the policy of deterrence that underlies rights of God.

\footnotetext[192]{Ibid.}
fact, for al-Māwardī, when both rights involve physical injury to the defendant, the purposes and social policy underlying the rights of God, such as deterrence (zajr, rad’) are implicitly upheld by satisfying the private right. 194

Another balancing scheme is posed by the Shāfi‘i jurist al-Shīrāzi. He argued that a conflict arises if a bandit both steals and amputates someone’s right hand and left foot. According to the hirāba doctrine, the bandit who steals suffers amputation of his right hand and left foot for violating a right of God (i.e. hirāba). But under a qisās private rights claim, he must lose the same limbs. If one right is satisfied, the other falls. 195 For al-Shīrāzi the ruling authority must apply the individual qisās penalty before the hadd penalty because of the general emphasis placed on individual rights (li-ta‘akhkūd ḥaqiq al-ādamī). 196 However, when the private rights are fulfilled, the rights of God do not necessarily fall. Rather the bandit would also lose his left hand and right foot to satisfy the rights of God. 197 The point for al-Shīrāzi, though, is to balance the interests posed by competing and distinct sets of rights, while prioritizing private rights given the presumed greater need for individuals to have their rights satisfied.

Like the Shāfi‘is, Ḥanbali jurists agreed that private rights take priority over the rights of God when they conflict. 198 They generally held that there are three possible scenarios when contending with situations in which multiple rights are at stake. First, one may deal with violations of different rights of God, for example, when someone both consumes alcohol and commits zinā. The punishments for both these crimes redress pure rights of God. In these cases, the Ḥanbalis argued that if the penalties for the hadd case include execution and some lesser punishment, the ruling authority must drop the lesser punishment and only execute the defendant. 199 The reason

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195 Again we see that the jurists did not satisfy the two rights through the same punishment. The right of God poses a distinct cause of action as does the private right. Consequently, separate and distinct liabilities must follow. This same dynamic operates in the qadhf case, in which jurists inquired whether the right of God or the private right was dominant (ghalib). In other words, the concern is with establishing a one-to-one correspondence between the violated interest and the punishment.
196 Shīrāzi, Muhadhdhab, 3:368.
197 Ibid. See also Māwardī, Ḥawāzi‘, 13:367, on the same hypothetical.
199 Ibn Qudāma, Mughnī, 8:298; Abū ‘Abd Allāh Ibn Mūlih, Furū‘, 6:68; Abū
they provided is that the purpose of the rights of God is to deter people from committing such acts. Deterrence is met by executing the defendant; further punishment is not necessary to meet that goal. But suppose someone must be executed for committing *hiriaba* and stoned as an adulterer: both punishments redress underlying rights of God. Ibn Qudâma argued that the defendant must be killed for *hiriaba* and not for adultery, because the former implicitly involves private rights to some degree, while the adultery charge is a pure right of God. If no execution is involved and all the violations are rights of God, the punishments should proceed in the order of severity. For example, if a virgin consumes alcohol and fornicates, he must first be whipped for consuming alcohol as punishment (forty lashes), and then whipped as punishment for committing *zinâ* (100 lashes). If he commits the same offense multiple times (i.e. multiple fornications), the ruler inflicts only one punishment.

The second case concerns those situations in which only private rights are implicated, e.g. *qadhf* and any rights stemming from *qisâs* liability. The Hanbalis generally argued that in this situation one must apply the punishments in order of increasing severity.

The final and most complex case is when the rights of God and


200 According to the doctrine on *hiriaba*, a bandit should be executed in the event he kills someone. But if he kills someone, the private *qisâs* right for retribution is also invoked. Consequently, killing the bandit pursuant to *hiriaba* also satisfies the survivor’s right to execute the bandit under a *qisâs* analysis. Ibn Qudâma, *Maghni*, 8:298.


202 The punishment for consuming alcohol is either forty or eighty lashes, depending on the school of law. For a discussion of this debate, see Husayn Hamid Hassin, *Naziyyat al-Mashâba fi al-Fiqh al-Islami* (Cairo: Dâr al-Nahda al-Arabîyya, 1971), 73.


