PART I

The Contribution of Islamic Values

INTRODUCTION

The nature of the ancient Arab custom from which the Islamic *ʿāqila* institution was derived differed considerably from that of the Sharīʿa, to which this institution was transferred.[1] Arab custom reflected the tribal society from which it originated, which lacked a central political authority and was based on the joint responsibility and solidarity of groups. In such a society, the safety of an individual's life, property, and rights depends largely upon the assistance and defense that his solidarity group provides. In contrast, Islam, whose values the Sharīʿa seeks to reflect, pays tribute to the idea of a community (*umma*) that unifies all Muslims, and within which the individual bears sole responsibility, both religious and legal,

[1] Against the accepted view that the Islamic *ʿāqila* has developed from an ancient Arab, tribal institution, Norman Calder proposed that the Muslims rather "adopted its various features from their sedentary non-Muslim neighbors, who quite clearly also possessed some such system" (Calder, *Studies*, 206). The Bedouin, in turn, might have "recognized community groupings, which acknowledged communal responsibility for non-deliberate injury, with fixed rates of payment, over fixed periods of time . . . due to the influence of the relatively civilized and/or organized cities" (ibid.). Calder seems to suggest, not entirely clearly, that first came the city-based *ʿāqila*, inspired by the neighboring communities, and that this *ʿāqila* then served as a model for the Bedouin *ʿāqila*. He finds support for this sequence of events in the fact that the bureaucratic *ʿāqila* appears in the Ḥanafī and to some extent in the Mālikī texts, which are relatively early, while the Shāfiʿī material, which is later, "displays some characteristic features of Bedouinization" (ibid., 207). It makes sense that the various Islamic urbanized, administrative *ʿāqila*s borrowed certain elements from non-Islamic sedentary models, but because Calder's speculation in this regard is merely "an experiment in historical reasoning" (ibid., 206), as he says, rather than a study based on evidence, it is difficult to consider his suggestion in a useful fashion.

for his actions. A number of Qur'ānic verses provide the basis for the notion of individual responsibility, and the major *Ḥadīth* collections often contain a section devoted to traditions that convey this concept, under the title: "Should a man be punished for the crime of another (*hal yu'khadhu aḥad bi-jarīrat aḥad*)," or a variation of this.[2] The state, with its army and institutions, rather than the tribal group, was supposed to care for the individual's protection. Tribal solidarity and loyalty along lines of descent (whether genuine or fictitious) or alliance, even if they continued to play a part in Islamic society and politics, were perceived as a threat to the coherence of the community.[3]

In no other Islamic legal institution is the tribal spirit more deeply inherent than in the *'āqila*, and no other institution contradicts more bluntly the Islamic principle of individual responsibility. The principle of joint liability for blood money, which underlies the *'āqila* institution, is the most salient expression of solidarity based on kinship and/or alliance, and the most effective way of delineating tribal lines. As was noted in the Preface, the collective obligation to pay blood money not only reflected the contours of tribal groups and of alliances but also contributed to defining and maintaining them.

Despite the conflict with the Islamic notion of personal responsibility and with the attempt to replace the tribal frameworks by united community and state administration, the tribal *'āqila* institution was adopted by the Sharī'a. The evident contradiction that this adoption produced, which greatly concerned Muslim jurists, is aptly articulated by the Egyptian Mālikī scholar Aḥmad b. Ghunaym al-Nafrāwī (d. 1125/1713) (whose words echo those of his celebrated predecessor, Ibn Rushd the Elder, of Cordova, who died in 520/1126):

> That liability for unintentional homicide rests on the killer's *'āqila* is based upon the *sunna* of the Messenger of God, God's blessing and peace be upon him,[4] and there is no dispute among the *'ulamā'* about this. It is a practice (*amr*) that prevailed in the Jāhiliyya, and the Prophet confirmed (*aqarra*) it under Islam, although it contradicts the general rule (*wa-in kāna al-qiyās khilāf dhālika*)

[2] Qur'ān: 6(*al-An'ām*):164; 35(*Fāṭir*):18; 53(*al-Najm*):38. For *Ḥadīth* see, e.g., Ibn Mājah, *Sunan*, 3:70–71 (*Kitāb al-Diyāt*); Nasā'ī, *Sunan*, 694–695 (*Kitāb al-Qasāma*). For a short discussion of the personal responsibility principle in Islamic dogma, with reference to more sources, see Landau-Tasseron, "Alliances in Islam," 22.