204 For *zinâ* punishment see Q. 24:2. See also Roberts, *Social Laws*, 37; Mutrak, “Sexual Offenses,” 215.

the rights of individuals combine and are mixed. In this situation there are three possible scenarios. The first scenario involves rights that do not require the defendant’s execution. Here the Hanbalis held private rights must be satisfied before any rights of God are enforced. The second scenario involves those situations in which execution is required either in satisfaction of a right of God or a private right. In this case, the execution should come last even if it vindicates a private right because the victim has the option to waive the execution at the last minute and forgive the defendant. All other rights of people should be satisfied in order of severity, followed by any rights of God. The third scenario is when both rights at stake involve either execution or amputation. In this case, the response will vary with the hypotheticals offered. For instance, suppose someone is sentenced to both stoning for committing zinā (a right of God) and execution under a qishās analysis for murder (a private right). In this case, Ibn Qudāma and al-Mardawī prioritized the qishās punishment in order to emphasize the importance of the private rights. But suppose one is subject to execution for both hirāba and the private right of qishās. Both crimes invoke private rights, but to varying degrees. Both jurists argued that the state must rely on a first-in-time rule to determine which right to vindicate. If the hirāba occurred first, qishās liability falls. But prioritizing the punishment for hirāba does not diminish the importance of private rights, since hirāba reflects a concern with both public and private interests. Abū ‘Abd Allāh Ibn Muflih (d. 763/1362) and others discussed a different hypothetical. Suppose an unmarried person fornicates, drinks alcohol, commits qadhf, and amputates someone’s hand. How should the rights

207 Ibn Qudāma, Maghāni, 8:300; Abū ʿIshāq Ibn Muflih, Mubdī’, 9:55.
208 Ibn Qudāma, Maghāni, 8:300; idem, Kāfī, 4:110. Interestingly, Abū ʿIshāq Ibn Muflih, Mubdī’, 9:55, did not expressly indicate that private rights must be satisfied first. Instead, he specified the order in which the rights of God must be satisfied: qadhf, sharb, zinā of virgins, and amputation. However he noted that where some believed the punishment for sharb is forty lashes, that should precede the qadhf punishment. He also noted that others would put a qishās claim before any hadd liability. Bahūtī, Kashshāf al-Qanūn, 6:110, held that if there is a mixed rights context in which both rights cannot be satisfied together, then the ruling authority must enforce private rights first since they are premised on scarcity and paucity (khubb and ḍāvīq).
211 Ibn Qudāma, Maghāni, 8:301; Mardāwī, Insāf, 10:157.
be vindicated? He argued that the defendant should first suffer the amputation pursuant to the purely private *qisās* right, followed by the punishment for *qadhf* which involves both a private right and a right of God, after which the punishments vindicating rights of God are applied in order of increasing severity, in this case consumption of alcohol and then *zinā* of the virgin. 212

**Concluding Note on Hirāba: The Role of Background Values**

In the case of *hirāba*, we see the desire to balance competing interests that benefit both society and the individual. Embedded in the juristic debates are the jurists’ background views of what those interests are, how they relate to one another, and how to prioritize them when they conflict. For the Shāfīʿīs and the Ḥanbalīs, individual interests—defined in terms of proprietary interests and physical integrity—seemed paramount. Protecting one’s expectation interests played a dominant role in how these jurists balanced claims. Society at large could afford to bear and spread the cost of violations of the social good better than the individual could, given the latter’s limited resources. The Ḥanafīs and Mālikīs, however, took the opposite view. They were concerned with vindicating the social good (and implicitly the defendant’s interests)—defined broadly in light of scriptural prohibitions—from which even the individual victim benefits, albeit while bearing some cost in the event his individual rights fall. Arguably, in constructing their conflicts schemes, Muslim jurists crafted rules of law in light of implicit visions of the nature of the individual, the social good, and the relationship between the two.

**From Substantive Doctrine to Hermeneutic License: The Haqq as a Discursive Site**

At issue in the debates on the rights of God and private rights are those rights that are actionable in court and allow legal redress. But

one question remains: what are the huqūq Allāh and the huqūq al-nās? Where do they come from and how are they determined?

The preceding discussion suggests, for instance, that the huqūq Allāh are stipulated in texts such as the Qur‘ān and hadīth. However, this is not always the case. As Hoexter has shown, the waqf institution involves a huqūq Allāh. Others have argued that the waiting period (’idda) observed by a woman upon divorce arises primarily out of a right of God, although it involves in part a private right. Furthermore, the private rights noted above are not necessarily derived from sacred texts. In their debates on the petition requirement in qadhdh cases, for instance, Muslim jurists generally did not cite Qur‘ānic verses, hadīth, or other traditions to justify their determination of that pleading rule. What this study suggests is that the huqūq Allāh/huqūq al-‘ibād heuristic is an analytical tool that jurists used to frame their determination of legal rules in light of competing visions of the individual and the social good. Consequently, when discussing ta’zīr or discretionary jurisdiction, Muslim jurists wrote how the ruling authority has the authority to create and satisfy new rights of God and private rights not already specified in precedential sources.