[3] For the Islamic rejection of (or reservation about) alliances see (*EI*[2], s.v. "Ḥilf" [Tyan]; Landau-Tasseron, "Alliances in Islam," 2ff).

[4] Honorific expressions related to God, to the Prophet, or to other worthy personalities are omitted in translations from Arabic henceforth.

according to which a man should not be burdened with another's offence (*lā yuḥammalu aḥad jināyat aḥad*), because of God's saying: '[On no soul does Allāh place a burden greater than it can bear], for it is (only) that which it has earned, and against it (only) that which it has deserved' (2[*al-Baqara*]:286), and 'Every soul earns only to its own account and no burdened soul shall bear the burden of another' (6[*al-Anʿām*]:164).[5]

One aspect of the clash between the concepts of individual responsibility and joint liability is religious. The Qur'ānic verses that al-Nafrāwī adduces, and the latter verse in particular, are taken by Muslim commentators to refer to the burden of sin,[6] and homicide, whose consequences the *ʿāqila* shares, contains an aspect of sin: it is considered a transgression not only against a human being but also against God. Another aspect of the clash is legal. While some jurists discuss the religious aspect,[7] others, such as the Shāfiʿī Abū al-Maʿālī al-Juwaynī (d. 478/1085), known as Imām al-Ḥaramayn, from Nīshāpūr, accentuate the legal contradiction, saying that the jurists "are in complete agreement that imposing blood money on the *ʿāqila* is a deviation from general rule (*qiyās*), for it amounts to holding against a man an offence perpetrated by another, whereas the general rule requires that blood money be imposed [only] upon the offender, even if he acted accidentally."[8] The Ḥanbalī Muwaffaq al-Dīn Ibn Qudāma (d. 620/1223) similarly says that the basic principle in pronouncing financial liability in cases of homicide is that "[liability for] indemnifying lies with the one who caused the damage (*badal al-mutlaf yajibu ʿalā al-mutlif*) … this principle is contravened, however, in the case of a non-culpable homicide perpetrated by a free man (*wa-innamā khūlifa hādhā al-aṣl fī qatl al-ḥurr al-maʿdhūr fīhi*) (for in this case the *ʿāqila* assumes payment)."[9] A shorter formulation of the same idea is included by the Mālikī Abū ʿAbdallāh al-Qurṭubī (d. 671/1272) in his commentary of Qur'ān 4(*al-Nisā'*):92.[10]

For Islamic law to adopt the pre-Islamic *ʿāqila* involved a process of adjustment. By this process the apparent contradiction between individual responsibility and joint liability was examined with due attention, and the relevant rules were modified with a view to resolving, or at least to

[5] Nafrāwī, *al-Fawākih al-dawānī*, 2:203, and Ibn Rushd, *Muqaddimāt*, 2:377.
[6] Ṭabarī, *Jāmiʿ al-bayān*, 5:3659–3660; Ibn al-Jawzī, *Zād al-masīr*, 3:162; Ibn Kathīr, *Tafsīr*, 3:141.
[7] E.g., Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:194.
[8] Juwaynī, *Nihāyat al-maṭlab*, 16:503.
[9] Ibn Qudāma, *Mughnī*, 12:13.
[10] Qurṭubī, *Jāmiʿ*, 5:315.

tempering the contradiction. In the Islamic shape that the *ʿāqila* institution eventually assumed, the contradiction was not entirely eliminated, but was considerably reduced. This was achieved by modifying the law in a way that restricted the liability of the *ʿāqila* while extending that of the perpetrator. This modification, which is the subject of Part I, is closely connected to other changes introduced in the Islamic law of homicide during its transition from Arab custom. A proper examination of the modification requires viewing it in the context of these other changes. Some of them, therefore, are discussed in the text that follows.

These changes, and the Islamic law of homicide in general, can be considered from two somewhat different points of view: the modern one and the Islamic one. To fully comprehend the changes in the Islamic law of homicide we need to view them sometimes from the modern and sometimes from the Islamic point of view. In Chapter 1 these two points of view are presented, and then used to examine some modifications of the Islamic law of homicide.