The jurists al-Kāsānī and al-Ghazālī held that the ta’zīr punishments are applied to those matters that are not addressed by the ḥudūd but which still invoke a right of God or a private right. The need for ta’zīr arises when no Sharī‘a precedent addresses a wrong (layṣa lahā ḥadd muqaddar fī al-shar‘ī) that may invoke interests that can be classified as a right of God or a private right. Likewise the Shāfi‘ī al-Shirāzī said that the political authority has the discretion to create and enforce new rights. However, al-Shirāzī held that if the political authority creates a new private right, it loses the discretion not to enforce it. He wrote: “If the political authority (sulṭān) chooses to avoid implementing the ta’zīr, it can do so when there are no rights of people that depend on [the ta’zīr].” In other words, ta’zīr provides the

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215 Kāsānī, Badā‘i‘, 9:270; Ghazālī, Wasiṭ, 4:156-7. See also Nawawī, Rawḍa, 10:174.
216 Shirāzī, Muhadhdhab, 3:374.
political authority with the power and jurisdiction to create new rights and entitlements that it enforces through its courts. For al-Shīrāzī, the “rights of God” and the “rights of individuals” are conceptual categories that can be employed in any context to capture new and changing interests that must be vindicated. Arguably, the terms are a heuristic device by which jurists can identify new rights and render them subject to the ruler’s enforcement. But for al-Shīrāzī, where the newly created laws invoke private rights, the ruling authority has no discretion to avoid enforcing them. By articulating new personal rights on the basis of taʿzīr, the ruler creates an expectation in the populace to new entitlements, and hence cannot willfully disregard the public’s reliance on those expectations.

To illustrate how the ḥuqūq Allāh/ḥuqūq al-ibād heuristic empowers jurists to construct new rules in light of varying circumstances, the Mālikī al-Ḥāṭṭāb (d. 954/1547) considered the situation in which a thief steals less than the minimum amount required to invoke the amputation punishment for theft. He argued that the ruler can nevertheless establish a punishment for the lesser theft on the grounds that such a punishment supports and vindicates a private right to proprietary interests, even if the punishment differs from that used for saraqa specifically.

The logic behind this grant of legislative authority is that taʿzīr punishment is applied against “someone who violates an obligation he owes to someone else.” But the notion of obligation here is built upon naturalistic assumptions about the needs and expectations of individuals in society, which thereby allow the government to create legal rules to satisfy those needs and interests. Individual needs and expectations may change in time and space. But taʿzīr is the legal mechanism by which the law redresses those changes. In fact, the Mālikī al-Khurashi argued that rights of God and individuals can change pursuant to variations in context (yakhtalifu bi-ikhtilāf al-nās wa-aqwālihim wa-afālihim).

\[\text{Footnotes:}\]
217 Interestingly, Ibn Hazm argued that taʿzīr punishment is used to vindicate violations of adab, or etiquette that go beyond the crimes listed as ḫudūd. For him, the ḫudūd crimes are: highway robbery, apostasy, fornication, slander, theft, denying a debt, and consuming alcohol. Taʿzīr punishments are those that might be applied to offenses such as: slandering someone while drunk, drinking blood, eating pork, and witchcraft. Ibn Hazm, Muhallā, 12:378.

218 Ḥaṭṭāb, Mawālīk al-Jāli‘l, 8:436-7. On this example, see also Shīrāzī, Muhaddithah, 3:373; Baghawī, Tahdībī, 7:428.


220 Khurashi, Ḥāshiyya, 8:346.
Muslim jurists attached great importance to the role played by the political authority in recognizing and giving effect to new rights under *tażżīr* jurisdiction. The political authority exercises its own interpretive effort to create new rights. The Shafi‘i al-Baghawi held that wrongs are penalized based on the discretionary jurisdiction of the *imām* who considers (*yarrā‘*) the appropriate punishment. However al-Baghawi and other jurists were adamant that *tażżīr*-based punishments, for instance, cannot exceed the punishments of the *hudud* penalties. Importantly, though, these jurists indicated that the *tażżīr*-based rules are the product of the *imām*’s reasoning or *ijtihād*. Al-Khursahi stated that *tażżīr* rules are based on the *imām*’s investigation (*ijtihād al-imām*) into the totality of circumstances. Likewise, al-Ghazali held that the duty to investigate (*ijtihād*) new rights of God falls upon the *imām* or political leader, given that such rights may be necessary in light of the dynamic nature of people and their contexts. Because the ruling authority is charged with upholding the public good as embraced by the *huqūq Allāh*, and since the *huqūq Allāh* are also reflected in individual rights, the ruling authority has the power, authority, and discretion to create and construct new private rights that benefit individuals.

This is not to suggest that the *imām*’s rules have the authority of rules based on the Qur’ān or *hadith*. Certainly Muslim theorists of government like al-Mawardi required that caliphs of the Muslim empire have the capacity to engage in *ijtihād*. But whether *ijtihād* in matters of *tażżīr* had the same authority as rules of *fiqh* based on Shari‘a precedent is a different matter entirely. For instance,

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224 The Ḥanbalī jurist Abū Ishāq Ibn Muflih wrote that *tażżīr* punishments are required for any disobedience (*md‘imyya*) for which there no specified punishment (*hadd*) or established form of penitence (*khaffār). An act of disobedience requires something to inhibit its performance. If there is no specified punishment to deter one from committing the act, *tażżīr* punishments must be created to fill the legislative void. Responsibility for establishing such discretionary punishment rests with the political authority or *imām*. Abū Ishāq Ibn Muflih, *Muhād* 9:108.

al-Baghawi noted that since ta‘zīr punishments are subject to investigation (mujtahad fīhū) by the imām, they are of qualified legal authority.226 Likewise, the Hanbali jurist Ibn Qudāma did not use the term ījtihād to describe the imām’s discretionary legislative activity. Rather he stated merely that resort to ta‘zīr rules is obligatory if the imām considers them necessary (al-ta‘zīr wājib idhā ra‘īhū al-imām).227 Instead, he emphasized the bounds within which ta‘zīr discretion can be used, thereby curtailing the scope of the imām’s discretionary activity.228

What this suggests, though, is that within the Islamic legal tradition is a method of legal creativity that is embedded within a rule of law system invoking different institutions of legal authority. Tā‘zīr, as a specific type of legal authority, provides the ruler with the power to exercise its interpretive efforts (ījtihād) to create new rights, whether of God or individuals. The jurists recognized that not all rights are fully articulated in the Qur’ān, Sunna, or even fiqh doctrine. Rather, a right is something that must be argued for and constructed in light of changing circumstances. As illustrated above, the ḥuqūq Allāh/ḥuqūq al-‘ibād heuristic provided jurists with an interpretive tool to frame their legal analysis in light of substantive background values about the interests of the individual and society in values like dignity, property, order, and stability. The ḥuqūq in general is not simply a determinate rule of law. It presents a site of evolving juristic discourse about how to protect and uphold the interests of individuals who are immersed in society and committed to the social good.

Conclusion

The ḥuqūq Allāh and ḥuqūq al-‘ibād distinction was an important heuristic device for Muslim jurists as they contended not only with the procedural rules for administering a lawsuit, but also with the ways in which rights, duties, and liabilities are created and distributed in society in light of the value commitments jurists held. Jurists relied on competing views of human nature by reference to the “rights of individuals”, and on the overall well-being of society as captured

226 Baghawi, Tahdhīb, 7:428.
227 Ibn Qudama, Muqni, 8:326.
228 Ibid., at 324-6.
by “rights of God”. Sunnī jurists implicitly relied on naturalistic concepts of the individual and the social good that guided their distribution of rights and liabilities as illustrated by the patterns of analysis above. Shāfī‘ī and Ḥanbalī jurists consistently emphasized private rights, Ḥanafīs seemed to prioritize the public good while protecting defendants, and the Mālikīs often took the middle position. These patterns, I argue, suggest that when Muslim jurists articulated the law, they did more than rely on positive scriptural precedent, or adhere to prior precedent decided by school founders. Jurists used the ḥuquq Allāh/ḥuquq al-ʿibād heuristic to introduce and balance extra-legal values about the individual and social good into their analysis, and to provide a framework for legally reasoning to and about rules that manifested the balance they reached. Jurists did not focus on the individual to the exclusion of society, nor did they prioritize the demands of society over those of the individual. Rather they balanced the competing and diverse interests that are present in any case in controversy. Depending on the school of law to which a jurist belonged, the private right might prevail over the public interest or vice versa. Furthermore, the fact that the political leader can exercise ijtihād to determine new rights, whether rights of God or of individuals, suggests that the ḥuquq Allāh/ḥuquq al-ʿibād heuristic was part of an ongoing discourse within Muslim legal culture that attempted to organize society in light of developments in understanding the needs and expectations of people immersed in society and committed to the public good.